

The London School of Economics and Political Science

The Penalty of Politics, Penalty in Contemporary Italy 1970-2000

Zelia Anna Gallo

A thesis submitted to the Department of Law of the London School of
Economics for the degree of Doctor of Philosophy, London, April 2013

Declaration

I certify that the thesis I have presented for examination for the MPhil/PhD degree of the London School of Economics and Political Science is solely my own work other than where I have clearly indicated that it is the work of others (in which case the extent of any work carried out jointly by me and any other person is clearly identified in it).

The copyright of this thesis rests with the author. Quotation from it is permitted, provided that full acknowledgement is made. This thesis may not be reproduced without my prior written consent.

I warrant that this authorisation does not, to the best of my belief, infringe the rights of any third party.

I declare that my thesis consists of 100,728 words.

Abstract

The thesis is a socio-legal account of Italian penalty between 1970 and 2000. It analyses the Italian experience as a critical case study with which to test David Garland, Alessandro De Giorgi and Nicola Lacey's theories of punishment in contemporary Western polities. It argues that Italian penalty is not sufficiently explained by reference to Garland or De Giorgi's meta-theories of 'late modern' and 'post-Fordist' punishment. Lacey's institutional analysis provides a better framework, if modified to allow for the centrality of political dynamics in Italy.

The thesis argues that Italian penalty is a 'volatile penal equilibrium', whose 'differential punitiveness' is marked by oscillations between repression and leniency. The thesis provides an institutional analysis of Italian punishment, investigating in turn the Italian political economy, political culture and state-citizen relations, judicial contributions to penal trends, and the punishment of non-EU migrants. The thesis argues that Italian penalty can be systematised by reference to political dynamics, in particular political conflict and political dualisms. Political conflict can broadly be defined as conflict between political interests, ranging from parties through to broader political groups such as families; dualisms are tensions produced by opposing institutional dynamics. The thesis analyses these conflicts and dualisms in terms of penal pressures, either in favour of penal exclusion or moderation. Italy's institutional structure incorporates political conflict, and fosters structural tensions. The result is that Italy's volatile political equilibrium is conveyed through its institutions to the penal realm, producing a volatile penal equilibrium.

Ultimately, the Italian case study demonstrates that contemporary theories of penalty should explicitly incorporate political dynamics and their institutional anchorage. Italian penalty can be analysed in terms of the nature of the state and its institutions and inclusion and exclusion from political belonging. Contemporary theories would profit from incorporating this analysis.

Acknowledgments

This thesis would have been an entirely different, and far less enjoyable, experience had it not been for my supervisors Nicola Lacey and Peter Ramsay. My thanks go to them for their support, insight and friendship over the years: they have been inexhaustible sources of inspiration.

Thanks also to Tim Newburn, for reading and commenting on an early version of Chapter 2, and steering me towards an ever responsible use of criminal justice statistics. The Centro Documentazione Caritas Ambrosiana, with its library and resources, were essential for my research in Chapter 6.

Many many thanks go to Linda Mulcahy, for her invaluable support throughout the last years of the PhD, and to Mike Redmayne for being a great teaching mentor.

Thanks, of course, go to the LSE, the LSE Law Department, and the Olive Stone Memorial Fund, whose financial support made the writing of the whole thesis possible.

I want to thank my parents, Tiziana Della Puppa and Cirino Gallo, for their guidance, love and patience, their immense foresight, and the great personal sacrifice they were willing to make for me. Finally, I would like to thank Sean Deel, my wonderful partner, who even read this thesis abstract to bibliography.

All responsibility for the contents of this thesis, and any errors it may contain, is solely my own.

Table of Contents

List of Figures and Tables	8
Chapter 1 - Introduction	9
I. Research Questions	12
II. Why investigate punishment?	12
III. Scopes and limits of this thesis.	15
IV. Boundaries: theorists, time and space	18
i. Why the theories?	18
ii. Why Italy?	20
iii. Why the timeframe?	23
V. The literature	26
i. Cultures of Control	26
ii. Political Economies of Punishment	35
iii. The Prisoners' Dilemma and comparative penology.....	39
VI. A note on methodology	48
VII. The contents of this thesis	51
Chapter 2 - Italy's Differential Punitiveness	54
I. Introduction – Hypothesising Differential Punitiveness	54
II. Italian penal trends: time trends and comparison	57
III. Interpreting the figures	61
i. Amnesties and Pardons	61
ii. Differential punitiveness and penal dualisms: repression and leniency	65
iii. The 1990s – growing prison rates.....	71
iv. Nationality and immigration	73
IV. Conclusions: differential punitiveness	78
Chapter 3 - Politics and Penalty: the Political Economy	81
I. Introduction	81
i. Italy and political conflict: interest fragmentation and institutional permeability	83
II. Politics, Penalty and the Political Economy	88
i. Political conflict and the political economy	88
ii. Italian parties – ‘partitocrazia’ and conflict as constraint	92
iii. The Italian political economy: the welfare system	98
iv. The Italian political economy: fragmentation and dualisms - territorial divisions, public and private Italies.	105
v. Reintegration or exclusion?	112
vi. Italy and post-Fordist economies	115
vii. The penal incentives of a politicised political economy: in-groups, identification, and informal social control	120
III. Politics and the political economy: theoretical conclusions	131
Chapter 4 – Politics and Penalty: State and Citizen, Politics and Culture	135
I. Introduction	135
II. State and citizens, politics and culture	135
i. Italy – divided allegiances and penal authority.....	135

ii. The penal law – symbolism and deployment, reception and avoidance.....	142
iii. Dualisms - widespread illegality and legalist utopias.....	146
iv. Principle and pragmatism, and Italian penalty as a volatile penal equilibrium	154
III. Conclusions	156
Chapter 5 – Judicial Actors and Italian Penalty.....	159
I. Introduction	159
II. The context: Italy and the comparative models.....	162
i. The Italian judiciary: bureaucracy and independence.....	162
ii. Institutional models: judicial structure and penalty	166
iii. The Italian judiciary: structure in context and legitimacy.....	171
III. Judicial legitimacy: waxing and waning.	175
i. The 1970s and 1980s: surrogacy, collusion and the eve of conflict	176
ii. Judicial collusion: purchase and role of judicial action	182
iii. The 1990s: times of conflict	184
iv. A summary and some hypotheses.....	187
IV. Judges and public: demands, reception and resistance	188
V. Conclusions.....	198
Chapter 6 - The Legal Vice: Punishing Migrants in Italy 1990-2000.....	200
I. Introduction	200
II. Setting the context - punishing migrants in Europe and the Italian legal vice.....	202
III. The incarceration jaw: economic inclusion through legal exclusion and the punishment of economic marginality	209
i. Economic inclusion through legal exclusion.....	209
ii. Economic inclusion in the data.....	211
iii. Penalising non-EU migrants	217
IV. The over-incarceration jaw: migrants as outsiders and dependence on Italian law 	221
i. Migrants’ dependence on law: law as a primary definer	221
ii. Outsiders and insiders: migrant profiles in the Italian context	231
iii. Depending upon Italian law	239
V. Conclusions.....	240
Chapter 7 – Conclusions.....	242
I. The Italian challenge	242
II. Italian penalty – the penalty of politics.....	243
III. Political conflicts and penal effects	246
i. Conflicts between political interests: clientelism.....	246
ii. Conflicts between political interests: parties and policy constraints, the state and the family.....	248
iii. Conflict between parties: particularising the state.....	249
iv. Conflicts within the state: judges and judges; judges and politicians.....	250
IV. Insiders and outsiders.....	251
V. Italy in theoretical perspective and penal theory from an Italian vantage point..	252
Appendix to Chapter 1	254
A brief history of contemporary Italy	254

TIMELINE: A Brief History of Italy 1967-2000	272
Appendix to Chapter 5	277
I. Article 112 of the Italian Constitution – the legality principle	277
II. The Italian criminal trial and the 1989 reform	277
III. Lay participation to the criminal justice process – Italian collaborative courts	280
IV. Referenda in Italy	280
Appendix to Chapter 6	283
I. Italian immigration legislation 1968 – 2002	283
Bibliography	286

List of Figures and Tables

International prison trends (1950-2010)	55
Prison rates Italy and England and Wales compared (1970-2000) including Italian clemency provisions.....	58
Pardons and Amnesties (1970-2007)	59
Prison rates European Comparisons (1987-2000)	60
Foreigners detained in Italian prisons (1990-2000)	75
Italy, prison population with and without migrants, and foreign detainees alone (1990- 2000)	76
Italy overrepresentation ratio (1990-2000)	77
The Italian judiciary, interrelations, self-conception and penal results	197
Judicial contribution to penal trends – structure and legitimacy.....	198
Total and foreign detainees in Italy (1990-2000).....	204
Comparative foreign overrepresentation ratios (2000)	205
Migrants regularised in Italy between 1986 and 1998.....	210
Migrants in administrative detention in Italy (1998-2000).....	211
Non-EU migrants’ reasons for residence in Italy (1990-2000).....	212
Residence permits for work purposes by type of labour (1990-2000).....	214
Foreigners employed and unemployed in Italy (1991-1999).....	215
Percentage of employees in irregular positions among total non-EU employees (1991- 2000)	217
Workers in informal occupations as a percentage of total workers, foreign and national (1991-2001)	217
Sentenced foreigners in Italy by offence type (1990-1995).....	219
Sentenced foreigners in Italy by offence type (1996-2000).....	219
Italy net migration rate 1956-2006	223
Non-EU foreigners resident in Italy by type of nation (1983-2000).....	224
First ten non-EU nationalities present in Italy (1990-2000, excluding USA).....	229
Italian political parties from First to Second Republic	271
Italian Prison Rates and Italian history (1970-2000)	276
The Italian Penal Trial	279

Chapter 1 - Introduction

How are we to explain contemporary Italian penalty? Though Italy is, by rights, a ‘contemporary Western democracy’ its penalty appears to differ from that described in authoritative accounts of contemporary punishment. Similarly Italy’s economy, politics and culture cannot be easily superimposed upon the economy, politics and culture analysed in these accounts. What then is the accounts’ explanatory capacity for Italy? And what are the primary determinants of punishment in Italy? This thesis provides my answers to these questions. It is an account of Italian penalty between 1970 and 2000 and uses Italy as a so-called ‘critical case study’¹, insofar as my analysis of punishment in Italy serves to critique existing theories of contemporary Western penalty. In particular, my thesis takes its cue from the analyses of David Garland in *The Culture of Control*; Alessandro De Giorgi in *Rethinking the Political Economy of Punishment*; and Nicola Lacey in *The Prisoners’ Dilemma*². All three theorists are concerned with explaining contemporary developments in Western punishment.

Garland and De Giorgi aim to explain how and why Western nations are (arguably) traversing a period of ‘increasing punitiveness’: a quantitative and qualitative intensification of formal punishment. This increasing punitiveness is purportedly manifest in rising incarceration rates: experienced as of the early 1970s by the United States and, to a lesser degree, the United Kingdom³. Both authors tether these penal changes to broader contextual transformations. In David Garland’s account, punishment is what he calls a ‘social institution’⁴. This means that, although it appears to be ‘an apparatus for dealing with criminals’, punishment in fact embodies ‘a whole web of social relations and cultural meanings’⁵. Punishment can then be ‘read’ to discern such meanings. This is, in a sense, what Garland does in *The Culture of Control*⁶, which explains contemporary penalty by reference to ‘late modernity’: a series of social, political, economic and cultural shifts that have conditioned how crime is interpreted and dealt with in contemporary societies. Alessandro De Giorgi, who gives a political economic account of punishment, links contemporary penalty to transformations in modes of production. His account is one of penalty in ‘post-Fordism’, with its progressive contraction of large scale industrial labour; an emphasis on deregulation; and the expulsion of large sectors of the work force from full-time, secure employment.

¹ See: Hancké (2009, pp. 68-71)

² De Giorgi (2006b); Garland (2001); Lacey (2008c)

³ Garland (2001, p. 14)

⁴ Garland (1990, p. 187)

⁵ *Ibid.*

⁶ Garland (2001)

Insofar as both Garland and De Giorgi use explanatory categories – late modernity and post-Fordism – that transcend specific contexts, it can be assumed that their theories purport to apply across Western nations⁷. By contrast to both Garland and De Giorgi, Nicola Lacey addresses the issue of *divergence* in punishment across Western nations. Her starting observation is that increasing punitiveness, as manifest in increasing imprisonment, is a reality only for certain western nations: notably the United States and, in Europe, the United Kingdom. Differences should be drawn even between these two nations⁸, but where the UK is then compared to nations such as Germany, we also witness a striking contrast. Germany has displayed penal stability across the decades⁹, and Lacey uses this fact as an illustration of the broader point that contemporary penalty is articulated differently across different nations¹⁰. Moreover, she argues that this difference can be explained by reference to different ‘varieties of capitalism’¹¹. In particular, she contrasts so-called liberal market economies (LMEs) and co-ordinated market economies (CMEs) and their institutional structures. To summarise, Lacey’s argument is that different institutional structures create different penal incentives. In liberal-market economies exclusion from economy and body politic through incarceration has relatively low costs. By contrast the organisation of co-ordinated market economies makes it more ‘sensible’ to reintegrate deviants. Where, as in CMEs, reintegration is the more advantageous option, we may then find lower, more stable, rates of imprisonment. Lacey hypothesises that in nations that display greater penal leniency, the institutional structure has intercepted the ‘global level’ changes associated with ‘late modernity’ and/or ‘post-Fordism’, to yield different penal outcomes. In this sense the ‘punitiveness’ of Garland and De Giorgi’s account is more situated than their explanatory categories would lead us to believe.

Where does Italy fit within this scenario? Italy is a ‘contemporary Western European nation’; this means that it too is presumed to have transitioned into ‘late modernity’ or into ‘post-Fordism’. As a Western European nation it is also a suitable subject for Lacey’s analysis of penal divergence. Though Italy is neither an LME nor a CME (Chapter 3) it too presents an institutional structure that will have ‘intercepted’ changes in the global political economy, and in the socio-political structure. This means that Italy can provide an illustration of how national institutions affect penalty, whether it is to produce punitiveness or leniency.

⁷ *Ibid.*, p. 75

⁸ The USA’s prison rates (1970 -2006) are so high that they stand alone compared to other Western nations: see Lacey’s figures for world imprisonment rates *with* and *without* the USA (2008, pp. 139,140)

⁹ Lacey (2008, p. 199)

¹⁰ Lacey (2008, pp. 55-113)

¹¹ Lacey builds on Peter Hall and David Soskice’s models (2001)

In fact, as I will explain in the coming pages, Italy presents features that cast doubt on all three theoretical accounts – Garland, De Giorgi and Lacey (accounts that are, in any case, not free from controversy¹²). First and foremost, Italian penalty neither displays the increasing incarceration rates presumed in *The Culture of Control* and in *Re-Thinking the Political Economy of Punishment*; nor does it display the stable penal rates of Lacey’s alternative comparators: co-ordinated market economies. As I will show in Chapter 2, Italian prison rates oscillated between 1970 and 2000: though incarceration increased overall, it did so unevenly, in a series of peaks and troughs. In this sense Italian penalty is neither univocally punitive, nor univocally lenient. Rather, it is beset by what I will call a leniency-punitiveness dualism.

The theories advanced by Garland, De Giorgi and Lacey cannot account for this dualism, although *in principle* (as a Western European nation) Italy should fall within their analytical remit. My thesis starts from this basic observation, to provide a set of interpretive hypotheses that explain the specific Italian experience. It does so by drawing on literature on Italian criminal justice and political culture, as well as on some statistical material. In so doing, it qualifies the three theories from which my work began. My thesis is a ‘mid-level’ theoretical account: this means that it is situated below macroscopic theories of contemporary penalty; but above more particular, empirical studies of punishment in Italy. The thesis develops a range of hypotheses; but it is not possible to fully prove some of my arguments with available empirical data (see below). However, in the coming pages I do identify the additional empirical research that would allow my claims to be tested, spelling out the nature of the approach required when conducting future research.

In this introduction I will first formulate the research question answered in my thesis. The succeeding section details the scopes and limits of the thesis and is followed by an explanation of the boundaries of my work. Firstly, I account for my choice of theories. Secondly, I account for the national context that I have chosen to explore: why Italy? The section ends with an explanation of the timeframe by which my research is limited (1970-2000). The rest of the introduction then provides detailed accounts of Garland, De Giorgi and Lacey’s three analyses. It lays out the theoretical framework within which my argument proceeds. The introduction concludes with a note on methodology and an outline of the thesis’s structure.

¹² For critiques of *The Prisoners’ Dilemma* see: "Review Symposium on Nicola Lacey, *The Prisoners’ Dilemma: Political Economy and Punishment in Contemporary Democracies*" (2011) For a sample of critical literature on *The Culture of Control* see: Ian Loader and Sparks (2004); Zedner (2002).

I. Research Questions

This thesis addresses a number of questions. The first and broadest question is whether contemporary Italian penalty can be characterised in terms of increasing punitiveness. I have already given a brief, headline: Italian penalty presents a leniency-punitiveness dualism. The question that follows is how to explain this dualism. In particular, and given my theoretical starting points, the research investigates the socio-political changes that have affected Italian penalty between 1970 and 2000. I also ask what political-economic transformations have influenced its penal evolution over the same period. This subset of questions aims to investigate whether Italian penalty can be analysed as ‘late modern’ or indeed as ‘post-Fordist’.

Considering where and why Italian penalty diverges from the more macroscopic accounts provided by Garland and De Giorgi, I then interrogate whether this divergence can be explained by reference to Italy’s institutional structure. *The Prisoners’ Dilemma* provides the theoretical framework for this line of inquiry. I thus ask if and how Italy fits the models used by Lacey, and what the penal incentives are that the Italian institutional/political set up creates. Given that all three theorists provide a guide but not a blueprint for my analysis, I ask if *other* factors are important in explaining Italian penalty. This is also a question of relative weight: I thus ask whether particular institutional variables (the electoral system as opposed to modes of production as opposed to social interpretations of punishment) occupy a more significant place in Italy than they do in Garland’s late modern polities, De Giorgi’s post-Fordist economies, and Lacey’s varieties of capitalism. The final question that this thesis asks, and which underlies it, is what Italian penalty tells us about broader theories of contemporary penalty. If the latter are supposed to encompass Italy and its penal evolution, but do not do so, can my account of Italian penalty help us refine their claims?

II. Why investigate punishment?

At the root of this thesis lies one other question of fundamental importance: why investigate punishment in Italy at all? Aside from interesting challenges posed by the Italian case, this also raises the broader question of why we should investigate contemporary punishment and penal escalation in any context. The answers that Garland and Lacey give to this issue are particularly insightful. They are, moreover, answers whose sentiment I share, to the point of having chosen their theories as a starting point for this thesis. It is therefore useful to look at each in turn.

Garland argues that his ‘history of [crime control’s] present’ implicitly bears ‘a critical, normative dimension’¹³. This dimension is one that ‘[urges] us to identify the dangers and harms implicit in the contemporary scheme of things, and to indicate how our present social arrangements might have been – and might still be – differently arranged’¹⁴. His concern is, therefore, to undertake a critical appraisal of ‘the culture of control’ and all it entails: including the ‘danger’ of increasing incarceration. Garland, by analysing the evolution of criminal justice in the contemporary context, also points to historical junctures at which different policy choices could have been made. Of course, to the extent that his explanations are tethered to the coming of ‘late modernity’, i.e., to the onset of global changes, they seem to offer a ‘counsel of despair’¹⁵. Garland appears to be focusing more on what ‘might have been’ rather than what ‘might still be’ different. Here Lacey’s account offers more hope, identifying institutional conditions under which penal moderation has been sustained. The aspiration is that we may maintain and even replicate such conditions where possible¹⁶. My thesis forwards this aim by investigating conditions of punitiveness/leniency in a nation not easily encompassed in either Garland or Lacey’s accounts, but that can nonetheless be seen as posing similar concerns on the dangers of punishment in contemporary polities.

The normative concerns that inform *The Prisoners’ Dilemma* are articulated in its preface: ‘[it] is generally agreed that the humanity, fairness and effectiveness with which governments manage their criminal justice systems is a key index of the state of a democracy’¹⁷. A nation in which incarceration is increasingly relied upon to manage social exclusion, thus seems to go against our (albeit debated) notions of contemporary democracy. Similarly, so does a state in which social exclusion is stigmatized through narratives that point to crime as ‘evil’, and urge a forceful and condemnatory response¹⁸.

Clearly the position that critiques contemporary penal expansion in terms of its anti-democratic credentials is controversial; not least because the very concept ‘democracy’ is highly debated¹⁹. A word is needed, therefore, to explain how this thesis conceptualises the link between punishment and democracy. My interest in investigating penalty, and in particular Italian penalty, rests on the belief that punishment and political membership are connected. The way we punish – the extent to which we punish and the means with which we do so – speak of how our societies constitute their political membership. They speak in

¹³ Informed by Michel Foucault: Garland (2001, p. 3)

¹⁴ *Ibid.*, p. 3

¹⁵ Lacey (2008, p. 25) See also: Ian Loader and Sparks (2004, p. 15); Zedner (2002)

¹⁶ Lacey (2008, p. xvii)

¹⁷ *Ibid.* p. xv

¹⁸ Narratives of the ‘criminology of the other’: Garland (2001, pp. 184-185)

¹⁹ Lacey (2008, pp. 6-7)

particular of who is ‘defined out of the edifice of citizenship’²⁰; of the ‘insiders’ and the ‘outsiders’ within our political communities. Ultimately, personal belief and political philosophies will determine what level of penal exclusion we feel is compatible with democracy. Yet we can still posit a link between the construction of our political communities, punishment’s role in this construction, and conceptions of contemporary democracy. An investigation of contemporary punishment thus becomes an important investigation of the conditions of membership in our political communities.

Punishment in contemporary Western societies also speaks to how we confront the crucial issue, articulated by Lacey, of ‘[responding] effectively and even-handedly to rights violations represented by criminal conduct without resorting to measures which in fact negate the democratic membership and entitlement of offenders’²¹. Here, investigations of penalty are important insofar as they allow us to gain clear understanding of the political and institutional conditions under which this challenge is best met.

We could, in fact, extend Lacey’s statement to argue that investigations of contemporary punishment can help us understand when social conflict might be better resolved *without* the criminal law; even where the apparent *absence* of criminal law seems to precipitate social conflict. This dilemma is particularly salient in Italy, where the ambiguity of the criminal law is at the forefront, and its presence and absence can be equally problematic. Public debates in Italy have often centred around the absence of law, understood as the law’s ineffectiveness or frequent breach. Italy is, in this interpretation, ‘Illegal Italy’²²; a nation beset by scarce respect for the law, and whose democracy suffers for it²³. Here the challenge is to break down the issues raised by ‘illegality’ without turning to the penal law as the obvious or unique solution. The challenge is to pre-empt over-reliance on the criminal law, knowing that it may, under given circumstances, lead precisely to the high levels of incarceration experienced in the UK.

In Italy, the need to understand this dilemma is more important still where we consider that responses to challenges to the state – for example organised crime – have often come from within the judicial sphere. This has coincided with the growing vision of judges as guardians of democracy. Surely this interpretation of the judiciary is much idealised, and glosses over differences within the judicial class (Chapter 5). However, to the extent that the narrative of judges as democratic guardians persists in Italy, in public and political circles, it has to be confronted. The danger in not doing so is to stimulate an acritical reliance upon the penal law and its agents, ignoring the pitfalls of such an approach. The danger is that attempts

²⁰ Dahrendorf (1985, p. 98) quoted in Lacey (2008, p. 6)

²¹ Lacey (2008, pp. 7-8)

²² Scamuzzi (1996a)

²³ See also Foot (2003, p. 62)

to bolster democracy will be enacted with penal tools, whose excess use may threaten the very same. Expanding outwards from Italy we can say that the urgency lies not just in identifying the institutional conditions that have limited penal expansion in Europe, but also in identifying those national features that might become opportunities for penal expansion: such as perceptions of ‘lawlessness’. These conditions and opportunities should be identified to bolster existing buffers to punitiveness by indicating, for example, when the apposite solution lies outside the penal realm²⁴. My thesis aims to contribute to this endeavour: first for Italy and then for our broader accounts of contemporary penalty.

III. Scopes and limits of this thesis.

My thesis provides hypotheses and theoretical conclusions on penal trends in Italy and on their implications for Garland, De Giorgi and Lacey’s accounts of contemporary punishment. Some of my hypotheses/conclusions are supported by statistical data, in particular statistics on imprisonment and recorded crime, and statistics on migrant presence, employment and incarceration in Italy. However, not all claims advanced in this thesis are tested empirically, partly because available data is lacking (see below). My claims have been formulated at a ‘middle theoretical level’, i.e., sensitive to contextual variation but pitched at the level of Italian institutions and institutional history, rather than at the level of more particular analyses. I argue that my claims provide the theoretical framework within which more particular accounts can be inscribed²⁵.

The hypotheses and theoretical conclusions that I put forward are consequently articulated in terms of political and political-economic structures, national political economies; modes of employment; patterns of civic trust; judicial actors; political ideologies²⁶. This has meant that certain ‘elements’ of the Italian experience have been dealt with at a general level: the level of ‘national penalty’. I am thinking here in particular of organised crime and political terrorism, phenomena that I discuss primarily in terms of the impulses they produce in favour of penal moderation or penal expansion, though both would be worthy of theses unto themselves. Where I have formulated hypotheses at this general level, I have however indicated paths for further research that would allow the hypotheses to

²⁴ To achieve what Loader and Sparks term ‘more intelligent public discourse about crime, and less anti-social forms of social control’ (2004, p. 27)

²⁵ Garland has a similar approach but a higher level of generality (2001, p. 21)

²⁶ In some cases, given the nature of the phenomenon in question, empirical data will not be available. For example, claims on political ideologies and their effect on attitudes to crime cannot easily be verified by data. This should not stop us from hypothesising about these effects, seeking support in existing historical and political accounts, and fuelling future empirical studies.

be tested, either by seeking additional existing empirical data or by generating further data through primary investigation²⁷.

Given my emphasis on Italian political culture and its institutional articulations, my thesis is not strictly an account of criminology and criminological discourse in Italy; its approach is akin to that adopted in *The Prisoner's Dilemma*. This again follows from my decision to concentrate on dynamics – political and economic – external to the criminological sphere. It also follows from the fact that the context itself suggested fruitful lines of inquiry in this direction. Italian political culture and institutional evolution emerged as particularly suited to an analysis of Italian penalty, even where they were not paramount within my theoretical starting points. There may of course be other, equally plausible ways of investigating Italian penalty. I hope to have provided a solid framework within which to conduct future research and with which to investigate other avenues that are complementary to my own analysis.

The Italian context again offered guidance for two of the *specific* areas that I investigate in this thesis: judicial actors and migrants. The choice of judicial actors follows also from the basic assumption that the agents of penalty should be part of our broader analysis of penal trends²⁸. Whatever the causal mechanisms that we identify as crucial to contemporary punishment, we need to understand how judicial actors mediate them, and thence how they are or are or are not ‘translated’ into punishment. Judicial actors also have particular importance *in Italy*, given the role that the judiciary has played in the Republic at the national political and judicial levels. I will analyse in Chapter 5 how the Italian judiciary has, to some extent, become a force pitched against the political class. This has occurred through a recalibration of the institutional balance of powers in Italy (Appendix), and has had a lasting impact on the rhetoric and themes of the Italian political scene. It thus becomes essential to analyse the way in which the evolution of the judicial role has affected the deployment of penal powers; and what impact this may have had on Italian penalty.

David Nelken’s work further suggests that judicial actors, and indeed penal procedures, occupy a noteworthy role in Italian penal trends:

‘In Italy [...] to make sense of prison numbers it is crucial to focus on what actually goes on in the criminal process. Prison rates are low [...] as a default consequence of processes of attrition; many cases start out, but few arrive at a conclusion.’²⁹

²⁷ In Michele Salvati’s words this thesis provides ‘an interpretive scheme [...] a skeleton with sufficient meat on its bones to give an idea of how the whole body might appear’ which, ‘precisely because of its incompleteness, shows the [body’s] principal mechanisms’ (2000, p. V).

²⁸ Garland (1990, pp. Especially at 108-109)

²⁹ Nelken (2011, p. 109)

Nelken here is arguing that legal delays are a crucial aspect of Italian penalty: delays, produced or precipitated by Italian penal procedure, are such that they filter out a good portion of cases before a custodial sentence can be imposed³⁰. This is just an example of the relevance of the judicial sphere to Italian punishment. We can take Nelken's insights and combine them with an institutional approach to penalty, contextualising judicial actors within the broader Italian institutional framework. We can ask how penal procedure relates to this framework; what causes high levels of attrition; whether they can be interpreted as the expression of wider (institutional, political, cultural) trends? Chapter 5 provides my answers to these questions.

The thesis investigates not just the (judicial) agents of Italian penalty, but also its subjects, and in particular non-EU migrants. This is partly because of the significant role that immigrants occupy in two of the theories on which my work builds. Non-EU migrants are, indeed, important figures in both De Giorgi's and Lacey's accounts of contemporary penalty. In this the latter can be set alongside a growing body of work on the punishment of migrants in contemporary European polities³¹. Note, however, that the significance of non-EU migrants is quite different in De Giorgi's theorisation than in Lacey's. In the former, migrants are the 'archetypal' post-Fordist workers; their punishment is a concentrate of broader penal trends³². By contrast, for Lacey the punishment of migrants can – in given circumstances – be an exception within otherwise penally moderate nations. It marks the conditions of inclusion in re-integrative polities³³.

Migrants are highly relevant within the Italian context. During the last decade of the twentieth century, Italy became a host nation to non-EU migrants. Since then, migrants' presence has increased on Italian territory, in the Italian economy, in the media, in political discourse; in the Italian prison system. This has itself sparked academic interest in the specific dynamics of migrant punishment in Italy, one primary example of which is the work of Dario Melossi³⁴. My own analysis (which responds to the 'social relevance' of immigrants in Italy) asks how we should understand the punishment of migrants in Italy: as an archetype, as an exception, or neither? (Chapter 6) I also relate this question to my broader analysis: I interrogate how Italy's institutional structure and political system – reflecting on Italian penal trends – also reflect on migrant punishment. What, if anything, does the incarceration of foreigners tell us about Italian penalty?

³⁰ Attrition exists in other nations: it is the *extent* of legal delays that seems to single Italy out. For the UK see Reiner (2007, p. 54)

³¹ For a selection see: Calavita (2005); De Giorgi (2006b, 2010); Melossi (2001, 2003, 2005); Palidda (2009); Solivetti (2012); Wacquant (1999)

³² De Giorgi (2006b, pp. 111-138); 2010)

³³ See: Lacey (2008, pp. 144-169)

³⁴ Melossi (2001, 2003, 2005); Melossi, De Giorgi, and Massa (2009)

IV. Boundaries: theorists, time and space

In this section I explain how I have constructed my investigation. I explain *why* I have chosen to work with Garland, De Giorgi and Lacey's analyses; why I have chosen Italy as my case study; and why I have narrowed my exploration to the period 1970 - 2000³⁵.

i. Why the theories?

Why have I selected Garland, De Giorgi and Lacey as a basis for my thesis? Their claims are not, after all, uncontested³⁶. Beginning with David Garland – and aside from the 'scope and authority' of *The Culture of Control*³⁷ – we note that he sees 'the institutions of crime control and criminal justice' as part of a broader 'network of governance and social ordering'³⁸. Penalty, he argues, is 'grounded in specific configurations of cultural, political and economic action [and] will tend to signal correlative transformations in the structure of social fields and institutions that are contiguous to it'³⁹. This means that, by tracing changes in penalty, we can also trace broader contextual changes: punishment acts as litmus test for 'cultural, political and economic' evolution in contemporary polities. Since this theory allows us to treat punishment as something more than a matter of criminal justice, it leads us to ask what is being talked about and what is at stake – over and above the 'reality' of victimisation – when (as in contemporary Britain) crime and social order dominate the political field⁴⁰.

Garland's approach also enables us to investigate the connection between penalty and 'statehood'. I use the term 'statehood' to denote the standing and evolution of the contemporary nation state and, in Garland's account, the transition from the 'modern' to the 'late modern' state. I also use the term to indicate *membership* of the political community in contemporary polities, and the mechanisms through which it is constituted. Punishment plays a role in constituting this membership; Garland's account is invaluable in investigating this connection, insofar as it tethers changes in criminal justice to 'the creation of [...] new [...] civic narrative[s]'⁴¹.

³⁵ For a historical account of Italy see Appendix.

³⁶ Ian Loader and Richard Sparks have critiqued *The Culture of Control* on substantial and methodological grounds, arguing that greater attention should be paid to 'particular political and intellectual struggles' and the formative impact they have had upon crime control: (2004, p. 5)

³⁷ *Ibid.*, p. 6

³⁸ Garland (2001, p. 5)

³⁹ *Ibid.*, p. 5

⁴⁰ Ian Loader and Sparks (2004, p. 26). This endeavour is central to other contemporary criminological texts. See Melossi (2008); Ramsay (2012); Reiner (2007); Wacquant (2009)

⁴¹ Garland (2001, p. 73)

One additional feature of *The Culture of Control* that makes it an apt starting point for my thesis is the level of generality at which the account operates. This is a feature that it shares with De Giorgi's account, though Garland's analysis functions in terms of 'late modernity' and De Giorgi's in terms of 'post-Fordism'. In both cases transition into these eras is thought to have occurred at a 'global' level: the changes they brought have occurred over and above single national realities⁴². Pitched at this level of generality, Garland and De Giorgi's accounts lend themselves to contextualisation, an approach that Garland himself urges us to adopt⁴³. Contextual adaptation is precisely what my thesis undertakes.

Re-Thinking the Political Economy of Punishment is a fruitful theoretical starting point in that it analyses contemporary penalty through the lens of the political economy. This position draws explicit links between contemporary economic conditions and contemporary penal evolution. It also demystifies the link between crime and punishment that, in its most basic form, would have punishment and crime react directly one to the other⁴⁴. By contrast, in De Giorgi's as in other political economic accounts, changing modes of production will have greater impact on modes of punishment than crime control policies⁴⁵. Much like Garland, De Giorgi sees penalty and incarceration as symptomatic of broader societal evolution. The work of the two authors is complementary: while De Giorgi provides a heightened and detailed attention to political economy, Garland provides an analysis of the cultural implications of the political economic changes detailed by De Giorgi. Garland's discussion of 'new collective experiences' of crime provides us with a new way of conceptualising the relationship between crime and punishment (see below). He allows us to re-introduce crime in our analyses of contemporary penalty, even where we agree with De Giorgi that punishment may have more to do with modes of production than with rates of recorded crime⁴⁶.

De Giorgi and Garland, however, do not constitute a sufficient basis for an analysis of Italian penalty. Both theories, precisely because articulated at the macroscopic level, can and have been subject to critique⁴⁷. De Giorgi's account, for example, pays little attention to agents of penalty. His analysis may, like other political-economic accounts before his, be critiqued on the grounds that it tends to prioritise economic determinants of punishment, at the expense of all other factors⁴⁸. His lack of attention to penal agents also follows from the fact that he deals

⁴² Garland (2001, p. 75)

⁴³ Garland (2001, p. 202); 2004)

⁴⁴ So that increasing punishment levels causes crime levels to decrease.

⁴⁵ Rusche and Kirchheimer (1939, p. 5)

⁴⁶ *Ibid.* See also: Garland (1990, pp. 83-110)

⁴⁷ Lacey's account (2008) does precisely this. See also: Ian Loader & Sparks (2004)

⁴⁸ 'Economic reductionism' somewhat tempered, in De Giorgi, by his use of Garland.

with political economic and penal processes at a very general level. His work presumes ‘global’ convergence both at the economic level (where all Western nations are assumed to be post-Fordist) and at the penal level (where all Western nations are assumed to have experienced increasing punitiveness). Garland is more attentive to agents of change, in particular criminologists and criminal justice professionals⁴⁹, but he too presumes substantial convergence across Western European democracies. His theory of ‘late modern penality’ operates on the assumption that statehood has developed in a similar fashion across Western polities and that cultural and political transformations have everywhere been similar to those detailed in *The Culture of Control*. Garland’s account also presumes that the outcome of such changes has been a ‘late modern penality’, visible across contexts, with increasing incarceration as its beacon.

However, as Nicola Lacey has noted, comparisons across European nations reveal divergence as much as they reveal convergence. This is so at the penal level *and* at the level of political economic/social change. Here, Lacey’s attention to systematic penal variation makes her work a useful starting point. It allows for a critical analysis of contemporary penal theories *through the medium of a national case study*. By working with *The Prisoners’ Dilemma* we can do a number of things: firstly, we can try and understand Italian penal divergence in a systematic fashion, i.e., linking to its institutions; secondly, we can construct a dialogue between Italy and broader theories of contemporary punishment. Moreover, the additional advantage of an institutional analysis is that it ties penality to more ‘manageable’ phenomena: institutions rather than macroscopic processes; electoral systems and industrial relations rather than ‘late modernity’ and ‘post-Fordism’. As Lacey herself contends, this means that we can then identify where to intervene should we wish to influence current penal trends⁵⁰. An institutional approach to punishment allows us, that is, to resist the conclusion that punitiveness and rising prison rates are a settled fate for all contemporary Western polities.

ii. Why Italy?

Why then is Italy an interesting critical case study? Most basically because, though it should fall within the remit of Garland, De Giorgi and Lacey’s theories, in many respects it does not do so. This is true in terms of penality – with its oscillation between punitiveness and leniency – but also in terms of the components of the three theoretical models. Italy presents a number of discrepancies with these models, and this prejudices their capacity to explain Italian penality. To give one example, we can look to Italian economic evolution. I will show

See Garland on Rusche and Kirchheimer (1990, p. 180)

⁴⁹ See Garland (1990, pp. 53-73)

⁵⁰ Lacey (2008, pp. xv-xx. Especially at xvii)

in Chapters 3 and 4 that the Italian political economy has developed in a regionalised and stratified manner. So much so that analyses of the Italian political economy have often been centred on the nation's fractures. Italy has been characterised as divided into three broad economic areas; it has also been described in terms of the differences existing between north and south⁵¹. Debated as these characterisations have been, they demonstrate the existence of multiple, if interlinked, economic systems in Italy. These range from the north-west and its large scale industries; to the north east and centre, with their multiple small and medium-sized industries; to the south with its agricultural past and an economy that rests heavily on absorption into public bureaucracy (Chapter 3)⁵². This is a simple and synchronic description, but it highlights that the Italian political economy escapes unitary categorisation as 'Fordist' and 'post-Fordist'. Italy never was a nation characterised – *as a whole* – by large-scale industrial production relying primarily on unskilled labour. Moreover, differences across regions and across sectors have persisted, as the nation has responded to 'global economic crisis'. Given these persisting differences, Italy raises interesting questions about the applicability of De Giorgi's account to its political economy and (thence) penalty.

Shifting away from the Italian economy to look at the Italian *state*, we then note a first discrepancy with Garland's account. This discrepancy is of particular importance given the connection posited by Garland between statehood and punishment. His theorisation of 'late modern' penalty builds upon the transformation of the 'modern nation state' – unchallenged in its authority and monopoly over law and order – into the 'late modern' nation state – no longer possessed of such monopoly or unequivocal authority. This account is difficult to superimpose upon Italy, where the state's authority has been challenged from the outset. Partly this reflects the nature of Italy's unification: 'unification from above', enacted primarily by Italian elites, unable to iron out existing territorial differences within national territory⁵³. The relationship between the Italian state and its components has remained tense and, without foreshadowing coming chapters, I suggest that Italy's centre and periphery are engaged in a competition that neither is strong enough to win. This has produced a state beset by internal weaknesses, even as it asserts strong central power. Looking back at Garland, we then see obvious discrepancies with the evolution of 'his' modern state and the evolution of modern Italy. We should also note how challenges to state authority in Italy have had a criminal, highly political, form. During the course of the post-war years the Italian Republic has faced violent challenges at the hands of national terrorism (left and right) and organised crime (Appendix and Chapters 2 and 3). These phenomena have affected crime and punishment in Italy. They also emphasise that, if penal accounts that link state sovereignty

⁵¹ For a synthesis of the 'southern question' see Foot (2003, pp. 150-158)

⁵² Bagnasco (1977)

⁵³ See Cotta and Verzichelli (2007, p. 1-34)

and contemporary punishment are to apply to Italy, they will have to incorporate these and similar challenges to state authority. Such accounts should, that is, be capable of applying to European nations like Italy, whose formation and consolidation has not followed the ‘typical’ transition into modernity⁵⁴. Where they do not, the Italian case is an appropriate one with which to refine their claims.

It seems that Italy, contrasting with Garland and De Giorgi’s theoretical starting points, is best seen in comparative context, the approach taken in *The Prisoners’ Dilemma*. However, and this is why Italy is such an interesting case study, even Lacey’s comparative, context sensitive theory, is unable to fully incorporate Italian penalty. *The Prisoners’ Dilemma* builds upon the Varieties of Capitalism (VoC) models put forth by Hall and Soskice⁵⁵. The two primary ‘varieties of capitalism’ in this account are liberal market economies and co-ordinated market economies (LMEs and CMEs) which possess institutional features that act in concert. They act, that is, via a series of positive feedback loops, with each feature reinforcing the others. The Italian institutional structure cannot easily be described in terms of such feedback loops; often its institutions seem to act in contradictory ways⁵⁶. This is why comparative analyses of the Italian political economy and institutions have tended to emphasise its ‘hybridity’ relative to existing models: for example Italy has been classed as a ‘mixed market economy’⁵⁷. The difficulties of classifying Italy are aptly summarised by John Foot in his historical account:

‘One of the most important interpretative questions regarding Italy is that of comparison. Who do we compare Italy with? [...] Italy has both Southern European and Northern European characteristics [...] has been “backward” and highly advanced at the same time, and often in the same region. One of the fascinating features of Italian history lies in [...] the difficulties [of] placing it into easy categories.’⁵⁸

Extending this analysis to the penal realm, we then find that Italian penalty is difficult to explain in terms of institutional ‘coherence’: whether the latter stimulates punitiveness *or* moderation. I argue that the institutional set up in Italy *nonetheless* produces penal incentives worthy of investigation. In fact the very absence of coherence, comparable to the CME/LME

⁵⁴ For a brief analysis of Italy’s ‘failure’ to adhere to comparative models of nationhood see Foot (2003, pp. 7-8)

⁵⁵ Hall and Soskice (2001)

⁵⁶ Trigilia and Burroni (2009)

⁵⁷ Molina and Rhodes (2007)

⁵⁸ Foot (2003, p. 7)

models, is the outcome of Italian institutional features: first and foremost a political system highly permeable to diverse, fragmented interests. The question then becomes if and how the different penal incentives produced by the Italian system can be mapped within a framework, so as to situate Italian penalty. Given that Italy shares features with its neighbouring nations – including the archetypal LME Britain, and the archetypal CME Germany – we also need to ask why its penalty differs from the punitiveness of one *and* the moderation of the other. We cannot assume that Italy is necessarily ‘exceptional’ in Europe, or that the VoC models necessarily exhaust the field⁵⁹. We should, instead, endeavour to find plausible explanations for Italy’s penal dualism within the European context. Ultimately this exercise will enhance our understanding of punishment in ‘central’ LME/CME cases: perhaps by highlighting features of the relationship between institutions and penalty, otherwise overshadowed by the models’ coherence.

iii. Why the timeframe?

These preliminary examples illustrate why Italy is an apposite case study against which to test theories of contemporary penalty. What remains to be explained is the timeframe for my investigation: 1970 to 2000. The starting date for this period has been selected by reference to the theories on which my thesis builds. Both Garland and De Giorgi identify the early 1970s as the beginning of the political, social economic and penal transformations, that they deal with⁶⁰. De Giorgi is in fact even more specific, arguing that 1973 is a ‘watershed’ for penalty ‘found in the same years in which the crisis of Fordism has been located’⁶¹. My own decision to investigate Italian penalty, as of 1970, is a means of testing Garland and De Giorgi’s theories against the Italian reality: testing penalty in ‘late modern’ or ‘post Fordist’ times from the time at which they are (roughly) thought to have begun.

The cut-off point for my investigation is motivated more by ‘internal’, national factors than external comparators⁶². Before explaining what these are, I should specify at the outset that there is a sense in which all periodisations are artificial: it is very rare to find historical ‘clean breaks’ from the past and this is also true of Italy⁶³. Thus, my choice of the year 2000 as a cut-off point is not meant to imply any ‘clean break’ between what came

⁵⁹ A position that its authors do not ascribe to. See also Hancké, Rhodes, and Thatcher (2007)

⁶⁰ Garland (2001, p. 96). This is not uncontroversial, Loader and Sparks for example use 1968 as their starting-point (2004, p. 18).

⁶¹ De Giorgi (2006b, p. 91)

⁶² Garland’s investigation also ends at the beginning of the new century.

⁶³ See Lucia Zedner’s (2000) critique of Garland and his account of the *demise* of rehabilitation. Looked at closely contemporary penalty still displays rehabilitative practices – change and continuity co-exist. See also Loader and Sparks’s discussion of Garland’s relationship to the ‘past’ (2004, pp. 14-15).

before and what came after. What I have sought to do, in picking my timeframe, is find a spectrum of time that would encompass the Italian political crisis of the 1990s – without which my account would have been stunted – but that was sufficiently removed from the present day, to allow me to make an intelligible evaluation of Italian penalty. The 1990s are thought to have initiated a political ‘transition’ in Italy⁶⁴; the three decades from 1970 to 2000 thus take us from one (global) crisis to the peak of one (local) crisis. However, if Pasquino is right, the political transition, that began in the 1990s is still ongoing in Italy⁶⁵; and here pragmatism plays its part. By choosing the year 2000 as the end-date for my investigation I have given myself a margin of detachment from the phenomena I am analysing. This margin (just over ten years) is advisable generally: as Hancké claims, researching a ‘moving target’ is a highly complex and not always fruitful endeavour⁶⁶. It is also advisable at a more specific, national level. In Italy political changes can be both unexpected and drastic: ‘[all] scholars of Italian politics are well aware of the risk that their analysis can be made obsolete by some sudden and unpredictable event, always a possibility in a political and institutional transition that no politician could control, steer, bring to an end’⁶⁷. Caution thus suggests that a wise cut-off point pre-dates the years during which my research is written; particularly where we aim to make sense of Italian penal trends without being blown off course by the (immediate) volatility of the Italian scenario⁶⁸.

Further explanations for the cut-off point can be sought in the political history of Silvio Berlusconi and his coalitions (see Appendix). Berlusconi first descended into politics in 1994; he brought with him a new style of mediatised leadership politics⁶⁹ which has coloured Italian politics since the mid-1990s. However it is only with the elections of 2001 – after having reconstructed his party, his economic patrimony and his alliances – that Berlusconi and his right-wing coalition came to power⁷⁰. They remained in power for seven years (five of which successive)⁷¹. Admittedly, Berlusconi represents both political change and political continuity⁷², though this is not the place to elaborate on either. Nonetheless, his ‘ascent’ to

⁶⁴ Pasquino (2002)

⁶⁵ *Ibid.*, p. 61.

⁶⁶ Hancké (2009, p. 31)

⁶⁷ Pasquino (2000, pp. 88-89)

⁶⁸ Pasquino’s point seems to have been vindicated by recent events including Silvio Berlusconi’s exit and re-entry into politics; the establishment of a (neo-liberal?) technical government; investigations into corruption within Italian local governments.

⁶⁹ The novelty being the mediatisation of leadership rather than the leader’s centrality: Foot (2003, pp. 164-165)

⁷⁰ Ginsborg (2004, pp. 81-86)

⁷¹ Between June 2001 and April 2005; April 2005 and May 2006; between May 2009 and November 2011.

⁷² Pasquino (2000)

power has potentially important penal implications, which can help us explain the need for a timeframe ending in 2000. Indeed, during the years of Berlusconi's right-wing coalitions, there were a series of executives whose attitudes to legality are explicitly contradictory⁷³. They also entrenched the conflict between judiciary and executive that first came to a head in the 1990s with *Tangentopoli*, i.e., the judicial investigations into political corruption that precipitated the collapse of existing political parties, and thus the transition into the so-called 'Second Republic' (Appendix). This conflict was articulated with vitriol by Berlusconi, even when Prime Minister⁷⁴. Thus we find a government that 'within weeks in office had rendered innocuous the legal sanctions against accounting fraud'⁷⁵, attempted to halt the introduction of the 'European warrant for arrest for crime such as corruption [...] and the laundering of dirty money', and 'reintroduced into Italian law the concept of "legitimate suspicion"', whereby defendants could ask for their trial to be transferred to another court, where they adduced 'legitimate suspicion' of the court's bias against them⁷⁶. This was an executive whose attitude to the 'forces of law and order' has contemporaneously been described as 'unqualified support'⁷⁷. It is the executive that modified immigration law to punish with up to four years imprisonment non-EU migrants who had previously been ordered to leave the nation and had nonetheless remained on Italian territory, without a 'good reason'⁷⁸. Under Berlusconi's executive, legislation on drugs was also modified and made harsher⁷⁹. Similarly, in 2005, the

⁷³ See De Giorgi (2006a, p. 88); Pepino (2006)

⁷⁴ His presence is an 'Italian anomaly', as he has been both 'defendant in various preliminary trials' and 'promoter [...] of *ad hoc* [substantial and procedural] penal reforms' that impact on his own trials: De Giorgi (2006a, p. 90 My translation).

⁷⁵ Ginsborg (2004, p. 135)

⁷⁶ *Ibid.*, p. 144

⁷⁷ *Ibid.*, 2004, p. 138

I am not implying that support for law and order was a preserve of the Italian right wing, but describe the contradictions of the right-wing executives in power during the early years of the last decade. On the narrowing of left- and right-wing positions on crime and 'security' see Pepino (2006, p. 82) For an interpretation of this phenomenon in terms of class struggle, see Melossi (2008, p. 235)

⁷⁸ Article 14, comma 5-ter ("Decreto Legge 14 settembre 2004, n. 241 'Disposizioni urgenti in materi di immigrazione',") was later declared contrary to European Directive 2008/15. In *El Dridi*, the European Court of Justice ruled that the directive precluded imprisonment. Non-compliance with an order to leave Italian territory consequently incurs fines but not imprisonment.

"Hassen El Dridi, alias Karim Soufi, Case C-61/11 PPU" 28 April 2011

See also: Pepino (2006)

⁷⁹ The law now draws no legal distinction between 'hard' and 'soft' drugs and has reversed the burden of proof on whether drugs were for personal consumption or sale: ("D.L. 2005 n. 72," 2005)

For an evaluation of penal reforms introduced during 2001-2006 see: De Giorgi (2006a); Pavarini (2006); Pepino (2006)

law on recidivism was reformed, increasing penalties for recidivists, and reducing their access to benefits once detained⁸⁰.

This contradictory ‘penal scenario’ at the very least raises the question of how these polarised stances have influenced Italian penalty. I suggest, however, that before we can answer this question, we must be able to trace lines of change and of continuity in Italian penalty. We must, that is, be able to compare the later decades of the 21st century with the First Republic, and with the first decade of the Second Republic.

In truth, the hostility to judicial power and its deployment against political corruption (often embodied by Berlusconi and his executive) was visible also in the 1980s and 1990s (Chapter 5)⁸¹. Similarly, as this thesis will show, there is nothing novel in the contradictory stance to punishment: I am, after all, arguing that Italy demonstrates a penal *dualism*. What is different is the incidence, under the right-wing coalitions, of legislation of a more ‘typically’ law and order kind. Again, legislation on immigration, recidivism and drugs are examples of this. Looking at this legislation alone, we might be justified in assuming that Italy has now aligned itself with other ‘Western counterparts’: as De Giorgi, or indeed Garland, might have led us to expect. I would, however, resist this conclusion, wary of taking explanatory categories – for example ‘populist punitiveness’ – from the Anglo-American context and simply superimposing them on the Italian context⁸². Even if we ultimately conclude that Italy today is aligned with its more punitive neighbours (and that the categories were thus accurate), we need to understand how and why this convergence has occurred. Again, the year 2000 appears as a useful cut-off point for us to do so. It halts our analysis before the election of Berlusconi and his coalition – and their potential penchant for ‘law and order’ – allowing us to look at penalty after 2000 in a way sensitive to continuity as well as change.

V. The literature

The following section provides a detailed account of the three analyses that I am working with. It serves as a means of contextualising my work in the broader literature, and as an explanatory guide for the thesis’ analysis of Italian penalty.

i. Cultures of Control

David Garland’s work is partly geared to explaining the increasing punitiveness that has peaked in the last decades of the 20th century. This punitiveness is worthy of attention because

⁸⁰ L. 2005 n. 251

See Pavarini (2006, p. 8)

⁸¹ See also Nelken (1996) on the timing of *Tangentopoli*.

⁸² A term used by the three authors quoted in this passage: De Giorgi (2006a); Pavarini (2006); Pepino (2006)

of its significant ethical implications, but also because it appears to stand in stark contrast to the penalty that it has replaced⁸³. Garland's work refers primarily to the United States, but his analysis explicitly extends to the United Kingdom and makes claims that, by implication, apply across contemporary Western societies⁸⁴. Garland argues as much insofar as his analysis of the changing criminological scenario is anchored in broader transformations that 'swept society in the second half of the twentieth century'⁸⁵. These, he argues, are characteristic of 'late modernity', though the use of this term poses significant difficulties because of its elusive nature. In Garland's theorisation, late modernity 'transformed [...] the social and political conditions upon which the modern crime control field relied'⁸⁶ whilst posing 'new problems of crime and insecurity, [challenging] the legitimacy and effectiveness of welfare institutions, and [placing] new limits on the power of the nation-state'⁸⁷. Consequently, the penal mode of late modernity shifted away from a welfarist approach, and towards a simultaneously more punitive and more instrumental approach to crime and punishment. The following sections explain this transition, abridged to focus on those aspects of *The Culture of Control* most relevant to my analysis of Italian penalty.

a. *Penal-welfarism*

Penal welfarism can be defined as a set of practices⁸⁸, and their ideology, dominant in the post-war years up to the 1970s, emphasising the rehabilitation and re-education of the offender. Garland describes the 'penal welfare structure' combining 'the liberal legalism of due process and proportionate punishment with a correctionalist commitment to rehabilitation, welfare and criminological expertise'⁸⁹. The criminology associated with this structure considered crime as a consequence of 'poverty and deprivation': its solution lay in expanding prosperity and social welfare⁹⁰. The role of punishment was to rehabilitate and reintegrate deviant individuals back into the body politic⁹¹ through 'individualized correctional treatment [and] welfare-enhancing measures of social reform' such as education and employment⁹². This was an approach which presumed that individuals could, under the

⁸³ Garland (2001, p. 3)

⁸⁴ *Ibid.*, p. 7

⁸⁵ *Ibid.*, p. 77

⁸⁶ *Ibid.*, p. 75

⁸⁷ *Ibid.*

⁸⁸ Dominant in rhetoric at least – see Zedner (2002, p. 345)

⁸⁹ Garland (2001, p. 27)

⁹⁰ Garland (2001, p. 43)

⁹¹ *Ibid.*, p. 44

⁹² *Ibid.*, p. 15

apposite circumstances, change for the better⁹³. It also followed from the rationale of the welfare state⁹⁴. In this framework – that of *correctionalist criminology* – it was the state’s responsibility to effect this change through its broader social and political measures; but also through its criminal justice institutions: ‘*the state was to be an agent of reform as well as of repression, of care as well as of control, of welfare as well as punishment*’⁹⁵. This also presumed a belief in the state’s competence to undertake such tasks, and a ‘widespread confidence’ in the state’s ‘crime control institutions’⁹⁶. Of these institutions, the prison theoretically occupied a ‘residual’ function. Prison was to be a measure of last resort in the penal welfarist logic⁹⁷, rather than the first port of call, and its purpose was to be re-educative.

What were the roots of this approach to crime and punishment? Garland traces them to ‘modernity’, and in particular to the modernist state and the modernist project of near universal social inclusion. As part of the evolution of the modern nation-state, Garland tells us, ‘in the course of the 18th and 19th century’ the state came to monopolise ‘policing, prosecution and punishment of criminals’⁹⁸. The power to punish was gradually removed from ‘competing secular and spiritual authorities’ and bestowed upon the institutions of criminal justice. With the expansion of democracy, the law itself changed, such that in the 19th and 20th centuries it laid claims to expressing popular will⁹⁹, in the name of which the state also punished. This development of state and crime control gave rise to what Garland calls the ‘myth of the sovereign state’ and of its monopoly over crime control¹⁰⁰. The latter rested upon the state’s ‘claimed capacity to rule a territory’ without being (seriously) challenged by alternative sources of authority. Integral to this was the capacity to ensure law and order, and to control crime and criminal conduct¹⁰¹.

In reality, of course, the modern state did not act on its own in controlling crime and deviance: as Garland notes, it also relied on informal social controls: ‘the learned, unreflexive, habitual practices of mutual supervision, scolding, sanctioning, and shaming carried out, as a matter of course, by community members’¹⁰². Families, neighbours and social institutions such as school and the workplace, exerted informal social controls. They worked

⁹³ *Ibid.* p. 15

⁹⁴ *Ibid.*

⁹⁵ *Ibid.*, p. 39 Emphasis in original.

⁹⁶ *Ibid.*, p. 33

⁹⁷ *Ibid.*, p. 177

⁹⁸ *Ibid.*, p. 29

⁹⁹ *Ibid.*, p. 30

¹⁰⁰ *Ibid.*, p. 109

¹⁰¹ *Ibid.*

¹⁰² *Ibid.*, p. 159

in harmony with the law, creating a series of ‘norms and sanctions’ complementary to ‘the law’s demands’¹⁰³.

If penal-welfarism relied on the modern state’s monopoly of power and claims to crime control, it also relied on the state in its welfarist guise: the state that reformed *and* repressed, cared *and* controlled. Garland argues that penal welfarism ‘interacted with a contiguous set of institutions’ characteristic of modernity: ‘the labour market and social institutions of the welfare state’¹⁰⁴. In particular it shared their ideology: ‘moderately solidaristic’ and geared to the inclusion of individuals into ‘full social citizenship’ with equality of rights and opportunities¹⁰⁵. This project of extended social inclusion was sustained by the economic prosperity experienced by the UK and USA between 1950 and 1973¹⁰⁶. In this scenario a re-integrative approach to punishment was materially possible, as well as ideologically coherent.

b. What changed? Economics, politics and the welfare state.

In Garland’s account, the passage from modernity to late modernity brought about historical changes that cumulatively caused a ‘shift in social practice and political sensibilities’¹⁰⁷. This shift, in turn, shaped and maintained contemporary penalty. The changes can be seen as occurring across three interlinked dimensions: the social, economic and cultural dimension; the political dimension¹⁰⁸; the dimension of crime and the experience of crime. I deal with each in turn.

At the economic level – capitalist production and market exchange¹⁰⁹ – we witness a shrinking of industrial production, with fewer, higher skilled jobs; the re-appearance of mass unemployment; and an increase in conflict between social partners, i.e., government, employers and trade unions¹¹⁰. Ultimately, workers became entitled to less job security and fewer benefits¹¹¹. Cumulatively these economic changes led to increasing income inequality and to the creation of a mass of ‘low-skilled, poorly educated, jobless people’, many ‘young, urban and minority’¹¹² and likely to face systematic exclusion from the job market¹¹³. The labour market became highly stratified; the ties of solidarity across, and within, classes

¹⁰³ *Ibid.*, p. 49

¹⁰⁴ *Ibid.*, p. 44

¹⁰⁵ *Ibid.*, p. 46

¹⁰⁶ *Ibid.*, p. 79

¹⁰⁷ *Ibid.*, p. 139

¹⁰⁸ *Ibid.*, p. 75

¹⁰⁹ *Ibid.*, p. 77

¹¹⁰ *Ibid.*, p. 81

¹¹¹ *Ibid.*, p. 72

¹¹² *Ibid.*, p. 72

¹¹³ *Ibid.*, p. 82

decreased. Changing social and cultural relations also played their part, with the ‘grip’ of more traditional social institutions – community, church and family – ‘relaxing’¹¹⁴; replaced by ‘communities of choice’ i.e. groups one opted into and out of, such as subcultures, or consumer identities¹¹⁵. Much as these communities of choice overcame the often coercive and hierarchical relations of more traditional institutions¹¹⁶, they also represented a decline of erstwhile ties of solidarity: ‘face-to-face [...] local [...] grounded in a shared sense of place or in the tight bonds of kinship’¹¹⁷.

As these economic developments were unfolding, political changes were also occurring with ‘realignment and policy initiatives’¹¹⁸. This realignment displayed a contradictory mix of free market neo-liberalism, and social (neo) conservatism; best exemplified by the Reagan and Bush administrations in the United States, and the Thatcher governments in Great Britain¹¹⁹. The new political discourses that emerged in this period produced what Garland has called a ‘reactionary reading’ of late modernity¹²⁰. This expressed itself in hostility to the welfare state, to public spending, to the ‘permissive culture’ of the 1960s and to the heretofore dominant, inclusive politics of social democracy¹²¹.

Part of this reactionary vein expressed itself in an interpretation of crime and of ‘immoral behaviour’ as the criminal and immoral conduct of the poor¹²². Discipline was increasingly reserved for the poor¹²³. Social stratification, which already followed from changes in the labour market, was thus entrenched. If the ideology of the post-war years had been solidaristic and inclusive, the ideology of late modernity enhanced class and race divisions; it led to a ‘cultural mood that was defensive, ambivalent and insecure’¹²⁴. In this context, violent crimes, substance abuse and street crimes worsened¹²⁵; crime (in general) came to occupy a privileged position in the narratives through which social and economic realities were interpreted¹²⁶.

¹¹⁴ *Ibid.*, p. 89

¹¹⁵ *Ibid.*, p. 89

¹¹⁶ *Ibid.*, p. 87

¹¹⁷ *Ibid.*, p. 89

¹¹⁸ *Ibid.*, p. 75

¹¹⁹ Between 1981-1992 in the USA and 1979-1992 in Britain: *Ibid.*, p. 75

¹²⁰ *Ibid.*, p. 98

¹²¹ Garland *Ibid.*, pp. 97-98.

For an account of changing images/interpretations of deviance before and after 1970 see Melossi (2008, especially at 249-250)

¹²² Garland (2001, p. 99)

¹²³ *Ibid.*

¹²⁴ *Ibid.*, p. 100

¹²⁵ *Ibid.*, p. 101

¹²⁶ Wacquant develops a related, but more extreme, line of argument. See for example: Wacquant (2009, pp. xi-xxiii, 287-314)

One other and key aspect of late modernity deserves attention: the crisis of the welfare state – a phenomenon that straddles both economic and political realms. This crisis can be seen as composed of both internal and external challenges to the welfare state. Internal were those that originated from the workings of post-war welfare (as articulated in Britain and America). The welfare state was prey to what Garland has called a series of ‘self-negating’ processes¹²⁷ that resulted in its being discredited. For example, as it uncovered more and more unmet needs, it increasingly appeared unable to satisfy the needs¹²⁸. As it nonetheless endeavoured to meet them, it expanded its apparatus: consequently appearing unwieldy as well as unsuccessful¹²⁹. State welfare was recast as an economic drain on the middle class and skilled workers¹³⁰, the welfare state’s ‘central constituency and tax-base’¹³¹, now prosperous enough to substitute state provision with private provision¹³².

In sum, the welfare state appeared to be cumbersome and doomed to fail. This interpretation was then heavily entrenched by the external challenges it faced, those deriving precisely from the reactionary line of politics described above¹³³. Crucially, from the neo-conservative perspective, ‘welfare policies for the poor’ were cast as ‘luxuries’ for the undeserving, paid for by harassed middle-class taxpayers¹³⁴. This feeling spilt over into criminal justice with ‘penal-welfare measures for offenders [...] depicted as absurdly indulgent and self-defeating’¹³⁵.

c. What changed? Collective experiences of crime.

In this transformed scenario, we witness the changing incidence and interpretation of crime. The outcome of such changes was what Garland has called a ‘cultural formation’ typical of high crime societies¹³⁶: the ‘crime complex’ that endowed the ‘late modern’ experience of crime with a ‘settled institutional form’¹³⁷.

At its outset, this new experience of crime rested on what Garland has called ‘rapid and sustained increase in recorded crime rates’, across offence categories, that occurred the

¹²⁷ Garland (2001, p. 93)

¹²⁸ *Ibid.*

¹²⁹ *Ibid.*, p. 94

¹³⁰ *Ibid.*, p. 94

¹³¹ *Ibid.*, p. 94

¹³² *Ibid.*, p. 93

¹³³ In Britain criticism came also from the left-wing, voicing impatience with the welfare state’s failure to deliver the promised social justice: *Ibid.*, p. 67

¹³⁴ *Ibid.*, p. 76

¹³⁵ *Ibid.*

For an analysis of the ‘neoliberal’ present and future of punishment see Wacquant (2009, pp. xi-xxiii)

¹³⁶ Garland (2001, p. 163)

¹³⁷ *Ibid.*

UK and USA in between 1960 and 1980¹³⁸. The causes of this increase were multifarious; including, for example, reduced informal social controls and increased opportunities for crime (as the circulation of commodities increased)¹³⁹. Demographic and ecological changes also played a part, with the creation of ‘decaying inner city areas’ removed from ‘middle-class white suburbs’¹⁴⁰. Suburbs became ‘well-stocked’, but anonymous and unsupervised¹⁴¹ ‘laden with criminal temptations’ and devoid of those social structures that had prevented temptation becoming opportunity¹⁴².

Robert Reiner’s analysis of crime trends adds nuance to Garland’s account by, for example, giving greater space to the discrepancy between recorded crime rates and victimisation rates (measured by the BCS)¹⁴³. Reiner’s account focuses on the UK, Garland’s focuses on the US: nonetheless Reiner’s discussion of the difficulties posed by crime statistics has general validity¹⁴⁴. Whatever the (ever chimerical) reality of crime, he concludes, it seems certain that fear and anxiety over crime rose: ‘the public [saw] crime as rising [...] throughout’¹⁴⁵. Here, in pointing out the ‘lack of correspondence between [...] statistics and public perception’, Reiner and Garland’s accounts coincide¹⁴⁶. Returning to Garland, we can then claim that high crime rates soon became a ‘normal social fact’ for contemporary polities and an ‘organizing principle of everyday life’¹⁴⁷. This was so not just for the poorer social strata, but also for the middle-classes¹⁴⁸. More crime was thus (in/directly) experienced, but it was also experienced by more people. Moreover, fear of crime acquired independent force and persisted even after recorded crime rates began to drop¹⁴⁹. Political discourse played a crucial role in this respect: crime, and law and order became a key subject of electoral competition¹⁵⁰, such that crime came to occupy a strategic role within the political culture of late modernity. It came to stand in for the problems that had (purportedly) been created by modernist era and modernist policies. Crime also came to act as ‘rhetorical legitimation’ for

¹³⁸ *Ibid.*, p. 90

¹³⁹ *Ibid.*

¹⁴⁰ *Ibid.*, p. 85

¹⁴¹ *Ibid.*, p. 91

¹⁴² *Ibid.*

¹⁴³ Reiner (2007, p. 55)

¹⁴⁴ Reiner divides crime trends in England and Wales into three ‘periods’: 1950-1980, 1980-1992 and 1992 onwards. Of these the 1980s emerge as ‘a genuine [...] decade of explosive increase’ in recorded crime and victimisation. Patterns after 1992 are more complex but consistently marked by divergence between BCS and recorded crime. Initially recorded crime decreased while victimization continued to increase; after 1997 BCS-levels decreased while recorded crimes rose: *Ibid.*, pp. 65-70.

¹⁴⁵ *Ibid.*, p. 71

¹⁴⁶ *Ibid.*, p. 73

¹⁴⁷ Garland (2001, p. 106)

¹⁴⁸ *Ibid.*, p. 152

¹⁴⁹ *Ibid.*, p. 164

¹⁵⁰ *Ibid.*, p. 13

the development of a 'strong disciplinary state' that stood where the welfarist state had once stood.

High crime rates also gave rise to *the demise of the myth of the sovereign state* (and I will later show how crucial this evolution is for a comparison of Italy with Garland's account). The modern state had laid claims to monopolising crime control and to ensuring law and order. Now the broader experience of crime ushered in by late modernity seemed to signal that the state had, in effect, lost control over social control. At the same time, however, the politicization of law and order meant that even as 'government authorities [saw] the need to withdraw their claims to be the primary and effective providers of security and crime control' they found themselves unable to do so: 'the political costs of [withdrawal]' were far too high¹⁵¹. This *predicament*, as Garland describes it, did little to assuage fears. Crucially, the erosion of the sovereign state myth increased anxieties and disillusion amidst the middle classes and 'liberal elites'¹⁵²; those upon whose support penal welfare policies had rested.

d. *Late modern punishment: penal punitivism and increasing incarceration.*

What was the combined penal effect of such changes? As its social and institutional supports faltered, and as the 'collective experience of crime' was established, penal modernism entered into crisis. Garland describes this as an 'assault upon penal modernism's premises and practices'¹⁵³. The 'premises' were precisely the contextual conditions that had changed with late modernity. The assault upon the 'practices' of penal modernism refers to the (unwittingly) combined efforts of those who criticised penal welfarism from within and those who adopted this criticism as instrumental to their political stance. Garland points to the instrumental role played by criminologists in discrediting rehabilitation. Those who had first advocated a shift to re-integrative, individualised treatment and diversion from prison, found themselves critiquing this system: on the grounds that it constituted an extension of a not always benign discipline, and left the fate of offenders to unmonitored discretionary decisions. However, this criticism - Garland recounts - was taken up and distorted by the neo-liberal, neo-conservative forces. The consequent reaction to critique of the penal welfarist model was, to paraphrase Garland, hysterically disproportionate¹⁵⁴: 'nothing works' became

¹⁵¹ *Ibid.*, p. 110

¹⁵² *Ibid.*, p. 148

¹⁵³ *Ibid.*, p. 53

¹⁵⁴ *Ibid.*, p. 69

the tag-line for this reaction and its unwillingness to ‘seek reform and repair’ of past rehabilitative practices¹⁵⁵.

All this ushered in a new penalty for late modernity whose articulation followed also from the double bind facing the state and its criminal justice apparatus. The ‘predicament’ of the late modern state is that, having claimed monopoly over crime control, it finds itself unable to deliver. Its penal reaction is dichotomous: the state simultaneously responds in ‘adaptive’ and ‘non-adaptive’ ways¹⁵⁶. The former are a pragmatic response to high crime rates and failing formal social control; the latter are a politicised, populist and expressive response to the same. These two opposite approaches are represented respectively by the state’s tendency to ‘define deviance down’ whilst simultaneously ‘deny’ and ‘act out’ against the demise of its crime control monopoly¹⁵⁷. When defining deviance down, the State capitalised on the apparent normality of crime, cast as a risk of ‘late modern’ life, to be circumvented by means of managerial strategies¹⁵⁸. Responsibility for this form of control is displaced and rests upon the shoulders of strictly non-state agents (the potential crime victim for example)¹⁵⁹. The deviant’s role too is recast: she is a rational individual, not dissimilar to our own ‘selves’, who can simply be bought out of her tendency to offend. Crime is a thoroughly amoral event – a question of economy and opportunity: these are the criminology of the self and of everyday life¹⁶⁰.

Alongside this discourse, however, the state engages in contradictory behaviour. It ‘wilfully denies [its] predicament and reasserts the old myth of the sovereign state and its plenary power to punish’¹⁶¹. It also ‘acts out’, employing an expressive mode to react to crime and the fear it provokes¹⁶². This reaction relies on the perceived need to protect victims of crime, where victims are *abstracted*, made into a symbol of contemporary fears¹⁶³.

Denying and acting out, the state attempts to bolster its monopoly over crime control. It deploys its repressive and authoritarian apparatus over ‘residual’ deviants: those who will not desist even in the face of the requisite opportunity structure. In this criminological discourse – the criminology of the other¹⁶⁴ – crime is thoroughly immoral, and those who

¹⁵⁵ *Ibid.*, p. 71

¹⁵⁶ *Ibid.*, pp. 127, 131

¹⁵⁷ See Garland at chapter 5: *ibid.*, pp. 103-138

¹⁵⁸ *Ibid.*, pp. 182-191

¹⁵⁹ *Ibid.*, pp. 124-127

¹⁶⁰ *Ibid.*, pp. 127-131, 137

¹⁶¹ *Ibid.*, p. 110

¹⁶² *Ibid.*

¹⁶³ *Ibid.*, pp. 11, 143-144, 201

¹⁶⁴ *Ibid.*, p. 137

engage in it deserve to be quarantined¹⁶⁵. Here, the prison comes to occupy an important role. From being the last resort of penal modernity, it becomes a ‘seemingly indispensable pillar of [late modern] social order’¹⁶⁶. There is no subtlety to the deployment of imprisonment: it becomes a clear way to exclude and control those who endanger the public¹⁶⁷. The –once problematic – stigma that accompanies imprisonment is now welcome: it serves to reinforce the penalty, and to identify dangerous deviants¹⁶⁸. Imprisonment has a symbolic function and, where it manages risk and encloses danger, an instrumental function¹⁶⁹. Unsurprisingly then, ‘late modernity’ sees ever-increasing incarceration rates: ‘most decisively in the USA, but latterly in the UK as well’¹⁷⁰.

ii. Political Economies of Punishment

In comparison with Garland’s account, De Giorgi’s analysis has a more explicit, if not exclusive, focus on the political economy. It illustrates how contemporary ‘punitiveness’ can be explained by the changed methods of production of post-Fordist economies. Like many existing political economic approaches to punishment, his thesis finds its roots in the classic account given by Rusche and Kirchheimer¹⁷¹. There is fundamentally a Marxist theory of punishment, and many of its insights can therefore be traced back to the basic proposition whereby ‘the way in which economic activity is organized and controlled will tend to shape the rest of social life’¹⁷². In *Punishment and Social Structure* Rusche and Kirchheimer detail the connection existing between modes of production and modes of punishment¹⁷³. Modes of production, they contend, possess corresponding modes of punishment: penalty is thus not primarily determined by crime control policy, though criminal justice policy will, of course, affect mode and incidence of punishment¹⁷⁴. Where modes of production emerge as the crucial factor in determining penalty, we should look to the availability of labour in order to understand the distribution of punishment. Thus, Rusche and Kirchheimer contend, when labour is in surplus, punishment is more reckless with human life, and when labour is scarce, punishment is more careful of human life, tending to reintegrate the deviant into the

¹⁶⁵ *Ibid.*, p. 178

¹⁶⁶ *Ibid.*, p. 14

¹⁶⁷ *Ibid.*, p. 177

¹⁶⁸ *Ibid.*, p. 181

¹⁶⁹ *Ibid.*, p. 199

¹⁷⁰ *Ibid.*, p. 14

¹⁷¹ Rusche and Kirchheimer (1939)

¹⁷² Garland (1990, p. 85)

¹⁷³ Rusche and Kirchheimer (1939)

¹⁷⁴ *Ibid.*, p. 5

production system. Now that prison is the primary penal mode¹⁷⁵, severity is measured in terms of more or less prison; so in times of labour surplus we witness greater incarceration, and in times of labour scarcity we witness a decreasing use of incarceration. More recent articulations have chosen to operationalise this basic hypothesis by using unemployment as a measure of labour availability and prison population as a measure of punishment¹⁷⁶. This has, unsurprisingly, yielded rather reductive interpretations of Rusche and Kirchheimer, not least because unemployment is a poor substitute for complex processes within capitalist economies (see below).

Re-Thinking the Political Economy of Punishment takes political economic analyses, and adapts them to the contemporary scenario. Adopting Rusche and Kirchheimer's main insights, De Giorgi analyses the shape of penalty now that we have shifted away from 'Fordist capitalism' to 'post-Fordist capitalism'. De Giorgi describes 'Fordist capitalism' as characterising the years between the end of the Second World War and 1970¹⁷⁷. This period saw the expansion of mass industrial production; labour market stability; limited unemployment levels. Lacey describes Fordist production as premised on 'standardised systems of industrial production which depended on high levels of relatively low-skilled labour'¹⁷⁸. Fordism was also a time during which 'the institutions of social control shared with those of the welfare state a program of social inclusion for those segments of the working class who remained outside the labour market: citizenship was still imagined as a complex of social rights, and crime was seen as a consequence of economic deprivation'¹⁷⁹. In this restatement De Giorgi's characterisation recalls Garland's account.

This is the scenario we have left behind us; the new scenario is somewhat more difficult to grasp. As De Giorgi warns us, 'post-Fordism' is an ill-defined phenomenon¹⁸⁰. However, for the purposes of his theory it can be detailed in terms of 'transformations of work and production'¹⁸¹. These transformations, that are purportedly articulated 'at a global level', run as follows¹⁸². Firstly, a decline of the industrial model: the 'fixed, rigid, centralised factory'¹⁸³ has been replaced by more flexible and decentralised labour, located in one of two hypothetical sites – 'the small, automated and hyper-technological factory' or the 'many

¹⁷⁵ A development linked to the birth of capitalism.

¹⁷⁶ Jankovic (1977)

¹⁷⁷ De Giorgi (2006b, p. 39)

¹⁷⁸ Lacey (2008, p. 25 n. 46)

¹⁷⁹ De Giorgi (2006b, p. 39)

¹⁸⁰ *Ibid.*, p. 41

¹⁸¹ *Ibid.*, p. 42

¹⁸² *Ibid.*, p. 44

¹⁸³ *Ibid.*

sweatshops where [...] residual material labour is performed'¹⁸⁴. Secondly: a fragmented labour force, with workers increasingly falling outside formal labour (and union protection), and outside labour statistics'¹⁸⁵. Post-Fordism displays 'total work-flexibility imposed by the de-regulation of markets in a neo-liberal economy'¹⁸⁶.

De Giorgi's analysis further explains changing modes of production in terms of labour 'surplus' or 'scarcity'. Post-Fordism is a time of labour *surplus* which is being contained through (increasing) incarceration. In De Giorgi's schema, today's surplus is distinctive because it is both a *productive* and a *social* surplus. This means that it should be measured not just in terms of the 'amount of labour *directly* employed'¹⁸⁷, but also in terms of the rights that it does, or better does *not*, give rise to. The increasing informality and flexibility of the labour force'¹⁸⁸, combines with the neo-liberal attack on the welfare state, to produce a situation of 'vulnerability [...] and new poverty'¹⁸⁹. From the Fordist 'jobs' – productive activities with 'stability [...] some legal guarantees [and] a complex of social rights'¹⁹⁰, we have shifted to post-Fordist 'work' – any productive activity 'naked' but for is productive outcome. In the gap between work and job we find the social surplus poor, marginalised and insecure.

The surplus is then also *productive* because labour is increasingly informatised and automated. Production is 'immaterial' and 'symbolic'¹⁹¹, but sustained by a residuum of material labour'¹⁹². The site of production is no longer the disciplined factory; it is the productive 'network' and its 'social disorganisation'¹⁹³. Labour has become stratified: a top tier of 'hyper-integrated, high income workers' engaged in immaterial production; a lower tier of labourers 'expelled from the (formal) circuits of [industrial] production'; in between 'a growing portion of the new labour force', insecure, precarious and exploited.¹⁹⁴

¹⁸⁴ *Ibid.*

¹⁸⁵ Hence the difficulties in operationalising Rusche and Kirchheimer via un/employment levels: *ibid.*, p. 45 see n. 13

¹⁸⁶ *Ibid.*

¹⁸⁷ Direct employment refers to 'industrial, full time, productive work' *Ibid.*, pp. 47-48

¹⁸⁸ See *Ibid.*, pp. 47-60

¹⁸⁹ *Ibid.*, p. 50

¹⁹⁰ *Ibid.*, p. 51

¹⁹¹ *Ibid.*, p. 54

¹⁹² *Ibid.*, p. 44

¹⁹³ *Ibid.*, p. 58

¹⁹⁴ *Ibid.*, p. 60

How is this new political economy linked to punishment? At the time of the Fordist factory, punishment was the disciplining of deviants to make Fordist workers¹⁹⁵. This meant disciplining them into accepting the economic rationality of industrial production, in order to reduce their inadequacy, insufficient socialisation and reluctance to take their place within the capitalist economy¹⁹⁶. Disciplined were not just those in prison, but also those one step away from the prison, kept in check (and in their economic position) by the ‘lesser eligibility’ of imprisonment¹⁹⁷. This ‘transformative project of disciplinary control’ was part of the modernist project of universal citizenship: geared at producing “‘good citizens” [...] by producing efficient workers’¹⁹⁸. The mode of punishment during Fordism was thus to discipline; and it was to discipline *scarcity*. This scarcity explains the relative (quantitative) ‘moderation’ of punishment and the limits on incarceration.

Today, however, mode and amount of punishment have changed. If Fordist punishment ‘disciplined scarcity’, De Giorgi tells us, post-Fordist punishment ‘governs surplus’¹⁹⁹. The type of work performed in the post-Fordist economy – ‘immaterial’²⁰⁰ – and the social surplus – the ‘underclass, the permanently unemployed, working poor, informal workers’²⁰¹ – escape the disciplinary logic. The surplus escapes unitary definition and is best characterised as a ‘multitude’²⁰²: at the individual level its members no longer present the clear markings of deviance²⁰³. Institutions of social control must thus regroup and reclassify the surplus in terms of risk categories²⁰⁴. Those who fall within these categories are then confined and incapacitated. Confinement has become ‘mass confinement’ through the prison – and here we find the increasing incarceration of contemporary penalty.

Building upon the work of Loïc Wacquant, De Giorgi also posits that post-Fordist penalty is most visible in the US, but is not thereby limited to the US. Indeed he borrows Wacquant’s notion of a ‘neo-liberal common sense’ spreading across Europe²⁰⁵, carrying with it the progressive restriction of the welfare state; of the latter’s citizenship project; of its penal logic. In this context, but across contexts, the prison occupies pride of place. This is not just a cyclical return of the prison as institution of punishment; and we will not ‘cyclically’ return to a future of rehabilitation. The changes of today are durable:

¹⁹⁵ De Giorgi explicitly references Foucault’s *Discipline and Punish*: De Giorgi (2006b); Foucault (1975, pp. 67-73) See also Melossi and Pavarini (1977)

¹⁹⁶ De Giorgi (2006b, p. 72) See also Melossi and Pavarini (1977)

¹⁹⁷ The concept of ‘less eligibility’ is taken from Rusche and Kirchheimer: (1939)

¹⁹⁸ Rusche and Kirchheimer (1939, p. 73)

¹⁹⁹ De Giorgi (2006b)

²⁰⁰ *Ibid.*, p. 75

²⁰¹ *Ibid.*, p. 75

²⁰² De Giorgi (2006b) here adopts Hardt and Negri’s (2000) terminology.

²⁰³ Evaluated according to the disciplinary logic of Fordist production.

²⁰⁴ De Giorgi (2006b, p. 76)

²⁰⁵ *Ibid.*, p. 101; Wacquant (2009)

[...] what has changed – with the transition from the industrial working class to the post-Fordist multitude – is the very rationality of control²⁰⁶

A clear indication of contemporary productive-penal processes can be seen in the fate of immigrants in Western polities, and particularly Europe. Non-EU migrants are, according to De Giorgi's schema, a 'paradigmatic case study of the emerging strategies of social control'²⁰⁷. They provide us with an extreme but representative version of contemporary punishment. Whether or not this is the case, and whether it is the case in Italy, will be discussed in Chapter 6.

iii. The Prisoners' Dilemma and comparative penology

So far I have described analyses of punishment unified in their generality, and in their pessimism. By contrast to Garland or De Giorgi, Nicola Lacey argues against a 'dystopian vision' of contemporary penalty²⁰⁸. In *The Prisoners' Dilemma* she notes that not all nations have experienced the rising punishment identified by 'the dystopian current in contemporary theory'. The current, of which Garland and De Giorgi are examples, seems to have adopted an analysis in fact suited mainly to neo-liberal polities, which has then been made into a blueprint for 'global' penalty²⁰⁹.

Even where, as in the UK, the penal scenario does seem to be one of increasing incarceration, Lacey asks whether increasing incarceration should thereby be seen as 'inevitable'²¹⁰. No such conclusion follows if, Lacey suggests, we pay close attention to the existing divergence in punishment levels across Europe²¹¹. In particular our analysis should be attentive to the 'features of social, political and economic organisation [that] favour or inhibit the maintenance of penal tolerance and humanity in punishment'²¹². This means not just criminal justice policy, cultural norms and 'macro-economic forces', but also 'institutional factors distinctive to particular political and economic systems'²¹³. These – which include economic *and* political institutions – have, by and large, remained intact even in our

²⁰⁶ De Giorgi (2006b, p. 102) For a contrasting position see Melossi who argues that discipline can be seen as integral to contemporary punishment. The prison's 'disciplinary logic' is to teach its inmates 'to lower [their] heads and execute orders' and does not need to be welded mechanically to the presence/absence of industrial labour (2008, p. 242).

²⁰⁷ De Giorgi (2006b, p. 117) See also De Giorgi (2010)

²⁰⁸ Lacey (2008, p. xvi) See also Loader and Zedner (2007)

²⁰⁹ Lacey (2008)

²¹⁰ Lacey *Ibid.*, p. xvi

²¹¹ Lacey *Ibid.*, pp. 138-142

²¹² Lacey *Ibid.*, p. xvi

²¹³ Lacey *Ibid.*, p. xvi

‘globalised times’. By analysing their impact on penalty we can then hope to understand existing penal divergence. More than this, Lacey argues, an institutional analysis will allow us to understand how ‘political-economic and institutional variables coalesce to produce family resemblances at the level of punishment’²¹⁴. In so doing we can also hope to understand what ‘options for reform’ are open to us where we feel that penal reform is necessary²¹⁵.

To further this endeavour, Nicola Lacey provides us with a series of hypotheses that link institutional organisation to polities’ capacity for penal moderation. She builds upon Hall and Soskice’s *Varieties of Capitalism*²¹⁶ and its analysis of ‘comparative institutional advantage and [...] capacities for strategic co-ordination’²¹⁷. Here ‘comparative institutional advantage’ refers to ‘how the institutions structuring the political economy’ favour a nation relative to other countries, influencing its evolution in the face of ‘globalisation’²¹⁸. Different ‘varieties of capitalism’ are thought to produce different structures of ‘institutional advantage’, such that what is advantageous in one is not necessarily advantageous in the other. In particular Hall and Soskice distinguish between ‘co-ordinated market economies’ (CMEs) – with Germany as a paradigm example – and ‘liberal market economies’ (LMEs) – where the European paradigm is the United Kingdom. CMEs operate primarily on the basis of ‘long-term relations and stable structures of investment’²¹⁹. This is visible at the level of education and skills training, where individuals are trained in company/sector specific skills²²⁰: long-term skills that cannot easily be replicated or replaced²²¹. CMEs, as their name indicates, are also ‘co-ordinated’, in the sense that their governmental structure incorporates ‘a wide range of social groups and institutions’²²² which are placed in conditions of interdependence to produce what could be termed a co-operative whole.

Lacey argues that, at the penal level, CMEs produce a ‘relatively inclusionary criminal justice system’²²³. Their institutional structure produces incentives for decision makers to re-incorporate offenders into ‘society and economy’²²⁴: reintegration is, in this context, the institutionally advantageous thing to do. The ‘interlocking’ structure of CMEs is also thought to produce and sustain ‘relatively extensive informal social controls’²²⁵, thus

²¹⁴ *Ibid.*, p. 52

²¹⁵ Lacey (2008, p. xvii)

²¹⁶ Hall and Soskice (2001)

²¹⁷ Lacey (2008)

²¹⁸ Hall and Soskice (2001, p. v)

²¹⁹ Lacey (2008, p. 58)

²²⁰ *Ibid.*

²²¹ This produces a labour regime in which there is always *scarcity*.

²²² *Ibid.*

²²³ *Ibid.*

²²⁴ *Ibid.*

²²⁵ *Ibid.*, p. 61

reducing reliance on formal penal control. This state of affairs has an additional implication (and here we see how institutional analysis can incorporate cultural variables), namely that of sustaining attitudes that reinforce ‘a moderated approach to formal punishment’²²⁶.

In this, CMEs stand in contrasts to LMEs, whose criminal justice systems are typically harsher. In LMEs there is a lower cost to developing exclusionary systems such as those described in Garland’s and De Giorgi’s analyses. This ‘lower cost’ results from LMEs’ institutional structure, premised on ‘flexibility and innovation’²²⁷, and a ‘hands-off’ approach to state regulation²²⁸. If CMEs can be characterised as polities premised on long-term social relations and mutual investment, LMEs are best characterised as polities premised on more individualistic, fast-changing interrelations²²⁹. In LMEs, we are then likely to find high levels of ‘surplus unskilled labour’; and are also likely to find it ‘contained’ through imprisonment. Penalty in LMEs appears to be more exclusionary than in CMEs.

Investigating the reasons behind such difference, Lacey analyses four ‘areas’ in which institutional structures and penalty interact. These include: ‘political systems: electoral arrangements and the bureaucracy’²³⁰; ‘the structure of the economy: production regimes, labour markets, education and training, disparities of wealth’²³¹; ‘the welfare state’²³²; ‘decision makers, veto points and constitutional constraints on criminalisation’²³³. Lacey also discusses the impact of ‘outsiders’ – non-EU – migrants on European CMEs’ re-integrative capacities²³⁴. With the exception of this last issue (which will be dealt with only very briefly in this introduction) I now propose to detail each of these four areas. My aim is to provide a guiding framework for my analysis of Italy. Given that differences between Italy and the CME/LME models do not allow simple transposition of the latter on the former, I will reframe Lacey’s hypotheses so that they can apply to the Italian case.

a. Political systems

Garland, in his analysis of contemporary penalty, characterises prevalent attitudes to punishment as ‘populist punitiveness’. This is visible both amongst government elites but also

²²⁶ *Ibid.*, p. 61

²²⁷ *Ibid.*, p. 59

²²⁸ *Ibid.*

²²⁹ *Ibid.*

²³⁰ *Ibid.*, pp. 62-77

²³¹ *Ibid.*, pp. 77-84

²³² *Ibid.*, pp. 84-90

²³³ *Ibid.*, pp. 91-106

²³⁴ *Ibid.*, pp. 106-109

in popular attitudes to punishment²³⁵. As Lacey reminds us there are, however, ‘contrasts’ in attitudes to punishment²³⁶ and this may in part explain divergence in punishment levels. However, where crime and punishment do become salient social issues, they do not necessarily translate into policy concerns. Here political institutions are paramount, as they affect both political systems’ ability to sustain penal moderation and their ability to resist shifts in popular attitudes to punishment²³⁷. Lacey argues that this ability will depend on two factors: existing electoral arrangements and the status and influence of professional bureaucracies.

In terms of electoral systems, Lacey contrasts CME systems with proportional representations (PR)²³⁸, against systems with majoritarian, first-past-the-post voting systems, more characteristic of LME nations²³⁹. PR systems, she hypothesises, are premised on ‘negotiation and consensus’ between the different political parties that typically form governing coalitions²⁴⁰. They are thus less volatile in their policy-making, including criminal justice policy, which is consequently less susceptible to potential surges in populist punitiveness.

By contrast, majoritarian systems produce executives that are far less constrained when in government (not having to account to coalition partners)²⁴¹. They are also more influenced by public opinion at election time, given their direct accountability to the electorate²⁴². These systems, for example the UK and US, have also tended to suffer from ‘relatively low trust in politicians’²⁴³ and increasing convergence between political parties. This has decreased parties’ capacity to appeal to a solid electoral base, and has left them dependent upon “floating”, median voters²⁴⁴. Median voters have begun to see crime and punishment as an increasingly important issue, which has consequently affected the extent to which parties appeal to median voters on a law and order agenda. This combination of factors has created a situation in which there is high volatility in policy-making, at the same time as

²³⁵ De Giorgi makes a similar point arguing that, as a result of changing labour relations, our societies are increasingly constructed of ‘communities of fear’. See Garland’s discussion of the pervasive, contemporary ‘fear of crime’: De Giorgi (2006b, p. 108); Garland (2001)

²³⁶ Lacey (2008)

²³⁷ *Ibid.*, p. 63

²³⁸ *Ibid.*, pp. 63-64

²³⁹ *Ibid.*, p. 64

²⁴⁰ They are also more inclusive than majoritarian systems, allowing more groups to be represented within the political system: *ibid.*, p. 65

²⁴¹ Contemporary British politics have complicated this issue: Lacey (2012)

²⁴² In PR systems intra-coalition negotiation ensures stricter adherence to political programmes: Lacey (2008, p. 66)

²⁴³ *Ibid.*, 76

²⁴⁴ *Ibid.*, pp. 66-70

criminal justice has become a salient electoral issue. The result is greater volatility in criminal justice policy, and greater political receptivity to popular punitive attitudes²⁴⁵.

In LME/ majoritarian systems such as the United Kingdom, we have thus witnessed a politicisation of law and order. This trend has then been exacerbated by the position of professional bureaucracies within such polities. Professional bureaucracies, Lacey tells us, are less respected and less influential in majoritarian systems, where ‘governments [have preferred] to work with their own, politically appointed advisers’²⁴⁶. Executives have thus acted in relative isolation from any advice that ran counter to their political programmes, ignoring, where this was expedient, the opinion of ‘neutral civil servants’²⁴⁷. Thus where law and order have become crucial electoral issues, policy has been ‘insulated’ from professional opinion advising against penal harshness²⁴⁸.

Events have followed a different route in CMEs where ‘deference to the expertise of professional bureaucracy [...] including [...] penal system officials [...] prosecutors [and] [...] judges’ has tended to be high²⁴⁹. Expert opinion has thus remained a valued contribution to the formation of criminal justice policy; it may then have contributed to sustain penal moderation, even in the face of contrary public attitudes.

From Lacey’s account it emerges that political systems and penalty interact. I propose to then ‘remove’ specific references to CMEs and LMEs so as to make Lacey’s insights applicable beyond the two central models. I suggest that this process yields the following hypothesis: *the extent to which negotiation and consensus are built into a political system will affect its policy-making, including criminal justice policy. The greater the need for consensus and negotiation, the greater the likelihood of policy stability. The lesser the need for consensus and negotiation, the greater the likelihood of policy volatility, where volatility indicates both the speed and the ease with which policy is changed. The status of professional bureaucracies within different institutional set-ups will also affect policy-making, including criminal justice policy, by affecting the extent to which such professionals contribute (directly or indirectly) to the policy-making process.*

²⁴⁵ This is particularly the case in polities, such as the US, populated by single-issue pressure groups, able to affect the ‘median voter’, sought after by parties in majoritarian systems: *ibid.*, pp. 67-70.

²⁴⁶ *Ibid.*, p. 72

²⁴⁷ *Ibid.*

²⁴⁸ In the UK we have witnessed a divergence, between political and judicial opinions on crime and punishment that has become out-and-out conflict: *Ibid.*, p. 74 See Chapter 5.

²⁴⁹ *Ibid.*, p. 72

b. *The structure of the economy*

In discussing the structure of the economy Lacey again contrasts LMEs and CMEs. LMEs, she claims, have suffered from the economic restructuring of more traditional political economic analyses of punishment. Modes of production have changed with, in particular, a collapse in Fordist production and a flexibilisation of labour markets²⁵⁰. This shift has been accompanied by increasing differences in incomes and skill²⁵¹; as a consequence ‘low skilled workers in liberal market economies’ are now facing ‘structural economic insecurity’²⁵². Changes have also occurred at the cultural level, with the growing influence of ‘a more aggressively market-oriented culture’. This has affected attitudes to poverty, such that economic exclusion is now also a mark of social exclusion, and poverty has itself become a (reviled) social status. At the level of the criminal justice system, changing economic and cultural ‘mores’ have begun to sustain ‘harsh and extensive punishment’²⁵³.

Things are different in CMEs, given different economic and social arrangements. Comparative institutional advantage in co-ordinated market economies rests on the incorporation of so-called ‘social partners’ – managers and unions – in running the economy²⁵⁴. This creates structural interdependence between such partners, and also increases workers’ bargaining power. The type of economic activity that CMEs display increases this bargaining power, as the production of ‘high quality goods’ requires ‘technical and industry-specific, non-transferable skills’²⁵⁵. The result is that employers have incentives to invest in their workers, not just at the level of training, but also by promoting welfare policies to safeguard those workers, who are temporarily unemployed, but whose skills will have to be reabsorbed into the economy²⁵⁶. Overall, this set up contributes to lower levels of income and skill disparity; it also places a high price on exclusionary criminal justice policies²⁵⁷.

In sum: polities whose economic systems are premised on long-term investment in, and interdependence between, its members are more likely to produce attitudes and policies that favour penal re-integration. These polities are also more likely to have lower income disparities. By contrast, polities whose economic policies are premised on short-term, prevalently unskilled labour, where working relations are characterised by flexibility and a high worker turnover, are more likely to produce attitudes that stimulate penal exclusion.

²⁵⁰ *Ibid.*, p. 81

²⁵¹ See figures 3 and 4 in Lacey: *ibid.*, pp. 80-81

²⁵² *Ibid.*, p. 78

²⁵³ *Ibid.*, p. 84

²⁵⁴ *Ibid.*, p. 79

²⁵⁵ *Ibid.*

²⁵⁶ *Ibid.*

²⁵⁷ *Ibid.*

Policies are also less likely to be influenced by the need to re-integrate individuals into the economy.

c. The welfare state

In explaining the link between differing welfare states and levels of punishment Lacey builds on literature analysing different welfare typologies: notably Esping-Andersen's distinction between liberal, continental and social-democratic welfare regimes²⁵⁸. From liberal through to social-democratic we find an increase in welfare provisions, with liberal regimes having reduced, and social-democratic regimes having maintained their post-war welfare state. Continental countries situated somewhere in the middle (though tending toward a social-democratic model)²⁵⁹. Lacey also builds on literature that emphasises the link between welfare states and punishment, such as work by Katherine Beckett and Bruce Western, correlating welfare provision and punishment across American states²⁶⁰. This line of scholarship has suggested that high prison populations are associated with low welfare provision, and vice-versa.

Lacey links the welfare state to national political economies, and thence to punishment. It is the different 'economic and [...] structural arrangements' of such political economies, she argues, that affect the viability (indeed the rationality) of generous welfare provision. In CMEs extensive unemployment benefits are *complementary* to an economic structure that is premised on long-term investment in non-transferable skills²⁶¹. By contrast, in flexible, service-heavy LMEs, the emphasis has been on stimulating workers to retrain, and rejoin the labour market when they lose their job, a policy made possible by the 'high degree of transferable skills' that workers typically display in LMEs²⁶². Unemployment provisions are consequently *less* generous in such systems, in keeping with their overall economic structure. The further conclusion to be drawn from this is that, if welfare and penalty are linked, and welfare itself is linked to national institutional arrangements, such arrangements will also affect penalty. Moreover, given that differences between national institutional arrangements have tended to persist over time, we can hypothesise the consequent penal differences in punishment are also likely to persist²⁶³.

²⁵⁸ Esping-Andersen (1990)

²⁵⁹ Lacey (2008, p. 85)

²⁶⁰ Beckett and Western (2001)

²⁶¹ Lacey (2008, p. 89)

²⁶² *Ibid.*

²⁶³ *Ibid.*, p. 90

In sum: *where generous welfare provision and broader economic structure interlock in a mutually reinforcing relationship, the resulting set-up is also likely to stimulate inclusive penal policies. By contrast, where the broader economic structure sustains lower levels of welfare provision, delegating to market mechanisms, there will be fewer incentives to create or sustain inclusionary penal policies.*

d. Criminal justice policy and constitutional structure

In her discussion on criminal justice policy and constitutional structure, Lacey deals with three main features: the distribution of decision making points among political actors; the structure of legal institutions and, in particular, methods of selection and status of prosecutors and judges and constitutional constraints on criminalisation²⁶⁴. Her investigation of these three factors illustrates the more general proposition that ‘the constitutional structure of a country provides parameters for the institutional environment [...] and for the legal system’²⁶⁵.

In this section, and given my interest in the role of judicial actors to Italian penalty (Chapter 5), I propose to deal primarily with Lacey’s arguments on the appointment and tenure of judges and prosecutors. Regarding the other two factors, her general position is as follows. Firstly, the distribution of veto points will affect the ‘style of policy-making’ in any given polity²⁶⁶. It will affect the need for co-operation and consensus in the formation of policy, influencing the extent to which the latter is influenced by sways in popular sentiment: including over law and order²⁶⁷. As regards constitutional constraints, we need to identify the different conceptions of law that exist within different constitutional set-ups. As Lacey details, law may be conceived of as a policy instrument (the more ‘managerial mentality’ that is associated with Britain and the United States)²⁶⁸, or it may be conceived of as ‘an autonomous system [placing] constraints on [political] power’²⁶⁹. Admittedly in Italy the constitutional conception of ‘law’ does not always accord with its practical deployment; however these distinctions (and their potential distortion) are important to bear in mind as we investigate the role of Italian penal law, and the evolution of the nation’s penalty.

²⁶⁴ *Ibid.*, p. 91

²⁶⁵ *Ibid.*

²⁶⁶ *Ibid.*, p. 92

²⁶⁷ The relationship between veto-points and criminal justice policy is not always straightforward but depends on numerous factors including the link between local policy and its cost (localised or centralised): Lacey (2008); Soskice (2007)

²⁶⁸ Lacey (2008, pp. 101-102) building on Dubber (2005); Ian Loader and Zedner (2007, pp. 142-152)

²⁶⁹ Lacey (2008, p. 102)

Returning to judicial actors, Lacey argues that ‘the selection, training and tenure of judges and other key criminal justice officials will be likely to have distinctive implications for the environment in which penal policy is developed and implemented’²⁷⁰. Thus where, as in some US states, judges are elected, this creates a more direct link between popular sentiment on penal matters and penal practices. Where, as in Great Britain, lay magistrates hear a large portion of criminal law cases, this is likely to increase the likelihood of ‘lay’ rather than professional opinion on law and order, informing their decision-making²⁷¹.

Lacey contrasts the British judiciary to continental European judiciaries whose ‘professionalised system’²⁷² reduces their susceptibility to popular sentiment on crime and punishment. Lacey also contrasts the different status of judges and prosecutors in the two contexts. In support of the argument made in relation to political systems, Lacey argues that different conceptions of the judicial role and judicial independence have an impact upon the levels of co-operation between judiciary and executive, in the formation of criminal justice policy. Where, as in Germany, judges are independent, but integral to the civil service, they tend to be understood as partners in the formation of criminal justice policy²⁷³. This contrasts to the way judicial independence is understood in the UK in which contact with government is considered improper— what Lacey calls ‘Olympian’ judicial independence²⁷⁴. Where this ‘Olympian’ conception is combined with increasing hostility between the two state branches, the likelihood of co-ordinated penal policy decreases. As does the likelihood of professional opinion, contrary to law and order rhetoric, informing penal policy in a context where law and order has key electoral importance²⁷⁵.

In sum: the constitutional distribution of veto points, which affects the need for co-ordination in policy making; the constitutional conception of criminal law, which affects the latter’s deployment and its symbolic role; and the tenure and status of the judiciary, which affects their susceptibility to public sentiment and their ability to co-operate with other governmental branches cumulatively affect the stability of criminal justice policy. They also (all) affect the role of the criminal law and of the judiciary within different polities

²⁷⁰ Lacey (2008, p. 94) Lacey builds on work by Joachim Savelsberg (1994, 1999). See chapter 5.

²⁷¹ Lacey note that judges and magistrates in the UK are *not* elected (2008, p. 94).

²⁷² *Ibid.*

²⁷³ *Ibid.*, p. 95

²⁷⁴ *Ibid.*, p. 96

²⁷⁵ *Ibid.*, pp. 95-96

e. *Immigrants (in brief)*

Does it follow from this account that CMEs are *always* purveyors of penal moderation? Clearly it does not. In systems premised on close integration and co-ordination, those who come from *outside* the system may find themselves excluded; the key to re-integration is belonging from the outset. Punishment in CMEs may thus be stratified – as in Germany – along an insider/outsider boundary. Outsiders may then indicate to the necessary coordinates for inclusion, and re-inclusion, in the body politic²⁷⁶. Chapter 6 will discuss the punishment of immigrants in Italy, in part testing the following observation:

In systems premised on integration and co-ordination it may be more difficult to integrate 'outsiders' and, all other things being equal, 'outsiders' may be more exposed to penal exclusion. By contrast, in systems premised on 'laissez-faire and individualistic culture typical of liberal market economies' it may be easier to integrate 'outsiders' where they find space in the labour market²⁷⁷. All other things being equal, 'outsiders' may thus share the same penal fate as 'insiders' in similar economic positions.

VI. A note on methodology

Having thus reviewed the relevant literature, I now summarise my position vis-à-vis its claims. My thesis builds upon the analyses advanced by David Garland, Alessandro De Giorgi and Nicola Lacey. Combined, their work yields a theoretical framework that considers punishment as a 'social institution', expressive of broader social and political transformations and anchored to the political economy and its evolution. In this framework, penal variation can be explained by reference to different national institutional configurations. The framework thus provides us with a fruitful way of conceptualising contemporary penality, and of understanding its conditions of existence. I use this structure to investigate Italian penality and, with the resulting account, to critique the theories upon which my work builds.

In formulating my account of Italian penal trends I have drawn on a number of sources. Firstly, I have drawn on penological literature, concerned with contemporary punishment, and contemporary punishment as it varies across contexts. I have also consulted analyses of the history of Italian incarceration and Italian prison reform as well as criminological accounts of clientelism and corruption and their internal 'orders'. I have not, however, limited myself to criminological literature. Taking an inter-disciplinary approach, true to the idea of punishment

²⁷⁶ See Lacey (2008, pp. 144-169)

²⁷⁷ *Ibid.*, p. 107

as a feature of broader social evolution, I have drawn on a number of other sources. These include historical analyses of Italy; political science literature concerned with Italy's institutions; literature explaining Italian political economy; accounts of Italian political developments over the decades. For Chapter 5 and its discussion of judicial actors, my investigation has then embraced texts detailing the history of the Italian judiciary since the early days of the Republic; but also manuscripts in which judicial actors themselves provided accounts of their involvement in *Tangentopoli* and the shifting nature of the judiciary after 1990. Chapter 6 has relied on existing accounts of migrant punishment in Western Europe and on literature that detailed the shape and incidence of immigration to Italy and to Southern Europe. This has included analyses of the economic insertion of non-EU migrants in Italy, with its implications for social exclusion. Some of the literature I have relied on has been both written in, and for, the Anglo-American context and some has been written in, and for, the Italian context. I have therefore tried to bring together two bodies of scholarship that have not always been in conversation. My aim is to use this combination of sources to avert the risk of producing an 'orientalistic' account of Italy. It has also contributed to the 'mid-level' theorisation that I set out to achieve.

In Chapters 2 and 6 of this thesis, I have used statistical data as a means to advance my arguments. Chapter 2, which investigates Italian incarceration between 1970 and 2000, uses primarily criminal justice statistics. Data are both Italian and European, and include comparative imprisonment rates, as well as data on foreign incarceration in Italy. I have extracted some of these figures from already existing articles or monographs. A large part, however, I have collected from yearly Italian statistics published by the Italian national statistical association (ISTAT), and spanning the years 1970-2000²⁷⁸. Some imprisonment data have also been taken from the Italian Department for Penitentiary Administration²⁷⁹. However, the overwhelming majority have been collected from ISTAT publications, since they are more complete both in terms of historical series and available datasets.

Chapter 6, which investigates the punishment of migrants in Italy, includes not just data on immigrant incarceration, but also data on immigrant presence in Italy between 1990 and 2000. I have collected the bulk of these data from the Caritas' yearly *Dossier Statistico Immigrazione*²⁸⁰, the Italian Caritas having been the one association that over the past decades systematically collected and compiled data on immigration in Italy. Their figures are elaborated from data provided by the Italian Interior Ministry and the *Dossier* remains one of the most complete sources of information on non-EU migrants in Italy. I have collected select

²⁷⁸ (ISTAT, 1970-2000)

²⁷⁹ (DAP, 1990-2001)

²⁸⁰ (Caritas, 1993-2003)

datasets from Caritas publications, collating them to produce historical series from which to derive an overall picture of immigration into Italy during the 1990s.

I have used these data as a means to test some of the assumptions contained in the literature. Thus, when investigating the existence or otherwise of Italian ‘punitiveness’ I have used imprisonment data to verify if this label could *prima facie* be applied to Italian penal trends. When investigating the punishment of migrants in Italy, the data served to test claims on migrants’ economic marginality in Italy, and on their relative over-incarceration in Italian prisons. In both Chapter 2 and Chapter 6, my interpretation is based *only* on descriptive analysis of the statistics, rather than on more complex statistical calculations. This is a conscious choice: my thesis is not a statistical thesis, and though the claims that I make are informed and sustained by statistical data, they remain rooted in the theoretical account developed throughout the thesis.

There are also limitations with the statistical data, such that they cannot be taken alone in drawing conclusions on Italian penality. One limitation lies in the divergence of prison data across official sources. The existence of divergent data sources is not an uncommon issue for official databases, each of which may have been constructed for different purposes²⁸¹. Thus imprisonment data for Italy provided by Eurostat databases, when compared to ISTAT databases, or to the World Prison Brief, (referred to in widely consulted secondary sources such as Cavadino and Dignan’s *Penal Systems*), have not always been identical²⁸². *However*, the trends which they disclose *are* the same (Chapter 2). In light of this fact, my choice of database (ISTAT) was conducted on the basis of the completeness of the statistics available.

The second limitation with the statistical material has been one of availability. This is in part due to the nature of the phenomena with which I am dealing: historical and social processes are not easily translated into statistical indicators, susceptible to measurement. In part, however, it is due to the fact that certain indicators either do not exist, or are not easily forthcoming in Italy. To give one example: few if any data exist that measure immigrant incarceration before the year 2000, layered by migrant socio-demographic characteristics. This type of data would have been useful in Chapter 6, to provide additional support for my hypotheses on how migrant incarceration relates to their position within Italian society. To seek out such data I researched ISTAT archives, Caritas publications, and directly consulted the Department for Penitentiary Administration (DAP). In none of these cases did I find the required statistics.

²⁸¹ Hancké (2009, pp. 98-99)

²⁸² Cavadino and Dignan (2006); World Prison Brief. International Centre for Prison Studies <http://www.prisonstudies.org/info/worldbrief>

This absence of data can be explained in a number of ways. In relation to prison data, concerns for detainees' privacy restrict the creation of detailed databases. Data that are layered too specifically may lead to detainees being identifiable, if additional contextual evidence is also available to the researcher. To prevent the detainee being identifiable by a process of elimination, for example, data are not collected that specify detainees' nationality, layered also by their marital status²⁸³. Another explanation for the absence of data rests on the interest raised by a particular topic that catalyses the research efforts through which datasets are produced. Large-scale immigration to Italy, for example, only began in the 1990s, and only after that date did migration clearly become a topic of interest for statistical investigation. Even then there may have been a time lag between the stage at which immigration became a topic of interest, the collection of data, and the collection of *sufficiently varied* data on immigration in Italy. This means that available historical series may not go as far back as the time frame for my research: such is the case with DAP statistics on unemployed migrants in prison, whose historical series begin in the year 2000²⁸⁴. This absence of data should not, however, stop us from investigating a given issue: theoretical arguments are still possible, and indeed necessary (not least to stimulate future collection of relevant data).

The topic of migration raises one further, and important, issue on the limitations of statistics, and an additional reason why not all my hypotheses have been subject to empirical verification. Some of the phenomena and processes analysed in this thesis are informal and difficult to capture statistically. Thus non-EU immigrants in Italy may be irregular, and their presence may not be officially quantifiable. Similarly, labour in Italy may be irregular: it will thus fall outside the remit of employment statistics; or only be available as an estimate measure²⁸⁵. Lack of data also means that any statistics I do rely on to measure these informal processes, can *at best* be rough guides for what I am describing. We need not thereby be dissuaded from investigating these informal processes: the lack of data must simply act as a catalyst for thorough theoretical research. I suggest that it will also pre-empt us from falling into the false security that derives from having statistical data measuring informal processes, thus over-determining both their certainty and quantifiability.

VII. The contents of this thesis

Alongside the introduction, this thesis consists of 6 chapters. Chapter 2 – *Italy's Differential Punitiveness* – asks whether we can talk of Italian penalty between 1970 and 2000 in terms of increasing punitiveness, or whether its penal trends reveal an alternative scenario. I argue

²⁸³ Personal communication: ISTAT Milano.

²⁸⁴ Personal communication: DAP.

²⁸⁵ On this point see also De Giorgi: (2006b, p. 45 n. 13)

that, on the basis of statistical data and historical accounts, Italy's punitiveness is in fact best classed as *differential*. The nation's penal trends oscillated between repression and leniency, and should be seen as an example of contained penal expansion. Chapter 3 and Chapter 4 both go under the title *Penalty and Politics*. Chapter 3 – subtitled *Politics and the Political Economy* – investigates the Italian political economy in terms of the penal incentives that it creates. In this chapter my main referents are De Giorgi and Lacey, whose assumptions and theories are questioned as they intersect with the Italian context. Chapter 4 – *State and Citizen, Politics and Culture* – analyses the relationship between Italian state and Italian citizen, and the impact it has had upon the purchase and role of the penal law in Italy. If Chapter 3 investigates the penal incentives created by the national institutional structure, Chapter 4 investigates how the nation's political evolution has affected the extent to which such incentives find penal expression. Here my referent is Garland, with his account of statehood and its contemporary 'predicament'. The two chapters conclude that Italian penalty should be understood in terms of political dynamics: the political conflicts and political dualisms that characterise national reality. Following on from this conclusion, Chapter 5 – *Judicial Actors and Penalty* – investigates one particular political conflict that has had lasting impacts on Italian penalty: that between judicial and political actors. The chapter analyses the Italian judiciary in terms of its structure, its interrelation with other state branches, and its variable legitimacy. I argue that, as a result of how these features have combined over the decades, judicial actors have had variable effects on Italian penalty. Thus, if at some times they have been purveyors of pressures for penal expansion, at other times they have resisted such pressures, and contributed to penal containment. Chapter 5 concludes that patterns of punishment in Italy cannot easily be predicted by looking at the agents of penalty (here, judicial actors) and that a more fruitful attempt at prediction can be made by looking at penal subjects. In Chapter 6 – *The Legal Vice* – I then investigate one particularly salient penal subject: non-EU migrants. The chapter analyses their punishment in 1990s Italy, and in it I argue that the punishment of migrants should be understood as a legal vice. In this 'vice', migrants' status as political and legal outsiders combines with their economic marginality to yield migrant over-incarceration across the decade. The chapter stresses the importance of political belonging in Italy, asking whether, in light of this theoretical conclusion, punishment is not therefore more likely to fall on non-EU migrants. The thesis concludes in Chapter 7, in which I return to the central argument whereby Italian penalty is best understood in terms of its political conflicts and political dualisms. I explain how each level of conflict produces different pressures for penal expansion or penal reintegration, and how each dualism affects the purchase and role of the criminal law in Italy and thus its use as a tool for conflict resolution. Having detailed the main conflicts and dualisms that have emerged throughout the thesis, I conclude by reflecting on the interaction between my account of Italy and the

theories from which this work began. I finally explain how the theories themselves can be altered in the light of insights drawn from my account of Italian penality. An appendix is included, with background information on Italy and its history, primarily aimed at readers not familiar with the Italian context.

Chapter 2 - Italy's Differential Punitiveness

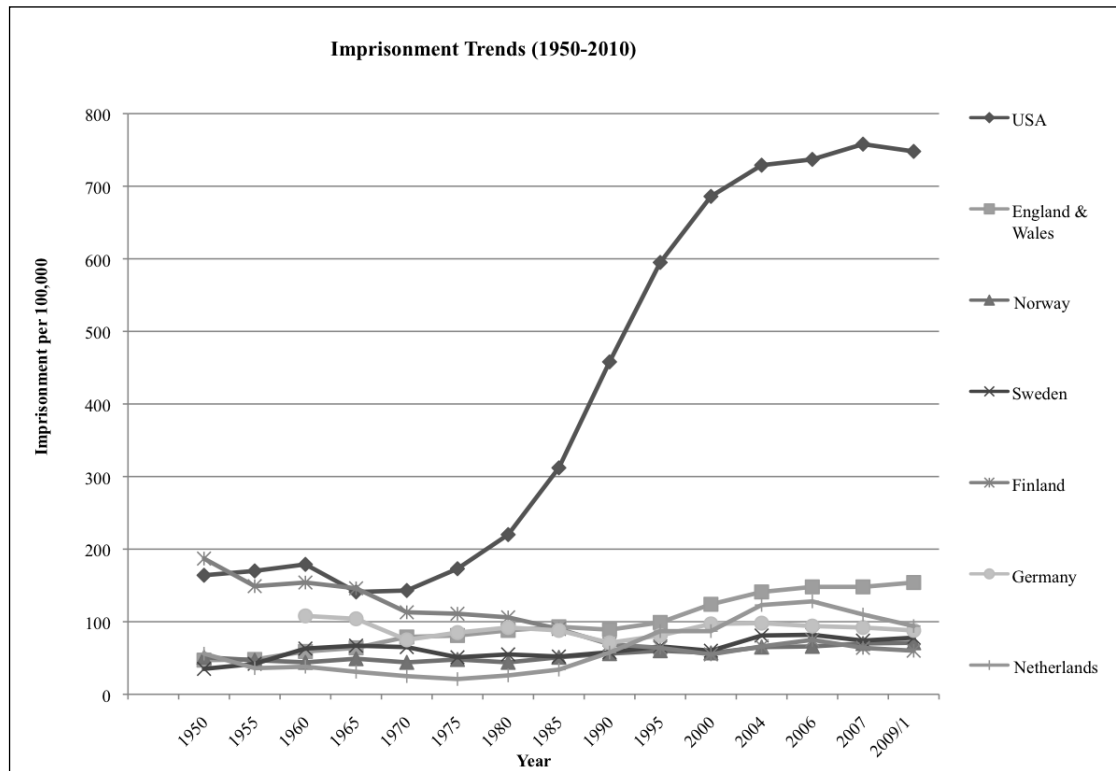
I. Introduction – Hypothesising Differential Punitiveness

As I have argued in Chapter 1, Garland and De Giorgi seem to agree on the shape – if not the cause – of contemporary penal developments, talking of Western Europe's increasing punitiveness. Furthermore, they locate the onset of 'punitiveness' in the early 1970s and point to increasing prison population as its primary manifestation. In Chapter 1, I had noted how this assumption has been questioned, and how increasing punitiveness may not in fact be Western Europe's unequivocal fate. Given existing penal divergence across Western Europe (and the US - Figure 1), comparative literature rightly argues for a more differentiated approach to penal theory²⁸⁶. It intimates that, looking beyond 'late modernity' and 'post-Fordism', we will find more complex national scenarios. These may be affected by global level phenomena, but the latter need not spell global convergence in punishment levels²⁸⁷. In the light of this argument (and as a precursor to determining the *why* of Italian penalty) I propose to verify whether or not Italy displays the 'increasing punitiveness' of many influential analyses. This chapter will chart the development of Italian penalty between the years 1970 and 2000. Note that the chapter is not an attempt to draw out a statistical relationship between prison rates and their determinants, but aims to chart Italian penalty by reference to the criteria used in my theoretical models.

²⁸⁶ See Chapter 1.

²⁸⁷ Lacey (2008, p. 58); on this point see also Crawford (2011, pp. 1-38)

Figure 1 – International Prison Trends 1950-2010



Sources: International Centre for Prison Studies (accessed February 2010); John Pratt (2008); Lacey (2012)²⁸⁸

Assumptions on the shape of Italian penalty run throughout the whole of my first chapter. Italian penalty appeared to shift between punitiveness and moderation, and thus stood out relative to Garland, De Giorgi and even Lacey’s models. The Italian political economy, and the Italian state, also seem to fall outside these theories, and these features suggest we need to qualify our accounts of punitiveness and moderation in Western polities if we are to account for the Italian case. I now bring these observations together into one single hypothesis, that of *differential punitiveness*²⁸⁹. This hypothesis embodies the idea that Italian penalty develops along two separate but interlinked strands. Italian penalty is split between poles of repression and leniency. The pre-eminence of one or the other varies: over time, for example, with the 1990s standing out as a time of steeply growing prison rates. But also across subjects, where punishment levels differ for ‘outsider’ migrants compared to nationals (see section below). Differentiation also occurs on a number of other levels: between symbol and substance where the letter of the penal law fails to match its application, and between types of crime, with

²⁸⁸ Pratt (2008a, 2008b); World Prison Brief. International Centre for Prison Studies. In Lacey (2012, p. 209)

²⁸⁹ This adapts the expression usually employed to describe punishment after the 1975 and 1986 Prison Acts: Pavarini (2001, p. 211); Ruggiero (1998, p. 417).

crimes 'against the state' (see below) receiving particularly harsh treatment. I hypothesise that comparatively Italy can perhaps still be seen as a penally moderate nation (at least relative to England and Wales) despite the visible instances of punitiveness in Italian penal trends.

To talk of prison rates and penalty raises the question of the adequacy of prison rates *as measures of penalty*. Why have I chosen to use prison rates, as shorthand for penal evolution? This is in fact a question that can be directed to many of the contemporary analyses of Western penalty. Implicit in this question is the further issue of whether reliance on prison rates does not betray an obsession with the carceral, which ignores other equally significant aspects of penalty. One answer to this is to acknowledge that surely penalty *is* more than just prison rates, and that prison rates are not an exhaustive measure²⁹⁰. They are, however, a highly convenient measure of punishment, and my decision to rely on prison rates is a pragmatic one. I am not arguing that 'penalty' and 'incarceration' are synonyms, nor that levels of incarceration on their own are sufficient gauges of national penal systems. However, I *am* arguing that prison rates are very useful within the context of political economic/cultural analyses of punishment. Firstly they are useful for comparative purposes²⁹¹: despite their shortcomings they remain an easily available measure of punishment, and one that is fairly consistent across Western polities (because collected on the same basis). Though there may be differences in prison conditions which make imprisonment a different *experience*, the formal meaning of imprisonment remains fairly uncontroversial across such polities. By contrast, alternatives to imprisonment are not necessarily the same in all nations: not just in terms of the variety of alternatives that exist in different countries, but also in terms of how developed such alternatives are²⁹². Nations may have introduced alternatives at later dates, staggered their introduction, or may rely more on the fine, on home arrest, or on (one Italian alternative) *affidamento in prova al servizio sociale* (consignment to social services). It thus becomes extremely complex to ensure that we are comparing like to like, when we compare Italian alternatives to, for example, alternatives in England and Wales over a period of three decades. Prison rates, for all their pitfalls, are less subject to such contextual variation.

Looking to questions of comparison we can also see that prison formally remains, in contemporary Western Europe, the most serious type of punishment available and ideally a measure of last resort²⁹³. If we are talking of levels of national punishment, of penal expansion and penal moderation, it is then both useful and interesting to see just *how* different nations use their most extreme form of punishment. How parsimonious are they in their use of

²⁹⁰ For more complex statistical measures of punitiveness see Blumstein, Tonry, & Van Ness (2005, pp. 353-364).

²⁹¹ See also Nelken (2005, p. 221)

²⁹² Tonry and Farrington (2005, p. 9)

²⁹³ Blumstein et al. (2005, p. 350)

detention? With what ease do they deploy it and against whom? Arguably, where a nation considers prison a measure of last resort yet is 'prison-happy', this raises *prima facie* questions on its punitiveness. Of course prison rates cannot be de-contextualised, and good criminological analysis only *sets forth* from incarceration rates to build up a more complex picture within which to contextualise them. This is the use made of prison rates in Garland, De Giorgi, and Lacey. Given that my thesis aims to set itself within this literature, it makes sense for me to have adopted a similar approach: ultimately, my critical analysis of the literature is not premised on questioning its use of prison rates, but on investigating the applicability of the literature's theses to the Italian context²⁹⁴.

The present chapter is structured as follows: it begins with a descriptive account of Italian penal trends, over time and in comparative perspective. It argues that Italian penalty displays a 'differential punitiveness' characterized by a harshness-leniency tension manifest in Italy's fluctuating prison rates. The succeeding section interprets these trends: it analyses the role and use of clemency provisions in Italy and examines some of the penal legislation of the period 1970-2000. It also provides preliminary explanations for the penal trends of the 1990s, focusing in particular on arguments advanced by Massimo Pavarini and on one particular phenomenon that stands out during this decade, the incarceration of non-EU immigrants.

II. Italian penal trends: time trends and comparison²⁹⁵

I start my investigation of Italy's differential punitiveness by considering prison rates between 1970 and 2000 (Figure 2). Italian prison rates do not seem to present any unequivocal trend across the 30 years at hand. They do show an upward motion, most visible if discontinuous readings are taken²⁹⁶, but they mainly progress in peaks and troughs²⁹⁷. This undulating motion can in part be attributed to the pardons and amnesties cyclically passed by the Italian government in an attempt to reduce the population detained (Table 1). From Figure 2 we can also identify two main periods during which prison rates increased: 1981 to 1984 and 1990 to 1994. The latter increase is particularly noticeable, marking a turning point in levels of Italian imprisonment, so that the lowest prison rates *after* 1992 are still higher than the highest rates before 1990. Before proceeding with further analysis, it is thus worth considering whether this

²⁹⁴ In this chapter's evaluation of Italian punitiveness, I am taking a viewpoint that is *external to the prison*. I am investigating the *incidence* and *frequency* of incarceration, leaving the question of *internal execution* of penalties unanswered, to be answered perhaps in future research.

²⁹⁵ For caveats on the data see Chapter 1.

²⁹⁶ For example, every ten years beginning in 1970.

²⁹⁷ See also Cavadino and Dignan (2006, p. 142)

temporal dimension of Italian penal expansion should not also be built into our hypothesis, by hypothesizing that punitiveness became *more prominent* from 1990.

Figure 2 – Prison Rates Italy and England & Wales Compared 1970-2000, including Italian clemency provisions.



Sources:

Italy: my elaboration from ISTAT – *Annuari di Statistiche Giudiziarie Penali 1970-2000*²⁹⁸ and ISTAT- Demo, Geodemo <http://demo.istat.it/> (accessed October 2009)

England and Wales: my elaboration from Home Office and Population Estimates, UK National Statistic. Population estimates available at: <http://www.ons.gov.uk/ons/rel/pop-estimate/population-estimates-for-uk--england-and-wales--scotland-and-northern-ireland/population-estimates-timeseries-1971-to-current-year/rft---table-1-total-persons-constituent-countries-regions.zip> (accessed October 2009)²⁹⁹

²⁹⁸ ISTAT (1990-2001)

²⁹⁹ HOSD (1984-1987); ONS (1970-2000); *Statistics of the Criminal Justice System England and Wales 1969-1979* (1980)

Table 1 – Pardons and Amnesties 1970-2007

Measure	D.P.R. 283/70 (amnesty and pardon)	D.P.R. 413/78 (amnesty and pardon)	D.P.R. 744/81 (amnesty and pardon)	D.P.R. 865/86 (amnesty and pardon)	D.P.R. 75/90 (amnesty) D.P.R. 394/90 (pardon)	L. 207/2003 (pardon 'indultino')	L. 241/2006 (pardon)
Years	1970	1978	1981	1986	1990	2003	2007
Pardoned population as a percentage of total population incarcerated	53,5	34,1	22,1	22,3	38,0	16,9	44,0

Source: Elaboration carried out by *Centro Studi Ristretti Orizzonti* Available at: <http://www.ristretti.it/index.htm> (accessed October 2009)³⁰⁰.

From a comparative perspective we see that throughout the three decades at hand Italian prison rates remained lower than those of England and Wales' (Figure 2). *Prima facie* this would suggest that Italy is penally more moderate than England and Wales. This conclusion is disrupted, however, if we consider the percentage increase in prison rates over the relevant period. In Italy, prison rates increased by 141% between 1970 and 2000, compared to the 55% increase in English and Welsh prison rates. Much of the increase in Italian prison rates is concentrated during the 1990s: with a 107% increase between 1990 and 2000 (though exaggerated by the 1990 clemency provisions – see below) compared to a 13% increase between 1970 and 1990 (again considering the 1990 amnesty/pardon). These findings show that between 1970 and 2000 Italy experienced pressures towards penal escalation, as did England and Wales. Comparative prison data thus suggests that Italy displays relative moderation *but also* punitiveness (here represented by the background increase, and 1990s peak, in prison rates).

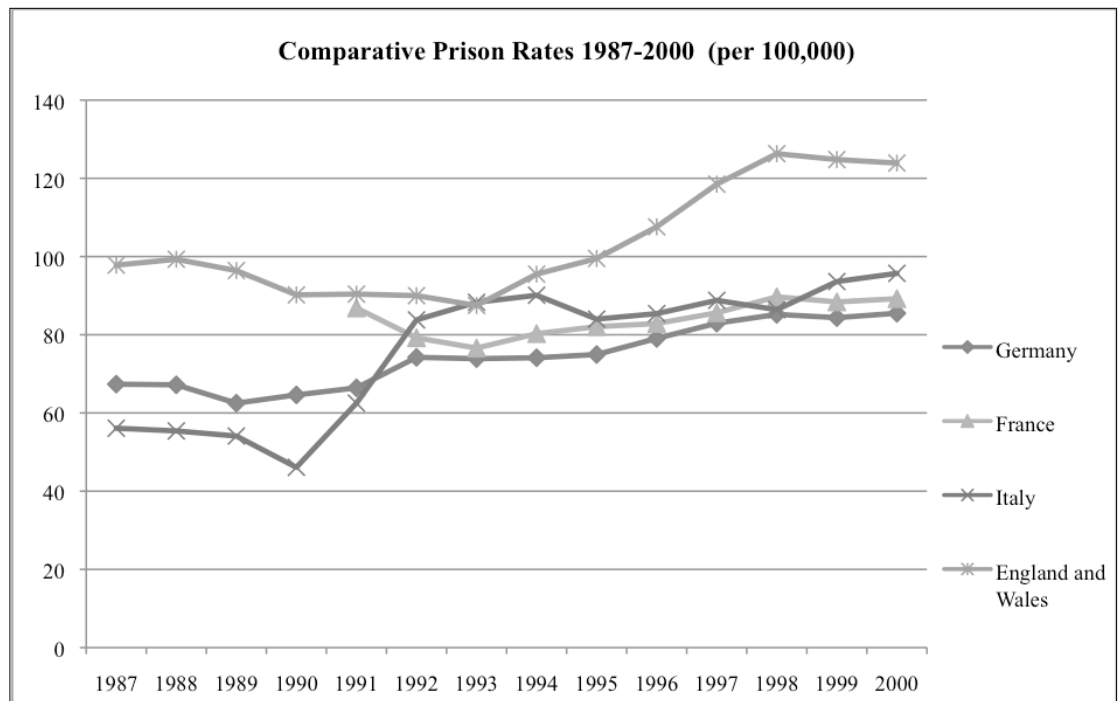
A comparison with other European nations – Germany and France³⁰¹ – also confirms that between 1987 and 2000, neither Italian penal expansion nor Italian penal stability were ever unequivocal. Thus, Italy's prison rates, which in 1987 start out lower than those of its three

³⁰⁰ Area studio su Amnistia e Indulto. Centro Studi Ristretti Orizzonti <http://www.ristretti.it/index.htm> Accessed October 2009

³⁰¹ These nations have been chosen in the light of the comparative literature cited above. Germany is the archetypal CME of *The Prisoner's Dilemma*: Lacey (2008, pp. 106-108). France is Italy's catholic corporatist companion: see Cavadino and Dignan (2006, pp. 129-148). Note that, due to Eurostat data availability, comparison is possible only between 1987 (1990 for France) and 2000.

comparators, rise substantially in the 1990s, surpassing for a time both German and French rates. Italian prison rates appear more variable than German and French rates³⁰². Similarly, returning to Figure 1 it appears that Italian penal trends fluctuate more than prison trends for England and Wales.

Figure 3 - Prison Rates, European Comparisons 1987-2000³⁰³



Sources:

Italy: my elaboration on ISTAT data, *England and Wales:* my elaboration on Home Office data and Population Estimates, UK national statistics.

Germany, Spain, France: my elaboration on Eurostat data³⁰⁴

Note – after 1989 Germany includes DDR

The fluctuation in Italian prison rates is partly due to a deflation achieved by means of cyclical amnesties/pardons. As I will show in the next section, these provisions are examples of politically willed penal moderation, but they also owe much to instrumental considerations.

³⁰² I have calculated the standard deviation for prison rates between 1987 and 2000, for Italy, England and Wales and Germany: 17 for Italy, 14 for England and Wales, 8 for Germany. This suggests that Italy has the most variable prison rates across this period.

³⁰³ I have calculated the rates in Figure 3 using Eurostat data. They differ somewhat from the rates made available by the World Prison Brief not least in terms of available years.

(<http://www.prisonstudies.org/info/worldbrief/>)

³⁰⁴ Barclay and Tavares (1999); Barclay, Tavares, and Siddique (2001, 2003); Eurostat, <http://epp.eurostat.ec.europa.eu/portal/page/portal/statistics/themes> Accessed October 2009; ISTAT, 1990-2001); White, Cullen, and Minchin (2000)

Whatever the design behind them, they are *de facto* examples of penal leniency, ‘ameliorating the levels of imprisonment in practice’³⁰⁵. This alerts us to the fact that ‘leniency’ and ‘punitiveness’ are crude, if instrumental, concepts³⁰⁶. We should in fact concede that we face not a discontinuous divide between the two, but rather a ‘leniency-punitiveness’ spectrum. This can encompass a number of factors – from the ‘unintended’ consequences of amnesties to more explicit legislative provisions for alternatives to prison. Once we concede that punitiveness and leniency can co-exist in Italy, the question becomes *how* the two are distributed and *why*. In order to analyse the distribution of punishment in Italy, and situate the nation in the broader criminological literature, we then need to ask how punitiveness was differentiated between 1970 and 2000. We also need to interrogate *where* and *why* Italy was moderate relative to the Garland/De-Giorgi scenario. The next section provides a partial answer to these questions by analysing the sources of Italy’s penal fluctuation.

III. Interpreting the figures

i. Amnesties and Pardons

The rise and fall of Italian prison rates is partly due to their deflation by cyclical amnesties (*amnistie*) and pardons (*indulti*). Given their visible effects on prison rates, it is worth discussing the provisions in more detail. This discussion also acts as a preamble to topics analysed in later chapters, as amnesties and pardons – in their structure, history and use – point to important issues relevant to broader evaluations of Italian penalty.

Amnesties are defined as ‘general clemency provisions with which the state, in exceptional circumstances, waives the punishment of a given number of offences’ committed before and up to the amnesty³⁰⁷. Amnesties are distinguished from pardons insofar as they extinguish the offence, whereas pardons extinguish the principal penalty only³⁰⁸. The offences encompassed in amnesties/pardons are identified in the clemency provision: often by reference to offences’ maximum penalties³⁰⁹. The procedure for clemency is found in article 79 of the Constitution, as modified in 1992³¹⁰. Before 1992 the President of the Republic, following an enabling law passed by Senate and Chamber of Deputies, issued clemency provisions by means of a

³⁰⁵ Pavarini (2001, p. 414)

³⁰⁶ Nelken (2005, pp. esp. at 219-221)

³⁰⁷ "Amnistia", <http://www.treccani.it/enciclopedia/amnistia/> Accessed December 2012. My translation.

³⁰⁸ "Indulto", <http://www.treccani.it/enciclopedia/indulto/> Accessed December 2012. My translation.

³⁰⁹ Piraino, <http://www.altrodiritto.unifi.it/ricerche/law-ways/piraino.htm> Accessed July 2012

³¹⁰ Articolo 79 Costituzione Italiana; l. cost. 1/1992

presidential decree. Since 1992 the procedure has been ‘parliamentarized’³¹¹: clemency provisions now require a 2/3 majority in each house³¹². This change was introduced in the wake of the 1990s corruption scandals (Chapter 1 and Appendix) with the aim of making the process more stringent, and clemency less frequent. Commentators judge that this objective has been achieved. As Vincenzo Maiello notes: given the political fragmentation that followed from the 1990s collapse of the party system, and the successive electoral reform, the required majority is difficult to achieve (Appendix & Chapters 3 and 4). The reduction of clemency provisions has had visible effects on incarceration: after 1990 it took ‘one decade alone for the prison population to double’³¹³. The 1992 reform thus stalled what had been a regular practice in Italian history (pre and post Republic). Piraino estimates that, on average, clemency provisions were issued about every three years between 1960 and 1990³¹⁴. This ‘liberal use of amnesties and pardons’ has always and only had short-term effects (Figure 2)³¹⁵.

Italian clemency provisions are thought to derive from the sovereign power that ‘in absolute monarchies represented the superiority of the monarch over judicial power’³¹⁶. By contrast, the procedure laid down in Italy’s Republican Constitution was designed to engage all the ‘principal constitutional organs’³¹⁷. Indeed, as Massimo Palmerini argues, in most cases it was the executive that initiated the proceedings. The legislature was then called upon to pass the enabling law; the head of state issued the decree; and the judiciary implemented it³¹⁸. Palmerini also notes that, at the outset, clemency provisions were intended as ‘exceptional’ measures: their repeat use (up until 1992) suggests that they have been interpreted otherwise.

Surveying contemporary uses of amnesties/pardons, numerous commentators have noted their pragmatic and instrumental character. Thus Ruggiero describes the provisions as legislative measures resulting from ‘both prisoners’ pressure and authorities’ concern about [...] overcrowding and unrest’³¹⁹. Maiello goes further, positing a direct link between

³¹¹ Maiello (1997, p. 978)

³¹² Required for the provision as a whole *and* for its individual articles.

³¹³ Piraino (accessed July 2012); see also Figure 2. The steepness of the increase between 1990 and 1992 reflects the low starting point given by the 1990 amnesty/pardon. The increase is not just due to the absence of further amnesties – see below for a discussion of emergency legislation passed during the decade.

³¹⁴ 3.5 for Pavarini (2001, p. 414); Piraino (accessd July 2012)

³¹⁵ Khun (1999); Pavarini (2001, p. 403)

³¹⁶ "Amnistia," my translation

³¹⁷ Palmerini (1954, p. 112)

³¹⁸ Precisely because of this design, Palmerini describes amnesties/pardons as ‘national facts’: *ibid.*, pp. 112-113.

The 1992 reform has changed the original constitutional design, consigning greater power to the legislature.

³¹⁹ Ruggiero (1995, p. 52)

political expediency and amnesties/pardons, describing Italy's use of clemency as sensitive to the political class' contingent needs³²⁰. Clemency provisions were used for their short-term deflationary effects, but also to produce electoral consensus³²¹. Maiello's analysis points to two additional features of the provisions, which can be used in a broader evaluation of Italy's differential punitiveness. He argues firstly that the 'ideal' function of amnesties/pardons was to act as a 'corrective' to the harshness of the penal law³²². He then contends that in their actual use they became not just politically expedient tools, but also the state's 'paternalistic' means of resolving social conflict. This, I add, was especially so where amnesties and pardons were passed contemporaneously to moments of social unrest³²³. From this analysis I pick out four (interlinked) features of clemency provisions: the connection between clemency and politics; clemency provisions as pragmatic measures; clemency provisions as paternalistic measures; amnesties/pardons as a 'corrective' to penal harshness.

The first – clemency provisions as susceptible to political contingencies³²⁴ – raises the issue of the influence of politics on Italian penalty, a subject that I will discuss at length in the coming chapters and will therefore not expand upon here. The second characteristic points to a certain pragmatism existing within Italian penalty (indeed within Italian political culture – Chapters 3 and 4). Here pragmatism lies in the instrumental use of deflationary measures as short-term solutions to structural problems that would otherwise have required more considered measures (not forthcoming within the Italian political scenario)³²⁵. Thus amnesties and pardons helped reduce the prison population – and in this were *de facto* measures of leniency³²⁶ – where the problem of overcrowding would have demanded more significant reforms³²⁷. This resort to short-term, stop-gap solutions expresses a certain volatility in Italian penalty which, I suggest, also reflects the alternation between punitiveness and leniency manifest in Italian prison rates.

³²⁰ Maiello (1997, p. 940); Piraino (accessed July 2012)

³²¹ A likely outcome, according to Maiello, at least until the 1990s: *ibid.*, p. 944

³²² Maiello (1997, p. 940); Piraino (accessed July 2012)

³²³ For example, the 1968 and 1970 amnesties were passed 'at the crux and at the end' of the student and worker movements of those years (see Appendix) and explicitly include offences committed with political aims. Clemency provisions are generally found at important 'junctures' of contemporary Italian history: Maiello (1997, p. 973); Piraino (accessed July 2012).

³²⁴ Here the production of consensus; political and social unrest; or the 'contingency' that is periodic overcrowding.

³²⁵ See Chapters 3 and 4.

³²⁶ Pavarini (2001, p. 414). For a discussion of volition and punitiveness see Nelken (2005, p. 221)

³²⁷ By changing, for example, the quantity and harshness of criminal legislation; or by building more prisons.

The pragmatic use of amnesties/pardons may be seen as a distortion of their original design where clemency became a frequent and instrumental, rather than exceptional, measure. The ‘paternalistic’ use of amnesties, as Maiello has termed it, is perhaps more coherent with clemency’s original (unreformed) design. The Republican constitution envisaged amnesties/pardons as products of Presidential will (supported but not yet supplanted by parliamentary will)³²⁸, and clemency was dispensed by the ‘head of the State’, upon the subjects of state law. Maiello argues, however, that the actual use of clemency testifies to a paternalism that goes beyond that inherent in the institutional design. As a routine measure, susceptible to political contingency, and used as a ‘corrective’ to penal harshness, clemency has come to reconstitute the relationship between state and citizen. Where amnesties are concerned, the relationship between state and citizen becomes one between ‘the giver of paternalistic protection and its devoted subjects’, a relationship sapped of the political autonomy that should ideally characterise citizens’ participation to their polity³²⁹. Maiello also discusses the use of clemencies to favour specific groups of ‘individuals close to the ruling class’, in particular, Piraino adds, via the ‘special attention’ paid by the legislative to financial offences³³⁰. These more ‘specific’ uses of clemency provisions have an ulterior distortive effect on state-citizen relations: they make its recipients not just subjects, but ‘clients’ (and ‘ethically subordinate’)³³¹. This clientelistic relationship between state and citizen, and the effect it has on citizens’ status within the Italian polity, is one that returns in coming chapters. Chapter 4 investigates the impact of this type of citizen-state interaction on the criminal law’s appeal, its use and its circumvention. Here it is enough to register that Italian penal instruments – such as clemency provisions – have been used to ‘dispense’ leniency, and that amnesties/pardons have been interpreted as both a form of paternalism and of patronage. This suggests that we need to qualify our analyses of ‘contemporary punitiveness’ to allow for the co-existence of punitiveness *and* leniency after 1970³³². It also suggests that we need to adapt our analysis of Italian penalty to encompass paternalistic/clientelistic interactions between state and citizens, with their (potential) penal articulations.

The fourth relevant feature of amnesty/pardons, i.e., their use to ‘soften’ penal legislation, supports the idea that a tension between repression and leniency runs through Italian penalty. Maiello, for example, talks of clemency provisions as a means to avoid the penal system’s

³²⁸ Maiello (1997, p. 947); Palmerini (1954, p. 109)

³²⁹ Maiello (1997, p. 941)

³³⁰ Piraino quotes the 1973 amnesty in matters of financial offences, as one illustrative example: (accessed July 2012). This has not been included in Figure 2– Table 1 which deals only with general clemency provisions.

³³¹ Maiello (1997, p. 941)

³³² We also need to allow for articulations of ‘the State’ different from the one presumed (most explicitly) in *The Culture of Control*: see Chapter 4.

‘short circuit’, provoked by its ‘*excess [of] penalisation*’³³³. Maiello is not alone in pointing to Italy’s over-reliance on the criminal law. Nelken also talks of Italy as a nation in which many ‘forms of conduct’ are ‘theoretically regulated by criminal law’, that would ‘in common law countries [...] be the subject of administrative or civil law’³³⁴. This ‘hypertrophic’, i.e. overdeveloped, criminal legislation then finds its contrapositive in the routine use of clemency provisions: ‘[Italy’s] excess penal legislation has provoked [...] the hypertrophic expansion of a culture of indulgence’³³⁵. The word ‘indulgence’ may over-state the case, but Italy does emerge from this portrait as a country with extremes of both of punitiveness and of leniency. The next section explores this tension in relation to Italy’s penal code and penal legislation.

ii. Differential punitiveness and penal dualisms: repression and leniency

The idea that a nation’s penalty should be split between repression and leniency is neither new nor limited to the Italian context. Garland himself talks of the ‘twin faces’ of state punishment, whereby the state simultaneously casts off responsibility for certain crimes and offenders while reasserting its authoritarian control against the ‘residual’ deviants³³⁶. In Italy, the oscillation between punitiveness and leniency is visible throughout national penal history: in penal legislation, in prison reform, and in the very principles thought to inform punishment.

The aims of punishment are laid down in the Italian Constitution: punishment ‘[...] must tend to the *convict’s re-education*’³³⁷. Orthodox legal doctrine has further emphasized that punishment ‘cannot [...] aim to enforce a superior idea of justice’, and that penal law, and prison, should be a measure of last resort³³⁸. The Italian Constitutional Court *has* recognised that retribution and deterrence can also be legitimate penal purposes, though they should not supplant re-education³³⁹. Following the Constitutional Court’s pronouncement, punishment

³³³ Maiello (1997, p. 94, my translation, my emphasis)

³³⁴ Nelken (2005, p. 225)

Nelken has illustrated this feature by comparing Italian and British approaches to ‘business and regulatory crime’. He characterises the British approach as ‘a system of “compliance” whereby ‘the use of the courts is kept as a last resort’. This contrasts with the Italian approach whereby ‘[...] ordinary judges [...] [use] normal techniques of criminal law and punishment’ against ‘pollution, neglect of safety at work, etc.’ (1994, p. 222)

³³⁵ Maiello (1997, p. 945)

³³⁶ Garland (2001, p. 137)

³³⁷ Art 27(3) Costituzione, my translation, my emphasis

³³⁸ Ruggiero (1998, p. 211)

³³⁹ Though ‘pure retribution’ remains unconstitutional: Marinucci and Dolcini (2006, p. 6); Musio, <http://www.altrodiritto.unifi.it/ricerche/law-ways/musio/> Accessed December 2012

in Italy can thus be defined as ‘polyfunctional’³⁴⁰: this implies greater flexibility in Italian penalty than the ‘rehabilitative myth’ – the pretence that punishment is a matter of ‘re-education’ - would suggest³⁴¹. We should also note that Italy’s penal code – the *Codice Rocco* – was passed in 1930 under Fascist rule. The code has not been fully revised but only subject to piecemeal modification, and it still bears signs of the authoritarian regime under which it was devised³⁴². It provides, in Pavarini’s words, ‘the possibility of draconian prison sentences for the most minor offence’³⁴³, ‘[reflecting] the authoritarian system of the thirties’³⁴⁴. Similarly ‘almost every offence carries a statutory minimum sentence’ and the code considers prison as the primary method of punishment³⁴⁵. The persistence of these features suggests that there is an undercurrent of *punitiveness*, present in Italian penalty, at least in potential. Italy’s over-reliance on penal legislation has heightened this potential by creating more opportunities for the deployment of punishment, including incarceration³⁴⁶. That Italy has not experienced unequivocal increases in prison rates is partly due to a discrepancy between primary and secondary criminalization, formal punishment and social demand for punishment respectively. As Pavarini explains: if Italy shows high levels of primary criminalization – ‘unusually severe [formal] sanctions’³⁴⁷ – it nonetheless displays low social demands for punishment³⁴⁸. This discrepancy is also expressed in judicial softening of severe sanctions, producing what Pavarini calls ‘paternalistic indulgence’ in practice³⁴⁹ (see also Chapter 4).

The penal code’s evolution – piecemeal and with no overall design – has, according to Musio, given rise a system ‘neither authoritarian nor liberal’, but simply ‘arbitrary’ (presumably because of its incoherence)³⁵⁰. This mode of change is not limited to Italy but what is interesting in Italy is that the penal law seems to evolve in response to *political* contingencies,

³⁴⁰ Cavadino and Dignan (2006, p. 140)

³⁴¹ To use Ruggiero’s telling description: (1998, pp. 207-232)

³⁴² Annetta (accessed December 2012)

³⁴³ Pavarini (1994, p. 49)

³⁴⁴ Pavarini (1994, p. 50) See also Olgiati (1996, p. 279)

³⁴⁵ Cavadino and Dignan (2006, p. 141)

³⁴⁶ See Ferrajoli’s contribution quoted in Stortoni (1992, p. 76).

³⁴⁷ Pavarini (1994, p. 50)

³⁴⁸ See Chapters 3 and 4.

³⁴⁹ Pavarini (2001)

³⁵⁰ Musio (accessed December 2012). Pavarini too talks of the ‘compartmentalisation of the criminal law system into subsystems of special criminal law’ (2001, p. 417). See also Stortoni, on the incoherence of measures against organised crime: ‘a hornets’ nest of different legal sources – legislation, legal decrees etc. – that is very difficult to unravel’ (1992, p. 45 my translation).

a connection at times very evident³⁵¹. Reforms passed to counteract Italy's 'emergencies' provide an example of this process³⁵². Here I will deal primarily with political terrorism and organised crime³⁵³, significant insofar as they represent direct challenges to the Italian state³⁵⁴. State reactions to such challenges point to Italian penalty's volatility, as penal law changes in response to political contingencies. Terrorism and organised crime have also been 'opportunities' for punitive turns in Italian penalty, that often co-existed with opposite penal impulses (e.g. the emphasis on the re-education of the prisoner). If amnesties and pardons are an aspect of the leniency, within the harshness-punitiveness dualism that characterizes Italy's 'differential punitiveness', then the responses to the emergencies can be seen as an aspect of the harshness within that dualism. I will discuss these responses in the coming sections.

Note that my focus in this section is the legislation's character in terms of the link between Italian penalty and politics, and of Italy's harshness-leniency tension³⁵⁵. Starting with the terrorist 'emergency', we can look to Luigi Ferrajoli's critical evaluation of the 'normative tools' employed against it³⁵⁶. These 'tools' were partly found in the *Codice Rocco* and partly introduced in the late-1970s, early-1980s³⁵⁷. They included an increased use of preventive custody (roughly remand in prison) and an extension of its maximum period³⁵⁸.

³⁵¹ For a critical appraisal of English criminal law and its evolution see Wells, Quick, and Lacey (2010).

³⁵² Cavadino and Dignan (2006, p. 142); Ruggiero (1998, pp. 217-219)

³⁵³ See also Chapter 1 and Appendix.

³⁵⁴ These challenges are explicitly countenanced in Italian penal law. Article 283 of the penal code provides for the offence of 'attack against the constitution of the State'; article 284 prohibits 'armed uprising against state powers' (Articolo 283 Codice Penale 'Attentato contro la costituzione dello Stato'; Articolo 284 Codice Penale 'Insurrezione armata contro i poteri dello Stato').

³⁵⁵ It is thus not meant as an exhaustive review of the legislation.

³⁵⁶ Ferrajoli's is a critique of the legislation and not, therefore, uncontested (1984, p. 280) Pre-trial detention has been described as Italy's 'chronic problem'. Cavadino and Dignan estimate that in 2006 'half the prison population in Italy' was made up of remand prisoners (2006, p. 145), this despite a 1995 reform reducing remand in custody to less than 1 month, for offences carrying sentences below 4 years: Ruggiero (1998, p. 223).

³⁵⁷ According to Ferrajoli, most emergency laws passed before this date were 'public order' rather than antiterrorism laws (1984, p. 279). This includes the 1975 Legge Reale: 'a new piece of legislation [...] which increased police powers to stop, search, raid, detain and question suspects in the absence of legal representation': Ruggiero (1998, p. 212). Stortoni contends that the Legge Reale was primarily aimed at the repression of political/mass demonstrations of the 1970s (1992, pp. 40-41).

³⁵⁸ This had already been reformed in 1974 and was further extended in successive years. Preventive custody is part of so-called precautionary measures, i.e., 'provisional and immediately effective measures, aimed at preventing the passage of time from hindering the trial or the execution of the sentence, or lead to a worsening of the consequences of the offence, or indeed facilitate the commission of other offences', Libro IV Codice di procedura penale, 'Misure Cautelari'; 'Misure Cautelari' <http://www.treccani.it/enciclopedia/misure-cautelari/> Accessed December 2012. My translation.

Today measures can be adopted either during the preliminary investigative phase (indagini preliminary) or during the trial phase (see Chapter 5). Precautionary measures that restrict

This produced a *de facto* penal harshness that, however, also sat along a form of leniency: reduced penalties for those who ‘repented’ of their terrorist affiliations, and cooperated with antiterrorism investigations³⁵⁹. Luigi Stortoni contends that preventive custody was often used precisely to obtain such ‘cooperation’ and further cites this mechanism as a practice born during the ‘antiterrorist emergency’ that later transformed into generalised praxis³⁶⁰. We do indeed find the same devices (preventive custody and collaboration) employed when countering organised crime³⁶¹. Stortoni’s claim can further be read as pointing to a broader phenomenon whereby emergency practices persisted *beyond* the emergency. This has been referred to as a ‘halo effect’³⁶² and may explain ‘the paradox [in Italian penal policy] whereby campaigns against specific offenders’ such as political terrorists and organised criminals ‘turn into increased penalties for [...] those who are not [direct] targets [of the campaign] or [even for] offenders in general’³⁶³. The notion of a ‘halo effect’ also lends support to the existence of a *punitive potential* within Italian penalty: a harshness present but not always manifest, here engendered by the emergency legislation. Where this potential is realised we could logically expect it to lead to an increase in incarceration rates. Admittedly, the potential for leniency is also present, but not constantly realised, in Italian penalty. It is contingent – in the political terrorist’s case, on collaboration – and therefore does not give rise to clear penal moderation³⁶⁴.

This co-existence of punitiveness and moderation can also be found within Italian prison legislation, in particular the Prison Acts of 1975 and its 1986 reform³⁶⁵. Both aimed to enact the Constitutional principle of punishment as re-education³⁶⁶. They embodied the ‘positivistic treatment model’ which ‘in other countries [had] lost ground to the ideologies of “just deserts” and “law and order”’³⁶⁷. Article 1(6) of the 1975 Prison Act (retained in the 1986 law) summarises the law’s position. It states that punishment must consist of ‘re-educative treatment [tending] to the re-socialization’ of detainees’. Treatment must be

personal freedom – including preventive custody – can be granted only where there is sufficient (‘grave’) proof of guilt, and there are ‘precautionary exigencies’ (art 274 of the Italian criminal procedural code), for example, risk of escape. Under article 280 of the procedural code preventive custody in prison can only be applied only where the offence in question carries of 4 years or more. In principle preventive custody in prison should be used as a measure of last resort; unless the offence is one of organised crime in which case it is compulsory (Art 274 c.p.p.; Art 280 c.p.p.)

³⁵⁹ Ferrajoli (1984, p. 281)

³⁶⁰ Rinaldi (1992, p. 96 note 33)

³⁶¹ *Ibid.*, p. 65 & 96

³⁶² Spreading outwards: Giuseppe La Greca referring to ‘antimafia’ legislation (2005, p. 48)

³⁶³ Pavarini (1994, p. 59; 1997, pp. 84-85); Ruggiero (1998, p. 216)

³⁶⁴ My reference point is Germany, with its stable incarceration rates.

³⁶⁵ L. 63/1986," ; L. 354/1975

³⁶⁶ La Greca (2005, p. 40)

³⁶⁷ Cavadino and Dignan (2006, p. 143); Pavarini (2001, p. 418)

‘individualized’, i.e., responsive to the needs of the specific prisoner, gauged by ‘scientific observation’ during detention (article 13). Re-education should also be achieved via contact with the outside world. Article 15 further specifies ‘education, work, religion, cultural, leisure and sporting activities’ and ‘relations with the family’ as means of re-socialisation³⁶⁸.

Importantly, (and because we should not assume that rehabilitation equates with moderation) the 1975 law also introduced alternatives to custody³⁶⁹. These included release on parole, day release and early release after successful participation in re-education programmes³⁷⁰. Custodial alternatives spell some degree of moderation, at least where punitiveness and moderation are gauged by incarceration levels. However, amidst the reforms’ generally moderate outlook there also existed particularly harsh provisions. Thus article 90 of the 1975 Act allowed for the total or partial suspension of detainees’ re-educative regime, where necessary to maintain ‘order and security’ in prison. As Ruggiero has noted, this single article effectively annulled the whole law of which it was part. It was the legislators’ warning ‘that punishment in the community and other alternative measures were not [...] part of an irreversible process of decarceration’ but only a contingent one³⁷¹. I further suggest that the presence of article 90, in the 1975 reform, formalized the repression-leniency split of Italian penalty. The act reserved repression (suspension of rehabilitation) for prisoners whose particular ‘dangerousness’ made them suitable subjects for incapacitation³⁷². These included political terrorists, and it was precisely ‘when political prisoners began to fill Italian institutions’ that the ‘exceptionally serious circumstances’ which in principle triggered article 90, ‘came to be seen less as [temporary] than as permanent’³⁷³. Article 90 was eventually abolished by the 1986 prison reform. However the harshness-leniency tension it represents remained within the new legislation. The split was successively intensified by changes introduced against organised crime.

The 1986 law, premised on facilitating decarceration, further expanded the range of alternatives to custody³⁷⁴. Alternatives were now available that ‘completely [diverted] offenders from the prison system’ or that ‘applied while offenders [were] already serving a

³⁶⁸ L. 354/1975, art 15.

These official aims have been difficult to operationalise, given the lack of adequate facilities for ‘re-education’: La Greca (2005, p. 40); Ruggiero (1998, p. 213).

For a full review of the reform see: Cavadino and Dignan (2006, pp. 143-144); La Greca (2005, pp. 37-53); Pavarini (2001, pp. 416-419); Ruggiero (1998, pp. esp. at 209-217)

³⁶⁹ For a summary of critiques of rehabilitation see Garland (2001 chapter 3).

³⁷⁰ Summarised in Cavadino and Dignan: (2006, p. 143).

³⁷¹ Ruggiero (1998, p. 216)

³⁷² Cavadino and Dignan (2006, p. 144); Ruggiero (1998, p. 216)

³⁷³ Article 90 led to the creation of maximum security prisons.

³⁷⁴ Such as consignment to social services.

sentence'. The latter were granted by judges overseeing prison supervision³⁷⁵, and contributed to '[shift] [...] power', to decide length of incarceration, away from the sentencing judge, to the prison administration³⁷⁶. Having abolished article 90, the 1986 Act still included provisions that established special restrictive surveillance for given detainees, and that allowed the suspension of re-educative treatment in emergency situations – articles 14-*bis* and 41-*bis* respectively³⁷⁷. In the early 1990s, in response to the organized crime emergency, article 41-*bis* was extended to cover prisoners thought to retain connections with organised crime (or indeed terrorist/subversive associations)³⁷⁸. The reform was further modified with a 1991 legal decree, later converted into legislation³⁷⁹, which introduced article 4-*bis* in penitentiary legislation. This article excluded prisoners, detained for specified offences, from benefitting from custodial alternatives. The relevant offences included so-called 'mafia association', but also drug trafficking and extortion, i.e., offences that 'in the official wisdom, are typically associated with the Mafia'³⁸⁰. The reacquisition of benefits was conditional on proof that no further connections subsisted between prisoner and relevant criminal association³⁸¹. Treatment and alternatives to custody were, however, open to offenders who fell under article 4-*bis* but collaborated with police or judiciary against their former criminal

³⁷⁵ La Greca (2005, p. 40); Ruggiero (1998, pp. 213-214)

³⁷⁶ Whose opinion – gleaned through 'scientific' observation of the detainee in custody – informed the supervision ruling: Cavadino and Dignan (2006, p. 143); Ruggiero (1998, p. 214)

³⁷⁷ Under article 14-*bis*, the reform singled out specific 'high security prisoners', including those who jeopardized the 'order and security' of the prison. Such prisoners were kept in high security units rather than high-security prisons. This division amongst prisoners could be justified in terms of rehabilitation: special supervision singled out prisoners who threatened their inmates' treatment: Ruggiero (1998, p. 213)

Note that art 41-*bis* was intended as 'a liberalization measure' vis article 90, aiming to reduce the over-employment of emergency provisions: Cavadino and Dignan (2006, p. 144); La Greca (2005, p. 43).

³⁷⁸ Art 41-*bis*, my translation

³⁷⁹ The legal decree is in principle an emergency executive measure, whose use (as described) testifies to the influence of political contingency on Italian penalty (Art 77 Costituzione Italiana).

³⁸⁰ Ruggiero (1998, p. 219); See also article 416-*bis* of the penal code: (Art 416-*bis* codice penale Associazione di tipo mafioso). The penal consequences of use and sale of drugs had been reformed in 1990. The reform introduced the offence of 'association aimed at illegal [drug] trafficking; with custodial penalties of 10 to 24 years. The same reform also punished repeat violations of rehabilitative programs with imprisonment: (D.P.R. 309/1990," 1990 art 74 and 76 respectively). Pavarini notes the impact of drugs on imprisonment in Italy estimating (in 2001) that around 30% of Italian prisoners were drug addicts: (Cavadino & Dignan, 2006, p. 142; Pavarini, 2001, p. 401)

³⁸¹ Article 4-*bis* creates two groups of offenders: the second group can obtain prison benefits in the absence of proof of subsisting connections. I am only dealing with the first category: (Art 4-*bis* o.p.)

organization³⁸². The condition for receiving treatment was, as with terrorists, a renewed allegiance to the established legal order³⁸³. Again the legislative structure here appears split between harshness (article 41-*bis*) and leniency (treatment regime and collaboration).

The legislative interventions of the early 1990s against organised crime have been defined in terms of ‘reform and counter-reform’³⁸⁴. I suggest that the expression can in fact be applied to Italian penalty more broadly³⁸⁵. It is a fitting expression because it communicates both fluctuation and volatility. Fluctuation is between moderation and repression and is integral to differential punitiveness as evidenced by Italy’s prison rates. Volatility is inherent in this fluctuation: we see it in relation to prison reform and penal legislation, we had seen it in relation to amnesties. Penal volatility here seems to point to a state that is trying to monopolise and direct not just the power to punish, but also the power to forgive: not just harshness but also leniency³⁸⁶. It is also a state torn between principle and pragmatism, one that wishes to re-educate and decarcerate as a matter of principle to the extent of re-education being enshrined in the Republic’s Constitution. Yet it is the same state that is drawn to a more pragmatic use of the penal law, where benefits are used as a bargaining tool to obtain collaboration and where amnesties – in principle exceptional – become routine deflationary measures.

iii. The 1990s – growing prison rates

So far my discussion thus has provided a theoretical account of Italy’s differential punitiveness and the tensions the latter embodies, in particular the harshness-punitiveness dualism. My account is not an attempt to correlate Italian penal legislation and Italian prison rates, tracing direct links between penal reforms and penal trends³⁸⁷. As Pavarini notes ‘more or less severe laws, or major changes in criminal offences do not translate, *sic et simpliciter*, into more or less use of imprisonment’³⁸⁸. However, when looking at Italian prison rates, it is useful to provide some starting hypotheses on the increase in prison rates experienced during the 1990s, given that the decade stands out as a time of increased incarceration. In this section I

³⁸² Art 58-*ter* o.p.

Massimiliano Annetta argues that, in practice, collaboration became the only way to disprove connections with organised crime, which otherwise rested on adducing proof of a negative fact, *non-connection* with organised crime (accessed December 2012).

³⁸³ For a similar point see Franco Bricola quoted in Rinaldi (1992, p. 67). See also La Greca (2005, p. 48)

³⁸⁴ Annetta (accessed December 2012) quoting Guazzaloca (1992, pp. 123-150)

³⁸⁵ It also encompasses prison reform – re-educational but with in-built caveats.

³⁸⁶ By contrast to the type of volatility displayed in Garland’s analysis – particularly in the USA – where the State is divided between ‘adaptation’ and ‘denial’ (2001, pp. 103-138). See Chapter 1.

³⁸⁷ This has already been done and in depth: see Pavarini (2001); Ruggiero (1998)

³⁸⁸ Pavarini (2001, p. 413)

will cover two main arguments that can help us account for the 1990s: they will be developed in greater depth in coming chapters. The succeeding section (nationality and immigrants) covers a third argument that also helps us explain 1990s penalty.

The first argument points to the change in the procedure for clemency provisions: after 1992 amnesties and pardons became more difficult to approve, and the Italian penal system was thus deprived of one frequent and immediate means of reducing incarceration. The second argument has been developed by Massimo Pavarini, according to whom crime has typically been construed as a *political* question in Italy. In this political ‘interpretation’, crime calls for resolution by political means rather than recourse to penal law. Pavarini provides a number of reasons for this approach, one being the prominence of *political* terrorism as crime emergency, during the 1970s and early 1980s³⁸⁹. However, this interpretation was not static in time and though, Pavarini argues, it began to change in earlier decades, it is in the 1990s that we witness the most visible shift. Pavarini describes the 1990s terms of a ‘new penology’ born of the ‘socio-political’ crisis of those years, i.e., the overhaul of the Italian political system in the wake of the large-scale corruption scandal *Tangentopoli*³⁹⁰. This crisis, fostering disillusionment with the political system, contributed to a paradigm shift in public conceptualization of crime. After the crisis crime came to be perceived as a social and moral issue whose solution lay in ‘identifying an enemy and [appropriate] legal punishment’³⁹¹. This caused social (secondary) demands for criminalization to grow closer to formal (primary) demands for criminalization, with ‘ever increasing levels of punishment [...] invoked socially and sanctioned institutionally’³⁹². This followed also from an increased legitimacy of the criminal justice system. As I have shown, demands for repression then extended beyond their initial targets, becoming a ‘much wider’ phenomenon³⁹³. Undoubtedly, the significance of the 1990s corruption scandal should not be overstated, and in Chapters 3 and 4 I will provide a broader account of the changing

³⁸⁹*Ibid.*p. 415

In some cases prison has been seen as a tool for class warfare, with the penal justice system as ‘a violent means of preserving an unequal society’, a belief that was reinforced by the *mixing* of 1970s political movements and prisoners’ movements: *ibid.*, p. 52-53.

³⁹⁰*Tangentopoli*, or ‘kickback city’: see Chapter 1 and Appendix.

³⁹¹ Pavarini (1994, p. 53)

³⁹² *Ibid.*, p. 53

³⁹³ *Ibid.*, p. 59

Annetta provides one account of how this may have happened, at the level of surveillance judges and thus of penal execution. The legislation of the 1990s, he argues, communicated the political class’ fundamental mistrust of surveillance judges’ evaluation of detainees and judges’ concession of custodial alternatives. This mistrust was ‘absorbed’ by surveillance judges, given their relative lack of professional ideology and established jurisprudence – much more characteristic of judges in their ‘ordinary’ functions (e.g. sentencing – see Chapter 5). Consequently, Annetta claims, surveillance judges granted fewer custodial alternatives: not just to organized criminals, but across the board (accessed December 2012.)

interaction between Italian politics (widely conceived) and penalty up to the 1990s. Yet, Pavarini's argument remains compelling insofar as it points to the decade as a time marked by a new way of conceptualising politics – bereft of Italy's heretofore dominant ideologies (Chapters 1, 3 & 4 and Appendix) – and thence crime. Solutions to social problems that had in the past been sought within the political system and its ideologies were now sought elsewhere. The judicial sphere offered one new source of conflict resolution, particularly given its revived role as buffer to political misfeasance (Chapter 5). One of the consequences was, as in Pavarini's account, the creation of fertile ground for a 'social interpretation' of crime as moral wrong with 'increasing levels of punishment'³⁹⁴.

Here then, we have a starting explanation for the 1990s penal escalation and its reflection in Italian prison rates. Again, I suggest, this escalation testifies to the punitiveness always present *in potential* within Italian penalty, one that co-existed with an equivalent potential for moderation and informal resolution of conflict. I argue that the 1990s' expansion can be seen as an example of Italy's punitiveness *materialized*, and not just as potential. It can then also be attributed to the entry of migrants as a 'new penal subject' on the Italian scene. In the next section I will investigate if and how this 'entry' is reflected in Italian prison data, and how it affects my differential punitiveness hypothesis.

iv. Nationality and immigration

Scholars of contemporary Western penalty agree on the relevance of migrants as subjects of punitiveness. Thus Alessandro De Giorgi sees immigrants as the paradigm exemplars of the 'social surplus', whose penal fate magnifies general trends present in Western penalty³⁹⁵. By contrast, *The Prisoner's Dilemma* sees migrants as the 'outsiders' of co-ordinated market economies and their penal moderation³⁹⁶, subjects of a punitiveness that is *not* equally distributed within, and across, national polities³⁹⁷. I will deal with the punishment of migrants in Italy in Chapter 6. For the time being I note that where literature has dealt specifically with the Italian situation it has tended to stress the invidious position occupied by immigrants vis-à-vis the Italian penal system³⁹⁸. A series of processes operate whereby migrants are over-penalised and consequently over-imprisoned. In ethnically homogenous societies such as Italy, for example, migrants are highly visible targets for policing even when they are not engaged in criminal or deviant behaviour³⁹⁹. Moreover, if and when apprehended, non-EU

³⁹⁴ Pavarini (1994, p. 53)

³⁹⁵ De Giorgi (2006, p. 117) See also Wacquant (1999, pp. 215, 219-220)

³⁹⁶ Lacey (2008, pp. 144-169)

³⁹⁷ See Chapter 6

³⁹⁸ Melossi (2003, 2005); Palidda (2009)

³⁹⁹ Melossi (2003, p. 379)

migrants do not possess those socio-demographic characteristics – economic stability, supportive networks, fixed address – required to receive non-custodial alternatives or sentence reductions once detained (Chapter 6)⁴⁰⁰. Unsurprisingly, the implications of these processes is that, if Italian penalty does operate on the basis of differential punitiveness, migrants are likely to be among the recipients of its harsher aspects.

My investigation of this claim starts from data on incarceration of non-EU migrants in Italy. Italian national data (ISTAT and DAP) on the incarceration of foreigners is available beginning from the year 1990⁴⁰¹.

⁴⁰⁰ De Giorgi, 2010, p. 156. See also Van Kalmthout A. *et al* (2007, pp. 78-88)

⁴⁰¹ The reference period 1990–2000 is explained in Chapter 6. For alternative data beginning in 1985, see Solivetti 2012, Table 3: (2012, p. 139). Having relied on ISTAT/DAP data in the rest of the Chapter, for consistency I have chosen to use ISTAT and DAP data on migrant incarceration. By contrast Solivetti's tables are constructed from Council of Europe data. The latter display some slight differences compared with Italian national data (the same caveats apply as in Chapter 1). Nonetheless the general trend is the same on both measures – an overall increase in the foreign detainees as a percentage of total detainees in Italian prisons.

Table 2 – Foreigners Detained in Italian Prisons (absolute numbers and percentages)

Year	Number of foreigners detained	Foreign detainees as a percentage of total detainees
1990	4.017	15.4
1991	5.365	15.1
1992	7.237	15.2
1993	7.892	15.7
1994	8.481	16.6
1995	8.334	17.5
1996	9.373	19.3
1997	10.825	21.4
1998	11.973	24.3
1999	14.057	26.4
2000	15.582	28.6

Sources: my elaboration on Dipartimento dell'Amministrazione Penitenziaria; ISTAT⁴⁰².

Looking at foreigners detained in Italy between 1990 and 2000 (Table 2), we can see that their number increased throughout the whole decade. This is a more marked increase than that registered by the prison population as a whole: the total number of detainees doubles between 1990 and 2000 whereas the number of foreigners detained quadruples over the same period⁴⁰³. Migrants thus appear as amongst the preferred targets of 1990s penalty and its increased punitiveness.

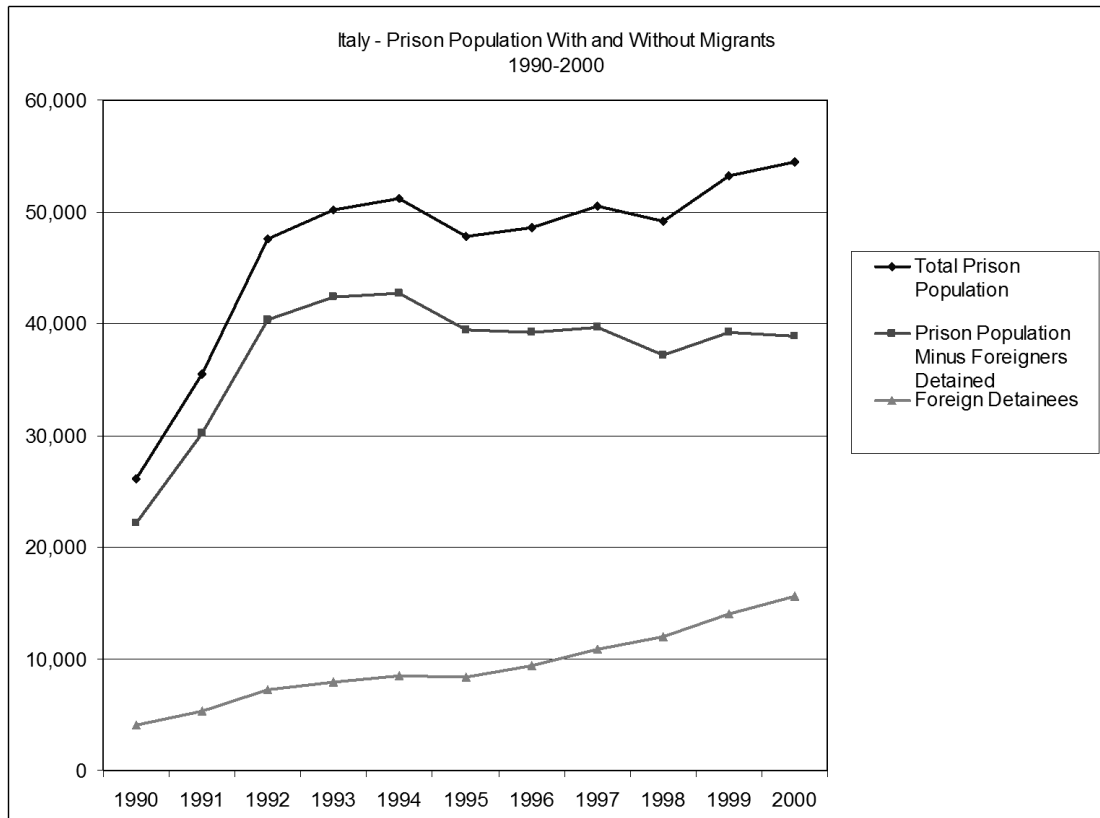
For further confirmation of this analysis, we can look at the contribution of foreigners to the total prison population increase between 1990 and 2000⁴⁰⁴. In 1990 the total population detained was 26,150, and increased to 54,491 by 2000; over the same period the number of foreigners detained increased from 4,017 to 15,582. This constitutes 41% of the total increase. We can see this by charting the Italian prison population between 1990 and 2000, with and without foreign detainees (Figure 4). The difference is marked where foreigners detained are compared to the total prison population (or national prison population). Nationals do make up for the bulk of the rapid increase associated with Italy's political crisis, but their numbers fluctuate, even decreasing across certain years. By contrast migrants make up the sustained character of the growth across the 1990s.

⁴⁰² DAP (1990-2001); ISTAT (1990-2001)

⁴⁰³ These data exclude immigrants in administrative detention, for which see Chapter 6.

⁴⁰⁴ See Lacey – similar calculations but applied to Germany (2008, p. 162).

Figure 4 – Italy, prison population with and without migrants, and foreign detainees alone, 1990-2000



Sources: My elaboration on Dipartimento dell'Amministrazione Penitenziaria, Ministero della Giustizia; ISTAT – Annuari di Statistiche Giudiziarie Penali 1970-2000, Rome: Istituto Nazionale di Statistica⁴⁰⁵.

Before drawing any conclusions on migrants as subjects of Italy's punitiveness, we need to consider whether the increase in detention of immigrants may not simply be the result of immigrants increasing within Italy's *population*. We can do this by calculating the so-called 'over-representation' ratio used, for example, by Dario Melossi⁴⁰⁶. The variable 'represents the ratio of the percentage of foreign inmates to the percentage of resident foreigners from countries other than the European Union'⁴⁰⁷. This measurement runs up against all the uncertainties linked to evaluating the presence of immigrants within Italy. Thus the number of foreigners present in Italy is estimated using the number of residence permits granted each year. Moreover, by excluding undocumented migrants, this underestimates the number of foreigners⁴⁰⁸. At the same time, prison figures for 'foreigners' include (non-Italian) EU

⁴⁰⁵ DAP, 1990-2001; ISTAT, 1990-2001

⁴⁰⁶ Melossi (2005, pp. 16-17); Solivetti (2012, p. 143)

⁴⁰⁷ Melossi (2005, pp. 16-17)

⁴⁰⁸ Data on residence permits do not include undocumented migrants, though certain years (1990, 1995, 1998) may include number of heretofore 'irregulars', granted permits by means

citizens, or people from North America, whose penalization is not at issue in this chapter. This may itself mean that we are overestimating the number of ‘outsider’ migrants in Italian prisons⁴⁰⁹. In the light of such limitations the ratios can therefore be considered as no more than an approximate measure.

Table 3 – Italy - Overrepresentation ratio 1990-2000

	Foreign detainees in Italian prisons as a percentage of total detainees in Italian prisons	Residence Permits as a percentage of the Italian Population (CARITAS data)	Ratio of percentage detainees/residents
1990	15.4	1.4	11.2
1991	15.1	1.5	9.9
1992	15.2	1.6	9.3
1993	15.7	1.7	9.0
1994	16.6	1.6	10.2
1995	17.5	1.7	10.0
1996	19.3	1.9	10.0
1997	21.4	2.2	9.8
1998	24.3	2.2	11.1
1999	26.4	2.2	12.0
2000	28.6	2.4	11.7

Source: my elaboration on DAP data, ISTAT data and CARITAS data⁴¹⁰

The estimates in Table 3 show that, throughout the decade, Italy had a share of foreign nationals within its prison population that was at least 9 and at most 12 times higher than the share of non-nationals within its resident population. Cumulatively, these data suggest that the high proportion of foreigners within Italian prisons is not entirely accounted for by their growing presence in the population. Solivetti⁴¹¹ has also calculated an ‘incarceration index’ (to use his term) for the decade 1990 to 2000, while controlling for age, gender and illegal

of Italy’s periodic ‘regularisations’. This highlights the problem of assuming that the ‘regular’ and ‘irregular’ population are two distinct groups: Calavita (2005, p. 50)

⁴⁰⁹ Though see Solivetti (2012, pp. 144-145)

⁴¹⁰ Caritas (1993-2003); DAP (1990-2001); ISTAT (1990-2001). Note that the overrepresentation ratio is calculated on the basis of foreign nationals resident in Italy and not just non-EU nationals resident in Italy. This is because the imprisonment data themselves do not differentiate between EU and non-EU foreigners, as no prison data are available that draw this distinction. The overrepresentation ratio in table 3 is thus a conservative estimate of non-EU migrant overrepresentation in Italian prisons. Where the ratio is calculated against non-EU residents alone, it varies between 13.8 in 1990 and 11.1 in 1992 with a ratio of 13.2 in 2000.

⁴¹¹ Solivetti (2012, p. 139)

immigration⁴¹². His data confirm the over-representation of non-EU migrants in Italy across the decade.

Solivetti and Melossi also provide comparative data on immigrant over-representation in European prisons⁴¹³. In both cases Italy emerges as one of the western European nations with the highest over-representation ratio for non-EU immigrants. In Solivetti's calculations, for example, Italy has the third highest ratio amongst 18 EU countries for the period 1990-2000: this is so even when controlling for age, gender and illegal migration. Melossi's data (extracted in Chapter 6) show Italy as the nation with the highest over-representation⁴¹⁴ for the year 2000, compared with Spain, Germany, France and the United Kingdom. Admittedly our observations are qualified if we acknowledge that 'in former colonial countries, such as France or the United Kingdom, there may be naturalized citizens [...] in prison because of social mechanisms not unlike those that preside to foreigners' imprisonment but [who] do not show up in foreigners' statistics'⁴¹⁵. This may have contributed to exaggerate Italy's punishment of foreigners relative to these particular European nations (France and England and Wales). However, the fact remains that Italy incarcerated a particularly high relative proportion of immigrants across the 1990s. In the chapters that follow it is therefore necessary to explain this over-incarceration and its (potential) broader significance for Italian penality.

IV. Conclusions: differential punitiveness

I had begun this chapter with the intention of answering the questions 'is Italy punitive?', and 'does the shape of Italian penality conform to a Garland-De Giorgi model of contemporary Western penality?'. My introduction had suggested that Italy in fact departed from this model. I had thus put forward an alternative hypothesis, according to which Italian punitiveness was *differential*: differentiated, for example, by both time and subject. This hypothesis was in part informed by the history of Italian penality that, since its inception, had been torn between the two opposites of leniency and repression. This was the possible effect of punishment's 'pluri-functionality' within the Italian system, whereby punishment '[possesses] a wide variety of attitudes that [can] from time to time be privileged, according to contingent pressures or the type of offender that the [criminal justice system comes up against]'⁴¹⁶. Literature and

⁴¹² To control for factors otherwise likely to increase chances of offending/incarceration (such as being young and/or male and/or an irregular migrant).

⁴¹³ Melossi (2005, p. 17 Table 1); Solivetti (2012, p. 144 Table 5)

⁴¹⁴ Albeit not adjusted for age, gender and illegal migration.

⁴¹⁵ Melossi (2003, p. 378)

⁴¹⁶ Fassone (1980, p. 15 my translation)

preliminary data analysis also suggested that if any period had to be singled out as a time of particular punitiveness, it would be the decade 1990 to 2000. During the greater part of this decade, migrants appeared as a group of subjects at risk of receiving harsh penal treatment.

I contend that the picture drawn in this chapter *has* shown Italy as a nation of ‘differential punitiveness’. Between 1970 and 2000 Italy displayed both the capacity for punitiveness and for leniency, an alternation that is partly reflected in its fluctuating prison rates. The nation’s prison trends are not univocal: they varied across the three decades, and did so on the backdrop of a general penal increase, particularly marked between 1990 and 2000. How we characterise Italian penalty therefore differs according to whether we take continuous or discontinuous readings of national prison rates, as continuous readings reveal fluctuations otherwise masked by a calculation of percentage increases. The background increase makes Italy’s comparative position difficult to interpret. Indeed though the nation maintained low prison rates relative to England and Wales – suggesting moderation – it also experienced a greater *change* in prison rates than did England and Wales – suggesting that its moderation is in some sense qualified. Similar conclusions can be drawn from broader European comparisons.

Throughout this chapter I have linked the variability of Italian penal trends to the differentiation of punishment which occurs at a number of levels, and can be seen as having contributed to a particular penal ‘dualism’, i.e., the alternation of punitiveness and leniency. Looking outwards to general penal trends, Italian penal duality was visible in yet another form, namely the various peaks and troughs of Italian prison rates. The ‘troughs’, as I have shown, are the direct effects of amnesties: deflationary provisions which, until the 1990s were routinely and pragmatically deployed, for example, as a solution to overcrowding.

As hypothesized, Italy’s penal dualism also reflected a number of historical features, such as the structure of contemporary penal reform. This was one but not the exclusive line of differentiation. Nationality also emerged as another prominent penal discriminant, with migrants experiencing over-representation in prison relative to their presence in the population.

I have suggested that prison trends, rising over three decades, but systematically dotted by amnesties, speak of penal volatility; of a system in which pressure towards penal escalation exists and affects Italian penal expansion, but in which there is also a margin for *de facto* leniency. At the very least, then, what this scenario confirms, relative to contemporary

analyses of Western penality, is that we do not face global penal convergence⁴¹⁷. Variation in prison rates persists across European nations, despite the presumed onset of ‘late modernity’ or ‘post-Fordism’. At a more theoretical level the Italian context also warns us against relying excessively on the concepts ‘penal punitiveness’ and ‘penal moderation’. It warns us against phrasing comparative criminological questions in the form ‘is Italy more moderate than England and Wales?’. This type of question presumes that penal leniency and penal punitiveness are mutually exclusive: Italy shows this is not so. Italian prison trends also suggest that the terms ‘punitiveness’ and ‘moderation’, when coupled with an analysis of prison rates, are primarily applicable to scenarios with clear penal patterns. Thus it may *prima facie* make sense to talk of increasing punitiveness in relation to England and Wales, as the latter’s penal trends show an increase across (most of) the period 1970 to 2000. Arguably, even this characterisation glosses over variation in the British context. It certainly is not capable of describing the sort of variation that we find in the Italian penal context, where ‘punitiveness’ can be a workable notion only if it is qualified as ‘differential’. There is merit in thus qualifying the term, and applying it to Italy, insofar as it keeps our analysis of the nation within the context of existing theories of contemporary western penality. Similarly, there is merit in starting our account by reference to Italian prison rates: the data act as a springboard for more theoretical analyses. However, as in the rest of this thesis, data and concepts (‘punitiveness’/‘leniency’) need to be contextualized.

What I have ultimately concluded in this chapter is, therefore, that an analysis of Italian penality should not simply ask whether Italy is as punitive as, or more moderate than, a Garland/De Giorgi paradigm. Rather, my investigation should interrogate the *various ways* in which Italy is more moderate (or possibly more punitive), and *why* this is so. This implies that I need to explore not just Italy’s potential penal trends, but the mechanisms behind them⁴¹⁸. The latter may indeed differ from context to context even where penal trends would suggest similarity⁴¹⁹. It will be my task to uncover these mechanisms by asking a series of questions: what have been the primary influences on Italian penality between 1970 and 2000? How can they be systematized (under what organizing principle) and not cast solely as an example of a ‘particular’ penal scenario? What does this analysis tell us about other accounts of contemporary penal trends? I start by investigating the political, economic and cultural influences on contemporary Italian penality.

⁴¹⁷ Lacey (2011, pp. 214-250)

⁴¹⁸ Clearly not all such mechanisms can be explored in my thesis. I have identified and analysed those I consider most significant, in the light of the theoretical framework laid out in Chapter 1.

⁴¹⁹ Lacey (2012, pp. 203-239)

Chapter 3 - Politics and Penalty: the Political Economy

I. Introduction

This chapter aims to identify some of the determinants of Italian penalty and to account for the penal variation analysed in Chapter 2. It advances a series of theoretical hypotheses on how Italian politics – the political system and institutions, but also Italian political culture – have affected the distribution of penal pressures in Italy. The chapter starts from the political economic and cultural analyses of Garland, De Giorgi and Lacey, which all point to the significance of the political economy and culture in defining the shape of contemporary punishment⁴²⁰. Lacey also alerts us to how punishment varies across polities. She systematises this variation by reference to contextual institutional structures, and the incentives or opportunities they create to re-integrate or exclude deviants⁴²¹. By understanding the links between the political economy and penalty in these terms, we can look at Italy's political economy and analyse it in terms of the pressures it produces in favour of penal moderation or penal exclusion in order to explain its penal trends. Given the 'hybrid' nature of the Italian political economy we may need to look beyond political economic categories to *systematize* Italian penalty.

In this chapter I argue that political variables play a primary role in shaping Italian penalty. In particular the notion of political conflict, the competition between different interest groups within Italian society, ranging from political parties through to more loosely 'political' groups such as familial structures, can help us understand the variation between Italian punitiveness and leniency. This is because political conflict has constrained the evolution of the Italian political economy, contributing to its hybridity. It has thus affected the various penal pressures that arise from the Italian political economy, consequently affected by political conflict. More broadly, political conflict can be used to describe a second set of dynamics shaping the Italian state, its formation and the allegiance it is able to command. Chapter 4 deals with the relationship between state and citizen and its importance in understanding Italian penalty. In particular the 'conflict' between state and citizen – the incomplete allegiance of citizens towards the Italian state and the scarce trust of state in its citizens – reveals the variable purchase of Italian penal law. It reveals that penal law has been used by the Italian state as a means of imposing authority on a divided national polity, and that it is often circumvented. This is so where informal means of social control are relied on to resolve social conflict created by deviance, contributing to the 'leniency' of differential

⁴²⁰ De Giorgi (2006); Garland (2001); Lacey (2008)

⁴²¹ Lacey (2008, pp. 56-57)

punitiveness. As this and the following chapter will show, incentives for informal conflict resolution are produced and sustained by the combined effect of political economic structures, political institutions and political culture. Politics and conflict are the common denominator across all three fields.

This questioning of the purchase and role of the criminal law should be a crucial aspect of analyses of contemporary punishment, and not just Italy. The political-economic analyses of punishment that I start from can indeed be seen as making two orders of claims. The first concerns the exclusionary/inclusionary character of given political-economic setups. For example, in a liberal market economy there is greater push towards the exclusion of deviants. The second concerns the use of the penal law in such political economies. For example, in liberal market economies (LMEs) the criminal law is also a crucial tool in effecting this exclusion. This second statement addresses the political system and its institutions, but also state history and cultural variables. So in co-ordinated market economies (CMEs) the political-economic structure makes it advantageous to reintegrate deviance but also, in co-ordinated market economies there tend to be political/judicial cultures that stimulate a parsimonious use of the criminal law vis-à-vis deviance⁴²². In these contexts, the criminal law is not necessarily seen as the best tool for the resolution of social conflict. I argue that this second order of analysis is essential to our understanding of contemporary punishment and that, as the Italian case shows, it addresses the *politics* of the different polities under consideration.

In Chapters 3 and 4 I am going to make these two orders of claim in relation to Italy. In this chapter, I will discuss the Italian political economy and its reintegrative or exclusionary tendencies. In Chapter 4, I will discuss the viability of the penal law as a tool for exclusion of deviance. Political conflicts and dualisms will be present throughout this discussion, as politics remain the factor through which we can systematise Italian penalty. Political conflict and dualisms shed light on the nature of the political economy, on the existence of pressures for penal moderation or punitiveness, and on when these pressures engage the criminal law. The first section of this chapter details the Italian political economy, in the light of Garland, De Giorgi and Lacey's analyses, and asks if and how Italy fits their explanations and how political conflict can be used to understand its shape. For my purposes political conflict is defined as follows: persistent struggles for power and resources, occurring between ideologies and between political parties, within party factions, and between interest groups as they vie to influence decision-making. These struggles are pervasive and have been incorporated into Italian institutions and are, for example, traceable in the distribution of labour and welfare

⁴²² *Ibid.*, p. 61

provision. The institutional incorporation of political conflict is particularly marked in Italy, and distinguishes it from its European comparators.

In this chapter I argue that, to the extent that political struggles create a systemic volatility in Italy, they also help explain the oscillation between leniency and punitiveness. Using the intellectual framework provided by the relevant theorists, this chapter analyses the Italian political economy in terms of its push towards punitiveness or moderation.

i. Italy and political conflict: interest fragmentation and institutional permeability

Political variables affect Italian penalty at a number of levels: post-war politics have constrained the evolution of the Italian political economy and its penal effects. Penalty has been shaped both in the short and long term by very evident political events such as *Tangentopoli* and the subsequent transition to the ‘Second Republic’. In order to understand how politics have had such an effect on Italian penalty, and why it can be seen as its organising principle, we first need to look at the Italian institutional structure. Thus, we will see how direct and visible the link can be between political arrangements – for example party dynamics – and policy evolution. This includes policy that affects penalty, either indirectly, by affecting political economic features that feed into penal dynamics, or directly, where they shape criminal justice policy. It is important that the Italian institutional structure can be said to have *incorporated* political conflict, magnifying rather than containing its effect on the functioning of the Italian polity and on its penalty⁴²³. This incorporation of conflict into the state institutions is distinctive to Italy, and is the subject of the following section. Its visibility in post-war Italy can be explained as a function of numerous features⁴²⁴ amongst which the *fragmentation* of interests in Italy. Italian decision making institutions also display high permeability to these interests⁴²⁵, because of the existence of veto points within its institutional structure⁴²⁶. The interests capable of exploiting permeability or veto points include political parties but also political ‘currents, groups, clans, clientele, single individuals and their personal following’: those whom Alessandro Pizzorno has termed the ‘intermediate stratum’ of the political class⁴²⁷. I would also add social partners to this list – for example trade unions – the latter having been engaged in policy negotiation across the decades.

⁴²³ Ginsborg (2001b, p. xi)

⁴²⁴ Definitions of the Italian political system abound within the political science literature: see Lange and Regini ((1989) 2010); Pasquino (1995a, 2002, 2010).

I have not adopted a single definition but focus on features, common across characterisations, which explain the impact of politics upon the incidence and distribution of penal pressures.

⁴²⁵ Lange and Regini ((1989) 2010, p. 22, p. 255)

⁴²⁶ Bull and Rhodes (2009, p. 3)

⁴²⁷ Pizzorno (1997, p. 340)

The combination of fragmentation and permeability has led to policy decisions in Italy being influenced by the numerous pressures present within the system, in such a way as to defy any overarching policy agenda⁴²⁸. As I will show below, this has led to difficulties in *defining* the Italian system in terms of its institutional structure. As Lange and Regini have commented, looking across Italian policy areas ‘we find few signs of designs [or] governing visions’ but rather ‘a crazy quilt of sometimes contradictory, sometimes complementary modes and institutions for regulating the production and allocation of resources’⁴²⁹. As Lange and Regini remind us, ‘this does not mean that the actors involved in policy-making do not have goals’; it means ‘that their outcomes do not reflect the intentions of any single actor or coalition’⁴³⁰. Lange and Regini further argue that ‘in the most immediate sense’ this combination of policy modes and output ‘can be explained as the outcome of the push and tug of relatively fragmented social and political actors’ operating within ‘an institutional environment that offers [the actors] ample access to multiple decision points’. This allows them to ‘defend their particularistic interests’⁴³¹. It is in this sense that Italy is beset by conflict: as the ‘push and tug’ of parties, factions, interest groups, social partners and so on, plays out in a system which incorporates but does not broker stable compromises between the divided interests that it encounters. I will show examples of this dynamic at several points in my analysis of the Italian political economy: one prominent example being the welfare state, described by Paci as ‘highly politicized in its focal points’⁴³². The existence in Italy of everything and its opposite, and their manifestation through policies and institutions, is what I have tried to capture with the notion of Italy’s ‘dualisms’ – oppositions created by the Italian political system and institutional structure.

To further explain this conflictual dynamic, we must look to the post-war Italian party system. Particularly between 1945-90, Italy has been characterised as a ‘republic of parties’ or partyocracy⁴³³ characterized as a system whereby political parties are the primary political players, ‘occupying’ the state at national and local levels. In Alessandro Pizzorno’s analysis, this ‘occupation’ can be seen in the attitude of the then governing parties, in particular the Christian Democracy, (DC) whose various constitutive groups – parties but also interest

⁴²⁸ See Lange and Regini ((1989) 2010)

⁴²⁹ Lange and Regini ((1989) 2010, p. 267)

⁴³⁰ *Ibid.*

This affects where we look for ‘complementarities’ within the Italian system, positive feedback mechanisms whereby different actors and institution act in a mutually reinforcing fashion. Trigilia and Burroni (2009) look across regions and policy domains, rather than national institutions.

⁴³¹ Lange and Regini ((1989) 2010, p. 267)

⁴³² Paci (1987, p. 276 My translation.)

⁴³³ Cotta and Verzichelli (2007, p. 35-66); Pasquino (1995a, 2002).

groups within and affiliated to them – possessed a ‘quota’ of power⁴³⁴ used to veto legislative initiatives, or as a bargaining tool in political deals, with the ultimate aim of increasing the group’s relative weight in the political system⁴³⁵.

The ‘occupation’ of the Italian system also occurred through so-called *lottizzazione*, i.e., ‘the subdivision of jobs and public posts, within public bodies and institutions according to political (rather than professional) criteria’⁴³⁶. Through this process, state institutions and resources have *de facto* been divided up amongst parties and, within the parties, amongst different factions⁴³⁷. A typical example is the distribution of managerial posts in government bodies, primarily on the basis of political affiliation. This process was initially bolstered by the presence of a high level of state control of Italian economic resources including state-owned firms. This control had, for example, allowed the particularistic distribution of posts by political parties aimed at obtaining political consensus, an exchange crucial to Italy’s clientelistic practices (see below). With the passage into the Second Republic, the demise of the main existing parties and the beginning of (some) privatization of state owned companies, this mechanism has become more difficult. Pasquino, however, suggests that the practice of *lottizzazione* has persisted after 1992⁴³⁸, not least because of the belligerence and ‘wrangling’⁴³⁹ between and within parties/coalitions⁴⁴⁰. This again suggests a divided political class, intent upon constant competition, and engaged in ‘wheeling and dealing’ between its members. I argue that this continuing ‘carving up’ of Italian institutions along political lines has incorporated political conflict into the workings of the Italian system and affected the formation of policy, including policies that impact upon penal pressures, for example welfare policies.

Giorgio Rebuffa’s characterization of the Italian political and institutional system can further help us flesh out this effect. Rebuffa argues that the Italian constitutional setup displays a general mentality of ‘proportional representation’⁴⁴¹. Proportional representation (PR) not only characterized the Italian electoral system until 1993 – after which the nation

⁴³⁴ Pizzorno (1997, p. 319)

⁴³⁵ ‘to confirm or increase [...] their positions within government and within the patronage system’: Pizzorno (1997, p. 319 My translation.)

⁴³⁶ "Lottizzazione," <http://www.treccani.it/vocabolario/lottizzazione/>. Accessed September 2012; Sabatini & Coletti, 2008 http://dizionari.corriere.it/dizionario_italiano/L/lottizzazione.shtml. Accessed September 2012 My translation.

⁴³⁷ See Pasquino (1995b, pp. 347-348) One example is the division of the Italian public television channels between political parties.

⁴³⁸ *Ibid*, p. 353

⁴³⁹ Gundle and Parker (1996, pp. 12-14)

⁴⁴⁰ For example the conflicts between the Northern League and its allies – Forza Italia and Alleanza Nazionale: compare AN’s centralising position and the League’s localist position.

⁴⁴¹ Rebuffa (1996, p. 156)

transitioned to a mixed majoritarian system⁴⁴² – but the entire institutional setup. Rebuffa talks of a ‘diffuse’ proportional system found across all elective organs: local government, but also other political governing bodies including constitutionally relevant bodies⁴⁴³. In chapter 5, for example, I will discuss the judiciary’s governing body – the Higher Council – partly staffed by lay members, who are elected by parliament to represent ‘the majority and opposition in government in a proportional way’⁴⁴⁴. Rebuffa also includes *lottizzazione* as further expression of Italy’s diffuse proportionality, insofar as it entails the subdivision of public posts to mirror the weight of different Italian political forces. Gianfranco Pasquino uses the term ‘proportional’, as Rebuffa does, to describe a general trait of the Italian political system. Crucially for my hypothesis, Pasquino also characterizes Italian democracy as a ‘proportionalistic, conflictual democracy’⁴⁴⁵, where conflict is incorporated by Italy’s ‘proportionalism’ – proportional representation within parliament, but also the proportional division of spoils⁴⁴⁶.

Italy’s ‘proportionalism’ is then important if we consider Lacey’s argument on how PR systems, and their ‘negotiation and consensus’, affect policy-making, and indeed on how PR may operate differently within different national systems⁴⁴⁷. The presence of more extensive ‘PR-type’ mechanisms throughout Italian institutions suggests a number of things. Firstly that power is diffuse in Italy – within its political system and institutions⁴⁴⁸ – and that this diffusion of power is manifest in the fragmentation of interests and their access to decision-making. Secondly, as a consequence of the diffusion of power, Italian institutions have internalized conflict and fragmentation. As I will discuss below, extensive requirements for consensus have produced some policy stagnation, where policy change occurs slowly, incrementally, and not always as planned⁴⁴⁹. This slow, negotiated change has, at times, had to give way to more immediate reform when policy problems that have come to a head require short-term solutions⁴⁵⁰.

Political conflict emerges as crucial to my analysis of the pressures brought to bear on Italian policies and decision-making, including those that influence penal pressures. In my discussion

⁴⁴² Italy shifted to a mixed plurality system with 75% of seats in both senate and chamber of deputies allocated by first-past-the-post and the remaining 25% by PR. A 1991 referendum also abolished the preference vote: Cotta and Verzichelli (2007, pp. 76-77)

⁴⁴³ Rebuffa (1996, p. 156)

⁴⁴⁴ Cotta and Verzichelli (2007, p. 241)

⁴⁴⁵ Pasquino (2002, p. 21)

⁴⁴⁶ *Ibid*, p. 20

⁴⁴⁷ Lacey (2012, pp. 216-234)

⁴⁴⁸ Lange and Regini use judicial review of legislation as an example ((1989) 2010, p. 257). See also Chapter 5.

⁴⁴⁹ Change may be more streamlined at the local level: Trigilia and Burrioni (2009)

⁴⁵⁰ Note similarity with amnesties (see Chapter 2)

of Italian penalty, politics are then important at a second level: they allow us to understand Italian punitiveness and moderation by illuminating the purchase and role of criminal law in Italy. They do so by drawing our attention to the political relationship between Italian state and citizens, interrogating the claims made by the state through its law, and the purchase of state law amongst Italian citizens. Here, as with the political constraints on the economy, one crucial aspect of Italian politics is their highly conflictual nature. I have described how conflict occurs at a variety of levels: between different parties; between factions within parties; between coalition partners. It also occurs between different ideologies, between state and citizen, between levels of allegiance (to state/to private interests). Crucially, the different conflicts are incorporated into the highly permeable institutional structure. Aside from the effects on policy formation, this situation has a general impact upon 'Italy' where the latter is conceived of as a unitary project including, I argue, formulation of and allegiance to the law. Salvati describes the Italian situation as one in which 'contrasts in [political opinion]' have not been reconciled within a 'collective project [...] common in its general traits' yet capable of containing 'different ideal and cultural orientations'⁴⁵¹. This results, he argues, from defects in Italian political culture and political institutions, such that political conflict is very rarely 'useful and progressive'⁴⁵² but is divisive and immobilizing. Arguing from the political economic perspective Molina and Rhodes echo this analysis, describing Italy as possessing a 'high degree of interest fragmentation' and high state permeability to vested interest demands. The combination of these factors impedes the creation of (national) collective goods⁴⁵³.

In sum, from an analysis of its political system, power and interest groups, Italy can be conceived of as organized around a 'conflictual political paradigm'⁴⁵⁴ composed of different political groupings that exist at various different levels (e.g. parties but also kinship networks, or political clienteles) and which compete for allegiance. On the basis of an analysis of Italy's institutional structure and political history, I now formulate the following theoretical hypothesis on Italian penalty: each level of conflict produces different penal pressures in favour of penal exclusion or penal repression, by affecting policies that directly or indirectly affect penalty – economic and social reforms, but also criminal justice policy. The conflict is diffuse – a constant negotiation and renegotiation between interest/political groups – and it produces variable penal pressures which are reflected in Italian prison rates, oscillating between repression and leniency. Politics in Italy are also characterised by various dualisms, tensions set up by contradictory structural dynamics and contradictory interests. These

⁴⁵¹ Salvati (2000, p. 112)

⁴⁵² *Ibid.*

⁴⁵³ Della Porta (1996); Molina and Rhodes (2007, p. 231); Regini (1997, p. 107)

⁴⁵⁴ This is Pavarini's expression, adapted to my analysis (1994, p. 52)

include the dualism between centre and periphery; or between private and public realms; or crucially between formal and informal social control. These dualisms are particularly significant in that they help us see if, and when, the criminal law will be the preferred tool for the resolution of social conflict.

II. Politics, Penalty and the Political Economy

i. Political conflict and the political economy

Political-economic analyses of punishment contend that our explanations of punitiveness and incarceration should focus on changes in the political economy. This is true even where the political economy itself is instrumental in shaping a primarily cultural ‘environment’, which in turn makes for escalating punitiveness. Referring again to Garland, we see that changes in the welfare state and its accompanying ‘solidarity project’⁴⁵⁵ play an important role in explaining both increasing socio-economic exclusion and a decreasing interest in the rehabilitation of offenders⁴⁵⁶. In De Giorgi’s more structural thesis it is the changing nature of Western systems of production and labour relations that has produced a ‘surplus’ to be contained by incarceration. Lacey’s differentiated political-economic analysis of punishment has then refined such broad explanations by linking varieties of capitalisms, and their different institutional arrangements, to their capacity to re-integrate deviants (Chapter 1).

To summarise: CMEs ‘[function] primarily in terms of long-term relationships and stable structures of investment [including] in education and training’⁴⁵⁷. They are premised on incorporation of a ‘wide range of social groups and institutions into a highly co-ordinated governmental structure’⁴⁵⁸ in which decision-making occurs mainly by consensus and negotiation⁴⁵⁹. The latter are stimulated by the coalition politics typical of CMEs. CMEs have experienced lower levels of economic disparity compared to LMEs⁴⁶⁰, and possess greater incentives to reintegrate individuals into economy and society, for example in cases of unemployment. This has meant that CMEs have also produced ‘other things being equal [...] incentives for [...] a relatively inclusionary criminal justice system’⁴⁶¹, a tendency broken only in relation to ‘outsider’ migrants⁴⁶².

⁴⁵⁵ Garland (2001, p. 199)

⁴⁵⁶ See chapter 1.

⁴⁵⁷ Lacey (2008, p. 58)

⁴⁵⁸ *Ibid.*

⁴⁵⁹ *Ibid.*, p. 65

⁴⁶⁰ *Ibid.*, p. 79

⁴⁶¹ *Ibid.*, p. 58

⁴⁶² *Ibid.*, p. 148

By contrast, the economy of LMEs is premised on ‘flexibility and innovation’ and they thus ‘depend [much less] on the sort of co-ordinating institutions [...] needed to sustain long-term economic and social relations’ in CMEs⁴⁶³. LMEs have tended to experience both high income disparities⁴⁶⁴ and high levels of ‘surplus unskilled labour’⁴⁶⁵. In LMEs, which often possess majoritarian electoral systems, decision-making is also less constrained by coalition politics than it is in CMEs, and is more influenced by ‘floating voters’ who have increasingly been swayed by ‘law and order’ issues⁴⁶⁶. This has increased the electoral appeal of ‘harsh, exclusionary criminal justice’ that, because of LMEs’ economic organisation, also bears lower costs than it would in CMEs⁴⁶⁷. The outcome has been more volatile and comparatively more exclusionary penal policy.

The question to ask is how the Italian political economy has affected its differential punitiveness; and whether this correlation coincides with any of the models proposed by Garland, De Giorgi and Lacey. The simple answer to the second question is that these models *do not* describe Italy satisfactorily. I have argued that Garland and De Giorgi’s models operate at too macroscopic a level to account for Italian specificities. The two varieties of capitalism models⁴⁶⁸ are also incapable of capturing the Italian political economy, as the latter is neither a liberal market economy nor a co-ordinated market economy. In order to classify the nation’s political economic characteristics, the literature has had to search ‘beyond varieties of capitalism’⁴⁶⁹. Italy has been classed as a ‘mixed-market’ economy (MME). Italy is ‘mixed’ in this classification because it presents a ‘high degree of institutional incoherence’⁴⁷⁰. It is situated between the LME and CME models, and possesses elements of both. It also possesses elements that are best analysed in terms of ‘Southern European’ countries⁴⁷¹ characterised, alongside ‘Europe’s Mediterranean MMEs’, as:

‘[...] more fragmented than either LMEs or CMEs by large/small firm, public-private and territorial divides. They [...] contain different logics of coordination and forms of actor interaction, making it difficult to talk of one national production model with a single form of comparative advantage. These cleavages underpin two [...] features of

⁴⁶³ *Ibid.*, pp. 58-59

⁴⁶⁴ *Ibid.*, pp. 79-81

⁴⁶⁵ *Ibid.*, pp. 58-59

⁴⁶⁶ *Ibid.*, pp. 66-71

⁴⁶⁷ *Ibid.*, pp. 58-59

⁴⁶⁸ Hall and Soskice (2001)

⁴⁶⁹ Hancké, Rhodes, and Thatcher (2007)

⁴⁷⁰ Molina and Rhodes (2007, pp. 223-252)

⁴⁷¹ Ferrera (1996)

these MMEs: the organizational fragmentation and politicization of interest associations and the greater role of the state as a regulator and producer of goods⁴⁷².

‘Political power’ is a crucial strategic asset in this scenario⁴⁷³, where fragmentation reduces the mechanisms for producing national-level collective goods, and where the state is permeable to vested interest⁴⁷⁴. Political power becomes the means to access channels of decision-making and impose ‘formal or informal vetoes’ upon the process⁴⁷⁵. Certain features of the Italian political setup enhance this tendency, for example proportional representation and the centrality of Italian political parties, discussed further in the next section.

Over the course of the last few decades attempts at reform have been made in Italy (more or less explicitly) that would have pushed it closer to either a CME or an LME model: no single market model has emerged from these reforms⁴⁷⁶. What we have witnessed in Italy, particularly during the 1990s, has been the birth of novel forms of ‘coordination’. These reflect the relative political and organizational strength of socio-economic actors (such as unions and employers), and their capacity to form coalitions⁴⁷⁷. These new forms of coordination depart from the more integrated mechanisms of CME coordination, given the multiplicity of veto points in the Italian system, and a lower cohesion between socio-economic actors and interest groups. Examples of Italy’s coordination mechanisms include new mechanisms of concertation (negotiation between social partners, to reach a common agreement) that have evolved at the firm level, that is at a lower, local level than national concertation⁴⁷⁸. They also include forms of cooperation through which smaller Italian enterprises have expanded and adapted to external pressures, including the ‘global crisis’ of the 1970s and increasing international competition over manufactured goods.

These pressures have led to what Molina and Rhodes call a ‘recalibration of production and protection systems’: changes in the labour market and in labour relations, as well as welfare reform in Italy. These changes have been shaped by political conflict and political exchange, with no single interest group emerging as predominant. Neither the employers – beset by the differences between small, medium and large concerns⁴⁷⁹ – nor the unions – not always acting in concert – have been strong enough to gain the upper hand. But they have both been involved in the negotiations through which Italy has adapted to changing

⁴⁷² Molina and Rhodes (2007, p. 225)

⁴⁷³ *Ibid.*, p. 228

⁴⁷⁴ *Ibid.*

⁴⁷⁵ *Ibid.*, p. 230

⁴⁷⁶ For a summary of differences between CMEs, LMEs and MMEs see Molina and Rhodes: *ibid.*, p. 229

⁴⁷⁷ *Ibid.*, p. 232

⁴⁷⁸ See Contarino (1995); Trigilia and Burroni (2009)

⁴⁷⁹ Molina and Rhodes (2007, p. 241)

economic conditions. These negotiations reflect both the fragmentation of the Italian context and the interdependence of its socio-economic actors. These same features have also meant that change has been slower and less drastic than in other countries: in relation to, for example, the liberalisation of employment relations. This aspect should be borne in mind as I investigate Italy's supposed transition into global 'post-Fordism'. Fragmentation and interdependence also explain Italy's mixed status: in Italy cooperation is more chaotic than in CMEs yet it exists; and thus has also meant that at least up until the year 2000, Italy had not experienced unbridled labour market reform associated with liberal market regimes.

One additional feature of Italy as MME is the important role the state still plays within the economy. It does so directly, through central provision of assistance such as unemployment benefits or by being a third party in collective bargaining agreements⁴⁸⁰. It also plays an indirect role where its absence stimulates alternative forms of regulation, or where state regulations are circumvented in favour of more 'voluntaristic, ad hoc solutions [...] by subjects of civil society in order to fill the gaps created by the weakness of the institutions'⁴⁸¹. Examples of the more 'ad hoc' forms of regulations include the circumvention of formal hiring practices (even in large firms) in favour of hiring through clientelistic mechanisms or mechanisms premised on family connections⁴⁸². This is one illustration of what Regini has called the discrepancy between 'overt' and 'covert' regulation of the Italian political economy⁴⁸³. The discrepancy mirrors a more general feature of normativity in Italy, where the state is present as the purveyor of rules that are later re-negotiated in their application⁴⁸⁴. Voluntaristic regulation will also be found in enterprises that employ less than fifteen workers, as they fall below the system of rules that regulates labour conditions and labour relations, established by the 1970s Worker's Statute.

To sum up: as a mixed market economy, Italy sits between the two varieties of capitalism on which Lacey builds. Italy does not display the 'liberal' character of LMEs: the political and economic structures that have allowed a liberalization of the labour market, a flexibilisation of labour, a 'rolling back' of welfare entitlements, effected by executives whose policy making is relatively unconstrained by the need for consensus and negotiation. Yet Italy is also not 'co-ordinated' as CMEs are, where co-ordination signifies integration into a system that functions according to positive feedback mechanisms (complementarities) that cumulatively

⁴⁸⁰ *Ibid.*, p. 246

⁴⁸¹ Regini (1997, p. 107)

⁴⁸² Reyneri ((1989) 2010, p. 132)

⁴⁸³ *Ibid.*, p. 106

⁴⁸⁴ The distinction between 'law in the books' and 'law in action' exists in all countries but, for the reasons discussed in Chapters 3 and 4, there is evidence that it is particularly acute in Italy.

and coherently strengthen the whole institutional system⁴⁸⁵. The Italian system is, to some extent, premised on co-operation, but is comparatively chaotic. Thus policy changes are constrained, but cannot necessarily be understood in terms of coherence and complementarity⁴⁸⁶. Rather, Italy demonstrates fragmentation and (sometimes reluctant) interdependence.

Despite its ‘mixed’ status and differences compared to CMEs and LMEs, I suggest that an institutional analysis of the Italian political economy is useful to understand its penalty. By adapting Lacey’s analysis, I build a framework through which to interpret and systematise Italian penalty. I argue that Italy’s particular political economic setup, though less integrated than the LME/CME models, will have influenced its penalty by producing incentive structures that either resist or allow penal expansion. These incentive structures can be understood by isolating those elements of the Italian political economy most relevant to its penalty and analysing them in terms of re-integrative and exclusionary penal pressures. As I have argued before, the ‘mixed, ‘hybrid’, ‘regional’ nature of the Italian political economy means, however, that an organising principle for Italian penalty cannot be sought in the political economy alone. Rather, it is by reference to political variables and dynamics that we can hope to systematise Italian penalty. The following section illustrates precisely this point by investigating how Italy’s post-war politics have affected the shape of its political economy. It focuses particularly on the role of political parties in this process. I then investigate the Italian political economy in depth, focusing on the Italian welfare state and the more general features of the labour market between 1970 and 2000. In both sections I analyse the fragmented nature of the Italian political economy and the pervasive private/public dualism it displays. I also compare Italy to Garland’s claims on the penal effects of the changing nature of welfare and to De Giorgi’s claims on the penal effects of the changing nature of labour. Using Lacey’s framework, I then translate this analysis to the penal level by interrogating the reintegrative/exclusionary pressures that follow from Italian welfare and production mechanisms.

ii. Italian parties – ‘partitocrazia’ and conflict as constraint

In order to understand Italy’s political-economic and institutional shape, we have to look in more detail to Italian politics and their development after the Second World War. This allows

⁴⁸⁵ Molina and Rhodes (2007, p. 226)

⁴⁸⁶ Trigilia and Burroni argue that searching for complementarities leads us to overlook the ‘tensions and contradictions between different institutions at national level, but also between centre and periphery [in Italy]’ (2009, p. 631)

us to see how political conflict has constrained political-economic evolution⁴⁸⁷, with a view to understanding its penal repercussions. I start with the formation of the Italian Republic. The Republic, established in 1946, is described as a ‘partitocrazia’, which loosely translates as ‘partyocracy’⁴⁸⁸. Partyocracy has been characterised as the take over of the post-war Italian state by political parties; the systematic colonisation of the state-machine by the parties⁴⁸⁹; the ubiquity of (clannish) political parties within the Italian state⁴⁹⁰. Partyocracy also operated through so-called *lottizzazione* (see above). As the various characterisations of partyocracy indicate, in the First Italian Republic, parties were the primary players at all levels of Italian life, permeating the greater part of its institutions, since the nation was composed of often competing, political sub-groups. According to Cotta and Verzichelli, this phenomenon finds its roots in the early formation of the Italian Republic when, between 1943 and 1945, parties gained control over the process of state reconstruction⁴⁹¹. Political parties were able to occupy such a significant position because of the Italian state’s weakness following the ‘breakdown of the Fascist regime’, Italy’s ‘occupation by Allied forces in the south’ and ‘the subsequent collapse of the state [...] its central administration and army’. In this situation, it was political parties that took charge of rebuilding the Italian state, ‘progressively gaining control of the process that would lead’ to the election of a Constituent Assembly, and to the Italian Constitution itself⁴⁹². After 1946 parties also came to control what Pasquino terms ‘[Italy’s] purse strings’ including the allocation of jobs and other economic resources⁴⁹³. This was also due to state control of economic sectors such as Italy’s ‘large industrial holdings’⁴⁹⁴.

Parties’ prominence was magnified, as it became apparent that the Italian state was increasingly likely to face legislative immobility⁴⁹⁵. Immobility followed partly from an institutional structure chosen to ensure that ‘no government organ prevailed over the rest’⁴⁹⁶ and to reduce opportunities for the centralisation of power⁴⁹⁷. This created a ‘weak

⁴⁸⁷ ‘[The] role of political variables in explaining economic outcomes [...] [is] singularly important [in Italy] when compared to other [national] accounts of economic evolution’: Salvati (2000, p. vi My translation.)

⁴⁸⁸ Cotta and Verzichelli (2007, p. 35-66)

Pizzorno prefers to talk of party ‘occupation’ of the Italian state during the 1980s. I use the term *partyocracy* but my analysis encompasses the dynamics described by Pizzorno (1997, pp. 339-340).

⁴⁸⁹ Bull and Rhodes (2009, p. 2)

⁴⁹⁰ *Ibid.*

⁴⁹¹ Cotta and Verzichelli (2007, p. 41)

⁴⁹² *Ibid.*

⁴⁹³ Pasquino (2002, p. 24)

⁴⁹⁴ Such as the oil and gas company ENI and the electric utility company Enel: Cotta and Verzichelli (2007, p. 48)

⁴⁹⁵ See chapter 5 and ‘judicial surrogacy’.

⁴⁹⁶ Della Porta (1996, p. 114 My translation.)

⁴⁹⁷ Lange and Regini ((1989) 2010, p. 257)

parliament, a weak government and a weak head of state⁴⁹⁸. Parties thus became primary intermediaries between state and civil society⁴⁹⁹ and the ‘main actors for the aggregation of social interests’⁵⁰⁰. This structure allowed the diffusion of political conflict throughout the Italian institutions: conflict passed into the institutional structure as parties and their interests came to colonise the very same.

The legislative immobility that catalysed (and was then entrenched by) the development of Italy’s partyocracy, can be linked to the early formation of the post-war state. As Cotta and Verzichelli note, the Italian Constitution of 1948 was *de facto* created by ‘consensus’ between ‘the largest parties’⁵⁰¹. However, the dominant parties of the time could not maintain this level of consensus in the practice of Italian politics. This was true particularly of the two great players within the First Republic: the Christian Democrats (*Democrazia Cristiana* or DC) and the Communist Party (*Partito Comunista Italiano* or PCI). The Christian Democracy was post-war Italy’s Catholic and anti-Communist party. They were formally pitched against the PCI, which, despite its large following⁵⁰², was never within governing coalitions⁵⁰³. This was partially a result of the DC’s own manoeuvring: the Christian Democrats’ anti-Communism ‘[excluded the PCI] *a priori* from [any] opening to the left’, leaving the PCI constrained ‘into the somewhat sterile role of semi-permanent opposition’⁵⁰⁴. This formally constituted Italian politics around a broad ideological fault line that, according to Salvati, severely impaired the evolution of Italian economic policy⁵⁰⁵. In particular, Salvati argues, the ideological ‘fracture’ prevented the evolution of consensus in matters of economic policy that would have brought Italy closer to its ‘Germanic and Nordic’ European counterparts⁵⁰⁶. The political conflict ensuing from this ‘fracture’ was further compounded by enmity *within* the left: particularly between the PCI and the Socialist Party (PSI)⁵⁰⁷.

This is not to say that there was no contact between PCI and DC during the First Republic. Pizzorno, amongst others, has noted that covert cooperation occurred among Italian

⁴⁹⁸ Della Porta (1996, p. 114 My translation.)

⁴⁹⁹ Selmini (2011, p. 175)

⁵⁰⁰ Ferrera (1996, p. 30)

See, however, Lange and Regini’s comment that, with the possible exception of the PCI, Italian political parties were so factionalised that they acted as aggregators *and* disaggregators of social interests: ((1989) 2010, p. 256)

⁵⁰¹ Cotta and Verzichelli (2007, p. 22)

⁵⁰² For many years the PCI was the second largest party in Italy.

⁵⁰³ Coalitions were necessary under PR (and remained necessary after the 1993 electoral reform).

⁵⁰⁴ Ginsborg (1990, p. 291); though note its influence at the level of local government.

⁵⁰⁵ Salvati (2000, p. vii and throughout.)

⁵⁰⁶ Such as Germany and Holland: *ibid.*, p. 63. See also Salvati (1984)

⁵⁰⁷ Salvati (2000, p. 20)

parties – so-called *consociativismo*⁵⁰⁸ – with a *de facto* convergence between governing forces and opposition⁵⁰⁹. A similar point is made by Lange and Regini, who note the apparent contrast between the ‘conflictual and polarized vision of Italian politics’, and the ‘relatively stable, distributive cooperation’ that occurred between parties⁵¹⁰. This points to an additional dualism in Italian politics between formal conflict and actual cooperation. Lange and Regini argue that the two sides of this dualism are, in fact, tightly linked. Cooperative games acted to grease a system that would otherwise have faced decisional stalemate⁵¹¹ had polarization been extreme and untempered. If decisional stalemate was avoided, however, what remained was institutional change constrained both by the formal division of Italian politics, *and* by the deals that occurred behind the scenes. The result was relative policy stagnation, and policies more akin to the ‘crazy quilt’ described by Regina and Lange, reflecting the push and pull between political forces rather than policies following clear political programmes.

Only in the 1990s did this set up change, first and foremost with the demise of the existing political parties. The PCI was dissolved after the collapse of the Soviet Union, and the PSI and DC swept away by their involvement in the corruption scandal of *Tangentopoli*. The electoral reforms of 1991 and 1993 also helped to alter the scenario since the new mixed-majoritarian system increasingly centred Italian politics around two large political coalitions (centre-left and centre-right). These changes ushered in the ‘Second Republic’ with ‘new’ political players but analogous levels of conflict. The Second Republic is no longer a *partyocracy* in the same terms as the First Republic: as Pasquino notes, the parties of the First Republic are quite different from the parties of the Second Republic⁵¹². This is because old parties changed names and identities and new parties came to life⁵¹³. The new parties differed from the old terms of their organisation, of the size of their membership, the territory they covered, and the discipline they displayed⁵¹⁴. They were smaller, had a reduced (and less capillary) presence on national territory and were, overall, less overtly ideological. The parties of the Second Republic were also no longer *mass* parties and were unable to command the same allegiance as their predecessors. They also found themselves relying primarily on state

⁵⁰⁸ This is defined, with reference to Italian politics, as a method of governing whereby governing parties and opposition parties converge to allow the latter some influence over political choices. The term has been used in a derogatory fashion to denote the subdivision of political power (*lottizzazione*) through agreements between major political forces including opposition parties: "Consociativismo," <http://www.treccani.it/vocabolario/consociativismo/> Accessed July 2012. My translation

⁵⁰⁹ Ideological conflict was then limited to areas of Italian political life that did not endanger the distribution of state resources: Pizzorno (1992, p. 60)

⁵¹⁰ Lange and Regini ((1989) 2010, p. 23)

⁵¹¹ *Ibid.*

⁵¹² Pasquino (2002); see also Cotta and Verzichelli (2007, pp. 35-66)

⁵¹³ Cotta and Verzichelli (2007, p. 55)

⁵¹⁴ Cotta and Verzichelli (2007, p. 64 see also 41); Pasquino (2002, p. 157)

contributions as their main source of income⁵¹⁵. I would add that, for reasons internal to Italian politics, but also because of the international developments that followed from the end of the cold war, political parties also changed ideologically. The cold war had contributed to structure Italian politics around anti-communism (represented primarily by the DC) and communism: this was no longer a necessary arrangement. The viability and perhaps appeal of the ideologies that had accompanied this set-up was also decreasing.

However, it is also true to say that the Second Republic shares a number of features with the First. Elements of continuity can be traced, relevant to my analysis of political conflict, as a constraint on Italian evolution. Firstly, we find that the Italian parties of the Second Republic were as fragmented, if not more so, than their predecessors⁵¹⁶. This has also meant that, though the system became formally bipolar in structure⁵¹⁷, governments were formed by multiparty coalitions⁵¹⁸. Much like the First Republic, the Second Republic thus experienced the constraints on government action imposed (for better or worse) by intra-coalition negotiations⁵¹⁹. With the birth of new splinter parties, and with the passing of Italy's ideological split, particularisms have also remained within the Second Republic: as new parties engage in 'a high level of activities [...] directed mainly at reaffirming their [now fuzzy] identities [...] and [at] marking their territory'⁵²⁰. This has also been possible because parties have managed to maintain some control over 'the power centres of the state', both cultural and political (national television) and economic (industrial holdings)⁵²¹. Incentives still exist for parties to continue their attempts to 'occupy' the state, leaving the general logic of the partyocracy spoils system intact⁵²². The Second Republic is perhaps a 'partyocracy without ideology' with many of the 'partyocratic' mechanisms intact, but without the dominating narratives of the First Republic.

Cumulatively, the elements of continuity between First and Second Republics have meant that Italian politics is still beset by fragmentation and conflict, with political parties as their vectors, and an institutional structure with numerous entry points for fragmented interests to influence policy-making. Relative immobility has ensued, in both Republics, because the capillary conflict that characterised Italian politics was ensconced within a consensus-oriented

⁵¹⁵ Cotta and Verzichelli (2007, p. 65)

⁵¹⁶ *Ibid.*; Pasquino (2002, p. 159)

⁵¹⁷ Compared to the First Republic when politics were centred around the DC 'and no alternation was possible': (Cotta & Verzichelli, 2007, p. 57)

⁵¹⁸ *Ibid.*, p. 55

⁵¹⁹ See Pasquino (2002, p. 160)

⁵²⁰ Cotta and Verzichelli (2007, p. 62)

⁵²¹ *Ibid.*, p. 48

⁵²² Pasquino (quoting Ilvo Diamanti) describes this as a '*partitino-crazia*', a partyocracy of small (not mass) parties (2002, p. 158)

system with a large number of veto-points⁵²³. It was a system that required consensus and in which (formal) consensus was not forthcoming. The type of reform possible in this context is aptly summarised by Ilvo Diamanti in his discussion of change and continuity in 1990s' Italian politics, when he refers to Italy as (roughly) an 'unintentional republic' ('*preterintenzionale*')⁵²⁴. Diamanti uses these terms to indicate the mode of political reform in Italy so different from what was envisaged at the Republic's inception, because it became waylaid by 'the unexpected effects of political action'⁵²⁵. At the legislative level, immobility was then enhanced by governments that could rarely command a very cohesive majority in Parliament', and consequently lacked 'a strong control of the parliamentary agenda'⁵²⁶; and by a series of short lived executives whose reform proposals were often interrupted by the frequent change of guard⁵²⁷. Cassese tellingly notes that 'during the one hundred and fifty years of its history as a unified nation, Italy has had 121 governments, with an average life of just over one year'⁵²⁸. During the First Republic, this instability was to some degree countered by the fundamental continuity of political personnel, and by the DC's domination of national governments between the end of the war and 1994. Yet it broke the momentum of political reform, where 'continuity at the level of executive action was interrupted' even though the same men returned to govern⁵²⁹. Reform was therefore not linear in Italy⁵³⁰. Ferrera, for example, looks to this political impasse as a reason why the Italian welfare state remained caught in the dualism between centralisation and fragmentation. Cassese (though not referring specifically to the welfare state) reminds us that government instability, affecting policy coherence, was due also to the persisting 'territorial dimension' to Italian politics, that is, its

⁵²³ The inevitable path dependence of institutional structures and the large number of veto points in [Italy's political system] ruled out the rapid changes [...] only ever really seen in [...] the strongest majoritarian democracies': Bull and Rhodes (2009, p. 3); also Pizzorno (1992, p. 56)

⁵²⁴ '*Preterintenzionale*' does not strictly mean unintentional. Rather it refers (in a rough linguistic and legal translation) to cases of constructive liability. 'Omicidio preterintenzionale' is thus akin to unlawful and dangerous act manslaughter – where the defendant may not intend to kill, but do some lesser harm, though death nonetheless follows, as does criminal liability for the death. I have chosen to translate the term as 'unintentional' not just for simplicity's sake, but also to avoid the added negative connotation of the term, i.e., the notion that the harm procured is greater than the harm intended. Indeed the 'waylaying' of planned reform by Italy's political dynamics cannot be said to have always been negative: much will have depended on the nature of the reform intended and waylaid. See: "Omicidio" [http://www.treccani.it/enciclopedia/omicidio_\(Enciclopedia-Italiana\)/](http://www.treccani.it/enciclopedia/omicidio_(Enciclopedia-Italiana)/). Accessed July 2012.

⁵²⁵ Diamanti (2001, pp. 4-5); also Cassese (2011, p. 110) Lange and Regini ((1989) 2010, p. 12, p. 267)

⁵²⁶ Cotta and Verzichelli (2007, p. 130)

⁵²⁷ Cotta and Verzichelli talk of 'high rate of government instability: *ibid.*, p. 24

⁵²⁸ Cassese (2011, p. 88 My translation.)

⁵²⁹ *Ibid.*

⁵³⁰ Molina and Rhodes (2007, pp. 235-236)

localism and regionalism⁵³¹. Moreover, if the political mobilisation that Italy experienced during the 1960s and 1970s did achieve some, albeit sectoral, change, the succeeding two decades of (1980-2000) unfolded as a period of ‘policy stagnation punctuated by sporadic consensus based reform’⁵³². Amidst this stagnation, political parties were still primary purveyors of political interests⁵³³.

In sum, Italy between 1970 and 2000 was a nation dominated by politics and political conflict⁵³⁴; in which the possibility for economic planning was constrained by conflict; and in which conflict was incorporated into the institutional system via party-permeation of the state. The evolution of the nation, beset by political volatility, created and entrenched existing political fragmentation. The fragmentation of welfare entitlements provides one illustrative example.

iii. The Italian political economy: the welfare system

Beginning first with a more detailed account of the Italian political economy, we see that it is state-driven, with a ‘social transfer-oriented welfare state’⁵³⁵ limited by sector and territory⁵³⁶. The political economy is divided along a number of lines, despite existing pressures in favour of centralisation. This structure is mirrored in Italy’s welfare state, which is at one corporatist *and* fragmented⁵³⁷ and thus ‘[maps] imperfectly on to the standard liberal versus social democratic/ [...] continental division’⁵³⁸. Italy provides welfare entitlements to some, and in a manner that mimics what Ferrera calls the ‘Bismarckian’ continental models⁵³⁹. However the Italian welfare state also excludes others from its provisions, and does so along definite fracture lines. Molina and Rhodes note, for example, how ‘southern European welfare systems [such as Italy] typically have less social protection and more employment protection’⁵⁴⁰. Further divisions include those between large firms and small firms, with

⁵³¹ Cassese (2011, p. 89).

‘Localism’ is visible in the regional dimension to national political sub-cultures, and is explicit feature of the Northern League’s politics. Regional differences also characterise the Italian political economy. See Chapter 1, Appendix.

⁵³² Molina and Rhodes (2007, p. 154)

⁵³³ Pasquino ((1989) 2010)

⁵³⁴ Ginsborg (2001b, p. xi)

⁵³⁵ Hancké, Rhodes, and Thatcher (2007b, p. 26)

⁵³⁶ Mingione (1995)

⁵³⁷ Ferrera (1996, p. 19)

⁵³⁸ Molina and Rhodes (2007, p. 225)

⁵³⁹ Ferrera (1996, p. 19); *ibid.*

⁵⁴⁰ Molina and Rhodes (2007, p. 226)

regulation and welfare entitlements concentrated in large firms⁵⁴¹; but also regional divisions that mirror the territorial distribution of different economic activities/sectors and the distribution of different sized firms. Ferrera has described the Italian welfare system as ‘almost “polarized”’⁵⁴² the most visible differentiation being that between a ‘core sector of the labour market force located within the [...] regular market, and those located in irregular or less regulated sectors: the latter are entitled to ‘weak subsidization’ only⁵⁴³. It is here, where there are ‘weak’ entitlements, that additional support structures such as the family act to supplement welfare deficits⁵⁴⁴. The family typically allows a sharing of protection, moving from one member ‘anchored’ in the core labour sectors, to the remaining members⁵⁴⁵. Alternatively, in the post-war years, political clientelism has provided a measure of *de facto* re-distribution of employment and welfare support: where ‘the emergence [...] of a “clientelistic market”’ ensured ‘state transfers to supplement inadequate work income [in exchange] for party support’⁵⁴⁶. This is a system that sports a ‘formal resemblance’ to ‘universalistic welfare states’ but in fact displays a ‘particularistic’ division of resources⁵⁴⁷.

Part of the fragmentation displayed by Italian welfare can be explained by reference to the territorial segmentation of Italy’s political economy, which is so acute that it has prompted authors such as Carlo Trigilia to talk of Italy as an example of ‘regionalised capitalism’, defying both the CME/LME model and Italy’s classification as an MME⁵⁴⁸. The regional subdivision of Italy has given rise to much debate about different ways of conceptualising this division⁵⁴⁹. For the purposes of this chapter I adopt what has been an influential analysis of Italy, first formulated by Arnaldo Bagnasco. Bagnasco describes the nation as being divided into ‘three Italies’⁵⁵⁰: the northwest characterised by the highest level of large scale industrialisation; the northeast and centre with their small-scale kinship based firms; the south once rural and now the source of large numbers of tertiary sector workers⁵⁵¹. The division between these ‘Italies’ is, of course, not carved in stone; and the First and Third Italy have drawn closer in more recent decades. However it remains true to say that the Italian political economy is divided. This, I argue, also influences the viability and distribution of re-integrative pressures in Italian penalty.

⁵⁴¹ For a historical overview of Italian economic division see Ginsborg (2001b, pp. 13-29).

⁵⁴² Ferrera (1996, p. 19)

⁵⁴³ *Ibid.*

⁵⁴⁴ *Ibid.*, p. 21

⁵⁴⁵ *Ibid.*, p. 25

⁵⁴⁶ *Ibid.*

⁵⁴⁷ *Ibid.*

⁵⁴⁸ Trigilia (1997, p. 53); Trigilia and Burrioni (2009, p. 637)

⁵⁴⁹ See Trigilia (1997); Trigilia and Burrioni (2009)

⁵⁵⁰ Bagnasco (1977)

⁵⁵¹ Cassese (1993, pp. 322-324)

We recall that the welfare state – changing over time and varying across contexts – plays an important role in Garland’s and Lacey’s accounts of contemporary punishment. There are only two examples of criminological literature that focuses on the correlation of punishment and welfare⁵⁵² (Chapter 1). At its most basic, this line of literature argues that the greater the welfare coverage, the lesser the likelihood of penal expansion; conversely, the lesser the welfare coverage, the greater the likelihood of penal expansion. In Garland’s schema, changes in the welfare state are thought to have brought parallel changes at the penal level: the rehabilitative logic that accompanied the welfare state receded as the welfare state shrank.

What of the Italian welfare state? What are its features and what are the incentives it creates for penal moderation or penal exclusion? I begin with Esping-Andersen’s tripartite categorisation of welfare states that allows for contextual variation even as it systematises this variation across welfare state ‘clusters’. In *The Three Worlds of Welfare Capitalism* Esping-Andersen divides existing welfare states into liberal, conservative corporatist and social-democratic regimes⁵⁵³. Italy is classified, alongside Austria, France and Germany as part of the corporatist traditions. As such it distributes social rights on the basis of status differentials, in particular, the position occupied within the labour market. As Cavadino and Dignan state, ‘the system is based on a hierarchical ordering of occupational groups’⁵⁵⁴. This partly reflects the fact that the corporatist model, with its compulsory state insurance⁵⁵⁵, is financed by tax contributions that are themselves anchored to individuals’ employment status⁵⁵⁶. In Italy, this reliance on contributions create a further fracture line within the welfare system: not just between those who are covered by state provisions and those who are not, but also between those who contribute to state finances through taxation, and those who do not. The former tend to include dependent workers in large private concerns, and public sector workers; the latter include the self-employed, and those working in Italy’s small and medium-sized concerns.

The corporatist welfare model is also characterised by a sharing of welfare responsibilities between the state and more traditional institutions such as the (in Italy, Catholic) Church and family⁵⁵⁷. This feature, as we have seen from Ferrera, acquires particular importance in Italy, as it has stimulated a ‘more traditional’ pattern of employment that presumes a single wage earner⁵⁵⁸. The state also assumes a residual role relative to the family: the state will not oust the family from its welfare role, and will only ‘interfere’ when

⁵⁵² Beckett and Western (2001a, 2001b); Cavadino and Dignan (2006, pp. 3-39); Garland (1990, 2001); Lacey (2008); (Wacquant, 2009)

⁵⁵³ Esping-Andersen (1990, pp. see 26-32)

⁵⁵⁴ Cavadino and Dignan (2006b, p. 17); Paci (2009, p. 287)

⁵⁵⁵ Esping-Andersen (1990, p. 23)

⁵⁵⁶ Paci (2009, p. 272)

⁵⁵⁷ Cavadino and Dignan (2006, p. 18); Esping-Andersen (1990, p. 27)

⁵⁵⁸ Cavadino and Dignan (2006, p. 18)

the family is unable to fulfil its function⁵⁵⁹. This persistence of traditional institutions contributes to the ‘overall philosophy and ethos of conservative corporatism’: ‘a communitarian one’, premised on the integration of ‘all citizens within the nation’⁵⁶⁰. Integration occurs via ‘individuals’ membership of interest groups and other social groupings’, which act as the link between individual and state⁵⁶¹. This membership of intermediate interest groups is in fact a crucial characteristic of Italian welfare, though it may not have bound Italians to the nation so much as to their specific interest groups. Here we find further examples of Italy’s ‘particularism’ and ‘fragmentation’ within the context of a contested nation-state.

This categorisation of Italy as a ‘conservative-corporatist’ welfare regime has been changed and refined over the years. Ferrera thus classifies Italy as a ‘Mediterranean’ or ‘southern European’ variant of the corporatist model. Massimo Paci characterizes Italy as a ‘mixed’ welfare model; a description that chimes with Molina and Rhodes’ account of the Italian political economy⁵⁶². The ‘mixed’ nature of the Italian welfare state is due, Paci argues, to the presence of a combination of (occasional) universalistic measures and more typically corporatist measures. Integral to Italian welfare are also ‘agencies’ that are ‘subsidiary to the State’ and on which the state relies for additional support⁵⁶³. These are the traditional institutions such as Church and family, though the extent of Italy’s reliance on the family may set it apart from northern European corporatist nations. I now look at examples of each feature – universal, corporatist, traditional – of the Italian welfare system.

One notable example of a universalistic measure is the 1978 National Health Service. At its outset the latter was universalistic insofar as it aimed to provide health care to all Italian citizens, though it has since been reformed with a delegation of functions to the private sector (see below). Other universalistic measures in Italy have included the so-called minimum pension (means tested and granted to those who do not have a right to a ‘work’ pension); free compulsory education; and inexpensive high school and university education⁵⁶⁴. Many of these features were introduced during the 1970s, partly under the impetus of the women’s movement and of the students’ movement. They represent, in Ascoli’s analysis, an uncharacteristic ‘bracket’ in a nation where welfare distribution and reform were otherwise heavily marked by a particularistic and clientelistic logic⁵⁶⁵.

⁵⁵⁹ *Ibid.*

⁵⁶⁰ *Ibid.*, p. 17

⁵⁶¹ *Ibid.*

⁵⁶² Molina and Rhodes (2007)

⁵⁶³ Paci (2009, p. 288)

⁵⁶⁴ Saraceno (1994, pp. 63-64)

⁵⁶⁵ Ascoli (1984, p. 40)

Notable examples of Italy's more 'typically' corporatist measures are work pensions and unemployment benefits, where the extent of coverage varies on the basis of individuals' occupational status⁵⁶⁶. The pension system was first introduced in 1968-9 and was further reformed in 1995⁵⁶⁷. Under its original provisions, workers' pensions were calculated on the basis of workers' remuneration and the number of years worked. After 1995, they were calculated on the basis of contributions paid by each worker, in principle adjusted to take into account demographic changes and changes in national GDP⁵⁶⁸. The 1995 reform is an example of persisting consensual reform in Italy, insofar as it was devised and implemented in concertation with Italian trade unions (see below). The unions have also softened the impact of the 'adjustment' to GDP and demographic trends⁵⁶⁹.

Alongside Italy's universalistic and corporatist measures we then find supplementary non-state forms of welfare provision, for example, the family. Paci also lists voluntary associations as complementary forms of support in Italy⁵⁷⁰: often but not exclusively religious⁵⁷¹. He further argues that the importance of these associations has grown over the decades, as the family unit has changed in Italy: 'particularly [its] more traditional [...] "extended" form' and especially 'in the centre-northern' regions⁵⁷². Despite such changes the family still remains an important unit of Italian welfare⁵⁷³, both in terms of its care function but also where it offers anchorage to state welfare provisions: 'access to social rights is granted through a family relationship (as a wife or a child) to someone having [a paid job and] work status'⁵⁷⁴. This makes the family the 'main redistributive and caring social agency in Italy'⁵⁷⁵ particularly in those regions of Italy where volunteer services are small and unsupported⁵⁷⁶.

An additional feature of the Italian welfare regime is the centrality of income transfers as a measure of social support, rather than the provision of services to citizens⁵⁷⁷. This is a particularly important aspect of welfare in Italy, given its links to clientelism and to direct welfare redistribution to achieve political consensus. Income transfers, unlike social services, are easier to distribute in a particularistic manner; they are also more susceptible to

⁵⁶⁶ Saraceno (1994, p. 64)

⁵⁶⁷ Paci (2009, p. 289)

⁵⁶⁸ *Ibid.*

⁵⁶⁹ *Ibid.*, p. 195

⁵⁷⁰ *Ibid.*, p. 288)

⁵⁷¹ Paci (1987, p. 281)

⁵⁷² Paci (2009, p. 288 My translation.)

⁵⁷³ Paci writes in 2009 – testifying to resilience of the family-unit as a political-economic entity.

⁵⁷⁴ Saraceno (1994, p. 63)

⁵⁷⁵ *Ibid.*, p. 68

⁵⁷⁶ *Ibid.*, p. 77

⁵⁷⁷ See: Ascoli (1984); Paci (1987, 2009); Saraceno (1994)

being used as ‘currency’ within a clientelistic exchange⁵⁷⁸. From Ascoli’s characterisation, we should also note how short-term political objectives play an important role in the evolution of Italian welfare. In his account of the history of Italian welfare, Ascoli repeatedly mentions the ‘use of social legislation’ as a means to manufacture political consensus, and increase the legitimacy of those in power⁵⁷⁹. This was a feature visible during fascist Italy as it was during republican Italy, and it is thought to have brought about ‘clientelistic dependency’ amongst Italian citizens, weakening civil society⁵⁸⁰.

It is in this political use of welfare that we can find a reason for the particularism of provisions in Italy. Similarly, fragmentation is rooted in the political use of ‘social legislation’ at a time when the social interests, whose consensus had to be attained, increased and multiplied after the Second World War⁵⁸¹. The 1950s and 1960s, for example, saw reforms geared to satisfy the growing middle classes, and in particular Italy’s self-employed workers⁵⁸². Here Ascoli (echoed by Paci) describes the growth of Italian welfare as an ‘incremental process’: responding to specific ‘pressures and problems’ rather than in the interest of a more general, unitary plan⁵⁸³. Note here the difference with the more decisive post-war welfare state settlement of Great Britain⁵⁸⁴. The ‘incremental’ growth of Italian welfare is significant because it represents a general tendency within the Italian system, in which reform is incremental and highly responsive to short-term political pressures. As such it mirrors the ‘volatile equilibrium’ that, I argue, characterises the Italian system, and is also reflected in its penal oscillation between leniency and punitiveness. Ascoli’s characterisation also emphasises the importance of politics and political conflict – here vying for political consensus, power, and control over resources – as an explanatory variable for accounts of Italy.

Analysing the Italian welfare state in terms of its impact on penalty, I would now argue a number of things. Firstly, that the ‘corporatist’ features in Italian welfare offer some protection against what Cavadino and Dignan call the ‘vicissitudes of unfettered market forces’⁵⁸⁵. Indeed so do the more universal features discussed above. Economic exclusion is kept at bay with methods of support built into the Italian welfare state, whether through the provision of (some) services, or the provision of income support. This in itself is likely to reduce exposure to criminal punishment where the latter derives from economic marginality.

⁵⁷⁸ Paci (2009, p. 276)

⁵⁷⁹ Ascoli (1984, p. especially 43)

⁵⁸⁰ See Saraceno (1994, p. 63)

⁵⁸¹ Ascoli (1984, p. 30)

⁵⁸² *Ibid.*, 20

⁵⁸³ *Ibid.*, pp. 31, 38

⁵⁸⁴ Esping-Andersen (1990, pp. 53-54)

⁵⁸⁵ Cavadino and Dignan (2006, p. 24)

In its more corporatist articulations, however, the support provided by Italian welfare is fragmented – divided according to occupational status. Here we return to Ferrera's 'polarization' of welfare provisions. Further fragmentation follows from the existence of regional discrepancies in welfare services: services that are in principle universal, such as health provision⁵⁸⁶, in fact become discontinuous due place of residence⁵⁸⁷.

Where state-provided welfare support is not sufficient, we find increased reliance on 'private' forms of support such as the family. This interplay produces a dualism between public and private welfare in Italy, further enhanced by the clientelistic use of welfare entitlements. The dualism suggests that Italy does display incentives to social and economic inclusion, but that these incentives are stratified and conditional. They may not be conditional on market forces, as in the more 'unfettered' (neo) liberal systems, but they do rest upon *qualifying* for support: through direct anchorage to the labour market, through indirect anchorage via a family member, through membership of a client-patron relation. The conditions for inclusion simultaneously produce a potential for the exclusion of those who do not 'qualify'. In a sense this could be seen as an upshot of the 'communitarian' ethos thought to accompany corporatist systems, where belonging to the 'community' is a pre-requisite to being reintegrated.

A corollary of this dynamic is that, where anchorage to welfare support passes through intermediate 'bodies' such as the family, or intermediate 'private' uses of the public realm such as clientelistic re-distribution, this reinforces intermediate loyalties. Loyalty will be to the family, or the political faction through which support passes⁵⁸⁸. Note that here 'loyalty' may be an entirely opportunistic sentiment rather than a deep-set allegiance. I suggest that it will, however, stand in competition with allegiance to the Italian state, where the latter is conceived of as an entity in some sense 'neutral' and capable of producing collective goods⁵⁸⁹. It stands to reason that this will impact upon allegiance to state laws, particularly where intermediate loyalties develop in contrast to formal state norms, for example where a supposedly universalistic provision is carved up along particular, politicised lines. My suggestion is that here we also find an incentive not to rely on formal state law in the resolution of social conflict and an incentive to respond to social conflict at the level of

⁵⁸⁶ Paci (2009, p. 289)

⁵⁸⁷ Chiara Saraceno includes locality alongside labour market participation as the 'two dimensions which now [...] frame citizenship in Italy' (1994, p. 77)

⁵⁸⁸ Or both where, for example, the absence of '[...] efficient' social services for families, was 'tempered' by the employment opportunity 'offered by clientelistic means to the head of the family' henceforth an anchor to state-guaranteed welfare provisions: Paci (1987, pp. 285-286 My translation.)

⁵⁸⁹ Bull and Rhodes (2009, p. 2). See also Nelken: 'in Italy [...] there is difficulty in formulating "the public interest" (1994, p. 234)

the ‘intermediary orders’ and thus through their normative dynamics. This includes the more traditional ‘informal social control institutions such as the family and religion’⁵⁹⁰.

In the sections that follow I develop this hypothesis in more detail. Before doing so, however, it is worth noting one additional implication of the existence of ‘intermediate’ welfare providers in Italy, and particularly the family. Looking back at Garland we can draw differences between the Italian reality and Garland’s penal scenario. We should note, for example, that in contrast to Garland’s account, social solidarity in Italy is clearly not premised on an extensive welfare state. Welfare coverage is piecemeal and sectoral and relies on the family and clientelistic networks as welfare supplements. We have seen that this makes it inappropriate to analyse the Italian reality in terms of waning family support, as Garland’s analysis suggests we should⁵⁹¹. We cannot then argue that (even during the 1990s) Italy was traversing the crisis of the ‘solidarity project’⁵⁹² of Garland’s analysis⁵⁹³. The project did not exist in such terms in Italy, and its demise does not, therefore, carry the same explanatory capacity as it does in Britain. The private/public welfare dualism that we witness in Italy produces precisely those pressures towards informal social control that the ‘culture of control’ seems to have ushered out. This persistence in Italy of informal social control structures, and of (non-state distributed) social solidarity has thus prevented the development of an ‘emphatic overreaching concern with [formal] control’⁵⁹⁴. In light of the high stratification of Italian welfare, I suggest that it is more likely that ‘[c]oncern with control’ has been selective, falling most intensely on those ‘outsiders’ who lacked the support mechanisms that catalysed penal diversion and reintegration⁵⁹⁵.

iv. The Italian political economy: fragmentation and dualisms - territorial divisions, public and private Italies.

In order to better understand the fragmentation of the Italian political economy, not just of Italian welfare but as a whole, we can look to Bagnasco's characterisation of the ‘three Italies’⁵⁹⁶, the political economic ‘regions’ into which he divides the nation. In particular his analysis allows us to focus on the presence or absence, in each Italy, of features likely to

⁵⁹⁰ Cavadino and Dignan (2006, p. 25). See Nelken: ‘in Italy, political, social and family groups tend to count more than [formal state] institutions’ (1994, p. 234)

⁵⁹¹ Garland (2001, p. 159)

⁵⁹² *Ibid.*, p. 199

⁵⁹³ This ‘project’ was most vital, in Britain, during the immediate post-war years. The contemporary British welfare state stands in contrast to the more generous German and Scandinavian welfare models: see Esping-Andersen (1990 chp 1)

⁵⁹⁴ Garland (2001, p. 194)

⁵⁹⁵ See chapter 5.

⁵⁹⁶ Bagnasco (1977)

stimulate inclusion and reinclusion into economy and society.

In the *First Italy*, inclusion was initially through employment in large industrial concerns, with union-negotiated worker rights. Here we find the most plausible example of Italian 'Fordism' and also of labour co-ordination not dissimilar to the one found in CMEs. The First Italy is composed of the industrial, northwestern regions of Italy enclosed between Turin, Milan and Genoa (the 'industrial triangle'). Here, the 1950s and 1960s saw a rapid growth of industrial firms, where the Italian share of 'Fordism' emerged premised on standardized production in large concerns⁵⁹⁷. The sectors that flourished in the 'First Italy' include the automobile industry, the chemical industry and mechanical engineering⁵⁹⁸, with state industries dominant in the steel and energy sectors⁵⁹⁹. Between 1950 and 1960, their period of major expansion, the industries of the northwest benefitted from cheap labour provided by internal migration: southern Italians who came to fill the ranks of the industrial working class. If, initially, industrial workers in northwestern industries suffered from poor working conditions and limited labour regulations, it was precisely this group that came to benefit from growing trade union strength and mobilization. The years 1969 to 1973 saw what Trigilia describes as a 'wave of industrial and social conflict'⁶⁰⁰ whose primary demands were increased welfare protection and improved working conditions. These demands were 'largely satisfied'⁶⁰¹ (the 'Workers Statute' was passed in 1970), though they came to privilege the 'adult male breadwinners' working in large-scale industries, with an emphasis on pensions and (to a lesser extent) unemployment benefits⁶⁰². This sowed the seeds of the fracture between large and small firms in Italy.

The *Third Italy* displayed different production systems compared to the First Italy, and with them different methods of labour regulation. Here regulation was often informal, facilitated by personal and kinship ties and integration into the political subculture typical of Third Italy's regions. The Third Italy is composed of the northeastern and central Italian regions; these tended to rely on small and medium sized industries (SMEs)⁶⁰³. Their presence, strengthened during the late 1970s, grew throughout the decades, becoming a stable feature of Italian economy during the 1980s and 1990s, and spreading beyond their regions of origin to

⁵⁹⁷ Trigilia and Burroni (2009, p. 635)

⁵⁹⁸ *Ibid.*

⁵⁹⁹ *Ibid.*, p. 636

⁶⁰⁰ *Ibid.*, p. 637

⁶⁰¹ *Ibid.*

⁶⁰² See also: Ascoli (1984, p. 22)

⁶⁰³ Molina and Rhodes (2007) See also: "Enterprise and Industry Small and medium-sized enterprises (SMEs)." Retrieved July 2010, from http://ec.europa.eu/enterprise/policies/sme/facts-figures-analysis/sme-definition/index_en.htm.

the northwest and even some southern regions⁶⁰⁴. SMEs are involved in traditional manufacturing sectors – textiles, clothing, and furniture⁶⁰⁵ – but also in ‘novel’ sectors such as mechanical engineering and the manufacture of specialized machinery. The enterprises of the northeastern and central regions eventually developed into so-called ‘industrial districts’, described by Trigilia as a local system, premised on horizontal rather than hierarchical integration between firms, with each enterprise in charge of a particular stage or component of production⁶⁰⁶. Production in SMEs has been characterized as ‘decentralized’ but premised on ‘high levels of collaboration’⁶⁰⁷, with levels of productivity sustained by the presence of a skilled labour force and by the availability of local infrastructure⁶⁰⁸. SMEs typically fell outside the trade union protection system and, often, broader state control. Regulation was primarily ‘micro-social regulation’, where personal trust, community ties and ideological belonging were particularly important⁶⁰⁹. This was certainly true where enterprises were kinship based where, it has been suggested, historical sharecropping arrangements ‘provided the model for the family as a productive enterprise and for the family sized enterprise’ also strengthening ‘attachment to the place of origin’⁶¹⁰. Family businesses were bolstered from within the political class, particularly the DC⁶¹¹, and such political support for familial enterprise further stimulated the family’s welfare role in Italy. The system of support also betrayed the DC’s hostility to introducing a ‘Western Europe-style welfare state’⁶¹². Cavadino and Dignan link this sentiment to the party’s Catholic inspired fears of state competition with ‘church and family’, in the provision of social services⁶¹³. The DC’s tendency to support family businesses, as well as its fiscal welfare and economic policies, also stimulated irregular employment and tax evasion⁶¹⁴. Its attitude, I will argue, also had an impact at the penal level by influencing identification with the Italian state and its law.

As this discussion of the DC reveals, local political-ideological subcultures played an important role in the evolution of the ‘Third Italy’⁶¹⁵. Different areas in the northeast and central regions of the Third Italy were characterized as either ‘red’ or ‘white’. ‘Red’ were regions where either socialist or communist movements prevailed; ‘white’ were those where

⁶⁰⁴ Salvati (2000, p. 79)

⁶⁰⁵ Trigilia and Burroni (2009, p. 638)

⁶⁰⁶ *Ibid.*

⁶⁰⁷ *Ibid.*

⁶⁰⁸ *Ibid.*

⁶⁰⁹ Reyneri (1987, p. 158)

⁶¹⁰ De Cecco (2009); Zamagni (2000, p. 60)

⁶¹¹ Mingione (1995, pp. 137-138)

⁶¹² Cavadino and Dignan (2006, p. 131)

⁶¹³ *Ibid.*

⁶¹⁴ Mingione (1995, p. 137)

⁶¹⁵ See Trigilia (1986)

Catholicism prevailed⁶¹⁶. The importance of these subcultures and their associated parties the DC and PCI lies in the fact that they strengthened the trust and identification crucial to the ‘micro-social regulation’ of the Third Italy. At the institutional level they also played a role in local government, providing the social services and infrastructure necessary to streamline the functioning of the networked small and medium sized enterprises⁶¹⁷. At both the formal (local government) and informal (identification) levels, industrial relations in the Third Italy developed on what Trigilia calls a ‘cooperative model’⁶¹⁸, echoing Molina and Rhodes’ ‘autonomous coordination’. Additional support was also provided by the family – particularly ‘extended families’ – in the form of income support and care functions⁶¹⁹: an unsurprising feature given the nature of the Italian welfare state.

Over the decades, and particularly after the 1970s, First and Third Italies have drawn closer together. The industries of the First Italy, responding to global economic pressures, began replicating aspects of the Third Italy: relying on already existing networks within their home regions⁶²⁰ and decentralising part of their labour to small concerns⁶²¹ to produce ‘locally rooted networks of [...] firms’⁶²². This change partially redirected social security in the northwest away from state provision and towards private forms of welfare⁶²³.

Different to both First and Third Italies, the Southern economy has depended mainly upon its workers being employed in public administration. Here inclusion into economy and society often rested upon clientelism, with jobs distributed by means of patron-client relations. The *South* had had a primary role as Italy’s agricultural base, but saw its agricultural economy shrink after the Second World War. This occurred without it developing the high number of large or small/medium industries found elsewhere in Italy⁶²⁴. The South did possess some large industries: large state-owned firms intended to stimulate industrial production in this area of Italy, but they soon became ‘cathedrals in the desert’ because they were exceptions within the southern political economy. Italians from the south, facing high levels of unemployment, thus tended to emigrate both to the north of Italy and the north of

⁶¹⁶ ‘Red’ regions include Emilia Romagna, Tuscany, Umbria and the Marche. ‘White’ regions include Veneto, Trentino Alto Adige, Friuli Venezia Giulia: Warren (1994, p. 94)

⁶¹⁷ Services and infrastructure such as ‘day care centres, transport, housing’ and ‘industrial areas, training and other services for firms’: Trigilia and Burroni (2009, p. 639)

⁶¹⁸ *Ibid.*

⁶¹⁹ *Ibid.*, p. 638

⁶²⁰ As occurred in Lombardy: Camagni and Capello (1998, p. 73)

⁶²¹ Salvati (2000, p. 20)

⁶²² Trigilia and Burroni (2009, p. 644)

⁶²³ Trigilia contends that formalized arrangements have increased, with increasing medium sized firms. Formal and informal modes of coordination now co-exist within the north and centre: *ibid.*, p. 648

⁶²⁴ Mingione (1995, p. 124)

Europe (between 1950 and the early 1970s), only to be ‘replaced’ by non-EU immigrants towards the end of the 20th century. The Italian public administration also absorbed many workers from the South⁶²⁵. Some of these posts were in fact distributed along clientelistic lines, where political clientelism clearly functioned as a means of supplementing lagging economic development⁶²⁶. State transfers constituted a principal source of income for the south: ‘cash-transfers’ to families, ‘hand-outs’ in the form of welfare benefits, and jobs in the public sector⁶²⁷. In the south, the Christian Democrats operated as a primary political patron, making these regions an important clientelistic base.

If clientelism was rife in southern Italy, it was, however, not limited to such regions. As Della Porta points out, the phenomenon was widespread across Italy⁶²⁸. This was partly an effect of partyocracy: where political parties acted as the primary conduit for citizens' access to state resources, and state resources were divided up along party lines, the road was open for clientelistic relations to develop. The road was in fact also open for corruption to emerge⁶²⁹, and this combination of partyocracy and clientelism contributed to further fragment and particularise the Italian state. The state consequently appeared as carved up along *lato sensu* political lines: it was not neutral but composed of numerous, competing, political groups, whose competition was not constrained by the unitary project ‘Italy’, and whose allegiances were not necessarily within the confines of the state⁶³⁰. I argue that this state of affairs produced a ‘volatile political equilibrium’ – constant conflict within an institutional set-up that simultaneously fosters conflict, and forces change when conflict becomes crisis, thus avoiding total system paralysis. As argued in Chapter 2, this mechanism is reflected in Italian penal trends. Penalty emerges as ‘organised’ around constantly competing penal influences – the different re-integrative/exclusionary pressures produced by each level of political conflict – whose ‘penal translation’ depends upon the varying purchase and role of the criminal law in Italy.

Despite the fragmentation, Italy’s political economy has unifying characteristics that aid a systemization of Italian penalty. First, we see the significance of political actors in shaping the Italian political economy, and of conflict of political interests in constraining its evolution. We also see how the Italian institutional structure, especially partyocracy, allowed the diffusion of political conflict throughout the Italian state. This has, among other things,

⁶²⁵ Cassese (1993, pp. 322-324)

⁶²⁶ Ferrera (1996)

⁶²⁷ Ginsborg (2001a, p. 24)

⁶²⁸ Della Porta (1992); Della Porta and Vannucci (2012) See also Davigo and Mannozi (2008)

⁶²⁹ Della Porta (1992); Della Porta and Vannucci (2012)

⁶³⁰ Pizzorno (1992, pp. 12-74)

permitted political conflict to be transferred to the penal realm: where penal impulses are produced by political conflict, they are magnified rather than moderated by Italy's institutional structure. In this, Italy stands in contrast to other polities such as Germany, where institutional structures have been more integrated and have tended to contain political conflict. The Italian welfare state, for example, has evolved through the incorporation of different instances, expressed by various different political interest/actors, including the trade unions, but also the PCI and the DC and their electoral following (for example, the DC's supporters among entrepreneurs of the 'Third Italy'). Such interests have been able to influence welfare as a result of Italy's institutional permeability to their requests. Permeability has, in some cases, been achieved by means of patron-client exchanges, with a party politician acting as a patron. These multiple influences have produced a mix (but not amalgam) of welfare institutes, and have stratified welfare protection. This will also have stratified the protection from economic exclusion, and/or the incentives for economic reintegration, that are provided by the welfare state. Likewise it will have stratified the penal effects thought to follow from expansive welfare protection. Since inclusion into the welfare state marks protection against penal exclusion, and different levels of inclusion are affected by political conflict, political conflict will have an indirect effect on penal protection. The state's permeability magnifies but does not homogenize Italy's fragmented interests (it suffers from a low production of collective goods): it incorporates but does not contain political conflict.

The Italian state is best by a fundamental dualism between public and private realms, illustrated (and enhanced) also in Italy's territorially divided political economy. Differences between large and small/medium concerns, between regulated and unregulated sectors, between welfare support systems, all betray a tension between public and private in Italy. This tension is visible, for example, in the 'public' rules that are supposed to regulate labour relations – such as rules on hiring – and the private forms of regulation that in fact replace the public rules with particularistic (clientelistic, familistic) criteria⁶³¹. The tension between public and private is also visible in the evolution of Italy's welfare state. As analysed by Massimo Paci, the welfare state evolved incrementally, as 'petitions advanced by the more diverse [...] groups have obtained institutional recognition'⁶³². This has created a public system constituted of non-homogenized 'private blocks'⁶³³. Moreover, Paci contends, welfare reforms such as the introduction of mandatory schooling (1962) and the establishment of the National Health Service (1978), have been universalistic in principle but not universalistic in application. Looking at the Italian national health service as an illustrative example, certain

⁶³¹ Reyneri ((1989) 2010, p. 132)

⁶³² Paci (1987, p. 277 My translation.)

⁶³³ *Ibid.*

functions are delegated to the private sector from within the public sector. Specific medical examinations or laboratory analyses may be carried out by private clinics or laboratories, and patients may be referred to private clinics⁶³⁴. Such delegated activities are performed within the private sector, yet paid for by means of social security contributions. In this sense, the Italian health service illustrates the blurred line between public and private in Italy, in particular within the welfare system⁶³⁵. Comparatively, we also see how the presence of private welfare provision is nonetheless different from the ‘neoliberal policies committed to “rolling back the state”’ that we associate with Britain⁶³⁶.

In his essay, *Italy: a state-less society?*, Sabino Cassese also points to the tension between public and private realms⁶³⁷, emphasising the overlap between private and public interests in Italy. He explains the State’s ‘permeability’ to vested interests, in particular economic and electoral (party) interests⁶³⁸, arguing that the Italian state has never been able to assert its independence vis-à-vis ‘civil society’⁶³⁹ – the realm ‘in which individuals pursue their private interests, particularly economic’. This has prevented the state from fully representing ‘public’, ‘collective’ interests⁶⁴⁰ – interests of citizens *qua* citizens, rather than *qua* clients. Public state institutions have too often become tools for the realisation of ‘all sorts of private interests, farmers’, traders’, industrialists’, workers’, [have] found [their] space within the state’s organisational structure’ but without a collective project. ‘[T]heir voice has been heard’ either because their representatives were part of the public decision-making process, or because their representatives have managed to influence the public decision-making process’⁶⁴¹. Again, the conflict between political interest has been incorporated *into* the Italian system, and under the umbrella of the Italian state, without thereby producing anything claiming the name of collective interest.

In referring to this mix of public and private, I use the word ‘tension’ rather than division, because as Cassese’s quote illustrates, the subdivision of labour between these two spheres has never been clearly defined⁶⁴². Here we find Italy’s hybridity. Partyocracy and clientelism are particularly apt examples of this tension, as they sit on the dividing line between public and private. Clientelism acts as a distribution mechanism for public entitlements, but through

⁶³⁴ See Granaglia (1987, pp. especially at 302-303); Paci (2009, p. 289)

⁶³⁵ Paci also sees the public/private tension in the state’s inability to regulate some areas of Italian welfare (1987, p. especially at 284).

⁶³⁶ Lacey (2011, p. 229)

⁶³⁷ Cassese (2011 My translation.)

⁶³⁸ *Ibid.*, p. 90

⁶³⁹ *Ibid.*

⁶⁴⁰ *Ibid.*

⁶⁴¹ *Ibid.*

⁶⁴² Salvati (1984, p. 73)

a private client-patron exchange⁶⁴³. Public goods are thus conceived of as available for private distribution⁶⁴⁴. I argue that Italy's public-private dualism also reflects a discrepancy between the 'project' that post-war Italy was at its inception – a substantively unified nation – and the reality of Italian political life as it evolved. I suggest that institutional features such as a welfare state that is corporatist *but* fragmented, or a consensus-based system *without* consensus, all point to this fundamental discrepancy.

How does this reconnect to Italy's differential punitiveness? We can refer to the two orders of claim made by contemporary penal theories. The first concerns the capacity displayed by given political economies to reintegrate or exclude deviants. Applying this schema to Italy, we need to ask how the political economy that I have described displayed such capacity and how this influenced Italian penal trends. The second order of claim concerns the propensity to *penal* exclusion, that is, how institutional advantage affects the propensity to exclude deviants *via the penal system*. This raises questions on the role of, and reliance on, the penal law in contemporary polities. Here Italy's political conflicts and dualisms, in particular the private-public division, are crucial to our understanding of both the role and relevance of criminal. Given this public-private dualism we need to ask what role the criminal law was endowed with by the Italian state, and what its actual authority was amongst citizens. Is it in the discrepancy between public and private realms that we find an explanation for Italy's oscillation between repression and leniency? The rest of this chapter considers the re-integrative and exclusionary pressures produced by the Italian political economy, while I turn to state-citizen relations in the next chapter.

v. Reintegration or exclusion?

I argue that the Italian political economy is structured in a manner that stimulates a certain level of re-inclusion of deviants. In this, Italy immediately stands in contrast to the more 'dystopian' scenarios painted by Garland and De Giorgi. It appears to share similarities with Lacey's co-ordinated market economies, at least insofar as elements of the economic system, welfare state and political relations have cumulatively created incentives for reintegration. Italy has a lower level of institutional integration, and has higher levels of internal, political economic variation than CMEs, but I will not cover all such particular dynamics as my interest lies in creating – as far as possible – a picture of 'Italian' penalty. I will focus on those existing local mechanisms that illustrate my basic hypothesis, using Bagnasco's

⁶⁴³ Della Porta (1992, p. 235). Cassese describes this as 'dressing private interest in public robes': (2011, p. 93 My translation.)

⁶⁴⁴ Della Porta (1996, p. 102)

subdivision as my main framework. My hypothesis is that Italy's political economy, in its different articulations, creates multiple incentives towards reintegration of deviance back into economy and society. It does so at a number of levels: by protecting individuals from economic hardship through subsidies; by investing in them as part of a complex productive mechanism; and by stimulating informal resolution of conflict. At each of these levels, local political economies are so structured that exclusion represents a costly disruption of socio-political and economic balances.

Starting with the 'First Italy', for example, we see that reintegration may have been stimulated by trade union policy and its successes. In this it may share some similarities with processes at work in CMEs, where unions are social partners 'integrated' in the management of the economic system⁶⁴⁵. Unlike in Lacey's analysis of Germany, however, this may have less to do with long-term investment in workers, through skills training and integration into co-ordinated systems of production⁶⁴⁶. In Italy's northwestern regions impulses towards re-inclusion may be more directly linked to trade union strategy. Indeed during much of thirty years at hand, and particularly during the 1970s, the trade unions were intent upon ensuring full-time, secure employment for workers (even low-skilled workers). They campaigned for, and won, provisions against unemployment such as the *Cassa Integrazione Guadagni* (CIG) – 'a special state redundancy fund that covers salaries of laid off workers'⁶⁴⁷ – and union-negotiated transfers of workers between firms to ensure that given workers remain in employment⁶⁴⁸. Promoting job security was a particularly important goal for the trade unions, given Italy's then-recent past of 'pervasive un- and under-employment'⁶⁴⁹. Note also the contrast with Germany, where union strength is premised on a highly coordinated negotiating system involving employers and government, with unions integrated into the system of government.⁶⁵⁰ It would be logical to suppose that this type of integration produces relatively more stable union protection than in the more volatile Italian system.

Cumulatively, union policy concerned with employment protection acted as a protective barrier for workers, halting or buffering their exclusion from the labour market and even mandating their re-insertion within the economy. I suggest that this constituted a *de facto* investment in the labour force, and that it may have stimulated penal re-inclusion in the 'First Italy'. The incentives coming from the economic system here are premised more on political dynamics – trade union strength and agendas – than they are on co-ordinated systems

⁶⁴⁵ Lacey (2008, p. 79)

⁶⁴⁶ *Ibid.* especially at 55-112

⁶⁴⁷ Reyneri ((1989) 2010, p. 137)

⁶⁴⁸ *Ibid.*, p. 139

⁶⁴⁹ *Ibid.*, p. 137

⁶⁵⁰ Thelen (2001, pp. 82-88)

of production⁶⁵¹. This further suggests that incentives for re-inclusion deriving from trade union gains would have been greater *when* union strength was greatest (the 1960s and 1970s), and *where* union strength was greatest. This reintroduces the distinction between large and small firms, where the latter fell outside trade union protection, and leaves the question open as to whether the incentives to reintegration persisted, even when trade union influence declined, during the 1980s for example⁶⁵². The political-economic literature on Italy suggests that to a certain extent the incentives persisted. Indeed, if it is true to say that the ‘First Italy’ did suffer from deindustrialization and decentralisation of production after 1970, with the introduction of more flexible forms of employment⁶⁵³, it is also true that such changes were tempered. Even to the extent that Marino Regini can talk of the wage-bargaining and social security reforms of the 1990s as examples of concertation and negotiation⁶⁵⁴. Molina and Rhodes also echo this sentiment, describing the emergence of new forms of macro-concertation ‘between employers, unions and governments’⁶⁵⁵ (see below). On the basis of their analyses it is logical to suppose that features of the First Italy persisted across the period 1970-2000 that were capable of sustaining incentives towards reintegration, even as industrial relations changed, and trade union strength declined. Moreover family ties were still – across Italy – crucial buffers to the worst effects of political economic changes (see below). They provided de facto welfare support, enhanced employment opportunities, and informed employment structures⁶⁵⁶. Cumulatively, this suggests that persistence of structural factors that stood in the way of the exclusionary penalty thought to accompany a free, ‘liberal’, economic system.

In addition to formal methods of negotiation such as concertation and the support role played by the family, we should note reintegrative pressure created by Italian political economic structures also derived from more ‘informal’ collaborative relations. Thus, in the more deregulated areas of the ‘Third Italy’ (and eventually ‘First Italy’) reintegration also results from reliance on kinship structure and personal relations. Note that I am not implying that relations in Italy’s industrial districts and their SMEs were necessarily ‘based in [...] harmonious cooperation’⁶⁵⁷. I am merely arguing that productive structures that required informal collaboration to function and flourish, created incentives in favour of the re-

⁶⁵¹ Molina and Rhodes characterise Italian industrial relations as highly conflictual: (2007, p. 244)

⁶⁵² See, amongst others, Pizzorno (1997, p. 332)

⁶⁵³ Ginsborg (2001a); Reyneri ((1989) 2010)

⁶⁵⁴ Regini (2000, p. 18) See also Contarino (1995); Reyneri ((1989) 2010, p. 144)

⁶⁵⁵ Molina and Rhodes (2007, p. 232)

⁶⁵⁶ See also Mingione (1994); Mingione and Morlicchio (1993) According to Ginsborg family ties were also crucial in the tertiary sector, particularly retailing (2001a, p. especially at 11)

⁶⁵⁷ Ginsborg (2001a, p. 19)

inclusion of individuals insofar as this was functional to the persistence of informal collaboration. My additional hypothesis is that these incentives also extend to the penal realm. Indeed, resort to penal law and formal social control, in the face of conflict, is not a pragmatic choice where economic advantage rests on informal trust networks, as these risk being ruptured by penal ‘interventions’. Moreover, the existence of family or family-like ties in Italy’s small and medium enterprises may *themselves* have acted as a form of control, potentially reducing the incidence of deviance, and thus the need for penal exclusion⁶⁵⁸.

This hypothesis leads us to ask *who* benefitted from the political economy’s various incentives for penal reintegration/moderation and who was excluded from them. After all Italian penalty does not show unequivocal moderation, but rather an oscillation between punitiveness and leniency. Much as Lacey does in relation to Germany, we thus have to interrogate the *conditions* for penal leniency in Italy. Who are its insiders and who are its outsiders? How are these outsiders constituted? This is an important question given the informality of some of the co-ordinative methods found in Italy. I suggest that informality here acts as a double-edged sword: if on the one hand it operates to reduce pressure for penal exclusion, it does so on a basis that is relatively uncertain insofar as it is informal. The uncertainty of the informal relations is tempered by kinship, community, subcultural ties but, where these ties are weakened or absent, then informality may more easily become insecurity. This may be the case, for example, in the case of new ‘arrivals’ into the political economy and social fabric. We should indeed note the relative homogeneity of the ‘Third Italy’ during the first decades of the Italian Republic: unified by subculture and, unlike the northwest, relatively ‘undisturbed’ by internal migration⁶⁵⁹. Unsurprisingly, the issue of conditions for inclusion and re-inclusion into polity and economy, was to become particularly salient as an increasing number of non-EU immigrants began to fill the lower tiers of the Italian labour market during the 1990s (Chapter 6).

vi. Italy and post-Fordist economies

Temporarily bypassing questions of insiders and outsiders, I compare my preliminary account of the incentives created by the Italian political economy with De Giorgi’s and Garland’s analyses of contemporary penal changes and their political-economic roots. The comparison reveals a number of differences between the literature and the Italian case. De Giorgi’s analysis sees contemporary penalty as the containment of a post-Fordist ‘surplus’, produced by the restructuring of contemporary economies. In particular, he points to the passing of ‘Fordist’ labour – mass industrial production, typically premised on low-skilled labour. Industrial production has ceased or been greatly reduced; in its stead we find ‘post-Fordist’

⁶⁵⁸ See for example Garland (2001, p. 34)

⁶⁵⁹ See Trigilia (1986)

flexible and fragmented forms of labour that are increasingly informal and rarely linked to the manufacture of ‘material goods’. Labour insecurity has also increased, as productive activities have been decoupled from the social entitlements that characterised Fordist labour. This produces a ‘surplus’ that is productive and social, and defies the classifications and penal strategies of the Fordist era (premised on disciplining individuals into efficient workers and thus good citizens⁶⁶⁰). Contemporary penalty is a way to manage the insecurity that follows from the passing of Fordism and the Fordist penal logic.

De Giorgi’s analysis is premised on the shift from Fordism to post-Fordism. At a very basic level, if his theory were to apply to Italy we would thus have to find Italy to have been both ‘Fordist’ and then ‘post-Fordist’. I suggest that this poses a number of difficulties. Firstly, we would be hard pressed to describe Italy (as a whole) as ever having been ‘Fordist’. From the accounts of the Italian political economy that I have analysed, what emerges is Italy’s high territorial differentiation: whether in terms of north and south, in terms of the three Italies, in terms of Italy’s ‘mixed’ and ‘hybrid’ economy. Moreover, analyses such as Bagnasco or Trigilia’s, illustrate how ‘mass industrial production’ premised on ‘relatively low-skilled’ labour, developed only in certain portions of Italy for which the ‘economic miracle’ of the 1950s and 1960s took a Fordist character. These ‘portions’ tended to be concentrated in the First Italy and in the few public industries set up in the South. Even if such industries monopolised the nation’s policy aspirations, ‘seen as hypothetically valid for the entire nation and [thus as] the implicit framework in debates on [economic] policies’⁶⁶¹, they did not in fact represent the entire Italian political economy. Our ‘Fordist’ starting point begins to waver.

We then need to consider the changes that occurred, to use De Giorgi’s periodisation, after 1973, asking how they were articulated across Italy. The question is whether, in its evolution between 1970 and 2000, Italy has become ‘post-Fordist’ in a manner that coincides with De Giorgi’s analysis. First, we can detail what changes *did* occur in Italy over the three relevant decades, particularly as regards changing ‘modes of production and labour relations. Large-scale industrial manufacturing contracted during these years, shedding part of its labour. ‘Shedding’ here may, but does not necessarily, imply unemployment, and indeed during the 1980s large industries imposed early retirement on portions of their workforce as a means of reducing their labour force⁶⁶². As large-scale manufacturing contracted they also reorganized and decentralized⁶⁶³. New forms of labour were introduced, such as part-time work –

⁶⁶⁰ De Giorgi (2006, p. 73); Melossi and Pavarini (1977)

⁶⁶¹ Reyneri ((1989) 2010, p. 133)

⁶⁶² De Cecco (2009, p. 112)

⁶⁶³ Ginsborg (2001a, p. 13)

previously anathema to the trade unions⁶⁶⁴. However it is only in the 1990s that we witness the introduction of so-called ‘atypical’ contracts: for example fixed-term contracts⁶⁶⁵.

Decentralization of large industries was then often decentralization of labour to smaller and medium sized enterprises. This was a bid to achieve greater flexibility, given the different (lower but also informal) forms of regulation on which SMEs operated. The change in industrial labour in Italy after 1970, should be understood as a transformation from a nation ‘oriented towards large scale enterprise’ to a one whose ‘industrial sector [was] characterised by many very small producers, some medium-sized ones, and a few large ones’⁶⁶⁶. The small and medium sized industries came to constitute a ‘kaleidoscope’ of enterprises⁶⁶⁷ in which Italian manufacturing found means to flourish after 1970, to the extent that in 1995 manufacturing and construction still accounted for 32.5 percent of Italy’s employment⁶⁶⁸. Alongside manufacturing, the service sector – particularly retail – grew from 48.3 percent of employment in 1980, to 60.1 in 1995⁶⁶⁹. In the service sector family and political patronage played an important part, with the ‘extraordinary importance’ of small family shops, but also because ‘economic protection and privileges’ were offered to the various small shopkeepers in exchange for electoral support⁶⁷⁰.

Do these changes mark the advent of ‘post-Fordism’ in Italy? Admittedly some of the innovations do mirror characteristics associated with (narratives of) ‘post-Fordist’ change: increased labour flexibility, decreased industrial production, and an increase in the relative weight of service sector. However, shifts in modes of industrial production were not unequivocal in Italy: they were generally contained and locally varied. In Molina and Rhodes’ analysis we find a general picture of Italy’s contained restructuring after 1973. The two authors note, for example, how the extension of flexibility in the hiring and firing of workers was ‘gradual and limited’⁶⁷¹. Similarly, innovation in the labour market occurred in a consensual manner⁶⁷². This is evidence of existing veto points available for social and economic actors to influence decision-making. The manner in which the Italian political economy changed was, in fact, sufficiently restrained for Molina and Rhodes to observe that,

⁶⁶⁴ Reyneri ((1989) 2010, p. 141)

⁶⁶⁵ Molina and Rhodes (2007, p. 244)

⁶⁶⁶ De Cecco (2009, p. 110)

⁶⁶⁷ Ginsborg (2001a, p. 17)

⁶⁶⁸ Albeit compared to 37.6 percent in 1980: Ginsborg (2001a, p. 13) See also De Cecco (2009, p. 117)

⁶⁶⁹ Ginsborg (2001a, p. 7)

⁶⁷⁰ *Ibid.*, pp. 11-12. Public services were also fertile terrain for employment-consensus exchanges.

⁶⁷¹ Molina and Rhodes (2007, p. 242)

⁶⁷² For example the introduction of flexibility in hiring practices and wages, agreed upon via collective bargaining: *ibid.*

the effects of ‘privatization and the liberalization of goods and services’, were faster and had greater impact upon Spain than Italy⁶⁷³, despite the similarities between the two nations as Mediterranean MMEs. In Italy, ‘market colonization’ – market regulation of labour – has been limited. Moreover throughout the 1980s and especially 1990s, we witness the co-existence of forms of ‘market’ coordination, such as increasing labour flexibility, *and* new forms of ‘non-market’ coordination. One such mechanism is negotiation between firms and workers – not at the national or sectoral level, but at the firm level⁶⁷⁴ – which has in some cases been able to maintain protection for workers even as demands for flexibility increased. It is also important to note that the Italian state has continued to play a prominent role in the economy: for example, by absorbing the costs of economic adjustment and thereby converting it into social contributions falling on both employees *and* employers⁶⁷⁵.

This mix of adaptive changes and continuity has produced a ‘series of puzzles’⁶⁷⁶: the Italian scenario contradicts the patterns of cause and effect (reform and results), witnessed in other ‘varieties of capitalism’. One puzzle is the ‘consolidation and re-organization of collective bargaining systems that have resisted pressures for decentralization’, despite ‘a gradual loss of trade union strength’ compared to the 1960s and 1970s. The ‘renegotiation of the welfare state’ is also a ‘puzzle’ insofar as it was not accompanied by ‘substantial cuts in benefit entitlements’⁶⁷⁷. What is interesting for our purposes is that these apparent contradictions indicate that the Italian political economy *has* been reformed in response to exogenous pressures (the oil and gas crisis, increasing international competition) in a manner that might have been expected to make it more ‘liberal’, but that has nonetheless *not* seen transition to ‘liberal’ post-Fordism. The ensuing political-economic scenario is difficult to classify in a univocal fashion: Italy remains ‘mixed’. Moreover, differences subsist across Italy’s fracture lines, with distinctions persisting between firms under trade union representation and those that fall outside their remit. However, I am at the very least led to claim that political-economic restructuring in Italy cannot be seen as a transition into De Giorgi’s post-Fordism, which again appears to be more context-specific than it claims to be.

Similar conclusions can also be drawn from Marino Regini’s account of ‘responses of European economies to globalization’⁶⁷⁸. Regini investigates modes of adaptation to the globalization of markets and intensification of competition during the 1990s, looking specifically at labour markets, collective bargaining and social security. Regini’s argument

⁶⁷³ *Ibid.*, p. 236

⁶⁷⁴ *Ibid.*, p. 244 See also Contarino (1995)

⁶⁷⁵ In Spain the cost has been borne primarily by workers: Molina and Rhodes (2007, p. 248)

⁶⁷⁶ *Ibid.*, p. 232

⁶⁷⁷ *Ibid.*

⁶⁷⁸ Regini (2000)

can be seen as twofold: firstly, he claims that in most European nations we witness neither convergence towards a deregulation of the economy, nor convergence to what he calls ‘neocorporatism’. ‘Neocorporatism’ entails ‘bargaining centralization, close regulation of the labour market and expansion of welfare benefits’⁶⁷⁹. Rather, what we see is that European nations are trying to strike a balance between these two poles. Moreover – the second aspect of his argument – different nations have adopted divergent strategies that reflect their different political economies⁶⁸⁰. Here, Regini’s approach mirrors Lacey’s call for attention to differences across European political economies, and for analyses attentive to comparative divergence, rather than tied to categories such as ‘post-Fordism’.

What is also interesting about Regini’s argument is that, in detailing European responses to ‘globalization’, he describes the limits that exist in Italy to economic restructuring and ‘deregulation’. Regini draws a picture of Italy in which change has been gradual and contained. Thus the labour market regime is one in which flexibility is a ‘controlled exception’ where, for example, work contracts have changed and new temporary contracts increased, but restrictions still exist on the use of temporary agency labour⁶⁸¹. Furthermore, labour flexibility is conceived of as a ‘limited and partial exception’ to the rules that otherwise apply to the labour market⁶⁸². In this, Italy contrasts with nations such as Britain where ‘flexibility has acquired the role of general principle’ applicable to the functioning of the labour market as a whole, ‘guiding [...] new legislation and social partners’ strategies’⁶⁸³. Italy has also experienced greater levels of consensus in the formulation of welfare reform. Reform of the Italian pensions system, for example, was negotiated and centred on projects drawn up by the trade unions⁶⁸⁴. The spending cuts that followed from it were gradual, achieving ‘more or less convinced endorsement by workers’⁶⁸⁵.

In sum, what emerges from this and Molina and Rhodes’ account, is that changes wrought to the Italian economy have been influenced by social partners – employers, unions and even the state – and have consequently been limited⁶⁸⁶. Admittedly, market segmentation has remained, with an increasing number of small firms falling outside formal regulation⁶⁸⁷; here it is more ‘informal’ methods of ‘autonomous coordination’ that have influenced labour relations.

⁶⁷⁹ Regini (2000, p. 17)

⁶⁸⁰ *Ibid.*, p. 9

⁶⁸¹ *Ibid.*, p. 26

⁶⁸² *Ibid.*, p. 12

⁶⁸³ *Ibid.*, p. 11

⁶⁸⁴ *Ibid.*, p. 28

⁶⁸⁵ *Ibid.*, p. 15

⁶⁸⁶ A process facilitated by the absence, at least until 2000, of a strong ‘capitalist coalition’ in power: Molina and Rhodes (2007, p. 244)

⁶⁸⁷ Though see Contarino (1995); Trigilia and Burroni (2009) on formalization of bargaining.

Overall, given features such as the gradual and limited flexibilisation of labour, the ‘controlled deregulation’ of the market and the persistence of consensual modes of economic reform, the shift between Fordism and post-Fordism appears an inadequate conceptual explanation to account for recent shifts in the Italian political economy. I now ask how this reflects on Italian penalty. I answer this question on the basis of my institutional analysis of the Italian political economy, combined with Lacey’s approach in *The Prisoners’ Dilemma*. My basic premise is that across Italy’s various political-economic ‘localities’ we find mechanisms that stimulate reintegration into the body politic, and hence stave off penal exclusion. They do so to an extent that allows Italy to maintain relative (formal) penal moderation. However, particular features of the Italian scenario – fracture lines, the informality of coordinative methods – suggest that the incentives for reintegration/diversion are not equally distributed. As in other ‘co-ordinated’ contexts, such as Germany, there are ‘insiders’ and there are ‘outsiders’, and ‘insiders’ are those more likely to benefit from re-integrative pressures. What is more, it may be that the boundaries of the ‘insider’ category are becoming less permeable over time. Having already described how re-integrative mechanisms are thought to work in relation to formal mechanisms of coordination I now focus on more informal means of collaboration, specifically those based on personal trust and networks of interrelation. In particular I investigate SMEs (and by extension industrial districts) and clientelistic networks, formulating some hypotheses on how these political economic structures/relations foster the informal resolution of conflict.

vii. The penal incentives of a politicised political economy: in-groups, identification, and informal social control

In my analysis of the increasing fragmentation of labour in Italy, such as that occurring in the northwest, I have noted that fragmentation was to some extent controlled by formal processes of negotiation. In addition to these methods we have also seen that fragmentation has partly occurred in the context of territorial, community-linked economic structures⁶⁸⁸. This is particularly true in Italy’s ‘industrial districts’ with their networks of small and medium sized enterprises (SMEs). Here a ‘widespread sense of community based on family and neighbourhood ties’ creates levels of trust needed in an economic environment that is broken up into small units⁶⁸⁹. It also ensures the informal coordination premised on personal

⁶⁸⁸ It has also happened in a context where the distinction job/work is not novel; for the distinction see De Giorgi (2006, p. 51).

⁶⁸⁹ Zamagni (2000, p. 57)

relations, necessary for the industrial districts to function⁶⁹⁰. Labour relations in such structures may not be ‘Fordist’, and irregular labour may be high, yet we still find some level of ‘group identification’ within the economic units⁶⁹¹. Moreover, this identification may be the result of previously existing economic structures, rejuvenated in the light of economic crisis, but not introduced *ex novo* out of the presumed shift from ‘Fordism’ to ‘post-Fordism’. Thus the northeastern and central regions of Italy have been described as having premised their ‘*post-war* industrialization’ on SMEs⁶⁹², whose incidence increased after 1973. Mark Warren notes also that ‘laws granting [...] financial benefits to small and artisan firms’, were passed by the DC during the 1950s⁶⁹³, suggesting that the growth and presence of such small firms in the Italian political economy should be traced at least to this date, i.e., to the Italian ‘economic miracle’ and the presumed heyday of ‘Fordism’⁶⁹⁴.

From the perspective of penal reintegration or exclusion, what is crucial in this scenario is both the persistence of political groupings – as found in the industrial districts of the Third Italy – and individuals’ *belonging* to such groupings. Together the two factors provided buffers against penal exclusion even as structures of production changed in Italy. For those who belonged, the mixing of life – with its affective and personal relations – and work – the productive activity – seems to operate as a source of social stability. It is thus not necessarily the source of insecurity that De Giorgi describes as a corollary of the contemporary melding of life and work⁶⁹⁵. In fact it could be seen as the distinguishing factor between small or medium sized firms and larger firms, in their adaptation to economic adjustment. Though, as Regini notes, while both increasingly relied on informal processes of ‘joint management’ to streamline labour changes, the informality brought greater uncertainty in large firms. By contrast, in SMEs embeddedness in ‘the social fabric and [...] community trust relations’, the subcultures that have characterised the Third Italy, provided stability even in conditions of informality⁶⁹⁶.

The existence of coordination within SMEs, whether informal or formal, and to some extent even the existence of informal co-operation in larger firms, suggests that our account of production changes in Italy cannot be simply of an increasing fragmentation of the labour force. The implications for social control that in De Giorgi’s account are thought to follow from labour shifts, are also called into question. We are instead taken back to Lacey’s analysis of CMEs, though Italy is more fragmented and more conflictual than CMEs and has produced

⁶⁹⁰ Though formal coordination *has* grown within the districts: *ibid.*

⁶⁹¹ Ginsborg (2001b, p. 45)

⁶⁹² Zamagni (2000, p. 60 My emphasis)

⁶⁹³ These included ‘tax exemptions, subsidized loans, lower employee contributions, and more flexible labour regulation’: Warren (1994, p. 91).

⁶⁹⁴ Warren (1994, p. 91) Paci (1987, p. 280)

⁶⁹⁵ De Giorgi (2006, p. 43)

⁶⁹⁶ Regini (1997, p. 113)

its own forms of ‘autonomous coordination’⁶⁹⁷. Keeping these differences in mind, we can draw an analogy with Lacey’s institutional account, and formulate a theoretical conclusion on penal pressures arising from the Italian political economy: where collaboration is essential to the functioning of Italian enterprises, there are greater incentives to reincorporate individuals into the social and economic fabric. This is particularly so in Italy’s SMEs, especially where the work force is both ‘highly specialized’ *and* ‘integrated in the life of the firm’⁶⁹⁸. My hypothesis is that this follows from what amounts to a *de facto* investment in the workforce, and in the stability of informal networks through which the enterprise functions.

We need not look to Italy’s industrial districts alone to locate the nation’s ‘re-integrative’ tendencies. The southern regions also point towards reintegration as a preferred option (even after 1973). Where the economy rests on patronage, there are incentives not to incarcerate one’s clients, particularly if the client-patron relationship is not above legal board. To illustrate this point, we find evidence Pizzorno, and Della Porta and Vannucci’s discussions of corruption in Italy⁶⁹⁹. I am not here assuming equivalence between clientelism and corruption: as Della Porta notes, clientelism in Italy was the exchange of administrative decisions for votes, whereas corruption was the exchange of administrative decisions for money⁷⁰⁰. However, not only are the two tightly linked in practice⁷⁰¹, but similarities can also be drawn between the two phenomena in terms of the mutual investment patterns that develop within the clientelistic network or the corrupt exchange, and the social control mechanisms deployed within them⁷⁰². Both rely, for example, on bonds of solidarity between their members⁷⁰³ that are reinforced where the relationship in question - clientelistic or corrupt - is illicit. The illicit nature of the transactions creates an incentive for resolution of conflict to occur in a confidential and ‘protected’ manner that does not carry with it the risk of formal penal exposure⁷⁰⁴. Pizzorno describes ‘sanctions’ being ‘distributed *within* the collective subject’ that is born from the ‘hidden’ exchanges of Italian politics⁷⁰⁵. He also describes its members’ ‘mutual interest in the continuity of the relationship’ and in the ‘regularity of ties’ forged within the political grouping. This ‘mutual interest’ acts as an incentive for informal resolution of conflict, effectively shielding it, to the extent that it succeeds, from formal penal dynamics.

⁶⁹⁷ Molina and Rhodes (2007)

⁶⁹⁸ Ginsborg (2001b, p. 17)

⁶⁹⁹ Della Porta (1992); Della Porta and Vannucci (2012); Pizzorno (1992)

⁷⁰⁰ Della Porta (1992, p. 233) See also: Ferrera (1996)

⁷⁰¹ Della Porta (1996, p. 102)

⁷⁰² *Ibid.*, p. 235

⁷⁰³ Pizzorno (1992, p. 24)

⁷⁰⁴ *Ibid.*, p. 29 See also Della Porta and Vannucci (2012, pp. 35-36)

⁷⁰⁵ Pizzorno (1992, 30: my translation and emphasis.)

Inferring from this discussion, I suggest that this set of interrelations also impacts on the likelihood of ordinary crime being dealt with through the penal law. As a preliminary interpretive hypothesis, we can envisage that their impact will be felt in one of two ways. Where an ‘ordinary’ crime, for example a theft, occurs *within the context of the clientelistic or corrupt relationship*, it may be that the systems of mutual interests intervenes to prevent the crime from being denounced. Here, there is greater advantage to be gained by maintaining the relationship than by formal recourse against the theft. ‘Advantage’ could be in terms of the resources that can be accessed through the clientelistic or corrupt exchange and that would no longer be accessible if the exchange itself were ruptured. Advantage could also be that of avoiding exposure of the exchange where it is not above legal board: where denouncing the theft in fact leaves a power of blackmail in the ‘thief’s’ hands. This mechanism, I suggest, will be more likely to work where the ordinary crime is ‘minor’, where the author of the ordinary crime is known, and where the crime does not itself threaten the interests created within the collective subject at hand⁷⁰⁶. Admittedly, this interpretation may work better for corrupt exchanges compared to clientelistic exchanges. Della Porta distinguishes between the two on grounds that what predominates in corrupt exchanges is an ‘instrumental rationality tied to the expectation that the rules of the game’ will continue unaltered⁷⁰⁷. Clientelistic relations are more premised on ‘personal obligations and gratitude’⁷⁰⁸. Moreover, whereas corruption is clearly unlawful, clientelism is not formally illicit (as Della Porta states, it is not a crime for a client to vote for a politician who has done him a ‘favour’⁷⁰⁹). Rather, it represents a distortion of existing norms and political procedures. Nonetheless, I suggest, both clientelistic and corrupt exchanges produce their own normative orders/schemas. Where the exchanges are sufficiently systematized and diffuse, they also produce ‘intermediate collective subjects’ premised on mutual interest. I further claim that, in the case of a conflict arising between its members, including conflict created by ordinary crime, there may be a tendency to resolve the conflict by reference to this intermediate normative schema.

Where an alternative normative order is relied upon, this does not mean that all conflict will be resolved in a predictable fashion. Where interactions are premised on informal relations, as in the example of the illicit relations of a corrupt exchange, the informality inevitably leads to some instability. Thus mediation may not always be the outcome where actors within the exchange have to deal with instances of ‘ordinary crime’ and denunciation may be preferred. Here, again, we have the seeds of the ‘volatility’ that accompanies attitudes

⁷⁰⁶ It may be that the self-enforcing mechanisms of complex corrupt exchanges prevent ordinary crime amongst its members given the importance of ‘a *reputation* of “honesty” in [corrupt] dealings’: Della Porta and Vannucci (2012, p. 36).

⁷⁰⁷ Della Porta (1996, p. 101 My translation.)

⁷⁰⁸ *Ibid.*

⁷⁰⁹ *Ibid.*

and recourse to the penal law⁷¹⁰, though investigating this hypothesis is beyond the scope of this thesis, and should be explored in future research.

The second way in which the ‘mutual interest’ created by a clientelistic network may stimulate the informal resolution of conflict is less direct. It rests on hypotheses about the effect that clientelism and patronage may have on attitudes to legal norms (hypotheses that I develop more fully in Chapter 4). It runs as follows. The clientelistic exchange – for example the exchange of a job for a vote – happens in the interstices of existing legal norms – such as the norms regulating hiring practices⁷¹¹. Formal legal norms are not directly relied upon in the relationship established between patron and client (though they should be) and are superseded by the norms that operate within the confines of the clientelistic exchange⁷¹². We have here a doubling of the legal order by a parallel, informal order. This type of doubling exists to some extent in all systems, but my analysis thus far suggests it is distinctively strong in Italy. Moreover I hypothesise that where, in Italy, this doubling is widespread, it may affect the purchase of formal legal norms. This includes not just the norms that, as in my example, should regulate employment relations and voting practices, but all legal norms, including penal ones. If, as Reyneri argues, particularistic practices flourish in the regulation of the Italian market since ‘they alone can “circumvent” rigid juridical norms thanks to the widely diffused complicity of family, community and clientelistic networks’⁷¹³, might the penal law not itself be subject to circumvention? The criminal law may, as a consequence, cease to be the ‘first port of call’ where deviance and ordinary crime are concerned⁷¹⁴. Its purchase is weakened, insofar as the law itself appears irrelevant or capable of being evaded in the regulation of other aspects of daily life. Where these ‘other aspects’ include matters as important as work and income, the absence of the law may register as particularly conspicuous. Members of clientelistic exchanges thus learn from the clientelistic interaction (and the network of relations that accompany it if it is sufficiently diffuse) and apply this

⁷¹⁰ ‘Mediation’ does not necessarily imply a horizontal relationship, with equality between players, but may be ‘mediation’ within the context of an informal *and* hierarchical relationship. The most extreme form of this dynamic is found within organised crime, or where organised criminals are called upon to ‘resolved’ social conflicts. See Della Porta and Vannucci (2012, pp. 30,32); Nelken (1994, p. 234)

This alerts us to an additional limitation of the punitiveness/leniency couplet. The terms describe formal penal phenomena – based on more/less use of criminal punishment – but ‘leniency’ as absence of formal punishment may hide *de facto* punishment.

⁷¹¹ Reyneri ((1989) 2010, p. 132)

⁷¹² *Ibid.*, p. esp. at 131

⁷¹³ *Ibid.*, p. 132

⁷¹⁴ Note Pizzorno’s argument whereby knowledge of corrupt exchanges is a resource in and of itself, where ‘promises of silence’ can be exchanged for favours. ‘[E]ven those who did not participate to corruption could [thus] obtain benefits, *simply by not denouncing the corrupt transaction*’: Pizzorno (1997, p. 339 My translation, my emphasis.)

lesson in the penal realm. The mechanism here is similar to that described by Alessandro Vannucci (recalling Pizzorno) whereby a ‘sense of belonging, the loyalty to certain organizations, such as one’s enterprise or party, can represent alternative sources of moral recognition’⁷¹⁵. These alternative sources, which can also accompany clientelistic exchanges, ‘attenuate, where they do not cancel, the psychological unease’ at engaging in illegal activities⁷¹⁶.

It is not a foregone conclusion that penal norms will be circumvented as a result of diffuse networks of clientelism or corruption. Dario Melossi has, for example, suggested that one effect of Italy’s malleable norms is an insistence that migrants comply with the penal law. This, he argues, is a form of ‘displacement’ following from the ‘malaise’ that Italians experience seeing ‘[their] own image in the strangers’ behaviour’⁷¹⁷, specifically illicit behaviour. The malaise then expresses itself as intransigence vis-à-vis the stranger. By analogy, it is logical to suppose that involvement in ‘intermediate collective subjects’ that operate between, or despite, legal norms, might produce a certain hypocritical resort to legality where others deviate. This would produce, not informal mediation of conflicts, but its opposite, recourse to formal penal law. It may also produce such a response in individuals who are not part of the clientelistic exchange, but witness its existence. The penal law may then stand in as a remedy to clientelism and corruption: if not directly against them then at least in relation to ordinary crime. In both cases the question would be whether this instrumental use of the law tends to be directed against a particular set of subjects – migrants in Melossi’s example – or occurs in a more haphazard fashion.

To sum up: I have been hypothesizing that the existence in Italy of channels of resource distribution, such as work/welfare supplements premised on patronage, produce incentives towards reintegration or towards informal conflict resolution. This is because, where these channels are sufficiently diffuse and complex, they produce intermediate normative orders that reduce the purchase of the penal law. The penal law is thus circumvented, either in the interest of safeguarding the patron-client relationship; or because the latter indirectly reduces the purchase of legal norms including criminal laws⁷¹⁸. However, these exchanges also have

⁷¹⁵ Vannucci (1997, p. 29 My translation.) Nelken (1994, p. 234)

⁷¹⁶ Vannucci (1997, p. 29 My translation.)

⁷¹⁷ Melossi (2003, pp. 382-383)

⁷¹⁸ Pasquino claims: ‘Italy remains a country where too many citizens do not abide by the rules [...]’; this is expressed in low 2008 ‘governance scores’ for rule of law and control of corruption. The indicators measure ‘the extent to which agents have confidence in and abide by the rules of society [...] in particular the quality of contract enforcement, the police, the courts, as well as the likelihood of crime and violence’ (rule of law) and ‘the extent to which public power is exercised for private gain, including both petty and grand forms of corruption,

the potential to produce an opposite penal effect. This may be because they produce an instrumental deployment of the penal law, or a ‘corrective’ deployment of the penal law. The extent to which these mechanisms affect ‘Italian penalty’ as a whole, will of course depend upon the diffusion of the ‘intermediate normative orders’ created by Italian political and economic dynamics. It is also likely to vary from region to region, as well as over periods of time⁷¹⁹. Both these questions need to be answered by future empirical research⁷²⁰.

Notions of solidarity and mutual interest that are relevant to clientelistic/corrupt exchanges may also be applicable to Italy's *other*, non-illicit, political networks. As observed in relation to small and medium sized enterprises (SMEs), even where there is no need to shield the ‘network’ from the law, there may nonetheless be group identification, solidarity and personal trust, perhaps reinforced by family ties⁷²¹. The bonds existing within this structure create a sense of allegiance, and produce behavioural norms that are then internalized by its members⁷²². They subsequently place a high price on the rupture of such bonds by defection or denunciation⁷²³: incentives are again towards informal social control and away from formal penal censure. This is of particular relevance in Italy, where allegiance to the state is often shared with allegiance to other ‘strong alternative sources of loyalty’⁷²⁴, and where the latter's ‘private [...] ends’ may well take precedence over ‘public procedures and laws’⁷²⁵. ‘[A]dditional institutional matrices are [...] created – complementary to political economic features – that exist in parallel to formal institutional matrices, and that rely on ‘informal and self-enforcing conventions’⁷²⁶. These networks, anchored in political-economic units, create *structural* incentives pulling away from criminal punishment and penal expansion. I claim,

a well as “capture” of the state by elites and private interests’ (control of corruption). Low scores indicate that there is low ‘rule of law’ and low ‘control of corruption’: Kaufmann, Kraay, and Mastruzzi (2009); Pasquino (2010, p. 196)

⁷¹⁹ During the 1980s Italian politics shifted heavily towards clientelistic relations: Pizzorno (1997, p. 338)

⁷²⁰ I am not arguing that Italy has a ‘culture of illegality’ nor am I endorsing Edward’s Banfield’s ‘amoral familism’ – an inability to act ‘for any end transcending the immediate, material interest of the nuclear family’ – often used to describe Italian attitudes (1958, p. 10). Such concepts, though descriptively appealing, are overly deterministic, glossing over Italy’s complexity. My discussion is not divorced from ‘culture’, but is grounded in *institutional* features that express and entrench political culture. I point to Italy’s institutional features – here patronage-based mechanisms of resource distribution – and analyse their impact on the role of the penal law.

⁷²¹ Della Porta and Vannucci (2012, p. 63)

⁷²² The ‘networks of social relations guarantee [...] workers’ acceptance of the principles of effort and subordination’ possibly lowering levels of social conflict. Reyneri ((1989) 2010, p. 133)

⁷²³ Della Porta and Vannucci (2012, p. 74)

⁷²⁴ *Ibid.*, p. 73

⁷²⁵ *Ibid.*

⁷²⁶ *Ibid.*, p. 230

based on my institutional analysis of Italy thus far, that the multiplication of these may partly explain why Italian incarceration rates were relatively contained between 1970 and 2000.

This is not to say that all ‘in-group’ relations created by political-economic structures will endure regardless of external pressures. David Nelken has, for example, argued that the timing of the 1990s corruption scandal (*Tangentopoli*) can partly be explained by the economic strain placed on businesses by the kickback mechanism⁷²⁷. Economic crisis made this particular system of exchanges untenable, with a knock-on effect on the penal pressures it created and sustained. Where kickbacks overlapped with existing networks of clientelism, the issue then became one of resilience: did clientelism persist after 1992? Did it continue to act as a catalyst for informal resolution of conflict? I suggest that it did, having been too far engrained not to pass into the Second Republic⁷²⁸.

This had consequent implications for the resilience of incentives to re-include deviants into the body politic, even in the face of the economic restructuring described by De Giorgi⁷²⁹. Economic restructuring is not enough to explain the existence of a ‘penal surplus’ in Italy, where changing labour may have been experienced only to a limited extent. The existence of a penal surplus will also depend on factors set outside economic/labour transformations. We cannot, for example, look at ‘informal labour’ – so crucial to De Giorgi’s characterisation of contemporary labour – and presume that it carries with it the social insecurity described in De Giorgi’s post-Fordist penalty. ‘Informal labour’ in Italy spans a number of activities and a number of income groups. Aside from the re-integrative mechanism I have described, often linked to informal ties, we also need to consider that the informal economy carries with it a range of human relations from – to use Warren – exploitation through to co-operation⁷³⁰. Similarly, not all those who are involved in the informal sector suffer from equivalent levels of marginality and vulnerability: informality is articulated differently across different matrices. In Warren’s analysis, for example, the effects of informality vary whether one considers the northwest, or the northeast and centre, or the south of Italy. Informal labour is more exploitative in the south, but leads to more

⁷²⁷ Nelken (1996, pp. 103-104)

⁷²⁸ Della Porta and Vannucci (2012, p. 252)

Lange and Regini observe the ‘capacity of the individuals and groups whose interests seem threatened to resist changes through evasion or to get subsequent changes in policy or its implementation that frustrate the global intentions of [the] reforms’ ((1989) 2010, pp. 254-255). Bull and Rhodes talk of a ‘post [*Tangentopoli*] of institutional (re-)stabilisation and negotiated change in which the “new” [...] looks remarkably similar to the “old”’ (2009, p. 6). See also Pasquino (2002, pp. 67-68)

⁷²⁹ See Chapter 1.

⁷³⁰ Warren (1994)

‘egalitarian’ relations in the northeast and to ‘mixed’ interrelations in the northwest⁷³¹. The implications of informality also vary across individuals: the public administrator who moonlights in a second, informal occupation, does not experience informality in the same way as the southern Italian worker who earns a low wage in ‘building [or] agriculture’⁷³². I argue that we should ask how these differences play out in the penal field: do they register as differences in the government of the ‘post-Fordist’ surplus? Who, amongst the individuals involved in the Italian informal economy, is (to use De Giorgi’s schema) being actuarially evaluated, and then contained? And does their involvement in the criminal justice system derive from their labour condition alone?

The ‘identity’ of the ‘penal surplus’ is, in Italy, constructed out of something more than economic conditions. From my analysis of the Italian political economy thus far, and from the work of authors such as Molina and Rhodes, Warren, and Mingione⁷³³, I suggest that this ‘extra’ characteristic in Italy is to be found at the level of political belonging. Note, for example, how Molina and Rhodes’ emphasise investment in ‘political power’ as a strategic asset in MMEs. I suggest that, given the importance of political belonging in the various (regional, sectoral) articulations of the Italian political economy, we should try and locate the ‘surplus’ in those who fall outside matrices of political belonging. This means outside the re-integrative structures that, I suggest, have shielded Italian nationals from the penal effects of (putative) changes in the global political economy. These structures, I argue, are political as well as economic – in the sense of being rooted in political relations and identification, even as the economic dimension remains important. Thus, if it is true that reintegration follows from belonging to a sector, or even a firm, that engages in concertation, it can also follow from belonging to SMEs in the northwest or centre of Italy⁷³⁴, where belonging was often articulated through the Communist and Catholic subcultures and the local organizations through which they were expressed⁷³⁵. Both have been integral to the functioning of enterprises that rest on inter-personal identification and trust, more than (or in addition to) formal regulation. Note also how, during the 1990s, with the formation of new political identities, some of these ‘subcultures’ have acquired an exclusionary articulation. This has occurred in those areas of the northeast where the Northern League has garnered electoral support⁷³⁶, partially replacing the DC’s electoral base⁷³⁷. The Northern League espouses both

⁷³¹ Warren (1994)

⁷³² Mingione (1994, p. 39)

⁷³³ Mingione (1995); Mingione and Morlicchio (1993); Molina and Rhodes (2007); Warren (1994)

⁷³⁴ Regini (1997, p. 110)

⁷³⁵ These included unions, local governments, local party sections which, in the Catholic regions, also shared links to the local Church. See: Trigilia (1986, p. 165)

⁷³⁶ Given the Northern League’s anti-immigration politics this is relevant to immigrants employed/living in these areas.

a localist and an anti-immigrant rhetoric and is politically less inclined to integrate ‘outsiders’.

One additional, explicit example of political belonging can be found in the case of patronage-based assistance, given that the relation between patron and client is political⁷³⁸. Where economic advantage accrues from being client, for example in a clientelistic vote exchange, the economic advantage is gained *within* the political patron-client relation. Exclusion from such a relationship is also exclusion from a political relation – a form of political exclusion – from which economic disadvantage may *then* follow⁷³⁹. In this, Italy’s re-integrative structures do not simply mirror economic advantage or economic changes.

Of course the economy remains at a very basic level relevant to punishment, such that ‘punishing the poor’⁷⁴⁰ is still a fairly apt description of what Western penal systems do most. However where, in Italy, we want to specify penal disadvantage beyond the generic label ‘poverty’, I suggest that we look outside the economy to politics and political belonging. Note that this may be simply a methodological point: *Re-Thinking the Political Economy of Punishment* is a political-economic thesis of punishment, and thus causes and consequences within De Giorgi’s schema are seen through a primarily economic lens⁷⁴¹. This presumes a particular type of causality, where exit from stable, formal, employment more often than not spells disadvantage, and the consequent insecurity and vulnerability that follow require penal management. This may well have been the case in neo-liberal economies such as the United Kingdom and the United States. However, I suggest that this type of causality is ill-suited to describe the Italian reality (which has more than once been described as defying ‘economic rationality’⁷⁴²). In Italy, just as ‘unemployment’ does not necessarily mean ‘unemployment’ (and in this De Giorgi is correct) informality does not necessarily spell disadvantage⁷⁴³.

The inadequacy of applying a strict political-economic lens to Italy is further illustrated if we look at the ‘paradox’ of southern Italy, where ‘the economy was patchy and

⁷³⁷ See Ginsborg (1990, pp. 286-289)

⁷³⁸ See also Molina and Rhodes (2007, p. especially at 228)

⁷³⁹ Mingione describes a southern Italian ‘underclass’ of precarious workers, excluded from the economic returns of a patronage system they nonetheless inhabit and live by. Here economic disadvantage is precipitated by incomplete incorporation into political patronage relations, and follows where the political relation fails to provide the expected economic returns (1994, p. 40).

⁷⁴⁰ Wacquant (2009)

⁷⁴¹ Though, on De Giorgi, see Lacey (2008, p. 49)

⁷⁴² Reyneri describes micro-social regulation in southern Italy as ‘counter to the logic of the market’; Molina and Rhodes discuss MMEs’ ‘[degeneration] into sclerosis’ and ‘durable non complementarities’ (2007, p. 228); Reyneri ((1989) 2010, p. 134) See also Trigilia and Burroni (2009).

⁷⁴³ In fact ‘unemployment’, where the label means inactivity, does not necessarily imply disadvantage in Italy. For example, the inactive individual may receive a pension as part of a clientelistic exchange though s/he may not strictly qualify for such a benefit: Ginsborg (2001b, p. 24) See also Reyneri ((1989) 2010)

unconvincing' for most of the period under consideration, yet 'standards of living continued to rise'⁷⁴⁴. Here state transfers and clientelistic relations made up for the absence of widespread – and legitimate – enterprise, boosting consumption without boosting production⁷⁴⁵. Here, politics were paramount to resource distribution (such as income) more so than (modes of) production. I am not arguing that mechanisms of distribution in southern Italy can simply be transposed to the rest of the nation: clearly there are marked regional distinctions. Nor am I arguing that there is no economic marginality in Italy.

In stating that our 'surplus' must be defined in something more than political economic terms, I am also not claiming that there is no connection between economic marginality and punishment. What I *am* hypothesising is that the marginality that often correlates to penalisation must, in Italy, be understood as having numerous dimensions. These include but are not exhausted by the economic dimension and are not necessarily subordinate to the economic dimension. Looking across the Italian political economy/economies with all their differences, the political dimension, especially political belonging, emerge as particularly important.

In synthesis: political economic features exist in Italy that stimulate informal resolution of conflict. They do so by creating alternative normative orders or strong sources of loyalty, which stand in competition with the state and its law. This is the case in relation to economic units found especially in the Third Italy and its industrial districts, where community, kinship and political subcultural ties have produced this alternative loyalty. Given the role of trust and identification in the functioning of SMEs and industrial districts (Trigilia and Burroni call these 'intangible factors' supporting productivity⁷⁴⁶) there is also strong instrumental advantage in resolving conflict informally. The advantage lies in not rupturing the informal networks upon which SMEs rely – where informality also indicates operating in the interstices of formal legal norms (for example, labour regulations).

A similar (but certainly not identical) mix of politics and economy can be found in clientelistic exchanges and in corrupt exchanges. Again, such exchanges function according to alternative normative schemas that produce incentives to informal resolution of conflict. In the case of corruption these alternative schemas have the added advantage of *not* exposing already illegal practices.

⁷⁴⁴ Ginsborg (2001b, p. 23)

⁷⁴⁵ *Ibid.*, p. 24

⁷⁴⁶ Trigilia and Burroni (2009, p. 638)

III. Politics and the political economy: theoretical conclusions

I now combine insights gained from the Italian scenario with insights gained from De Giorgi and Lacey. Italy has pointed to the importance of politics to the shape of the national political economy, and to the shape of its re-structuring after 1970. From De Giorgi I take the basic insight that political economy and punishment are linked, and changes in one will affect the other. From Lacey I borrow the hypothesis that given institutional set ups will sustain or militate against formal penal moderation by affecting incentives to re-integrate deviance into society and economy. Together these insights yield the following theoretical hypothesis: politics and political belonging, which are crucial to the Italian political economy and to Italy's institutional structure, are also crucial variables in our explanations of Italian punishment. Politics are important to the distribution of power and resources across the nation, including economic resources; they are important in creating incentives for reintegration of deviants; they are important for the circumvention of formal punishment and incarceration⁷⁴⁷. If nothing else, then, the political dimension seems to offer the possibility for a systematic explanation of penalisation in Italy, without needing to rely on such globally indefinite categories as 'post-Fordism', yet without limiting ourselves to excessively particularistic analyses.

To sum up the particularities of Italian political dynamics remain the best way to allow a fruitful conversation between Italy and other penal regimes, rather than simple comparison and a description of difference. We can understand Italian penal evolution as a whole by looking at its political conflicts and political tensions. Political power is a crucial resource in the Italian political economy⁷⁴⁸, which has been shaped by political conflict. Political conflicts occur across ideologies and between parties; within party factions; between interest groups as they vie to influence decision-making. Once political crisis struck, conflict also flared up between political class and judicial class (Chapter 5). In a more general, theoretical sense, conflict occurs also between normative orders: the state-mandated normative order, and orders created by intermediate political subjects such as client-patron networks, and political economic structures whose functioning often rests on the circumvention of formal labour regulations. Political players in Italy have also stimulated the growth of practices that produced pressures towards reintegration: for example, by entrenching group identification and inter-dependence amongst group members.

⁷⁴⁷ See Chapter 6.

⁷⁴⁸ To analyse MMEs we need to 'bring politics back in' to our framework: Molina and Rhodes (2007, p. 228)

Group identification also reinforced the opposition that existed between public and private realms in Italy: between public and private welfare, but also between public and private forms of conflict resolution. It left many spaces in which informal social control, rather than the penal law, was the preferred means of resolving conflict. This can explain why penal expansion in Italy has been *contained* relative to the penalty of De Giorgi and Garand's analyses, between 1970 and 2000, even against the backdrop of an overall increase in prison rates. I argue that the tension between formal and informal social control is then reflected in Italy's differential punitiveness, and that differentiation very often follows lines of political belonging. *Not-belonging* seems to emerge as a crucial factor increasing the chances of penal exclusion in Italy. Here, Lacey's general schema for CMEs – generous to 'insiders' but harsher to 'outsiders' – is very relevant, as Italy differentiates between those who are integrated within Italy's politico-institutional structure and those who are excluded from it. Given that my institutional analysis of Italy has revealed the importance of politics in Italy, and the utility of political over economic variables in systematising Italian punishment, it should come as no surprise that 'insiders' and 'outsiders' here are also defined in political terms.

Political conflict is then also relevant in that it very visibly affects the feasibility of some of Italy's re-integrative practices: the corrupt practices of *Tangentopoli*, for example; but also the re-integrative impulses, rooted in Italy's dominating ideologies, which ended with the First Republic. Thus the exposure of corrupt political practices and clientelistic exchanges forced these practices to change. If the extent of the practices may not have decreased overall, I argue that it may nonetheless have decreased in its extension and inclusiveness⁷⁴⁹. This follows in part from the demise of mass parties – parties capable of appealing to broad ideologies and able to rely on networks of local political infrastructure – but also, in the DC's case, parties made up of internal factions each involved in the pursuit of consensus, where consensus was bolstered through clientelistic exchanges. This had allowed a certain breadth of inclusion into the various clienteles: widening the group of 'insiders' (to the party electorate and client-patron relations). With the passing of this party structure and with the 'emersion' of corruption in *Tangentopoli* the 'insider' group restricted in breadth⁷⁵⁰ both because of structural reasons (shrinking party structure) and for instrumental reasons (the need to reduce the immediate visibility of corrupt practices). This also affected the incentives for informal social control that derived from such practices. If I am right, then these

⁷⁴⁹ Corruption rests on *concealed* exchanges and is thus difficult to estimate. Some indication is provided by Transparency International's national *corruptions perception index*, a value from 10 to 0, where 0 marks high levels of corruption. Italy's Cpi was 4.86 between 1980 and 85; 4.30 between 1988 and 92; and between 2.99 and 5.03 between 1995 and 2000: Davigo and Mannozi (2008, pp. 96-97)

⁷⁵⁰ See Mingione (1994)

incentives applied more selectively. In a different fashion, yet still linked to political change, the ‘passing’ of Italy’s great ideologies may also have reduced the integrative effect thought to follow from their ‘communitarianism’⁷⁵¹. This was so particularly where ‘communitarianism’ was replaced by ‘localism’: as in the DC’s replacement by the Northern League⁷⁵².

Where political changes made re-integrative practices, premised on ideological incentives or following from corruption/clientelism, unsustainable or unfeasible or made it expedient to denounce them, they had to cease. Their resilience then depended on a number of factors, including their anchorage in Italy’s political-economic and institutional structures; or their independence from the economy, such that they persisted even where the contraction of the economy (and ‘economic rationality’) would have suggest otherwise. In the case of corruption, resilience may have been achieved by deflecting public denunciation onto more ‘suitable’ targets: and here we also see a potential pressure towards penal expansion. Hypocritical resort to formal censure became an expedient way to place a distance between the censored (corrupt) practices, and their previous ‘practitioners’. This produced cries for ‘law and order’ after *Tangentopoli*, and legislation to the same effect. An example of is the reform of article 79 of the Italian Constitution, and the procedure for granting amnesties (Chapter 2), which reduced one of the safety valves that the Italian penal system had relied on to limit its penal population. Amnesties had become ‘politically unacceptable’ after *Tangentopoli*⁷⁵³. However, and because Italy presents numerous structural oppositions, we should not think that *Tangentopoli* had univocal legislative and penal effects. Thus David Nelken talks of laws having been passed ‘partly under the shock of the *Tangentopoli* investigation [...] that allowed those sentenced to less than three years in prison to ask to be placed under what is often little more than nominal social work tutelage outside prison’⁷⁵⁴. Combined with the change in amnesty laws, this second change illustrates Italy’s penal dualism, from the political crisis we have new laws that on the one had keep the prison population high (which we can dub ‘punitive’) and laws allowing for decarceration (which we can dub ‘lenient’). We also have insights into the important role of politics in Italy, as the political class were the implicit or explicit point of reference for both sets of changes – lenient and punitive. This was so whether or not in practice politicians were the ones to suffer/benefit from the legal provisions (Chapters 2 and 5).

The 1990s can also be singled out as a time when political conflict produced pressures in

⁷⁵¹ Cavadino and Dignan (2006, p. 140)

⁷⁵² Ginsborg (2001b, pp. 174-178)

⁷⁵³ Nelken (2011, p. 110)

⁷⁵⁴ *Ibid.*

favour of a strategic deployment of the criminal law. I say ‘strategic’ because even after 1990 the actual recipients of penal censure were not primarily those whose actions were being condemned (Chapter 2)⁷⁵⁵. Political belonging was again crucial in avoiding the full impact of *Tangentopoli*’s penal backlash (Chapter 6). Interestingly, the 1990s’ peak in incarceration rates alerts us to the fact that Italy’s re-integrative impulses carried with them an opposite, exclusionary potential. Where there was need for visible censure, but also the necessity to maintain political interconnections, it became easier to look for appropriate targets of censure *outside* the political ‘grouping’⁷⁵⁶. Again similarities emerge between Italy and Lacey’s Germany: kind to insiders but harsh to outsiders: again the difference in Italy lies primarily in the conditions of ‘outsiderness’. This additional political dualism – between insiders and outsiders – is itself reflected in the penal tension between repression and leniency, and may help explain variation of Italian prison rates analysed in Chapter 2⁷⁵⁷.

⁷⁵⁵ See chapter 2; see also Pavarini (1994) and Della Porta and Vannucci (2012, p. 226)

⁷⁵⁶ Melossi (2003, 2005)

⁷⁵⁷ A question for future investigation remains: given that Italy appears to be politically fragmented, and susceptible to particularistic demands, which of these fragmented interests have remained ‘insiders’, which have faced expulsion from Italy’s political re-integrative methods and why?

Chapter 4 – Politics and Penalty: State and Citizen, Politics and Culture

I. Introduction

In Chapter 3, I analysed the Italian political economy, its susceptibility to particular political dynamics, and the combined effects of politics and political economy in producing exclusionary or reintegrative penal pressures. The current chapter also investigates the importance of politics to Italian penalty, but analyses politics as the relationship between the Italian state and Italian citizens, with implications for the role and purchase of penal law in Italy. This chapter implicitly interrogates the type of state-citizen relations presumed in other accounts of contemporary penalty and the relevance of penal law within differently-structured contemporary polities.

I will first analyse the historical evolution of the Italian state, focusing on the ‘divided allegiances’ it ‘enjoys’ among its citizens. I elaborate upon the penal implications of these divided allegiances, comparing the Italian state to the ‘modern state’ of Garland’s analysis. I then investigate the symbolic and practical use of criminal law in Italy, linking it to the nature of the Italian state, and to Italian political culture. Finally, I discuss Italy’s penal dualism between principle and pragmatism as a symptom of Italian penalty, which I characterise as a ‘volatile equilibrium’ that alternates between leniency and punitiveness.

II. State and citizens, politics and culture.

i. Italy – divided allegiances and penal authority

The Italian state is a contested state and, I argue, is incapable of commanding exclusive allegiance. It is also a state that suffers from a defect of legitimacy that extends to Italian law in general and to the penal law in particular. We can find an explanation for the tensions existing between the purchase and the role of the Italian penal law, as well as the existing discrepancy between primary and secondary criminalisation, in the nation’s divided allegiances. I have analysed the intermediate normative orders found in Italy (loci of informal social control) attached, for example, to political economic units such as SMEs or client-patron networks. I have argued that these intermediate political subjects affect reliance on, and the purchase of, legal norms insofar as they can command allegiance in parallel to the State and its formal legal frameworks. There is also a notable difference between the existence of criminal laws (primary criminalisation), and public or even judicial demands for

their deployment (secondary criminalisation)⁷⁵⁸ in Italy. This often produces reliance on informal means of social control. I argue that sources of the discrepancy between stringent legal dicta (primary criminalisation), their softened application and social demands for punishment (secondary criminalisation) can also be found by investigating the historical evolution of the Italian state. Similarly, the latter can help us explain why the Italian state commands only divided allegiances, and how this has affected national penalty.

Alessandro Pizzorno provides us with an interesting way of conceptualising the scenario that engages explicitly with state-citizen identification, and leads us to the penal articulations of Italy's divided allegiances. In his preface to Della Porta's *Lo Scambio Occulto*, Pizzorno talks of 'intermediate collective loyalties, institutionally subordinate, but psychologically alternative, to loyalty for the State'⁷⁵⁹. These include 'party loyalties; but also [...] alternative loyalties' which were 'associational, religious, territorial and, in various forms, personal'⁷⁶⁰: this is an apt description of the Italian reality, as characterised in Chapter 3⁷⁶¹. Pizzorno also points to the existence of two types of 'public ethic' in democratic polities. One, he argues, is the so-called *senso dello stato*, or sense of state; to be contrasted with a *senso della politica*, or sense of politics⁷⁶². The two differ insofar as those who possess a developed 'sense of state' conceive of state institutions and their set up as a means to achieve 'cohabitation [...] within the confines of the state'⁷⁶³. This also entails 'respect for [legal] procedures' as a 'symbolic acceptance of [...] cohabitation'⁷⁶⁴. Those who possess a more developed 'sense of politics' however, 'conceive of political activity as a means to achieve long-term ends [...] directed to a collectivity that does not necessarily coincide with the population living within national boundaries'⁷⁶⁵. This alternative collectivity may be unified by 'social class, or belief, or religious practice' or even 'kinship or cultural bonds'⁷⁶⁶. Pizzorno argues that the latter attitude, displayed for example by the Italian Republic's 'great ideologies', has significant implications for legality. A developed 'sense of politics', he claims, stimulates a pragmatic attitude to 'institutions and procedures' that are 'respected or violated purely on the basis of their utility in achieving aims that go beyond the State'⁷⁶⁷. Italy, Pizzorno concludes, has traditionally shown a high sense of politics, which takes precedence over its collective sense

⁷⁵⁸ See Chapter 2.

⁷⁵⁹ Pizzorno (1992, p. 19 My translation)

⁷⁶⁰ *Ibid.*; Nelken (1994, p. 234)

⁷⁶¹ See Trigilia (1997, p. 69).

⁷⁶² Pizzorno (1992, pp. 66-67)

⁷⁶³ *Ibid.*, p. 67 My translation, my emphasis.

⁷⁶⁴ *Ibid.*

⁷⁶⁵ *Ibid.*, p. 66

⁷⁶⁶ *Ibid.*, p. 67

⁷⁶⁷ *Ibid.*

of state⁷⁶⁸. It is logical to suppose that this discrepancy between state and politics also produced an attitude to Italian law, including penal law, which ranged from indifference (where other forms of social control were preferred) to circumvention, to active avoidance. This attitude was displayed by Italian citizens, but was also found *within* state institutions – where ‘state servants’ conceived of institutions as tools for the realisation of superior aims⁷⁶⁹.

We should not assume that Pizzorno’s two categories are mutually exclusive or place too much reliance on them. I argue (and Pizzorno’s own account allows for this) that *both* sense of state and sense of politics co-existed within Italian reality. Even Italy’s ‘great ideologies’, for example, allowed for some investment in the Republican state⁷⁷⁰: the very same Republic that they had contributed to create after the Second World War. Pizzorno’s categories are better seen as an alternative means of conceptualising Italy’s centre-periphery dualism (with its additional implications for tensions between public and private realms). Translated into penal terms, his account also points to the co-existence of deployment *and* avoidance of penal law in Italy. Thus if, on the one hand, divided allegiances produced a certain reluctance to engage with, and employ the criminal law, it can be argued that they also produced a repressive state reaction that used the criminal law to bolster its authority (Chapter 2). The interplay between the symbolism and deployment of the penal law – between reaction and avoidance – is key to understanding Italy’s penal oscillation between repression and leniency.

In order to further understand the existence of Italy’s divided loyalties, and their impact on penalty, we can look to the creation of the Italian nation during the late 19th century. Italy was unified in 1861⁷⁷¹, a famously troubled process carried out primarily by a liberal elite⁷⁷², that brought together ‘a number of regional states and [...] parts carved out from the declining [...] [Austro-Hungarian] monarchy’⁷⁷³. As John Agnew points out⁷⁷⁴, the unifying process began in northern Italy and was ‘initially at least, by [initiative of] northern Italians’⁷⁷⁵ with the monarchy of Savoy-Piedmont at their helm. Unification occurred by progressive annexation of Italy’s regional state to Savoy-Piedmont rather than by ‘consensual

⁷⁶⁸ *Ibid.*, p. 68

⁷⁶⁹ Nelken (1994, p. 234)

⁷⁷⁰ Pasquino claims that, despite their defects, ‘the great national parties, and [particularly] the PCI [...], had attempted to “educate” Italian citizens to democratic mass politics’: (2002, p. 71)

⁷⁷¹ Cotta and Verzichelli (2007, pp. 3-4)

⁷⁷² Cotta and Verzichelli (2007)

⁷⁷³ *Ibid.*, p. 2

⁷⁷⁴ Agnew (2002)

⁷⁷⁵ *Ibid.*, pp. 42-43

unification⁷⁷⁶. Given its difficulties unification has in some cases been characterised as *incomplete*. This “incompleteness” refers, amongst other things, to the fact that the nascent Italian state was not homogeneous and faced substantial internal opposition⁷⁷⁷. Cotta and Verzichelli point in particular to the opposition of the Southern aristocracy and of the Catholic Church⁷⁷⁸; Agnew notes the republican opposition and the lack of peasant support for a unified Italy⁷⁷⁹. Although not strong enough to seriously threaten Italian unity, this opposition did impact on the evolution of Italian institutions. It affected, for example, relations between central and local government, whose relative powers and responsibility have been debated, refined and re-defined across the centuries⁷⁸⁰. Internal opposition also influenced levels of citizen identification with, and investment in, the Italian nation. Varying identification was partly due to the territorial differences that existed and exist in Italy, the nation having been constructed from a series of separate polities, which bear significant political-economic divergences (Chapter 3)⁷⁸¹. The obvious European comparator here is Germany, whose federal system has effectively provided a stable national framework for negotiation between, but preservation of, local differences⁷⁸². The process of annexation, rather than unification by consensus in Italy meant that ‘the national institutions created at the time [...] were seen by significant minorities as foreign impositions [...] [The] state [also] brought novel practices to regions where the writ of any sovereign was historically weak (Sicily, for example), and many groups (such as serious Catholics and anarchosyndicalists) regarded the state itself as illegitimate’⁷⁸³. The opposition of the Catholic Church to the Italian nation was crucial – and lasting⁷⁸⁴ – further weakening the Italian’s state legitimacy vis-à-vis portions of its citizens. In Agnew’s words, the state’s fundamental inability to ‘[capture] the religious beliefs and practices of the Italian population’, eventually compromised ‘the ritual power of the Italian state’ and the extent to which it could obtain ‘symbolic investment’ from its citizens⁷⁸⁵.

Of course, we should be wary of over-emphasising the narrative of Italy’s incomplete unification. The issue is a contested one, and is highly debated both at the academic level⁷⁸⁶

⁷⁷⁶ Cotta and Verzichelli (2007, p. 3)

⁷⁷⁷ *Ibid.*, p. 27

⁷⁷⁸ *Ibid.*, p. 5

⁷⁷⁹ Agnew (2002, p. 81)

⁷⁸⁰ See Cassese (2011, p. 84) Cotta and Verzichelli (2007)

⁷⁸¹ Agnew (2002, p. 56); Cotta and Verzichelli (2007, p. 6)

⁷⁸² See Cotta and Verzichelli (2007, p. 173)

⁷⁸³ Agnew (2002, p. 57)

⁷⁸⁴ The settlement of disputes between Church and Italian state occurred only in 1929.

⁷⁸⁵ Agnew (2002, p. 58)

⁷⁸⁶ Cassese (2011, p. 99).

Punishment, by reason of being expression of State authority, still bears some of the more traditional marks of centralisation.

and within the public and political realm⁷⁸⁷. One useful way of conceptualising Italy is, I argue, as a nation beset by a tension between centre and periphery; a tension that cannot easily be resolved. Thus Italy appears unified in many significant respects – not least of which in its criminal laws – and must be dealt with as unified⁷⁸⁸. But it also appears as internally divided and must be dealt with as internally divided. Throughout this thesis, my aim has been to navigate this and the numerous tensions and contradictions of the Italian scenario, trying to do them justice without abandoning the quest for a more generalised analysis.

With these complexities in mind, it is worth returning to the Italian state's contested formation and its initial defect of legitimacy. Commentators agree that this defect continued, in some form, from unification through to contemporary Italy⁷⁸⁹. I suggest that this contestation has significant penal implications that emerge if we view the creation of the Italian nation in light of Garland's discussion of punishment and modernity. In his discussion of 'the emergence of a criminal justice state'⁷⁹⁰, Garland argues that 'criminal justice institutions first emerged as integral elements of the long-term process that produced the modern nation-state'⁷⁹¹. Part of the process saw the 'various victorious sovereign lords hold out the promise of [peace and justice] to their subjects'⁷⁹². This included guaranteeing 'law and order', which, in Garland's words, 'originally meant the suppression of alternative powers and competing sources of justice as well as the control of crime and disorderly conduct'⁷⁹³. By contrast to Garland's account of modern state building, in Italy the creation of a nation *failed* to overcome the 'alternative powers' threatening its sovereignty. I suggest that this line of reasoning can be extended to argue that the Italian state also failed to overcome the 'competing sources of justice' that existed within its boundaries. Note the additional theoretical implications of this hypothesis: the Italian state's initially contested authority affected its ability to make *claims* to authority. It also had an impact on the claims to authority that the Italian state nonetheless made – for example as it attempted to force unification – using the law not as an expression of the authority it had, but of the authority it aspired to. However, the limits to its monopoly over 'justice' also limited the extent to which the Italian State's authority was received and accepted by its citizens. Taking the connection between sovereign power and punishment, and state punishment as a manifestation of state

⁷⁸⁷ The issue of federalism versus central government has become a salient issue in contemporary Italian politics with one of its most reactionary articulations in the Northern League. See Diamanti (2001); Ginsborg (2001); Ricolfi (1995)

⁷⁸⁸ See also Agnew (2002, p. 56).

⁷⁸⁹ Agnew (2002) but also Cassese (2011).

⁷⁹⁰ Garland (2001, p. 29)

⁷⁹¹ *Ibid.*

⁷⁹² *Ibid.*

⁷⁹³ *Ibid.*

sovereignty, this argument can be ‘translated’ into penal terms. The Italian state’s inability to command exclusive authority can be thought to have affected all of the following: the state’s effective power to deliver law and order; its attempts to deliver law and order; its use of the penal law to command authority; and the effectiveness of the penal law in reducing ‘alternative powers’ and ‘disorderly conduct’. It also influenced the extent to which the claims made through the penal law were accepted and internalised by Italian citizens. Particularly in relation to this acceptance, Sabino Cassese has noted the detachment that existed between Italian society and State, between the Italian reality and the Italy imagined in its laws, and between citizens and authority. This distance, he argues, notable at the time of Italian unification, has become a constant feature of ‘public power’ in Italy, i.e., of the power commanded by the state and its institutions⁷⁹⁴. Interestingly, Cassese links this distance between state and citizen to an additional feature of Italian unification, namely the restriction of suffrage in Italy⁷⁹⁵. Low levels of participation, even where citizens could vote, further limited the state’s popular political base. This combination created, Cassese argues, a detachment that went two ways: ‘lack of trust by the citizen in the State, exclusion [of citizens] by the State’⁷⁹⁶. If Garland is right and penalty expresses notions of state sovereignty, then it follows that this detachment (and the issues highlighted above) will have influenced Italian penalty. What is more, I argue that penal expressions of modern statehood will have also played out differently as different nations transitioned into ‘late modernity’, whose penalty Garland links to changing myths of state sovereignty (Chapter 1). The scarce credibility of the myth of the sovereign state in Italy forces us to reconsider if, and how, Italy can be said to have transitioned into ‘late modern penalty’ where the latter expresses, as per Garland, the waning of such a myth.

Support for my interpretations can be sought in two particular consequences that followed from the contested nature of the early Italian state. First is the Italian state’s inability to overcome its territorial cleavages – a feature that characterised the nation in 1861 as it did after the Second World War. This inability was matched by the inadequacy of any federal claims as against Italian unity: opposition to a unified Italy was never strong enough to threaten the ‘Italian’ project, but was always strong enough to affect the evolution of the Italian polity⁷⁹⁷. Second, as Cotta and Verzichelli note, is the ease with which liberal elites used repressive means against any ‘subversive’ manifestations that threatened the unified

⁷⁹⁴ Cassese (2011, p. 72 My translation.)

⁷⁹⁵ By census and by literacy; universal (male and female) suffrage was granted in 1945: *ibid.*, pp. 73-74

⁷⁹⁶ *Ibid.*, p. 74

⁷⁹⁷ This has been referred to as Italy’s ‘asymmetric’ regionalism: Cotta and Verzichelli (2007, p. 171). Italy has also been described as having a ‘*weak centralism*’: Cassese (2011, p. 100)

state⁷⁹⁸, manifesting the centre's willingness to rule the periphery by 'repressive means'. Centre and periphery should be understood then as physical *and* symbolic realms: 'centre' denotes not just the nation as a whole, but also the aspiration to a unified and centralised nation, and 'periphery' denotes Italy's regions but, more generally, its fragmentation. A passage through Fascism did not eradicate this tension, despite the regime's markedly centralising and repressive tendencies⁷⁹⁹.

The Italian Republic inherited this tension and was likewise marked by divided allegiances. I have shown, for example, how it came to include several political sub-groupings, whose existence provided heavy incentives in favour of group identification: in parallel to or, at times, against the state. Ilvo Diamanti claims that the Italian state 'is poorly recognised. In Italy [...] it enjoys limited trust amongst [its] citizens'⁸⁰⁰. The Italian state was, at various stages, explicitly challenged in its monopoly of political power by both terrorism and organised crime⁸⁰¹. The dynamic of divided allegiances was then reinforced by the existence of partyocracy and clientelism, as they contributed to politicise and carve up the Italian nation⁸⁰². Moreover, beyond the existence of these opportunistic attitudes to institutions, there existed also ideological motives to citizens' diluted identification with the Italian state. Indeed both Catholicism and Communism, the dominant ideologies of the time, acted as primary competitors in commanding loyalty over and above the Republican institutions⁸⁰³. This occurred even as political efforts at centralisation were being made, with the contemporary Italian state formally 'spreading its wings'⁸⁰⁴ over a multiplicity of interests that it co-opted without co-ordination⁸⁰⁵. Not only did this state of affairs reinforce the tension between centre and periphery, it also entrenched the dualism between public and private: where the public realm appeared as constituted of non-integrated interests.

⁷⁹⁸ Cotta and Verzichelli (2007, p. 6)

⁷⁹⁹ 'Fascism was, amongst other things, an [ultimately unsuccessful] way of trying to *force* unification': Agnew (2002, p. 57); Cotta and Verzichelli (2007, pp. 18-19 also)

Fascism consolidated the use of law as a tool for the imposition of authority and forced centralisation, for example through laws prohibiting political dissent: De Vito (2009, p. 5)

⁸⁰⁰ Diamanti (2001, p. 30)

⁸⁰¹ Ginsborg (1990, p. 201)

⁸⁰² Pizzorno (1992, p. 19)

⁸⁰³ Pasquino (2002, p. 72) Despite *de facto* collusion between the two political fields in the practice of government, we cannot discount the purchase of these ideologies amongst the Italian population.

⁸⁰⁴ Cassese (1987, p. 45: my translation.) See also Agnew (2002, p. 87)

⁸⁰⁵ Cassese (1987); Ginsborg (2001); Locke (1995)

ii. The penal law – symbolism and deployment, reception and avoidance.

The symbolic and instrumental use of the penal law – as a means to impose cohesion on a fragmented reality – was clearly visible within the Italian Republic. It found explicit articulation, between 1970 and 1990, in state reaction to terrorism and organised crime. These phenomena gave rise to what is known as the ‘logic of emergency’⁸⁰⁶, a willingness to react to deviance in a punitive fashion, when faced with explicit and organised threats to state power. In Chapter 2 I showed how this repressive ‘logic’ was in fact built into contemporary Italian penal reforms, as the legislation contained provisions for incapacitation that were reserved precisely to those individuals who threatened the Italian state and refused to sever their alternative political loyalties⁸⁰⁷, notably terrorists and organised criminals. A primarily incapacitative prison regime was thus laid out for those individuals whose allegiance lay unashamedly with an authority *other than* the state, and who had manifested this alternative allegiance in *violent opposition to* the state. What is interesting about this ‘logic’ is its capacity to produce a punitive momentum going over and above the single ‘emergencies’ at which it was initially directed. Thus when, in the 1990s, public and political attention shifted to ordinary (‘micro’) crimes⁸⁰⁸, existing emergency provisions were applied to ordinary crime.

As explored in Chapter 2 preventive incarceration – remand in custody – as one illustrative example of this dynamic. Preventive incarceration was reformed in 1974 in response to terrorism, so as to allow an extension of the maximum period of remand in custody⁸⁰⁹. Though softened in the early 1990s, the legal institution remained even after the end of the ‘terrorist emergency’, and the ‘organised crime emergency’ against which it had been deployed (the ‘halo effect’). Preventive incarceration inflated Italian prison rates *across* the three decades 1970 to 2000, as its punitive mode persisted beyond its initial targets⁸¹⁰. It became, that is, a tool available for use against diffuse, general deviance despite the latter being very different crime to the crime it was initially intended to curb. I suggest that this collision of punitive momentum and ordinary crime may subsequently have influenced the increase in Italian prison rates, particularly visible across the 1990s when a new and more

⁸⁰⁶ See Ruggiero (1995)

⁸⁰⁷ See also Cavadino and Dignan (2006, p. 144)

⁸⁰⁸ Nelken (2005, p. 225)

⁸⁰⁹ De Vito (2009, p. 95)

⁸¹⁰ Cavadino and Dignan estimate that ‘around half the [Italian] prison population [consists] of remand prisoners’: (2006, p. 145).

On 31.01.2013, 38.7% of the total prison population were pre-trial/remand prisoners (excluding minors): World Prison Brief. International Centre for Prison Studies http://www.prisonstudies.org/info/worldbrief/wpb_country.php?country=147 Accessed February 2013

visible target – non-EU migrants – offered itself to Italian penalty⁸¹¹.

The continued existence of a ‘logic of emergency’ and emergency provisions in Italian penalty speaks of the penal law as a tool to bolster authority amidst contestation. It reinforces the picture of a state in which unresolved conflicts and alternative allegiances imbued the penal law with particular symbolic and practical functions. The *role of the penal law* in this scenario – practical and symbolic – produced a potential for punitiveness that was present throughout contemporary Italian penalty. This ‘potential’ originated where the symbolic use of the penal law, as a means of imposing unity/loyalty, set in motion criminal justice processes that produced penal expansion in their collisions with ‘ordinary’ crime. I argue that the particular role the criminal law was thus invested with also contributed to cast the relationship between state and citizen as one of mutual distrust⁸¹². Unsurprisingly, it failed to integrate Italy’s various components, or even to monopolise political authority. This was particularly true where structural and institutional factors, few of which were curtailed by penal repression of alternative political allegiances, entrenched fragmentation. By contrast this use of the penal law reinforced what Cassese has termed the Italian ‘fear of Bonapartism and its abuses’⁸¹³, a fear of central authority, given its use as a tool of repression. The symbolic/instrumental use of the criminal law further bolstered the notion that crime was a *political* issue, and that criminal law was itself political. Once again, and in certain circles, this produced incentives *not* to rely on the penal law to resolve social conflict⁸¹⁴: as a political problem, crime required a political solution⁸¹⁵.

This meant that, paradoxically, an authoritarian deployment of the penal law reinforced existing incentives to informal social control⁸¹⁶. I have analysed how these incentives were anchored in political-economic and institutional structures. I also suggest that they were rooted in a reaction against the criminal law’s more repressive roles. The incentives to informal conflict resolution were then sustained by the penal philosophies issuing from

⁸¹¹ It is possible that a similar mechanism operated against other categories of deviance before the large-scale arrival of non-EU migrants. I deal primarily with non-EU migrants to illustrate the idea of ‘outsiderness’ in Italian penalty. Further research is needed to determine whether other ‘groups’ of deviants can be located in contemporary Italian penalty – for example drug offenders – investigating whether their punishment can be understood as the punishment of political outsiders.

⁸¹² Selmini (2011, p. 174)

⁸¹³ ‘fear of “Bonapartism” and its abuses [...] have accustomed people to [...] despise authority; to cherish certainty, if there is at least an escape through exceptions and derogations. [...]’: Cassese (1993, p. 325)

⁸¹⁴ See Chapter 2.

⁸¹⁵ Pavarini (1994, pp. 57-59)

⁸¹⁶ Cassese (1994, p. 129)

Catholicism and from Communism⁸¹⁷. Structural characteristics do not alone explain the incentives for informal social control in Italy: re-integrative impulses had politico-cultural roots, moulding citizens' reception to, and potential avoidance of, penal law. The Communist ideology, for example, contributed to the politicisation of social conflict. It stands to reason that as an ideology with purchase amongst portions of the Italian population, it contributed to the translation of 'collective sentiments of insecurity' into 'political demand for change and greater participation'. As analysed by Pavarini, this conversion can be seen as a partial explanation of Italy's typically low social demands for penalty⁸¹⁸. Communism, and in general the leftist ideologies present in Italy, can also be seen as having stimulated a sense of solidarity and social responsibility: if penal solutions *were* sought to social conflict they were thus likely to be re-integrative rather than geared to containment. As Cavadino and Dignan argue, reform and re-education of the deviant are 'congruent with [...] Communist communitarianism'⁸¹⁹.

This is not to say, however, that an analogous attitude was displayed by the Communist party, or indeed by the Left-wing parties more generally⁸²⁰. Here in fact is another example of the dual penal pressures originating from the same or similar sources: in this case, left-wing ideology and its formal articulation. Pavarini notes how 'with moderate and conservative parties reluctant to commit themselves on criminal policy issues', penal matters fell into the hands of the Left⁸²¹. This was true as regards penal reform (Chapter 2) and to some extent penal procedural reform (Chapter 5); it was also true in relation to the penal policy formulated during the mid-70s, against 'red' and 'black' terrorism⁸²². I have discussed the duality of the 1975 and 1986 penal reforms, which legislated for resocialization and treatment *yet* contained provisions allowing for their suspension, when applied to deviants committed to normative orders alternative to the state. Similarly, dualisms can be found in legislation against organised crime whose introduction was again supported by the Italian Left. In this sense, whilst communist and socialist ideologies may have had a moderating impact on Italian penalty – by stimulating a communitarian ethos and a conception of crime as a political issue – their support for emergency legislation may have had the opposite effect of inflating general punishment levels⁸²³.

⁸¹⁷ Cavadino and Dignan (2006)

⁸¹⁸ Pavarini (1994); 1997, p. 82)

⁸¹⁹ Cavadino and Dignan (2006, p. 140)

⁸²⁰ See Ferrajoli (1994)

⁸²¹ Pavarini (1997, p. 77)

⁸²² *Ibid.*; for a synoptic analysis of the PCI's intransigence vis-à-vis the Red Brigades see Pizzorno (1997, pp. 325-332)

⁸²³ Pavarini describes the attitudes of the left-wing parties, to terrorism and organised crime, as partly tactical. Left-wing terrorism was a form of political competition and a 'threat to the [...] democratic Left'. Black terrorism linked 'to the political systems in power', could

Turning now to the second ideology dominant in Italy – Catholicism – we see how it too shared a focus on social responsibility and solidarity⁸²⁴. If left-wing ideology emphasised the political nature of criminal law, Catholicism emphasised personal morality and repentance as preferable to state intervention in social conflict. Ginsborg describes the Italian Catholic Church's approach to authority as being premised on 'submission and docility, accompanied by the unparalleled virtue of mediation'⁸²⁵. Mediation was preached, for example, as the preferred mechanism for families to seek 'solutions in their relations to the outside world' rather than more active, collective solutions⁸²⁶. This attitude can be seen in the Christian Democracy's own tendency towards mediation, sustained as it was by those politico-institutional structures described in Chapter 3⁸²⁷. It is best exemplified in the DC's clientelistic practices, in which the 'affairs of the State'⁸²⁸ were mediated within the clientelistic relation rather than regulated by formal state laws and procedure, with the patron 'mediating' between his client and the centres of power⁸²⁹. It would seem to follow that the tendency to mediation may then have influenced ways of resolving social conflict: not by reference to neutral, formal state laws, but by reference to closer, more personalistic, informal normative orders (unified, for example, by the Catholic faith).

Dario Melossi provides us with a further characterisation of Catholic attitudes to penalty that he describes as marked by 'soft authoritarian paternalism'⁸³⁰. This attitude embodies a paternalistic tendency in favour of the informal resolution of deviance (restoring the sheep back to the fold), nonetheless sided by authoritarian reactions to direct challenges to 'religious or political hierarchies'. In this formulation we find echoes of the tension between formal and informal resolution of conflict in Italy, where the penal law was used to bolster established authority, even as portions of this 'authority' created incentives for informal resolution of conflict. This is yet another instance of the oscillations between punitiveness and leniency present within Italian penal trends between 1970 and 2000, influenced by political dynamics – conflicts and dualism – as they affect both the capacity to reintegrate deviance, and the use of the criminal law where deviance arises.

prevent the Left from ever reaching government. Thus '[for] the parties of the democratic Left' reaction against these types of crime 'was tantamount to a struggle for political survival', waged by 'enlisting the [...] assistance of criminal law sanctions' (1997, p. 95 note 91.)

⁸²⁴ Cavadino and Dignan (2006, p. 140)

⁸²⁵ Ginsborg (2001, p. 103)

⁸²⁶ *Ibid.*

⁸²⁷ *Ibid.* See also Molina and Rhodes (2007, p. 235)

⁸²⁸ Ginsborg (2001)

⁸²⁹ Foa and Ginsborg (1994, pp. 74-75)

⁸³⁰ Melossi (2001, p. 412)

iii. Dualisms - widespread illegality and legalist utopias

Melossi has also argued that Italy's system of 'de facto informal social control' is deeply entwined with what he terms 'widespread illegality'⁸³¹. Widespread illegality here does not mean high crime rates. Italian crime rates have tended to be similar to those experienced across Europe during the same period, growing between 1970 and 2000⁸³². The term 'widespread illegality' indicates a more 'diffuse and capillary'⁸³³ phenomenon: in Melossi's words, 'traditional practices of moderate but pervasive violations of the law'⁸³⁴. The latter are well exemplified by the high levels of tax evasion and informal labour by which Italy is beset⁸³⁵. The collection of essays, *Italia Illegale*, is dedicated precisely to charting 'widespread illegality', its consequences and its institutional anchorage. Among the essays, Sergio Scamuzzi's contribution provides us with a clear (if not univocal) articulation of the concept. Scamuzzi subdivides 'widespread illegality' into a fourfold typology⁸³⁶. The first 'type' is so-called *truffe* – roughly translatable as 'scams' – encompassing formal frauds including tax evasion and more informal examples of 'swindling'⁸³⁷. The illegality here is 'diffuse' because it is not 'concentrated [in] particular social groups or specific territories' but rather 'involves relatively wide portions of the population'⁸³⁸.

The second expression of 'widespread illegality' quoted by Scamuzzi (and, I add, one intimately linked to the Italian political economy) is diffusion of informal labour. Informal labour here means 'licit activities [not illegal] yet not disclosed [as existing economic activities] to the public administration'⁸³⁹. Under this label Scamuzzi includes a complex mix of behaviours. The latter range from moonlighting, second jobs taken on by those already formally employed where a second job is forbidden and/or on which no taxes are paid;

⁸³¹ Melossi (2003, p. 381)

⁸³² Scamuzzi (1996b, p. 10 My translation.)

⁸³³ Baldissera (2006, p. 60 My translation.)

⁸³⁴ Melossi (2003, p. 382)

⁸³⁵ Regini (1997, p. 109); Scamuzzi (1996b, p. 10)

⁸³⁶ Scamuzzi (1996b)

⁸³⁷ Scamuzzi refers to a 1995 study by the Italian research institute *Eurispes* entitled 'The Italy that Frauds'. It details the 80 most common forms of 'swindling', including the use of fake cheques (Chapter 1), tax evasion (Chapter 28) and breach of construction regulations (Chapter 41). The report is 'half-way between journalistic investigation and research', but can illustrate what Scamuzzi's first category of diffuse illegality means: Eurispes, 1995 http://www.eurispes.it/index.php?option=com_content&view=article&id=741:litalia-che-truffa-piccole-e-grandi-illegalita-nel-malpaese&catid=56:criminalitaesicurezza&Itemid=323

⁸³⁸ Scamuzzi (1996b, pp. 11-12)

⁸³⁹ *Ibid.*, p. 13

working as an employee where the job is the employee's principal activity but is not disclosed as such, and on which no contributions are paid⁸⁴⁰; self-employment that is unregistered, falls outside commercial regulation, and on which no taxes are paid⁸⁴¹. Though the phenomenon is difficult to gauge, given its informality, Italian national statistics on levels of informal labour do give us an idea of its diffusion during the 1990s. They show that irregular workers as a percentage of all individuals employed ranged between 13.4 and 11.7, in 1991 and 2000 respectively⁸⁴². Mark Warren, writing in 1994, provides us with a comparative outlook: '[the] informal economy accounts for between 20% and 33% of the gross national product in Italy, while averaging around 5% for Scandinavia and the [European Union] countries'⁸⁴³.

In Scamuzzi's analysis, this type of informal labour betrays the existence in Italy of a 'tacit complicity' between those who demand and those who provide informal labour⁸⁴⁴. This establishes, I add, a different set of norms regulating the request for – and delivery of – labour, which falls outside the formal law. As Scamuzzi notes, this type of interaction, and the incidence of informal labour, are linked to the more general aspects of the Italian political economy and economic policy. The incidence of informal labour, and the less than stringent application of fiscal rules have characterised the evolution of the so-called 'Third Italy' (Chapter 3).

Political corruption is Scamuzzi's third 'type' of diffuse illegality ('diffuse across the nation' and not limited to the instances emerged during the *Tangentopoli* scandal)⁸⁴⁵. By allowing the concentration of power and resources, and by permitting their distribution through particularistic means, clientelism, nepotism, partyocracy, the domination of one political party over the course of the decades⁸⁴⁶ have created both material and social incentives for corruption. Here it is the structure of the Italian political regime that contributes to 'diffuse illegality'.

Fourth, and final, in Scamuzzi's list is organised crime⁸⁴⁷, a phenomenon more territorially specific than other forms of diffuse illegality. Though no longer limited to such regions⁸⁴⁸, different organised crime cartels originated in distinct Italian localities, most notably, Cosa Nostra in Sicily⁸⁴⁹. Here the illegality – which covers a wide variety of

⁸⁴⁰ With an employer, and not self-employed.

⁸⁴¹ *Ibid.*, p. 13; Reyneri ((1989) 2010, pp. 132-133). See Chapter 5.

⁸⁴² 3,081,100 workers in 1991 and 2,685,900 workers in the year 2000: ISTAT (1980-2010) <http://www.istat.it/it/archivio/39522> Accessed July 2012. See Chapter 6, Table 5.

⁸⁴³ Warren (1994, p. 90)

⁸⁴⁴ Scamuzzi (1996b, p. 14 My translation.)

⁸⁴⁵ *Ibid.*, p. 15

⁸⁴⁶ *Ibid.*, p. 15

⁸⁴⁷ Scamuzzi's definition departs from Melossi's *moderate* pervasive illegality.

⁸⁴⁸ Scamuzzi (1996b, p. 17)

⁸⁴⁹ For an authoritative analysis of the Sicilian Mafia see Gambetta (1996)

activities⁸⁵⁰ – is of particular interest for our broader theorisation of Italian penalty in that it represents a form of deviance that directly competes with state authority⁸⁵¹. It speaks, therefore, of a state beset by alternative allegiances, but also a source of formal legal reactions to illegality that feed into Italy's leniency-punitiveness dualism (see below).

In Scamuzzi's analysis, 'widespread illegality' covers numerous forms of behaviour, from scams, through informal labour and tax evasion to organised crime⁸⁵². These are examples of 'diffuse' illegality in that they are present (to different extents) throughout the Italian social and political fabric. I also suggest that they are, importantly, a corollary of the Italian institutional setup. Italian welfare institutions, with the gaps in provision highlighted by Ferrera, are supplemented by compensatory mechanisms such as clientelistic exchanges (Chapter 3). Partyocracy, by concentrating power and resources in party hands, allows party politicians to act as patrons within the clientelistic relationship. Scamuzzi points to the institutional 'supports' for 'widespread illegality'⁸⁵³, talking of its intimate links with the 'organisation of power' in Italy. This means both the distribution of politico-economic power and resources that results from the institutional setup; and the opportunity for their *re*-distribution through the mechanisms of widespread illegality. Scamuzzi phrases this institution-illegality link in terms of the 'opportunity structure' created by the Italian setup (almost an 'informal' version of the 'institutional advantage' which form the basis for archetypal 'varieties of capitalism').

I argue that, crucially, all these forms of 'widespread illegality' point to the existence of normative orders in Italy, according to which the illegality functions, 'alternative' to the formal legal order. Recall Pizzorno's discussion of Italy's 'intermediate collective loyalties'⁸⁵⁴. The breach of formal legal rules here is relatively systematic, and the systematicity derives both from the diffusion of illegal behaviour ('widespread') and from the fact that it follows alternative normative schemas. So, for example, the 'tacit pact' between those who provide and those who request informal labour represents not just a breach in labour regulations but, widespread as it is in Italy, an alternative 'informal' economic structure. The 'informal' economy here functions in parallel to the 'formal' economy, in the interstices of the laws that are laid down to regulate the latter. Here the nature of Italian norms also plays a part in stimulating diffuse illegality. Sabino Cassese gives an account of the

⁸⁵⁰ Scamuzzi quotes drugs and arms trafficking but also 'brokering' and the distribution of favours between politicians, entrepreneurs and even magistrates (see also Chapter 5).

⁸⁵¹ Scamuzzi (1996b, p. 16)

⁸⁵² His analysis is not exclusive, see: (Sgroi, 1996)

⁸⁵³ Scamuzzi (1996b, p. 17)

⁸⁵⁴ Pizzorno (1992, p. 19)

interplay between ‘ordinary’ norms and ‘derogating’ norms⁸⁵⁵. In particular he points to a tendency existing within the Italian system, to lay down a norm that is then derogated from by additional, and subsequent, legal norms⁸⁵⁶. The discrepancy between the two then creates a space for the ‘negotiation’ of legal rules: where multiple and conflicting norms apply to the same situation, those who have recourse to the norms are incentivised to select the most advantageous⁸⁵⁷. Similarly Lange and Regini describe the Italian bureaucracy as ‘available to penetration and ready [...] to interpret the law in a way that allows exceptional treatment or [delayed] implementation’ albeit behind its ‘veil [...] of [...] rigid universalistic rule-making’⁸⁵⁸. It is logical to suppose that in this space for negotiation, we also find opportunities for ‘widespread illegality’: as in the case of violations of construction laws, later rectified by so-called *condoni* or pardons. Here the original norm restricts the opportunities for construction, yet its violation is condoned *post-hoc* by the derogatory norm, the pardon⁸⁵⁹. This interplay, given its repeat occurrence, creates further incentives to repeat the breach despite its fraudulent nature: the consequence is for that illicit practice to become ‘widespread’.

Here we find the ‘informal social controls’ that are deeply embedded in Italy’s widespread illegality. Informal social controls are necessary where legal norms are negotiable, or routinely not applied. Informal social controls also spring forth from illicit exchanges where they are sufficiently diffuse and/or systematic. The notion of ‘social control’ is complex and well debated and I will not enter into this debate in this thesis⁸⁶⁰. For my purposes ‘informal social control’ indicates the use of norms and rules that breach, bypass or contradict formal legal norms, or in relation to which legal norms are not directly relevant; whose use is geared to controlling human interaction, in order to achieve a particular result (e.g. economic advantage); or resolve a social conflict (e.g. as caused by deviance)⁸⁶¹. Recall my hypothesis on mechanisms of clientelism and corruption where, for example, the existence of clientelistic relations reduces the feasibility of penal solutions to crime and deviance. Here the resolution

⁸⁵⁵ See Rebuffa’s (1996) analysis of the ‘diffuse illegality’ within the Italian constitution

⁸⁵⁶ See analogies with the discussion of the ‘reform’ and ‘counter-reform’ of Italian penal law – Chapter 2.

⁸⁵⁷ Cassese (2011, p. 85) See also Regini (1997, p. 106)

⁸⁵⁸ Lange and Regini ((1989) 2010, p. 257)

⁸⁵⁹ See Sgroi (1996, pp. 61-62)

⁸⁶⁰ See Bergalli and Sumner (1997)

⁸⁶¹ Mechanisms of informal social control may ‘directly contradict the spirit and word of the law’ or may contravene the law’s spirit but not its formal dictate: Sgroi terms these ‘illegal’ and ‘alegal’ methods respectively. He points to the use of remand in custody to obtain a suspect’s co-operation, as an example of ‘alegal’ control: informal controls are thus not limited to Italian citizens, but are also present in Italian institutions (1996, p. 28)

of conflict, created by an ordinary crime of one member of the corrupt exchange against another, may have to be resolved outside formal penal procedure.

Conceding the ‘widespread illegality’ of Italian society, however, does not mean that we should also assume the criminal law has had *no* purchase amongst Italian citizens. Nor should we assume that it has had unquestioned purchase *within* the state. My analysis of Italian politics – its different components, its numerous conflicts and oppositions – should in fact have alerted us to the *multiplicity* of penal impulses that are produced at every level of the Italian setup. Similarly, we note how many of the analyses contained in *Italia Illegale* locate the sources of illegality in state structure: the practices and rules of government and public administration. Thus if it is true that the state relies on the penal law to impose social cohesion, it is also true that components of the state are themselves purveyors of ‘illegality’. The lack of trust in Italian law is also a reaction to these instances of collusion⁸⁶², wherein the state itself is seen to breach its laws. This co-existence, *within the state*, of law and its breach produces two opposed reactions to the penal law, one providing incentives for penal exclusion, and one pulling away from penal exclusion.

On the one hand, the unreliability of the state reinforces both informal social control and widespread illegality. Reliance on informal orders may also be the more pragmatic option given that in Italy the legislative process is notably sluggish, and the legal process beset by high attrition rates⁸⁶³. Legal delays in particular follow from Italian penal procedural rules. Procedural guarantees – which after 1989 include a mix of both accusatorial and inquisitorial guarantees (Chapter 5) – can dilate trials to such an extent that a final verdict ‘sometimes [takes] over 10 years’⁸⁶⁴. The trial is also affected by so-called *prescrizione* – the statute of limitations period – after which ‘criminal proceedings become null and void’⁸⁶⁵. The combination of lengthy trials and the running of the limitation period are thought to increase the number of cases that end up being declared void. Nelken in fact sees this interaction of procedural rules as a primary reason why Italian prison rates are relatively low in comparative perspective⁸⁶⁶. I suggest that delays will also impact upon reliance upon the penal law: where the latter is perceived as being ineffective by reason of legal delays, it may no longer be a sensible option for resolving social conflict. In a polemic vein, Emanuele Sgroi notes how ‘a strategy adopted by victims who wish to avoid the futile [...] resort to the State’s repressive apparatus’ is simply *not* to report the crime they have suffered⁸⁶⁷. Where they do, they may

⁸⁶² See Chapter 5.

⁸⁶³ Nelken (2009, p. 110); 2011)

⁸⁶⁴ Nelken (2011)

⁸⁶⁵ *Ibid.*, p. 110

⁸⁶⁶ Nelken (2009, 2011)

⁸⁶⁷ Sgroi (1996, p. 28)

find that the level of delay achieves much the same result. Cavadino and Dignan make a similar point, noting that the ‘agonising slowness’ and inefficiencies of the Italian criminal system produce a cynical attitude to criminal justice: my suggestion is that this may reduce the system’s overall efficiency and, in some cases, decrease the instances in which criminal justice is relied upon⁸⁶⁸. I also suggest that it manifests a discrepancy between state (penal) legal dicta and their application that reduces the purchase of such dicta overall.

On the other hand, the co-existence of law and its breach within the state apparatus also produces an impulse towards *more, and more rigidly applied*, laws. These are seen, by certain sectors of the legal and political profession and the public, as the necessary solution to widespread illegality: but also as the necessary remedy to the politicised fragmentation of Italian society. The latter approach rests on a formalistic conception of equality before the law, which presumes that law is the apt remedy to the excesses of Italian partyocracy and to the private distribution of public entitlements. Much simplified, the reasoning might run as follows: before the law we are all equal, thus more law, better applied, amounts to greater equality, and this counters the excesses of a politicised society.

The co-existence of law and its breach, and the dual results it produces, are well described by Cassese in his discussion of discrepancies between Italian norms. These discrepancies arise he argues, because Italian codified norms have too often been sidelined and – Cassese implies, distorted by ‘special norms, exceptions, derogative norms’⁸⁶⁹. The result is ‘legal disobedience’, or ‘legal a-legality’⁸⁷⁰, marked by the existence of multiple norms, all applicable to the same case, yet standing in contradiction with one another. This is ‘legal a-legality’ because legal norms exist (they are ‘legal’) that seem to undo what other legal norms have put in place (producing ‘a-legality’). Within the context of administrative law, this has produced legal uncertainty and, Cassese claims, an incentive to negotiate over which norm should apply in any given case⁸⁷¹. Cassese extends this argument beyond administrative law, arguing that ‘Italian history is replete with [examples] of this state of legal a-legality, in which the multiplicity of norms [...] makes every sort of negotiation possible between citizen and State, whether [the negotiation] is legitimate or illegitimate’⁸⁷². I suggest that this might bolster a more general tendency to negotiate in situations of social conflict, including deviance, pushing towards means of social control that do not rely on formal legal dicta or

⁸⁶⁸ Cavadino and Dignan (2006, p. 146)

⁸⁶⁹ Cassese (2011, p. 84)

⁸⁷⁰ *Ibid.*, pp. 84-85

⁸⁷¹ *Ibid.*; Sgroi (1996, p. 60)

⁸⁷² Cassese (2011, p. 85) See also Sgroi (1996, p. esp. 60)

Lack of funds also incentivises administrators to act ‘or [...] [omit to act]’ and contradict the letter of the law: Scamuzzi (1996b, p. 13)

procedures. This may also result from what Sgroi has called a ‘reduced sense of entitlement to rights’: where the rights are *de facto* reduced to requests (as in client-patron exchanges) the right-holder begins to perceive them as favours⁸⁷³. Overall this ‘reduces social actors’ expectations’ of what they can obtain from the law; including penal law and penal procedure⁸⁷⁴.

However, as Cassese does, I also argue that the ‘malleability’ of legal norms in Italy, manifest in administrative law, may have the opposite effect, producing, alongside incentives towards informal resolution of conflict, a marked tendency to rely on the law. The latter may indeed appear as the best (if not the only) tool to overcome the vagaries of an over-inflated and negotiable system of norms. This again leads us to the idea of law as a solution to inequality⁸⁷⁵; but also to the high judicial caseload that this attitude can lead to; and thus to further increases in legal delays⁸⁷⁶. Delays are then interpreted as marks of state inefficiency, bolstering persisting inequalities within Italian society, creating incentives towards informal resolution of conflict... and so on in a vicious circle.

Feeding into Italy’s penal dualism, the tendency that I have just analysed – the (paradoxical) reliance on more and stricter law – is also expressive of ‘legalism’, or what Reyneri describes as Italy’s ‘juridical-formalistic culture’⁸⁷⁷. This attitude can be found both amongst Italian citizens *and* within state elites. It is marked by an almost utopian belief in the power of the law such that law is seen as a necessary and sufficient solution to social problems (including deviance)⁸⁷⁸. I suggest that its roots are to be found in the history of Italian unification⁸⁷⁹, where law offered one way to stimulate (and not just impose) the cohesion that Italy lacked. Moving to the penal law, I also suggest that in its contemporary articulations legalism can be linked to Italy’s tendency to regulate by criminal law ‘many forms of conduct’ that would elsewhere ‘be the subject of administrative or civil law’ (Chapter 2)⁸⁸⁰. This tendency produces an inflation of criminal legislation that itself expresses an over-reliance on the law. Set in context, this reliance produces what Cassese has described as one of Italy’s

⁸⁷³ As typically occurs in the clientelistic exchange. Sgroi (1996, p. 75)

⁸⁷⁴ Sgroi (1996, p. 75)

Sgroi claims that the law’s negotiability leads values such as ‘solidarity and equality’ to lose credibility or to find ‘refuge in *partial systems of aggregation [held together by] motivational resources that are sentimental, ideological or religious*’ (1996, pp. 18-19 My translation; my emphasis).

⁸⁷⁵ Cassese (2011, p. 86) Sgroi (1996, p. 29)

⁸⁷⁶ Cassese (2011, p. 86)

⁸⁷⁷ Reyneri (1987, p. 155 My translation.)

⁸⁷⁸ Reyneri describes ‘the [formally] unlimited trust in legislative norms’ ((1989) 2010, p. 132)

⁸⁷⁹ Cassese (2011, p. 82)

⁸⁸⁰ Nelken (2005, p. 224)

contradictions: the co-existence of high legalism and low étatism⁸⁸¹. It can also be linked to Pizzorno's categories – sense of state and sense of politics – and likened to the 'ritualism' that, he argues, is one side-effect of an extreme 'sense of state'⁸⁸². It is a form of 'ritualism' because state procedures and laws are seen as ends unto themselves, and divorced from the principles that inspired them⁸⁸³, and because the laws are divorced from the context in which they are being applied and from the results they are actually achieving⁸⁸⁴. This ritualism may well characterise those state elites that, in opposition to collusion and pervasive illegality, relied primarily on the law to remedy Italy's over-developed sense of politics. Where it expressed itself as over-reliance on *criminal* law, legalism clearly produced an impulse to penal expansion⁸⁸⁵. An example of legalism as reliance on the formal dictates of the law can be found in the attitude of left-wing parties to Italy's crime emergencies. As analysed by Pavarini, the Left's 'commitment to the idea of the State'⁸⁸⁶, which co-existed with its more 'anti-system' articulations⁸⁸⁷, led it to 'conceive of any reform of the state in terms of changes in the law, including the criminal law' and thus to insist on criminal policies⁸⁸⁸.

I argue that, during the 1990s, legalism also provided an existing discourse, ready to be adopted in the face of, and in contrast to, the political crisis that followed *Tangentopoli*. By the end of *Tangentopoli* the Italian political scene was bereft of its past ideologies and of a credible political class, a substantial part of which had been revealed as corrupt. The left-wing itself was, in Pavarini's words, 'at a complete loss, with no solution to offer'⁸⁸⁹ to existing social and political issues, except that of bolstering the fight for formal legality⁸⁹⁰. The left-wing, in a sense, re-constituted its new identity around law and legality⁸⁹¹. Moreover, by contrast to the immobile and discredited political class, at this time Italy possessed an active judicial class – the most visible author of political change⁸⁹² – as well as a legalistic 'ideology' to embrace (Chapter 5). This combination of factors – legalism, political corruption, judicial investigations – led to the situation described by Pavarini, whereby

⁸⁸¹ Etatisme denotes the strong central state authority that Italy lacked: Cassese (1993, p. 318)

⁸⁸² Pizzorno (1992, p. 67)

⁸⁸³ *Ibid.*

⁸⁸⁴ Recall Lange & Regini, (1989) 2010, p. 257)

Note the analogy with the logic of emergency and the 'halo effect'.

⁸⁸⁵ See Chapter 5

⁸⁸⁶ Pavarini (1997, p. 77)

⁸⁸⁷ A term used to describe the PCI.

⁸⁸⁸ *Ibid.* See also: Pizzorno (1997, p. 328)

Note the contrast with the broad penal effects that left-wing ideologies are thought to have had in Italy.

⁸⁸⁹ Pavarini (1997, p. 84)

⁸⁹⁰ *Ibid.*, p. 77

⁸⁹¹ Pavarini (1994, p. 57); Melossi (2003, pp. 384-385)

⁸⁹² Della Porta (2001); Nelken (1996)

emphasis was placed on legal solutions to deviance, and judges and penal law enjoyed a heretofore unprecedented legitimacy⁸⁹³. Demands for penal censure grew in this decade, untempered by the more inclusive influences of Italy's past ideologies. In a 'partyocracy' devoid of ideology⁸⁹⁴, demands for penal censure came to occupy a strategic role: diverting attention away from persisting structures of political interest⁸⁹⁵ and towards 'outsiders'. Furthermore Pavarini emphasises how the social and political insecurity caused by the political crisis led to demands for *immediate* improvements: an immediacy that doomed these demands to being unmet. The result was 'a moralist intransigence that foments *righteous crusades to seek out scapegoats on whom to heap all the ills of society*'⁸⁹⁶, a process not dissimilar to the 'displacement' tactics described by Melossi⁸⁹⁷. Cumulatively, I argue, these tendencies produced a push towards incarceration that tended to fall on subjects *other than* those at the heart of the 1990s political crisis⁸⁹⁸. The notable example here is non-EU migrants, 'new arrivals' within the Italian context precisely during this turbulent decade. As I will argue in Chapter 6, immigrants, as 'naked' legal subjects, were unable to rely on the informal social control available to most nationals, paying the penal price of Italy's high legal formalism.

In sum: Italy's widespread illegality produced a tendency to legalism whose punitive potential came to the fore after *Tangentopoli*, but whose effects found a novel target – non-EU migrants – during the 1990s.

iv. Principle and pragmatism, and Italian penalty as a volatile penal equilibrium

Even legal formalism, however, fell short of its aim: political conflict continued to bolster Italy's fragmentation, political tensions continued to produce incentives towards informal conflict resolution, both contributed to maintain pockets of illegality in Italy. This continued to defuse calls for 'law and order' even during the 1990s, such that any Italian 'populist punitiveness' was at the very least selective. In this context, the principled stance of the legalist was often forced to yield to pragmatism⁸⁹⁹, highlighting yet another unresolved political tension in Italy, between principle and pragmatism, with its varying penal effects (Chapter 2).

⁸⁹³ Pavarini (1994, p. 59); 1997, p. 84)

⁸⁹⁴ Della Porta (2004)

⁸⁹⁵ Melossi (2003, p. 382)

⁸⁹⁶ Pavarini (1997, p. 83. My emphasis.)

⁸⁹⁷ Melossi (2003)

⁸⁹⁸ Cornelli (2010, p. 40); Pavarini (1994, p. 59)

⁸⁹⁹ Nelken (2009, p. 292) As one prominent Italian politician claimed: 'in Italy it is only possible to take remedial measures once the roof has fallen in': quoted in Ginsborg (2001, p. 272)

Amnesties embody this contradiction. They are a concession to pragmatism: as short-term solutions to the chronic overcrowding of Italian prisons, they operated as safety valves within Italian penalty, tempering penal expansion and forestalling the penal system's implosion⁹⁰⁰. They are also a symbol of the state's monopoly over penalty, whether through repression or through leniency, and they give us an insight into Italian penalty as a whole, in which punitiveness and moderation vary on the basis of political conflict, as the competition between political groupings affects both the propensity to exclude, and the capacity to re-integrate deviance. They vary also on the basis of political dualisms – such as the tension between principle and pragmatism – which influence the use of the penal law as a tool for conflict resolution. Within this system amnesties and immigrants have provided short-term solutions to penal expansion, respectively by defusing it and by directing it towards more 'suitable enemies'⁹⁰¹. Bringing together insights from this and previous chapters I can now provide a definition of Italy's 'volatile penal equilibrium'. The term indicates a system marked by the co-existence and alternation of repression and leniency, with Italy's 'safety valves' providing, at times very explicit, means for the system to 'self-correct', to temper penal expansion. The use of the word 'equilibrium' is meant to indicate the *recurring* alternation of repression and leniency, distinct from the type of penal escalation witnessed in the UK. The term 'volatility' is meant to indicate that the oscillation between the two nonetheless occurs, hence Italy does not produce the same moderation witnessed in Germany. Finally, the expression is meant to mirror my description of Italian politics as a 'volatile political equilibrium', indicating the susceptibility of penalty to Italy's political conflicts and tensions.

Placing this scenario in theoretical context, Italy presents more than one contrast with the literature with which this chapter started. Comparing Italian penalty to Garland's account, for example, we see that Italy between 1970 and 2000 did not display the 'increasing punitiveness' that he describes in *The Culture of Control*. Nor does Italy coincide with the cultural scenario that Garland draws. In Italy, informal social control is still (at times unexpectedly) a very relevant part of contemporary penalty. My discussion of the *role* of Italian criminal law also suggests that it cannot occupy the type of symbolic position that it did in Garland's Britain: the law in Italy has variable purchase, and variable roles, and it is not politically feasible, or necessarily popular, to insist upon 'law and order'⁹⁰². Moreover, ideologies that supported penal re-integration were for decades central to Italian life and were sustained by structural features whose persistence suggests the continued existence of re-

⁹⁰⁰ Cavadino and Dignan (2006); Pavarini (2001)

⁹⁰¹ Wacquant (1999)

⁹⁰² Nelken (2005). See Chapter 5.

integrative impulses, forgiveness, or mediation. Even where we assume that the crisis of the 1990s left nothing of the post-war ideologies, their structural anchors remained, though less ideological and more personal in their political character, and continued to produce insulating networks of belonging. The ‘culture’ that exists in Italy is thus of a *different* type of control, not equivalent to the one analysed by David Garland.

Of course, this critique partly reiterates the idea that penal pressures, rolled out at a ‘global’ level, have national institutional structures to contend with. As Lacey’s analysis shows, institutions do a lot to mediate penal pressures, producing quite distinct national penal scenarios. Lacey’s analysis has informed my own approach to Italian penality and it is fundamentally bolstered by my account of Italian penal trends. However, when comparing Italy with Lacey’s models, we see the inability to systematise Italy’s volatile political equilibrium alongside *The Prisoner’s Dilemma*’s CMEs and LMEs. The institutional structure in Italy is not as integrated as that of the United Kingdom or Germany. It is structurally a hybrid, and differs from both models insofar as it produces networks of inter-dependence without also producing co-ordination. In the Italian context, the organising principle for penality is best sought in politics, as political variables play a crucial role in shaping Italian penality. Such variables *are* part of the account offered in *The Prisoners’ Dilemma* but, in Italy, they are of particular relevance: in a nation where the institutional structure has incorporated and magnified political conflicts and dualisms, they are the key to systematising Italian penal trends.

III. Conclusions

In Chapters 3 and 4, I have been arguing that we need to look to political institutions and dynamics in order to explain, and systematise, Italy’s differential punitiveness. Contemporary Italy can be understood as composed of numerous competing political sub-groups. Its politics are thus conflictual, and are also beset by political dualisms, tensions originating from contradictory structural dynamics, which are incorporated and magnified by Italian institutions. These institutions are ‘proportionalist’ and dominated by political parties but unable to broker resolution of conflicts. In this, Italian political dynamics are *prima facie* more volatile than in those European nations where the institutional structure is, for better or for worse, more integrated.

Starting from the notion of conflictual politics, I have argued that Italian penal trends can be understood on two levels. On one level, they can be understood as the end point of existing structural incentives to either punitiveness or moderation. The Italian political economy, even as a hybrid, produces incentives to re-include or exclude deviants. The industrial districts of the Third Italy, the industries where changes were negotiated and contained, or the

clientelistic relations of the South, have all been examples of structures that stimulate the re-integration of deviants. In all such structures, whether through informal bonds or through formal labour relations, penal exclusion is a costly disruption. Political dynamics are crucial in understanding not only how these structures work, but also their historical development and their commonalities.

I have also argued that, at the second level of analysis, Italian penal trends should be understood in terms of the *penal translation* of existing structural incentives. This level of analysis investigates whether or not the penal law is the apt tool with which to realise institutional advantage, in favour of exclusion or re-integration. The question concerns the purchase and role of the criminal law in Italy, and Italy's political dualisms are particularly significant in this respect. They help us explain the discrepancy between the purchase and the role of criminal law and how it produces explicitly penal tensions, between formal and informal social control, and between repression and leniency. This analysis has engaged Italian history, but also culture, and has interrogated the structural anchorage of relevant historical and cultural features. I have pointed to the dualism between centre and periphery, expressing divided allegiances to the Italian state, and rooted in the history of the latter's formation. I have shown how divided allegiances produce a strong state reaction to dissidence, in which the penal law has been a principal tool of imposed cohesion, producing a potential for penal expansion. Yet divided allegiances also produce the opposite tendency, namely the tendency to avoid the penal law and to deploy informal social control in its stead. This produces a potential for penal containment and it is an attitude stimulated, for example, by the network of clientelistic relations found throughout Italy. The latter are the same that contribute to fragment the Italian state, stimulating an authoritarian penal reaction to fragmentation, and further avoidance of the penal law... and so on. As illustrated, these dynamics produce a condition of volatile equilibrium, which recalls the continuous conflict and tensions of Italian politics.

Italy's volatile penal equilibrium differs from Garland's culture of control and De Giorgi's post-Fordist penalty. Partly this is because Italy does not present the 'increasing punitiveness' of their theories, but also because it diverges from the political economic and cultural scenarios their theories relate to. Analysed through an institutional lens, Italian penalty does, however, fit Lacey's claims on comparative penal variation. Italian institutions do act to mediate penal pressures, and this produces a distinctive (though not *sui generis*) penal scenario. As in my account of Italy, political dynamics are also an integral part of *The Prisoners' Dilemma*, albeit within the context of more integrated LME and CME models.

My explanation of Italian penalty can then be put in conversation with Lacey's models, and with Garland and De Giorgi, via renewed focus on the notion of politics as a conceptual bridge between Italy and broader theories of contemporary punishment. From this 'conversation' I conclude that the three theorists are themselves making claims about the influence of politics on penalty. What differs compared to Italy, but also when the three accounts are compared, is the explicitness and centrality of political dynamics to the accounts. So, for example, *The Culture of Control* makes claims about the political viability of calls for law and order, in the same way as De Giorgi makes claims about the political changes that led to the economic shift into 'post-Fordism'. In *The Prisoner's Dilemma* political variables have a more explicit place. The one primary distinction with Italy remains, therefore, the primary role that political dynamics play in Italian punishment. This distinguishes Italy from CMEs: Italy has some dimensions typical of CMEs (collaboration and interdependence) but set within such a fragmented (politicized) context that they fail to produce real capacity for coordination. If political variables are, as I argue, important penal determinants across contexts, it still remains true that in Italy they stand out for their visibility and their particular connection to penal trends.

Chapter 5 – Judicial Actors and Italian Penalty

I. Introduction

Judicial actors – judges and prosecutors – are particularly significant to our analysis of Italian penalty. This is not just because, as Nelken argues, criminal procedure should be seen as an ‘independent variable in its own right’ when investigating penal systems⁹⁰³, it is also because of judges’ and prosecutors’ particular institutional position, which has caused them to purvey different penal pressures either for penal expansion or penal containment. This in turn is a further source of the variation between repression and leniency that is integral to Italy’s differential punitiveness.

In order to explain the effect that judicial actors have had on Italian penal trends and to understand it in a broader comparative scenario, I start from the models suggested by Savelsberg and Lacey, which I apply to the Italian context⁹⁰⁴. I argue once again that Italy is not yet well accounted for by these models, and in this chapter I build from and modify them to increase their explanatory capacity, whilst maintaining their fundamental insights, by factoring in the notion of ‘legitimacy’. In this chapter I am *not* charting direct correlations between judicial action and Italian prison rates. This endeavour (especially in its historical aspects) ‘would require a research program that could not be realized by an individual researcher’⁹⁰⁵. Rather, this chapter develops a series of interpretive conclusions on judicial contributions to Italian penalty that are premised on an institutional analysis of judicial actors similar to that found in Savelsberg and Lacey.

The two authors rightly note that judicial structure and institutional situation will, in given contexts, contribute to penal stability or penal dynamism⁹⁰⁶. Specifically, they argue that levels of judicial bureaucratization will affect the judiciary’s capacity to resist popular calls for law and order⁹⁰⁷. Additionally, judges’ interrelation with politicians will affect levels of institutional co-ordination over penal matters⁹⁰⁸. With all other contextual circumstances aligned, such co-ordination may sustain levels of penal moderation and stability. By contrast where there is no co-ordination, there may be greater leeway for penal expansion, if catalysed by other institutional features. Lacey’s and Savelsberg’s main axes -

⁹⁰³ Nelken (2011, p. 109)

⁹⁰⁴ Lacey (2008); Savelsberg (1994, 1999)

⁹⁰⁵ Savelsberg (1994, p. 193)

⁹⁰⁶ Lacey (2008); Savelsberg (1994, 1999)

⁹⁰⁷ Lacey (2008, pp. 93-94)

⁹⁰⁸ *Ibid.*, pp. 93-95

bureaucracy/independence, and institutional co-ordination/conflict – help to elucidate the potential relationship between judicial and political actors; and between judicial actors and public opinion. Both of these interrelations in turn affect the judicial contribution to penalty.

Taking my cue from their work, in this chapter I will ask whether, and to what extent, the Italian judicial structure protects judges and prosecutors from putative, punitive pressures from public and politicians. How will the judiciary react to calls for law and order, should these arise (as in Garland's scenario⁹⁰⁹)? Will their institutional structure, and their relations with other Italian institutions, allow them to resist such pressures should they feel the duty to do so? Or will punitive pressures be channelled through the judiciary and into the penal process? Following on from these questions I will also analyse the evolution of judicial legitimacy, asking how changing legitimacy has influenced judges' role in Italy, and with what penal effects.

When applying the models to Italy, three main considerations have to be made. Firstly our analysis of structure must allow for a judiciary that is both bureaucratized *and* highly independent. Judges in Italy are not appointed or politically elected: they are members of the civil service, selected through public examination. However they are also autonomous of other state branches: they are, for example, self-governed rather than being accountable to the executive. Secondly, it is necessary to consider a *range* of interrelations, between the judicial and political classes, that go beyond co-operation and conflict. Judicial actors have variously collaborated, colluded and entered into conflict with political actors in Italy, with varying penal effects: an account of Italian penalty should incorporate this variation. Thirdly, to understand the particular penal results that have accrued from structure and institutional situation *within the Italian context*, we need to consider the issue of judicial legitimacy in Italy. Judges' legitimacy has fluctuated over the decades. Its waxing and waning has affected both the powers that judicial actors have been endowed with, and the deployment of such powers. Legitimacy should also be read to include *internal* legitimacy, or judicial self-conception, whose evolution maps the changing Italian context and the changing relations between judiciary, public and political classes. The inclusion of legitimacy and self-conception helps contextualise our analysis of Italian judicial actors. It puts in relief the fact that structure alone cannot account for judicial contributions to penal trends, and that it will only do so in conjunction with other institutional features. For example, bureaucracy and co-ordination, in a context that is itself co-ordinated, may make for penal stability. By contrast, an independent judiciary in conflict with its political counterparts may make for penal volatility in a context where the institutional structure already stimulates penal exclusion. If,

⁹⁰⁹ Garland (2001)

in the same context, law and order become topical electoral issues, this volatility may then manifest itself as penal escalation.

The Italian context is one in which the penal law has had variable purchase and a varying role. I argue that this variation can be mapped onto issues of judicial legitimacy. Judges and prosecutors contribute to, and partake of, the varying *purchase*, of the law, the extent to which citizens will appeal to and rely on the law. Similarly, issues of self-conception reflect the varying *role* of Italian law: where changing self-conception changes judicial ideas of what this role entails. Legitimacy and self-conception also speak to the evolution of judges as political actors where judicial self-conception is constituted in opposition to other state branches. In Italy, structure (bureaucracy, independence) and context (interrelations and legitimacy) have combined to produce a judicial class that is diverse, independent, and directly involved in the political dynamics that have influenced Italian penalty. By understanding this intersection of structure, legitimacy and institutional setup, we can understand the details of how judicial actors have produced variable penal impulses in Italy. The result has been neither the penal stability of the German scenario nor the penal escalation of the British case, but oscillation between repression and leniency.

Before continuing, I should specify that in this chapter I deal with judges and public prosecutors together. This conflation, which might strike a reader unfamiliar with the Italian context as counter-intuitive, reflects the institutional position of both actors in Italy. The conflation is common in the literature on Italian judicial actors, usually defined simply as ‘judges’ – a rough translation of the word ‘magistrati’. The term encompasses ‘investigating magistrates [...] judges of the bench [and] public prosecutors’⁹¹⁰. They are all part of the same professional body⁹¹¹ and in principle the same individual could, over the course of her career, occupy both roles⁹¹². This also means that ‘prosecutors enjoy the same independent status as judges’, which means total formal independence from the executive and thus from any ‘institutional mechanism to direct criminal prosecution’⁹¹³. It is true that after the 1989 reform of criminal procedure (see below) prosecutors should in principle occupy a partisan role within the trial, much like their adversarial cousins⁹¹⁴. However, commentators have agreed

⁹¹⁰ See Della Porta (2001, p. 19); Nelken (1996)

⁹¹¹ ‘Montana and Nelken (2011, p. 288). The ‘generalist approach’ to judicial functions means judges are expected to perform numerous functions including adjudication and public prosecution: Guarnieri and Pederzoli (2002, p. 67)

⁹¹² The number of judges who change careers may be limited: ‘in 1999 [...] less than 100 judges and prosecutors (out of 8000) asked to change roles’: Nelken (2003, p. 118)

⁹¹³ Guarnieri and Pederzoli (2002, p. 118); Montana and Nelken (2011)

⁹¹⁴ Guarnieri and Pederzoli (2002, p. 133); Sarzotti (2006a, p. 75)

that the reform has not achieved the desired ‘adversarial’ transformation⁹¹⁵. Prosecutors continue to view their role as ‘neutral quasi-judicial figures’ and claim to have ‘a similar duty of [...] impartiality [as] the judge’ still acting ‘in some ways [...] as [...] examining magistrates in the inquisitorial tradition’⁹¹⁶. This, apart from any formal institutional mechanism, justifies treating ‘magistrati’ (judges and prosecutors) together even after 1989. If anything can be said of Italian public prosecutors today it is that they occupy an ‘ambivalent’ space in the Italian trial, ‘still possessing many of the attributes of quasi-judicial actors searching for the truth whilst being inserted in a new legal architecture designed to cast them on one side of the contest’⁹¹⁷. Until this ambivalence is resolved I will treat judges and prosecutors together under the labels ‘judges’, ‘magistrates’ and ‘judicial actors’.

To proceed as set out above, I will first explain the structure of the Italian judiciary and its relation to the political class. The succeeding section discusses the waxing and waning of Italian judges’ legitimacy between 1970 and 1990. It draws out hypotheses on how this fluctuation, combined with judges’ institutional situation and internal organization, may have influenced Italy’s differential punitiveness. The discussion of legitimacy is set within a broader framework that investigates the relationship between judges and political class. I then analyse judicial receptivity/resistance to public opinion, investigated by discussing judicial legitimacy vis-à-vis the public, but also judicial self-conception – public demands made of judges and judges’ responses to such demands. I conclude with an overview of judicial contributions to Italian penalty.

II. The context: Italy and the comparative models.

i. The Italian judiciary: bureaucracy and independence.

This section first charts the structure of the Italian judiciary, paying particular attention to its independence and bureaucratisation. The term ‘bureaucratic’ requires some explanation. Both Savelsberg and Lacey, when using it to describe judicial actors, refer to the latter’s position as part of the civil service. In Savelsberg’s words, members of ‘bureaucratic’ judiciaries are ‘appointed as civil servants with tenured positions, early in their professional career’ and their appointment is usually by ‘academic achievement tests’⁹¹⁸. His and Lacey’s reference point is the Germany judiciary that Savelsberg contrasts to the US judiciary, and Lacey to the UK judiciary. According to the broader comparative studies by Guarnieri and

⁹¹⁵ Guarnieri and Pederzoli (2002, p. 133); Montana and Nelken (2011, pp. 287-288)

⁹¹⁶ Montana and Nelken (2011, pp. 288, 290)

⁹¹⁷ *Ibid.* (2011, p. 288)

⁹¹⁸ Savelsberg (1994, p. 931). See also Lacey (2008, pp. 96-97)

Pederzoli, of judiciaries across Western democracies, bureaucratic judiciaries are characterised by five main features: selection of judges; training; internal organization; judicial tasks; independence⁹¹⁹. Selection is through examinations, at an early stage in the applicants' career (usually just after university). Training occurs mainly within the judiciary, which is organised in hierarchical ranks⁹²⁰. Career advancement is competitive: through 'formal criteria combining seniority and merit'⁹²¹. Bureaucratic judges have a 'generalist approach to work performance' and are presumed to carry out all roles 'associated with their rank', for example adjudication across a number of disciplines⁹²². Bureaucratic judges also tend to have weaker 'guarantees of independence'⁹²³. Professional judges, on the other hand, are appointed later in their careers, once they have acquired experience in the legal field (often, 'but not always, as legal advocates')⁹²⁴. The process of career advancement is less formalised than in bureaucratic judiciaries; promotions are not as frequent, and 'higher-ranking judges' exert weaker controls over their colleagues than their bureaucratic counterparts, though concerns with being overruled by higher court judges will exert indirect influence on lower-ranking judges⁹²⁵. Guarantees of independence are stronger in professional than in bureaucratic judiciaries, hence, in Lacey's words, the 'Olympian independence' of British judges⁹²⁶.

As Guarnieri and Pederzoli remind us, the two categories 'professional/bureaucratic' are highly stylized, glossing over the complexities of 'actual' judiciaries⁹²⁷. However 'judiciaries in democratic countries can be placed on a continuum' with the archetypal bureaucratic and professional judiciaries at their extremes⁹²⁸. Where does Italy lie on this scale? Historically, the Italian judiciary shared similarities with the French, as both were premised on the Napoleonic model⁹²⁹. This model was accepted by the assembly formed to draft the post-war Constitution, and remained substantially unmodified throughout the 1940s and 1950s⁹³⁰. However, during the 1960s and 1970s, the Italian judiciary underwent a number of gradual changes, moving further away from the 'bureaucratic' archetype⁹³¹. Judicial self-government is one example of such changes; similarly, methods of career advancement have

⁹¹⁹ Guarnieri and Pederzoli (2002, pp. 66-67)

⁹²⁰ *Ibid.*, p. 66

⁹²¹ *Ibid.*, p. 67

⁹²² *Ibid.*

⁹²³ *Ibid.* See also Lacey (2008, pp. 94-97)

⁹²⁴ Guarnieri and Pederzoli (2002, p. 67)

⁹²⁵ *Ibid.*

⁹²⁶ *Ibid.*; Lacey (2008, p. 96)

⁹²⁷ Guarnieri and Pederzoli (2002, p. 66)

⁹²⁸ *Ibid.*

⁹²⁹ *Ibid.*, p. 54

⁹³⁰ *Ibid.*, p. 54

⁹³¹ *Ibid.*, pp. 54-57

been reformed and advancement is now premised only on seniority⁹³². These changes were intended to ‘shield the judiciary from all partisan interest’⁹³³. This aim was formally achieved and, institutionally, the Italian judiciary became almost entirely independent of executive and legislative branches⁹³⁴. However, as we will see, informal connections between judges and the political sphere have remained⁹³⁵.

With its high degree of independence, self-government and automatic advancement, the Italian judiciary is distinct from its bureaucratic counterparts⁹³⁶. Yet, I suggest, on the ‘bureaucratic-professional’ continuum it is closer to the ‘bureaucratic’ than to the ‘professional’ pole. Italian judicial actors are still akin to civil servants and are still recruited by a public examination, ‘a state-wide competitive procedure’ which can be taken by all law graduates⁹³⁷. Career progression within the judiciary is premised on seniority alone⁹³⁸, which means that ‘after a given number of years all magistrates reach the upper levels and [ultimately] also the career [...] level of the highest court, the Court of Cassation’⁹³⁹. Italian judges are also expected to take a generalist approach to their role. It is because of these persisting features that I refer to the Italian judiciary as bureaucratic. However, throughout this chapter, we must bear in mind that it is bureaucratic *with caveats*, that is, features that fall outside the bureaucratic ideal-type, also difficult to reconcile with the professional archetype. This chapter will analyse how these features play out in penal terms.

In terms of independence, Italian *magistrati* benefit from a very pure form of independence: the Italian judiciary is not accountable to the executive but is self-governed by a Higher Council (*Consiglio Superiore della Magistratura – CSM*) which has the power to nominate and promote, as well as remove or discipline, magistrates⁹⁴⁰. Judges and prosecutors together elect their representatives to this Higher Council⁹⁴¹. In the Republic’s constitutional order, the accountability of the independent judiciary is ensured by the legality principle, which

⁹³² *Ibid.*, pp. 54-59

⁹³³ Of the kind exerted on the judiciary during the Fascist regime: *ibid.* p. 55

⁹³⁴ Guarnieri and Pederzoli (2002, p. 55). Della Porta talks of some weak ‘institutional resources’ available to the executive to control the judiciary, such as the inspections carried out, at the Justice Minister’s behest, ‘at the Milanese [prosecutorial office]’ during the time of *Tangentopoli*: (2001, p. 6)

⁹³⁵ Della Porta (2001, p. 2); Guarnieri and Pederzoli (2002, p. 59)

⁹³⁶ Guarnieri and Pederzoli (2002, p. 54)

⁹³⁷ Cotta and Verzichelli (2007, p. 236)

⁹³⁸ Di Federico (1998, p. 377). For a more detailed analysis of the Italian judicial structure, its constitutional roots, and its history see Borgna and Cassano (1997); Guarnieri (1997); Nelken (1996); Zagrebelsky (1998)

⁹³⁹ Not all magistrates occupy the limited positions in the higher courts: Cotta and Verzichelli (2007, p. 240)

⁹⁴⁰ *Ibid.*, p. 241

⁹⁴¹ Grande (2000, p. 236)

mandates compulsory prosecution of all offences⁹⁴². This, in principle, pre-empts preferential treatment of certain cases over others, though in practice some discretion is necessarily exercised in the prioritising of cases⁹⁴³. Automatic advancement on the basis of seniority has bolstered internal independence by limiting the judiciary's internal hierarchy and the extent to which senior judges can influence junior judges⁹⁴⁴. These characteristics, introduced by the Italian Constitution⁹⁴⁵, stem from fears of executive subjugation of the judiciary and judicial subservience to the executive, which had characterised the relationship between magistrates and executive under Fascism⁹⁴⁶.

The high level of Italian judicial independence played an important role in *Tangentopoli*: though by no means the only factor that allowed prosecution of large scale political corruption, it did insulate judicial action from any political interference⁹⁴⁷. Unsurprisingly, given the aftermath of the investigation (the overhaul of dominant political parties) judicial independence became a focus of heated debate, and eventually a target of political attack. The main argument put forth was that such a high level of independence allowed for unaccountable judicial activity, leaving judges' and prosecutors' potential political motives unchecked⁹⁴⁸. This argument partly reflected a deep-seated distrust existing between the Italian executive and the Italian judiciary that came to the fore after 2000, particularly with Silvio Berlusconi's entry into politics⁹⁴⁹. In one way or another, the conflict has coloured Italian political life since the late 1990s: after *Tangentopoli*, public (and media) debate on Italy's 'balance of powers', has been polarised into pro-judge and anti-judge stances⁹⁵⁰. Literature on Italian judicial actors is not so coarsely divided, but it too has been engulfed by the terms of this debate, with invidious effects on the reliability of sources: such heavily politicised and polarised debate does not make for dispassionate appraisals, and make all seemingly 'neutral' appraisals suspect⁹⁵¹. Discussions of the role judicial actors play in Italian penalty has also been overshadowed by debates on what the appropriate judicial role *should* be in Italy. It is in part to overcome the 'pro-judge/anti-judge' debates that I analyse the Italian judiciary using Savelsberg's and Lacey's arguments. Their framework facilitates a

⁹⁴² Art. 112 Cost; Davigo and Mannozi (2008, p. 210)

⁹⁴³ Montana and Nelken (2011, p. 288)

⁹⁴⁴ Guarnieri and Pederzoli (2002, p. 57)

⁹⁴⁵ Although decades had to pass before all constitutional provisions were enacted. The creation of the Higher Council, for example, occurred in 1958. See: Zagrebelsky (1998, p. 743)

⁹⁴⁶ See Ferrajoli (1999, pp. 36-38)

⁹⁴⁷ Della Porta (2001); Nelken (1996)

⁹⁴⁸ Nelken (2004, pp. 25-26)

⁹⁴⁹ Nelken (2003, p. 123)

⁹⁵⁰ Della Porta (2001, p. 15)

⁹⁵¹ See Montana and Nelken on Di Federico: (2011, p. 288)

more comprehensive investigation of judicial contribution to penalty by analysing their role within a broader institutional context.

Of course we should not expect Italy to simply slot into existing institutional accounts. Investigating judicial interrelation with other state branches in Italy, for example, means investigating not just co-ordination and conflict with the political class⁹⁵², but investigating collaboration, collusion and conflict between judicial and political classes and their alternation across the decades. This range of relations has also had unexpected results. Thus, if collaboration between political and judicial classes has contributed to contain penal expansion in certain European nations, in Italy, as we will see, it is the ‘refusal of [...] collaboration’⁹⁵³ that has had similar effects. The unexpected nature of political-judicial interaction in Italy could in fact lead us to suggest, in David Nelken’s words, that the Italian judiciary is ‘a mysterious and unpredictable force’⁹⁵⁴. Without going this far, I argue that we nonetheless need to acknowledge that Italian judicial actors have produced contrasting penal impulses between 1970 and 2000⁹⁵⁵.

ii. Institutional models: judicial structure and penalty

Savelsberg contends that our analyses of contemporary punishment should incorporate ‘knowledge and domination’⁹⁵⁶. ‘Knowledge’ indicates assumptions about crime and punishment prevalent within society/different social sectors. Domination is the power to have such knowledge acted upon once it is expressed as a ‘command’: it is the likelihood that knowledge is translated into legal or policy decisions⁹⁵⁷. The institutionalisation of knowledge production – the mechanisms by which it is produced and translated into decision-making – must be part of our analyses⁹⁵⁸. If these variables are built into theories of punishment, they will allow us to understand how macro-structural changes are accompanied by, and transmitted through, changes in knowledge. This will in turn tie penal changes to social action, including judicial action, engaged in both knowledge production and in domination.

Savelsberg is interested in tracing the links between political and judicial classes and the links between the public and judicial classes. He asks: how direct is the relationship between public knowledge on punishment and legal decision-making? How does the

⁹⁵² Lacey (2008, pp. 95-97)

⁹⁵³ Nelken (2011, p. 109)

⁹⁵⁴ Nelken (2003, p. 113)

⁹⁵⁵ I cannot discuss all the penal impulses produced by the Italian judiciary but present a representative subset, that illustrate the potential for punitiveness and leniency, generated by Italian judges.

⁹⁵⁶ Savelsberg (1994, p. 912)

⁹⁵⁷ *Ibid.*

⁹⁵⁸ *Ibid.*

relationship between judicial and political actors affect knowledge on punishment? How does this influence judicial and political action in the criminal justice sphere?⁹⁵⁹ My chapter asks similar questions for Italy.

To illustrate his arguments, Savelsberg compares the United States and Germany, useful case studies insofar as they possess significant institutional differences. The US is, in his analysis, a system of ‘universalistic personalism’: ‘[in which] public knowledge translates relatively easily into legal/political decision making’ such as ‘minimum mandatory sentence laws, guilty verdicts, or sentences’⁹⁶⁰. This is unsurprising considering that in some American states judges are elected⁹⁶¹. Direct accountability to the public may well mean that judicial decisions are swayed by public knowledge on crime and punishment: when public knowledge favours punitiveness – as in accounts of ‘populist punitiveness’ – judicial action may follow suit. Similarly, the potential volatility of public opinion may translate into volatility at the judicial level. Matters in America are further exacerbated by lay participation in juries – also a feature of the British criminal trial⁹⁶². It stands to reason that this set-up contributes to the mechanisms witnessed in the US (and that partly inform Garland’s analysis): increasing punitiveness; increasing prison rates; volatile attitudes to punishment⁹⁶³.

Different mechanisms operate in Germany’s judicial system, characterized as a ‘universalistic bureaucracy’⁹⁶⁴ in which decision-making, including over criminal justice, is ‘more strongly based on bureaucratized procedures’⁹⁶⁵. This implies that the influence of public knowledge will be heavily mediated by the procedures themselves, but also by the professional culture that the procedures foster. Professional culture may explicitly incorporate some resistance to public opinion, if public opinion diverges from professional knowledge on crime and punishment⁹⁶⁶. Even in the face of ‘populist punitiveness’, decisions in the criminal justice field are thus more likely to reflect the rationales developed within the judicial and political spheres. If these rationales support penal moderation, then they may intercept any ‘populist punitiveness’. In Germany, it is judges’ membership of the bureaucracy that stimulates this ‘interception’. German judges are tenured civil service

⁹⁵⁹ Savelsberg is not positing direct and unmediated links between knowledge/domination and punishment, which itself requires further translation through ‘[...] sentencing guidelines [...] funding for prison construction, prosecutors’ charging decisions, probation officers’ sentencing recommendations [...] judges’ sentencing’: *ibid.*, p. 936

⁹⁶⁰ *Ibid.*, p. 912

⁹⁶¹ Lacey (2008, p. 94); Savelsberg (1994, p. 931)

⁹⁶² For different approaches to the contribution of ‘criminal justice agents’ to policy see: Miller (2004)

⁹⁶³ Recall Garland’s discussion of ‘defining deviance down’ and hysterical reassertion of State power through punishment: (2001, pp. 103-139)

⁹⁶⁴ Savelsberg (1994, p. 912)

⁹⁶⁵ *Ibid.*

⁹⁶⁶ *Ibid.*, p. 913

officials with no direct accountability to the public⁹⁶⁷. They are ensconced in a system that promotes negotiation between political branches, including over punishment⁹⁶⁸ and, interpreting Savelsberg, each level of negotiation can be a space for debate over the purpose and appropriate quantity of punishment. Given the right contingencies – a judiciary devoted to rehabilitation, a political class interested in re-socialisation of deviance – each level of negotiation provides an opportunity for penal moderation. Where judges are willing to negotiate policy issues with the (rest of the) bureaucracy, this helps develop moderate policies that have political support. Passing through these various ‘levels’, knowledge on punishment is also stabilised: Germany is again illustrative in this respect⁹⁶⁹.

We can further understand Savelsberg’s hypotheses by looking at Lacey’s analyses of judicial actors and their influence on penalty⁹⁷⁰. Lacey, building upon Savelsberg, hypothesises that different judicial structures, and different levels of co-ordination between judges and politicians, partially explain penal variance across contexts. Variance will also depend upon the institutional arrangements that the judiciary inhabit. Lacey is particularly concerned with the presence or absence of a *bureaucratic* judiciary, as well as the status that is accorded to judges within different polities. She compares Germany with England and Wales (rather than Germany and the US). Britain differs from the US insofar as there is no direct judicial accountability to the public, but even here the buffer provided by bureaucratization of the judiciary against populist punitiveness is attenuated. The bulk of criminal law cases in England and Wales are heard by appointed lay magistrates⁹⁷¹ who can, to some extent, be seen as purveyors of popular sentiment within the penal process⁹⁷². By contrast, nations such as Germany are better placed to resist popular penal demands because of the bureaucratic nature of their judiciary⁹⁷³. The ‘selection, training and tenure of judges’ is instrumental in maintaining stable, moderate penalty, insofar as it insulates ‘judicial decision-making from the sway of popular sentiment’⁹⁷⁴. Stability and moderation in devising criminal justice policy are also thought to follow from high levels of co-operation between

⁹⁶⁷ *Ibid.*

⁹⁶⁸ Lacey (2008, p. 95)

⁹⁶⁹ Savelsberg (1994, p. 925)

⁹⁷⁰ Lacey (2008, pp. 93-97); Savelsberg (1994, 1999)

⁹⁷¹ Lacey (2008, p. 94)

⁹⁷² There is some lay participation to the criminal justice process in Germany, through tribunals composed of lay and professional judges. It has been suggested that lay judges’ influence in is minimal, with the professional judge essentially directing the trial. See: Dubber (1996-1997); Machura (2001); Wolfe (1994).

Italy too has collaborative courts: the Court of Assizes and the Court of Appeal of Assizes. There is little research on the lay component’s impact on the Court’s sentencing practices: I suggest that structural similarities between Italian and German judiciaries are likely to produce similar results.

⁹⁷³ Savelsberg (1994, pp. 90-93)

⁹⁷⁴ Lacey (2008, pp. 93-94); Savelsberg (1999, p. 55)

governmental branches including the judiciary⁹⁷⁵. This is the case in Germany where co-operation between judicial and political classes mirrors more widespread institutional co-ordination⁹⁷⁶.

In contrast to Germany, nations such as Great Britain do not possess much space for co-operation between judges and policy makers. In England and Wales, Lacey notes, this may be because judges, though independent, are nonetheless not bureaucratic. This means they are considered (and consider themselves) to be *autonomous* of the political sphere: co-operation with legislative and executive is therefore thought to be improperly political⁹⁷⁷. On the political side, this particular culture of judicial independence also allows politicians to write off judges as out of touch⁹⁷⁸ and thus makes co-ordination highly unlikely, particularly with the increasing politicisation of ‘law and order’. The clash between judicial and political spheres is, in some instances, so severe that it has led ‘the government [...] to regard the judiciary as [...] irksome and irresponsible [...] to be thwarted as often as possible by legislative and other means’⁹⁷⁹.

Stylizing the two authors’ arguments, the following general propositions can be formulated. First: analyses of punishment need to incorporate penal agents in their accounts, including judicial actors. Second: two particular dimensions are important to analyses of judicial contributions to penal trends. The first can be described as the *susceptibility of judicial decision-making to public opinion*. The second can be described as the *relationship between judicial and political classes*. Both dimensions reflect judges’ institutional organisation, ‘likely to have distinctive implications for the environment in which penal policy is developed and implemented’⁹⁸⁰. They also incorporate the broader political and economic context in which judges act – liberal or co-ordinated market economies⁹⁸¹ – which will have important implications for the manner in which different institutional actors interact and for how ‘knowledge’ on punishment is produced within the system. In LMEs with majoritarian electoral systems, for example, the importance of ‘floating voters’ swayed by ‘law and order’ has created the conditions for them to become important electoral issues, with consequent effects on politicians’ willingness to negotiate penal policy with judges.

Consider the two dimensions in turn. Regarding judicial susceptibility to public opinion, we can argue that the more direct and institutionalised the link between public and

⁹⁷⁵ Lacey (2008, pp. 93-95)

⁹⁷⁶ *Ibid.*, p. 95. On Germany see also Cavadino and Dignan (2006, p. 101-112)

⁹⁷⁷ Lacey (2008, p. 95)

⁹⁷⁸ *Ibid.*, p. 96

⁹⁷⁹ *Ibid.*

⁹⁸⁰ *Ibid.*, p. 94

⁹⁸¹ Though we know that Italy is neither: see Chapters 3 and 4 and Hall and Soskice (2001)

judiciary, the greater the probability that public opinion will influence judicial decisions, including sentencing. Examples of ‘direct and institutionalised links’ include the ‘electoral’ link between some American judges and their voters or the incorporation of the ‘lay’ perspective into the criminal justice process, as with the magistrates in England and Wales⁹⁸². A more direct link may then mean more punitiveness at the judicial level when in the presence of public opinion that favours harsher punishment. It may also mean volatility of punishment: punishment will vary as judicial action varies, and judicial action will vary as public opinion varies. By contrast, the greater the institutional buffers between public opinion and judicial actors, the greater the institutional mediation of public opinion. Moreover, the greater the scope for divergence between public opinion and judicial action, the greater the probability of stable penal knowledge/decision-making. From their observations of Germany, Savelsberg and Lacey have hypothesised that institutional ‘buffers’ are more likely where the judiciary is ‘bureaucratic’. This is because a bureaucratic judiciary will act on professional (‘expert’) knowledge on punishment: reflecting a bureaucratic ‘rationality’ that is operationalised through bureaucratic procedures⁹⁸³.

The second dimension is the type of relations existing between judicial actors and political actors such as government and civil service⁹⁸⁴. At its simplest, the relationship between judicial actors and political actors can be expected to affect decision-making in the criminal justice field. For example, from her analysis of Germany and the UK, Lacey hypothesises that a system in which judicial and political actors are willing to negotiate may, under the right circumstances, provide incentives for penal moderation. This is more likely in a nation such as Germany whose institutional set-up is premised on ‘co-ordination’, including between judicial and executive branches. In Germany, it is the judiciary’s status as members of the State bureaucracy that presumes and incentivises this type of negotiation. By contrast in nations such as the UK, the role of the judiciary, and the judiciary’s understanding of its role, generally preclude ‘negotiated co-determination of criminal policy’⁹⁸⁵. Overall, this reduces the margin available for existing discussions on ‘penal moderation’ to cross the judicial/executive boundary. This dimension encompasses the impact of *bureaucratisation* and *coordination* on judicial action. The hypothesis is that a bureaucratized judiciary, ensconced within a co-ordinated system, increases the likelihood of penally-moderate attitudes, where these attitudes are already prevalent within the system.

⁹⁸² ‘Institutionalised’ because public influence is formally built into the system.

⁹⁸³ Savelsberg (1994, p. 913)

⁹⁸⁴ Lacey (2008, p. 95)

⁹⁸⁵ *Ibid.*

The final general assumption that can be drawn from Lacey and Savelsberg, crucial to the rest of the chapter, is that we should not expect the two dimensions – ‘public-judicial links’ and ‘judicial-political relations’ – to produce the same effects in all national contexts.

iii. The Italian judiciary: structure in context and legitimacy.

Judicial interaction with politicians and the public is also relevant to Italian penalty: judges are integral parties to the political dynamics that influence Italian prison trends. How does Italy map onto Lacey and Savelsberg’s models? Before answering this question, it is worth recalling the shape of Italian penalty. As seen in previous chapters, Italian penalty can be characterised as a volatile equilibrium in which punitiveness and moderation alternate, and which exhibits safety valves – amnesties and a capacity to target punitiveness onto outsider groups – that prevent the system’s implosion. Penal trends are influenced by conflict between different political groups, and are beset by tensions (dualisms) created by institutional oppositions. Political ‘outsiderness’ has emerged as an important penal discriminant within the Italian scenario. An institutional analysis of this scenario requires that we ask how judicial structure relates to differential punitiveness. I build on the comparative models, verifying how much the Italian judicial structure isolates judges from potential punitive demands, and how far the political- and judicial-sphere are co-ordinated.

Italy’s judiciary is bureaucratic *and* highly independent, and formally the judiciary’s independence from the executive is absolute. However, this has not prevented contact (formal and informal) and collaboration between the judges and the political class⁹⁸⁶. In Luciano Violante’s words, in contemporary Italy, judges and public prosecutors have acted as ‘high counsellors to government and parliament’ on legal matters⁹⁸⁷. Additionally, the particularly *political* nature of the Italian judiciary has encouraged further contact between magistrates and politicians. Italian magistrates ‘have traditionally been divided along political lines’⁹⁸⁸ and their professional association – the National Association of Magistrates – is split into political factions⁹⁸⁹. The latter have diverse ‘political orientations’, as well as ‘somewhat different conceptions of the role’ of the judiciary ‘[within] society’⁹⁹⁰. This structure is capable of accommodating different penal philosophies. Further links between the political and judicial classes are to be found within the Judicial Higher Council: one third of the

⁹⁸⁶ Della Porta (2001, pp. 2-3); Guarnieri and Pederzoli (2002, pp. 58-59)

⁹⁸⁷ Violante (1998b, pp. xxvii-lxxiii; lxvi My translation.)

⁹⁸⁸ Della Porta (2001, p. 2)

⁹⁸⁹ The most important factions (*correnti*) include Magistratura Democratica, Movimento per la giustizia, Unita’ per la Costituzione and Magistratura Indipendente; Magistratura Democratica is furthest to the Left and Magistratura Indipendente furthest to the Right. See Cotta and Verzichelli (2007, pp. 240-243); Guarnieri and Pederzoli (2002, p. 54)

⁹⁹⁰ Cotta and Verzichelli (2007, p. 242)

Council consists of lay members, lawyers and law professors elected by Parliament⁹⁹¹, ‘in practice [...] chosen to reflect the strength of the different political parties in Parliament’⁹⁹². Given this structure, it is not surprising that in past decades there have been ‘exchanges of different types’ between Italian judges and politicians⁹⁹³: some of these, at least, will have been relevant to the formation of penal policy. Here we have an independent and politicised judiciary capable, in its independence, of contact and collaboration with the political class.

However, judicial and political classes have not always been in harmony, and the 1990s – with the corruption investigations of *Tangentopoli* and the beginning of the Second Republic – marked a time of heightened conflict between judges and politicians. Collaboration between the two classes consequently declined, and I will investigate the penal changes that followed from this revised relationship. However if, for the sake of systematisation we temporarily halt our analysis pre-*Tangentopoli*, it seems that the Italian judicial system possessed characteristics that elsewhere have provided some insulation from penal populism. One such characteristic is bureaucratization, where incorporation into the civil service is thought to insulate the judiciary from fluctuations of popular sentiment. Another characteristic is political collaboration, where cooperation suggests greater leeway for judges and politicians to co-ordinate over criminal justice matters. The question is whether the elements of bureaucratization and collaboration have *in fact* influenced Italian penalty by stimulating moderation.

The answer is that these two factors alone cannot explain Italian penalty and to them I add a third factor, judicial legitimacy. Italy’s differential punitiveness is not the same as Germany’s relative penal stability, or Britain’s relative penal escalation. An institutional analysis of judicial actors in Italy should therefore be capable of explaining how bureaucracy/independence and co-ordination/conflict have recombined to produce differential punitiveness. Why, for example, have elements that produced penal stability in Germany not had analogous effects in Italy? It is here, I argue, that contextual details are crucial. The specific context of the Italian judiciary’s experience has been the profound political crises that have affected the Italian state during our period. Judicial legitimacy has varied through, and at times because of, the course of these crises, and judicial legitimacy provides us with a third axis which has influenced the Italian judiciary’s practice. Only with an understanding of judicial legitimacy, which includes judicial self-conception (judges’ understanding of their own legitimacy), can we grasp the specific contribution that it has made to Italian penalty.

⁹⁹¹ Guarnieri and Pederzoli (2002, p. 55)

⁹⁹² *Ibid.*

⁹⁹³ Della Porta (2001, pp. 2-3)

In the remaining sections I investigate how legitimate the judiciary was in Italy between 1970 and 2000, for whom, and with what effects. I also explore the notion of judicial self-conception as a form of internal legitimacy: its existence, its evolution and its potential implications. This set up allows an investigation not just of the judiciary's structure, but also of the powers with which the judiciary was progressively endowed, and the ideas under which these powers were deployed. Moreover it will allow me to ask if and how legitimacy has shaped judicial action in the penal sphere.

Legitimacy may have two meanings: 'conformity to the law or to rules' and also 'ability to be [...] justified'⁹⁹⁴. My discussion of judicial legitimacy encompasses both these uses. It touches on the first meaning insofar as I discuss the conformity of judicial action to judges' constitutional role. It also addresses judges' role vis-à-vis the political and executive branch, and the relationship between judiciary and political class. My discussion touches on the second meaning of legitimacy because it addresses the extent to which judicial action was seen as justified and justifiable by the public, by the political class and by the judiciary themselves. The notion 'legitimacy' encompasses the two questions 'were Italian magistrates acting within their remit?' and 'how was their action received?'⁹⁹⁵. I should point out that I am interested in charting the answers *given* to these questions *by judges, political class and public*, as opposed to providing a normative evaluation of judicial action in Italy during these years. I aim to thereby set my chapter apart from the pro-judge/anti-judge stances that have influenced contemporary debate.

Using Lacey's and Savelsberg's language, legitimacy – how judicial role was interpreted and enacted – has affected the type of interaction between judiciary and politicians over criminal justice matters. It has also affected the terms of this interaction: as discussed below, at times and for certain judges the relationship with the political class has been one of 'role substitution'; at times and for certain judges it has been one of 'collusion'⁹⁹⁶. Each type of interaction can be understood as embodying a particular conception of il/legitimate judicial action. The conflict between Italian judiciary and political class expresses a particular criticism of judicial activism as *illegitimate*; it expresses a particular judicial self-conception of this activism as not only legitimate but also *necessary*. It then affects the extent to which

⁹⁹⁴ "Legitimacy," <http://oxforddictionaries.com/definition/english/legitimacy?q=legitimacy>
Accessed February 2013

⁹⁹⁵ The idea of 'legitimacy' shares some similarities with the definition of 'judicial role' used by Guarnieri and Pederzoli: 'the set of expectations, values and attitudes about the way judges behave and should behave' (2002, pp. 68-69).

'Legitimacy', as used in this chapter, is a broader notion, encompassing an analysis of how judicial action was received by politics and public.

⁹⁹⁶ Della Porta (2001, p. 18 for 'role substitution')

judges and executive have been willing to negotiate over criminal justice matters, and with what effects.

Internal legitimacy (self-conception) also help explain the extent to which judicial actors have been willing to respond to public opinion on matters of crime and punishment. In other words, structure is not the only determinant of judicial contributions to penalty. Judges' interpretation of their own role, within their structural context, also affects these contributions. Judicial self-conception has affected the manner in which judges have *legitimated* their actions internally, even (perhaps especially) when these were in open conflict with the political class. *External* legitimacy also encompasses the extent to which the public saw judicial action as legitimate, the way the public's evaluation changed over time and the effect this had on public reliance on the law, raising issues of the law's purchase and role (Chapters 3 and 4).

To sum up: the overall progression of my argument, from Savelsberg and Lacey, to Italy's differential punitiveness, runs as follows. The structure of the judiciary and its role within the larger institutional setup, will affect judicial contribution to penalty. In particular, the relationship between judiciary and public opinion (dimension 1), and the relationship between judiciary and political class (dimension 2), may affect national punitiveness/moderation. The directness of the judiciary-public connection and the relationship between judges and political class are good predictors of how judicial action will affect penal trends. However, the Italian judiciary presents features that set it outside these two axes. In order to systematise judicial contribution to Italian penalty we therefore need to consider one further dimension, legitimacy, as the latter has affected the extent and terms of judicial interaction with the political class (dimension 2); and the extent and effects of judicial links to public opinion (dimension 1). Varying judicial legitimacy has also meant varying judicial powers⁹⁹⁷. The application of these powers has varied on the basis of judicial self-conception; this variance has not been linear and, I suggest, it has contributed the leniency-repression dualism of Italian penalty.

The next section specifically investigates the various phases of judicial legitimacy between 1970 and 2000.

⁹⁹⁷ Powers inherent to judges' constitutional role, and powers later acquired in the wake of Italy's emergencies

III. Judicial legitimacy: waxing and waning.

The Italian judiciary experienced fluctuating external legitimacy between 1970 and 2000. Legitimacy varied across time, socio-political groups, and according to the different issues judges were called upon to resolve. The 1990s stand out as a decade in which Italian judges experienced a peak in their public legitimacy, given their role in uncovering the political corruption of *Tangentopoli*, and in precipitating the demise of the First Republic⁹⁹⁸. This decade also saw judges' fall from favour once the early support for judicial activism dissipated. At this time political attacks against judicial action increased as renewed judicial activism began to threaten Italy's 'widespread illegality' (Chapter 4)⁹⁹⁹. The preceding decades (1970 to 1990) are more difficult to characterise in terms of judicial legitimacy because of the many positions found in the judiciary, over and above an *esprit de corps*, which flourished only after 1990 and conflict with the political class¹⁰⁰⁰. Variation of opinion – which can be traced to judicial recruitment¹⁰⁰¹ – was reflected in the different factions or 'currents' within the judiciary's professional association¹⁰⁰².

The waxing and waning of judicial legitimacy has a direct link with the type and extent of powers granted by the political class to Italian judges, such as those devolved to the judiciary (through executive decrees and legislation) in order to face Italy's 'emergencies' such as terrorism and organised crime (Chapter 2)¹⁰⁰³. These powers have, in more recent analyses, been singled out as one potential cause of the penal expansion experienced by Italy across the 1990s¹⁰⁰⁴. Recall my discussion of the 'halo effect' wherein preventive custody, broadened to

⁹⁹⁸ See Pavarini (1994, p. 59)

⁹⁹⁹ Attitudes to the judiciary varied across different social sectors, some of which were supportive of the judiciary. Della Porta, for example, quotes 'the *Partito Democratico della Sinistra* [...] successor of the Communist Party, credited for a long period with being the "party of the judges"' (2001, p. 15)

¹⁰⁰⁰ See section below on judicial self-conception.

¹⁰⁰¹ Nelken (1996, p. 99)

¹⁰⁰² Cotta and Verzichelli describe the 'left-right dialectics' found within the judicial currents which they contrast to the 'common front' the judiciary has been 'ready to present' in response to political attack (2007, p. 242)

¹⁰⁰³ Ferrajoli describes this as the political system giving the magistrates *carte blanche* in the fight against terrorism (1994, p. 70)

¹⁰⁰⁴ See, amongst others, Ferrajoli (1996, pp. 65-84)

deal with the various ‘emergencies’, had outlived them and had eventually been applied to ‘ordinary crimes’¹⁰⁰⁵.

The general attitude with which the emergency provisions were accompanied is also interesting: what did this ‘devolution’ signify over and above the specific provisions, and how did it reconfigure relations between judiciary, executive and legislative? I argue that it reconfigured the judiciary as *political* actors, a role that for penal judges was not limited to their role as criminal justice officials. Judges were ‘political’ not in the sense of party-political actors (though some have successively stood in this guise), but in the sense of being actors operating within the Italian polity on a par with executive and legislative. This ‘reconfiguring’, in conjunction with the judiciary’s variable composition and penal/political positions, allowed judicial actors to purvey pressures both for penal expansion and penal moderation. These pressures derived from the interaction of judicial structure, judicial institutional situation and judicial role/legitimacy. The rest of the section tries to ‘periodise’ changing judicial legitimacy.

i. The 1970s and 1980s: surrogacy, collusion and the eve of conflict

To understand varying judicial legitimacy in Italy, I start by investigating the phenomenon referred to throughout the literature as ‘*supplenza giudiziaria*’¹⁰⁰⁶ or ‘judicial surrogacy’. This label indicates that judges in Italy have acted as ‘surrogates’, even as ‘substitutes’, for the political class¹⁰⁰⁷. This does not necessarily point to improper judicial expansion into the executive/legislature’s remit. As Nelken states: ‘penal rules and judicial interventions are often relied on as a substitute for political and policy-led decision making’, and this is done within constitutional rules¹⁰⁰⁸. In fact surrogacy was a ‘necessity’ in the First Republic’s otherwise ‘blocked’ political system where incessant political conflict stood in the way of timely reform (Chapters 3 and 4). Issues, for example those pertaining to labour relations, which might have been resolved by legislative means or policy change, fell to be resolved by judicial means¹⁰⁰⁹.

If this expansion of judicial activity is not exclusive to Italy¹⁰¹⁰, the increasing role played by judges in countering terrorism and organised crime *is* more particular to the Italian

¹⁰⁰⁵ He also argues that emergency laws extended judicial discretion overall, consequently ‘lowering the level of procedural guarantees’: Ferrajoli (1996, p. 71). For similar observations on the use of preventive custody in the context of *Tangentopoli* see: Della Porta (2001, p. 14); Neppi Modona (1993, p. 18)

¹⁰⁰⁶ See Violante (1998b, p. lvi)

¹⁰⁰⁷ Della Porta (2001, p. 16)

¹⁰⁰⁸ Nelken (2009, p. 301)

¹⁰⁰⁹ Della Porta (2001, p. 5)

¹⁰¹⁰ Guarnieri and Pederzoli’s book is dedicated to varying degrees of ‘judicialization of politics’ across Western Democracies (2002, p. 4)

context. Della Porta claims: ‘in the fight against terrorism and the Mafia, the magistracy exercised a proactive power, and acted as a surrogate for a weak political will’¹⁰¹¹.

‘Surrogacy’ in this particular ambit endowed the judiciary with a certain level of legitimacy among the public and political class. We witness this legitimacy increasing across the 1970s: ‘during the years of terrorism [...] public opinion supported investigating magistrates as the defenders of citizens in the face of a weak and internally divided political class’¹⁰¹². Pizzorno claims that ‘during its actions against terrorism [...] *the organs of law enforcement acquired [...] a positive image vis-à-vis the population; [one] they had heretofore lacked*’¹⁰¹³. A similar effect followed during the 1980s and early 1990s, in the wake of judicial engagement against organised crime. The legitimacy following from this proactive engagement was also reflected in the political sphere until it waned from the late 1980s.

In this sense, the expansion of judicial power at the hands of the political class can be taken as a testimony of politicians’ trust and belief that judges were well placed to defend the Italian state from challenges to its authority. To be sure, political willingness to co-ordinate with the judiciary over terrorism and organised crime was also instrumental: it was easier to deploy judicial action than to devise political solutions to Italy’s ‘emergencies’, and it contemporaneously allowed the government to placate the public anxiety the emergencies provoked. By passing penal legislation against terrorism – of the kind discussed in Chapter 2 – the government seemed to be taking action against terrorism, though the legislation effectively delegated resolution of Italy’s ‘emergency’ to judges and the penal system. However, despite this instrumental side to political support for judicial ‘surrogacy’, judicial legitimacy *did* increase between 1970 and 1990 by reason of this delegation of responsibility to judges. This type of ‘surrogacy’ enhanced judicial standing amongst sectors of both the political class and of public opinion by giving judges power of effective action in an immobile political system.

However, judicial surrogacy brought an increase and also a decrease in judicial legitimacy. In judicial surrogacy judges and political actors do not just negotiate over criminal justice policy, rather the political class *delegates* decision-making to the judiciary. Delegation was specifically over the repression of emergencies but it seems plausible that it produced a more general punitive potential, by endowing judges with additional powers of repression and the role to deploy them as they saw fit. However the same setup – judicial powers and surrogacy – also had the potential for *reducing* judicial legitimacy. This is precisely what occurred when judicial attentions shifted to political corruption¹⁰¹⁴. Significantly, the terms of

¹⁰¹¹ Della Porta (2001, p. 5)

¹⁰¹² *Ibid.*, p. 14; also Nelken (1998, p. 621)

¹⁰¹³ Pizzorno (1997, p. 331 My translation).

¹⁰¹⁴ Ferrajoli (1994, p. 75) Neppi Modona (1993, p. 25)

the subsequent political-judicial conflict have turned on an idea of judicial surrogacy negatively conjugated – as an example of judges overstepping their role, operating in a partisan manner, and trying to undercut elected politicians¹⁰¹⁵.

During the late-1980s and the 1990s, in response to investigations against political misfeasance, portions of the political class embraced these arguments, contending that the Italian judges were excessively independent and their decision-making driven by ideological motives¹⁰¹⁶. The implication of this was that judges should be more accountable to the executive. This line of argument was, in a sense, bolstered by a period of explicit political engagement of certain judges during the 1970s. Members of the left-wing faction *Magistratura Democratica* (MD), for example, had rejected the idea of judges as mere executors of the law, and had chosen to participate in the political struggle of the times¹⁰¹⁷. They endorsed the notion of an activist judiciary, with the judge as ‘a general political subject’ (over and above the judicial role), applying the Constitution where the legislative and executive had failed to do so¹⁰¹⁸. This explicit judicial activism sowed the seeds for future attacks on the judiciary¹⁰¹⁹.

The influence of *Magistratura Democratica* within the judiciary should not be over-estimated. Italian judges have never been homogeneous, and MD has generally occupied minority positions¹⁰²⁰. Nonetheless the existence of ‘surrogacy’ – judicial action as a remedy to political inaction – contributed to the potential volatility of judicial legitimacy. Two alternative results have then accrued from the same structural and contextual features. Surrogacy followed from judges’ institutional position: independence, open politicisation and cooperation with the political class, to the point of judges standing in for the political class. This judicial surrogacy expressed and bolstered judicial legitimacy. Crucially, where surrogacy was *not* over criminal justice matters¹⁰²¹, it legitimised judges *as* broad political subjects. This set-up *simultaneously* paved the way for attacks against judicial legitimacy,

¹⁰¹⁵ Della Porta (2001, p. 15)

¹⁰¹⁶ For example, the Socialist Party (PSI) in government during the 1980s Ginsborg (2001, p. 193)

¹⁰¹⁷ See Borgna and Cassano (1997)

¹⁰¹⁸ Note that this was done within the ambit of judges’ interpretation of the Constitution. Thus Article 3 of the Italian Constitution, mandated equality before the law, and placed the onus on the ‘Republic [...] to remove economic and social obstacles that in practice limit citizens’ freedom and equality’. Article 3 was applied by some judges to industrial disputes, in ways that favoured employees. See Della Porta (2001, p. 5). See also Guarnieri and Pederzoli (2002, p. 76)

¹⁰¹⁹ As did *Magistratura Democratica*’s proximity to the Communist Party – though note their divergence over the repression of political terrorism (see Chapter 4).

¹⁰²⁰ Della Porta (2001, p. 5); Ferrajoli (1996, p. 79) Guarnieri and Pederzoli (2002, p. 56) See, on the opposite side, the alignment of certain judges with Italy’s conservative forces (especially during the 1950s and 1960s): Della Porta (2001, p. 4)

¹⁰²¹ For example, over employment disputes: Della Porta (2001, p. 5); Reyneri ((1989) 2010, p. 135)

whereby judges were perceived as politicised, biased, and encroaching upon executive/legislative functions. The interaction of structure and context constituted the penal judiciary as a political subject provided with powers of repression, and cast doubts on the motives behind their use.

In light of this account, I modify Lacey and Savelsberg's analyses to yield hypotheses on judicial actors' contribution to Italian penality. Looking at the interaction of the judicial and political classes in Italy, we note:

1. Judges have been in contact with the political class over penal matters. Contact has included co-operation, but also judicial surrogacy. Surrogacy expressed and bolstered judicial legitimacy amongst political class and public.
2. Italy's institutional setup facilitated this type of variable interaction between judges and political class. Judges are part of the state bureaucracy and are thus seen as potential partners in criminal justice policy formation. Simultaneously, judges are highly independent of other government branches, and this allows for divergence between judiciary and political classes, including over criminal justice matters.
3. Co-operation and surrogacy, as with the legal decrees of the late-1970s that expanded judicial powers regarding terrorism, has engendered a punitive potential. Elsewhere I have argued that, when realised, this potential contributed to the periods of harshness in Italy's differential punitiveness.
4. Judicial surrogacy had broader political articulations that went beyond engagement against terrorism and organised crime – as in the case of *Magistratura Democratica*. Again, this broader articulation is a result of the Italian institutional setup, where politicisation is part and parcel of the judiciary's organisation. The judiciary's independence, and their role as counterweight to the executive and legislative branches, has allowed for an interpretation of the judicial role in which judges are 'broad political subjects' capable of acting autonomously to enact Constitutional aims, where the political class lags behind¹⁰²².
5. In its broader articulations, and where judicial powers are directed against the 'wrong' target, surrogacy has become a source of political attacks against Italian judges. The legitimacy of judicial action is called into question. The penal effects of these attacks have varied depending on their terms.

¹⁰²² For a discussion of this self-conception see Guarnieri and Pederzoli (2002, pp. 71-72)

The dynamics illustrated in points 1 to 5 can further be understood by looking at the 1980s, a decade that provides other apt illustrations of variable judicial legitimacy in Italy. On the one hand, during the 1980s the judicial class gained power and status by dint of its engagement against organised crime (Chapter 2 and Appendix). This engagement increased the judiciary's 'reserve of legitimacy', testifying 'to a commitment to the State that politicians were unable to show'¹⁰²³. The 'reserve' increased still more when, in the early 1990s, anti-Mafia judges Giovanni Falcone and Paolo Borsellino were assassinated by organised crime¹⁰²⁴. On the other hand, the late 1980s witnessed a series of legislative changes meant to impact on both judicial structure and role. In one interpretation, such changes testified to increasing political hostility to judicial investigations into corruption, directed against the independence of judicial action and the use of expanded judicial powers. Though judicial powers had been strengthened by the political class (Chapter 2), they became problematic when directed against politicians¹⁰²⁵. Proof of political hostility to, and public interest, in judicial structure and function, can be sought in the 1987 referendum on judges' civil liability. In the referendum 'members of the judiciary were called on to accept responsibility for civil liability in the cases in which they took part'¹⁰²⁶. Supporters of the referendum emphasised that the existing institutional setup, including judicial independence, gave rise to judges' 'irresponsibility' and 'politicisation'¹⁰²⁷. It left them with excess powers and excess discretion but limited accountability. The imposition of civil liability would curb this situation, presumably by deterring improper judicial action.

The referendum does not lend itself to straightforward interpretation, though Chimenti is explicit in stating that it marked the onset of conflict between judicial and political classes¹⁰²⁸. For my purposes we can also refer to Della Porta's analysis of the campaign that accompanied the referendum. She contends that the campaign, led by the Socialist Party (then part of the ruling coalition), expressed 'the hostility of both individual politicians and political parties' to judges' 'growing activism in bringing politicians to trial'¹⁰²⁹. It was an example of political 'attempts to reduce the power of the judges'¹⁰³⁰ and, as such, prefigured political attacks of later decades in which the activism, and not the laxity, of the judiciary was criticised. The referendum also testifies to increasing public interest in

¹⁰²³ Della Porta (2001, p. 14)

¹⁰²⁴ *Ibid.*

¹⁰²⁵ Davigo and Mannozi (2008, p. 221); Ferrajoli (1994, p. 75)

See Chapter 2 where I had noted that emergency legislation often started as legal (executive) decrees, later converted into legislation.

¹⁰²⁶ Della Porta (2001, p. 7). See also: Ginsborg (2001, p. 194).

¹⁰²⁷ Bruti Liberati and Pepino (2000, p. 11 My translation.)

¹⁰²⁸ Chimenti (1993, p. 84) See Appendix.

¹⁰²⁹ Della Porta (2001, p. 7)

¹⁰³⁰ *Ibid.*

matters of judicial legitimacy and accountability, and growing public receptivity to political attacks against the judges¹⁰³¹.

Similar sentiments can be traced in the 1989 reform of Italian criminal procedure, which attempted to graft adversarial elements onto Italy's existing inquisitorial system¹⁰³². The reform has been interpreted as the expression of 'worries about [judicial] neutrality'¹⁰³³, and concerns about a 'machinery of justice [...] unable to fully protect the defendant's right to a fair trial'¹⁰³⁴, to be assuaged by the increased separation between investigative and adjudicative bodies within the trial. The new procedure also aimed to streamline the criminal trial, and thus overcome Italy's problem with legal delays¹⁰³⁵. As with the 1987 referendum, the 1989 reform is not easy to interpret, not least because it embodied a variety of concerns and interests¹⁰³⁶. For example, as Nelken and Montana note, 'the continued accuracy and validity of [Italy's] traditional inquisitorial models', which the reform aimed to change, was 'widely criticized *both* by academic commentators *and* – for their own reasons – by politicians'¹⁰³⁷. Politicians' reasons included concerns with judicial activism: at the political level, it seems that judicial actors were no longer considered sufficiently 'trustworthy' to be in charge of an inquisitorial system¹⁰³⁸.

Ultimately, the 1989 reform did not achieve a successful policy graft. Rather, it created 'another type of non-adversarial model' within the Italian system¹⁰³⁹. Judicial actors resisted their new role, insofar as it presumed a more passive judiciary, and 'judicial activism [remained] highly prevalent in Italy's system'¹⁰⁴⁰. Whatever its effects, the reform emphasises the increasing conflict between judicial and political class. It can in part be seen as a political attempt to influence judicial action via legislation. I will discuss the implications of such relations below. Here it is worth pointing to the difference between Italy and England and Wales. In both cases we have structural similarity: an independent judiciary that, because of its independence, can and has entered into conflict with the political class. The effect of this

¹⁰³¹ Sufficient for such issues to become electorally relevant topics. See also Chimenti (1993, p. 84)

¹⁰³² See amongst others: Grande (2000); Mirabella (2012); Montana and Nelken (2011); Pizzi and Marafioti (1992)

¹⁰³³ Mirabella (2012, p. 233)

¹⁰³⁴ Grande (2000, p. 230)

¹⁰³⁵ *Ibid.* Legal delays have added to the judiciary's supposed 'inefficiency', see Chapters 4 and 1.

¹⁰³⁶ For a schematic appraisal of the Italian criminal trial, see Appendix.

¹⁰³⁷ Montana and Nelken (2011, p. 287 My emphasis). Criticism also came from within progressive judicial ranks, see Colombo (1991). See Ferrajoli for criticism of the distortions of criminal trials before the 1989 reform: Ferrajoli (1984, pp. 280-284). See also Neppi Modona (1993, p. 25)

¹⁰³⁸ Mirabella (2012, p. 252)

¹⁰³⁹ Grande (2000, p. 230) See also Davigo and Mannozi (2008, pp. 175-190); Montana and Nelken (2011)

¹⁰⁴⁰ Grande (2000, p. 238)

conflict has, however, had different results in Italy compared to the UK: in particular, in Italy, the conflict has been over judicial activism rather than judicial leniency¹⁰⁴¹. The executive has been concerned with limiting this activism and – with political misfeasance in mind – has approved provisions that have had wider penal implications (the 1987 referendum affected *all* judges; the 1989 reform to criminal procedure *as a whole*). These provisions have acted to restrain penal expansion. This difference between England and Wales and Italy is, as Nelken has observed, due to different contextual variables intervening to disturb our institutional models¹⁰⁴². Yet we need not abandon these models: ‘legitimacy’ – as I define and use it – helps us explain penal divergence even in the face of apparent institutional similarity. In contrast to the UK, where the judiciary interpret their legitimate role as independent and aloof vis-à-vis the political class¹⁰⁴³, in Italy, judges see their legitimate role as independent but also activist. This difference in judicial and political interpretations of judges’ roles determines the terms on which the political class critique/clash with the judiciary.

ii. Judicial collusion: purchase and role of judicial action

When discussing judicial actors and penal trends we cannot forget that the Italian judiciary is not homogeneous. The position that ascribed too many politically deployed powers to the judiciary is a limited interpretation of judicial actors, particularly where the argument takes its cue from judicial investigations into political misfeasance. In Ginsborg’s words, the attempted prosecution of political corruption during the 1980s, was happening at the hands of ‘an obstinate minority that would not toe the line’, rather than by a large contingent of judges. ‘[M]ost magistrates were more than willing not to inquire too vigorously into the system’¹⁰⁴⁴ and it was only with *Tangentopoli* that investigations reaped success and support (both popular and within judicial ranks).

Della Porta has observed that high levels of political corruption in Italy can in fact be associated with ‘high levels of *collusion* between judges and politicians’¹⁰⁴⁵. Structure and self-conception are again important here. Structurally, it is important that over the decades ‘the judiciary and political worlds [...] judges and political parties’ and their factions, have ‘developed contacts’¹⁰⁴⁶. The judiciary’s formal, total independence has been accompanied by informal connections between judges and politicians¹⁰⁴⁷. We can presume that some of these connections are simply informal channels of influence: *informal*, but not necessarily

¹⁰⁴¹ Nelken (2011, p. 109)

¹⁰⁴² *Ibid.*, pp. 109-110

¹⁰⁴³ Lacey (2008, pp. 95-96)

¹⁰⁴⁴ Ginsborg (2001, p. 194)

¹⁰⁴⁵ Della Porta (2001, p. 2 My emphasis)

¹⁰⁴⁶ Della Porta (2001, p. 6) See also Guarnieri (1992, pp. 25-26)

¹⁰⁴⁷ Enhanced by the political cleavages in the higher council, and by the presence of the council’s ‘lay’ members: Della Porta (2001, p. 7)

dissimilar, to the negotiations within the German bureaucracy, including the judiciary. In Italy, however, some informal connections have fostered judicial ‘connivance [...] with corrupt politicians’ and even with organized criminals¹⁰⁴⁸. Connivance/collusion was obtained by ‘fees and favours’, or by outright ‘pay-offs’ to the judiciary, and has translated into delayed or even blocked criminal investigations¹⁰⁴⁹.

Della Porta explains this collusion between judges and politicians by reference to the strength of their informal ties and personal networks¹⁰⁵⁰. Over time these ties have led some judges and politicians to share the ‘normative values’ found in corrupt networks (Chapter 3)¹⁰⁵¹. This was possible because, up to the 1990s, Italian judges ‘lacked a strong professional culture’ and were open to external reference groups and value systems¹⁰⁵². The absence of a professional culture reduced the ‘moral costs’ of corruption, lowered even further when judges’ external reference group comprised corrupt politicians¹⁰⁵³.

This form of judicial-political collusion produced ‘uncertainty over the outcome of judicial action against entrenched powers’, an interesting counterweight to judicial involvement against Italy’s emergencies¹⁰⁵⁴. Collusion has also had broader effects, as suspicion of the magistracy radiated outwards, from the impunity of corrupt politicians, to produce a more ‘atavistic distrust’ of judicial actors¹⁰⁵⁵. I had discussed such sentiments for law and legal actors in my analysis of state and citizen in Italy. In Chapter 4, I noted how Italy displays a dualism between a formalistic insistence on the law and a tendency towards the informal resolution of conflict (Chapters 3 and 4). The latter, I argued, is enhanced by the existence of corrupt and clientelistic exchanges. Judicial actors can themselves be seen to have contributed to this dualism: here by fostering distrust with the law, stimulating reliance on alternative, informal means of conflict resolution.

This statement must be qualified to account for judicial variability: judges’ multiple approaches to their role and the different *reactions* to judicial action. The interaction of internal variability, judges’ multiple relations with the political class, and judicial self-conception can be synthesised into a notion of legitimacy. If, on the one hand, we have magistrates whose legitimacy is called into question because of (perceived) excess activism, on the other we also find judges whose legitimacy is eroded by the (perceived) impunity of

¹⁰⁴⁸ Della Porta (2001, p. 8)

¹⁰⁴⁹ *Ibid.*, p. 10

¹⁰⁵⁰ *Ibid.*, p. 11

¹⁰⁵¹ *Ibid.*

¹⁰⁵² *Ibid.*

¹⁰⁵³ *Ibid.*

¹⁰⁵⁴ *Ibid.*

¹⁰⁵⁵ Respondent in an interview quoted in Della Porta: *ibid.* See also Neppi Modona (1993, p. 16)

the powerful. These contradictory attitudes testify to the diversity of the Italian judiciary: some colluded, some investigated. They also testify to the divergence in political reactions to judicial action – desire for activism over ‘emergencies’ but not over political corruption – and to the diverse results of Italian institutional organisation, as judicial surrogacy but also judicial inactivity have occurred in a institutional context that allowed judges to adopt both approaches. This context, in which the law had variable role and variable purchase, permitted attacks against the judiciary whether as too active or not active enough.

Here we see how the law’s role and purchase varied on the basis of judges’ deployment of the law. Where there was judicial collusion, for example, collusion suggested that there was no *role* for the law. There were thus increasing instances in which there was no *purchase* for a law that was imperfectly applied. I have argued that this lack of ‘purchase’ acted to restrain formal penal expansion. It would then seem to follow, from this analysis of Italian judges in context, that they have contributed to the nation’s penal volatility. Different impulses have been propelled from the judiciary into the penal realm, surrogacy feeding into a punitive potential (harshness), and collusion stimulating distrust and informal conflict resolution (de facto leniency). It also stands to reason that given the politicisation of the judiciary, expressed internally in its factions and externally in its conflict with the political class, judges should be seen as *additional* players in the ‘volatile political equilibrium’ to which I have anchored Italy’s differential punitiveness.

iii. The 1990s: times of conflict

So far I have described a judicial class that has collaborated, stood in for, colluded and clashed with the political class. Each different interaction has affected judicial legitimacy, which has consequently waxed and waned over time and affected the powers with which judges have been endowed, and the terms under which these powers have been deployed. These ‘terms’ have not always been interpreted in the same way by judges and politicians with penal impulses further influenced by the changing interaction between judicial and political classes. I now come to the 1990s: earlier chapters have emphasised that conflict between political and judicial classes peaked during the decade and its corruption scandal. This section addresses the flaring of this conflict, laying out some interpretive conclusion on its penal repercussions. For the purpose of this chapter the crucial events of the 1990s were the ‘clean hands’ (*mani pulite*) investigations through which *Tangentopoli* was uncovered and its political participants prosecuted¹⁰⁵⁶. A significant contribution to *mani pulite*’s success came from the Italian judiciary’s institutional structure as well as the activist articulation of the judicial role. Both factors added to those circumstances that allowed the judges to succeed

¹⁰⁵⁶ See Appendix.

where previously they had failed. The Italian judiciary's particular independence, for example, permitted investigations to continue even against ruling politicians, as neither the legislative nor the executive had any means to curtail them¹⁰⁵⁷. The consequent political 'revolution' that the judges provoked was carried out by legal means and within the bounds of Constitutional propriety. Unsurprisingly, after *Tangentopoli*, judges' role as 'high counsellors' on matter of justice began to wane¹⁰⁵⁸. Judges became the primary target of increasingly direct political attacks against the breadth and misuse of judicial powers¹⁰⁵⁹. As in the 1980s, these attacks took legal (and not just rhetorical) form, crystallised in political reforms with the potential of diluting judicial activism¹⁰⁶⁰.

Here, again, we have a concentrated version of the dynamics described above, where by contrast to the effect it has had in Britain, judicial-political conflict in Italy has contributed to *contain* rather than increase Italian penal rates¹⁰⁶¹. 'Containment' has been achieved, for example, by means of political initiatives to curb judicial powers. These were to become particularly apparent in the early years of the successive decade with the introduction of procedural changes that lengthen the duration of the penal process. Nelken recounts:

'The centre-left coalition [in power during the second half of the 1990s] had [...] been the author of a variety of stricter provisions to do with the validity of types of testimony, as part of the creation of "just trials" [...]; these provisions were adding considerably to the difficulties of gaining convictions.'¹⁰⁶²

The right-wing government of 2002 passed the so-called *Cirami* law, modifying article 45 of the criminal procedural code¹⁰⁶³. The article allows 'defendants the right to take their case to the Supreme Court and ask for a delay of sentence while a decision [is] made as to whether

¹⁰⁵⁷ Nelken (1996, p. 196)

¹⁰⁵⁸ Violante (1998a, p. lxvi)

¹⁰⁵⁹ '[By 2003] the heady days of Tangentopoli were long over: it was now the judges who were themselves under attack' (Nelken, 2003, p. 11)

¹⁰⁶⁰ One of the most obvious examples is the 1994 'Biondi decree' (D.Lgs. 480/1994) named after the then Minister of Justice. The decree limited the use of preventive custody for a series of offences, including forms of corruption then under investigation. It provoked 'such strong protest by judges, public opinion' and even a governing party, that it was withdrawn: Della Porta (2001, p. 7). See also: Davigo and Mannozi (2008, pp. 159-173).

For an overview of the penal/procedural changes of the decade see Davigo and Mannozi who also provide hypotheses on the effects these reforms had on proceedings against corruption (*ibid.*, chapter 4). See also Nelken (2003, pp. 115-126).

¹⁰⁶¹ Nelken (2011, p. 109) Lacey (2008, pp. 95-97)

¹⁰⁶² Art 111 Cost.; Nelken (2003, p. 122) See also Davigo and Mannozi (2008, pp. 155, note 152)

¹⁰⁶³ Nelken (2003, p. 116)

the case should be removed from a whole tribunal area'¹⁰⁶⁴. Referral can be requested on a number of grounds including – a motive introduced by the *Cirami* law – ‘legitimate suspicion’, ‘a grave, objective local situation, representing a real threat of judicial bias, or a threat to the trial unfolding serenely’¹⁰⁶⁵. Referral may lead to the trial being transferred to another judge. Though chronologically it falls outside the scope of my thesis, the *Cirami* law is nonetheless a concentrate of the sentiments that bloomed in the 1990s after *Tangentopoli*. It speaks of conflict between judicial and political classes, phrased in terms of potential judicial bias, embodied in political provisions capable of limiting judicial activity by enhancing procedural delays¹⁰⁶⁶. Nelken’s research further testifies to generalised political unease at judicial action at the time of the *Cirami* law: I claim this unease also existed in preceding years¹⁰⁶⁷.

The procedural changes of the late-1990s and early-2000s are indicative of the broader penal effects of political reactions to the judicial-political conflict. They increased the obstacles that must be surpassed before the statute of limitation applies and criminal proceedings are discontinued¹⁰⁶⁸. Nelken is not alone in observing that procedural changes have substantially slowed the pace of the Italian penal trial: legal delays have more than once been the subject of research and reform proposals¹⁰⁶⁹. In one such instance, the Italian penal trial has been characterised as a series of ‘overlapping norms that have created a cumbersome system [...] full of traps’¹⁰⁷⁰. Where these legal delays have combined with limitation periods, they have also given rise to the practice among lawyers, whereby ‘the ultimate aim of the defence is almost always, and explicitly, that of obtaining temporal dilations in view of the approaching *prescrizione*’¹⁰⁷¹. Again it is logical to suppose that, by adding to Italy’s already lengthy procedural delays, the set of procedural hoops introduced by political reform may have been used to reduce the total number of cases ending in a conviction, reducing penal

¹⁰⁶⁴ *Ibid.* p. 115

¹⁰⁶⁵ "Legittimo sospetto", <http://www.treccani.it/enciclopedia/legittimo-sospetto/> Accessed February 2013. My translation. For ‘local situation’ read ‘place of trial’: Nelken (2003, pp. 115-116)

¹⁰⁶⁶ The *Cirami* law has been criticised because where a trial was successfully transferred, evidence would have to be gathered ‘all over again’, increasing the risk of ‘cases [...] becoming time-bound’: *ibid.*, pp. 116-117

¹⁰⁶⁷ ‘As politicians, [the opposition parties] had reservations about the influence of judges on politics’ and were unsure ‘as to how [and] how far to support the judges’ Nelken (2003, p. 122.)

See also Davigo and Mannozi on attempts at reforming judicial roles, including attempts at an institutional separation between *magistrati* in their prosecutorial and adjudicatory roles ‘creating some form of political control’ over prosecution (2008, p. 192)

¹⁰⁶⁸ Nelken (2003, pp. 122-123)

¹⁰⁶⁹ See, for example: Grande (2000); Paciotti (2006)

¹⁰⁷⁰ Diotallevi, Onida, and Scotti (2006, p. 84 My translation.) See also Nelken and Zainer (2006)

¹⁰⁷¹ Nelken and Zainer (2006, p. 160 My translation.)

escalation as a whole¹⁰⁷². Here, the conflict between judicial and political classes – expressed in terms of illegitimate judicial activism (illegitimate because politicised and excessive) – has produced legislative changes that impacted upon national penalty.

Interestingly, the 1990s also saw a number of executive decrees meant to *bolster* judicial powers against organised crime¹⁰⁷³. This emergency legislation has been described in terms of ‘reform and counter-reform’ (Chapter 2)¹⁰⁷⁴. It would be logical to extend this description to the varying relations between Italian judiciary and political classes. Politicians were, at one, interested in *enlisting* the judiciary in the fight against organised crime¹⁰⁷⁵, yet were simultaneously concerned with hampering judicial investigations into political misfeasance. They bolstered judicial powers on the one hand, and tried to limit them on the other. Assuming that the ‘halo effect’ described in Chapter 2 also applies in this context, it would be logical to expect a wider impact for these contradictory relations, producing both a punitive potential and a potential for punitiveness to be defused/tempered.

iv. A summary and some hypotheses.

These historical developments (1970-200) can be stylized and linked back to Savelsberg’s and Lacey’s hypotheses on judicial contributions to national penalty:

1. Consideration of how ‘knowledge and domination’ impact on criminal punishment in Italy should allow for an institutional setup that incorporates and transmits variance. Italy’s institutional structure allows for different judicial attitudes and approaches to the judicial role, and for various types of interrelations between judiciary and executive.
2. The notion of ‘judicial legitimacy’ can help explain national penal divergence, where similar institutional features have played out differently across contexts. The way institutional conflict has played out in Italy is not for judges to be bypassed in order to punish more; it is for judges to be bypassed in order to punish less.
3. Variable relations between Italian judicial and political classes can be explained by reference to judicial self-conception (internal legitimacy). The Italian judiciary’s weak professional culture – heterogeneous self-conception – stimulated informal

¹⁰⁷² Davigo and Mannozi (2008, p. 191); Nelken (2011, p. 109-110)

¹⁰⁷³ D.L. 1992 n. 306; D.L. 1991 n. 152

¹⁰⁷⁴ See also Davigo and Mannozi who describe legislative interventions on the penal procedural code as a series of ‘actions and reactions’. These were stimulated, during the decade after its introduction, by the ‘intense dialectic’ between legislature and Constitutional Court over the procedural code: (2008, p. 188. My translation)

¹⁰⁷⁵ Cerri talks of judges’ being seen, institutionally, as subjects fighting against organised crime (*soggetto in lotta*). See Ferrajoli for a similar analysis of judges as ‘crime fighters’ against the Mafia: conference contributions quoted in Rinaldi (1992, pp. 71, 76 respectively).

contacts with the political class. It is logical to suppose that these informal contacts stimulated the co-negotiation of criminal justice policy elsewhere associated with penal moderation. Weak professional culture and informal contacts have also allowed judicial collusion with political corruption, contributing to Italy's leniency by limiting criminal investigations, or by enhancing Italian citizen's distrust of Italian law.

4. During the 1990s, the Italian judiciary acquired greater *esprit de corps*. This gave rise to attempts to curb judicial activism even through legislative means. Within the judiciary, it has led to judges setting aside their internal divisions in defence of the existing judicial structure¹⁰⁷⁶.

These insights can be summarised into an overall theoretical conclusion that links back to Lacey's and Savelsberg's two dimensions. First, a bureaucratic judiciary that co-operates with the civil service of which it is a part will generally enhance the likelihood of penal moderation. However, much will depend on how judiciary and political classes interpret their respective roles, and how these roles are operationalised. For example, in a co-ordinated system co-ordination will only follow if judicial action is considered fundamentally (institutionally) legitimate by its political counterparts, and vice-versa. The Italian system, where co-operation and conflict alternate, yields variable results – co-operation when legitimacy is high, and conflict when legitimacy is low.

The terms of the judicial-political interaction between judiciary and political classes will vary at any given moment in time, and so will its penal effects. A system in which co-operation is over penal repression may yield greater harshness; the same system may also allow for a withdrawal of co-operation and, depending on its terms, harshness may then be reduced. In Italy, co-operation over 'emergencies' created a punitive potential partly by expanding judicial powers. The subsequent conflict with the political class gave rise to reforms intended to reduce judicial powers, with a potentially limiting effect on overall penal expansion.

Judges have inhabited Italy's volatile scenario in various politicised guises and, in their various guises, have contributed to Italian penalty's leniency-repression dualism.

IV. Judges and public: demands, reception and resistance

So far I have been discussing judicial structure and institutional organisation, and especially judicial interaction with the political class. To fully understand judicial actors' contribution to Italian penalty, it is also necessary to consider the demands actually made of the judiciary, and their responses to such demands. I have looked at political 'demands' in the previous

¹⁰⁷⁶ Nelken (2003, p. 120)

section. In this section I will interrogate *public* demands and their influence on judicial action. Lacey and Savelsberg hypothesise that the relationship between judiciary and public will impact upon the extent to which public opinion influences judicial action: the greater the institutional ‘distance’ between public and judges, the greater the likelihood that judges will be able to resist/mediate public demands on to punishment. Bureaucratisation is again a good predictor of this ‘distance’.

I now apply this framework to Italy: what is the relationship between the Italian public and Italian judges? What is its impact on punishment?¹⁰⁷⁷ ‘Judicial legitimacy’ is still relevant to this discussion and here it encompasses the role the public has envisaged for judicial actors, and the role judicial actors have crafted for themselves vis-à-vis the public. This analysis requires some discussion of the actual ‘content’ of public demands and it is here that we find scope for Italian divergence even in the presence of structural similarity with its European comparators. Assumptions on the content of public demands are present throughout our theories on contemporary punishment. Garland, for example, assumes that the public has become ‘punitive’, and evidence from the US and the UK (also see Savelsberg on the US) corroborates this interpretation¹⁰⁷⁸. Discussions of judicial-public interactions have thus been concerned with judges’ resistance/permeability to punitive demands. The Italian public, however, has not overwhelmingly generated demands for punitiveness, or ‘law and order’¹⁰⁷⁹. Law and order have become a salient public/electoral issue only in the 1990s, and even then demands for ‘law and order’ have been selective¹⁰⁸⁰. How, if at all, does this change our appraisal of judicial-political relations and their penal effects?

Judicial engagement against terrorism and organised crime had increased judicial legitimacy in the public eye across the 1970s and 1980s¹⁰⁸¹. Compared with an immobile political class, judges appeared as those most proactive in the defence of Italian democracy. Judicial actors were seen as an alternative – though not direct – source of political representation¹⁰⁸². This set-up had multiple effects: judges’ open politicisation provided the opportunity for public suspicion of *excessive* deployment of judicial powers or, by contrast, of *insufficient* deployment of judicial powers. It is logical to suppose that suspicion of excessive deployment will have accompanied what Pavarini has described as Italian society’s political interpretation of crime and punishment. If, in this interpretation, ‘control [is] tantamount to coercion’ and

¹⁰⁷⁷ Neppi Modona (1993, p. 14)

Chapter 4 addressed the relationship between citizen and State. I now narrow this discussion to focus on the judge-public interaction.

¹⁰⁷⁸ See Savelsberg (1994, p. 932)

¹⁰⁷⁹ See Chapters 3 and 4. See also Melossi and Selmini (2009, pp. 156-158)

¹⁰⁸⁰ See Chapters 3 and 4; see also Chapter 6.

¹⁰⁸¹ See *inter alia* Davigo and Mannozi (2008, p. 221)

¹⁰⁸² One example is, again, judicial pursuance of article 3 of the Italian Constitution.

‘the criminal justice system [is a] paradigm of social order’, the political variability of the judiciary and the expansion of judicial powers may have fostered suspicions of the latter’s inappropriate deployment¹⁰⁸³. Admittedly, this attitude will have been more characteristic of the Italian left-wing, and we need to be aware of variation both amongst the Italian public and Italian judges¹⁰⁸⁴.

Unsurprisingly, a polarisation of the relationship between judges and the Italian public emerged in the 1990s. In the early-1990s, public support for the judges increased: if previous decades had seen judicial surrogacy in the face of an absentee political class, these years saw the judiciary *substitute* for the ‘tainted’ political class, in the public imagination¹⁰⁸⁵. For a time, judges came to be the primary representatives of the Italian state, representing rectitude in an era of corruption. Their investigations into *Tangentopoli* were seen, in Nelken’s words, as the ‘judges’ campaign to remoralize Italian public life’¹⁰⁸⁶. As Della Porta also notes, at the time the public image of the judiciary, adopted and amplified by the media¹⁰⁸⁷, was centred on the figure of the ‘judge-hero’ pitched ‘against the politician villain’¹⁰⁸⁸. ‘Public opinion’ went as far as ‘[expressing] its support for judges with protest demonstrations’, when it seemed that the political class was trying to hamper judicial investigations¹⁰⁸⁹.

This is symptom and cause of what Pavarini has described as a shift in the ‘collective perception’ of crime and punishment, which has shifted from ‘the paradigm of “political danger” [...] to [that of] “social danger”’¹⁰⁹⁰. When this new paradigm is applied to political corruption it ‘gives way to moralism. The magistrates conducting investigations into political corruption [...] become the latest public idols, great “moralisers” because [...] great “judges”’¹⁰⁹¹. The implication is that the ‘judge-hero’ was given the public’s complete confidence in her pursuit of law and order¹⁰⁹².

¹⁰⁸³ Pavarini (1994, p. 52) Note also the internal critique of judicial powers after the ‘emergencies’: Ferrajoli (1994, p. 77)

¹⁰⁸⁴ Pavarini (1994, pp. 52-53)

These may have been bolstered by the ‘conservative [judicial] stances’ of the 1950s, when judicial structure was not yet fully reformed, and ‘a sort of “class collusion”’ existed between judges and the upper classes to which they belonged: Della Porta (2001, p. 4)

¹⁰⁸⁵ For increasing public legitimacy see: Eurisko (1993) quoted in Pavarini (1994, p. 59); (Pavarini, 1997, p. 83)

¹⁰⁸⁶ Nelken (1996, p. 11)

¹⁰⁸⁷ See amongst others Raiteri (1992); Righettini (1995)

¹⁰⁸⁸ Della Porta (2001, p. 2); see also Pavarini (1994)

¹⁰⁸⁹ Della Porta (2001, p. 15)

¹⁰⁹⁰ Pavarini (1994, p. 57)

¹⁰⁹¹ *Ibid.*

¹⁰⁹² For the effect this had on the Italian Left-wing see Chapter 4; see also Pavarini’s discussion of the Left-wing’ falling back upon ‘formal law and [...] current formal legality’ too easily transformed into ‘a campaign for the greater effectiveness of the state’s repressive machinery’ (Pavarini, 1997, pp. 84-85)

However, widespread public support for the judges began to wane towards the late-1990s¹⁰⁹³ as hostility grew between (some) citizens and part of the judiciary. Della Porta explains the judges' fall from grace as part of the natural progression of Italy's political transition¹⁰⁹⁴. *Tangentopoli* had marked the First Republic's demise and the Second Republic's birth, in which judicial actors had played a crucial role. Now they could no longer hope to occupy the same pivotal, political role they had come to occupy during the crisis. They had to 'leave the stage' to the seemingly renewed political class: any judicial resistance to this passage of power could be taken as an illegitimate surfeit of judicial activism¹⁰⁹⁵. Political attacks against the magistracy certainly argued as much, and may have influenced public attitudes to the judiciary. In Melossi's analysis, Italy's 'widespread illegality' also contributed to judges' waning legitimacy: in a nation characterised by such 'widespread illegality' and informality, it was easier to accept attacks on judges' improper political motives than to modify one's own behaviour¹⁰⁹⁶. What is more, during this era, there was a burgeoning concern with urban and immigrant crime (Chapters 3, 4 and 6)¹⁰⁹⁷. This accompanied a shift away from concerns with threats to the State, including the 'threat' of corrupt politicians. It may be that judges' continuing focus on political misfeasance, in the face of growing attention to street and immigrant crime, was seen as misplaced by certain sectors of the public: judges' persisting interest in 'macro' crimes marked a delegitimizing neglect of citizens' preoccupations with worsening 'micro' crimes¹⁰⁹⁸. Specifically in this last dynamic we find the makings of a growing demand for law and order, but targeted selectively.

What are the implications of this judicial-public interaction for Italian penalty and for our institutional models? I argue the following:

1. Our analysis of the link between the public and judges should encompass a discussion of the *content* of public opinion on punishment. We cannot presume 'populist punitiveness' across contexts: in Italy, for example, demands for law and order have been relatively limited. Certain sectors of the public have interpreted crime and punishment as political issues and have therefore sought solutions in political and social, rather than judicial, spheres. This has limited overall public pressure in favour of penal expansion. Chapters 3 and 4 had also shown how the Italian context

¹⁰⁹³ Della Porta (2001, p. 15); Nelken (2003, p. 112); Neppi Modona (1993, p. 16)

¹⁰⁹⁴ Della Porta (2001, p. 15)

¹⁰⁹⁵ *Ibid.*

¹⁰⁹⁶ Melossi (2003, p. 383). See also Nelken when he talks of judges' 'difficulty in gaining social acceptance of the need to live life within the constraint of legal rules' (2004, p. 10).

¹⁰⁹⁷ Montana (2009a, pp. 478-479). See also Melossi and Selmini's analysis of local crime prevention initiatives in Bologna: (2000, pp. 149-150; 2009, p. 156)

¹⁰⁹⁸ See Sarzotti (2006a, p. 82)

produced incentives towards the informal resolution of conflict. Where these incentives exist we would expect them to have reduced the public demands directed to the criminal justice system and to judicial actors.

2. The issue of the public's influence on judicial decision-making also touches upon issues of judicial legitimacy. Considering external 'legitimacy' here means asking: will the judiciary be considered the public's interlocutors? If so, on what terms? In Italy the public has not always seen judicial actors as suitable/preferred interlocutors. Low legitimacy has defused demands for formal penal solutions to social conflicts. In the 1990s, however, public support for judicial action peaked – a time of high legitimacy. Much has depended on the terms of this support: during the early 1990s, support was bolstered over issues of political corruption, but the terms of the judicial-public relationship have varied after *Tangentopoli*. As the decade progressed, diffidence about judicial activism grew. Once Italy had transitioned into the Second Republic, judicial activism was perceived as illegitimate since it threatened 'widespread illegality'; it was perceived as misplaced for those more concerned with street crime and immigration. My argument has been that this increased targeted demands for 'legal solutions' to 'social problems'¹⁰⁹⁹.
3. An overview of the Italian public's attitudes to the judicial class also reveals the variability associated with Italy's 'volatile political equilibrium'. Judges and judicial action have been interpreted differently across social groups and across historical periods. At the very least this has meant that, between 1970 and 2000, calls for judicial solutions to 'law and order' issues have not been unequivocal; nor have they been overwhelming. It is logical to suppose that this variability translated into the variable public 'penal' demands, available for absorption or filtration by political and judicial institutions.

As point 3 reveals, public demands are only one side to the 'judges-public' relation, which also encompasses judges' 'receptivity' to public demands. As Lacey and Savelsberg argue (albeit in slightly different terms) 'receptivity' – the willingness to consider and be guided by public opinion on punishment – varies according to judicial structure. It will differ depending on how direct the link is between public opinion and judicial decisions. For example, in the United States, some judges are elected and hence directly accountable to the public.

It is not structure alone, however, that mandates the relationship between judges and public opinion (and public influence on penally-relevant decisions). Much depends on how

¹⁰⁹⁹ Pavarini (1994, p. 57)

judges interpret their role within this structure. Italy is a particularly apt case study in this respect, illustrating the importance of judicial self-conception on processes of knowledge production and domination. Self-conception – internal legitimacy – is relevant insofar as it affects judges’ *autonomy* in interpreting public demands for ‘punishment’. Given the relatively late development of a judicial *esprit de corps*, I will focus mainly on the Italian judiciary in the 1990s¹¹⁰⁰. Partly because of the judicial-political conflict, judges have begun to see themselves as the last bastions of legality in Italy¹¹⁰¹. This idea is also linked to the Italian Constitution, and judges’ perception of their role as its guardians¹¹⁰². The Republican judge understands herself to be ‘not just a servant of the law [...] but a servant of the Constitution, which belongs to all citizens’¹¹⁰³. This means that it is the judiciary’s role is to listen and, in some sense, ‘represent’ all citizens (not just the majority)¹¹⁰⁴, even where this implies independent interpretation of legality, and even where it requires judges to uphold the Constitution *against the political majority*¹¹⁰⁵.

This symbolic link between Italian judges and the public should not be seen as a necessary conduit for public opinion into judicial decision-making. It is likely that the judiciary will be sensitive to public opinion, particularly where they see themselves as representatives of the Constitution (and hence the people). But ‘sensitive to public opinion’ does not mean dependent on, or indeed contiguous with, public opinion. In this the Italian judiciary is still closer to the German, bureaucratic judiciary, than it is to the US and UK professional judiciaries. Thus, even when – as in the 1990s – the connection between public and judiciary seemed most direct, the judiciary still possessed the structural features necessary for an autonomous evaluation of crime and punishment. Judges’ institutional independence and professional culture allowed them to ‘take into account in their professional choices their own moral convictions as well as the collective consequences of the decisions they [took]’, potentially balancing them against public ‘penal’ pressures¹¹⁰⁶. This is exemplified in Nelken’s analysis, whereby the Italian judiciary possesses ‘priorities [...] often different *both from those of the politicians and of the general public*’¹¹⁰⁷.

¹¹⁰⁰ Della Porta (2001, pp. 5, 15)

¹¹⁰¹ *Ibid.*, p. 16

¹¹⁰² This attitude was also visible in earlier decades and in the activism of *Magistratura Democratica*.

¹¹⁰³ Borgna and Cassano (1997, p. 55 My translation).

¹¹⁰⁴ Guarnieri and Pederzoli link this to judicial review of legislation in Italy which can be initiated by judges (2002, p. 76)

See also Righettini on the judiciary’s strategies of ‘autonomous communication’ with the public sphere Della Porta (2001, p. 16); Righettini (1995, pp. 227-265)

¹¹⁰⁵ See for example Ferrajoli (1994, p. 66). See also Morisi (1999, p. 141)

¹¹⁰⁶ Della Porta (2001, p. 16)

¹¹⁰⁷ Nelken (2011, p. 109 My emphasis.)

The implication of this setup is that judicial decision-making in Italy is still greatly determined by judicial priorities rather than by ‘populist’ demands. Montana and Nelken observe that Italian magistrates have been able to resist ‘moral panics’ about street crime and immigration, and have diluted the impact of these panics upon the criminal justice process¹¹⁰⁸. Judicial resistance follows from a combination of judicial independence, diffidence if not open hostility to the political class, and a self-conception centred on an autonomous interpretation of ‘legality’. Admittedly, ‘the external influences [on the judiciary] do not disappear’ and ‘there is a limit to [judicial] resistance’¹¹⁰⁹. Moreover, the judicial structure as described also allows for judicial *receptivity*, and not just resistance, to ‘external influences’. Judges’ autonomous interpretation of crime and punishment may thus also *support* penal expansion and, as I had analysed in relation to judges and politicians, moderation is not a foregone conclusion of judicial action in Italy¹¹¹⁰. As the Italian case confirms, judicial contributions should be part of our analyses of punishment, which must, however, allow for systems that produce more or less coherent patterns of contribution or that point to more variable contribution. Variability, for example, is *built into* the Italian system, such that variation may occur, on the basis of judges’ penal philosophy, their moral convictions, the locality in which they operate¹¹¹¹. Similar dynamics should be sought across contexts.

This discussion of judicial receptivity to public demands allows me to draw one further conclusion:

4. In considering the ‘interlocution’ between the judiciary and public, it is necessary to consider judicial self-conception. The way in which judges understand their role, and legitimise their action, will influence their willingness to respond to or reject public demands for more or less punishment. For example, where judges see themselves as the legitimate arbiters of what legality requires, they may ultimately follow their own priorities in judicial decision-making, despite public and political demands. How this plays out in the penal realm will depend on the content of the demands and on the values informing judicial decision-making. For example, in response to ‘moral panics’ on street crime and immigration, the judiciary’s professional evaluation of

¹¹⁰⁸ *Ibid.* See also Montana (2009a, 2009b)

¹¹⁰⁹ Montana and Nelken (2011, p. 292)

¹¹¹⁰ See the fears expressed by Ferrajoli of ‘temptations’ experienced by the judiciary given the ‘*surplus* of improper political legitimation [...] that might endanger [...] rigorous respect of procedural guarantees’ (1994, p. 77. My translation)

¹¹¹¹ For variation across regions/cities see Sarzotti (2006a, pp. 67-86; 2006b) and Torrente (2006, pp. 227-365) on judicial actors in Turin and Bari. Future research should investigate the extent of resistance across time, judicial actors and Italian localities.

these threats has limited the potentially expansive effects of public punitive demands¹¹¹². However, under the right conditions, the same combination of judicial autonomy and self-conception will produce the opposite effects, namely penal expansion. This is the case for example where judicial evaluation of ‘moral panics’ coincides with that of a ‘punitive’ public (for example, where judges evaluate public concerns with micro-crime as justified). Variability again emerges as a key feature of the Italian institutional setup, ensconced in judicial structure, self-conception and institutional interactions.

These insights can be summarised in an overall hypothesis: a judiciary that is electorally linked to public opinion, or incorporates public opinion through lay participation, will generally be influenced by public opinion in its decision-making. A judiciary that, structurally, is distanced from public opinion in its decision-making, will have greater chances of mediating the impact of public opinion on judicial action. Whichever the structural setup, it still necessary to consider the general *content* of public attitudes to crime and punishment. If the public are not punitive then we need not expect punitiveness to translate into criminal justice decisions even in the presence of direct judge-public links. In Italy public approaches to punishment have been relatively moderate though not necessarily stable. Demands for law and order have not been overwhelming, and have been different to the demands recounted by Garland for the US and UK, relating to ‘ordinary crime’ and matched by an increased demand for punishment¹¹¹³. Even when they have entered public discourse, such demands may have been targeted primarily at political outsiders. This has limited the extent to which judges have had to absorb or resist calls for ‘law and order’.

Judicial contributions to penal trends will also vary with judicial receptivity or accountability to public demands. This is partly a function of judicial structure and partly a function of judicial self-conception (internal legitimacy) and the extent to which it enhances or limits autonomous judicial interpretation of crime and punishment. Bureaucratisation is again a good predictor of judges’ power to resist/mediate public demands. For example, the internal legitimacy of bureaucratic judiciaries does not depend on judicial decisions replicating public attitudes. In Italy, judges have begun to see themselves as guardians of the Constitution. This allows them to interpret external influences on judicial decision-making, including public opinion. Given that Italian judges (bureaucratic *and* independent) are influenced, *but not bound by*, public opinion, they have been free to reject or accept pressures coming from it. Their internal legitimacy is influenced by public attitudes, but does not

¹¹¹² Montana and Nelken (2011)

¹¹¹³ Melossi & Selmini (2000, p. 150)

depend upon replicating them. The Italian institutional structure has thus further incorporated penal variability.

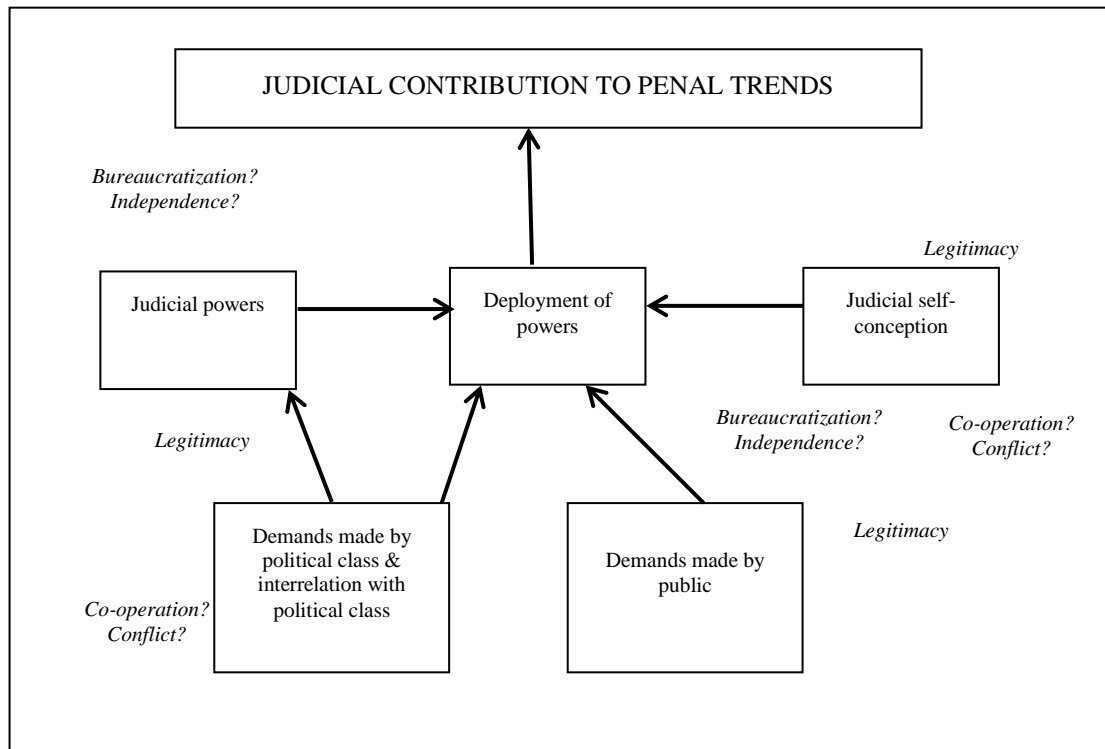
The relationship between judges' and public is not independent of the interaction between judicial and political actors. In fact none of the dimensions analysed in this chapter can be taken singly. Judicial 'selection, training and tenure'; the level of their bureaucratisation; their interrelations with the executive/civil service; their interrelation with the public, their self-conception; all constitute different facets of the way in which judicial actors contribute to penal trends. My understanding of judicial contributions to Italian penalty is summarised in Figure 1. Table 1 also provides an overview of the relationship between judges and political class, the relationship between judges and public, and changes in judicial self-conception between 1970 and 2000. The final column provides a (simplified) evaluation of judicial contribution to Italian penal trends.

Table 1. The Italian Judiciary, interrelations, self-conception and penal results¹¹¹⁴

Decade	Relationship between Judiciary and Political Actors	Relationship between Judiciary and Public	Judicial Self-Conception	Contribution to penal trends
1970s	Judicial surrogacy. Surrogacy over terrorism and emergencies. Growing judicial legitimacy. Judicial collusion.	Growing judicial legitimacy over emergencies. Judge as political actor: suspicion over political motives.	Independent judiciary. Internal variability after 1960s reforms: multifaceted judiciary. Institutional politicisation through political currents. External reference groups.	Judge as political actor: crime as politics and low demands for punishment. Emergency powers and punitive potential. Collusion: law with no purchase: diversion.
1980s	Organised crime: judicial surrogacy. Political corruption: judicial collusion. Variable legitimacy. Political corruption: beginnings of conflict.	Reserve of judicial legitimacy over emergencies. Judicial collusion and ‘atavistic distrust’ for judges/law. Growing public attention to judicial accountability and responsibility: 1987 referendum.	Independent judiciary. Internal variability. Lack of a common professional culture. External reference groups.	Collusion: law with no purchase: diversion. Emergency powers and punitive potential. Legislation: procedural delays and limits to penal expansion.
1990s	<i>Tangentopoli</i> . Out and out conflict with part of the political sphere. Political attempts to limit judicial activism. Continuing sectors of judicial collusion.	Judges as moral hero: apogee of legitimacy. Judges’ fall from favour: too active given widespread illegality. Too little concern with micro crimes.	Growth of a more unified self-conception following political attack. Judges as guardians of the Law and the Republican Constitution. Judges as interlocutors for the ‘citizens’.	Judicial priorities: resistance to calls for law and order. Judicial priorities: receptivity to calls for law and order. Legislation: procedural delays and limits on penal expansion.

¹¹¹⁴ The table simplifies all the dynamics shown and cannot show their continuity across the decades.

Figure 1: Judicial Contribution to Penal Trends – structure and legitimacy



V. Conclusions

The Italian judiciary has played a central role in Italian public life. Judges and prosecutors have partaken of the nation’s ‘volatile political equilibrium’, with its various conflicts and tensions. At the penal level, judicial actors have also contributed to Italy’s differential punitiveness. The combination of judicial structure, institutional situation and variable legitimacy has, when set in context, produced pressures in favour of penal expansion *and* in favour penal moderation at different times depending on the shifting balance of factors that I have outlined. In terms of the comparative models set forth by Lacey and by Savelsberg, this has meant that the nation has diverged both from the German and the Anglo-American models where judges in context have, respectively, enhanced penal stability and contributed to penal volatility. However, the Italian case can still be understood in terms of (a modified version of) these models, just as an analysis of Italy helps us to refine those models. Judicial contributions to Italian penal trends can be reconnected to judicial structure, and to the position of judicial actors within institutional set-ups. The axes of bureaucracy/independence and co-operation/conflict, have been modified in order to apply them to Italy. My account has had to explain a judiciary that is both bureaucratic and highly independent, capable of resisting popular sentiment in decision-making but also sufficiently independent to respond to such sentiments where judges thought it appropriate to do so. That this has not led to full blown penal expansion is testament to the variable pressures produced by the Italian context,

in which the penal law is not necessarily the preferred method of conflict resolution. It is also a testament to the diverse composition of the judiciary, capable of displaying various penal and political outlooks.

My mapping of judicial interaction with the political class has also had to be modified, relative to the comparative models, insofar as it encompasses judicial collaboration, collusion and conflict with the political class. These various interrelations have affected, and been affected by, changing judicial legitimacy. The latter has emerged as a crucial, additional, variable for our understanding of judicial contribution to Italian penal trends. Volatile legitimacy has impacted upon the role of judges in Italy, vis-à-vis the public, vis-à-vis the political class, and within judicial ranks (Table 1). The latter – judicial self-conception – has become more defined following conflict with the political class. It has bolstered the judiciary's role as independent political player within the Italian scenario, often set in opposition to politicians. Given the importance of legitimacy and self-conception within the Italian context, it may be worth questioning what role these factors play in other contexts. It would be interesting to ask what we can evince about judicial legitimacy and self-conception within Lacey's and Savelsberg's accounts of Germany, Britain and the United States. How is legitimacy constituted in and across these contexts? How do judges think of themselves in different polities? How this has impacted upon their contribution to penal stability or dynamism?

The Italian judiciary itself has not produced unitary penal pressures; they have contributed to both volatility and containment. This is because in the Italian institutional context judges are a genre of political actor whose incentives and opportunity structures shape a varying position on punitiveness. This leads me back to the notion of Italy's political conflicts and equilibrium: where judges are an integral part of this equilibrium, their impact upon penalty will vary according to the factors I have discussed. It also leads me back to Italy's multiple incentives for reintegration, and informal resolution of conflict: to those 'protective structures' that divert from the penal law. To understand the evolution of Italian penalty, it is therefore necessary to ask, not 'what happens when defendants encounter Italian penal law?', but 'who reaches Italian penal law, and why?'. If we seek to identify consistent patterns in Italian penalty, we are thus best advised to look at penal subjects rather than looking at judicial action.

Chapter 6 - The Legal Vice: Punishing Migrants in Italy 1990-2000

I. Introduction

This chapter investigates the punishment of non-EU immigrants in Italy, between 1990 and 2000, a decade that saw a marked prominence of migrant incarceration in Italian prison rates and its contribution to the 1990s' penal expansion. This chapter is written against the backdrop of a fertile theoretical context, where literature has attempted to explain rates of migrant imprisonment across Western Europe. In relation to my broader arguments on Italy, an investigation of migrant incarceration also functions as a case study, illustrating the significance of political dynamics to Italian penality. The chapter illustrates one particular example of Italy's differential punitiveness and follows on from the insights I have developed on the importance of political conflicts and dualisms to penal trends, and on the importance of political belonging to penal reintegration or exclusion in Italy. The penal fate of non-EU migrants in 1990s Italy provides us with an extreme instance of the conditions of inclusion and exclusion within the Italian polity and their respective penal effects. In this it mirrors the arguments advanced in *The Prisoners' Dilemma*, namely that individuals' exposure to penality depends both on the institutional/political-economic context they inhabit and their structural position within this context¹¹¹⁵.

In this chapter, I will argue that the punishment of non-EU migrants in Italy during the 1990s should be interpreted as the punishment of political outsiders. 'Political outsiders' should be understood as defined in Chapters 3 and 4: individuals falling outside those politico-institutional structures that catalyse penal diversion and reintegration in Italy. The *outsiderness* is political because it is rooted in political relations and identification, a dimension that emerged as a crucial complement to economic integration in Italy. As far as migrants are concerned, the outsiderness is also political in a more formal sense: as exclusion from citizenship and relegation to a 'legal residence' in need of constant reaffirmation.

My investigations span the decade 1990 – 2000. 1990 was chosen because this is the date at which migration to Italy began to increase substantially. It is also during the 1990s that immigration became 'a major political issue' – both in party politics and in public awareness¹¹¹⁶. This starting point also allows us to capture the increasing incidence of immigration from Eastern Europe, immediately following the fall of the Berlin Wall and the

¹¹¹⁵ Lacey (2008)

¹¹¹⁶ Bozzini and Fella (2008, p. 246)

The first comprehensive legal text on immigration was passed in 1990: Legge Martelli 39/1990 "L. 28 febbraio 1990, n. 39" 1990)

dismantling of the Soviet Union. The end point is in part justified by the scope of my thesis, halting my analysis before the 2001 victory of Berlusconi's coalition, and the beginning of a more obviously contradictory attitude to punishment (Chapter 1). This consideration remains valid for immigration legislation not least because, with the xenophobic Northern League as part of the governing coalition, immigrants were the targets of increasing 'law and order' rhetoric. Admittedly the cut-off point limits the scope of my claims to the decade at hand¹¹¹⁷. There is no a priori reason why my claims should not extend past the year 2000 but the reader should be aware that this chapter deals only with the punishment of migrants in Italy during the 1990s. It may be that in the successive decades the punishment of immigrants followed different dynamics to the ones highlighted here: again, there is no a priori reason why this should not be so. Of course, I believe that there are insights in this chapter that will help us view immigrant punishment in Italy even after 2000, if nothing else at least in terms of change. However, I must emphasise that these beliefs have not been tested in this chapter whose insights must be taken as temporally bounded.

In this chapter, I propose a theoretical hypothesis that follows logically from both my analysis of Italian punishment and from the nature of migration to Italy during the 1990s. I argue that the punishment of non-EU immigrants in Italy should be understood as a two stage process, a 'legal vice' resting first on migrants' dependence on Italian law, and then on the law's definition relegating immigrants to economic marginality. The chapter is structured as follows. It first engages with the theoretical literature that has explained immigrants' punishment as an articulation of broader contemporary penal trends. As in the rest of the thesis, I take the literature as a starting point for my own critical analysis, examining how Italy compares to existing theories, and what we can glean from the similarities and differences emerging from this comparison. Here comparison has meant verifying whether the punishment of non-EU immigrants in Italy fit the arguments advanced by Alessandro De Giorgi and those advanced by Nicola Lacey¹¹¹⁸. The chapter engages with De Giorgi's work by testing some of his key assumptions against data on immigration to Italy. I have collected these data from Italian Caritas publications¹¹¹⁹, and they include data on the presence of migrants, their insertion into the labour market, the demographic make-up of immigration during the 1990s. Collated, the data have provided closer contextual support for De Giorgi's

¹¹¹⁷ It halts before the 2002 law that imposed harsher conditions on immigration, shortening the duration of immigrant residence permits, limiting family reunification and increasing the maximum period of administrative detention: Einaudi (2007, p. 417). See Chapter 1 for a discussion of the timeframe. For more detail on immigration legislation in Italy (1986-2002) see Appendix. The 2002 law has been included to provide extra context, but is not part of my analysis.

¹¹¹⁸ De Giorgi (2006, 2010); Lacey (2008)

¹¹¹⁹ Caritas (1993-2003)

analyses of migrants' economic position in contemporary Western polities. The data is followed by further theorisation on the mechanisms of migrant incarceration in Italy that teases out the political dimension already present within De Giorgi's account and relates it directly to the Italian context.

Before embarking upon this investigation a few caveats on the statistical data are in order. As I had noted in my introduction, data on immigration is often beset by the problem of irregularity: thus, unless specifically stated, the statistics I include in the following pages measure the characteristics of the *regular* immigrant population. This is unsurprising, given that the data rely on official residence permits, but it means that the data are necessarily partial¹¹²⁰. Note also that data on immigrants in Italy are often absent or incomplete, particularly where used to capture features of immigration at the local, rather than national, level¹¹²¹. Any data pitched at the national level necessarily gloss over variations in experience by immigrant communities and the localities they come to inhabit. This suggests that statistical data should be used only as an aide in any discussions of immigration and immigrant incarceration, but that not everything is verifiable through statistics. This is the point made by Strozza and Golini when discussing ways of measuring immigrant integration in Italy: 'not all the measures proposed could in fact be constructed: this was due in part to the absence of necessary data, and in part to the data's failure to correspond to the reality that we wished to represent'¹¹²². This highlights the need to elaborate thorough theoretical analyses of immigrant punishment in Italy. The following chapter builds upon existing theories – first and foremost De Giorgi's – and sets forth a series of interpretive hypotheses sensitive to the theoretical and Italian context. As with the rest of this thesis, the aim is for this analysis to provide a framework for future research that will generate richer primary material where data is absent and that can capture the variation in experiences of immigration to Italy¹¹²³.

II. Setting the context - punishing migrants in Europe and the Italian legal vice

Chapter 2 confirmed the *over* penalisation of migrants in 1990s' Italy. High levels of migrant incarceration are apparent in prison data and secondary literature alike (see Figure 1 and Table 1)¹¹²⁴. Between the years 1990 and 2000, for example, foreign detainees in Italian prisons increased by 288 percent. By the year 2000, 28.6 percent of detainees were foreign

¹¹²⁰ Strozza and Golini (2006, p. 68)

¹¹²¹ *Ibid.*

¹¹²² *Ibid.*, p. 56 My translation.

¹¹²³ Ideally this research would combine approaches adopted by Alessandro De Giorgi, and (more qualitative approaches) of Dario Melossi and Kitty Calavita: Calavita (2005a); De Giorgi (2010); Melossi (2003, 2012); Melossi, De Giorgi, and Massa (2009)

¹¹²⁴ De Giorgi (2006, 2010); Melossi (2003, 2005); Solivetti (2004, 2012)

compared to only 2.5 percent of foreigners resident in Italy¹¹²⁵. According to Melossi, Italy possessed one of the highest migrant overrepresentation ratios within Europe, incarcerating more foreigners relative to foreign residents than either the United Kingdom or Germany¹¹²⁶. Admittedly, a comparison with the UK may be unfair, given its history of immigration and Italy's conversion to host country only after 1980¹¹²⁷. Nonetheless, it remains true to say that Italy presents us with very high levels of migrant incarceration. Moreover, in a nation where prison rates have tended to fluctuate (Chapter 2), the detention of foreigners shows a remarkably consistent upward trend.

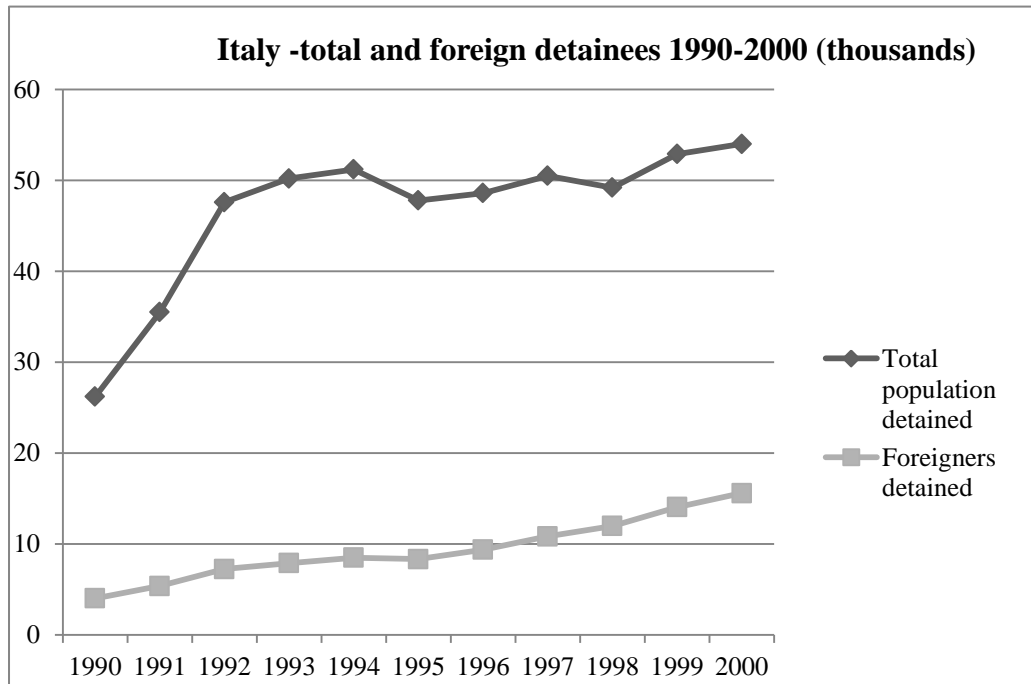
¹¹²⁵ Figures calculated from my elaboration of data from the Italian Department of Penitentiary Administration (DAP), the Italian National Statistics Association (ISTAT 1990-2001) and Caritas Statistical Dossiers on Immigration (Caritas 1993-2003).

¹¹²⁶ Melossi (2005, p. 17); Solivetti (2012, p. 14)

¹¹²⁷ Caritas (1993-2003); Melossi (2003, p. 378)

This late conversion suggests that accounts of migrant punishment in Italy cannot simply be subsumed in accounts of migrant punishment in European 'postcolonial' nations such as France, or compared to the overrepresentation of ethnic minorities in US prisons. Direct analogies with either context gloss over important differences between Italy and the US/France. Italy does not share the US's history of slavery, with its impact on race relations and punishment. In Italy 'migrants [...] are for a good percentage perceived as "white"' (Melossi, 2012, p. 416). Italy also displays significant differences with France: sharing neither the latter's history as immigrant host country, nor its colonial past. Thus Melossi claims that 'the kind of ghettoization that one can find [in America] or [...] in the French *banlieu*' was 'unknown in Italian cities' - 'a serious and urgent' but yet unrealised danger: (2003, p. 386) For France and the US see: Wacquant (1999, 2009) For contrasts between Italy and the US on issues of migration flows and territorial segregation see: Melossi (2013); Mingione (2009, p. 225)

Figure 1 – Total and foreign detainees in Italy 1990-2000 (thousands)



Source: My elaboration on data from the Institute for National Statistics ISTAT. (1990-2001) and ISTAT (1990-2001); Melossi (2003); Trigilia (1997); Penitentiary Administration Data¹¹²⁸

¹¹²⁸DAP (1990-2001); ISTAT (1990-2001)

Table 1: Comparative Foreigner Overrepresentation Ratios – year 2000

	Number ¹	% ²	% ³	Ratio ⁴
France	10553	21.6	5.6/3.6	6
Germany	26839	34.1	8.9/6.6	5.2
Greece	3892	48.4	6.4/n.a.	7.6 ⁵
Italy	15582	29.6	2.4/2.1	14.1
Portugal	1540	12.1	2/1.5	8.1
Spain	8470	18.8	2.2/1.5	12.5
United Kingdom	5716	8.3	4.1/2.6	3.2

Source: Adapted from Melossi, D. 'Security, Social Control, Democracy and Migration'¹¹²⁹

¹ Number of foreign prisoners at 1.9.2000¹¹³⁰.

² Percentage of foreign prisoners on the total number of prisoners at 1.9.2000¹¹³¹

³ Percentage of foreigners/foreigners from outside the EU on the resident population at 31.12.2000 (elaboration of data from Caritas¹¹³²).

⁴ Ratio of % foreign inmates to % foreigners from outside the EU.

⁵ Underestimated because EU population was not subtracted, as data were not available.

Explanations of immigrant punishment in Western Europe can be sought in materialist accounts of Western penality, which seek to explain varying punitiveness through developments in political economy. Of particular interest in this chapter are De Giorgi's insights on the punishment of migrants in the context of post-Fordism¹¹³³. The chapter also builds upon *The Prisoners' Dilemma* which points to immigrants as the 'outsiders' of coordinated market economies: individuals whose punishment marks the boundaries of an otherwise reintegrative penalty¹¹³⁴. In these two strands of literature, non-EU migrants stand out as recipients of harsh punishment across Western European polities¹¹³⁵. The two analytical positions, however, do not accord the same significance to migrants' punishment. In Alessandro De Giorgi's thesis, migrants are archetypal penal subjects, whose punishment is distinguished from nationals' by its relative intensity¹¹³⁶. The mechanism by which they are punished remains a function of macroscopic political economic dynamics whose weight falls on migrants insofar as it falls on labour's lower echelons. De Giorgi thus refers to non-EU migrants as a 'paradigmatic case-study' for penality, controlled by 'immigration policies [that] should be seen as a "laboratory"[for] new strategies [...] for the authoritarian control of

¹¹²⁹ Melossi (2005, p. 17)

¹¹³⁰ Caputo (2003, p. 71); ("SPACE I", 2003)

¹¹³¹ Caputo (2003); ("SPACE I", 2003)

¹¹³² Caritas (2003, p. 50)

¹¹³³ De Giorgi (2006, 2010) But see also Wacquant (2009)

¹¹³⁴ Lacey (2008, pp. 144-169). Garland does not elaborate on the punishment of migrants in *The Culture of Control*, so is largely absent in this chapter.

¹¹³⁵ De Giorgi (2006, 2010); Melossi (2005); Solivetti (2004, 2012)

¹¹³⁶ De Giorgi (2010, p. 154)

[contemporary] “advanced marginality” as a whole¹¹³⁷. Kitty Calavita also uses this idea of migrants as archetypes when describing migrants’ impoverishment in Italy¹¹³⁸. This could be taken to imply that there is a fundamental continuity between migrants and nationals, (insofar as nationals’ fate is reflected in migrants’ fate). The mechanism through which migrants are punished, therefore, would not be exclusive to them *as migrants*, but falls upon them *as economically marginal*.¹¹³⁹

By contrast, I argue that the connection between economic marginality and punishment should not lead us to conclude that foreigners in Italy are necessarily ‘mirrors’¹¹⁴⁰ for nationals¹¹⁴¹, though both nationals and immigrants may experience economic marginality. Immigrants are not penal prototypes, at least where, as in De Giorgi’s adaptation of Rusche and Kirchheimer, punishment is linked to economic marginality. In this chapter I suggest that the punishment of migrants follows a particular trajectory that results from their dependence on law, symbolically and practically. The punishment of non-EU migrants can be seen as an example of Italy’s ‘differential punitiveness’ differentiated, in this case, by political belonging.

De Giorgi’s approach is further premised on the idea that contemporary penalty is anchored to broad macroscopic changes, namely the onset of post-Fordism¹¹⁴². This presumes substantial continuity across national contexts, including Italy¹¹⁴³. In Lacey’s account, however, the significance of migrants’ punishment is thought to vary according to the type of capitalism they inhabit. Thus, in LMEs, migrants’ political-economic position exposes them to punishment and this is a fate that, all other things being equal, they may share with nationals in similar economic positions. CMEs possess a more inclusive penal system. In such polities, where comparative advantage stimulates the reintegration of deviants, migrants’ punishment is not ‘more of the same’ but is categorically different to the punishment of nationals. Migrants in CMEs are ‘outsiders’¹¹⁴⁴, generally excluded from structures, such as education and training, that catalyse the reintegration of deviants.

How can this schema be applied to Italy? The Italian political economy is characterised as hybrid. I have also argued that Italian penalty is heavily susceptible to

¹¹³⁷ (De Giorgi, 2006, p. 117)

¹¹³⁸ Calavita (2005a); 2005b, p. 415)

¹¹³⁹ See Calavita’s conflation of ‘immigrants’ and ‘the locally dispossessed’ in Italy; and De Giorgi’s conflation of immigrants and ‘the homeless, the poor, the addicts’: Calavita (2005a, p. 159); De Giorgi (2010, p. 151)

¹¹⁴⁰ Sayad (1996)

¹¹⁴¹ Dal Lago (1999)

¹¹⁴² De Giorgi (2006)

¹¹⁴³ See Chapter 1

¹¹⁴⁴ Lacey (2008, pp. 106-107)

political dynamics and conflicts, as discussed. In Chapters 3 and 4, I have shown how political belonging emerges as a crucial factor in catalysing the reintegration of deviance, or the reliance on informal social control vis-à-vis deviance. Thus in Italy's industrial districts, integration and reintegration follow from inclusion in the district's economic activities *and* from inclusion in the trust networks that regulate the activities. As I have argued in Chapter 3, these networks provide incentives for informal resolution of conflict. Alternatively, where formal labour regulation is stronger, reintegration into the body politic may follow from insertion into the economy *complemented by* union representation. Representation acts as an additional barrier to economic exclusion and its (potential) penal consequences, creating *de facto* long-term investments in the workforce on whose behalf they act, and some protection from changes in the political economy. 'Protection' from changes in the political economy may also follow from clientelistic relations, which are clearly political in their distribution of economic resources (job, welfare entitlements) and stimulate political loyalties parallel to the state.

Combining the insights of Chapters 3 and 4 with the framework derived from Lacey – whereby in certain contexts immigrants will fall outside structures of integration – we can then derive an account of immigrant punishment in Italy. I argue that my analysis reveals how Italy punished migrants *as outsiders* between 1990 and 2000. By contrast to migrants within CMEs, however, non-EU immigrants in Italy were *political* rather than economic outsiders. Indeed, although they were subordinated economically, they were nevertheless fundamentally integrated within the Italian economy. It is De Giorgi who captures this paradox in the phrase 'economic inclusion through legal exclusion'¹¹⁴⁵. The formula indicates both that migrants were included as subordinates in the Italian economy, and that this subordination was the function of their exclusion from stable legal residence. The economic marginality that followed from this subordinate inclusion exposed immigrants to high levels of penalisation. I argue that, supplementing De Giorgi's account, what precipitated their exposure to formal punishment, in addition to their economic marginality, was migrants' ulterior political *non-integration* (political outsidership). This *non-integration* occurred at the formal level, as exclusion from political citizenship; but it also occurred at a broader level, with migrants' exclusion from political structures such as families or established immigrant communities. This broader exclusion had numerous implications: it meant that in the 1990s, migrants were primarily defined, by and for the Italian state, in terms of their legal status. This legal status was mainly dictated by immigration law. As I will illustrate, this simply increased non-EU migrants' economic marginality. It also marked migrants as exclusively legal subjects – a

¹¹⁴⁵ De Giorgi (2010, p. 160)

notion (explored below) that highlights how and why migrants have experienced intense exposure to the criminal justice system. Since political belonging is a particularly important complement to both legal and economic integration in Italy, this heightened migrants' exposure to punishment. Political belonging helps both to stave off economic hardship and its penal consequences, and to catalyse informal resolution of conflicts where deviance occurs. It also allows individuals to bridge the gap between the letter of the law and the application of the law in a context often marked by the 'negotiability' of norms (Chapter 4). Political belonging has, moreover, influenced personal experiences of the economy: where the ability to call upon formal and informal political resources has been crucial in tempering the changes associated with contemporary capitalist developments. A study of the punishment of migrants therefore also reinforces the notion that Italian penalty is heavily influenced by political dynamics; those that, in this instance, create an insider-outsider dualism with consequent penal effects.

A useful tool for understanding migrant punishment is my concept of the 'legal vice'. The vice is a two-stage process (with each stage as a jaw of the vice) leading not just to the incarceration of migrants, but to their *over*-incarceration. Over-incarceration indicates high levels of migrant imprisonment relative to their presence within the resident population. It also raises the question of whether different levels of political integration of nationals and immigrants are also reflected in different punishment levels. This question implicitly suggests that we locate the source of migrant punishment not just in their economic marginality, but in their economic marginality *combined with* their political marginality. I hypothesise that the latter is a *sine qua non* for the 'legal exclusion' of De Giorgi's formula: were migrants not formal outsiders (but Italian or EU citizens) they would not need the recognition of immigration law; were migrants not *political* outsiders they would not be so harshly affected by the conditions on which this recognition is premised¹¹⁴⁶. Note that my argument here *supplements* De Giorgi's argument, because it adds a layer of analysis to his theory, adapting it to Italy. My approach uses De Giorgi's analysis of economic inclusion through legal exclusion, however it asks how this mechanism has played out in a nation where political dynamics have visibly influenced both the application of the law and the evolution of the economy.

¹¹⁴⁶ This particular hypothesis – which follows from the character of punishment, politics and migration in Italy – should be tested with further empirical research. It could be tested by qualitative studies of different migrant communities, across Italian regions, identifying their presence, economic and political insertion, and involvement with the criminal justice system. This type of approach would help circumvent the vagaries of statistics on migration. It would allow our analyses to incorporate the distinctiveness of immigrant communities and Italian regional variation, with their implications for immigrants' insertion into economic and political life, and (thus) for their exposure to penal censure.

In this chapter I will explore both ‘jaws’ of the legal vice: I will first examine the jaw that accounts for migrant incarceration in Italy. I use Caritas data to see whether it is possible to say that migrants suffered from ‘economic inclusion through legal exclusion’ in 1990s’ Italy¹¹⁴⁷. The succeeding section then details the remaining ‘jaw’ of the vice, explaining immigrants’ *over*-incarceration. Using the same Caritas data to build a demographic ‘profile’ for migrants and asking how an individual with such a ‘profile’ would fare in Italy, I subsequently illustrate why immigrants were outsiders, how this constituted them as primarily legal subjects and what the penal effects were of being primarily legal subjects in the Italian context.

III. The incarceration jaw: economic inclusion through legal exclusion and the punishment of economic marginality

i. Economic inclusion through legal exclusion.

The process described by De Giorgi as ‘economic inclusion through legal exclusion’¹¹⁴⁸ can be seen as one jaw of the legal vice. In Italy, migrants’ ‘economic inclusion’ derives from the fact that the labour market relies on immigrant labour. The ‘legal exclusion’ derives from the immigration regime, which excludes migrants from stable and regular residence, and thus sustains their subordinate economic integration. The important part played by immigration law in this ‘exclusion’ is apparent: legislation passed in the 1990s subordinates mid and long-term residence to formal and stable employment¹¹⁴⁹. These conditions are, as Kitty Calavita states, a near impossibility in the Italian context, where the labour available to immigrants is typically short-term and scarcely regulated or informal¹¹⁵⁰. Immigration law, in fact, mandates that foreigners should be called into Italy primarily to offset existing labour shortages¹¹⁵¹. This already presumes that they will be employed in the type of jobs that will not ensure legal residence: the insecure, low-status jobs that nationals reject. This means that non-EU immigrants’ legal residence can be at best temporary – subject to constant reappraisal on the basis of employment status – and at worst unachieved¹¹⁵². Regularity and irregularity become

¹¹⁴⁷ The Italian Caritas, with the Fondazione Migrantes, has over the past decades been the primary organisation dedicated to the systematic collection and publication of data on immigration in Italy. See <http://www.dossierimmigrazione.it/categoria.php?cid=1>

¹¹⁴⁸ De Giorgi (2010, p. 160)

¹¹⁴⁹ L. 6 marzo 1998, n. 40; L. 28 febbraio 1990, n. 39

¹¹⁵⁰ Calavita (2005b, p. 413)

¹¹⁵¹ Ferraris (2008, p. 27); Zanfrini (2007)

¹¹⁵² See for example Calavita on the *Martelli* law: (2005a, p. 31)

two points on a spectrum of possibilities always present within each migrant's biography¹¹⁵³. We can ask whether the Italian legislation does not, in fact, indirectly acknowledge this, given the repeat 'regularisations' (*sanatorie*) of the irregular migrants already present on Italian territory. As Table 2 shows, regularisations have been a feature of Italian immigration policy since the late-1980s, with the number of foreigners formally 'regularized' increasing over the years. The *sanatorie*, however, are limited in scope by 'low [turn-outs] and administrative delays'. Moreover, they do not ensure long-term regularity: 'immigrants who manage to legalize are often returned to illegality after one or two years [and only] about half of those who were legalized [in] 1990 retained their legal status a decade later'¹¹⁵⁴.

Table 2: Migrants regularized in Italy between 1986 and 1998

	Law 943/86	Law 39/90	Decree 489/95	Decree (Decreto Presidente Consiglio dei Ministri) 16/10/98
Total number of individuals regularized	105000	217626	244492	217124

Source: Caritas¹¹⁵⁵

The precariousness inherent in migrants' ir/regularity, is made worse by the threat of expulsion and detention with which irregularity is punished (Table 3)¹¹⁵⁶. Migrants' consequent vulnerability, combined with individuals' commitment to their migratory projects, contributes to immigrants' economic marginality. It forces migrants to 'accept virtually any degree of exploitation in the flexible labour markets of advanced [...] economies'¹¹⁵⁷. This precariousness further contributes to migrants' economic marginality, by acting as a disincentive for employers to improve migrants' conditions¹¹⁵⁸, and by leaving immigrants with few legal means to challenge their situation.

¹¹⁵³ Calavita (2005a, p. 50)

¹¹⁵⁴ *Ibid.*, p. 39

¹¹⁵⁵ Caritas (1993-2003)

¹¹⁵⁶ Expulsion rests on knowing *where* to expel the foreigner: her own nation of origin, or the nation she came from when she entered Italy. However information on immigrants' provenance may not be forthcoming, and the third country may not agree to receive the expelled individual. Perhaps to obviate these obstacles, the 1998 law establishes 'Temporary Residence Centres' where 'irregular' non-EU immigrants are detained if they cannot be expelled.

¹¹⁵⁷ De Giorgi (2010, p. 160) See also Reyneri (2004a)

¹¹⁵⁸ Calavita (2005a, p. 43)

Table 3: Migrants in administrative detention, in Italy (1998 – 2000)

Year	Number of individuals in administrative detention	Percentage of individuals repatriated from administrative detention
1998	5007	57.1
1999	8847	44.1
2000	9768	16.8

Sources: for years 1998-1999 Caritas; for year 2000 Barbagli *Immigrazione e Sicurezza in Italia*¹¹⁵⁹.

Note: Administrative detention centres were first introduced by the 1998 Turco-Napolitano law: the data thus cover only the three years shown above.

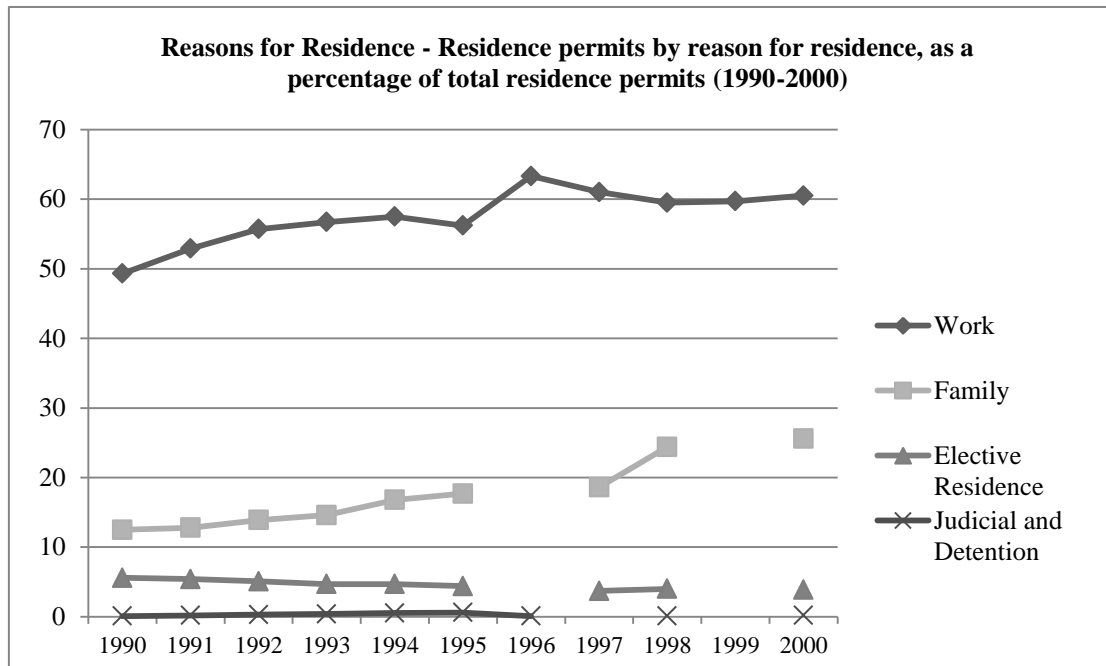
ii. Economic inclusion in the data

Both data and literature confirm this subordinate economic inclusion of migrants. They show that foreigners were fundamentally integrated into the Italian labour market: the economy exercised a notable pull on immigration, as work *was* available. This is reflected in the overwhelming majority of residence permits granted for ‘work reasons’ across the 1990s (Figure 2)¹¹⁶⁰. Note that the data missing in both Figure 3 and Figure 2 is due to the absence of statistics on immigrant residence by type of labour/reason for residence *also* layered by non-EU status.

¹¹⁵⁹ Maurizio Barbagli (2008, p. 119); Caritas (1993-2003)

¹¹⁶⁰ These figures should be taken with caution: they are linked to residence permits and reflect the policy behind their distribution as much as the ‘objective reality’ of immigration. All analysis of Caritas data is based on my elaboration of statistics extracted from Caritas publications.

Figure 2 – Non-EU migrants’ reasons for residence in Italy 1990-2000



Source: My elaboration on Caritas data¹¹⁶¹

Note: Permits for ‘elective residence’ are granted to those foreigners who can support themselves economically without needing to work. Alternatively, they can be granted to foreigners previously residing on a work or family permit, where they can benefit from old age, disability pension (or other similar pensions)¹¹⁶².

By accompanying Caritas data with data derived from the Italian social security institute (INPS) we see that the number of immigrant workers increased during the 1990s, ‘[tripling] in eight years’¹¹⁶³. This confirms that if immigrants were economically marginal in Italy, it is not because of economic exclusion *as such*. Furthermore, immigrants tended to complement, and not compete, with local labour (though their insertion into the official labour market varied across regions)¹¹⁶⁴. The demographic makeup of migrant communities also accounted for their complementary role in the Italian economy¹¹⁶⁵, with a primarily young and willing

¹¹⁶¹ Caritas (1993-2003)

¹¹⁶² Olivetti (2009) At: http://www.asgi.it/home_asgi.php?n=documenti&id=770&l=it

¹¹⁶³ Reyneri (2004b, p. 73)

¹¹⁶⁴ Maurizio Barbagli (2007, p. 188); Quassoli (1999, p. 220); Reyneri (2004b); Venturini and Villosio (2008)

Seasonal workers in Southern agriculture are an exception; even in this sector, however, Italians occupy the higher ranks.

¹¹⁶⁵ On approximate measures, calculated on residence permits, immigrants’ unemployment rate was lower than Italian nationals’ (1991 – 2001): Maurizio Barbagli (2007, p. 188); Strozza and Cibella (2006, p. 139).

migrant population pitched against an ageing Italian population, whose youth were unwilling to occupy the harsher roles of the labour market¹¹⁶⁶.

Caritas data show a majority of permits were granted to individuals working in dependent labour, working under a contract of services with an employer, rather than self-employed¹¹⁶⁷. This in part reflects the 'tendency of immigrant workers to concentrate in areas where local labour is insufficient to satisfy demands'¹¹⁶⁸. The main sectors of immigrant employment included construction, services, domestic labour and agriculture¹¹⁶⁹.

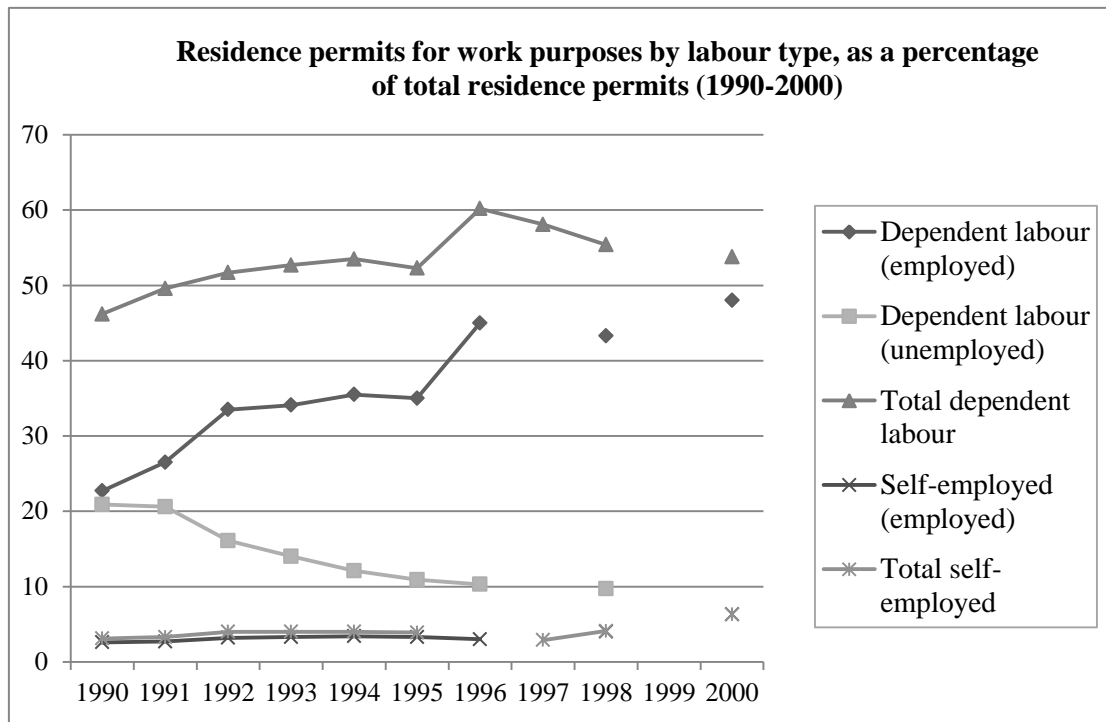
¹¹⁶⁶ Calavita (2005a, p. 42)

¹¹⁶⁷ Reyneri (2003) Note the increasing incidence of self-employed immigrants, over time, and in certain regions/sectors: Mingione (2009)

¹¹⁶⁸ Reyneri (2004b, p. 75)

¹¹⁶⁹ Macioti and Pugliese (2003, pp. 58-86)

Figure 3: Residence permits for work purposes, by type of labour 1990- 2000



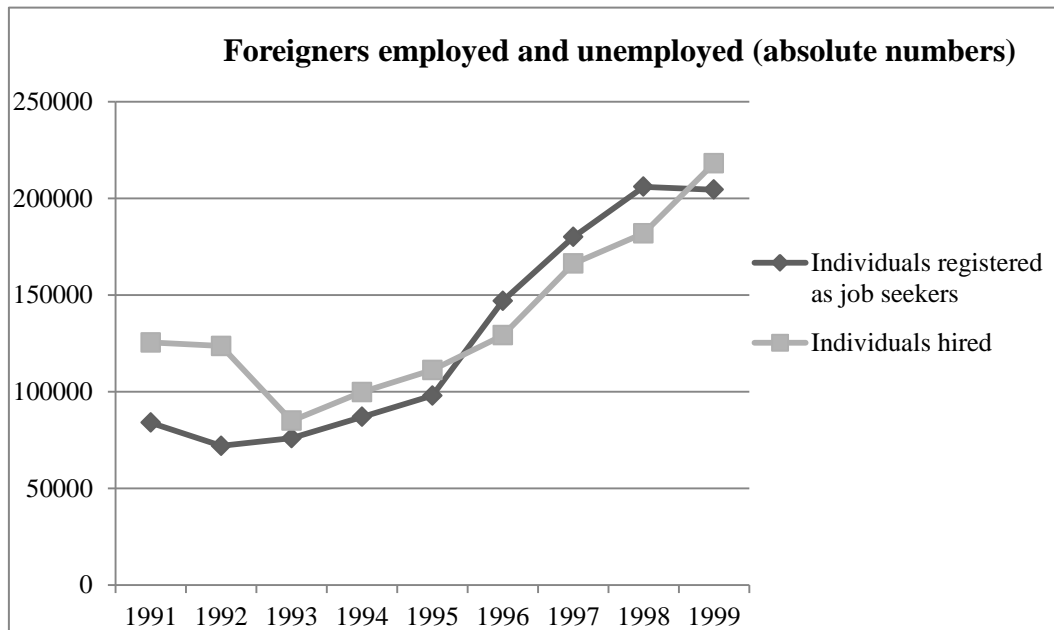
Source: my elaboration on my elaboration on Caritas data¹¹⁷⁰.

Note: Dependent labour refers to labour carried out by employees i.e. individuals employed (by an employer) under a contract of services.

Self-employed refers to individuals working independently or under a contract for services.

¹¹⁷⁰ Caritas (1993-2003)

Figure 4 – Foreigners employed and unemployed in Italy 1991-1999



Source: My elaboration on Caritas data.¹¹⁷¹

The one common denominator that emerges from this picture seems to be the precarious and unstable nature of labour across sectors and across migrant nationalities. Thus Maciotti and Pugliese talk of employment in the tertiary sector as ‘temporary and precarious’ with the dominant characteristic being ‘the irregularity of the employment relation’¹¹⁷². They talk also of agricultural labour as being ‘precarious and marginal’ with a ‘systematic violation of any union agreement’¹¹⁷³, of construction work being ‘destructured’ and outside trade union protection¹¹⁷⁴ and of migrants being hired in industrial labour in ‘absolute informality’¹¹⁷⁵. This instability is also reflected in data on foreign employment and unemployment (Figure 4). Employment can be gauged by analysing the number of immigrants hired each year¹¹⁷⁶, and Caritas data show that an increasing number of foreigners were hired across the 1990s. Interestingly, as of 1993, the number of jobseekers also increases¹¹⁷⁷. This was occurring at a

¹¹⁷¹ Caritas (1993-2003)

According to Reyneri the drop in 1993 is due to the economic crisis (2004b, p. 74)

¹¹⁷² Maciotti and Pugliese (2003, p. 78 My translation.)

¹¹⁷³ *Ibid.*, pp. 78-79

¹¹⁷⁴ *Ibid.*, p. 80

¹¹⁷⁵ *Ibid.*, p. 82

¹¹⁷⁶ Migrants are otherwise excluded from labour force surveys.

¹¹⁷⁷ The two values are not mirror-images – availability of labour may increase even as demand increases: where demand surpasses availability this yields both increasing hires and increasing job-seekers.

time when immigration was growing (see Figures 6 and 7) during a general economic depression¹¹⁷⁸.

Note that our interpretation of data on migrant hires and jobseekers must be based on what they show but also on what they conceal: where employment levels are concerned, we should ask not just whether immigrants are employed, but also for how long they remain on the market. The number of hired employees could indicate that individuals were employed in a succession of short-term contracts, as occurred for a large proportion of immigrant workers¹¹⁷⁹. Data on hires are unable to capture this passage from job to job, and over-represent the stability of immigrant employment. The data thus reveal increasing employment, but of a kind more precarious than we might first assume. Similarly, as Maciotti and Pugliese state, the high number of immigrants registered as jobseekers was both an expression of migrants' frequent transition between jobs, and of the temporary nature of the jobs offered to them¹¹⁸⁰. Moreover even where migrants were *formally* unemployed, some were *in fact* employed in Italy's informal economy¹¹⁸¹. Registration as jobseekers would thus be the necessary tribute to legislation that premises residence on regular labour (actual or sought): 'overall, it is safe to assume that those registered as unemployed [were] in fact part-time, in transit from one short-term contract to the next, or irregularly employed'¹¹⁸². Irregular forms of labour are disproportionately diffuse in Italy¹¹⁸³ and can be found in sectors such as construction, manufacturing and agriculture. Similarly, where there is informality, there are likely to be harsher working conditions and scarce legal safeguards – again the type of jobs migrants, but not nationals, are likely to take on. Moreover, it seems plausible to assume that, given the absence of comprehensive state provision for the unemployed (Chapter 3), immigrants could not stay inactive for long and would seek informal work¹¹⁸⁴, especially considering that few if any could benefit from the family support that substitutes welfare provision in Italy¹¹⁸⁵.

¹¹⁷⁸ National unemployment rates grew between 1991 and 1992, fell the following year, grew again between 1993 and 1995, stabilising until a final drop between 1999 and 2000: ISTAT, [http://seriestoriche.istat.it/index.php?id=7&user_100ind_pi1\[id_pagina\]=76&cHash=c255f48159e3c338760577586eaab610](http://seriestoriche.istat.it/index.php?id=7&user_100ind_pi1[id_pagina]=76&cHash=c255f48159e3c338760577586eaab610) Accessed September 2013

¹¹⁷⁹ Reyneri (2003); 2004b, p. 74)

¹¹⁸⁰ See also Maurizio Barbagli (2007, p. 209); Maciotti and Pugliese (2003)

¹¹⁸¹ Mingione and Quassoli (2000) See also Table 4.

¹¹⁸² Reyneri (2004b, p. 83)

¹¹⁸³ Mingione (1995)

¹¹⁸⁴ Bozzini and Fella (2008, p. 253)

¹¹⁸⁵ Mingione (1995, p. 83); Reyneri (2004b, p. 87) Immigration increasingly *constitutes* welfare for Italian middle class families (with variation by immigrant community and Italian region), as immigrants take over the care functions formerly reserved to Italian women: Mingione (2009). This adds a layer of complexity to analyses that tie welfare provision to incarceration, as migrants are both sources of welfare and preferred subjects of penalisation. This is a question for future research.

Table 4: Percentage of employees in irregular position among the total of non-EU employees (1991-2001)

Year	1991	1992	1993	1994	1995	1996	1997	1998	1999	2000	2001
Employees in irregular positions (%)	33.1	33.5	48.3	56.7	37.1	31.6	33.8	31.2	38.3	41.3	39.5

Source: Reyneri ‘Immigrants in a segmented and often undeclared labour market’¹¹⁸⁶.

Note: Sicily excluded except for 1993 and 1997.

Table 5: Workers in informal occupations as a percentage of total workers, foreign and national 1991-2001.

Year	1991	1992	1993	1994	1995	1996	1997	1998	1999	2000	2001
Workers in irregular positions (%)	13.4	12.9	12.8	12.4	12.6	12.5	12.4	12.2	11.8	11.7	12.2

Source: ISTAT (1980-2010)¹¹⁸⁷

iii. Penalising non-EU migrants

Data, despite their limits, help illustrate that migrants’ material conditions in Italy coincide with those laid out by De Giorgi and Calavita’s critiques. It seems that immigrants suffer from mutually-reinforcing legal and economic marginality, as legal residence depends on economic stability, but economic stability generally requires legal residence¹¹⁸⁸. In this sense, theirs is a legal form of exclusion that sustains subordinate economic inclusion. To the extent that economic marginality leads to penalisation, it is then not surprising that a large number of migrants are incarcerated in Italy. What I am arguing however is that their *over*-penalisation is not explainable by migrants’ economic subordination alone.

To understand migrant over-incarceration, I argue, it is necessary to look at migrants’ economic marginality *and* their exclusion from political structures that complement economic status, and whose absence precipitates exposure to the criminal justice system. Before turning to this argument, I will explain how De Giorgi’s ‘economic inclusion through legal exclusion’ links to migrant penalisation. Orthodox political-economic analyses of punishment have

¹¹⁸⁶ Reyneri (2004b, p. 84)

¹¹⁸⁷ ISTAT, <http://www.istat.it/it/archivio/39522> Accessed July 2012.

¹¹⁸⁸ Calavita (2005a, p. 64)

emphasised that punishment falls disproportionately on the poor¹¹⁸⁹. In this sense, immigrants in Western European polities, relegated to economic marginality, are obvious candidates for penalisation. De Giorgi explains that this happens by a process he terms ‘hyper-criminalisation’¹¹⁹⁰. Part of this process sees (some) immigrants commit ‘crimes of desperation’¹¹⁹¹: impelled by their economic marginality (and potential irregularity), they typically engage in crimes against property and drug-related crimes, or prostitution. 1990s criminal justice data bears this out, with substantial numbers of foreigners sentenced for property offences or ‘offences against the economy’ (including drug offences). In addition to these ‘desperate’ and highly-visible crimes¹¹⁹², immigrants may also be implicated in crimes of immigration, those offences that attach to, or are aggravated by, their migrant status¹¹⁹³.

¹¹⁸⁹ See for example De Giorgi (2010); Wacquant (2009)

¹¹⁹⁰ De Giorgi (2010, p. 152)

¹¹⁹¹ *Ibid.*, p. 149; Rusche (1933/1978, p. 4)

¹¹⁹² Angel-Ajani (2003, p. 438); De Giorgi (2010, p. 157); Melossi (2003, p. 379)

¹¹⁹³ De Giorgi (2010, p. 158)

Figure 5a – Sentenced foreigners, in Italy, by offence type 1990 - 1995

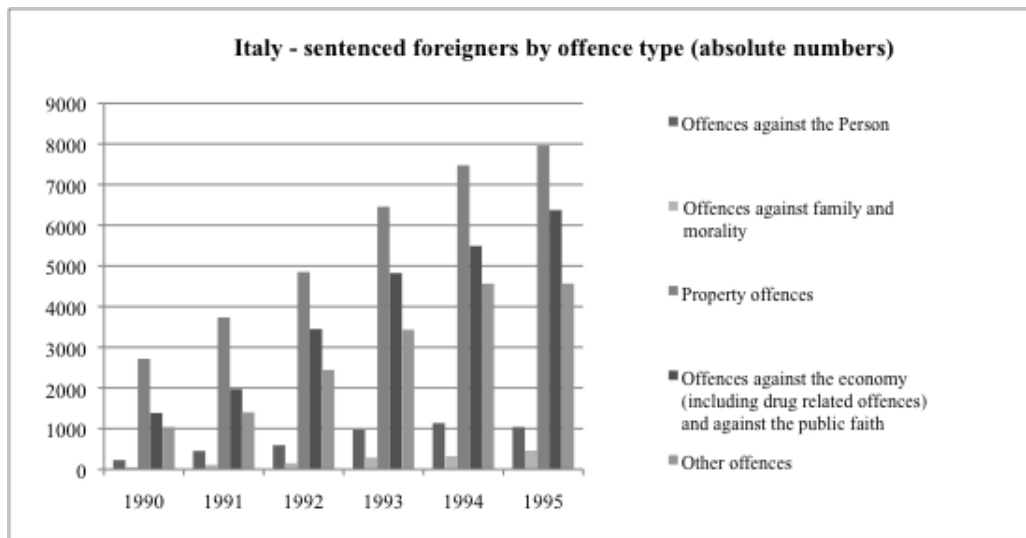
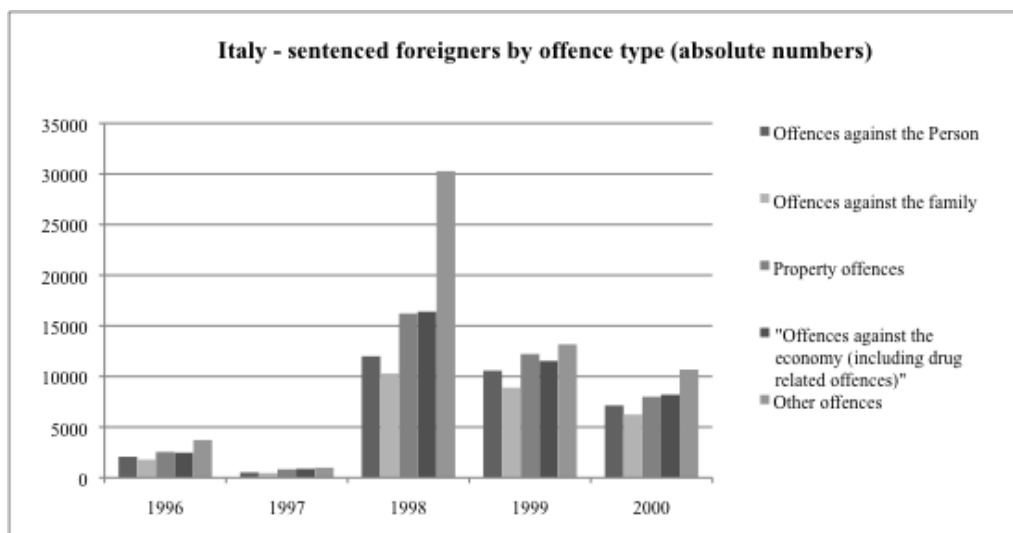


Figure 5b – Sentenced foreigners, in Italy, by offence type 1996 – 2000



Source: My elaboration on ISTAT data¹¹⁹⁴

Note: The data is separated into two different figures (1990-1995 and 1996-2000), due to changes in the categorisation of offences.

The causes of migrant involvement in crime are complex. For example, Caritas data show that Italy's immigrants have tended to be young, urban and male, and it is difficult to know the extent to which these socio-demographic characteristics, rather than their immigrant status, have contributed to their involvement in crime¹¹⁹⁵. I contend that in the Italian context, certain

¹¹⁹⁴ ISTAT (1990-2001)

¹¹⁹⁵ Holmberg and Kyvsgaard (2003); Lacey (2008, pp. 155-156); Melossi et al. (2009) Arguably this caveat does not apply to immigration offences, such as overstaying.

structural characteristics – precarious regularity, low political integration, low political representation – make migrants ‘penal outsiders’ regardless of their demographic make-up¹¹⁹⁶. In any case, and whatever the factors contributing to their deviance, migrants’ interaction with the criminal justice system is marked by systematic disadvantage where ‘legal, economic and social vulnerability’¹¹⁹⁷ collide with procedural requirements for diversion from prison. This increases migrants’ exposure to formal punishment: in Italy, for example, house arrest (roughly equivalent to remand on bail) requires appropriate housing, and lack of appropriate housing (a problem often faced by immigrants) leads to incarceration on remand¹¹⁹⁸. As Melossi argues, ‘there is [...] a tendency to bifurcation, where Italian offenders tend to get more and more non-detentive custody and punishment terms, whereas foreigners are [...] locked in prison more often, before and after trial’¹¹⁹⁹.

Combined, crimes of desperation, immigration crimes, and procedural disadvantages, precipitate immigrants’ criminalisation and subsequent detention. The stigmatic involvement with the criminal justice system further relegates immigrants to economic vulnerability. Economic marginality may then take on a racial and cultural dimension when it becomes conceptually welded to migrants’ presumed racial and cultural differences¹²⁰⁰. Calavita and Angel-Ajani note, through notions of cultural essentialism, that immigrants are perceived as being ‘culturally’ disinclined to respect Italy’s legal tenets¹²⁰¹. We then have a series of mutually reinforcing vicious cycles at work in Italian society: crime and otherness are equated and connected to migration, economic marginality is perceived as being limited to immigrants and immigration, crime and economic subordination become synonymous. These cycles blur the boundaries between myth and realities of migrant existence, contributing to plunge foreigners deeper into economic subordination.

This link between marginality and penalisation partly explains why non-EU migrants were ‘hyper-incarcerated’¹²⁰² in 1990s’ Italy. However, I suggest that to fully understand the mechanism of migrant punishment in Italy, we need to look at the other jaw of the legal vice.

¹¹⁹⁶ Solivetti (2012, pp. 143-144)

¹¹⁹⁷ Lacey (2008, p. 156)

¹¹⁹⁸ De Giorgi (2010, p. 156); In general see: Van Kalmthout A, F, and F (2007)

¹¹⁹⁹ Melossi (2003, p. 381) See also: Solivetti (2012, p. 135); Strozza and Cibella (2006, p. 153)

¹²⁰⁰ Calavita (2005b, p. 414)

¹²⁰¹ Angel-Ajani (2000, p. 343); Calavita (2005a, pp. 148-154) See also Balibar (1991)

¹²⁰² De Giorgi (2010, p. 148)

IV. The over-incarceration law: migrants as outsiders and dependence on Italian law

i. Migrants' dependence on law: law as a primary definer

During the 1990s, non-EU migrants depended upon immigration law insofar as they needed it to obtain some formal recognition within the Italian polity. I argue that this dependence was a necessary condition for the exclusion-inclusion dynamics described by De Giorgi: immigration law was capable of sustaining these dynamics precisely because migrants needed its legal recognition and suffered when the recognition granted only temporary legal inclusion. Non-EU migrants' dependence thus had a formal side, their lack of political citizenship, which was entrenched by both immigration and citizenship law, as they laid down the conditions for the acquisition of Italian citizenship or permanent residence¹²⁰³. The citizenship law passed in 1992 allowed for the acquisition of citizenship by non-EU migrants only after ten years' legal residence¹²⁰⁴. Alternatively, under the 1998 immigration law, it became possible to acquire permanent leave to remain where non-EU migrants had legally resided in Italy for at least 5 years¹²⁰⁵. In both cases, legal residence was required to have been uninterrupted for the relevant period, which meant that the same type of labour as ensured regular residence to working migrants was also necessary to ensure citizenship or permanent leave to remain. Given what we know of the nature of migrant occupation, and the ease with which migrants slipped into irregularity, 'patching together years of uninterrupted legal residence' to acquire citizenship, was 'almost impossible'¹²⁰⁶. Where citizenship was virtually impossible, then, the only legal status available to non-EU immigrants was as the subjects of immigration law: in this sense legal status became non-EU migrants' primary status.

Migrants' dependence on law also had broader articulations specific to the Italian context. Chapter 3 has illustrated how in Italy, citizens' formal legal identity is often complemented by a political identity. 'Political' here may indicate some ideological belonging or, in the 1990s when the ideologies began to wane, anchorage to broad political structures that also catalyses informal resolution of conflict. In Chapter 3, I had shown how these structures included the family or family-like political-economic structures, or even political 'clienteles'. In a context marked by a state that claimed to be the central provider of welfare and support, but failed to be such a provider¹²⁰⁷, this additional political identity was crucial. It was important for access

¹²⁰³ L. 5 febbraio 1992, n. 91, in materia di "Nuove norme sulla cittadinanza"; see also Solivetti (2004 Especially at 186)

¹²⁰⁴ L. 5 febbraio 1992, n. 91, in materia di "Nuove norme sulla cittadinanza"

¹²⁰⁵ On a permit granted for a reason that allows an indeterminate number of renewals: art 7, *Legge Turco-Napolitano*: L. 6 marzo 1998, n. 40

¹²⁰⁶ Calavita (2005b) See also Solivetti (2004, p. 144)

¹²⁰⁷ Ferrera (1996)

to welfare and to employment¹²⁰⁸, and it was important for diversion from formal penal censure into informal social control. Looking at the nature of immigration during the 1990s, it appears, however, that in most cases no such complementary political identity was available to migrants.

This is partly the result of the nature of migration to Italy. In its contemporary history the nation has not traditionally been a receiving country but, up to the 1970s, was mainly a country of emigration. It began to receive a small number of immigrants during the 1970s and then, more solidly, during the late-1980s and early-1990s¹²⁰⁹. It has since continued to receive incoming migrants, to the extent that ‘at the end of 2000, the incidence of foreigners on the total population [made] Italy the fourth European country in terms of immigration’, after Germany, France and the United Kingdom¹²¹⁰. This influx consisted of immigrants from economically ‘developing’ nations into ‘Fortress Europe’ with a significant number from the former Soviet bloc¹²¹¹. Data (Caritas and ISTAT, Figure 7) confirm a steadily growing presence of immigrants in Italy since the late-1980s. Where ISTAT data is narrowed to include only ‘high pressure migration nations’, the percentage increase is markedly higher: 134 percent across the decade¹²¹².

¹²⁰⁸ See Chapter 3; see also Mingione (1994)

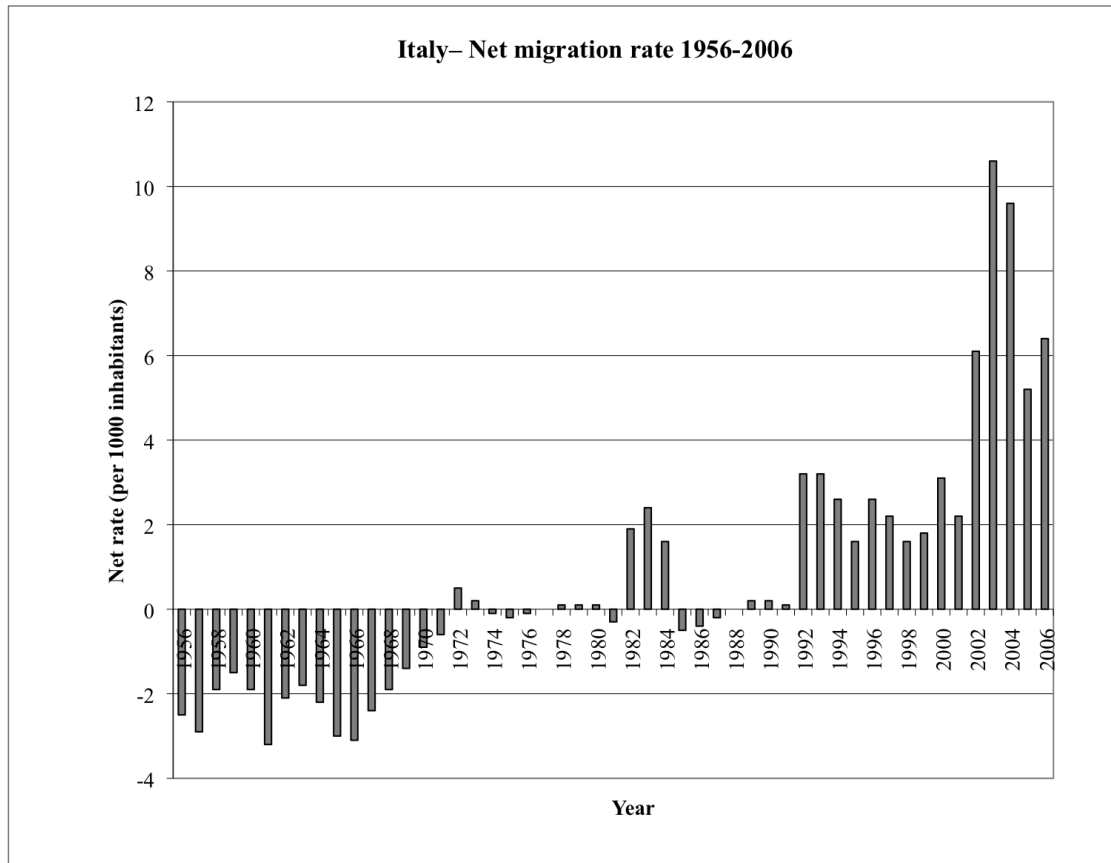
¹²⁰⁹ Bozzini and Fella (2008, p. 246); Melossi (2003, p. 378)

¹²¹⁰ Ammendola, Forti, Pittau, and Ricci (2004)

¹²¹¹ Calavita (2005b, p. 413)

¹²¹² High-pressure migration nations include Eastern European countries and ‘developing countries’: Caritas (1998). Unless specified, where data refer to ‘foreigners’ we cannot assume that they refer only to individuals from high-pressure nations. They may include foreigners from non-EU, highly-developed nations, not systematically involved in the processes under consideration.

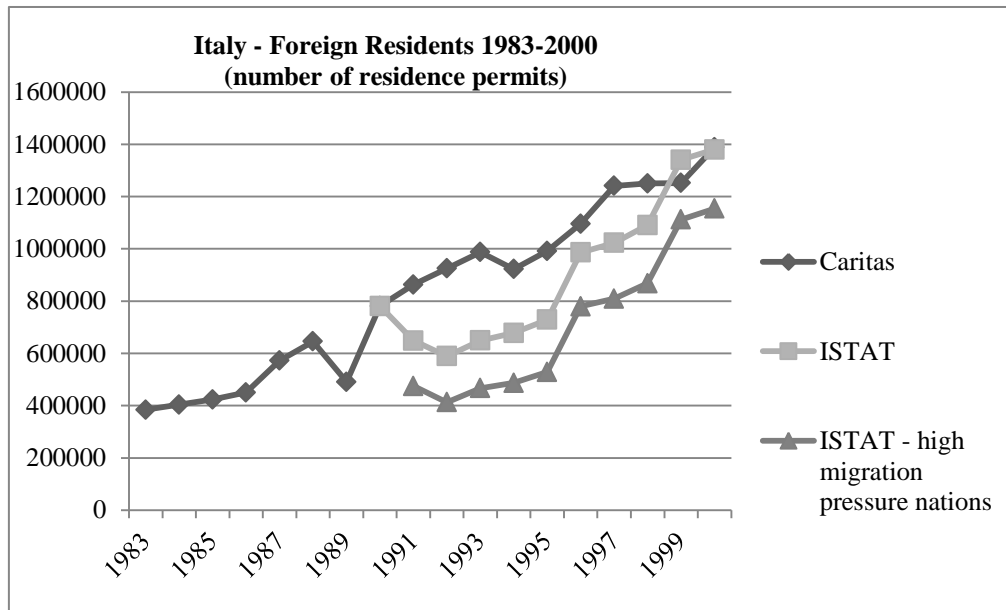
Figure 6: Italy – Net Migration rate 1956 - 2006



Source: OECD¹²¹³

¹²¹³ OECD, <http://www.oecd.org/statsportal> Accessed October 2008.

Figure 7: Foreigners resident in Italy, by type of nation (1983-2000)



Source: my elaboration on ISTAT and Caritas data¹²¹⁴.

Note: all data are originally calculated on the basis of Interior Ministry data.

More than half of the migrants entering Italy during this period were men, and were overwhelmingly young – with 68 percent between 19 and 40 years of age¹²¹⁵. There were few minors, suggesting that the migrant population was mainly unaccompanied, rather than consisting of families with children. Support for this can be sought in data on reasons for residence, with permits granted for ‘family reasons’ (including reunification) never exceeding 26 percent of all permits¹²¹⁶, though the number of family reunifications did increase across the decade¹²¹⁷. Immigration to Italy was also characterised by its heterogeneity¹²¹⁸: the biggest resident national group (Morocco) made up an average of ten percent of all foreign residents across the 1990s; the four next-largest groups varied between just over 4 and just over 5 percent of all foreign residents¹²¹⁹. This heterogeneity is partly a reflection of the lack of former colonies for which Italy would have been an obvious migratory destination¹²²⁰, and

¹²¹⁴ As quoted in Caritas (1993-2003)

¹²¹⁵ *Ibid.*

¹²¹⁶ See also Solivetti (2012, p. 144)

¹²¹⁷ Levels of reunification will vary by migrant communities: see Strozza and Cibella (2006, p. 118).

The increase is to be expected, as immigration gains stronger foothold over the decade. I am not arguing that immigrants were always or totally ‘lone individuals’ in Italy. I claim that they experienced greater isolation from family/kinship than the national population and migrants with settled communities in nations with longer histories of immigration.

¹²¹⁸ Mingione (2009, p. 227); Natale and Strozza (1997, p. 370)

¹²¹⁹ In Italy the first 15 immigrant communities make up 50% of the total compared to the first 3 in Germany, and the first 4 in France: Strozza and Cibella (2006, p. 83)

¹²²⁰ Angel-Ajani (2003, p. 341)

has tended to imply that, once in Italy, migrants have not found large settled communities from their country of origin on which to rely for support¹²²¹.

This is not to say that immigrants have not found *any* support when arriving to Italy. Bozzini and Fella point to the existence of an ‘advocacy coalition within [Italian] civil society’ composed of ‘social movement organisations [...] and public interest groups that [defended] the rights of immigrants and [promoted] their welfare’¹²²². This ‘coalition’ included immigrant associations – both *of* and *for* migrants – as well as trade unions and non-governmental organisations¹²²³. Notable amongst the organisations of denominational origin is the Italian Caritas, linked to the Catholic Church¹²²⁴. The 1998 *Turco-Napolitano* law also contained numerous provisions favouring immigrant integration, including the creation of a ‘Comission for Integration policies [...] charged with the task of drafting an annual report on the state of implementation of policies for the integration of immigrants’¹²²⁵. ‘Territorial councils’ have also been founded – composed of local politicians, local organisations, workers and employers’ organisations – with the aim of ‘involving pro-immigrant civil society actors’ to inform ‘policy affecting immigrants’¹²²⁶.

However, when discussing the ‘political outsidersness’ of immigrants in 1990s’ Italy and their consequent dependence on the law, it is essential to question not just the existence, but also the effectiveness of such associations and initiatives. Effectiveness means their capacity to grant migrants political representation and integration, in particular with a view to participation in Italian political life. This participation would ideally provide migrants with power to influence their living conditions by contributing (directly or indirectly) to policy-making, including immigration and citizenship policy. Looking at the 1998 *Turco-Napolitano* law, however, it appears that migrants groups’ influence on its formulation was limited. Thus the legislation provided for administrative detention for migrants despite the fact that it was ‘much contested by pro-immigrant associations’¹²²⁷. This episode may express a wider phenomenon: the relative lack of influence exerted generally by associations on immigration policy and its application: ‘[I]mmigrants often complained that, in the forums for dialogue set up by the *Turco-Napolitano* law ‘there [were] no real links between the deliberative process

¹²²¹ Quassoli (1999, p. 219)

¹²²² Bozzini and Fella (2008, p. 247)

¹²²³ Calavita (2005a, p. 117)

¹²²⁴ Bozzini and Fella (2008)

¹²²⁵ *Ibid.*, p. 248; Calavita (2005a, pp. 31-33)

¹²²⁶ Basili (2006, p. 40); Bozzini and Fella (2008, p. 247); Calavita (2005a, p. 79)

¹²²⁷ Bozzini and Fella (2008, p. 246) This testifies to the legislations’ ‘twin souls’: committed to integration *but* establishing a precarious form of regular residence: Calavita (2005a, pp. 43-47)

and the decision making process'¹²²⁸. Claudia Mantovan provides an even starker judgement in her study of 'participation and self-organisation of immigrants in the Veneto'. She claims that initiatives such as consultations and inter-ethnic organisations, set up in the 'late 1980s and early 1990s' to foster migrant participation, 'largely failed' in Veneto¹²²⁹, a region identified by Calavita as one of the most active in terms of integration policies¹²³⁰.

This is not to say that legislative efforts at integration were in bad faith, or simply political posturing¹²³¹. Rather, I point to the gap existing between legislation and its implementation, which may be seen as a broader feature of Italian law (Chapter 3). The gap has been described specifically in relation to the Turco-Napolitano law as the result of 'implementation deficits', 'deficiencies in the effective application of [integration policies] – the contrast between [the legislative] objectives declared and [the] results obtained'. It also encompasses deficiencies 'in the institutional tools' available to effectively implement policy objectives¹²³². Maciotti and Pugliese note how these deficits result partly from the division of labour inherent in the legislation: general decisions and policy outlooks are determined at the national level, funds and applicatory legislation are laid down at the regional level, and actual application occurs at the local level¹²³³. These deficits may also have resulted from the limited popular support commanded by immigration integration policy during the 1990s such that, after 2001 and a change in political guard, any initiatives 'could be abandoned without political fallout'¹²³⁴. Lack of public support also made 'the option of ignoring the demands of [pro-immigrant] advocacy groups [...] an easier one for decision makers' to take¹²³⁵. In fact, as the 1990s unfolded, it was the contrast to – and control of –immigration that gained increasing political clout, with politicians very reluctant to support integration initiatives for fear of losing votes¹²³⁶.

Looking specifically at associations *of migrants for migrants*, the question remains as to what their level of influence was in Italian politics and whether it could make them effective surrogates for migrants' formal political dis-integration and thus a source of substantive political integration. By 2001, there were an estimated 750 immigrant

¹²²⁸ Bozzini and Fella (2008, p. 253)

The associations that continued to influence immigration policy after 2001 are the Caritas and employers' associations: Bozzini and Fella (2008, p. 249).

¹²²⁹ Mantovan (2006) <http://search.proquest.com/docview/36714957?accountid=9630>
Accessed June 2012.

¹²³⁰ Calavita (2005a, p. 93)

¹²³¹ *Ibid.*

¹²³² Maciotti and Pugliese (2003, p. 100 My translation.)

¹²³³ This is likely to produce high variation in integration policies across localities and across policy sectors: Maciotti and Pugliese (2003, p. 100)

¹²³⁴ Bozzini and Fella (2008, p. 257)

¹²³⁵ *Ibid.*, p. 250

¹²³⁶ *Ibid.*, p. 254

associations in Italy, sided by 150 associations of Italians acting on migrants' behalf¹²³⁷. Bozzini and Fella have described the immigrant associations as 'weak, fragmented [and] small-scale', with greater focus on 'cultural initiatives [...] than [on] political mobilisation'¹²³⁸. This suggests two things: firstly, that the associations were not directly concerned with providing political representation (a harder task than service provision). Secondly, that even in their socio-cultural support functions they may have been too 'weak' and 'fragmented' to transform immigrants into a 'critical mass' within Italian society. This further suggests that the associations and initiatives were not firmly rooted in the Italian political context, nor were they capable of providing migrants with a political representation that lasted over time¹²³⁹. Rather, immigrant and pro-immigrant associations were better placed to provide 'frontline services' – welfare and social assistance, particularly on migrants' arrival to Italy, mutual aid rather than political participation¹²⁴⁰.

Mantovan has noted an additional obstacle to migrant participation through third-sector initiatives: the marginality of immigrants' influence relative to the influence of Italian nationals within integration initiatives. From her research it appears that 'Italians [...] monopolised all the central positions within the local immigration field'¹²⁴¹. This also meant that, in the absence of migrants' right to vote in administrative elections, 'the forms of "representation" that resulted, addressed a need on the part of the host society' rather than of the immigrants themselves¹²⁴². A similar point is made by the Caritas itself, noting that migrants' associations 'have often felt that Italian associations [...] were competitors rather than allies' and that 'they benefitted from greater access to resources'¹²⁴³.

It is again the Caritas that provides us with a summative statement of migrants' political 'outsiderness' in Italy despite the presence of third-sector associations and integration initiatives:

'Currently immigrants are not legitimately recognised actors, but represented only by trade unions and non-profit organisations. [This means] *that the processes of [immigrant] inclusion [into the Italian polity] are managed without [migrants'] participation as principal actors [...] [Immigrants in Italy] participate in civil society without being able to access [the political sphere] and this lack of participation*

¹²³⁷ *Ibid.*, p. 252; Calavita (2005a)

¹²³⁸ Bozzini and Fella (2008, p. 252); Mantovan (2006)

¹²³⁹ Hence their easy abandonment after 2001.

¹²⁴⁰ Bozzini and Fella (2008, p. 247)

¹²⁴¹ Mantovan (2006)

¹²⁴² Basili (2006, p. 41); Mantovan (2006)

¹²⁴³ Caritas (2000, p. 171)

*increases already existing difficulties [...] [It places migrants] in a position of subordination, given the continued denial of their right to vote in administrative elections, and the [...] difficulties [they face] in acquiring citizenship'*¹²⁴⁴.

This evaluation – provided by one of the associations most influential in the immigration field – is an apt synthesis of immigrants' political subordination. It clearly identifies immigrants as political outsiders, though with an emphasis on its formal aspects – the exclusion from citizenship and from political participation. Immigrants' right to vote in local elections was indeed canvassed and repeatedly rejected over the years¹²⁴⁵. Mantovan further adds that the 'polycentric fragmentation' of immigrant communities (Table 5) and the 'recent nature of immigration to Italy' were further obstacles to migrants' successful political participation, substantive as well as formal¹²⁴⁶. Tellingly, she claims that within the immigrant communities, it is those who have acquired Italian citizenship or have been resident in Italy for many years – those 'who are a bit less immigrant' – who manage to command the greatest relative power within the immigration policy field¹²⁴⁷. In the language of my argument, these are individuals who have become political insiders – either formally or substantively. Whether through citizenship or long-term residence they have acquired an identity that is additional to the (legal) identity laid down in immigration law, and their residence no longer needs to be constantly re-legitimised.

¹²⁴⁴ *Ibid.* My translation, my emphasis.

A similar argument is quoted by Calavita in relation trade unions. The unions' advocacy, centred more on 'social issues' than 'labour per se', has been criticised as '[underscoring] the perceived role of immigrants [...] as socially and economically marginalized subjects in need of assistance': Calavita (2005a, p. 118).

¹²⁴⁵ Bozzini and Fella (2008, p. 246); Zincone (2006, p. 359) On on the difficulties of establishing migrant (political) associations see Einaudi (2007, p. 141)

¹²⁴⁶ Mantovan (2006)

¹²⁴⁷ *Ibid.*

Table 6: First ten non-EU nationalities present in Italy 1990-2000 (excluding USA)

Country	Average percentage 1990 to 2000 (as a percentage of total immigrant residents)	Average number of immigrants 1990 to 1998 (number of residents) ¹²⁴⁸
Morocco	10.40	105,159
Former Yugoslavia	5.16	49,716
Philippines	4.73	48,543
Tunisia	4.54	45,120
Albania	4.25	43,760
Senegal	2.87	28,605
People's Republic of China	2.59	25,567
Egypt	2.37	23,490
Romania	2.34	23,209
Poland	2.26	22,939

Source: my elaboration on Caritas data¹²⁴⁹

Public and policy acknowledgement that people were systematically immigrating into Italy, and that their immigration might be different in nature to the industrial migration of the 1950s and 1960s, came late¹²⁵⁰. Moreover, immigration policy was unable to acquire a ‘deep-seated [...] framework’ and was susceptible to changing short-term political moods¹²⁵¹. Even when the reality of migration was acknowledged, the character of the phenomenon continued to be unclear. Italy still lacks accurate and official numbers for its immigrant population: the best sources of information are provided by the ISTAT and the Caritas (elaborating upon Interior Ministry figures). However, given that the institutions use different methodologies, they too provide substantially different measures of immigrants’ presence. Moreover, official data fail to capture the incidence of irregular migrants, or to track shifts between regularity and irregularity. This raises the issue of migrants’ ‘unknowability’, an expression that I use to indicate the factual but also symbolic purgatory occupied by immigrants in Italian society¹²⁵².

Symbolically, immigrants are abstracted and feared and, at the level of public discourse and centralised legislation, the precise shape and impact of immigration (who, how many, with what effect for the Italian polity) seems to have been estimated more than established¹²⁵³. At the same time, immigration is made knowable by the imposition of categories and presumptions that eventually influence migrants’ experience; the presumption,

¹²⁴⁸ The figures exclude migrants resident in 1999: Caritas data for this year diverge (upwards) from Interior Ministry data.

¹²⁴⁹ Caritas (1993-2003)

¹²⁵⁰ Bozzini and Fella (2008, p. 247)

¹²⁵¹ *Ibid.*, p. 248; Calavita (2005a)

¹²⁵² For a similar point on immigrants in the UK see Bosworth and Guild (2008, pp. 705-706)

¹²⁵³ Amato (2008, p. esp. at 19)

for example, widespread during the 1990s that Italy was being ‘invaded’ by immigrants, in particular by migrants from the Maghreb and Eastern Europe¹²⁵⁴. Or, as Angel-Ajani notes, the ‘[d]iscourses of criminality and “job stealing” that [were...] increasingly projected onto [immigrant] communities’¹²⁵⁵. These discourses may have practical, negative, effects for foreigners: where they contribute to a racialised perception of criminal activity they may, for example, skew policing of crime against migrants¹²⁵⁶. It has also been suggested that these myths affect popular perception of non-EU migrants as inherently deviant and that this is reflected in the mismatch between the number of immigrants reported and the number actually arrested¹²⁵⁷.

The lack of knowledge on migrants has a number of implications beyond difficulties in estimating immigrant presence. Their contribution to the Italian economy may also go unrecognised, given the informality of much migrant labour and the relative ‘invisibility’ of their labour activity. Moreover, since migrants lack large communities with a representative voice, we are again left with myths and assumptions that consolidate over time, and become more difficult to cast off. Mantovan notes how migrants lament the ‘lack of access to the mediating and political “foundry” which shapes their social image’¹²⁵⁸. The myths on immigrants may be the product of media discourse or instrumental political rhetoric, and of some academic work on migration as it tries to grapple with erratic information or where it too is politically-driven. Yet there is no reason why we should be relying on such assumptions in analysing immigration, particularly if this reinforces the stereotypes that stigmatise migrants¹²⁵⁹.

In the face of this ‘unknowability’, the law – as an emanation of the state, and as a force less arbitrary than myth, assumption or popular common sense – becomes the primary tool for making migrants ‘knowable’. In Melossi’s words, ‘the law literally runs after [migrants] trying to pin them down, to [...] define them’¹²⁶⁰. The law thus acts as migrants’ ‘primary definer’ at a symbolic level¹²⁶¹. Significantly, I have argued that immigration law also acts as their ‘primary definer’ at a practical level, by laying down conditions for migrants’ ‘regularity’ and ‘irregularity’. The law – and immigration law in particular – thus wields considerable power over immigrants’ fate. Immigrants’ fate will consequently vary on

¹²⁵⁴ Dal Lago (1999 e.g. at 7)

¹²⁵⁵ Angel-Ajani (2000, p. 338)

¹²⁵⁶ Angel-Ajani argues that we witness a form of racialised common sense according to which ‘drugs and prostitution [...] are being characterised as almost ‘un-Italian’ in nature’ (2003, p. 437). Also Calavita (2005a, p. 145)

¹²⁵⁷ Palidda (1996, p. 252)

¹²⁵⁸ Mantovan (2006)

¹²⁵⁹ The relative lack of knowledge also makes it difficult to make sense of patterns of immigrant deviance in the same way that we make sense of ‘national’ deviance.

¹²⁶⁰ Melossi (2003, p. 387)

¹²⁶¹ Borrowing from Hall (1978, p. 58)

the basis of the law's definition of migrants. Even where penalisation has occurred, and involvement in the criminal justice system has put the penal law in charge of migrants' 'biographies'¹²⁶², this second level of definition rests upon immigrants' initial dependence upon migration law. Migrants are, initially, legal subjects alone, and only after are they recognised as economic subjects through the law's definition. From there, the structural mechanisms that follow from economic marginality make them easy penal subjects.

ii. Outsiders and insiders: migrant profiles in the Italian context

This exclusively legal identity makes migrants political outsiders because immigration law grants non-EU migrants only very precarious regularity. In part, however, it is also because migrants' legal identity lacks the broad political anchorage that, in Italy, catalyses informal resolution of conflict. This lack is apparent if an (ideal-type) profile for migrants in 1990s Italy is contrasted with a similar profile for 'successful' Italian nationals. The immigrant profile can be drawn up by combining socio-demographic information and information on migrants' economic position. The 'successful national' profile derives from an analysis of Italy's political economy.

Beginning with the migrant profile, the picture emerging from Caritas data points to non-EU immigration from a multiplicity of nations, made up mainly of young, unaccompanied individuals, a (slight) majority of whom are males¹²⁶³. Kinship ties seem to be weak for immigrants – as evidenced by the 'polycentric fragmentation' of migrant communities – at least during the 1990s and especially for some groups¹²⁶⁴. We also know that migrants in Italy work mainly in dependent labour, and informal (irregular or insufficiently-regulated) labour¹²⁶⁵. Immigrants were 'well established as employees on all the lower rungs of the labour market'¹²⁶⁶. From Maciotti and Pugliese's elaboration of social security data, it emerges that, between 1994 and 1997, the majority of immigrants registered as employees were employed in metallurgy and mechanics. Immigrants were also employed in commerce and construction; employment in textiles and chemical industries increased by the end of the

¹²⁶² De Giorgi (2010, p. 131)

¹²⁶³ Note the variation across migrant communities over time: Strozza and Cibella (2006, p. 86 and 80 (respectively))

¹²⁶⁴ See Table 6; see also Mantovan (2006). Some indication of the weak kinship ties can be sought in the numbers of residence permits granted 'for family reasons': (Figure 2). Strozza and Cibella provide data on foreigners with residence permits 'for family reasons' layered by nationality. These range (at 31/12/2001) from a 33.3% of total residence permits for Polish immigrants; to 7.5% for Senegalese immigrants (2006, p. 117)

¹²⁶⁵ Reyneri (2004b)

¹²⁶⁶ *Ibid.*, p. 81

decade¹²⁶⁷. They were also employed in the informal economy, with the highest incidence in catering and tourism, cleaning services, domestic work, artisan work and small commerce¹²⁶⁸. Immigrants also face substantial difficulties finding adequate housing in Italy¹²⁶⁹, and lack of housing is a substantial obstacle preventing family reunification, which requires that the migrant possess provably adequate living facilities in Italy. Lack of housing also contributes to migrants' over-incarceration where they are incapable of providing the fixed address necessary for both house arrest and access to alternative sentences¹²⁷⁰.

How would a migrant fare in Italy, if s/he were to correspond to this profile? As seen in Chapter 3, the Italian political economy is state-driven, with a welfare state both corporatist and fragmented¹²⁷¹. Welfare rests heavily on supplementary sources of welfare assistance, most often the family¹²⁷², leading Enzo Mingione to talk of the 'familial physiognomy' of the Italian working class¹²⁷³. This creates a tension between public and private forms of welfare support that mirrors a more general dualism between public and private realms in Italy; with the public seemingly carved up along private lines. The Italian political economy is territorially segmented, divided into 'three Italies'¹²⁷⁴: the industrialised northwest; the northeast and centre typified by small and medium sized enterprises; and the South, whose primarily agricultural economy has been replaced with tertiary occupations distributed along clientelistic lines¹²⁷⁵.

Briefly looking at this context, we can consider the viability of non-EU migrants in Italy finding economic stability in a number possible of situations. On the basis of my understanding of theory and data, I hypothesise that economic stability would follow from integration into 'First Italy'-type employment, and acquisition of the 'adult male breadwinner' role that carries with it stable work and social security. Alternatively, and given

¹²⁶⁷ Reyneri talks of growing immigrant presence in the industrial sector, with a high percentage of unskilled blue collar workers. In 1997 27% of dependent immigrant workers were in manufacturing; 20% in services (concentrated in retailing and restaurants) and 30% in domestic services: Maciotti and Pugliese (2003, p. 66); Reyneri (2004b, pp. 75-77)

¹²⁶⁸ With the exception of domestic work (where migrants' presence is greater) this mirrors nationals' involvement in the underground economy: Reyneri (2004b, p. 84)

¹²⁶⁹ Calavita (2005a, p. 111); Maciotti and Pugliese (2003, p. 103)

¹²⁷⁰ De Giorgi (2010, p. 156); Van Kalmthout A et al. (2007)

¹²⁷¹ Ferrera (1996)

¹²⁷² *Ibid.*; Mingione (1995)

¹²⁷³ In particular the Northern Italian working class (reflecting patterns of production in Italy): Mingione (1994, p. 32). Where the punishment of immigrants is seen through the lens of political economy, the Italian working class' familial character deserves greater attention.

¹²⁷⁴ Bagnasco (1977)

¹²⁷⁵ Ferrera (1996, p. 25)

the shortage of such labour¹²⁷⁶, migrants could work in the small and medium sized concerns diffuse across northern and central Italy, as has indeed tended to occur¹²⁷⁷. Given that such firms usually entail lower levels of regulation (covering security and wages), employment would have to be supplemented by kinship ties within the workplace, or by the family as welfare provider, in order to avert economic difficulties. Enzo Mingione and Kitty Calavita both suggest that this additional socio-political integration has not been forthcoming for migrants, despite their economic inclusion. Mingione hypothesises that, though industrial districts have become increasingly open to immigrant labour, ‘immigrants are [nonetheless] excluded from local trust-based networks’¹²⁷⁸. This may also account for Calavita’s observation that, in regions such as Emilia Romagna (part of the ‘Third Italy’): ‘[the] intense demand for immigrant workers does not [...] seem to translate into their increased bargaining power or improved working condition’¹²⁷⁹.

The family’s centrality arguably extends to all sectors of Italian society, few being the breadwinners in stable and protected employment (Chapter 3)¹²⁸⁰. Mingione points to the crucial role of ‘householding and family strategies’ as ‘non-monetary and informal resources’ complementary to the ‘monetary and officially recorded resources’ (e.g. state welfare) that promote ‘individual welfare and social mobility’¹²⁸¹. The ‘particularistic/reciprocity based’ strategies enacted by families range from income pooling and investment, to access to political patrons via a family member. They make up for the ‘persistent deficiencies of the public welfare system and [for] serious housing problems’¹²⁸². By analogy, this would suggest that immigration and integration would be easier for groups where there was already a presence in Italy. Such groups would be able to replicate the ‘collective solidaristic’ strategies necessary to navigate the public/private divide in Italy. This condition was, however, difficult to achieve given the fragmentation of immigrant communities in Italy (Table 5) and the absence of a ‘critical mass’ or kinship network to join: recall the discussion of the obstacles created by migrants’ ‘polycentric fragmentation’ to their social and political integration. Obstacles to family reunification also impair migrant collective strategies¹²⁸³. Moreover,

¹²⁷⁶ For which competition with Italian nationals is very strong: Reyneri (2004b, p. 78). There has, however, been an increase immigrants’ unisation: we need to question its extent relative to the total migrant population and to the number of immigrants employed in informal labour.

¹²⁷⁷ Mingione (2009)

¹²⁷⁸ *Ibid.*, p. 232

¹²⁷⁹ Calavita (2005a, p. 83)

¹²⁸⁰ Ginsborg (2001, p. xii and 227)

¹²⁸¹ Albeit with North-South differences: Mingione (1994, p. 34)

¹²⁸² *Ibid.*, p. 31

¹²⁸³ Strozza and Cibella (2006, p. 117)

family reunification itself may not be enough to overcome scarce political integration¹²⁸⁴. Mingione's frequent reference to 'long-term [...] intergenerational [...] strategies' of Italian families¹²⁸⁵ implies a *rootedness* of Italian families. Hence, for the family to function as a politico-economic resource, it is not enough for it to be a family nucleus present on Italian territory, it is important for the family to be extended (possibly) and (certainly) capable of tapping into resources otherwise not available through universalistic, formal means (e.g. housing benefits and unemployment benefits)¹²⁸⁶. This presumes a relatively long-term presence combined with social and political integration complementary to inclusion in economic activities¹²⁸⁷. Finally, and particularly in the South, political patronage could ensure a certain economic stability, especially in the face of economic stagnation and unemployment¹²⁸⁸. Note that where the clientelistic relationship is premised on the exchange of decisions for votes,¹²⁸⁹ it will only be possible where the client is a voter, and migrants are not¹²⁹⁰. Formulated in terms of Italian dualisms, this means that economic stability in Italy requires anchorage to political structures that allow individuals to bridge the gap between public and private realms and public and private welfare.

Comparing migrant profiles with these conditions for integration, we are again faced with a picture of immigrants' relegation to economic marginality. They have neither the working nor the social conditions for success; they are excluded both from long-term, protected labour and from the social structures that shield nationals facing similar exclusion in all three political-economic regions. Hence, where penalisation ensues from economic marginality, the penal effects are not the results of economic subordination alone. Significantly, they are the result of migrants' exclusion from those *ulterior* (political) structures that complement nationals'

¹²⁸⁴ A factor which again raises the issue of how to 'measure' migrant 'integration', where statistical indicators are inadequate to gauge the phenomenon described. Mingione and Morlicchio make this point when discussing the family as an 'institution of reciprocity' which helps to stave-off 'urban poverty' in Italy: '[t]his type of investigation is difficult because it cannot start from statistical data, but rather from a complex typology of chequered individual and family paths in difficult social contexts'. They thus formulate 'a set of assumptions about the condensed form of the phenomenon'. A similar caveat applies to my discussion of migrant families particularly given the variation across immigrant nationalities: Mingione and Morlicchio (1993, p. 419); Strozza and Golini (2006, p. 56)

¹²⁸⁵ Mingione (1994, p. 28)

¹²⁸⁶ In the South the family may act as a means of tapping into clientelistic distribution of resources, in a context where multinuclear families, typical of the North, are scarce, weakened by migration, unplanned urban growth and inefficient transport: *ibid.*, pp. 36-38

¹²⁸⁷ This analysis would need to be modified if we were to consider EU citizens living and working in Italy. My claims in this chapter are limited to non-EU migrants *and* to the years before the EU expansions of 2004 and 2007.

¹²⁸⁸ *Ibid.*; see also Chapter 3

¹²⁸⁹ Della Porta (1992, p. 233)

¹²⁹⁰ Zincone (2006, p. 355)

economic status: the family ties that tend to accompany informal labour and allow for some protection in the absence of state regulation; the kinship ties that accompany employment in small and medium industries, promoting mutual trust and, importantly, informal resolution of conflict; and the political clienteles that act as welfare supplements. Immigrants in 1990s' Italy, often alone (because single but often also without a family present) and with weak community/kinship ties, could rarely rely on such bonds and integrative structures. They are not voters; they are visibly *other* within Italian communities; they are early newcomers bereft of their own community or family networks; and they are thrown back on surrogate forms of political representation that help but do not compensate for the lack of in/formal political integration.

What this discussion further suggests – and what my discussion of third sector assistance to migrants implied – is the need to relate our analyses of migrant punishment more closely to the context in which it occurs. Here ‘context’ means the national political system, its institutions and its attitudes to the law, including those that require political integration to bridge the public/private gap. Luigi Solivetti makes a similar point, emphasising the importance of host country characteristics in explaining over-incarceration¹²⁹¹. Solivetti undertakes linear regression analysis that tests the relationship between over-representation ratio of non-nationals (‘relative index of non-national imprisonment’) and a series of contextual variables across 18 Western European countries¹²⁹². These include their ‘socio-economic and cultural characteristics’, level of socio-economic wellbeing, equity and social cohesion, education and knowledge, and transparency¹²⁹³. They also include measures of ‘non-national integration’ in their host country, and measures of immigrant origin¹²⁹⁴. Italy is included in Solivetti’s study, which covers the period 1990-2000. Solivetti uses his analysis to explain the ‘dissimilar non-national shares’ of the prison population in different European nations¹²⁹⁵. Crucially, for my purposes, he tests a set of variables that he collectively terms ‘institutional social capital’ that measure the vertical links between state and immigrants in their host country¹²⁹⁶. Amongst these variables we find transparency – a measure of

¹²⁹¹ Solivetti (2010, 2012)

¹²⁹² His sample includes European Union member states and members of the European Free Trade Association, including Italy, the UK, France and Germany.

¹²⁹³ GNP per capita, percentage of GDP spent on food, GNP for the poorest 10% of the population, indicators of transparency, indicators of national education and knowledge. Solivetti (2010); 2012, pp. 145-147)

¹²⁹⁴ Non-national unemployment and illegal immigration; and immigration from ‘less developed countries’: Solivetti (2012, pp. 147-148)

¹²⁹⁵ *Ibid.*, p. 145

Solivetti’s broader aim is to explain the link between migration and crime and he uses the incarceration index as a measure of non-national involvement in crime: I do not.

¹²⁹⁶ *Ibid.*, p. 147

corruption and ‘[...] solidarity [...] and [...] *particularism*’, i.e., ‘the prevalence of private over collective, interests’¹²⁹⁷, but also ‘rule of law’ – the reliability of the justice system – and the hidden economy¹²⁹⁸. I suggest that this ‘institutional social capital’ can be used to gauge the accessibility of political and legal institutions for citizens, as well as the institutions’ compliance with formal, transparent rules (‘fairness and universalism’)¹²⁹⁹. Solivetti also tests over-incarceration against a number of other variables, including those that measure economic inequality and relative deprivation.

From his quantitative analysis, Solivetti concludes:

‘the non-national imprisonment index is higher in countries where [there are] particularly low incomes for the poor, unfair income distribution, little social protection, high corruption level, scarce rule of law [...] widespread hidden economy [...]’¹³⁰⁰

Given the literature I have been dealing with thus far, it is not surprising that economic inequality and low social protection should be associated with high levels of migrant incarceration. It is perhaps more interesting to note that Solivetti’s analysis points to higher overrepresentation where ‘non-nationals have rapidly grown over the last few years [...] their children are fewer (that is, families are less numerous and roots limited) [...] illegal immigration is common; and [...] non-nationals from non-European and [less developed countries] are numerous and growing’¹³⁰¹. This description seems to sum up the state of immigration to Italy, particularly during the decade I am considering. Even more interesting is Solivetti’s additional observation that ‘indicators of legality (corruption, rule of law, hidden economy and illegal immigration) show coefficients higher than those shown by indicators of economic well-being, equity and relative deprivation’¹³⁰². This suggests that there is greater association between the indicators of legality and incarceration index (controlling for other explanatory variables) than between indicators of economic wellbeing and incarceration, (controlling for other explanatory variables)¹³⁰³.

¹²⁹⁷ As measured by Transparency International: *ibid.*, p. 146

¹²⁹⁸ *Ibid.*, pp. 146-147

¹²⁹⁹ *Ibid.*, p. 154

¹³⁰⁰ *Ibid.*, p. 148

¹³⁰¹ *Ibid.*

¹³⁰² *Ibid.*, p. 149

¹³⁰³ Figure 2 in Solivetti’s 2012 article shows that the relative index of non-national imprisonment increases as ‘rule of law, control of corruption and illegal immigration’ decrease. The same figure shows that Italy scores high for non-national imprisonment, and low for ‘rule of law etc’: *ibid.*, p. 151

Since Solivetti's research includes Italy, it can be used to provide some indirect support for my theoretical claims. Importantly, it points to the significance of political and legal variables for immigrant incarceration, emphasising the role of 'legality' in processes of criminalisation and punishment (see section below). In Solivetti's claims on 'transparency', 'rule of law', and 'institutional social capital', we can read a hypothesis on the link between punishment and the availability/distribution of collective goods within different polities¹³⁰⁴. We can use his work in a discussion of law and punishment in Italy, a nation in which collective goods have been relatively scarce, as has their distribution by means of clear and unequivocal norms ('transparency' and 'rule of law'). I have argued that in such a context the low level of collective goods ('institutional social capital') makes it necessary for individuals to belong to intermediate political structures that can compensate for the lack of collective goods. This 'belonging' is the additional political identity – acquired over time and once established within the local context – required to supplement citizens' (bare) legal identity. It is the substantive political belonging that is complementary to formal political belonging – citizenship. As Solivetti's analysis suggests, this type of additional political integration may be more relevant to immigrant incarceration than economic deprivation, though the two will clearly act in concert. The conclusion to draw from this would be that, at an equivalent level of economic marginality, immigrants might be more exposed to the criminal justice system than Italian nationals, the latter being more politically integrated. This is a claim that remains to be tested empirically but it is, as I have shown, a well-supported hypothesis worth investigating (on a par with De Giorgi's political-economic analysis of migrant hyper-incarceration). This finding would also bolster the notion that punishment in Italy, as a whole, reflects patterns of political 'insiderness' and 'outsiderness'.

Kitty Calavita seems to imply a similar political distinction between immigrants and Italians. She describes the economic difficulties faced by 'the locally dispossessed' such as Italian youth employed in the underground economy, emphasising their inability to find independent housing, and thus their tendency to live with their parents 'well into their twenties and thirties [...]'¹³⁰⁵. However, the very characteristics she is using as 'markers' of nationals' poverty would also insulate 'young Italian workers' from penalisation, by allowing for alternatives to imprisonment, or because of the informal social control the family exerts¹³⁰⁶. By contrast, migrants are very often excluded from such protective structures, precipitating their dependence on law, which remains their primary resource in Italy. This is

¹³⁰⁴ See Basili (2006, p. 11)

¹³⁰⁵ Calavita (2005a, p. 159)

¹³⁰⁶ Melossi et al. (2009, pp. 50,61; 2012, pp. 424-425); Nelken (2005, p. 232); Solivetti (2012). Though it will not account for exposure from the criminal justice system deriving, for example, from biases in policing.

particularly so for irregular migrants for whom the penal system may come to ‘[constitute] the only system of welfare available, *lato sensu*’¹³⁰⁷.

As in co-ordinated market economies and their institutional structures, where non-EU immigrants are not already integrated in Italy’s cultural-political structures, the reintegration of deviant migrants becomes more difficult. Note also that the relative lack of political sway for migrants’ demands may well reduce the chances of this situation changing over time (whether through migrant associations or via Italian ‘surrogates’)¹³⁰⁸. The fragmentation of migrant communities and associations, the absence of effective political interlocutors¹³⁰⁹ and the absence of public support for a further political integration of immigrants all limit migrants’ access to policy making including policy that affects their legal status and socio-political integration. This lack of formal political influence will precipitate migrants’ need to belong to those intermediate political subjects that bridge the gap between ‘legal Italy’ and ‘real Italy’¹³¹⁰ (and the ‘implementation deficits’ for immigrant integration). This form of substantive ‘political belonging’ is what tends to follow from being a client, a voter, a member of a family rooted in Italy: in short from *being Italian in Italy*¹³¹¹. It would logically follow that those migrants capable of replicating such conditions are those best protected against over-incarceration. Given how unlikely this ‘replication’ was – certainly during the first decade of large-scale migration into Italy – it is unsurprising that immigrants were overrepresented in Italian prisons.

By effecting a comparison between immigrants and ‘successful Italians’, I am not implying that all Italians are successful and all non-EU immigrants necessarily marginal. There *are* Italians who are economically marginal and whose marginality might well warn us against assuming that formal citizenship automatically leads to substantive inclusion¹³¹². Though imprisonment data does not exist that would allow us to test the claim (see introduction), I nonetheless hypothesise that, when we pass from economic marginality to penalisation and incarceration, the distinction between nationals and foreigners is likely to subsist. Whatever the limits of formal citizenship we should not underestimate how disempowering it is to *lack* such citizenship¹³¹³. As Dal Lago argues, we should not be too eager to conflate the

¹³⁰⁷ Melossi (2003, p. 378)

¹³⁰⁸ Bozzini and Fella (2008)

¹³⁰⁹ Particularly after 2001 and the victory of the right-wing coalition: *ibid.*, pp. 248-249

¹³¹⁰ Though this would not circumvent issue of legal status.

¹³¹¹ See Dal Lago’s claim that immigrants in Italy are ‘slaves to their nationality, to the fact of being foreigners’: (1999, p. 207 My translation.); Mantovan (2006)

¹³¹² Calavita (2005a, p. 159)

¹³¹³ Dal Lago (1999, p. 222)

punishment of immigrants with the punishment of national ‘outsiders’¹³¹⁴, but ought to distinguish immigrants from ‘all those subjects that experience radical social exclusion [such as] the homeless, drug addicts, the poor’. Though the latter may share social hardship with migrants at the margins of Italian society, they are nonetheless ‘legitimate subjects’, i.e., individuals with formal civil rights, whose residence in Italy needs no legal affirmation¹³¹⁵. Non-EU migrants, by contrast, are *ab initio* excluded from making demands of the Italian state¹³¹⁶. In making any political claims, they are dependent upon the mediation of associations that may not always be representative, and whose influence may in any case be limited. Moreover, as I will now show, because of the particular nature of Italian law, migrants may find that as primarily legal subjects they are also exposed to a greater risk of penalisation.

iii. Depending upon Italian law

The law (*all law*) in Italy is a capricious creature, operated on a discretionary basis¹³¹⁷. It also displays a dualism between principle and pragmatism that is essential to Italian legal/political culture, but that can act to confound migrants not aware of its exigencies. Furthermore, the dualism can catch migrants without the resources necessary to inhabit this contradiction, primarily, I have been arguing, complementary legal *and* political identities¹³¹⁸.

We can find echoes of this account in Melossi’s analysis of Italian society and its criminogenic consequences’ vis-à-vis migrants¹³¹⁹. Melossi characterises Italy as beset by ‘widespread illegality’¹³²⁰ (Chapter 4) an illegality that is fostered by (some) citizens’ instrumental attitude to the state¹³²¹. He talks also of the ‘hypocritical tolerance’¹³²² of Italian society, whereby acceptance of deviance stops mainly where ‘suitable enemies’¹³²³ are concerned. This was particularly true after the 1990s corruption scandal, which engendered the need for visible punishment¹³²⁴. Economic marginality and criminalisation of migrants made migrants just such ‘suitable enemies’¹³²⁵. Hypocritical censure of deviance thus

¹³¹⁴ It remains to be tested whether punishment in Italy is distributed along a more general outsider/insider dichotomy, not limited to foreigners.

¹³¹⁵ *Ibid.* My translation.

¹³¹⁶ Einaudi (2007); Salvati (1984, p. 107)

¹³¹⁷ Melossi (2003, p. 382); see also Chapter 4.

¹³¹⁸ The existence of regularisations makes this dualism particularly visible (and relevant) to immigrants. Note the conceptual similarity between regularities and the pragmatism of amnesties (see Chapter 2) as post hoc acceptance of (formal) illegality: Ferraris (2008, p. 29)

¹³¹⁹ Melossi (2003, p. 383); Ruggiero (2009, p. 48)

¹³²⁰ Melossi (2003, p. 382)

¹³²¹ See parallels with Solivetti’s account above.

¹³²² Melossi (2003, p. 382)

¹³²³ Wacquant (1999)

¹³²⁴ Pavarini (1994). See Chapters 1-4

¹³²⁵ Wacquant (1999)

crystallised into demands for strict legal compliance by immigrants, who were faced with intransigent demands for legality, even as the ‘apparent lack of law [...] [made] learning [...] by example almost impossible’¹³²⁶.

In a context marked by dual attitudes to law, immigrants lacked the structural, political and cultural co-ordinates to navigate Italian law¹³²⁷. Foreigners were almost always excluded from its web of informal social control and social provision; an exclusion that both expressed and followed from their existence as legal subjects alone. As primarily legal subjects, migrants were also the preferred recipients of Italy’s formal control and penal harshness. Commentators have described the development of a ‘dual’ penal system, reflected in the divergent national and foreign incarceration of the 1990s¹³²⁸. Again we have, not just migrants incarceration, but their *over*-incarceration; following not from their economic marginality alone, but from their economic marginality *combined with* their political exclusion. The *over*-incarceration is then an expression of the *insider-outsider* dualism of 1990s Italian penalty.

V. Conclusions

In the 1990s, Italy received (and began to acknowledge) immigrants from non-EU countries, a process that increased and quickened over the decade. Migrants who arrived in Italy found a country ambivalent to migration, in dire need of foreign labour but unprepared to accept migrants as anything *other than* labour. Once past the increasingly policed Italian borders, migrants – employed in the least protected, least remunerated sectors and bereft of the family ties so crucial for stability in Italy – found themselves socially and economically marginalised. They were not excluded from the Italian political economy: they were integrated, but only as subordinate ‘others’, in a position that did not assure stable legal residence, premised on an economic stability that migrants could not achieve.

Their marginalisation was not only a consequence of market conditions but was legally constructed, reproduced by a constant threat of expulsion or detention, precipitated by migrants’ reliance on law for intelligibility in Italy. This process also lent itself to criminalisation: because it marked irregularity, and irregularity itself was assumed to imply deviance; because it pushed some migrants towards some offences; because poverty and crime have often been conflated, and in Italy this link has been racialised, transforming crime into the ‘other’s’ cultural attribute. Marginalisation transformed into penalisation where its practical effects barred access to legal benefits that divert from prison and where manifest irregularity (such as the refusal to show one’s papers) translated into arrest.

¹³²⁶ Melossi (2003, p. 382)

¹³²⁷ *Ibid.*; Solivetti (2004)

¹³²⁸ Melossi (2003, p. 381)

Migration law's definition of immigrants as economic individuals then locked them into a subordinate position that facilitated penalisation. It could do this because, in Italy, immigrants were excluded from the structures and loci of belonging that nationals inhabit. Non-EU migrants depended upon immigration law for their primary definition and for protection. This dependence on legal definition, and a legal definition that relegated migrants to economic marginality, constituted a legal vice. It is this legal vice, and the marginality *as part of the vice*, that contributed to migrants' over-representation in the Italian criminal justice system. Theirs was the penalisation of 'outsiders' and not just of economic 'subordinates'. In this chapter, I have argued that non-EU migrants were outsiders because they were excluded from political belonging, possessing no bargaining power vis-à-vis their host state, and could fall outside its remit. They were bereft of those characteristics that would have allowed them to inhabit the contradictions of Italian politics – the welfare dualisms, the tension between legal pragmatism and legal principle – without falling foul of its penal dictates. In this context, migrants' otherness was primarily a political reality, and it was as political 'others' that they were punished.

This study of the punishment of immigrants thus reinforces the notion that politics are a crucial penal determinant in contemporary Italy. It also emphasises that, within the Italian context, marked by a differential punitiveness in which repression and leniency alternate, leniency is often conditional upon possessing both a legal *and* a political identity. A nation with a highly politicised institutional structure is, unsurprisingly, better inhabited by individuals with a well-rooted political identity. Crucially, this is also true in relation to national penalty. Where individuals, such as migrants, possess a primarily *legal* identity, Italian criminal law reveals itself as particularly strict. It becomes the purveyor of a penal severity that is distributed selectively, varying across an *outsider-insider* dualism.

Chapter 7 – Conclusions

In this thesis I argue that Italian penalty is a ‘volatile penal equilibrium’, oscillating between repression and leniency, whose variance is determined by short-term political dynamics. The politicisation of state institutions in Italy anchors its structural-institutional features to political dynamics – conflict between ideologies, or the competition between state and intermediate political orders. Italian institutions tend to amplify, rather than restrain, the effects of political conflict on penalty. This setup is sustained by the tensions of Italian political dualisms, by the contradictory structural dynamics and opposing interests that, alongside widespread political conflicts, express and reinforce Italy’s institutional instability. Italy remains a contested state, torn between centralisation and fragmentation, with institutions pervaded by political competition. In this conflictual and politicised environment, belonging to political groupings becomes the key to overcome the state’s shortcomings – the key to accessing welfare entitlements and the pre-condition for diversion from formal penal censure. This is a context which ‘outsiders’, *political* outsiders – such as migrants – find difficult to navigate and in which ‘outsiders’ may find themselves over-penalised, particularly where outsidersness combines with economic marginality.

I. The Italian challenge

Italian penalty challenges existing models of contemporary western penalty, including the theoretical models from which I began, as Italy displays penal trends that escape unitary categorisation. Its prison rates fluctuated significantly between 1970 and 2000, a feature that stands in the way of characterising the nation in terms of unequivocal ‘penal escalation’. However, if we cannot talk of Italy in terms of increasing punitiveness, neither can we talk of it in terms of penal moderation: prison rates in Italy *did* increase, albeit erratically, over the three decades and cannot be described as symptoms of penal stability. Rather, Italy exhibits a differential punitiveness. Its penalty is a volatile equilibrium, whose prison trends oscillate over the years, with full-scale penal expansion staved off by safety valves such as amnesties and selectively targeting of punitiveness (Chapters 2 and 6).

Italy challenges existing theories of penalty in terms of their observed penal trends, the social phenomenon that Garland, De Giorgi, and Lacey endeavour to explain¹³²⁹. Italy also challenges the authors’ explanatory frameworks, as often it does not comfortably fit the political, economic and institutional variables operationalized in existing analyses of western

¹³²⁹ De Giorgi (2006); Garland (2001); Lacey (2008)

penalty. Thus Italy does not, and did not, possess a welfare state similar to Britain's immediate post-war welfare state whose demise Garland decries. This suggests that analyses of Italian penalty cannot rely on the shrinking of the welfare state and its penal corollaries as causes of penal change. Similarly, given the highly fragmented nature of the Italian political economy it is not possible to presume, à-la De Giorgi, that Italy has transitioned from Fordism into post-Fordism and from Fordist to post-Fordist penalty¹³³⁰. Even seen through *The Prisoner's Dilemma's* comparative and institutional framework, Italy poses challenges¹³³¹. It is a 'mixed' political economy¹³³² that falls outside the varieties of capitalism (VoC) poles – liberal and co-ordinated market economies – on which Lacey builds. However, Lacey's analysis remains the most fruitful: my work shares its emphasis on specific institutional dynamics, rather than general meta-theories of cultural or economic changes, and it is by undertaking an institutional analysis of Italy that I have elaborated a systematic explanation of Italian prison trends.

II. Italian penalty – the penalty of politics.

When applied to Italy, an institutional analysis points to the importance of political variables, which have only recently started to be addressed as primary determinants in contemporary theories of western penalty. The nature of the Italian state and its institutional setup lead short-term political dynamics to be reflected in Italian penalty. The political volatility experienced in Italy between 1970 and 2000 feeds into the penal volatility of the same period. To argue that the Italian institutional setup conveys political dynamics into penalty invites the question of how and why Italian institutions produce this effect. This is a particularly interesting question in light of Lacey's argument according to which certain institutional configurations contribute to penal stability (for example in CMEs)¹³³³. In Italy, however, we witness a *politicisation of state institutions*, such that its state is not 'neutral' (Chapters 3 and 4). Italy is 'proportionalistic and conflictual', inhabited by conflicting political interests, each of which finds a space to influence decision-making¹³³⁴. In my research I have analysed conflict between judicial and political classes, within judicial factions and between different judicial penal philosophies, between political parties and party factions, and between different political interests. I have shown that the Italian political system does not have a coherently institutionalised way of dealing with such conflicts (by contrast, for example, to Germany). The warring of various political groupings produces political volatility, which favours *penal*

¹³³⁰ See Chapter 1

¹³³¹ See Chapter 1

¹³³² Molina and Rhodes (2007)

¹³³³ See Chapter 1

¹³³⁴ Pasquino (2002, p. 21)

volatility as each level of political conflict is left to produce, directly or indirectly, pressure towards penal repression or penal leniency. In Chapter 2, I showed how the changing incidence of these pressures is visible in Italian prison rates and their oscillation.

Italian penalty is influenced by politics not just through the institutionalisation of conflict. Its penal volatility is also influenced by Italy's dualisms: one dualism sees a *split between centre and periphery*, with the Italian state at once centralised and fragmented¹³³⁵; a tension also exists between *principle and pragmatism*, between formal and pragmatic policy tools such as amnesties or regularisations of non-EU migrants; there is a dualism between *public and private networks*, a tug of war between the state's formal claims to complete allegiance, and the reality of an allegiance due, primarily or in parallel, to other sub-state groupings. A similar public-private dualism is visible in welfare provision, where the Italian state makes claims to comprehensive provision of welfare but needs private forms of welfare to supplement its deficiencies. This division partially explains the divided allegiances mentioned above, and helps explain another penally-relevant dualism – *insiders and outsiders*. Insiders are those who can rely on legal and political identities. They are citizens, with stable legal belonging, but are also part of *additional* political groups. This double belonging buffers insiders from economic hardship and, crucially, allows them to be subject to informal social control rather than formal penal censure. Admittedly, the extent of this reliance will vary for insiders (some are more 'inside' than others). However, it remains true to say that for outsiders – such as (but not only) non-EU immigrants – the absence of complementary legal and political identities results in greater exposure to the penal law. There are both fewer incentives for informal resolution of conflict and more structural opportunities for penal exclusion in relation to outsiders. Conditions of inclusion and their institutional anchorage are a key feature of punishment in Italy. The outsider/insider dualism illustrates another political, and penal, duality – between *formal and informal social control*.

How do these dualisms explain Italian penalty? I argue that each dualism, like every conflict, can be understood in terms of pressures towards penal repression or leniency. In some cases the differing pressures result from the varying *purchase and role* of penal law, and the dualisms can be articulated in terms of this purchase and role. Looking again at the tension between formal and informal social control, for example, it appears that in some cases the penal law has had a minimal role and, as an expression of state authority, has had varying purchase (Chapters 3 and 4). The issue of how conflicts and dualisms dictate penal effects cannot be resolved simply. Some political conflicts produce opportunities either for penal

¹³³⁵ Cotta and Verzichelli (2007, p. 173)

repression or leniency, and the dualisms influence when these opportunities materialise in penal terms. Thus, the relation between judiciary and political class produces both expansive judicial powers and a judiciary convinced of its role as representative of legality. This creates some opportunity to deploy, and incentives towards deploying, the penal law. Where this opportunity structure meets outsiders – such as migrants – it may lead to their penal exclusion. In this case, the existence of the insider/outsider dualism provides penal subjects against which penal repression can materialise.

The following sections summarise the sources of Italian penal trends by reference to some of the political conflicts and dualisms incorporated into Italian state institutions. Before moving to this explanation it is worth pointing to another key feature of the Italian polity: considering its history, we can observe that Italy's institutions do not 'work together' to produce a relatively 'coherent' state setup¹³³⁶. Conflict is incorporated into Italian institutional structures and is not just part of its political life. So if, in other national contexts, institutions seem to tame political conflict in some way – such that from a bird's eye view they present a more coherent scenario – in Italy this has not been the case. Though the state has developed to work despite constant conflict, it has not developed in such a way as to temper the conflict. This has led to a divorce between the post-war political 'project', and the present, more fragmented Italian reality. Conflicts and dualisms are an expression of this evolutionary path and partly cause, because they reinforce, Italy's institutional instability. These conflicts find expression in the divided allegiances to the Italian state and its penal law.

The additional conceptual implications of Italy's evolution, which takes us back to the 'Italian challenge', is that the Italian state escapes unitary definition. Italy cannot be characterised using models that presume high levels of institutional coherence. There is, for example, a marked contrast between Italy and the more centralised political institutions of the British 'liberal market economy'¹³³⁷. This is why Italy always appears as a *particular* scenario incapable of being systematised, implying that its penalty likewise escapes systemisation. Contrary to this implication, I have argued that Italian penalty can be systematised by factoring in certain contextual features like political dynamics. The Italian case study suggests that analyses of contemporary western penalty should look more closely at the politics that influence penalty, and how they do so in different contexts. I also argue that Italy points to one aspect of 'politics' of particular relevance to accounts of contemporary penalty in other national contexts: the legitimacy and function of the penal law. In order to understand Italian penal trends, I have had to ask why and when the state will rely on its penal arm; and who, and when, will make use of the penal law. I claim that similar questions can be asked about

¹³³⁶ Trigilia and Burroni (2009)

¹³³⁷ Hall & Soskice (2001); Lacey (2008)

other polities. In accounts of British penal evolution we might ask, for example, why recent calls for ‘law and order’ have been made, and why they have found popular (‘populist’) purchase. We then have to understand how such demands find institutional anchorage, interrogating both the *political viability* of penal trends, and the *structures* that support them. It is essential for analyses of punishment to ‘build a systematic account of how political institutions shape penalty’,¹³³⁸ interrogating the extent to which ‘the distribution of political interests’ as well as ‘political mentalities and climates of [...] opinion’ affect contemporary penalty¹³³⁹.

In the following sections I analyse Italian penalty by reference to political conflicts and dualisms. After reviewing how Garland, De Giorgi and Lacey’s accounts do not satisfactorily explain Italian penal trends, I suggest how my thesis contributes by modifying existing accounts of contemporary western penalty.

III. Political conflicts and penal effects

Political conflict is incorporated in Italy’s politicised institutions, which transmit rather than limit the incidence and influence of conflict. Political conflicts, interacting with Italy’s dualisms, produce tensions towards penal exclusion or penal diversion/reintegration. The alternation between these tensions is the penal mark of a contested state, in which the criminal law functions as a statement of state authority, but where it is unevenly applied and appealed to. How do the various levels of conflict analysed in this thesis shed light on these dynamics? I deal with each conflict in turn, detailing how they interact with Italy’s various dualisms to influence penalty.

i. Conflicts between political interests: clientelism

Like all nations, Italy can be analysed in terms of competing political interests. Historically, these interests have been components *and* competitors *within* the state (Chapters 3 and 4). This particular level of conflict explicitly points to the contested nature of post-war Italy and explains the existence of many of its dualisms.

The warring of political interests, for example, plays a part in constituting the dualism between public and private networks, with its implications for reliance on in/formal social control. Political clientelism is an illustrative case: as seen in Chapter 3, the relationship between patron and clients mimics the relationship between state – as provider – and citizens

¹³³⁸ Lacey (2013, p. 277)

¹³³⁹ *Ibid.*, p. 260

– as entitled recipients of provision such as ‘work income’¹³⁴⁰. In so doing, the clientelistic network enters into conflict with the state, for the client-patron relation competes with the state-citizen relationship. It thus creates two tiers of allegiance, one of which (patron-client) often occurs in the interstices of the law.

By creating a relationship of *servilism* between the client and the patron¹³⁴¹, clientelism weakens citizens’ sense of entitlements vis-à-vis what should be theirs by law. In this relationship, ‘rights are perceived as [...] mere entitlements, satisfied by virtue of a favour’¹³⁴². I have argued that this increases reliance on informal social control in Italy: where rights are not conceived of as such, they will not be pursued *as rights*, with a subsequent restrictive effect on formal legal demands¹³⁴³. This attitude may well extend to the penal law, keeping demands for formal resolution of conflicts relatively low. Clientelism also stimulates reliance on informal social control because of its own illicit nature. The relationship it establishes is one that happens in the interstices of the law (if entitlements are sold off as favours) or as a form of political corruption. In this context, the resolution of conflicts that occur *within the clientelistic network* will also happen outside the law¹³⁴⁴: the clientelistic relationship produces incentives for a ‘parsimonious’ appeal to the criminal law (Chapter 3).

Here we have a conflict of political interests that both expresses and reinforces the political dualism between public and private networks. It impacts upon penalty by creating an opportunity structure for informal social control, enhancing the divergence between public-state criminal law, and social control within private networks¹³⁴⁵. It may, however, also create incentives for the *deployment* of the criminal law, by provoking the state’s reaction in the face of competing interests. The criminal law then becomes a tool for the imposition of an authority that remains highly contested (Chapter 2). This may also shed light on Italian *legalism*, the utopian reliance on the power of law as a tool for the resolution of conflicts and the creation of social cohesion. Legalism embodies notions of the appropriate *role* of the criminal law in a politically conflictual scenario. This has further implications for the actual purchase of law in different contexts.

¹³⁴⁰ Ferrera (1996, p. 25)

¹³⁴¹ Ginsborg (2001, p. 100)

¹³⁴² La Spina (1993, p. 58)

¹³⁴³ *Ibid.*, p. 59

¹³⁴⁴ Resta (2003, p. 94)

¹³⁴⁵ Melossi (2003, p. 381)

ii. Conflicts between political interests: parties and policy constraints, the state and the family.

This analysis does not exhaust the interrelations that exist within the conflict between political interests and the public/private duality. More links can be traced, for example, in its impact on dimensions of welfare provision. The previous section merely serves as an example of the interplay between the various dimensions of Italian politics and their impact on the nations' penal trends. The same is true of the following explanation of conflict between parties.

As we have seen in Chapter 3, during the First Republic, the principal conflict was between the Christian Democratic Party (DC) and the Communist Party (PCI). Of particular interest in this section is how this conflict impacted on the evolution of the welfare state. We recall that conflict between the two parties, as well as divisions within the political Left, occurred within the context of Italy's consensus-oriented system¹³⁴⁶. Within a system with many veto-points¹³⁴⁷, capillary political tension enhanced legislative immobility: reform required consensus, but consensus was not forthcoming. This led to the situation whereby Italy had neither the impetus to develop as a fully corporatist nation, nor the impetus to develop as a fully liberal nation,¹³⁴⁸ and the Italian welfare state developed as 'corporatist' yet 'fragmented'¹³⁴⁹. This meant that the Italian state's claims to comprehensive provision of welfare and labour were never fully realised, a discrepancy enhanced by stark regional differences, for example across the 'three Italies'. The welfare state therefore had to be supplemented by a series of parallel, private, structures. Here we find Italy's private/public welfare dualism.

I have focused on two particular 'supplementary' structures that illustrate this tension: clientelism and the family (Chapters 3 and 4). The family can function as a welfare supplement through the presence of an adult male breadwinner, who typically shares his state-provided entitlements (such as salary, or pension) with the rest of the family. Like the clientelistic network, it also illustrates the dualism between private and public networks in Italy – intermediate normative orders in competition with the state. This conflict between political interests bolsters both the use of the criminal law as a tool to strengthen the state in the face of internal divisions, producing pressures towards penal expansion. Yet it also entrenches the existence of private networks that catalyse reliance on conflict-resolution *outside of* the penal sphere. Occasionally, the diversionary role of the family has been explicit – for example where it acts as a procedural advantage for youth offenders. In this instance the

¹³⁴⁶ Bull and Rhodes (2009, p. 3)

¹³⁴⁷ *Ibid.*

¹³⁴⁸ Salvati (2000, p. 63 and throughout)

¹³⁴⁹ Ferrera (1996, p. 19)

state relies on the family and the ‘variety of soft sanctions’ it exercises¹³⁵⁰, as a corrective structure.

iii. Conflict between parties: particularising the state.

Conflict between parties is important not just because of its constraining effect on Italy’s political economy. It is also important because post-war Italy can be classed as a *partycracy* (Chapter 3), meaning that parties have been the primary political players, dominating the state and its institutions¹³⁵¹. State and institutions, permeated by parties, have absorbed and reflected the competition between them, and the state has thereby functioned along particularistic lines.

This phenomenon has interesting penal implications. Partycracy and clientelism, fragment the state¹³⁵², which appears carved up along particular interest lines, blurring the line between private and public. I argue that the ensuing fragmentation, and the dualism it reinforces, recasts the relationship between state and citizen as one of ‘mutual’ lack of trust. The state sees its relationship with civil society primarily as the imposition of ‘a sovereign state over its subjects’¹³⁵³ – of authority by penal means. Citizens will also see the state in the light of its penal reaction, perhaps one to elude precisely because of its repressive character¹³⁵⁴. However, the imposition may not only fail to command authority, but also fail to curb the illicit practices against which it is directed, particularly if they are embedded within state practices, for example in judicial collusion with corrupt politicians, or particularistic practices. The state then becomes purveyor of severity *and* of illegality.

Illegality is then so ‘widespread’¹³⁵⁵ that we witness an *ex post facto* acceptance of illicit behaviour¹³⁵⁶ which may account for Italy’s tension between principled statement of political intent, and pragmatic political measures responding to a reality that does not match its ideal. We can see amnesties precisely in this light, as pragmatic and short-term solutions to unresolved structural problems (Chapter 2). This *ex post* acquiescence enhances the perception of the state as relatively unreliable: it reinforces citizens’ distrust, increasing reliance on private networks and their potential informal social controls.

¹³⁵⁰ Nelken (2005, p. 232); see Chapter 3

¹³⁵¹ Bull and Rhodes (2009); Cotta and Verzichelli (2007); Selmini (2011)

¹³⁵² Ferrera (1996)

¹³⁵³ Selmini (2011, pp. 174-175)

¹³⁵⁴ See Chapters 2-4

¹³⁵⁵ Melossi (2003, p. 381)

¹³⁵⁶ La Spina (1993, p. 58)

iv. Conflicts within the state: judges and judges; judges and politicians.

The purchase and role of the penal law are also relevant to a discussion of judicial contributions to penal trends, as both are influenced by judicial action. In Chapter 5, I used the notion of judicial legitimacy to explore the interaction between judges and the political class, judges and the public, and judges and other judges. All three sets of interactions have expressed different levels of judicial legitimacy over the decades, and the varying legitimacy of judicial action is highly consequential for judges' influence on penalty at different times. The Italian case confirms the importance of understanding the conditions under which judges are susceptible to political and public influence on punishment.

The relationship between judges and politicians has been, at various times, one of co-operation, collusion and conflict. It has affected judicial legitimacy, and produced varying penal pressures. The collusion that is thought to have existed between portions of the judiciary and political classes, for example during the 1980s, produced incentives *not* to rely on the formal penal law (low public legitimacy). By contrast, the co-operation that occurred between the judiciary and political classes, for example during the 1970s, (high political legitimacy) produced variable incentives. By stimulating contact between the two state branches, it ensured that any judicial advice against penal expansion could find appropriate institutional interlocutors. However, given that co-operation partly occurred over the 'management' of Italy's emergencies and resulted in the creation of significant judicial powers¹³⁵⁷, it also produced the potential for penal expansion by the use of such powers. Judicial action against terrorism/organised crime points to Italy as a contested state, forced to react to frequent attacks against its authority. It also leads us to look at judicial actors as *representatives* of the Italian state (in periods of high public legitimacy), raising the issue of judicial self-conception (changing internal legitimacy).

In Chapter 5, I concluded that, given the structure of the Italian judiciary – composition, institutional position and independence – which has sustained the existence of different attitudes within the judiciary and different interactions with public and political class, judicial action has produced variable penal effects. A heterogeneous judiciary set in a context that offers diverse incentives means that judicial action cannot easily be correlated with penal trends. It is not possible, when considering the judiciary, to predict whether they are incentivised to contain or convey punitiveness. At the end of Chapter 5, I had thus suggested that we look to the subjects of penalty in order to better understand patterns of punishment. The other conflicts summarised in this conclusion, which intersect with the dualism between public and private networks articulations of welfare (Chapter 3, 4 and 6), highlight Italy's insider/outsider dualism, and articulate it in terms of *political belonging*.

¹³⁵⁷ See Chapter 2

IV. Insiders and outsiders.

I argue that political belonging – for example belonging to a political clientele or working in an SME in the ‘Third Italy’ – mitigates formal penal censure where this belonging creates parallel networks of allegiance and conflict resolution. This avoidance should not necessarily be taken to imply illegality: it may mean simply that the penal law is not seen as the appropriate tool to resolve conflicts created by deviance.¹³⁵⁸ The importance of political belonging, may then explain why it is immigrants who, in the 1990s, bear a disproportionate brunt of Italian penal expansion. The deficit in political belonging is particularly true for migrants, though not confined to them. I have argued that migrants’ ‘*outsiderness*’ should be seen in political terms, rather than only in terms of economic marginality¹³⁵⁹. It is true that immigrants generally do occupy conditions of economic marginality due to the interaction of immigration law and labour market demands,¹³⁶⁰ and that this economic marginality precipitates both migrants’ involvement in crime and their criminalisation. However, I argue that economic marginality is insufficient to explain non-EU migrants’ overrepresentation in Italian prisons; this requires the additional consideration of their *political outsiderness*.

In the heavily politicised Italian context, where the informal extra-legal realm is particularly important, ‘political’ belonging is a necessary complement to formal legal identity, allowing people to tap into resources otherwise not available to them. Crucially, political belonging allows citizens to tap into informal resolution of conflicts and hence avoid formal penal censure where such conflicts develop. The incentives to resolve conflicts *without* the penal law are not just expressions of cultural tendencies, but have institutional anchoring. They find support and amplification in political and political-economic institutions, for example partyocracy and clientelistic networks, but also the small and medium enterprises of northern and central Italy – relatively small units that foster mutual investment between members¹³⁶¹. The existence of such structurally-grounded buffers to penal expansion has, I argue, tempered tendencies towards expansion even after the political transition of 1990s and the consequent change in dominant political ideologies. The outcome of these buffers in a new ideological context is a selective deployment of the criminal law that has fallen on migrants as a ready example of political outsiders (Chapter 6). Though in this thesis I have only investigated non-EU migrants, my discussion of political belonging and punishment opens up the agenda for future research, geared at investigating changing conditions of political inclusion and their impact on punishment.

¹³⁵⁸ Pavarini (1994)

¹³⁵⁹ See Chapter 6

¹³⁶⁰ Calavita (2005, 2006); De Giorgi (2006, 2010)

¹³⁶¹ See Chapter 3.

V. Italy in theoretical perspective and penal theory from an Italian vantage point.

In sum, the Italian scenario cannot be readily accounted for by Garland, De Giorgi and Lacey. None of the theories explicitly consider comparable political dynamics, which I have argued are crucial to understanding Italian punishment. Short- and mid-term political dynamics of the kind that I have elucidated in the Italian case are relevant political dynamics in all contexts, and we should recalibrate our analyses of contemporary Western penality to include their more direct consideration as a penal determinant, even where political dynamics are not as visibly interlinked with penality as they are in Italy¹³⁶².

More than this, I claim that political dynamics do, in fact, form an implicit part of Garland and Lacey's theoretical frameworks. In *The Prisoner's Dilemma*, for example, the dimension of politics is one of the multiple layers on which Lacey's analysis rests¹³⁶³. Italy does not fit the VoC models which Lacey's works with, but it *does* show that the dimension of politics can, under certain institutional conditions, operate as a primary factor influencing penal trends. This occurs very clearly in Italy, where the state has not developed the same institutional integration as ideal-type liberal or coordinated market economies, and has consequently experienced political volatility.

Garland's analysis, unlike Lacey's, is not articulated in clearly institutional terms. Yet political dynamics play a part at several stages of *The Culture of Control*. The dynamics are relevant to Garland's discussion of the transformation of the state in late modernity. Garland's account can be seen as a story of penality in political transition, during the course of which law and order has been politicised, and during which political discourse has been *hijacked* by law and order issues.¹³⁶⁴ In this transition, the type of authority commanded by the state has been reconfigured, and the expansion of the penal law, and of punitiveness, speak of a decline in political authority in favour of penal reaction.

We witness a similar but not identical development in Italy during the 1990s, as the penal expansion of the decade can be seen as the penality of a political transition. Admittedly, it would be difficult to talk of the reconfiguration of the myth of the sovereign state in Italy,¹³⁶⁵ given the conflicts and dualisms of the Italian state. However, the 1990s do stand out as a decade of significant change, characterised particularly by the disappearance of longstanding political parties, the primary actors of the Italian polity, and the mediating link between central state and civil society. The disappearance of those parties was also accompanied by the end of the (Red/White) ideological cleavage so crucial to life in the First

¹³⁶² See Lacey (2012, 2013)

¹³⁶³ *Ibid*; Lacey (2008)

¹³⁶⁴ Note that elsewhere Garland himself displays a more explicit interest in politics and punishment: Garland (1990, 2010)

¹³⁶⁵ See Chapter 4

Republic. With the aggregative and socialising effects of parties and ideologies gone, what remained was a partyocracy in which interests were ever more particularised. Many of the First Republic's structures remained, but without the impetus to look outside existing in-groups and into the public realm.¹³⁶⁶

At the same time, the political sphere – new parties, restructured parties and Italian politicians – was interested both in 're-qualifying' itself in the public's eyes after the corruption scandals *and*, paradoxically, in limiting prosecutorial action to prevent further investigation into political misfeasance. The penal law then became a tool to be embraced – a sign of state strength and political catharsis – but selectively. Here we find the impetus to penal expansion, but also to its differentiation. In this changed political context, political belonging remained important but more difficult to *acquire*, with the passing away of parties and ideologies that might have acted as routes to 'insiderness'. Those who belonged did so as a part of already existing, and relatively closed, structures, and not because of the outward-looking and inclusionary effect of political ideologies/parties. Those who arrived from *outside*, such as non-EU migrants, found that they did not belong, at a time when belonging was a primary means to temper the harshness of a (relatively) re-invigorated Italian penalty.

What we must understand about this process, over and above its 'Italian' features, is that it points to the *political nature* of contemporary penalty, a feature that can also be seen in Garland, De Giorgi and Lacey. Recent penal developments express political arrangements within contemporary Western polities; these political arrangements have interacted with institutional structures to produce specific national penal trends.¹³⁶⁷ In certain contexts they have allowed moderation even in the face of putative 'global' pressures towards penal expansion; in others, they have allowed penal expansion and the entry of 'law and order' rhetoric into political discourse. In Italy, they have produced differential punitiveness. The politics that influence penalty are important in all of these contexts, though they are more apparent in some than in others. Their visibility in Italy is due to the nation's institutionalisation of a politics both conflictual and replete with dualisms. However, insofar as it has implications that go beyond the Italian context, this study of Italian penalty hopes to have restored an explicit consideration of political dynamics to the analysis of contemporary penalty in other Western states.

¹³⁶⁶ See Della Porta (2004)

¹³⁶⁷ See Lacey (2013, p. 273)

Appendix to Chapter 1

A brief history of contemporary Italy

This appendix provides a brief, schematic outline of Italy – its political institutions and its history. The account is meant as a complement to the discussions that occur throughout the thesis, in particular where they touch upon political events experienced between 1970 and 2000. The reader should thus bear in mind that what follows is my selection of relevant historical events/institutional features. The latter have been chosen on the sole ground that they help to my analysis of Italian penalty more intelligible to readers, and in particular those unfamiliar with the Italian context¹³⁶⁸. This summary has no pretensions of being an exhaustive account of a highly controversial and contested political experience.

After sketching a basic overview of Italian institutions, my focus in this outline is on the main political events, and the main political players, of the Italian Republic (up until 2000). Events and players function as a crucial backdrop to the processes I analyse in the main chapters.

a. The Constitution; central government; local government.

The Italian Republic was established in 1946 and its Constitution was passed in 1948. The Constitution was drawn up by a Constitutional Assembly, elected by proportional representation, and composed of Italy's various anti-fascist forces¹³⁶⁹. It established that the Republic was a parliamentary democracy, with the President of the Republic at its head. Italy's parliament was designed as composed of two chambers – *Senato* (Senate) and *Camera dei Deputati* (Chamber of Deputies): both chambers must approve legislative acts for the latter to pass¹³⁷⁰. The head of the Italian government is the president of the Council of ministers, and is appointed by the President of the Republic. According to John Foot 'this [structure] has left most of the real power with Parliament itself, and hence with political parties'¹³⁷¹.

The Constitution also established the relationship between Italy's central and local government. It set up an 'asymmetric' form of regionalism¹³⁷² – a system neither fully federal nor fully centralised – based on a three-tier system of 'responsible sub-national governments:

¹³⁶⁸ The current account builds upon six main sources: Cotta and Verzichelli (2007); Foot (2003); Ginsborg (1990, 2001); McCarthy (2000); Pasquino (1995c)

¹³⁶⁹ Foot (2003, pp. 62, 63-70)

¹³⁷⁰ *Ibid.*, p. 67

¹³⁷¹ *Ibid.*, p. 68

¹³⁷² Cotta and Verzichelli (2007, p. 171)

the municipalities (*comuni*), the provinces and the regions'¹³⁷³. Note, however, the delayed implementation of this system, with regions established in 1970¹³⁷⁴. During the course of the 1990s greater steps have been taken to satisfy Italy's 'growing but disorderly demand for federalism'¹³⁷⁵. These range from the direct election of mayors and province presidents (1993); to increasing devolution of 'resources and operational responsibility to local authorities' during the second half of the 1990s¹³⁷⁶. Looking just beyond my reference period (for greater contextual clarity) note that in 2001 the Constitutions' chapter on local government was also reformed. The reform consolidated the changes previously made to the distribution of legislative powers between state and local authorities. It has also widened regional competences to include economic policy and planning¹³⁷⁷. At the end of this process, regions and local governments have 'enhanced their role in the [...] political system'¹³⁷⁸. However, given its persisting weaknesses, (lack of uniformity, complexity, stop and start motion of changes¹³⁷⁹) the system must still be defined as 'transitional'¹³⁸⁰.

b. Buffers against centralisation: the electoral system, checks and balances, the judiciary

Crucial to both the ideation and functioning of Italian political life, was the balance of powers within the Republican set up. This feature, with its sometimes-unexpected consequences, came to play an important role in the evolution of Italian political life and thence penalty. Similarly, and unsurprisingly, the Italian legal system influenced its penal trends both through its rules (legislation and procedure) and through its actors.

Beginning with the Italian electoral system we see that, from its outset and until 1993 the system was a very pure form of proportional representation. After 1993 (and up to 2005¹³⁸¹) the nation shifted to a 'mixed' system, with both PR and first-past-the-post

¹³⁷³ *Ibid.*, p. 178

¹³⁷⁴ *Ibid.*, p. 182

¹³⁷⁵ *Ibid.*, p. 171

¹³⁷⁶ *Ibid.*, p. 189

¹³⁷⁷ *Ibid.*, pp. 192-193

¹³⁷⁸ *Ibid.*, p. 193

¹³⁷⁹ *Ibid.*

¹³⁸⁰ Cento Bull and Gilbert (2001, p. 199) Quoted in Cotta and Verzichelli (2007, p. 194)

¹³⁸¹ In 2005 further changes were made to Italian electoral law. See: Legge 21 Dicembre 2005, n. 270 in materia di 'Modifiche alle norme per l'elezione della Camera dei deputati e del Senato della Repubblica' The law approved in 2005 reintroduced proportional representation for the election of deputies and (elective) senators. It introduces 'large regional constituencies in both chambers' and a blocked list system, with no preference votes (a feature characteristic of the pre-1993 system). The reform has also introduced thresholds that aim to encourage coalition formation: '[the] threshold for a party which runs alone, with no links to any "majoritarian" cartel, is [...] challenging', 4 percent of nationwide vote compared to 2 percent for parties 'linked to other lists in a cartel': Cotta and Verzichelli (2007, pp. 91-92)

components¹³⁸². The initial choice of PR points to one of the primary concerns that informed the construction of the Italian Republic. It speaks of a desire to build checks and balances into the national framework¹³⁸³, with the aim of creating buffers against the excess centralisation of powers (an extreme form of which Italy had experienced under Fascism). Arguably, it is in the interest of establishing such checks and balances that Italy has a Constitutional Court, with the power to declare laws unconstitutional: ‘the civil and penal codes are now full of minor and major amendments to laws and norms, imposed over time by Constitutional Court decisions’¹³⁸⁴. The structure of the judiciary as a whole could also be seen as an example of the balance of powers established in Italy. The judiciary’s independence is notable in this respect (see chapter 5), as the judiciary benefits from total independence from the executive and the legislature. Note also that Italy is a civil law, rather than common law, country. At its most basic ‘Italian law has been shaped around two broad legal codes: the *penal code*, and the *civil code*’¹³⁸⁵. Its penal code is still the 1930 Rocco code, i.e., the code passed under Fascist rule; it has never undergone wholesale reform, but has been subject to modifications during the course of Italy’s republican history (for which see chapter 2). In terms of penal procedure Italy was, up until 1989, a ‘mixed inquisitory process [with] an inquisitory pre-trial phase and an accusatory trial phase’¹³⁸⁶. In 1989 penal procedure was reformed, with a view to aligning it with the American adversarial system¹³⁸⁷. Commentators agree that the reform has in fact produced a ‘mixed’ system, with a layering of accusatorial and adversarial features¹³⁸⁸ (see chapter 5).

c. The cold war at home and abroad: international divisions and mass parties.

Leaving Italy’s institutions to look at its history, we should note first that Italian post-war history was strongly influenced by cold-war dynamics, affecting the shape and influence of Italian political parties. Up until the early 1990s Italy was a country of mass parties – ‘with political sub-cultures that spread their tentacles deep into civil society, the economy and cultural spheres’¹³⁸⁹ – such as the Christian Democrats (*DC* 1942-1994) and the Communist

¹³⁸² For a more detailed account of the 1993 electoral law see Cotta and Verzichelli (2007, pp. 75-77)

¹³⁸³ Foot (2003, p. 65)

¹³⁸⁴ *Ibid.*, p. 68

Note that the establishment of the Court was delayed until 1956.

¹³⁸⁵ Foot (2003)

¹³⁸⁶ ‘Two phases led to prosecution for crimes: an inquisitory pre-trial phase and an accusatory trial phase’: *ibid.*, p. 88. See chapter 5 and appendix to chapter 5.

¹³⁸⁷ See for example: Grande (2000)

¹³⁸⁸ *Ibid.*

¹³⁸⁹ Foot (2003, p. 8)

Party (*PCI* 1921-1991). The two were primary contenders in the Italian political struggle¹³⁹⁰. This was so at an electoral level but also in terms of the influence each 'bloc' had within Italian society. The *PCI* in particular had a '[highly] developed membership organization'¹³⁹¹ as well as multiple associations across social sectors: culture, sports, leisure organizations and so on¹³⁹². The *DC* was initially weaker in this respect, but could count on the support of religious organizations and, after 1948, on its effective control of the state and state bureaucracy¹³⁹³.

The *DC/PCI* rivalry clearly mirrored the international division between communism and anti-communism¹³⁹⁴. This produced a situation whereby the *PCI* was forever excluded from central – though not local – government because of its ideological affiliations, and its links to the Soviet Union¹³⁹⁵. By contrast the *DC* had as its primary credential that of being anti-communist: reason enough for it to maintain power, and a shield against criticism of the *DC*'s political attributes¹³⁹⁶. Giovanni Sartori has described this system as one of 'polarized multipartitism' – with a multiplicity of parties, set in between two 'anti-system parties'¹³⁹⁷. In this system only 'peripheral alternation' was possible, i.e., alternation at the level of the 'small centrist parties'¹³⁹⁸ allied with the *DC*¹³⁹⁹.

As of 1947, and until its demise in the early 1990s, the *DC* remained the dominant party in government. This led to 'an extraordinary [identification] between the Christian Democratic party and the republican state'¹⁴⁰⁰. However, this should not be taken to imply a necessary coherence of aims in the party's mode of governing¹⁴⁰¹. According to Ginsborg, the *DC* was in fact beset by numerous tensions over ideology, representation of interests and party organization¹⁴⁰². At the level of ideology, the tension was between 'traditional Catholic

¹³⁹⁰ In 1976 the two parties together had a joint percent of 73.1 percent of votes. Even in 1987, and with a shrinking electorate, their cumulative percentage was of 60.9% of votes. For a detailed breakdown of valid votes obtained by Italian parties, in the elections to the chamber of deputies (1948-2001) see the tables provided by Ginsborg (1990, p. 442); 2001, p. 347)

¹³⁹¹ Cotta and Verzichelli (2007, p. 44)

¹³⁹² Cotta and Verzichelli (2007); Foot (2003)

Note also the *PCI*'s links with the left-wing trade union *CGIL* (*Confederazione Generale Italiana del Lavoro*).

¹³⁹³ Cotta and Verzichelli (2007, p. 44)

¹³⁹⁴ *Ibid.*, p. 42

¹³⁹⁵ *Ibid.*, p. 44

¹³⁹⁶ For example its clientelistic practices: *Ibid.*, p. 43

¹³⁹⁷ The *PCI* on the left, and the Fascist Party's heir – the *MSI* or *Movimento Sociale Italiano* – on the right.

¹³⁹⁸ *Ibid.*, p. 43

¹³⁹⁹ Sartori (1976)

¹⁴⁰⁰ Ginsborg (1990, p. 153)

¹⁴⁰¹ *Ibid.*

¹⁴⁰² *Ibid.*

social theory' and 'liberal individualism'¹⁴⁰³. At the level of representation, tensions were engendered by the DC's desire to be 'inter-classist': not of the right, nor of the bourgeoisie, but a party of the centre, capable of representing capital; as much as the middle classes (urban and rural); as much as Catholic workers¹⁴⁰⁴. Organizationally, tensions were embodied and entrenched by the DC's notable factionalism. This was caused, in part, by its failure to develop strong central leadership¹⁴⁰⁵. Each faction 'rotated around one or more leaders of national importance, was soundly based in at least one region of the country, and demanded its share of governmental power'¹⁴⁰⁶; DC factions also controlled important ministries. Unsurprisingly, this fragmented the party and its mode of governance. Likewise so did the coalition governments into which the DC was forced during its time in power¹⁴⁰⁷. Indeed, in exchange for their support and thus for parliamentary majority, its allies too demanded some influence over government policy¹⁴⁰⁸. This situation weakened both the collegiate role of the Italian cabinet (*Consiglio dei Ministri*); and left Parliament with a subservient role to both 'minor sectional or even individual interests'¹⁴⁰⁹. State resources were fragmented and particularised in order to satisfy the DC's factions and coalition partners. This strategy was made possible by the DC's increasing financial strength and autonomy, achieved through the creation of new government agencies and by increasing state control over the banking sector¹⁴¹⁰.

Over time, and despite Italy's 'polarization', the Communist Party and the Christian Democrats did grow closer together. In fact, between 1976 and 1979 the PCI provided 'common parliamentary support for a DC Cabinet'¹⁴¹¹. This was the time of the so-called 'national solidarity' governments. These governments were possible in part because the PCI had gradually loosened its links with the Soviet Union and 'moderated' its position¹⁴¹². They also fulfilled a number of diverse functions. On the DC's side, they served to defuse the PCI's electoral strength (in 1976 the party had polled 34.4% of votes for the chamber of deputies

¹⁴⁰³ *Ibid.*

¹⁴⁰⁴ Cotta and Verzichelli (2007, p. 46); Ginsborg (1990, p. 154)

Admittedly the DC's wide following across many, and different, Italian regions has led Cotta and Verzichelli to dub it the 'only fully national party' in Italy (2007, p. 47)

¹⁴⁰⁵ The existence of preferential voting as part of Italy's electoral system, meant that factionalism also had an electoral side to it: *ibid.*, p. 44

¹⁴⁰⁶ Ginsborg (1990, p. 154)

¹⁴⁰⁷ For example, the government of 1962 saw the DC allied with the Social Democrats and the Republicans. This was one of a number of 'centre-left' governments that the DC inhabited during the 1960s: *ibid.*, pp. 254-297

¹⁴⁰⁸ *Ibid.*, p. 154

¹⁴⁰⁹ *Ibid.*, p. 155

¹⁴¹⁰ *Ibid.*, p. 156

¹⁴¹¹ Cotta and Verzichelli (2007, p. 44)

¹⁴¹² Sartori (1976)

compared to 38.7% polled by the DC). The then leader of the DC – Aldo Moro – aimed to ‘see the full legitimization of a reduced Communist Party at last capable of competing with a reformed Christian Democratic Party, though never able to defeat it’¹⁴¹³. The leader of the PCI – Enrico Berlinguer – was pursuing his vision of a ‘historic compromise’: an alliance between Communist, Christian Democrats and the Socialist Party (*Partito Socialista Italiano* – *PSI*) that would prevent Italy from splitting into two blocks, and would ‘[insulate] the DC and the [middle classes] from authoritarian temptations’¹⁴¹⁴. Finally, it was in the interest of both parties that they should be involved together in braving the economic crisis, and the terrorist threat that Italy was then facing¹⁴¹⁵.

It was, in the end, the assassination of Aldo Moro by the left-wing terrorist Red-Brigades, that put an end to the ‘historic compromise’. The period of ‘national solidarity’, however, had been enough to weaken the PCI¹⁴¹⁶: by the 1980s, the party had returned to its erstwhile role of permanent opposition, but with declining electoral support¹⁴¹⁷.

d. The 1960s and 1970s: economic crisis, social movements and political terrorism

Of all the events that occurred between 1960 and 1970, I focus here on economic crisis, social mobilisation and the rise of terrorism. I look at the economic crisis because it provides some initial insight into Italian responses to the events thought to mark the beginning of post-Fordism. Social mobilisation, because it helps us understand the reforms effected to Italian welfare during my research period (see chapter 3); terrorism because it features throughout the thesis as a form of crime that sheds light on the challenges faced by the Italian state and their various penal effects.

Beginning with mobilisation: the late 1960s and the 1970s were marked by fervent social and political mobilisation among ‘students, workers, women, [and] youth’ in Italy¹⁴¹⁸. In part the mobilisation followed similar ‘student revolts’ in other European nations and in the United States. However, Italy’s ‘1968’ (as it is commonly known) was *uncommon* in its breadth and duration: a decade as opposed to the few months of the French ‘May 1968’¹⁴¹⁹. The years 1968 to 1978 also saw ‘a level of collective action and conflicts [...] not matched

¹⁴¹³ Pasquino (2000, p. 76)

¹⁴¹⁴ Ginsborg (1990, pp. 353-357)

Berlinguer’s reference-point here was the overthrow of the Chilean socialist government in 1973.

¹⁴¹⁵ *Ibid.*, p. 45

¹⁴¹⁶ For an evaluation of the historic compromise and the years of national solidarity see Ginsborg (1990, pp. 354-358; 376-379)

¹⁴¹⁷ Cotta and Verzichelli (2007, p. 45)

¹⁴¹⁸ Allum (2000, p. 26)

¹⁴¹⁹ *Ibid.*, p. 27

elsewhere' in Europe¹⁴²⁰. Consequently Italy experienced profound social changes, some of which were expressed and entrenched in legislative enactments. Thus in 1970 the Workers' Statute was passed, entitling many (though not all) Italian workers to greater rights and better working conditions. Family law was reformed in 1975, establishing 'parity between the two partners in marriage'¹⁴²¹. In 1977 voluntary abortion was decriminalised: a change that benefitted from the input of the Italian women's movement. The welfare state was also expanded in this period with, for example, the 1978 establishment of the National Health Service.

These events were occurring against the backdrop caused by economic crisis, experienced in Italy as in other advanced capitalist economies¹⁴²². According to Ginsborg, Italy was one of the European economies most vulnerable to the crisis: a state of affairs that reflected the nation's over-reliance on oil; a capitalist class that 'had [...] responded to industrial unrest with investment strikes and the flight of capital'; weak governments; and a strong labour movement, unwilling to have the crisis absorbed by decreasing wages¹⁴²³. The Italian economy experienced alternating periods of recession and recovery, as did many other advanced capitalist countries during the crisis¹⁴²⁴. Italy suffered from stagnating production and (slowly) increasing unemployment¹⁴²⁵. But the nation also responded to the crisis in ways particular to Italian conditions, i.e., with 'a very high and lasting rate of inflation, the growth of the "black" economy, a limited decline in production and [a] spiralling public-sector deficit'¹⁴²⁶. During this period Italian employers increasingly de-centralized their production to small firms, where trade union activism was difficult, and tax avoidance easier. Informal labour, with low labour costs but high profits, also held up the Italian economy despite the recession¹⁴²⁷. Thus, the nation managed to maintain a more vital economy than captured in labour statistics suggested¹⁴²⁸; though the cost was borne by public sector spending and public deficit¹⁴²⁹, both of which increased across the crisis years.

During the 1960s and 1970s Italy also experienced political conflict in a particularly violent form: terrorism. Terrorism was 'Red' (left-wing) and 'Black' (right-wing). 'Red' terrorism was the extreme expression of dissatisfaction with the Italian institutions, as 'the most

¹⁴²⁰ *Ibid.*

¹⁴²¹ Ginsborg (1990, p. 370)

¹⁴²² This synthesis of the economic crisis in Italy, is based on Ginsborg's account: (1990, pp. 351-354)

¹⁴²³ Ginsborg (1990, p. 352) See also: Salvati (2000, pp. 35-59)

¹⁴²⁴ Ginsborg (1990, p. 352)

¹⁴²⁵ *Ibid.*, p. 353

¹⁴²⁶ *Ibid.*, p. 152

¹⁴²⁷ *Ibid.*, p. 353

¹⁴²⁸ *Ibid.*

¹⁴²⁹ *Ibid.*, p. 354

militant sectors of the working class and of the student movements came to the conclusion that [...] official and institutional politics' would not bring 'fundamental change'¹⁴³⁰. As Percy Allum claims, some left-wing groups were thus 'willing to countenance [...] terrorism' with the aim of 'mobilising the working class for revolution'¹⁴³¹. Red terrorist groups – of which the Red Brigades (*Brigate Rosse* or *BR*) are a primary example – waged an attack against the central state by 'kidnapping and assassinating state personnel': from judges, to public sector workers, to police officers and to party officials¹⁴³². Notable is the 1978 kidnapping and assassination of the leader of the Christian Democrats, and erstwhile Prime Minister, Aldo Moro.

Black terrorism, by contrast, aimed to 'block the leftward shift' of Italian society as expressed, for example, in the industrial mobilisation of 1969 (the 'Hot Autumn'). It did so through a 'strategy of tension' (that predates the explosion of red terrorism), i.e., the planned creation of disorder to be 'blamed on the Left, in order to create the conditions for a military coup'¹⁴³³. 'Black terrorists' were, in Foot's analysis, 'right-wing elements within the security forces, working with NATO agents and Italian neo-fascists'¹⁴³⁴; groups that, as Allum claims, 'could count on the protection and connivance of the State authorities'¹⁴³⁵. A crucial event in the strategy of tension was the 1969 bomb placed in Milan's Piazza Fontana; one of numerous bomb strikes between the years 1969 and 1980¹⁴³⁶.

Judicial action was eventually undertaken both against those engaged in the strategy of tension, and against left-wing terrorism, though the connivance of state authority has arguably prevented full knowledge of black terrorism. By the mid 1980s 'terrorism of the right and left' had been defeated; thanks to the action of 'some courageous judges and loyal state functionaries'; and with the contribution of former terrorists turned state witnesses (*pentiti* – 'the penitent')¹⁴³⁷.

e. Organized crime

The state faced also a second challenge from organised crime during much of its Republican history. Initially concentrated in Western Sicily, Italian organised crime – the Mafia – expressed the central state's failure to 'impose authority and establish consent' in the

¹⁴³⁰ Pasquino (2000, p. 75)

¹⁴³¹ Allum (2000, pp. 28-29)

¹⁴³² *Ibid.*, p. 30

¹⁴³³ Foot (2003, p. 57)

¹⁴³⁴ *Ibid.*

¹⁴³⁵ Allum (2000, p. 29)

¹⁴³⁶ Foot (2003, p. 57) For a more detailed reconstruction of terrorism and the strategy of tension in Italy see: Della Porta (1995); Ginsborg (1990, pp. 333-335; 361-366; 379-387)

¹⁴³⁷ Pasquino (2000, p. 75)

region¹⁴³⁸. Its primary activities have been drug trafficking and the ‘politico-military control’ of given territories¹⁴³⁹. Mafiosi are, in one influential analysis, entrepreneurs whose service is protection against violence, the same violence whose control the state has failed to monopolise¹⁴⁴⁰. Threats against individuals’ personal or economic integrity, inflicted at the hands of organised criminals, also contribute to keeping demands for private protection high¹⁴⁴¹.

The 1970s saw the Mafia ‘[flourish] as never before’ in Italy, as a consequence of an expansion in the international drugs trade¹⁴⁴². Involvement in the drugs trade increased the power wielded by organised criminals; it also destabilised the Mafia¹⁴⁴³. Between 1981 and 1983 this gave rise to fierce intercline warfare between competing internal groups within the Sicilian Mafia. Conflict with the State also increased during this period, with a number of state servants – judges, local politicians, members of the armed forces – assassinated by organised crime¹⁴⁴⁴.

During the 1970s and early 1980 organized crime expanded in Italy. The phenomenon was not just limited to Sicily and by the 1980s ‘it was possible for the first time to talk of an interlinked even if constantly conflictual southern Italian criminal class, with increasing activities and contacts in the centre and north of the country’¹⁴⁴⁵. This expansion ‘benefited’ from the collusion of ‘significant sectors’ of the political class¹⁴⁴⁶. An exchange mechanism was established whereby organised criminality could ensure votes to politicians, from the areas it controlled; and politicians could ensure protection for organised criminals¹⁴⁴⁷. This type of relationship was established first with the Christian Democracy and then, from 1970 onwards, with other government parties¹⁴⁴⁸. Crucial to this relationship were the resources available to the Italian political class, often distributed with a view to reinforcing personal clienteles, in whose distribution organized crime sought to participate¹⁴⁴⁹.

Despite the collusion between sectors of the political class and organised crime, there did exist state servants engaged in opposing the Mafia. Their operations intensified during the 1980s and the decade saw, *inter alia*, the creation of a group of anti-mafia magistrates

¹⁴³⁸ Ginsborg (2001, p. 195)

¹⁴³⁹ Catanzaro (1995, p. 418)

¹⁴⁴⁰ Gambetta (1996)

¹⁴⁴¹ Catanzaro (1995, p. 420)

¹⁴⁴² Ginsborg (2001, p. 199)

¹⁴⁴³ *Ibid.*

¹⁴⁴⁴ Catanzaro (1995, p. 428)

¹⁴⁴⁵ Ginsborg (2001, p. 201)

This criminal class included, as well as Cosa Nostra in Sicily, the Camorra in Campania; the ‘Ndrangheta in Calabria; the Sacra Corona Unita in Puglia.

¹⁴⁴⁶ Catanzaro (1995, p. 421); Ginsborg (2001, p. 201)

¹⁴⁴⁷ Catanzaro (1995, p. 420)

¹⁴⁴⁸ *Ibid.*, p. 420

¹⁴⁴⁹ Ginsborg (2001, p. 203)

including, notably, Giovanni Falcone and Paolo Borsellino¹⁴⁵⁰. With the watershed decision by a senior mafia boss, to cooperate with this group, a ‘maxi-trial’ (*maxi-processo*) was held in 1986-7:

‘Four hundred and fifty-six persons were accused of various crimes, among them legendary [Mafia] leaders [...] At the end of the trial in [...] 1987 the court found 344 defendants guilty and inflicted nineteen life sentences on Mafia leaders’¹⁴⁵¹

The Italian Cassation Court confirmed the verdicts in 1992¹⁴⁵²; the Mafia soon exacted its revenge: first through the assassination of politicians, and erstwhile ‘partners’ of the Mafia, who had failed to protect them¹⁴⁵³; then with the assassination of judges Falcone and Borsellino (in May and July 1992 respectively). Moreover, in 1993 bombs exploded in some of Italy’s major cities including Florence and Milan (i.e. cities outside the regions where organised crime ‘traditionally’ operated), as a further warning against the state’s anti-mafia activities¹⁴⁵⁴.

f. From 1980 to 1990: a blocked democracy

Thus, during the 1980s Italy witnessed the rise, and partial fall, of organised crime. At the level of politics, the 1980s are also the period of what Pasquino terms a ‘blocked democracy’¹⁴⁵⁵. This is the era of the *pentapartito* (1980-1992) and came after the centrist coalitions of 1947 to 1962; the centre-left coalitions of 1963 to 1976 and the national solidarity governments of 1976 to 1979¹⁴⁵⁶.

As its name indicates, the *pentapartito* was a five party coalition government composed of the Christian Democrat and Socialist Parties, as well as the Liberals, Republicans and Social Democrats¹⁴⁵⁷. The PSI (1892-1994) was originally a Marxist workers’ party, and was

¹⁴⁵⁰ *Ibid.*, p. 208

¹⁴⁵¹ *Ibid.*, p. 209

¹⁴⁵² Catanzaro (1995, p. 420)

¹⁴⁵³ For example Salvo Lima see: Ginsborg (2001, p. 212)

¹⁴⁵⁴ *Ibid.*, p. 280

¹⁴⁵⁵ Pasquino (2000, p. 76)

¹⁴⁵⁶ *Ibid.*, p. 69 Centrist coalitions were those composed of the DC and ‘minor lay parties’: [http://www.treccani.it/enciclopedia/centrismo_\(Dizionario-di-Storia\)/](http://www.treccani.it/enciclopedia/centrismo_(Dizionario-di-Storia)/) Accessed February 2013

¹⁴⁵⁷ The Italian Liberal Party (*PLI* 1922 – 1994) was a conservative party with a free-market approach to economics. It was part of the governing coalitions between 1945 and 1952, and part of the opposition to Italy’s centre-left governments from the early 1960s. Between 1985 and 1994 the PLI was a member of the pentaparty. Involved in *Tangentopoli* it disbanded in 1994: [http://www.treccani.it/enciclopedia/partito-liberale-italiano_\(Dizionario-di-Storia\)/](http://www.treccani.it/enciclopedia/partito-liberale-italiano_(Dizionario-di-Storia)/) Accessed February 2013

The Social Democratic Party (*PSDI* 1947 – today) represented the social-democratic wing of

an important player to the left of the Republican political spectrum¹⁴⁵⁸. It represented workers but also sectors of the middle class; and until 1956 acted in concert with the PCI. As of 1956, however, the PSI distanced itself from the PCI, and from the early 1960s the Socialists were part of the centre-left ruling coalitions. In 1976 Bettino Craxi became its leader and under Craxi the party joined the ‘pentapartito’. Craxi himself was prime minister between 1983 and 1987: under his leadership the PSI increased its electoral support. John Foot describes the PSI under Craxi as ‘a post-labourist body, breaking [...] with the symbols of socialism [...] and its traditional [working class base]’¹⁴⁵⁹. Pasquino claims that Craxi ‘inaugurated a new style of politics’: one of confrontation with Italy’s ‘politically relevant organizations’, that stood in contrast to the DCs tendency to constant negotiation with the same¹⁴⁶⁰.

The PSI embraced ‘[modern] trends of entrepreneurship, of consumption and individual liberty [...] without [...] any reflexive filters’¹⁴⁶¹. This itself stood in stark contrast with the austerity that the PCI was then advocating. The two parties consequently drew apart; Craxi in fact aimed to marginalise the PCI¹⁴⁶² and, ultimately, the alliance between PSI and DC achieved just this. This marginalisation contributed to halt any political turnover within the Italian political system, that would have followed had the PCI been formally recognised as a plausible political partner. Given their stable and unquestioned presence in power, the government parties grew more powerful and, if Pasquino is correct, they came to benefit from substantial *impunity*. In this environment – characterised by a mentality of ‘enrichissez vous’ – political corruption flourished¹⁴⁶³. The state budget bore the burden of corruption; unsurprisingly, then, under the *pentapartito* the Italian public debt finally surpassed national

the workers’ movement. It split from the PSI in 1947 and participated in the Republic’s governing coalitions as the DC’s ally. It was also part of the first Republic’s centre-left coalitions. The PSDI suffered a decline in support during the 1970s and 1980s; after its participation to the penta-party it splintered, but re-formed after 2000:

[http://www.treccani.it/enciclopedia/partito-socialista-democratico-italiano_\(Dizionario-di-Storia\)/](http://www.treccani.it/enciclopedia/partito-socialista-democratico-italiano_(Dizionario-di-Storia)/) Accessed February 2013

The Italian Republican Party (1895 - today) when founded in 1895 had as its primary aim Italy’s transition from monarchy to republic. After the second-world war, Italy having become a republic, the PRI set to the left of the political spectrum. It partook of the centre-left coalitions of the first Republic. It too was part of the *pentapartito*. The PRI had some involvement in *Tangentopoli*, but was not dismantled, and in 1995 joined the then centre-left coalition: [http://www.treccani.it/enciclopedia/partito-repubblicano-italiano_\(Dizionario-di-Storia\)/](http://www.treccani.it/enciclopedia/partito-repubblicano-italiano_(Dizionario-di-Storia)/) Accessed February 2013

¹⁴⁵⁸ The PSI disbanded following its involvement in the Tangentopoli corruption scandal, but it has since reconstituted as a centre-right party: [http://www.treccani.it/enciclopedia/partito-socialista-italiano_\(Dizionario-di-Storia\)/](http://www.treccani.it/enciclopedia/partito-socialista-italiano_(Dizionario-di-Storia)/)

Accessed February 2013

¹⁴⁵⁹ Foot (2003, p. 177)

¹⁴⁶⁰ Pasquino (2000, p. 77)

¹⁴⁶¹ Ginsborg (2001, p. 151)

¹⁴⁶² *Ibid.*; Pasquino (2000, p. 78)

¹⁴⁶³ Pasquino (2000, p. 79) See also: Ginsborg (2001, p. 282)

GNP¹⁴⁶⁴. However, impunity did not last, and in the late 1980s/early 1990s a series of national and international transformations combined¹⁴⁶⁵, that ended the *pentapartito*, and the political system it inhabited.

g. The 1990s: crisis and transition. From First Republic to Second Republic.

As a whole, the 1990s were a time of time of crisis and transition in Italy. Given the importance of this transition in my thesis, it is worth dealing with it in some detail. Note that the peak of the crisis occurred between 1992 and 1994; though the political transition lasted across the 1990s¹⁴⁶⁶.

Within the space of ten years Italy saw the collapse of its erstwhile party system and the end of its mass parties. Partly this was the result of investigations into political corruption (see below) that left none of the nation's elites untouched: from political elites, through administrative elites, to economic elites¹⁴⁶⁷. The Christian Democrats and the Socialist Party, and their coalition parties within the *pentapartito*, all disbanded during these years, following their involvement in the corruption scandal. The Communist Party had itself been re-defined in 1991, following the fall of the Berlin Wall, and had consequently split. Its heirs were the Democratic Party of the Left (*Partito Democratico della sinistra – PDS*) and the smaller Communist Refoundation (*Rifondazione Comunista - RC*)¹⁴⁶⁸.

As the mass parties were unravelling, a series of popular referenda were promoted, including referenda in favour of electoral reform. In 1993, for example, the electorate was called to vote on whether proportional representation, for elections to the Senate, should be repealed¹⁴⁶⁹. The overwhelming majority of voters agreed that it should¹⁴⁷⁰; an event that forced the political class to promote reform, though it was ultimately under a technical government that the latter was passed. By 1993 Italy had shifted away from proportional representation to a 'mixed' system (25 percent PR, 75 percent majoritarian – see chapter 3) that moved the nation closer to bipolar political competition, though it did not reduce party fragmentation. The new electoral system was a further nail in the coffin of the Italian party

¹⁴⁶⁴ Pasquino (2000, p. 83)

¹⁴⁶⁵ Notably the fall of the Berlin Wall.

¹⁴⁶⁶ See Pasquino (2002, p. 61)

¹⁴⁶⁷ Ginsborg (2001, p. 279)

¹⁴⁶⁸ For a table of the main parties before and after the crisis, see below.

¹⁴⁶⁹ One of the referenda asked whether the public financing of parties should be repealed; 90.3% of those who voted agreed that it should. However, as Pasquino notes, by 1996 a new law had been approved, on state funding to parties, that violated the 1993 referendum (in spirit if not technically): Pasquino (1995b, pp. 130-131); 2002, p. 66)

¹⁴⁷⁰ For a brief history of this and the other referenda of the period see: Pasquino (1995b, pp. 129-131)

system, as its parties were now bereft of the electoral mechanism that had allowed them, by granting them a share of political influence, to partake of Italy's *partitocrazia*¹⁴⁷¹.

Parties' growing arrogance and corruption¹⁴⁷² were particularly noticeable at this time, given the economic crisis that Italy was traversing. In Italy as in Europe the 'great post-Maastricht depression' had struck¹⁴⁷³. In Italy it took the shape of high budget deficits that the then government attempted to tackle by means of a budgetary reform and cuts in fields such as health and social insurance. The government also increased taxation and took some steps towards privatizing public sector companies, including the energy companies ENI and ENEL (for an evaluation of these measures in comparative perspective see chapter 3)¹⁴⁷⁴. It is important to note that at least some of the reforms passed during the period benefited from the agreement (if not support) of the trade unions. During this era 'consensual compromise between government, employers and trade unions became the very basis of governance'¹⁴⁷⁵. The technical government appointed in 1993, under Carlo Azeglio Ciampi, further reformed industrial relations¹⁴⁷⁶: following the changes implemented by the technical government, trade unions and employers' association and governments, were drawn into 'regular tripartite discussion' in the formulation of labour policy¹⁴⁷⁷.

The first elections to be held under Italy's new electoral system saw a panoply of new parties compete (see below). These elections are thought to mark the entry into the Second Italian Republic¹⁴⁷⁸. Amongst the new parties, Silvio Berlusconi's *Forza Italia* (FI) and its allies, the National Allegiance (*Alleanza Nazionale* – AN) and the Northern League (*Lega Nord*), were victorious. Berlusconi was a 'media baron' and an entrepreneur turned politician; he filled the political void left by the demise of the First Republic's parties¹⁴⁷⁹. He promised 'liberty from the state, from the Communists (real and imaginary) and from excessive taxation'¹⁴⁸⁰. His allies were two unlikely bedfellows: on the one hand AN, 'nationalist, with a Fascist past, convinced of the need for a strong centralized and interventionist state', supported mainly in Rome and in the South¹⁴⁸¹. On the other hand we find the *Lega*: 'neolocalist and separatist, racist but not Fascist, anxious for the industrious North to be left in

¹⁴⁷¹ Pasquino (2000, p. 86); 2002, p. 59)

¹⁴⁷² Ginsborg (2004, p. 58)

¹⁴⁷³ Ginsborg (2001, p. 265)

¹⁴⁷⁴ *Ibid.*, pp. 272-273

¹⁴⁷⁵ *Ibid.*, p. 266

¹⁴⁷⁶ The Amato government (June 1992 – April 1993) had been forced to resign over its attempts to end the Tangentopoli investigations: *ibid.*, pp. 275-276.

¹⁴⁷⁷ *Ibid.*, p. 277

¹⁴⁷⁸ See Pasquino (2000, p. 89)

¹⁴⁷⁹ Ginsborg (2001, 2004)

¹⁴⁸⁰ Ginsborg (2004, p. 67)

¹⁴⁸¹ Ginsborg (2001, p. 291)

peace [...], wedded to the free market but not to the State'¹⁴⁸². The *Lega* garnered the vote of erstwhile DC supporters freed, by the end of the Cold War, of the need to vote the Christian Democrats against the 'Communist threat'. The *Lega*'s success in particular, can also be ascribed to its anti-immigrant rhetoric, all the more powerful as Italy suddenly discovered itself a nation of immigration: slowly in the late 1980s and then with greater force in the 1990s (chapter 6).

In later years the coalition created by Berlusconi was to prove victorious; in its early years it was marked by instability. Thus, when in 1994 Berlusconi too was involved in ongoing corruption investigations, the *Lega* strategically withdrew its support and the Berlusconi government fell. After another 'technical' parenthesis, the rest of the decade saw a succession of centre-left coalition governments¹⁴⁸³. The coalition was fragmented, and beset by instabilities which came to a head with a government crisis in 1998. Its main party – the *PDS* 'lacked vision' and had been unable to forge a new identity out of its Communist past¹⁴⁸⁴. However, the centre-left was not without its successes. Crucially in 1996 – following a series of 'drastic economic measures'¹⁴⁸⁵ – it managed to negotiate Italy's re-entry into the European Monetary System, four years after the nation's exit due to devaluation of the national currency¹⁴⁸⁶. These and other achievements were nonetheless not sufficient, or not sufficiently publicised, for the centre-left to garner electoral success¹⁴⁸⁷. In the absence of a strong leadership, the centre-left could not counter Berlusconi, whose revived coalition won the 2001 elections.

h. Tangentopoli

Crucial to the political crisis of the 1990s, and instrumental in the shift from 'first' to 'second' Italian Republics, are the events collectively described as *Tangentopoli*. During the early 1990s (precisely in 1992) a group of Milan prosecutors (*magistrati*) began a 'campaign for legality in public life'¹⁴⁸⁸; or, as Nelken describes it, 'the judges' campaign to remoralize Italian public life'¹⁴⁸⁹. This came in the form of investigations into political corruption, whose primary focus were politicians belonging to the then ruling parties – the Socialist Party and the Christian Democracy¹⁴⁹⁰. The investigation also exposed the connivance of businessmen

¹⁴⁸² *Ibid.*

¹⁴⁸³ For an overview see Ginsborg (2001, pp. 302-316)

¹⁴⁸⁴ *Ibid.*, p. 302

¹⁴⁸⁵ Such as spending cuts and increased taxation: *ibid.*, p. 306

¹⁴⁸⁶ *Ibid.*

¹⁴⁸⁷ Such that by the 2001 elections 'there was little enthusiasm for, or even knowledge' of what the centre left had done: *ibid.*

¹⁴⁸⁸ Ginsborg (2004, p. 59)

¹⁴⁸⁹ Nelken (1996, p. 95)

¹⁴⁹⁰ Ginsborg (2004, p. 60)

in the corrupt exchanges¹⁴⁹¹. As a result of the investigations, Milan was renamed *Tangentopoli* or ‘Kickback city’; but magistrates all over Italy took their cue from the Milan *pool* of magistrates, and the investigations extended across the nation. The term *Tangentopoli* then acquired a broader meaning, and has since been used to indicate the ‘highways and byways of corruption’¹⁴⁹² of Italian public life that emerged during this period. *Tangentopoli* was concerned specifically with the illegal financing of political parties, and the exchange of money between politicians, businessmen and managers of state holding companies. This exchange had, by the early 1990s, become highly systematised¹⁴⁹³. The ‘kickback mechanism’ was widespread: so much so that ‘at one time as many as a third of [parliamentarians] were under investigation’¹⁴⁹⁴. Ministers, party leaders, administrators, civil servants, members of the secret services, all were involved¹⁴⁹⁵. Those involved were accused of crimes ‘such as bribery, corruption, abuse of public office [...] fraud, [...] false accounting and illicit political funding’¹⁴⁹⁶. Nelken has analysed *Tangentopoli* as the product of a confluence of disparate factors that, together, permitted a political ‘revolution’ at the hands of the judiciary. This ‘revolution’ did not aim to overthrow the existing political system ‘in the cause of a new [...] class or [...] a new ideal’¹⁴⁹⁷. Rather, it was conducted from within the law, and within the boundaries of constitutional propriety:

‘*Tangentopoli* was the result of the determined exertion of their powers by some judges, using existing criminal laws approved by politicians themselves, which led to the condemnation not of individuals or factions but of a whole political class.’¹⁴⁹⁸

Tangentopoli was possible, Nelken explains, because of the particular structure of the Italian magistracy: judges’ and prosecutors’ independence, of executive and legislative control, was crucial in this respect. Similarly, the fact that judges and prosecutors belong to the same profession in Italy, meant that ‘each prosecutor [could benefit] from the same guarantee of independence as the judges’, and that each prosecutorial office could enjoy a high degree of autonomy in its decisions¹⁴⁹⁹. These structural factors combined, during *Tangentopoli*, to

¹⁴⁹¹ Ginsborg (2004, p. 83); Pasquino (2000)

¹⁴⁹² Ginsborg (2001, p. 257)

¹⁴⁹³ Nelken (1996)

¹⁴⁹⁴ *Ibid.*, p. 97

¹⁴⁹⁵ Ginsborg (2001, p. 279)

¹⁴⁹⁶ Nelken (1996, p. 97)

¹⁴⁹⁷ *Ibid.*, p. 96

¹⁴⁹⁸ *Ibid.*

¹⁴⁹⁹ Moreover, ‘prosecutors [in Italy have tended to] think of their role as being like that of the judge concerned with [...] the ideal of working to ensure respect for the law’. Prosecutors are not, therefore, simply the counterweight for the defence: *ibid.*, p. 100. See chapter 5.

remove the investigations from political attempts to hinder their progress; they also allowed the ‘judges’ revolution’ to gain momentum (see chapter 5).

The timing of *Tangentopoli* must also be linked to the particular politico-historical conjuncture that we have been describing in this section: ‘the ferment of political activity’ which saw the rise of the Northern League, and the referendum votes on the electoral system and ‘on the direct election of local mayors’¹⁵⁰⁰. The end of the Cold War and the consequent drying up of foreign funds for the party system; the economic crisis and business’s reduced willingness ‘to keep paying bribes in the face of decreasing returns’ from the political class: all these events combined to weaken the political system and its parties. They also contributed to rupture the ‘silent collusion [...] between the bribe givers and takers’, creating fertile ground for the *Tangentopoli* investigations to succeed where previous investigations had failed¹⁵⁰¹.

As *Tangentopoli* progressed ‘[both] magistrates and politicians, as well as much of public opinion called for a solution’ but could not agree on what this solution could be¹⁵⁰². The magistrates wished to see the various *Tangentopoli* trials reach a verdict, and swiftly¹⁵⁰³. They also urged for laws against corruption in order to prevent a repetition of the events that brought to *Tangentopoli*¹⁵⁰⁴. Politicians were ‘naturally enough [...] more concerned with clemency’¹⁵⁰⁵. The two positions could not be reconciled. By 1998, ‘of the 2970 cases connected’ with *Tangentopoli* only 566 had reached first level verdict; 106 of which not guilty, 61 by reason of the statute of limitations. Though the investigations had contributed to the collapse of the First Republic’s parties, as time progressed *Tangentopoli* was left to ‘fizzle out’¹⁵⁰⁶. In Ginsborg’s evaluation of events:

‘The prosecuting magistrates were too isolated to succeed. After initial enthusiasm for their actions, public opinion became more tepid, alarmed that the enquiries would delve too deeply into all aspects of Italian life. “Accommodations” and illegalities were too much a part of daily transactions for Italians to feel comfortable with an overzealous judiciary’¹⁵⁰⁷.

¹⁵⁰⁰ Nelken (1996, p. 102)

¹⁵⁰¹ *Ibid.*, pp. 102-104

¹⁵⁰² Ginsborg (2001, p. 280)

¹⁵⁰³ *Ibid.*

¹⁵⁰⁴ *Ibid.*

¹⁵⁰⁵ *Ibid.*

¹⁵⁰⁶ *Ibid.*, p. 313

¹⁵⁰⁷ Ginsborg (2004, p. 61) See also Nelken (1996, pp. 107-108)

Note that the ‘overzealous’ portion of the judiciary, was in any case a minority (see chapter 5): other *magistrati* were ‘hostile, suspicious or with guilty consciences’¹⁵⁰⁸. The left-wing parties, though mostly untouched by the investigations, were themselves not willing to support the magistrates and were quite happy to see their efforts wane¹⁵⁰⁹. However, *Tangentopoli* remains significant in one important, and lasting, respect. The investigations into political corruption had ‘severely disturbed’ the balance of power in Italy, but had not replaced it with a new equilibrium between legislative, executive and judiciary¹⁵¹⁰. What is more, they had pitched the judiciary and political classes (or at least portions of each) one against the other. In coming years this conflict was to be amplified and dragged centre-stage.

To sum up: by the end of the 1990s Italy had experienced the collapse of its political system; the decline of its traditional ideologies; the birth of new parties; two technical governments; electoral reform; exit and re-entry from the EMS; and the onset of immigration. This transition into the Second Republic had interesting and noticeable penal repercussions. Although continuities certainly existed between First and Second Republics, it is also true that ‘[at] almost every level of Italy’s political institutions, questions had been asked which, if answered in a determined fashion, promised to alter significantly the nature of Italian public life’¹⁵¹¹.

¹⁵⁰⁸ Ginsborg (2001, p. 254)

¹⁵⁰⁹ *Ibid.*, p. 313

¹⁵¹⁰ *Ibid.*, p. 280

¹⁵¹¹ *Ibid.*, p. 285

Table 1: Italian political parties from First to Second Republic

Elections to Chamber of Deputies (date)	1987	1992	← From 1 st to 2 nd Republic →	1994	1996
	Christian Democrats (DC)	DC		–	–
	–	–		Italian People's Party (PPI)	PPI
	–	–		–	Christian Democratic Centre & United Christian Democrats (CCD/CDU)
				Forza Italia (FI)	FI
	Northern League (LN)	LN		LN	LN
	Communist Party (PCI)	–		–	–
		Communist Refoundation (PRC)		PRC	PRC
		Democratic Party of the Left (PDS)		PDS	PDS
	Socialist Party (PSI)	PSI		PSI	–
	Social democratic Party (PSDI)	PSDI		–	–
	Liberal Party (PLI)	PLI		–	–
	Italian Republican Party (PRI)	PRI		–	–
	Italian Social Movement (MSI)	MSI		–	–
	–	–		National Alliance (AN)	AN

Source: my elaboration on Ginsborg¹⁵¹²

Note: this is only a selection of the main parties that received valid votes at the general elections of 1987, 1992 and 1994.

Where one or more Second Republic parties succeeded a First Republic party, the former

¹⁵¹² *Ibid.*, p. 347

have been placed underneath the latter. For example, the PCI was replaced by both RC and PDS; the Fascist MSI was replaced by AN. Clearly this is just a rough depiction of the evolution of Italian parties and cannot account for the nuances of political re-alignment in Italy between First and Second Republic.

TIMELINE: A Brief History of Italy 1967-2000¹⁵¹³

1967-68: Student rebellion – universities and secondary schools

1969 - ‘Hot Autumn’: almost 1.5 million workers called upon to strike. Trade Unions active participants/organiser of workers’ movement.

1969 – Disturbances in prison; demands are for reforms of system bearing a strong Fascist Legacy (1930 Rocco Code).

1969 – Piazza Fontana massacre. Part of ‘strategy of tension’

1970 - Legislation:

- 1) Workers’ Statute approved (safeguard of worker’s rights)
- 2) Divorce made legal

1970 – Attempt Coup d’Etat: ‘Golpe Borghese’

1970 – Communist Terrorist group -Red Brigades- instituted

1971 – *Economic Crisis: deflation*

1973- General elections

Shift to the right:

MSI – growth; especially in Southern Italy

Centre-right coalition government (DC and co.).

1973 *Economic crisis: stagnation, inflation, unemployment*

Growth of submerged economy. CENSIS estimates for 1979: 15-20% of Italian economy

1973 – Birth of movement for prisoners’ rights.

Revolt within prisons. Creation of short lived Proletariat Armed Nucleus (NAP). Some of its members subsequently joined the Red Brigades

1974 – Referendum on law allowing divorce: 1970 law on divorce kept by majority vote.

May 1974 – Bomb explodes in anti-fascist demonstration in Piazza della Loggia, Brescia

October 1974 – Bomb on train between Bologna and Florence

1974 - Italian Communist Party (PCI) Secretary Berlinguer suggests ‘Historic compromise’: co-operation with Christian Democrats (DC), combining catholic solidarity and communist tradition of collective action. Historic compromise was to serve as bulwark against splitting the nation into two warring faction and in countering the tension strategy and consequent threat to democracy.

1975 – Women’s movement acquired national importance

1975 – Penal reform

¹⁵¹³ Compiled from Ginsborg (1990, 2001)

- 2 souls of reform:
 - Innovatory – alternatives to custody, stimulating contact between detainees and the ‘outside’
 - Conservative – Art 90 allowing, in case of an emergency, suspension of changes wrought by the reform, lasting until normality re-established.

1976 – First disturbance in female prison. Led by political detainees and complaining about prison conditions

1977-78 – Red Brigades commence policy of indiscriminate action against professionals and State servants, aiming to hamper the regular workings of the State.

March – May 1978 – Red Brigades kidnap and kill Secretary of DC Aldo Moro.
Law approved reducing punishment for terrorists who cooperated with police

1978 – National Health System established

1979 - General elections.

1980 – Terrorist bombing at Bologna station

1981 – ‘Pentaparty’

Alliance of DC, PSI, Republicans, Liberals, Social democrats – a coalition lasting a decade

1981 – Prison reform.

1981 – Referendum attempting to repeal legalised abortion: failed, law remained

1981 – Milan magistrates uncover P2 – Masonic lodge, anti-communist, anti-TU. Defined by parliamentary commission as having polluted nation’s existence. P2 advocated system of diffuse corruption allowing to buy off ‘enemies’. Case transferred to more accommodating Rome magistrates. Verdict given 13 years later: according to the Cassation Court the P2 was primarily a ‘business association’

1981 – 1983 – Cosa Nostra: clan rivalry and drug trade disputes led to violent war between two factions. Mafia related murders of statesmen who opposed organised crime.

1983 – Passage of Rognoni-LaTorre law establishing crime of Mafia association

1983 – Craxi –PSI secretary- becomes Prime Minister

Thatcherite values imported under Craxi: entrepreneurship, consumption, individual liberty. Personalised and simplified politics.

Economic boom - Maintained by high public debt and annual deficit

1984 – Berlinguer dies; exacerbates decline of Italian communism.

1986 – **Gozzini Law** –

- following on from 1975 reform
- extends possibility of non-custodial alternatives
- reaffirms concept of differentiated punishment – a gradation of punishment on the basis of behaviour within prison
- benefit-regime established
- rehabilitative rhetoric: punishment as an opportunity to identify the prisoner’s needs

- still contains an (albeit diluted) opportunity to suspend benefits in cases of emergency

1986/87 – Palermo ‘Maxi-trial’ against Mafiosi

1987 General Elections – emergence Northern League in political spectrum

1989 – Italy enters European Monetary System

Recession

1991 – Referendum: electoral reform.

Reduced PR in elections to the Senate

Abolished PR in local elections

End of multi-choice preference voting in Chamber of Deputies

1991-92: legislation against organised crime, identified specific cases of offenders who could not be rehabilitated except in extraordinary circumstances. Also:

- more powers to police in cases of kidnapping
- protection of collaborators
- more transparent subcontracting
- improvement coordination of police’s anti-mafia activity

1991 – PCI dismantled. Split into PDS (Left Democrats) and, to its left, RC (Communist Refoundation)

Feb 1992 – Beginning of *Tangentopoli* with arrest of Mario Chiesa:

1992 – General elections: vote at lowest level. Collapse DC and PSI. Rise of Northern League.

May 1992 - Magistrate Falcone killed by Mafia.

Popular protest among critical middle class in Palermo.

July 1992 – Magistrate Borsellino killed by Mafia.

Protest gives way to exhaustion.

7000 troops sent to Sicily – psychological measure.

1992 TANGENTOPOLI

1992 *Lira plummets, Italy is forced to exit the EMS*

1993 – Reform of electoral system: move towards majoritarian, bipolar system

1993 – Mafia bombs explode in major cities: reprisal for State’s anti-Mafia activism.

1994 – Craxi (under investigation for *Tangentopoli*) flees to Tunisia

Demise of DC, PSI and others.

1993 – Birth of Forza Italia

1994 – General elections:

Coalition headed by Berlusconi wins: includes *inter alia* Forza Italia, Alleanza Nazionale (former MSI) and Northern League

Instability in governing coalition caused by Northern League

1994 Government collapses.

1996 – Centre-Left government

1996 – European crisis of confidence in Italy.

High public debt and fast approaching deadlines for monetary union.

Drastic economic reforms: increased cuts and taxation.

Italy re-enters EMS

1996 Government collapses due to withdrawal of support by RC. Replaced by other centre-left government (succession of C-L governments lasts until 2001)

2001 – end of Centre-Left mandate.

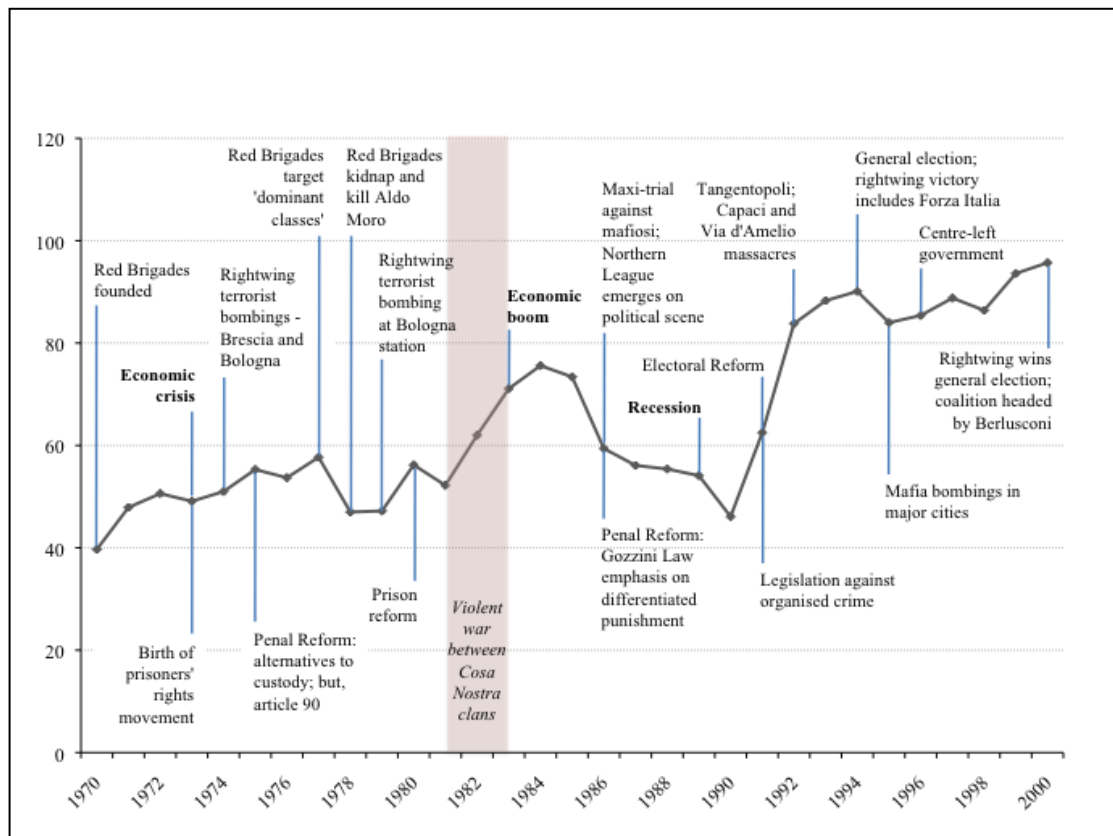
Berlusconi's campaign:

- individual choice and liberty
- limitation of State's power
- personal autonomy in the context of public security
- action against politicized judiciary
- safer Italian cities
- action against illegal immigration and attendant crime¹⁵¹⁴

2001 – Right-wing coalition headed by Berlusconi, wins election.

¹⁵¹⁴ Ginsborg (2001, p. 321)

Figure 1 – Italian Prison Rates and Italian history (1970-2000)



Source – My elaboration from: Campelli, Faccioli, Giordano, and Pitch (1992); Ginsborg (1990, 2001)

Appendix to Chapter 5

The following appendix accompanies chapter 5: it is a (brief) ‘reader’s guide’ to those aspects of the Italian criminal trial mentioned throughout the chapter. It also contains a description of referenda in Italy, with particular focus on the 1987 referendum.

I. Article 112 of the Italian Constitution – the legality principle

Art 112 of the Constitution reads: ‘*Il pubblico ministero ha l’obbligo di esercitare l’azione penale*’: ‘the public prosecutor is under an obligation to initiate penal action’ where evidence is available. The principle ‘cannot be compromised even for supposed reasons of public interest’¹⁵¹⁵. A similar precept operates in Germany, but in Germany it is discontinued for offences that do not carry a mandatory minimum sentence¹⁵¹⁶.

II. The Italian criminal trial and the 1989 reform

Until 1989 Italian criminal trial did not differ significantly from other European inquisitorial systems¹⁵¹⁷. Guarnieri and Pederzoli describe the latter’s general framework and note:

- The existence of an inquiry stage at the end of which a decision to prosecute/dismiss charges is made. If the decision to prosecute is taken, the case proceeds to trial. This stage is important insofar as information gathered at the inquiry stage ‘forms and integral part of the file that the trial judge will receive’¹⁵¹⁸.
- The role of an examining judge or public prosecutor in directing the investigation during the inquiry stage: ‘it is up to the examining judge to conduct investigations, to take decisions affecting personal freedoms, and to decide whether to withdraw the case or refer it to trial’¹⁵¹⁹. As a consequence, the examining judge is expected to conduct an impartial search for evidence that will either confirm or disprove charges¹⁵²⁰.

¹⁵¹⁵ Art. 112 Cost.; Montana and Nelken (2011, p. 288)

¹⁵¹⁶ Guarnieri and Pederzoli (2002, p. 114) Nelken (2004, p. 22)

¹⁵¹⁷ Guarnieri and Pederzoli (2002, p. 133)

¹⁵¹⁸ *Ibid.*, p. 132

¹⁵¹⁹ *Ibid.*, p. 131

¹⁵²⁰ *Ibid.*

- The ‘limited weight given to [...] adversarial principles’ at both inquiry stage and during trial¹⁵²¹.
- The role of the trial judge in the inquisitorial system: ‘in continental systems evidence is not given through the confrontation of parties before an impartial judge with no prior knowledge of the case’. Rather ‘continental judges are allowed to exclude evidence they believe irrelevant and to search for elements considered pertinent to reach a decision’. As such they may question witnesses and defendants¹⁵²².

Before 1989, the Italian criminal trial too possessed an inquiry stage. This investigative phase of the trial could be carried out ‘either by a public prosecutor’ or ‘by an examining judge’¹⁵²³, both of whom were committed to a ‘non-partisan investigation’¹⁵²⁴. The 1989 reform changed Italian penal procedure by:

- Abolishing the examining judge
- Entrusting prosecutors with investigation
- Instituting a judge in charge of ‘preliminary investigations’, and responsible for ‘all decisions affecting personal freedom’. The judge for preliminary investigations also decides whether or not a case will proceed to trial¹⁵²⁵.
- Restructuring the trial as a ‘face to face confrontation of parties before a judge who is supplied with a far more limited file than before’¹⁵²⁶.

Figure 1 provides a summary of the Italian penal trial after 1989.

¹⁵²¹ *Ibid.*, p. 132

¹⁵²² *Ibid.*, pp. 132-133

¹⁵²³ Grande (2000, p. 229)

¹⁵²⁴ This system was criticised for making the trial ‘little more than a repetition and confirmation of [...] the earlier [investigative] phase’ with the judge simply reviewing the prosecutorial file: *ibid.*, p. 229

¹⁵²⁵ Guarnieri and Pederzoli (2002, p. 133)

¹⁵²⁶ *Ibid.*

Figure 1: The Italian Penal Trial¹⁵²⁷

I. Preliminary investigation

Carried out by public prosecutor.

Reviewed by judge for preliminary investigations.

Judge supervises the investigative activities e.g. wiretapping.

Necessity for pre-trial detention decided at this stage.

Prosecutor can ask for dismissal if she considers the case is too weak to lead to a conviction.

Where there is enough evidence prosecutor makes formal request for committal to trial.

II. Preliminary Hearing

Determines whether the case proceeds to trial.

Based on documents contained in prosecutor's investigative file.

Debate between parties occurs at the hearing.

The judge for the preliminary hearing decides whether to continue to trial, or drop charges.

Alternatives to trial can be allowed at this stage e.g. *giudizio abbreviato*: fast-track proceedings in which the judge is asked for a decision on the merits of the case.

Alternatives also include plea-bargaining

III. Trial Phase

For criminal law cases the trial phase can be heard by:

- Justices of the peace: for minor crimes
- Tribunals: cover the majority of crimes.
 - o The more serious cases are heard by 3 judges; the remaining by 1 judge.
- Court of Assizes: for more serious crimes including homicide.

Court decides on guilt and sentence.

IV. Appeal

From Justices of the peace to Tribunal

From Tribunal to Court of Appeal

From Court of Assizes to Court of Appeal of Assizes.

The appellate court may reform any aspect of the decision. This includes the sentence (in part or completely) and factual and legal conclusions.

As a consequence of the appeal the first instance decision may be confirmed, modified or annulled. The appeal includes the possibility of retrial on the facts.

Points of law are reviewed by the Court of Cassation.

Appeal to the Court of Cassation are possible against unappealable sentences and against decisions made by the Appeals Court

¹⁵²⁷ Adapted from: Chiavario (2009); Grande (2000); Manna and Infante (2000); Mirabella (2012); Pizzi and Marafioti (1992)

III. Lay participation to the criminal justice process – Italian collaborative courts

Lay participation to the Italian criminal justice process occurs through collaborative courts: the Court of Assizes (*Corte d'Assise*) and the Court of Appeal of Assizes (*Corte d'Assise d'Appello*), with appeals from the *Corte d'Assise* being heard in the *Corte d'Assise d'Appello*. Similar collaborative courts are found in Germany, but unlike their German counterparts, the Italian collaborative courts have a significant number of lay judges relative to professional judges. There are 6 lay and 2 professional in Italy, compared to 2 and 1, 2 and 2, or 3 and 2 in Germany (depending on the type of court). In Italy, these courts try the most serious criminal offences i.e. those carrying a sentence of 24 years or over, or a life sentence. Appeal is still possible from the *Corte d'Assise d'Appello*, and goes to the Court of Cassation (*Corte di Cassazione*), which is composed entirely of professional judges.

There is little research on the impact the lay component has on the Court's sentencing practices. I would suggest that structural characteristics of the Italian judiciary are likely to produce results similar to those observed in Germany, whereby the actual influence of lay judges in mixed tribunals is limited, with the professional judge essentially directing the trial¹⁵²⁸. In Italy the effects of the 'lay' component may also be limited by the fact that offences serious enough to be tried by the Courts of Assizes are only a small percentage of all tried offences.

IV. Referenda in Italy

Referenda are provided for by article 75 of the Italian Constitution and they are *abrogative* because the electorate is asked to approve the repeal of one or more legislative provisions. Constitutional laws, tributary and budget laws, penal amnesties, or laws relating to Italy's international obligations cannot be subjects of referenda.

The Court of Cassation and the Constitutional Court must validate referenda; for the vote itself to be valid it must cross a threshold – a *quorum* – of 50% plus one of those entitled to vote. Any referendum is called for at the behest of five hundred thousand voters, or five regional councils¹⁵²⁹. If it is successful, i.e., if the provision is repealed, the consequent legislative vacuum should be filled by the legislature, in keeping with popular will. This arrangement is not beyond criticism, and authors such as Bruti Liberati and Pepino¹⁵³⁰ have

¹⁵²⁸ Dubber (1996-1997); Machura (2001); Wolfe (1994)

¹⁵²⁹ Art 75 Costituzione Italiana

¹⁵³⁰ Bruti Liberati and Pepino (2000)

critiqued the use of referenda as a means to shift existing political equilibria, and to ‘influence the legislator’ over and above the specific issues addressed by the referenda¹⁵³¹.

Bruti Liberati and Pepino argue that the 1987 referendum is a good example of this mechanism. The referendum asked a number of questions including whether the electorate was in favour of repealing provisions that excluded judges from incurring civil liability in the exercise of their functions. The electorate voted in favour of their repeal, and the ensuing legislative vacuum was filled with a law establishing civil liability for judges¹⁵³². According to the new legislation, citizens may proceed in damages against the State, if and when they have suffered unjust harm due to judicial misconduct (malice, gross negligence), or due to denial of justice,¹⁵³³. The State can then recoup part of the monies from the liable judge.

The referendum also asked questions relating to nuclear plants in Italy which, once answered in the affirmative, prevented the development of nuclear plants/reliance on nuclear power in Italy. The referendum also asked whether the parliamentary commission, entrusted with judging ministerial malfeasance, should be abolished and ministers be subject to ordinary prosecution. The electorate voted in favour of its abolition.

In its concern with judicial liability, the 1987 referendum was integral to party political tactics of the time, and in particular to the power struggle that was occurring between the Socialist Party (PSI) and Christian Democracy¹⁵³⁴ (DC). Thus, though initially campaigned for by other parties (Radical and Liberal), it was eventually ‘adopted’ by the Socialist Party as its own. The referendum also provided the PSI with means to advance its growing intolerance of judicial investigations into political misfeasance¹⁵³⁵. Fortuitously for the Socialist party, and other parties interested in the referendum’s success, 1987 marked a time during which the issue of judicial liability enjoyed particular popular attention¹⁵³⁶. Legal attrition also made its appearance on the scene, the blame for the length of legal proceedings increasingly being laid (by politicians and to a certain extent by the public) at the judiciary’s doorstep¹⁵³⁷. The tenor of the debate raging around the referendum is well summarised in the slogan used by its supporters - ‘for a just justice’ - which itself implied that unreformed, the existing system was in fact unjust¹⁵³⁸. As Chimenti recounts, ‘the two major parties, DC and

¹⁵³¹ Bruti Liberati and Pepino (2000, p. 10 My translation.)

¹⁵³² L. 1988 n. 117," 1988

¹⁵³³ For details see: Chimenti (1993, pp. 87-88, note 83)

¹⁵³⁴ *Ibid.*, p. 77

¹⁵³⁵ *Ibid.*, p. 84

¹⁵³⁶ The interest had been sparked by a number of intersecting factors, including the spectacular sentencing and successive acquittal of television host Enzo Tortora. Tortora was initially sentenced for drug trafficking and ‘criminal association’ with the Neapolitan Camorra. In 1987, two years after the first sentence, Tortora was acquitted on appeal: Chimenti (1993, pp. 78-79); Ginsborg (2001, pp. 194, 200)

¹⁵³⁷ Chimenti (1993, p. 84)

¹⁵³⁸ *Ibid.*

PCI' also backed the referendum once it became clear that the latter was (in part at least) 'a referendum on the judiciary' *and* that it was likely to succeed. Christian Democracy and the Communist Party urged their electorate to vote 'yes' to the questions posed by the referendum.

As stated in chapter 5, the 1987 referendum result does not lend itself to straightforward interpretation. Roberto Cartocci, writing in 1988, suggests that what in fact swayed the vote was not the substance of the issues being debated, but the appeal of the two main parties – the DC and PCI – though they had given only lukewarm support to the referendum. He argues that the substantive question of judicial liability was in fact too complex, and the electorate insufficiently informed, for the majority of voters to have developed a well-defined opinion on the issue¹⁵³⁹. Unsurprisingly it was party allegiances that still commanded authority in the 1987 vote. Nonetheless the referendum *can* be seen as expressing some, politically mediated, public fear of unaccountable judicial activism¹⁵⁴⁰.

It is interesting to note that the 1987 referendum was not the only referendum that addressed issues of judicial roles and judicial structure. In 2000, for example, the electorate was called to vote upon the separation of judicial careers, separating *magistrati* in their adjudicative functions, from *magistrati* in their prosecutorial role¹⁵⁴¹. However the necessary quorum was not obtained¹⁵⁴².

¹⁵³⁹ Cartocci (1988, p. 72)

¹⁵⁴⁰ According to Chimenti, the referendum's promoters made it clear that the consultation was to measure public faith in the workings of the judicial system: Chimenti (1993, p. 84)

¹⁵⁴¹ For details on the others see: Bruti Liberati and Pepino (2000, p. 11)

¹⁵⁴² Bruti Liberati and Pepino argue that the 1987 and 2000 referenda, as others concerned with the judiciary, were politically significant insofar as they were attempts to break with the existing institutional set-up. As we have seen, in the language of its opponents, the institutional set-up was thought to give rise to 'irresponsibility' and 'politicisation' of the judiciary, leaving them with excess powers: *ibid.*, p. 11 My translation

Appendix to Chapter 6

I. Italian immigration legislation 1968 – 2002¹⁵⁴³

1986 Foschi Law (943/30, December 1986)

First law on working immigration. Established equal treatment and equal rights for immigrant and Italian workers. It authorised family reunification and regulated entry for work reasons with monthly censuses. Non-EU immigrants were to be employed only after having established that there were no EU workers available.

The law included a regularization.

1990 Martelli Law

Established workers quota system. Established residence permit for self-employed. Residence permits were valid for 2 years and renewable for 4 upon proof of continued employment. Immigrants working in the underground economy could make an ‘auto-certification’ of income, but only where they revealed the name of their employer. The law included measures for refusal of entry at the frontiers (*respingimento*); measures for expulsions with accompaniment to the frontier (measures considered exceptional). The law provided for appeal against both measures. It created a fund for immigration policy.

The law included a regularization.

1992 Law on Citizenship

Favoured the preservation of Italian nationality by descendants of Italian immigrants abroad. Increased to 10 years the period of uninterrupted residence needed for the naturalization of non-EU citizens. It also increased the obstacles to acquisition of citizenship for children born in Italy, but to foreign parents.

1998 Turco-Napolitano Law

First organic law on immigration. Reorganized the planning of immigrant flows, leaving it to the executive, to be reviewed every 3 years. Set up mechanism to determine the annual

¹⁵⁴³ This brief chronology has been constructed from the chronology included by Luca Einaudi in his book *Le Politiche dell’Immigrazione in Italia dall’Unità a Oggi*, and from Kitty Calavita’s analysis of immigration policy in *Immigrants at the Margins*: Calavita (2005, pp. 31-35); Einaudi (2007, pp. 416-417. All the material excerpted from Einaudi has been translated by the author).

worker quota: the quotas were to be established considering the number of foreign workers already on government lists, labour needs and unemployment rates

Facilitated entry for work reasons – including job seeking. Residence permits were usually granted for two years, and were renewable if the original conditions (such as formal employment) persisted. Foreigners who lost their job could remain in Italy, for up to one year after redundancy, to seek new employment.

The law established a sponsor system, whereby public entities – such as trade unions, employers' associations, NGOs – could sponsor immigrants to come to Italy as job seekers. This was conditional on the sponsor guaranteeing the immigrant's livelihood, and on the immigrant falling within established quotas. The TN law introduced permanent residency card (*carta di soggiorno*) for long-term residents. It also established a number of integration programmes.

The *carta di soggiorno* required 5 years of uninterrupted legal residence; a legitimate occupation; enough income for the applicant to support herself and family (spouses and minor children were eligible for the *carta*). Once the *carta di soggiorno* was granted, legal residence was open-ended.

The TN facilitated irregular immigrants' access to urgent medical care. However it also increased frontier controls, and instances of expulsion by accompaniment to the frontier. The law created centres for administrative detention of immigrants (*Centri di Permanenza Temporanea - CPT*).

The law included a regularization.

2002 Bossi-Fini Law

Created the contract of residence for entry and work, closely tying legal residence to work contracts. Only with a work contract in hand could foreigners immigrate to Italy, and only within the quota system.

The sponsor system was abolished. Where an immigrant was made redundant they had 6 months (rather than 1 year under the TN) to seek new employment.

The BF law shortened the duration of residence permits: permits were valid for a maximum of 2 years and renewals had to be requested 3 months before expiry. It also limited family reunification to spouses and minors (excluding extended family) and increased the period of legal residence required for a *carta di soggiorno* to 6 years.

The law generalized deportation with accompaniment to the frontier, so that an official order to leave Italian territory, became the exceptional way of expelling immigrants. The BF also increased the maximum detention period in CPTs from 30 to 60 days. It further increased the custodial penalty for illegal re-entry and for trafficking. It introduced fingerprinting for all non-EU foreigners applying to renew their residence permit.

The law included a regularization.

Bibliography

- Agnew, J. A. (2002). *Place and Politics in Modern Italy*. London: The University of Chicago Press.
- Allum, P. (2000). Italian Society Transformed. In P. McCarthy (Ed.), *Italy Since 1945* (pp. 10-41). Oxford: Oxford University Press.
- Amato, F. (Ed.). (2008). *Atlante dell'immigrazione in Italia*. Roma: Carocci editore.
- Ammendola, C., Forti, O., Pittau, F., & Ricci, A. (2004). The impact of immigration on Italy's society. Rome: IDOS Italian Contact Point European Migration Network.
- 'Amnistia'. *L'Enciclopedia Italiana*. Roma: Edizioni Treccani. Retrieved December 2012, from <http://www.treccani.it/enciclopedia/amnistia/>
- Angel-Ajani, A. (2000). Italy's Racial Cauldron. *Cultural Dynamics*, 12(3), 331-352.
- Angel-Ajani, A. (2003). A question of dangerous races? *Punishment and Society*, 2003(5), 433-448.
- Annetta, M. Dalla legge Gozzini alla legislazione di emergenza. Politica penale e professionalita' della magistratura di sorveglianza. Retrieved December 2012, from <http://www.altrodiritto.unifi.it/ricerche/misure/annetta/>
- Area studio su Amnistia e Indulto. Centro Studi Ristretti Orizzonti. <http://www.ristretti.it/index.htm> accessed October 2009
- Articolo 4-bis ordinamento penitenziario.
- Articolo 41-bis ordinamento penitenziario.
- Articolo 58-ter ordinamento penitenziario.
- Articolo 75 Costituzione Italiana.
- Articolo 77 Costituzione Italiana.
- Articolo 274 Codice di Procedura Penale 'Esigenze Cautelari'.
- Articolo 280 Codice di Procedura Penale 'Condizioni di applicabilita' delle misure coercitive'.
- Articolo 416-bis codice penale Associazione di tipo mafioso.
- Articolo 27(3) Costituzione Italiana.
- Articolo 79 Costituzione Italiana.
- Articolo 111 Costituzione Italiana.
- Articolo 112 Costituzione Italian.
- Articolo 283 Codice Penale 'Attentato contro la costituzione dello Stato.
- Articolo 284 Codice Penale 'Insurrezione armata contro i poteri dello Stato.
- Ascoli, U. (1984). Il Sistema Italiano di Welfare. In U. Ascoli (Ed.), *Welfare State all'Italiana* (pp. 5-52). Roma-Bari: Editori Laterza.

- Bagnasco, A. (1977). *Tre Italie: la problematica territoriale dello sviluppo Italiano*. Bologna: Il Mulino.
- Baldissera, A. (2006). L'illegalità diffusa in Italia: un'interpretazione sociologica. *Quaderni di Sociologia*, 50(40), 65-83.
- Balibar, E. (1991). *Race, nation, class: ambiguous identities*. London: Verso.
- Banfield, E. C. (1958). *The Moral Basis of a Backward Society*. New York: The Free Press.
- Barbagli, M. (2007). 1° Rapporto sugli immigrati in Italia. Rome: Ministero dell'Interno.
- Barbagli, M. (2008). *Immigrazione e Sicurezza in Italia* (2 ed.). Bologna: il Mulino.
- Barclay, G., & Tavares, C. (1999). *Digest 4 Information on the Criminal Justice System*. London: Home Office Retrieved from <http://www.homeoffice.gov.uk/rds/digest41.html>.
- Barclay, G., Tavares, C., & Siddique, A. (2001). *International comparisons of criminal justice statistics 1999*. London: Home Office Retrieved from www.homeoffice.gov.uk/rds/pdfs/hosb601.pdf.
- Barclay, G., Tavares, C., & Siddique, A. (2003). *International comparisons of criminal justice statistics 2001*. London: Home Office Retrieved from www.homeoffice.gov.uk/rds/pdfs2/hosb1203.pdf.
- Basili, M. (2006). Sull'integrazione della popolazione immigrata. In A. Golini (Ed.), *L'immigrazione straniera: indicatori e misure di integrazione* (pp. 9-52). Bologna: il Mulino.
- Beckett, K., & Western, B. (2001a). Governing social marginality Welfare, incarceration and the transformation of state policy. *Punishment and Society*, 3(1), 43-59.
- Beckett, K., & Western, B. (2001b). Welfare, incarceration, and the transformation of state policy. In D. Garland (Ed.), *Mass Imprisonment* (pp. 35-50). London: SAGE Publications.
- Bergalli, R., & Sumner, C. (Eds.). (1997). *Social Control and Political Order. European Perspectives at the end of the Century*. London: Sage.
- Blumstein, A., Tonry, M., & Van Ness, A. (2005). Cross-National Measures of Punitiveness. *Crime and Justice*, 33(1), 347-376.
- Borgna, P., & Cassano, M. (1997). *Il giudice e il principe*. Roma: Donizelli Editore.
- Bosworth, M., & Guild, M. (2008). Governing through Immigration Control. *British Journal of Criminology*, 48(6), 703-719.
- Bozzini, E., & Fella, S. (2008). The role of civil society in immigration policy making in Italy: changing patterns of conflictual cooperation. *Policy and Politics*, 36(2), 245-259.
- Bruti Liberati, E., & Pepino, L. (2000). *Giustizia e referendum*. Roma: Donzelli editore.

- Bull, M., & Rhodes, M. (2009). Introduction - Italy a contested polity. In M. Bull & M. Rhodes (Eds.), *Italy – A Contested Polity* (pp. 1-14). Abingdon: Routledge.
- Calavita, K. (2005a). *Immigrants at the Margins. Law, Race, and Exclusion in Southern Europe*. Cambridge: Cambridge University Press.
- Calavita, K. (2005b). Law, Citizenship, and the Construction of (Some) Immigrant "Others". *Law and Social Inquiry*, 30(2), 401-420.
- Calavita, K. (2006). Gender; Migration, and Law: Crossing Borders and Bridging Disciplines. *International Migration Review*, 40(1), 104-132.
- Camagni, R., & Capello, R. (1998). Innovation and Performance of SMEs in Italy: The Relevance of Spatial Aspects. *Competition and Change*, 3(1/2), 69-106.
- Campelli, E., Faccioli, F., Giordano, V., & Pitch, T. (Eds.). (1992). *Donne in Carcere*. Milan: Giangiacomo Feltrinelli Editore.
- Caputo, A. (Ed.). (2003). *Gli stranieri ed il carcere: aspetti della detenzione*. Roma: ISTAT, Istituto Nazionale di Statistica.
- Caritas. (1993-2003). *Immigrazione Dossier Statistico*. Roma: Edizioni Nuova Anterem.
- Caritas. (2000). *Immigrazione Dossier Statistico 2000*. Roma: Edizioni Anterem.
- Caritas. (2003). *Immigrazione Dossier Statistico 2003*. Roma: Edizioni Nuova Anterem.
- Cartocci, R. (1988). Il referendum sulla Responsabilità Civile dei Magistrati. *Rivista Italiana di Scienza Politica*, 18(1), 41-72.
- Cassese, S. (1987). Stato ed economia: il problema storico. In P. Lange & M. Regini (Eds.), *Stato e Regolazione Sociale*. Bologna: Il Mulino.
- Cassese, S. (1993). Hypotheses on the Italian administrative system. *West European Politics*, 16(3), 316-328.
- Cassese, S. (1994). Breve discorso critico sulla magistratura nel sistema politico. In N. Rossi (Ed.), *Giudici e Democrazia* (pp. 125-130). Milano: Francoangeli.
- Cassese, S. (2011). *L'Italia: una società senza Stato?* Bologna: il Mulino.
- Catanzaro, R. (1995). La mafia. In G. Pasquino (Ed.), *La Politica Italiana. Dizionario Critico*. (pp. 417-432). Roma Bari: Editori Laterza.
- Cavadino, M., & Dignan, J. (2006). *Penal Systems A Comparative Approach*. London: SAGE Publications.
- Cento Bull, A., & Gilbert, M. (2001). *The Lega Nord and the Northern Question in Italian Politics*. London: Palgrave.
- 'Centrismo'. *Dizionario di Storia Treccani*. Roma: Edizioni Treccani. Retrieved February 2013, [http://www.treccani.it/enciclopedia/centrismo_\(Dizionario-di-Storia\)/](http://www.treccani.it/enciclopedia/centrismo_(Dizionario-di-Storia)/)
- Chiavario, M. (2009). *Diritto processuale penale. Profilo istituzionale*. Milanofiori Assago: Utet Giuridica.

- Chimenti, A. (1993). 1987 I referendum su giustizia e nucleare *Storia dei Referendum* (pp. 77-88). Roma-Bari: Editori Laterza.
- Colombo, G. (1991). The new code of criminal procedure. In F. Sabetti & Catn (Eds.), *Italian Politics: A Review vol. 5*. London: Pinter Publishers.
- 'Consociativismo'. In I. E. Italiana (Ed.), *Il Vocabolario della Lingua Italiana Treccani*. Roma: Edizioni Treccani. Retrieved July 2012, from <http://www.treccani.it/vocabolario/consociativismo/>
- Contarino, M. (1995). The Local Political Economy of Industrial Adjustment. Variations in Trade Union Responses to Industrial Restructuring in the Italian Textile-Clothing Sector. *Comparative Political Studies*, 28(1), 62-86.
- Cornelli, R. (2010). L'emergere della 'questione sicurezza' nell'Italia degli anni Novanta. In L. Massari & A. Molteni (Eds.), *Giustizia e sicurezza. Politiche urbane, sociali e penali*. Roma: Carocci editore.
- Cotta, M., & Verzichelli, L. (2007). *Political Institutions in Italy*. Oxford: Oxford University Press.
- Crawford, A. (Ed.). (2011). *International and comparative criminal justice and urban governance : convergence and divergence in global, national and local settings*: Cambridge University Press.
- D.L. 30 Dicembre 2005, n. 72 in materia di 'Modifiche al testo unico delle leggi in materia di disciplina degli stupefacenti e sostanze psicotrope, prevenzione, cura e riabilitazione dei relativi stati di tossicodipendenza' (2005).
- Dahrendorf, R. (1985). *Law and Order*. London: Stevens and Sons.
- Dal Lago, A. (1999). *Non-persone* (Third ed.). Milano: Giangiacomo Feltrinelli.
- DAP. (1990-2001). *Detenuti presenti italiani e stranieri* Retrieved November 2011, from: http://www.giustizia.it/giustizia/it/mg_1_14_1.wp?facetNode_1=0_2&facetNode_2=1_5_1&previousPage=mg_1_14&contentId=SST165666
- Davigo, P., & Mannozi, G. (2008). *La corruzione in Italia*. Roma-Bari: Editori Laterza.
- De Cecco, M. (2009). Italy's Dysfunctional Political Economy. In M. Bull & M. Rhodes (Eds.), *Italy- A Contested Polity* (pp. 107-127). Abingdon: Routledge.
- De Giorgi, A. (2006a). Liberta, Eguaglianza, Proprieta e Bentham al tempo di Berlusconi. *Studi Sulla Questione Criminale*, 1(1), 88-98.
- De Giorgi, A. (2006b). *Re-Thinking the Political Economy of Punishment*. Aldershot: Ashgate.
- De Giorgi, A. (2010). Immigration control, post-Fordism and less eligibility: a materialist critique of the criminalization of immigration across Europe. *Punishment and Society*, 12, 147-167.
- De Vito, C. G. (2009). *Camosci e girachiavi*. Bari: Editori Laterza.

- 'Decreto Biondi' (1994).
- Decreto del Presidente della Repubblica 9 ottobre 1990, n. 309 Testo unico delle leggi in materia di disciplina degli stupefacenti e sostanze psicotrope, prevenzione, cura e riabilitazione dei relativi stati di tossicodipendenza (1990).
- Decreto Legge 8 giugno 1992 n. 306 (convertito con modificazioni dalla L. 07 agosto 1992, n. 356) in materia di 'Modifiche urgenti al nuovo codice di procedura penale e provvedimenti di contrasto alla criminalita' mafiosa' (1992).
- Decreto Legge 13 maggio 1991 n/ 152 '(coordinato con la legge di conversione n. 203/1991), in materia di 'Provvedimenti urgenti in tema di lotta alla criminalita' organizzata e di trasparenza e buon andamento dell'attivit  amministrativa' (1991).
- Decreto Legge 14 settembre 2004, n. 241 'Disposizioni urgenti in materi di immigrazione'. (2004)
- Decreto Legislativo 13 Luglio 1994, n. 480 in materia di "Riforma della disciplina sanzionatoria contenuta nel testo unico delle leggi di pubblica sicurezza, approvato con regio decreto 18 giugno 1931, n. 773 " (1994).
- Della Porta, D. (1992). *Lo Scambio Occulto*. Bologna: il Mulino.
- Della Porta, D. (1995). Il terrorismo. In G. Pasquino (Ed.), *La Politica Italiana. Dizionario Critico 1945-95*. Roma-Bari: Editori Laterza.
- Della Porta, D. (1996). I circoli viziosi tra corruzione, clientelismo e cattiva amministrazione. In S. Scamuzzi (Ed.), *Italia Illegale* (pp. 95-116). Torino: Rosenberg & Sellier.
- Della Porta, D. (2001). A judges' revolution? Political corruption and the judiciary in Italy. *European Journal of Political Research*, 39, 1-21.
- Della Porta, D. (2004). Political parties and corruption: Ten hypotheses on five vicious circles. *Crime, Law and Social Change*, 42(1), 35-69.
- Della Porta, D., & Vannucci, A. (2012). *The Hidden Order of Corruption*. Aldershot: Ashgate.
- Di Federico, G. (1998). Prosecutorial Independence in Italy. *British Journal of Criminology*, 38(30), 371-387.
- Diamanti, I. (2001). *Politica all'Italiana. La parabola delle riforme incompiute*. Milano: Il Sole 24 ORE S.p.A.
- Diotallevi, G., Onida, V., & Scotti, L. (2006). La giustizia penale. In E. Paciotti (Ed.), *I tempi della giustizia. Un progetto per la riduzione dei tempi dei processi civili e penali*. (pp. 83-113). Bologna: Societa editrice il Mulino.
- Dubber, M. (2005). *The Police Power*. Columbia: Columbia University Press.
- Dubber, M. D. (1996-1997). American Plea Bargains, Germany Lay Judges and the Crisis of Criminal Procedure. *Stanford Law Review*, 49(3), 547-605.

- Einaudi, L. (2007). *Le politiche dell'Immigrazione in Italia dall'Unità a Oggi*. Roma-Bari: Editori Laterza.
- Esping-Andersen, G. (1990). *The Three Worlds of Welfare Capitalism*. Cambridge: Polity Press.
- European Commission Enterprise and Industry Portal (2010) 'Enterprise and Industry Small and medium-sized enterprises (SMEs)'. Retrieved July 2010, from http://ec.europa.eu/enterprise/policies/sme/facts-figures-analysis/sme-definition/index_en.htm
- Eurisko. (1993). Cio' che fa piu' paura agli Italiani *Indagine condotta per conto dell'osservatorio permanente sulla comunicazione, Ministero dell'Interno*. Rome: Ministero dell'Interno.
- Eurispes. (1995). L'Italia che Truffa - Piccole e grandi illegalità nel Malpaese. Retrieved August 2012, from http://www.eurispes.it/index.php?option=com_content&view=article&id=741:litalia-che-truffa-piccole-e-grandi-illegalita-nel-malpaese&catid=56:criminalitaesicurezza&Itemid=323
- Eurostat. Eurostat statistics - crime and criminal justice. Retrived October 2009, from <http://epp.eurostat.ec.europa.eu/portal/page/portal/statistics/themes>
- Fassone, E. (1980). *La Pena Detentiva in Italia dall'Ottocento alla Riforma Penitenziaria*. Milan: Il Mulino.
- Ferrajoli, L. (1984). Emergenza penale e crisi della giurisdizione. *Dei delitti e delle pene*(2), 271-292.
- Ferrajoli, L. (1994). Per una storia delle idee di Magistratura democratica. In N. Rossi (Ed.), *Giudici e Democrazia* (pp. 55-79). Milano: Francoangeli.
- Ferrajoli, L. (1996). La giustizia penale nella crisi del sistema politico. In E. Bruti Liberati, A. Ceretti & A. Giasanti (Eds.), *Governo dei giudici - la magistratura tra diritto e politica*. Milano: Feltrinelli Editore.
- Ferrajoli, L. (1999). *La cultura giuridica nell'Italia del Novecento*. Bari: Editori Laterza.
- Ferraris, V. (2008). L'obbiligata illegalita': l'impervio cammino verso un permesso di soggiorno. *Studi Sulla Questione Criminale*, 3(3), 25-44.
- Ferrera, M. (1996). The 'Southern Model' of Welfare in Social Europe. *Journal of European Social Policy*, 6(1), 17-37.
- Foa, V., & Ginsborg, P. (1994). *Le Virtu' della Repubblica*. Milano: Il Saggiatore.
- Foot, J. (2003). *Modern Italy*. Basingstoke: Palgrave Macmillan.
- Foucault, M. (1975). *Surveillir et Punir*. Paris: Gallimard.
- Gambetta, D. (1996). *The Sicilian Mafia. The Business of Private Protection*. London: Harvard University Press.

- Garland, D. (1990). *Punishment and Modern Society*. Oxford: Clarendon Press.
- Garland, D. (2001). *The Culture of Control*. Oxford: Oxford University Press.
- Garland, D. (2004). Beyond the culture of control. *Critical Review of International Social and Political Philosophy*, 7(2), 160-189.
- Garland, D. (2010). *Peculiar Institution*. Oxford: Oxford University Press.
- Ginsborg, P. (1990). *A History of Contemporary Italy*. London: Penguin Books.
- Ginsborg, P. (2001a). The Italian Economy: Constraints and Achievements *Italy and Its Discontents 1980-2001* (pp. 1-29). London: Penguin Books.
- Ginsborg, P. (2001b). *Italy and Its Discontents 1980-2001*. London: Penguin Books.
- Ginsborg, P. (2004). *Silvio Berlusconi. Television, Power and Patrimony*. London: Verso.
- Granaglia, E. (1987). Intervento pubblico e politica sanitaria: un'analisi delle tendenze in atto. In P. Lange & M. Regini (Eds.), *Stato e Regolazione Sociale* (pp. 295-313). Bologna: il Mulino.
- Grande, E. (2000). Italian Criminal Justice: Borrowing and Resistance. *The American Journal of Comparative Law*, 48(2), 227-260.
- Guarnieri, C. (1992). *Magistratura e politica in Italia. Pesi senza contrappesi*. Bologna: Il Mulino.
- Guarnieri, C. (1997). Prosecution in Two Civil Law Countries: France and Italy. In D. Nelken (Ed.), *Comparing Legal Cultures*. London: Ashgate.
- Guarnieri, C., & Pederzoli, P. (2002). *The Power of Judges: a comparative study of courts and democracy*. Oxford: Oxford University Press.
- Guazzaloca, B. (1992). Differenziazione esecutiva e legislazione di emergenza in materia penitenziaria. *Dei delitti e delle pene*, 3, 123-150.
- Gundle, S., & Parker, S. (1996). Introduction: the new Italian Republic. In S. Gundle & S. Parker (Eds.), *The New Italian Republic, From the Fall of the Berlin Wall to Berlusconi* (pp. 1-15). London: Routledge.
- Hall, P., & Soskice, D. (Eds.). (2001). *Varieties of Capitalism*. Oxford: Oxford University Press.
- Hall, S. (1978). *Policing the Crisis: Mugging, the State and Law and Order*. Basingstoke.
- Hancké, B. (2009). *Intelligent Research Design: A Guide for Beginning Researchers in the Social Sciences*. Oxford: Oxford University Publishing.
- Hancké, B., Rhodes, M., & Thatcher, M. (Eds.). (2007a). *Beyond Varieties of Capitalism*. Oxford: Oxford University Press.
- Hancké, B., Rhodes, M., & Thatcher, M. (2007b). Introduction: Beyond Varieties of Capitalism. In B. Hancké, M. Rhodes & M. Thatcher (Eds.), *Beyond Varieties of Capitalism* (pp. 3-38). Oxford: Oxford University Press.
- Hardt, M., & Negri, A. (2000). *Empire*. Cambridge MA: Harvard University Press.

- Hassen El Dridi, alias Karim Soufi, Case C-61/11 PPU (European Court of Justice 28 April 2011). Retrieved October 2013, from <http://curia.europa.eu/juris/liste.jsf?num=C-61/11>
- Holmberg, I., & Kyvsgaard, B. (2003). Are Immigrants and Their Descendants Discriminated against in the Danish Criminal Justice System? *Journal of Scandinavian Studies in Criminology and Crime and Prevention*, 4, 125-142.
- HOSD. (1984-1987). *Home Office Statistical Bulletin*.
- 'Indulto'. *L'Enciclopedia Italiana*. Roma: Edizioni Treccani. Retrieved December 2012, from <http://www.treccani.it/enciclopedia/indulto/>
- ISTAT. La misura dell'occupazione non regolata nelle stime di contabilità nazionale 1980-2010. Retrieved August 2012, from ISTAT <http://www.istat.it/it/archivio/39522>
- ISTAT. *Tassi di occupazione, di disoccupazione e di attività per classe di età, sesso, regione e ripartizione geografica - Italia - Anni 1977-2010* Retrieved August 2012, from: [http://seriestoriche.istat.it/index.php?id=7&user_100ind_pi1\[id_pagina\]=76&cHash=c255f48159e3c338760577586eaab610](http://seriestoriche.istat.it/index.php?id=7&user_100ind_pi1[id_pagina]=76&cHash=c255f48159e3c338760577586eaab610)
- ISTAT. (1970-2000). *Annuari di Statistiche Giudiziarie Penali*. Roma: ISTAT.
- ISTAT. (1980-2010). La misura dell'occupazione non regolare nelle stime di contabilità nazionale. Retrieved July 2012 <http://www.istat.it/it/archivio/39522>
- Jankovic, I. (1977). Labour Market and Imprisonment. *Crime and Social Justice*, 8(1977), 17-31.
- Kaufmann, D., Kraay, A., & Mastruzzi, M. (2009). Governance matters VIII: aggregate and individual governance indicators for 1996-2008 (Vol. Working Paper No. 4978). Washington DC: World Bank Policy Research Working Paper No. 4978.
- Khun, A. (1999). Incarceration Rates Across the World. In M. Tonry (Ed.), *Penal Reform in Overcrowded Times* (pp. 101-114). Oxford: Oxford University Press.
- La Greca, G. (2005). La riforma penitenziaria del 1975 e la sua attuazione. *Rassegna Penitenziaria e Criminologica*, 2(3), 39-53.
- La Spina, A. (1993). Le strategie informali di autotutela del cittadino: significato, presupposti, linee di tendenza. *Quaderni di Sociologia*, 37(4), 42-62.
- Lacey, N. (2008). *The Prisoners' Dilemma*. Cambridge: Cambridge University Press.
- Lacey, N. (2011). Why Globalisation Doesn't Spell Convergence: Models of Institutional Variation and the Comparative Political Economy of Punishment. In A. Crawford (Ed.), *International and Comparative Criminal Justice and Urban Governance*. Cambridge: Cambridge University Press.
- Lacey, N. (2012). Political System and Criminal Justice: The Prisoners' Dilemma After the Coalition. *Current Legal Problems*, 65(1), 203-239.

- Lacey, N. (2013). Punishment, (Neo)Liberalism and Social Democracy. In J. Simon & R. Sparks (Eds.), *The Sage Handbook of Punishment and Society*. London: SAGE.
- Lange, P., & Regini, M. (Eds.). ((1989) 2010). *State, Market and Social Regulation*. Cambridge: Cambridge University Press.
- Legge 5 dicembre 2005, n 251 in materia di 'Modifiche al codice penale e alla legge 26 luglio 1975, n. 354, in materia di attenuanti generiche, di recidiva, di giudizio di comparazione delle circostanze di reato per i recidivi, di usura e di prescrizione' (2005).
- Legge 5 febbraio 1992, n. 91, in materia di "Nuove norme sulla cittadinanza" (1992).
- Legge 6 marzo 1998, n. 40 (Legge Turco-Napolitano), in materia di "Disciplina dell'immigrazione e norme sulla condizione dello straniero" (1998).
- Legge 10 ottobre 1986 n. 663 Modifiche alla legge sull'ordinamento penitenziario e sulla esecuzione delle misure privative e limitative della liberta' (1986).
- Legge 13 aprile 1988 n. 177 in materia di 'Risarcimento dei danni cagionati dall'esercizio delle funzioni giudiziarie e responsabilita' civile dei magistrati' (1988).
- Legge 21 Dicembre 2005, n. 270 in materia di 'Modifiche alle norme per l'elezione della Camera dei deputati e del Senato della Repubblica'. (2005)
- Legge 26 luglio n. 354 Norme sull'ordinamento penitenziario e sulla esecuzione delle misure privative e limitative della liberta' (1975).
- Legge 28 febbraio 1990, n. 39 (Legge Martelli) in materia di "Conversione in legge, con modificazioni, del decreto-legge 30 dicembre 1989, n. 416, recante norme urgenti in materia di asilo politico, di ingresso e soggiorno dei cittadini extracomunitari e di regolarizzazione dei cittadini extracomunitari ed apolidi già presenti nel territorio dello Stato. Disposizioni in materia di asilo." (1990).
- Legge Costituzionale 6 marzo 1992 n. 1. Revisione dell'art. 79 della Costituzione in materia di concessione di amnistia e indulto. (1992).
- ‘Legitimacy’. *Oxford English Dictionary*. Oxford: Oxford University press. Retrieved February 2013, from <http://www.oed.com/view/Entry/107111?redirectedFrom=legitimacy#eid>
- ‘Legittimo sospetto’. *Treccani, Enciclopedia Italiana*. Roma: Edizioni Treccani. Retrieved February 2013, from <http://www.treccani.it/enciclopedia/legittimo-sospetto/>
- Libro IV Codice di procedura penale 'Misure Cautelari'.
- Loader, I., & Sparks, R. (2004). For an Historical Sociology of Crime Policy in England and Wales since 1968. *Critical Review of International Social and Political Philosophy*, 7(2), 5-32.

- Loader, I., & Zedner, L. (2007). Police Beyond Law. *New Criminal Law Review*, 10(1), 142-152.
- Locke, R. (1995). *Remaking the Italian Economy*. Ithaca: Cornell University Press.
- 'Lottizzazione'. *Treccani, Enciclopedia Italiana*. Roma: Edizioni Treccani. Retrieved September 2012 from <http://www.treccani.it/vocabolario/lottizzazione/>
- Machura, S. (2001). Interaction Between Lay Assessors and Professional Judges in German Mixed Courts. *Revue Internationale de droit penal*, 72(1), 451-479.
- Maciotti, M., & Pugliese, E. (2003). *L'esperienza migratoria: immigrati e rifugiati in Italia*. Roma: GLF Editori Laterza.
- Maiello, V. (1997). La politica delle amistie. In L. Violante (Ed.), *Storia d'Italia Annali vol. 12*. Torino: Einaudi.
- Manna, A., & Infante, E. (2000). *Criminal Justice Systems in Europe and North America*. Tampere: Tammer-Paino Oy.
- Mantovan, C. (2006). Immigration and citizenship: Participation and self-organisation in Veneto (North Italy). *Forum Qualitative Social Research*, 7(3). Retrieved June 2012, from <http://search.proquest.com/docview/36714957?accountid=9630>
- Marinucci, G., & Dolcini, E. (2006). *Manuale di Diritto Penale* (2nd ed.). Milano: Giuffrè Editore.
- McCarthy, P. (2000). *Italy Since 1945*. Oxford: Oxford University Press.
- Melossi, D. (2001). The cultural embeddedness of social control: Reflections on the comparison of Italian and North-American cultures concerning punishment. *Theoretical Criminology*, 5(4), 403-424
- Melossi, D. (2003). 'In a peaceful life' Migration and the crime of modernity in Europe/Italy. *Punishment and Society*, 5(4), 371-397.
- Melossi, D. (2005). Security, Social Control, Democracy and Migration within the 'Constitution' of the EU. *European Law Journal*, 11(1), 5-21.
- Melossi, D. (2008). *Controlling Crime, Controlling Society*. Cambridge: Polity Press.
- Melossi, D. (2013). Punishment and Migration between Europe and the United States: A Transnational "Less Eligibility"? In J. Simon & R. Sparks (Eds.), *The Sage Handbook of Punishment and Society* (pp. 416-433). London: SAGE.
- Melossi, D., De Giorgi, A., & Massa, E. (2009). The 'normality' of 'second generations' in Italy and the importance of legal status: a self-report delinquency study. *Sociology of Crime, Law and Deviance*, 13, 47-65.
- Melossi, D., & Pavarini, M. (1977). *Carcere e Fabbrica*. Bologna: Il Mulino.
- Melossi, D., & Selmini, R. (2000). Social conflict and the microphysics of crime: the experience of the Emilia Romagna *Citta' Sicure* project. In T. Hope & R. Sparks (Eds.), *Crime, Risk and Insecurity*. Abingdon: Routledge.

- Melossi, D., & Selmini, R. (2009). "Modernisation" of institutions of social and penal control in Italy/Europe: the "new" crime prevention. In A. Crawford (Ed.), *Crime Prevention Policies in Comparative Perspective*. Cullompton: Willan.
- Miller, L. (2004). Rethinking Bureaucrats in the Policy Process: Criminal Justice Agents and the National Crime Agenda. *The Policy Studies Journal*, 32(4), 569-588.
- Mingione, E. (1994). Life Strategies and Social Economies in the Postfordist Age. *International Journal of Urban and Regional Research*, 18(1), 24-45.
- Mingione, E. (1995). Labour Market Segmentation and Informal Work in Southern Europe. *European Urban and Regional Studies*, 2(2), 121-143.
- Mingione, E. (2009). Family, welfare and districts. The local impact of new migrants in Italy. *European Urban and Regional Studies*, 16(3), 225-236.
- Mingione, E., & Morlicchio, E. (1993). New Forms of Urban Poverty in Italy: Risk Path Models in the North and South. *International Journal of Urban and Regional Research*, 17(3), 413-427.
- Mingione, E., & Quassoli, F. (2000). The participation of immigrants in the underground economy in Italy. In R. King, G. Lazaridis & T. Charalambos (Eds.), *Eldorado or Fortress? Migration in Southern Europe*. Basingstoke: Macmillan.
- Mirabella, J. G. (2012). Scales of justice: assessing Italian criminal procedure through the Amanda Knox trial. *Boston University School of Law*, 30(1), 229-260.
- ‘Misure Cautelari’ *L’Enciclopedia Italiana*. Roma: Edizioni Treccani. Retrieved December 2012, from <http://www.treccani.it/enciclopedia/misure-cautelari/>
- Molina, O., & Rhodes, M. (2007). The Political Economy of Adjustment in Mixed Market Economies: A Study of Spain and Italy. In B. Hancké, M. Rhodes & M. Thatcher (Eds.), *Beyond Varieties of Capitalism* (pp. 223-252). Oxford: Oxford University Press.
- Montana, R. (2009a). Prosecutors and the definition of the Crime Problem in Italy: Balancing the Impact of Moral Panics. *Criminal Law Forum*, 20(4), 471-494.
- Montana, R. (2009b). Pubblico Ministero e Pratiche di selezione del crimine. *Cultura giuridica e rappresentazioni di senso comune: perché si può ancora sperare. Antigone. Quadimestrale di critica del sistema penale e penitenziario*, 2-3(December 2009), 274-298.
- Montana, R., & Nelken, D. (2011). The Ambivalent Role of Italian Prosecutors And Their Resistance To 'Moral Panics' About Crime. In S. C. J., S. X. Zhang & B. Rosemary (Eds.), *Routledge Handbook of International Criminology* (Vol. 286-296). Oxford: Routledge.
- Morisi, M. (1999). *Anatomia della Magistratura*. Bologna: Il Mulino.

- Musio, S. La vicenda del Codice Rocco nell'Italia repubblicana. Retrieved Decembr 2012, from <http://www.altrodiritto.unifi.it/ricerche/law-ways/musio/>
- Natale, M., & Strozza, S. (1997). *Gli immigrati stranieri in Italia*. Bari: Cacucci Editore.
- Nelken, D. (1994). Whom can you Trust? The Future of Comparative Criminology. In D. Nelken (Ed.), *The Futures of Criminology*: SAGE Publishers.
- Nelken, D. (1996). The Judges and Political Corruption in Italy. *Journal of Law and Society*, 23 (1), 95-112.
- Nelken, D. (1998). Il significato di Tangentopoli: la risposta giudiziaria alla corruzione e i suoi limiti. In L. Violante (Ed.), *Storia d'Italia Annali - Legge Diritto Giustizia* (pp. 597-632). Torino: Giulio Einaudi Editore.
- Nelken, D. (2003). Legitimate Suspicions? Berlusconi and the Judges. In B. Jean & S. Paolo (Eds.), *Italian Politics. The Second Berlusconi Government*. (pp. 112-128). Oxford: Berghahn Books.
- Nelken, D. (2004). Using The Concept of Legal Culture. *Australian Journal of Legal Philosophy*, 29(1), 1-26.
- Nelken, D. (2005). When is a society non-punitive? The Italian case. In J. Pratt (Ed.), *The New Punitiveness* (pp. 218-235). Cullompton: Willan.
- Nelken, D. (2009). Comparative Criminal Justice: Beyond Ethnocentrism and Relativism. *European Journal of Criminology*, 6(4), 291-311.
- Nelken, D. (2011). Explaining differences in European prison rates. A comment on Lacey's "The Prisoners' Dilemma". *Punishment and Society*, 13(1), 104-114.
- Nelken, D., & Zainer, M. L. (2006). Tra norme e prassi: durata del processo penale e strategie degli operatori del diritto. *Sociologia del diritto*, 2006(1), 143-166.
- Neppi Modona, G. (1993). Ruolo della giustizia e crisi del potere politico. *Quaderni di Sociologia*, 37(5), 6-30.
- OECD. (2008). OECD Factbook 2008: Economic, Environmental and Social Statistics. Retrieved October 2008, from <http://www.oecd.org/statsportal>
- Olgiate, V. (1996). Legal Systems and the Problem of Legitimacy: The Italian Case. In V. Gessner, A. Hoeland & C. Varga (Eds.), *European Legal Cultures* (pp. 278-282). Aldershot: Dartmouth.
- Olivetti, L. (2009). Ingresso e soggiorno per residenza elettiva. from Associazione per gli Studi Giuridici sull'Immigrazione
http://www.asgi.it/home_asgi.php?n=documenti&id+770&I=it
- ‘Omicidio’. *L'Enciclopedia Italiana*. Roma: Edizioni Treccani. Retrieved July 2012
[http://www.treccani.it/enciclopedia/omicidio_\(Enciclopedia-Italiana\)/](http://www.treccani.it/enciclopedia/omicidio_(Enciclopedia-Italiana)/)
- ONS. (1970-2000). *Mid-1971 to Mid-2010 Population Estimates: United Kingdom; estimated resident population for constituent countries and regions*. Retrieved October 2008,

- from <http://www.ons.gov.uk/ons/rel/pop-estimate/population-estimates-for-uk--england-and-wales--scotland-and-northern-ireland/population-estimates-timeseries-1971-to-current-year/rft---table-1-total-persons-constituent-countries-regions.zip>
- Paci, M. (1987). Pubblico e privato nel sistema Italiano di welfare. In P. Lange & M. Regini (Eds.), *Stato e Regolazione Sociale*. Bologna: Il Mulino.
- Paci, M. (2009). Il regime corporativo di welfare tra resistenza e cambiamento. Alcune riflessioni sui casi Italiano e Francese. *Rassegna Italiana di Sociologia*, 50(2), 279-299.
- Paciotti, E. (Ed.). (2006). *I tempi della giustizia. Un progetto per la riduzione dei tempi dei processi civili e penali*. Bologna: Societa Editrice il Mulino.
- Palidda, S. (1996). La construction sociale de la deviance et de la criminalite parmi les immigrés: Le cas Italien. In E. Commission (Ed.), *Immigrant delinquency: Social Sciences*. (pp. 231-266). Luxembourg: European Commission.
- Palidda, S. (2009). Criminalisation and Victimization of Migrants in Europe Retrieved from <http://www.reseau-terra.eu/IMG/pdf/criminalisation.pdf>
- Palmerini, M. (1954). Profili costituzionali dell'amnistia e dell'indulto (Art. 79 della Costituzione). *Rivista trimestrale di diritto pubblico*, 4(1), 70-117.
- 'Partito Liberale italiano'. *Dizionario di Storia Treccani*. Roma: Edizioni Treccani. Retrieved February 2013, from [http://www.treccani.it/enciclopedia/partito-liberale-italiano_\(Dizionario-di-Storia\)/](http://www.treccani.it/enciclopedia/partito-liberale-italiano_(Dizionario-di-Storia)/)
- 'Partito Repubblicano Italiano'. *Dizionario di Storia Treccani*. Roma: Edizioni Treccani. Retrieved February 2013, fr [http://www.treccani.it/enciclopedia/partito-repubblicano-italiano_\(Dizionario-di-Storia\)/](http://www.treccani.it/enciclopedia/partito-repubblicano-italiano_(Dizionario-di-Storia)/)
- 'Partito Socialista Democratico Italiano'. *Dizionario di Storia Treccani*. Roma: Edizioni Treccani. Retrieved February 2013, from [http://www.treccani.it/enciclopedia/partito-socialista-democratico-italiano_\(Dizionario-di-Storia\)/](http://www.treccani.it/enciclopedia/partito-socialista-democratico-italiano_(Dizionario-di-Storia)/)
- 'Partito Socialista Italiano'. *Dizionario di Storia Treccani*. Roma: Edizioni Treccani. Retrieved February 2013, from [http://www.treccani.it/enciclopedia/partito-socialista-italiano_\(Dizionario-di-Storia\)/](http://www.treccani.it/enciclopedia/partito-socialista-italiano_(Dizionario-di-Storia)/)
- Pasquino, G. (1995a). *La Politica Italiana. Dizionario Critico 1945-95*. Roma-Bari: Editori Laterza.
- Pasquino, G. (1995b). I referendum. In G. Pasquino (Ed.), *La Storia Italiana. Dizionario Critico 1945-95* (pp. 121-133). Roma-Bari: Editori Laterza.
- Pasquino, G. (1995c). La Partitocrazia. In G. Pasquino (Ed.), *La Politica Italiana Dizionario Critico 1945-95* (pp. 341-354). Roma-Bari: Editori Laterza.
- Pasquino, G. (2000). Political Development. In P. McCarthy (Ed.), *Italy since 1945* (pp. 69-94). Oxford: Oxford University Press.

- Pasquino, G. (2002). *Il sistema politico italiano*. Bologna: Bononia University Press.
- Pasquino, G. (2010). Still an outlier: Italy in a Southern European comparative perspective. *Journal of Modern Italian Studies*, 15(2), 183-199.
- Pasquino, G. ((1989) 2010). Unregulated regulators: parties and party government. In P. Lange & M. Regini (Eds.), *State, Market and Social Regulation. New Perspectives on Italy* (pp. 29-50). Cambridge: Cambridge University Press.
- Pavarini, M. (1994). The new penology and politics in crisis: the Italian case. *British Journal of Criminology*, 34(Special Issue), 49-61.
- Pavarini, M. (1997). Controlling social panic: Questions and Answers about Security in Italy at the End of the Millenium. In R. Bergalli & C. Sumner (Eds.), *Social Control and Political Order. European Perspectives at the end of the Century* (pp. 75-95). London: Sage Publications.
- Pavarini, M. (2001). The Politics of Punishment: The Death of Prison Reform in Italy. In D. van Zyl Smit & F. Dünkel (Eds.), *Imprisonment Today and Tomorrow* (pp. 400-424). Boston: Kluwer Law International.
- Pavarini, M. (2006). La neutralizzazione degli uomini inaffidabili. La nuova disciplina della recidiva e altro ancora sulla guerra alle *Unpersonen*. *Studi Sulla Questione Criminale*, 1(2), 7-29.
- Pepino, L. (2006). Spunti per una interpretazione delle politiche penali della destra. *Studi Sulla Questione Criminale*, 1(1), 69-87.
- Piraino, F. Amnistia, indulto e popolazione detenuta nell'Italia repubblicana. Retrieved July 2012, from <http://www.altrodiritto.unifi.it/ricerche/law-ways/piraino.htm>
- Pizzi, W. T., & Marafioti, L. (1992). The New Italian Code of Criminal Procedure: The Difficulties of Building an Adversarial Trial System on a Civil Law Foundation. *The Yale Journal of International Law*, 17(1), 1-40.
- Pizzorno, A. (1992). La Corruzione nel Sistema Politico *Lo Scambio Occulto* (pp. 12-74). Bologna: Il Mulino.
- Pizzorno, A. (1997). Le trasformazioni del sistema politico italiano, 1976-92. In F. Barbagallo (Ed.), *Storia dell'Italia Repubblicana: III. L'Italia nella crisi mondiale. L'ultimo ventennio: 2. Istituzioni, politiche, culture*. (pp. 301-344). Torino: Giulio Einaudi Editore.
- Pratt, J. (2008a). Scandinavian Exceptionalism in an Era of Penal Excess Part I The nature and roots of Scandinavian Exceptionalism. *British Journal of Criminology*, 48(2), 119-137.
- Pratt, J. (2008b). Scandinavian Exceptionalism in an Era of Penal Excess Part II Does Scandinavian Exceptionalism have a Future? *British Journal of Criminology*, 48 (3), 275-292.

- Pratt, J., Brown, D., Brown, M., Hallsworth, S., & Morrison, W. (Eds.). (2005). *The New Punitiveness*. Cullompton: Willan.
- Quassoli, F. (1999). Migrants in the Italian Underground Economy. *International Journal of Urban and Regional Research*, 23(2), 212-231.
- Raiteri, M. (1992). Rappresentazioni del Giudice e Realtà della Magistratura. In A. Giasanti (Ed.), (pp. 495-516). Milano: Giuffrè Editore.
- Ramsay, P. (2012). *The Insecurity State*. Oxford: Oxford University Press.
- Rebuffa, G. (1996). Illegalità costituzionale. In S. Scamuzzi (Ed.), *Italia Illegale* (pp. 151-160). Torino: Rosenberg & Sellier.
- Regini, M. (1997). Social Institutions and Production Structure. The Italian Variety of Capitalism in the 1980s. In C. Crouch & W. Streeck (Eds.), *Political Economy and Modern Capitalism: Mapping Convergence and Diversity* (pp. 102-116). London: Sage.
- Regini, M. (2000). Between Deregulation and Social Pacts: The Responses of European Economies to Globalization. *Politics and Society*, 28(1), 5-33.
- Reiner, R. (2007). *Law and Order. An Honest Citizen's Guide to Crime and Control*. Cambridge: Polity Press.
- Resta, E. (2003). Regole Invisibili. *Quaderni di Sociologia*, 37(4), 90-96.
- Review Symposium on Nicola Lacey, The Prisoners' Dilemma: Political Economy and Punishment in Contemporary Democracies. (2011). *Punishment and Society*, 1(13).
- Reyneri, E. (1987). Il mercato del lavoro italiano tra controllo statale e regolazione sociale. In P. Lange & M. Regini (Eds.), *Stato e Regolazione Sociale*. Bologna: Il Mulino.
- Reyneri, E. (2003). *Illegal immigration and the underground economy*. Paper presented at the The Challenges of Immigration and Integration in the European Union and Australia, University of Sydney.
- Reyneri, E. (2004a). Education and the Occupational Pathways of Migrants in Italy. *Journal of Ethnic and Migration Studies*, 30(6), 1145-1162.
- Reyneri, E. (2004b). Immigrants in a segmented and often undeclared labour market. *Journal of Modern Italian Studies*, 9(1), 71-93.
- Reyneri, E. ((1989) 2010). The Italian labor market: between state control and social regulation. In P. Lange & M. Regini (Eds.), *State, Market and Social Regulation. New Perspectives on Italy* (pp. 129-145). Cambridge: Cambridge University Press.
- Ricolfi, L. (1995). La Lega. In G. Pasquino (Ed.), *La Politica Italiana Dizionario Critico 1945-95* (pp. 261-272). Roma-Bari: Editori Laterza.
- Righettini, S. (1995). La politicizzazione di un potere neutrale. Magistratura e crisi italiana. *Rivista Italiana di Scienza Politica*, XXV(2), 227-265.

- Rinaldi, S. (1992). Un dibattito sulla risposta istituzionale alla criminalità organizzata. *Dei delitti e delle pene*, 2(3), 57-99.
- Ruggiero, V. (1995). Flexibility and intermitted emergency in the Italian Penal system. In V. Ruggiero, M. Ryan & J. Sim (Eds.), *Western European Penal Systems: A Critical Anatomy* (pp. 46-70). London: SAGE Publications.
- Ruggiero, V. (1998). The country of Cesare Beccaria: the myth of rehabilitation in Italy. In Weiss & South (Eds.), *Comparing Prison Systems: Toward a Comparative and International Penology* (pp. 207-232). Amsterdam: Gordon and Breach.
- Ruggiero, V. (2009). Illegal activity and migrant acculturation in Italy. *International Journal of Law, Crime and Justice*, 37(1-2), 39-50.
- Rusche, G. (1933/1978). Labor market and penal sanction: Thoughts on the sociology of criminal justice. *Crime and Social Justice*, 10, 2-8.
- Rusche, G., & Kirchheimer, O. (1939). *Punishment and Social Structure*. New York: Morningside Heights: Columbia University Press.
- Sabatini, F., & Coletti, V. (2008). Lottizzazione. *il Sabatini Coletti Dizionario della Lingua Italiana*. Milano: Rizzoli-Larousse. Retrieved September 2012, from http://dizionari.corriere.it/dizionario_italiano/L/lottizzazione.shtml
- Salvati, M. (1984). *Economia e politica in Italia dal dopoguerra a oggi*. Milano: Garzanti.
- Salvati, M. (2000). *Occasioni mancate. Economia e politica in Italia dagli anni 60 a oggi*. Roma-Bari: Editori Laterza.
- Saraceno, C. (1994). The Ambivalent Familism of the Italian Welfare State. *Social Politics*, 1(1), 60-82.
- Sartori, G. (1976). *Parties and Party Systems: A Framework for Analysis*. Cambridge: Cambridge University Press.
- Sarzotti, C. (2006a). Le Procure della Repubblica come attori del campo giuridico-penale. *Studi Sulla Questione Criminale*, 2(2), 67-86.
- Sarzotti, C. (Ed.). (2006b). *Processi di Selezione del Crimine. Procure della Repubblica e organizzazione giudiziaria*. Milano: Giuffrè editore.
- Savelsberg, J. (1994). Knowledge, Domination and Criminal Punishment. *The American Journal of Sociology*, 99(4), 911-943.
- Savelsberg, J. (1999). Knowledge, Domination and Criminal Punishment Revisited: Incorporating State Socialism. *Punishment and Society*, 1(1), 45-70.
- Scamuzzi, S. (Ed.). (1996a). *Italia Illegale*. Torino: Rosenberg & Sellier.
- Scamuzzi, S. (1996b). Illegalità e Neopatrimonialismo. In S. Scamuzzi (Ed.), *Italia Illegale* (pp. 9-23). Torino: Rosenberg & Sellier.

- Selmini, R. (2011). The Governance of Crime in Italy: Global Tendencies and Local Peculiarities. In D. Melossi, M. Sozzo & R. Sparks (Eds.), *Travels of the Criminal Question* (pp. 161-183). Oxford: Hart Publishing.
- Sgroi, E. (1996). Farsi giustizia da sé. Strategia di sopravvivenza e crisi della legalità. In S. Scamuzzi (Ed.), *Italia Illegale* (pp. 25-81). Torino: Rosenberg & Sellier.
- Solivetti, L. M. (2004). *Immigrazione, integrazione e crimine in Europa*. Bologna: il Mulino.
- Solivetti, L. M. (2010). *Immigration, Social Integration and Crime*. Abingdon: Routledge.
- Solivetti, L. M. (2012). Looking for a Fair Country: Features and Determinants of Immigrants' Involvement in Crime in Europe. *Howard Journal of Criminal Justice*, 51(2), 133-159.
- Soskice, D. (2007). *American Exceptionalism and Comparative Political Economy*. Berkley University. Retrieved July 2012, from <http://www.irle.berkeley.edu/events/fall07/symposium/soskice.pdf>
- SPACE I (2003). In C. o. Europe (Ed.).
- Statistics of the Criminal Justice System England and Wales 1969-1979*. (1980).
- Stortoni, L. (1992). Criminalita' organizzata e legislazione di emergenza. *Dei delitti e delle pene*(3), 39-52.
- Strozza, S., & Cibella, N. (2006). Elementi e caratteri dell'integrazione. In A. Golini (Ed.), *L'immigrazione straniera: indicatori e misure di integrazione* (pp. 75-163). Bologna: il Mulino.
- Strozza, S., & Golini, A. (2006). Misure e indicatori dell'integrazione degli immigrati. In A. Golini (Ed.), *Immigrazione straniera: indicatori e misure di integrazione* (pp. 53-74).
- Thelen, K. (2001). Varieties of Labor Politics in Developed Democracies. In P. Hall & D. Soskice (Eds.), *Varieties of Capitalism*. Oxford: Oxford University Press.
- Tonry, M., & Farrington, D. (2005). Punishment and Crime across Space and Time. *Crime and Justice*, 33(1), 1- 41.
- Torrente, G. (2006). Le storie organizzative di due Procure della Repubblica tra obbligatorietà dell'azione penale e selezione del crimine. In C. Sarzotti (Ed.), *Processi di Selezione del Crimine. Procure della Repubblica e organizzazione giudiziaria*. (pp. 227-356). Milano: Giuffré Editore.
- Triglia, C. (1986). Small-firm development and political subcultures in Italy. *European Sociological Review*, 2(3), 161-175.
- Triglia, C. (1997). The Political Economy of a Regionalised Capitalism. *South European Society and Politics*, 2(3), 52-79.
- Triglia, C., & Burroni, L. (2009). Italy: rise, decline and restructuring of a regionalized capitalism. *Economy and Society*, 38(4), 630-635.

- Van Kalmthout A., Hofstee-van der Meulen, F., & Dünkel, F. (2007). *Foreigners in European Prisons*. Nijmegen: Wolf Legal Publishers.
- Vannucci, A. (1997). *Il mercato della corruzione. I meccanismi dello scambio occulto in Italia*. Milano: Societa' Aperta.
- Venturini, A., & Villosio, C. (2008). Labour-market assimilation of foreign workers in Italy. *Oxford Review of Economic Policy*, 24(3), 517-541.
- Violante, L. (1998a). I cittadini, la legge e il giudice. In L. Violante (Ed.), *Storia d'Italia Annali - Legge Diritto Giustizia* (Vol. 14, pp. xvii-lxxiii). Torino: Giulio Einaudi Editore.
- Violante, L. (Ed.). (1998b). *Storia d'Italia Annali - Legge Diritto Giustizia* (Vol. 14). Torino: Giulio Einaudi Editore.
- Wacquant, L. (1999). 'Suitable enemies' Foreigners and immigrants in the prisons of Europe. *Punishment and Society*, 1(2), 215-222.
- Wacquant, L. (2009). *Punishing the Poor: the neoliberal government of social insecurity*. Durham [NC]: Duke University Press.
- Warren, M. R. (1994). Exploitation or Cooperation? The Political Basis of Regional Variation in the Italian Informal Economy. *Politics and Society*, 22(1), 89-115.
- Wells, C., Quick, O., & Lacey, N. (2010). *Lacey, Wells and Quick Reconstructing Criminal Law*. Cambridge: Cambridge University Press.
- White, P., Cullen, C., & Minchin, M. (2000). *Home Office Prison Population Brief*.
- Wolfe, N. T. (1994). Lay Judges in German Criminal Courts. *Proceedings of the American Philosophical Society*, 138(4), 495-515.
- World Prison Brief. International Centre for Prison Studies.
<http://www.prisonstudies.org/info/worldbrief>
- Zagrebelsky, V. (1998). La magistratura ordinaria dalla Costituzione a oggi. In L. Violante (Ed.), *Storia d'Italia Annali 14 - Legge Diritto Giustizia* (Vol. 14, pp. 713-792). Torino: Giulio Einaudi Editore.
- Zamagni, V. (2000). Evolution of the economy. In P. McCarthy (Ed.), *Italy since 1945* (pp. 42-68). Oxford: Oxford University Press.
- Zanfrini, L. (2007). Il Lavoro. In F. ISMU (Ed.), *Dodicesimo Rapporto sulle Migrazioni 2006* (pp. 103-128). Milano: FrancoAngeli.
- Zedner, L. (2002). Dangers of Dystopia in Penal Theory. *Oxford Journal of Legal Studies*, 22, 341-366.
- Zincone, G. (2006). the Making of Policies: Immigration and Immigrants in Italy. *Journal of Ethnic and Migration Studies*, 32(2), 347-375.