

**Not Citizens, Not Real People. The Italian Way of Governing
Immigration through the Criminal Justice System**

**Ni ciudadanos ni personas reales. El estilo italiano de gobierno
de la inmigración a través del sistema penal**

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ABSTRACT

The aim of this article is to describe the specious use made of the Italian criminal justice system as a device to manage the demands for security due to the general perception of increased immigration flows in Italy. In particular, the article analyses - in each stage of the penal system from substantive criminal law, through criminal procedure law, to the prison system - the connection between the processes of criminalization and the use of extrajudicial measures to control immigration flows (such as border controls and expulsions). The results suggest that this criminal 'double track' (Italian citizens on the one side and migrants on the other) - with the subsequent hyper-incarceration of aliens and their final deportation as a consequence of the breach of either or both administrative and criminal law - is a disguised but deliberate choice of recent Italian legislative policy regarding the justice system.

Keywords: Criminal justice, Unlawful migration, Coercive measures, Hyper-incarceration, Segregation, Social control, Penal populism.

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RESUMEN

El objetivo del presente artículo es describir el uso engañoso que se hace del sistema penal italiano como un dispositivo para gestionar las demandas de seguridad justificadas en la percepción generalizada de aumento de los flujos migratorios en Italia. En particular, el artículo analiza - en cada etapa del sistema penal, derecho penal sustantivo, derecho procesal penal y sistema penitenciario - la conexión entre los procesos de criminalización y el uso de medidas extrajudiciales para controlar los flujos migratorios (como los controles fronterizos y las expulsiones). Los resultados sugieren que esta 'doble vía' penal (ciudadanos italianos por un lado y migrantes por el otro) - con el subsecuente hiperencarcelamiento de extranjeros, así como su deportación final como consecuencia de la vulneración de las leyes administrativas y/o penales - se configura como una elección disfrazada, aunque deliberada de la reciente política legislativa italiana con respecto al sistema de justicia.

Palabras clave: sistema penal, migración ilegal, medidas coercitivas, hiperencarcelamiento, segregación, control social, populismo penal.

1. Introduction

One of the most discussed topics in the current debate on punishment is the decline of the prison population. After the era of mass incarceration, the past ten years have shown, in some countries, signs of a contraction in the levels of incarceration. Firstly, of course, is the case of the USA, where in ten years the prison population rate has declined by a total of 100 basis points. Indeed, in 2008 the prison population rate was 755 prisoners per 100,000 national residents and in 2016 it has fallen at 655², with almost 200,000 fewer imprisonments than in 2006³. This trend is apparent in several European countries as well. From 2008 to 2010 the prison population diminished in Spain, Germany, the Netherlands and Sweden. More in general, from 2012 onwards – after years of increases – there was a decline in the European Union average rate of incarceration from 143 prisoners (in 2014) to 102.5 (in 2018) per 100,000 inhabitants⁴.

² For the updated data on the world prison population, we thank the World Prison Brief database edited by the Institute for Criminal Policy Research of the Birkbeck University of London <https://www.prisonstudies.org/>. See also the 12th edition of the World Prison Population List edited by Roy Walmsley (2018).

³ In this regard, we should stress that some authors maintain that this reduction is, all in all, rather small (Austin, 2016; De Giorgi, 2015).

⁴ See Aebi and Tiago (2018).

In the recent literature, some authors have considered austerity to be a factor able to explain the prison population reduction. From this point of view, the crisis of the prison system may derive also from the cuts in public spending which followed the economic crisis of 2008-2010. On this interpretation, the economic crisis is not of course the only factor that has favoured the decline of imprisonment, but it is nevertheless one of the most influential variables. Some authors underline that the economic crisis is only a mediate cause enabling consolidation of a political discourse favourable to the reduction of imprisonment (Dagan, Teles, 2016); others (Clear, Frost, 2014; Pfaff, 2017) concentrate their analysis both on the spending cuts imposed by the economic crisis and on the reduction of crime rates.

Nevertheless, the need to reduce the cost of the justice system acts as a variable able to encourage a reduction of mass incarceration in favour of a new humanitarianism in criminal justice. Other authors (Matthews, 2014; Melossi, Sozzo, Brandariz Garcia, 2018), have argued against the austerity thesis by citing some closely related factors: the reduction of the prison population only minimally affects the costs of the prison system; the decrease in prison population rates also – and in some cases, mainly – involves countries not affected by the economic and financial crisis (e.g., Germany); the degrowth trend is continuing even after the fading of the economic crisis.

In alternative to the austerity interpretation, part of the literature suggests an explanation that recalls some classic concepts of the sociology of criminal law, such as ‘transcarceration’ (Lowman, 1987; Scull, 1987) or ‘net-widening’ (Cohen, 1985). From this point of view, the decline of incarceration can be explained as due to the ‘crime drop’ phenomenon (Farrel, Tilley and Tseloni, 2014; Van Djik, 2014). This expression, defined as the decrease in reported crimes – mainly violent crimes – primarily concerns the USA but some European countries as well.

How does the reduction of violent crimes influence imprisonment rates? We know that it is not possible to establish a direct relationship between crime trends and imprisonment (Melossi, 2000). Nevertheless, following Garland’s thesis (2001), we can agree that rising crime rates in the 1970s and 1980s facilitated the ‘punitive turn’ during the 1980s and 1990s. According to this thesis, the current reduction of crime levels is favouring a decrease in public

punitiveness and, in general, a fear of crime (Clear and Frost, 2014, Matthews, 2014; Pfaff, 2017). The consequences of this turn are – among others – the lesser efficacy of the populist rhetoric focused on the fear of crime and greater emphasis on other phenomena like immigration and terrorism (but also economic insecurity). These changes have encouraged the use of alternatives to imprisonment in the penal field⁵. We therefore witness a proliferation of systems of control alternative to the criminal justice system (De Giorgi, 2015; Platt, 2015).

From this perspective, it is apparent that criminal justice and prison walls have been progressively side-lined and replaced by instruments alien to the tradition of criminal justice. Hence, border controls, deportation, and the proliferation of different kinds of total institution, where migrants are detained, are examples of the extension of the net of social control beyond the borders of the penal system, with fewer procedural guarantees and a greater ruthlessness towards the enemies of today's society (Baker, 2018; Bosworth, 2017; Pickering, Bosworth, Aas, 2014).

2. The Italian case

In this article, we discuss the position of Italy with regard to these general trends in social control. The questions that we address are the following: Can we really confirm a decline of the prison system in Italy? Is the criminal justice system being replaced by other administrative/preventive instruments focused on migration control? Is there a decline in the moral panic focused on crime in favour of amplification of the risks connected with migration?

Italy is one of the European countries that, during the years of mass incarceration, experienced a particularly significant increase in incarceration rates. In the Italian literature,

⁵ This thesis has been well-argued by José Ángel Brandariz Garcia during a lecture held at the University of Torino on September 24th 2018 and reported on the documents of the International Summer School on Fundamental Rights and Imprisonment with the title “Oltre l’ipotesi dell’austerità. Riflessioni sul declino della popolazione detenuta”.

many authors (Dal Lago, 1999; Melossi, 2003; Palidda, 2009) agree that the increase in the prison population can be explained – also – by the reaction of the Italian political system to the wave of immigration that started in the early 1990s. According to these authors, the criminalization of immigrants has proceeded in two main directions: the criminalization of immigration as such; the marginalization of immigrants and the punishment of their unlawful behaviour with especial severity.

From this point of view, the penal populism rhetoric has connected the fear of crime with the fear of immigration (Maneri, 2009). Based on that populist discourse, although it is not possible to find a direct connection between immigration and crime (Ferraris, 2012), the two phenomena have been linked especially in the political field. This parallelism between criminality and immigration has produced various changes in the penal system resulting in an erosion of the civil liberties and procedural guarantees characterising the Italian liberal model of justice.

Indeed, the use of criminal justice measures to deal with immigration is not only a problem of criminalization of immigration (meaning that illegal immigration becomes a criminal offence); it is also a process that concerns all three traditional branches of the criminal justice system, infecting substantive criminal law, criminal procedure law, and prison law. It is a widespread phenomenon in most contemporary legal systems, and it also affects the Italian criminal justice system, hitherto known for its high standards in the protection of individual rights and personal freedom⁶.

First, we will discuss the main features of the criminalization of immigrants in the fields of criminal law, criminal procedure, and punishment rules. Second, we will explain how Italy is involved in the structural changes of social control briefly discussed in the first

⁶ The reference here is notably to some general features of the Italian criminal procedure system, conceived as an adversary trial process with the grafting of many guarantees that go further than those to be found in many European and non-European systems: i.e., the general double degree of jurisdiction on the merits connected to a third instance on legitimacy issues; the right of appeal against every decision on personal freedom and a third instance as well; the presumption of innocence until the final judgment; legal assistance for the accused from the first investigation hearings; information on the right to remain silent and on the privilege against self-incrimination from the first step of the procedure (and the impossibility of drawing negative inferences from exercise of the right to silence); the existence of an invalidity system that strictly requires the exclusion of evidence obtained in violation of human rights.

section. Specifically, we will analyse the bases of (i) the current rhetoric on fear and social control, and (ii) the interweaving between criminal justice and administrative procedures (prison, probation, and deportation).

The results, we must say, are ambiguous. On the one hand, there is evidence of increasing punitiveness in the specific field of migration enforcement, with border control assuming a leading role in the control of migration. On the other hand, we cannot find in Italy a real decline of imprisonment and of populist slogans on crime and fear in the public debate.

3. Criminal law: Migration-related offenses, enemy criminal law theory and the purpose of punishment

As far as the substantive law is concerned, the criminalization of illegal immigration is not exclusive to Italy, since 25 out of 28 European Union countries punish unlawful entry or stay within the national borders as a criminal offence⁷. Moreover, many countries also criminalize behaviours strictly connected to illegal immigration that could be considered instrumental to the entry or the stay itself, and which increase the risk of criminalization for foreign national individuals and groups. In this area, Italian law has proved to be particularly “creative” and contains a wide range of immigration-related offences (Art. 5 (8bis) legislative decree⁸ 286/1998), or perjury in providing personal details (Art. 495 and 496 penal code) through non-exhibition of a valid ID or residence permit (Art. 497bis p.c. and Art. 6(3) D.Lgs. 286/1998), non-compliance with an expulsion order or a re-entry ban (Art. 13 and 14 D.Lgs. 286/1998), to fingerprint alteration (Art. 495ter p.c.).

Somehow, these criminal offences lower the threshold of punishment. They do not imply an immediate and concrete harm to the legal asset, but they do seem to be mainly or instrumentally intended to prevent the unlawful presence of immigrants within the national borders. This legislative technique concerns so-called ‘crimes of danger’, as opposed to

⁷ See the Report of the European Union Agency for Fundamental Rights (https://fra.europa.eu/sites/default/files/fra_uploads/fra-2014-criminalisation-of-migrants-1_en.pdf).

⁸ Henceforth D.Lgs.

‘crimes of damage’⁹: if we assume that the harm to be prevented is the unlawful presence of immigrants, the commission of these offences endangers the protected interests.

This is nothing unusual, since contemporary legal systems feature a proliferation of preventive offences, and we are currently witnessing a sort of ‘preventive turn’ in crime control policies (Crawford, 2009). Nonetheless, in the risk society, crimes of danger were long marked by the need for protection against the risks deriving from technological and scientific progress: fear and insecurity were caused by the unknown consequences of progress and science. Nowadays, in the contemporary consumer society, prevention is gradually becoming a way to strengthen social ties among local communities and a key means by which neoliberal social and economic policies can ensure the protection of private property against attacks by poor and marginalized people (Melossi & Selmini, 2009). By criminalising unlawful immigration with so many instrumental offences and danger-crimes, many European countries, and Italy above all, are reacting to this fear of the unknown and of new jeopardies to private assets with a risk management achieved through criminal law.

Insofar as the unknown perceived as dangerous is a human being and not a scientific technique, or a technological process, the management of migration flows adopts personological models of criminalization within the global frame of so-called ‘enemy criminal law’ or *Feindstrafrecht* (Jakobs, 1985). In the new millennium, the logic of enemy penology is being adapted to deal with the novel dangers and threats (such as terrorism, cybercrimes), thus receiving a new momentum closely connected to preventive approaches. This emerging enemy criminal law aims to criminalize an enemy – the unlawful immigrant – whose criminological roots are more than controversial. It is so because the law itself creates the status of illegality, so that what is lawful or unlawful depends on the law of each receiving country and it may differ from one country to another, and from one period to another. What is illegal here and now could be legal elsewhere or tomorrow (Parkin, 2013).

⁹ Traditionally, the European criminal law literature draws a distinction between ‘crimes of damage’ or ‘crimes of harm’ (where the offence is described as the causation of the harmful result) and ‘crimes of danger’ (when the punishment is imposed merely for creating danger, even though the harmful result does not occur). See i.e. Angioni (1994), Baumann (1966), Binavince (1969), Hurtado Pozo (2008).

In the specific Italian case, the introduction of a kind of enemy criminal law has assumed mainly symbolic forms. In fact, there is evidence of a special criminal law for migrants in formal law and the political rhetoric (see section 5 below). More complex is the situation in the field of law in action. As we will show later (see section 6), in recent years Italy has engaged in the over-imprisonment of migrants while, on the contrary, it has constantly recorded low rates of deportation. Italy therefore seems to be characterized by the over-criminalization of immigrants by law in the books and only partial enforcement of the enemy criminal law arrangements in the concrete practices of social control agencies.

Within the framework of this *crimmigration* trend (Stumpf, 2006), also penalties are crucial instruments. In many countries, and mainly in Italy, penalties connected to immigration crimes appear entirely disproportionate (up to 10 years of imprisonment) to their essence as misdemeanour offences. Since no penalty can have a real deterrent effect on people willing to do anything to escape from their countries due to wars, violence, and poverty, this phenomenon seems even more meaningless. The presence and the value of fines and other monetary penalties for immigration crimes seems curious as well because have-nots can hardly pay fines (in Italy, for example, the breach of a re-entry ban is subject to a fine of up to 30,000 euros).

To understand this phenomenon, two elements must be considered. First, the general emphasis on harsh punishments – a central issue in the current Italian criminal policy debate – has deep roots connected to the crisis of the rehabilitation model and the rise of incapacitation and deterrence theories (Garland, 2001). As regards illegal immigrants, in recent years, severe penalties and their symbolic use have become just incapacitation measures excluding precarious members of the community and thereby strengthening citizens' trust in the state's power (Aas, 2014). What matters in this context is not only the criminal punishment and incarceration of the sentenced immigrants themselves but also the more frequent use of deportation as the final consequence for a breach of criminal law. Indeed, repatriation in Italy is formally also – and we could say mostly – a replacement sanction (applied when immigrants cannot pay the penalty or when they should face a short prison sentence) or as an alternative sanction (enforced in the last phase of a prison sentence).

Hence the two consequences are «simply different ends of a single punitive spectrum of governmental authority» wielded over the unlawful migrant (García Hernández, 2013).

This growing ancillary function of criminal law regarding the administrative procedure of repatriation, and ultimately regarding migration policies, is quite evident in many European countries. As far as Italy is concerned, it has been endorsed by the European Court of Human Rights in the well-known *El Dridi vs. Italy* judgment (ECHR, C-61/11, 28 April 2011).

By increasing the criminal significance of immigration conduct and linking deportation to criminal convictions, Italian criminal law has undergone teleological contaminations, quickly becoming a crucial instrument of border management policies. Furthermore, the increased role of criminal law in shaping migration policies is connected with the principle of mandatory prosecution, which constitutes an underlying principle of criminal law common to many European countries.

4. Criminal procedure: A new double-track among pre-trial detention, special swiftness and rights of defence

Criminal procedure law – to cite a historical definition (Carrara, 1881) – is a set of rules conceived to protect “gentlemen defendants” and based on the principle that a person is innocent until proven guilty beyond any reasonable doubt. The evolution of criminal procedure law in recent years seems inspired by the idea of different rules and fewer guarantees established by law for immigration crimes and endured *de facto* for alien defendants in ordinary criminal proceedings. Italy is very well-known for its special legislation against mafia networks, which is the procedural double-track *par excellence*, the forerunner of any double track. Nonetheless, in recent years changes have been gradually made to the basic rules of criminal procedure also for various crimes of high social concern, ranging from crimes relating to paedophilia or paedo-pornography, through drug trafficking, to immigration crimes. However, this broad outline of two ‘immigrant double track systems’ – one established by the law and one *de facto*, often merging with each other – must be filled

with details to determine how criminal procedure can be a ‘silent servant’ for the aims of criminal policies.

Starting from the preliminary investigations, the set of rules regulating arrest *in flagrante delicto*, custody, and precautionary detention can easily ensure, in most cases, the pre-trial detention of a suspected or accused non-citizen. Arrest *in flagrante delicto* (Art. 380 c.p.p., i.e., criminal procedure code) is provided as mandatory for many immigration offences, and many immigration-related crimes allow arrest not *in flagrante delicto*. Ordinary discretionary arrest *in flagrante delicto* is enforced «only if it justified by the seriousness of the criminal act or by the person’s dangerousness inferred from his personality or the circumstances of the act» (Art. 381 c.p.p.) so that the police, based on a logic of stereotypes, will easily feel entitled to proceed against an immigrant who is committing a crime. Moreover, the practical implementation of precautionary detention – based on specific considerations such as the risk of absconding, of suppression of evidence or of re-offending (Art. 274 c.p.p.) – rests on presumption rules, so that in the case of an undocumented immigrant at least a significant risk of flight is extremely likely and pre-trial detention – as statistics show – becomes almost the rule (for the U.S. situation see Vázquez, 2017).

Nonetheless, if by any chance the accused is not in pre-trial detention, and the administrative authority can order his/her deportation, he/she will probably never take part in the ensuing trial, because the judge will authorise his/her expulsion before the judgement, closing the case with a dismissal and with an undeniable infringement of the rights of defence (Art. 13(3quarter) D. lgs. 286/1998). Of course, this is mainly a theoretical possibility because only in a few cases is the deportation order actually enforced. Nevertheless, the mere possibility of pre-trial expulsion is a clear message of a special criminal proceeding - with fewer guarantees - against dangerous categories for which the use of preventive measures is formally preferred.

With the accused often in custody, the proceedings for the most common immigration crimes are characterized by a certain speed, since a mandatory or binding discretionary fast-track is imposed for such offences. In the Italian criminal procedure code, these “fast trials” are special proceedings that significantly reduce the length of the trial, thus accelerating its

conclusion: The Public Prosecutor brings the arrested defendant directly before the trial judge for confirmation of the arrest and a simultaneous trial; or after the confirmation of the arrest, he/she proceeds with a fast-track trial by taking the defendant person to a hearing within thirty days of the arrest (Art. 449 c.p.p.). In these trials the evidence collection and the time limits for preparing the defence are significantly reduced, and what has already been found during the first steps of the investigation or in the confirmation of the arrest can carry considerable weight in the judgement (not by chance the ‘fast trial’ model was initially conceived for cases in which preliminary investigations are needless). On this basis, achieving rapid convictions is anything but unlikely.

Moving from the law in books to the law in action, any immigrant charged with a crime faces numerous barriers hampering his/her rights of defence. Under Italian law, free legal aid – based on the income of the applicant (and of her/his cohabiting relatives), which must not exceed approximately 11,493€ – is granted to everybody, citizen and non-citizen alike, regardless of whether they are regularly residing in Italy. Some restrictive interpretations – addressed to demanding the claimant’s ID and an income certificate issued by the embassy of his/her country – have been gradually adopted and currently hampers the effectiveness of the right to defence.

Another matter are the quality standards in legal assistance, but this issue is also closely connected to the substantial language barriers obstructing the everyday interaction between lawyer and client. In line with international law provisions¹⁰, the Italian code of criminal procedure establishes in Art. 143 that each «accused who does not know the Italian language has the right to be assisted free of charge, regardless of the outcome of the proceedings, by an interpreter to understand the accusation against him and to follow the completion of the proceedings and the hearings in which he participates». Besides this general provision, Art. 143 c.p.p. also enshrines the right to the free assistance of an interpreter for communications with the defendant before an interrogation, or to present a

¹⁰ See European Convention on Human Rights (Art. 5 § 2 and Art. 6 § 3a); Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings.

request or a report and the right to written translations of certain proceedings (automatically or as a result of a discretionary decision based on the judicial evaluation). In fact, these two kinds of restrictions greatly weaken the right of defence since a translation limited to certain key procedural records, and very little communication between lawyer and accused, can severely affect the rights to take proper part in the trial and adequately defend oneself against the charges. Moreover, the relative weakness of some procedural consequences due to the unavailability of an interpreter or the inability to find one for some crucial activities – as still established in case law – can further undermine the rights of foreign national defendants.

Lastly, judicial practices constantly show the obsolescence of a system conceived in the late eighteenth century for English speaking or French speaking foreigners at most: today, the issue of training a new generation of interpreters, with specific legal skills, is far from negligible and not easy to resolve, and it involves not only a problem of languages but even more often a problem of idioms. As a result of the foregoing considerations – and to the extent that criminal procedure law is always “the safest index” with which to measure a country’s degree of civilization and political freedom (Lucchini, 1899) – the Italian situation plainly shows its shortcomings.

The third approach to verify possible convergences between immigration policies and criminal justice is to analyse the prison system, which is a crucial field to understand the responses to security demands connected to mass immigration.

The data revealing a hyper-incarceration of immigrants in Italy are not surprising, given that the legislation, as previously seen, enables both a broad criminalisation of migrant behaviours and a reduction of trial guarantees. However, it should be stressed that the rules governing enforcement of the judgment support this trend as well, because immigrants encounter many obstacles – *de facto* or *de jure* – in accessing alternative measures which represent the main means to avoid imprisonment or to be early release from prison.

In the Italian system any person sentenced to less than four years of imprisonment is allowed to request an alternative measure directly after the *res judicata*, which leads the public prosecutor to suspend the sentence (Art. 656 c.p.p.). The result is that the surveillance tribunal’s decision imposing these alternative measures can be taken without any transit in

jail. It is therefore crucial to focus on the restrictions that an immigrant has to face in fulfilling the requirements of this procedure because it can become entirely useless for him/her. Alternative measures conceived for people with a high (or at least standard) level of social integration, with family bonds and a social network to support the enforcement of a non-custodial sentence, cannot be easily applied to immigrants: the so called “sospensione dell’ordine di esecuzione” (suspension of the public prosecutor’s enforcement order) hypothetically makes it possible to obtain the alternative measure demanded directly from freedom, but for migrants this is often unfeasible.

This phenomenon produces a higher incarceration rate for immigrants than for Italians committing comparable offences. In addition, it raises obstacles that seem very hard to overcome in the subsequent stages. Requirements for probation, home detention, day release, etc. can be fulfilled only by providing guarantees regarding home, work, livelihood, and finally a legal residence status¹¹. Moreover, the sword hanging over immigrants’ heads – namely the crime-related expulsion order – may be an alternative sanction (Art. 16(1-4) D.lgs. 286/98), a security measure (Art. 15 D.lgs. 286/98; Art. 235 c.p.), but also an alternative measure (Art. 16(5-8) D.lgs 286/98). Without going into the technical features of each of these measures, it is evident that establishing repatriation as an alternative sentence demonstrates the real purpose of these legal provisions: the immigrant’s expulsion.

As frequently happens, the distance between the legislator’s intentions and the concrete practices of social control agencies is too wide. Thus, the deportations effectively carried out are only a small part of those formally ordered. Consequently, the prison system remains the main means adopted by the Italian legal system to neutralize migrants who commit – mainly – minor crimes.

¹¹ Fabio Quassoli (2002) has shown, with the tools of the ethnography of judicial practices, that these requirements affect the decision-making of Italian magistrates.

5. “Jocks with phones” and “bloody thieves”. The propagation of enemies

In Italy, we cannot really state that we are witnessing a decline of the penal populist rhetoric. Rather, what we have seen in recent years is an increase in the number of public enemies.

On the one hand, the topic of migration has progressively become the main argument in the populist rhetoric on security. From this point of view, the last right/5star¹² Italian government was a quintessential manifestation of the use of fear as a tool of government¹³. In this case the fear has been concentrated on the risks connected with immigration.

What we witnessed for 15 months¹⁴ was a constant increase of news items, alarms, and calls for a state of emergency, where the immigration phenomenon was depicted as the main problem for national security. The main moral entrepreneur¹⁵ of this crusade against immigrants was the former Minister of Home Affairs, Matteo Salvini. With his skills in the use of a populist rhetoric – supported by a massive use of social media – he painted asylum-seekers as potential criminals, dangerous people that had to be removed by any means. At the same time, organisations promoting the defence of human rights were criminalised, being *de facto* prevented from operating in support of migrants and, in some cases, also being denied their democratic right to speak.

On a cultural level, the result of this crusade against migrants has been the endorsement of forms of racism that hitherto had been banned from the public sphere. The introduction into the political discourse of derisory expressions¹⁶ about migrants has contributed to exacerbating – representing it as rightful – suspicion, and in some cases hatred, towards migrants, the effects of which are likely to last a long time in Italian society.

Another turn has taken place in the practices of immigration control. Until a few years ago, in the political debate the fear of immigrants was focused on the figure of the criminal

¹² This was the name of the alliance between the right-wing nationalist party called “Lega Nord” and the populist party called “Movimento 5 stelle”.

¹³ This phenomenon bears some similarities to the use of the “War on Crime” as a tool of government in the USA (Simon, 2006).

¹⁴ This was the duration of the first government headed by Prime Minister Antonio Conte.

¹⁵ In Becker’s (1963) sense.

¹⁶ Among them, this section’s title is only an example.

foreigner. Starting from that premise, the law-and-order campaign centred on a demand for severe and certain punishment of those immigrants who committed crimes¹⁷. That campaign has progressively shifted to the figure of the immigrant considered to be a risk to society as such. Consequently, in the rhetoric against immigration, criminal justice measures have been progressively substituted by an emphasis on other instruments deemed more suitable. Indeed, in the current populist rhetoric, the use of criminal justice tools in fighting migration is no longer the preferred solution. In fact, the criminal justice system can be used only for those immigrants caught red-handed committing crimes. Moreover, with its lengthy procedures and legal uncertainty, criminal justice resources are an instrument of no use to a political establishment that needs to demonstrate its ability to produce instant results in neutralizing dangerous immigrants. Instead, border controls, refoulement of ships carrying migrants, and criminalisation of the NGOs that try to rescue asylum seekers exemplify the means that are considered most efficient in rejecting migrants. It is no coincidence that, in its media communication, the last government focused on border controls and deportation as the main instruments to fight immigration. Furthermore, it does not matter for the success of this populist campaign that, in fact, only a minority of illegal immigrants are really deported¹⁸; what appears to be sufficient is the media emphasis on the problem and the constant repetition of law-and-order slogans.

However, this emphasis on immigration as a real problem does not mean that Italy is witnessing a decrease of attention to crime. On the contrary, the focus on migration and border control has flanked a constant alarm on crime and security.

This emphasis on law-and-order works despite the fact that also Italy, like the USA, is witnessing a decline in violent crimes. The homicide rate, for example, has been decreasing since the early 1990s (Figure 1). Nevertheless, the topic of crime and security has not been removed from the political discourse. Rather, an alarmist propaganda is putting the spotlight on petty crimes, in a discourse where migration/security and various forms of urban marginality have been identified as the main issues for Italian society.

¹⁷ On this topic, we refer to Marcello Maneri (2009).

¹⁸ For the updated data on Italian deportation rates see the next section.

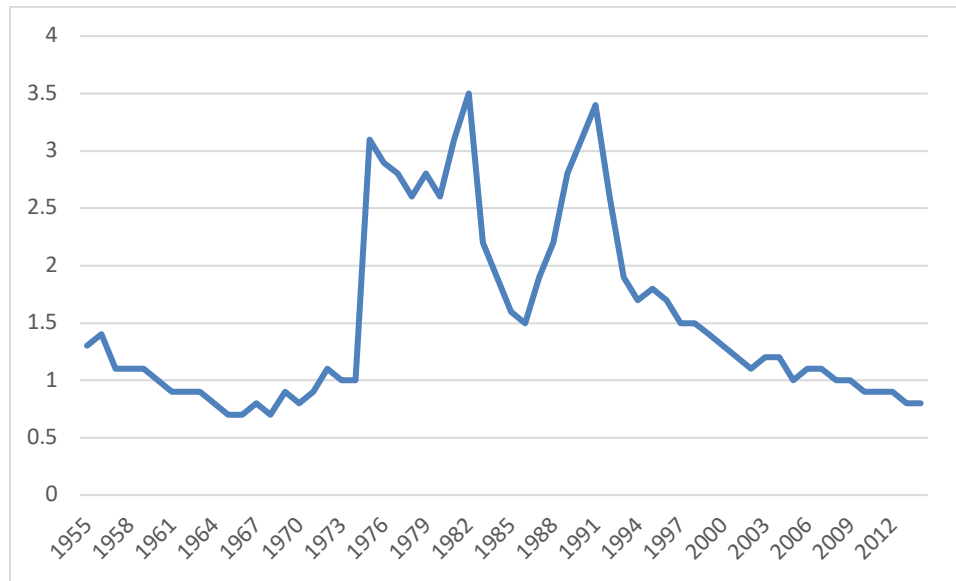


Figure 1: Italy: *Homicides per 100,000 inhabitants*

Source: Home Office

In the last few years, the qualitative leap has been epitomised by a political language full of rage and contempt, which is unknown in recent Italian political history. Such language, depending on the case, has enabled an Italian government minister to describe migrants blocked at sea in a boat as “jocks” that do not really need medical or economic support, also because they have smartphones; and, in other instance, to call an immigrant woman with children arrested for stealing a “bloody thief”, hence calling on the authorities to separate her from her children¹⁹.

The final result is a general picture where immigrants and street criminals have been merged together as the current dangerous class against which Italian society must defend itself²⁰. It is no coincidence, therefore, that the various security measures approved by the penultimate Italian government have alternated, often within the same law, some measures against migration and others against street crime or, more in general, social disruption, in a

¹⁹ Both examples are sourced from Matteo Salvini’s tweets on migration and security.

²⁰ The references, obviously, are to Michel Foucault’s lectures on the state’s reaction to dangerous classes (1997).

mix where the final goal has been to maintain the pressure on the everyday enemies without which the government's life would have been more difficult²¹.

6. Not prison decline

Moving from the political rhetoric to the practices of social control, we can state that also Italy, following the USA's example, and like other European countries, is reorienting migration control practices towards border control.

Indeed, the Italian system of immigration control has centred on preventing migrant landings on the Italian coast. Actually, in Italy there has been a significant reduction of landings from Africa in the last years (Table 1), after the agreements made with the Libyan government in February 2017. Only in 2020 the number of boats arriving from Africa has increased again, probably influenced by two factors: the negotiation with the Libyan government on the renewal of the agreement; the current diplomatic crisis with the Tunisian government.

Table 1.

Migrants landed in Italy 2017-2019

| Year | Number of migrants landed in Italy |
|---|------------------------------------|
| From August 1st 2013 to July 31st 2014 | 116,940 |
| From August 1st 2014 to July 31st 2015 | 175,720 |
| From August 1st 2015 to July 31st 2016 | 154,077 |
| From August 1 st 2016 to July 31 st 2017 | 182,877 |
| From August 1 st 2017 to July 31 st 2018 | 42,700 |
| From August 1 st 2018 to July 31 st 2019 | 8,691 |
| From January 1 st 2020 to August 28 th 2020 | 17,985 |

Source: Italian Department for the Civil Liberties and Immigration

²¹ Examples of these legislative approaches are the “security decrees” issued by the Italian government via Law no. 132 of December 2018 and Law no. 186 of June 2019.

The current official approach is founded on the removal of the problem. In fact, the Italian government has decided to delegate to the Libyan authorities the management of the mass of desperate people coming from the global South and heading for the Italian coast. On this approach, it does not matter if Libya today is a country unable to guarantee fundamental rights; just as still unheeded are the UN observers who describe the inmates of Libyan detention centres as experiencing “unimaginable horrors”²². In front of the logic of emergencies, Italy has decided to address illegal immigration by removing it at the roots, hence raising the walls of the fortress.

This strategy also derives from the historical inability of the Italian government to increase the number of deportations (Figure 2). In this regard there is a substantial difference between the Italian practices of border control and those of the USA and some European countries. In the context of great efforts to prevent the illegal entry of immigrants, the Italian administration, for many reasons²³, has been enduringly ineffective in carrying out deportation practices.

²² This definition is included in the 2018 report published jointly by the UN Support Mission in Libya and the UN Human Rights Office after 20 months of inquiry in the Libyan detention system.

²³ In this regard, the concept of ‘undeportability’ adopted by Giulia Fabini (2019) is particularly interesting to explain Italy’s ineffectiveness in deportation practices.

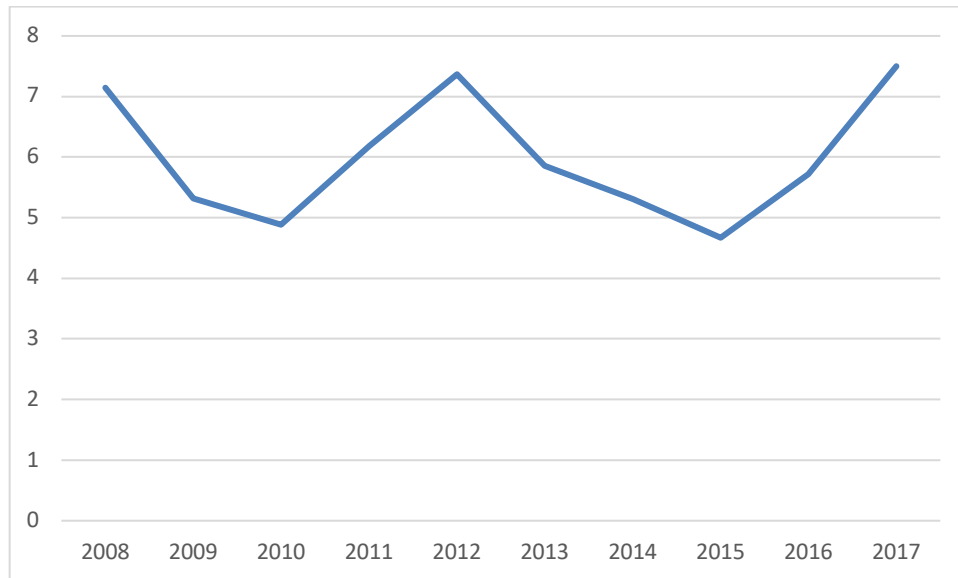


Figure 2: Number of expulsions from Italy (in thousands)

Source: Eurostat

At the same time, the number of migrants detained in the so-called Centres for Identification and Expulsion has not increased significantly in recent years. Unfortunately, the Italian Home Office does not publish reliable data on the number of immigration detainees. Nevertheless, studies conducted with unpublished data (Anastasia and Ferraris, 2013), have shown that, after a short-lived rise in 2008 and 2009, the number of detainees declined until 2016 (Table 2). In the following years, by contrast, the number of detained immigrants increased again (Table 3). In fact, the new CPR are the same structures as the old CIE with a mere change of name. Probably, their use as instruments of ‘preventive’ police power (Campesi, 2020) has increased since the last ‘Salvini decree’ due to the obstacles raised against regular human mobility²⁴.

²⁴ The Italian government has recently undermined the System of Protection for Asylum seekers and Refugees (SPRAR), which was considered as a best practice in migrant integration policies. For a recent reflection on European migrant support practices, we refer to a recent article by Donatella della Porta and Elias Steinhilper (2020).

Table 2.*Number of immigration detainees, 2013-2016*

| Year | Number of immigration detainees |
|-----------------------------------|---------------------------------|
| 2013 | 6,016 |
| 2014 | 4,986 |
| 2015 | 5,242 |
| 2016 updated until September 15th | 1,968 |

*Source: Commission for Human Rights of the Italian Senate of the Republic***Table 3.***Number of immigration detainees, 2018-2019*

| Year | Number of immigration detainees |
|------|---------------------------------|
| 2018 | 4,092 |
| 2019 | 6,172 |

Source: 2020 Report of the Italian National Preventive Mechanism for safeguarding the rights of people detained or deprived of freedom

The focus on border control and the increased use of preventive measures for dangerous classes (Campesi and Fabini, 2020) like migrant detention centres has not resulted in a decline of incarceration rates. To describe the Italian prison system, we shall move from a specific premise. In comparing the structural situation of imprisonment in Italy, the USA and some European countries (Table 4), it is apparent that Italy does not have incarceration rates higher than those of other countries. In fact, with 100 prisoners per 100,000 inhabitants, Italy has an incarceration rate similar to those of France and Greece and lower than those of the U.K. and Spain, but higher than those of Germany and Sweden. The distinctiveness of the Italian case resides in the overcrowding rate (118.9%), in pre-trial detention (32.6%), and in the foreign prison population rate (33.8%). The combination of these three main crucial features, among other features of Italian prison practices, justified the ECHR decision sentencing Italy for the structural condition of its prisons In 2013²⁵.

²⁵ We are referring to the “Torreggiani” decision (Torreggiani and Others vs. Italy 43517/09. ECHR, 8 January 2013) where the European Court for Human Rights decided to sentence Italy, after many complaints lodged by

Table 4.
Comparison of prison populations 31.10.2019

| Country | Number of prisoners | Prison population rate | Overcrowding rate | Pre-trial detention rate | Foreign prisoners |
|-----------------|---------------------|------------------------|-------------------|--------------------------|-------------------|
| United States | 2,121,600 | 655 | 103.9% | 21.6% | 5.2% |
| Italy | 60,985 | 101 | 120.8% | 31.6% | 33% |
| France | 71,710 | 106 | 117.4% | 29.3% | 21.7% |
| Spain | 59,275 | 127 | 71.8% | 14.9% | 28.0% |
| Greece | 10,216 | 95 | 102.8% | 31.1% | 52.7% |
| Germany | 64,666 | 78 | 88.5% | 20.7% | 24.0% |
| England & Wales | 83,665 | 140 | 111.4% | 11.1% | 11.0% |
| Sweden | 5,979 | 59 | 92.9% | 30.6% | 22.1% |
| Norway | 3,373 | 63 | 83.9% | 22.9% | 30.9% |

Source: World Prison Brief

As can be seen in Figure 3, the prison population in Italy began to increase from the early 1990s until 2010, when the Italian prison population was on the verge of the 70,000 inmates mark with overcrowding rates above 140%. The only exception in this surge of the prison population occurred in 2006 when the Italian Parliament approved a collective pardon that reduced the prison population by more than 20,000 inmates. Unfortunately, in the following years the prison population began to increase again with a speed unknown in Italian history²⁶.

prisoners detained in various Italian facilities with regard to the structural condition of the cells, the absence of activities and the ineffectiveness of judicial rulings.

²⁶ For a reconstruction of Italian prison population rates since the early twentieth century, also in comparison to the USA ones, see Dario Melossi's important book (Melossi, 2002).

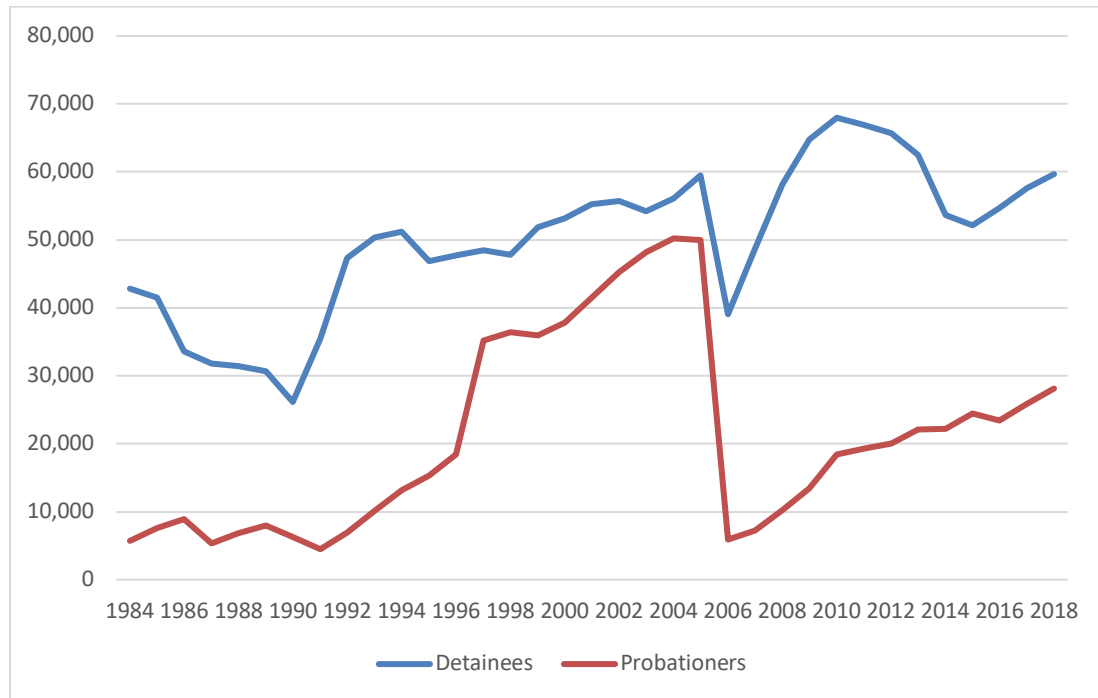


Figure 3: Number of prisoners and probationers, 1984-2018

Source: Ministry of Justice

These changes in prison rates are the consequence of two main phenomena. The first is the adoption by Italian governments of zero-tolerance policies. For many years, in fact, both right-wing and left-centre governments adopted bipartisan law-and-order policies, supported by almost all political parties. The consequence of these policies was, for example, the criminalisation of the use of drugs, the reduction in the use of alternatives to imprisonment for recidivists, and a strong reduction of pardons²⁷. The entry into force of several measures against street crimes has, in fact, favoured a significant rise in prison admissions and, above all, a marked reduction in the utilisation of early release schemes.

The second phenomenon has been migration. Italy has a long history as a country of emigration. For many years, Italian citizens left their native towns to emigrate to North and

²⁷ This is a topic that cannot be neglected in Italy. Indeed, for decades the recurrent approval of amnesties has been one of the main tools used to contain prison overcrowding. On this point, see Manconi and Torrente (2015).

South America, Germany, France, etc²⁸. After the ‘industrial boom’ that followed WWII, Italy became a country of immigration. Initially, starting in the 1950s, there was internal migration from the South to the North. Subsequently, Italy received migratory flows from the Maghreb and, after the fall of the Berlin Wall, from Eastern European countries, particularly Albania and Romania.

The prison system is a mirror of the impact of the immigration policies applied in the last twenty years. Especially if one considers prison flow data from 1991 to 2018 (Figure 4), one can observe the process of substitution in the composition of the prison population that has characterized Italy in the past twenty years. From 1992 onwards, the steady decline in the imprisonment of Italian citizens was offset by a continued increase of migrant prisoners. This process determined a constant increase in both the number of foreigners (Figure 5) and the percentage of foreigners in the total prison population (Figure 6). The peak of this process of incarceration of illegal immigrants was reached in 2007 and 2008, when foreign inmates accounted for almost 38% of the Italian prison population²⁹.

²⁸ For a recent historical re-interpretation of Italian migration, see the book by Piero Bevilacqua, Andreina De Clementi and Emilio Franzina (2017).

²⁹ In interpreting these data, it must be considered that migrant groups, are largely concentrated in the North of Italy. Consequently, in North Italian prisons the foreign prison population rates have often been above 70%.

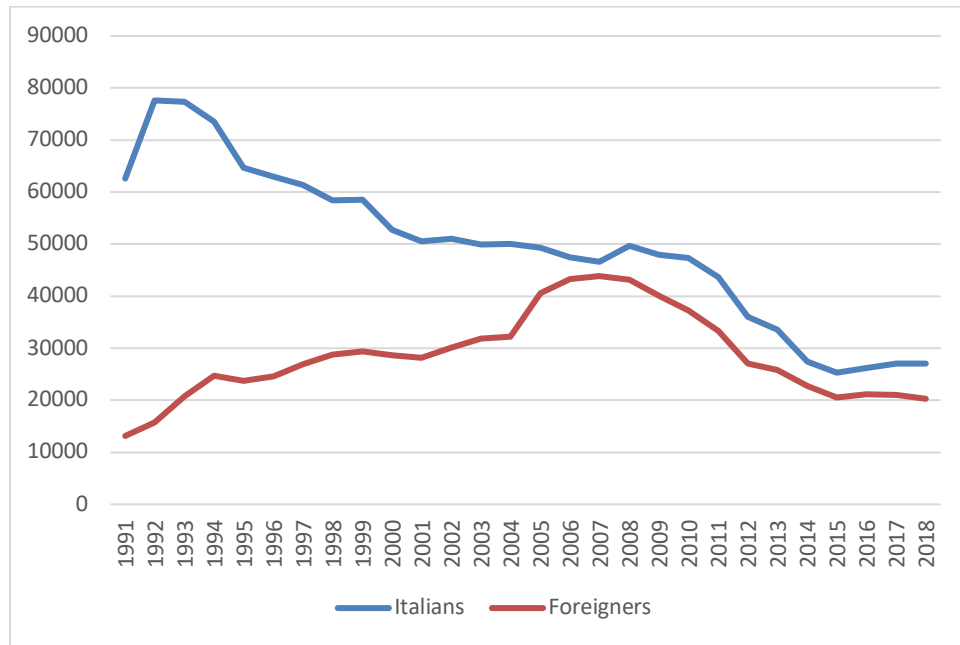


Figure 4: Prison admissions, 1991-2017

Source: Ministry of Justice

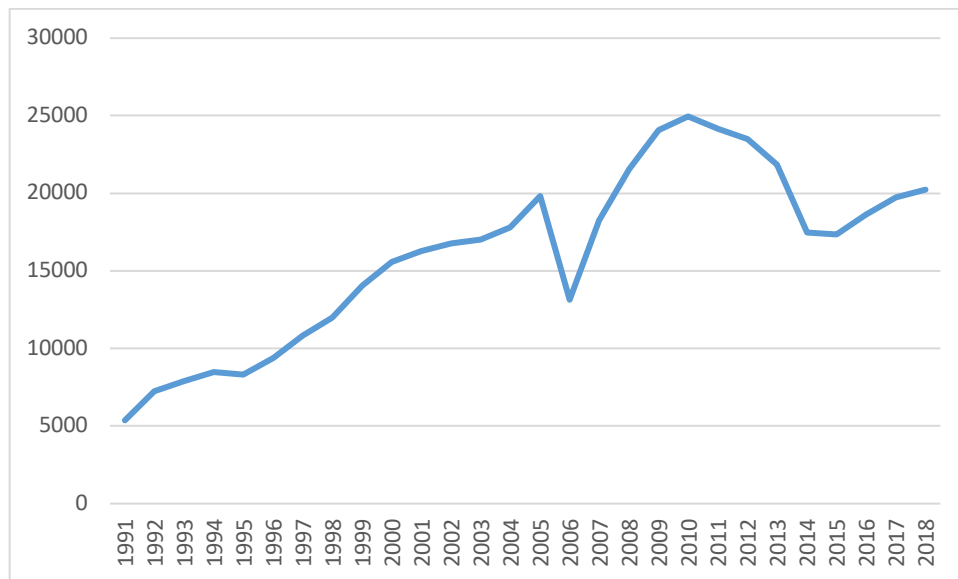


Figure 5: Number of foreign prisoners

Source: Ministry of Justice

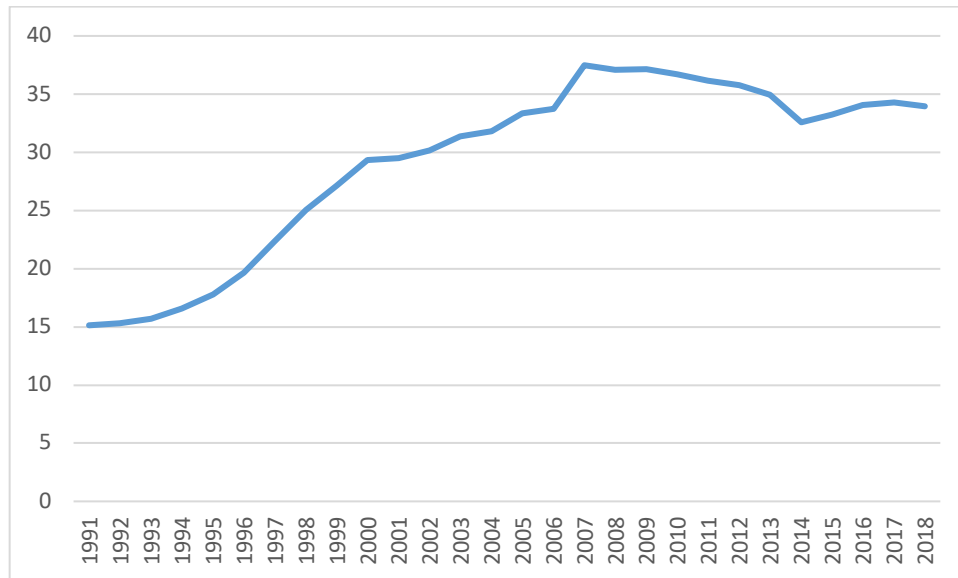


Figure 6: *Percentage of foreign prisoners*

Source: Ministry of Justice

This process began to change course in 2010, when the prison population – albeit initially slowly – started to decrease and the percentage of foreigners in the total prison population also began to descend. A turning point appears to have taken place in 2013. In that year, as said, the Italian government had to comply with the obligations imposed by the ECHR ruling *Torreggiani vs. Italy*. The reaction of the Italian authorities to the requirements imposed by the Court was the establishment of a team of experts, coordinated by the president of the National Preventive Mechanism against Torture, Mauro Palma, with the goal of suggesting immediate actions to bring the system in line with the court injunction. For these purposes, the Italian government approved a number of measures to alter various aspects of the criminal procedure, the criminal and prison laws, and the administrative organisation of the prison system. After this first action, the Italian government established a broad expert consultation body, called “States-General of Penal Enforcement”³⁰, with the purpose of proposing a general reform of the criminal justice system, especially of criminal sanctions.

³⁰ The results of this public consultation are accessible on the website of the Italian Minister of Justice https://www.giustizia.it/giustizia/it/mg_2_19_3.page?previousPage=mg_2_19.

The results have been, in many ways, surprising. From 2013 to the end of 2015, the Italian prison population decreased by almost 15,000 inmates. This drastic reduction was not obtained with amnesties or other provisions of clemency, but with the introduction of various measures³¹ able to mitigate the most stringent legal aspects and to modify organisational practices in terms of imprisonment and social control. For example, new measures have rendered pre-trial detention more difficult in the case of perpetrators of petty crimes, and have facilitated both home detention for convicted individuals sentenced to less than 18 months of imprisonment and deportation as an alternative to imprisonment. From the organisational point of view, the Italian administration introduced measures to improve living conditions inside prisons and to facilitate work in prison. More generally, a new penal climate emerged, in which the emphasis on crime and control was reduced and where all criminal justice actors have been involved in reducing the pressure on the prison system and achieving a positive outcome of the procedure started with the “Torreggiani” ruling.

Unfortunately, in the following years the massive decline of this two-year period (2013-2015) proved to be only an interlude in the recent Italian history of penal control. Indeed, in 2015 the Council of Europe declared its satisfaction with the Italian efforts to meet the ECHR’s requirements. In fact, this decision of the European authorities led to the closure of the “Italian dossier” and the end of the state of emergency in the prison system.

Immediately after the Council of Europe’s decision, the Italian prison population began to increase again, and it grew by almost 10,000 individuals from 2015 to 2018. Today, the number of Italian prisoners is once again passing the 60,000 unit mark. Furthermore, the broad consultation body that should have produced a structural reform of the prison – and penal – system did not effectively produce the expected legislative results. The changes in the political climate which accompanied the 2018 election campaign, and the subsequent rise of the right/5-star government dashed any criminal justice reform expectations³².

³¹ In those years, all the Ministers of Justice in office approved at least one block of measures in order to relieve the pressure on prisons.

³² Although the legislative texts produced by the Ministerial Commission were technically ready, the Italian government implemented only some of the measures suggested with a partial – and unsatisfactory – reform of certain aspects of prison work and prison health. For a reform commentary, see Gonnella (2019).

The trends in the prison population described above also affected immigration control practices. After the extensive process of immigrant imprisonment of the late 1990s and early 2000s, there was an evident decline in prison admissions of noncitizens (Figure 4). However, whilst the last period has been characterized by a new prison population rise, the number of imprisoned migrants has not increased. This pattern probably reflects the border closure policies described previously.

Nevertheless, in the past three years there has been a new increase in both the number of foreign prisoners, who currently once again amount to more than 20,000, and the prison population rate. After a 7-year decrease in the percentage of foreigners in the total prison population, this percentage has surged again in the past 3 years to almost 35% of the total prison population.

The apparent contradiction between, on the one hand, no increase in prison admissions and, on the other, an increase in the percentage of migrants in the total prison population, stems from the obstacles preventing noncitizens from benefitting from measures alternative to imprisonment. As was previously pointed out (see section 4), sentenced foreigners usually are banned from early release schemes. We can now verify the impact of legal and social discrimination on the composition of the prison population. If we consider the prison population in connection with the remaining sentence to be served (Table 5), we observe that 28.8% of the foreigners confined in Italian prisons today have to serve less than one year of their sentence; furthermore, more than 70% of the foreign prison population has less than three years to serve. These are prisoners that, although they fulfil the formal conditions to benefit from an early release arrangement, spend their entire sentence in prison, without any kind of benefit.

Table 5.*Prison population. Remaining sentence to be served, 31.12.2019*

| | From 0 to 1 year | From 1 to 2 years | From 2 to 3 years | From 3 to 5 years | From 5 to 10 years | From 10 to 20 years | More than 20 years | Life sentence |
|------------------------------|---------------------|-------------------------|-------------------------|-------------------------|--------------------------|---------------------------|--------------------------|------------------|
| Prison population | 8,525 (21.45%) | 7,760 (19.53%) | 5,952 (14.98%) | 6,976 (17.55%) | 5,881 (14.8%) | 2,445 (6.15%) | 451 (1.13%) | 1,748 (4.4%) |
| Foreign prisoners | 3,596 (28.8%) | 3,017 (24.16%) | 2,092 (16.76%) | 1,909 (15.29%) | 1,267 (10.15%) | 436 (3.49%) | 59 (0.47%) | 109 (0.87%) |

Source: Italian Ministry of Justice

7. Conclusions

We devote the conclusion of this article to the questions from which we started. Firstly, we asked whether in Italy we have witnessed a decline of imprisonment in favour of a concentration on preventive measures intended mainly to protect the country's borders. In this regard, the Italian case appears somewhat ambiguous, featuring a significant gap between the law in the books and the law in action.

On the one hand, we are witnessing a focus on border controls, in terms of both political rhetoric and practices aimed at controlling (and rejecting) immigrants. On these grounds, we can find many similarities with the current USA approach, at least in terms of populist political agendas. Furthermore, current law-making appears to be oriented more to the use of preventive/administrative measures than to the traditional guarantees of the criminal justice system. However, at the same time deportation rates have constantly remained rather low.

On the other hand, we do not see a structural reduction in imprisonment. In fact, today we can reasonably construe the 2013-2015 prison decline as a contingent factor strictly related to the penal field expectations. Therefore, it was not a structural reduction in the use of imprisonment, but rather a momentary mitigation of the process of hyper-incarceration (Wacquant, 2008) that followed the ECHR *Torreggiani vs. Italy* decision. In fact, Italy's

prison overcrowding rates are among the highest in Europe, and the prison population is still rising.

More generally, we note that both administrative/preventive tools and the criminal justice system are giving shape to special control arrangements targeting immigrants. In our view, indeed, administrative/preventive measures and the criminal justice system operate within the same structural mechanism designed to discipline non-EU citizens living in Italy.

Refoulements and agreements with other countries – such as Libya – are apparently the most effective instruments adopted by the Italian authorities to prevent immigrants from reaching Italian soil. In addition, deportation and detention measures, although they are not widely applied, can be viewed as preventive measures designed to discipline immigrants. In this context, the large use of imprisonment can be seen as part of a broader process whereby immigrants are first marginalized and then severely punished when they commit crimes.

The discipline process in this case is intended to push immigrants into the role of an underclass. The adoption of this role is closely connected with acceptance of humiliation and the violation of the most basic human rights: a subordinate position in the black labour market; poor access to health care; homelessness, etc. Consequently, we conclude that administrative and penal measures can be viewed as instruments of a structural framework designed to segregate migrants.

Secondly, we asked whether the moral panic focused on migration has favoured a decrease in the emphasis on crime and a crisis of law-and-order policies. On this point, we can state that this is not the case of Italy. On the contrary, punitive populism³³ is increasingly influencing social control strategies. The structural nature of punitive populism seems to affect all discourses on migration, security, crime and victimization without any real distinction among these different phenomena.

Consequently, also political parties that are not particularly engaged in populist rhetoric do not dare to propose an alternative perspective, because doing so could be potentially dangerous in electoral terms. Certainly, the penal populism agenda encounters

³³ According to Bottoms' (1995) definition of punitive populism.

certain obstacles in the law enforcement field, where both the inefficiency of the administrative sector and the Italian legal culture³⁴ have raised some resistance against the most authoritarian tendencies. Nevertheless, punitive populism seems to dominate in other fields, like the criminalization rhetoric, the production of law, border control practices, and the use of prison as the main means to segregate immigrants.

Some traces of this structural scenario can be found in the current Italian political situation. Since September 2019, the right/5-star government has been substituted by a left/5-star executive. One of the catchwords of the new government has been “discontinuity” with the previous policies. According to some, this discontinuity should also have concerned security policies and migrant control, with broader attention to human rights and to both procedural and substantial guarantees in the field of criminal justice. One of the first measures enacted by the new government should have been the withdrawal of the “Security Decrees” strongly backed by the former Minister of Home Affairs. As a matter of fact, though, we can find only a few traces of the promised discontinuity.

Probably, the only field in which changes are apparent is communication, where the unusual and, at times even violent, style of the former Minister has been replaced by a more moderate approach. We are witnessing less emphasis on news regarding immigrant landings or the operation of asylum seeker reception facilities. From this point of view, we can find an attempt to replace a strategy founded on everyday alarmism with another one that aims to avoid polarising public opinion about immigration.

On the contrary, nothing has really changed in the field of immigration control practices. It seems that these policies are still concentrating on border control, and on preventing immigrants’ entry into Italy. From this point of view, it is no coincidence that Italy is going to renew – although hopefully with some changes? – its agreements with Libya on the detention of migrants in the Libyan centres.

Nor is any real change apparent in the field of imprisonment and security. The prison population is still growing and there are no signs of a revision of security policies. More

³⁴ David Nelken (2005) describes Italy as a case of a “non-punitive” legal culture.

generally, what we are witnessing is the success of a fear inducing strategy in both the political discourse and the policies of social control. The same fear that seems to permeate current Italian society³⁵ is affecting the political discourse. Consequently, no real alternative is being promoted in either the field of migration governance or that social control practices. Conspicuously, this incapacity also involves the political parties that should base their action on the values of equality, solidarity and tolerance.

³⁵ At the time of writing, Italy was suffering the terrible impact of the Covid-19 pandemic. In this scenario, various political forces have singled out immigrants affected by the virus as possible sources of infection for Italian citizens. This connection between migration and viral contagion is giving new impetus to border control policies and to refoulement practices.

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