

# Injustices under the shield of the law

An exploratory study of judicial practices towards foreign  
defendants in an Italian criminal court



Eleonora Di Molfetta





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## **Onrecht onder het schild van het recht**

Een verkennend onderzoek naar de berechting van buitenlandse verdachten in  
een Italiaanse rechtbank

Thesis

to obtain the degree of Doctor from the  
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by command of the  
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To my husband,  
who is nowhere in this book,  
but everywhere.



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## **Chapter one**

Introduction: The contours of discretion  
in trans-local societies



## 1.1. Introduction

*In order to understand the operations of courts  
and the functions they perform for the community,  
it is necessary to locate them in a larger context, to see them  
not only as systems which have created their own internal dynamic,  
but also as institutions responding to their environment.*  
(Feeley, 1992:20)

The most basic definition of a criminal court is a court that has jurisdiction to try those accused of committing a crime, and to punish those found guilty. In the popular image of criminal courts, we think of public prosecutors as those who seek to obtain a conviction, defence attorneys as those who attempt to bail their clients out of trouble and judges as those who have the last word. However, not only is reality very far removed from the popular image, but it is also far more complex. Those who perform their tasks in the court, from judges to defence attorneys, are not necessarily antagonists. In reality, courtroom actors are somehow members of the same ‘team’, and they must cooperate, at times even compromise, with each other. Within a court, there is a shared set of informal rules, customs and practices that inform its members how to process cases and come to decisions (Eisenstein and Jacob, 1977). Further complicating matters, judicial practices are developed within a particular context. Here, I am not simply referring to the legal context. Courts are not made of law enforcement ‘machines’ that mindlessly apply the law. Rather, judicial practices are developed in and shaped by the political, social and cultural environment in which a court is located. In other words, ‘courts are part of the community’ (Feeley, 1992:20). Hence, to mindfully understand how courts function, it is important to consider how they interact with and adapt to the broader environment.

It is the task of judges, public prosecutors, defence attorneys, and more generally of decision-makers, to make choices. Judges decide whether to convict a defendant, public prosecutors whether to dismiss a case, defence attorneys whether to take a plea bargain, and so on. In reality, everyone’s day is marked by choices. Shall I take the metro or a cab? Shall I accept the job offer or wait for something better? Shall I go out at the weekend or get more work done? However, it would be a mistake to assert that discretion is involved in all these choices. As Christie points out ‘criticizing a person for acting imprudently or indiscreetly, or for failing to show or exercise discretion, is not the same thing as criticizing him for abusing his discretion, or for making a decision that was beyond his discretion, or for claiming to have any discretion. Only where there is accountability can we meaningfully speak of discretion in choice’ (1986:751-752). If we look at the criminal justice system, it is nearly impossible to identify categories of decision-makers who hold absolute discretion and are capable of making arbitrary decisions, meaning decisions based on personal will in defiance of rules. Most often, discretion is not boundless, but instead constrained, either by legal rules (Dworkin, 1977) and/or by social and moral norms, political

expectations and economic pressure (Galligan, 1986; Hawkins, 1992; Black, 1995). This is because discretion goes hand-by-hand with accountability, inasmuch as in every jurisdiction a system of checks and balances is provided in order to avoid arbitrariness and autocracy. Yet, although circumscribed and controlled, discretion is unavoidable. In fact, one cannot be held accountable without having a choice of action or inaction (Pepinsky, 1984). This is why discretion requires accountability and vice versa.

There may be good discretion and bad discretion, but discretion is a pivotal and inescapable aspect of each legal system (Hawkins, 1992). It is the very nature of the law-in-the-books that requires discretion. General and abstract provisions must be interpreted and applied to individual cases, and such operationalization passes through decision-makers' discretionary powers (Pound, 1910). Without discretion, it would be impossible to ensure the proper administration of justice, as law cannot foresee beforehand all potential combinations of events. Thus, courtroom actors are called upon in the task of transmuting general and abstract provisions into concrete outcomes. Because each case is different, this task is performed by taking into account all relevant factors and weighing them to make a just decision. But how much room is given to courtroom actors when making choices? Generally, courtroom actors' discretion is constrained within a certain set of outcomes. In other words, as long as they do not 'trespass' beyond the boundaries of law, different outcomes are possible. One might ask: how do courtroom actors choose which outcome to achieve? Or, in other words, what are the objectives that drive this enormous power at their disposal? The law-in-action, compared to the law-in-the-books, is a whole different story.

One of the main problems in understanding discretionary powers, and accordingly in research dealing with decision-making and discretion, comes from the situation where it is almost impossible to account for all factors that courtroom actors evaluate when making decisions (Hutton, 2006). This circumstance is due to the fact that legal constraints are only one aspect of processes of decision-making, and not necessarily the most salient. For example, in many civil law jurisdictions – in contrast with common law jurisdictions where mandatory penalties are prevalent – penalties range from a minimum to a maximum. Within this range, judges have to decide the 'amount' of penalty to impose, normally by taking into account factors related to the conduct of the offence (seriousness, harm to the victim, etc.) and offenders' characteristics (prior criminal records, employment conditions, etc.). Nevertheless, the impact of these factors might be weighted differently according to individual decision-maker (Berman, 2005). Determining the level of penalty is a highly discretionary assessment: a conduct considered 'particularly' serious by an individual decision-maker, it might not be considered as such by another. It has already been questioned whether judges are capable of making 'neutral' decisions within a class society (Liebknecht, 1907) and how people with weak socio-economic resources often suffer from prejudicial treatment (cf. Rovers, 1999). Indeed, examples of sentencing disparities are quite widespread both in Anglo-Saxon and continental jurisdictions. Such disparities not only arise from situations where the same judge imposes different penalties on different groups (e.g. nationals and immigrants), but also to situations where different judges deliver dissimilar penalties in similar cases. Cases of inter-judge sentencing disparities are fairly common in the Italian justice

system. This phenomenon is known as *giurisprudenza della porta accanto*, ‘the jurisprudence of next door’, an expression used to refer to the circumstances in which a case assigned to the judge ‘sitting next door’ might have a different outcome.

The point that I want to make here is that, despite legal constraints, discretion cannot be completely bounded, as decision-makers will always have some room for manoeuvre. Further complicating matters, this room is not isolated from the outside world. Decision-makers do not live in a social vacuum and it is likely that their decisions are driven by, and embedded in, a particular social, political, cultural and economic atmosphere. As Ulmer points out ‘what kind of sentence one gets, and the factors that predict why one gets it, in significant part depends on where one is sentenced’ (2012:14). Hence, it is important to investigate the use of discretion in context. And this context must be understood in its *trans-local* dimension (Appadurai, 1995), as a space in which national and sub-national traits meet broader instances. Processes of globalisation are changing the make-up of our cities, the goods and products at our disposal, the information we consume in the world of multimedia, and so on. Within the European Union, barriers to trade are dismantled, internal borders are removed, and the free movement of goods, services, capital and persons is ensured, although selectively (cf. De Giorgi, 2011). Due to these developments, our local realities are no longer the same. In Italy, globalising forces have entered into our local spaces through impersonal channels, i.e., media and Internet, as well as through personal contacts with people from different countries and cultures (Giddens *et al.*, 2012:717). This diversity and richness would have been impossible to imagine for the Italy of fifty years ago, at least in smaller towns, whereas the biggest cities began to experience international migration in the early 1980s (Baldi and Cagiano de Azevedo, 2000).

I am aware of the circumstance that using the term ‘richness’ to define the new make-up of Italian cities is not value-free, as I also know that many would employ a different term. In the last years, global migration in Italy have often met the hostility of political parties and citizens as well. For example, during his mandate, the 2018 Minister of the Interior, Matteo Salvini, promoted several anti-immigration political campaigns, including *porti chiusi* (harbour closed). Besides, the then Minister did not lose a chance to blame the European Union for being helpless: this is not surprising given that countries like Italy and Greece have perceived more intensively the lack of solidarity from other European leaders since they had no choice other than to deal by themselves with continuous arrivals by sea (Postelnicescu, 2016). The failure of an overly bureaucratic European Union to intervene in the refugee crisis has contributed to the rise of nationalist parties across European countries, and Italy is no exception. In 2018, immigration was perceived as a threat to security by 35% of left-wing supporters and no less than 80% of right-wing supporters (Segatti and Vegetti, 2018). These numbers are quite alarming, but hostile feelings and harsh policies towards immigrants are not peculiar to Italy.

Quite contrarily, while it is true that each local reality adapts and responds to globalising forces differently – something known as *glocalization* – negative political and cultural attitudes towards immigrants are fairly diffused. It is enough to take a look at the grip on immigration by President

Trump in the United States, especially towards immigrants from Latin America countries.<sup>1</sup> Closer to home, the Freedom Party of Austria puts the fight against immigration at the top of its list of priorities;<sup>2</sup> the nationalist political party Alternative for Germany is openly focused on curbing immigration and minority groups, especially Muslim migrants;<sup>3</sup> Wilders, the Dutch far-right leader, never misses an opportunity to stir up hostile feelings towards residents or citizens with a non-Western background.<sup>4</sup> Given the rise of populist right-wing parties and of harsher immigration policies proposed or implemented across different nation states, research on decision-making cannot simply observe that our local realities have been swayed by movement of people and new cultural meanings. Instead, research on decision-making must engage with global developments and delve into the implications of such developments for the local context. The question here is whether and how the ‘mutated’ social fabric of our societies has shaped the nature of the penal state and the contours of discretion. As mentioned earlier, decision-makers do not live on a distant planet. On the contrary, they live in the same environment as we do, with its rhetoric and contradictions, and their way of understanding society and relationships between members is influenced by such an environment. At the same time, it would be a mistake to assume that this influence is straightforward. Rather, the relationship between law and society creates an intricate melting pot in which opposing forces and values clash in certain ways and align in others. The complexity of decision-making processes requires a holistic approach towards the subject, in order for the researcher to investigate different actors and forces in place, and to situate their actions and discourses in a trans-local context.

This research aims at exploring the impact of globalising forces, or more specifically the movement of people, ideas and cultural meanings (cf. Appadurai, 1990), on judicial practices towards foreign defendants without a valid residence permit in an Italian court. Throughout this first chapter, I intend to set out the framework of this research. First, I discuss the theoretical framework in which this research is located, namely the socio-legal scholarship on decision-making and discretion, and I briefly address the previous literature on the topic. Here, I introduce the five dimensions of the penal state identified by Garland (2013). These dimensions represent the lens through which I structure and analyse the empirical findings of this research. Next, I provide the reader with an overview of the socio-legal context of the research. In particular, I describe first the main characteristics of Italian penal policies and afterwards I outline the local context in which the research was conducted, that is in the city of Turin. This paragraph is meant to stress the importance of the local to understand the global and vice versa. The reason for choosing Turin as the site of this research is to be found in the significant presence of immigrants in the city, which is nearly double the percentage at the national level. Last, I provide a reading guide of the book to help the reader to follow this research journey.

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<sup>1</sup> One of President Trump’s strategies to discourage immigration from Latin American countries was to cut aids to the Northern Triangle: <https://time.com/5564653/donald-trump-central-american-aid/>

<sup>2</sup> <https://www.ft.com/content/e8435d86-3533-11ea-a6d3-9a26f8c3cba4>

<sup>3</sup> <https://www.bbc.com/news/world-europe-37274201>

<sup>4</sup> <https://nos.nl/artikel/2351928-tweet-wilders-over-coronapatienten-met-niet-westerse-achtergrond-wekt-woede.html>

## 1.2. Discretion and legal culture: when the context matters

Discretion and legal culture have an intricate, yet fundamental relationship. Discretion, broadly speaking, can be defined as the capacity of individuals to choose between several lawful courses of action (Sossin, 2006). The degree of discretionary powers held by individual decision-makers varies considerably across legal systems. For example, prosecution systems such as the French and the Dutch, which adhere to the expediency principle, give public prosecutors the discretion to choose when prosecution is deemed opportune. Other systems, such as the German and the Italian, embrace the principle of mandatory prosecution, meaning that public prosecutors must prosecute all offences that come to their knowledge, without any further evaluation. Most certainly, the two principles impose very different legal constraints on public prosecutors who exercise their powers within a certain legal framework. At the same time, legal constraints are not the only forces directing decision-makers towards one outcome rather than other. What about external pressure, either by politicians or public opinion? And what about budgetary constraints? Is bureaucracy something to consider? Is there a space for individual values and experiences? Does legal culture play a role? For example, the Italian legal culture is characterised by a strong legal formalism (Ferrajoli, 1989) to the detriment of efficiency, while the Dutch legal culture, on the contrary, exhibits managerial and actuarial elements (Downes and van Swaaningen, 2007). Does this difference matter to decision-making? And last, but not least, is the broader economic, political and cultural dimension of society capable of shaping decisions?

### 1.2.1. *Law in the books vs. Law in action: the room for discretion*

Law cannot be merely understood by reading a collection of statutes in books (Ludwig, 1955). Rather, it must be observed in action, in the light of discretionary powers granted to decision-makers to interpret and apply law. The distinction between the law in-the-books and the law in-action is hardly a new topic for socio-legal scholarship since Roscoe Pound (1910) showed the tension between legal rules, the ‘black-letter-law’, and the way rules are interpreted and applied. Since then, socio-legal scholarship has stressed the importance of exploring how decision-makers interpret and enforce the law in the books. In other words, to explore how legal provisions work *in action*, in the day-to-day activities in the administration of justice (Rothmayr-Allison, 2015). This research is grafted into this tradition and aims at providing the reader with a vivid image of judicial practices in the criminal court of Turin. Looking at the law in-action is particularly important in research into sentencing decision-making because:

“The manner in which criminal statutes [...] become enacted during the mundane work of a court depends upon a number of nonstatutory factors, such as the goals of various court actors (defence counsel, prosecution, social welfare agents, judges, even defendants and family members), the constraint imposed on judicial discretion by administrative guidelines, and the nature of the legal culture that

emerges within a given court, as well as the individual creativity (or lack thereof) of a court's presiding judge' (Barret, 2013:73).

By exploring the tension between the black-letter-law and the law in-action, it is possible to shed light on how and why courtroom actors interpret and apply the law in the way they do, and on factors and constraints that drive their decision-making. The gap between the law in-the-books and the law in-action is filtered through courtroom actors' discretionary powers. Defining discretion is a complex task and many scholars have embarked upon this task, each time untangling various dimensions and meanings of discretion (Davis, 1969; Dworkin, 1977; Goodin, 1986; Galligan, 1986; Hawkins, 1992). In a broad sense, discretion can be defined as 'the space between legal rules in which legal actors may exercise choice' (Hawkins, 1992:11). Dworkin has famously compared this space to the hole in a doughnut, 'an area left open by a surrounding belt of restriction' (1977:31). According to Dworkin, discretion exists not only every time decision-makers have the power to choose whether to act or not, but also when decision-makers can choose *how* to act within the range of possibilities provided for by law. On this account, discretion is a *relative* concept, the meaning of which depends upon existing standards and rules and it exists only insofar as legal restrictions do so (Hawkins, 1992). The problem in embracing a meaning of discretion as the one envisioned by Dworkin is that it entails discretion as restricted and governed only by legal norms.

However, reality is much more complex, as it encompasses also decisions made 'outside' the boundaries of the law and 'on the fringes' of the law. In other words, decisions that, in a certain way, 'escape' the boundaries set by legal norms. These decisions might be the product of a partial legislative vacuum (as codified rules cannot cover every situation), ambiguity in policy wording or the influence of extra-legal factors on courtroom actors' decision-making. In fact, social norms, political forces, institutional needs, local environment and legal culture are all factors, 'extra-legal' restrictions, driving decision-makers towards a certain pattern of choices rather than another. As Schein points out 'decision-makers, after all, do not live or work in a vacuum; they are inevitability products of their environment, and their environment is, to some extent, an environment of shared social norms' (1992:80).

Social norms are the cluster of informal rules that govern the way in which groups and societies behave by driving and constraining them towards certain expected demeanours (Lewis, 1969; Posner, 2000; Hechter and Opp, 2001; Bicchieri, 2006). Social norms, in other words, are conventional routes. They tell 'what is expected from us' in a given social context. Judges, public prosecutors and defence attorneys, through their formal training and informal socialising, have learned how to act and how to make choices that are rational for certain social and organizational standards. It is *not only* the law that constrains courtroom actors' decision-making. Rather, it is the broader social context that dictates to them whether to act and how. On this basis, this research embraces a *social* meaning of discretion, defined as the space between legal and extra-legal restrictions in which courtroom actors make choices.



### 1.2.2. *Foreign nationals on trial: a brief literature overview*

Quantitative research on decision-making and sentencing disparities between different groups of defendants – especially African Americans and Latin Americans compared to their white counterparts – is extremely abundant in the United States (Steffensmeier *et al.*, 1998; Steffensmeier and Demuth, 2000; Everett and Wojtkiewicz, 2002; Kutateladze *et al.*, 2014; Feldmeyer *et al.*, 2015). More recently, sentencing scholarship has started to pay attention not only to defendants' ethnicity, but also to their immigration status, in order to underscore whether it might have impact upon sentencing outcomes (Wolfe *et al.*, 2011; Light *et al.*, 2014; Orrick *et al.*, 2016). However, research findings are widely inconsistent, ranging from studies concluding that there is no difference in sentencing between citizens and non-citizens (Everett and Wojtkiewicz, 2002; Kautt and Spohn, 2002), studies suggesting that non-citizens are disadvantaged at sentencing (Hartley and Tillyer, 2012; Wermink *et al.*, 2015; Light, 2016), to studies concluding that non-citizens receive shorter prison terms than citizens (Wu and Delone, 2012; Wu and D'Angelo, 2014). The variety in research findings can be explained by different research aims, methodologies, variables employed, availability of aggregated data and so on. Additionally, the judicial system in the United States is highly decentralised, hence different sentencing outcomes might reflect heterogeneous court practices and social contexts.

With regard to qualitative research there are, on the contrary, few studies on judicial decision-making in relation to immigrants (Campesi, 2003; Light, 2017; Villagómez, 2018; Tosh, 2019). Light conducts a study on the salience of membership in the United States and in Germany, and concludes that in both countries, albeit to a different degree, harsher punishment is delivered to immigrants and that expressions of resentment are consistently linked to the criminality of non-state members (2017:59). These findings are consistent with the ones of the study conducted by Campesi (2003) on the archetypal rhetoric of immigrants in an Italian criminal court, where the same image of 'dangerous and criminal' outsiders emerges from narratives of judges and public prosecutors. Tosh (2019) and Villagómez (2018) investigate the socio-legal construction of the 'bad' immigrants in criminal courts, by considering the potential 'punitiveness' stemming from the convergence between criminal and immigration law. Tosh (2019) analyses developments and outcomes of aggravated felony in the court of New York City. She concludes that the intertwining of drugs, crime and immigration policies perpetuates racial and ethnic stereotypes. Villagómez (2019) examines the 'crimmigration' decision-making determinants within the Spanish context. He concludes that criminal courts contribute to the social construction of the 'criminal' others, and that deportation is employed by courtroom actors to incapacitate 'criminal immigrants'. Except for the study conducted by Light (2017), the other studies investigate the role of all main decision-makers in a criminal court, namely judges, public prosecutors and defence attorneys. This approach is in line with the naturalistic tradition, which 'emphasizes a holistic view of discretion and decision-making as a collective process' (Hawkins, 1992:26). In other words, by adopting this epistemological approach, the researcher is not so much concerned to understand how individual actors make rational decisions in pursuing a set of targets, which is an aim shared by scholars working within the rationalistic tradition. Rather, within the naturalistic tradition, the

researcher interprets decision-making as a collective enterprise that displays tension, clashes and alignment between different actors, forces and interests at stake. This is the approach I have adopted in this research.

In his comparison between Germany and the United States, Light refers to the diverse legal culture in criminal sentencing between the two countries, suggesting that this feature could help in explaining the difference in the punishment gap (2017:64). Along this line, one might wonder whether peculiar traits of a local context can help in explaining and accounting for similarities and differences in research findings. In other words, does the context matter? I believe the answer is yes. For example, countries with a judicial system characterised by an emphasis on actuarial elements and risk management (cf. Feeley and Simon, 1992) might manage unruly groups of people differently from countries with a more traditional and formalist approach to law. Countries where the judiciary is independent from executive powers might have a judicial system less prone to influences from political parties compared to countries where judges are appointed by the executive. In countries with strong public resentment and political propaganda against immigrants, criminal justice agencies might be more inclined to enforce criminal and immigration law compared to countries where immigration is not framed as a security issue. These legal and social peculiarities at the local and national level cannot be underestimated. Conversely, an explanation for differences and similarities in sentencing practices across various jurisdictions might precisely come from this context.

### *1.2.3. A contextual approach to decision-making*

The site in which decision-making takes place *matters* not only to the content of decisions, but also to their meaning (Silbey, 2010). When I refer to the meaning of decisions, I intend to call attention to the significance that these decisions have for those who make them. The very fact of considering not only *which* decision is made, but also *why* it is made, opens up the possibility to better understanding of the aim and relevance of individual decisions. Of course, meanings, rationales, principles and objectives contained in decisions are not likely to be the product of individual decision-makers, but rather of a broader environment. As Spohn and Fornango (2009) argue, local legal culture shapes the way courts operate and the pattern of outcomes they produce. Stated otherwise, the legal, political, social, environmental and organisational context in which a court is embedded shapes individual courtroom actors' decision-making. Inside a court, there is a way of thinking about how the work should be done, a sort of 'collective programming of the mind' (Hofstede, 1980:21), that drives the choices of individual decision-makers. And this invisible, but extremely seminal, programming is termed *legal culture*.

It is not my aim here to provide a distinguishing definition of legal culture. The concept of legal culture, since it was introduced by Friedman (1975), is a troublesome and controversial one. This is also due to the inconsistent and polyvalent nature of the word 'culture', the Geertz's 'webs of significance' (1973:5), a word deemed to have more than 150 definitions (Nelken, 2006; for a critique of the term, cf. Cotterrell, 1997). The acknowledged father of the term 'legal culture'

defines it as a set of ‘attitudes, values, and opinions held in society, with regard to law, the legal system, and its various parts’ (Friedman, 1977:76). He intends to shift attention from the law-in-the-books and place emphasis on the law-in-action, in particular on the ‘social forces [...] constantly at work on the law’ (Friedman, 1975:15). Many scholars contribute to the theoretical debate on meanings and dimensions of legal culture (Nelken, 2010; Merry, 2010; Engel, 2010; Pennisi, 2018; Quiroz Vitale, 2018), and many others attempt to operationalise the concept in case studies (Kritzer and Zemans, 1993; Nelken, 2004; Field, 2010; Montana, 2012; Damiani di Vergada Franzetti, 2018; Fabini, 2018). In this research journey, I intend to contribute to the latter scholarship and endeavour to operationalise the concept of legal culture in the Italian case study.

More specifically, I seek to use the concept of legal culture as a heuristic device for understanding how individual decision-making is influenced by the social, political, economic and moral forces in place within a local reality (Webber, 2004). Given the differences between local contexts, rather than speaking of legal culture, it would be more appropriate to speaking of legal culture(s) of states, organisations or groups (cf. Merry, 2010). Friedman (1975) famously distinguishes between *internal* legal culture, meaning attitudes and ideas of legal professionals, and *external* legal culture, meaning opinions, interests and pressures exercised by wider social groups ‘outside’ the legal system. This distinction lays focus on the possibility of large differences between ideas and attitudes held by legal professionals working within the justice system and the others (Nelken, 2006:206). In other words, those who are trained to think in legal terms and who daily exercise their activities in the criminal justice system have an ‘inside’ viewpoint that might be totally different from the one of those who have sporadic encounters with the justice machine.

Nevertheless, legal culture cannot be interpreted statically, and neither can it be seen as something absorbed passively by legal actors. Rather, a legal culture of groups or organisations is likely to be shaped and influenced by local peculiarities, hence to produce a variety of attitudes towards law and judicial practices. An example of such interaction between legal culture and local dimension comes from a study conducted by Eagly (2013). The study explores how local criminal processes are organised around immigration enforcement in three different American jurisdictions. The research shows that the way immigration-related concerns interact with crime-related concerns is highly dependent upon different local practices. Eagly concludes that the interaction between judicial practice and immigration enforcement creates unique features in relation to the social, political and organisational environment in which this interaction takes place.

The impact of local peculiarities on the homogeneity of judicial practices at the national level is contingent upon the degree of difference between local realities within a nation. To provide an example, internal legal culture, in the Italian landscape, is known for being characterised by legal formalism, resistance to normative changes and a strong discrepancy between law and reality.<sup>5</sup> At

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<sup>5</sup> On this point, cf. Ferrajoli (1989) and its famous theory of *garantismo penale*, according to which stronger formal and procedural guarantees are necessary in Italy because of the wide gap between criminal law principles and their enforcement.

the same time, Italy is also known for being a polarised country with a profound socio-economic gap between southern and northern regions (DiMaria, 2018). Because of this multifaceted portrayal of local realities, it is likely to find different degrees and methods of law enforcement. For instance, in the Neapolitan area, a territory characterised by a high level of informality, it is easier for irregular immigrants to settle due to the under-enforcement of immigration law by police officers and the over-abundance of ‘tolerated’ irregular employment (Pascali, 2019). This *forma mentis* circulating in the Neapolitan area is very unlikely to be found in other areas of the country, especially in cities located in the northern regions, such as Turin.

Do such local peculiarities make it impossible to speak of an Italian legal culture? I believe not. After all, judges and public prosecutors, before being appointed, must complete a traineeship that is equal at the national level. The same goes for defence attorneys, who need to succeed in a national examination to register for the Bar Association. Additionally, defence attorneys can represent their clients in different courts, and magistrates can request to be transferred to a different city. Because courtroom actors share the same formal training and informal socialisation with their peers, inside each group there is a common professional culture that tells them how to think and act (cf. Schein, 1992; Brown, 1995; Düvell and Jordan, 2003; Sun, 2008; Thomas, 2010). At the same time, this shared baggage of learned ways of thinking and acting meets local demands, needs and concerns. This is the reason why it is not surprising to find different judicial practices across criminal courts of the same country. Even when magistrates or defence attorneys share the same baggage of ideas and attitudes, such baggage must dialogue with local realities. Thus, while legal culture remains an important heuristic device to understand how and why courts function in a certain way, it is important as well to locate and analyse judicial practices in light of the local context. In the course of this book, it will become clear how local traits matter in shaping judicial practices in the city of Turin.

#### *1.2.4. Shaping penal practices: state structure and legal processes*

Courtroom actors do not live in a social vacuum. Instead, they work in a community where they meet local demands, needs and pressures. The extent to which these social forces are capable of influencing sentencing practices is contingent upon the specific characteristics of individual criminal justice systems. According to Garland, in order to grasp the key processes that determine penalty, it is opportune to focus on ‘the structure of the state, its power and capacities, its autonomy or its openness to popular pressure, its internal divisions and restraints, and the interests and incentives of legal actors’ (2013:494). In his contribution, Garland uses the term ‘penal state’ to indicate those agencies and authorities that direct, control and affect the use of penal power. To avoid confusion, I wish to clarify what I mean when I talk about ‘the penal state’. This is because the term is often used with reference to the punitive turn in the USA, *scilicet* the increased severity of punishment (cf. Rubin and Phelps, 2017). Here, in line with Garland, I use the term in a neutral, nonevaluative sense (2013:495). This is to say that a penal state might even produce lenient penal outcomes, depending on how the agencies who direct and control the use of penal power make use of it. The nature of the penal state and its characteristics can help

explaining different penal outcomes across countries. For example, why in some countries popular resentment against immigration is rapidly translated into ‘crimmigration’ policies (cf. Stumpf, 2006)? Why are some countries less prone to use deportation as a consequence of criminal conviction? Why are some countries more inclined to use incarceration rather than alternative measures, such as community services? With an integrated state-and-society approach as suggested by Garland (2013:509), it is possible to untangle penal practices by analysing how the structure of state, institutions and legal processes relate to (local) cultural, social, economic and moral forces. Garland (2013:496) identifies five dimensions of the penal state. I will briefly address each of them in order to provide an overview of how these dimensions might differ across countries and influence penal outcomes.

The first dimension of the penal state is *state autonomy*, and it refers to the autonomy of the state in relation to society. More specifically, are citizens and media capable of dictating penal policies and influencing state actors’ decision-making? Apart from authoritarian regimes, no democratic state is completely impervious to social pressure. At the same time, the level of immunity to external influences might vary remarkably across different realities, ranging from strong states to weak states in respect of their degree of autonomy from society (Davidheiser, 1992). These external demands might come from powerful pressure groups or even local committees although, obviously, the impact of lobbying groups is not always the same. Examining whether the penal state is vulnerable to external pressure, and to which kind of group interests, allows for a better understanding of the occurrence of certain penal policies and the different degree of enforcement.

The second dimension of the penal state is *internal autonomy* and it refers to the degree of independence of the penal state from other institutions. In particular, this dimension untangles the autonomy of penal agencies and their members in shaping penal outcomes (Garland, 2013:499). Are courtroom actors capable of making decisions according to their own beliefs and targets or are they under the influence of other actors within the state? While delving into internal autonomy, one must examine whether courtroom actors, rather than being influenced by something *outside* the state, such as media and group pressure, are influenced by something *inside* the state, for example ruling political parties. The internal autonomy of the penal state is inevitably linked to the degree of independence of the judiciary from executive powers and to the breath of courtroom actors’ discretion in shaping penal outcomes. Therefore, in countries with an autonomous and independent judiciary, it should be less likely that election results influence penal enforcement, especially compared to countries where the judiciary is politically appointed.

The third dimension of the penal state relates to *control of the power to punish*. In particular, this dimension refers to where the power to punish is allocated, not only vertically – and thus between national and local governments – but also horizontally, between and within penal agencies. Inherently, this allocation varies remarkably across different realities inasmuch as some countries delegate power at the sub-national level (e.g. federal states), while others maintain the power to punish at the national level. More specifically, this dimension considers where the power to

punish is allocated and how it is distributed across the process that leads to penal outcomes. Can judges shape penal outcomes or are they restricted by the legislature? Can public prosecutors decide which offences to prosecute or are they subject to the principle of mandatory prosecution? Can defence attorneys' strategies and requests have a real impact on judges' decisions? And what is the role of police officers in this process? The balance of power between different agencies might be wavering and shifting over time: this dimension refers not only to where the power to punish is allocated, but also to how agencies compete and collide for its control.

The fourth dimension of the penal state is *modes of penal power* and it refers to the qualitative dimension of power. Penal power can be used to incapacitate, punish or deter unlawful conduct. It can also be used to rehabilitate, reintegrate or restore social cohesion. Normally, states use both positive and negative penal power, although the balance between them might vary (Garland, 2013:501). Besides, the use of penal power in a state might differ over the course of time. For example, in periods of social insecurity and public concerns over certain crimes or criminals, penal power might become detached from its constructive and capacity-building character and become unduly harsh and detrimental towards specific targets. This dimension reflects upon how much penal power is used by the penal state and especially *how* it is used. In particular, how do courtroom actors rationalise their actions? What are the objectives, techniques and practices they employ? By exploring this dimension, it is possible to understand not only the modes in which penal power is used at a particular moment in time, but also what are the rationales behind its use.

The fifth dimension of the penal state relates to the quantitative dimension of power, that is *power resources and capacities*. This dimension refers to a state's resources and its capacity to take effective actions, including budget, personnel, system coordination and infrastructure and so on. Besides, this dimension covers not only economic resources, but also cultural ones, such as knowledge, expertise, research, cost-benefit analysis and statistics. According to Garland (2013:502), if the penal state holds a large amount of economic and cultural capital, it is more likely that such capital will be employed to pursue positive modes of penal power. This is because positive penal powers that aim at capacity building are more costly and require a higher level of coordination between different agencies. On the contrary, negative penal powers require few resources and coordination, and thus it is likely that penal states with scarce economic and cultural capital will rely more on incapacitation, retribution and confinement.

The five dimensions of the penal state identified by Garland (2013) offer a unique lens for analysing judicial practices in the *torinese* criminal court. By analysing judicial practices in the light of state structures and processes, one can be better able to contextualise such practices within a particular socio-legal context. More specifically, this conceptual model allows the examination of judicial practices by looking both at state permeability and modes of penal power *vis-à-vis* their qualitative and quantitative dimension. At the same time, these dimensions can be untangled by adopting a law-and-society perspective. In particular, this perspective emphasises the social

dimensions surrounding penal practices, and thus allows to locate judicial processes in their broader economic, political and cultural context.

### 1.3. Italian penal policies: a conundrum of contradictions

Decision-making and policy-making are diverse, yet strongly interrelated activities. Their boundaries are not always easy to set in practice, and their relationship is a dynamic one. When it comes to judicial decision-making, it is important to recall that the objects and subjects of penal policies are established at the policy-making level, as well as the degree of discretion of individual decision-makers (cf. van der Woude and van der Leun, 2017). This requires magistrates to deal with a range of actions and omissions that have already been selected and criminalised by the legislative and policy level. Moreover, the way they deal with criminalised actions (i.e., degree of discretion, punishment available) is also established for them at the legislative and policy level. Despite the gap between the law in-the-books and the law in-action, it is undeniable that judicial practices are, to some extent, the result of policy-making processes. Given such circumstances, in this paragraph I provide the reader with an overview of Italian penal policies. In particular, I highlight the political, social and cultural processes that lead to a change in Italian penalty from the 1990s, when a ‘tough-on-crime’ approach started to percolate penal policies.

Italian penal policies are a mixture of contradicting rationales and unbalanced compromises, together with a profound detachment between formality in law and informality in enforcement. In order to understand why Italy displays hybrid approaches to criminality, and delivers them differently, it is necessary to take a step back. Until the 1990s, Italy exhibited a mild approach towards crimes. Politicians during the *Prima Repubblica*<sup>6</sup> approached crime as a political matter, but they did not politicise it. In those years, the Parliament enacted harsher law against political terrorism and mafia, but responses towards other less serious crimes remained mild (Corda, 2016). According to Melossi (2001:413), the Italian ‘culture of indulgence’ is embedded in the longstanding Catholic tradition of forgiveness and solidarity shared by the different political parties. In the years of the First Republic, the use of amnesties and pardon to reduce punitiveness was a widespread practice, and it was not until the late 1990s that their use started to be strongly criticised.<sup>7</sup> But what happen exactly from the 1990s? The shift from moderation towards punitiveness in penal policies appears to have been caused by a concatenation of events.

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<sup>6</sup> The expression *Prima Repubblica* is used to indicate the political system that governed Italy from 1948 to 1992, year in which it was conducted the ‘Clean Hand’ investigation. From 1994, it started the so-called *Seconda Repubblica*, in which a radical change in Italian politics occurred because many historical parties disappeared, and new parties emerged.

<sup>7</sup> While amnesty and pardon are often conceptually linked together, they are, in reality, different. Amnesty is a measure that erases criminal liability – thus, it is like the offender never committed the crime. On the contrary, pardon is a measure that erases punishment – thus, the offender is responsible for the crime, but he or she will not serve a term of imprisonment. From 1948, Italy has granted amnesty or pardon approximately thirty times. The last amnesty was granted in 1990, while the last pardon in 2006.

First, in 1992, a team of public prosecutors conducted a judicial investigation known as *Mani Pulite*, Clean Hands, which uncovered a system of bribery, illegal funding and corruption involving leading politicians, civil servants and businessmen. This event not only marked the end of the First Republic, but also put a strain on citizens' trust in the political system, including the government's ability to tackle criminality. Second, in the early 1990s, Italy, together with other Western countries, endured a period of economic downturn, a debt crisis that strongly affected the economy of the country. Third, the beginning of international immigration increased citizens' concerns and fears in a moment of economic and political instability. Taken together, these events contributed to the rise of strong attitudes towards deviance, matched by a request for 'more punishment' – especially against the 'outsiders', who had the misfortune to arrive in Italy in those years. In the late 1990s, the (symbolic) answer to emotional demands from citizens was represented by political campaigns explicitly based on law-and-order, with an increasing focus on street-crimes and undocumented immigration (Corda 2016). From the early 2000s, penal policies were characterised by an 'unequal distribution of punishment' between insiders and outsiders (Gallo, 2019:158). White-collar crimes were punished mildly, in spite of the great damage they silently produce in society. At the same time, harsher immigration policies were enacted, the so-called 'security packages', and a draconian war on drugs began (Corda, 2016).

Since then, the situation has not changed much. Nowadays, Italy still witnesses an incoherent, mixed penal model. On the one hand, there are reforms aimed at limiting the use of pre-trial detention and shortening the length of criminal proceedings. On the other hand, there is an increase of minimum sentences for certain crimes, such as burglary, mugging and robbery, which nullifies the effects of procedural reforms (Gallo, 2019:159-160). Besides, the double standard of penalty is particularly visible in the draconian penalties that are provided for by the law against crimes traditionally committed by the poor and by immigrants – and often the two go hand-by-hand. For example, aggravated burglary<sup>8</sup> is punished with a term of imprisonment of up to *six years*; the sale of counterfeit goods<sup>9</sup> is punished with a term of imprisonment of up to two years, which becomes up to *eight years* when public prosecutors charge defendants also for possession of stolen goods;<sup>10</sup> false identity statement is punished with a term of imprisonment of up to *five years*<sup>11</sup>, and so on. The result is a schizophrenic justice system that formally places defendants who make a false identity statement on an equal footing with defendants who commit manslaughter.<sup>12</sup>

Nevertheless, these 'zero tolerance' penal policies against the poor and the immigrants encounter a series of institutional and structural counter-balances. First, the rise of punitiveness in Italy seems to be mitigated by 'a uniquely strong corps of self-governing and independent judges and

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<sup>8</sup> Aggravated burglary is traditionally seen as a particularly serious kind of burglary, but this is not always the case. Art. 625 of the Italian criminal code enlists a series of circumstances that allow aggravating the penalty for burglary. For example, if burglary is committed in any means of public transport (bus, tram, etc.), the offender is charged with aggravated burglary.

<sup>9</sup> Art. 474, comma 2, of Italian criminal code.

<sup>10</sup> Art. 648 of Italian criminal code.

<sup>11</sup> Art. 496 of Italian criminal code.

<sup>12</sup> Art. 589 of Italian criminal code: manslaughter, that is killing another person without having the intention to do so, is punished with a term of imprisonment from six months to five years.



prosecutors, whose priorities are often different from those of both politicians and the public' (Nelken, 2009:301). Second, to mitigate overcrowding in prisons, the Parliament enacted a series of laws that implement the use of alternative measures to imprisonment. Additionally, several offences have been decriminalised to ease the work pressure on criminal courts.<sup>13</sup> However, rather than an interest in embracing a penal system aimed at reintegration and capacity-building, these reforms are the result of an increased awareness about the shortages of resources (Corda, 2016). In other words, in order for a state to increase punitiveness, more capital and human resources should be available – and Italy lacks both of them. Third, punishment might be harsh in books...but what about in action? How penal policies are translated at the enforcement level is a whole different story, as it will be shown in the course of this book. Additionally, the structural characteristics of the criminal justice system lead towards a lack of certainty of punishment. In particular, given the length of criminal proceedings, statutes of limitations, procedural guarantees, three degrees of judgment and judges' workload, it is likely that the punishment will be enforced after years of delay – if ever enforced at all (sic!). It is exactly the blending of these factors that seems to prevent an *in-action* escalation of punitiveness in Italy.

#### 1.4. Zooming in on the local...or the trans-local context?

In the previous paragraph, I mentioned how Italy is a polarised country with a strong socio-economic difference between the north and the south (DiMaria, 2018). This is the reason why I believe it is important to provide the reader with a picture of the local context in which this research was conducted. The research was conducted in Turin due to the significant number of immigrants in the city, which is approximately double the average in comparison to the national level.<sup>14</sup> Whereas the focus of this research is the city of Turin, it must be remembered that processes of globalisation are 'translocal in their origin and impacts' (Beckett and Herbert, 2009:24). When I talk about a trans-local dimension (Appadurai, 1995), I mean to suggest that the local cannot be seen as a closed entity impermeable to global forces. Rather, the local must be analysed in its trans-local dimension, in its capacity for dialogue with the global. Because this research investigates specifically the impact of immigration on judicial practices, I here examine the geographic, social, cultural and economic traits that characterise the city of Turin in relation to the inward movement of people.

##### 1.4.1. On board the 'sunshine train' with destination Turin

Demographically, Turin is the third economic pole and the fourth biggest city in Italy with almost 900 thousand inhabitants. It is known in the territory and abroad for having been the first capital of the Reign of Italy, the city in which the film industry was established for the first time – and where in 1914 was filmed the colossal *Cabiria* – and where the main Italian publishing houses

<sup>13</sup> <https://www.penalecontemporaneo.it/d/4427-depenalizzazione-e-nuovi-illeciti-sottoposti-a-sanzioni-pecuniarie-civili-una-riforma-storica>

<sup>14</sup> Source: ISTAT.

were founded. It is also known for hosting in one of its main squares *il mercato di Porta Palazzo*, the biggest open-air food market in Europe. However, probably the city of Turin is most known for being the place where in 1899 Giovanni Agnelli founded the famous car manufacturer FIAT, an event that marked deeply the economic development of the area. From the 1950s, Turin represented the preferred destination for immigrants from the southern regions of the country. Many southerners migrated to Turin due to job opportunities offered by city factories, especially FIAT, during a period of extraordinary economic and industrial development, which was beyond the scope of the local labour supply. In those year, the demography of the city changed dramatically. In 1951 the city hosted 719.300 inhabitants, while after two decades, in 1971 the city grew to 1.167.968 inhabitants.<sup>15</sup> The then mayor stated, ironically, that Turin was the third Italian southern city by population after Naples and Palermo.

In those years, every day, hundreds of immigrants arrived at *Porta Nuova*, Turin's old main railway station, on board a train known as *il treno del sole*, the sunshine train, which connected Palermo directly to Turin (De Rossi, 1994). Once arrived in Turin with their families, southern workers had to face one of the most tormenting moments, that is the search for accommodation – especially because Turin urban space, in those years, portrayed the ethnic and class divisions of its population (Talamo, 1962). The majority of southerners settled in the rapidly growing suburbs of the city, mainly impoverished areas with crowded public housing. One of these districts was *Vallette*, an area in the far periphery of the city, which in the 1960s housed approximately 20.000 tenants. However, the district was so poorly connected with the city that this created *de facto* a segregation of immigrants (Pizzolato, 2007:64). Those who did not find accommodation in the city were forced to move to close-by small villages at the edge of the city, such as *Nichelino* and *Falchera*, where urban decay and lack of municipal services created a similar sense of territorial and social exclusion (Musso, 2002).

Integration of the newcomers was not easily achieved. In the beginning, cultural differences between the 'northerners' and the 'southerners' made their coexistence particularly tense. The hundred-years old *questione meridionale*, the 'Southern Question' – meaning the cluster of beliefs and practices that support the representation of southerners as different, inferior, lazy and barbaric – provided at that time a complex frame of themes and images to put the newcomers in and make sense of differences. The *meridionali* were stigmatised through different social practices that placed emphasis on all those traits reinforcing the idea of 'otherness', such as dialects, physical features, excessive size of families and exuberant behaviour. Forms of discrimination took place during those years, such as signs erected at front doors bearing the imprint '*non si affitta ai meridionali*' (we don't rent to southerners) or the creation of epithets full of resentment towards the newcomers (Filippa, 1998). Remarkably, only the most vicious and racist attacks and attitudes were publicly censured, whereas the majority of them were read and interpreted in the light of 'a bit of healthy' *campanilismo*, that is love for one's own city (Capussotti, 2010). Indeed, the real cultural battle was not really about north versus south. Rather, it was about *piemontesi* and the

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<sup>15</sup> Dati ISTAT, municipality of Turin.

region of Piedmont against *meridionali* and *mezzogiorno*, southerners and their areas, thus collecting all identities – from Neapolitans to Sicilians and all regions in between – under one label.

Despite this social and cultural battle, the tensions between northerners and southerners were softened by the fact that citizenship granted formal equality, the right to vote and access to the welfare system. Additionally, it is important to recall that immigration in those years was triggered by a demand for labour from the north that matched a supply from the south. Thus, as time passed, a progressive share of public, private and working experiences led to a full integration of the newcomers in the social and economic fabric of the city. However, the newfound social balance did not last long, since Turin was not immune to international migration. By the end of the 1990s, the city became the destination for immigrants mainly from Central and Eastern Europe and North Africa. The railway station of *Porta Nuova* started again to welcome several groups of newcomers, although this time there was not a demand in the *formal* labour market to match. A passage of the novel *Torino è casa mia* recalls the change:

*Torinesi* do not really like Porta Nuova. It is full of bad people, like any other railway station. Besides, from Porta Nuova too many arrived. First, all those Sicilians. Then, all those Calabrians. Then, all those Neapolitans. Then, all those Pugliesi. Then, all those Moroccans. Then, all those Tunisians. Then, all those Algerians. Then, all those Senegalese. Then, all those Nigerians. Then, all those Chinese. Then, all those Albanians. Then, all those Romanians. The irony is that, as time passed, albeit with difficulties, the newcomers also started to feel *torinesi*. And so, in turn, Sicilians started first to complain about all those Calabrians, and then about all Neapolitans, Pugliesi, Moroccans, Tunisians, Algerians, Senegalese, Nigerians, Chinese, Albanians and Romanians. Calabrians, in turn, started first to complain about all Neapolitans and then about all Pugliesi, Moroccans, Tunisians, Algerians, Senegalese, Nigerians, Chinese, Albanians and Romanians. [...] And so on. With regard to Romanians, they are eagerly waiting for someone else to decide to migrate to Turin because, being the latest arrivals, they don't know to whom complain about' (Culicchia, 2005:25-26, my translation).

A rediscovered (or brand-new?) Italian identity to provide insulation against the 'strangers' emerged in those years. The new 'otherness' gave Italians, the southerners and the northerners, the chance to finally see themselves united against a common enemy: resentment against southerners was replaced by resentment against immigrants (Capussotti, 2010). The presence of immigrants grew constantly during the years, contributing to change in the makeup of the city, which was entering in its post-industrial period. In 2004, Turin hosted 55.500 immigrants, around 6.4% of the resident population, while in 2018 the city hosted 133.137 immigrants, making up 15.1% of the resident population – nearly twice the current percentage of the national level, which

is 8.5%.<sup>16</sup> Nowadays, the largest foreign communities in the city are represented by Romanians (39.2%), Moroccans (12.6%), Chinese (5.7%) and Peruvian (5.6%), followed by Albanians (4%), Nigerians (3.9%) and Egyptians (3.8%).

#### *1.4.2. Immigrants and urban areas: close to us, distant from us*

Contrary to the southerners in the 1960s, immigrants are not segregated in any district of the city. Of course, there are districts in Turin that are more mixed in their demographic composition than others, but there are no ‘immigrant ghettos’ in the city. This certainly differs from other European cities, for example Madrid, London and Tallinn, where urban segregation of minority groups divides the poor from the wealthy, the natives from the foreigners (Tammaru *et al.*, 2015). In Turin, this is not the case. Foreign communities are distributed almost across all districts, with some of their neighbourhoods located not far from the city centre. However, it must be mentioned that ‘a low level of residential segregation does not necessarily imply an equally low level of social marginalisation’ (Bolzoni, 2016:60). On the contrary, it is possible to identify certain neighbourhoods in Turin ‘where the processes of social changes are more pronounced than in other areas of the city’ (Cingolani, 2016:124). In detail, I refer to certain districts that are known for being the site of drug trafficking and disorderly conduct due to the presence of immigrants. In these districts, namely *San Salvario*, *Barriera di Milano* and *Porta Palazzo*, the coexistence between native and foreign-born residents is not always so peaceful.

Undoubtedly, the most problematic district with respect to security is *Barriera di Milano*, a district located in the north of the city. Until the 1970s, *Barriera di Milano* was the par excellence working-class neighbourhood in Turin. During the economic miracle years, many southern immigrants, together with their families, settled in this district since the area was a sort of small village within the chaotic and industrial city. The legacy of this internal migration is still visible in the urban reality, where streets are named after southern villages and small shops, by now few, offer a variety of typical products from the south (Cingolani, 2016:132). As time passed, the old residents moved to other districts and the relatively low price for housing attracted foreign immigrants, who currently represent the youngest segment of residents in *Barriera di Milano*.<sup>17</sup> However, immigrants encountered serious difficulties to fit in the district and often tensions arose not only with the few locals remained, but also between different ethnic groups, among whom often occur violent clashes. Senior residents do not hide their prejudices and resentment against foreign residents, who are accused of having brought chaos, disorder and crime in the district (Cingolani, 2016). The negative image of *Barriera di Milano* is often associated with the high presence of immigrants, reinforcing the stereotypical myth of immigrants as bearers of decay and crime. In the last decade, the district has witnessed the establishment of spontaneous organisations of local residents. These committees, dissatisfied with the political responses to the district’s troubles, have started to patrol

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<sup>16</sup> Dati ISTAT, municipality of Turin, 1st January 2014 and 1st January 2018.

<sup>17</sup> For a detailed history of the district, cf. *Storia della Barriera di Milano dal 1946*, Associazione Culturale ‘Officina della Memoria’ 2006.

by themselves the streets late at night to intimidate and drive away drug dealers (Cingolani, 2016). Nowadays, in *Barriera di Milano* there are problems of urban security due to the high number of irregular immigrants with a criminal history lingering in the streets, the widespread drug trafficking and the presence of prostitutes from the Central African Republic working in the far-out suburbs.

*Barriera di Milano* might be the most problematic urban segment in Turin when it comes to urban security, but it is certainly not the only one. In fact, there are certain areas in the centre of the city, characterised by a high presence of immigrants often involved in drug trafficking. It is specifically immigrants' *visibility* in a certain kind of illegality that makes the relationship between immigrants and locals extremely tense. Generally, these areas are frequently patrolled by the police, who attempt to restore urban decorum and safety through identification and law enforcement. In other words, surveillance and control dominate these areas. In particular, the hills of *parco del Valentino* – a 42 hectares park which stands in the centre of the city along the shores of the Po river – are knowingly used by immigrants as 'headquarters' for hiding small amounts of drugs and conducting their business out of sight. When approaching the nightlife in *San Salvario*, the area of the city crowded with restaurants and bars, young locals know they must avoid 'certain' streets, which have been monopolised by ethnic markets and are often the scene of drug trafficking and brawls between groups of immigrants. In the same *mercato di Porta Palazzo*, the biggest open-air food market in Europe, locals are aware of the need to be attentive while shopping because they can run into various forms of 'illegality' that have become the stock in trade of immigrants – for example, drug trafficking, robberies, brawls, counterfeit items and so on. It must be mentioned that the widespread feeling of discomfort towards immigrants and their (deemed) disorderly behaviour is amplified by the recent transformation of the city. In the last twenty years, Turin has tried to rebrand its image by moving away from its Fordist past to become an attractive city for culture, tourism and business. This is visible in the events promoted in the last decades, such as the Winter Olympic Games in 2006, and the investment in restaurants and night-time entertainments, especially in the district of *San Salvario* (cf. Bolzoni, 2016:61). It is not surprising, then, that hostility against immigrants has grown exponentially as their presence in urban spaces clashes with the new image that Turin wants to give of itself.

The involvement of immigrants in this low, yet highly visible, criminality, together with scaremongering media coverage and xenophobic political discourses about immigration all contribute to reinforce the nexus between immigration and criminality, foreigners and urban decay. Notwithstanding the fact that Turin began to experience international migration earlier than the rest of the country, it does not seem that the city has accommodated immigrants peacefully. On the contrary, just like southerners in the 1960s, immigrants today struggle to integrate within society because of the aura of negative opinions around them. In the past, the 'lazy' strangers came from the inside. Today, the 'dangerous' strangers come from the outside, threatening Italian identity and culture with their baggage of customs and traditions. The stigma of otherness, apparently, has been transferred to them:

‘It was not so long ago that a northern Italian thief was a thief, and a southern Italian thief was a southern Italian. What was once a practice that was coded as ‘southern’ by northerners, and therefore not ‘Italian’ has been transformed by the presence of immigrants in the north. Now, in cities with increasing immigration, the once southern Mafia is now Italian. However, it is not so much a ‘healing’ of the divide but a reconstitution of it, altered with regard to who is positioned on which side of the border’ (Kowalczyk and Popkewitz, 2005:432-433).

#### 1.4.3. Turin: an exceptional case of resistance to populism?

While this historical overview might lead one to think that *torinesi* have simply found a new scapegoat, I believe this is not the case. The reason is that the two migrations differ in some, yet fundamental, traits. Although southerners differ from northerners in many aspects, they are alike for others. They speak the same language, share the same religion, have a similar diet and support the national team during the Football World Cup – it might sound odd for a foreign reader, but Italians often rediscover their *italianità* during football tournaments. In contrast, foreign immigrants are perceived to be culturally distant from Italians. They are seen and depicted as ‘strangers’ who speak exotic languages, eat outlandish food, practise incomprehensible faiths, hold bizarre customs and use public space eerily. Besides, the two migrations not only differ intrinsically, but also in their capacity to integrate into society because of the historical moment in which they occurred.

Internal migration in the 1960s was triggered by a compelling need for labour in the *formal* sector, especially in the automotive industry. Instead, foreign immigrants’ arrival matched a period of economic deadlock for the country, followed by a global economic crisis – something that strongly affected the labour market in Turin as well. The collapse of the industry in one of the most progressive and tolerant Italian cities certainly had its impact on Turin’s social inclusivity (De Martini Ugolotti and Moyer, 2016:191). However, it must be mentioned that there is a dynamic relationship between (irregular) international migration and the demand for a *specific* labour (cf. De Genova, 2013). In fact, the demand for cheap, low-skilled and precarious workers is eventually laced with ‘the toleration of certain levels of “physiological” irregular migration’ (Triandafyllidou and Bartolini, 2020:149). Additionally, immigrants’ willingness to accept flexible and low-paid labour, often in sectors with a strong informal economy, contributes to disseminate the leitmotif of *i migranti rubano il lavoro agli italiani*, that is immigrants steal jobs from Italians (Merrill and Carter, 2002). Perceived as a threat to the local economy and portrayed as drug dealers, thieves and prostitutes – something amplified by their *visible presence* in certain illegal sectors – immigrants must endure a growing resentment from the locals against their very presence in the city. The old *campanilismo* against southerners held different features because it was the product of specific economic and social traits that characterised the city in the 1960s. However, Turin is remarkably changed since then, and the current economic, social and cultural fabric of this by now post-industrial city lends itself to the rise of *nazionalismo* against immigrants.

Does Turin exhibit unique local features, compared to the national framework, in its relationship with immigration? Historically, Turin is probably the city in Italy that has experienced the most significant demographic, social and urban transformations because of the migration, first internal and then international. Nevertheless, it is hard to state that Turin, pursuant to its history, is a unique city in the national panorama. For example, it is doubtful whether the city has been capable of withstanding the rising waves of populism and nationalism at the national and European level. Turin has historically been a left-wing city – and not surprisingly given the importance of the working-class movement in what once was the Italian industrial pole. However, it is sufficient to look at the latest election results to realise that this might no longer be the case. In June 2016, at the local administrative election, Chiara Appendino, the current mayor of the city from *Movimento 5 Stelle* (a populist, anti-immigration and Eurosceptic political party) defeated Piero Fassino, the incumbent mayor of Turin from the left-wing party.<sup>18</sup> At the political election of March 2018, the left-wing parties coalition received 33.69% of preferential votes, the right-wing parties coalition received 33.08% (the only *Lega*'s preferences amounted to 16.71%) and the *Movimento 5 Stelle* received 24.22% of preferential voters.<sup>19</sup> It seems that the old left-wing city has opened its gates to the 'new right' carrying nationalist and populist tendencies. It is not surprising, then, that in the current economic, social and political situation of the city of Turin, integration of immigrants is still an on-going and difficult process.

## 1.5. Reading guide

This book consists of eight chapters. The current chapter is the first, which represents the introductory chapter. It was meant to provide the reader with information related to background, theoretical foundations and context of the research. The next chapter contains research question, research aims and methodology. Chapters three to seven explore empirically judicial practices towards foreign defendants without a valid residence permit, while the last chapter, that is chapter eight, contains the conclusion and discussion. The five empirical chapters are organised following the five dimensions of the penal state identified by Garland (2013). The chapters are closely connected between each other, inasmuch as they examine in-depth a particular dimension of the penal state. In other words, each chapter represents a piece of this 'research puzzle'. In greater detail, chapter three deals with state autonomy, and it discusses whether and how external forces have influenced judicial practices towards foreign defendants without a valid residence permit. Chapter four addresses internal autonomy, by examining whether courtroom actors hold the power to shape penal outcomes. In other words, this chapter deals with all those aspects related to discretionary powers held by individual actors and on their impact on judicial practices. Chapter five deals with those aspects related to power control: in other words, it looks at how individual actors compete to hold the power to punish. Chapters six and seven address the qualitative and quantitative dimension of penal power. Respectively, chapter six analyses the

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<sup>18</sup> <http://www.comune.torino.it/elezioni/2016/amministrative/ballottaggio/citta/>

<sup>19</sup> <https://www.corriere.it/elezioni-2018/risultati-politiche/camera/torino.shtml>

rationales and objectives driving the use of penal power, while chapter seven puts an emphasis on resources and capacities to use effectively such power. Chapter eight summarises conclusions from the previous chapter, while further reflecting on research findings and their practical implications.



## **Chapter two**

Courtroom ethnography: inside an Italian criminal court



## 2.1. Introduction

Understanding decision-making processes in the court requires a rigorous and complete methodological approach. This is because, in judicial decision-making, there are various different factors *and* actors that contribute to the ‘final’ product of sentencing. This chapter begins with the research aim, question and relevance. Then, I provide a detailed account of the methodologies employed in this research. I adopted a holistic approach by interviewing various courtroom actors, namely judges, public prosecutors and defence attorneys, with the purpose of providing a complete picture of the different perspectives on the same issues. These findings are combined with observations of direct proceedings, judicial case files analysis and local news media analysis. Taken together, these methods allow for a more comprehensive and thorough understanding of the impact of globalising forces on judicial practices towards foreign defendants without a valid residence permit. I conclude this chapter with some reflections on positionality, data validity and ethical issues.

## 2.2. Research aim, question and relevance

This book aims at exploring how courtroom actors make decisions when sentencing foreign defendants without a valid residence permit and how their decisions are shaped by the socio-legal context in which they take place. In particular, the topic will be explored by examining judicial practices in the court of Turin, a city located in the north-west of Italy. The research attempts to provide an empirical account of how judges, public prosecutors and defence attorneys conceptualise their decisions and set their targets when dealing with foreign defendants without a valid residence permit. Although clerks, court interpreters, witnesses, police officers and defendants play a more or less prominent role in the court, I focus my attention on the ‘key’ players of the courtroom workgroup (cf. Young, 2013). This is because, in Italy, judges and public prosecutors, and defence attorneys to a lesser extent, are the most important actors in shaping judicial practices. The following research question will be answered through the different chapters of the book:

*How do courtroom actors make use of discretion when sentencing foreign defendants without a valid residence permit and how such use is influenced and constrained by the broader socio-legal context?*

The academic relevance of this research is based on several aspects. First, this research seeks to make a scientific contribution to the current socio-legal scholarship on judicial decision-making towards foreign defendants without a valid residence permit. To the best of my knowledge, few qualitative studies (Campesi, 2003; Light, 2017; Villagómez, 2018; Tosh, 2019) have attempted to unravel decision-making processes in respect of such a vulnerable group of defendants. While there is a significant interest in the academic community in understanding whether and how

foreign defendants, especially those without a valid residence permit, experience a different system of justice, the lack of in-depth qualitative research remains a recognised shortcoming.

Second, this research places the accent on the power relationship between different courtroom actors, which has rarely been explored so far. Most research focuses on decisions made by individual actors or fails to explore the interaction between different actors in their analysis (cf. van de Woude, 2017). If judicial decision-making is envisioned as a chain where the output of one decision represents the input for another, how do courtroom actors react when they disagree with the previous outcome? Is there a ‘competition’ for controlling the power to punish and gaining control over penal outcomes? Research on judicial decision-making cannot overlook how decisions made by different actors align or clash with each other. Because of the structure of decision-making, it might be hard to understand the meaning of an individual’s decision when isolated from the chain in which it takes place. Whereas this is theoretically a dimension of some note, it is, however, empirically underexposed.

Third, this research seeks to generate theoretical insights and to stimulate academic discussion on the prominent role played by the *context* in studies on judicial decision-making. Different or similar conclusions reached by studies on judicial decision-making towards foreign defendants conducted in Italy (Campesi, 2003), Spain (Villagómez, 2018), Germany (Light, 2017) and the United States (Eagly, 2013; Tosh, 2019), show that the context *matters* to penal outcomes. At the same time, this dimension tends to get overlooked because there has never been proper investigation into *how* local traits matters and *why*. This research attempts to delve into this dimension and bring the importance of the socio-legal context in analysing judicial decision-making to the forefront. When I talk about the socio-legal context, I refer not only to how the judicial apparatus is structured, but also to the cultural traits of this apparatus, which are likely to reflect the cultural traits of society at large. The analysis of these legal-cultural traits can shed lights on why in countries with similar legal systems we find different judicial practices and vice versa. By analysing judicial practices towards foreign defendants in the light of the socio-legal context in which they are embedded, this research takes up this challenge and encourages other scholars to embark on similar research journeys.

The research benefits the community in several ways. The importance of studies related to irregular immigration hardly needs stressing due to the social and political relevance of the phenomenon, especially over the last decade. The unrelenting press coverage and the scaremongering political discourses on irregular immigration, too often associated with criminality and growing insecurity, underline the centrality of the problem in the European landscape. However, too often political and media discourses rely on implicit stereotypes, negative opinions and penal populism. It is not uncommon to read news related to an alleged immigrants’ propensity to crimes and to their over-representation in penitentiary facilities. Quite often, this news is inaccurate and only tells half of the story. By analysing judicial practices towards foreign defendants, this research seeks to shed light on the processes that lead to judicial outcomes. It is my belief that a better understanding of these processes might contribute to defeat

stereotypes and generalisation in public opinion, too often unaware of ‘what is behind’ political and media story-telling.

Second, this research aims at informing policy-makers about the problems that courtroom actors face in defending, prosecuting and sentencing foreign defendants without a valid residence permit. Provisions of criminal law and penal procedural law are traditionally drafted on ‘nationals’, and thus they do not consider the legal and social differences between national and foreign defendants. Here, I refer to differences such as a lack of documents, a fixed abode, the capability to master the language of the trial, and so on. As a result, for courtroom actors it is not always easy to reconcile the requirements of national provisions with the specific needs and characteristics of foreign defendants. This discrepancy might lead to different uses and meanings of penal power towards foreign defendants, thus creating a two-track system of justice. Additionally, compared to nationals, foreign defendants hold an extremely vulnerable legal position. This is because a criminal conviction affects their legal status in the country, through mechanisms of denial or withdrawal of residence permit. Such vulnerability is not counterbalanced by greater legal and procedural safeguards. A better understanding of judicial processes might provide purposive scientific knowledge to identify problems and inform legislative actions about present obstacles to sentencing equality for foreign defendants.

Last, but not least, the research attempts to open the ‘black-box’ of courtroom actors’ decision-making and shed light on whether and how social, political, organisational and local forces drive their decisions. Thus, it aims to benefit the ‘protagonists’ of this research by providing them with an external lens through which they can look at their actions. Courtroom actors are not isolated from the broader environment. Rather, before being legal professionals, they are citizens and they breathe the cultural climate present in society. As argued above, current discourses on the subject of immigrants create and reinforce their representation as enemies, invaders and above all criminals. Harsher immigration policies and lack of social prevention hinders immigrants’ integration and leaves them lingering in the streets without possibilities for employment and housing. Citizens, at the mercy of social insecurities and urban fears, ask for tougher laws on irregular immigration and for stricter law enforcement. Within this landscape, there is no guarantee that policy-enforcers are free from the influence of extra-legal forces at work, even unconsciously. Thus, this research seeks to unearth meanings and objectives that courtroom actors set for themselves when using penal power towards foreign defendants, especially the irregular component. On this basis, the research aims at offering deeper insights to judges, public prosecutors and defence attorneys about extra-legal factors, constraints and meanings they might unconsciously consider in their decision-making.

### **2.3. Conducting ethnographic research**

In this paragraph, I illustrate the methodological approach adopted to answer the research question. Before doing so, it is necessary to specify the ontological and epistemological paradigm

on which this research relies. This is because being aware of the researcher's perspective on reality helps understanding the choice of a method over another (Bachman and Schutt, 2015). This research is guided by interpretivism. This paradigm assumes that reality is socially constructed (Ponterotto, 2005) and that the researcher seeks to understand it from the perspective of individuals' experience of events and the meanings these events have for them (Henning *et al.*, 2004). Thus, the goal of interpretive research, to use Max Weber's words, is to *verstehen*, 'to understand', *scilicet* to have a meaningful understanding of something.

### 2.3.1. Courtroom ethnography

Ethnography is a methodological approach particularly suitable for interpretive research. The term 'ethnography' does not have a well-defined meaning, since it has been re-interpreted and re-contextualised across different times, contexts and disciplines (Hammersley and Arkinson, 2007). Willis and Trondman define ethnography as 'the disciplined and deliberate witness-cum-recording of human events' (2002:394). Ethnographers normally adopt an open-ended exploratory orientation approach (Maxwell, 2004) by participating in people's daily life for an extended period of time in which they observe activities, listen to discourses, ask questions and collect documents. In order to study people in their natural setting, ethnographers normally use participant observation, interviewing or both. There are no particular techniques associated with ethnography, rather than 'being there' and immersing oneself into the group for a long time. In other words, ethnography encompasses all those methods that help the researcher to 'describe and understand the natural social world as it really is, in all its richness and detail' (Bachman and Schutt, 2015:193).

Courtroom ethnography is an ethnography where the researcher has a specific setting, that is the court, in which he or she aims at observing and describing activities, events, rituals and actors embedded in this specific *locus*. Traditionally, courtroom ethnography focuses on what people say during hearings, how they say it and how they construct *their* reality through linguistic utterances (Conley and O'Barr, 2004). Since language is the most prominent feature of courtroom hearings, attention towards discursive registers is necessary. At the same time, language is not the only vehicle for meanings. Rather, ethnographers must try to approach and grasp feelings and atmospheres as well. A too narrow focus on spoken discourses runs the risk of overlooking non-spoken interactions, expressions and hidden emotions that occur silently during courtroom hearings (Bens, 2018). The setting itself is also an important element for ethnographers. The architecture of the courtroom displays power relationships, and it is rich in symbolism of hierarchy and authority. Exploring the court signifies paying attention to verbal and non-verbal interactions, as well as to human and non-human bodies located in the setting.

### 2.3.2. The criminal court of Turin

The ethnography took place in the criminal court of Turin from January 2018 until February 2019. The choice of this setting as a case study was based on two main factors. The first relates

to research focus, to wit, the fact that I was interested in judicial processes against foreign defendants. The second relates to the feasibility of the fieldwork in terms of possibilities of data collection and time available.

With regard to the first factor, because the research deals with judicial practice towards foreign defendants, it was necessary to select a city where the presence of immigrants would be significant enough to encounter them in the criminal court. Contrary to common belief, whereas it is true that immigrants – especially the irregular component – enter Italy from the southern shores, afterwards the majority move to the north due to better chances of finding a job. This is confirmed by the data from 2018 on the presence of immigrants in the twenty regions of the country: 57.8% of immigrants live in the north, 25.7% in the centre, 11.8% in the south and 4.7% on the two islands.<sup>20</sup> It would not have been meaningful to select a court in the south of the country, where the presence of immigrants is less representative. My choice, thus, was to select one of the main cities located in the north-west of the country. Indeed, it is there that the majority of immigrants live, in particular 33.8% of the foreign population, compared to 24% in the north-east. The large size of the criminal court and the Public Prosecution Service – which generates a representative and variable caseload – together with the high presence of immigrants, made Turin a suitable choice for the research.

A word of clarification about the ‘recipients’ of the judicial practices I investigated. When I use the term *foreign defendants without a valid residence permit*, I refer to non-EU immigrants who lack or have lost a legal permit to reside in the country. I am aware that irregularity assumes diverse meanings through time and space (cf. Cvajner and Sciortino, 2010). Immigration policies differ across European countries, as well as the grounds on which immigrants are allowed to stay (i.e. humanitarian, work, family reunification) and the grounds on which they are not, either at the beginning or at a later time. For the sake of clarity, I now specify on which categories of foreign defendants I focused my attention in analysing judicial practices. These categories were partially sketched before entering the field, but their boundaries have been redefined during fieldwork, mainly based on the ‘kind’ of irregularity that I encountered.

The first category is represented by those who I call irregular immigrants *ab origine*. Those are immigrants who enter the country irregularly and never legalize their status. Within this category, there are both immigrants without any identification document and immigrants who possess a valid ID or passport. The great majority of foreign defendants belongs to the first group, *scilicet* immigrants whose identities are unknown by the authorities – they are informally called ‘ghosts’. The second category is represented by what I call irregular immigrants *ex post*. Those are

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<sup>20</sup> Dati ISTAT, 1<sup>st</sup> January 2018. More specifically, in the north of the country, the regions with the highest presence of immigrants are Lombardia (1.153.835), Emilia-Romagna (535.974), Veneto (487.893), Piemonte (423.506), Liguria (141.720), Friuli-Venezia Giulia (106.652), Trentino Alto-Adige (94.947) and Valle d’Aosta (8.117). In central Italy, the regions with the highest presence of immigrants are Lazio (679.474), Toscana (408.463), Marche (136.045) and Umbria (95.710). In the south of the country, the regions with the highest presence of immigrants are Campania (258.524), Puglia (134.351), Calabria (108.494), Abruzzo (87.054), Basilicata (22.500) and Molise (13.943). In the two islands, there are respectively 193.014 foreign immigrants in Sicilia and 54.224 in Sardegna.

immigrants who legally resided and/or worked in the country for a certain period of time, and whose residence permit has expired. Within this category, there are immigrants who could not extend their residence permit because of losing their jobs, and immigrants who could not extend their residence permit because of committing a crime. The presence of irregular immigrants *ex post* was more sporadic in the *torinese* court. The third category is represented by rejected asylum seekers, who eventually became irregular immigrants because they failed to leave the country after their application was rejected. Only a few foreign defendants who I observed have lodged an asylum application in the past. Because during the fieldwork I encountered mostly these macro-categories of 'irregularity', I decided to focus my attention on judicial processes towards these 'recipients'. Despite different immigration trajectories, these categories of immigrants share the same vulnerable legal position because they are both in a limbo of irregularity. In fact, some foreign defendants stand trial as irregular in the national territory, while others stand trial as 'would-be-irregular'. In the course of this book, I will discuss whether different immigration trajectories matter to courtroom actors and, if so, how and why.

With regard to the second factor, in selecting one of the main cities in the north-west of the country, the feasibility of conducting the ethnography played a major role. In fact, I began to inquire about various courts to get a sense of what kind of data I could have collected with the time available at my disposal. Courts in Italy have to deal with a heavy backlog, barely supported by human and economic resources to cope with it. In such conditions, I was afraid that courtroom actors and personnel would have not been willing to dedicate me their time or accommodate my requests. In the national landscape, the court of Turin stands for its efficiency and capacity to cope with the workload. While the average length of trials at the national level is 559 days, in Turin is 397 days. Furthermore, while at national level 9% of crimes became statute-barred, in the court of Turin this percentage drops to 4.6. The same goes for the Public Prosecution Service. The average time needed to make a motion for dismissal or a request of proceedings to trial is 404 days at national level, while 363 days in Turin.<sup>21</sup> The efficiency of the court in Turin, at least compared to the national level, had an impact on my choice as I thought that courtroom actors and the administrative personnel might have been more willing to collaborate in my research due to reduced pressures and workload.

In greater detail, I conducted fieldwork in the criminal section of the court and in the Public Prosecution Service. The court is located in the city centre, not far from the current main railway station in Turin, that is *Porta Susa*. Once entering the building, one needs to pass through the metal detectors for the observers, who are often quite busy in the morning due to people attending criminal and civil hearings in different roles (i.e. witnesses, court interpreters, experts, plaintiffs, and so on). Legal professionals and administrative personnel have a reserved entrance on the right-hand side of the hall, where personal controls are much faster (for example, they do not need to take off shoes or belts). Once passed the control, there is a courtyard surrounded by

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<sup>21</sup> Data from the Ministry of Justice, Public Prosecution Service, year 2017. Available at: <https://webstat.giustizia.it/SitePages/StatisticheGiudiziarie/penale/Area%20penale.aspx>



two large wings. The left wing of the building has three stairways, simply named A, B, and C, which are reserved for the civil section of the court. Here are located the offices of civil judges, personnel and hearing rooms for civil cases. The criminal section of the court occupies the right wing of the building and has three stairways as well, named D, E and F. Here there are the offices of judges, personnel and hearing rooms only for criminal cases. In both wings, hearing rooms are normally located on the ground floor, and on the floors above there are offices of judges and personnel. The Public Prosecution Service is located in the same court, but on the top floors of the right wing, although some offices are located in the left wing as well due to lack of space. On the right side of the court there is a cafeteria, a post office, a bank and a tobacco shop.

### *2.3.3. Access to the field and sampling*

Entering the field is always a critical stage in qualitative research because negotiating and obtaining access is ‘something of a full-time occupation’ (Sampson and Thomas, 2003:173). When I selected the court of Turin, I was aware that formal authorisation was not strictly necessary. This is because hearings are open to the public and magistrates, being independent, could have agreed to be interviewed by simply giving me their consent. However, because I did not have any contacts in the court of Turin, there was no guarantee that my presence would have been welcomed since legal professionals might have perceived me as an outsider ‘looking into their business’. Quite often, access to the field must be negotiated not only formally through official authorisation, but also, and especially, *informally* through casual interactions aimed at building trust in the institutional environment. Besides, eventually, I needed formal authorisation to access legal documents and statistics. Thus, I decided to ask authorisation for all the activities that I planned to conduct during my fieldwork in order to ‘formally’ introduce myself and make some contacts. In September 2017, I emailed the office of the president of the court to explain the research that I wished to conduct with the collaboration of the court.

From the very beginning, the office of the president was extremely kind to me. They asked me to draft an official authorisation in which I had to include, in detail, all the data I wanted to have access to. I drafted the authorisation explaining that I planned to conduct my fieldwork from January 2018, and that I intended to follow direct proceedings, interview magistrates and retrieve judgments pronounced against foreign defendants from the year 2015 until 2017. In less than two weeks, I received an email with the authorisation signed by the vice-president of the court. Since I wanted to develop a clear understanding of the environment and get to know people, I visited the court of Turin in November 2017 for two days. My intention was to use this time to retrieve judgments as well, so that I could analyse them before starting the fieldwork and get a sense of judicial practices towards foreign defendants.

During my short visit, I was referred to the administrative coordinator of the criminal sector in the court, with whom I had an appointment. The coordinator had a cooperative and constructive attitude towards me. She showed me the court, gave me directions to retrieve judgments and introduce my presence in the court to some personnel and judges as well. This initial contact was

extremely useful because it gave me an idea of the environment, its rhythms and people's attitudes towards my presence. At the same time, it was good for people working in that environment to get the chance of meeting me personally and *informally*. Generally, it is easier to make a positive impression by talking face-to-face, rather than by exchanging emails. Although I was already formally authorised to conduct my research, I used these days in the court to be 'informally' authorised. Additionally, because some people were very open towards me, I was able to identify potential 'gatekeepers', who are individuals who it is advisable to approach in order to secure access to key sources and to create avenues of opportunity.

Strategic impression management was used while negotiating and obtaining access to the field. I tried not to be perceived as an outsider, unaware of formal and informal rule and completely unprepared. I arrived on time to all my appointments to show them that I was a reliable and respectable person. I followed the dress code by wearing long pants or skirts below the knee with a blouse. I complied with social rules in the court. For example, I turned off my phone, kept my voice down, waited when necessary and tried not to obstruct the staff's daily activities. My psychological appearance, appropriate dress code and behaviours were designed to contribute to building trust amongst staff and magistrates by making them less suspicious about my presence and more collaborative with my requests. In this earlier phase of entering the field, it was also important to frame my research in the proper manner. Thus, I attempted to strike a balance between the necessity to obtain informed consent and the need not to fully disclose the aim of my research because the information provided might have affected people's behaviour (Hammersley and Atkinson, 2007).

During my first contacts with magistrates and personnel, they showed curiosity towards the study and its purpose, as they often asked detailed information about 'what I really wanted to know'. I told them that I was interested in the problems that courtroom actors encounter when sentencing foreign defendants. By using this framing, my aim was to introduce my research not as an 'evaluation' of judicial practices, but rather as a study that acknowledges the problems in sentencing foreign defendants and aims at understanding how courtroom actors deal with them. This sympathetic way of presenting the research allowed me to disclose enough information to ensure informed consent, and at the same time it showed understanding and avoided jeopardising access. Naturally, over the course of the fieldwork, I no longer introduced myself as a researcher before any casual interactions. Disclosing information is a balancing act that must be judged in the field at the time to be the most appropriate, given the purpose of the research and the circumstance in which casual interactions take place (Hammersley and Atkinson, 2007:58). Thus, sometimes I refrained from disclosing my identity to personnel, police officers, court interpreters, witnesses and others with whom I had informal conversations, unless I was expressly asked to do so.

In the court it is possible to identify different actors, such as legal professionals, court clerks, administrative personnel, police officers, experts, court interpreters and so on. Thus, for the purpose of my research, it was necessary to identify the actors whose decisions substantially

contribute to shaping judicial practices. Because in ethnography the development of the research problem is rarely completed before the fieldwork begins, it is normally only possible to identify the most appropriate actors to be investigated by keeping an open mind for reconsidering this selection over the course of the research (Hammersley and Atkinson, 2007). I decided to adopt a theoretical sampling, that is a selection of research subjects that aimed at producing as many categories and properties as possible in order to explore the relationship amongst these categories (Glaser and Strauss, 1967). This kind of sampling was particularly suitable for my research because I had a list of actors ‘to begin with’, but I was not sure whether I was missing important concepts or relationships. Before entering the field, I simply sketched a list of courtroom actors that I believed would be the main focus of my research, namely judges, honorary assistant prosecutors and defence attorneys. As data collection progressed, together with my comprehension of the subject, this list was partially enlarged. In particular, after spending some time observing direct proceedings and conducting interviews, I decided to contact public prosecutors and senior police officers as well. The reason for talking with them was that I wanted to expand my understanding of uncovered dimensions and to collect information related to certain concepts. I explain in detail why I enlarged the spectrum of actors to interview below. These actors were selected ‘on the basis of their potential manifestation or representation of important theoretical constructs’ (Patton, 1990:177).

## **2.4. Research methods**

Courtroom ethnography provides a holistic in-depth understanding of the social reality inside the court and of how courtroom actors, through their constant interactions, make sense of the world around them (Hammersley and Atkinson, 2007). To *verstehen* courtroom actors’ actions and beliefs in the city of Turin, I had to immerse myself completely in their daily, social reality. For that purpose, I employed different research methods and collected a variety of data that together allow me to better understand the social and cultural dynamics of the *torinese* court.

### *2.4.1. Case-file analysis*

During my initial contacts in the court of Turin, I collected judicial case files, in particular judgments related to foreign defendants. Because the social world of sentencing is largely devoted to written documents, it is necessary to think about this context as also encompassing a documentary construction of reality (Coffey and Atkinson, 2004). Written documents should be treated as social products because their creation is a socially organized activity since they are ‘made and used in accordance with organizational routines, and depend for their intelligibility on shared cultural assumptions’ (Hammersley and Atkinson, 2007:132). Thus, I decided that, before entering the field physically, it would have been useful to access the social world of this court by reading their production. To this extent, I collected different kinds of judgments.

First, I went to the secretary of the office of the *GIP*, who is the pre-trial judge. Pre-trial judges are normally in charge of supervising preliminary investigations and ordering precautionary measures. However, defendants can waive their right to trial, in exchange for a reduction of penalty, and ask to be sentenced by the *GIP*. It is quite common, then, that pre-trial judges sentence defendants accused of crimes of low and medium severity, and foreign defendants are often amongst them. However, these trials are not open to public. Hence, the only way to access this piece of reality was to collect judgments written by different pre-trial judges. The office of the *GIP* in the court of Turin is organised quite well compared to other offices in the same court. In particular, from some years now, the administrative personnel has started digitalising judgments. This meant that I could select and retrieve judgments simply by scrolling through the folders listed in chronological order.<sup>22</sup>

To select the judgments I was interested in, I looked into the folders from 2015 until 2017. As my fieldwork would have started in January 2018, I wanted to have an idea of what happened before, and of potential difference in judicial practices over the years. Identifying judgments related to foreign defendants was not that complicated. Each judgment was saved in a folder named after the defendant, thus I could easily identify a defendant's nationality when I came across a foreign name.<sup>23</sup> This is because Italy is a country of recent immigration, and it is quite uncommon that people with a foreign name hold Italian citizenship. However, in unclear cases, I opened the folder to have a quick look at the specific dossier. I selected judgments randomly, by saving one out of twelve on a folder that was later transferred to my USB key. I collected in total 83 judgments: 24 for the year 2015, 28 for the year 2016 and 31 for the year 2017. The great majority of judgements related to drug trafficking, exploitation of prostitution and violent crimes. Because judgments are the 'final product' of judicial processes, I asked for authorisation to make a copy of three judicial cases related to foreign defendants. My intention was to look into the entire dossier – containing documents produced by police officers, defence attorneys and public prosecutors – to better understand the system of input and output of the judicial chain. After being authorised, I randomly selected three dossiers<sup>24</sup> and I spent an afternoon making photocopies of them.

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<sup>22</sup> Besides having digital copies of all judgments, the office of the *GIP* – as all offices in the court – has an hard copies of them as well. However, consulting hard copies is extremely time-consuming. Indeed, one needs first to open each dossier (and at time there is a very thick file) to verify whether a defendant is non-Italian. After, one needs to make a copy of the original judgment. As there are hundreds of judgments against foreign defendants – and against Italians as well – it would have taken months to select a representative sample for each year, even by random sampling. In fact, the reason the office of the *GIP* has started to digitalise all judgments is to speed up time in retrieving a dossier when necessary. Recently, other offices in the court have started to do the same.

<sup>23</sup> It happened quite often that I encountered the same (or very similar) name or surname on different folders (and thus on different judgments). However, after a rapid check, I realised that I was not coming across the same defendant. I asked explanation to court personnel and they informed me that because irregular immigrants often lack a valid ID, when asked to identify themselves, they have a 'standard' name or surname to give to the police.

<sup>24</sup> The room in which all dossiers were held was not particularly big, but it was heavily filled with folders. I randomly picked up three dossiers, two from 2016 and one from 2017. Two dossiers out of three are small-size, one is a medium-size dossier, containing approximately 500 pages of documents. As mentioned, the purpose for collecting these dossiers was to better understand the steps leading to the final product of sentencing.

The last judgments I collected were retrieved from the office of the trial judge.<sup>25</sup> In particular, I was interested in collecting judgments of the type of proceedings that I would have observed later, that is direct proceedings. My intention was to get a picture of the kind of crimes and defendants that I would probably encounter during my observations. Besides, I was keen to see whether there was a difference in how categories and concepts are framed by pre-trial and trial judges or whether they simply followed standard formulas. The office of the trial judge has started digitalising judgments only recently, since mid-2016, but it is still a work-in-progress. For my main purpose, that was to have some background on trial judges and direct proceedings, I randomly selected 16 judgments from 2017.

#### 2.4.2. Participant observation

The second method employed was participant observation, which is at the heart of much ethnographic research (Newburn, 2013). Participant observation is a research method through which the researcher gathers data by participating in the daily life of the people or organization studied (Mac an Ghaill, 1996). As Becker points out ‘the approach is close to everyday interaction, involving conversations to discover participants’ interpretations of situations they are involved in’ (1966:652). The aim is to produce ‘thick description’ (Geertz, 1973) of social interactions within natural settings. Participant observation favours a deep understanding from the inside out of a certain group of people or phenomena, as it does not disrupt the normal routines of activities within a setting. In practice, participant observation involves taking notes of what the researcher listens, sees and experiences of the setting and people observed.

There are different degrees of participating and observing, ranging from being a complete observer who does not participate in groups’ activities to being a cover participant who fully participates in groups’ activities without disclosing his or her identity, with some middle positions in between (Bachman and Schutt, 2015:174). The adoption of one role mostly depends on the setting in which the ethnographer conducts observation, and it is likely to change over the course of the fieldwork. The setting in which I conducted observation was the hearing room, where I spent most of the time sitting in the public area and observing activities, participants, interactions and discourses. Thus, during my observation I held a peripheral role with a strong emphasis on observation because participation was mitigated by the institutional setting in which activities and interactions took place.

In more detail, I conducted observations in hearing room number 59, the ones in which every morning are held direct proceedings. A direct proceeding, in Italian *giudizio direttissimo*, is a special proceeding meant to avoid the phase of preliminary hearing. Public prosecutors are the only

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<sup>25</sup> In particular, I retrieved the judgments from the third section. The criminal court of Turin is divided into sections composed by nine judges. Each section deals with a particular type of crimes (e.g. white-collar crimes, crimes against the public administration, and so on). However, for my purpose, it is not particularly relevant from which sections judgments were retrieved. This is because direct proceedings are held on a shift by all judges, irrespective of their ‘specialisation’. Because I was trying to get a sense of direct proceedings before starting to observe them, I retrieved judgments from the third section simply because I had a good relationship with the personnel working there.

‘engine’ for this proceeding because only they can ‘activate’ a direct proceeding once having fulfilled the conditions provided for by law, namely someone is arrested red-handed and there is no need to conduct further investigations. In these cases, public prosecutors can bring a defendant in front of a judge within 48 hours from the arrest. A direct proceeding, in principle, can be used for every crime, even for manslaughter. However, it is quite rare, if not impossible, that for such cases public prosecutors can collect enough evidence to go to trial within such a short time (it is enough to think about how long it takes to obtain the result of an autopsy). Besides, the most severe crimes are tried by a panel of three judges, and in the court of Turin there is a single judge on shift each day for direct proceedings. In sum, time and organizational constraints eventually allow the use of direct proceedings only for minor offences. A direct proceeding allows three matters to be condensed into a single hearing: validation of arrest made by the police, (potential) imposition of a precautionary measure and establishment of judgment, that is a defendant receives an acquittal or a conviction.<sup>26</sup>

The reason for which I decided to follow this kind of proceedings is threefold. The first reason is quite practical: the average length of an ‘ordinary’ criminal proceeding in the *torinese* court is 397 days.<sup>27</sup> With the time available at my disposal, it would have been impossible to observe a trial from the beginning to the end. Besides, I would have missed the potential imposition of a precautionary measure, which is an extremely important moment of decision-making, as I will examine later. The second reason relates to the high numbers of foreign defendants in direct proceedings. Whereas the arrest is not the only gate through which defendants are brought to court, certainly for foreign defendants it is the main gate. By observing direct proceedings, I was sure that I would have encountered enough foreign defendants to be able to trace discourses, attitudes and concepts in courtroom actors’ routinely activities. The third reason relates to the fact that I am aware of the selective step ahead of direct proceedings. I submit, in other words, that when police officers decide to arrest someone, they contribute to shape judicial practices as their decisions mark the entrance path to the judicial system. Whereas selective enforcement of criminal law by police officers is not the focus of this research, observing direct proceedings has the benefit of indirectly looking at these selective mechanisms and ascertaining whether courtroom actors’ decisions align or clash with them.

During the period in which I observed direct proceedings, I spent my time sitting in the public area of hearing room number 59 and taking notes. Most of the time I was there completely alone, in a few cases a defendant’s relatives were there. Conversely, police officers were always standing in front of me or on my side, as they were there to escort defendants to trial. Because the public area is located at the back of the hearing room, I could avoid the so-called ‘observer’s paradox’. The problem of the ‘observer’s paradox’ is that the researcher aims ‘to find out how people talk when they are not systematically observed; yet we can only obtain these data by systematic observation’ (Labov, 1972:20). During my fieldwork, this paradox was mitigated by several

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<sup>26</sup> Art. 449 Italian Criminal Code of Procedural Law.

<sup>27</sup> Data from the Ministry of Justice, year 2017.

factors. First, as I already mentioned, the position of the public area is not central in the design of the hearing room. This means that public prosecutors and defence attorneys had their backs to me, whereas judges were in front of me, but on the opposite side of the room. Between the area reserved for the key players in the court and the public area where I was, there is a third area with benches for defence attorneys awaiting their turn. Their presence was a sort of natural architectural shield, as they covered my figure from judges who were often looking to their left side, where there is the area reserved for defendants. Thus, the design of the room was somehow capable of masking my presence. Second, activities in the court are designed with the aim of observability. In other words, the administration of justice is meant to be public and available for inspection and control (Komter, 1998). Hence, my presence was often unnoticed and did not influence the routine activities of the court since police officers, journalists, relatives and law students can easily be part of the public. Third, it has been noted that, in institutional settings, the actors involved often have more urgent businesses and less time available to notice the presence of an outsider on the courtroom benches (Maynard, 1984; Komter, 1998). Indeed, given the large number of trials to deal with, judges were often too busy to notice my presence.

From January 2018 onwards for more than a year, I observed 148 direct proceedings in total, 113 of which involved foreign defendants, among whom the majority lacked a valid residence permit. I took unstructured notes of what I was seeing and listening to in small notebooks. At times, my notes were quite extensive, but most of the time, because Italians are fast talkers, I was only able to note jottings, which helped my memory when writing up the actual field notes. In the 148 direct proceedings that I observed, I encountered various courtroom actors. This is because in the court of Turin, direct proceedings are scheduled on a rotation mechanism, thus every day there is a different trial judge responsible for them. The Public Prosecution Service adopts a similar organizational model. Each prosecutor has a 24-hours shift in which he or she is responsible for making decisions about people arrested in that timeframe (i.e. dismiss the case, release the arrested person until the trial or request a direct proceeding). During my fieldwork, I tried to observe as many judges at work as possible in order to grasp differences or similarities between attitudes and behaviours. In total, I managed to observe 23 judges while administering direct proceedings. Besides, by observing direct proceedings day after day I could also appreciate decisions made by different prosecutors on duty, especially in respect to precautionary measures.<sup>28</sup> By focusing my attention on different judges and different proceedings, I aimed at providing a nuanced image of judicial practices that could account for the multiple and diverse decisional dynamics encountered.

#### 2.4.3. *Interviewing*

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<sup>28</sup> It is worth noticing that public prosecutors are not present during direct proceedings, given the nature of the crimes tried (i.e. street crimes with few legal issues). In their place, there are honorary assistant prosecutors, who have the discretion to decide the penalty to request during the hearing. However, the precautionary measure to request to the judge is *already* established by the public prosecutor formally in charge of the dossier. Thus, honorary assistant prosecutors ask the judge to impose the precautionary measure that is already indicated in the dossier.

The third method employed in this research was conducting interviews with courtroom actors. Generally, asking questions is a fundamental part of almost all qualitative research designs (Bachman and Schutt, 2015). For the purpose of my research, I chose to conduct semi-structured interviews, in order to leave my respondents sufficient freedom to discuss issues or problems that concerned them the most. Based on my preliminary analysis of judicial case files, I made a list of questions on topics that stimulated my interest. As has been noted ‘elites especially – but other highly educated people as well – do not like being put in the straightjacket of closed-ended questions. They prefer to articulate their views, explaining why they think what they think’ (Aberbach and Rockman, 2002: 674). Along this line, I decided to use open-ended questions for two orders of reason. First, I wanted to avoid my respondents feeling restricted in their answers, something that they might have disliked. Second, formulating open-ended questions gave me the chance of following the articulation of their thoughts, without putting them on a pre-determined reasoning path (Petintseva *et al.*, 2020).

After examining judicial case files, I drew three different lists of open-ended questions: one was meant for judges, another for public prosecutors and the third one for defence attorneys. It was necessary to design tailor-made questions for each group of respondents because the three main actors in the court hold different roles and make different decisions. Once I started conducting observations, I partially modified my list of questions based on what I saw during direct proceedings, such as decisions or activities I could not make sense of. Eventually, I prepared a guiding schedule for my interviews, divided thematically. My guide began with some demographic questions, which were meant to make my interviewees feel comfortable. Then, I structured my interview chronologically, by following the various phases of a direct proceeding, so asking my respondents questions related to arrest, precautionary measures, penalties and so on. My questions were broadly formulated, in order to leave some room for discussing issues they perceived most problematic. However, I also asked more specific questions whenever my respondents gave me superficial or strictly law-based answers. I also drafted a few probes and additional questions, although most of them developed during the interviews.

One of the advantages of semi-structured interviews is that it allows for a two-way communication, in which both the interviewer and the interviewee can ask questions and have a comprehensive discussion on the topic. At the same time, I was aware that I needed to be well prepared for each discussion that might have arisen. Interviewing elites can become arduous if the researcher has not done some homework, because elites might challenge the questions asked and their relevance (Zuckerman, 1972). Thus, being prepared was of fundamental importance for making a positive impression and gaining respect and trust from my respondents (Harvey, 2011). Another factor to be considered when interviewing elites is time management. Often elites do not have strong incentives or much time to participate in the interview (cf. Petintseva *et al.*, 2020). Therefore, when asking their availability for an interview, it is always better to inform them about how long it will last. I asked my participants for an hour of their time: while most of them agreed, few asked whether I could complete the interview in less time. I accommodated their requests,



and I used the time at my disposal to focus on those aspects that seemed to be more relevant according to previous interviews.

With regard to the selection of respondents, I adopted similar strategies amongst the various groups. With regard to defence attorneys, I often stopped them at the end of a hearing I observed and asked whether they wished to participate to my study. Generally, this sort of recruitment worked quite well, although some defence attorneys did not answer my calls to schedule an interview. A few defence attorneys were recruited through ‘snowball’ sampling. In particular, this happened only when a respondent advised me to contact a colleague because of his or her experience with foreign defendants. With regard to judges, I decided to interview the judges I observed ‘at work’. This kind of recruitment allowed me to understand in-depth what I observed during a hearing, since I could ‘tailor’ a section of the interview, for example by asking why he or she acted in that way. I normally emailed judges after the hearing (email addresses are available on the court website) and asked his or her availability for an interview. Almost all the judges I contacted agreed to be interviewed. As mentioned earlier, I observed 23 judges and it would have been impossible for me to interview all of them since there were other actors in my study. Thus, I attempted to diversify my sample by selecting judges who differ in terms of age and gender, and in terms of attitudes and behaviours.<sup>29</sup> A few judges were interviewed without being observed earlier: a gatekeeper personally introduced me to them, and I felt uncomfortable not asking them for an interview.

With regard to the Public Prosecution Service, I began with interviewing honorary assistant prosecutors since they are delegated by prosecutors to attend direct proceedings. After observing hearings, I recruited some honorary assistant prosecutors personally, but a gatekeeper introduced me to the majority of them. While interviewing honorary assistant prosecutors, I realised that it was necessary to interview public prosecutors as well, despite their absence during direct proceedings. The reason for this decision was twofold. First, honorary assistant prosecutors do not make decisions about precautionary measures, but they simply follow the directions of the prosecutor in charge of the dossier. Thus, when asked, they could only ‘guess’ why the prosecutor in charge of the case made that particular decision. However, their responses lacked any in-depth knowledge. Second, honorary assistant prosecutors can be considered as auxiliary personnel. In fact, their presence in the Public Prosecution Service is meant to help prosecutors to deal with the workload by handling less complex criminal cases.<sup>30</sup> Hence, they are generally a minor figure in decision-making processes because their activities are normally directed by public prosecutors. Given these circumstances, I decided to start interviewing public prosecutors, who were in charge of the cases I observed in direct proceedings. As with judges, I recruited public prosecutors by

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<sup>29</sup> From certain behaviour, attitudes and comments displayed in courts towards foreign defendants, I could grasp the difference between judges also in terms of ideological leanings (e.g. whether they were more *garantisti* or not). I took into account this aspect as well when selecting my respondents.

<sup>30</sup> To become an honorary assistant prosecutor is necessary to participate to a contest, in which the main requirements are to possess a degree in law and have some experience in the field. After being selected, an honorary assistant prosecutor undertakes a short period of internship. It is worth mentioning that they do not receive a monthly income, but they are paid on a piecework basis. Thus, for some of them, their job in the court is a part-time job.

sending them an email and asking whether they were willing to be interviewed. The office of the Public Prosecution Service in Turin is quite large and there are approximately fifty public prosecutors working there. I selected randomly forty public prosecutors and I emailed all of them. Nearly half agreed to be interviewed.

The last actors I interviewed belong to police forces. As mentioned earlier, the police was not included in my research because the selection of research participants was based on the setting of my study. In the court, the presence of police officers was quite marginal, because their role was limited to escorting people arrested in front of the judge. However, while I was immersing myself in the legal and social reality of Turin, I noticed some major changes. Hearings became increasingly longer due to the growing number of people arrested. Local newspapers reported the news by means of ascribing these trends to the policy implemented by the new local chief of police. The presence of police officers in certain areas of the city (for example, in a park that I used to visit) became more visible and numerous. Experiencing these changes first-hand triggered my curiosity. Through some contacts I had at the Public Prosecution Service, I interviewed two senior police commissioners and the *questore*, who is the local chief of the police. I used these interviews to deepen and enrich my understanding of how the political, legal and social context shapes judicial practices, and of whether these practices are ‘reactive’ to changes in the context in which they develop.

Interviews took place in the interviewees’ offices inside the court and the Public Prosecution Service. Defence attorneys were interviewed in their law firms, which were normally located quite close to the court. The length of interviews conducted varies from twenty-five to one hundred and twenty minutes, but on average most interviews lasted fifty minutes. Before the interview began, I introduced myself as a researcher from Erasmus University Rotterdam and I briefly explained the content of my research. Then, I summarised the content of the interview, thus my interviewees knew beforehand the topic that I wished to talk about with them. I told them the interviews were anonymous and confidential, and thus they were free to share the information they wanted and even not to answer my questions. Next, I asked their consent to record the interview. Apart from six, all interviewees agreed to have our conversation recorded. The possibility to employ a record device was a great asset, as I could engage more actively with my interviewees and after have a verbatim transcript of the conversation. With regard to the interviews I could not record, I took some notes during the interview itself and I tried to complement them with my memories as soon as I was home. However, it is undeniable that some qualitative data got lost (Harvey, 2011). In total, I conducted forty-nine interviews: ten with defence attorneys, thirteen with judges, seventeen with public prosecutors, six with honorary assistant prosecutors, three with members of the police force.

#### *2.4.4. Local news media analysis*

The fourth method employed was analysis of local news media, in particular an online (but also distributed in hard copy) newspaper named *CronacaQui*. The newspaper was created in 2002 and

it is well known for stirring up the emotional wave of crime news in the city of Turin. Media not only influence people in their daily life, but they also become a fundamental part of it (Deuze, 2011). Media reports reveal something about power relationships in society, by documenting the perspectives of the privileged and restraining those of others (Couldry and Curran, 2002). In reporting news, media select and construct events by paying attention to some aspects and obscuring others (Hodgetts and Chamberlain, 2013). Thus, what we read in media news tells us something about society and power relationships. The way certain social groups are framed in media contributes to public understanding of social events and, in return, it affects how some social groups are perceived and treated by mainstream society. Media texts should not be simply seen as texts to analyse. Rather, they should be understood and analysed as *text-in-context* (Hodgetts and Chamberlain, 2013:383), inasmuch as they reflect broader social processes towards the assertion of certain views and meanings by powerful groups. Rather than providing an objective representation of groups and events, media are cultural artefacts because they contribute to create new meanings and transform old ones. In a sort of cause-and-effect-process, media framing influences public understanding and at the same time is influenced by it.

Given the importance of media reports in society and the circumstance that I was looking at irregular immigration, something that wildly attracts media attention, I decided to read the newspaper *CronacaQui*. The newspaper is known for its attention to street-crimes, and more broadly to any episode relates to (in)security and urban decorum. It is a right-wing newspaper, but it is popular amongst different readers (Faloppa, 2011). The local newspaper is fairly diffused in the metropolitan area of Turin, where it sells around 50.000 copies per day (data from 2009).<sup>31</sup> I decided to follow a local newspaper for two main reasons. The first was that local media cover ‘local’ episodes and events, something that I was pre-eminently interested in. The second was that local media are hypersensitive in covering episodes that attract their ‘daily consumers’ at most, and thus their coverage often reflect people’s interests and emotions (cf. Palidda, 2000). Hence, this newspaper, with its emotionally laden headlines, was a perfect candidate for enhancing my understanding of how events related to immigration and criminality are constructed and disseminated in Turin. During my year of fieldwork, I read everyday news related to security and urban decorum – and the majority of them related to immigrants as well. I was able to read the majority of news online, and after reading articles of my interest, I saved them in PDF format. Long reports were only partially available online and thus, whenever relevant for my research, I bought a hard copy of the newspaper. From January until December 2018, I read and saved on my laptop 492 news reporting episodes involving immigrants, either in relation to criminality or security or urban decorum.

#### 2.4.5. Data analysis

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<sup>31</sup> [https://www.affaritaliani.it/mediatech/cronaca-qui130109\\_pg\\_2.html?refresh\\_ce](https://www.affaritaliani.it/mediatech/cronaca-qui130109_pg_2.html?refresh_ce)

Data analysis is theoretically informed, so it must spring from the epistemological foundations of the research and methodology adopted. Because the process of data collection was characterised by a reflective search for meanings and interactions, to delve into my data I relied on ethnographic content analysis. The latter is a reflective analysis used to understand the communication of meanings through a process of constant *discovery* and *comparison* of relevant activities and meanings, thus allowing, at the same time, the development of initial concepts and appearance of new ones (Altheide, 1987:68). Data collection and data analysis are not necessarily separate activities. Rather, through observations in the field one can become aware of some concepts and attempt to understand them by investigating further their meanings (Bachman and Schutt, 2015:190). This is something that happened during my fieldwork as well. It is undeniable that I entered the field with certain *sensitizing concepts* (Glaser, 1978; Padgett, 2004; Bowen, 2006) emerging from my educational background and previous research. At the same time, after a few months of fieldwork, when transcribing the data collected, I came across concepts that were not amongst those that initially guided my study. Thus, I went back to the field and I started to delve into new concepts. I adopted the same approach in data analysis. After reading and ‘digesting’ the materials collected, I approached my data both deductively and inductively (Azungah, 2018). In particular, I used a deductive approach where pre-existing theories and concepts were capable of capturing ‘something important in relation to the overall research’ (Braun and Clarke, 2006:82). At the same time, I tried to be reflective and open to the discovery of new concepts. I often asked myself ‘what does it really mean?’ while reading a description or a statement. This reflectivity allowed me to develop new codes directly from my data.

Data collected during the fieldwork was transcribed into text form in order to allow a comprehensive analysis of them all together. I transferred my field notes, transcripts, judgments and newspaper articles into ATLAS.ti, a computer programme for qualitative data analysis. It must be mentioned that transcripts were written in Italian, but I used both Italian and English codes. The reason why I decided not to translate my data into English is that I wanted to analyse a document that was as close as possible to the original source, without adding another layer. Besides, my respondents often used vivid expressions, ways of speaking and metaphors that I could not properly translate in English without losing their meanings. When I coded my data, I used both languages. In particular, I used Italian for the more descriptive codes because translation of certain terms was misleading in English. Then, I used English for abstract and pattern codes because my theoretical background is in English, as well as the written language of this research.

I started coding my data by using descriptive codes. This first round of coding allowed me to read thoroughly all documents and to really see for the first time ‘what was in there’. After that, I did a second round of coding in which I created abstract codes. These codes were created using concepts and meanings that were developed from theories and from ‘raw data’ as well. The third and last round of coding was meant to isolate meaningful patterns and relationships between my codes, in particular to ascertain how patterns of code related to each other, both in a horizontal and vertical dimension. All this results in a code system which was used to interpret a

comprehensive dataset in which I integrated data from multiple sources, i.e. transcripts, fieldnotes, judgments and news media. Coding and analysing data was a time-consuming activity, and it required a great deal of focus and meaningful inspection. At the same time, this activity was fundamental to get an in-depth understanding of the materials collected, in order to accurately describe activities and to bring to light their significance.

## **2.5. Positionality, validity and ethical issues**

In this sub-section, I intend to devote some words about positionality and ethics in qualitative research. Both aspects are of pivotal importance because they say something about a researcher's stance in relation to the research subjects, and how he or she dealt with ethical issues. As Pechurina observes, 'the need to make ethical decisions on the spot reflects the nature of qualitative ethnography, which always aims to reveal complexities and contradictions within the studied community' (2014:117). On this account, it is fundamental for researchers to acknowledge their positionality and the ethical challenges they face during fieldwork in order to seek a more meaningful, complex and rigorous approach to the research topic.

### *2.5.1. Positionality and reflectivity*

In courtroom ethnography, or better in any ethnographic study, the researcher represents the instrument of data collection (Mac an Ghaill, 1996). On this account, the researcher has to reflect on the effects of his or her position in that particular environment from the moment data are collected to the moment they are analysed. As Hall argues 'there's no enunciation without positionality. You have to position yourself somewhere in order to say anything at all' (1990:18). Positionality, in particular, refers to values and worldviews into which the researcher is discursively embedded, together with the researcher's identity, including ethnicity, gender, appearance, age, educational background, political views, religious beliefs and so on (Fremlova, 2018:101). The researcher must reflect and acknowledge his or her positionality during the whole course of the research project because a researcher's values and attitudes are likely to affect knowledge production (Lincoln and Guba, 1985). Reflectivity, thus, is an ongoing process of self-scrutiny in which the researcher reflects upon the impact of his or her involvement in how data are collected, analysed and eventually framed into as conclusion (Malterud, 2001).

While conducting observations, I kept track of every decision I made (including the reasons behind them) and of personal presuppositions on my notebooks. When I wrote down my field notes on my laptop, I used two different colours, one for observational notes and another for reflective notes. In this way, I could ascertain the difference between what I was 'objectively' seeing and how I was subjectively perceiving and interpreting it, together with tracking the changes in my impressions and feelings during the course of fieldwork. This process of awareness was particularly important given the fact that I am Italian, I received a legal training in Italy, and I was observing Italian courtroom actors 'in action'. Despite the fact that I never practised law,

from the very beginning, the setting sounded quite familiar to me because I could recognize legal categories, procedures, rationales and formalities. As Hammersley and Atkinson notice ‘most events in our own society and especially settings with which we are familiar seem “natural” and “obvious”. We have already learned the culture and we find few things problematic’ (1983:128). Thus, writing down reflective notes helped me to think about the situation where I was interpreting a decision or an event in *that* particular way because years ago, in law school, I was taught to do so. By tracking my closeness to the research setting and my familiarity with meanings, activities and behaviours, I attempted ‘to make the setting anthropologically strange’ (Mesor and Woods, 1991:70) and to culturally distance myself from what I was observing.

As Hammersley and Atkinson (2007) note, there are some researcher’s ascribed aspects that are not particularly open to strategic impression management, such as gender, ethnicity, appearance and age. Certainly, this is not something inherently bad, because their positive or negative influence depends on the people and settings investigated. My female gender and my physical appearance during the fieldwork played a double role. When approaching male respondents, they were generally quite pleased to spend some time being interviewed, and some of them even tried to ‘expand’ our time together by sharing funny episodes with me or by offering me a coffee. Quite surprisingly, I was often asked about my ethnic background, both by my respondents and by other people who I met informally during fieldwork. For example, while observing hearings, I was often asked by defence attorneys or police officers whether I was a Russian interpreter. The reason for their questions relates to the fact that despite my Italian origin, my physical characteristics do not fulfil the stereotype of Italian women, who are generally dark-haired and full-figured. Rather, I am blonde, with high cheekbones and petite. These episodes helped me in understanding why some male respondents were so willing to be interviewed. My impression was that they perceived my appearance as almost ‘exotic’, different from them, and thus they felt attracted by my presence (without any aspiration of personal gain). On the contrary, my physical appearance did not go down that well with female respondents. While some of them were kind and interested in my research, others – luckily, a small minority – displayed some hostility towards my presence. My impression is that, because they saw a ‘young girl with a pretty face’, some female respondents did not take seriously my role as a researcher.

Age was another factor that played a major role during fieldwork. Because I was conducting research in a ‘senior’ environment, my young age was something that drew my respondent’s attention. I was often asked about my age. At the time I was conducting fieldwork, I was twenty-seven years old. However, many believed that I was three or four years younger than my actual age. The problem with my age was that some respondents did not take my questions seriously because they perceived me as a ‘little girl’. Some of them made jokes by starting their answer with a *‘you were not even born when...’* referring to legal provisions or practices that were in force fifteen years ago (sic!). At other times, my respondents came very close to taking control of the interview by telling me what they believed to be relevant information given their ‘experience’ and ‘wisdom’, occasionally introducing topics not relevant for my research. As Ostrander observe, ‘elites are used to being in charge, and they are used to having others defer to them. They are also used to

being asked what they think and having what they think matter in other people's lives. These social facts can result in the researcher being too deferential and overly concerned about establishing positive rapport' (1993:19-20). Although I sometimes felt frustrated by certain attitudes, I hid my feelings and I tried to re-gain control over the interview, thus not allowing them to act as the maestro giving me a lesson on the subject. I did not want to become too deferential, hence allowing my respondents to take charge of our conversation. I began doing some extra homework, especially before interviewing older respondents. It was fundamental to avoid being unprepared or disorganized because otherwise they would have taken charge of the conversation. A deeper knowledge of the subject allowed me to even challenge my respondents' answers if I had the impression that they were giving me cliché answers. While this is not a by-the-book approach, it turned out to be the right one in my specific situation. I intentionally mitigated the impact of my young age with a well prepared and challenging interviewing attitude. This strategy allowed me to avoid losing control over the conversation and collecting meaningful data about personal experiences and beliefs rather than prefabricated and routine legal answers.

In spite of the situation that irregular immigration is a highly politicized matter in Italy, I was not asked about my political leanings during my fieldwork. To be more specific, I was never explicitly asked about it. Several respondents, directly or more subtly, shared with me their agreement or disagreement with the current political class. This was something that I somehow expected given that I conducted fieldwork during the period of national elections and in the aftermath. I never made a judgment about their political views, irrespective of my personal beliefs. However, I noticed that, after sharing their political views with me, many respondents lifted their gaze to meet mine and ascertain whether I shared their leanings or not. I intentionally decided not to embark upon a debate on politics because my primary goal was to produce knowledge and describe my respondents' understanding of the matter. Besides, it was not my task to judge their political ideas and compare them with mine. Thus, I attempted minimizing any distortions in data collection by remaining neutral to political preferences and discourses (cf. Hammersley and Atkinson, 2007).

#### *2.5.2. Validity, reliability and generalisation*

Evaluating the quality of a research is essential, especially if the findings are intended to influence an executive agenda. In qualitative research the need to assess validity and reliability with proper criteria is often stressed, although social scientists hold different ideas when it comes to their importance (Norris, 1997). In simple terms, validity refers to the integrity of the methods and the accuracy of the findings, while reliability refers to the consistency of the research approach adopted (Creswell, 2009). It has been argued that, since there is no reliability without validity, generally a demonstration of the latter is sufficient to establish the former (Lincoln and Guba, 1985; Patton, 1990; Golafshani, 2003). Validity and reliability are often ensured through a series of methodological strategies that aim at strengthening the 'trustworthy nature' of the findings.

First, I meticulously kept recordings of processes and data collected. The very fact of recording and reproducing the exact words of my respondents was also meant to ensure validity and reliability of research findings. Second, validity and reliability can be enhanced in reporting findings as well. Including rich and full descriptions of settings, activities and participants' accounts help to support research findings. Third, disclosing and reflecting upon personal biases that might have adversely affected data collection and analysis helps minimising their impact on research findings. Last, but not least, an acknowledged strategy to produce a more comprehensive set of findings is data triangulation, whereby different methods, approaches and data are combined (Hammersley and Atkinson, 2007). In the current research, triangulation was obtained by collecting different data, namely interviews, field notes, judicial case files and news reports. By doing so, I was able to analyse the same issues from different angles, thus strengthening the validity of my findings. Besides, interviewing different actors, with diverse roles, backgrounds and viewpoints, allows the comparison of activities and meanings, and thus provides a multifaceted portrayal of the social reality of the court.

Generalisation refers to the degree to which the findings can be generalised from the research sample to the entire population (Mayring, 2007). Generalisation is something of less concern for in-depth qualitative case-studies since their goal is not to produce general conclusions, but to examine in-depth a particular case. Additionally, I have already stressed the importance of the context in which the research was conducted. The local context plays a major role in shaping activities and meanings. At the same time, I wish to make two remarks which will be elaborated in the conclusion of this book. First, whereas it is true that this study focuses on the local, the latter is affected by processes which are 'translocal in their origin and impacts' (Beckett and Herbert, 2009:24). It follows that, in reality, the study of the 'local' says something about the 'global'. Second, one should question whether the 'local' of this research is so distinctive to be unique (cf. Feeley, 1992). Because this study provides for a detailed description of settings, roles, activities and meanings, these findings might be valuable for other settings displaying similar social and legal features. If Turin is not an 'exceptional' case, it is likely then that some research findings might be generalizable to certain other settings and cases.

### *2.5.3. Ethical issues*

As Bachman and Schutt argue 'No matter how hard the field researcher strives to study the social world naturally, leaving no traces, the very act of research itself imposes something unnatural on the situation' (2015:197). Thus, the researcher must identify and take responsibility for any ethical issues that might arise from his or her involvement with research subjects. The main ethical concerns in the current study relate to informed consent, voluntary participation, right to privacy and confidentiality.

Informed consent is a legal and ethical requirement that must be fulfilled while conducting research that involves people. At the beginning of each interview, I informed respondents about the purpose of my research and I asked them whether they wished to participate. I did not provide



detailed information about the purpose and design of my research because they were not necessary for informed consent and because they might have affected respondents' answers as well (Hammersley and Atkinson, 2007). Informed consent and voluntary participation were more problematic while conducting observation. At times, I had interactions with people attending a hearing, but it was impossible, if not detrimental, to ask informed consent from everyone simply because I was observing their behaviour or having a short chat with them at the coffee machine. I could not have issued a warning similar to 'some sociological equivalent to the familiar police caution, like "Anything you say or do may be taken down and used as data" (Bell, 1977:59). Besides, given the large and interactive context, I did not even have the power to ensure that all people I was observing and talking with were informed about my research (Punch, 1986).

It must be noted that, when it comes to courtroom ethnography, it is questionable to what extent the researcher can ensure informed consent given the specific features of the context. In particular, I could not enter the hearing room and introduce myself to the judge, the public prosecutor and least of all to the defendants on the bench. Thus, it is true that I observed a multitude of actors without them knowing about it, but at the same time I was not allowed to inform them about my presence and the purpose of my research. Besides, proceedings are open to the public: everyone, from journalists to law students, is allowed to attend court proceedings. In a way, a court is a 'judicial theatre', with its setting, audience, and actors performing their roles (Ball, 1975). There is no way for the researcher to 'interrupt the play' and obtain informed consent from all actors, especially from those who are unapproachable even after the trial, such as foreign defendants. At the same time, this situation was balanced in other ways. For instance, when casual interactions with the same person became frequent, I disclosed my identity and the purpose of my research. Besides, after some months in hearing room number 59, most people were aware of who I was and what I was doing. Thus, with time passing, my identity and the reason for my presence there were known to almost everyone.

Anonymity and confidentiality of the information shared by respondents must be ensured as well. I ensured my interviewees that their identities, or any sensitive information that could have allowed tracing back their identities, were not going to be revealed in any way, thus ensuring anonymity and confidentiality. Besides, when saving interview recordings and transcripts, I never used respondents' names. Rather, I assigned a numerical code to both recordings and transcripts. Last, in reporting my data, I expunged not only names, but also any identifying materials that could have led to the disclosure of identities. In my field notes, I kept track of basic personal information of courtroom actors observed, but this data was never transferred on my laptop. All data collected have been deleted from my laptop and stored in one encrypted USB stick to ensure that private data remains protected and to prevent unauthorized access or copying.



## **Chapter three**

Citizens first: how to legally enhance exclusionary citizenship



### 3.1. Introduction

Recent years have witnessed a growing aversion to the presence of immigrants in our societies, often backed up by political and media discourses portraying immigration as a security threat (Maneri, 1998; Marchetti and Molteni, 2013). Global migration, in fact, rather than being seen as a phenomenon that might potentially benefit host countries, both economically and demographically, is predominantly depicted as ‘massive invasion’ of potential criminals and terrorists from whom the states and citizens must protect themselves (Guia, 2013; Galantino, 2020). Globalisation and global mobility seem to go hand-in-hand with instances of securitisation. As global processes accelerate, so does the sense of insecurity in our societies (Haynes, 2016). Globalisation has not only changed the economic and social make-up of our communities, but also the way human relationships are interpreted and cultivated, especially in local urban spaces (Guia, 2013). Collective fears, doubts and feelings of insecurity towards the ‘strangers’ collectively contribute to support processes through which a non-security issue, such as immigration, has fallen within the security paradigm.

Both in Europe (Huysmans, 2000; Lazaridis, 2011) and the United States (De Genova, 2007; Bigo, 2008) immigration is predominantly framed as a matter of security. This process is known as ‘securitisation’ of immigration. With the term securitisation, in line with the School of Copenhagen (Buzan *et al.*, 1998), I refer to those political, social and cultural processes through which an area of regular politics is percolated by security discourses to the extent that it justifies the use of exceptional instruments, including preventive and punitive measures, to tackle the alleged threat. For governments to do so, it is pivotal that the public accepts and supports elites’ claim that something or someone is a danger for society, a security problem (Waever, 1995). Once the public is convinced of such a claim, ‘decision-makers purportedly are then at liberty to transfer the affected issue out of the realms of conventional politics and policy-making and into the domain of emergency politics, where it can be expeditiously resolved’ (Messina, 2014: 531).

Such processes have taken place in the realm of immigration as well (Guild, 2009; van Munster, 2009; Bourbeau, 2011; Togral, 2011; Chebel d’Apollonia, 2012; Bilgic, 2013). Often political discourses and media have framed global migration as a danger to economic stability, a threat to cultural unity and a risk for citizens’ safety. In turn, citizens, at the mercy of economic vulnerability and social instability, have started to perceive migratory movements as a source of problems, sometimes even as *the* source of all problems. Since the late 1990s, in Italy (Menichelli, 2015) as in other European countries, such as Belgium (Devroe, 2013) and the Netherlands (van Swaaningen, 2005), urban security has become an issue, and powerful discourses related to the danger of urban life, street-crimes and urban decay started powerfully to emerge (Selmini, 1999; Melossi 2002). It should be noted that discourses surrounding urban security and incivilities developed together with a growing aversion to the presence of immigrants. Media and political debate often linked episodes of urban decay or street-crimes to ethnicity (van Swaaningen, 2005; Maneri, 2011; Ricotta, 2016), and so to the very presence of immigrants in the national territory. Following this growing sense of insecurity amongst citizens, governments are called upon to

protect national borders and ensure that actions are taken against ‘new risks’ in society (Beck, 1992). In other words, they ought to make citizens feeling safe.

Local governments across European cities answered to this pressing political issue by prioritising and engaging in repression of incivilities and street-crimes (Kübler and de Maillard, 2020). Despite some variations between national contexts, the problem of urban security shows some convergent social and cultural traits across European countries, such as increased public concern about crime and *fear* of crime, together with acknowledgment of governments’ limited capacity to provide an adequate answer to criminality (Crawford, 2009). Faced with their inability to tackle security issues, and in the light of the central role that security discourses acquired in public debate, governments answered to citizens’ requests with expressive and populist policies, often based on a governing-through-crime approach (Simon, 2007). Additionally, the very fact that citizens perceived immigration as a threat to urban security – something which media emotive storytelling has remarkably contributed to – provided governments with a sound reason to adopt a zero-tolerance approach and to justify the implementation of harsher and more openly exclusionary policies given the state of ‘emergency’ (Menichelli, 2015; Ricotta, 2016).

After all, political parties answer to their electorate, and immigrants, especially those in the most vulnerable position, are certainly not amongst them. Policies to answer citizens’ requests for security are many and varied. Besides, they often exploit the leitmotiv of ‘emergency’ to justify the introduction of legislation explicitly targeting ethnic minorities (Menichelli, 2015:269). These policies are implemented both in the realm of immigration law and criminal law, although they share the same *esprit*: they are meant to reassure the public through expressive actions that are highly populist and politicised (Garland, 2001). Examples of these policies include, but are not limited to, the introduction of stricter requirements to obtain residence permits; increased police checks in areas frequented by immigrants; criminalisation of activities related to migratory movements; enhanced use of deportation to remove long-term foreign residents who have committed a criminal offence; expansion of the grounds on which entry ban can be issued; use of bans to remove groups deemed unruly from certain local areas. Taken together, both administrative and penal measures, strive to reach the same goal: in a two-tier social system, they are meant to provide security to citizens and remove non-citizens from society.

To fully understand current governmental policies towards immigration, it is pivotal to consider the role played by social forces in shaping them. Citizens, the only ones who hold voting rights, are increasingly concerned about the presence of immigrants in their neighbourhoods and ask for a stronger intervention from public authorities (Quassoli, 2004). This growing demand for security might be capable of affecting not only policy-makers, who must answer their electorate, but also policy-enforcers, who are urged to solve community problems and provide security. The level of influence exercised by social pressure on the penal state might vary remarkably across countries. Garland (2013) refers to this dimension as *state autonomy*, meaning the level of immunity of the penal state from external influences. This dimension emphasises the role played by pressure

groups in the occurrence, as well as in the degree of enforcement, of certain penal policies. In other words, is citizens' demand for security capable of shaping law enforcement?

This chapter deals with state autonomy, and it discusses whether and how social forces have percolated criminal justice policies towards foreign defendants in the city of Turin. In particular, this chapter pays attention to policing, intended as the outcome of actors, agencies and processes within the organisation (cf. Crawford, 2013), and to the Public Prosecution Service. This is because the police and the Public Prosecutor's office are potentially more open to citizens' pressure given their position as primary actors in the field of security and insecurity (Quassoli, 2004). The first part of this chapter addresses how the police answered to citizens' requests for security, and in particular how the local chief of police dealt with the problem of urban security through increased activities of patrolling. The second part explores the role of the Public Prosecution Service in matters of urban security, from the creation of a working group *ad hoc* to deal with street-crimes to the most recent judicial practices. It follows a discussion on the impact of social forces on decision-making.

### **3.2. The power of narratives: the security paradox**

In the city of Turin, as elsewhere in Italy (Del Lago, 1998; Quassoli, 2004; Ambrosini, 2013; Mantovan, 2018) and no less abroad (Agozino, 1997; Holdaway, 2000; Chebel d'Apollonia, 2012), the presence of immigrants is often experienced by local residents as a prominent source of insecurity and urban decay. This image is reinforced and sustained by political discourses and media coverage, the latter being a prominent channel in directing and shaping public opinion. Indeed, episodes of conflict in urban public spaces are often 'the result of a process of *social construction* implemented by a number of social actors (media, citizens' committees, politicians and police forces), who represent the visible presence of migrants in these public spaces as *deviant* and *unlawful*' (Mantovan, 2018:340).

In Italy, the *hyper-visible* (Cancellieri and Ostanel, 2015) presence of immigrants, especially in certain urban areas, has often triggered heated protests from citizens' committees or individuals. In particular, local residents blame immigrants for the downgrading of their neighbourhoods and consider their presence as an illegitimate 'surplus' in public spaces (Agustoni and Alietti, 2015). This is why complaints and reports from residents to the police are not limited to episodes of criminality (e.g. the old lady who reports drug trafficking outside her house), but more generally to the very presence of immigrants and the perceived 'barbaric' use they make of public space (e.g. the noisy groups of young foreigners who consume alcohol on sidewalks or leave garbage around) through behaviour that often does not fall within the realm of criminal law (Chiesi, 2004; Menichelli, 2015). In other words, citizens often complain about incivilities against which police officers cannot do much, consequently increasing residents' sense of frustration and helplessness. The boundaries between fighting crimes and maintaining public order are no longer so easily identifiable (van de Bunt and van Swaaningen, 2012).

It has been estimated that 38% of Italians do not feel safe in their cities because of fear of crime.<sup>32</sup> In fuelling this collective perception of insecurity amongst citizens, media coverage and political discourses have undoubtedly played a prominent role. In the period when this research was carried out, Matteo Salvini was deputy prime minister, minister of the interior, and leader of the right-wing political party *Legga*. The then minister made 'security' his political war-horse. In particular, he often blamed immigrants for the lack of security in the country and promised to recruit 10,000 new police officers to tackle the problem (Bove *et al.*, 2019). Additionally, he regularly employed various social media, such as Facebook and Twitter, to share and comment on news and episodes related to immigrants' involvement in criminal activities and disorderly conduct against police officers and citizens.

Media as well played a prominent role in defining immigration as a problem of social order for the country (Palidda, 2000). By framing the debate over immigration through emotion-laden representations of security and order (Cisneros, 2008; Benson, 2013), media contribute to shape public opinion and its proximity towards anti-immigration political parties (Boomgaarden and Vliegthart, 2007). It is evident that the political panorama, together with scaremongering media coverage conflating migration with terrorism (cf. Pogliano, 2016; Galantino, 2020), did not help to reduce the collective unease about immigrants' arrivals by sea and their presence in the territory, which become more visible and threatening for local residents. According to Mela (2003), *torinesi* have become increasingly anxious in the last decades, and their feelings of fear and insecurity can be partially ascribed to an over-exposure to media content. This over-exposure is particularly visible when it comes to areas of the city deemed 'problem areas' due to the presence of immigrants. For example, in *Barriera di Milano*, 63.4% of the news items deal with the neighbourhood by making reference to immigrants, and 29.4% of these news item deal specifically with crime (Pogliano, 2016:161-162). The production of narratives of danger reinforces the image of immigrants as purveyors of crime and disorder, and consequently it increases social conflicts between local residents and the newcomers.

Interestingly, the growing sense of insecurity amongst citizens never matches reality. In fact, not only has the presence of immigrants not increased the overall crime rate in Italy (Bianchi *et al.*, 2012), but the crime rate in the country even continues to drop. In greater detail, after a peak of 2.9 million registered criminal acts in 2012/2013, the number has decreased to 2.2 million in 2017/2018.<sup>33</sup> In other words, crime is decreasing overall, but fear of crime is increasing. Turin, together with other Italian cities, is in the grip of a 'security paradox', *scilicet* a disconnection, a gap between the actual security, the real risk of being victim of a crime, and the perceived security, the perceived fear of potentially being victim of a crime. According to a recent study, Turin,

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<sup>32</sup> According to the *XI Rapporto sulla sicurezza e l'insicurezza sociale in Italia e in Europa*, in Italy, as well as in Europe, there is a growing sense of insecurity amongst citizens. However, there are considerable differences between countries with regard to citizens' perception of insecurity. Italy, France and Hungary are the countries in which citizens feel unsafe at most; on the flip side, Germany, the United Kingdom and the Netherlands are the countries where citizens feel safer. From data it emerges a net division in European citizens' perception of insecurity between northern and southern countries. The latest report in Italian is from February 2019 and is available at: [http://www.demos.it/2019/pdf/49772019\\_rapporto\\_sicurezza\\_demos\\_unipolis.pdf](http://www.demos.it/2019/pdf/49772019_rapporto_sicurezza_demos_unipolis.pdf).

<sup>33</sup> <https://www.statista.com/topics/4051/crime-in-italy/>



together with Milan, Naples and Rome, is amongst the cities in which residents are more concerned about their safety than the national average (Valente *et al.*, 2020). The study concluded that fears of crime and insecurity are ‘increasingly a problem of civic coexistence and social vulnerability more than a crime-related issue’ (Valente *et al.*, 2020:14).

This collective perception of insecurity caused by the alleged troublesome presence of immigrants is translated into a request for reassurance to local authorities (Cotesta, 1995). Notwithstanding the fact that actual security in Italy is ‘under control’, as the decrease in crime rates shows, the authorities’ main response to citizens’ demands was to intensify police presence, in order to guarantee control of local urban spaces and calm citizens’ concerns (Quassoli, 2004; Maneri, 2001; Palidda, 2000; Mantovan, 2018). In other terms, fear of crime has taken on ‘its own political significance’ (Hernandez, 2013:1496). In the past decade, under the banner of ‘security’, the government has made available to local municipalities more economic resources with the purpose of implementing various projects related to urban safety (Menichelli, 2015). According to a recent study (Bove *et al.*, 2019), immigration has led to an increase in public spending on security across Italian municipalities due to erosion of social capital and unfounded fears of criminality amongst local residents.

Along with other local realities that have adopted a variety of strategies to ensure urban safety deemed hampered by immigrants, such as municipalities in Emilia Romagna (Quassoli, 2004), Veneto (Mantovan, 2018) and Lombardia (Ambrosini, 2013), the municipality of Turin has not been indifferent to citizens’ request for security. As mentioned above, anxieties and fears from local residents are mostly heard by those responsible for security, *scilicet* police forces and the Public Prosecutor’s office. It is precisely in the activities, strategies and perceptions of both actors that it is possible to identify ‘the principal dimensions and social actors of insecurity’ (Quassoli, 2004:1165). Concurrently with the beginning of the fieldwork in 2018, a new *questore*, that is the local chief of police, arrived in the city of Turin. During the first press conference, the new local chief stated that public order was a priority, and that in the city of Turin there was a demand for security deserving of an adequate answer.<sup>34</sup> In line with this perceived necessity, the local chief introduced an action plan to achieve such an objective. Next to the regular activity of patrolling, an extraordinary high-impact activity of patrolling was introduced. The reason for increasing patrolling surveillance was pre-eminently based on the growing sense of insecurity amongst citizens. Crime rates in Turin, in conformity with data at national level, have been reducing for the last six years. However, citizens were still very concerned about their safety. Thus, according to the local chief, to solve this paradox it was necessary to implement a policy that could affect citizens’ perception of crime. The local newspaper also made reference to this profile:

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<sup>34</sup> [https://www.youtube.com/watch?v=KogEa4zIHB\\_I](https://www.youtube.com/watch?v=KogEa4zIHB_I)

‘Crime goes down, but fear remains: more officers on the streets’ (*CronacaQui*, April 11<sup>th</sup> 2018)

‘The high-impact patrolling activity is meant to weigh on all criminal episodes that affect citizens’ perception of security’ (*CronacaQui*, June 23<sup>rd</sup> 2018)

‘The daily and on-going activity performed by the police in the territory shows that in the city there are no free zone’ (*CronacaQui*, May 21<sup>st</sup> 2018)

The action plan implemented by the local chief, however, was not meant to increase patrolling in the whole city. Rather, it was restricted to certain areas, mainly parks and squares, and to certain neighbourhoods where the occurrence of minor offences (e.g. drug trafficking, incivilities, property crimes) was particularly prominent. Because street-crimes are the ones capable of instilling anxieties and fears in local residents at most (Battistelli, 2011), the local chief decided to increase activity of patrolling in areas where this type of crimes were highly concentrated. The areas selected for the density of street-crimes match areas of the city where the presence of immigrants is more visible, either because they live in these areas or because they gather there, sometimes for running illegal businesses, but for drug trafficking above all. These areas are known for being ‘sensitive’ also due to recurrent episodes of incivilities involving immigrants, often followed by citizens’ requests for intervention vis-à-vis police forces (Campesi, 2003), something that the local newspaper never misses to address. In fact, local residents have been quite active in notifying the police of criminal activities in their areas and local media have ridden the wave of this collective feeling of frustration:

‘Maxi-blitz in *San Salvario* [a neighbourhood]. Anti-drug operations following numerous complaints by residents, now “prisoners” of pushers’ (*CronacaQui*, March 20<sup>th</sup> 2018)

‘*Aurora* [a neighbourhood] rose up against decay: “We’re hostages of pushers and brawls”. Throwing bottles between pushers, gangs, tensions and decay: citizens are sick of this’ (*CronacaQui*, June 28<sup>th</sup> 2018)

‘*Piazza Baldissera* [a square in the neighbourhood of *Barriera di Milano*], disorderly conduct off the premises: “In the grip of brawl and pushers” Alarm from local residents, who are now pressing charges’ (*CronacaQui*, August 18<sup>th</sup> 2018)

‘Neighbourhood under attack: children are playing surrounded by pushers. Residents are scared and do not leave their homes. Streets in the hands of gangs of violent Africans’ (*CronacaQui*, September 15<sup>th</sup> 2018)

The sensational and alarming headlines of the local newspaper are a vivid testimony of the climate of tension between local residents and immigrants in the city of Turin. Whereas in these headlines ethno-national origins are not explicitly mentioned, the negative practice of referring to an offender's nationality or ethnicity still prevails in Italian national and local media (Pogliano, 2016). In fact, not surprisingly, after a few lines, the articles do not omit to mention the nationalities of the 'pusher'. Besides, it is interesting to note how local media labels different social groups. Local residents' feeling of oppression and loss of control over their neighbourhoods are conveyed through the use of terms as 'prisoners', 'hostages', 'in the hands of' and 'in the grip of'. In this narrative, *torinesi* are depicted as the residents, those who have been 'dispossessed' of their legitimate space (Marzorati, 2010). In contrast, immigrants are the 'extraneous', the invaders who have brought disorder and fear in the neighbourhoods (Orrù, 2018). It is important not to under-estimate the role of local media in creating 'local securitisation'. Not only are local media hypersensitive in covering episodes and events that attract their 'daily consumers' most, but they have also understood how the current sense of insecurity stemming from immigration is a successful *leitmotiv* (Palidda, 2000:152). The emphasis that the local newspaper *CronacaQui* places on episodes related to immigration, criminality and disorderly behaviour mirrors citizens' fear of the troublesome invaders, and at the same time amplifies this fear through emotion-laden images of decay and insecurity.

In certain areas of the city, the tension between local residents and immigrants lead to serious 'urban crisis' (Allasino *et al.*, 2000). For example, a senior police commissioner told me that local residents in *Barriera di Milano* are currently unable to sell their houses or are forced to sell them at a very low price because the high number of immigrants in the neighbourhood discourages buyers. The environmental impact of immigration on the real estate market in *Barriera di Milano* has increased the tension between local residents and immigrants, with the former experiencing a deterioration of their living conditions for which the latter are held responsible.<sup>35</sup> Whether this is true or not, the way in which local residents have interpreted, framed and represented immigrants in their neighbourhood has caused a 'self-fulfilling prophecy' (Merton, 1948), as the tension between the two groups continues to increase.

More generally, one of the main concerns for *torinesi* lies in the problem of drug trafficking, an activity in which immigrants are highly involved, or more likely their involvement is highly visible. Drug trafficking is a phenomenon not unique to disadvantaged neighbourhoods. Rather, it takes place as well in *Parco del Valentino*, a park highly frequented by families and runners, and *San Saba*, a neighbourhood known for its nightlife. Both frequenters and residents of these areas perceive the presence of immigrants selling drugs out in the open as highly disturbing, mainly because it infuses a feeling of lack of control and an image of urban decay, which is often experienced as social downgrading (Mantovan, 2018). It is not surprising that in front of a

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<sup>35</sup> For a detailed history of the district, cf. *Storia della Barriera di Milano dal 1946*, Associazione Culturale 'Officina della Memoria' 2006.

pressing and loud citizens' demand for security and urban decorum, police forces and judiciary cannot stand idle and pretend nothing is happening. And this is exactly the *esprit* behind the extraordinary high-impact activity of patrolling implemented in Turin in 2018 by the local chief of police.

### 3.3. Patrolling on immigrants

Before describing how this activity of patrolling was implemented, I wish to draw attention to the words *extraordinary* and *high-impact*. The label used to refer to the new activity of patrolling already suggests that such activity is meant to tackle a problem that cannot be properly solved through 'ordinary' patrolling and surveillance. This label conveys the idea that 'extraordinary' situations of disorder, insecurity and urban decay requires 'extraordinary' policing approach. Besides, the label also suggests that these activities are meant to have a 'high-impact'. According to the local chief, the new patrolling aims at combatting not only criminality, but also urban decay and immigration through increased administrative controls, including preventive inspection of premises owned or frequented by immigrants. In other words, the idea behind this activity of patrolling is to act upon citizens' demand for security with every power and instrument held by police forces, thus tackling at the same time both criminal and administrative offences. Through massive police patrolling and repressive actions in areas of the city considered 'sensitive' due the confluence and frequency of disorderly activities it is possible to make a clean sweep of these areas and eventually decrease citizens' perception of fear.

It must be noted that the *esprit* behind this activity of patrolling recalls the one behind *reassurance policing* (Millie and Herrington, 2005), a model developed in the United Kingdom. This policing is not strictly oriented at crime control, but rather at 'fear control'. In particular, the idea behind it is that by increasing police visibility on the streets, it is possible to tackle public confidence and order maintenance, and thus reduce fear of crime amongst local residents. This model was also adopted in the United States a decade ago, when law enforcement agencies implemented strategies 'that took the reduction of fear as a distinct, self-standing policy goal' (Garland, 2001:122). Of course, one might wonder whether reassurance policing is only meant to lull local residents into a false sense of security or to have an actual impact on crime and disorder (FitzGerald *et al.*, 2002). The citizen-focused activities implemented by the local chief in early 2018 surely had an impact, or at least so it seemed. From the very beginning, the local newspaper did not miss the chance to report the results achieved by police forces:

'Turin, fight against drug trafficking: in the last month 117 people arrested and 278 kilos of drugs confiscated. Police activities are mainly focused on the most sensitive areas of the city, such as the neighbourhoods of *Aurora*, *Barriera di Milano*, *San Salvario* and *Parco del Valentino*. In addition to 117 people arrested,

210 people have been reported and 1.764 identified. Flushed out and deported 116 irregular immigrants'. (*CronacaQui*, March 7<sup>th</sup> 2018)

Eventually, 'high-impact' activity of patrolling consists of 'saturating' sensitive areas with police officers. Increasing the number of checks, consequently increased the number of immigrants arrested, identified and deported precisely because police officers focus their attention on this social group. In a way, these 'hybrid' checks directed towards immigrants allow police officers to 'spot' a variety of situations and to act upon them through criminal and administrative powers. An experienced defence attorney refers to how these activities are not in line with the 'traditional' idea behind patrolling:

The police go looking for criminals, whereas arresting someone should be the consequence of the capillary control of the territory...in the sense that you are in a car or by foot, you see someone committing a crime or citizens call you, then you go and arrest someone. You should not go looking for criminals, this is a whole different story (Defence attorney, interview n. 5, January 31<sup>st</sup> 2018)

The impact of these activities of patrolling on the criminal justice machine, especially with regard to the number of arrests, cannot go unremarked. The table below shows the fast-growing trend in arrest rates compared to previous years:

	<b>Total arrests</b>	<b>Italians</b>	<b>Foreigners<sup>36</sup></b>
<b>2014</b>	2291	820	1646
<b>2015</b>	2256	819	1566
<b>2016</b>	2521	945	1776
<b>2017</b>	2593	872	1913
<b>2018</b>	2909	996	2043

*Arrest rates in Turin 2014-2018. Data from the Public Prosecution Service.*

While observing direct proceedings, I did not only witness first-hand the rise in the number of arrests, but I also noticed that the great majority of these arrests were for drug trafficking. In fact, out of 113 direct proceedings involving foreign defendants that I observed, half of them related to drug trafficking. At the same time, the local newspaper increased the coverage of news related to drug trafficking and urban decay, together with anti-drug operations following local

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<sup>36</sup> The Public Prosecutor Service lists under the category 'foreigners' all people arrested without Italian citizenship.

residents' petitions. The increased activity of patrolling was often framed as a 'fight' against 'death dealers', epithet used to refer to drug dealers.<sup>37</sup> Clearly, for *torinesi* drug trafficking was a burning issue, a 'signal crime' (Innes and Fielding, 2002), something that disproportionately affects their perception of security. In this panorama, it is not surprising that uprooting drug trafficking was a top priority for the chief of police. Some respondents address this zero-tolerance policing approach in these terms:

A while back I noticed an increase...I mean, fifteen arrests in a day for drug trafficking is a lot, they even arrested for mild episodes [...] You know, here comes the new local chief, who maybe wants to give, how to say, an image of efficiency...or maybe there have been many petitions from citizens, newspapers articles. Thus, police forces feel they must be more present and active in providing security. However, this is not something that happens casually...I believe it answers to well thought-out policies (Public prosecutor, interview n.6, April 23<sup>rd</sup> 2018)

I think these days [police officers] received the order to arrest, I don't know why, maybe because political elections are approaching...there are far too many arrests, even unjustified, the arrests of my hearing day were all unjustified (Judge, interview n. 4, February 7<sup>th</sup> 2018)

The increased number of arrests affected courtroom actors' daily work because they found themselves swamped with cases which they often considered not worth the time spent on them. This is because the great majority of arrests were made for offences so mild (e.g. dealing few grams of marijuana) that did not reach the threshold for imposing pre-trial detention. As a consequence, the majority of people arrested were to be released after the hearing. Some respondents share with me the impression that these kinds of arrests are made mainly to answer citizens' request for security:

Police forces have their viewpoint, which is often not in line with the ones held by public prosecutors. We need to consider their arrests, yes, but we also need to consider the law and the law provides for boundaries, for limits. So, the combined assessment is that in the short term one 'cleans up' a bit and lays down the rules, but in the long term, this policy doesn't pay back. However, I am aware of the fact that police forces need to send a message to citizens (Public prosecutors, interview n. 13, October 2<sup>nd</sup> 2018)

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<sup>37</sup> The first time that I have heard this epithet during fieldwork was on a live on Facebook from the then minister of the Interior Matteo Salvini.

[Ironically] Mean-minded people say that [these arrests] are simply driven by the necessity to provide a positive image of police forces. So, I make a lot of arrests: these arrests result in statistics and then I can brag about them with the public, no? Mean-minded people say this... (Judge, interview n. 5, February 22<sup>nd</sup> 2018)

Maybe this is high-impact patrolling because rather than arresting two or three people, they arrest ten of them...but after all, there is a direct proceeding and defendants are released within few days. So, the impact is only of appearance, do you understand? (Defence attorney, interview n. 10, February 4<sup>th</sup> 2019)

Several respondents noted how these high-impact activities of patrolling provide only for short-term results because immigrants caught selling modest amounts of drugs can be 'removed' from the streets for no longer than a couple of days. Once released, nothing stops them from coming back to their business in the same areas or in less exposed areas. Moreover, high-impact patrolling is not capable of identifying and removing people at the 'top' of the organisation, those who really profit from such activities (Quassoli, 2004). However, whereas this policing is not effective in striking down the operative capacity of criminal organisations given the lack of investigative efforts, it is effective in the eyes of the public because it provides 'an immediate and effective response to the definition of the problem and the gravity associated with it, as expressed by the public' (Quassoli, 2004:1174).

Together with a certain amount of scepticism on whether this policing might have a real impact on crime and disorder given its short-sighted approach, various respondents do not look upon it favourably because they do not believe there is any kind of emergency in Turin:

Do you really believe this [policy] is implemented because people are scared or because the political majority has changed? I mean, Turin is a medium-large size city where, as in all medium-large sized cities, there is certain level of small-scale criminality. To me, saying that in Turin there is an emergency is too much. My impression is that the chief of police is giving these directions, knowing that somehow he makes the minister of the interior happy...police forces depend from there (Public prosecutor, interview n. 16, November 8<sup>th</sup> 2018)

I am absolutely against the new policy. It is total insanity. They need to stop saying that there are serious street crimes, that we are in danger, that foreigners are a problem, that crime rates are rising and so on... (Defence attorney, interview n. 7, October 15<sup>th</sup> 2018)

From my point of view, this policy is trivial. It is simply a political move, there is no emergency, immigrants commit street-crimes today no more than yesterday (Public prosecutors, interview n. 17, November 9<sup>th</sup> 2018)

It must be noticed that courtroom actors experienced the effects of this intensive activity of patrolling only on the front of criminal law through an increase in the number of immigrants arrested, especially for drug trafficking. However, the intervention plan to eradicate crime and disorder implemented by the chief of police was much broader since it relied on administrative law as well. In particular, to 'clean' areas of the city deemed sensitive due to the high presence of immigrants, police officers conducted checks in shops and bars run and/or frequented by immigrants. Often these shops were reported to the police by local residents, who perceived their presence as a 'takeover' of urban spaces (Marzorati, 2010). During this intervention, police officers checked whether shopkeepers complied with administrative requirements for selling foods and drinks (e.g. whether food was stored at the right temperature) and, at the same time, checked the papers of people gathering in shops and bars. These checks were eventually meant to discourage the presence of immigrants in certain areas under the banner of urban security (Semperebon, 2011; Cancellieri and Ostanel, 2015; Mantovan, 2018).

Sometimes local residents reported to the police an ethnic bar for being 'too noisy' or for having 'bad-looking' people gathering around it (Campesi, 2003). In other words, a gathering of immigrants was signalled because somehow it offended the 'aesthetic sensibility' of local residents (cf. Beckett and Herbert, 2009:21). The fact that the premises were frequented by immigrants with prior criminal records often became a 'signal' of its potential danger. The local newspaper reported the closure of several bars and locals run by foreigners, not failing to place emphasis on the usual leitmotiv of danger, public order and criminality:

Fifteen days of suspension of the licence for a bar. The bar has been reported several times by local residents for being a regular hangout of people potentially dangerous for public order and citizens' safety. The chief of police has decided that the situation displays the unambiguous profile of social danger, contributing to the increase of criminal episodes in the area, and thus the licence of the bar has been suspended for fifteen days (*CronacaQui*, March 21<sup>st</sup> 2018)

Second-time offenders, drugs and pushers in the bar. Fifteen days of suspension of the licence for the bar. This is written in the decision made by the chief of police. The decision has been taken because the bar, heavily frequented by numerous immigrants – many of whom are involved in drug trafficking – has become a place of contact for drug-related crimes (*CronacaQui*, October 22<sup>nd</sup> 2018)



In the last month, eleven bars have been closed because of criminal's presence  
(*CronacaQui*, November 3<sup>rd</sup> 2018)

The temporary closure of these premises eases residents' concerns because, at least for a while, they would not encounter 'swarms of bad-looking immigrants' hanging about on the pavement and 'obstructing' their passageway. Together with the closure of some ethnic shops, these administrative checks are also a valuable tool to 'spot' situations of irregularity amongst the frequenters of bars and shops. In fact, during these checks, immigrants without papers were brought to the police headquarter in order to evaluate their position in the national territory. A senior police commissioner told me that during these checks, in what she considers the 'best case' scenario, the police spot some immigrants with unenforced arrest warrants. In these instances, by enforcing such warrants, immigrants are brought to jail and removed from public space 'for good'. In other cases, the police spot immigrants in a position of *deportability* (De Genova, 2002). Here, as well, immigrants are removed from public space through administrative confinement and expulsion. On the contrary, there are cases when the police spot immigrants who have already received an expulsion order but given the lack of a complete identification or return agreements with third countries, these orders are unenforceable. In these cases, administrative checks have no other result than issuing the umpteenth expulsion order.

It must be mentioned that this policing approach to immigration does not belong to Turin only. In the last decades, police forces in Italy have started to focus on urban security due to an increased and pressing demand for intervention against immigrants stemming from local residents (cf. Campesi, 2003; Quassoli, 2004; Cancellieri and Ostanel, 2015; Mantovan, 2018). To satisfy such demand, police forces have started to conduct more and more often operations to remove immigrants from public spaces through a combination of criminal and administrative powers. These operations, in police jargon, are referred to as 'nigger hunting' or 'ethnic cleansing'<sup>38</sup> (Palidda, 2000:230). This 'uncensored' police jargon might sound odd for a foreign reader, but it seems to stem from a sort of 'cultural unpreparedness' of the police when dealing with foreigners, and from a certain degree of 'tolerated' racism in the country. This also relates to the fact that, in countries of recent immigration, such as Italy, there is less public and institutional 'awareness' of racism and discrimination than in countries of longstanding immigration. In implementing this kind of operations, police officers are encouraged to use a wide range of powers, through administrative checks and initiatives aimed at crime prevention and control, to remove immigrants from public spaces because their presence is hardly tolerated

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<sup>38</sup> In countries of longstanding immigration, the use of these terms would have been censured by formal control institutions and would have attracted considerable media attention. However, in Italy this is not the case. It seems that a bit of racism is somehow tolerated by formal control institutions, especially within the police. This might be due to the structure of the organisation itself and its hierarchy. There have been instances in Italy where high rank officials preferred to be silent than censuring the behaviours of police officers working under their control and responsibility. Undoubtedly, this also stems from a sense of belonging and companionship within the police. In any case, the 'uncensored' police jargon, in the opinion of the writer, is attributable to cultural unpreparedness or inexperience from police officers in dealing with foreigners, together with a certain degree of racism.

by local residents. Criminal and administrative law, then, are used instrumentally and *ad hoc* (Sklansky, 2012) to ‘clean’ local spaces and satisfy citizens’ demand for security.

### 3.4. A torinese speciality: the creation of *Sicurezza Urbana*

In the city of Turin, the increased police’s attention to citizens’ demands seems to match a high degree of permeability from the Public Prosecution Service (Sarzotti, 2007). At the end of the 1990s, the neighbourhood of *San Salvario* experienced a real ‘urban crisis’ (Allasino *et al.*, 2000). In particular, following various criminal episodes, considerably exaggerated by local media, residents brought pressure to bear on criminal justice agencies to pay greater attention to crimes committed by immigrants (Torrente, 2007:335). In those years, the neighbourhood of *San Salvario*<sup>39</sup> was considered a ghetto by local residents due to the high concentration of immigrant residents and their involvement in anti-social behaviour, a situation similar to other areas of the city, such as *Barriera di Milano* and *Porta Palazzo*. Those years have seen the rise of several citizens’ committees asking for greater law and order in their neighbourhoods, often backed up by local politicians who intervened for a tougher approach to street-crimes (Torrente, 2007). The local context and citizens’ demand for acting upon this alleged ‘emergency’ played a pivotal role in the creation, within the Public Prosecution Service, of the working group *Sicurezza Urbana* (Blengino, 2007).

It must be noted that, in Italy, the presence of specific working groups is quite common in the Public Prosecutor’s office. Normally, working groups are created because certain criminal offences represent a priority, for example crimes against vulnerable people, such as children and women, or because it is necessary to develop particular knowledge of a complicated subject, for example financial crimes (Montana, 2009). Nevertheless, the working group *Sicurezza Urbana*, that is urban security,<sup>40</sup> is a speciality of the Public Prosecution Service in Turin and it does not seem to answer to any of the mentioned needs (Montana, 2009). In fact, the working group *Sicurezza Urbana* was created in 2001 by the will of the then chief prosecutor of Turin and by the influence of local community and local media (Sarzotti, 2007). The latter, in those years, played a major role in amplifying residents’ perception of security and social alarm (Belluati, 2004). Following social pressures, the Public Prosecution Service decided not to remain indifferent to citizens’ demands and created *Sicurezza Urbana* to deal with street-crimes and provide for an adequate answer to this type of criminality.

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<sup>39</sup> The neighbourhood of *San Salvario* has historically hosted many immigrants, first from the south of Italy and afterwards from countries outside the European Union. The coexistence of different groups was not always peaceful and in the 1990s the neighbourhood became a sort of ghetto due to the high number of street-crimes registered, often committed by immigrants who struggled to find their place within society. From 2000s on, the neighbourhood underwent an important change through a redevelopment plan. Nowadays, notwithstanding certain streets are still the theatre of drug trafficking and brawls between immigrant groups, *San Salvario* is known for its nightlife and it is highly frequented by young people.

<sup>40</sup> The Italian word *sicurezza* can be translated both with security and safety. In this context, the preferred translation is security because the working group *Sicurezza Urbana* holds a managerial top-down approach to the problem of urban security.

Amongst the advocates of the creation of *Sicurezza Urbana* was the widely-held idea that, until then, citizens' demands for security had not received an adequate answer, both at the political and judicial level (Borgna and Maddalena, 2003). The reason for such inadequacy was, on the political front, a short-sighted attitude in dealing with the complexity of global migration and, on the judicial front, a cultural and organisational incapacity to provide adequate answers to street crimes (Borgna and Maddalena, 2003:103-105). The lack of meaningful interventions from the executive and the judiciary contributed not only to the rise of political movements who employed (or better, exploited) the nexus between immigration and criminality as a war-horse to gain electoral votes, but also to the loss of citizens' credibility in the judiciary (Borgna and Maddalena, 2003:104). In particular, citizens not only sensed the state's inability 'to deliver the expected levels of control over crime and criminal conduct' (Garland, 2001:110), but they also perceived that the judiciary was not interested in their everyday problems. This is an issue that will be addressed in the next paragraph.

At the beginning, *Sicurezza Urbana* was considered more of a 'service' than a working group. Public prosecutors, on a voluntary basis and in shifts of six months, had the possibility to join the group with the advantage of being relieved of part of their regular workload. The main task of the group was to deal with street-crimes. Thus, public prosecutors working for the group administered all reports of arrests related to street-crimes and gave absolute priority to these reports. When the group was created, a list of criminal offences within the group's remit was drawn up. However, a study conducted in the Public Prosecution Service in Turin shows that none of the public prosecutors in the group was capable of indicating criminal offences within the group's remit, but they generally affirmed that the group dealt with 'street-crimes perceived as dangerous by public opinion, and so capable of generating social alarm' (Torrente, 2007:342). *Sicurezza Urbana* was not looked upon favourably by all magistrates. On the contrary, the creation of the group generated some tensions within the judiciary, as recounted by a respondent:

'The creation of this service dates back to 2000 and it really created a rift within the judiciary. What was the *ratio* behind the group? It was to pay greater attention to street-crimes, to avoid minimising the phenomenon and not to provide an adequate answer [...] However, from an ideological point of view, there were many criticisms inside the judiciary. In particular, I remember that the traditional left wing ideological faction, the *Magistratura Democratica*, had openly taken sides against the creation of this group. They were sharply critical of this decision because it seemed to be a group to fight crimes committed by immigrants. In other words, critics said that this group was created only with the purpose of fighting crimes mainly committed by immigrants. So, critics saw in the creation of this group almost an *ad hoc* form of persecution, something that should have not been allowed (Public prosecutor, interview n. 8, May 31<sup>st</sup> 2018)

From 2008 *Sicurezza Urbana* became an autonomous group, and from 2011 the shift length increased from six months to two years.<sup>41</sup> However, the group remained on a voluntary basis. According to some respondents, public prosecutors who joined the group held a repressive and interventionist view of the judiciary. Indeed, the presence of a group committed to fight street-crimes gave, to a certain extent, a *priority response* to street crimes which were mainly committed by immigrants. This situation fuelled criticisms inside the judiciary because few people shared the idea that low-level offences, just because they were capable of generating insecurity, should be dealt with by an *ad hoc* pool of public prosecutors. The scepticism of that time is visible in the narratives of some respondents:

The point is that prosecution is mandatory and is mandatory for every crime, I do not believe that demands stemming from citizens committees troubled by the presence of immigrants should have a priority response. They will have a response, but they will have a response like everyone else [...] I believe that having a pool of public prosecutors dedicated solely to this task ran the risk of keeping too much attention focused on this issue (Public prosecutor, interview n. 6, April 23<sup>rd</sup> 2018)

This group, somehow, created a differential treatment to street-crimes for the very reason that they had a group dealing solely with these crimes. It is my opinion that a city like Turin is not a city with such great problems of urban security to the point that it justified the creation of this group. I mean, this is my personal viewpoint, but it was a sort of organizational model that backed up alarmist political ideas about urban security...we are in danger, we are attacked on the streets, there is the bogeyman who robs us, who assaults us, we need the group *Sicurezza Urbana* to monitor the situation [...] The creation of this group attracted excessive attention, but above all, implicated that 'common crimes' were given priority without a reason (Public prosecutor, interview n. 16, November 8<sup>th</sup>, 2018)

Before the creation of the group *Sicurezza Urbana*, the so-called 'common crimes', that are crimes not falling within the competence of any working group, were dispersed among all public prosecutors. This meant that, given the workload of each prosecutors, it was very unlikely that an individual prosecutor would deliberately choose to give priority to a street-crime rather than to a more serious offence. The creation of *Sicurezza Urbana*, together with relieving group members from part of their workload, gave public prosecutors the possibility to pay greater attention to crimes that they would have not considered as a priority earlier. In other words, the

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<sup>41</sup> [http://www.procura.torino.it/altrifile/criteri\\_org\\_2015.pdf](http://www.procura.torino.it/altrifile/criteri_org_2015.pdf)

group created *de facto* a priority route to the criminal justice system for authors of street-crimes, the majority of whom are immigrants.

### 3.5. The legacy of *Sicurezza Urbana*

I never took part in the group and honestly, I agree with its abolition. I don't see why in a Public Prosecution Service there has to be a group *Sicurezza Urbana*. We deal with justice and not with security. And anyhow, I don't like the name (Public prosecutor, interview n. 14, October 11<sup>th</sup> 2018)

In 2015, with protocol n° 3403 establishing new organisational criteria for the Public Prosecutor Service, the group *Sicurezza Urbana* was abolished.<sup>42</sup> Following this event, a new group termed *Reati di Criminalità Organizzata e Sicurezza Urbana* was created with the task of dealing with organised crime. According to the then chief prosecutor, because the old *Sicurezza Urbana*, besides dealing with street-crimes, conducted investigations in relation to the criminal organisations behind street-crimes, the creation of the *Reati di Criminalità Organizzata e Sicurezza Urbana* required the abolition of *Sicurezza Urbana* to avoid overlapping activities of investigation. Thus, from 2015 on, the old organisational model was restored. All public prosecutors deal with arrests for street-crimes during their 24-hours shift, and they hand the dossier on to the new group only in the case of organised crimes related to street-crimes. However, the label *Sicurezza Urbana* remains in the name of the new group, as to indicate that the Public Prosecution Service has not decided to leave unheard citizens' demands for security. Indeed, despite its abolition, it is possible to identify some traces of the legacy from *Sicurezza Urbana* in how the Public Prosecutor's office deals with street-crimes.

The attention towards citizens' demand for security seems to remain a peculiarity of the Public Prosecution Service in Turin. The latter, in the past, has been quite open to citizens' requests, probably due to its unique *local* legal culture. In particular, the legal culture within the *torinese* Public Prosecutor's office has overcome the formalist separation between the judiciary and civic society, a feature of the more 'traditional' legal culture at the national level (Sarzotti, 2007). In this regard, the Public Prosecution Service in Turin seems to hold a certain 'public sensibility' (Sarzotti, 2007:69-70) and to be more open to public debate, at the same time with a focus on efficiency to avoid jeopardising the course of justice (Blengino, 2007). From a comparative study conducted by Sarzotti (2007) on the Public Prosecution Service in Turin and in Bari emerges an explanation of how the *torinese* Public Prosecutor's office displays a higher degree of *permeability* to citizens' demands for security compared to the southern organisation, and how the creation of *Sicurezza Urbana* is the result of this openness towards citizens' needs.

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<sup>42</sup> [http://www.procura.torino.it/altrifile/criteri\\_org\\_2015.pdf](http://www.procura.torino.it/altrifile/criteri_org_2015.pdf)

Notwithstanding the abolition of the working group, the Public Prosecution Service in Turin seems to be willing to maintain a conversation with civic society. In particular, public prosecutors often refer to the view that they '*non sono sotto una campana di vetro*', that is they do not live 'wrapped in cotton wool' and sheltered from everything. On the contrary, prosecutors argue that they read newspapers and statistics and are aware of the problems of the society in which they live in, hence they are inevitably affected by this information.<sup>43</sup> Recurrent in prosecutors' narratives is the leitmotif of '*dare un segno alla collettività*', give a signal to the community. In other terms, public prosecutors often take into account the consequences of their decisions in terms of the image they deliver to citizens. By considering the impact that their decisions might have on citizens' perceptions of the judiciary, many prosecutors do not leave anything to chance when dealing with street-crimes. For example, when it comes to crime prevention, prosecutors prefer adopting a precautionary measure, even when not strictly necessary, to avoid sending a wrong message to citizens:

Sometimes a criminal case is all over the news and if something happens, then it's like 'the public prosecutor did nothing, the public prosecutor did not adopt a precautionary measure'. You know, this is something you must take into account (Public prosecutor, interview n. 5, April 17<sup>th</sup> 2018)

Public prosecutors' openness to social pressure and scrutiny seems to be amplified by instances of 'securitisation' that have arisen in late modern societies (Sarzotti, 2007). Indeed, the widespread level of insecurity and the increased demand for law and order has put extra pressure on public prosecutors, who prefer to adopt a tough-on-crime approach. In Turin, this pressure was particularly visible in cases where police officers arrest someone for behaviour or acts that could benefit from a dismissal of charge because of their leniency.<sup>44</sup> The statute providing for this punishment exemption was introduced in 2015 to curb prison overcrowding, and it enables prosecutors to dismiss a charge for behaviour of trifling significance (Rampioni, 2016). However, the alarming climate surrounding issues of urban security and immigration 'pushes' public prosecutors in a different direction:

You know, sometimes you do not dismiss a case of trifling significance because you get someone arrested...and then it's up to individual prosecutors. But in this sense, the police forces' approach, together with the public prosecutors' approach, are beginning to change. I mean, this repressive apprehension makes it very hard to say to police forces 'what the heck have you done, now I free the

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<sup>43</sup> Notes from interviews n. 1 and n. 2 with public prosecutors.

<sup>44</sup> Art. 131-*bis* of the Italian Criminal Code.

arrested, I ask for a dismissal and I also give you a good telling off' (Public prosecutor, interview n. 11, October 2<sup>nd</sup> 2018)

While observing direct proceedings, I witnessed first-hand that many hearings involved conduct that could have benefitted from dismissal due to its low importance. For example, I refer to foreign defendants without a criminal record charged for dealing in a few grams of marijuana (in some instances, less than a gram!). However, public prosecutors quite often did not opt for dismissing a case. In a few instances, judges later acquitted a defendant because of the relatively low seriousness of his or her conduct. However, it must be remembered that the primary definers (Hall *et al.*, 1978:59) and players in the field of security are precisely the policy and public prosecutors. Because they are naturally more exposed to social pressures, and consequently more open to them, it is not surprising that behaviours considered as trifling by judges was earlier evaluated as serious by public prosecutors. Whereas this law-and-order approach to street crimes is driven in good part by an individual magistrate's ideology, a subject I shall return to in the next chapter, it is nonetheless more common among public prosecutors than judges.

Besides being cautious in dismissing cases, the Public Prosecutor's office prefers to opt for a fast definition of cases related to street-crimes. The use of direct proceedings after the abolition of *Sicurezza Urbana* is certainly part of its legacy. In particular, before the creation of this group, the Public Prosecution Service in Turin made a very limited use of a direct proceeding (Blengino, 2007), a special proceeding that allows cutting out the preliminary phase and bringing the arrested person directly in front of a judge. When *Sicurezza Urbana* was created, the idea behind the working group was indeed to focus attention on street-crimes, but also to do so in the most efficient way possible (Sarzotti, 2007). Hence, the Public Prosecution Service began to use direct proceedings because this allowed them to obtain a first-degree judgment within 48-hours from the arrest. And of course, to never see the dossier again.<sup>45</sup>

Despite the abolition of the group, the use of direct proceedings to deal with street-crimes is still widespread amongst public prosecutors for two reasons. The first reason, which is mentioned by the majority of my respondents, is that, by requesting a direct proceeding, public prosecutors do not have a pending case on their desk, but instead they 'get rid' of a dossier within 48-hours. Given the non-complex character of street-crimes, direct proceedings represent a valuable tool for public prosecutors to cope with their workload, especially with routine cases. Together with the need to streamline court procedures, another reason for using a direct proceeding to deal with street-crimes relates to the nature of this proceeding and its effect on citizens' perception of the justice machine. Some respondents refer clearly to this 'additional' objective:

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<sup>45</sup> It must be recalled that public prosecutors can ask for direct proceeding only when someone is arrested red-handed and there is no need to conduct further investigation to support the charge.

Proceedings are held quickly, so it's also a matter of giving a signal to authors of these crimes, but also *in terms of image*, you know, that proceedings are actually held (Public prosecutor, interview n. 9, June 13<sup>th</sup> 2018, emphasis added)

What is the *ratio* of a direct proceeding? It is a proceeding from the fascist era, the purpose of which was not the efficiency of the justice system, but *the image* of the justice system. It's as though I'm going to show you that as soon as you misbehave, you receive immediately an answer from the justice system (Public prosecutor, interview n. 11, October 2<sup>nd</sup> 2018, emphasis added)

From the narratives above it becomes clear how for public prosecutors the image of their office that is given to the outside world is important. In particular, the fact that a direct proceeding provides a prompt answer to citizens' demand for security represents an incentive to rely on this procedural statute. Public prosecutors' responsiveness to social pressure in Turin is quite unique in the national panorama and, as mentioned earlier, it can be associated with its *local* legal culture (Sarzotti, 2007). The attempt to break the traditional separation between the judiciary and civil society was at the root of the creation of *Sicurezza Urbana* and its legacy is still present. Due to this inherent openness and responsive reaction to public concerns, prosecutors value citizens' needs and opinions to the point that their operation is influenced by them.

Existing research (Giles *et al.*, 2008; Epstein and Martin, 2010; Clark, 2011) provides two explanations why the judiciary might consider including the will of the people in their decisions. The first reason relates to re-election and electorate connection, whereas the second relates to legitimacy (Nelson, 2014). With regard to the first reason, it has been noted that elected magistrates consider public opinion in their decisions, and moreover that they weigh the electoral impact of such decision (Pritchard, 1986; Haddad *et al.*, 2008). Of course, this is something limited to countries where the judiciary is elected, and it is of no great importance for the Italian context. With regard to the second reason, it has been argued that magistrates 'attempt to follow public opinion to bolster their legitimacy even though they will never face the electorate' (Nelson, 2014:119). In 2017, 63% of Italians declared having little or no faith in the judiciary; besides, 72% of Italians perceived that not all magistrates were independent, but that some of them pursued their own political interests.<sup>46</sup> These numbers have considerably increased since 2001, when the distrust in the judiciary was 13 percentage points lower, showing that the relationship between citizens and the judiciary is deteriorating, with the former questioning the operation of the latter. As mentioned in the previous paragraph, the creation of *Sicurezza Urbana* was also driven by the necessity of considering citizens' needs and, by doing so, of restoring credibility and trust in the judiciary.

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<sup>46</sup> <http://www.swg.it/politicapp?id=qbig>



In this regard, it might be argued that prosecutors' responsiveness to citizens' request in Turin is partially grounded on the need to re-affirm their legitimacy. Along this line, prosecutors' interests in providing an answer to citizens' demands for security might be related to the need to disprove the leitmotif of '*la polizia arresta e la magistratura scarcerava*' (Torrente, 2007:336), that is the police arrest and the judiciary releases, thus, to show citizens that the judiciary is not insensitive to their needs. In chapter five, I will discuss more in-depth this issue by examining how magistrates tend not to override decisions made by police officers, and also not to feed citizens' discontent about the work of the judiciary. This is something unique to the Public Prosecution Service in Turin, precisely because of its local legal culture. In other words, because of this inherent tension towards blurring the traditional boundaries between citizens and the judiciary, prosecutors perceive the need to re-affirm the legitimacy of their operation and gain the trust of *torinesi* through decisions that prioritise, or at least do not neglect, citizens' requests for safety.

### 3.6. Conclusion and discussion

In this chapter I have discussed the impact of social forces on decision-making processes by focusing the analysis on the police and the Public Prosecutor's office as primary *definers* in the field of security (Hall *et al.*, 1978). Increased instances of securitisation in late modern societies have contributed to a governing-through-crime approach (Simon, 2007) to urban security, deemed compromised by the presence of immigrants. This chapter examined the activities of patrolling implemented in 2018 in the city of Turin by the then local chief of police following citizens' demands for security and order. The instrumental and *ad hoc* (Sklansky, 2012) use of administrative and penal instruments by police forces was intended, in Turin as elsewhere in Italy, to 'reclaim' public space for citizens and to ease 'fear of the foreigner' amongst residents.

Whereas it is not possible to enlarge the comparison in an empirically based way other than with the Public Prosecutor's office in Bari, it seems that the Public Prosecution Service in Turin displays a unique level of permeability to external pressures (Sarzotti, 2007). This openness to social inputs is grounded on the peculiar local legal culture in the *torinese* Public Prosecutor's office, which rejects formalism and strives to remove traditional boundaries between citizens and the judiciary. The local openness towards citizens' demands for security was particularly visible in *Sicurezza Urbana*, a working group created to deal with street-crimes, and in the judicial practices maintained after the group was dismantled. I argued that public prosecutors' openness and sensibility to inputs from society might have provided fertile ground to implement judicial practices aimed at re-affirming the legitimacy of the judiciary through judicial practices focused on those crimes that affect society the most.

Analysing the role of social forces in dictating the conduct of the penal state allows for a better comprehension of the occurrence of penal policies and of their degree of enforcement over time. The way the police and the Public Prosecutor's office conceptualise and define priority in the field of security helps in understanding which crimes or criminals, at a particular moment in time,

are deemed a security threat, and hence are worthy of having cultural and economic resources devoted to them. The attention from police forces and public prosecutors towards street crimes committed by immigrants in the city of Turin reflects broader instances of securitisation at a higher level. In particular, processes at work at the local level seem to be the result of national and global factors (Mantovan, 2018:352). A widespread fear of the 'others', together with the state's inability to provide security in a society increasingly globalised and multicultural, has triggered short-sighted penal policies aimed at removing immigrants from public spaces and consequently reassuring citizens. I deliberately used the verb 'reassure' to address the populist and expressive character of these policies. Indeed, as mentioned by some respondents as well, a tough approach to street-crimes meets the limits of legal provisions. In other words, it is not possible through arrests and direct proceedings to prevent small-time offenders from re-offending, even if citizens perceive them as hardened criminals. Expressive policies, as the ones implemented by police forces and public prosecutors, are mainly capable of 'reassuring' citizens that their needs matter to the penal state. However, these policies do not provide citizens with the 'security' they want for two reasons.

The first reason is that the significant involvement of immigrants in street-criminality stems from their lack of legal and economic resources to integrate into society. The great majority of foreign defendants without a valid residence permit, who I encountered, had a criminal history. This is not because, as someone might infer, they are more prone to crime. Rather, this is because foreign defendants, once convicted, are barred from legalizing their position in the national territory. Hence, they risk falling into illegal activities again, insofar as they need to provide themselves with essential goods. By continuing to arrest and put foreign defendants on trial for dealing in few grams of marijuana, the issue is not (and cannot be) solved. The second reason relates to the kind of security citizens ask for. In particular, citizens sometimes complain about improper behaviours, gathering of groups, noises or 'suspicious' activities. Whereas such conducts might disturb the peacefulness of citizens and offend their aesthetic sensibility, they do not fall within the scope of criminal law. Put in simpler terms, these are not crimes. The use of administrative (e.g. inspection of premises, check of papers) and criminal (e.g. arrest for petty crimes) instruments to ensure urban decorum does not solve the real problem here, that is the unfinished process of integration of immigrants within Italian society. The practices implemented in Turin are destined to fail because, as many other repressive and populist policies, they attempt 'to use the criminal justice system to solve a set of entrenched social problems' (Beckett and Herbert, 2009:21)

In the local context under study, it seems that social pressures have percolated judicial practices towards foreign defendants without a valid residence permit. Local residents and citizens' committees, backed up by media, have repeatedly asked for a tough approach to street-crimes and urban incivilities for which immigrants are deemed responsible. The police, on the one hand, have employed a set of criminal and administrative instruments to deliver the expected level of security to local residents. The Public Prosecutor's office, on the other hand, has provided an 'immediate' answer to authors and victims of street crimes, hence delivering the image of a

powerful penal state. Both actors, by prioritising crimes that affect citizens' perception of security at most, have set in motion a legal mechanism through which social inequalities are reproduced. In fact, this policy reinforces the division between 'good citizens' and 'non-citizens' (cf. Anderson, 2013), a subject which will be discussed in the next chapters. Non-members, who 'illegitimately' take over public areas, are removed from the scene, and the city is returned to citizens, the 'only' legitimate owners (Marzorati, 2010).



## **Chapter four**

Non-citizens and the crime problem: assessing the impact of institutional context and legal culture on the use of discretion



#### 4.1. Introduction

In Italy, non-citizens are over-represented not only in the prison population, but also among the population of citizens who are charged of some criminal offence. In 2010, immigrants accounted for almost 23% of all criminal charges, although they represented only 6-7% of the resident population, with the rate rising to 7-8% if one includes the estimated quota of undocumented immigrants (Pinotti *et. al*, 2013:54). As stressed in the previous chapter, the high number of immigrants funnelled into the criminal justice system might be accounted for by the role of the police in ‘supervising’ zealously certain social groups, and so contributing to processes of secondary criminalisation. According to Motomura (2011), the power to arrest is one of extreme importance in channelling immigrants into the criminal justice system. Less well known, however, is what happens once non-citizens enter in the criminal justice system, and how important are decisions made by other actors in contributing to such over-representation. In Italy, courtroom ethnography that focuses on this group of defendants is extremely rare (for exceptions, cf. Campesi, 2003), and most of the insights into the importance of membership in criminal courts come from research conducted in common law jurisdictions (cf. Eagly, 2013; Aliverti, 2018).

The law and society perspective emphasises the importance of examining legal actors’ decisions in order to understand how the law is enforced and developed in daily practices (Pound, 1910; Feeley, 1992; Calavita, 2010). Courtroom actors spend quite some time in making choices: public prosecutors decide whether to charge a suspect or dismiss a case, judges decide whether to punish or acquit a defendant, defence attorneys decide whether to ask for a trial or accept a plea bargain, and so on. In these instances, courtroom actors use discretion, in so far as they select the actions to be undertaken within an established legal framework (Dworkin, 1977). The rule of law draws the boundaries within which discretion is exercised, thus constraining individual decision-makers’ power and, at the same time, preventing misuses of discretion. As Bingham (2011:73) points out, a corollary of the rule of law is that ‘ministers and public officers at all levels must exercise the powers conferred on them in good faith, fairly, for the purpose for which the powers were conferred, without exceeding the limits of such powers, and not unreasonably’.

The fact that discretion must be constrained by the rule of law does not mean that the former is inherently bad or the latter inherently good. Quite on the contrary, as Davis argues ‘every government has always been a government of laws and men’ (1975:33). Thus, far from being in opposition to one another, ‘both law and discretion are necessary in order for the criminal and other justice systems to function properly and to be just’ (Van der Woude, 2017:12). The breadth of discretion granted to individual decision-makers depends on the nature of the power held and on the recognised authority and ability of an individual to make choices (Mensah, 1998; van der Leun, 2006). Of course, discretion is also context dependent. For example, when investigating prosecutorial discretion, it matters whether public prosecutors exercise their power in a system where the principle of opportunity is in force, or whether judges are bound by mandatory sentencing guidelines. This is because discretion is structured through legal norms, inasmuch as it is first allocated at the legislative and policy levels (van der Woude and van der Leun, 2017).

Hence, for research on discretion it is fundamental to consider the rules involved (Hupe, 2013), and to pay attention to the institutional and procedural context in which discretion is employed (Richman, 2003:755). However, how I understand this context cuts across the purely legal realm and considers the cultural dimension in which discretion is exercised. This broader understanding implies that decision-making is not only modelled by legal rules, but also by how decision-makers understand and internalise these rules. Delving into internal legal culture (Friedman, 1975), particularly the attitudes and ideas of legal professionals, can help explaining why decision-makers act in the way they do.

This chapter intends to place emphasis on the procedural context and the legal culture percolating Italian courtroom actors' decision-making. In particular, I intend to examine how discretion is institutionally allocated and how it is employed in action. How is the Italian judiciary structured? How much discretion do magistrates have? Are they bound to the executive power or do they exercise discretion freely? Garland (2013) terms this dimension as the *internal autonomy* of the penal state, referring to whether courtroom actors can make decisions free from political parties. When assessing the breadth of decision-makers' discretion it is important to understand whether they hold or not the power to shape penal outcomes. The institutional framework in which discretion is exercised, however, does not show the whole picture. Independence from external pressures and adherence to the black-letter-law is not an autonomous value that magistrates follow passively (Jackson, 2012). Rather, it is a 'sociocultural variable' (Nelken, 2009:301), inasmuch as decision-makers internalise this principle differently. Together with accounting for the institutional and procedural context establishing and constraining the use of discretion, then, it is important to consider those 'informal, or sociological forms of checks, structures of thought, and influences, which can promote, contain or undermine judicial independence' (Jackson, 2012:25).

Scholars (Hawkins, 2003; Hupe, 2013; van der Woude, 2017) argue that inquiry into decision-making must address three elements. First, the social and political context in which decisions are made; second, the legal and organisational context setting the boundaries of discretion; and third, individuals' frame for decision-making including personal values and beliefs. Chapter three addressed the social and political context in which this research was conducted. This chapter builds on the previous one and analyses the legal and organisational context in which decision-making takes place and the breadth of individuals' autonomy in the process. In other words, this chapter examines how much discretion courtroom actors have and how they use it. At the same time, I do not intend to limit the analysis to the legal framework only. Rather, my aim is to provide a broader picture and account for all factors, both legal and non-legal, that are capable of shaping the use of discretion. The next paragraph briefly sketches the institutional context in which decision-makers exercise discretion, in particular by examining decision-makers' autonomy vis-à-vis the executive power and the judiciary itself. Next, I move to the empirical material to analyse how discretion is used in action and what are the drivers behind courtroom actors' choices. I first explore judges' decisional autonomy, and I analyse how judges shape penal outcomes towards foreign defendants by attributing different meanings to certain characteristics, such as a lack of residence permit. In this section, I also address how different ideological leanings and judicial



narratives influence the use of discretion. Then, I discuss the principle of mandatory prosecution by examining whether and how public prosecutors have discretion in enforcing the constitutional provision. There follows the conclusion and discussion on the use of discretion, together with the impact of institutional structure and legal culture on enhancing or constraining its use.

## **4.2. Allocating discretion: the Italian institutional framework**

The institutional and procedural context in which decision-makers act is of pivotal importance not only to set the boundaries of discretion, but also to understand underpinning values and ideas driving its use. From this point of view, the Italian case is of certain interest not only because of the significant degree of magistrates' decisional autonomy, but also because of their strong attachment to principles of independence and autonomy. According to Di Federico (2012:357), a leading scholar on the judicial system in Italy, the best way to assess judicial independence is to analyse the government of the judiciary and the extent to which the executive can affect decisions in that area. This is because, as also argued by Garland (2013), if the executive has the power to control recruitment and tenure of the judiciary, it is likely that members of the judiciary will act according to 'what is expected' of them in order not to jeopardise their positions within the organization. Conventionally, Italian scholars (Di Federico, 2002; Guarnieri, 2008; Ferri, 2017) identify two types of judicial independence. The first is external independence, which refers to the degree of independence of the judiciary from the executive, and the second is internal independence, which refers to the degree of independence of individual magistrates from their organisation. Clearly, this second type of independence relates to the more or less hierarchical structure of the judicial organisation itself and to the breadth of discretionary powers granted to individual decision-makers. In this paragraph, I first analyse the structure of the judiciary by examining those legal mechanisms that isolate Italian magistrates from external pressures. After that, I analyse the boundaries in which magistrates exercise discretion, and their relationship with their colleagues. This paragraph is not only meant to provide the reader with a smattering of knowledge about the Italian judiciary, but it also aims at emphasizing how the structural characteristics of a system influence the use of discretion (cf. Biland and Steinmetz, 2017).

### *4.2.1. External independence: a deliverance gained from the executive*

In Italy, judicial independence has undergone a long cultural and historical process that remarkably contributed to the great significance that this value holds nowadays for the judiciary. The judicial system in 1941 strongly manifested the political vision of fascism, which intended to concentrate powers in the hands of the executive. Back then, two main principles underpinned the judicial system. First, the hierarchical structure, with the Court of Cassation – composed by conservative judges attuned to the executive – was at the top of the pyramid. Second, the *eterogoverno*, meaning that the judiciary was not a self-governing body, but rather the Minister of Justice held powers to direct public prosecutors, supervise judges and impose sanctions (Ferri, 2017). After the fall of fascism, the enactment of the Italian Constitution in 1948 marked the first

step towards judicial independence. In particular, article 101 and article 104 establish, respectively, that ‘judges are subject only to the law’ and that ‘the judiciary represents an autonomous institution independent of any other power’.

The creation of judicial councils to ensure independence from the executive is quite common in, but not limited to, countries that have previously experienced dictatorships, for example Spain, Portugal and some Latin American countries (Di Federico, 2002). Article 105 of the Italian Constitution states that responsibility for decisions related to magistrates’ recruitment, appointment, transfer, promotion and disciplinary measures is in the hands of the judicial council. The Italian Superior Council of the Magistracy, the *Consiglio Superiore della Magistratura* (hereafter: CSM) came into operation in 1959. As ‘the bulwark of judicial independence from all other powers’ (Di Federico, 2012:386), the CSM has full powers of decision not only in recruiting and evaluating magistrates, but also in monitoring the functioning of Italian courts. A word of clarification: in this chapter, when using the term *magistrates*, I refer to judges and public prosecutors. The reason for doing so is that in Italy it is hard to distinguish between the two figures institutionally, as career shift between the bench and prosecution service and back is possible. This is also because, contrary to other European judicial councils, such as the *Raad voor de Rechtspraak* in the Netherlands and the *Conseil supérieur de la magistrature* in France, the CSM has absolute decisional power with regard to both standing and sitting magistrates (Di Federico, 2002).

Another element of divergence compared to other European judicial realities is represented by the extremely weak position of the Minister of Justice in the government of the judiciary. The Constitution confers two main powers on the Minister of Justice. Article 107 states that the Minister of Justice has the authority to start disciplinary action against magistrates, and article 110 states that the Minister is responsible for the organisation and the functioning of the judicial system. The first power gives the Minister the possibility to take action against the conduct of individual magistrates when deemed opportune, hence opening up the possibility to exercise a certain influence on individual magistrates. However, the Minister has rarely exercised this power. According to Di Federico (2002:120-121), this self-imposed limitation has its roots in two main concerns. The first is that the Minister fears that his or her actions might be perceived as interference in the judiciary. This is because, after decades under the grip of the executive, Italian magistrates are strongly attached to self-governance and independence, thus lining up together against any kind of ‘illegitimate’ interference. The second concern is that, in order to start disciplinary action, the Minister must rely on the support work of the ministry to collect information and investigate conduct. However, the support team of the Minister is composed of magistrates subject to the authority of the CSM only. This means that, for magistrates who perform administrative tasks at the Ministry of Justice, it is quite difficult to investigate their own peers and conduct activities not welcomed by their organisation. In other words, they are more concerned about being liked by their colleagues than by the Minister of Justice. Compared to other European countries, where the powers of the Minister of Justice are seen as an integral part

of a system of checks and balances, the Italian Minister of Justice has limited formal powers, which are in practice very limited (Di Federico, 2002:124).

#### 4.2.2. *Internal independence: setting the boundaries of discretion*

From the previous paragraph it emerges that the Italian judiciary is well isolated from the executive power, and this is because every decision related to the judiciary is the exclusive responsibility of the CSM, a judicial council predominantly composed of magistrates elected by their colleagues. I now move to examine the magistrates' degree of discretion, and their relationship with their colleagues. As mentioned in the introduction, the importance of examining the black-letter-law comes from the fact that it is the latter that structures and constrains the use of discretion (Hupe, 2013).

The Italian Public Prosecution Service is governed by the rule of mandatory prosecution, meaning that individual prosecutors must prosecute every crime that comes to their knowledge, without the possibility of making an assessment about the opportunity of doing so. Nevertheless, the constitutional provision must face reality: it is impossible for public prosecutors to prosecute everything. As Di Federico argues, 'prosecution in Italy is *de facto* just as discretionary as in other countries (such as Germany and France) and perhaps more' (1998:387). Research conducted between prosecution services in Bologna, Ferrara, Padova, Torino, Firenze, Catania (Nelken and Zanier, 2006) as well as between Torino and Bari (Sarzotti, 2007) revealed the existence of different prosecutorial practices across the country. These differences are explained on the grounds of distinctive styles of leadership between chief prosecutors and heterogeneous organisational routines. In other words, the research claimed that different approaches in prosecutorial decision-making are best understood as multiple and various ways of structuring discretion, by considering the capacity of the office, the type of crime and the local legal culture percolating the organisation (Zanier, 2009; Nelken, 2013).

The role of chief prosecutors in shaping prosecutorial discretion comes from the circumstances in which, according to legislative decree n. 106/2006, chief prosecutors can determine the organisational criteria of the service. Such criteria must be drafted in compliance with the general guidelines provided for by the CSM, which holds the power of direction and control over all prosecutorial services. Thus, the margins of discretion are not as wide as one might think, since chief prosecutors face the risk of receiving negative evaluation from the CSM when not fulfilling its expectations (cf. Di Federico, 2013). With regard to the principle of mandatory prosecution, legislative decree n. 106/2006 establishes that the only holder of criminal prosecution is the chief prosecutor, who has the task of assigning cases to lower ranking prosecutors. It must be noted that, to safeguard internal independence of individual prosecutors, once a case has been assigned, the assignee has full power in deciding whether and how to deal with that case.<sup>47</sup> Thus, whereas

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<sup>47</sup> <https://www.csm.it/documents/21768/112811/Decreto+Legislativo+20+febbraio+2006+n.+106/3a1fad33-c632-42e7-a996-1b9e963594b>

the Public Prosecution Service is a hierarchic organisation, this hierarchy is known as *attenuata* (Borraccetti, 2008), that is ‘softened’, because it is a balance between individual independence and the proper functioning of the office. The relationship between the leadership of the chief prosecutor and prosecutorial discretion will be discussed further in the empirical paragraph.

Contrary to public prosecutors, judges are not embedded within a hierarchical structure. Generally, they are grouped together in sections, with each section dealing with certain crimes (e.g., economic crimes). Each section has a president, but his or her task is limited to organise the work of the section, without the possibility of interfering with individual magistrates’ decisional autonomy. In principle, Italian judges enjoy a ‘bounded discretion’. Article 132 of the criminal code states that judges have discretion in deciding penalties within the limits provided for by law, and that they must state the reasons to justify the use of discretion. There are no mandatory or advisory guidelines to follow. The main factors that judges must take into account when deciding a penalty are stated in article 133 of the criminal code, namely the seriousness of an offence and an offender’s propensity to commit crimes. Following these two criteria, judges determine type and length of penalties within a minimum and maximum range established for each crime. However, these ranges are wide and not entirely ‘fixed’ because judges can make upward and downward departures by a third on the basis of aggravating and mitigating circumstances. In this respect, judges have ample room for manoeuvre in applying penalties depending on their ‘flexibility’ in granting mitigating circumstances.

As Hawkins argues ‘discretion is heavily implicated in the use of rules: interpretative behaviour is involved in making sense of rules, and in making choices about the relevance and use of rules’ (1992:13). Besides enjoying wide discretion, Italian magistrates’ cultural attachment to independence encourages them to make ample use of decisional autonomy, a reality I document in the next sections. This means that decisions about how to proceed in a particular case might vary remarkably amongst members of the same court. Whereas it is not possible to talk about well-defined decisional ‘trends’, individual magistrates embrace certain mainstream ideological leanings. In particular, different ideologies within the judiciary are visible in the factions of the National Judiciary Association, *Associazione Nazionale Magistrati* (hereafter: ANM), of which almost all magistrates are members. Generally, each magistrate joins the faction closer to his or her idea of justice and of magistrates’ role. The ANM holds internal elections, where rivals from different factions attempt to earn a seat on the committee and influence the ideological views of the association. There are left-wing factions, based on a progressive cultural background that supports underprivileged citizens, right-wing factions that assert the apolitical nature of the judiciary and share conservative values, and moderate factions in between (Ceron and Mainenti, 2015:227). Together with magistrates’ professionalism and the structure of the court, research shows that decision-making is affected by magistrates’ ideological stances (cf. Sunstein, 2006; Beim and Kastellec, 2014), even in countries where judges are independent from political institutions, such as Italy (cf. Ceron and Mainenti, 2015) and Spain (cf. Garoupa *et al.*, 2012). The empirical material points in this direction. In the next section, I intend to explore how the use of discretion is eventually driven by institutional, organisational and ideological factors as well.

### 4.3. Judges' decisional autonomy: a socio-cultural approach

Although there is some agreement amongst scholars that a defendant's legal status matters to judges when determining a penalty, there is much debate about *how* it matters (Hartley and Tillyer, 2012; Wermink *et al.*, 2015; Wu and D'Angelo, 2014; Light, 2016; Orrick *et al.*, 2016). This is because, in both common and civil law jurisdictions, the impact of a defendant's personal characteristics on judges' decision-making is varied, and often there are no 'firm' points in the law. This situation contributes to creating a multi-faceted portrayal in which the same condition or characteristic can be judged differently, according to 'past experience, stereotypes, prejudices, and highly particularized views of present stimuli' (Clegg and Dunkerley, 1980:265) of the sitting magistrate. Besides, structural characteristics of a system can enhance or constrain the use of discretion. For example, in judicial systems with advisory sentencing guidelines, inter-judges sentencing disparity seems to increase compared to systems where mandatory sentencing guidelines are in force (Scott, 2010). In Italy, the lack of sentencing guidelines and the high degree of decisional autonomy contribute to a situation of uncertainty about sentencing outcomes (Pardolesi and Pino, 2017), where eventually what really matters is *who* applies the law.

Some judges do not care at all about a foreign defendant's legal status, while others ask many questions about it. There is now on trial a foreign defendant with a regular residence permit who just admitted committing the crime. 'How come? *You are a regular*, how it is possible?' I heard the judge asking (Field notes, Hearing room 59, January 2018, emphasis added).

In the court of Turin, judges hold very different attitudes when it comes to evaluate a foreign defendant's personal situation, and in particular his (less often her) irregular status. This information, as confirmed by several respondents, is not so relevant when it comes to determining the penalty to impose. Instead, a defendant's lack of residence permit has an impact on judges when they have to assess whether to impose a precautionary measure, namely a restriction on a defendant's personal freedom.<sup>48</sup> I broach the subject related to the uses and rationales of precautionary measures in chapter six. Here, it is important to mention that a precautionary measure (i.e. pre-trial detention; reporting to the police), especially in cases of street crimes, is generally imposed to prevent the risk of reoffending. To impose a precautionary measure, judges use the seriousness of the offence and prior record as initial punishment benchmarks, but after that they 'make situational attributions about defendants' character and risk based on more subtle, subjective, decision-making schema' (Johnson *et al.*, 2008:745). One of my respondents refers to how 'customised' these assessments are:

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<sup>48</sup> Article 274 of the code of criminal procedure.

Assessing the risk of re-offending and determining penalties are the moments in which the subjectivity of the judge, the culture of the judge, play a major role, and have the greatest influence. And this discretion is very hard to control, to check rationally, because if you look at article 133 of the criminal code and article 274 of the code of criminal procedure, you can see that the elements listed are all gradable. There, who you are begins to matter. And you can force yourself to make it right or wrong, but there is a component that, regardless of how hard the legislator tries, is emotional and irrational (Judge, interview n. 5, February 22<sup>nd</sup> 2018).

Discretion is allocated at the legislative and policy levels, inasmuch as it is up to the legislator to establish the criteria judges have to weigh when making decisions (cf. van der Woude and van der Leun, 2017). However, as the respondent observes, ‘regardless of how hard the legislator tries’, discretion cannot be totally constrained by the rule of law since judges make choices about the relevance and use of legal provisions (cf. Hawkins, 1992). The problem is that whereas a certain amount of discretion can bring positive benefits and contribute to justice (Weber, 2003), an excessive flexibility in interpreting legal categories can contribute to injustice by privileging certain categories of defendants over others (van der Woude and van der Leun, 2017). With regard to precautionary measures, the law generally establishes that judges must evaluate the risk of re-offending from ‘the personality of the offender, drawn from behaviour or actions or prior record’.<sup>49</sup> Prior records are normally enlisted in a defendant’s personal dossier, and it is quite uncontested that they represent an indicator of a defendant’s propensity to crime. On the contrary, risk assessment becomes more ‘customised’ (and liable to be contested) when an assessment of a defendant’s personality is more generally based on ‘behaviour’ or ‘actions’. Which manners or types of conduct are deemed dangerous? The point here relates to how judges ascribe meanings to certain defendants’ characteristics, especially when sentencing categories of defendants at the social and economic fringes of mainstream society.

There is a clear, yet complex, relationship between the courts and the outside, judicial decision-making and social norms (Lin, 1999). This is because a court is embedded within a certain social environment from which it receives cultural stimulus. Along this line, it is inevitable that a court and its members are affected by narratives that circulate within society. As Lin argues, ‘courts are comprised of judges who, while aspiring to impartiality, are nonetheless members of society. By virtue of this membership, judges undoubtedly absorb some amount of the rhetoric that mainstream culture espouses, which may be incorporated, whether consciously or unconsciously, into their analyses and opinions’ (1999:746-747). As chapter three illustrates, in Turin, there is a dominant societal narrative of danger related to immigrants. The presence of immigrants in urban spaces is depicted as a threat to safety and peace, and local residents have begun to bring pressure to bear on local institutions to solve the problems. The police and the Public

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<sup>49</sup> *Ibidem*.

Prosecution Service have been quite responsive to citizens' requests by adopting a tough-on-crime approach to irregular immigrants, which eventually contributes to reproducing social inequalities and enhancing exclusionary citizenship. In the light of the above, it should not surprise the reader to recognise some of the dominant narratives that circulate within the *torinese* society in the following excerpts.

From the first day I started observing direct proceedings, I was surprised by how honorary assistant prosecutors address a foreign defendant without a valid residence permit, that is by the term '*clandestino*'. When a foreign defendant is on trial, the prosecution does not use terms like '*imputato*' or '*arrestato*', defendant or arrested person, which are commonly used in the rare cases of an Italian defendant on trial. Rather, foreign defendants without a valid residence permit are addressed as '*clandestini*'. Together with being an inappropriate term to use within official settings, the term '*clandestino*' is generally used, in common parlance, to identify the most problematic group of immigrants, those who are dedicated to committing crimes (Solano, 2011). By using the term '*clandestino*' to address a foreign defendant without a valid residence permit, the prosecution already casts a bad light on his (less often her) personality. In fact, this way of referring to a foreign defendant without a valid residence permit is intended to deliver a precise message to judges, that is that a defendant, because of his legal status, or more likely the lack thereof, is inclined to commit crimes. While interviewing judges, I did not lose the chance to ask how they interpret a defendant's status of '*clandestino*':

The fact of being *clandestino* speaks like 'you are in this condition, and I make a prediction that you will keep committing crimes because it is through these crimes that you find the money to sustain yourself'. That's the point (Judge, interview n. 1, February 2<sup>nd</sup> 2018)

I don't like to think in terms of '*clandestino*, with no fixed abode, therefore a potential criminal'. I don't like it, but there is some truth in it (Judge, interview n. 4, February 7<sup>th</sup> 2018)

Being *clandestino*, in the collective imagination, well...you are *clandestino*, so you are going to commit crimes. Objectively, maybe a bit instinctively, for human nature, it is obvious that this condition outlines a negative imagine (Judge, interview n. 10, April 13<sup>th</sup> 2018)

From these excerpts we can see how the condition of *clandestinità* generally triggers a stricter assessment on the need to impose a precautionary measure. The dominant societal narrative of irregular immigrants destined for a life of poverty and crime has somehow seeped into the court (Campesi, 2003; Lousley, 2020). The power of this narrative was visible in defence attorneys' attempts to challenge the relationship between a lack of residence permit and greater perceived

dangerousness (cf. Quassoli and Chiodi, 2000; Campesi, 2003; Light, 2017). A defence attorney argued that his client works illegally (sic!) to convince the judge that his client does not necessarily have to commit crimes to provide for himself. Another attorney argued that his client, although residing illegally in the national territory (sic!), has not committed a crime in the last fifteen years. Another attorney claimed that his client has worked in a factory for more than ten years before being fired, so therefore he has always been a 'hard worker'. These counter-narratives are used to convince judges of the good character of foreign defendants without a valid residence permit, of their 'non-membership' of the most problematic segment of the immigrant population. In other words, defence attorneys attempt to break the equation that *clandestino* is equal to criminal by emphasizing certain elements, such as present or past work experience or length of residence. This is because in the social representation of irregular immigrants, irregularity is synonymous of criminality (Campesi, 2003). The commonplace view about irregular immigrants as bearers of crime and disorder, far from being an exclusive domain of the media, public opinion, and political discourses, has found its space in formal control institutions (Melossi, 2003).

If the condition of *clandestinità* is surrounded by narratives of danger, being regular is not necessarily interpreted as synonymous of 'goodness' by all judges. On the contrary, for some judges 'being regular' is an indicator of a sort of incapacity to abide by the rules. At times, foreign defendants with a valid residence permit are deemed more blameworthy because they disregard the rules of the country hosting them (Light, 2017). In other words, criminal offences committed by 'entitled guests' carry a greater level of disapproval, a greater disqualification (Sayad, 2004:282). According to a judge, the reason behind is that one must be very reckless not to play by the rules of the hosting country, especially considering how hard it is to get a residence permit. The following quotes show how different narratives in the court can coexist, eventually leading to diverse evaluations of a foreign defendant's status:

In Turin, judicial decisions about precautionary measures are motivated like this: 'serious offence, committed by an irregular immigrant, so there is the risk that he will commit crimes again due to his social conditions'. And so, detention is the answer. Other decisions are motivated like this: 'serious offence, and even more serious because committed by a regular immigrant, so he is really unscrupulous'. And so, detention is the answer. And of course, in front of this reasoning, that is not really reasoning, defence attorneys are disoriented because they say 'well, tell us what do you want'. The answer is always detention, irrespective of the regular or irregular status (Judge, interview n. 5, February 22<sup>nd</sup> 2018)

The residence permit is a double-edged sword because judges interpret it differently. Some judges argue 'you have one more chance compared to those who lack a residence permit and, in spite of this, you commit crimes rather than getting busy and go finding a job'. And some judges write this in their



decisions about precautionary measures, not even rarely...they argue that the defendant must be really unscrupulous, or anyhow that he does not care at all about the rules, because he has a residence permit and yet he commits crimes. As a defence attorney, I am very careful about the judge assigned to my cases (Defence attorney, interview n. 8, November 12<sup>th</sup> 2018)

It is quite interesting to note that both narratives, the one of dangerousness and the one of recklessness, eventually lead to the same outcome, meaning an attribution of 'extra' blameworthiness stemming from a defendant's foreignness. From observation and interviews it emerges that, in the court of Turin, the 'real' mainstream narrative is not that much about which foreign defendant is deserving of leniency and which is not. Rather, there is a divisive rhetoric that places 'them' against 'us', regardless of the different immigration trajectories and legal positions of 'them' (Vertovec, 2007). In other words, multiple narratives coexist under a single cultural umbrella that replicates social inequalities and enhances exclusionary membership. It must be noted that narratives of otherness are not equally shared by all the judges who I observed and interviewed. Rather, they are more frequent among judges who belong to the conservative faction of the judiciary. This group of judges tends to consider street-crime, especially immigrants' involvement in drug trafficking, as something on which the judiciary must act firmly. Some magistrates shared openly their ideological leanings with me, while others did not, but I could sense their ideological stances from the narratives they embrace. For example, a judge told me she gets quite annoyed when an honorary assistant prosecutor addresses a foreign defendant as *clandestino* to influence negatively her assessment about the risk of re-offending. At the same time, she also claimed that this type of argument functions quite well with certain judges, although she does not listen to it. In a way, she distances herself from those judges who attribute threat to the condition of *clandestinità*.

Whereas different approaches and narratives relating to foreign defendants stem from judges' ideological leanings, they are eventually the product of internal legal culture (Friedman, 1975). In particular, when I asked judges about intra-judges sentencing disparities, many stressed how important it is for them being independent, by which they mean making choices according to personal outlook. Quite interestingly, judges do not conceptualise independence as the capacity to make decisions free from political pressures or private interests. Rather, they conceptualise independence as 'loose' discretion, meaning they can make decisions by embracing categories and meanings they value the most. Hence, whereas the amount of discretion that Italian judges have is the product of institutional and organisational context, how they use it relates to internal legal culture (Friedman, 1975). It could be said that it is the legal culture of a judicial system that determines how judges conceptualise decisional autonomy and relationship with colleagues. For example, Biland and Steinmetz claim that French judges tend to exercise little discretion in decision-making because discretion is 'often seen as a threat of arbitrary decision making' (2017:314). When analysing the impact of legal culture on judicial practices, Light (2017:41) argues that German judges emphasise corporatist self-understanding and internal consistency

(Albrecht, 2013), hence minimising inter-judges sentencing disparities, while American judges embrace a philosophy allowing for greater individual expression in decision-making (cf. Epstein *et al.*, 2013). In this regard, Italian judges appear to be more like their colleagues from common law jurisdictions. By conceptualising discretion as the key condition for independence and autonomy, internal consistency in Italy is not as important as in other civil law jurisdictions.

Another telling example of how judges interpret legal categories flexibly relates to cases when a defendant has declared different identities whenever stopped by the police. In Italy, this conduct is a crime punishable with a prison sentence of up to six years.<sup>50</sup> Generally, immigrants, especially the irregular component, are the most common ‘perpetrators’ of this offence. When I asked judges how they interpret this element, foreign defendants who provided aliases are portrayed differently, ranging from ‘dangerous fugitives’ or ‘reckless criminals’ to ‘poor devils’. In this regard, the coexistence of multiple and antagonist narratives reflects more clearly differences in judges’ ideological views and their membership of different factions within the ANM (cf. Ceron and Mainenti, 2015). Judges who belong to the most conservative faction, as well as some belonging to the moderate faction, believe that aliases indicate that a defendant has ‘something to hide’. In other terms, they interpret aliases as a defendant’s attempt to weasel out of social control (Campesi, 2003). Of course, this interpretation has an impact on risk assessment, especially when it comes to imposing a precautionary measure. For example, a judge said that aliases inhibit the infliction of a precautionary measure based on trust, for example reporting to the police. The reason behind this is that it is impossible to trust someone who attempts to escape justice and has already shown no respect for the authority of the hosting country. Other judges, mainly those who belong to the most progressive faction of the judiciary, consider aliases as a harmless matter. In greater detail, they believe that the habit of providing false identities has nothing to do with a defendant’s danger or disrespect for the authority. Rather, aliases are considered an act of self-protection stemming from immigrants’ vulnerable legal position and disadvantaged living conditions. In other words, progressive judges believe that irregular immigrants provide false identities to the police when stopped to prevent identification and potential expulsion from the country.

What emerges from the interviews is that a high level of flexibility in interpreting legal provisions might lead to penalise or benefit certain groups of defendants over others (cf. van der Woude and van der Leun, 2017). At times, foreign defendants without a valid residence permit are considered high-risk because of their disadvantaged socio-economic conditions. At other times, foreign defendants with a valid residence permit are considered high-risk because of their recklessness towards social norms. If one wants to understand why Italian judges *make* such different evaluations, the answer lies in the procedural and institutional context in which they work (Richman, 2003). Judges enjoy substantial discretion which provides them with the power of interpreting and applying legal provisions as it best suits their personal outlook, values and beliefs. Along the same line, if one wants to understand why Italian judges not only make, but

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<sup>50</sup> Article 495 of the criminal code.

also *are inclined to* make different choices, the answer then lies in the legal culture percolating their professional organisation (Friedman, 1975). And this is true also for public prosecutors. Even when a magistrate joins an ideological faction within the ANM, no one can compel him or her to make decisions according to that ideology. The following excerpt illustrates quite clearly how Italian magistrates think about sentencing disparity:

*Tot capita, tot sententiae*, the Romans always say. The richness of our justice system is that each magistrate is independent. One can consider a conduct to be serious and another can consider it to be not. Different assessments respect the independence of each magistrate (Public prosecutor, interview n. 7, May 8<sup>th</sup> 2018)

The fact that magistrates can and do evaluate the seriousness of a conduct in different ways has an enormous impact not only on how individual cases are handled (i.e., prosecuting or dismissing, convicting or acquitting), but also on the criminal justice system as a whole, since uncertainty and disparity are the masters. At the same time, almost all magistrates I interviewed do not find it surprising to adopt decisions that are in contrast with the ones of their colleagues, even those belonging to the same faction. In fact, judges conceptualise ‘independence’ as being free to interpret legal provisions in the way that suits their outlook and idea of justice at best (Sklansky, 2012). From their viewpoint, independence is equal to ‘loose’ discretion. This *forma mentis* should not be underestimated when exploring the uses and meanings of discretion. Italian magistrates’ internal legal culture, professionalism, membership of certain ideological factions and relationship with colleagues, all explain why it is widely accepted, and even appreciated, that each decision-maker makes choices according to personal values and beliefs. Contrary to their colleagues from other civil law systems (cf. Hörnle, 2013), Italian judges do not aim for internal consistency, and neither do they care if similar cases are handled differently. Rather, they cherish individual independence to the point that inter-judges sentencing disparity is the ‘price’ to pay for making autonomous and independent decisions.

#### **4.4. Do-it-yourself prosecution: *garantisti* vs. *efficientisti***

When talking about judicial decision-making, it must be recalled that whereas the term ‘magistrates’ refers to both judges and public prosecutors, the two actors hold different discretionary powers that consequently give rise to different issues. This is because judges’ discretion relates to interpretation and application of the law, while public prosecutors’ discretion has to do with how the prosecution service is organised and according to which priorities (Borgna and Maddalena, 2003). Talking about prosecutorial priorities might sound odd in the Italian legal context since article 112 of the Constitution establishes that the Public Prosecutor’s office is bound to prosecute all crimes. And this is true. However, it is also true that Italy experiences a

profound detachment, an ‘ungluing’ between the black-letter-law and its enforcement. And it is precisely in these circumstances that lies the added value of conducting courtroom ethnography in this country. The divergence between the law in-the-books and in-action can only be captured by observing daily practices and talking with those who interpret and implement legal provisions. In fact, from the ethnography it emerges that, far from being constrained by the law, the use of discretion in prosecutorial decisions is ‘widespread, significant and ineluctable’ (Fabri, 1997:183, my translation).

Because of its highly symbolic value in the Italian legal culture, the majority of public prosecutors are not willing to ‘get rid’ of the principle of mandatory prosecution, albeit admitting the impossibility of upholding the constitutional provision (Nelken and Zanier, 2006). A respondent has even defined the principle of mandatory prosecution as ‘sacrosanct’. At the same time, ‘*ad impossibilia nemo tenetur*’, no one is expected to do impossible things. Hence, because of their inability to handle all *notitiae criminis* that land on their desks, individual prosecutors are forced to apply their own priority criteria. In other words, they establish by and for themselves which crimes need to be dealt with first (Peri, 2010). Generally, prosecutors give priority to serious crimes, those harming the community at most, and dedicate less attention to crimes which are not likely to make it to trial because of delays in investigations or because they are close to becoming statute barred (Nelken, 2013). Obviously, these evaluations give individual prosecutors ample room for manoeuvre through a sort of *discrezionalità fai da te* (Nelken and Zanier, 2006:151), do-it-yourself discretion, in that the outcomes of these evaluations are highly subjective and personalised.

To deal with a growing caseload, some chief prosecutors set priority criteria for their organisation, thus reducing the discretion of individual prosecutors and, at the same time, ensuring uniformity in decision-making within the prosecution service. The Public Prosecutor’s office in Turin stands for its historic attempts to deal efficiently with caseloads, in particular by establishing guidelines about the ‘order’ in which crimes should be handled (Peri, 2010). The strong leadership of chief prosecutors that have followed in the last decades in Turin has contributed to making the *torinese* Public Prosecutor’s office known, at times even criticised, for its attempt to reconcile the principle of mandatory prosecution with the limited human resources available to the prosecution service.

The famous *circolare Zagrebelsky*, the first document setting priority criteria, was issued in 1990 by the then chief prosecutor of Turin. The enactment of the document has caused much discussion, in public opinion too, for two reasons. First, it represented an unequivocal statement about the failure of the principle of mandatory prosecution ‘in action’ and, second, it gave to chief prosecutors the power of establishing priority criteria by themselves (Verzelloni, 2014:816). This was, of course, something quite revolutionary, especially for a judicial system profoundly attached to the principle of mandatory prosecution. In short, the *circolare* created ‘fast tracks’ for certain crimes, meaning that certain crimes had priority over others. Despite criticisms, chief prosecutors in other cities followed this approach, and it was also substantially approved by the CSM (Peri, 2010; Verzelloni, 2014). The judicial council ‘saved’ the *circolare Zagrebelsky* from its alleged

contrast with the principle of mandatory prosecution by arguing that establishing priority criteria is not about convenience, but rather about good organisation, considering the limited resources of prosecution services (Galantini, 2019).

Another stark stance in relation to the principle of mandatory prosecution is represented by the *circolare Maddalena*, issued in 2007 by the then chief prosecutor of Turin. The document was issued after the Parliament approved a general pardon. The chief prosecutor Maddalena stated that it made no sense to handle crimes that were eventually covered by the pardon (Peri, 2010). This was one of the main differences with the *circolare Zagrebelsky*. Whereas the latter looked at the future by setting fast tracks to prioritise the handling of certain crimes, the *circolare Maddalena* looked at the past by inviting public prosecutors to ‘generously’ dismiss cases, meaning to set aside certain crimes (Galantini, 2019). Like the *circolare Zagrebelsky*, the *circolare Maddalena* was approved by the CSM on the grounds that it fostered the efficiency of the service and, at the same time, avoided fortuity and unevenness in prosecutorial decisions within the same office (Verzelloni, 2014).

What emerges from the deliberations of the CSM is that if chief prosecutors decide *not to* issue priority criteria, then discretion in prosecutorial decisions is left in the hands of individual prosecutors, enhancing a sort of do-it-yourself discretion (Nelken and Zanier, 2006:151). And this is exactly the situation I found in the *torinese* Public Prosecutor’s office when I started conducting my research at the beginning of 2018. The then chief prosecutor believed that setting priority criteria would violate the principle of mandatory prosecution. Hence, public prosecutors are invited to deal with all *notitiae criminis*.<sup>51</sup> Together with abolishing priority criteria, the then chief prosecutor dismantled the group *Sicurezza Urbana*. As discussed in detail in the previous chapter, the group was created in 2001 to deal efficiently with street-crimes (Sarzotti, 2007). Many prosecutors mentioned that the abolition of *Sicurezza Urbana* leads to an enhancement of individual prosecutors’ discretion in dealing with arrests. The situation that there is no longer a pool of public prosecutors dealing with street-crimes specifically causes a lack of uniformity in decision-making:

We have very different sensibilities. For example, with regard to drug trafficking, the group *Sicurezza Urbana* guaranteed more uniformity in decision-making. Now, everyone follows his or her own orientation [...]. Sometimes talking between each other and discussing decisions might be useful, especially with a view to equal justice, to avoid that I make certain decisions and my colleagues make others. There is certain heterogeneity here, not only between public prosecutors, but also between judges. This is a problem. Because we lack firm points, there is a drift towards discretion. I

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<sup>51</sup> [http://www.procura.torino.it/altrifile/criteri\\_org\\_2015.pdf](http://www.procura.torino.it/altrifile/criteri_org_2015.pdf)

stand by this fully. Each of us – I mean judges know well prosecutors and vice versa – can bet on our colleagues’ orientation and know exactly how the trial will go (Public prosecutor, interview n. 6, April 23<sup>rd</sup> 2018)

In the passage above, I believe my respondent did not mention drug trafficking as an example casually. And I say so because drug trafficking is not only the crime for which irregular immigrants are arrested most frequently, but also the crime for which I observed the greatest variety of orientations between standing magistrates. In particular, I refer to decisions about the *opportunity* to bring to trial someone arrested for dealing in a few grams, at times not even one gram (sic!), of marijuana. As documented in the previous chapter, when this research was conducted, there was a substantial increase in arrest rate in Turin, and the majority of these arrests related to drug trafficking. This is something that has not gone unnoticed amongst public prosecutors, who hold very different approaches to the phenomenon:

You research is on a highly topical subject because we magistrates are now dealing with this problem. We feel more responsible, we try to pay greater attention to how we deal with arrests. Once someone has been arrested, each of us takes the responsibility for his or her decisions. So, if the police have arrested someone who should not stay in jail, I take responsibility for the release. Unfortunately, and this is inevitable, we have different sensibilities: some consider the supply of a single dose of hashish to be a serious crime, while others do not [...] There should be more attention for this, this is a highly topical subject now. And yes, some colleagues decide in one way and some in another (Public prosecutor, interview n. 16, November 8<sup>th</sup> 2018)

Different sensibilities. There is a margin of discretion in applying the law. Besides, it is convenient to send to trial someone who has stolen a sausage [for a petty offence]. If you ask for a direct proceeding, you get rid of a dossier within 48 hours. However, you have also taken someone’s freedom away. I am personally convinced that, even if the law allows so, taking someone’s freedom away for stealing a sausage is not right, is not good. Some argue ‘well, it is just one night in the cells and, the day after, we hold the trial and the case is closed’. To me, a night in the cells for stealing a sausage is unacceptable, but the law leaves space for both decisions. Unfortunately, sometimes we have a trial against someone who stole a sausage without having a criminal record...this is something I strongly disagree with, but it is not forbidden [...] I know that many colleagues apply a standard criterion, ‘clean sweep, clean *Valentino* [the park known for drug dealing], I don’t care and so on’. But this

is to deny our role; we must apply the law to concrete cases (Public prosecutor, interview n. 17, November 9<sup>th</sup> 2018)

From the passages above there emerges a certain degree of inconsistency in prosecutorial decisions with regard to how to handle the increased number of arrests for petty offences. Interviews and observation show that, in the absence of guidelines, public prosecutors make highly discretionary assessments in deciding the *an* and *quomodo* of prosecution. Two main orientations are visible, which resemble public prosecutors' ideological leanings, especially how they interpret their roles within the judicial system. Prosecutors who belong to the progressive faction of the judiciary define themselves as *garantisti* and interpret their role as 'guardians of the law' (Montana, 2009). Hence, this group of prosecutors tends to react against practices not in line with such a standpoint by enhancing defendants' rights, especially when it comes to vulnerable groups such as the poor and immigrants. Conversely, prosecutors who belong to the conservative faction of the judiciary play the role of 'crime fighters' (Montana and Nelken, 2011), as they believe their task is to fight criminality efficiently, by bringing the greatest number of offenders to trial. In their activities, they tend not to overlook at street-crimes and their decisions are often aligned with the ones made by the police. The relationship between the police and magistrates is a reality documented in the next chapter. I call this group of prosecutors '*efficientist*' because they rely on fast procedures to 'speed up' the justice machine.

In a way, there is a tension in prosecutorial decisions between deference to the rule of law, in particular protection of a defendant's rights, and the need to provide a prompt answer to a certain kind of criminality, *even* if this entails by-passing somehow legal guarantees. Certainly, this decision-making schema is also connected to the routine character of direct proceedings and to the low level of offence and complexity of crimes involved. As Montana rightly observes, the routine arrangements of some criminal procedures weaken public prosecutors' power to activate the process of 'legal normalization', defined as 'patterns of official activity that provide protection to the defendant's rights' (2012:117-119). In other terms, the limited time available, together with the non-complexity and trivial nature of crimes involved, lead public prosecutors to be less attentive to procedural guarantees and defendants' rights. This is not something limited to Italy only. In fact, as observed for example in the United States (Mileski, 1971) and France (Biland and Steinmez, 2017), courtroom actors, when feeling under pressure from heavy caseloads, tend to process cases they consider routine and unworthy of attention quickly.

The lack of guidelines about how to deal with arrests for petty crimes leaves an enormous discretionary power to individual prosecutors about 'what to do', sometimes even opening up space for prosecutorial decisions on the fringes of the law. According to article 121 of the rules governing the implementation of the code of criminal procedure, public prosecutors must release the arrested person when they consider it inappropriate to ask for a precautionary measure. In other words, public prosecutors cannot ask for a direct proceeding, and consequently take someone's freedom away until the trial is held, unless they intend to ask the judge for a

precautionary measure. Notwithstanding the black-letter-law, some prosecutors ask for a precautionary measure with the sole purpose of holding a trial within 48-hours, even if they do not believe that a defendant is dangerous:

I always ask for a precautionary measure when I ask for a direct proceeding. I must do so, the law obliges me [...] I might also ask for validation of arrest and release the arrested person until the trial. I can do that, but I make my life harder...I tell you, honestly, also for reason of efficiency, sometimes I ask for a direct proceeding and to do so, I ask for the mildest precautionary measure, like reporting to the police (Public prosecutor, interview n. 14, October 10<sup>th</sup> 2018)

Sometimes, there is a first-time offender...in that case, I ask for a direct proceeding. It is my mistake. For drug trafficking, the arrested is placed in a cell and not jail, the trial is held within 48-hours, so honestly the right to freedom is curtailed for a very short time. And so I send the arrested person to a direct proceeding and I ask for a mild measure, like reporting to the police [...] *Asking for a precautionary measure is the instrument to ask for a direct proceeding*, otherwise I should release the arrested person until the trial. But the justice machine has already started running, so it's better to keep it running (Public prosecutor, interview n. 15, October 12<sup>th</sup> 2018, emphasis added)

Other prosecutors, albeit a minority, in complete defiance of the rule of law, ask for a direct proceeding without even requesting a precautionary measure. This practice seems to have its roots in the need to handle the accused rapidly:

Drug trafficking is a crime, so yes, I ask for a direct proceeding. Then, if the arrested is a first-time offender, I can think about a direct proceeding without a precautionary measure [...] Besides, you must consider that these people often have no fixed abode, so asking for a direct proceeding becomes the instrument to hold a trial. Otherwise, where I am going to find this person again? These are needs of efficiency for the service (Public prosecutor, interview n. 11, October 2<sup>nd</sup>, 2018)

In the end, it's just 48-hours in a cell, all in all a crime has been committed, I can also ask for a direct proceeding without a precautionary measure, do you see? [...] When someone is arrested, I mean, what do we do? Do we start releasing everyone? Besides, you should consider that people arrested are often foreigners, with no fixed abode...it's also to give a prompt answer, to



have a trial within 48-hours, to have a judge who questions the arrested person and delivers a judgment. This makes sense to me. But to release the arrested person until the trial is held, if and when, against a phantom about whom I have absolutely no information...no, this does not seem a smart choice to me (Public prosecutor, interview n. 8, May 31<sup>st</sup> 2018)

What emerges from the interviews is that some prosecutors ask for a direct proceeding, even in absence of the requirements to do so, only to be able to close a case within 48-hours. For some, this choice seems appropriate for reasons of efficiency with respect to foreign defendants, meaning that the lack of identity document or residential address makes it impossible to identify and trace the arrested person in the national territory once released. Public prosecutors, then, prefer to restrain someone's freedom rather than taking the risk of holding a trial against a 'phantom'. The variety in prosecutorial decisions reflects as well the different ideological orientations amongst magistrates. Some prosecutors, mainly those belonging to the progressive faction of the judiciary, prioritise defendants' rights above all. Hence, they do not hesitate to criticise openly their colleagues when the latter use a direct proceeding simply to get rid of a dossier. On the contrary, prosecutors who belong to the conservative faction of the judiciary claim to be more concerned with the efficiency of the justice system. Regardless of whether it is possible to find a balance between the two interests at stake, it is clear that prosecutorial practices are the result of decisions made at the policy level (van der Woude and van der Leun, 2017). The lack of administrative guidelines leaves to individual prosecutors the discretion to decide whether to prosecute or dismiss a petty crime, to hold a trial within 48-hours or release the arrested person. The result is that similar cases are dismissed today and brought to trial tomorrow, at the expense of legal certainty.

It should not be underestimated how prosecutorial discretion is influenced 'by socio-political considerations about the definition of the crime problem' (Montana, 2009:483). In other terms, how individual prosecutors understand the crime problem has an impact on how they assess the seriousness of an offence. Whereas the law provides certain criteria to guide the evaluation of the seriousness of an offence (i.e., the severity of the punishment), these criteria can be disregarded (cf. Montana, 2009), and even interpreted differently. Without administrative guidelines, each prosecutor establishes for him or herself which crime is serious enough to call for a prompt answer. In this regard, prosecutorial decisions in the case of drug trafficking reflect most clearly different ideological leanings. In particular, public prosecutors' membership of a faction of the ANM tells us something about how individual prosecutors conceptualise the crime problem. In particular, prosecutors with conservative leanings consider drug trafficking to be as 'an alarming phenomenon in Turin', so they believe they must act severely and immediately upon it. Conversely, prosecutors who belong to the progressive faction of the judiciary consider drug trafficking as 'a normal crime in medium-large cities'. In other words, they do not believe it is necessary to focus too much energy and attention on a crime they do not consider as a priority, but as any other crimes. As a consequence, they take a strong stance against intensive policing actions by activating processes of 'legal normalisation' (Montana, 2012:117). This group of public prosecutors not only avoid

bringing cases of trivial significance to trial, but they also attempt to persuade police officers from performing unnecessary arrests. This is something I discuss more in detail in the next chapter. To conclude, how public prosecutors conceptualise the crime problem leads to different prosecutorial practices, which are based on meanings that individual decision-makers ascribe to certain offences and offenders.

#### 4.5. Conclusion and discussion

This chapter has examined how magistrates use discretion when prosecuting and sentencing foreign defendants, together with structural and cultural factors driving their decisions. From data collected in the *torinese* court and the Public Prosecutor's office emerge how the use of discretion depends largely on the organisational and institutional setting in which decisions are made, and on the internal legal culture permeating judicial activities. In particular, judges interpret socio-legal categories in the way that best suits individual ideological leanings and ideas of justice (Sklansky, 2012). This is possible because of the good insulation from the executive power and the broad discretion institutionally granted to them. These circumstances are documented by the multiple, and at times contradictory, meanings that judges attribute to foreign defendants' characteristics (i.e., lack of residence permit or aliases) when making risk assessments. Additionally, how judges exercise discretion is also largely influenced by internal legal culture. Indeed, judges cherish independence and autonomy to the point that internal consistency, far from being seen as a beneficial objective, is deemed a 'downside' that must be accepted to ensure autonomy.

Like judges, public prosecutors, despite the principle of mandatory prosecution, make choices according to their personal outlook. In particular, standing magistrates prioritise crimes to prosecute according to their own definition of the crime problem (Montana, 2009), which strongly relates to their ideological leanings within the judicial organisation. Making priorities is somehow inevitable due to heavy caseloads and limited resources available at the Public Prosecutor's office. However, individual prosecutors' discretion turns out to be greater when no directions on how to make decisions are provided for at the policy level (cf. van der Woude and van der Leun, 2017). After a past of 'managerial' leadership (Sarzotti, 2007), when this research was conducted, the *torinese* Public Prosecutor's office had no priority criteria about how to handle *notitiae criminis*. The lack of administrative guidelines increases discretionary powers in the hands of individual prosecutors, at the expense of internal consistency. This situation is visible in how public prosecutors deal with the increased number of arrests. In particular, there is a tension between *garantisti*, namely prosecutors who prioritise defendants' rights, and *efficientisti*, namely prosecutors who give greater attention to the overall functioning of the office.

An inquiry into discretion cannot avoid paying attention to the institutional and procedural context in which discretion is exercised (Richman, 2003). In fact, discretion is first allocated at the legislative and policy levels (van der Woude and van der Leun, 2017), and for understanding

how courtroom actors use discretion it is necessary to consider how much discretion they have and in which institutional setting they work. In this regard, it is interesting to note that the way in which discretion is allocated inevitably affects how it is exercised. According to some respondents, prosecutorial discretion in the *torinese* Public Prosecutor's office is more widespread than in the past because of the lack of administrative guidelines. In fact, the Public Prosecutor's office, being a hierarchical office, can display a more or less strong system of power relationships. Consequently, prosecutorial practices change greatly depending on whether chief prosecutors decide to retain discretion by setting criteria for priorities or whether they decide to 'spread it out' amongst individual decision-makers. In other words, and in line with Nelken and Zanier (2006), I submit that the leadership of each prosecution service can restrict or allow for greater discretionary powers in the hands of individual prosecutors. This means that internal consistency would be enhanced when individual prosecutors are subject to administrative guidelines about *how* decisions should be taken, whereas this would not be the case in prosecution services where decisions are left to individual decision-makers. In Italy, both models are legitimate and possible, and penal outcomes will naturally be affected on the basis of the strength of the hierarchical model in place.

As I stressed many times in this chapter, the institutional setting in which discretion is exercised represents only half of the story. An important way for understanding the use of discretion is represented by how courtroom actors internalise the meanings of discretion and how they act upon it within the institutional setting in which they work. In Italy, internal legal culture has a great impact on the *de facto* use of discretion, and this is because Italian magistrates somehow tend to overlap the concept of 'independence' with 'loose discretion'. A recurring theme during interviews was that each magistrate has his or her own 'orientation' about how justice should be administered, and that different applications of the law, far from being an obstacle to equal justice, represent 'evidence' of how independent they are. The meaning Italian magistrates attribute to independence and autonomy is much broader than the significance these principles have on the black-letter-law. The independence of the judiciary relates to the circumstances where the judiciary is not subject to improper influence from other powers or private interests. Italian magistrates relate independence to the idea that they can make decisions according to personal ideas and values, at the expense of equal justice.

Because magistrates conceptualise discretion as something stemming from their independence, any attempt to restrict discretion is likely to be perceived as an attack on autonomy and independence. In this regard, what the Italian case shows is how judicial independence is indeed 'a sociocultural variable' (Nelken, 2009:301) and, as such, its meaning and scope vary remarkably across judicial systems (Di Federico, 2012:396). Hence, to really understand the use and meanings of discretion, it is pivotal to analyse the institutional context in which discretion is exercised not only in its legal dimension, but also in its cultural significance. This is because both dimensions are capable of restricting or enhancing the use of discretion in a particular context. In the *torinese* context (and this is likely to be true at the national level), how individual magistrates interpret their role and power enhances the use of discretion, inasmuch as it is institutionally,

professionally and culturally accepted amongst standing and sitting magistrates to interpret the law as it pleases them.

According to Garland (2013:499) ‘if the legislature lacks autonomy and it is relatively responsive to electorate pressures, then penal state agencies will tend to be weakly autonomous’. In other words, there should be a convergence between internal and external autonomy. The *torinese* case stands as an exception. Whereas courtroom actors in Turin are well insulated from improper influence from agencies *inside* the penal state, they are on the contrary vulnerable to social and media pressures from *outside*, as argued in chapter three. The divergence between internal and external autonomy finds an explanation in the institutional framework. In this regard, it can be argued that magistrates, precisely because of their relatively broad autonomy and independence, can shape penal outcomes according to their own ideological leanings and preferences. In other words, magistrates can decide whether to ‘accommodate’ citizens’ request. The real problem here is that this enormous amount of discretion is not matched by an effective mechanism of check and balance. The CSM, the judicial council vested with the task of supervising individual magistrates, is elected by those who should be controlled (cf. Di Federico, 2013). In other terms, those who are audited elect the auditor. It is extremely doubtful that, given the current institutional framework, a magistrate would ever be held accountable for how he or she makes use of discretion in cases where such use does not meet legitimate purposes. The next chapter adds another piece to this puzzle by examining patterns of interactions between courtroom actors. In particular, the chapter investigates how the use of discretion, or better the non-use as we shall see, is influenced by informal dynamics taking place inside the court.

## **Chapter five**

Spotting the discretion that matters: an inquiry into courtroom dynamics at the front door of the judicial chain



## 5.1. Introduction

In the introduction of this book, I stressed the importance of adopting a holistic approach when studying decision-making in order to better understand the uses and meanings of discretion. Adopting such an approach implies investigating how various actors within the judicial chain act and interact between each other, and how decisions made by one actor affect and shape decisions made by another (Hawkins, 1992; Hupe, 2013). The reason for analysing decision-making with an eye on different judicial actors is that it is hard to find during the process where the ‘discretion that matters’ is located. Van der Woude (2017:16) refers to ‘a chain of discretion’ when highlighting that discretion is dispersed among a series of actors involved in decision-making. Hence, it is necessary to adopt a more systemic or holistic approach to discretion and focus the analysis on the interaction of factors and actors along the judicial chain. This is because what it is interpreted as ‘individual decision-making’ is more often the product of a series of decisions taken by multiple actors who all play a role in restricting and influencing the handling and outcome of individual cases.

For example, if one wants to understand the occurrence of certain judicial practices, it would be a mistake to pay attention solely to judges’ decision-making and ignore the role played by public prosecutors as gatekeepers in selecting cases (Jacoby and Ratledge, 2016), or the different impact of court-appointed or private attorneys on penal outcomes (Stover and Eckart, 1975; Champion, 1989; Hoffman *et al.*, 2005; Eldred, 2013). In fact, each judicial decision should be conceptualised as an inter-dependent link of a unified decision chain, in which the ‘output’ of one actor represents the ‘input’ for another (Hawkins, 1992; Hupe, 2013; van der Woude, 2017). The concept of a courtroom workgroup (Eisenstein and Jacob, 1977) is often used to help explaining patterns of decisions and dynamics within criminal courts, especially in common law systems. According to this concept, variations in outcomes and procedures across criminal courts are largely explained by different relationships and norms that key players, namely judges, public prosecutors and defence attorneys, develop within a particular local context and the objectives they set to achieve (Eisenstein *et al.*, 1988). The best methodological approach to study the relationship between different courtroom actors is deemed to be long-term ethnographic research based on multiple methods. This methodology ‘has tended to produce the most convincing qualitative accounts of courtroom dynamics’ (Young, 2013:223). This is demonstrated by the empirical material I collected in the court of Turin, which provides rich insights into how discretion is allocated through the judicial chain.

Whereas police officers are not ‘key players’ in the courtroom, it is undeniable how their activities eventually shape penal outcomes since they are in control of ‘case intake’ (McIntyre, 1975:210). As Tieger argues ‘the power to define what shall be criminal is effectively delegated to the police’ (1971:718). In other terms, police officers, through their activities of crime prevention and control, decide which unlawful conducts should be brought to public prosecutors’ attention and which not. This discretionary power is of a certain interest in Italy, a country characterised by some acceptance of deviance (Melossi, 2003:382). Here, police officers are not only in charge of

case intake in the criminal justice system, but they also hold the power to establish the distinction between ‘illegal’ and ‘tolerated’ conduct (Palidda, 2017:241). This selective enforcement clearly has an impact on judicial decision-making because public prosecutors first, and judges later, receive the ‘output’ of police activities and translate them into ‘input’. Here, the question is: are courtroom actors passive recipients of policing ‘outcomes’? And if not, how and to what extent do they react to them? This question is of pivotal importance because it helps in understanding where the discretion that matters is located. In other words, who holds the power to punish? And moreover, how and to what extent do courtroom actors compete for controlling such power?

Garland (2013:499) refers to this third dimension of the penal state as ‘control of the power to punish’. This dimension looks at how penal power is distributed across the judicial decision-making process and how different actors compete for control. Of course, the balance of power varies not only across jurisdictions, but also over time within the same jurisdiction. For example, in Italy, magistrates are vested with the task of exercising judicial control over policing outcomes (i.e., assessing whether an arrest was legitimate), the latter being the result of directives from the Minister of Interior. If at a particular moment in time, the Minister of Interior opts for a ‘tough-on-crime’ approach towards certain offences or offenders, magistrates might decide to tighten up judicial scrutiny, hence gaining control over penal outcomes. In this regard, Nelken argues that the rise of punitiveness in Italy is offset by ‘a uniquely strong corps of self-governing and independent judges and prosecutors, whose priorities are often different from those of both politicians and the public’ (2009:301).

The example above shows how it is of vital importance to contextualise the uses and meanings of discretion within a particular socio-legal setting (Hupe, 2013) *and* in a particular moment in time. Italian magistrates are called upon for the task of exercising judicial supervision in a delicate and demanding time. From the early 2000s, the Italian government enacted harsher immigration policies through so-called ‘security packages’ (Corda, 2016), and increased the minimum sentences for crimes traditionally committed by the poor, such as burglary, mugging and robbery (Gallo, 2019). Since then, the situation has not changed much, and maybe has reached its peak during the election campaign of March 2018, when the leader of the right-wing political party *Lega* Matteo Salvini deployed populist discourses on immigration to gain electorate votes and succeeded. The newly elected Minister of the Interior, besides introducing more stringent requirements to obtain residence permits,<sup>52</sup> promised to increase the number of police officers on patrol to improve security in the country (Bove *et al.*, 2019).

In the period when this research was conducted, Matteo Salvini was the Minister of Interior. As the police receive directives from political bodies – and at the top of the pyramid there is the Minister of the Interior – it is not surprising that I witnessed an increase in arrest rates, especially of irregular immigrants, in that particular moment. The question here is whether the judiciary reacted to it by increasing judicial supervision and enhancing the rule of law. Chapter three

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<sup>52</sup> Cf. Decree n. 132/2018, known as Security and Immigration Decree.



analysed the social and political context in which this research took place, by highlighting the role played by social forces in shaping the actions of police officers and public prosecutors. Chapter four dealt with the legal and organisational setting, by investigating the breadth of magistrates' autonomy and the role of an individuals' decisional frame in exercising discretion. This chapter examines the interactions between courtroom actors, and their relationship with the police when it comes to monitor decisions of case intake in the judicial system. In particular, it unravels whether and how courtroom actors compete to control the power to punish, and how internal dynamics and relationships affect the use, or better the non-use as we shall see, of discretion.

In the next paragraph, I provide a brief account of the relationship between the police – as actor at 'the front door' of the judicial system – and magistrates, in order to outline the institutional and procedural context in which this relationship takes place. This paragraph is also meant to stress the importance of adopting a systemic approach to decision-making in order to identify the various 'sites' of discretion and the intertwinement between different actors and forces along the decision-making chain. Then, I intend to examine different patterns of interactions between decision-makers. First, I focus on judges and their power to scrutinise and validate arrests made by the police. In this paragraph, attention is given to whether and how judges fulfil this task 'in-action'. Afterwards, I analyse the relationship between public prosecutors and police officers, by looking at the first moment of interaction between the two actors. Here, I examine how this interaction develops unique features based on different actors' ideological leanings, viewpoints and professional cultures. The last paragraph contains the conclusion and discussion.

## **5.2. At the front door of the judicial decision-making chain**

Reitz (1998:391) defines sentencing outcomes as 'the product of cumulative decisions by multiple actors'. Each decision taken along the judicial chain is part of a broader network of relationships between decision-makers (Emerson, 1983; van der Woude, 2017; van der Woude and van der Leun, 2017). Courtroom actors inter-act with and re-act to each other by individually contributing to the final product of sentencing. The request of a public prosecutor affects a judge's deliberation, but the opposite is also true. A judge's decision during the trial might shape as well how a public prosecutor decides to proceed with that case. An esteemed defence attorney might persuade a judge to lower the penalty or a public prosecutor to bargain for the most favourable conditions for his or her client. In all these instances, courtroom actors' capacity to shape penal outcomes comes from the circumstances where judicial decision-making is intrinsically characterised by a constant interaction between different actors, forces and interests at stake. As Eisenstein and Jacob argue 'outcomes of the felony disposition process are not the result of a singular effort by judges, prosecutors, or defence counsel. Outcomes result from interactions among courtroom members *and others*. They not only interact with one another but also became dependant on one another' (1977:294, emphasis added).

The *others* to whom I want to bring attention here are police officers. The police are not officially considered as courtroom actors, and in fact they play a marginal role in courtroom dynamics.<sup>53</sup> However, it would be a mistake to ignore the importance of their decisions for the judicial system. In fact, whereas law enforcement decisions are made outside the court, the output of these decisions represents the ‘input’ for all subsequent judicial decisions. As Motomura (2011:1837) argues, ‘the discretion to arrest has been the discretion that matters’ in channelling non-citizens into the criminal and immigration system. This is why it is important to consider the role and tasks of police officers, and moreover their relationship with key courtroom actors. In Italy, the police are directly responsible to the Minister of the Interior and perform a whole range of tasks, such as control of the territory, identity checks, maintenance of public order, immigration control and administrative activities as well (Barbagli and Sartori, 2004). Some police activities precede the exercise of judicial power, as they take place in the pre-trial phase, such as discovering crimes, conducting investigations, securing evidence, performing acts useful to the prosecution and limiting the consequences of a crime (Montana, 2009:316). In this paragraph, I wish to discuss the power of police officers to arrest someone, and how this power affects judicial outcomes. For the sake of clarity, it must be mentioned that I did not observe directly police officers performing their task, in particular carrying out an arrest. Additionally, in Italy there is scarce empirical research on the police (for exceptions, see Palidda, 2000; Della Porta and Reiter, 2004) and relatively little information on how police forces are organised and perform their tasks (Barbagli and Sartori, 2004). However, existing research offers some interesting insights to analyse the role of police forces and their relationship with courtroom actors.

Since the 1990s, the Italian police have prioritised the fight against insecurity, understood as street crimes, terrorism, the presence of Roma and irregular immigrations (Palidda, 2015:61), with practices and discourses of ‘governing through crime’ (Simon, 2007). It must be mentioned that the Italian police have always dedicated a great amount of time and energy to controlling the territory, especially to identity checks. 36% of people in Italy are stopped at least once per year for an identity check, a percentage much higher than in other western countries<sup>54</sup> (cf. Barbagli and Sartori, 2004:167). Emphasis on security and control of the national territory gave rise to zero-tolerance policing. This approach consequently produced an increase in arrest rates and in the number of detainees, especially amongst the immigrant population (Palidda, 2015). More police officers on the streets create the potential for more arrests, and zero tolerance policies generally encourage arrests for minor offences (Zeidman, 2015:316). This is the situation I found in the city of Turin when I started conducting my research. From 2014 to 2018, there was an increase in arrests of 618, with two thirds of the people arrested being non-Italians.<sup>55</sup> According to Palidda ‘such over-representation can simply be explained by the police’s doggedness in

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<sup>53</sup> While observing direct proceedings, I encountered daily police officers because they escorted people arrested to the hearing room. They almost never interacted with ‘official’ courtroom actors.

<sup>54</sup> For example, stop for identity check happens only in 12% of cases in the UK and only in 11% of cases in the USA. One of the greatest activities of identification from police officers is visible in Russia, where 40.5% of population are stopped once per year for identity checks. Source: Barbagli and Sartori, 2004: 167-169.

<sup>55</sup> Data from the Public Prosecution Service in the city of Turin, years 2014-2018.

pursuing foreigners, i.e. the passage from discretion to discrimination to arbitrariness and racial criminalization' (2015:68).

A police officer's decision to arrest someone is seldom 'final', inasmuch as in all democratic countries judicial authorities monitor and oversee the conduct of the police. At the same time, although subject to judicial review, the decision to arrest someone is the sole responsibility of the police. The Italian legal system does not differ from other countries in this regard. Article 380 of the code of criminal procedure establishes that arresting someone is an act of competence of the police only, *but* this act is subject to judicial control. In particular, magistrates must assess not only whether an arrest is legitimate, but also whether an arrested person must remain *in vinculis*. This task is fundamental for the proper functioning of the judicial system: failure or lack of attention in supervising police officers' decisions can lead to 'extensive and uncontrolled police powers that, accordingly, can undermine both the rights of the defendant and of the victim' (Montana, 2009:310). Judicial supervision, then, is a fundamental part of a system of checks and balances, in which judicial power can identify potential misuses of discretion from enforcement agents and react against arbitrariness.

The decision to arrest someone is regulated and constrained by the rule of law, which limits police officers' discretion. In particular, articles 380 and 381 of the code of criminal procedure gives police officers the power to arrest anyone caught in the act of committing a crime. However, an important distinction must be made between the two legal provisions. Article 380 establishes that an arrest is *mandatory* if someone is caught committing an offence punishable with a minimum penalty of no less than five years. In these cases, police officers lack discretion to decide whether to arrest the person caught red-handed: they must do so, and judicial supervision in these cases is very limited. On the contrary, article 381 gives police officers ample room for manoeuvre. In particular, the article establishes that an arrest is *optional* when someone is caught committing an offence punishable with a maximum penalty of more than three years. In these cases, it is up to police officers to decide whether to carry out an arrest. However, the law drives police officers' discretion, by establishing that the police must carry out the arrest when 1) the unlawful conduct is serious or, 2) when the offender is deemed dangerous, something inferred from his or her personality or factual circumstances. In this chapter, I pay attention to *optional* arrests only. This is because, in the case of such arrests, courtroom actors are called to scrutinise police actions and ascertain whether the police have used their discretion well.

Judicial supervision is not simply part of a system of checks and balances through which the judiciary monitors decisions of law enforcement authorities. The interaction between judicial and administrative authorities is of great interest for understanding decision-making processes because it sheds light on what happens when a decision to arrest enters into the criminal justice system. Whether it is undeniable that decisions made by the police greatly influence the work of the judiciary, the opposite is also true. A quite telling example of how judicial supervision can counterbalance, and sometimes even *restrain*, police discretion is what happened in the city of Turin with the enforcement of article 495 of the criminal code. The article sets out the crime of

false identity statements, establishing that anyone who makes false statements about his or her identity, status or quality to a public officer commits a criminal offence punished with a term of imprisonment of up to three years. As mentioned in the previous chapter, immigrants without a valid residence permit are often the ‘typical offender’ with respect to this crime, given the lack of documents and their propensity to try to wriggle out of police control for avoiding administrative detention and deportation. In 2008, with law n. 125, the government made the harsh step of raising the maximum penalty for false identity statements to *six years* allowing, then, police officers to carry out optional arrests for this offence.<sup>56</sup> According to some respondents, the police did not miss the chance offered by the new formulation of the article:

In a certain period, we had many arrests in Turin – and this was a phenomenon visible only in Piedmont, only in Turin – for the crime established in article 495, that is false identity statements [...] For years the police arrested for this crime. Then, after a battle of some of us judges, we did not validate arrests, and now things are changed. It is years since I last saw this kind of arrests (Judge, interview n. 4, February 7<sup>th</sup> 2018)

In this excerpt, the interviewee refers to ‘a battle’ undertaken by some judges against increased arrests for the crime provided for by article 495. Judges’ reaction was triggered by a change in policing outcomes, a change that apparently did not match magistrates’ outlooks. In fact, judges and public prosecutors took a stance against police officers’ decisions by critically scrutinising their legitimacy. How *torinesi* magistrates pursued their battle was by placing greater emphasis on the black-letter-law. A public prosecutor recalls how they dealt with the situation:

We overcame that moment thanks to strong judicial supervision over those arrests, we made clear that they were not always legitimate. For example, I meet an irregular immigrant, I have no idea of who he is, I stop him, and he gives me a name and surname different from the ones that he gave me three months ago. In this case, we said to the police that you cannot arrest him because he has no documents, and so you are not sure whether the name and surname that he is giving you today are false. Maybe the ones that he gave you last time were false. And if you don’t know this, then you don’t have the flagrancy of the crime [...] You cannot arrest him red-handed because you don’t know if you caught him while committing the crime. So, we overcame all those arrests in this way, we said that to the police, we started not to validate arrests and eventually the police

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<sup>56</sup> According to article 381 of the code of criminal procedure, optional arrests can be carried out if the maximum penalty provided for by law for an offence is higher than three years.

stopped arrests for this crime (Public prosecutor, interview n. 16, November 11<sup>th</sup> 2018)

Judicial supervision can effectively influence law enforcement through patterns of ‘legal normalisation’ (Montana, 2012:117), judicial processes that enhance the protection of accused persons’ rights. The fact that some magistrates began to evaluate more critically the ‘flagrancy’ of the crime (i.e. the transgressor must be caught in the act of committing a crime for being arrested by the police) gave them the possibility of closing the ‘privileged’ front door of the criminal justice system, namely direct proceedings. In fact, by inhibiting the arrest, the crime of false identity statements cannot be tried through a direct proceeding since the latter requires the presence of the arrested person. Consequently, the person accused is charged without arrest, meaning that he or she is released until the ‘regular’ trial is held – of course, if the crime does not become, in the meanwhile, statute-barred (Campesi, 2003). The example I have just discussed shows how it is possible for magistrates to contain the flow of *notitiae criminis* into the criminal justice system, and so gaining control over the power to punish.

At the beginning of 2018, *torinesi* magistrates had to deal (again) with an increased flow of *notitiae criminis*. The main target of this policing was still represented by immigrants, but this time arrests related mainly to drug trafficking. As addressed in chapter three, the rise in arrest rates is attributable to the extraordinary high-impact activities of patrolling implemented by the new chief of police. In the next paragraphs, I intend to analyse whether and how judicial actors monitor the police, and moreover how different actors interact with each other. The dynamics between different actors will be analysed ‘in action’ by relying on observation and semi-structured interviews. The main focus of the next paragraphs will not be on what courtroom actors should do, but rather on what they *actually* do. Whether I believe it is important to address the black-letter-law, thus describing the room for manoeuvre available to different decision-makers, it is the law-in-action that eventually provides the most interesting insights (Feeley, 1992; Calavita, 2010). And this is particularly true in the country where this research was conducted. As Montana, acutely, observes ‘as always, if one wants to understand Italy, it is necessary to look beyond the formal legal rules’ (2009:317).

### 5.3. Monitoring the police: judges’ failure in promoting justice

Article 391 of the Italian code of criminal procedure establishes that if the police carry out an arrest legitimately, judges must proceed to its validation. The legal provision gives judges the task, or better the duty, to ascertain whether an arrest is legitimate or not. As mentioned in the previous paragraph, judges’ assessment of police conduct is somehow limited in the case of *mandatory* arrests. In these cases, as police officers have limited discretion, the same is true for judges. In fact, in the greatest majority of mandatory arrests, judges have bounded discretion. In other words, they must simply validate arrests. Exceptions to this rule are restricted and laid down by

law. For example, judges can decide not to validate an arrest for aggravated burglary – which is normally mandatory – with hypotheses of ‘mild nature’<sup>57</sup> (the textbook example is the old man who steals a piece of cheese from a shop by breaking the package). On the contrary, in cases of *optional* arrests, judges are called to exercise a stricter control over the conduct of the police since they must assess whether ‘police officers have made *good use* of their discretionary powers’.

Judges’ assessment over police decisions in the case of optional arrests revolves around the same criteria that police officers must take into account to carry out an arrest.<sup>58</sup> In particular, to establish the legitimacy of the police conduct, judges must assess whether the arrest was justified either by the seriousness of the conduct (i.e. theft of ten euros would hardly fulfil this criteria) *or* by the degree of danger presented by an offender (i.e. no criminal record makes it harder to claim potential danger). The two criteria are not cumulative. The presence of only one criterion is deemed enough to establish that police officers have made good use of discretion. But what is considered *good use* of discretion? There is no universal definition or list of best practices to exercise discretion. However, it can be stated that good use of discretion, in line with the rule of law, occurs when decision-makers exercise their powers for the purpose for which these powers were conferred and without abuses (Bingham, 2011). Hence, police officers, when using discretion well, should not cross the boundaries of the law or pursue other objectives or interests than those established by the law.

The police and the judiciary are distinct organisations, whose evaluations and objectives are not always compatible (McIntyre, 1975). It can happen, and it does happen, that police officers consider as ‘serious’ a conduct deemed of trivial significance by judges. In fact, administrative authorities’ assessment does not always ‘match’ that of judicial authorities (Campesi, 2003). Disagreement occurs especially when police officers adopt policies much more focused on maintaining order than on crime control, for example by increasingly relying on arrests for unlawful behaviours of a mild nature (Zeidman, 2005). Judges, especially those more sensitive to the protection of the rights of defendants, might condemn misuses of discretion and react against hyper-reliance on criminal law. For example, in Italy, in times of increased surveillance, some judges protested about the rising number of unjustified arrests carried out by the police (Palidda, 2000). At the same time, the discretion held by individual police officers should be framed within broader dynamics at the policy level (Provine and Doty, 2011; Sklansky, 2012; van der Woude and van der Leun, 2017). In fact, it must be observed that the police are an organisation with a strong hierarchical structure. This means that individual police officers act in line with directives from their superiors. If the top of the pyramid decides to translate citizens’ demands for security in harsher, targeted and selective policing operations against ‘the enemy of the moment’, individual police officers are ‘forced’ to act in this direction (Palidda, 2017:247). Eventually, directives ‘from the top’ can be counter-balanced by magistrates who decide to comply strictly with legal guarantees (Palidda, 2015), either by not validating illegitimate arrests, meaning arrests

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<sup>57</sup> Article 380 of the code of criminal procedure, subsection 2(e).

<sup>58</sup> Article 381 of the code of criminal procedure, subsection 4.

for which the law provides no justification, or by acquitting defendants. This is exactly what happened in Turin with the crime of false identity statement, when arrests for this crime were rescinded by magistrates' decisions not to validate them. This is because judges have the power to monitor and 'put a break' on certain administrative policies, especially those not in compliance with principles of fair and equal justice. However, the question is whether judges are willing to use such a power.

The fact that an authority is vested with a certain power does not always mean that this power will be used. Discretion is not only a positive power, but also a negative one, inasmuch as decision-makers have the power not to enforce the law. This power is no less dangerous because 'discretionary power not to enforce is the power to discriminate' (Dubber and Hörnle, 2014:160). While observing direct proceedings, I could not avoid noticing how judges were generally reluctant when it came to assess the legitimacy of police officers' decisions. To provide a rough estimation, in more than two-thirds of cases involving first-time foreign offenders arrested for dealing in few grams of drugs, judges validated these arrests. This implies that, in these cases, judges did not ascertain whether legal requirements, namely the seriousness of an offence or an offender's potential threat, were met. The interviews confirmed the lack of in-depth scrutiny from judges during validating hearings:

Sometimes when validating arrests, how to say this, we force a bit...I mean, let's have the trial and the case is closed [...] But actually, it is a moment at which we should pay adequate attention (Judge, interview n. 6, March, 2<sup>nd</sup> 2018)

In the last days, there have been many strange arrests. I validated them, but a judge more rigorous than me would not have done the same (Judge, interview n. 4, February 7<sup>th</sup> 2018)

Validating hearings are conducted with certain superficiality from everyone. For instance, I give you an example: someone steals something from a shop and the security guard catches him. The guard gets the stolen object back and calls the police. The police arrive and arrest the thief, ok? This is a case in which there is no flagrancy. And arrests like this are often validated. I have myself validated these arrests (Judge, interview n. 5, February 22<sup>nd</sup> 2018)

Several judges 'admit' to not being particularly meticulous when it comes to evaluating the legitimacy of the conduct of the police. At the beginning of my fieldwork, I thought judges were simply superficial. Later, as my understanding of courtroom dynamics increased, I was able to identify different rationales for which judges are reluctant to participate more significantly in law enforcement decisions. First, the reader should not be underestimated the fact that I observed and interviewed trial judges and *not* pre-trial judges. The two figures have different tasks, and

consequently different cultural approaches about how ‘things should be done’ (Hofstede, 1980). To be specific, trial judges, known as *giudici del dibattimento*, establish the facts and decide the outcomes of cases, whereas pre-trial judges, known as *giudici per le indagini preliminari*, supervise investigations and guarantee accused persons’ rights. Pre-trial judges are particularly sensitive in scrutinising police officers’ decisions because it is their ‘daily’ task to validate arrests. In other words, pre-trial judges have a different professional culture than trial judges. One of my interviewees referred to this difference, stating that trial judges who have previously served as pre-trial judges are more scrupulous when it comes to evaluating the conduct of the police since they perceive their role as guarantors of accused persons’ rights.<sup>59</sup> Conversely, those who have always served as trial judges are more interested in the trial in and of itself, and in other tasks they perceive more clearly to be ‘their work’ (LaFave and Remington, 1965:994).

Besides the fact that validation hearings are ‘culturally’ strange to trial judges, the lack of proper judicial supervision seems to stem also from the non-complex and trivial nature of the crimes involved (Montana, 2012). Because direct proceedings involve mostly trivial crimes, judges might perceive the pressure of dealing with more important cases on their available time (LaFave and Remington, 1965:994), and so dedicate less attention to what they perceive as ‘second-class’ crimes. As the judge above states ‘let’s have the trial’, as if to say that it is not wise to spend too much time on certain offences and offenders. Courtroom actors develop informal rules that allow them to deal with cases expeditiously (Eisenstein and Jacob, 1977). This is particularly true in routine and relatively simple cases. For example, in cases of drug trafficking involving foreign defendants without a valid residence permit, the stereotype of irregular immigrants as ‘serial’ drug dealers, as criminals who, once released, will return back to their business, provides *torinesi* judges with a shortcut that allows easing the load of making a decision and proceeding cases in no time. Campesi (2003) identifies similar rationales when examining direct proceedings in another Italian criminal court. When validating arrests, judges are not concerned much about the seriousness of an offence or an offenders’ potential threat, but rather they feel the need to activate the criminal apparatus against certain offences and offenders. In Turin, drug trafficking, when committed by foreign defendants without a valid residence permit, is an offence for which the criminal justice system is used instantaneously and without too much scrutiny.

The lack of proper judicial supervision from judges is not counterbalanced by defence attorneys. During observations, I almost never heard a defence attorney asking a judge not to validate an arrest. In truth, the majority of defence attorneys I encountered are court-appointed attorneys, who seem not to put a great effort into defending their clients. This situation might relate to the low fees court-appointed attorneys get for legal aid. Some defence attorneys told me that they often work ‘for free’ because their clients disappear right after being released, without signing a request for legal aid. Indigent defendants are in a particularly vulnerable position within the criminal justice system because they often lack the economic resources to have adequate legal representation. Together with economic deprivation, the position of foreign defendants is further

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<sup>59</sup> Judge, interview n. 7.



weakened by the lack of knowledge about language, culture and legal system of the country in which they settle (Katzmann, 2008). In spite of the importance of legal representation for vulnerable groups is, research show that immigrants, in administrative proceedings, struggle to obtain proper legal representation (Katzmann, 2008; Markowitz, 2009; Colyer *et al.*, 2009). The same is true in criminal proceedings, where foreign defendants are offered poor legal assistance from court-appointed attorneys, who exercise their duties with a certain shallowness. Next to the low compensation, an additional reason for which defence attorneys might refrain from 'active' defence is to avoid aggravating the work of other members (Young, 2013), especially given the stakes, meaning the mild penalties their clients might get. It is not surprising that defence attorneys decide to 'get along by going along' (Flemming *et al.*, 1992:9) not to disrupt the courtroom workgroup and upset judges, whose approval might be convenient in more profitable cases.

Another factor that helps to explain judges' willingness to 'turn a blind eye' (Zeidman, 2005) to unjustified arrests relates to how the police and the judiciary conceptualise the crime problem. In greater detail, judges are reluctant to question certain policies because crimes selected by police officers, mainly episodes related to drug trafficking, somehow match the great majority of judges' outlook about which crimes should be prosecuted and tried (Campesi, 2003:187). Many respondents are quite sensitive to 'the drug problem', and they conceptualise it as a serious offence, regardless of the fact that foreign defendants are often on trial for dealing in a few grams of marijuana. Only two or three of the judges I observed took the responsibility not to validate arrests of first-time offenders for such low-level drug trafficking. The fact that many judges share the same 'categories' as the police grants the latter the power to interpret the law 'as it pleases them', knowing they their conduct would hardly be put under scrutiny (Palidda, 2017:242). The passivity of *torinesi* judges in exercising proper judicial supervision contributes to unchecked and exclusionary policing against irregular immigrants, often covered under an alleged 'war on drugs'. The failure to supervise police conduct should not be underestimated in its consequences. There are no other actors in the judicial chain who hold the authority to compel judges to exercise their power (Dubber and Hörnle, 2014). Although it is much harder to detect and study, the negative power of discretion has far-reaching consequences for the fairness and equality of the justice system (LaFave and Remington, 1965; Zeidman, 2005).

The circumstances where judges generally refrain from monitoring law enforcement decisions has their roots also in the complex relationship between the two actors. Decisions not to validate arrests are adopted with caution because they might create tension between the two actors, as they put judges 'in opposition' to police officers. Whereas they are not formally courtroom actors, the police work in the same decision-making chain. Avoiding unpleasant and difficult relationships is surely one of the concerns within the courtroom workgroup (Eisenstein and Jacob, 1977). One of the judges I interviewed told me that a decision not to validate an arrest represents a strong stance, certainly of no small import, because somehow it says that the police

have done something wrong.<sup>60</sup> Clearly, not all judges are willing to put themselves in conflict with administrative authorities, even the more *garantisti*, and many prefer to ‘turn a blind eye’, especially considering the mild penalties defendants eventually will get. The idea of minimizing conflict with the police, or not questioning priorities from the executive, ‘nudge’ judges to waive their power. In fact, judges are well aware that their decisions not to validate an arrest will be frowned upon by police officers:

I believe that we as judges can do something. What I mean is that in handling individual cases, you drop seeds. The other day, my decision not to validate an arrest is a seed for police officers who were there. Of course, they muttered, they insulted me, but in the end it is a seed. And if you drop seeds, you can expect that something will change. Even with small decisions something can change, no? (Judge, Interview n. 4, February 7<sup>th</sup> 2018)

Judges know quite well that a meaningful judicial supervision can impact policing. However, they also know that such supervision can create a potential tension, an antagonism, with the police. Disagreements between the two decision-makers are often the results of different objectives and role perceptions. The legal culture percolating the work of the two actors is extremely diverse (Friedman, 1977; Merry, 2010), as well as the organisational structure in which they operate. As argued in the previous chapter, the structure of an organisation, together with legal culture, plays a pivotal role in determining how discretion is used (Biland and Steinmetz, 2017; cf. also Savelsberg, 1992; Ulmer and Kramer, 1996). The police have a hierarchical structure, and low-ranking police officers have a strong ‘street cop culture’ (Chan, 1996) that can hardly be contested and adjusted (Reiner, 1992; Chan, 1999; Dixon, 1999). The objectives driving their decisions are quite specific because police officers are evaluated on the basis of quantitative indicators, such as arrests, deportations, denunciations and controls performed on persons and vehicles (Montana, 2009:491). Individual police officers’ decisions, values and attitudes, then, are the ‘cultural’ product of training and socialisation with their colleagues within their organisation. When another authority contests their decisions, resentment and frustration are the most common feelings amongst low-ranking police officers (cf. McIntyre, 1975).

In this respect, when judges, but only a small minority, censured police officers’ decisions to arrest first-time offenders for dealing in a few grams of drugs, the atmosphere in the hearing room becomes tense amongst police officers who were there to escort defendants. Although they did not carry out the arrest first-hand, I heard police officers complaining about judges’ decisions, every time these decisions were not in line with the ‘tough-on-crime approach’ adopted by the police. Individual officers’ close observance of practices and values of their own organisation was remarkable. Comments towards the judge on trial often took an offensive tone when an arrest

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<sup>60</sup> Judge, interview n. 6.

was not validated, in the guise of ‘he doesn’t know how to apply criminal law’<sup>61</sup> or ‘he’s in the wrong profession’<sup>62</sup> or ‘they do nothing and free everyone. They live on Mars, completely detached from reality’<sup>63</sup>. A police officer answered to a colleague who asked where the judge was, with the joke ‘he went to deliberate or liberate, if you get it’.<sup>64</sup> These quotes are just a few examples of how police officers perceive judges’ decisions when the latter somehow ‘repeal’ policing outcomes. The delicate and knotty relationship between the two actors might explain why the great majority of judges prefer not to critically scrutinise street-level decisions. Far from being ‘oblivious’ to the excesses from the police, judges are willing to turn a blind eye (Zeidman, 2005:352) to avoid conflict between authorities.

#### 5.4. Public prosecutors as potential ‘filterers’ of police priorities

In the previous paragraph, I highlighted how the dynamics between judges and police officers are characterised by mixed professional cultures and objectives, sometimes in conflict with each other, and how informal dynamics influence the handling and outcomes of individual cases. This paragraph will add another piece to this intricate chain of discretion in order to better understand how the power to punish is distributed across the judicial chain, and eventually identifying the discretion that matters, if there is any. Whereas it is true that judges are the only ones vested with the power of validating arrests, they do not exercise judicial supervision alone. In fact, before cases ‘end up’ in the hearing room, they must sift through public prosecutors’ decisions to *actually* bring them before a judge. Hence, the legitimacy of police officers’ decisions is, or should be, judicially scrutinised *twice*.

Yes, we assess whether a police officers’ decision to arrest was legitimate or not. However, public prosecutors should evaluate a police officers’ decision earlier, when they receive the arrest report and decide whether the arrested person should appear before a judge. And in truth, this is an assessment that public prosecutors make up to a certain point (Judge, interview n. 5, February 22<sup>nd</sup> 2018)

As the respondent points out, public prosecutors are the first *judicial interlocutors* who the police must confront after carrying out an arrest. In fact, police officers have the duty to ‘promptly inform’ public prosecutors after arresting someone.<sup>65</sup> In practice, police officers call the public prosecutor on shift informing him or her that someone has been arrested, and subsequently provide the arrest report. Once the public prosecutor receives such a report, he or she has the

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<sup>61</sup> Fieldnotes, April 2018.

<sup>62</sup> Fieldnotes, December 2018.

<sup>63</sup> Fieldnotes, June 2018.

<sup>64</sup> Fieldnotes, April 2018.

<sup>65</sup> Article 386 of the code of criminal procedure.

duty to scrutinise police officers' decisions. Here, there are three possible by-the-book scenarios. The first scenario occurs when an arrest carried out by the police was *not* legitimate. In this case, public prosecutors must immediately release the arrested person.<sup>66</sup> The second scenario occurs when an arrest carried out by the police was legitimate *and* the offender is deemed dangerous (e.g. he or she has a criminal record). In this case, public prosecutors ask a judge to both validate the arrest and impose a precautionary measure.<sup>67</sup> The third scenario occurs when an arrest carried out by the police was legitimate, *but* there is no need to hold the arrested person *in vinculis*. In this case, the public prosecutor must release the arrested person and ask a pre-trial judge to validate the arrest only.<sup>68</sup> In this last scenario, the arrested person is free until the trial is held. In conclusion, whereas judges are vested with the task of evaluating the legitimacy of an arrest only, public prosecutors should also assess the opportunity to bring the arrested person before a trial judge immediately.

When discussing the relationship between the police and the Public Prosecutor's office, it is not accurate to adopt a 'static' model, in which police officers decide whom to arrest and public prosecutors who to charge (Richman, 2003:751). This is because, in reality, the two actors constantly influence each other. It is in the complex dynamics between police officers and public prosecutors that is possible to ascertain forces, rationales and interests driving decision-making processes towards certain outcomes. When exercising their tasks, public prosecutors must cooperate, and sometimes even compromise, with police officers (Cox, 1976) since the two authorities work together in the pre-trial phase. However, working together does not imply having the same viewpoints and goals. Indeed, not infrequently the objectives which two organisations, as well as individual agents, set for themselves are different (McIntyre, 1975). As in the case of judges, different structural arrangements and professional cultures (Richman, 2003; Biland and Steinmetz, 2017) might lead the two decision-makers to have diverse, at times even antagonist, positions about how individual cases should be handled. On the one hand, the police answer to the Minister of Interior. This means that the Public Prosecutor's office lacks the authority to control police officers' decisions to arrest someone. On the other hand, public prosecutors must 'endure' police officers' decisions, although it is not always easy for them, especially when it comes to arrests for crimes that might benefit from dismissal.

In order to decide which 'legal paths' a case must follow, public prosecutors are vested with the task of making a first 'screening' of the conduct of the police and deciding whether the arrested person should be released until the trial or brought immediately before a judge. In theory, public prosecutors carry out such screening on offences and offenders that have *already* been selected by police officers (Campesi, 2003). In other words, they are 'collectors' of police priorities: if the police decide to conduct an anti-drug operation, public prosecutors are forced to deal with all cases brought to their attention by law enforcement authorities (Montana, 2009:491). However, these circumstances do not mean that public prosecutors have their hands tied when it comes to

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<sup>66</sup> Article 389 of the code of criminal procedure.

<sup>67</sup> Article 390 of the code of criminal procedure.

<sup>68</sup> Article 121-bis of the rules governing the implementation of the code of criminal procedure.

control case intake. In fact, in the case of optional arrests, public prosecutors must release the arrested person when an arrest is not justified in the light of the seriousness of the conduct or an offenders' potential threat. Nevertheless, from observation and interviews it emerges that, similar to judges, public prosecutors are reluctant to critically scrutinise the conduct of the police:

If the police want to arrest a first-time offender, I try persuading them not to do so. However, if they proceed with the arrest anyhow, despite my attempts of persuasion, then I normally ask the judge to validate the arrest...I mean, it is a matter of avoiding useless contrasts with the police. My decision might expose the police officer who carried out the arrest to disciplinary consequences. So, it is true, similar cases are often processed differently based on the sensitivity of the police officer who dealt with a certain situation (Public prosecutor, interview n. 14, October 11<sup>th</sup> 2018)

From public prosecutors' narratives there emerges again the leitmotif of minimizing conflict with other decision-makers (Eisenstein and Jacob, 1977). For the sake of clarity, it must be mentioned that cases of petty crimes committed by first-time offenders are generally dismissed or dealt with a *denuncia a piede libero*, that is a charge without arrest, an alternative procedure known as citation in common law jurisdictions. In other terms, the person caught committing a crime is not held in police custody but charged with that crime and released until the trial. From interviews it emerges that public prosecutors, when unable to persuade police officers to press charges without arrest, prefer not to activate formal mechanisms (i.e., release the arrested person) because this decision represents a strong stance against police officers. From their viewpoint, it is one thing to advise the police not to arrest someone, but it is another to order the immediate release of an arrested person, thus making it clear that the arrest was illegitimate or unnecessary.<sup>69</sup> Maintaining a good relationship with the police seems to be an important objective for key actors in the courtroom workgroup (Eisenstein and Jacob, 1977). Group cohesion is deemed significant not only amongst the 'restricted' players within the court, but also towards actors at the front door of the judicial system. In fact, it must be noted that investigations of criminal cases are coordinated by public prosecutors but are 'physically' conducted by police officers. This means

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<sup>69</sup> Whereas the law in the books does not talk about 'unnecessary' arrest, I use this label to clarify to foreign readers the different legal grounds on which public prosecutors can release the arrested person. When an arrest is illegitimate, public prosecutor evaluate, indeed, its legitimacy. On the contrary, when an arrest is unjustified, public prosecutors do not question its legitimacy, but the opportunity to arrest someone rather than using a charge without arrest. An example of illegitimate arrest would be when police officers arrest a first-time offender caught red-handed dealing 2 grams of soft drugs. In this case, because the conduct is not serious and the offender is not dangerous, the arrest is illegitimate given the lack of both requirements provided for by the law for optional arrests. As a consequence, public prosecutor must release the arrested person, as established by article 389 of the code of criminal procedure. An example of unnecessary arrest would be when police officers arrest a first-time offender caught red-handed dealing 10 grams of soft drugs. In this case, because the offender is not dangerous, but the conduct is serious, the arrest is deemed legitimate. Public prosecutor must ask to a pre-trial judge to validate the arrest, as established by article 121 of the rules governing the implementation of the code of criminal procedure. However, in these cases, the offender should be released because it is not necessary to keep him or her in custody further. Because a defendant is released from police custody, this type of arrests are generally considered 'unnecessary', inasmuch as the offender could have been charged without arrest.

that it is important for public prosecutors to avoid the unpleasantness of conflict. According to Stemen and Frederick (2013), relationships are one of the contextual constraints that influence prosecutorial discretion, and consequently alter prosecutorial decisions. In fact, even when public prosecutors do not consider certain arrests to be ‘necessary’, they bring nonetheless a case before a judge to avoid jeopardising their relationship with law enforcement authorities.

Together with relationships, resources, or perhaps the lack thereof, represent another contextual constraint to prosecutorial discretion (Stemen and Frederick, 2013). Public prosecutors must work within the limits of available resources. This implies prioritising the faster resolution of cases in order not to become overwhelmed by dossiers of pending trials. This is a concern particularly significant for the Public Prosecutor’s office in Turin, and also in the light of its past attempts to deal expeditiously and efficiently with street crimes (Sarzotti, 2007). As I argued in chapter three, the legacy of the old managerial structure of the *torinese* Public Prosecutor’s office is still visible in how public prosecutors are relatively concerned about the proper use of resources. Many public prosecutors I interviewed believe that, although petty crimes should be dealt with a charge without arrest, it is better to ‘speed up’ the justice machine:

If you charge someone without arresting him, then the dossier remains for longer in the Public Prosecutor’s office. You have to make several judicial documents, such as conclusion of investigation, summons, and notify them all. A direct proceeding saves resources compared to release an arrested person until the trial (Public prosecutor, interview n. 14, October 11<sup>th</sup> 2018)

To save resources, which may be understood as *time*, is another element that public prosecutors evaluate when making a first screening of the conduct of the police. Although releasing a defendant until the trial is formally the most appropriate legal procedure to follow in the case of minor crimes committed by first-time offenders, public prosecutors have developed a series of informal rules shared by the courtroom workgroup as a whole (Eisenstein and Jacob, 1977). In fact, it is remarkable to note how both public prosecutors and judges prefer to ‘turn a blind eye’ to reduce tensions and conflicts with the police and proceed with cases expeditiously. Whereas each member has a specialised decision-making role within the group, they made decisions according to informal customs and practices developed within the courtroom (McIntyre, 1975; Eisenstein and Jacob, 1977). These circumstances might also explain why public prosecutors are not concerned about being overruled by judges. Both standing and sitting magistrates share the same informal rules about how cases should be processed. This requires that public prosecutors should be aware that their decisions, even those ‘on the fringes’ of the law, would hardly be contested by judges.

One of the reasons for observing and interviewing members of the courtroom workgroup is that it is possible to detect and analyse informal behaviour of decision-makers (Eisenstein and Jacob,

1977). In other words, courtroom ethnography allows interviewing decision-makers *after* observing them in their natural setting, and so asking questions about practices not readily understandable for outsiders. This was a great asset for my research, as I could investigate informal practices that take place behind closed doors. From interviews it emerges that an informal mechanism of supervision might effectively impact upon case intake. In particular, not all public prosecutors act simply as ‘collectors’ of police priorities. Instead, some prosecutors, especially those who share progressive values and are more sensitive to the protection of defendants’ rights, attempt to control police officers’ decisions to arrest through a range of informal practices. In this regard, the first contact between the two actors, that is a police officers’ call to the prosecutor on shift in order to inform him or her about an arrest, is of particular interest. The empirical material sheds light on a slightly different story from the law in the books:

When talking with my colleagues, I noticed a certain level of inconsistency...I mean, there are colleagues that during their shift have three times the number of people arrested that I have. This is because some of them do not act as a filterer, so they get everything. During my last shift, I had three arrested persons and I talked police officers out of arresting another four persons (Public prosecutor, interview n. 12, October 2<sup>nd</sup> 2018)

The interviewee here refers to a difference in prosecutorial decisions when it comes to ‘filtering’ policing outcomes. Whereas the public prosecutors’ role should be limited to receiving the information that someone has been arrested from police officers, in reality this is not always the case. In fact, some prosecutors prefer to adopt a more ‘active’ role when it comes to the interface with administrative authorities. This happens, in particular, when police officers call the public prosecutor on shift not saying that they have arrested someone, but rather that they *intend* to arrest someone. The fact that police officers speak of a possibility, and not of a finite action, somehow opens the door to a more incisive intervention from public prosecutors. In these situations, often an informal not by-the-book dialogue between the two actors is established, the outcomes of which are various and not always predictable. This is because, although some police officers might be more open to dialogue, it does not mean that they are willing to ‘give up’ their power, as vividly illustrated by the following excerpt:

If you really want to know what happens in the great majority of cases, I will tell you. Police officers prefer to carry out the arrest because they need to use it for statistical evaluations. They need to carry out a certain number of arrests each month. I know that this is ugly, cynical, terrible, but this is how it works. They receive these directions from their superiors. So, the typical call works like this...they try to push for arresting someone, and if you disagree, they push a little more. After if they see that you are firm in your decision, they follow you and

abstain from carrying out the arrest. However, sometimes you find a police officer who is stricter than others, and he carries out the arrest even if you told him that it is better to proceed with the case without arrest (Public prosecutor, interview n. 16, November 11<sup>th</sup> 2018)

Different decision-makers seem to operate in a cooperative and inter-dependent manner (Dixon, 1995; Ulmer and Johnson, 2004) when they attempt to reach a compromise about how a case should be handled. The outcomes of this interaction are multiple and varied, inasmuch as they depend on both actors' openness to dialogue. Some prosecutors, either because they do not want to be 'collectors' of police priorities or because they are unwilling to be filled with dozens of routine cases that might benefit from dismissal, attempt to filter case intake by dissuading police officers from arresting someone. However, not all public prosecutors are willing to embark upon that path. In particular, other public prosecutors emphasise how the responsibility for carrying out an arrest is exclusively in the hands of police officers. In other words, they claim to lack the authority for interfering with police officers' decisions. It is likely that public prosecutors who interpret strictly the wording of the law will refrain from exercising any filtering before an arrest has actually been carried out. It must be noted that every attempt to 'stop' police officers from arresting someone is not an act of small importance considering the impact of street-level decisions. Street-level decisions are not only highly discretionary (Lipsky, 2010), but they are also the drivers of processes of secondary criminalisation, inasmuch as they *select* who is funnelled in the judicial system and who is not (Motomura, 2011; Hernandez, 2013; van der Woude and van der Leun, 2017). This is why public prosecutors' informal attempts to control case intake is of extreme importance. Because arrests are generally processed with minimum conflict, these (limited) informal attempts represent eventually the only filter to policing outcomes. However, as documented by the number of cases that are processed every day through direct proceedings, most of the times, mechanisms of secondary criminalisation are replicated within the criminal justice system.

Informal practices developed within an organisation not only vary from a court to another, but also from an actor to another (Richman, 2003:793). This is because not only organisations, but also individuals within the same organisation might have different outlooks. In discussing the 'drivers' of decision-making, Richman argues that 'every prosecutor or agent is impelled by a broad variety of motives, personal and institutional, and that the salience of each motivation to each actor varies greatly' (2003:758). The author puts emphasis on how dynamics between public prosecutors and enforcement agents are eventually shaped by how each actor approaches this relationship, and by priorities and objectives that individual decision-makers set for themselves. In the *torinese* Public Prosecutor's office, public prosecutors' attitude towards practices of 'informal filtering' differs significantly amongst individual decision-makers even in relation to the 'amount' of interference. For example, some public prosecutors limit themselves to giving an advice to the police, without insisting when police officers are intent on arresting someone. Others, on the contrary, are not willing to yield to police officers' decisions. In particular, some



prosecutors, especially those attached to a more conservative image of the judiciary, become quite tense when police officers do not take seriously their advice:

This is more an impression than a fact supported by data, but in the past when we public prosecutors told police officers not to arrest someone or to evaluate better the flagrancy of the crime or the evidence of guilt, they used to listen more to our indications, whereas now this is no longer the case [...] I have an extremely negative attitude towards this interaction with the police. At the first call I am ok, at the second call I am ok, but at the third call I get very annoyed for obvious reasons. Arresting someone is an act of the police, but if they ask me for advice and I give it, then they must follow my advice. I mean, they ask my opinion about an arrest, I tell them that it is better not to carry out the arrest, and then they try to convince me that it is better to arrest! If you ask my opinion and I said no, then stop (Public prosecutor, interview n. 11, October 2<sup>nd</sup> 2018)

The dynamics between police officers and public prosecutors are not always easy, and sometimes opinions and objectives held by the two agents can be remarkably different. On the one hand, police officers, often for statistical purposes (Montana, 2009), opt for a strict enforcement of criminal law even for petty crimes. This situation is particularly visible in zero-tolerance policy on arrests, when police officers aim at making a ‘clean sweep’ of certain offences and offenders. On the other hand, public prosecutors are the gatekeepers of the criminal justice system. It does not sound surprising that some of them, especially the more *garantisti*, became tense when receiving eight, nine or even ten calls about illegitimate or unnecessary arrests, especially for cases that might be dealt with by a charge without arrest. In fact, when I asked to public prosecutors their opinions about the increase in arrests for petty crimes, some become vexed when explaining that it is frustrating for them to deal ‘cyclically’ with police priorities – especially when the latter do not match prosecutorial priorities. It is undeniable that dealing with dozens of arrests per day takes public prosecutors’ time away from more important investigations and cases. In fact, an excessive increase in the number of arrests ends up damaging the proper functioning of the criminal justice system. And this is why some public prosecutors decide not to stand idle. Whereas the law does not allow public prosecutors to interfere with police officers’ power to arrest someone, some of them nevertheless do so anyhow to re-affirm their role as gatekeepers of the justice machine.

Dynamics between public prosecutors and police officers are not only shaped by informal rules and professional cultures, but also by how individual decision-makers conceptualise certain offences and offenders (Campesi, 2003). For example, like judges, many public prosecutors conceptualise drug trafficking as a serious issue, a phenomenon that must be eradicated. Clearly, these public prosecutors are less willing to ‘filter’ police priorities when it comes to drug trafficking because police priorities are in line with their personal outlook and their own definition

of the crime problem (see chapter four). On the contrary, public prosecutors who consider drug trafficking an offence 'like any other' would probably not stand back from confrontation with police officers. These instances show that whether or not the courtroom workgroup concept is a useful interpretative device to understand how courtroom dynamics shape the nature of sentencing, it should not be interpreted too narrowly because it would be misleading to assume that all courtroom actors aim at the same objectives or hold the same outlook (Young, 2013:214). Analysing the dynamics between different decision-makers is not meant to quantify how much power individuals hold or to determine who 'wins' this game of power. Instead, examining these dynamics is important in order to understand how each power can affect the other in exercising discretion (Richman, 2003:774). A holistic approach to the study of decision-making, therefore, sheds light on how each decision-maker eventually works in a chain reaction (Van der Woude, 2017), and how a decision is never simply a decision, but rather the product of contrasting rationales, forces and objectives.

## 5.5. Conclusion and discussion

In this chapter I have discussed the relationships and dynamics that take place between different courtroom actors, and I have emphasised how these dynamics are able to shape sentencing practices. In particular, I have examined the dynamics that take place at the front door of the judicial chain, namely magistrates' supervision of police officers' decisions to arrest someone. Although police officers are not 'officially' courtroom actors, their interaction with judges and public prosecutors is significant in the handling of individual cases. From the empirical materials it emerged that magistrates do not exercise a meaningful supervision over police officers' decision-making. Whereas the negative exercise of discretionary powers is hard to detect, through interviews and observation of direct proceedings, it was possible to account for how courtroom actors can decide to waive judicial power. By doing so, police priorities are not 'filtered' through judicial supervision. As a consequence, mechanisms of secondary criminalisation are reinforced within the judicial decision-making chain.

In particular, judges seem to be reluctant when assessing the legitimacy of police officers' decisions to arrest someone. On first impressions, I thought judges were superficial in judicial supervision. However, a more in-depth analysis identified a series of drivers behind the negative power of discretion. Decisions not to critically monitor law enforcement are partly explained by internal dynamics within the courtroom workgroup (Eisenstein and Jacob, 1977). In particular, the need to process 'second-class' offences expeditiously (cf. Montana, 2012) and to maintain a good relationship with other decision-makers seems to play a prominent role in judges' decisions to turn a blind eye to arrests made on the fringes of the law. Besides, the circumstances where trial judges are generally involved in handling the trial, and not in the pre-trial phase, makes them less keen to perform a task that is somehow 'culturally' extraneous to their main role (LaFave and Remington, 1965). This negative use of discretion, on the one hand, might have made public prosecutors less attentive in the first screening of cases, as they know judges would hardly make

a different assessment. On the other hand, it might have contributed to not ‘putting the brakes’ on selective and targeted policing, as police officers seldom see their decisions overturned by judicial authorities (Campesi, 2003; Palidda, 2017).

Whereas judges are the only people vested with the power to validate arrests, public prosecutors play an important role in overseeing law enforcement because they are the first judicial actor to assess not only the legitimacy of an arrest, but also the opportunity to bring the arrested person before a judge immediately. Like judges, public prosecutors are reluctant to supervise critically law enforcement decisions (Zeidman, 2005). When I observed direct proceedings, it was not uncommon to see first-time foreign offenders on trial for dealing in a few grams of drugs. Interviews confirmed public prosecutors’ propensity to proceed with cases expeditiously and with minimum conflict with the police (Eisenstein and Jacob, 1977), who are more often determined to arrest. This propensity is also rooted in public prosecutors’ high level of receptiveness when it comes to drug trafficking. Quite surprisingly, the empirical materials reveal the presence of an informal mechanism of supervision that might effectively have an impact on case intake. Here, I refer to how some public prosecutors, either because they defuse the issue of drug trafficking or because they are unwilling to be filled with routine and pointless dossiers, attempt to ‘filter’ police priorities in an earlier stage, namely when police officers convey to them their intention to carry out an arrest. In this out-of-the-book dynamics, public prosecutors try to persuade police officers not to carry out an arrest when they consider it illegitimate or unnecessary. The outcomes of this interaction are varied and unpredictable, vary from one agency to another (Richman, 2003) and depends on how hard individual agents try to control the power to punish.

In the introduction of this chapter, I asked whether magistrates are passive recipients of policing outcomes or whether they attempt to shape them, and eventually gain control over the power to punish. From the empirical materials it emerges that magistrates, by exercising strict supervision, can minimise harsh and selective policing outcomes and eventually control the power to punish. They can, but they are not forced to do so. In particular, in the *torinese* case, it seems that who will be punished, and for what, largely depends on police officers’ decisions. This is because public prosecutors do not attempt either to dismiss cases of trivial significance or to release the arrested person until the trial. Likewise, judges fail to dispense justice when validating arrests for which the law provides no justification only for the purpose of expediency. The *torinese* court is a context where informal rules and legal culture steer magistrates to be largely indifferent, yet not oblivious, to how police officers exercise discretion (cf. Zeidman, 2005). Surely, one must not forget that this research deals with foreign defendants, the majority of whom do not hold a valid residence permit, charged with drug trafficking. I believe that both types of offence *and* offender play a pivotal role in shaping courtroom actors’ decisions not to censure police excesses (cf. Campesi, 2003). However, the problem is that a lack of judicial supervision ends up legitimising police officers’ discriminatory checks of certain groups, especially foreigners and minorities, a

problem addressed also by the European Commission against Racism and Intolerance in various reports as well.<sup>70</sup>

The importance of adopting a holistic approach to unravel courtroom dynamics is particularly visible once it is understood that the ‘discretion that matters’ is not in the hands of an individual decision-maker. Instead, the discretion that matters is located alongside the whole judicial decision-making process (cf. van der Woude, 2017). In other words, all discretion matters. In fact, courtroom actors exercise discretion mainly in a way that meets the expectations of their peers and do not disrupt routine activities. Police officers increasingly rely on arrests to supervise and control a segment of the foreign population, in particular irregular immigrants involved in drug trafficking, by knowing that public prosecutors would hardly question their choices. Likewise, public prosecutors do not intervene in stopping this hyper-reliance on criminal law because they are aware that their decisions would hardly be overruled by judges. Judges, for their parts, prefer to avoid putting themselves in opposition to law enforcement authorities, especially when public prosecutors themselves have ‘approved’ certain decisions. Whereas Italian magistrates enjoy a high degree of decisional autonomy (see chapter four), how they exercise discretion is eventually shaped by internal dynamics and relationships with their colleagues. This implies that, most often, it is the alignment between multiple and diverse objectives, values and constraints that determines the direction of the decision-making processes. As Richman (2003:794) acutely argues ‘the allocation of power that results from this dynamic will largely determine how enforcement discretion is exercised – against which targets and with what force’. If one wants to open the ‘black box’ of decision-making, then, it is important to study the dynamics between different decision-makers as they help to shed light on the meaning and uses of discretion. Attention must be paid not only to the interaction between individual actors, but also to institutional and procedural context (Richman, 2003), legal culture (Friedman, 1977) and informal practices developed within the courtroom workgroup (Eisenstein and Jacob, 1977).

We are more than halfway through this research journey. In chapter three, I examined the social and political context in which judicial practices towards foreign defendants take place. In chapter four, I investigated the institutional context and the legal culture percolating the court of Turin. This chapter concluded that the use of discretion is also influenced by internal dynamics, and that the latter play an important role in determining sentencing outcomes. In the next chapters, I intend to continue adding pieces to this complex puzzle. The following two chapters delve into the qualitative and quantitative dimension of discretion. In particular, the next chapter analyses objectives and meanings behind the use of discretion. In other words, it looks at the drivers of discretion. Here, attention is paid to the use of a specific precautionary measure, that is a prohibition of residence, in order to ascertain whether courtroom actors strive for other or additional objectives than the official ones. The last empirical chapter, that is chapter seven,

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<sup>70</sup> In particular, cf. second report, adopted on 22 June 2001, available at <https://rm.coe.int/second-report-on-italy/16808b582e> and fourth report, adopted on 6 December 2011, available at: <https://rm.coe.int/fourth-report-on-italy/16808b5834>

considers the impact of financial and cultural capital in the use of discretion. It is followed by the last chapter, in which all pieces of these puzzles are brought together.



## Chapter six

A (cr)immigrant ban? Unveiling new forms and uses of penal power for non-citizens





## 6.1. Introduction

Globalisation is said to facilitate the circulation of people, products and ideas. Within the European Union, internal borders are formally dismantled, and people can move to, and reside in, whatever country they wish. Local realities are more and more characterised by cultural heterogeneity, creating possibilities to interact with and learn from people of different countries and cultures (Giddens et al., 2012). As a result of these developments, we now have access to information, knowledge, ideas and discourses that were out of our reach not so long ago. However, as De Giorgi (2011) observes, this alleged universalism is, in reality, selective. Not everyone can move freely and not all ideas and practices are equally disseminated. Globalisation is also said to bring risks and uncertainty. Changes associated with globalisation provoke social and political inequalities, job insecurity and contribute to a 'crisis of identities' (Kennedy, 2001). In a way, global processes coincide with the development of 'new images of disorder' (Melossi and Selmini, 2009:160), which tend to relate to the presence of immigrants in society. This social group, in particular, has been heavily implicated in new forms of territorial and social control, through which nation states attempt to re-establish order and security, together with re-defining social identities and the boundaries of membership (cf. Zedner, 2010; Ugelvik, 2012). The overlap between lack of formal citizenship and criminality has given rise to new forms and objectives of crime control towards the present-day 'suitable enemies' (Wacquant, 1999).

From the early 1990s, in Italy, citizens started experiencing a widespread feeling of lack of security. In particular, what mainly affected residents' fear of crime was represented by manifestations of disorder and incivilities in the area where they live (Selmini, 2011:167). Marginal groups, such as the homeless, prostitutes and drug addicts, are often depicted as bearers of disorder and decay, at times even a security threat. However, at the top of the list of 'the social outcasts' there are the immigrants, especially '*clandestini*', those who are ethnically and culturally 'too' different from us. This social group stands 'at the intersection of class and race exclusions' (Mireanu, 2014:180). As a consequence, images of crime and disorder are consistently associated with their presence in urban spaces. This situation amplifies the conflicts between local residents and the 'unwanted' guests, and it turns immigrants into the scapegoat for all economic and societal problems (Marzorati, 2010).

It must be mentioned that, from the 1990s, in almost all European countries there was an increased interest in security, or perhaps the lack thereof, often understood in terms of incivilities and improper behaviour (van de Bunt and van Swaaningen, 2012). In many countries, private actors emerge in the field of security management (Schuilenburg, 2015), although this phenomenon is less visible in Italy, except for citizens' committees. The latter, however, can be mainly considered as 'actors of new urban conflicts' (Della Porta, 2004:9), and there is doubt about their ability to affect the policy agenda in matters of security. This growing obsession with urban security, deemed to be threatened by the presence of homeless, drug dealers and irregular immigrants in public spaces, contributes to the development of practices of selective exclusion (cf. Schuilenburg, 2015). This is most visible in the reliance on banning orders across many

western countries to deny access to certain areas of the city to people generally considered as troublesome. This new strategy of social control combines elements of criminal and administrative law by creating hybrid legal techniques that are exclusionary and punitive towards ‘those who appear disorderly or who otherwise inspire trepidation’ (Beckett and Herbert, 2009:21) amongst urban residents. Similar to ‘crimmigration’ practices (cf. Stumpf, 2006), which rely on immigration and criminal law to control and expel those who lack citizenship, policies of social urban control enhance the power of the state to exclude social groups deemed less than ‘full’ citizens (Beckett and Herbert, 2009).

The current legal and social developments invite scholars to question traditional assumptions about the role of criminal law in society, and to investigate hybrid practices that question the traditional ‘architecture of crime control’ (Zedner, 2010). Which kind of justice do we deliver to outsiders? (Ugelvik, 2012) And more specifically, what are the rationales driving the use of penal power against non-citizens in an era of growing insecurity caused by global mobility? (Franko, 2013) The way penal power is deployed by a particular criminal justice system is characterized by different modalities and objectives. Penal power can be used in a positive manner, meaning to rehabilitate, reintegrate and restore social cohesion, but it can also be deployed in a negative manner, meaning to incapacitate and confine wrongdoers. Garland (2013) terms this dimension ‘modes of penal power’ referring to the modes, rationales and proportions with which a particular state deploys penal power. Normally, states use both positive and negative power. However, the balance between them might vary not only across time, but also across different social groups. This dimension puts into perspective practices and techniques of penal power implemented by individual decision-makers, and moreover the rationales and objectives behind such practices.

In the previous chapters, I argued how some key variables of the Italian penal state can help in explaining sentencing practices towards foreign defendants without a valid residence permit, and how these variables are instilled into, and translated at, the local level. In particular, I examined how decision-making processes in Turin are influenced by social pressures (chapter three), and how they are shaped by institutional context and legal culture (chapter four), together with the internal, informal dynamics that develop at the local level (chapter five). This chapter builds on the previous and it looks more specifically at the substantive nature of penal power, meaning at the rationales behind decision-making processes concerning foreign defendants without a valid residence permit. The chapter is structured as follows. The next paragraph provides a theoretical examination of the major socio-legal developments in practices that enhance the power of the state to exclude. In particular, I draw from the work of David Sklansky (2012) and the literature on urban governance (cf., amongst others, Beckett and Herbert, 2009; Schuilenburg, 2015) to account for how the use of penal power is affected by global trends, and how decision-makers can contribute to the development of new forms of social control through ‘*ad hoc* instrumentalism’ (Sklansky, 2012). Then, I move to examine how courtroom actors use penal power towards foreign defendants without a valid residence permit by examining the enforcement of precautionary measures. These are legal measures adopted by a judge during the pre-trial or trial phase consisting in restrictions, to various degrees, on a defendant’s personal

freedom. I focus, in particular, on a prohibition of residence, a measure adopted under criminal law that bans defendants deemed dangerous from the city of Turin. After providing a brief overview of the discipline and purpose of precautionary measures, I move to the law-in-action. In this paragraph, the empirical material sheds light on how penal power somehow ‘changes’ its nature when exerted towards foreign defendants without a valid residence permit. The last paragraph contains the conclusion and discussion.

## **6.2. The identity of penal power in trans-local societies**

In her often-cited article, Juliet Stumpf (2006) coined the term ‘crimmigration’ to indicate the overlap between immigration and criminal law, in both substance and procedure. Since then, a growing body of scholars have started to engage in interdisciplinary research on how the criminal justice system is shaped by border control and vice-versa (amongst others, cf. Franko, 2011; Bosworth, 2012; Pickering *et al.*, 2014; Kaufman, 2015; van der Woude *et al.*, 2017). A recent area of criminological inquiry is devoted to chart how globalisation affects the way penal power is exerted on non-citizens. In particular, a growing scholarship (Zedner, 2010; Ugelvik, 2012; Bosworth, 2012; Franko, 2014) argues that when the state exercises its authority towards those who lack formal membership, penal power is infused by rationales that do not traditionally belong to the criminal justice domain. In particular, besides being excluded from a ‘positive’ form of penal power, non-citizens experience a unique form of negative penal power, one that is not much concerned about prevention and confinement, but rather about banishment and expulsion. A striking characteristic of this emerging form of penal power is that it is exclusively directed at non-members, who are expected to remain in their condition of ‘outsiders’ (Melossi, 2003; De Giorgi, 2010; Bosworth *et al.*, 2018), inasmuch as the enforcement of ‘crimmigration’ policies intensifies permanent banishment and expulsion. These policies are often the hybrid product of a mix of legal instruments from immigration and criminal law, and are purposely employed to monitor, discourage and banish immigrants from the place where they are ‘guests’.

This new configuration of penal power is visible across several democratic countries, although diverse national contexts display unique socio-legal features (cf. van der Woude *et al.*, 2014). In analysing the drivers of ‘crimmigration’ in the United States, Sklansky (2012:160) refers to three larger trends to which current global developments are somehow related. Whereas these trends are identified and described in the American context, they appear to be ‘translocal in their origin and impact’ (Beckett and Herbert, 2009), although with some variations at the local level. I briefly discuss the three trends because I believe each of them plays a role in determining the use of penal power towards foreign defendants without a valid residence permit in the court of Turin. It must be stressed that these trends are not necessarily tied to the emergence of ‘crimmigration’ practices only. Rather, I believe that they contribute explaining the development of different hybrid practices that enhance the power of the state to exclude social groups deemed to be less deserving of membership.

The first trend is nativism, meaning an emerging feeling of hostility towards newcomers, who are sometimes even subject to racist treatment. Historically, minority groups have often struggled to integrate into society (cf. Hernandez, 2013). However, more recently we witness the rise of stronger feelings of enmity towards non-members, accompanied by a ‘crescendo of official statements against immigrants and refugees’ (Melossi, 2020:59). In 2018, in Italy, episodes involving racism and intolerance towards immigrants were often reported in the press (Melossi, 2020). To tackle this issue, in the same year, the then chief prosecutor of Turin enacted a *protocollo* to emphasise more effectively the growing number of hate crimes occurring in the city.<sup>71</sup> In the collective consciousness, immigrants are often depicted with long-standing stereotypes circulating within Italian society, such as pariahs, invaders, criminals, drug-pushers, prostitutes and so on. The connection between immigration and censorial expressions, according to Dario Melossi, ‘seems to have the force of what Durkheim called “a social fact”: whatever its origins, it is something we cannot ignore, it is part of our social “horizon”’ (2003:379). This rooted rhetoric of deviance has remarkably contributed to the stigmatisation and criminalisation of immigrants from Italian society. As *non-persons* (Del Lago, 2005), immigrants are ostracised and placed at the legal, social and territorial fringes of society.

The second larger trend is over-criminalisation, meaning a hyper-reliance on criminal law even when its heavy-handed machinery is not suited for governing certain fields (Skllansly, 2012). In this respect too, Italy does not differ from other countries. From the early 2000s, harsher immigration policies were enacted, so-called ‘security packages’, and a draconian war on drugs began (Corda, 2016). To control cross-border movements, the Italian government relied increasingly on the criminal law apparatus, although various immigration offences have been gradually dismantled by the Constitutional Court.<sup>72</sup> The unconditional use of criminal law to tackle social problems contributes to creating ‘the societal perception that crime lurks everywhere’ (Hernandez, 2013:1460). At the same time, similarly to other European countries (cf. Barker, 2013; Franko, 2014), Italy experiences a bifurcation of penal power (Gallo, 2019). In particular, enactment and enforcement of criminal law is unequally distributed across social groups, meaning that insiders are punished mildly, while outsiders experience a more punitive response from the state.

The third larger trend is what Sklansky defines as a ‘cultural obsession with security’ (2012:160), in the sense that there is a tendency to view all social problems through the lens of crime and security. The idea that we live in a ‘risk society’ (Beck, 1992) and that we are constantly facing challenges to security contributed to the rise of a policy of ‘governing through crime’ (Simon, 2007). This is particularly visible in the field of global mobility, especially if one considers that

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[https://www.giurisprudenzapenale.com/wp-content/uploads/2018/07/direttive\\_reati\\_odio\\_razziale\\_affari\\_immigrazione\\_r1.pdf](https://www.giurisprudenzapenale.com/wp-content/uploads/2018/07/direttive_reati_odio_razziale_affari_immigrazione_r1.pdf)

<sup>72</sup> The Italian Constitutional Court, with the judgments n. 249 and n. 250 of 2010, declared unconstitutional the aggravating circumstance of ‘*clandestinità*’, that is being irregular. The Court stated that an immigrant’s legal status, or better lack thereof, must not be used as a circumstance allowing different and harsher treatment, especially in criminal law. In 2004, with the judgment n. 223, the Italian Constitutional Court declared unconstitutional art. 14, comma 5-quinquies of Law n. 286/1998 (Consolidated Act on Immigration), in the part in which provides for mandatory arrest for non-compliance with the removal order.

Italy became a country of immigration only from the 1970s. Since the beginning, immigration was not seen as somehow a natural phenomenon, but it was perceived as a threat to security by a significant portion of Italians (Segatti and Vegetti, 2018). Immigrants were not meant to integrate into Italian society, but rather they were considered purely as ‘workers’ willing to perform marginal jobs with low wages and no social security (cf. Calavita, 2005). The marginal position of immigrants in the work and economy of the country led to ‘concomitant processes of racialisation and criminalisation’ (Melossi, 2020:54). Media storytelling and political discourses did not help to break the equation between immigration and insecurity. In this regard, it is enough to look at how words have been used. The fact that the government enacted policies under the label of ‘security *and* immigration’ reveals the underpinning idea of various decrees, a sort of populist slogan that whispers, ‘less immigration, more security’.

One of the most vivid consequences of this cultural obsession with security is visible in governments’ reliance on preventive and repressive measures to control urban space. The literature on urban governance points to a move towards a ‘security-obsessed urbanism’ (Schuilenburg, 2015:279). In particular, governments, both at the local and at the national level, rely on practices of banishment ‘to manage people and situations that bother and disturb – but do not endanger – other urban residents’ (Beckett and Herbert, 2009:63). It must be noted that the use of banning orders marks a shift in crime policy from ‘fighting crime’ to ‘fighting incivilities and nuisances’ (cf. van de Bunt and van Swaaningen, 2012). This is because banning orders aim mainly at ‘removing’ those deemed troublesome, most often homeless, drug dealers and irregular immigrants, from certain places or areas of the city, thus providing urban residents with a perception of safety. Banning orders are adopted in several countries, such as the United States (Beckett and Herbert, 2009), the United Kingdom (Crawford, 2009), Germany (Belina, 2007) and the Netherlands (van de Bunt and van Swaaningen, 2012; Schuilenburg, 2015).

There are three elements worth consideration with regard to banning orders. The first relates to the hybrid legal nature of banning orders. Whereas banning orders are mostly adopted under civil law, their infringement opens up the path to criminal justice intervention (Beckett and Herbert, 2009). In this regard, as I will discuss later in this chapter, the *torinese* case is of certain interest because in this context banning orders are adopted under the umbrella of criminal law but are imbued with rationales of socio urban control. Second, banning orders enhances the state power to exclude certain social groups, mainly those in marginal socio-economic conditions. Besides being experienced as punitive by those who are excluded from certain places (Beckett and Herbert, 2009; Schuilenburg, 2015), banning orders reproduce social inequalities present in society and reinforce the division between ‘good citizens’ and ‘failed citizens’ (cf. Anderson, 2013). Third, as mentioned above, the use of banning orders is not that much prompted by ideas of fighting crimes and solving problems, but rather by the need to make the problem go away (cf. Beckett and Herbert, 2009) and reassuring citizens by removing incivilities and nuisances from their sight (van de Bunt and van Swaaningen, 2012). In other words, banning orders are an exclusionary tool to ease citizens’ fears and anxieties caused by improper behaviours on the streets.

There is a last piece to add to this puzzle. Together with these three larger global trends, Sklansky (2012) draws attention to another element that contributes to the creation of the condition for ‘crimmigration’ practices, namely ‘*ad hoc* instrumentalism’. With this term, the author describes ‘a particular way of thinking about law and legal institutions, a way of thinking marked both by skepticism of formal legal categories and by skepticism of the idea that official discretion needs to be, and can be, cabined and controlled’ (Sklansky, 2012:197). Whereas this concept is developed to explain ‘crimmigration’ practices, I believe it can be used as an interpretative tool to examine the uses and meanings of discretion, especially when the boundaries of the purported legal domain are blurred.

It must be mentioned that an instrumental use of criminal law to solve social problems, and in particular global mobility, is not a novelty in Italy. In the last decade, the government has vigorously policed non-citizens by relying on the criminal law apparatus, either by criminalising immigration offences or by increasing surveillance and patrolling. A respondent recalls the various ‘tools’ employed by formal institutions to control immigrants in Turin:

There was a period, for example, in which the police arrested immigrants for non-compliance with the removal order issued by the local chief of the police. It was the crime foreseen by articles 13 and 14 of the law *Bossi-Fini*. Afterwards, the majority of those crimes were declared unconstitutional, and now the police cannot arrest anymore for them [...] However, yes, those crimes do not exist any longer, but they always try...I mean, the policy of solving the immigration problem with criminal law tools comes back cyclically. Now, it is clearly the moment for arresting immigrants for drug trafficking, especially here in Turin, where we have immigrants dealing in drugs in well-known areas of the city, like *San Salvario* and *Parco del Valentino*. The police go in these areas and arrest some immigrants. This is clearly the moment at which the police arrest for drug dealing. A while ago, for example, another instrument that the Parliament tried to use to contain, to solve the immigration problem with criminal law tools, was article 495, the crime of a false identity statement (Public prosecutor, interview n.16, November 8<sup>th</sup> 2018)

The respondent here refers to a ‘cyclical’ reliance on criminal law from law enforcement authorities to monitor immigrants and eventually discourage them from staying in Turin. As documented in chapter three, repressive and exclusionary practices of policing are not a *torinese* speciality. Rather, these strategies have been adopted by municipalities in Emilia-Romagna (Quassoli, 2004), Veneto (Mantovan, 2018) and Lombardia (Ambrosini, 2013). They seem to be the offspring of a global trend of ‘security-obsessed’ urban policies that tend to tackle social problems with preventive and repressive measures. The government, both at the local and at the

national level, being unable to provide the level of security that citizens ask for, tackles immigrants already present in the national territory with increased criminalisation and surveillance. Hence, non-citizens are constantly under the watch of public authorities (Garland, 2001). The global trends described above, together with the ‘*ad hoc*’ and instrumental use of discretion, help to understand how courtroom actors use discretion when sentencing foreign defendants without a valid resident permit. The question here is whether and how courtroom actors’ decisions are driven by other rationales and objectives that do not traditionally belong to the criminal law realm. In particular, this chapter explores how *torinesi* magistrates use precautionary measures, *scilicet* measures that aim at preventing the danger of re-offending by restricting a defendant’s personal freedom. I focus mainly on a prohibition of residence because this measure is the most used in the court of Turin when it comes to monitor foreign defendants without a valid residence permit.

### 6.3. A brief overview of precautionary measures

While observing direct proceedings in the court of Turin, I could not avoid noticing how many foreign defendants without a valid resident permit were subject to a precautionary measure. As a former law student, this struck me at that time as an eccentric practice. This is because, in my ‘legal’ mind, limiting someone’s personal freedom before a final judgment should represent the exception and not the rule. But I must proceed step by step. Precautionary measures, foreseen by article 274 of the Italian code of criminal procedure, are measures adopted to avoid the occurrence of something unwanted. The law establishes that a judge can impose a precautionary measure only when deemed appropriate to prevent certain risks. These risks are known as *i tre pericoli*, the three dangers. They are: 1) flight risk, that is whether a defendant has reasons and means to escape trial; 2) risk of suppression of evidence, that is whether a defendant can compromise an investigation by destroying evidence against him or her; and 3) risk of re-offending, that is whether a defendant is likely to reoffend. Judges must always base the imposition of a precautionary measure on one of the three grounds. Most often, in the case of street-crimes, a decision to impose a precautionary measure to a foreign defendant without a valid residence permit is based on the risk of re-offending due to his or her marginal socio-economic conditions.

Pre-trial detention is probably the most known precautionary measure. At the same time, it is (or it should be) the least used. Article 275 of the Italian code of criminal procedure – read in conjunction with article 280 – establishes that pre-trial detention can be imposed only for crimes punishable with a maximum penalty above five years, *and* if a judge intends to impose a penalty above three years. Clearly, the great majority of crimes tried through direct proceedings do not meet these requirements. In order of seriousness, other measures that can be imposed during direct proceedings are house arrest<sup>73</sup>, a prohibition or obligation of residence<sup>74</sup> and reporting to

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<sup>73</sup> Article 284 code of criminal procedure.

<sup>74</sup> Article 283 code of criminal procedure.

the police.<sup>75</sup> I believe there is no need to explain what house arrest consists of. The other two measures, on the contrary, require a brief explanation since they are less well-known. A prohibition or obligation of residence consists in a duty to stay in, or a ban from, a certain municipality. The *ratio* behind this measure is to ‘distance’ a defendant from a territorial context deemed ‘criminogenic’ for him (less often her). Reporting to the police consists in the duty to present oneself at the police headquarters at the times indicated by a judge and to sign a *registro presenze*, an attendance register. The *ratio* behind this measure is to ‘control’ a defendant, who is somehow under the watch of public authorities.

A precautionary measure is also chosen in the light of its ‘adequacy’ in relation to the nature and degree of the danger to prevent.<sup>76</sup> To provide with an example: if a crime does not have a link with a certain ‘territorial’ dimension, for example online fraud, an obligation to reside in a certain municipality would hardly prevent the reiteration of such crime. Besides, when it comes to foreign defendants without a valid residence permit, certain measures are not accessible. In particular, a recurring theme during the interviews was that the greatest majority of foreign defendants lack a fixed abode, and so judges are unable to impose house arrest. Interestingly, from the fieldwork it emerged that the most ‘popular’ precautionary measure amongst *torinesi* magistrates is a prohibition of residence. It is not clear whether the use of this measure is circumscribed at the local level only, but data at the national level suggest that this might not be the case. The latest data available from the Minister of Justice reveal an increase in the use of this measure across Italian courtrooms.<sup>77</sup> The use of a prohibition (or obligation) of residence increased by 0.4% from 2016 to 2017,<sup>78</sup> and by 1.6% from 2017 to 2018.<sup>79</sup> The statistics match the storytelling that I have heard many times from my respondents. Courtroom actors agree that the use of a prohibition of residence is the ‘novelty’ of recent years. Or better, it is the novelty of recent years when it comes to street-crimes committed by irregular immigrants. But why is it so? A judge explained to me the reasons behind the increased use of a prohibition of residence in cases of drug trafficking of a mild nature. To understand the present, however, is necessary to take a step back in time.

On January 8, 2013 the Court of Strasburg, with the judgment *Torreggiani and Others v. Italy*, condemned Italy for violating article 3 of the European Convention of Human Rights due to the inhumane and degrading treatment of inmates in the overcrowded prisons of the country. At the beginning of 2014, in order to reduce prison overcrowding, the Italian government changed the law related to drug trafficking.<sup>80</sup> In particular, drug trafficking of a mild nature became an autonomous offence punishable by a maximum sentence of imprisonment of four years. Due to

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<sup>75</sup> Article 282 code of criminal procedure.

<sup>76</sup> Article 275 code of criminal procedure.

<sup>77</sup> Data are not available from all Italian courts, but only from the courts that provide it to the Ministry of Justice. However, data were provided from the largest courts, including Turin, thus the sample is representative. The comparison between years was made on the relative value, as it was not possible to rely on the absolute value given the different sample per year. In detail, data of 2016 are from 64% of Italian courts, data of 2017 are from 73% and data of 2018 are from 84%.

<sup>78</sup> [https://www.giustizia.it/resources/cms/documents/Relazione\\_Misure\\_cautelari\\_personali\\_2017\\_aggiornamento\\_aprile\\_2018.pdf](https://www.giustizia.it/resources/cms/documents/Relazione_Misure_cautelari_personali_2017_aggiornamento_aprile_2018.pdf)

<sup>79</sup> [https://www.giustizia.it/resources/cms/documents/Relazione\\_Misure\\_cautelari\\_personali\\_2018\\_aggiornamento\\_marzo\\_2019.pdf](https://www.giustizia.it/resources/cms/documents/Relazione_Misure_cautelari_personali_2018_aggiornamento_marzo_2019.pdf)

<sup>80</sup> Law n. 10/2014.



this change, it is no longer possible to impose pre-trial detention for such an offence. Judges and public prosecutors claim that, after this legislative change, their hands ‘are tied’. At the same time, because the majority of defendants charged with drug trafficking of a mild nature are irregular immigrants, their hands of judges and public prosecutors are tied *twice*, in that they cannot impose house arrest because this group of defendants lack a fixed abode. At this point, in courtroom actors’ toolbox, the next tool available in terms of seriousness is a prohibition or duty of residence. In order to remove drug dealers from their ‘hotspots’, then, courtroom actors rely on a prohibition of residence to prevent the risk of re-offending. Or at least, this is the ‘official’ reason behind the increased use of this measure. However, from the interviews there emerges a slightly different story than this one.

#### 6.4. Delving into meanings: ‘get out of my city’

There is now on trial a foreign defendant, a native of Senegal. He speaks little Italian, so an interpreter is called to help him out. He was arrested for drug trafficking of a mild nature. He was caught selling a single drug dose to an Italian. Lately, he was searched by the police and other drug doses were found, together with 400-euro in cash. The public prosecutor asks the judge to validate the arrest and impose a prohibition of residence in Turin. The judge retires to decide. Once back, he validates the arrest carried out by the police and imposes a prohibition of residence in Turin. The judge argues that there is the risk that the defendant will re-offend because of his criminal history, lack of employment and alias he provided in the past when stopped by the police. The defendant says that he has something to ask. The judge lets him speak. The defendant asks how much time he has to leave the city. He says that he doesn’t have money or documents with him, so he needs some time to organise his departure. The judge says that he needs to leave the city immediately, right after the police release him. The defendant places both hands to the side of his head. He is in the depth of despair; he keeps saying that he doesn’t know how to leave the city. The judge answers that he must leave Turin immediately, and that if the police find him in the city, his legal position will worsen (Fieldnotes, Hearing room 59, January 2018)

Observing this proceeding was emotionally difficult to me given the unexpected reaction of the defendant who received the order to leave Turin. The judge was quite surprised as well. It rarely occurs that a defendant asks about how to leave the city in due time. I asked several respondents what happens in practice when a defendant receives a prohibition of residence. In a nutshell, after a direct proceeding, the defendant, who is always a foreign defendant without a valid residence permit, as I explain below, is released by the police and invited to leave Turin. It does not matter *where* he goes, the measure requires only that the defendant leaves the city as soon as released. Besides, the defendant is not escorted by the police out of the city. In other words, he must

autonomously leave Turin, and the police will not check on whether this ‘voluntary’ departure has taken place. But how can judges know whether a defendant complies with this measure? And above all, how can a banning order prevent a defendant from re-offending? The problem with these questions is that they *assume* that judges, when imposing this measure, aim at preventing the risk of re-offending as envisioned in the law-in-the-books. But is that really the case with the law in-action?

When judges decide on the imposition of a prohibition of residence, the standard formula in the judgment is ‘*to sever the ties with the criminal context that the defendant has in the territory*’. While delving into the rationales behind the imposition of a prohibition of residence, I realised that the majority of my respondents are not that much concerned about preventing the risk of re-offending. Rather, the ‘official’ objective of precautionary measures is somehow accompanied, often even replaced, by objectives that do not traditionally belong to the penal domain. In other words, courtroom actors use this measure to reach objectives that are not contemplated in the law-in-the-books (Sklansky, 2012). It is through this instrumental and *ad hoc* use of penal power that a prohibition of residence is transformed into an instrument of urban social control. From the narratives of my respondents, I was able to identify three main objectives that add to the by-the-books objectives. At times, these objectives become the main driver behind the imposition of a prohibition of residence. What emerges from the interviews is that, whereas different courtroom actors favour different objectives, the latter partake in the same concern, *scilicet* banishment and removal of those deemed troublesome for the community.

#### *6.4.1. Above all, the public must be reassured*

As argued in chapter three, residents in Turin are extremely concerned, and often vexed, about the presence of immigrants in certain areas of the city. Collective grievances occur especially in areas like *San Salvario*, *Porta Palazzo* and *Parco del Valentino*, which are well-known amongst young adults, but not only, for drug trafficking. Formal control institutions, such as the police and the judiciary, are not well equipped to tackle this phenomenon and to provide a satisfactory answer to citizens. This is because, as mentioned above, drug trafficking of a mild nature does not allow the imposition of pre-trial detention. In other words, if an offender is arrested and tried for selling a few grams of marijuana, he must be released, regardless of how many times he was arrested and tried for that offence. In fact, it is not uncommon to meet foreign defendants without a valid residence permit but with a long criminal record, especially for drug trafficking. In June 2018, during a direct proceeding, I heard the judge saying ironically to a defendant ‘We meet again!’, referring to the fact that she had already sentenced him for drug trafficking some months earlier.

In his famous book *The culture of control: Crime and Social order in contemporary society*, David Garland (2001) points out that when governments can do little about crime, they turn their attention to victims, in an attempt to show that something has been done. Clearly, these policies hold a populist and expressive nature because they do not really tackle the crime problem, but they pretend to do so by placing emphasis on public safety, and thus showing citizens that the state is

taking actions. Although Garland's analysis relates to the changes in crime control that took place in Britain and the United States, practices and ideas of security policy, meaning the policy aimed at crime prevention and social reassurance, travel across different contexts, despite differences in size and intensity (Selmini, 2011). For example, Downes and van Swaaningen (2007) analyse the changes in the penal climate in the Netherlands and conclude that the Dutch penal system is not so different from the American and British when it comes to adopting emotive politics of law and order and to situate the crime problem amongst 'other people', those who are not like 'us'. In a similar way, Selmini argues that, in Italy, from the 1990s, the emergence of 'a social reaction against ordinary crime' and 'a growing interest of institutions towards citizens' fears and concerns' became clear (2011:163). As in the Netherlands, the social group deemed primarily responsible for crime and disorder is represented by those who are not like 'us', the immigrants, especially without a valid residence permit. These developments must be taken into account when examining how courtroom actors deal with street-crimes committed by those who are 'responsible' for the lack of security.

The legal provision that barred pre-trial detention for cases of drug trafficking of a mild nature prevents courtroom actors from 'removing' drug dealers from the streets of *San Salvario* and *Porta Palazzo*. This is because, once defendants are released *without* being subject to a custodial measure (i.e., pre-trial detention or house arrest), they are essentially free to return to the city, something that gives citizens the impression that formal control institutions are 'doing nothing'. At this point, the only tool that courtroom actors have left to 'remove' defendants from a certain environment is a prohibition of residence. Many respondents refer to the fact that they use this as a precautionary measure because it is the only option:

A prohibition of residence is the most used measure now because we cannot impose pre-trial detention [for drug trafficking of a mild nature] any longer. The punishment threshold is too low (Judge, interview n. 11, May 30<sup>th</sup> 2018)

The problem is that for cases of drug trafficking of a mild nature we cannot impose pre-trial detention. Hence, the only answer that you can give to this phenomenon is reporting to the police and, for those who believe in it, a prohibition of residence (Judge, interview n. 5, February 22<sup>nd</sup> 2018)

In the last quote, the expression 'for those who believe in it' is of particular interest. Here, the respondent refers to the fact that many judges are sceptical about the effectiveness of a prohibition of residence in preventing the risk of re-offending. This is because no one is in charge of verifying that a defendant leaves the city. Most often, the police find out that a defendant has violated the prohibition of residence while 'randomly' patrolling the city. Although judges are aware of these circumstances, they impose nonetheless this measure claiming that it is 'better than nothing'. The question here is what drives decision-makers to impose a measure despite

knowing that it will not succeed in its scope. At the beginning of my fieldwork, I interviewed a young defence attorney on this issue. When I asked his opinion about the heavy reliance on a prohibition of residence from magistrates, he answered in this term:

This is a factual hypocrisy. It is really a hypocrisy. The problem is that often citizens complain about drug trafficking of a mild nature. And if citizens, after the intervention of police, after two or three days, see the same guy selling drugs in the same spot, they get mad no? So, a prohibition of residence allows solving this problem here, substantially urban decorum (Defence attorney, interview n. 6, February 7<sup>th</sup> 2018)

On similar lines, a more experienced defence attorney says that courtroom actors use a prohibition of residence to avoid immigrants 'disturbing public order'.<sup>81</sup> In other terms, from the interviews emerge the idea that magistrates rely on this measure to assure residents that 'something is done and lawlessness is not tolerated' (Garland, 2001:132). Even if a prohibition of residence is likely to be violated, one must consider that irregular immigrants lack the economic resources to travel or rent a house elsewhere, but at least, it placates citizens' fear. In Italy, as elsewhere, public reassurance is more and more becoming an objective of crime control and prevention strategies (cf. Melossi and Selmini, 2009). When I interviewed two experienced public prosecutors<sup>82</sup>, who have served as such for more than thirty years, they asked me how I would feel seeing groups of immigrants dealing in drugs outside my house. They told me that residents do not see the 'big drug lords', but rather they see small drug dealers outside their houses or in public spaces who are arrested today and released tomorrow. Residents complain about this 'visible' criminality, which delivers an image of urban decay. As a consequence, courtroom actors rely on banning orders as the only possible answer to citizens' requests for 'cleaning up' areas of the city deemed disorderly or threatening due to the presence of immigrants (Beckett and Herbert, 2009:38). Hence, a prohibition of residence is the instant response to street-criminality, especially the kind of criminality that instils fear into the resident population, that is immigrants' involvement in drug trafficking of a mild nature. Whether or not the effectiveness of this measure in preventing crimes is doubted even by those who rely on it, this measure does show that 'the state is in control and is willing to use its power to uphold "law and order" and to protect the law-abiding public' (Garland, 2001:133).

It must be observed that a prohibition of residence is a measure almost exclusively used against foreign defendants without a valid residence permit. In fact, national and foreign defendants with a regular residence permit would hardly ever receive this measure. This is because the law provides that judges, before imposing this measure, must consider a defendant's needs, in terms

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<sup>81</sup> Defence attorney, interview n. 1.

<sup>82</sup> Public prosecutors, interviews n. 2 and n. 3.

of accommodation, job and support.<sup>83</sup> In practical terms, if a defendant has a job, a house and a family, ordering him to leave the place of residence would be unduly harsh. This is why this measure is not used towards 'foreign defendants' as a whole. Rather, it is used towards foreign defendants who are in the most marginal socio-economic conditions, those who linger in the streets of the city selling legal or illegal goods to scrape some money together. This is the social group that inspires fear and dislike amongst the residents, they are the target of security policy, certainly not wealthy foreign investors. This is an instance where issues of race, ethnicity and citizenship intersect with social class, enhancing an even more exclusionary idea of membership.

#### *6.4.2. Making the problem go away*

Besides reassuring citizens, a prohibition of residence results in a valid tool of socio-urban control. As mentioned above, this measure should only be imposed with the legitimate aim of preventing a risk of re-offending. Given the marginal socio-economic conditions of foreign defendants without a valid residence permit, the question spontaneously arises of whether 'barring' them from the city wherein they reside can really reduce the likelihood of re-offending. The practice of ostracizing those deemed a threat for the community is not a novelty. The literature on urban governance stresses the move towards a 'security-obsessed urbanism' (Schuilenburg, 2015:279), consisting in the implementation of preventive and repressive measures to control urban spaces. In particular, banning orders are adopted in several countries to tackle people and situations that disturb local residents and instil in them fear and insecurity. Unlike traditional banning orders, a prohibition of residence is adopted under the umbrella of criminal law. However, as the following excerpts show, the idea of 'cleaning up' the local territory, more than preventing the commission of crime in itself, is paramount for courtroom actors. When I 'provoked' my respondents saying that a prohibition of residence sounded like 'go and commit crimes somewhere else', many confirmed that, when imposing this measure, their main concern is 'to make the problem going away':

I am responsible for a particular area, and I don't want you to commit crimes in my area. So, first I make sure that you don't commit crimes in my area, and second I make sure that your conduct doesn't clog up my office (Public prosecutor, interview n. 13, October 2<sup>nd</sup> 2018)

We are Piedmontese and we protect ourselves from a certain guy. He will go to Milan and then Milan will deal with him (Honorary assistant prosecutor, interview n. 3, February 16<sup>th</sup> 2018)

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<sup>83</sup> Article 283, 5 comma, of the code of criminal procedure.

I understand your objection. Let's say that it is an unmentionable thought of judges and the police to think 'we get rid of this guy' (Judge, interview n. 9, March 23<sup>rd</sup> 2018)

From the interviews it emerges that *torinesi* magistrates are not concerned about the possibility that a defendant under a banning order might reoffend. Rather, their main concern is, as the last respondent observes, 'to get rid' of certain defendants deemed destined to be outlaws due to their marginal socio-economic conditions. Whereas a prohibition of residence is adopted towards an individual defendant, the empirical material shows that this measure is more generally implemented with the purpose of removing and relocating visible manifestations of disorderly behaviour and street-crimes (Beckett and Herbert, 2009). Far from ascertaining an individual defendant's propensity to crime, a prohibition of residence is used to pursue security and restore urban decorum. At the same time, some respondents shared with me their concerns about the effectiveness of this practice in preventing crimes. In particular, they claim that the use of a prohibition of residence marks a return to the old Italian 'parochialism', together with a preference for 'crime commuting':

Some colleagues argue you need to uproot a defendant from the *torinese* context...but honestly, it's like to hiding behind an excuse because a defendant goes to Bologna or Cuneo and enters very easily into such a context again [...] So it's like saying 'we get rid of the problem and now it's the problem of someone else'. But we are on the same boat; we are all on the Italy boat. We cannot move the problem from one territory to another (Public prosecutor, interview n. 9, June 13<sup>th</sup> 2018)

In a similar way, a defence attorney criticises magistrates' reliance on banning orders because, according to him, this measure is used with the sole purpose of removing certain people and behaviour from the city. He pleaded a case that provides a clear account of his negative opinion about banning orders. I interviewed him after observing the direct proceeding in which his client, charged with drug trafficking of a mild nature, was ordered to leave Turin. At the time when the trial was held, his client lived in Moncalieri, a town nearby Turin. The odd thing is that he lived close to the border between the two cities. In particular, his apartment was fifty metre from Turin, and he was arrested in Turin. When the Public Prosecutor's office asked for a prohibition of residence in Turin, the defence attorney became quite annoyed. He argued that this measure did not make any sense because his client could have continued with his 'business' in Moncalieri rather than in Turin. Besides, he added that, given the proximity of his client's apartment to Turin, it would have been hard for him to adhere strictly to the measure as mistakes can easily occur. The judge, nonetheless, imposed a prohibition of residence in Turin on his client:

I got mad when I heard that. This is a novelty and it is a bad novelty. This novelty is called NIMBY, not in my back yard. I'll try to explain this to the judge, it is not less serious if my client deals in drugs in Moncalieri. You should safeguard the Italian Republic from crimes, you should not say 'well, I prevent this guy from making a nuisance of himself in my garden' (Defence attorney, interview n. 7, October 15<sup>th</sup> 2018)

From these narratives it appears that some respondents are quite critical about the use of this measure because of its relatively narrow focus on the crime problem. They believe that, by imposing this measure, magistrates aim exclusively at displacing crime and disorder, and not at preventing an individual defendant from re-offending, as envisioned in the law in-the-book. From the data it emerges that broader cultural and social processes in society affect the way courtroom actors make use of discretion. A crescendo of social pressure on local institutions, together with the emergence of 'new images of disorder' (Selmini, 2011:178-179), often related to the presence of immigrants in urban spaces, compels magistrates to deliver security in their territory with any instrument available at their disposal. Far from being a measure adopted to prevent the risk of re-offending through a 'rupture' with the "criminogenic" environment, a banning order is used to remove failed non-members from the city of Turin. Although this measure is used widely by the majority of magistrates, few of them, especially those belonging to the progressive faction of the judiciary, make harsh criticism about its use:

It's nothing new. It's the old medieval ban. You must leave Turin. So, go and offend somewhere else. It's nonsense. The objective of a precautionary measure is to prevent the commission of future crimes. It is not to prevent the commission of future crimes in Turin (Judge, interview n. 5, February 22<sup>nd</sup> 2018)

To me, it looks like a sort of cloaked deportation. Isn't it? I mean, you deal in drugs and I forbid you to stay in Turin. But well, this person is going to deal in drugs somewhere else. You did not solve the problem. You solve your problem that this person is no longer in the city. You didn't tackle the crime problem (Public prosecutor, interview n. 16, October 11<sup>th</sup> 2018)

Only a few magistrates shared with me their resentment about the use of a prohibition of residence. In particular, they claimed that this precautionary measure moves the 'problem' from Turin to somewhere else. These quotes stress the irrationality of banishment as a practice that does 'little more than recycle undesirables between neighbours' (Gibney, 2020:292). A prohibition of residence, as used by magistrates in the court of Turin, evokes the idea of controlling public space by barring certain social groups from it. Similar to banning orders in the

United States (Beckett and Herbert, 2009) and elsewhere (cf. Schuilenburg, 2015), it is based on the idea of combating troublesome behaviours and increasing citizens' perception of security (van de Bunt and van Swaaningen, 2012). The problem is that, by using this measure against an *ad hoc* group of defendants, magistrates reinforce through 'official' channels the idea of exclusionary membership, together with the idea that the city belongs exclusively to *torinesi*, the only legitimate owners (cf. Marzorati, 2010). As a consequence, a prohibition of residence in-action becomes an exclusionary tool aimed at those deemed less than 'us' because not only are they 'non-members' but they are also 'failed' ones (cf. Anderson, 2013).

#### 6.4.3. *Bypassing statutory limit for pre-trial detention*

Besides being used *ad hoc* towards foreign defendants without a valid residence permit, a prohibition of residence is also highly instrumental, meaning that it is used to achieve the aims which magistrates set for themselves (cf. Sklansky, 2012). This aspect is most visible in what I identified as the third main 'driver' behind the use of this measure. In particular, from the interviews the impression is given that magistrates use their discretionary powers to bypass the black-letter-law and remove, this time for good, the unwanted guests from the city. A defence attorney describes how magistrates manage to 'open' the jail gates for defendants charged with drug trafficking of a mild nature, a crime for which pre-trial detention is, by law, not allowed:

Drug trafficking of a mild nature does not allow the imposition of pre-trial detention any longer. So, what's the trick? And this is done with malice by judges. It is done with malice. I say it honestly. They think this way: I cannot send you to jail, but I am 90% sure that you will commit the same crime again, so what can I do? I don't impose on you reporting to the police, as this measure is statistically less used. And the reason is that, for example, you go to the police station at 18.00, sign your report and at 18.05 you deal in drugs again. At this point, the police arrest you and then they must release you again because formally you respected the precautionary measure, no? You went to sign your report to the police station, but afterwards you run your drug business again. The difference with a prohibition of residence is that, maliciously, I know that you, under no circumstances, will be found in Turin. Once the police find you here, I can send you to jail. Is that clear? It is done maliciously; the dishonesty of many judges is blatant. Ten years ago, when other defence attorneys and I asked judges to apply this measure to our clients, they laughed at us saying 'What's this measure? How can I control someone that is not in Turin?' Do you know what is the difference today? It's that you cannot send them to jail. So, the path to send them anyway to jail is banning them from Turin...once the police stop them, you can send them to jail (Defence attorney, interview n. 2, January 18<sup>th</sup> 2018)



The respondent here refers to a legal loophole used by magistrates to obtain pre-trial detention for drug trafficking of a mild nature. Article 276 of the Italian code of criminal procedure establishes that if a defendant violates a precautionary measure, even a non-custodial one, such as a prohibition of residence, the judge who imposed that measure can replace it with a *custodial* measure (e.g. house arrest or pre-trial detention). In other words, if a defendant is found in Turin while under a banning order, he may be sent to prison. According to my respondent, magistrates impose a prohibition of residence – knowing that it will be violated – to obtain eventually the only instrument to make ‘visible criminals’ invisible, that is jail. Other defence attorneys made this point by claiming that magistrates use a prohibition of residence with the only purpose of opening the jail gates to foreign defendants without a valid residence permit. In particular, they believe that magistrates rely on a prohibition of residence not to reduce the likelihood that an individual defendant would reoffend, but rather to increase the chance of obtaining pre-trial detention for petty criminals. After all, what is more effective than jail to remove those deemed troublesome and who otherwise would linger in public parks and streets? Quite surprisingly, the great majority of judges and public prosecutors have made no secret of this ‘practice’:

Ordering a prohibition of residence in Turin is often a way to send them to jail. I am a supporter of the respect of defendants’ rights, I say so myself, but sometimes I order this measure so defendants will violate it and I send them to jail (Judge, interview n.4, February 7<sup>th</sup> 2018)

I tell him [a defendant] that he cannot stay in Turin, but of course I know that he will remain here...so once they have found him, I can ask for jail (Public prosecutor, interview n. 13, October 2<sup>nd</sup> 2018)

A prohibition of residence? We need it to send them [foreign defendants] to jail (Judge, interview n. 10, April 13<sup>th</sup> 2018)

A prohibition of residence is an effective measure because as soon as the defendant violates this measure, I can ask the judge to increase it. Hence, the defendant goes to jail. I asked for this measure several times, it is really effective (Public prosecutor, interview n. 15, October 12<sup>th</sup> 2018)

These are just few of the many quotes where magistrates explain why they heavily rely to such an extent on this measure. When I started discussing a prohibition of residence with my respondents, in the first instance they justified its use claiming that their ‘hands were tied’. They asserted that foreign defendants without a valid residence permit are ‘problematic’ because they lack a fixed abode, and therefore magistrates are ‘obliged to’ impose a prohibition of residence. However, when I pointed out that they could use reporting to the police to ‘keep an eye’ on certain defendants, they eventually acknowledged that reporting to the police is useless because

the great majority of defendants will respect it. This way of reasoning is of certain interest in the light of the concept of *ad hoc* instrumentalism (Sklansky, 2012). When *torinesi* magistrates decide which measure impose between a prohibition of residence and reporting to the police, their choice is not driven by concerns about which measure is more effective in preventing crime, as envisioned by the law-in-the-books. Rather, their choice is driven by the likelihood that a measure will be violated, thus ‘paving the way’ for imposing pre-trial detention. A public prosecutor belonging to the most progressive faction of the judiciary refers to this custom in these terms:

This is a pathological custom. When I request a precautionary measure and the judge imposes it, I request this measure because I hope that the defendant will respect it. I do not hope that the defendant will violate it so I can send him to jail. This should be the rule. You commit a crime, so I order you to go to the police headquarter every evening at 8.00 pm to sign a report, so I don’t have to send you to jail. I hope that you go and sign. It is not that I hope you won’t go and sign, so I can send you to jail! (Public prosecutor, interview n. 16, November 8<sup>th</sup> 2018)

The respondent here defines this custom as ‘pathological’, as an anomaly of the system. It can hardly be denied that this practice represents a move away from the black-letter-law. Whereas a prohibition of residence should be imposed to prevent an individual defendant from re-offending, in practice it is deployed against an *ad hoc* group of defendants deemed intrinsically outlaws. This instrumental use of a prohibition of residence was common amongst many magistrates, especially those belonging to the most conservative faction of the judiciary, but not only them. In fact, some progressive magistrates, despite their acclaimed sensibility for defendants’ rights, also tend to rely on this measure to ‘contain’ small drug dealers. The problem is that this custom runs the risk of ‘de-individualising’ an individual defendant. In other terms, it fails to distinguish foreign defendants without a valid residence permit as individuals and it treats them instead ‘as an undifferentiated mass’ (Stumpf, 2013:68). This is because a defendant is ‘automatically’ considered prone to commit crimes because he belongs to a social group that, in the collective consciousness, is deemed incapable of obeying the law.

However, as Beckett and Herbert observe, ‘social problems are not individual matters’ (2009:145). These circumstances question the legitimacy of adopting a precautionary measure with the only purpose of detaining defendants who are targeted for their vulnerable legal and socio-economic conditions in and of itself. Although the law establishes that drug trafficking of a mild nature is a crime for which pre-trial detention is not the right tool, the great majority of *torinesi* magistrates have established that it is so. So, by relying on the article 276, which allows the aggravation of a previously breached measure, magistrates can confine defendants who, in principle, should not endure pre-trial detention. Some respondents attempt to ‘legitimize’ this custom by claiming that it is the only way to stop street-crimes. Others argue that foreign defendants without a valid residence permit, because of their socio-economic alienation, will not

refrain from committing crimes. Hence, the only option with them is confinement. Whatever the grounds, how magistrates use a prohibition of residence questions the compatibility of this practice with the rule of law (cf. Sklansky, 2012).

## 6.5. Conclusion and discussion

This chapter explored the uses and rationales of penal power when exerted on foreign defendants without a valid residence permit. Global trends, in particular the emergence of nativism, over-criminalization and security obsession (Sklansky, 2012), have an impact on how formal control institutions exercise penal power. Despite differences in size and intensity, western countries embrace new concepts and practices of security by adopting policies of crime prevention and social reassurance (Selmini, 2011). Immigrants, especially the irregular component, have become an important target of hybrid preventive and repressive measures aimed at excluding those deemed troublesome. This chapter looked at the law-in-action to investigate how magistrates make use of precautionary measures, *scilicet* legal measures consisting in restrictions, to various degrees, on a defendant's personal freedom. In particular, I focus on a prohibition of residence, a precautionary measure widely adopted by *torinese* magistrates, that bars defendants deemed dangerous and prone to crime from the city of Turin.

From data collected in the *torinese* court and the Public Prosecutor's office emerge how magistrates use a prohibition of residence exclusively towards an *ad hoc* group of defendants, namely foreign defendants without a valid residence permit. This is because this group lacks a job, accommodation and any kind of social or family ties in Turin, so it is possible to 'remove' them from the city. The use of a prohibition of residence, besides being exclusive for this group of defendants, is also instrumental in reaching a series of objectives that magistrates establish for themselves (Sklansky, 2012). In particular, from the empirical materials collected it was possible to identify three main drivers: 1) placating citizens' concerns about the presence of immigrants interpreted as disturbing and dangerous; 2) controlling the local territory and removing immigrants from the city; and 3) bypassing the statutory limit for imposing pre-trial detention, and so obtaining the most severe form of incapacitation foreseen by the penal state: detention. These additional objectives, extraneous to the traditional criminal law domain, illustrate how penal power 'changes' its nature when exerted on non-members. In particular, 'getting rid' of the troublesome and easing citizens' concerns about crime and disorder become the main drivers of the decision-making processes affecting foreign defendants without a valid residence permit. As a consequence, a system of urban-socio control is created within the penal domain, leading to exclusion and removal from the city of the social group not welcomed by *torinesi*, the only 'legitimate' owners of public spaces.

In the theoretical section of this chapter, I pointed out a number of characteristics of banning orders which I believe it is worth devoting some words about. In particular, I referred to how banning orders are measures on the cutting edge between criminal and administrative law

(Beckett and Herbert, 2009), and how they are used to contrast a phenomenon which is more ‘disturbing’ than dangerous to the public (van de Bunt and van Swaaningen, 2012). Both elements are visible in the use magistrates make of banning orders. In particular, in the *torinese* case, banning orders belong to the criminal law domain and yet are imbued with objectives of socio urban control. Besides, magistrates use banning orders as a response to that misconduct which alters citizens’ perception of security, that for *torinesi* is an immigrant’s involvement in drug trafficking of a mild nature. Of course, I am not claiming that the police and the judiciary should not be concerned about drug trafficking. The point is whether drug trafficking of a mild nature should be a ‘priority’ because citizens establish that it is so. And this reflection brings me to the last point, that is the capacity of banning orders to enhance the power of the state to exclude (Beckett and Herbert, 2009).

Banning orders are aimed at social groups at the social and economic fringes of society, such as the homeless, drug addicts, prostitutes and immigrants (van de Bunt and van Swaaningen, 2012). These categories have long been considered as outcasts, whose presence threatens and equally disturbs the peaceful life of citizens. By banning from public spaces those who already struggle to be considered part of it, this spatial segregation reinforces the moral divisions between ‘good citizens’ and ‘failed citizens’ (i.e., criminals) or ‘non-citizens’ (i.e., immigrants) (Anderson, 2013). However, when it comes to foreign defendants without a valid residence permit, issues of citizenship, race, ethnicity and class merge. This social group is ostracized from the city not only because they are non-members, but also because they are deemed to be ‘failed’ members who represent a burden to society and a threat to security. The problem is that these practices, by taking ‘out of circulation’ (Garland, 2001:136) those depicted as hardened criminals and incapable of obeying the law, reinforce the divisive rhetoric between us, the good members of the community, and them, the failed guests. As Gibney argues ‘by purging society of failed members, banishment demonstrates the worth of membership and affirms the symbolic boundaries of community’ (2020:279). When foreign defendants without a valid resident permit are banned, they lose ‘the right to the city’ (Mitchell, 2003), a right that apparently does not belong to anyone in ‘global cities’ (Sassen, 2001). Thereby judicial practices in the court of Turin contribute to sustaining the moral division between ‘us’ and ‘them’, together with reinforcing social inequalities that haunt global societies.

Now for a concluding remark. The similarities between urban security and ‘crimmigration’ policies are unlikely to escape the attentive reader. In particular, both practices are developed at the intersection between different legal domains against social groups considered ‘less’ than citizens. Additionally, both practices seem to be the offset of broader global trends affecting the way societies interpret security and the boundaries of membership. Last, but not least, both practices enhance the power of the state to exclude the outcasts through banishment and expulsion. Yet despite these similarities, ‘crimmigration’ practices have a feature that distinguish them from other exclusionary policies, that is a migration control logic (cf. Brouwer, 2020). In particular, ‘crimmigration’ practices are firmly rooted in the idea of controlling national borders and reinforcing the boundaries of citizenship. Urban security policies, on the contrary, are more

concerned with banishment of 'failed members', regardless of their status as non-citizens (of course, it is undeniable that being a non-member reinforces the status of outsider). This is why a prohibition of residence cannot be considered a '(cr)immigrant ban', precisely because it lacks any logic of migration control. Conversely, the rationales behind the use of this banning order resemble more vividly exclusionary and repressive approaches to urban security. Far from being an instrument of migration control, a prohibition of residence is grounded on the idea of removing or relocating manifestations of crime and disorder that exaggerate citizens' perception of security in their neighbourhoods.



## **Chapter seven**

State capacity in the era of global mobility: when domestic judicial practices  
meet ‘the others’





## 7.1. Introduction

There is now a foreign defendant on trial who doesn't speak Italian. The English interpreter next to him fills in the identification form together with the defendant. The public prosecutor reads the arrest report: the defendant is charged with robbery. The public prosecutor asks the judge to impose pre-trial detention as a precautionary measure, because the defendant is a habitual offender. The judge reads the identification form and asks the defendant whether he told the truth about his personal information. The interpreter translates the question to the defendant, who eventually answers 'yes'. The judge asks the defendant: 'Who do you live with at the address you indicated? Do you have a regular rental agreement?' I think the judge is evaluating whether it is possible to opt for house arrest. The interpreter translates the question into English for the defendant, but I can't understand anything. The translation is terrible, the judge is having a hard time as well, because the translation is incomplete and vague. The defendant has a strong African accent and the interpreter is not a native English speaker. From their dialogue it is not clear with whom the defendant lives. After a while, the judge moves to another question: 'do you have a job?' The interpreter translates the question to the defendant, who eventually answers 'I drive a car'. The interpreter translates the defendant's answer to the judge. The judge asks the interpreter '*cosa significa? Fa l'autista?*', that is 'what does this mean? Is he a driver?' I have the impression that the interpreter doesn't know the English word for '*autista*' because he keeps saying that the defendant drives a car. The judge gives up: the identification takes too long and produces too little (Fieldnotes, Hearing room 59, January 2019)

While conducting ethnographic research at the court of Turin, I came across many episodes similar to the one I have just recounted. The leitmotif of these episodes is often the same: the communication between magistrates and foreign defendants is hindered by language-related barriers, there is little or no information about a defendant's status, and domestic legal procedures are somehow unsuitable for foreign defendants. The presence of foreign defendants in national courtrooms raises a whole range of new challenges for the criminal justice system, which is conventionally designed and equipped to deal with citizens (Zedner, 2013). Through this chapter, I intend to examine how the penal state, a term used in a neutral manner to indicate those agencies and authorities that direct, control and affect the use of penal power (Garland, 2013), deals with challenges posed by processes of globalization, in particular movement of people (Appadurai, 1990). My argument is that the enforcement of penal policies is shaped not only by different rationales and objectives, as documented in the previous chapter, but also by state resources and capacity. The latter are hardly being tested by current processes of globalisation. When I use the term 'state capacity', I refer to the ability and the capacity of a state to take action and implement official goals (Besley and Persson, 2011). State capacity encompasses a range of distinct but inter-

related facets (Painter and Pierre, 2005). However, in this chapter I borrow the concept of state capacity from the social science literature to discuss the ability of the *penal* state to enforce policies. In other terms, I intend to consider what states ‘are able to do’ (Leerkes and van Houte, 2020) and how their enforcement capacities affect penal policies. To this extent, states with a ‘high capacity’ are states that hold the necessary economic resources and institutional infrastructure to implement effectively penal policies.

Garland (2013) terms this dimension ‘power resources and capacity’, thereby referring to the resources and means at the disposal of the penal state to take effective action. However, when elaborating on the concept, Garland suggests that state capacity does not only refer to economic capital, but also to cultural capital in terms of professional expertise, trained personnel and system coordination (2013:501). This dimension is, in other words, the other end of the spectrum. While in the previous chapter I discussed the qualitative dimension of the penal state, this chapter examines its *quantitative* dimension. At the same time, as I have done often in the course of this book, I intend to locate this dimension in a particular socio-legal context, represented by globalisation, multiculturalism and the decline of centrality of the state in favour of supra- and sub-national entities (Robinson, 2008). As a result, the diversity of the social world outside the court is mirrored by a demand for new rules and resources inside the court (Aliverti and Seoighe, 2017). This is because processes of globalisation are not only changing our daily lives, but they also have an impact on the kind of capacities that the state is required to obtain in order to engage with new challenges, needs and actors (Robinson, 2008).

Garland (2013) points out that the qualitative and quantitative dimensions of the penal state are expected to move forward hand-in-hand. Penal states that lack economic and cultural capital would rely on a negative form of power, which is relatively simple and requires little coordination, whereas penal states with a high capacity can implement more complex policies, which normally require a trained staff, coordination and support from wider networks (Garland, 2013:502). Whereas state capacity by itself is not enough to explain penal outcomes, this dimension can shed light on why penal responses across states are different (Garland, 2013). For example, in the last decades, reliance on deportation has been on the rise across European countries (cf. Gibney, 2008). However, if a state does not have return agreements with third countries, then, it is likely that deportation orders will remain a dead letter. Bilateral return agreements facilitate the removal and deportation of non-citizens, and it matters whether a state is capable of engaging in mutual cooperation (Adepoju *et al.*, 2010). A recent study by Leerkes and Van Houte (2020) concludes that there is considerable variation in how countries deal with deportation, and that such variation is also contingent upon state capacity. Hence, ‘influences below and beyond the state’ (Weber, 2015:167) often hinder the state capacity to implement its policies in a globalised landscape with multiple actors.

This chapter is structured as follows. The next paragraph discusses the challenges that globalisation, and in particular movement of people, pose on the capacity of the state to implement penal policies. In particular, I pay attention to how the increased presence of foreign

defendants in national courts put new demands on the penal state, and how the Italian penal state has met, or not, these demands. To do so, I focus on two issues which I believe to be particularly salient in showing how penal responses, but more generally penal practices, can be affected by the economic and cultural capital at the disposal of the penal state. First, I examine how the *torinese* court deals with language-related barriers when it comes to foreign defendants. The empirical material shows how budgetary restrictions hinder the communication between magistrates and foreign defendants, at the expense of the latter. Next, I discuss whether and how deportation is used by courtroom actors. This section aims at emphasising the role of cultural capital and legal culture in shaping penal practices. It is followed by a conclusion and discussion.

## 7.2. (Mis)adapting judicial practices to a globalised society

Globalisation has a significant impact on nation states and on their capacity to engage with new challenges and opportunities. Globalisation also leads to the creation of different political entities, such as the European Union, that somehow take possession of a portion of sovereignty from member States, which are now subject to new obligations (Robinson, 2008). A particular *scape* of globalization (Appadurai, 1990), that is displacement of people, has strongly challenged state capacity, especially in countries of recent immigration, such as in Southern-Europe. The latter, for historical reasons, had less time to develop capacities to deal with global migration compared to countries of longstanding immigration (Leerkes and van Houste, 2020). Criminal courts are not exempt from the dramatic changes that are taking place at the national level. In fact, current developments in the social *and* legal dimension of nation states have an impact on judicial rules and activities as well. Whereas the judicial function has traditionally been considered as ‘domestic’, in truth globalisation is changing the make-up and practices of national courts as well (Cartabia and Cassese, 2013). It is interesting to look at the increased percentage of foreign defendants in Italian hearing rooms over the last decades. As the percentage of foreign residents in the Italian population increased from 1% in 1992 to 8.3% in 2017, so it did the percentage of foreign defendants in Italian courts. While in 1990 only 2.5% of all defendants were born abroad, this number has grown exponentially to 25.7% in 2017.<sup>84</sup> The presence of ‘new’ clients in the judicial system questions whether the penal state is equipped to deal with additional requirements, needs and expectations.

From the moment I started observing direct proceedings, it was clear to me how trials with foreign defendants are unquestionably more problematic and time consuming compared to trials with Italian nationals. This is because courtroom actors must deal with a new spectrum of specific needs and challenges, ranging from summoning an interpreter for non-Italian-speaking defendants to ascertaining foreign defendants’ identity and/or legal position in the national territory. The extent to which these needs and challenges are met, and if so how, is the subject of this chapter. This chapter does not provide an extensive analysis of all problems that judges,

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<sup>84</sup> Source: ISTAT.

public prosecutors and court-appointed attorneys face when a foreign defendant is in the dock. In this paragraph, I limit myself to providing the reader with an overview. In the next paragraphs, I examine in-depth two issues which I believe to be particularly salient when it comes to assessing the impact of state resources and capacities on judicial practices, meaning interpretation of meaning and use of deportation.

One of the most common problems when a foreign defendant is on trial is represented by the difficulty, sometimes even the inability, to ascertain his or her identity. This is to say that often judges are holding a proceeding against ‘nobody’. At the beginning of a direct proceeding, a defendant is invited to provide his or her personal information, such as name, date of birth, residence address, family status and employment situation. However, because the majority of foreign defendants are undocumented, the identification – which normally lasts a couple of minutes for Italian defendants – becomes a tangled conundrum. Judges have no other options than relying on the information provided by defendants, who often ‘make strategic use of international law by concealing their own identity’ (Broeders and Engbersen, 2007:1603). It was not uncommon to see defendants who declared to be under-age to escape justice<sup>85</sup> – of course, when their physical appearance allows them to do so – or who claimed to come from Gabon or Ghana, two countries known for being particularly reluctant to take back their own nationals. Foreign defendants are reluctant to disclose their identity because they fear deportation (cf. Campesi, 2015). Several defence attorneys told me that their clients fear deportation more than serving time in prison. However, their attempts to remain ‘nobody’ leave magistrates with little or no information about their identity, life habits and so on. As I will discuss later, the lack of coordination between penal and administrative authorities does not allow magistrates to obtain information about a foreign defendant’s legal position in the national territory. Given such circumstances, the capacity of the penal state to implement certain policies (e.g., probation, house arrest) is hindered by the near complete absence of information about foreign defendants.

Together with identification, language is another problem that magistrates have to deal with, and it is certainly one of no small importance (Shulman, 1993; Aliverti and Seoighe, 2017; Berk-Selingson, 2017). In the direct proceedings I observed, the great majority of foreign defendants were unable, or at best struggled a lot, to master the language of the trial. The current Italian legislation on assisting non-Italian-speaking defendants is the result of the transposition of directive 2010/64/EU on the right to interpretation and translation in criminal proceedings. It is thanks to the ‘boost’ given by the European Union that the right to language assistance has received a more comprehensive discipline in the Italian legislation (Gialuz, 2018). This is an instance where global conventions and regulations place new obligations and standards on the state, thus ‘challenging the conventional parameters of state action’ (Robinson, 2008:569). It is

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<sup>85</sup> I witnessed several cases in which a defendant claimed to be under-age. The problem here is that a defendant’s lack of document prevents judges from verifying whether he or she is really under-age. In the majority of the cases, the problem was solved by a medical report – in which age is estimated after a physical examination or an X-ray of wrist, jaw or collar bone – provided by the police. However, when the medical examination was not really accurate, judges preferred to return the case to the Public Prosecution Service because they fear to lack jurisdiction.

clear that in order to comply with supra-national regulations, the state must equip itself adequately for being able to guarantee a fair trial to foreign defendants. During my time at the court of Turin, I met many interpreters who were summoned to support defendants during the trial by translating from Italian into English, French, Arabic and Wolof, to cite the most common languages. In the next section, I deal more specifically with language-related obstacles and the practices developed in the *torinese* court.

Together with identification and language, another shortcoming relates to a substantial degree of cultural distance between foreign defendants and courtroom actors. When I speak about cultural distance, I refer to a lack of knowledge about beliefs and customs of a particular social or religious group, which eventually represents an obstacle during direct proceedings. Italian magistrates frequently have difficulty in comprehending the meanings behind foreign defendants' words or actions. In Italy, the need for cultural mediation arose around the nineties following the increased presence of foreigners in different public services, such as schools, health care and justice (Casadei and Franceschetti, 2009:3). Notwithstanding the importance of this figure to solve conflicts between foreign defendants and legal institutions, the presence of cultural mediators is quite rare in Italian courts, whilst it is more frequent, for example, in penitentiary facilities (Casadei and Franceschetti, 2009). I never met a cultural mediator in the court of Turin. However, as some magistrates noted, it is not uncommon for them to be in a situation where understanding the cultural component *matters*.

There is an episode that is still etched in my memory. In February 2018, there was a trial with a foreign defendant who was charged with violence against the police. The whole episode was rather vague, and it was unclear why the defendant got upset and reacted violently against police officers during an identification at the police station. After a few failed attempts, the defendant was able to explain the reason behind his reaction. He said that he started pushing police officers away because he was upset not for the identification in itself, but for how it was meant to happen. Four police officers asked him to get undressed for a search, and he refused to do so because he claimed that, being Muslim, he was not allowed to get naked in front of other men. The judge, a middle-aged woman with friendly ways, was quite surprised by the defendant's explanation, as she did not expect such answer. She took some time to process this 'cultural justification' and assess its weight and credibility.<sup>86</sup>

A month earlier, I attended a proceeding in which it was impossible to ascertain the defendant's age. In particular, the judge invited the defendant to say his date of birth, and he answered that he did not know it. This time, the judge, a woman with not so friendly manners, became quite annoyed at the defendant. She began yelling at him that it is impossible not to know when one is born. The defendant, in broken Italian, explained that, in Senegal, he was educated in Islamic schools and not in French schools. Hence, he does not know 'the year here'. The judge, then,

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<sup>86</sup> The defendant was acquitted on the ground that there is no substance to the fact. In particular, the judge argued that the defendant did not intend to use violence against the police, but he reacted against a request that he perceived as illegitimate.

asked the defendant to tell her the year written on his passport. The defendant answered that he lost his passport – at this point, the judge took a deep breath – and that anyhow he can read only Arabic. After, he added that he does not know ‘the French numbers’. The judge, at this point, gave up identification and proceeded with the trial – of course, not with a good attitude towards the defendant. Later that week, I discussed this episode with a defence attorney who was in the hearing room with me on that day. She claimed to have much experience in dealing with immigrants because her professional activity focuses on international protection. However, she also practices criminal law when her clients are in trouble – and this does not happen rarely. She told me that, especially for clients coming from rural villages or desert areas of Africa, age is not really an issue. According to her, it is true that some foreign defendants do not know their age for a variety of reasons. For example, in some villages there are no civic registers, or they have been destroyed during conflicts. Besides, many foreign defendants are illiterate or have received little education, and they only know the Islamic calendar. She believed that some magistrates are more narrow-minded than others, as they have difficulty in understanding that foreigners might have different customs than we do. For example, she told me that some of her clients know their age with reference to episodes that happened in their village, such as ‘I was born in the year of the massive flood’. Consequently, the fact that certain social and cultural realities are unknown or poorly understood hinders judges’ ability to comprehend foreign defendants’ behaviour or attitudes.<sup>87</sup>

When the penal state lacks resources and capacities to deal with foreign defendants, the enforcement of ‘domestic’ institutes and procedures is greatly compromised. As Robinson argues, ‘contemporary states in the era of globalisation are faced with the challenge of acquiring new types of capacity that enable them to engage with a growing plurality of actors and institutions at the global, sub-national and local levels’ (2008:567; on the topic, cf. also Rondinelli and Cheema, 2003). Nation states are called to acquire new economic and cultural resources, and their ability to do so has an impact on how penal policies will develop. As mentioned above, Garland argues that whereas the capacity of the penal state does not account by *itself* for penal patterns and outcomes, it can help in explaining why different penal states ‘respond differently to common challenges and common social developments’ (2013:502). In the following paragraphs, I examine how the limited capacity of the Italian penal state in dealing with foreign defendants *matters* to the enforcement of penal policies.

### 7.3. ‘Lost in translation’: the burdensome interpreter

When I started observing direct proceedings at the court of Turin, the presence of interpreters was practically a constant in the daily administration of low-level criminal offences. As multilingualism has become one of the most prominent features of criminal courts (Aliverti and Seoighe, 2017:150), interpreters have become important actors in the dynamics inside the court.

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<sup>87</sup> Defence attorney, interview n. 4.

Yet, the impact of interpreters on the development of judicial practices, together with the implications of interpreters' activities for criminal cases, is largely under-researched (for exception, see: Nartowska, 2016; Berk-Selingson, 2017; Aliverti and Seoighe, 2017). According to data from ISTAT, the Italian National Institute of Statistics, the most spoken languages by foreign residents in Italy are Romanian (21.2%), Arabic (13.1%), Albanian (10.5%) and Spanish (7%).<sup>88</sup> However, these are not the languages for which translation is more requested when it comes to direct proceedings in the court of Turin. In fact, I most often encountered interpreters for English, Arabic, French and Wolof. This is because the great majority of foreign defendants charged with drug trafficking come from African countries, where those languages are commonly spoken. I remember that the presence of an interpreter in the hearing room suggested me that *at least* one defendant was non-Italian. As Aliverti and Seoighe argue, the presence of an interpreter 'is the most tangible indicator of the defendant's outsider status' (2017:150). Besides, in the court of Turin, language speaks also about the 'type' of criminality. For example, the presence of Arabic and Wolof interpreters in the hearing room gave me a hint about the proceedings that I was going to observe, meaning African defendants charged with drug trafficking. Or the presence of Romanian and Albanian interpreters signalled to me property crimes, such as robbery, theft or burglary. I was often right in my predictions. Several magistrates told me that they are able to 'identify' before opening the dossier a defendant's charge simply by reading his name. This is to say that 'certain' nationalities relate to 'certain' crimes. For example, when it comes to street-crimes, magistrates 'know' that Africans are charged with drug trafficking, Romanians with robbery and Georgians with burglary. Language, hence, is a proxy for nationality (Aliverti and Seoighe, 2017), and nationality is a proxy for 'different' criminality.

Interpreters are vested with the task of removing language barriers and facilitating communication between the parties (Nartowska, 2016). At the same time, it would be a mistake to assume that an interpreter's role is limited to translate word-by-word what the parties said during the trial. Rather, interpreters can alter the perception of those who listen to them and affect the outcome of criminal cases, as they have the power to control and filter the information produced in the dialogue between the parties (Aliverti and Seoighe, 2017; Howes, 2019). At the same time, the presence of an interpreter can, occasionally, be reassuring for foreign defendants who are unfamiliar not only with the language, but also with the criminal procedures more generally (Morris, 2010). This is to say that interpreters might be perceived differently depending on who is using their service. In the court of Turin, interpreters are not warmly welcomed by magistrates and defence attorneys. In reality, the presence of an interpreter in the hearing room was often perceived as an obstacle to a fast and 'painless' trial by courtroom actors. It was not uncommon to see a hint of discomfort on judges' face when an interpreter was in the hearing room. Undoubtedly, these reactions were not triggered by the presence of the interpreter *per se*, but by what this presence implies for the proceeding. In fact, interpretation is time-consuming and not always fruitful. It must be mentioned that, when there was an English interpreter, I could

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<sup>88</sup> <https://www.istat.it/it/files//2014/07/diversita%C3%A0-linguistiche-imp.pdf>

not avoid noticing that his or her translation consisted often in a very basic summary of what a defendant said. I did not interview interpreters directly, but my impression was that they try not to ‘exaggerate’ with interpretation as judges tended to expedite matters. As has been argued, interpreters may adapt ‘their behaviour to meet the expectations and style of other professionals in the situation in which the interpretation is being provided’ (Morris, 2010:23).

In order to limit the side effects caused by the presence of an interpreter, judicial practices in Turin have somehow been adjusted to new challenges. For example, to save time, the great majority of judges prefers not to question foreign defendants directly about their identity, as they would do with Italian defendants. Rather, they ask interpreters to fill in an identification form with the information the defendant provides directly to the interpreter. Respondents referred to this practice in this term:

Well, it is a deception, we use it [the identification form] to speed up procedural obligations. Sometimes we have many direct proceedings, and so...in reality, this custom is unorthodox because it is responsibility of the judge to identify a defendant (Judge, interview n. 4, February 7<sup>th</sup> 2018)

Interpreters, to speed up procedures, prepare an identification form with a defendant’s information. So, often judges do not ask questions directly to a defendant, but they simply copy the information in the form. The problem is that not all interpreters are meticulous, not all interpreters work properly, we have limited time, defendants speak a spectrum of different dialects...so yes, sometimes it can happen that the identification goes wrong (Defence attorney, interview n.6, February 7<sup>th</sup> 2018)

Time is a precious resource in the court of Turin, and this is why some judges rely on information collected by interpreters rather than identifying defendants by themselves. In other terms, the interpreter substitutes for the judge in his or her task of identifying a defendant. Only in a few cases do judges, after reading the identification form, ask a defendant to clarify some information, for example the name of the bar in which a defendant claimed to work or the name of the friend with whom a defendant claimed to live. Most of the time, judges prefer not to do so to avoid further complicating matters. In some cases, the judges’ negative approach to interpretation goes even further. In this regard, it must be mentioned that article 143 of the Italian code of criminal procedure establishes that a judge must appoint an interpreter if a defendant is unable to understand and speak the language used in the court. The same article also provides that the judgment of whether a defendant is able to master the language used in the court rests with judges. Despite the black-letter-law, from observation it emerged how judges, at times, are reluctant to ascertain if a defendant’s command of the language is sufficient to exercise the right to defence. In particular, judges’ decisions in relation to a defendant’s capacity to master the



language of the court is often made ‘on the basis of considerable ignorance’ (Eades, 2003:116). However, it is one thing to be able to answer to some basic biographical questions, it is another to engage in more complex dialogues with legal implications.

Some judges, for example, attempt to avoid interpretation when a defendant speaks Italian a little. In October 2018, I attended a direct proceeding with a foreign defendant charged with robbery. He claimed to speak Italian, but in practice he had many difficulties, something that could not go unnoticed. At the same time, he was very anxious to explain himself, so he tried to tell his side of the story and answer to the questions from the judge and the public prosecutor. However, it was clear that he was unable to understand the legal jargon. The defendant’s command of the language was too poor to defend himself against the charge of having committed robbery. In spite of this, an interpreter was not summoned because the defendant said to the judge that he speaks Italian ‘*un poco*’, a bit. After the public prosecutor finished her argument, the defendant stood up. He had a very concerned look on his face. He said that he did not understand many things, especially the ‘bad words’ – he referred to the legal jargon in this term. The judge, at this point, scolded the defendant arguing that, at the beginning of the proceeding, he said he could speak Italian and that it is now too late to say that he does not. Attempts to completely avoid interpretation, fortunately exceptional, show how interpreters are ‘reluctantly (and often poorly) accommodated in the courtroom’ (Aliverti and Seoighe, 2017:150).

Together with saving time, saving ‘money’ is another big concern for *torinesi* judges. In the last decade, in the Italian political debate, similar to other European countries (cf. Koning, 2017), there emerged the idea that immigrants represent a burden on the welfare state. According to the report by the ‘Jo Cox’ committee, 65% of Italians think that refugees are a burden because they exploit the social benefits and work of native inhabitants.<sup>89</sup> Kymlicka argues that ‘the perception of economic burden is an effect of perceptions of cultural otherness’ (2015:11), meaning that concerns to ‘cut costs’ are amplified by the legal status, the otherness, of those who need ‘our’ resources. While observing direct proceedings, it was quite common to witness judges asking a defendant whether he (less often she) wanted to waive the translation of the judgment. This ‘custom’ is in stark contrast with article 143 of the Italian code of criminal procedure that, in line with the directive 2010/64/UE, establishes that a written translation of essential documents, including judgments, must be provided to the accused person who does not understand the language of the trial (Di Molfetta, 2019). When asked about this practice, the majority of judges believe that there is nothing wrong in ‘cutting costs’ for the penal state:

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<sup>89</sup> [https://www.camera.it/application/xmanager/projects/leg17/attachments/uploadfile\\_commissione\\_intolleranza/files/000/000/006/INFOGRAFICA\\_EN.pdf](https://www.camera.it/application/xmanager/projects/leg17/attachments/uploadfile_commissione_intolleranza/files/000/000/006/INFOGRAFICA_EN.pdf)

I always ask if they [foreign defendants] waive the right to translation. If they say no, then I order the translation. It is a cost for the state, so if I can avoid it... (Judge, interview n. 12, June 14<sup>th</sup> 2018)

Well, as a rule, we should always translate judgments, especially if a case is complex. If it's an easy case, the defendant admitted his guilt, well...then, it's pointless to lose time and waste public money. I know, there are international obligations, but there is no agreement about which documents must be translated. I don't think it's a big issue [...] I spoke about this with more experienced colleagues than myself, and also with the administrative personnel...they are very pragmatic and advised me not to exaggerate with translations (Judge, interview n. 11, May 30<sup>th</sup> 2018)

From the interviews it became clear how judges confront themselves with the opportunity to avoid translation of judgements. Few judges, mainly those belonging to the most progressive faction of the judiciary, say that they always order the translation of judgments because a defendant must be able to read the reasons behind the conviction in his mother language, especially if he intends to appeal against it. However, for the great majority of judges, cutting costs is perceived as more important. Many judges claim that, because the state has to bear the costs of translation, this service should be avoided as much as possible. It was not uncommon to hear judges asking *explicitly* to defence attorneys to 'invite' their clients to waive translation. In one occasion, a judge smilingly said to an attorney: 'do me a favour: waive translation and I'll give you the attenuating circumstances', and the attorney responded in the affirmative to this question, without consulting his client.<sup>90</sup> There are different reasons behind this reckless attitude to language assistance. According to some, defendants are likely to disappear after the proceedings because they have no interest whatsoever to their cases. Others believe that defendants are too ill-educated to understand the substance of the judgment, even if translated. In both cases, translation is perceived as a useless service because foreign defendants would never really enjoy their rights. It must be mentioned that Turin is not an exceptional case, since other courts have developed internal practices to avoid translation and save costs. For example, the guidelines adopted by the court of Milan establish that written translation of plea bargain is ordered by judges *only* when a defendant *explicitly* requires it (Gialuz, 2018). Likewise, a research conducted in the court of Trieste show that judgments, as internal practice, are never translated (Mometti, 2014). These *contra legem* judicial customs address a lack of sensitivity from the Italian judiciary when it comes to language assistance, together with an impelling need to cut costs.

Apart from avoiding translation, observation of criminal proceedings revealed how the quality of the services provided by court-appointed interpreters is far from sufficient. This outcome is in line with research conducted in the United States (Berk-Seligson, 2017), and in Austria and

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<sup>90</sup> Fieldnotes, June 2018.

Poland (Nartowska, 2016) on interpreting services. These studies conclude that interpreters could not guarantee complete understanding to foreign defendants, and that the communication between parties is deficient and not effective. As evidenced by the episode in the introduction, Italy is not exempt from this criticism: the quality of translations provided to defendants is often scarce. Of course, my understanding is limited to communication in English, given my poor linguistic proficiency in other languages. However, there is one episode that addresses how language-related obstacles in communication might be not limited to English only. In February 2018, I saw a criminal proceeding involving an Arabic-speaking defendant. I could not understand anything of the communication between the Arabic interpreter and the defendant. However, two women sitting behind me (I discovered afterwards that they were the defendant's wife and sister-in-law) complained loudly in Italian about the translation, shouting 'this is not what he said!'. The judge pretended to ignore their voices, almost as if it was not so strange that something went wrong with the translation. When I discussed this issue with judges, quite surprisingly, many agree that the quality of translation provided to foreign defendants is often insufficient:

The quality of our interpreters, sometimes, is really embarrassing. I speak English and French a bit. I shouldn't do this, but sometimes I help interpreters in translating [...] There's a double problem here. First, interpreters have a poor knowledge of the language they are called to translate. For instance, we have people from Maghreb who are English interpreters, and they know the language so-so. Second, this is also due to the fact that you pay interpreters too little. If the state decides to pay interpreters on the cheap, of course we won't see here someone graduated at the Sorbonne or at Cambridge, someone with an advanced language proficiency! If you pay interpreters 8 euros for two hours of work, that's what you get! (Judge, interview n. 5, February 22<sup>nd</sup> 2018)

There are many problems, especially with Arabic languages. In fact, we should talk about Arabic languages because they are many and different. So, sometimes, interpreters and foreign defendants do not speak the same language, they do not always understand each other. It would be better to summon different interpreters, for instance Egyptian interpreters for Egyptians, and so on. But here, we perceive foreigners as if they are all the same, we don't really know them (Judge, interview n. 10, April 13<sup>th</sup> 2018)

The lack of an adequate level of professionalism from interpreters is a widespread problem across European countries, as only a few provide a high standard of quality (Gialuz, 2018:156). However, the fact that states are unwilling to invest resources in language assistance to foreign-

speaking defendants has an impact on how penal practices develop. The Italian case shows how the lack of professional expertise and trained personnel, due to budgetary constraints, not only hinders the communication between parties, but also affects the significance of penal practices. Identification is no longer the moment when judges collect information on a defendant's personality. Rather, when it comes to foreign defendants, especially the irregular component, it is the moment when stereotypes are replicated and reinforced. To save time and money, judges do not attempt to identify an *individual* defendant as such, for example by ascertaining his or her immigration history, living conditions and the reasons behind the commission of a certain offence. Rather, judges rely on old stereotypes that reinforce a divisive rhetoric that places 'them', the foreign defendants, against 'us', regardless of the diversity of 'them' (Vertovec, 2007). In fact, judges insist on translation only when an element 'breaks' the equation, for example a defendant *used to be* regular. In these (limited) cases, judges ask different questions to a defendant about his or her life and rely more significantly on language assistance services. Otherwise, judges' assessment of a defendant is driven by received ideas and prejudices against undocumented immigrants in the national territory. Due to the limited resources available to language assistance services, judges are not well equipped to deal efficiently with foreign defendants. Therefore, they develop (informal) internal practices aimed at processing cases as promptly as possible. These circumstances show how the lack of economic and cultural capital is most likely to lead to simple and ill-informed judicial practices (Garland, 2013).

#### **7.4. Out from the trial: judges' resistance to deportation**

Deportation 'is intended to forcibly remove a person from their place of residence to their purported country of origin' (Hasselberg, 2016:24). Generally speaking, deportation is used against immigrants who do not hold the right to reside in a country. In recent years, many Western countries have increasingly relied on deportation to control global migration. Gibney (2008:146) refers to a 'deportation turn' to indicate how a secondary instrument of migration control has acquired a prominent role in managing the 'unwanted'. For example, countries have started to deport long-term residents who have committed a criminal offence, hence 'attaching' immigration consequences to criminal convictions (Sklansky, 2012; Stronks, 2013; Tosh, 2019). In this regard, deportation is employed both in the immigration and criminal law domain to remove those deemed to be undeserving of membership from society. Scholars have documented the increasing reliance on deportation in various national contexts, such as Sweden (Khosravi, 2009), the United Kingdom (Gibney, 2008; Kaufman, 2015), Australia (Pickering and Weber, 2012; Stanley, 2018), the United States (Eagly, 2013; Macías-Rojas, 2016; Brotherton, 2018) and the Netherlands (Broeders, 2010; Brouwer, 2020).

Yet, the fact that countries attempt to control national borders through practices of banishment and expulsion does not imply that they would succeed in doing so. This is because 'deportability' (De Genova, 2005) does not necessarily lead to actual deportation (Campesi, 2015). Whereas deportation might be seen as an exercise of state unilateral power, in reality, many situations

preclude its enforcement, such as a lack of re-admission agreements with third countries or the impossibility of establishing a non-citizen's nationality or identity. As a result, states are facing what has been termed a 'deportation gap' (Gibney, 2008), referring to the difference between the number of non-citizens who can be deported and those who are actually deported. In a recent article, Leerkes and Van Houte conclude that it would be more suitable to talk about a 'globalised' deportation turn (2020:320), given the different interests and capacities of individual states to enforce deportation. Italy, in particular, is amongst the countries with a 'thin enforcement regime' (Leerkes and Van Houte, 2020:333) because of its limited enforcement capacities. In fact, in the country the deportation gap is particularly striking: in 2019, 26.900 non-citizens were ordered to leave Italy, but only 6.470 did so.<sup>91</sup>

In the Italian legal context, deportation can be ordered by both administrative and judicial authorities.<sup>92</sup> Administrative deportations are issued by the *prefetto*, who represents the government at the provincial level, against foreign nationals who do not fulfil the requirements to reside in Italy. Judicial deportations are issued by judges against criminally convicted non-citizens. In particular, deportation orders can be issued by trial judges both as an alternative to detention and as a security measure, the latter to be enforced after a defendant has served his time in prison. Surveillance judges too, that are judges responsible for supervising the implementation of the penalty imposed upon criminal conviction, can issue a deportation order as a condition for early release. It is not my intention here to scrutinise one by one the complicated rules governing the expulsion system of foreign nationals in Italy.<sup>93</sup> I limit myself to mentioning two issues that deserves attention. A word of clarification about the terminology. Despite the act of removing someone from the national territory goes under different labels, such as expulsion, deportation, removal and involuntary departure, the term 'deportation' is the most appropriate to indicate the removal of convicted foreign nationals (cf. Turnbull and Hasselberg, 2017). Whereas in Italy we use the word *espulsione* to indicate both judicial and administrative expulsions, I use to word 'deportation' for terminology consistency with the research field. Returning to the subject, it must first be observed that both administrative and judicial deportations are enforced by the *questore*, who is the provincial chief of the police. This means that, when enforcing deportation orders, immigration officers face the same obstacles (e.g., lack of an available carrier to execute deportation), regardless of the authority who issued the order. Second, whereas administrative expulsions are based on the fact that a person lacks the requirements to reside in the country, for whatever reasons, judicial expulsions are based on the fact that a defendant is deemed a danger to society, irrespective of his legal position.

From the analysis of case files it appears that deportation in lieu of detention and as a security measure are rarely used by trial judges.<sup>94</sup> The limited use of the first deportation relates to its

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<sup>91</sup> Source: Eurostat.

<sup>92</sup> Expulsions are disciplined by legislative decree 286/1998.

<sup>93</sup> For an overview of administrative expulsions, cf. the mission report "*Undocumented*" *Justice for Migrants in Italy*. International Commission of Justice (2014). Available at: <https://www.refworld.org/pdfid/5452554a4.pdf>

<sup>94</sup> Early release in view of expulsion was not investigated because this measure is ordered by surveillance judges, who are responsible for supervising implementation of penalty.

limited scope. Deportation in lieu of detention, in fact, can be ordered only against first-time offenders charged with a non-serious offence, and *immediately* deportable. Because foreign defendants are brought in front of a trial judge within 48-hours after being arrested, it is unlikely that immigration officers at the police station would be able to identify an arrested person within such short time frame. Deportation as a security measure, on the contrary, can be ordered by a trial judge when a convicted defendant is deemed socially dangerous, a risk assessment normally based on a defendant's criminal history. However, the deportation order can be enforced only after the defendant has served his time in prison, and if a surveillance judge confirms the risk assessment. Otherwise, the deportation order is revoked. I decided not to refer to any deportation in particular, and to introduce the topic to my respondents more generally, by asking 'Have you ever requested/issued a deportation order? If so, can you tell me something about it?'. I did so to allow judges and public prosecutors to articulate answers according to their own framing, and to speak about the deportation that they actually use.

The interviews unearthed the reasons why a 'deportation turn' (Gibney, 2008) did not take place in the Italian criminal justice system. A word of clarification. I have been told that deportation orders are used as the back door of the judicial system at most. However, surveillance judges were outside the scope of this research, so my findings are limited to the sentencing phase only. Trial judges are reluctant to order, and public prosecutors to request, deportation of foreign defendants for three reasons. The first reason relates to the circumstances where magistrates have little knowledge of deportation, to the point that many of them did not know the difference between deportation in lieu of detention and deportation as a security measure. Some magistrates were almost ashamed of their ignorance on the subject as they tried to divert my question. Others, with a smile on their face, admitted to a lack of knowledge of the subject:

As far as I am concerned, I am quite ignorant on this subject [...] I think that not even judges know it (Public prosecutor, interview n. 12, October 2<sup>nd</sup> 2018)

It's almost never used. I remember that once a public prosecutor asked me to order a deportation and I had to study it (Judge, interview n. 6, March 1<sup>st</sup> 2018)

The 'unfamiliarity' of Italian magistrates with the discipline also creates some confusion about the authority 'in charge' of this measure. In particular, public prosecutors claimed that security measures, including deportation, must be ordered by judges. Judges, on the contrary, claimed that security measures affect a defendant's personal freedom, hence it is the responsibility of

public prosecutors to ask for it. One judge, a middle-age woman with curt manners, went even further by saying that she would gladly order deportation if only public prosecutors asked her to. She claimed that if they do not do so, her hands are ‘tied’. Besides a certain degree of uncertainty concerning who is in charge of ‘triggering’ the deportation machine, from the fieldwork there appeared a widespread lack of knowledge on the role of deportation in criminal proceedings amongst magistrates. The latter ascribe their ignorance on the subject partly to the circumstances that security measures are little used and partly to the circumstances that deportation, by itself, is an unknown measure. This situation holds true also for defence attorneys. The great majority of attorneys I interviewed work mainly in the field of criminal law. Although they have many foreign nationals without a valid residence permit amongst their clients, defence attorneys admit to lacking expertise on immigration law. This is because, in Italy, defence attorneys, but more generally legal professionals, hold knowledge in a specific area of law. Hence, if a defence attorney has developed his competences in criminal law, it is not surprising that he lacks knowledge and experience in other areas. Besides, the Italian discipline on immigration law is confusing and unintelligible, and small reforms are often on-going. Hence, an immigration attorney must be well-prepared and always updated on this complicated subject. From a study conducted by Barbara Faedda it appears that even attorneys working in the field of immigration consider the laws ‘really complex, stratified, inconsistent and ever changing because they are at the mercy of the current government’ (2014:121). Given such complexity, it is unlikely that legal professionals working in other areas of the law, for example criminal law, would take the trouble to study immigration law, especially if its rules are under-enforced in criminal justice settings.

The second reason why deportation is rarely used within the criminal justice system relates to the impossibility of its implementation. ‘Undeportability’ has to do with certain material and structural limitations of the Italian deportation machine, such as the shortage of places in detention centres and the paucity of return agreements with third countries (Fabini, 2019:180). Together with limited capacities, it has been argued that the reliance on a migrant workforce in the informal economy of the country makes it more difficult to institutionally exclude irregular immigrants (cf. Leerkes and Van Houste, 2020). Whereas it is true that courtroom actors lack technical knowledge of deportation, they are well aware of the more practical obstacles surrounding its enforcement. The circumstances of knowing that a deportation order would remain a ‘dead letter’ represents a hindrance in the effective use of this measure:

To me [deportation] is of little use because deportation orders are often not enforced. Hence, a deportation order issued by a judge adds little to the overall effectiveness of deportation (Judge, interview n.5, February 22<sup>nd</sup> 2018)

Deportation ordered by a judge faces the same obstacles of administrative deportation. One must be able to enforce deportation, understand? So, it’s a blunt weapon (Judge, interview n. 8, March 2<sup>nd</sup> 2018)

[Deportation] is difficult to enforce, just because a judge orders it doesn't mean problems are solved...you don't know the identity of a person, the country of origin, and there are no return agreements with many countries (Public prosecutor, interview n. 9, June 13<sup>th</sup> 2018)

Courtroom actors are aware of the fact that deportability (De Genova, 2005) does not lead to deportation for the great majority of foreign defendants without a valid residence permit. Hence, they believe that it is pointless to issue an order that eventually will never be enforced. This situation shows how practical constraints not only determine the failure of the Italian deportation machine (Campesi, 2015), but also have an impact on the extent to which deportation finds 'its space' in the criminal justice system. Additionally, several magistrates mention that administrative deportations are faster and less guaranteed. This element deserves attention. The 'crimmigration' literature has stressed how deportation, because it is classified as an administrative measure, 'is shielded from the scrutiny that is applied when punishments are imposed' (Bowling and Westenra, 2020:167). These circumstances have made deportation particularly attractive to governments for dealing with non-citizens, inasmuch as cheap and fast administrative measures allow for procedural side-stepping (Zedner, 2016:9; cf. also Kanstroom, 2000; Dow, 2007; Aliverti, 2012; Weber and Pickering, 2013). In the Italian legal context, this is not the case when deportation is ordered as a security measure. As mentioned above, this type of judicial deportation, in fact, becomes 'enforceable' only after a judgment becomes final – which may take years – and a surveillance judge confirms the risk assessment made by a trial judge.<sup>95</sup> Given these circumstances, it does not sound surprising that judges and public prosecutors prefer to 'leave the floor' to administrative authorities, considering the practical and procedural obstacles surrounding the enforcement of deportation.

The third reason why deportation is under-enforced in criminal justice settings relates to how magistrates interpret their roles and the relationship, or lack thereof, between the criminal and administrative law domains. Whereas deportation might be used by magistrates, they show some resistance in doing so because they perceive it as 'outside' their professional activities:

I forgot about [deportation], you made me remember, I know it exists...but this is because it seems to me something for administrative authorities to deal with (Judge, interview n. 9, March 23<sup>rd</sup> 2018)

A deportation can be easily ordered by the *prefetto*. My task is to ask for a penalty, and the *prefetto* deals with a deportation (Public prosecutor, interview n. 11, October 2<sup>nd</sup> 2018)

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<sup>95</sup> This is not the case for deportation in lieu of detention (imposed by trial judges) and early release in view of deportation (imposed by surveillance judges). In these two cases, deportation is immediately enforceable.



The circumstances where deportation is perceived as an extraneous issue by the penal domain has contributed to its non-enforcement by Italian magistrates, and I believe also to the lack of knowledge about it. An experienced immigration attorney told me that the main reason for which magistrates do not use deportation is that they '*fanno penale*', meaning that they are criminal court judges.<sup>96</sup> This is to say that criminal court judges deal with crimes and criminals. Because deportation relates to the lack, or the loss, of a residence title, magistrates perceive that it is not their business. This is also because article 10-*bis* of the Consolidated Immigration Act, that is the crime of irregular entry or stay in the national territory, does not fall under the competence of criminal courts of the first instance. It is up to the office of justice of the peace to adjudicate on minor criminal offences,<sup>97</sup> including article 10-*bis*, which is punishable by a fine from 5,000 to 10,000 euros. However, the misdemeanour under article 10-*bis* is per se under-enforced (Fabini, 2017:55), as the police tend to arrest immigrants when other elements than the lack of papers are identified (for example, a record for drug trafficking, the presence of aliases or 'suspicious' behaviour). The 'only' immigration crime left to criminal court judges is the one foreseen by article 13 of the Consolidated Immigration Act, that is when an immigrant who has been deported re-enters the national territory before expiration of the re-entry ban. Except for this case, criminal court judges do not deal with immigration law, and they perceive it to be something outside of their competence. In sum, whereas 'being irregular' informs magistrates about a defendant's situation in the national territory in terms of precariousness and propensity to crime (see chapter four), they do not perceive it to be their task to act upon it.

Another structural element that seems to 'enlarge' the distance between the immigration and the criminal law domain is represented by the lack of coordination between the two authorities. This contrasts sharply with other legal realities, such as Belgium (De Ridder, 2016), the Netherlands (Brouwer, 2020) and the United Kingdom (Kaufman, 2015), where immigration and penal authorities work hand-by-hand to tackle criminally convicted non-citizens. On the contrary, in Italy, the two authorities do not communicate with each other, even if they have the 'same' client. In May 2018, I was astonished by this trial where the judge could not ascertain whether the defendant resided regularly in Italy or not. From the dossier it appeared that the defendant entered the country three years earlier, although it seemed that he already entered and left some years before. So, three years earlier he got a residence permit, but later he was expelled, apparently because he committed some criminal offences. Now, he is on trial for re-entering the territory before expiration of the re-entry ban, but his residence permit appears to be under renewal. The judge looked stunned at the public prosecutor and defence attorney. After reading the dossier again, he said that these are 'the mysteries' of our immigration laws, and that it is not his problem how this will end up. The immigration and criminal justice system are so cut off from each other that judges do not know whether a defendant, once released under criminal law, will be detained under immigration law:

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<sup>96</sup> Defence attorney, interview n. 1.

<sup>97</sup> Legislative decree n. 274/2000.

I have no idea about what happens to a defendant after I release him. Maybe I give him a suspended sentence because he is a first-time offender and I do not believe he deserves to serve a sentence. However, he doesn't have a residence permit. I have no idea about what happens to him afterwards, this is something that stays out of my trial. It is not up to me. There should be some coordination between judicial and administrative authorities. And I have to say that sometimes I am surprised because I see defendants with many criminal convictions and not a single expulsion order [...] And then, I see first-time offenders who are tried for re-entry in Italy after been expelled. And I think...shouldn't you expel those who have many criminal convictions? (Judge, interview n.1, May 30<sup>th</sup> 2018)

Structural, procedural and cultural obstacles contribute to keep deportation outside the sentencing phase. In Italy, a deportation turn (Gibney, 2008) in the criminal justice system is unlikely to take place because magistrates lack knowledge of immigration laws and procedures *and* of a defendant's migration history, both past and future. Additionally, magistrates do not wish to deal with certain issues because they perceive them as outside their competence. As mentioned above, they deal with crimes and criminals. This confirms that, as documented through chapters four and five, the legal and professional culture of magistrates plays a pivotal role in determining the use of discretion. Even if the government 'transfers' an immigration measure to the criminal law domain, magistrates are reluctant to use this tool because they perceive that it is up to administrative authorities to issue deportation orders. In Italy, then, the strongest hindrance to the development of 'crimmigration' practices is represented by the resistance from the judiciary to rely on 'hybrid' measures in criminal justice settings.

## **7.5. Conclusion and discussion**

This chapter discussed the role of state capacity and resources in shaping penal practices in the context of foreign defendants without a valid residence permit. Processes of globalization, and in particular the movement of people, have placed greater demands on the penal state, which is now required to develop procedures and acquire resources to comply with international obligations and solve logistical problems (cf. Robinson, 2008). This chapter argued that the 'amount' of economic and cultural capital at the disposal of the penal state can help to explain the occurrence of different policies between different states (cf. Garland, 2013). From the fieldwork it became clear that the limited resources of the Italian penal state favour the development of fast, simple and uncoordinated judicial practices, at times at the expense of foreign defendants without a valid resident permit. In particular, this chapter examined two issues directly related to resources, or better to the lack thereof, meaning language-related obstacles and the enforcement of deportation orders.

Despite the importance of court-appointed interpreters to remove language barriers and facilitate communication between the parties, courtroom actors do not seem to welcome interpreters in the hearing room. On the contrary, when possible, judges attempt to avoid interpretation or rely on linguistic services as little as possible. This happens from the very beginning of direct proceedings, when judges must identify a defendant. Judges do not rely on interpreters as a linguistic support to question directly foreign defendants, as established by the law. Rather, they ask interpreters to fill in an identification form, hence developing a time-saving and convenient practice. If ‘saving time’ is a concern at the individual level, ‘cutting costs’ is something that relates to the judicial machine as such. In particular, the *torinese* court, or better the Italian penal state in this case, has invested little or nothing to ensure an adequate level of professionalism of court-appointed interpreters. As a consequence, interpreters are poorly accommodated in the hearing room (Aliverti and Seoghe, 2017) because the quality of their assistance is deemed insufficient, occasionally even a waste of time. Furthermore, because interpreters are paid on a piecework basis, the great majority of judges avoid translation as well. This judicial practice was developed in conjunction with the administrative management with the purpose of cutting ‘useless’ costs in the *torinese* court.

When it comes to judicial practices related to deportation, the capacity of the penal state must be examined in terms of cultural capital and system coordination. In fact, from the interviews it emerged that the main barrier to the use of deportation in the sentencing phase is represented by a lack of cultural capital. In short, magistrates are unaware of the requirements and grounds on which deportation orders can be issued. As a judge tellingly admitted, she had to study the discipline of deportation when a public prosecutor asked her to issue a deportation order. This lack of knowledge seems to be favoured by a strong division between professionals working in different areas of law, and by a certain degree of ‘insulation’ of the judiciary from other authorities (see chapter four). Criminal trial judges perceive their task to be limited to ascertain whether a defendant has committed a crime or not, regardless of his or her position in respect to other authorities. Similarly, defence attorneys limit themselves to defend a client in respect of a criminal charge, without considering the consequences of a potential conviction for request or renewal of residence permits. Additionally, the absence of a system of coordination and operational cooperation between administrative and judicial authorities makes judicial deportations an unnecessary duplication of administrative deportations. As many judges observed, administrative deportations are faster and come with fewer procedural guarantees compared to judicial deportations. Besides, the latter face the same obstacles of administrative deportations in terms of enforcement, inasmuch as they are destined to remain unenforceable, regardless of their ‘judicial’ input.

The analysis of judicial practices with regard to language assistance and deportation shows a common denominator, that is the limited capacity of the penal state to provide adequate answers to emerging needs. As long as domestic procedures are not ‘adapted’ to foreign defendants, the penal state remains unable to provide solutions in a judicial reality by now multicultural. On the one hand, the lack of economic capital does not allow the penal state to provide proper linguistic

assistance to foreign defendants. Whereas this is a topic under-researched by criminal justice scholars, I believe that the impact of interpreters on judicial practices should be carefully considered. As Aliverti and Seoighe argue, ‘the presence of interpreters draws attention to the deficient realization of basic due process rights’ (2017:150). Indeed, because interpreters are reluctantly accommodated in the hearing room, judges are less keen to ascertain responsibility and more incline to rely on long-standing stereotypes. Further empirical research is needed to assess whether and how interpreters influence decision-making processes.

On the other hand, the lack of cultural capital and system coordination places foreign defendants in the middle of two isolated legal systems. Criminally convicted non-citizens, in fact, at the end of their ‘journey’ in the criminal justice and penitentiary systems, are detained in pre-removal detention facilities for identification and expulsion (Campesi, 2015:431). At the same time, this is something that remains outside the criminal justice system. As mentioned above, judges do not know – and have no interest in doing so – whether a defendant will be detained under immigration law once released under criminal law. The lack of communication and cooperation between criminal and administrative authorities is in sharp contrast with the ‘crimmigration’ trend. In fact, several countries have developed a system of coordination between the two authorities to ‘expedite’ the deportation machine (Sklansky, 2012; Kaufman, 2015; Brouwer, 2020). In the Italian context, on the contrary, this did not happen. Additionally, whereas immigration measures have been transferred to the criminal law domain, judges are reluctant to enforce them. In other terms, the merger between immigration and criminal law might have taken place ‘in-the-books’, but it is far from happening ‘in-action’.

The point that I want to make here, once again, is that the context *matters*. In Italy, the professional culture of the judiciary and their detachment from the immigration realm has not allowed a ‘deportation turn’ (Gibney, 2008) in the criminal justice system. In this regard, I agree with the conclusion that it would be more appropriate to talk about a ‘globalised’ deportation turn since the latter ‘takes different forms, and has different consequences, depending on how it interacts with national and local contexts’ (Leerkes and Van Houte, 2020:320). The historical, economic and cultural differences between European countries make it difficult to talk about a ‘deportation turn’ or ‘crimmigration practices’ in Europe as opposed to the American context. In reality, in the US there are different shades of grey too. For example, the study conducted by Eagly (2013) in three different American jurisdictions shows that the way in which immigration-related concerns interact with crime-related concerns is highly dependent upon different local judicial practices. These findings show how studying the local level might provide a more nuanced view of the ‘crimmigration trend’. Case studies are much needed in this research field to obtain an in-depth appreciation of how national and local contexts respond to global trends.

## **Chapter eight**

Concluding remarks



### 8.1. At the beginning of the research journey

Globalisation has impacted our national and local realities significantly. A global world is a 'borderless world' (De Giorgi, 2011:113), where free movement is granted, national borders fall, and ideas, discourses and practices travel across countries. However, as De Giorgi (2011) observes, this 'alleged' universalism is, in truth, selective. Not everyone can move freely and not all critical discourses and practices are equally disseminated. Within this process of 'selective globalisation' (De Giorgi, 2011:114), there is a strong tendency amongst politicians and mass media to engage vigorously in discourses about crime, security (or better the lack thereof), and immigration. These narratives are fairly diffused across European countries and no less abroad, for example in the United States and Australia, although eventually each socio-legal context adopts and re-shapes ideas and practices differently (cf. Selmini, 2011). The starting point of this research lies in the belief that globalisation has impacted the activities of criminal courts, as well as individual decision-makers' use of discretion. This is because courtroom actors are not immune from 'wider cultural expectations' (Nelken, 2011:76). At the same time, the way they react to the wishes of the larger population or ruling political parties is unique, and it might lead to judicial practices even in contrast with the 'black-letter-law' or policy intentions (Nelken, 2011). The importance of analysing the 'law-in-action' stems precisely from the gap between what the law lays down and *what* and *how* it is enforced by decision-makers.

The main aim of this research is to provide an understanding of whether and how globalising forces have left an imprint on courtroom actors' uses and meanings of discretion in an Italian criminal court. In particular, it looks at the court of Turin, a city located in the north-west of the country, to shed light on how sentencing practices are developed at the local level. Hence, this research places emphasis on the trans-local site in which judicial activities take place, and it stresses the importance of this site to understand their developments and meanings. As Smith notes, 'the local sites of translocal practices – whether cities, suburbs, or community of origin – are not merely empty containers of trans-local articulations. The local sites of translocal processes matter' (2005:243). On this account, this study not only examines how courtroom actors make use of discretion when sentencing foreign defendants without a valid residence permit, but also how such use is influenced and constrained by the broader socio-legal context.

The five empirical chapters of this book analyse different aspects of the penal state. Each chapter focuses on a single dimension of the penal state and aims at examining how certain characteristics of the Italian penal state matter for explaining sentencing practices. According to Garland, 'the structure of the state, its powers and capacities, its autonomy or openness to popular pressures, its internal divisions and restraints, and the interests and incentives of legal actors' (2013:494) are determinative in explaining variations in penal practices and outcomes. In other terms, each of these dimensions matters when it comes to understanding why penal states' responses to global phenomena vary between countries. Taken together, these five dimensions offer a unique lens through which exploring how specific socio-legal traits in a given context impact and shape judicial practices.

In order to explore the uses and meanings of discretion, this study relies on courtroom ethnography to provide a vivid image of what happens in the daily activities of a criminal court when foreign defendants are on the bench. Observation of direct proceedings, namely special proceedings meant to cut through the phase of preliminary hearing, allows the capture of informal practices and narratives developed by courtroom actors. Semi-structured interviews provide a deeper understanding of how courtroom actors make use of discretion, and moreover on the meanings they attach to their decisions. Local media analysis captures the wider cultural and social dimension of the city of Turin, thus providing insights into the local reality in which courtroom actors make their decisions. The variety of the research methods employed provides a detailed portrayal of judicial activities in the *torinese* court, and of the impact of trans-local processes on courtroom actors' uses and meanings of discretion.

This final chapter brings together the previous empirical chapters and discusses them in the light of the overarching theoretical framework of this dissertation. In particular, the next paragraph analyses the main findings. Then, there is a paragraph dedicated to answering the research question. Last, follows a discussion on reflections and implications of this research.

## **8.2. Main research findings**

The empirical findings of this research provide a rich insight into local sentencing practices affecting foreign defendants without a valid residence permit. In the following sub-paragraphs, I analyse the key findings from this case study, both at the theoretical and empirical level.

### *8.2.1. 'Crimmigration' practices in the city of Turin?*

Before making any claim about the occurrence of 'crimmigration' practices in the *torinese* context, I believe it is important to define what 'crimmigration' is, or better what I mean when I use this term. This is because compared to when Juliet Stumpf (2006) introduced the concept, it has more recently become a 'container' to examine policies and practices that in various ways relate to migration. In particular, Stumpf (2006) coined the term 'crimmigration' referring to the merger between immigration law and criminal law, whereas nowadays the term is employed to analyse a much broader phenomenon (cf. Brouwer, 2020). For example, in analysing 'crimmigration' in the Netherlands, van der Woude, van der Leun and Nijland (2014) adopt a wider definition, one that encompasses the social and political dimension of discourses on crime and immigration. The way I use the concept of 'crimmigration' is as an interpretative tool to examine the various ways in which instances of crime control and migration control merge, overlap or intertwine with each other. In this way, 'crimmigration' is not relegated to the legal realm, but it also covers social and cultural meanings and narratives. By employing a broader definition of the term, I intend to place emphasis on those aspects of the intertwinement between crime and migration control that are not necessarily 'visible' in the black-letter-law, but that are more 'hidden' at the enforcement level.



One of the most interesting findings of this research relates to the question of how magistrates in the *torinese* context make use of deportation in criminal proceedings. Or better, do not make use of it. Chapter 7 shows how, despite the fact that the black-letter-law opens up the route to deportation of criminally convicted foreign defendants, magistrates do so seldom. This finding is in sharp contrast with what we are witnessing in other European and non-European countries, which are increasingly relying on deportation as a tool to manage the ‘unwanted’ (Gibney, 2008), although with different enforcement regimes (Leerkes and Van Houte, 2020). The empirical material points to various reasons for which magistrates do not order deportation of criminally convicted foreign defendants. These reasons relate mainly to the amount of cultural capital available, an element that Garland (2013) enlists amongst the dimensions that shape penal practices. In particular, *torinesi* magistrates do not use deportation mainly because they have little knowledge of this matter. Many respondents took a few minutes before answering my question on the use of deportation, because they needed to remember the rules regulating this institute. Besides, the lack of coordination between judicial and administrative authorities reinforces magistrates’ feelings that deportation is something ‘outside’ of the criminal proceeding, something that is not ‘up to them’.

The non-use of deportation in Turin is an extraordinary example of the tension between legal rules and the way in which they are interpreted and applied (Pound, 1910). Despite the legislator’s attempt to ‘assimilate’ deportation into criminal justice settings, magistrates’ resistance hinders the use of an administrative institute in the criminal law realm. From this finding it emerges the importance of analysing the law-in-action to better understand, and account for, ‘crimmigration’ processes. If one limits the analysis of ‘crimmigration’ to the black-letter-law, the conclusion would most likely support the idea of a ‘deportation turn’ (Gibney, 2008) in Italy as well. Yet, on the contrary, the *torinese* case study shows that this is far from taking place. At the enforcement level, in the day-to-day activities in the administration of justice (Rothmayr-Allison, 2015), magistrates are reluctant to employ an administrative instrument to deal with foreign defendants deemed to be ‘dangerous’. As mentioned in chapter 7, deportation is subject to an assessment of danger, most often related to the risk of re-offending. This requires that magistrates, to justify the imposition of a deportation order, must state the reasons on which such an order is based. However, the non-use of deportation is not linked to magistrates’ belief that foreign defendants are not dangerous. As I argued, narratives of danger and deviance are employed during the hearings to cast a ‘bad light’ on foreign defendants. The non-use of deportation by magistrates is based on the assumption that it is not their task to decide on the expulsion from the territory. As such, magistrates are not primarily involved in practices of migration control.

There is another practice of urban social control that needs to be examined in the light of the ‘crimmigration’ framework, *scilicet* the use of precautionary measures in the *torinese* context. Chapter 6 shows how magistrates impose a prohibition of residence on foreign defendants not that much to prevent the risk of re-offending, which is the ‘official’ aim to impose such a measure. Instead, they do so to remove the ‘unwanted’ from the city of Turin. It must be recalled that banishment as a strategy of social control is not a *torinese* speciality. Beckett and Herbert analyse

how the city of Seattle relies on banishment ‘primarily to manage people and situations that bother and disturb – but do not endanger – other urban residents’ (2009:63). Banning orders, meaning orders that exclude people deemed disorderly from certain places for a certain period of time, are common in several countries, such as Germany (Belina, 2007), the United Kingdom (Crawford, 2009) and the Netherlands (van de Bunt and van Swaaningen, 2012; Schuilenburg, 2015). The *torinese* practice of banishment closely resembles these administrative banning orders. Although a prohibition of residence belongs exclusively to the criminal law realm, it shares the same rationale with banning orders, *scilicet* make the problem go away (cf. Beckett and Herbert, 2009:43).

Whereas banning orders limit access only to certain public spaces, a prohibition of residence prohibits access to the entire city. Despite this difference, both measures are embedded in a trend of ‘security-obsessed urbanism’ that employs preventative, repressive and exclusionary measures to enhance the quality of the urban environment (Schuilenburg, 2015:279-280). Displacement via banishment (Beckett and Herbert, 2009:18), then, became the easiest and most visible answer to citizens’ complaints and fears. Because *torinesi* are largely concerned about the presence of irregular immigrants, who are seen as excessively involved in drug trafficking, nuisances and incivilities, magistrates rely on banishment to remove the troublesome from Turin. Irregular immigrants are seen to spend their days loitering in the city, as they often lack a fixed abode and employment. This makes them the perfect candidate to be ‘relocated’ somewhere else outside the city. Indeed, practices of banishment are often disproportionality employed against the homeless, drug addicts and minority groups (cf. Beckett and Herbert, 2009). Irregular immigrants are at the top of the pyramid of those considered as ‘social outcasts’, inasmuch as their vulnerable legal position adds to their marginal economic conditions. Additionally, similar to what happened in the US, eventually banishment ‘functions as a pathway to criminal justice intervention, rather than an alternative to it’ (Beckett and Herbert, 2009:104). In fact, as examined in chapter 6, the violation of a prohibition of residence allows magistrates to ‘open’ the jail gates for offences for which pre-trial detention is, in principle, not allowed. Hence, the banished are first removed from the city and then confined in penitentiary facilities, where their presence will not ‘offend our aesthetic sensibilities’ (Beckett and Herbert, 2009:21).

Is banishment a ‘crimmigration’ practice in the *torinese* context? I believe it is not. In the introduction of this paragraph, I define ‘crimmigration’ as the ways in which instances of crime control and migration control merge, overlap or intertwine with each other. In other terms, in line with Brouwer, I submit the thesis that the overlap or exchange between crime control and migration control is ‘the defining feature of crimmigration’ (2020:157). When relying on a prohibition of residence, magistrates do not aim at migration control, but rather at urban social control. Although a prohibition of residence might resemble a re-entry ban, that is a ban from entry to the territory from which someone has been expelled, a prohibition of residence is somehow different, because it is not rooted in the idea of governing migration or protecting national borders. In fact, as shown in chapter 6, not only are magistrates aware that a prohibition of residence would be hardly complied with by foreign defendants, but they even look forwards to its violation with the aim of imposing pre-trial detention. This is to say that there is not a

‘migration control logic’ to the use of banishment. Rather, this practice is implemented mainly to reassure citizens and reduce their feelings of insecurity by showing that state agencies ‘have done something’. Of course, this does not make the use of a prohibition of residence less questionable, inasmuch as a criminal law tool is employed as a band-aid solution to deeply rooted social problems.

This research concludes that courtroom actors, even when removing foreign defendants from the city through banishment, do not aim at migration control. In fact, from the data it emerges that any ‘migration control logic’ is extraneous to courtroom actors’ decisions, rationales and goals. At the same time, it must be recognised that in the situation where migration control is not an ‘obvious goal’ of decision-makers it is not enough to conclude that ‘crimmigration’ is completely absent from the picture. Rather, it is necessary to really delve into ‘crimmigration’, its processes, objectives and outcomes, to identify and appreciate the nuanced features of the phenomenon across different national and sub-national contexts. Following this logic, from the *torinese* case it emerges that, whereas migration control is not the intended aim of judicial practices, it is eventually the unintended consequence. In particular, even if courtroom actors do not rely on criminal law tools to control migration, in the end, the criminal justice apparatus becomes a direct instrument of migration control. This is because the effect of judicial practices on foreign defendants, *both* those with and without a valid residence permit, is to preclude the possibility of regularisation. In a nutshell, the actual outcome of judicial practices, although not intended for that purpose, is migration control. This conclusion calls for a much broader understanding of what ‘crimmigration’ means and implies across different socio-legal settings.

#### 8.2.2. *Judicial narratives of ‘otherness’*

Narratives play an important role in the social construction of reality. Within the criminal justice setting, narratives shed light on the meanings that penal actors give to legal and non-legal categories, and on how their decisions are shaped by dominant societal narratives. On this account, one cannot overlook at how penal actors ‘build’ the social representation of who is ‘good’ and what is ‘acceptable’ through their narratives. Besides, judicial narratives – together with all ‘official’ narratives – are particularly powerful, inasmuch as they are the only providers of an ‘official’ version of an event (Verde and Bongiorno Gallegra, 2008:510). This is to say that judicial narratives play a prominent role in the construction of the social reality since they are naturally vested with legitimacy and authority. Although judicial narratives might have the same content as dominant societal narratives, the former are the only ones holding an official status. Not to mention that judicial narratives are also powerful in their effects, inasmuch as narratives of danger trigger the criminal justice apparatus against an offender.

As documented in chapter 4, judicial narratives are extremely powerful in constructing a divisive rhetoric between ‘deserving’ and ‘undeserving’ immigrants, thus affecting the way courtroom actors make use of discretion. In a system where magistrates have ample room to manoeuvre, the main driver behind the use of discretion is represented by the meanings created and reinforced

through the narratives inside the court. These circumstances are particularly visible when judges have to decide whether to impose a precautionary measure on a foreign defendant on the grounds of his (less often her) alleged risk of re-offending. Although a defendant's irregular position in the territory is not a legal element to take into account in assessing a defendant's personality, judicial narratives tend to consider this element. The very fact that the prosecution repeatedly uses the word '*clandestino*' when referring to a foreign defendant without a valid residence permit reflects negatively on his or her personality. The word '*clandestino*' is frequently used to identify the most 'problematic' group of immigrants arriving in Italy, the 'bad' immigrants, those who are dedicated to committing crimes (Solano, 2011). '*Clandestino*' is not a value-free term, but rather it evokes an image of inherent deviance. It is employed to deliver a precise message to judges, a 'warning' about a defendant's propensity to break the law (cf. Campesi, 2003; Light, 2017). Whereas judges never use the word '*clandestino*' during hearings, the narratives they embrace move along the same line. Judges define being 'irregular' as being incapable of having a job and a fixed abode – in other words, of living like 'us'. Hence, foreign defendants without a legal residence permit are portrayed negatively, as a group destined to a life of crime in order to provide for themselves.

The power of this narrative is also visible in how defence attorneys attempt to rely on other narratives to 'resist' such a dominant narrative, for instance by claiming that their client works illegally (sic!). There is a great irony here – having an illegal job is used as a counter-narrative to break the equation 'irregular' equals to 'destined to crime', as it makes a defendant 'less' intrinsically deviant and worthy of judges' leniency (Lousley, 2020). At the same time, in the *torinese* court, the division between 'good' and 'bad' immigrants is more blurred than one might expect. In fact, while there are narratives that depict the 'irregular' component of the immigrant population as the 'undeserving', those condemned to a life of poverty and crime (Campesi, 2003), other narratives are in action to question the 'goodness' of regular immigrants. At times, regular immigrants become the 'bad' immigrants, the 'shameless', those who are brazen enough to disregard the rules of the country in which they are guests (Light, 2017). As one judge commented, when it comes to foreign defendants, dangerousness and blameworthiness are often implicit 'irrespective of the regular or irregular status' (see chapter 4). This is because, in the court of Turin, the dominant narrative is not that much about which immigrants are deserving of leniency, and which are not. Most often, judges do not care about collecting information about a defendant's legal status, they do not attempt to ascertain whether a defendant entered the country illegally or lost his residence permit later. In the court of Turin, the dominant narrative is a divisive rhetoric that places 'them', the immigrant, against 'us', *regardless* of them being diverse (cf. Vertovec, 2007).

The dominant narrative of 'us' versus 'them' does not allow magistrates to distinguish between, and care about, the diversity of the immigrant population. This is why defence attorneys have to bring other narratives to the forefront to make their client appear less intrinsically 'deviant'. For example, by claiming that a client is awaiting the outcome of the asylum application, and his wife has already obtained protection, therefore stating that his client is not like all the 'others' who enter the country by deceit or illegally. The reliance on immigrants' stories is eventually an attempt to 'distance' a certain defendant from the collective imagination of the immigrant population, to

soften the distance between ‘them’ and ‘us’ by portraying a foreign defendant as ‘morally’ closer to us. Anderson (2013) argues that modern states have the tendency to construct themselves as populated by ‘good citizens’, a category of law-abiding and hard-working members, in opposition to ‘non-citizens’ (migrants) and ‘failed citizens’ (criminals). When it comes to foreign defendants, lack of citizenship and criminality overlap. In a way, they are not only ‘non-citizens’ but also ‘failed’ ones, a burden for the state and a security threat to citizens. This narrative is particularly dangerous because it ostracizes those groups who allegedly do not share ‘our’ same set of values, beliefs and social behaviour (Anderson, 2013). And it is not surprising to discover that these dominant societal narratives have seeped into the court (Lousley, 2020) and have then been ‘vested’ with authority. In fact, judicial narratives should not be interpreted as an exclusive product of the courtroom environment. Rather, one should ask, where do these narratives come from?

Judicial narratives largely depend and build on the dominant societal narratives that circulate outside the court (Verde and Bongiorno Gallegra, 2008; Lousley, 2020). As Aliverti observes, ‘the courts are not only influenced by the outside world but may also replicate and contribute to reproduce the power relationships within the communities they serve and wider social inequalities’ (2016:73). In a way, judicial narratives reproduce and reinforce political and media leitmotifs and narratives. As shown in chapter 3, the social fabric of Turin has been remarkably affected by demographic, economic and cultural changes that took place in the city from the 1990s. The growing sense of insecurity amongst *torinesi* is largely attributed to the presence of immigrants, who are increasingly perceived as ‘usurpers’ of public space from the only legitimate owners, the citizens (Marzorati, 2010). Media make sensational headline when reporting episodes relating to immigrants, for example referring to them as pushers, brawlers and violent Africans. Citizens’ committees, backed up by local media, have raised their voices against this alleged ‘spread’ of deviance around the city. These dominant societal narratives have seeped into the court and then, have become ‘official’ narratives. It is no longer just the local newspaper claiming that immigrants are ‘non-citizens’ and ‘failed citizens’ (Anderson, 2013), but judicial narratives move along the same line when drawing the boundaries between ‘us’ and ‘them’.

Chapter 3 and chapter 4 examine how immigrants’ involvement in drug trafficking is an issue which is felt as particularly important by *torinesi*. This is not only visible in how much attention local media pay to stories about drug trafficking, but also in how formal control institutions act upon it. The way the Public Prosecution Service in Turin deals with drug trafficking is a powerful example of how a dominant societal narrative, by seeping into the criminal justice system, can change the contour of law enforcement. It is not my intention here to downplay the importance of drug trafficking and its consequences. However, it cannot go unnoticed that the definition of the ‘crime problem’ in the Public Prosecution Service in Turin is, after all, a dominant societal narrative. This is to say that the pressing media coverage, together with citizens’ demand for security, has taken over from the normative dimension in how public prosecutors set their priorities. As chapter 4 documents, whereas the law ‘dictates’ to release first-time offenders arrested for a petty offence, the great majority of public prosecutors ask for a trial when it comes to drug trafficking because of the socio-political definition of the crime problem (Montana, 2009).

As a consequence, in hearing room 59 of the court of Turin, the room where direct proceedings are held, everyday there are trials against foreign defendants, at times even without a criminal record, charged with drug trafficking of a (very) mild nature. Some defence attorneys, using a confrontational tone, question whether an Italian caught selling a few grams of marijuana in local parks would be arrested and brought to trial as well. In more than one year of observation, I never saw an Italian on trial charged with drug trafficking. This might be due to the fact that the definition of the ‘crime problem’ in relation to drug trafficking is exclusively construed in terms of *immigrants’ involvement* in drug trafficking.

This situation raises questions of whether narratives of otherness are eventually *racialised* narratives. Several scholars (Bowling, 2013; Parmar, 2016; Turnbull, 2017) have called for a more explicit engagement on issue of race and racism when analysing contemporary practices of migration and crime control. Garner (2013) points out that even if a narrative never uses the language of ‘race’, it can be nonetheless a racialised narrative as long as it defines a group as inferior and deviant (cf. also Lousley, 2020). When I began conducting fieldwork, issues of race were not an explicit focus of this research, and I did not even think about racialised practices or discourses. Of course, I had in the back of my mind the potential dichotomy of ‘us’ versus ‘them’, but I did not consider ‘them’ as a racially constructed group. This idea was somehow reinforced when courtroom actors refer to foreign defendants’ propensity to crime and deviance as stemming from their vulnerable condition in the country. In a way, foreign defendants were depicted as different from ‘us’ for a variety of reasons, but there was never a reference to race or whiteness or inferiority. However, often race moves along ‘concurrent visibility/invisibility’ (Turnbull, 2017:150) and it did not take too long for an ‘unspoken’ issue to manifest itself through narratives.

In the court of Turin, an explicit reference to race emerges when police officers talk to each other about foreign defendants they escort in the hearing room. In chapter 5, when discussing the dynamics between courtroom actors, I refer to how police officers are quite vexed when a judge does not validate an arrest or acquit a foreign defendant. In some cases, police officers become visibly annoyed about it and start to insult sitting magistrates. However, police officers’ negative comments are not limited to judges only. Instead, police officers make explicit, at times disturbing, comments about foreign defendants. Racist attitudes and discourses involve mainly non-white defendants, who are often mocked for their accent, their skin colour and their allegedly ‘bad’ smell, in the tone of ‘We smell Chanel n. 5 here, eh?’<sup>98</sup> or ‘Which one is yours?’ ‘The black guy’ ‘They are all black’ (laughing).<sup>99</sup> During interviews, some respondents make a clear reference to police officers’ incapacity to deal with ‘diversity’ and their propensity to supervise and control ‘certain’ ethnicities. In a way, race is an ‘invisible’ element percolating the narratives of courtroom actors when discussing policing practices. An experienced defence attorney mentioned explicitly the issue of racism amongst some police officers. This is to say that whereas in judicial narratives there is never an explicit reference to race, in truth the ‘shadow’ of racism is acknowledged by several

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<sup>98</sup> Fieldnotes, 18th May 2018.

<sup>99</sup> Fieldnotes, 12th April 2018.

respondents. After all, as Garner (2013) points out, even if a narrative is not explicitly construed in a racialised way it does not mean that race has not subtly percolated a certain narrative. These findings stress the importance of investigating how narratives contribute to the social construction of reality, and to critically consider issues of race. Racism can no longer be seen as a thing of the past, and it is necessary to unveil its more subtle manifestations and critically engage with them.

### 8.2.3. *The importance of the socio-legal context*

Throughout this study, I have attempted to bring to the forefront the importance of the socio-legal context to gain a meaningful understanding of sentencing practices. This is because the socio-legal context *matters* in determining the uses and meanings of discretion. As stressed in chapter 1, rather than talking about the local context, it would be more appropriate to talk about the trans-local context (Appadurai, 1995). In fact, in analysing the site where sentencing practices take place, one cannot ignore the complex relationship between the global and the local. As Sassen (2001) points out when talking about the ‘global city’, the global is, in the end, incorporated in the local. Appadurai (1990) identifies different spheres, or *scapes* as he called them, in which processes of globalisation have more visibly been incorporated into the local, namely circulation of people, cultural meanings, ideologies, technologies and capitals. In this research, my intention was to understand the contours of the local as embedded in the global, especially in relation to migration, ideas and cultural meanings. Looking at the context through the concept of trans-local allows to better understand and reconcile ‘the situatedness of urban communities and community media with their capacity to transgress their local boundaries’ (Carpentier, 2007:1).

Beckett and Herbert argue that processes of globalisation are ‘translocal in their origin and impacts’ (2009:24). This is not to deny the peculiarities of the local context in which certain practices are developed. Rather, it is to emphasise the importance of the global in ‘making’ the local. Along this line, Selmini (2011) argues that whereas narratives, practices and ideas travel across countries, each socio-legal context is, at the same time, unique as it adopts and shapes these narratives, practices and ideas differently. In a way, scholars invite us to consider the ‘embeddedness’ of certain narratives and practices *together with* their capacity to travel. As Nelken argues, embeddedness ‘must be treated not only as a fact but also as a process’ (2011:77), inasmuch as practices and ideas are the result of a dynamic relationship between the local and the global. In this case study, there is a striking example of how the local meets the global, and how local adaptation to global processes is unique. In chapter 3, I discuss the increased surveillance and control of immigrants with the police in the city of Turin. In particular, I investigate how the then local chief of police implemented so-called *extraordinary high-impact activities of patrolling* to ease citizens’ fear and insecurity stemming from immigrants’ involvement in incivilities and street-crimes. In short, immigrants were increasingly kept under surveillance even for behaviour that do not necessarily fall under criminal law. An analogous preventive and repressive policy is examined in chapter 6, where I investigate the increased use of a prohibition of residence, a practice of banishment aimed at removing immigrants from urban spaces. Whereas the two strategies of

urban control have their differences, they eventually share the same goals, meaning to supervise the troublesome immigrants, control urban spaces and reassure local residents.

Policies aimed at reducing fear of crime by adopting preventive, repressive and exclusionary measures to low-level criminality are not a *torinese* speciality. ‘Security-obsessed’ urban policies are visible in many European and non-European countries such as Germany, the Netherlands, the United Kingdom and the United States (cf. Schuilenburg, 2015). In Italy, different local realities have adopted a variety of strategies to supervise and control immigrants. Municipalities in Emilia-Romagna (Quassoli, 2004), for example, have implemented by-laws aimed at suppressing behaviour considered indecent. Municipalities in Veneto (Mantovan, 2018) and Lombardia (Ambrosini, 2013) have increased preventive checks to combat illegal activities and tackle condemned social behaviour. In short, Turin is far from being an exceptional case. At the same time, Turin presents some peculiar traits. I refer here to how the Public Prosecution Service reacted to citizens’ requests for security by creating *Sicurezza Urbana*, an *ad hoc* working group of public prosecutors who deal exclusively with street-crimes. As concluded in chapter 3, the unique ‘public sensibility’ (Sarzotti, 2007) of the *torinese* Public Prosecutor’s office, its high level of permeability to external pressures, is quite peculiar. In a way, the global spread of security policies has found fertile ground in Turin precisely because of local formal control institutions’ openness to citizens’ requests. And I stress here the importance of the local context. Nelken argues that the rise of increasingly harsh punishment in Italy seems to be mitigated by magistrates, whose priorities differ from those of both politicians and the public (2009:301). This might be true in other local contexts, where this obsession with security would remain in the political and social realm rather than being actually embraced by formal control institutions. However, this is not the case in Turin, where the police and the Public Prosecutor Service are highly responsive to the public.

Whereas chapter 3 deals with the socio-cultural context, chapter 4 and chapter 5 analyse the institutional and organisational context in which these practices are embedded. Whereas social scientists tend to neglect the analysis of ‘purely’ legal norms, through these two chapters I draw attention to how the legal context, together with legal culture, is of pivotal importance to understand the uses and meanings of discretion. This is to say that inquiries that aim at bringing the context to the forefront cannot overlook the importance of the legal dimension. This is particularly true in research on decision-making, inasmuch as discretion is first allocated at the legislative and policy levels (van der Woude and van der Leun, 2017). Hence, for a meaningful understanding of decision-making, together with the socio-cultural dimension, one must consider the rules involved (Hupe, 2013), and the institutional and procedural context in which discretion is used (Richman, 2003). The importance of the institutional context for understanding the uses of discretion is particularly visible when I analyse prosecutorial practices, especially in how standing magistrates prioritise crimes to prosecute (see chapter 4). The fact that the then chief prosecutor of Turin decided not to set priority criteria or guidelines contributed to a spread of discretion through the whole office. In other words, the organisational context of the Public Prosecutor Service in Turin enhances the use of discretion from individual magistrates, leading to a sort of do-it-yourself discretion (Nelken and Zanier, 2006:151). Previous research (Nelken and



Zanier, 2006; Sarzotti, 2007) shows how prosecutorial practices differ remarkably across Italian courts, based on the leadership of individual chief prosecutors and on heterogeneous organisational routines. This is why it is important to look at the organisational context to account for the formal and informal boundaries in which discretion is exercised.

Another important finding from this research is that the organisation and institutional context in which discretion is exercised cannot be analysed only in its legal dimension, but it must be understood also in its cultural significance. This study sheds light on how important legal culture is for understanding how courtroom actors internalise legal provisions. One of the most striking examples is how magistrates give a meaning to 'being independent'. Judicial independence is a principle enshrined in the Italian Constitution, and it was introduced to ensure the independence of the judiciary from the executive power. During my fieldwork, I realised that magistrates appeal to the principle of judicial independence to 'explain' inter-judges sentencing disparity or to 'justify' highly discretionary assessment. Surprisingly, although this finding can be generalised in the national context as it was shared by magistrates recently transferred to Turin, *torinesi* magistrates interpret 'being independent' as meaning that they can make decisions according to their own personal outlook. In other words, judicial independence is understood in terms of loose discretion. Given these circumstances, it becomes clear to me why magistrates, and defence attorneys as well, do not have a problem with inter-judges sentencing disparity. For them, it is simply the 'proof' of how independent magistrates are. This finding illustrates how the use of discretion is indeed context-dependent, and it does not depend only on the institutional framework setting the boundaries of discretion, but also on the legal culture percolating the professional organisation in which magistrates work (Friedman, 1975).

#### 8.2.4. *The process is the punishment*

Can a process be in and of itself a punishment? Malcolm Feeley (1992), in his famous book *The Process is the Punishment: Handling Cases in a Lower Criminal Court*, posits that the punishment is not necessarily confined at the end of the process, but rather it can be present throughout the whole process. More specifically, he refers to arrest, pre-trial detention and plea-bargaining, as moments, 'junctures' within the process which are costly matters. Feeley's research focuses on the New Haven Court of Common Pleas, a lower criminal court in the US which mostly deals with misdemeanours and minor felonies. Feeley explains how penalties, either imprisonment or fines, are generally mild in lower criminal courts. However, he also points out that there are other costs involved. Feeley considers not only the emotional cost represented by the unpleasantness of standing trial, but also the financial cost of pleading guilty, obtaining bail, missing work, retaining an attorney and so on. Besides, arrest and pre-trial detention are experienced as well as extreme negative moments by defendants. These financial and emotional costs, Feeley concludes, are far more burdensome for defendants than the final penalty.

Stumpf (2013) analyses 'crimmigration' practices in the light of Feeley's argument. She reflects on how 'crimmigration' processes become punishment either when they create a punitive

experience for non-citizens, as with immigration detention, or when they take the place of formal punishment, such as when the purpose of a police arrest is to channel a non-citizen into a deportation track' (2013:60). Drawing on observations conducted in Crown Courts in London, Lousley (2020) concludes that a harsh form of justice is delivered to non-citizens not in terms of sentence, but in terms of the practice of their sanctioning and punishment. These contributions trigger a reflection on whether and how the process in the *torinese* court is the punishment. I believe it is important to consider more generally the process, the kind of justice to which foreign defendants without a residence permit are subjected in Turin. This is because if one limits him or herself to consider sentencing outcomes only, it can hardly be contested that foreign defendants receive analogous sentences, or at least very similar, to national defendants. While observing direct proceedings, it was common to hear that a foreign defendant received a lenient sentence – for instance, three or four months of detention. Of course, these circumstances relate also to the nature of the offence committed, often minor offences that do not even allow the imposition of pre-trial detention. Does this mean that foreign defendants are subjected to the same 'justice' as national defendants? I believe not, and the answer to this question is to be found exactly in the *process* of sentencing and punishing.

First and foremost, foreign defendants must endure an extremely high cost if convicted, *scilicet* the refusal or withdrawal of a residence permit. Article 4 of the Consolidated Immigration Act lists the crimes that hinder the issuing or renewal of residence permits, and drug trafficking is amongst them. This means that a foreign defendant convicted in the first degree for drug trafficking, even for selling two grams of marijuana, would automatically lose the right to reside in Italy. It is not an overstatement, then, to say that all foreign defendants I encountered in the court of Turin are destined to remain or become irregular. Some defence attorneys who are more experienced in immigration law mention that the real problem with foreign defendants lies in the fact that a criminal conviction stands in the way of regularisation. For them, the process *is* the punishment.

Foreign defendants not only lose their residence permit, but also they do so very quickly. This is because magistrates rely increasingly on a procedural mechanism, that is a direct proceeding, which allows cutting out the preliminary phase and bringing the arrested directly in front of a judge. Normally, this kind of proceeding should be the exception and not the rule, especially given the less procedural protection for defendants. Nevertheless, in the *torinese* Public Prosecutor's office, a direct proceeding is commonly used to prosecute minor offences committed by *immigrants*. In a way, a formally allowed procedural mechanism is exploited to bring as many immigrants as possible to trial in the shortest time possible. This practice can be understood as a move away from the primary purpose of a direct proceeding, that is to 'speed up' the justice machine *only* when the evidence against a defendant is conclusive *and* there is risk of re-offending, something normally inferred from a defendant's criminal history. As documented in chapter 3 and chapter 4, public prosecutors rely heavily on direct proceedings to ease the workload and provide a prompt answer to a certain type of criminality, even in the absence of the requirement about the risk of re-offending. In a direct proceeding, there is no preliminary

phase, there is no waiting for a hearing date, there is no consultation with a defence attorney if not a couple of minutes before the hearing begins. An offender is arrested, stripped of his or her personal freedom and then brought in front of a judge within 48-hours. Whereas it is true that defendants in these proceedings are subjected to mild penalties, the process itself is extremely stressful. Defence attorneys have barely the time to prepare a proper defence for their clients, and foreign defendants do not meet the court-appointed attorney until the hearing day. It is very much in question whether this practice is in line with the right to personal freedom and the right to defence, established in the Italian Constitution and in the European Convention of Human Rights. This is why a direct proceeding in and of itself takes the place of traditional punishment. Following their arrest, foreign defendants are dragged into a vortex of chaotic and confusing procedural steps, from which they will emerge with a precautionary measure, a criminal conviction and barred from regularization.

As Stumpf (2013:66) argues, actors such as the police and public prosecutors can be more influential than judges in determining who is punished. Scholars have already stressed how important decisions made by the police (Motomura, 2011) and by public prosecutors (Eagly, 2013) are in establishing who is channelled into the criminal justice system. In the *torinese* case, the police and public prosecutors, being the primary players in the field of security (Hall *et al.*, 1978), play an extremely critical role in shaping sentencing processes for foreign defendants. The police's decision to arrest, even when public prosecutors suggest otherwise, is the main gateway to the judicial system for foreign defendants. Similarly, public prosecutors' decisions to ask for a direct proceeding, even when not necessary or appropriate, is the main gateway to a first-degree conviction – at least, in the great majority of cases. The point here is not that foreign defendants are sentenced 'faster' than national defendants – although one might question why they have 'priority boarding' to the judicial system and not so much in other matters. The point here is that the costs of 'dealing with cases quickly' are so heavy for foreign defendants that it has shifted 'the locus of sanctioning away from the formal stages of adjudication and sentencing onto the process itself' (Feeley, 1992:15). I saw a foreign defendant more concerned about the obligation of leaving Turin than detention. Another defendant turned pale when his attorney said that he will have problems renewing his residence permit, but he acted indifferently when condemned to 6 months of detention. The process becomes the punishment when the consequences of being caught in the system – arrest, prohibition of residence, impossibility of obtaining/renewing a residence permit – outweigh the actual penalty. Of course, this might be more common in lower criminal courts, where penalties are generally lenient. However, the point is that a mild penalty does not necessarily come from a mild process or a more general 'mild penalty'. Most often, this is not the case. As Feeley argues, 'to look at each stage as a wholly separate and distinct decision in isolation from the others may fragment the process beyond recognition' (1992:149). It is by investigating the complex, dynamic and interrelated series of stages and sanctions within the process that we can then recognize the punishment.

### 8.3. Answering the research question

The empirical findings of this research give nuances to the understanding of sentencing practices towards foreign defendants without a valid residence permit in the court of Turin. This paragraph intends to answer the research question that has guided this study, that is

*How do courtroom actors make use of discretion when sentencing foreign defendants without a valid residence permit and how such use is influenced and constrained by the broader socio-legal context?*

The research question encompasses two related but distinct issues. The first is how discretion is used ‘in-action’ by courtroom actors, whereas the second relates to the degree to which the use of discretion is shaped by the broader environment. With regard to the first issue, the concept of ‘*ad hoc* instrumentalism’ is particularly apt to account for how *torinesi* courtroom actors make use of discretion. Sklansky introduces this concept to refer to ‘a particular way of thinking about law and legal institutions, a way of thinking marked both by skepticism of formal legal categories and by skepticism of the idea that official discretion needs to be, and can be, cabined and controlled’ (2012:197). Whereas Sklansky develops this concept to explain ‘crimmigration’, and as an outcome of it as well, in reality the concept can be used as an interpretive tool to analyse the uses and meanings of discretion. In particular, this concept emphasises two diverse aspects of discretion. The first is the instrumental character, as opposite to formalistic, which refers to how discretion can be used to achieve additional or different aims than the ones established by law. The second is the *ad hoc* character, as opposed to systematic, which refers to how a set of rules is applied on a case-by-case basis, to certain defendants or certain groups of defendants.

In the court of Turin, discretion is used in a highly instrumental manner. In particular, courtroom actors use the law to achieve the outcomes they set for themselves, outcomes that more and more often move away from the official ‘in-the-books’ rationales and aims. This study provides many vivid examples of how the use of discretion is far from being in line with formal legal categories. I refer to a prohibition of residence to begin with. As chapter 6 illustrates, courtroom actors do not use a prohibition of residence to prevent crime, as established by law. Rather, this legal instrument is mobilised to placate citizens, control the local territory and bypass the limit of statutory law to impose pre-trial detention. Likewise, a direct proceeding is exploited to ‘get rid’ of a dossier, even when the legal requirements to ‘activate’ this proceeding are not present, a reality documented in chapter 4. Quite interestingly, even the negative use of discretion is instrumental in achieving the outcomes that individual courtroom actors set for themselves or that the courtroom group set as a whole. I refer here, for example, to magistrates’ reluctance to exercise supervision over police officers’ decisions to arrest. As documented in chapter 5, interviews demonstrate how magistrates waive judicial power with the purpose of maintaining a good relationship with the police. The pressure from the courtroom group towards additional extra-legal objectives is visible in other instances. For example, in how magistrates avoid translation, despite the letter of the law, to ‘save costs’ for the system, as illustrated in chapter 7. These examples shed light on how the instrumental use of the law is not necessarily confined to the

individual level, to how an individual decision-maker pursues his or her own objectives. Rather, the use of discretion can be instrumental to meet peer expectations and ‘management’ goals.

Besides being instrumental for reaching individual or collective objectives, the use of discretion in the court of Turin seems directed towards specific defendants. When I state that there is an *ad hoc* component in the use of discretion, I do not mean that courtroom actors make decisions on a case-by-case basis. Rather, I refer to how certain sentencing practices are developed and employed towards specific groups and crimes, in particular foreign defendants without a valid residence permit involved in drug trafficking. The creation of an *ad hoc* working group in the Public Prosecution Service, that is *Sicurezza Urbana*, has led to the development of sentencing practices aimed at targeting street-crimes, especially drug trafficking, in which immigrants’ involvement is more visible. As illustrated by chapter 3, despite the abolition of the group in 2015, these practices have largely remained in place, as is apparent from the use of direct proceedings for providing a prompt answer to street-crimes. Cases of small-scale drug trafficking, indeed, are not dealt with through ordinary procedural paths. Rather, they are processed with special proceedings that allows a defendant to be brought before a judge within 48-hours. The *ad hoc* character of these practices is also documented by the use courtroom actors make of a prohibition of residence. This measure is not applied based on ‘a defined, across-the-board set of rules or standards’ (Sklansky, 2012:161). Rather, it is applied to foreign defendants to answer the compelling need of removing them from public space. The point that I want to make here is that we are not in front of a case-by-case application of legal norms. Rather, we are witnessing a sort of group-by-group application of legal norms, in which the latter are used to deal with a specific group of defendants deemed troublesome and deserving of an immediate answer. This *ad hoc* use of discretion has produced a set of sentencing practices that ‘fail to distinguish between non-citizens as individuals, treating them instead as an undifferentiated mass’ (Stumpf, 2013:68).

Once we understand the instrumental and *ad hoc* character of sentencing practices towards foreign defendants without a valid residence permit, the question is whether these practices are somehow the product of the broader socio-legal context. In other words, I ask whether the site of these practices matters. Throughout this study, I attempt to show how the use of discretion is the offspring of practices, ideas and cultural meanings of the trans-local site in which courtroom actors live and act. The very choice of structuring this research along with the five dimensions of the penal state identified by Garland (2013) was meant to emphasise how different aspects of the penal state matter in determining penal practices. Permeability to external or internal pressures, internal dynamics and restraints, interests and incentives of individual decision-makers are all elements that help in understanding the key processes that determine penalty (cf. Garland, 2013:494). By taking the legal processes inside the court into account, this study sheds light on how procedural elements are important in determining the use of discretion. To provide an example, the fact that the *torinese* Public Prosecutor’s office lacks administrative guidelines determines a spread of discretion amongst individual prosecutors, at the expense of consistency. Again, the fact that the *torinese* judicial reality puts emphasis on and promote efficiency means that magistrates feel impelled to develop informal practices to speed up procedures, for example by

‘overusing’ direct proceedings. Without considering the formal and informal rules governing the activities of public prosecutors, it would be impossible to account for how these rules shape decision-making.

Together with legal and structural elements, this study also considers the socio-cultural context of sentencing practices. When I talk about the socio-cultural context, I refer first to the environment outside the court, as documented in chapter 3. The importance of examining what happens outside the court comes from the circumstances that ‘courts are part of the community’ and ‘what they do is in part a function of what the community expects of them’ (Feeley, 1992:20). In fact, research findings show how external dynamics, such as media and public pressures, have an impact on the development of sentencing practices (i.e., the creation of *Sicurezza Urbana* is maybe the most vivid example). Together with accounting for how the court responds to the external environment, this study places emphasis on the importance of internal dynamics and legal culture in determining the meanings behind sentencing practices, as illustrated in chapter 5. Without considering attitudes and ideas held by legal professionals (Friedman, 1975) we cannot achieve a complete understanding of why courtroom actors think and act in the way they do. For example, without considering legal culture, we would simply conclude that Italian magistrates tend to exercise a great discretion, without knowing that such use relates to how they interpret discretion, that is as a ‘proof’ of their autonomy and independence. Analysing the context in its broader socio-cultural dimension helps to unroot the cultural meanings behind judicial practices and to better understand the significance that decision-makers attach to their roles and decisions.

#### **8.4. Theoretical reflections and implications**

There is a rich tradition of court-based qualitative studies that seek to understand how the criminal justice process works in practice (for a literature review, cf. Paik and Harris, 2015). As Barret points out ‘it is from the study of the mundane and ordinary, often boring (to some), spaces where the law lives that we gain important and much needed insights into what the law actually is, what it is not, and what it should be’ (2018:28). Despite the importance of adopting this methodological approach to grasp how the law works in-action, courtroom ethnographies in civil law jurisdictions are generally scarce. To the best of my knowledge, in Italy, the ethnography conducted by Campesi (2003) is the only systematic study on judicial practices involving foreign defendants. Other studies focused on a single trial (Carlini, 2016) or on a specific criminal offence (Bianchelli, 2016). The paucity of ethnographic research in Italy, but more generally in civil law jurisdictions, might stem from the situation that civil law jurisdictions rely mainly on written form, whereas common law jurisdiction deals with cases orally. Or maybe, this paucity might be due to a sort of ‘academic tradition’, meaning that scholars doing research in common law jurisdictions are more accustomed to courtroom ethnography than their European colleagues.

Before graduating in law school, I remember that an older colleague told me that everything I learned until then would have been completely different ‘in the outside world’. I never truly

understood the meanings of those words until I set foot in hearing room 59 of the court of Turin, the room where direct proceedings are held. This is because there I encountered a set of informal practices and dynamics that were impossible to even imagine without going to the place where the law alive. It is true that trials in civil law jurisdictions are characterised by fewer oral exchanges compared to trials in common law jurisdictions. Nevertheless, this fact should not discourage academics working in civil law jurisdictions from going to a court and observing a trial. The architecture of a hearing room, the way different courtroom actors communicate and relate to each other, their discursive registers, even their non-verbal interactions, these are all elements that provide rich insights into power relationships and decision-making (Bens, 2018). It is not my intention here to deny the importance of written documents, such as judgments and dossiers, as a 'social product' made by courtroom actors in accordance to their shared cultural assumptions (Hammersley and Atkinson, 2007:132). On the contrary, I believe that the written production of a court can be better understood if one observes how courtroom actors arrive at that 'product', which interests prevail, which do not and why it is so. It is precisely because these dynamics *matter* in determining sentencing outcomes that it is important to engage in ethnographic research. It is my hope that the findings of this study show the importance of ethnography for understanding how the law comes to life in-action, even if it might be disappointing to realise that often the law in-action does not take the shape that one would have imagined or hoped for.

Another point that I wish to make relates to how important it is to adopt a holistic approach in investigating decision-making. If there is something that I have learned by conducting this research it is how each individual decision is dependent on another. Decision-making is truly a chain reaction (Van der Woude, 2017), inasmuch as judicial practices are the product of a constant interaction between actors, rationales, forces and objectives. Metaphorically speaking, the process is like a game in which different players follow the same rules. However, each player adopts and modifies his or her strategies based on the opponent's moves, and the better equipped player is the one that eventually scores. If there is an inflexible public prosecutor, a defence attorney is not going to enter into plea bargains, but rather he or she would insist on going to trial. If there is an irritable judge, a defence attorney is going to advise his client to admit guilt rather than recounting 'his version of the events' to avoid upsetting the judge. These are not really individual decisions in and of themselves, but rather individual decisions *based on* how other players act. In other terms, the process is 'an open system, one based primarily upon cooperation, exchange, and adaptation' (Feeley, 1992:57). Investigating decision-making only by examining individual actors' decisions runs the risk of losing sight of the formal and informal rules of the game within the court. And I believe these rules to be determinant in creating the pattern of processes and outcomes of a court.

It must be mentioned that the informal rules of the game are not only known by all players, but also mutually shared. This is because, in a court, there are certain 'modes of thinking' about legal practices that inform its members about how the work needs to be done. Newcomers have no other options than learning and following the rules of the game when they approach the new environment. However, the interesting thing is that these rules are not so much imposed, but rather recognised and internalised by all members of an organisation. This is because the informal

rules of the game are developed in line with the legal culture percolating the professionalism and work of individual members (cf. Friedman, 1975). Examining the legal culture of a given court, then, helps to shed light on those values, beliefs and ideas that are at play in the creation and development of sentencing practices. The legal culture is not a set of values and opinions accepted passively by members of an organisation. Rather, it is an extremely dynamic and ‘alive’ component of judicial practices. As Feeley (1992:60) points out, the legal culture not only ‘produces’ the members of an organisation, but also constantly shapes their outlooks. Hence, the task for the researcher is to unearth those values, beliefs and ideas that circulate silently within an organisation, but that vigorously shape decision-making. This research approach can provide some much-needed insights on the drivers behind judicial practices.

I wish to devote a few words to an issue that has not been adequately addressed earlier. In this chapter, but more generally throughout the whole research, I stress the importance of the context and legal culture in determining sentencing practices. Here comes the issue of generalisation into play. Is Turin unique? Are these findings confined to the *torinese* case? As I mentioned in the introduction, generalisation is something of less concern for in-depth qualitative case study. However, I believe that this issue deserves attention. In this regard, there are two points that must be addressed. The first relates to the trans-local character of local realities. The latter can no longer be considered as closed entities impermeable to global forces. On the contrary, local realities need to be analysed in their trans-local dimension (Appadurai, 1995), by considering the complex relationship between the local and the global. Whereas it is true that each local context is diverse, they have all been affected by the same processes, which are ‘translocal in their origin and impacts’ (Beckett and Herbert, 2009:24). This is why the study of the ‘local’ does not only provide insights into processes at the local level. Instead, studying the local, or better the trans-local can shed light on processes that are far from ‘local’. In brief, the local can teach us much about the global, about how and to what extent global forces have transformed our realities.

The second point I want to make relates to the ‘typicality’ of the *torinese* context. A foreign reader might wonder whether Turin is atypical in the national panorama. It is Turin ‘unique’ or it is a ‘typical’ Italian city, so that the research finding can be generalised? Malcolm Feeley, in reflecting on the issue of generalisation, points out that ‘no single city can be regarded as “typical” (1992:xxxii). He claims that the real point is not whether a city or a context is typical, because all cities and contexts are somehow distinctive. Rather, the point is whether ‘a city is not so atypical as to be unique’ (1992:xxxii). In this regard, it can hardly be claimed that Turin is unique. There is no exceptional rate of crime or imprisonment, no exceptional number of foreign residents, no exceptional rate of unemployment.<sup>100</sup> Nothing in the city is unique. It is not that Turin is not distinctive. Its industrial past, its immigration history, its extensive green area, the baroque style of its buildings, it is hard to deny that Turin holds peculiar characteristics. However, the city is not *that* distinctive to state that research findings cannot be generalisable to other cities or contexts. At the same time, the point here is not whether these research findings are generalisable.

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<sup>100</sup> Source: ISTAT 2018



Rather, my intention is to emphasise the rich and valuable insights that one can obtain by analysing the local. Together with teaching us something about the global, documenting a local context can also open our eyes to *other* local realities by showing patterns of commonalities and differences. It is surprising how much one can learn and understand from the local.

## 8.5. Epilogue

Much has changed since I started writing this dissertation. We endured a ‘quarantine’ (in reality, it was far more than 40 days...) due to the covid-19 pandemic, which has remarkably changed the world in which we live. It was thought by us, or at least me, that narratives of ‘us’ versus ‘them’ disappear as soon as we face the same enemy. Despite the tragedy of those months, the right-wing populist politician Matteo Salvini did not lose the chance to reignite hostile feelings against the ‘others’. In July 2020, a group of immigrants which arrived by boat in Sicily and transferred to Basilicata was found positive to covid-19. Salvini commented on the episode in these terms ‘Italians have been in quarantine for months while infected immigrants are able to land freely’.<sup>101</sup> A month earlier, thousands of people in Rome, Milan, Florence, Turin, Naples and other cities, in the wave of Black Lives Matter, protested against racism following the death of George Floyd at the hands of the American police.<sup>102</sup> These protests brought back in the media and the public spotlight the debate on Italian citizenship. As citizenship is granted automatically only to those born to Italian parents, nowadays there are one million people in Italy without citizenship, even if they were born on Italian soil or migrated with their parents as minors.<sup>103</sup>

Despite decades of debate on citizenship rights, the government has found no majority in reforming the law as political parties continue to be split on the issue. In a way, everything has changed and yet nothing has changed. Together with denying citizenship to those who spent most of their lives in Italy, the government has tightened the rules for obtaining a residence permit, visa and asylum. Restrictive and exclusionary immigration policies place immigrants in a limbo of semi-legality or illegality, where they might have no other options than to turn to crime or accept labour exploitation in order to survive in the country. Of course, some immigrants are able to find support from religious congregations and NGOs, but given the high number of immigrants seeking help, this support is most of the time only temporary. The great majority of foreign defendants I encountered during fieldwork never had a residence permit. Only a small percentage of them had held a residence permit in the past. In this regard, research shows that legalisation reduces the crime rate (Pinotti, 2017). In other terms, if you give these people the right to live and work in the country, to rent an apartment, to have access to health and social

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<sup>101</sup> <https://www.lagazzettadelmezzogiorno.it/news/home/1238812/coronavirus-basilicata-positivi-23-migranti-ospiti-in-un-centro-d-accoglienza.html>

<sup>102</sup> <https://www.thelocal.it/20200608/in-photos-italy-black-lives-matter-protests-racism-police-brutality>

<sup>103</sup> <https://www.inmigrants.net/en/post/25300/i-am-italian-too-how-blacklivesmatter-protests-reignited-the-italian-citizenship-debate>

security, to send their kids to school, and so on, it is less likely that they will end up in a criminal court. Foreign defendants in hearing room 59 are the last of society, the hopeless, those who never had a chance to integrate, to have the same rights that Italians have. And their trials are dealt with accordingly. As soon as the trial is over, foreign defendants find themselves divested of any possibilities to get a normal life in Italy.

I would like to finish with this though. In the introduction of this book, I mention the impact that this study might have on legal professionals and on the general public. While I was writing this last chapter, I started thinking about what the general public would really think about these research outcomes. How would *torinesi* feel when knowing that magistrates do not turn a blind eye to a few grams of marijuana? How would they understand the prominent presence in direct proceedings of foreign defendants without a valid residence permit? How would they consider repressive, exclusionary and *ad hoc* judicial practices when it comes to foreign defendants? I would not be much surprised to find the general public quite pleased with this kind of approach. After all, they are the ones who asked the judiciary to intervene on episodes of incivilities and petty crimes in the first place. This situation made me think about how the findings of this study might be (mis)used to give leverage to the idea that immigrants are highly involved in crimes, and consequently to increase support for zero-tolerance judicial practices. I can refute the idea that foreign defendants are prominently present in direct proceedings because they are constantly under the watch of the police. I can refute the idea that judicial practices towards foreign defendants are not only unduly harsh, but also *contra legem*. At the same time, I am aware that this topic is highly political and emotional. Hence, I am not sure whether my refutation would be enough for an issue very much felt by citizens. So, I address the judiciary as I think they need more than a gut feeling when making decisions. ‘Injustice anywhere is a threat to justice everywhere’ wrote Martin Luther King Jr. It is time to question which kind of justice do we deliver to foreign defendants and moreover whether this justice is, after all, injustice.

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## Appendix – List of Respondents

Code	Gender	Recording	Duration
IT001M	Female	Yes	1.57.41
IT002M	Female	No	-
IT003M	Female	Yes	57.55
IT004M	Female	Yes	1.04.18
IT005M	Male	Yes	52.07
IT006M	Male	Yes	1.04.27
IT007M	Male	Yes	1.25.30
IT008M	Female	Yes	53.31
IT009M	Female	Yes	1.10.55
IT010M	Female	Yes	42.25
IT011M	Male	Yes	1.02.05
IT012M	Female	Yes	39.47
IT013M	Male	Yes	36.47
IT001D	Male	Yes	56.41
IT002D	Female	Yes	30.14
IT003D	Male	Yes	1.02.18
IT004D	Female	Yes	1.05.20
IT005D	Male	Yes	1.19.59
IT006D	Male	Yes	1.01.51
IT007D	Male	Yes	1.06.32
IT008D	Female	Yes	1.52.10
IT009D	Male	Yes	36.41
IT010D	Male	Yes	39.28
IT001Q	Male	No	-
IT002Q	Male	Yes	41.48
IT003Q	Female	Yes	1.26.16
IT001VPO	Female	Yes	1.14.15
IT002VPO	Female	Yes	46.25
IT003VPO	Female	Yes	37.37
IT004VPO	Female	Yes	54.02
IT005VPO	Male	No	-
IT006VPO	Female	Yes	1.02.07
IT001P	Male	No	-
IT002P	Female	No	-
IT003P	Male	No	-

<b>IT004P</b>	Female	Yes	41.22
<b>IT005P</b>	Female	Yes	50.10
<b>IT006P</b>	Female	Yes	28.10
<b>IT007P</b>	Male	Yes	1.01.43
<b>IT008P</b>	Male	Yes	53.56
<b>IT009P</b>	Male	Yes	52.49
<b>IT010P</b>	Female	Yes	1.28.09
<b>IT011P</b>	Male	Yes	29.27
<b>IT012P</b>	Male	Yes	36.33
<b>IT013P</b>	Female	Yes	41.41
<b>IT014P</b>	Male	Yes	52.39
<b>IT015P</b>	Female	Yes	33.01
<b>IT016P</b>	Male	Yes	58.43
<b>IT017P</b>	Male	Yes	24.15

## Summary

Processes of globalisation are changing the make-up of our cities, the goods and products at our disposal, the information we consume in the multimedia world, and so on. Within the European Union, barriers to trade are dismantled, internal borders are removed and the free movement of goods, services, capital and persons is ensured, although selectively. At the same time, globalisation provokes social and political inequalities, job insecurity and contributes to the development of new images of disorder. In fact, as global processes accelerate, so do citizens' feelings of insecurity, often related to the presence of immigrants in our societies. Criminal courts are not exempt from the dramatic changes that are taking place at the national level. Whereas the judicial function has been traditionally considered as 'domestic', in reality globalisation is changing the make-up and practices of national courts.

The main aim of this research is to explore the impact of globalising forces, more specifically flow of people, ideas and cultural meanings, on judicial practices related to foreign defendants without a valid residence permit in an Italian court. To that end, this study explores empirically judicial practices and activities in the court of Turin, a city located in the northwest of the country, to provide a comprehensive account of how courtroom actors make decisions when sentencing foreign defendants. The central question of this study is:

*How do courtroom actors make use of discretion when sentencing foreign defendants without a valid residence permit and how such use is influenced and constrained by the broader socio-legal context?*

The research investigates, in particular, decisions made by the key players of the courtroom workgroup, namely judges, public prosecutors and defence attorneys. Attention is also paid to the role of the police in shaping judicial practices, albeit to a limited extent. The 'recipients' of the judicial practices observed and investigated are foreign defendants without a valid residence permit, *scilicet* non-EU defendants who lack or have lost the right to reside in Italy. This research relies on courtroom ethnography to explore how courtroom actors make use of discretion, and on constraints and forces at work in shaping their decisions. In particular, it draws on extensive empirical materials consisting of semi-structured interviews with courtroom actors, local media analysis, case-file analysis and observation of direct proceedings, that are proceedings used for dealing expeditiously with street-crimes.

Together with accounting for how discretion is used by courtroom actors when foreign defendants are on the bench, this research also considers the impact of the broader socio-legal context in making decisions. In particular, it explores how the legal, organisational, political, social and cultural environment in which a court is located shapes decision-making processes. At the same time, this context is analysed in its *trans-local* dimension, as a space where national and sub-

national traits meet broader instances. This study aims at emphasizing the importance of the context for investigating judicial practices and penal outcomes. The socio-legal context is analysed through the five dimensions of the penal state identified by David Garland. Each dimension is the subject of an empirical chapter. The term 'penal state' is a neutral, nonevaluative term to indicate the agencies and authorities that direct, control and affect the use of penal power. The five dimensions relate to the structure of the state, its openness to external pressure, its internal structure, the interests and incentives of courtroom actors, together with powers, resources and capacities. The structure of the penal state and its characteristics contribute to explaining differences and similarities in penal outcomes across countries.

*What citizens want': how to enhance exclusionary citizenship*

The first empirical chapter considers whether and how external pressures have percolated criminal justice policies towards foreign defendants in the *torinese* court. Garland refers to this dimension as *state autonomy*, meaning the level of immunity of the penal state from external influences. This dimension emphasises the role played by pressure groups in the occurrence, as well as in the degree of enforcement, of certain penal policies. This chapter looks at whether and how the police and the Public Prosecutor's office, as primary definers in the field of security, answer to citizens' requests for security. In the city of Turin, as elsewhere in Italy, urban security is deemed to be hampered by the presence of immigrants in public spaces and their visible involvement in street-crimes and episodes of incivilities. Local media narratives contribute to increased citizens' fear of crime through emotional-laden images of crime, disorder and urban decay consistently associated with immigrants. The empirical materials suggest that societal and media narratives play a major role in shaping law enforcement practices.

The first part of this chapter examines how the local chief of the police dealt with the problem of urban security by increasing the surveillance of immigrants in areas of the city considered 'problematic' with regard to security. In particular, at the beginning of 2018, extraordinary high-impact activities of patrolling were introduced to ease citizens' fear of crime and disorder. These activities of patrolling combined administrative and criminal law with the aim of 'cleaning up' areas of the city with every legal instrument at the disposal of the police. This policy resulted in an increase in the number of immigrants arrested, especially for drug trafficking of a mild nature. Additionally, the police intensified administrative checks in bars and shops run by and/or frequented by immigrants with the aim of discouraging their presence in urban spaces. The use of administrative and criminal instruments to ensure urban decorum increases surveillance and control of a particular social group deemed a threat to security, hence contributing to processes of secondary criminalization. In turn, this policy reinforces the societal and media narrative of immigrants as bearers of crime and disorder.

The second part of the chapter analyses how the maintenance of law and order is matched by a high degree of permeability from the Public Prosecutor's office. Public prosecutors are particularly responsive to those crimes that affect *torinese's* sense of security the most, above all

immigrants' involvement in drug trafficking of a mild nature. This is visible in how public prosecutors prefer not to dismiss cases of trifling significance because they fear the consequence that such a decision might have on citizens' perception of the judiciary. At the same time, these crimes are dealt with through direct proceedings, namely speedy trials that allow the arrested person to be brought in front of a judge within 48-hours, to streamline court procedures. The idea of giving an immediate answer to street-criminality represents the legacy of the dismantled group *Sicurezza Urbana*, a working group of public prosecutors created to deal efficiently with crimes that affect citizens' perception of security the most. The openness of the *torinese* Public Prosecutor's office towards external pressure is also rooted in its peculiar legal culture, which attempts to break the traditional separation between the judiciary and civil society. By creating a 'priority route' to the criminal justice system to authors of street-crimes, whose majority are immigrants, the Public Prosecutor's office sets in motion a legal mechanism through which social inequalities are reproduced and bolstered. This is because this policy reinforces a divisive rhetoric between 'good citizens' and troublesome 'non-citizens', with the latter being constantly under the watch of public authorities inasmuch as their presence inspires fear and trepidation.

*Unchecked judicial independence: discretion does not always rhyme with accountability*

The second empirical chapter examines how magistrates make use of discretion when prosecuting and sentencing foreign defendants, together with structural and cultural factors driving their decisions. Garland terms this dimension as the *internal autonomy* of the penal state, referring to whether courtroom actors can make decisions free from political parties. Assessing the breadth of decision-makers' discretion is important in understanding whether they hold or not the power to shape penal outcomes. This chapter analyses the legal and organizational context setting the boundaries of discretion, together with individuals' decisional frame including personal values and beliefs. The first part of this chapter looks at judges' decisional autonomy, and in particular at how judges can shape penal outcomes by attributing different meanings to a defendant's personal characteristics. The second part of this chapter discusses the principle of mandatory prosecution in-action, and it analyses how the degree of discretion held by individuals also depends upon the organization of the Public Prosecutor's office and the leadership of chief prosecutors. The empirical material suggests that institutional structure and legal culture play a major role in shaping the use of discretion.

Italian magistrates enjoy a high level of internal and external independence, meaning that the institutional framework grants judges and public prosecutors the power to make decisions free from political parties and the judicial organisation as well. The degree of discretion held by judges is particularly visible when it comes to interpretation and application of the law. In detail, the empirical material sheds light on the various, at times antagonistic, meanings that judges ascribe to defendants' characteristics. 'Being irregular', for instance, is interpreted as an indicator of danger, meaning that foreign defendants without a valid residence permit are considered more prone to crime because of their marginal socio-economic conditions. However, this narrative of danger is not shared by all judges. On the contrary, some judges consider 'being regular' as an

indicator of recklessness, meaning that foreign defendants with a valid residence permit are deemed incapable of abiding by the rules. From the fieldwork it emerges how judges embrace the narrative closest to their ideological leanings, as reflected by the factions within the judiciary. The situation where judges can make such different assessments is not only the result of how discretion is institutionally allocated, but also of how judges interpret their powers. An interesting finding stands out: judges interpret independence as ‘loose’ discretion, meaning that inconsistent decision-making is not seen as an obstacle to equal justice, but as the ‘price’ to pay to ensure the independence of individual magistrates. Italian magistrates’ internal legal culture, professionalism, membership of a certain ideological factions and relationship with colleagues explain why it is widely accepted, and even appreciated, that each decision-maker makes choices according to their personal values and beliefs.

Whereas judges’ discretion relates to the application and interpretation of the law, public prosecutors’ discretion pertains mainly to how the Public Prosecutor’s office is organised and according to which priorities. Despite the principle of mandatory prosecution, public prosecutors prioritise crimes to prosecute according to their own definition of the crime problem, which strongly relates to their ideological leanings. Making priorities is somehow inevitable due to heavy caseloads and limited resources available at the Public Prosecutor’s office. However, individual prosecutors’ discretion becomes greater when no directions on how making decisions are provided for at the policy level. After a past of ‘managerial’ leadership, when this research was conducted, the *torinese* Public Prosecutor’s office had no priority criteria about how to handle crimes. The lack of administrative guidelines increases discretionary powers in the hands of individual prosecutors, at the expense of internal consistency. This do-it-yourself discretion is visible in how public prosecutors deal with the increased number of arrests. In particular, on the one hand, there are the *garantisti*, namely prosecutors who interpret their role as ‘guardians of the law’ and react against repressive policing by enhancing defendants’ rights. On the other hand, there are the *efficientisti*, namely prosecutors who believe their task is to fight criminality efficiently: hence they perceive the need to provide a prompt answer to a certain kind of criminality, especially crimes committed by immigrants. Like judges, public prosecutors tend to select the course of action that is closer to individual leanings and idea of justice. The problem is that, because magistrates are supervised by a judicial council elected and composed by magistrates, the use of discretion escapes from the effective mechanisms of check and balance, at the expense of the rule of law.

*At the front door of the judicial chain, where all discretionary powers matter*

The third empirical chapter explores courtroom dynamics in-action, and it sheds light on how informal practices and relationships affect the use of discretion. Sentencing outcomes are always the product of decisions made by multiple actors who must cooperate, at times even compromise, with each other to keep the justice machine running. This entails that, to fully understand decision-making, it is necessary to adopt a holistic approach and to investigate how different actors contribute to the final product of sentencing. In fact, internal dynamics, together

with informal incentives and constraints, impact how an individual actor makes decisions. Garland terms this dimension *control of the power to punish* to refer to how the power to punish is distributed along the judicial chain and how different actors compete for control. This chapter, in particular, looks at the mechanisms at the front door of the judicial chain by examining how magistrates translate policing outcomes in judicial ‘inputs’, and on the incentives and constraints that govern the relationship between courtroom actors and the police. It questions whether magistrates are passive recipients of policing outcomes or whether they attempt to gain control over case intake by increasing judicial supervision and enhancing the rule of law. This question is particularly relevant considering that, in the period when this research was conducted, there was an increase in arrest rates for petty offences, hence a change in the ‘regular’ flow of case intake. The empirical materials suggest that magistrates tend to avoid judicial supervision, and it sheds light on the rationales and meanings behind this negative use of discretion.

The first part of the chapter explores the relationship between judges and the police when it comes to validate arrest decisions of police officers. It is the task of judges to validate arrests decisions, thus to ascertain whether police officers have made good use of discretion. From data it emerges that judges are often willing to turn a blind eye when arrest decisions are made on the fringes of the law for a variety of factors. First, the professional culture of trial judges, who are used to dealing with the trial in and of itself rather than with activities in the pre-trial phase, makes them less sensitive to scrutinize police officer’s arrest decisions. Second, the non-complex and trivial nature of the crimes involved makes judges uninterested in what they perceive as ‘second-class’ trials, as they prefer to dedicate their limited time in dealing with more important cases. Third, judges’ willingness to turn a blind eye stems also from how they conceptualise the crime problem. In detail, crimes selected by police officers, mainly episodes related to drug trafficking, somehow match the great majority of judges’ outlook about which crimes should be prosecuted and tried. Because the great majority of judges perceive drug trafficking as a very serious matter, it is not surprising that they feel the urge to validate such arrest decisions. The last factor that helps in explaining judges’ passivity in monitoring policing outcomes has its roots in the complex relationship between judges and the police. Judges tend to validate arrest decisions on the fringes of the law to minimizing conflict and tension with the police. Maintaining good relationships is a concern within the courtroom workgroup, and this is true also in respect of the actor at the front door of the judicial chain. Considering the mild penalties that defendants will eventually get, judges prefer to avoid questioning priorities from the executive. Although it is much harder to detect, the negative power of discretion has far-reaching consequences for the fairness and equality of the justice system.

Whereas judges must assess whether an arrest decision is legitimate, public prosecutors must decide whether the arrested person should be released or brought in front of a judge. The second part of this chapter investigates the relationship between public prosecutors and the police, and it sheds light on informal mechanisms through which public prosecutors might effectively control case intake. From interviews it emerges that public prosecutors share concerns similar to those of judges. In particular, public prosecutors tend to avoid dismissing cases to minimise

conflicts with law enforcement authorities, given that investigations are conducted in cooperation with the police. Besides, public prosecutors place greater emphasis on the need to process cases expeditiously. Whereas they admit that certain arrest decisions involve cases that could be processed through a charge without arrest, public prosecutors prefer nonetheless not to release the arrested person and ‘get rid of’ a dossier in the shortest time possible. At the same time, an unexpected finding stands out. Some public prosecutors, albeit a minority, attempt to control case intake informally and in an earlier phase, in particular by trying to dissuade police officers from arresting someone. In cases where they succeed, this mechanism results in an effective filter to the criminal justice system. However, the general reluctance amongst public prosecutors to act as ‘filterers’ contributes to selective and targeted policing, as police officers are aware that arrest decisions would seldom be questioned by the Public Prosecutor’s office. In turn, public prosecutors might be less attentive in the screening of cases since it almost never happens that judges make a different assessment. The same goes for defence attorneys, of whom the great majority refrain from active defence not to disrupt the activities of the courtroom workgroup. These findings confirm that courtroom actors exercise discretion in such a way that meets the expectations of their peers and does not disrupt routine activities. As such, the ‘discretion the matters’ in determining penal outcomes is not held by individual actors but is located alongside the whole judicial decision-making process.

*How to enhance the power of the state to exclude: the resurgence of banishment*

The fourth empirical chapter delves into objectives, practices and techniques of penal power as deployed by courtroom actors. It charts the rationales behind *torinesi* magistrates’ decisions when foreign defendants without a valid residence permit are on the bench. Garland terms this dimension modes of penal power, and it refers to how much penal power is used by the penal state, and whether it is used in a positive or negative manner. Penal power can be used to rehabilitate, restore social cohesion, but also to incapacitate and confine. Additionally, the use of penal power can vary across time and social groups. This is why inquiries into the use of penal power must be carried out by taking into account how global socio-legal trends and developments impact rationales and techniques of penal power. In the last decades, we have witnessed the emergence of hybrid practices that enhance the power of the state to exclude. These practices seem to be the offspring of a growing obsession with security, increasing hostile feelings towards the ‘others’ and a hyper-reliance on criminal law. In the *torinese* case, these global trends contribute to the development of a repressive and exclusionary practice that allows courtroom actors to banish foreign defendants without a valid residence permit from the city. This chapter examines, in particular, how magistrates turned an instrument of crime control into an instrument of socio-urban control. It does so by examining the formal and informal objectives behind the use of precautionary measures, in particular a prohibition of residence.

Precautionary measures are measures adopted in the pre-trial phase to avoid the occurrence of something unwanted. They consist of restrictions, to various degrees, on a defendant’s personal freedom. In the case of street-crimes, precautionary measures are generally imposed to prevent



the risk of re-offending. From the empirical materials it emerges how the most commonly imposed precautionary measure on foreign defendants without a valid residence permit charged with drug trafficking of a mild nature is a prohibition of residence. This measure bans foreign defendants from living in Turin on the grounds that the local environment is deemed 'criminogenic'. Because magistrates, to impose this measure, must take into account a defendant's needs in terms of housing, employment and support, this measure is eventually imposed only on foreign defendants without a valid residence permit since they lack social and economic ties to Turin. This measure marks a return to old practices of banishment though which social groups deemed dangerous are banned from the city and lose membership. At the same time, practices of banishment are not an Italian speciality, but rather the offspring of a global trend of security-obsessed urbanism. Banning orders, in fact, are currently used in many Western countries to remove social groups considered unruly from public spaces. They are mostly adopted under a blend of criminal and administrative law towards social groups in marginal socio-economic conditions, such as homeless, drug addicts and immigrants. These are the social groups who mostly inspire feelings of insecurity amongst local residents, who often translate such feelings into a request for 'cleaning up' areas of the city deemed disorderly.

From interviews it emerges how magistrates, when imposing a prohibition of residence, are not much concerned about preventing the risk of re-offending. Rather, there are other not-by-the-book objectives that add, and at times even replace, traditional instances of crime control. First, magistrates impose banning orders to reassure the public that the judiciary is sensitive to their requests and that lawlessness is not tolerated. By removing irregular immigrants from the city, magistrates avoid the situation where immigrants' presence is a threat to public order, thus placating citizens' fears. Second, magistrates rely on banning orders to 'make the problem go away'. Whereas a prohibition of residence is adopted towards an individual defendant, the empirical material shows that this measure is more generally implemented with the purpose of removing and relocating visible manifestations of anti-social behaviours and street-crimes. Whereas magistrates are aware that banning orders might favour the commuting of crimes and criminals, they are more concerned about 'getting rid' of certain defendants from the territory for which they are responsible. Third, magistrates use banning orders to bypass the statutory limit for imposing pre-trial detention. In detail, magistrates are well-aware that foreign defendants without a valid residence permit lack the economic and legal resources to change residence as it pleases them. However, the reason why magistrates impose this measure is that they know that foreign defendants will not abide by it. This situation allows magistrates to aggravate the previously breached measures, so as to order pre-trial detention to foreign defendants charged with drug trafficking of a mild nature who, in principle, should not endure pre-trial detention given the low seriousness of the offence committed. The practice of imposing banning orders on foreign defendants without a valid residence permit represents a move away from the black-letter-law. These not-by-the-books objectives illustrate how penal power 'changes' its nature when exerted towards non-members. In particular, 'getting rid' of the troublesome, and easing citizens' concerns about crime and disorder become the main drivers of decision-making processes towards foreign defendants without a valid residence permit. As a

consequence, a system of urban-socio control is created within the penal domain, leading to exclusion and removal from the city of social groups who are unwelcomed by the citizens.

*Sentencing the 'others': are national courts equipped to deal with foreign defendants?*

The last empirical chapter analyses the capacity of the penal state, in terms of economic and cultural capital, to implement official goals. Garland terms this dimension *power resources and capacity* referring to resources and means at the disposal of the state to take effective actions. The capacity of the penal state to implement penal policies is challenged by processes of globalization, in particular flows of people. In fact, the penal state is required to develop new capacities in order to engage with emerging challenges, needs and actors. National courts are not excluded from these global trends, inasmuch as the complexity of the social world outside the court is mirrored by a demand for new rules and resources inside the court. This chapter, in particular, examines how the increased number of foreign defendants in national courts challenges domestic practices. Whereas state capacity by itself is not enough to explain penal outcomes, the empirical material sheds light on how the economic and cultural capital of the penal state play an important role in shaping judicial practices, and consequently penal outcomes. This chapter focuses on two main issues connected to state capacity. The first is how the *torinese* court deals with language-related barriers when it comes to foreign defendants who do not master the language of the trial. The empirical material shows how budgetary restrictions hinder the communication between magistrates and foreign defendants, at the expense of the latter. Next, I discuss whether and how deportation is used by courtroom actors, and the role of cultural capital and legal culture in shaping penal practices.

Foreign defendants who are unable to master the language of the trial are entitled to being assisted by an interpreter in order to exercise their right to defence. Despite the European directive on the right to interpretation and translation in criminal proceedings has been transposed into national law, from the empirical material it emerges how the right to language assistance struggles to assert itself in-action. Courtroom actors perceive the presence of interpreters in the hearing room as an obstacle to a fast and 'painless' trial. This is because interpretation is time-consuming and not always fruitful. As a consequence, judges rely on informal practices to limit the side-effects of interpreters. To start with, to save time, judges do not question foreign defendants directly about their identity, but rather they ask interpreters to fill in an identification form with the information defendants provide directly to interpreters. By doing so, judges favour expediency over a proper understanding of a defendant's personal conditions. Along this line, judges attempt to avoid interpretation in various ways. Despite the black-letter law, judges are reluctant to ascertain if a defendant's command of the language is sufficient to exercise the right to defence. Most of the time judges avoid interpretation when a defendant speaks Italian a little, although it is doubtful whether a limited language proficiency allows a defendant to engage in complex dialogues with legal implications. Together with saving time, 'cutting costs' is another big concern for *torinesi* judges. From observation it emerges how the great majority of judges ask a defendant whether he (less often she) wants to waive the

translation of the judgment. This custom, in stark contrast with the black-letter-law, is 'justified' on the ground that foreign defendants have no interest whatsoever to their cases or they are too ill-educated to understand the substance of the judgment, even if translated. The circumstance that the penal state is unwilling to invest economic resources in language assistance is also visible in the poor quality of the services provided for by court-appointed interpreters. The lack of an adequate level of professionalism from interpreters, who are neglected and poorly paid, does not guarantee the communication between the parties. Given the language assistance services' shortcomings, judges are not well equipped to deal efficiently with non-Italian-speaking defendants. Therefore, they develop (informal) internal practices aimed at processing cases as promptly as possible. This circumstance shows how the lack of economic capital is likely to lead to simple judicial practices with little know-how.

The lack of economic capital is matched by a lack of cultural capital, in terms of professional expertise, trained personnel and system coordination. This is most visible in how judges make use of deportation orders towards convicted foreign defendants. In recent decades, many Western countries have started to rely on deportation to expel 'unwanted guests', including convicted long-term foreign residents. Similar to other jurisdictions, in Italy the law provides judges with the power to order deportation of convicted foreigners deemed dangerous for the community. However, judges seldom use this power. From the interviews it emerges why a 'deportation turn' is far from taking place in the Italian criminal justice system. First, judges do not order deportation because they 'admit' having little knowledge on this measure, to the point that they are unable to identify 'who', if public prosecutors or judges, is in charge of triggering the deportation machine. This might be due to the fact that legal professionals in Italy hold knowledge in a very specific area of law, hence it is unlikely that criminal judges are informed about measures that do not traditionally belong to the penal apparatus. The second reason why deportation is rarely used relates to the impossibility, or great difficulty, of its enforcement. Judges are aware that 'deportability' does not lead to deportation for the great majority of foreign defendants without a valid residence permit. Hence, judges claim that it is pointless to issue a deportation order that eventually will never be enforced due to certain material and structural limitations of the Italian deportation machine. The third reason why deportation is under-enforced in criminal justice settings relates to how magistrates interpret their roles. Whereas deportation might be used by judges, they claim that it is an institute unfamiliar to the penal domain. Hence, magistrates perceive deportation as something outside their competence, as it is not their task to act upon it. Another structural element that seems to 'enlarge' the distance between the immigration and the criminal law domain is represented by the lack of coordination between the two authorities. In Italy, the immigration and criminal justice system are so detached from each other that judges do not know whether a defendant, once released under criminal law, will be detained under immigration law. As a consequence, judges perceive immigration matters as something outside their business. Thus, the strongest hindrance to the development of 'cimmigration' practices is represented by the resistance from the judiciary to rely on 'hybrid' measures in criminal justice settings.

This research examines how courtroom actors make use of discretion when sentencing foreign defendants without a valid residence permit, and how such use is influenced and constrained by the broader socio-legal context. Taken together, the findings of this research point to the conclusion that judicial practices are largely the product of a variety of legal, structural, social and cultural factors. In particular, courtroom actors use discretion in a way that largely meets the expectation of their peers and of the general public. Internal and external forces, taken together, determine the objectives that drive individuals' decision-making. This impact of external forces is particularly visible in how grand societal narratives depicting immigrants as bearers of crime and disorder have seeped into the court and have been vested with authority. The impact of internal forces, on the other hand, is most evident in how individuals' decisions are largely determined by a set of informal rules, values, objectives and concerns developed within the courtroom workgroup, such as processing cases expeditiously and minimizing conflicts. This is why it is important to adopt a holistic approach to the study of the decision-making process in order to identify how different actors and forces contribute to the final product of sentencing. Along this line, this research brings to the forefront the importance of the context for understanding the development of judicial practices. This study concludes that the uses and meanings of discretion are the offspring of practices, ideas and cultural meanings of the trans-local site, intended as a space in which national and sub-national traits meet broader instances, in which courtroom actors live and work.

The context is also important when it comes to exploring the development, or better the non-development, of 'crimmigration' practices. Whereas by looking at the black-letter-law only is possible to see some traces of 'crimmigration', for example in deportation following a criminal conviction, the law-in-action shows a quite different story. In fact, in this research context, structural and cultural factors hinder an Italian 'deportation turn'. In detail, magistrates' professional culture, together with the lack of coordination between judicial and administrative authorities, the shortage of places in detention centres and the paucity of return agreements with third countries, prevent an escalation of deportation in Italy. These findings stress the importance of exploring the context not only in its purely legal dimension, but also in its cultural and more practical aspects. The latter can be appreciated only by going to the place where decisions are actually made, where the law comes alive. Investigating the law-in-action allows us to open the black-box behind decision-making processes and to better understand rationales, objectives and meanings behind an individual's decision. The great advantage of conducting courtroom ethnography is that it allows us to observe the informal practices developed within a given court, together with understanding of 'what is behind' them, and in particular which needs and demands these practices are designed to meet.

Together with stressing that the importance of the context for understanding judicial practices, this research addresses the importance of investigating the complex, dynamic and interrelated stages of the process. This is particularly visible when investigating proceedings such as the ones

observed in this study, meaning trials designed to deal expeditiously with lower criminal cases. Most of the time, these proceedings deal with petty offences which are followed by low penalties, to the point that courtroom actors consider them as 'second-class' trials. However, low penalties follow costly matters for foreign defendants without a valid residence permit. This research shows how burdensome are the various stages of a direct proceeding for this group of defendants, from the moment they are arrested, passing through to the moment they are banned from the city, until reaching the moment they lose the right to stay in the country once convicted. The process becomes the punishment when the costs involved in being caught in the criminal justice machine are higher than the final penalty. These findings stress the importance of adopting a process-oriented approach to the study of decision-making in order to capture practices and activities behind the final product of sentencing. Behind the surface of a 'just' penalty, there might be considerable grey zones that question the legitimacy of the justice system and its adherence to the rule of law.



## Samenvatting

Globaliseringsprocessen veranderen de samenstelling van onze steden, de goederen en producten waarover we beschikken, de informatie die we consumeren in de multimediawereld, enzovoort. Binnen de Europese Unie worden handelsbelemmeringen en binnengrenzen opgeheven en het vrije verkeer van goederen, diensten, kapitaal en personen gewaarborgd, zij het op selectieve wijze. Tegelijkertijd veroorzaakt globalisering sociale en politieke ongelijkheden, baanonzekerheid en draagt het bij tot de ontwikkeling van nieuwe ideeën van wanorde. Naarmate mondiale processen versnellen, nemen ook de gevoelens van onveiligheid van burgers toe, vaak gerelateerd aan de aanwezigheid van immigranten in onze samenlevingen. Ook in de strafrechtbanken zijn de gevolgen van deze ingrijpende veranderingen op nationaal niveau voelbaar. Terwijl justitie traditioneel als een nationale aangelegenheid wordt beschouwd, verandert de globalisering de werking van nationale rechtbanken.

Het belangrijkste doel van dit onderzoek is om de impact te onderzoeken van globaliserende krachten, meer bepaald de stroom van mensen, ideeën en culturele betekenissen, op gerechtelijke praktijken met betrekking tot buitenlandse verdachten zonder een geldige verblijfsvergunning bij een Italiaanse rechtbank. Daartoe onderzoekt deze empirische studie gerechtelijke praktijken en activiteiten in de rechtbank van Turijn (een stad in het noordwesten van het land) om een uitgebreid verslag te geven van hoe gerechtelijke actoren beslissingen namen bij het veroordelen van buitenlandse verdachten. De centrale vraag van dit onderzoek is:

*Hoe maken gerechtelijke actoren gebruik van hun discretionaire ruimte bij het berechten van en beslissen over buitenlandse verdachten zonder geldige verblijfsvergunning en hoe wordt dit gebruik beïnvloed en beperkt door de bredere sociaal-juridische context?*

Het onderzoek focust in het bijzonder op beslissingen van de belangrijkste spelers in de rechtszaal, namelijk rechters, openbare aanklagers en advocaten. Ook wordt aandacht besteed aan de rol van de politie bij het vormgeven van justitiële praktijken, zij het in beperkte mate. De ‘onderworpenen’ aan de geobserveerde en onderzochte gerechtelijke praktijken zijn buitenlandse beklagden zonder geldige verblijfsvergunning, gedaagden van buiten de EU die geen recht (meer) hebben om in Italië te verblijven. Er werd etnografisch onderzoek gevoerd in de rechtszaal om te onderzoeken hoe actoren daar gebruikmaken van hun discretionaire bevoegdheden, en welke beperkingen en krachten daar aan het werk zijn en een invloed hebben op de tot stand gekomen beslissingen. Uitgebreid empirisch onderzoek werd gevoerd, gebruikmakende van semi-gestructureerde interviews met gerechtelijke actoren, lokale media-analyses, dossieranalyses en observaties van ‘snelprocedures’ die worden gebruikt voor het snel afhandelen van straatcriminaliteit.

Naast het analyseren hoe discretie wordt gebruikt door gerechtelijke actoren wanneer buitenlandse verdachten op de beklaagdenbank zitten, kijkt dit onderzoek ook naar de impact van de bredere sociaal-juridische context bij het nemen van beslissingen. In het bijzonder wordt onderzocht hoe de juridische, organisatorische, politieke, sociale en culturele context waarin een rechtbank is gevestigd, besluitvormingsprocessen vormgeeft. Tegelijkertijd wordt deze context geanalyseerd in zijn translokale dimensie, als een ruimte waar nationale en subnationale kenmerken met transnationale ontwikkelingen in interactie treden. Deze studie wil het belang van de context voor het onderzoeken van gerechtelijke praktijken en strafrechtelijke uitkomsten in de verf zetten. De sociaal-juridische context wordt geanalyseerd aan de hand van de vijf dimensies van de *'penal state'* die door David Garland zijn geïdentificeerd. Elke dimensie is het onderwerp van een empirisch hoofdstuk. De term *'penal state'* is een neutrale, niet-evaluerende term om de instanties en autoriteiten aan te duiden die het gebruik van bestraffing dirigeren, controleren en beïnvloeden. De vijf dimensies hebben betrekking op de structuur van de staat, zijn openheid voor druk van buitenaf, zijn interne structuur, de belangen van gerechtelijke actoren, samen met bevoegdheden, middelen en capaciteiten. De structuur van de *'penal state'* en zijn kenmerken bieden verklaringen voor verschillen en overeenkomsten in strafrechtelijke uitkomsten tussen landen.

*'Wat burgers willen': hoe 'exclusionary citizenship' versterkt wordt*

In het eerste empirische hoofdstuk wordt nagegaan of en hoe externe druk het strafrechtelijke beleid jegens buitenlandse beklaagden voor de Turijnse rechtbank heeft beïnvloed. Garland noemt deze dimensie *staatsautonomie*, dat wil zeggen het niveau van immuniteit van de *'penal state'* tegen invloeden van buitenaf. Deze dimensie benadrukt de rol die actiegroepen spelen bij het optreden en de mate van handhaving van bepaald strafrechtelijk beleid. In dit hoofdstuk wordt gekeken of en hoe de politie en het Openbaar Ministerie, als voornaamste actoren op het gebied van veiligheid, reageren op de roep van burgers om veiligheid. In de stad Turijn bestaan, net als elders in Italië, gevoelens van stedelijke onveiligheid door de aanwezigheid van immigranten in de openbare ruimte en hun zichtbare betrokkenheid bij straatcriminaliteit en overlast. Verhalen uit de lokale media dragen bij aan de grotere angst van burgers voor criminaliteit door middel van emotioneel beladen beelden van misdaad, wanorde en stedelijk verval, die veelvuldig met immigranten in verband worden gebracht. Het empirische onderzoek suggereert dat maatschappelijke narratieven een narratieven in de media een belangrijke invloed hebben op de manier waarop wetshandavingspraktijken tot stand komen.

In het eerste deel van dit hoofdstuk wordt onderzocht hoe het plaatselijke hoofd van de politie omging met het probleem van stedelijke veiligheid, met name door het toezicht op immigranten te versterken in gebieden van de stad die als 'problematisch' worden beschouwd op het vlak van veiligheid. In het bijzonder werden begin 2018 buitengewone patrouilleactiviteiten met grote impact uitgevoerd om de angst van burgers voor misdaad en wanorde te verminderen. Deze patrouilleactiviteiten combineerden bestuursrechtelijke en strafrechtelijke activiteiten met als doel stadsdelen 'op te ruimen' met alle wettelijke instrumenten die ter beschikking van de politie



stonden. Dit beleid leidde tot een toename van het aantal gearresteerde immigranten, vooral voor milde drugshandel. Bovendien heeft de politie de administratieve controles geïntensiveerd in bars en winkels die worden gerund door en/of bezocht door immigranten, met als doel hun aanwezigheid in stedelijke ruimten te ontmoedigen. Het gebruik van administratieve en strafrechtelijke instrumenten om een stedelijk decorum te waarborgen, verhoogt de bewaking en controle van een bepaalde sociale groep die als een bedreiging voor de veiligheid wordt beschouwd, en draagt zo bij aan processen van secundaire criminalisering. Dit beleid versterkt op zijn beurt maatschappelijke narratieven en narratieven in de media waarbij immigranten als dragers van misdaad en wanorde worden voorgesteld.

In het tweede deel van het hoofdstuk wordt geanalyseerd hoe handhaving van de openbare orde gepaard gaat met een hoge mate van 'doorlaatbaarheid' van het parket. Openbare aanklagers reageren bijzonder goed op die misdrijven die het gevoel van veiligheid van de *torinesi* het meest aantasten, vooral de betrokkenheid van immigranten bij milde drugshandel. Dit is te zien aan de manier waarop openbare aanklagers zaken van onbeduidende betekenis liever niet afwijzen omdat ze bang zijn voor de gevolgen die een dergelijke beslissing zou kunnen hebben op de perceptie van de burger over van de rechterlijke macht. Tegelijkertijd worden deze misdrijven afgedaan via 'snelprocedures', namelijk snelle processen waarbij de aangehouden persoon binnen 48 uur voor een rechter kan worden gebracht om de gerechtelijke procedures te stroomlijnen. Het idee om een onmiddellijk antwoord te geven op straatcriminaliteit vormt de erfenis van de gewezen werkgroep *Sicurezza Urbana*, een werkgroep van openbare aanklagers die is opgericht om efficiënt om te gaan met misdrijven die de perceptie van veiligheid van burgers het meest aantasten. De openheid van het Openbaar Ministerie in Turijn ten aanzien van externe druk is ook geworteld in zijn bijzondere juridische cultuur, die probeert de traditionele scheiding tussen de rechterlijke macht en het maatschappelijk middenveld te doorbreken. Door een 'voorrangsroute' naar het strafrechtstelsel te creëren voor verdachten van straatmisdrijven, waarvan de meerderheid immigranten zijn, zet het Openbaar Ministerie een juridisch mechanisme in werking waardoor sociale ongelijkheden worden gereproduceerd en versterkt. Dit komt doordat dit beleid de verdeeldheid zaaïende retoriek versterkt waarin een onderscheid wordt gemaakt tussen 'goede burgers' en 'lastige niet-burgers' waarbij de laatsten voortdurend onder toezicht van de overheid worden gehouden, aangezien hun aanwezigheid angst en ongerustheid opwekt.

*Ongecontroleerde rechterlijke onafhankelijkheid: discretionaire ruimte gaat niet altijd samen met verantwoordingsplicht*

Het tweede empirische hoofdstuk onderzoekt hoe magistraten gebruikmaken van hun discretionaire ruimte bij het vervolgen en veroordelen van buitenlandse verdachten, alsook de structurele en culturele factoren die hun beslissingen sturen. Garland noemt deze dimensie de interne autonomie van de '*penal state*', verwijzend naar de vraag of gerechtelijke actoren beslissingen kunnen nemen zonder de invloed van politieke partijen. Het beoordelen van de omvang van de discretionaire ruimte van besluitvormers is belangrijk om te begrijpen of zij al

dan niet de macht hebben om autonoom strafuitkomsten vorm te geven. Dit hoofdstuk analyseert de juridische en organisatorische context waarbinnen de grenzen van deze discretionaire ruimte worden bepaald, samen met het beslissingskader van individuen, inclusief persoonlijke waarden en overtuigingen. Het eerste deel van dit hoofdstuk gaat in op de beslissingsautonomie van rechters, en in het bijzonder op hoe rechters strafuitkomsten kunnen vormgeven door verschillende betekenissen toe te kennen aan de persoonlijke kenmerken van een verdachte. Het tweede deel van dit hoofdstuk bespreekt het principe van verplichte vervolging *'in-action'*, en analyseert hoe de mate van discretie van individuen ook afhangt van de organisatie van het parket en de leiding door hoofdaanklagers. Het empirische materiaal suggereert dat de institutionele structuur en de juridische cultuur een belangrijke rol spelen bij het vormgeven van het gebruik van discretionaire ruimte.

Italiaanse magistraten genieten een hoge mate van interne en externe onafhankelijkheid, wat betekent dat het institutionele kader rechters en openbare aanklagers de bevoegdheid verleent om beslissingen te nemen die vrij zijn van politieke invloed en de gerechtelijke organisatie. De discretionaire macht van rechters is vooral zichtbaar als het gaat om de interpretatie en de toepassing van de wet. Meer specifiek werpt het empirische materiaal licht op de verschillende, soms antagonistische betekenissen die rechters toekennen aan de kenmerken van beklaagden. Zo wordt 'het niet beschikken over verblijfsrecht' geïnterpreteerd als een indicator van gevaar, wat betekent dat buitenlandse beklaagden zonder geldige verblijfsvergunning als meer vatbaar voor criminaliteit worden beschouwd vanwege hun achtergestelde sociaaleconomische omstandigheden. Dit verhaal over gevaar wordt echter niet door alle rechters gedeeld. Integendeel, sommige rechters beschouwen 'het beschikken over verblijfsrecht' als een indicator van roekeloosheid, wat betekent dat ervan wordt uitgegaan dat buitenlandse verdachten met een geldige verblijfsvergunning zich vaker niet aan de regels houden. Uit het veldwerk blijkt hoe rechters het verhaal omarmen dat het dichtst bij hun ideologische voorkeuren ligt. Dat rechters zulke verschillende beoordelingen kunnen maken, is niet alleen het resultaat van de institutioneel aan hen toegekende discretionaire macht, maar ook van de interpretatie van hun bevoegdheden door de rechters zelf. Een interessante bevinding valt op: rechters interpreteren onafhankelijkheid als 'losse' discretionaire macht, wat inhoudt dat inconsistente besluitvorming niet wordt gezien als een belemmering voor gelijkheid en rechtvaardigheid, maar wel als de 'prijs' die moet worden betaald om de onafhankelijkheid van individuele magistraten te waarborgen. De interne juridische cultuur, professionaliteit, lidmaatschap van bepaalde ideologische partijen en de relatie met collega's verklaren waarom het algemeen aanvaard en zelfs gewaardeerd wordt onder Italiaanse magistraten dat elke besluitvormer keuzes maakt op basis van zijn persoonlijke waarden en overtuigingen.

Waar de beoordelingsbevoegdheid van rechters betrekking heeft op de toepassing en interpretatie van de wet, heeft de beoordelingsvrijheid van de openbare aanklagers vooral betrekking op de wijze waarop het parket is georganiseerd en volgens welke prioriteiten. Ondanks het principe van verplichte vervolging geven openbare aanklagers prioriteit aan misdrijven volgens hun eigen definities van het misdaadprobleem, die sterk verband houden met

hun ideologische voorkeuren. Het stellen van prioriteiten is op de een of andere manier onvermijdelijk vanwege de hoge caseloads en de beperkte beschikbare middelen bij het parket. De discretie van individuele aanklagers wordt echter groter wanneer er op beleidsniveau geen aanwijzingen zijn voor het nemen van beslissingen. Ondanks een verleden van 'leidinggevend leiderschap', had het bureau van de openbare aanklager in Turijn geen prioriteitscriteria voor de aanpak van misdrijven toen dit onderzoek werd uitgevoerd. Het ontbreken van administratieve richtlijnen vergroot de discretionaire bevoegdheden van individuele aanklagers, ten koste van de interne consistentie. Deze 'doe-het-zelf-discretie' is zichtbaar in de manier waarop openbare aanklagers omgaan met het toegenomen aantal arrestaties. In het bijzonder zijn er enerzijds de *garantisti*, openbare aanklagers die hun rol als 'hoeders van de wet' interpreteren en tegen repressief politieoptreden reageren door de rechten van verdachten te verdedigen. Aan de andere kant zijn er de *efficientisti*, openbare aanklagers die geloven dat het hun taak is om criminaliteit efficiënt te bestrijden: daarom zien ze de noodzaak in om snel een antwoord te geven op een bepaald soort criminaliteit, met name misdrijven gepleegd door immigranten. Net als rechters hebben openbare aanklagers de neiging om de handelwijze te kiezen die dichterbij de individuele voorkeuren en het eigen idee van rechtvaardigheid ligt. Het probleem is dat, omdat magistraten onder toezicht staan van een rechterlijke raad die door magistraten wordt verkozen en samengesteld, het gebruik van discretionaire macht ontsnapt aan effectieve mechanismen van controle en '*checks and balances*', ten koste van de rechtsstaat.

*Aan de voordeur van de gerechtelijke keten, waar alle discretionaire bevoegdheden ertoe doen*

Het derde empirische hoofdstuk onderzoekt de dynamiek van de rechtszaal '*in-action*' en belicht hoe informele praktijken en relaties het gebruik van discretionaire ruimte beïnvloeden. De uitkomsten van veroordelingen zijn altijd het product van beslissingen van meerdere actoren die moeten samenwerken, soms zelfs compromissen sluiten met elkaar om de justitie-machine draaiende te houden. Dit houdt in dat, om de besluitvorming volledig te begrijpen, het noodzakelijk is om een holistische benadering te hanteren en om te onderzoeken hoe verschillende actoren bijdragen aan het uiteindelijke product van berechting. In feite beïnvloedt de interne dynamiek, samen met informele aspecten, hoe een individuele actor beslissingen neemt. Garland noemt deze dimensie controle van de macht om te straffen en verwijst daarbij naar hoe de macht om te straffen is verdeeld doorheen de gerechtelijke keten en hoe verschillende actoren strijden om controle. Dit hoofdstuk gaat in het bijzonder in op de mechanismen aan de voordeur van de strafrechtelijke keten door te onderzoeken hoe magistraten politieresultaten vertalen in gerechtelijke '*inputs*', en op de aspecten die de relatie tussen gerechtelijke actoren en de politie beïnvloeden. De vraag staat centraal of magistraten passieve ontvangers zijn van politieresultaten of dat ze proberen controle te krijgen over de activiteiten van de politie. Deze vraag is met name relevant gezien het feit dat in de periode dat dit onderzoek werd uitgevoerd, er een toename was van het aantal arrestaties voor kleine delicten, en daarmee een verandering in de 'reguliere' instroom van zaken. Het empirische materiaal suggereert dat magistraten de neiging hebben om gerechtelijk toezicht te vermijden, en werpt licht op de redenen en betekenissen achter dit 'niet-gebruik' van discretie.

In het eerste deel van het hoofdstuk wordt de relatie tussen rechters en de politie onderzocht op het vlak van de validering van arrestatiebeslissingen van politieagenten. Het is de taak van rechters om arrestatiebeslissingen te valideren, en daarmee na te gaan of politiemensen goed gebruik hebben gemaakt van hun discretionaire bevoegdheden. Uit gegevens blijkt dat rechters vaak bereid zijn om een oogje dicht te knijpen wanneer arrestatiebeslissingen worden genomen in de marge van de wet, omwille van een verscheidenheid aan factoren. Ten eerste maakt de professionele cultuur van rechters ten gronde, die gewend zijn om het proces af te handelen in plaats van activiteiten in de fase van het vooronderzoek, hen minder gevoelig voor het onderzoeken van arrestatiebeslissingen van politieagenten. Ten tweede zorgt de niet-complexe en triviale aard van de betrokken misdrijven ervoor dat rechters niet geïnteresseerd zijn in wat zij beschouwen als 'tweederangsprocessen', aangezien ze er de voorkeur aan geven om hun beperkte tijd te besteden aan het behandelen van belangrijkere zaken. Ten derde komt de bereidheid van rechters om een oogje dicht te knijpen ook voort uit hoe zij het misdaadprobleem opvatten. Meer specifiek komen de door politieagenten geselecteerde misdrijven, voornamelijk feiten die verband houden met drugshandel, op de een of andere manier overeen met de visie van de grote meerderheid van de rechters over welke misdaden vervolgd en berecht zouden moeten worden. Omdat de grote meerderheid van de rechters drugshandel als een zeer ernstige zaak beschouwt, is het niet verwonderlijk dat ze de neiging hebben om dergelijke arrestatiebeslissingen te valideren. De laatste factor die helpt bij het verklaren van de passiviteit van rechters bij het toezicht op politieresultaten heeft zijn wortels in de complexe relatie tussen rechters en de politie. Rechters valideren arrestatiebeslissingen in de marge van de wet om conflicten en spanningen met de politie tot een minimum te beperken. Het onderhouden van goede relaties is een zorg bij de actoren in de rechtszaal, en dat geldt ook voor de actor aan de voordeur van de justitiële keten. Gezien de milde straffen die beklaagden uiteindelijk zullen krijgen, vermijden rechters het in twijfel trekken van de prioriteiten van de uitvoerende macht. Hoewel het veel moeilijker te onderzoeken is, heeft deze negatieve beoordelingsbevoegdheid verstrekende gevolgen voor de rechtvaardigheid en gelijkheid van het rechtssysteem.

Terwijl rechters moeten beoordelen of een arrestatiebesluit legitiem is, moeten openbare aanklagers beslissen of de aangehouden persoon moet worden vrijgelaten of voor een rechter moet worden gebracht. Het tweede deel van dit hoofdstuk onderzoekt de relatie tussen openbare aanklagers en de politie en werpt licht op informele mechanismen waarmee openbare aanklagers effectief toezicht kunnen houden op de opname van zaken. Uit interviews blijkt dat openbare aanklagers dezelfde zorgen delen als rechters. In het bijzonder hebben openbare aanklagers de neiging om zaken niet af te wijzen om conflicten met wetshandhavingsinstanties tot een minimum te beperken, aangezien onderzoeken worden uitgevoerd in samenwerking met de politie. Bovendien leggen openbare aanklagers meer nadruk op de noodzaak om zaken snel te behandelen. Terwijl ze toegeven dat bepaalde arrestatiebeslissingen betrekking hebben op zaken die kunnen worden afgehandeld door middel van een aanklacht zonder arrestatie, kiezen openbare aanklagers er toch de voorkeur aan de aangehouden persoon niet vrij te laten en een dossier in de kortst mogelijke tijd af te handelen. Tegelijkertijd valt een onverwachte bevinding op. Sommige openbare aanklagers, zij het in de minderheid, proberen informeel en in een eerdere

fase controle uit te oefenen op de intake, met name door politieagenten ervan te weerhouden iemand te arresteren. In de gevallen waarin ze daarin slagen, resulteert dit mechanisme in een effectieve filter naar het strafrechtstelsel. De algemene onwil van openbare aanklagers om op te treden als ‘*filter*’ draagt echter bij aan selectief en gericht politiewerk, aangezien politieagenten zich ervan bewust zijn dat arrestatiebeslissingen zelden in twijfel worden getrokken door het parket. Het kan zijn dat openbare aanklagers op hun beurt minder oplettend zijn bij het screenen van zaken, aangezien het bijna nooit gebeurt dat rechters een andere beoordeling maken. Hetzelfde geldt voor advocaten van de verdediging, van wie de overgrote meerderheid afziet van actieve verdediging om de activiteiten in de rechtszaal niet te verstoren. Deze bevindingen bevestigen dat actoren in de rechtszaal discretie uitoefenen op een manier die aan de verwachtingen van hun *peers* voldoet en routinematige activiteiten niet verstoort. Als zodanig ligt de discretionaire bevoegdheid bij het bepalen van strafuitkomsten niet bij één individuele besluitvormer, maar wordt discretionaire macht uitgeoefend doorheen het hele gerechtelijke besluitvormingsproces.

*Hoe de macht van de staat om uit te sluiten te vergroten: de heropleving van de verbanning*

Het vierde empirische hoofdstuk focust op doelstellingen, praktijken en technieken van strafrechtelijke macht zoals ingezet door gerechtelijke actoren. Het brengt de beweegredenen achter de beslissingen van *torinesi* magistraten in kaart wanneer buitenlandse beklaagden zonder geldige verblijfsvergunning op de beklaagden bank zitten. Garland noemt deze dimensie modi van strafrecht, en het verwijst naar hoeveel strafrecht wordt gebruikt door de ‘*penal state*’, en of het op een positieve of negatieve manier wordt gebruikt. Strafrecht kan worden gebruikt om te rehabiliteren, de sociale cohesie te herstellen, maar ook om te neutraliseren en te beperken. Bovendien kan het gebruik van strafrechtelijke bevoegdheden variëren in de tijd en in sociale groepen. Daarom moet bij onderzoek naar het gebruik van strafrechtelijke macht rekening worden gehouden met de invloed van mondiale sociaal-juridische ontwikkelingen op de achterliggende doelstellingen en technieken van strafrecht. In de afgelopen decennia zijn we getuige geweest van de opkomst van hybride praktijken die de macht van de staat om uit te sluiten hebben vergroot. Deze praktijken lijken het resultaat te zijn van een groeiende obsessie met veiligheid, toenemende vijandige gevoelens jegens de ‘anderen’ en een overmatige afhankelijkheid van het strafrecht. In het *torinese* geval dragen deze wereldwijde trends bij aan de ontwikkeling van een repressieve en uitsluitende praktijk die gerechtelijke actoren in staat stelt om buitenlandse verdachten zonder geldige verblijfsvergunning uit de stad te bannen. In dit hoofdstuk wordt in het bijzonder onderzocht hoe magistraten een instrument van misdaadbestrijding hebben omgevormd tot een instrument van sociaal-stedelijke controle. Het doet dit door de formele en informele doelstellingen achter het gebruik van voorzorgsmaatregelen te onderzoeken, in het bijzonder een verblijfsverbod.

Voorzorgsmaatregelen zijn maatregelen die in het vooronderzoek worden genomen om te voorkomen dat er iets ongewensts gebeurt. Ze bestaan uit beperkingen, in verschillende mate, op de persoonlijke vrijheid van een verdachte. Bij strafcriminaliteit worden doorgaans

voorzorgsmaatregelen opgelegd om het risico op herhaling te voorkomen. Uit het empirische materiaal blijkt hoe de meest voorkomende voorzorgsmaatregel die worden opgelegd aan buitenlandse verdachten zonder geldige verblijfsvergunning die wordt beschuldigd van drugshandel van milde aard, een verblijfsverbod is. Deze maatregel verbiedt buitenlandse verdachten om in Turijn te wonen omdat de lokale omgeving als 'criminogeen' wordt beschouwd. Omdat magistraten, om deze maatregel op te leggen, rekening moeten houden met de behoeften van een verdachte op het gebied van huisvesting, werkgelegenheid en ondersteuning, wordt deze maatregel uiteindelijk alleen opgelegd aan buitenlandse beklaagden zonder geldige verblijfsvergunning, aangezien ze geen sociale en economische banden met Turijn hebben. Deze maatregel markeert een terugkeer naar oude praktijken van verbanning, waarbij sociale groepen die als gevaarlijk worden beschouwd, uit de stad uit worden geweerd en hun lidmaatschap verliezen. Tegelijkertijd zijn verbanningpraktijken geen Italiaans unicum, maar eerder het resultaat van een wereldwijde trend van door veiligheid geobsedeerde stedenbouw. Verbanning worden momenteel in veel westerse landen gebruikt om sociale groepen die als onhandelbaar worden beschouwd, uit de openbare ruimte te verwijderen. Zulke verboden worden meestal genomen op basis van een mix van strafrecht en administratief recht, ten aanzien van sociale groepen in achtergestelde sociaaleconomische omstandigheden, zoals daklozen, drugsverslaafden en immigranten. Dit zijn de sociale groepen die vooral gevoelens van onveiligheid opwekken bij omwonenden, die dergelijke gevoelens vaak vertalen in een verzoek om wanordelijk geachte wijken van de stad 'op te ruimen'.

Uit interviews blijkt dat magistraten bij het opleggen van een verblijfsverbod zich niet veel zorgen maken over het voorkomen van recidive. Er spelen eerder andere, informele doelstellingen, die traditionele doelstellingen van misdaadbesteding aanvullen en soms zelfs vervangen. Ten eerste leggen magistraten verblijfsverboden op om het publiek ervan te verzekeren dat de rechterlijke macht gevoelig is voor hun bekommernissen en dat wetteloosheid niet wordt getolereerd. Door irreguliere immigranten uit de stad te verwijderen, vermijden magistraten de situatie waarin de aanwezigheid van immigranten als bedreiging voor de openbare orde wordt beschouwd, om zo de angsten van de burgers te stillen. Ten tweede vertrouwen magistraten op het verblijfsverbod om 'het probleem te laten verdwijnen'. Hoewel een verblijfsverbod aan een individuele verdachte wordt opgelegd, blijkt uit het empirische materiaal dat deze maatregel weinig individueel wordt toegepast, maar eerder algemeen met als doel om zichtbare uitingen van antisociaal gedrag en straatcriminaliteit te doen verwijderen, oftewel te verplaatsen. Terwijl magistraten zich ervan bewust zijn dat het verblijfsverbod 'pendelverkeer' door daders kan bevorderen, achten ze het belangrijker om beklaagden waarvoor ze verantwoordelijk zijn 'weg te werken' van het grondgebied. Ten derde gebruiken magistraten verblijfsverboden om de wettelijke beperkingen aan het opleggen van voorlopige hechtenis te omzeilen. Zo zijn magistraten zich er terdege van bewust dat buitenlandse beklaagden zonder geldige verblijfsvergunning niet over de economische en juridische middelen beschikken om van woonplaats te veranderen wanneer zij dat willen. De reden waarom magistraten deze maatregel toch opleggen, is dat ze weten dat buitenlandse beklaagden zich er niet aan zullen houden. Deze situatie stelt magistraten in staat om de eerder geschonden maatregelen te 'benutten' om voorlopige hechtenis te bevelen aan

buitenlandse verdachten die beschuldigd zijn van milde drugshandel en die in principe geen voorlopige hechtenis zouden moeten doorstaan, gezien de lage ernst van het gepleegde misdrijf. De praktijk van het opleggen van verblijfsverboden aan buitenlandse verdachten zonder een geldige verblijfsvergunning is een instrumenteel gebruik van de wet. Deze informele doelstellingen illustreren hoe de strafrechtelijke macht ‘verandert’ van aard wanneer deze wordt uitgeoefend op niet-burgers. Met name het ‘wegwerken’ van overlastveroorzakers en het tegemoet komen aan de zorgen van burgers over criminaliteit en wanorde worden de belangrijkste drijfveren van besluitvormingsprocessen ten aanzien van buitenlandse verdachten zonder een geldige verblijfsvergunning. Als gevolg hiervan ontstaat binnen het strafrechtelijk domein een systeem van stedelijke sociale controle, wat leidt tot uitsluiting en verwijdering uit de stad van sociale groepen die ongewenst zijn.

*De ‘anderen’ veroordelen: zijn nationale rechtbanken in staat om buitenlandse verdachten te berechten?*

Het laatste empirische hoofdstuk analyseert het vermogen van de ‘*penal state*’ om officiële doelen te implementeren, in termen van economisch en cultureel kapitaal. Garland verwijst met deze dimensie naar bevoegdheden en capaciteiten en verwijst naar middelen die de staat ter beschikking staan om effectieve acties te ondernemen. Het vermogen van de ‘*penal state*’ om een strafrechtelijk beleid uit te voeren, wordt op de proef gesteld door globaliseringsprocessen, met name door mensenstromen. In feite moet de ‘*penal state*’ nieuwe capaciteiten ontwikkelen om het hoofd te bieden aan nieuwe uitdagingen, behoeften en actoren. Nationale rechtbanken staan niet los van deze wereldwijde trends, aangezien de complexiteit van de sociale wereld buiten de rechtbank wordt weerspiegeld door de vraag naar nieuwe regels en middelen binnen de rechtbank. In dit hoofdstuk wordt met name onderzocht hoe het toegenomen aantal buitenlandse verdachten bij nationale rechtbanken de binnenlandse praktijken onder druk zetten. Aangezien de capaciteit van de staat op zichzelf niet voldoende is om strafrechtelijke uitkomsten te verklaren, werpt het empirische materiaal licht op hoe het economische en culturele kapitaal van de ‘*penal state*’ een belangrijke rol speelt bij het vormgeven van gerechtelijke praktijken en bijgevolg strafrechtelijke uitkomsten. Dit hoofdstuk richt zich op twee belangrijke kwesties die verband houden met de staatscapaciteit. De eerste is hoe de *torinese* rechtbank omgaat met taalgerelateerde barrières als het gaat om buitenlandse verdachten die de taal van het proces niet beheersen. Het empirische materiaal laat zien hoe budgettaire beperkingen de communicatie tussen magistraten en buitenlandse beklaagden belemmeren, ten koste van laatstgenoemden. Vervolgens wordt besproken of en hoe deportatie wordt gebruikt door gerechtelijke actoren, en wat de rol van cultureel kapitaal en de juridische cultuur is bij het vormgeven van strafpraktijken.

Buitenlandse beklaagden die de taal van het proces niet beheersen, hebben recht op bijstand van een tolk om hun recht op verdediging uit te oefenen. Ondanks dat de Europese richtlijn omtrent het recht op vertolking en vertaling in strafprocedures is omgezet in nationaal recht, blijkt uit het empirische materiaal hoe het recht op taalondersteuning in de praktijk een lege doos kan blijven. Actoren in de rechtszaal zien de aanwezigheid van tolken in de verhoorkamer als een obstakel voor een snel en ‘pijnloos’ proces. Dit komt doordat interpretatie tijdrovend is en niet altijd als

vruchtbaar wordt beschouwd. Bijgevolg vertrouwen rechters op informele praktijken om het gebruik van tolken te beperken. Om te beginnen, om tijd te besparen, bevragen rechters buitenlandse verdachten niet zelf over hun identiteit, maar vragen zij tolken om een identificatieformulier in te vullen met de informatie die verdachten rechtstreeks aan deze tolken verstrekken. Door dit te doen, geven rechters de voorkeur aan gemakzucht boven een goed begrip van de persoonlijke omstandigheden van een verdachte. Op eenzelfde manier proberen rechters interpretatie op verschillende manieren te vermijden. Ondanks de formele regelgeving zijn rechters terughoudend om na te gaan of de beheersing van de taal door een verdachte voldoende is om het recht op verdediging adequaat te kunnen uitoefenen. Meestal vermijden rechters vertaling wanneer een verdachte een beetje Italiaans spreekt, hoewel het twijfelachtig is of een beperkte taalvaardigheid een verdachte in staat stelt om complexe dialogen met juridische implicaties te begrijpen en te voeren. Naast het besparen van tijd is 'kostenbesparing' een andere grote zorg voor *torinesi* rechters. Uit observaties blijkt hoe het overgrote deel van de rechters aan een verdachte vraagt of hij (minder vaak zij) wil afzien van vertaling van het vonnis. Deze gewoonte, in schril contrast met de geschreven wet, is 'gerechtvaardigd' op grond van de veronderstelling dat buitenlandse beklaagden geen enkel belang hebben bij hun zaak of te slecht opgeleid zijn om de inhoud van het oordeel te begrijpen, zelfs als de procesgang vertaald zou zijn. Dat de '*penal state*' niet bereid is om economische middelen in taalhulp te investeren, blijkt ook uit de slechte kwaliteit van de dienstverlening van door de rechtbank aangestelde tolken. Het gebrek aan een bepaald niveau van professionaliteit van tolken, die worden verwaarloosd en slecht betaald, bemoeilijkt de communicatie tussen de partijen. Gezien de tekortkomingen van de taalbijstandsdiensten zijn rechters niet goed uitgerust om efficiënt om te gaan met niet-Italiaans sprekende verdachten. Daarom ontwikkelen zij (informele) interne praktijken om zaken zo snel mogelijk te behandelen. Deze omstandigheid toont aan dat het gebrek aan economisch kapitaal waarschijnlijk zal leiden tot eenvoudige gerechtelijke praktijken met weinig knowhow.

Het gebrek aan economisch kapitaal gaat gepaard met een gebrek aan cultureel kapitaal, in termen van professionele expertise, geschoold personeel en coördinatie. Dit komt het meest tot uiting in de manier waarop rechters gebruikmaken van uitzettingsbevelen voor veroordeelde buitenlandse verdachten. In de afgelopen decennia begonnen veel westerse landen te vertrouwen op deportatie om 'ongewenste gasten' uit te zetten, waaronder veroordeelde langdurig ingezetenen uit het buitenland. Net als in andere landen geeft de wet in Italië rechters de bevoegdheid om de deportatie te bevelen van veroordeelde buitenlanders die als gevaarlijk worden beschouwd voor de gemeenschap. Rechters gebruiken deze bevoegdheid echter zelden. Uit de interviews komt naar voren waarom er in het Italiaanse strafrechtssysteem nog lang geen sprake is van een '*deportation turn*'. Ten eerste bevelen rechters geen deportatie omdat ze 'toegeven' weinig kennis van deze maatregel te hebben, tot het punt dat ze niet kunnen aangeven 'wie' verantwoordelijk is voor het activeren van de deportatiemachine, of het nu bijvoorbeeld openbare aanklagers of rechters zijn. Dit kan te wijten zijn aan het feit dat juridische professionals in Italië kennis bezitten op een zeer specifiek rechtsdomein, en daarom is het onwaarschijnlijk dat strafrechters worden geïnformeerd over maatregelen die traditioneel niet tot het strafapparaat behoren. De tweede reden waarom deportatie zelden wordt gebruikt, houdt verband met de



onmogelijkheid of de grote moeilijkheid van de tenuitvoerlegging ervan. Rechters zijn zich ervan bewust dat ‘uitzetbaarheid’ voor de overgrote meerderheid van buitenlandse verdachten niet leidt tot daadwerkelijke uitzetting. Daarom beweren rechters dat het zinloos is om een deportatiebevel uit te vaardigen dat uiteindelijk nooit zal worden uitgevoerd vanwege bepaalde materiële en structurele beperkingen van de Italiaanse deportatiemachine. De derde reden waarom deportatie in strafzaken onvoldoende wordt afgedwongen, houdt verband met de manier waarop magistraten hun rol interpreteren. Hoewel deportatie kan worden gebruikt door rechters, beweren zij dat het een instituut is dat niet tot het strafrechtelijk domein behoort. Daarom zien magistraten deportatie als iets dat buiten hun bevoegdheid valt, aangezien het niet hun taak is hieromtrent beslissingen te nemen. Een ander structureel element dat de afstand tussen migratie- en strafrecht lijkt te ‘vergroten’, wordt vertegenwoordigd door het gebrek aan coördinatie tussen de twee bevoegde autoriteiten. In Italië staan het immigratie- en strafrechtstelsel zo los van elkaar dat rechters niet weten of een verdachte, eenmaal vrijgelaten op grond van het strafrecht, zal worden vastgehouden volgens de immigratiewetgeving. Als gevolg daarvan zien rechters immigratiekwessies als iets dat buiten hun domein valt. De sterkste belemmering voor de ontwikkeling van ‘crimmigratie’-praktijken wordt dus vertegenwoordigd door het verzet van de rechterlijke macht om in strafrechtelijke situaties te vertrouwen op ‘hybride’ maatregelen.

#### *Onrechtvaardigheid onder het schild van de wet*

Dit onderzoek gaat na hoe gerechtelijke actoren gebruikmaken van discretionaire macht bij het veroordelen van buitenlandse verdachten zonder geldige verblijfsvergunning, en hoe dergelijk gebruik wordt beïnvloed en beperkt door de bredere sociaal-juridische context. Alles bij elkaar genomen komt dit onderzoek tot de conclusie dat gerechtelijke praktijken grotendeels het product zijn van een verscheidenheid aan juridische, structurele, sociale en culturele factoren. Gerechtelijke actoren gebruiken discretie op een manier die grotendeels voldoet aan de verwachtingen van hun *peers* en van het bredere publiek. Interne en externe krachten bepalen samen de doelstellingen die de besluitvorming van individuen stimuleren. Deze impact van externe krachten is vooral zichtbaar in de manier waarop maatschappelijke narratieven waarin immigranten worden afgeschilderd als veroorzakers van misdaad en wanorde, de rechtbank zijn binnengesijpeld en met gezag zijn bekleed. De impact van interne krachten is daarentegen het duidelijkst in hoe de beslissingen van individuen grotendeels worden bepaald door een reeks informele regels, waarden, doelstellingen en zorgen die zijn ontwikkeld onder actoren in de rechtszaal, zoals het snel behandelen van zaken en het minimaliseren van conflicten. Daarom is het belangrijk om een holistische benadering te volgen bij de studie van het besluitvormingsproces, zodat geïdentificeerd kan worden hoe verschillende actoren en krachten bijdragen aan het eindproduct van bestrafing. Zo brengt dit onderzoek het belang van de context voor het begrijpen van de ontwikkeling van juridische praktijken naar voren. Deze studie concludeert dat het gebruik en de betekenissen van discretionaire ruimte het resultaat zijn van praktijken, ideeën en culturele betekenissen van de translokale setting, waarmee verwezen wordt naar, een ruimte waarin transnationale ontwikkeling vorm krijgen in een context met nationale en subnationale kenmerken. Het is deze context waarin actoren in de rechtszaal leven en werken.

De context is ook belangrijk als het gaat om het onderzoeken van de ontwikkeling, of beter de niet-ontwikkeling, van ‘crimmigratie’-praktijken. Waar door alleen naar de ‘*law in the books*’ te kijken, enkele sporen van ‘crimmigratie’ te zien zijn, bijvoorbeeld bij deportatie na een strafrechtelijke veroordeling, laat de ‘*law in action*’ een heel ander verhaal zien. In deze onderzoekscontext verhinderen structurele en culturele factoren in feite een Italiaanse ‘deportatie-omslag’. Meer in het bijzonder verhinderen de beroepscultuur van magistraten, samen met het gebrek aan coördinatie tussen gerechtelijke en administratieve autoriteiten, het tekort aan plaatsen in detentiecentra en het gebrek aan terugkeervereenkomsten met derde landen, een escalatie van deportatiepraktijken in Italië. Deze bevindingen benadrukken het belang van het verkennen van de context, niet alleen in zijn puur juridische dimensie, maar ook in zijn culturele en meer praktische dimensie. Dit laatste kan alleen worden verwezenlijkt door naar de plaats te gaan waar daadwerkelijk beslissingen worden genomen, waar de wet tot leven komt. Door de wet-in-actie te onderzoeken, kunnen we de zwarte doos van besluitvormingsprocessen openen en de beweegredenen, doelstellingen en betekenissen achter de beslissing van een individu beter begrijpen. Het grote voordeel van rechtszaaltnografie is dat het ons in staat stelt om de informele praktijken te observeren die binnen een bepaalde rechtbank zijn ontwikkeld, samen met begrip van de achterliggende redenen en mechanismen waardoor deze praktijken zijn ontworpen.

Samen met het benadrukken van het belang van de context voor het begrijpen van juridische praktijken, toont dit onderzoek het belang aan het onderzoeken van de complexe, dynamische en onderling gerelateerde stadia van het gerechtelijke proces. Dit is met name zichtbaar bij het onderzoeken van procedures zoals die in deze studie centraal stonden, namelijk processen die bedoeld zijn om ‘kleinere’ strafzaken snel af te handelen. Meestal gaat het in deze procedures om kleine vergrijpen die worden gevolgd door lage straffen, waardoor gerechtelijke actoren ze beschouwen als ‘tweederangsprocessen’. Lage straffen kunnen niettemin zware gevolgen hebben, voor buitenlandse verdachten zonder geldige verblijfsvergunning. Dit onderzoek laat zien hoe belastend de verschillende fasen zijn van een ‘snelprocedure’ voor deze groep verdachten, vanaf het moment dat ze worden gearresteerd, via het moment dat ze de stad uit worden geweerd, tot het moment dat ze het recht op verblijf verliezen in het land. Het proces wordt de straf wanneer de kosten die gemoeid zijn met het doorlopen van de strafrechtmachine hoger zijn dan de uiteindelijke straf. Deze bevindingen benadrukken het belang van een procesgeoriënteerde benadering van de studie van besluitvorming om de praktijken en activiteiten achter het eindproduct van bestraffing te capteren. Achter de oppervlakte van een ‘rechtvaardige’ straf kunnen er aanzienlijke grijze zones bestaan die de legitimiteit van het rechtssysteem en de naleving van de rechtsstaat in vraag doen stellen.

# Portfolio

**Eleonora Di Molfetta LLM, MSc**

Department:	Criminology Erasmus Graduate School of Law Erasmus School of Law Erasmus University Rotterdam
Research Programme:	Monitoring Safety and Security
PhD-period:	September 2016 – August 2020
Promoters:	prof. dr. R.H.J.M. Staring prof. dr. R. van Swaeningen

## Scholarly Publications

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Di Molfetta, E. (2021) A machine without an engine: why deportation would hardly find its place in the Italian justice system. *Crimmigration & Recht*, forthcoming.

Di Molfetta, E. & Brouwer, J. (2020) Unravelling the ‘crimmigration knot’: Penal subjectivities, punishment and the censure machine, in *Criminology & Criminal Justice*, 20(3), 302-318.

Di Molfetta, E. (2019) La traduzione degli atti per lo straniero alloggiato: un diritto incompiuto tra incertezze legislative e resistenze giurisprudenziali, in *Diritto, Immigrazione e Cittadinanza*, 2, 114-146.

Di Molfetta, E. (2017) The barter between immigration and criminal law: symbolic use of penal instruments in Italy. In Van Berlo, P. *et al.* (Eds.) *Over de grenzen van de discipline*. Den Haag: Boom Juridisch, 103-115.

## Conferences and Seminars

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Paper presentation ‘Is there a space for deportation in criminal courts? An ethnography of the process of decision-making in an Italian courthouse’ European Society of Criminology, 19<sup>th</sup>

Annual Conference *Convergent roads, bridges and new pathways in criminology*, University of Ghent, 18-21 September 2019.

Paper presentation 'A crimmigrant ban? Unveiling new modes of penal power' European Society of Criminology, Working Group in Immigration, Crime and Citizenship *Immigration, Crime and Citizenship in Troubled Times*, University of Malaga, 9-10 May 2019.

Paper presentation 'A crimmigrant ban? Opening the black-box behind decision-making processes in the courthouse' *IV CINETS Conference*, Queen Mary University of London, 5-6 October 2018.

Poster presentation 'Sentencing decision-making processes for immigrants with a vulnerable legal status' Seminar *Transformative borders and the Politics of Mobility in Western Liberal Democracies*, Leiden Law School, 14-16 March 2018.

Participant to the roundtable, Seminar *National and Local Consequences of Global Mobility in the context of border security*, Erasmus University, 29-30 May 2017.

Project presentation 'Making crimmigration: discretionary powers and their interactions in sentencing decision-making processes in Italy and in the Netherlands' *Review Day at EGSL*, Erasmus School of Law, 14 May 2017.

Paper presentation 'The barter between immigration and criminal law: symbolic use of penal instruments in Italy' *PhD Day Criminology and Criminal Law*, Leiden University, 19 May 2017.

## Teaching Activities

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Tutor PBL in *Introduction to International and European Law*, Erasmus School of Law, March-April 2019.

Tutor PBL in *European Law: Home Justice and Affairs*, Erasmus School of Law, February-March 2019.

Guest Lecture 'Immigration, Crime and Membership: sentencing decision-making in the shadow of crimmigration process', *Minor in Criminology*, Erasmus School of Law, 17 October 2017.

Guest Lecture 'Tracing Crimmigration: sentencing decision-making in the shadow of crimmigration process', *MSc in Criminology*, Erasmus School of Law, 18 September 2017.

## Training

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Tutor Training in PBL (Problem Based Learning), Erasmus School of Law, 13-14 December 2018.

Summer School on Advanced Qualitative and Legal Methods in Criminology, Utrecht University, July 2017, 5 ECTS.

Course: Qualitative Interviewing, International Institute of Social Studies, Den Haag, February-March 2017, 4 ECTS.

Educational Programme, Erasmus Graduate School of Law, 2016/2017, 60 ECTS. Courses:

- Writing Clinic
- Introduction to Legal Methods
- Research Lab
- Collaborating with your Supervisor
- Reflection on Social Science Research

## Grants and Awards

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Grant from *EGSL 'Call for Ideas'*, 25 September 2018.

Grant from *Erasmus Plus Programme* to conduct fieldwork in Italy, 18 July 2018.

Grant from *Erasmus Trustfonds Foundation* to conduct fieldwork in Italy, 22 November 2017.

## Professional Experience

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Treasurer of PILAR (PhD in Law Association Rotterdam), September 2017 – August 2019.

Member of the organizing committee of the seminar 'Building the brand YOU: How to get your PhD published?' Erasmus School of Law, 11 April 2019.

## Peer Review Activities

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Punishment & Society

Studi sulla questione criminale



## Curriculum vitae

Eleonora Di Molfetta was born in Trani (Italy) on November 23, 1990. She obtained a master's degree in Law *cum laude* from the University of Trento (Italy) in March 2015, spending one semester at Utrecht University (the Netherlands). In September 2016, she obtained a master's degree in Criminology and Criminal Justice *cum laude* from Leiden University (the Netherlands). For her master thesis, she joined a larger research project and conducted interviews with foreign national prisoners in Ter Apel, a Dutch prison. From September 2016, she worked as a PhD candidate at the department of Criminology of Erasmus School of Law (the Netherlands) under the supervision of prof. dr. Staring and prof. dr. Van Swaaningen. For her PhD research, she conducted one year of courtroom ethnography in Turin (Italy) to explore judicial practices towards foreign defendants without a valid residence permit. She is currently living in Turin.

