

# **Not citizens, not real people. The Italian way of governing immigration through the criminal justice system.**

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## **ABSTRACT**

The following article aims to investigate the specious use of the Italian criminal justice system as a management tool to meet the demands of social security that are connected with the general perception of the increase of migration flows that is currently present in the national social fabric. In particular, the authors analyse - in each stage of the penal system, from substantive criminal law, to procedural criminal law, to the prison system - the connection between the processes of criminalization and the use of extrajudicial tools as a means to control migration flows (such as border controls and expulsions). Results suggest that this criminal “double track”, with EU/Italian citizens on one side and migrants on the other, the subsequent hyper-incarceration of aliens and their final deportation, as a segregating consequence for the violation of either or both administrative and criminal law, is a disguised but deliberate choice of recent Italian legislative policy regarding the justice system.

### ***Key words***

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

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## **1. Introduction**

One of the most discussed topics in the current debate on penalty is the decline of prison population. After the era of Mass Incarceration, the last 10 years show, in some Countries, signs of a contraction in the levels of incarceration.

Firstly, of course, we can find the U.S. case where, in 10 years, the prison population rate has declined by a total of 100 basis point from the 755 detainees per 100,000 national population of 2008 to the 655 of 2016<sup>2</sup>, with almost 200.000 fewer attendances than 2006<sup>3</sup>.

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<sup>2</sup> 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 12<sup>th</sup> edition of the World Prison Population List edited by Roy Walmsley (2018).

<sup>3</sup> On this perspective, we have to stress how some authors support the thesis that this reduction is, all in all, rather small (Austin, 2016; De Giorgi, 2015).

The influence of this trend is touching also different European Nations. Among other countries, from 2008-2010 we can find a reduction in the prison population in Spain, Germany, Netherlands, Sweden. More in general, from 2012 we can find – after years of increases – a decline in the European Union average rate of incarceration from the 143 detainees (in 2014) to the 102, 5 (in 2018) per 100,000 habitants<sup>4</sup>.

In recent literature, many authors explain this contraction of the prison system by adopting the perspective of austerity. From this point of view, the crisis of the prison system could derive from cuts in public spending which followed the economic crisis of 2008-2010 (Clear, Frost, 2014; Dagan, Teles, 2016; Pfaff, 2017). Following this interpretation, the need to reduce the cost of the justice system would have favoured a reduction of the mass incarceration in favour of a new humanitarianism in criminal justice.

However, other authors (Matthews, 2014) have argued against the austerity thesis considering some strictly related factors: the reduction of the prison population only minimally affects the costs of the prison system; the decrease of prison population rates involve also – and in some cases, mainly – countries not affected by the economic and financial crisis (ex. Germany); the de-growth 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 classical concepts of the sociology of criminal law like “trans-carceration” (Lowman, 1987; Scull, 1987) or “net-widening” (Cohen, 1985). From this point of view, the decline of incarceration can be explained as deriving from the “crime drop” phenomena (Farrel, Tilley and Tseloni, 2014; Van Dijk, 2014). With this expression, defined as the reduction of the reported crimes – mainly violent crimes – this involves firstly the USA but some European countries as well.

How does the reduction of violent crimes influence imprisonment rates? We know that we cannot find a direct relationship between crime trends and imprisonment (Melossi, 2000). Nevertheless, following the Garland thesis (2001), we can agree that the ’70 and ’80’s growth of crimes facilitated the “punitive turn” in the ’80 and ’90’s policies. Following this thesis, the reduction of crime levels today is favouring a decrease in the public punitiveness and, in general, a fear of crime (Clear and Frost, 2014, Matthews, 2014; Pfaff, 2017). Consequences of this turn are – among others – lower levels of efficiency of the populist rhetoric focused on the fear of crime in favour of an 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 field; following suit, we witness a proliferation of systems of control that are alternative to the criminal justice system (De Giorgi, 2015; Platt, 2015).

With this perspective, we can see how criminal justice, and prison walls, have been progressively sided and replaced by tools that are alien to the tradition of criminal justice. From this angle, border controls, deportation, and the proliferation of different kinds of total institutions, where migrants are detained, represent examples of an enlargement of the net of social control beyond the borders of the penal system, with less procedural guarantees and a greater ruthlessness towards the enemies of today’s society.

## **2. The Italian case**

In this article, we would discuss the position of Italy with these general trends on social control. The questions that we would like to deal with are: can we really find a decline of the prison system in our Country? Are various other tools progressively replacing the criminal justice system in migration control? Is there a decline in the moral panic focused on crime in favour of an amplification of the risks connected with migration?

As is known, Italy is one of the European countries that, during the years of mass incarceration, most experimented an increase of incarceration rates. In Italian literature, many authors

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<sup>4</sup> See Aebi, Tiago (2018).

(Dal Lago, 1999; Melossi, 2003; Palidda, 2009) agree that the increase of the prison population can be explained – also – with the reaction of the Italian political system against the first immigration phenomena that involved our Country starting from the early '90s.

Hence a process of criminalization that in the first years of control – and repression – of immigration in Italy that has mainly affected the penal field. From this point of view, the rhetoric connected with the penal populism has connected the fear of crime with the fear of immigration (Maneri, 2009). This parallelism between criminality and migration has produced various interventions in the penal system with an erosion of the civil liberties and procedural guarantees of the Italian liberal model of justice.

Indeed, the use of criminal justice tools in facing migration, is not only a problem of criminalization of immigration in itself (meaning that illegal migration becomes a criminal offense), but it is something that goes through all three traditional branches of the criminal justice system, infecting substantive criminal law, criminal procedural law and prison law. It is a widespread phenomenon in most contemporary legal systems, which also affects the Italian criminal justice system, known so far for its high standards in the protection of human rights.

In the first part of this article – par. 3 and 4 - we discuss the main features of the criminalization of migrants in the fields of criminal law, criminal procedure, and punishment rules.

In the second part – par. 5 and 6 - we try to discuss how Italy is involved in the structural changes on social control briefly discussed in the first paragraph. In particular, we will tackle both the bases of the current rhetoric on fear and social control and of the criminal justice and administrative flows (prison, probation fields and deportation).

The results, we must say, appear ambiguous. On one side, we can see trails of an administration of social control in the specific field of repression of migration with a leading role of border control in the control of migration. On the other side, in Italy we cannot find a real decline of imprisonment and of the populist slogans on crime and fear in public debate.

### **3. Criminal law: migration related offenses, enemy criminal law theory and purpose of penalty.**

As far as the substantive law is concerned, the criminalization of illegal immigration is not an Italian exception, since, within the European Union, 25 out of 28 countries punish the unlawful entry or stay within the national borders as a criminal offence. Moreover, many countries also criminalize behaviours strictly connected to illegal migration that we could consider as instrumental to the entry or the stay itself, and that increase the risk of criminal charges for foreigners, mainly or solely. In this area of instrumental offences, perhaps no one has operated with the Italian “creativity” which led to immigration-related offenses that range from document forgery (art. 5 co. 8 *bis* legislative decree<sup>5</sup> 286/1998) or perjury in providing personal details (articles 495 and 496 penal code.) to non-exhibition of a valid ID or residence permit (art. 497 *bis* p.c. and art. 6 co. 3 D.Lgs. 286/1998), from violation of an expulsion order or of a re-entry ban (articles 13 and 14 of D.Lgs. 286/1998), to fingerprint alteration (art. 495 *ter* p.c.).

Somehow, these criminal offenses bring forward the threshold of punishment, as they do not imply an immediate and concrete damage of the legal asset, but they do seem to be mainly or instrumentally addressed to avoid the unlawful presence of the migrant within the national borders. This legislative technique reminds us of the so-called “crimes of danger”, as opposed to the “crimes of damage”: if we assume that the harm to be prevented is the unlawful presence of migrants, the execution of these offences brings about a danger to protected interests.

There is nothing unusual, as contemporary legal systems feature a real proliferation of preventive offences, and nowadays we are witnessing a sort of «preventive turn» in crime control

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<sup>5</sup> From now D.Lgs.

policies (Crawford, 2009). Nonetheless, in our contemporary risk society, crimes of danger were long marked by the need for protection from the risks deriving from technological and scientific progress: fear and insecurity were caused by the unknown consequences of progress and science. Nowadays, in our contemporary consumer society, prevention is gradually becoming a way of strengthening the social ties among the local communities and a key tool for the neoliberal social and economic policies of ensuring the protection of private property by the attacks of poor and marginalized people (Melossi & Selmini, 2009). Criminalising the phenomenon of unlawful migration with so many instrumental offences and danger-crimes, many European countries, and Italy above all, are reacting towards this fear of the unknown and of the new jeopardies to the private assets with a risk management achieved through substantive criminal law.

In so far as the unknown, perceived as dangerous, is a human being and not a scientific technique, or a technological process, the criminal managing of migration flows ends up adopting personological models of criminalization in the global frame of the so-called “enemy criminal law” or *Feindstrafrecht* (Jakobs, 1985). In the new millennium, the logic of enemy penology is adapting to deal with the new dangers and threats (such as terrorism, cybercrimes), thus experiencing a new momentum strictly connected to preventive approaches. At any rate, in this new branch of enemy criminal law, we witness a criminalization of an enemy – the unlawful migrant – whose criminological roots are, to say the least, more than controversial, if only 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).

Within the framework of this *crimmigration* trend (Stumpf, 2006), penalties are a crucial tool as well. In many countries, and mainly in Italy, penalties connected to migration crimes appear out of any proportion (up to 10 years of imprisonment) compared to their essence of misdemeanour offences. Since no penalty can have real deterrent functions towards people willing to do anything to escape from their countries due to wars, violence, and poverty, this phenomenon can seem even more meaningless. The presence and the value of fines and other monetary penalties as consequences of immigration crimes could seem curious as well, as have-nots can hardly pay fines (in Italy, i.e., the violation of a re-entry ban is subject to a fine of up to 30.000 euros).

To understand this phenomenon, two elements have to be taken into account. First, the general emphasis on harsh punishments – a real current topic in 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). Towards illegal immigrants, over the last years, severe penalties and their symbolic use have become just an incapacitation tool addressed to the exclusion of precarious members of the state community that strengthen the citizens’ trust in the State power (Aas, 2014). What matters, in this context, is not only the criminal punishment and the incarceration of the sentenced immigrants themselves but the expanded use of deportation as the final consequence for the violation of criminal law. Indeed, repatriation in Italy is also – and we could say mostly – a replacement sanction (applied when immigrants cannot fulfil the penalty or when they should face a short prison sentence) or as an alternative sanction (enforced towards the end of the imprisonment), so that the two consequences are «simply different ends of a single punitive spectrum of governmental authority» wielded over the unlawful migrant (Cuahtémoc & 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 and as far as Italy is concerned it has been somehow endorsed by the European Court of Human Rights in the well-known *El Dridi vs. Italy* judgment (04/28/2011).

By increasing criminal relevance of immigration conducts and linking deportation to criminal convictions, the Italian criminal procedural law is suffering teleological contaminations, quickly becoming a crucial tool in the border managing policies. This statement can be proven, even leaving aside the current reshaping of priorities in criminal prosecutions, which is a phenomenon affecting Italy as every country, based on the mandatory prosecution principle as well.

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

Criminal procedural law – quoting a historical definition (Carrara, 1881) – is a set of rules thought for protecting “gentlemen defendants” and based on the principle that a person is innocent until proven guilty beyond any reasonable doubt. The trend that has ruled the evolution of criminal procedural law over the last years seems inspired by the idea of a new track with different rules and lesser guarantees, established by the law for criminal charges of immigration crimes and assessed de facto for alien defendants in ordinary criminal proceedings. Italy is a very well-known country for its special legislation against the mafia phenomenon, which is the procedural double-track par excellence, the forerunner of any double track. Nonetheless, over the last years we have slowly introduced changes in the basic rules of criminal procedure also for various crimes of high social concern, starting from crimes relating to paedophilia or paedo-pornography, to drug trafficking and finally to immigration crimes. At any rate, this broad outline of two “immigrant double track systems” – one established by the law and one de facto, often merging one another – must be filled with details in order to figure out 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 criminal or accused non-citizen. The arrest in flagrante delicto (art. 380 c.p.p., i.e. criminal procedural code) is provided as mandatory for many immigrants offences, and many immigration-related crimes allow an 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 be easily feel entitled to proceed towards a migrant who is perpetrating a crime. Moreover, the practical implementation of precautionary detentions – based on specific requirements such as the danger of escape, of suppression of evidence or of re-offending (art. 274 c.p.p.) – rests on presumptions rules, so that if you are an undocumented immigrant, without lawful residence, at least a significant risk of flight is extremely likely and the 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 the deportation of the foreigner, the accused will probably never take part in the ensuing trial, as the judge will authorise his expulsion before the judgment, closing the case with a dismissal and with an undeniable infringement of the rights of defence (art. 13 co. 3 *quarter* d. lgs. 286/1998).

With an accused often in custody, the proceedings for the most common immigrant crimes are featured by a certain speed, since a mandatory or binding discretionary fast-track is imposed for these offences. In the Italian criminal procedural code, these “direct trials” are special proceedings that significantly reduce the length of the trial thus quickening its conclusion: the Public Prosecutor takes the arrested accused person 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 direct trial by taking the accused 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 defence are significantly reduced and what has already been found out during the first steps of the investigation or in the confirmation of the arrest can considerably weigh in the judgment (not by chance the “direct trial” model was initially conceived to be used in case of needlessness of preliminary investigations). On this basis, to achieve quick convictions is anything but unlikely.

Moving from the law in books to the law in action, any immigrant charged with a crime faces many barriers dealing with the 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, regardless of whether they are regularly present in Italy. Some restrictive interpretations – addressed to demanding the ID document of the claimant and an income certificate issued by the embassy of their country – have been gradually and not easily abandoned in order to ensure the real effectiveness of the right.

Another matter is the need for constant quality standards in legal assistance, but this issue is also strictly connected to the substantial language barriers remaining in the daily interaction between lawyer and client. According to the transnational provisions, 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 in order 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 the communications with the defender before an interrogation, or in order to present a request or a memory and the right to written translations of some proceedings (automatically or as a result of a discretionary decision based on the judicial evaluation). Actually, these two kinds of restrictions harshly weaken the right of defence since a translation limited to some key procedural records, and very few communications between lawyer and accused can seriously affect the rights to properly take part in the trial and to defend himself against the charges adequately. Moreover, the relative weakness of some procedural consequences because of the unavailability of the interpreter or the inability to find an interpreter for some crucial activities – as still established in case law – can further undermine the rights of the foreign accused.

Lastly, the practice of the courtrooms shows daily the obsolescence of a system conceived in the late Eighteenth century for English or French foreigners at the most: nowadays, the issue of training a new generation of interpreters, with specific legal skills, is far from negligible and likewise not so easy to handle and it involves not only a problem of languages but even more often a problem of idioms.

As a result of this outlined framework – and to the extent that Criminal procedural law is always “the safest index” to measure the degree of civilization and political freedom of a country (Lucchini, 1899) – the Italian situation plainly shows its boundaries.

The third lens through which to verify possible convergences between immigration policies and criminal justice is the analysis of the prison system, which represents a very crucial field to understand the answers to the social security demand connected to the phenomenon of mass immigration.

The data of a general hyper incarceration of immigrants in Italy are not surprising as far as the legislation in itself, as previously seen, tends to a broad criminalisation of migrant behaviours and a reduction of the trial guarantees. However, it is worth stressing that the rules governing the enforcement of the judgment support this trend as well, because immigrants meet many obstacles – de facto or de jure – in the access to alternative measures which represent the primary tool to avert imprisonment or to obtain an early release.

In the Italian system any person convicted with less than four years of imprisonment is allowed to request an alternative measure directly after the *res judicata* and the Public Prosecutor shall order the suspension of the enforcement of the penalty (art. 656 c.p.p.), with the result that the decision of the Surveillance Tribunal on the measure can be taken avoiding any transit in jail. Therefore, it is crucial to focus on the restrictions that an immigrant has to face in fulfilling the requested admission standards as this tool can become entirely useless for him. Alternative measures conceived for people with a high (or at least standard) level of social integration, with a family and social network to support the path of an out-of-prison execution, cannot be easily applied to immigrants: the suspension of Public Prosecutor enforcement is no more than an abstract tool for them, with little chances of producing any result.

This phenomenon produces a higher number of incarcerations for immigrants dealing with comparable infringements, but it triggers obstacles that seem very hard to overcome even in the subsequent stages. Access requirements for probation, home detention, day release, etc. can be fulfilled only providing guarantees regarding home, work, livelihood, and last but not least a legal residence status. In addition, the sword hanging over the immigrants' head – namely the expulsion order – for a convicted person may be an alternative sanction (art. 16 par. 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 par. 5-8 d.lgs. 286/98). Without deepening the technical characters of each of these measures, it is easy to see that setting up the repatriation also as an alternative provision shows the real target of the legislation, almost implying that if an immigrant seeks to claim a benefit, the most likely to succeed is the one meant for him.

Not surprisingly, the data reflects these considerations.

## **5. “Jocks with phones” and “bloody thief”. The propagation of enemies**

In Italy, we cannot really state that the border control has substituted crime in the rhetoric connected with fear and safety.

Rather, what we have witnessed in the last 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 penultimate Italian government has been a real example in the use of the fear of migrants as a tool of government<sup>6</sup>. What we witnessed for 15 months<sup>7</sup> has been a daily increase of news, alarms and calls for a State of emergency, where the migration phenomenon has been pictured as the main problem for Italian security. Of course, the main moral entrepreneur<sup>8</sup> of this crusade against migrants has been the former Minister of Home Affairs, Matteo Salvini. With his skills in the use of a populist rhetoric – also with a massive utilisation of social media – he painted asylum-seekers as potential criminals, dangerous people that need to be removed by any means. At the same time, organisations promoting the safeguard of human rights have been criminalised, de facto preventing them from operating in support of migrants and, in some cases, also denying their democratic right to speak.

On a cultural level, the result of this crusade against migrants has been a clearance of forms of racism that, until now, had not found the opportunity to express themselves freely. The introduction in the political discourse of derisory<sup>9</sup> expression towards migrants has contributed to exacerbate – representing it as rightful – a feeling of suspicion, and in some cases of hate, towards migrants, the effects of which in the Italian society will likely last a long time.

In the field of the practices of control of migrants, we witnessed another turn. In the rhetoric against migration, criminal justice tools have been progressively substituted by other instruments considered more efficient in the removal. Indeed, in the current populist rhetoric, the use of the criminal justice tools in fighting migration is no longer considered the preferred solution. In fact, the criminal justice system, with its long term procedures and the legal uncertainty, is not useful for a political establishment that need to show its ability to produce instant results in the fight against migration. Border controls, refoulement of ships with migrants and the criminalisation of the Ngo's that try to rescue asylum seekers is an example of a means of rejecting migrants considered most efficient. It's no coincidence that, in its media communication, the last government focused on border controls and deportation as the main instruments in the fight against migration.

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<sup>6</sup> In the Simon (2006) meaning.

<sup>7</sup> This was the duration of the first government chaired by the Prime Minister Antonio Conte.

<sup>8</sup> In the Becker (1963) sense.

<sup>9</sup> Among them, the paragraph's title is only an example.

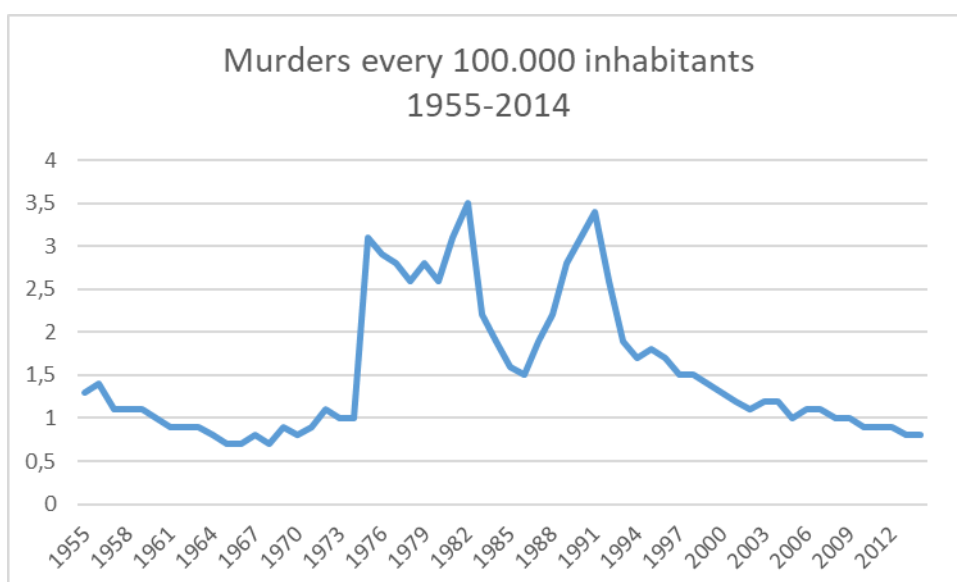
On the other hand, these changes in the approach to migration do not mean that Italy is acknowledging a decrease of attention on crime.

Indeed, in Italy, the focus on migration as a main risk for the national security has not been matched by a decline of penal populism. On the contrary, the focus on migration and border control has sided with the daily alarms on crime and security.

This is true despite the fact that also in our country, like in the USA, we are witnessing a decline in violent crimes. The murders rates, for example, are decreasing since the early '90 (graph n. 1). Nevertheless, we are not witnessing a removal of the topic of crime and security in the political discourse. Rather, we are witnessing a focus by an alarmist propaganda on the petty crimes in a discourse where migration/security and various forms of urban marginality have been identified as the main issues for Italian society.

In the last years, the qualitative leap has probably expressed itself in a political speech full of rage and contempt previously unknown in recent Italian political history. Language that, depending on the case, has allowed an Italian minister of the Republic to define migrants blocked in a boat into the sea as “jocks” that do not really need medical or economic support, even because they have a smartphone; and, in other instances, to define a woman with children charged for stealing as a “bloody thief”, hence calling for the authorities to separate her from her children.<sup>10</sup>

The final result is a general picture where migrants and street criminals have been brought together as the current dangerous classes towards which the Italian society has to defend itself<sup>11</sup>. It is no coincidence, then, that the various security measures approved by the penultimate Italian Government have alternated, often within the same law, some measures against migration and others versus street crimes or, more in general, social disruption, in a mix where the final goal has been to keep up the pressure against the everyday enemies without which the Government’s life would have been more difficult<sup>12</sup>.



<sup>10</sup> Both the example are sourced from Matteo Salvini’s Tweets on migration and security.

<sup>11</sup> The references, obviously, are on Michel Foucault’s lesson on the reaction of the State in the face of dangerous classes (1997).

<sup>12</sup> Examples of these legislative approaches are the “security decrees” issued by the Italian Government with Law n. 132 of December 2018 and Law n. 186 of June 2019.



## 6. Not a decline of imprisonment

Moving from the political rhetoric to the practices of social control, we can state that even Italy, following the USA example, and like other European countries, is directing the practices of migration control directly on the grounds of border control.

Indeed, the Italian way in migration control has been focused on the attempt to avoid the migrants' landing on the Italian coast. Actually, in Italy there has been a significant reduction of the landings from Africa since 2018 (Table 1), after the agreements with the Libyan Government in February 2017.

The agreement 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 directed to the Italian coast. Within this approach, it does not matter if Libya today is a Country that is not able to guarantee the most basic fundamental rights; just like unheeded remain the ONU observers who define those committed inside the Libyan centres of detentions as "unimaginable horrors"<sup>13</sup>. In front of the logic of emergencies, Italy has decided to address the migration phenomenon by removing it from 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 (Graph 2).

At the same time, the presence of migrants in the Centres for Identification and Expulsion has not increased significantly during the last years. Unfortunately, the Italian Home Office does not publish reliable data on the presence in these centres; nevertheless, studies conducted in our country with unpublished data (Anastasia, Ferraris, 2013) showed how, after the increase in presence between 2008-2009, in the following years the migrants' transition in the centre for expulsions is tending to decline.

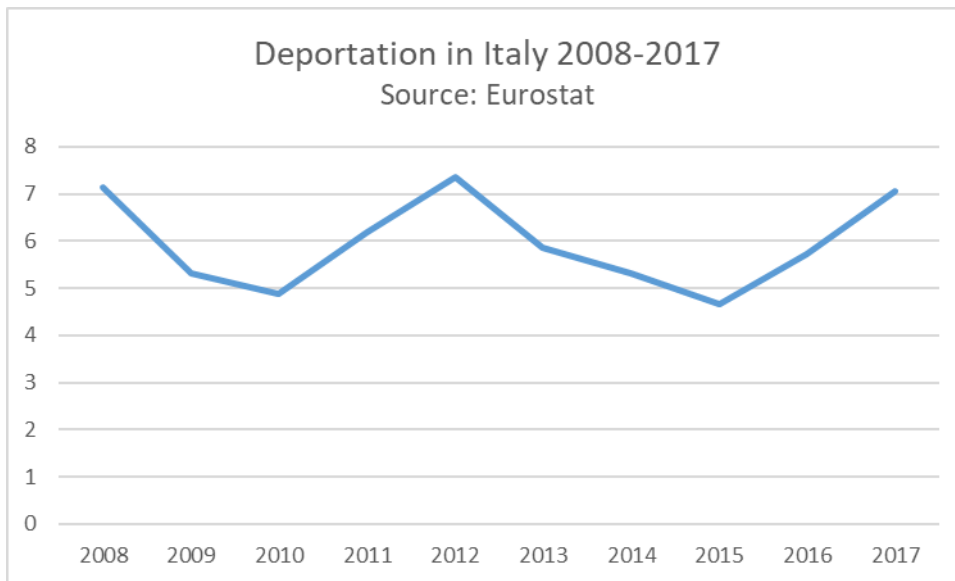
*Table 1. Migrants landed in Italy 2017-2019*

<b>Year</b>	<b>Number of migrants landed in Italy</b>
2017	111.401
2018	22.031
October 30 <sup>th</sup> 2019	9.532

*Source: Italian Department for the Civil Liberties and Immigration*

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<sup>13</sup> 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 inquiry in the Libyan centre of detention.



Nevertheless, the focus on border control in Italy has not fostered a decline in imprisonment.

To describe the Italian prison system, we shall move from a premise. Comparing the structural situation of imprisonment in Italy, the USA and some European countries (table n. 2), we can see that Italy does not have detention rates that are higher than other countries. In fact, with 100 detainees per 100.000 inhabitants, Italy is witnessing detention rates at the same levels of France and Greece and lower than the U.K. and Spain, but higher than Germany and Sweden. The peculiarity of the Italian case can be found in the overcrowding rates (118,9%), in pre-trial detention (32,6%), and in foreign prisoner rates (33,8%).

The combination of these three main critical features, among other features of the Italian prison practices, has justified the decision by the ECHR to sentence Italy in 2013 for the structural condition of its prisons<sup>14</sup>.

As we can see from the following graphs (Graph n. 3), the prison population in Italy began to increase from the early '90s up to 2010, when the Italian prison population was on the verge of the 70.000 attendee mark with overcrowding rates at more than the 140%. The only exception in this run-up in the prison population was in 2006 when the Italian Parliament approved a collective pardon that reduced the prison population by more than 20.000 attendees. Unfortunately, in the following years the prison population restarted to increase with a speed unknown in Italian history (Melossi, 2002). These changes in the prison rates are the consequences of at least two main phenomena. The first, is the adoption by the Italian governments of the zero-tolerance policies. For many years, indeed, both right and left-centre governments adopted law and order policies like a “group think”, with few real exceptions in the whole Parliament. The consequence of these policies affected, for example, the criminalisation of the use of drugs, the reduction in the use of alternatives to imprisonment for repeat offenders, a strong reduction of pardons<sup>15</sup>. The entry into force of several measures against street

<sup>14</sup> We are referring to the “Torreggiani” sentence where the European Court for Human Rights decided to sentence Italy, after many complaints coming from prisoners detained in various Italian facilities with regards the structural condition of the cells, the absence of activities and the ineffectiveness of the judicial decision.

<sup>15</sup> This is a topic that in Italy cannot be neglected. Indeed, in our country for many years the recurrent approval of amnesties for decades has been as one of the main tools used to contain the prison overcrowding. On this point, let us refer to Manconi, Torrente (2015).

crimes has, in fact, favoured a greater number of entries in prison and, above all, fewer chances to leave prison before the end of the sentence for people convicted with a prison sentence.

The second phenomenon has been migration. Italy has had a long history as a Country of emigration. For many years, Italian citizens left their native cities to emigrate to North and South America, Germany, France etc.<sup>16</sup>. After the “industrial boom” that followed WWII, Italy moved from a country of emigration to a nation of immigration. Firstly, starting in the ‘50s, internal migration from the South to the North; years later, migratory flows from the Maghreb area and, after the fall of the Berlin wall, from Eastern European countries, particularly from Albania and Romania.

The prison system is a mirror of the impact of the policies on migration applied in the last twenty years. Especially if we look at the flows of imprisonment in Italy from 1991 to 2018 (Graph 4), we can observe the process of substitution in the composition of the prison population that has characterized Italy in the last twenty years. Starting from 1992, the steady decline in the entries of Italian citizens has been compensated by a continued increase in migrant entries into prison. This process determined both a continuous increase in the number of foreigners (graph n. 5) and in the percentage of foreigners on the total prison population (Graph n. 6). The peak of this process of incarceration of migrants was reached between 2007 and 2008 when almost 38% of the Italian prison population consisted of foreigners<sup>17</sup>.

This process showed a partial turnaround starting from 2010 when 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 take place after 2013. In that year, as said, the Italian government had to comply with the obligations imposed by the ECHR sentence (Torreggiani Vs. Italy). The reaction of the Italian authorities in the face of the requirements imposed by the Courts was the establishment of a team of experts, coordinated by the actual President of the National Preventive Mechanism against torture Mauro Palma, with the goal of suggesting immediate actions in order to bring the system within the boundaries of law. Just with that, the Italian Government approved a number of measures to intervene on various aspects of the criminal procedure, of the criminal and penitentiary laws, and in the administrative organisation of the penitentiary system. After this first action, the Italian government established a broad expert consultation, called “States-General of the Penal Execution”<sup>18</sup> with the aim to propose a general reform of the penal justice system, especially of criminal sanctions.

The results have been, in many ways, surprising. From 2013 to the end of 2015, the Italian prison population has decreased by almost 15.000 people. This drastic reduction was not obtained with amnesties or other provisions of clemency, but with the introduction of several measures<sup>19</sup> able to affect the most dangerous aspects of legislation and to modify organisational practices in terms of imprisonment and social control. As an example, measures were introduced in order to make pre-trial detention more difficult for perpetrators of petty crimes, measures to facilitate home detention for convicted individuals who are charged with less than 18 months of imprisonment, measures to

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<sup>16</sup> For a recent historical re-interpretation of Italian migration, we refer to the book by Piero Bevilacqua, Andreina De Clementi and Emilio Franzina (2017).

<sup>17</sup> In the interpretation of this data, we have to consider that migrants, in Italy and in the prison system, are concentrated in the North of Italy. This leads to the fact that in North Italian prisons the foreigner rates were often higher than 70%.

<sup>18</sup> 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](https://www.giustizia.it/giustizia/it/mg_2_19_3.page?previousPage=mg_2_19).

<sup>19</sup> In those years, all the Ministries of Justice in charge approved at least one block of measures in order to relieve the pressure on prisons.

facilitate the deportation as an alternative to imprisonment. From the organisational point of view, measures were introduced in order to improve liveability within prisons and to facilitate work in the prison. More in general, there has been a promotion of a general climate where the emphasis on crime and control has been reduced and where all the players of the administration of justice have been involved in the aim to reduce the pressure on the prison system, in order to enable a positive outcome of the procedure started with the “Torreggiani” sentence.

Unfortunately, in the following years we discovered that the massive decline of the two-year period between 2013 and 2015 had been just an interlude in the recent Italian history of penal control. Indeed, in 2015 the Council of Europe declared its satisfaction for the Italian efforts in order to meet the ECHR’s remarks. In the 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 EU decision, the Italian prison population re-started to increase and in the three-year period 2015-2018 the Italian prison population increased by almost 10.000 people.

Today the Italian detainees are once again passing the 60.000 unit mark.

Furthermore, the large consultation that should have produced a structural reform of the prison – and penal – system did not effectively produce the legislative results desired by the promoter. The changes in the political climate which accompanied the 2018 election campaign, and the following rise of the right-five star government has, *de facto*, tanked any hopes for a reform of the criminal justice system<sup>20</sup>.

The trends in the prison population here described also affected the control practices on migration. After the late '90 and early '00's big process of migrant imprisonment, we can notice a decline in prison entries from freedom of no Italian citizen. Furthermore, over the last two years, characterized by a new growth of prison population, the imprisonment from freedom of migrants did not increase. On this point, probably, we can find traces of the border closing policies described previously.

Nevertheless, in the last three years we see a new increase in the number of foreign detainees, currently more than 20.000 once again, and in the rate of the total prison population. After a 7-year decrease in the rate of foreigners over the total prison population, in the last 3 years we are witnessing a new increase in the percentage of foreigners, with a share today of almost 35% of the total prison population.

The apparent contradiction between, on one side, no increase of entries from freedom and, on the other side, an increase in the percentage of migrants over the total prison population, can be found in the difficulties for non-Italian citizens to benefit from measures alternative to imprisonment. Previously<sup>21</sup>, we described how foreigners convicted usually meet more difficulties in taking advantage of an early release. Now we can verify the impact of legal and social discrimination in the composition of the prison population. Especially if we consider the prison population in connection with the remaining sentence to be served (Table n. 3), we can observe how 28,8 % of the foreigners detained in the Italian prisons today has to serve less than one year of his/her sentence; furthermore, more than 70% of the foreign prison population has less than three years to be served. These are

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<sup>20</sup> Although the legislative texts produced by the Ministerial Commission were technically ready, the Italian Government implemented just a few parts of the measures suggested with a partial – and unsatisfactory – reform of some aspects of work in prison and of the safeguard of the health system in prison. For a reform commentary, we refer to Gonnella (2019).

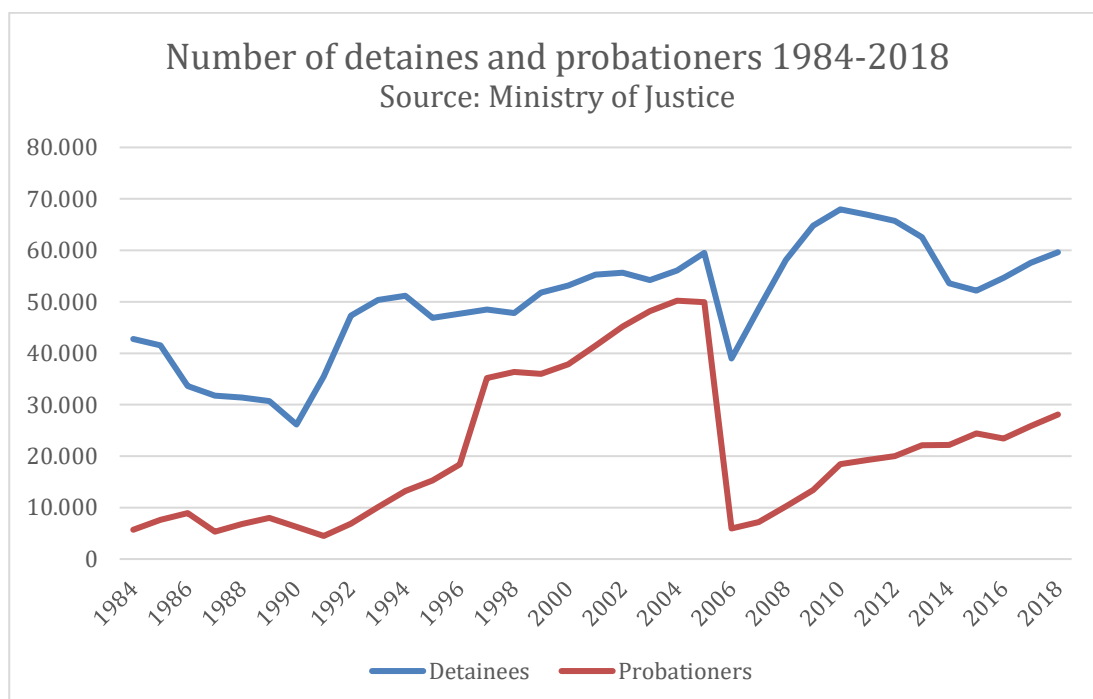
<sup>21</sup> See paragraph 4.

prisoners that, although they are in the formal conditions to benefit from an early release, spend all the sentence in prison, without any kinds of benefit.

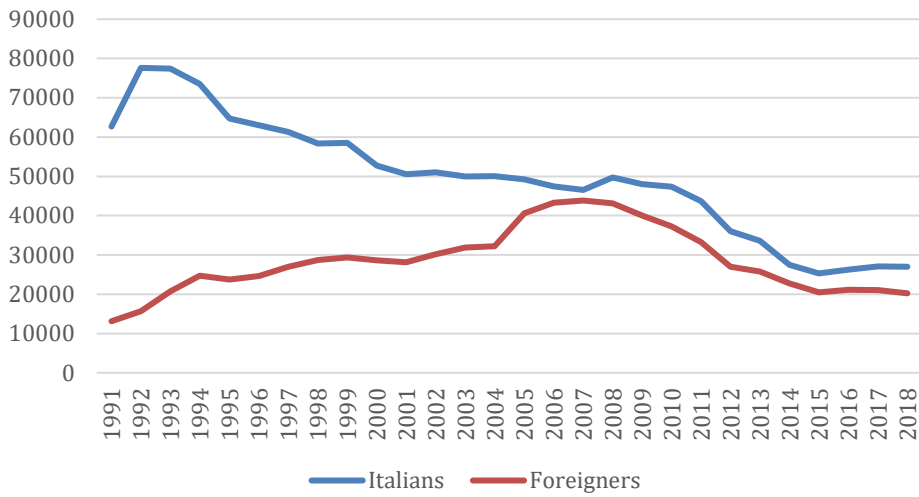
Table n. 2 Comparison on prison population 31.10.2019

Country	Number of prisoners	Prison population rate	Overcrowding rates	Pre-trial detention rates	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%

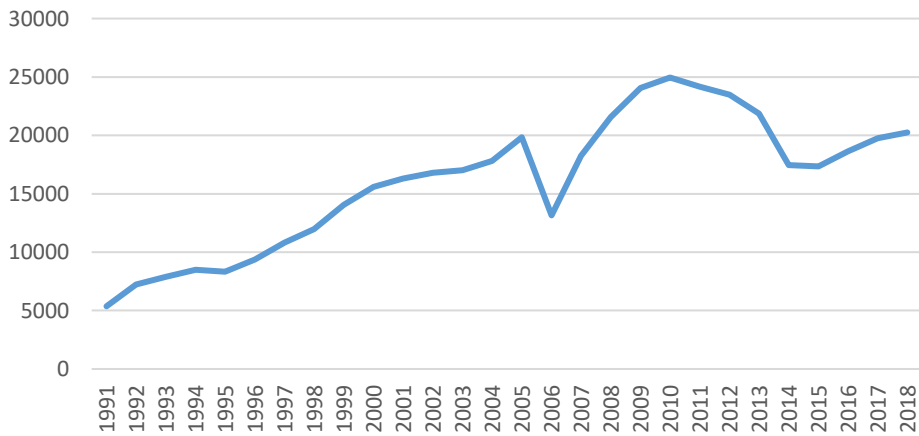
Source: World Prison Brief

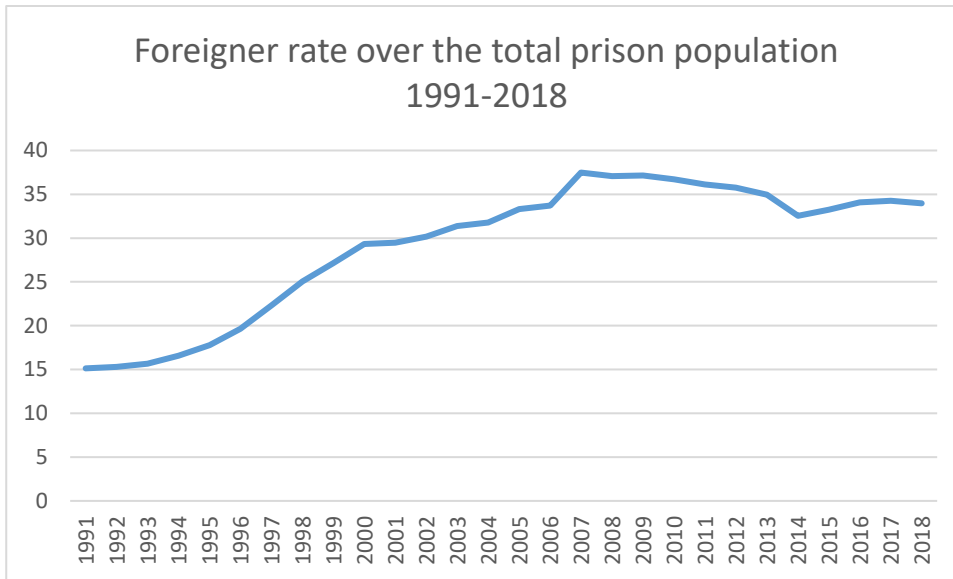


Imprisonment from freedom in Italy  
1991-2018



Number of foreign detainees  
1991-2018





*Table n. 3. Prison population with the remaining sentence to be served*

	<b>From 0 to 1 year</b>	<b>From 1 to 2 years</b>	<b>From 2 to 3 years</b>	<b>From 3 to 5 years</b>	<b>From 5 to 10 years</b>	<b>From 10 to 20 years</b>	<b>More than 20 years</b>	<b>Life sentence</b>
<b>Prison population</b>	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%)
<b>Foreigners</b>	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*

## Conclusions

We would like to dedicate the conclusion of this article to a reflection on the current Italian trends in control policies.

In doing so, we can move by trying to compare what is happening in the USA in terms of decline of imprisonment in favour of a concentration in the protection of the borders. On this point, we can probably affirm that the Italian case appears somewhat ambiguous.

On one side, we are witnessing a focus on border controls, both in terms of political rhetoric and in practices of control (and rejection) of immigrants. On these grounds, we can find many similarities with the current USA approach, at least, in the rhetoric used by the more populist political parties.

On the other side, we do not see a structural reduction in imprisonment. In fact, today we can reasonably read 2013-2015's reduction in prison population as a contingent factor, strictly related to the penal field expectations. Therefore, not a structural reduction in the use of imprisonment, but rather a momentary mitigation of the process of hyper-incarceration<sup>22</sup> that followed the ECHR *Torreggiani vs. Italy* sentence.

Instead, what we are probably witnessing is the success of penal populism at a structural level. From this perspective, we have to note how penal populism, especially punitive populism<sup>23</sup> has established itself as an element able to affect all practices of social control. The structural nature of punitive populism seems to affect all the discourses on migration, security, crime and victimization. In so far, it expels all differing positions from public discourse. This situation produces that, also those political parties that do not directly benefit from the populist rhetoric are cowed to propose an alternative perspective, because it could be potentially dangerous in terms of electoral consensus.

It is possible to find traces of this structural situation in the current Italian political situation. As is known, the right-5star government has been recently substituted by a left-5star executive<sup>24</sup>. One of the slogans of the new Government has been "discontinuity" with the previous policies. According to some, this discontinuity should have also regarded the field of security policies, with a broader attention to the safeguard of human rights and to both the procedural and substantial guarantees in the field of criminal justice. One of the first measures of the new Government should have been the withdrawal of the "Security Decrees" strongly backed by the former Minister of the Home Affairs.

As a matter of fact, today, we can find only a few traces of the promised discontinuity.

Probably, the only field where we might find changes is in the 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 the spread of news regarding the landing of migrants or about the operation of asylum seeker acceptance. From this point of view, we can find the attempt to replace a strategy founded on everyday alarmism with another one based on a low profile, that is in fact trying not to polarise public opinion on the subject of migration.

On the contrary, for the moment, nothing has really changed in the concrete practices of migration control. It seems that the policies are still concentrating on border control, and on the attempt to avoid the migrants' entry into Italy. From this point of view, it is no coincidence that Italy is going to renovate – although with some hoped changes – its agreements with Libya for the detention of migrants in the Libyan centres.

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<sup>22</sup> In the Wacquant (2008) sense.

<sup>23</sup> According to the Bottoms (1995) definition of punitive populism.

<sup>24</sup> The transfer of power between the old and the new Government took place last September.



Even in the field of imprisonment and security, we cannot see a real turning point either. The prison population, indeed, is continuing to grow and we cannot really find signs of a revision of the security policies.

More in general, what we are witnessing is the success of the fear paradigm in the political discourse and, as a consequence, in the policies of social control. The same fear that seems to permeate current Italian society is affecting the political discourse. The result is an incapacity to promote a real alternative both in the field of governance of migration and in the practices of social control. This incapacity, tangibly involves also the political parties that should base their action on the values of equality, solidarity and tolerance.

Moving from this situation, we can state that penal populism and punitive populism are today structural elements of the Italian political discourse, without real signs of them changing in the short term.

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