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‘The constitution of political membership’: punishment, political membership, and the Italian case.

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Abstract: The article argues that punishment will vary depending on how political membership is constituted in different polities. This has significant implications for arguments that link contemporary Western punitiveness to ‘anti-politics’, understood here as a degradation of political membership. The article argues that the spread of ‘anti-politics’ and its penal implications will depend on how political membership is constituted in different polities and in their ‘State’. It reaches this conclusion by exploring the way in which ‘the State’ appears in the literature on politics and punishment, and by adopting a re-worked definition of ‘the State’. The Italian case study is then used to demonstrate both the link between punishment and political membership, and the need to contextualise our analyses of ‘anti-politics’ and punitiveness.

Keywords: state theory, punishment, political membership, anti-politics, Italy

Introduction: political membership and ‘the State’

In this article I argue that punishment and political membership are intimately connected. This connection emerges from a study of the role that different conceptions of ‘the State’ play in analyses of contemporary Western punishment, particularly the literature that investigates the link between punishment and politics

(Lacey, 2008; Barker, 2009; Miller, 2013; Miller, 2016; Garland, 2001; Loader, 2008; Ramsay, 2012).

To make this argument, I operationalize the key concepts ‘the State’ and ‘political membership’, and apply them to analyses that have linked punitiveness to ‘anti-politics’ (Loader, 2008) – a degradation of democratic politics and an expression of weakened state sovereignty (Ramsay, 2012). ‘Anti-politics’ is of interest insofar as it raises concerns both for democratic politics and for democratic punishment. ‘The State’ in such narratives is the Leviathan (Hobbes, 2008), and I argue against such a monolithic vision of ‘the State’, by showing that in the politics and punishment literature ‘the State’ appears at two additional levels: institutions and citizens. ‘The State’ also needs to be understood as *relational* (Barker, 2009: 31): it is never just the personified sovereign, but is simultaneously its institutions, its citizens, *and* their interrelations.

This reconfiguration of ‘the State’ has implications for the way in which we think about punishment: if we expand our notion of ‘the State’, we are automatically forced to ask exactly *how* citizens inhabit their polity, and how this comes to shape the demands they *do or do not* make of the sovereign State, including putative demands for law and order. Key to this redefinition of ‘the State’ is the issue of political membership, understood as the sovereign State’s conception of its citizens; the available routes for citizens to contribute to the running of the State; and citizens’ conception of their own belonging. Together these dimensions speak of ‘the constitution of political membership’: the manner in which political membership is constructed and articulated in any given polity. I apply this notion to claims concerning punishment and ‘anti-politics’. I complicate our understanding of political membership by asking whether ‘the constitution’, and thus the ‘dereliction’, of

political membership have been equivalent across polities. This reveals the limits and comparative applicability of the ‘anti-politics of crime’.

The article’s conceptualisation of ‘the State’ and political membership derives from my reading of the Italian case study, a case that challenges contemporary penal analyses (Gallo, 2015; Menichelli, 2015). At the penal level, for example, Italy displays both punitiveness and moderation (Gallo, 2015: 600-609). Consequently this ‘dual penalty’ is ill suited to accounts that presume either increasing Western punitiveness (Garland, 2001; Wacquant, 2009) or penal stability (Lacey, 2008). The *Italian State* also complicates explanations of contemporary punitiveness that call upon ‘the State’ as sovereign. The Italian State is ‘contested’ (Gallo, 2015: 610; Agnew, 2002: 58) or even ‘absent’ (Cassese, 2011), terms that indicate a historical tension between sovereign and citizens, which has an impact on the use and distribution of punishment (Gallo, 2015), and is manifest in the existence of informal institutions and informal social controls.

Consequently, Italy is a useful case study against which to test the comparative purchase of analyses on political decline and rising punitiveness. The comparison with Italy emphasises that penal theories need to take account of differences in the construction of political membership across polities, as these differences have consequences for punishment. We can neither assume ‘anti-politics’ have taken equal hold across Western polities, nor that they inevitably produce a demand for more law and more punishment (Loader, 2008: 405).

The article proceeds in six sections: section one provides a brief explanation of the link between punishment and political membership as it features in existing literature. Section two analyses ‘anti-politics’ in terms of the decline of political membership and its penal implications. Section three unearths the assumptions

present in such narratives, both in terms of how ‘the State’ is understood, and in terms of the spread of ‘anti-politics’. Section four tests the assumptions on ‘the State’ by tracing how the latter appears in the politics and punishment literature; it concludes by arguing that we need to look more closely at the constitution of political membership across contexts. Sections five and six test this contextual applicability in Italy: first by looking at the nature of Italian penalty and State (section five) and then by interrogating whether Italy can be described as a society dominated by law and order (section six).

Punishment and political membership.

In the literature on politics and punishment, the relationship between punishment and political membership has been conceptualised as going in two different, interconnected, directions. On the one hand, punishment is a means with which to understand political membership: we investigate punishment within particular polities to understand how it contributes to, and constructs, membership. Punishment ‘sorts and stratifies’ amongst citizens (Barker, 2009: 13; Stumpf, 2006), in the process defining the ‘insiders’ and ‘outsiders’ (Lacey, 2008: 6) within our political communities: *punishment differentiates amongst citizens*.

By analysing punishment we can further identify which transgressions of the community’s rules set individuals outside it, and track the effects of penal exclusion on offenders’ future reintegration into society (Loader and Sparks, 2014: 117; Stumpf, 2006: 405-406). Studies that have analysed the evolution of contemporary Western punishment during the twentieth and twenty-first centuries (for example Garland, 2001), can thus be interpreted as studies of the instrumental role that punishment plays in shaping the relationship between State and citizens.

However, the link between punishment and political membership also goes in the opposite direction. The focus here is on political membership, and its construction, as an indicator of punishment (Aas, 2014: 526). This point is persuasively made by comparative penal analyses, in particular those that have focused on political, institutional, and political economic differences across polities (Lacey, 2008; Cavadino and Dignan, 2006; Barker, 2009: 25), and how they relate to penal divergence. This literature is arguing that *differently constituted political communities punish differently*. Institutions, political economy, welfare support, can then be seen as mechanisms through which membership is constituted, i.e., mechanisms through which the relationship between ‘the State’ and its citizens is constructed, that also play out in the penal realm. The article is concerned with this second relationship.

Throughout the article ‘citizens’ should be understood as *legal* citizens. Legal citizens possess a panoply of rights that are otherwise denied to migrants, or granted to them only in dilute forms. This includes voting rights, but also the procedural safeguards inherent in criminal law (Zedner, 2013), which may not extend to migrants, thus contributing to their differential experience of punishment (Barker, 2013; Aas, 2014).¹

Anti-politics and punishment – problems of membership

The link between punishment and political membership is directly called into question by the ‘anti-politics of crime’, a notion developed by Ian Loader (2008) in his review of Jonathan Simon (2007) and Richard Ericson’s work (2007). According to Loader, today’s penalty – with the predominance of crime and punishment and a harshening of penal practices – has been explained as the penalty of societies whose political reality has changed. In particular, Western democracies have faced a ‘decline of

politics’ and a loss of ‘political vision(s)’ (2008: 405) and have consequently lost the guiding principles for collective action. ‘Anti-politics’ is associated with Colin Crouch’s account of ‘post-democracy’ (2004) wherein citizens have withdrawn from political participation, and political activity is relegated to a small group of expert professionals (Crouch, 2004; Dzur et al., 2016: 98). The concept of ‘political decline’, as linked to ‘anti-politics’ and as it appears in penal literature, presumes the fundamental *disaggregation* of our political communities (Ramsay, 2012: 227; 2016).

Prey to the structural changes of late modernity (Garland, 2001), subject to the hegemony of economy (Ramsay, 2016: 98), and the economic insecurities of neoliberalism, bereft of political ideologies with which to interpret present changes and future trajectories, political communities lose ‘confident belonging’ (Loader, 2008: 406). This loss of cohesion is vertical: the weakening of the relationship between representatives and represented (Ramsay, 2012: 222; Mair, 2013). It is also horizontal: citizens do not trust one another, seeing their fellow citizens as sources of risk and potential danger. The axes of political membership have changed: the State as sovereign sees its citizens as subjects that need to be constantly controlled and constantly reassured (Ramsay, 2012: 229), and where mutual co-existence can only be imposed. Citizens perceive the State as culpably absent, precisely where it ought to reassure them that they can indeed be ‘confident’ in their mutual co-existence. Citizens therefore demand *more* reassurance, in the form of demands for law and order, thus becoming potential sources of ‘punitiveness’.

Faced with the ‘predicament’ identified by Garland (2001) – an inability to control crime and an inability to fully admit to failure – but faced also with ‘widespread distrust in government and expertise’ (Loader, 2008: 401) the State and its agents offer more penal control. This recipe serves as an attempt at reassertion of

authority. It serves also as a diversion ‘to sidestep [...] processes of public reflection and choice about how to distribute resources and recognition’ (405).

What the State offers does not address the fundamental structural causes of political disaggregation. In fact it reinforces disaggregation where expanding criminalisation serves as an authoritative (State) claim to the State’s own lack of authority (Ramsay, 2012: 217-219). To the extent that citizens perceive this claim, and to the extent that it coincides with the fact or perception of high crime rates (Garland, 2001; Miller, 2016), it engenders greater insecurity (Ramsay, 2012: 226).

Simplifying, the logical progression here appears to be the following: the decline of politics leads to, and follows from (Loader, 2008: 404), the centrality of crime as a political narrative. Crime becomes pervasive, at least as a source of fear (though see Miller, 2016). It stands in for the loss of social cohesion brought about by structural changes (‘late modernity’), including economic changes (Wacquant, 2009; De Giorgi, 2006), which we can no longer make sense of precisely because our political narratives and participatory processes have degraded. The degradation, which contributes to a de-legitimation of State authority, is met with an emphasis – by State and citizens – on penal control, and punishment as its preferred articulation (Loader, 2008: 401, citing Ericson, 2007). The emphasis does not assuage the disillusioned citizenry, but in fact reinforces their need for reassurance, leading to offers of ‘more police, greater imprisonment, new laws, more criminal offences’ (Loader, 2008: 405), in short greater punitiveness. The ‘anti-politics’ of crime thus speaks of *weakened* political membership, as bonds of trust are replaced by fear and State coercion, within and across polities.

Anti-politics and punishment – assumptions

This intellectual analysis rests on a number of assumptions. One key assumption seems to be about the State's capacity to monopolise political sovereignty. Past though it may be, fleeting as it may have been (Simon, 2007: 13), there was a time when the (modern) State was capable of claiming political sovereignty even though this may have been no more than a myth (Garland, 2001). More than this, state *law* was the crystallisation of political sovereignty, and frequently commanded legitimacy amongst citizens. This is an assumption about the power of the law that is necessary if we are to make the logical connection between political disaggregation, and law and order. The argument that links the 'dereliction' (Ramsay, 2012: 227) of political communities to punishment presumes that it makes sense, in the face of insecurity and fear, for citizens to turn to the law in a bid for more order. If citizens are 'eager consumers of public and private governmental tools against crime risk' (Simon, 2007: 16) the law as integral, though not exclusive (Garland, 2001: chapter 5), part of this dynamic must appeal to citizens precisely as such a tool.

The link between 'populist punitiveness' (Bottoms, 1995) – citizens' clamour for more and harsher punishment – and law and order likewise presumes the moral authority of state law, a moral authority capable of generating, now that more positive avenues for participation and conflict resolution have declined, demands for 'law-for-order' that translate into 'punitiveness' and incarceration. Theories of contemporary punishment seem to presume that such demands are made by citizens (Enns, 2014: 869). Even accounts that are explicitly limited to the assumptions of 'parliament, executive and the courts' (Ramsay, 2012: 226), beg the question of citizen demands. They require us to ask what role citizens play in the process through which state laws

produce penal effects: are they making demands for law and order, and how are these channelled to produce punishment (Gottschalk, 2013; Lacey and Soskice, 2015: 459)?

The connection between political decline and punishment also requires us to privilege a vision of political membership centred on the vertical relationship between State and citizens, in which state law plays a key regulatory role. This is what Insa Koch calls a ‘state-centric’ vision of order (2016: 14) where ‘the State’ is to be understood as the sovereign. There is space for mediation in such visions, but it tends to be (in its ideal form) the mediation of mass political parties, organised around the main ideological fault lines of the post-war era. As such, it is mediation that has been seriously called into question in Western democracies (Mair, 2013; Crouch, 2004), leaving citizens to seek ‘public or private tools’ with which to make up for State absence. Without glossing over these problems of democracy, I argue that we may nonetheless need to interrogate the limits of these arguments: is ‘the State’ in penal theory always and only the sovereign State? Have all contexts equally fallen prey to the ‘anti-politics of crime’?

‘The constitution of political membership’ – state levels and conceptions of political membership

In the punishment and politics literature, ‘the State’ in fact appears at a number of different ‘levels’. On one level (level 1) ‘the State’ is understood as the sovereign authority: Hobbes’ Leviathan (2008), to whom citizens confer centralized authority in exchange for the promise of peace and security (Ramsay, 2012: 215; Koch, 2016: 2; Loader, 2008: 403). Here we find those theories that have explained contemporary punishment in terms of sovereignty and its travails. Garland’s account is a key example in this respect (2001), as it discusses modern and late modern penality in

terms of the waxing and waning of the ‘myth of state sovereignty’, with the late modern State unable to deliver on the modern state’s promise – and hallmark of sovereignty – of crime control, and thus forced to rely on increasingly harsh punishment to reassert its wavering sovereignty (109-110).

The State and its sovereignty are also the subject of Peter Ramsay’s *The Insecurity State* (2012), which analyses contemporary (British) criminal justice specifically in terms of state authority, politics and ideology (2012: 230). When discussing sovereignty, Ramsay builds on Martin Loughlin’s distinction between *legal sovereignty* and *political sovereignty* (Loughlin, 2003: 84). Legal sovereignty can be understood in terms of competence and authority (85): the State’s absolute competence to enact law (84; Ramsay, 2012: 221). Political sovereignty is a matter of capacity and power: ‘the capacity of a people to overcome social division and conflict by establishing a sense of political unity’, and the power to shape a state and its governmental forms (Loughlin, 2003: 85). Political sovereignty is premised on a political relationship between citizens and State, more specifically: ‘the reflexive relations of accountability between people and government’ (Ramsay, 2012: 221; Loughlin, 2003: 85). According to Ramsay it is this political sovereignty that is hollowing out, at least in the British context. The ‘hollowing out’ is not merely the waning of a myth, but is an *actual* loss of political sovereignty (Ramsay, 2012: 230), brought about by the weakening of the relationship between representatives and represented (222). At this level, the State as sovereign also stands in for a – usually national – collectivity of which it is the embodiment and impartial representative.

Vanessa Barker’s work provides us with an example of the second level (level 2) at which ‘the State’ appears in penal theory. In her account of penal divergence across US federal states, Barker focuses on the institutional framework and decision-

making processes in each of these regions. This attention to institutions is forefront also in Nicola Lacey's *The Prisoners' Dilemma* (2008) and its account of penal variation across liberal market economies (LMEs) and co-ordinated market economies (CMEs). The LME and CME models (Hall and Soskice, 2001) are indeed characterised, not just by different political economic set ups, but also by different levels of institutional integration and co-ordination (Lacey, 2008).

We have moved away here from weakening sovereigns, and moved further towards the internal mechanisms of 'the State': institutions, decision-making, veto-points (for Italy see Gallo, 2015). Here 'the State' can also be broken down into sub-national units (such as US federal states: Barker, 2009; Lacey and Soskice, 2015). Broadly speaking, at this level we are addressing the question of the mechanisms for different interests to be heard within a given polity, and reflecting on the effect these interests do or do not have on policy, including criminal justice policy (Gottschalk, 2013; Miller, 2008).

The question of interests and their incorporation, links to the third level (level 3) at which 'the State' is brought into analyses of punishment: as the *citizens* of the State. Within the context of literature concerned with Western penality, reference to citizens has often been negative, insofar as citizens are identified as 'the blood-thirsty mob pursuing the suspected law-breaker' (Miller, 2013: 283) whose demands are capitalised upon by politicians aiming to 'shore up the authority and legitimacy of government institutions' (284). This vision of the punitive citizenry links to arguments in favour of isolating criminal justice policy from 'popular passions' and political entrepreneurs (Petitt, 2002; Lacey, 2008), 'depolicizing the criminal question, to subject crime to a regime of *technocratic evaluation*' (Loader and Sparks, 2016: 318).

This vision of the ‘punitive public’, and of the necessity of insulating penalty from its influence, has recently been challenged (Miller, 2013; 2016; Dzur, 2010; though see Enns, 2014; Loader, 2008).² Lisa L. Miller (2013; 2016), for example, has argued that we need to pay closer attention to the ‘complex political demands’ (2013: 284) that are made by communities beset by high rates of violence, and the conditions under which these complex demands translate into requests for more punishment (2013; 2016: 198). This means, *inter alia*, reconsidering the extent to which these requests are necessarily visceral and irrational. In the United States demands for more law and order might in fact be the only viable, if normatively problematic, way to respond to a state absence, the ‘certain level of state incapacity’ (2016: 200) that is manifest in exceptionally high rates of violent crime (2016; Gallo, Lacey and Soskice, forthcoming).

To the extent that it rests on the levels of violence in the US, Miller’s account is limited to the US. However, from a broader perspective, it highlights the need to focus on the dynamic interaction between State and citizens, and its influence on punishment levels. Miller’s conclusions also lead us to query some of the assumptions made by contemporary theories of punishment, including the assumptions on the public as inherently punitive. We find similar reflections for England and Wales in the work of Koch (2016). Koch’s ethnographic study of a council estate in England, gives us insights into the relationship between the State, state law, and citizens, challenging existing accounts of contemporary punishment as the return of a – however hobbled – Leviathan (2016: 2). Koch provides a voice to (some of) the citizens of ‘the State’ that are implicitly invoked in contemporary penal theories. Again, this is a voice that is neither uniformly nor consistently punitive (5). From Koch’s account we see how citizens’ relations to the State can vary: thus *some* of

Koch's respondents appropriate the State and its authority *some* of the time in resolution of personal conflicts (11-12); but at other times they reject the State and its authority, and indeed flaunt its laws, particularly where alternative, informal, means of social control are available or more accessible (13).

Though Miller and Koch's analyses are contextually specific, they ask questions with broader analytical validity, which may help us account for penal variation across contexts. In particular, Koch asks a key question: 'in what kinds of situations [do] people come to demand more law and order'? (2016: 16; also Barker, 2007: 628) What 'alternative demands' are being made that are not acknowledged in penal theory or that have no outlet within given polities? (Miller, 2016: 198; also Loader, 2008: 406)

In sum, where 'the State' appears within the literature concerned with punishment and politics, it features at one of *three* levels: the sovereign State; the institutions of the State; the citizens of the State. Note that this classification is meant to be indicative rather than exhaustive.³ We should also not assume that the three 'levels' are watertight compartments. Contemporary penal theories, even when privileging one level explicitly, may in fact be drawing upon aspects of the other two. This is most clearly articulated by Barker who, while concerned with the institutional mechanisms of the State (2009: 30), is also careful to draw our attention to 'ordinary people, citizens and social groups in civil society' as the agents of 'collective action' (30). Barker describes the State 'as a relationship' (31), a conception that we find also in Ramsay's work (2012: 222; Loughlin, 2003: 83-86), and echoes of which are present in Koch's ethnography where citizens 'see the state as a personal tool' (2016: 3) to appropriate when needed.⁴

To talk of the State as ‘relational’ implies that the phenomenon ‘the State’ is not a pre-existing (pre-political) entity, but is *constituted* by political processes in which actors – citizens and political agents – participate and interact. It is also to define ‘the State’ in a way that consciously encompasses all three of the levels identified above. As we can see from the authors cited, these levels are linked in a number of ways. For example: citizens (level 3) are involved in, or excluded from, political institutions and decision-making (level 2); institutions and the outcomes of decision-making (level 2) simultaneously forge and represent the authority of the sovereign State (level 1); the strength of this authority is then what we call into question when we discuss sovereignty; and the strength or weakness of state sovereignty (level 1) comes to shape the demands made by the sovereign State of its citizens, and by citizens of their sovereign State (level 3). I argue that political membership is the common denominator across these three levels. Here the term ‘political membership’ denotes:

- a) *The State’s conception of its citizens*: as sources of authority to be involved in decision-making, as risks to be contained, as electors to be assuaged.
- b) *The available routes for citizens to contribute to the running of the State*, interrogating political participation and the accessibility of democratic institutions, including relations of accountability between citizens and State.
- c) *Citizens’ conception of their own belonging*, that is to say, citizens’ conceptions of the sovereign State – as a source of authority, as a desired but absent authority, as a source of coercion, as a community to identify with – but also of themselves and of each other – as trustworthy members of the same community, as trustworthy members of a community unified *in* the State, as

sources of risk and fear. Belonging is affected by democratic institutions and political cultures – including available ideological narratives (Loader, 2008; Loader and Sparks, 2016) – as they evolve over time.

The three levels of the State, the idea of the State as relational, and a layered understanding of political membership, can be summed up in the notion of ‘*the constitution of political membership*’. This expression refers to the dynamic process through which the contours of political membership and the State-citizen relationship are constructed over time and across different polities. I argue that differences in the constitution of political membership will have an impact on the likelihood of ‘anti-politics’ taking hold within a given polity, *and* the likelihood of ‘anti-politics’ expressing itself as recourse to, and demands for, law and order. Penal theories need to allow for contextual differences in the constitution of political membership across polities, and therefore allow for contextual differences in its possible degradation and attendant penal consequences.

State and punishment in Italy

Certainly the Italian case allows for no easy assumptions concerning ‘the anti-politics of crime’, particularly as a punitive manifestation of sovereign State decline (level 1).⁵ It thus serves as an apt illustration of Western penal divergence, and of the need to account for such divergence. In terms of punishment, for example, contemporary Italian penalty has been described as neither punitive nor moderate, but ‘one in which repression and leniency co-exist and alternate’ (Gallo, 2015: 599; also Gonnella, 2013). This oscillation is manifest in Italian incarceration rates, whose ‘background increase [...] since 1970 [...] has [nonetheless] been dotted by repeat amnesties’

(599) and by provisions in favour of decarceration (though of short term effect – Gallo, 2015: 606). The same alternation is a broader feature of Italian penal policy (602; Padovani, 1981: 93). Italian penalty can therefore be characterized as both harsh and lenient, and neither an example of straightforward penal convergence around a Western ‘punitive’ model, nor an example of straightforward resistance to punitiveness.

This dual penalty is the penalty of a ‘contested State’ (Gallo, 2015: 599), and it reflects the Italian State’s need to assert its authority on a fragmented reality by attempting to monopolise *both* the distribution of punishment *and* the dispensation of forgiveness. The frequent use of amnesties can partly be seen in this light: as the State claiming its monopoly on leniency, either as an act of paternal forgiveness or, often, as a pragmatic concession to the needs of a system beset by over-reliance on criminal legislation, and by prison overcrowding (Gallo, 2015: 607-608). However, moderation in Italy is not just a preserve of the sovereign State. It is also linked to the continuing importance of informal social controls (Melossi, 2003: 381) – such as those deriving from the family – that may either contribute to reduce deviance, or may make state law redundant in the resolution of social conflict. This type of moderation has been described as moderation in fact (*‘de facto’*): not necessarily the outcome of conscious policy decisions, but ‘the [formally] unintended corollary of existing socio-political dynamics’ (Gallo, 2015: 608).

The Italian State is *contested* insofar as it has failed to command exclusive allegiance from its citizens (Agnew, 2002). This failure derives historically from the process through which Italy was unified ‘initially at least, [by initiative of] northern Italians’ led by the monarchy of Savoy-Piedmont (Agnew, 2002: 42-43; Cassese, 2014: 29). Unification was by annexation of Italy’s various regions, rather than by

consensus (Cotta and Verzichelli, 2007: 3), and this led to a heterogeneous national State, that faced substantial internal opposition (27) including, at the time, from the Catholic Church (5; Cassese, 2014: 314-315; Donovan, 2003: 97). The national State did not come to represent ‘the religious beliefs and practices’ of its citizens, and this compromised its ritual and symbolic power (Agnew, 2002: 58; Cassese, 2014: 25). This gave the State an ‘extremely fragile social base’ (Cassese, 2014: 38), not least because of the initial limitations on suffrage (Cassese, 2011; Cassese, 2014; Urbinati, 2013: 192). According to Sabino Cassese, the unified Italian State possessed different levels of state capacity (‘stateness’ or *statalità*) and relatively weak institutions: Cassese identifies this as a constant feature of Italian history (38). Contemporary examples of the ‘contestation’ faced by the State, include both internal political terrorism and organised crime, ‘emergencies’ faced by the Italian Republic, that represented explicit challenges to its political authority.

Italy’s internal heterogeneity has then been reinforced by the nation’s territorial differentiation (Cassese, 2014: 61), which has been variously conceptualised (Sciarrone and Storti, 2015), including by the long-standing division between North and South (339). Differentiation persists to this day and is manifest in the regional cleavages within the Italian political economy (Crouch, 2005: 5; Trigilia, 1997), for example in terms of type, size and concentration of enterprises. Regional differences provide continuing structural anchorage for Italy’s heterogeneity, as a consequence of which the nation displays ‘a tension between centre and periphery’ – between central State and its component parts (Gallo, 2015: 610). This tension has affected State-citizen relations: ‘for a long period the state has conceived of its relationship as mere imposition of sovereignty over its subjects. Meanwhile, civil society itself has kept its expectations towards the state and its institutions rather low’

(Selmini, 2005: 317). The centre-periphery tension has also had repercussions on contemporary Italian penalty, including the negotiation and re-negotiation between central State and local authorities on matters of local safety (Selmini, 2005: 311; more broadly Cassese, 2014: 34 and 89-114). The central State, for example cut funds available to local authorities (Menichelli, 2015: 273), even as a 2001 constitutional reform restructured the balance of powers between local authorities and central government, 'listing the duties reserved to national government and those in concurrent legislation' and 'leaving everything else to the competence of each region' (267).

To the extent that the Italian State 'has conceived of the relationship' with its citizens as the necessary 'imposition of sovereignty', this has further created the potential for a punitive use of the criminal law, precisely as a tool with which to impose authority over a heterogeneous polity (Gallo, 2015: 614; Cassese, 2014: 350). This is most visible in emergency laws against political terrorism and organised crime. These laws, for example, require such offenders to collaborate with the authorities, against their terrorist or organised crime group, in order to access alternatives to custody (see further Gallo, 2015: 607). Collaboration here serves as practical manifestation of renewed allegiance to the State.

Moderation too is influenced by the tension between centre and periphery, insofar as *de facto* moderation and informal social controls, are linked to the presence of so-called 'intermediate normative orders': broadly speaking 'political institutions that stand in between the state and its citizens, and mediate between the two' (Gallo, 2015: 610). These orders are alternative collectivities which carry with them 'intermediate collective loyalties, institutionally subordinate, but psychologically alternative, to loyalty for the State', including 'party loyalties; but also [...]

associational, religious and, in various forms, personal' loyalties (Pizzorno, 1992: 19, cited in Gallo, 2015: 611). Examples of such orders include post war mass parties (Donovan, 2003: 98) – the Christian Democracy (DC) and the Communist Party (PCI) – but also clientelistic and corruption networks, families, and kinship networks.

Intermediate normative orders are linked to moderation insofar as citizens may choose to resolve social conflict by relying on the orders' norms and practices, rather than by relying on state law (Gallo, 2015). Where these norms and practices do not coincide with state norms, reliance on them may in fact stimulate the corollary to *de facto* moderation and informal social controls: a low-level, diffuse ('widespread') illegality (Melossi, 2003: 382; Nelken, 2014: 282), which is thought to characterise Italy, and which is manifest in high levels of informal labour and tax evasion (Scamuzzi, 1996: 134; Pasquino, 2015; Sciarrone and Storti, 2015; Gallo, 2015: 608). For example, estimates for 2014 place the value of the shadow economy at 13% of Italian GDP (ISTAT, 2016: 2), with the greatest value added generated by tax irregularities, followed by informal labour, and illegal activities.

Cassese talks of the different 'layers' that make up the Italian State that 'live an autonomous life [and] overlap in a non-orderly fashion' thus producing weak legality (2014: 37; or different levels of legality: Sciarrone and Storti, 2015). 'Weak legality' is not just limited to citizens: widespread illegality also encompasses corruption, a phenomenon held to be '[embedded] [...] in Italy's institutions' (Rhodes, 2015: 321; Ruggiero, 2010). Political corruption emerged with virulence in the 1990s, with the large-scale scandal known as *Tangentopoli* that contributed to the collapse of the erstwhile political parties (Nelken, 1996; Rhodes, 2015). Commentators judge that corruption has not abated in Italy since then (Rhodes, 2015: 320). Moreover, though public opinion has not been consistent in its support for anti-

corruption (320), *Tangentopoli* (and the conflict between judicial and political classes that it enflamed) has contributed to citizens' distrust of political and economic elites (Vannucci, 2009: 258; Ginsborg, 2013: 284). A 2016 survey reveals, for example, that only 6% of those interviewed had 'much or very much trust' ('*molta o moltissima fiducia*') in political parties, 11% in Parliament, and 20% in 'the State' as a whole (Diamanti et al, 2016: 8).

The depiction of Italy as containing 'intermediate normative orders' coincides with the idea of normative pluralism, developed by the Italian jurist Santi Romano, and held to reflect the '[p]luralism [...] built into Italian society' (Zanetti, 2011: para. 3). Romano argued that the legal order is not the sole preserve of the central State, but that a legal order exists 'wherever there exists a social organism, of some complexity'. Such an organism, according to Romano, produces an internal discipline, 'authority, powers, norms and sanctions' ([1946] 2013: 90). Note the similarity here with Della Porta *et al*'s analysis of recently discovered corruption networks (linked to large construction works) in which 'decisions, attitudes, negotiations, expectations [...] are based on pre-established scripts following rules that are well known to the people involved and informally codified, [...] [which] marginalize or punish those who show opposition or express disagreement' and 'socialize [novices to] the "laws" of corruption' (2015: 198).

As this example shows, while a legal order may find support in the State's legal order, it may also be distinct from, or even in explicit contradiction with, state law. Examples of the latter include 'criminal or revolutionary societies' (Romano, [1946] 2013: 33). Again, the Catholic Church, organised crime cartels, but also parties such as the PCI, have been identified – despite their notable differences – as pertinent examples of alternative normative institutions (Zanetti, 2011). '[R]elations

such as kinship hierarchies and economic structures’ are then amongst the features thought to distinguish these institutions from mere ‘clusters of randomly assembled persons’ (Croce and Salvatore, 2007: 8).

Romano also notes the inverse relationship between the strength of the sovereign State and the strength of any internal juridical order contained within it: the stronger the State, the weaker the pull of alternative normative authorities and vice versa (Romano, [1946] 2013: 88). In this respect Italy seems to have historically displayed ‘a [...] national state [...] rarely able to dominate alternative institutions but [...] also in need of some kind of negotiable help from them’ (Zanetti, 2011: para. 13). That is to say, Italy displays a State beset by a *tension* between centre and periphery (also Sciarrone and Storti, 2015).

From this depiction, we can conclude that the Italian nation State has historically displayed a defect in ‘political sovereignty’ (Loughlin, 2003): it has failed to monopolise its citizens’ allegiance, and create a cohesive political unit. In contemporary Italy this defect is manifest precisely in the presence of intermediate normative orders. This presence alerts us to the fact that political belonging in Italy may well be *shared belonging*. At the citizens’ level, citizens may conceive of themselves as belonging *simultaneously* to a political community unified in the State – understood here as an impartial entity representing the national collectivity – *and* to a political community unified by more personalistic bonds – kinship bonds, for example, or the bonds established within a political clientele.

Citizens may also conceive of themselves as belonging to the State *via* the medium of an intermediate normative order. Thus Italy’s post war mass parties educated citizens to political participation in democratic institutions (Selmini, 2005: 317; Pasquino, 2002: 71; Pasquino, 2015: 38; Urbinati, 2013: 189; Gallo, 2015: 610),

with the PCI and DC ‘[adapting] their ideological confrontation so as to make it become an [...] asset that contributed to the country’s political integration’ (1993: 558). Here belonging was *in the parties* – with their historically strong subcultures (Donovan, 2003: 98; Bogaards, 2005: 507) – and, *through the parties, in the State*. A similar mechanism follows also from the post-war Italian welfare state, where it displays features common to ‘conservative corporatism’ (or ‘social corporatism’ - Urbinati, 2013: 196) which premises incorporation into the nation State on incorporation into particular labour categories (Cavadino and Dignan, 2006: 17).

In sum, in Italy political membership can be in the State *and* in intermediate normative orders; in the State *through* an intermediate normative order; and in some cases in an intermediate order *rather than* the State (as in the example of organised crime or political terrorist associations). Only in some cases is membership constituted exclusively in the national collectivity; and only in some cases is the primary relationship with political representatives of the national collectivity.

This shared membership is also possible because of the particular nature of Italian institutions, including Republican institutions, described by Cassese as ‘porous’ to the multiplicity of interests present within the nation (2014: 345; Gallo, 2015; Rebuffa, 1996; also Bogaards, 2005). The Italian Republic presents both ‘a fragmented, corporative, civil society’ and ‘permeable and penetrable institutions’ (Pasquino, 2015: 50)⁶, given their multiplicity of veto-points. Again note that, where access to state institutions is by means of an intermediate order, this is likely to reinforce intermediate loyalties (Gallo, 2015: 603). Where such orders are premised on more ‘personal’ bonds – clientelistic bonds, personal following, kinship – this also gives a more ‘privatistic’ nature to the access to democratic institutions (Sciarrone

and Storti, 2015). Access here is by *political belonging* rather than, as with political parties, by *political participation* (Gallo, 2015).

I have already discussed some of the penal implications of Italy's shared political membership: the sovereign State tries to harness both punishment and forgiveness to shore up its authority. We find a push for harsh punishment where the sovereign State attempts to contain the risks posed by shared membership. We find also a push towards mediation and pragmatic moderation, where the State attempts to appropriate leniency, even disobedience, trying to incorporate its recalcitrant citizens (and agents) by forgiveness (see also Melossi's notion of 'soft authoritarian paternalism', 2001: 412). Shared political membership then creates incentives towards *de facto* moderation if and where state law is displaced by norms internal to the various 'orders' that co-exist with and within the central State (Gallo, 2015). In sum, what we see here is that the constitution of political membership in Italy is intrinsically linked to the distribution of both repression and leniency, with shared political membership contributing to a dual penalty.

Anti-politics and punishment – comparisons and implications

In his analysis of 'anti-politics', Loader urges us to pay close attention to 'unevenness in the development of crime dominated societies' (2008: 406) rather than presume their universality. What does the Italian case contribute to this debate, and with what broader implications for theories of State, membership, (anti) politics and punishment? Firstly, given Italy's 'contested State' – one in which political membership is shared with orders possessing norms that may or may not coincide with state law – there is limited space for easy assumptions on state power, or on the unchallenged authoritativeness of state law, or on the appeal of state law for citizens.

Applying the ‘anti-politics’ premise to Italy, over-estimates past political cohesion in ‘the State’ as the national collective entity and sovereign (level 1). It also assumes the absence of political cohesion today, without investigating the conditions of political membership, or querying the capacity for pockets of ‘communal solidarity’ (Ramsay, 2012: 212) to resist structural changes associated with ‘late modernity’. This vision ignores the existence of, and variation in, methods of producing social capital (Putnam, 1992; Barker, 2007; Barker, 2009) that do not depend exclusively upon a model of politics premised on the mediation of mass political parties. Moreover, to assume that political disaggregation leads to a saturation of the political field by forms of ‘penal control’ (Garland, 2013), is to presume that the law is capable of monopolising citizens’ imagination of, and demands for, order. It is to presume that citizens can and do re-imagine themselves as abstracted victims (Simon, 2007; Ramsay, 2012) or that they are in fact subject to victimisation, to be solved – in the short and long term – only by formal penal censure.

All such assumptions need to be tested across contexts. For example, if in Italy citizens’ political communities are also ‘intermediate normative orders’, then we need to ask which of these ‘orders’ has survived into the contemporary era and on what terms. It may make sense to talk about ‘anti-politics’ in relation to the passing of the PCI and its ideology.⁷ It may make less sense to apply this analytical lens to ‘intermediate orders’ unified by family or kinship ties, which may have demonstrated greater resilience over time (see Saraceno, 2015).

Assumptions on politics and punishment also need to be tested against comparative institutional differences, insofar as institutions are the means through which individuals participate in given polities, giving substance to political membership (Barker, 2009). Miller argues that in the US it is significant that the

political agenda and policy choices may be closed off to citizens, as this leaves them with a choice between ‘maintaining the status quo [– high rates of violent crime –] or doubling down on [...] support for increasing punitiveness’ (2016: 196; Gottschalk, 2013). Unsurprisingly citizens may opt for the latter.

In Italy, the porousness of institutions to a plurality of interest groups is similarly significant. Porous institutions have affected the character of political participation and in some cases personalised it, for example through kinship or clientelistic connections. This consequently begs the question of how ‘representative’ representative politics actually were, even prior to their ‘decline’. In a more positive light, a porous institutional structure also provides a conduit for different interest groups to try and react to, and possibly resist, the structural changes associated with ‘late modernity’ or economic neoliberalism. Different strata, in a stratified society whose political community is only partly unified in ‘the State’, suffer structural changes differently.

Similarly, stratification may also extend to the presence or absence of political ‘visions’ within society, so that we cannot assume the exclusive dominance of law and order narratives. Admittedly contemporary ‘visions’ may be increasingly narrow: for example, the demise of mass parties in Italy was met by a resurgence of localism (Selmini, 2005: 319; Calise, 1993: 558). Dispiriting as this may be from the perspective of a democratic politics premised on inclusive participation and national collective goods (Gallo, 2015: 612; Lacey and Soskice, 2015: 469-470), it nonetheless suggest that further investigation needs to be undertaken, before we conclude that all Western democracies, and all citizens within such democracies, have equally transitioned into ‘anti-politics’ with its penchant for penal control. Again, this insight is well articulated by comparative penal analyses, where they urge us to focus on

‘insiders’ and ‘outsiders’, their different levels of integration into political communities, and their different levels of exposure to penal censure. In Western Europe this issue is of particular salience where such ‘outsiders’ are immigrants (Lacey, 2008; Melossi, 2013; Aas, 2014; Barker, 2013, 2017).⁸

Similarly we cannot presume that, in the face of insecurity, citizens will necessarily turn to the law for reassurance. In Italy, the centre-periphery tension manifests itself in a dualism between an over-inflation of laws (Gallo, 2015: 612) and their circumvention (Cassese, 2014: 342-343); between legal coercion and informal mediation. This suggests that, even in the face of the structural changes presumed in the penal literature, the demand for ‘law-for-order’ will not be consistent across Italian society. Some citizens may turn to the law and legality as the fallback solution to the absence of compelling political narratives, and in the presence of political corruption. This is indeed the trajectory that Massimo Pavarini traces for the Italian Left in the 1990s (1994; Ginsborg, 2013), and is a dynamic that is thought to engender a ‘punitive potential’ in Italy (Gallo, 2015: 612; Sciarrone and Storti, 2015). However, other citizens may choose to resolve conflicts via the informal norms of existing ‘intermediate orders’, suggesting if not outright ‘resistance’ then perhaps ‘refusal’ of, or ‘indifference’ to (Loader, 2008: 406), the criminal law as a solution to social conflict.

The presence of informal social controls militates against seeing Italy simply in terms of a society saturate with penal control. I claim that this issue, the existence and persistence of alternative ‘social norms and logics’ (Koch, 2016: 14), is relevant also to the penalty of other Western polities. David Garland has identified the absence of informal social controls, and the deficit in social organisation and social integration, as key to explaining the ‘exceptionalism’ of US penalty (2013; though

see Lacey and Soskice, 2015: 465). In the US, penal control is the necessary ‘back-up’ where ‘more positive and more productive modes of social control are unavailable’ (Garland, 2013: 505; Lacey and Soskice, 2015: 473). This raises the question of the fate penal control has had in societies where different forms of social control have persisted (Lacey, 2008; Lappi-Seppala, 2008).

I argue that this question can be re-phrased in terms of the constitution of political membership: how is political membership constituted across different Western polities? Through what institutional means, permeated by what (changing) political narratives, creating what level and manner of identification between the State, as sovereign and political collectivity, and citizens? Scholars of punishment need to continue interrogating the construction and evolution of political membership, and its contextual variation. This process will give us insights into how different polities are transitioning into the contemporary era and with what political outcomes: to what extent do we face a disaggregation of political communities? These insights may in turn help us explain if and why punitiveness, an overwhelming preoccupation with crime, and a reliance on penal control, are indeed taking hold in different polities: are disaggregated communities turning to state punishment as their solution?

Conclusions: ‘the constitution of political membership’ and penal difference

Contemporary punishment has been analysed as an articulation of the dissolution of political communities. This produces increasing punitiveness, as law and order replace more positive civic narratives and processes with which to understand and address social conflict. This is the ‘anti-politics of crime’, a development whose implications are worrisome insofar as they delineate a deterioration of democratic politics, and a deterioration of democratic punishment, two parts of a self-reinforcing

cycle of political decline. Political membership is an inherent part of this narrative: claims concerning the hollowing out of political sovereignty as a cause of punitiveness, are *also* claims about the changing conditions of political membership in Western polities; claims concerning citizens' demands for punishment, are *also* claims concerning the way in which political membership is experienced, and the role that State power plays in this experience.

Yet, the 'anti-politics of crime' has limits, and this article uses the Italian case to reveal them. An analysis of contemporary punishment as the penalty of 'anti-politics' rests on some key assumptions. Firstly it requires us to see 'the State' primarily as the sovereign. Secondly, it requires us to assume the disaggregation of political communities in Western democracies. Finally it requires us to assume the reliance – by both state agents and by citizens – on law and punishment as a means to remedy this disaggregation. I argue that these assumptions need to be explored further, and that they need to be contextualised. They are difficult to apply to Italy, but research drawn from the UK (Koch, 2016) suggests that the picture may be more complicated even within the one European polity thought to fit more squarely within narratives of 'punitiveness', and 'anti-politics'. Research from the US likewise suggests the specificity of American over-reliance on penal censure and the political dynamics (accessibility of institutions; levels of electoral competition) thought to accompany it (Garland, 2013; Miller, 2016; Lacey and Soskice, 2015).

Comparative literature has made this claim before: different polities punish differently. In this article I have formulated this claim in terms of political membership: differently constituted polities punish differently. They suffer different levels of vulnerability to 'anti-politics', and if we look beyond the State as sovereign to the existence of different 'orders and logics', we may find sites of resistance or

resilience to political disaggregation. We may also find that, even if faced with political disaggregation, not every polity will turn to the law and punishment as its preferred solution. Here we have to ask more about State authoritativeness, past and present, and the place that the law plays in constituting the relationship between citizens and sovereign State. We need to allow for possible ‘indifference’ to formal penal censure and preference for informal conflict resolution. Ultimately, much depends on exactly how the relationship between sovereign and citizens is constituted, through what historical process and political narratives, captured in what institutional structure: much depends, that is, on the ‘constitution of political membership’.

This implies that punishment and political membership need to be studied side by side. There are, in this respect, interesting interdisciplinary pathways for us to keep following. Scholars of punishment have already been engaging with notions borrowed from political sociology, such as ‘post-democracy’ (Crouch, 2004; Loader and Sparks, 2016; Ramsay, 2012). Close and critical engagement with this concept, and the discipline in which it is rooted, will give us a sharper understanding of how punishment changes as politics evolve, and with what level of convergence across contexts. At a time when questions of political belonging and political participation are thrown into sharp relief by current events and sustained economic crisis, we may also benefit from looking at political theory and its explanations of Western polities’ democratic difficulties (Loader and Sparks, 2014: 114). Nadia Urbinati (2014), for example, has characterised contemporary Western democracy in terms of three ‘disfigurements’: ‘unpolitical’ democracy, populism and plebiscitarianism. Two of these at least – populism and ‘unpolitical’ democracy (or technocracy) – already figure in penal literature. These concepts theorise changes in the constitution of

political membership: the relationship between State(s) and citizens; the conceptions and conditions of political membership; the manifestation of sovereign State authority, and its purchase among citizens. They therefore offer fruitful sources of analysis for scholars of punishment – also a manifestation of State authority (or lack thereof). By paying close attention to how political membership is being reshaped – under what conditions and with what contextual variations – we may be able to better understand the penal implications of such processes, perhaps forestalling their worst articulations.

Notes

¹ I do not explicitly deal with such differential experience, though my findings are relevant to the current debate on the penalization of migrants.

² On public opinion and punitiveness see Roberts et al (2003).

³ For a more comprehensive account see Barker (2009: chapter 2).

⁴ See also Miller's 'security gap' (2013: 3; 2016).

⁵ Though 'the State' as sovereign occupies a large part of this section discussions of sovereignty (level 1) are contextualised by reference to the – formal and informal – institutions (level 2) that shape citizens' belonging (level 3) within the Italian nation.

⁶ The 'First' Italian Republic (1946-1993) was a 'partycracy', characterised by the systematic occupation of the state machinery by political parties (Bull and Rhodes, 2009). Italy still displays institutions porous to political interests (Pasquino, 2015).

⁷ The survival of the post-war subcultures 'well into the 1980s' (Bogaards, 2005: 507) suggests that we may need to interrogate their continuing influence on Italian society.

⁸ Ethnicity and race are also relevant to categories of political membership, and thus punishment, as the US clearly shows.

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