

# PR3155 – Politics of the Law and Rights

## Week 5 – Politics of Prosecution

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## ITALY'S ELECTIONS 2022

Perspectives and Challenges after the Victory of the Populist Right

### Online Workshop

Giacomo **BENEDETTO**, Royal Holloway University of London

Marianna **GRIFFINI**, King's College London

Marco **GUGLIELMO**, Royal Holloway University of London

### Q&A

Chair > Laura **SERRA**, Royal Holloway University of London

Tuesday 18 October, 18.00-19.00 (GMT)

MS Teams





Feedback deadline: Friday 21 October

**I cannot review any case summaries sent after this date**

Those who send it before this date will receive feedback by October 30



## Basic distinctions between prosecuting systems

### *Political* prosecutions

1. US Attorney Generals firing scandal
2. Tangentopoli
3. Lava Jato



# BASIC DISTINCTIONS



- Foundational differences → what is the model of prosecution?
- Structural location → where do prosecutors sit?
- Selection, recruitment and training → how are prosecutors recruited?



**adversarial** vs **inquisitorial** systems reflect the common law vs civil law divide

→ this shapes the attitudes of prosecutors

in adversarial systems, it's the job of prosecutors to secure (better) convictions and (possibly) longer sentences

in inquisitorial systems, "the prosecutor is as concerned to exculpate the innocent as to convict the guilty and in many countries makes no recommendations about sentencing" (Tonry, 2012)



**legality** vs **expediency** systems also reflect the common law vs civil law divide

- **Legality**: all cases must be treated equally, no discretion in how to proceed; well-founded prosecutions have to be pursued
- **Expediency**: discretionary police and prosecutorial decisions in individual decisions; prosecutions can be prioritized given office priorities or dismissed for other good-faith reasons
- Systems that value expediency believe sentences should be individualised to take account of rehabilitative and incapacitative considerations
- Systems that value legality reject indeterminate sentencing

Often, inquisitorial = legality, but there are mixes (e.g. The Netherlands and Norway have inquisitorial systems but operate more on expediency)



## Democratic accountability

→ concerns the role of **public opinion**

- Most countries regard the influence of public attitudes, emotions and preferences as fundamentally inappropriate considerations
- In the US, elected prosecutors regularly adjust decisions to take into account public opinion and emotions



## What happened to James Bulger? The harrowing story of the boy murdered by Jon Venables and Robert Thompson

In 1993, two 10-year-old boys tortured and murdered the toddler after leading him away from a shopping centre in Bootle, Merseyside



James Bulger (centre) and his killers Jon Venables (left) and Robert Thompson (right) (Photo: Getty)



In England too there is (some)  
consideration of public opinion

### Justice Secretary ready to block 'perverse' release of James Bulger's killer Jon Venables

Brandon Lewis will meet James's mother to hear her calls for her son's killer to remain in prison



**“The three foundational distinctions between prosecution systems do not line up perfectly, but they cluster. In general, inquisitorial systems are more likely than accusatorial systems to operate under the legality principle and to try to insulate decisions about individuals from influence by elected politicians, public opinion, and emotion”.**

**(Tonry 2012, p. 13)**



- consider whether prosecutors are located in the **executive** or **judicial**
- In some countries (France, Italy, Sweden), prosecutors or prosecution services are formally part of the judiciary could also serve as judges
  - In other countries, prosecutors are independent, but treated as though they were part of the judiciary (Netherlands)
  - In other countries (England, Norway), prosecutors might formally be part of the executive (i.e. reporting to the ministry of justice)
  - In other countries still (US, Switzerland) prosecutors can be elected!
- **when members of the executive, prosecutors' priorities are set by political officials**



“The extreme consequences of the American system include use of ideological and partisan political criteria in civil service hiring, spurious federal criminal charges against Democratic Party politicians during the George W Bush administration, and prosecutions in state courts on the basis of media coverage and electoral implications. **Extreme abuses of power for political reasons are clearly wrong, but their origins cannot be attributed only to individuals' bad characters and bad values. The problems are at least partly structural and influence mundane day-to-day operations”.**

(Tonry 2012, p. 16)

# Does it matter?



It matters for four aspects:

1. Diversion → in Europe, higher chances of *alternative* sentencing
2. Charging → in the US, alleged criminals are often *overcharged*
3. Bargaining → in the US, alleged criminals can *negotiate*
4. Sentencing → in the US, prosecutors (rather than judges) can determine sentences

...where would you rather commit a crime?



**"A rational self-interested defendant would prefer to face criminal charges in Europe, for two reasons... First, as a matter of principle in legality principle countries and as a matter of professionalism in all, prosecutors are expected to file charges that they believe can be proven in court... Pursuing charges that cannot be proven is unprofessional and potentially embarrassing. Second, European prosecutors are seldom likely to engage in systematic overcharging." (p. 21)**

**Is this picture a bit too rosy...?**



**"[Giuseppe di Federico] finds it unacceptable that single prosecutors can start investigations on their own initiative and not 'pay for it' even when their accusations, as happens, turn out to be totally ungrounded at the trial level" (Nelken, 2013a; Di Federico, 1998).**



# *POLITICAL PROSECUTIONS*

## The 2007 US Attorneys firing scandal

# The 2007 US Attorneys firing scandal



- On December 7, 2006, the George W. Bush Administration's Department of Justice ordered the unprecedented midterm dismissal of seven United States attorneys
- Allegations: some attorneys were targeted to impede investigations of Republican politicians or for their failure to initiate investigations that would damage Democratic politicians
- In 2008, the Justice Department Inspector General said the process was "arbitrary", "fundamentally flawed" and "raised doubts about the integrity of Department prosecution decisions".
- In July 2010, the Department of Justice prosecutors closed the investigation without filing charges after determining that **the firing was inappropriately political, but not criminal.**



**...has prosecutorial discretion been employed to persecute enemies or shield allies?**

# The wrong way to do it



Shields and Cragan (2007) suggest that Democrats were up to seven times more likely to be investigated by the Bush Justice Department than were Republicans.

## The study:

Under a Republican administration, they want to know the difference between:

- probability of investigation if the target is a **Democrat**, and
- probability of investigation if the target is a **Republican**

The probability is just # of investigations divided by # of referrals (no ability to initiate prosecutions)

If we know the # of investigations, what does that tell us about the probability?

# The better way to do it (1)



Compare **aggregates** across administrations, assume no change in underlying distribution of referrals

**TABLE 1. Partisan Affiliation of Public Corruption Prosecution Defendants, Bush and Clinton Samples**

	Bush Sample 2004–2006			Clinton Sample 1998–2000		
	Public	Private	All	Public	Private	All
Dem affiliated	49	35	84	36	13	49
Rep affiliated	8	15	23	14	14	28
Other	78	36	114	107	39	146
Ratio (Dem/Rep)	6.13	2.33	3.65	2.57	0.93	1.75
Ratio (Dem/non-Dem)	0.57	0.69	0.61	0.3	0.25	0.28
Ratio (Rep/non-Rep)	0.06	0.21	0.12	0.1	0.27	0.14

# The better way to do it (2a)



Compare individual sentences across defendants of different types.

Here, Gordon (2009, pp. 538-539) makes the following argument:

- if there is pro-Republican bias (🐘), we will see a greater proportion of referrals about Democrats taken to prosecution
- This means that cases that were less serious will now be taken up, which were not taken up before
- This means that the **average sentence** for Democrats will actually become less severe, as weaker cases flood the pool.

# The better way to do it (2b)



**TABLE 2. Descriptive Indicators of Partisan Bias in Sentencing: Administration-specific Differences Between Republican and Democratic Defendants and Differences-in-Differences**

Defendant Party/ Prosecuting Administration	Prison Only			Incorporating Probation		
	Mean (1)	Dif. in Means (2)	Dif. in Difs. (3)	Mean (4)	Dif. in Means (5)	Dif. in Difs. (6)
<i>All Partisan-Affiliated Defendants</i>						
Republicans under Bush	28.39			38.06		
Democrats under Bush	20.07	8.32 (.17)		29.59	8.48 (.17)	
Republicans under Clinton	12.39		14.85 (.06)	22.42		15.14 (.06)
Democrats under Clinton	18.92	-6.53 (.04)		29.08	-6.66 (.06)	
<i>Public Employee Defendants</i>						
Republicans under Bush	39.25			51.25		
Democrats under Bush	19.9	19.35 (.07)		29.55	21.7 (.05)	
Republicans under Clinton	10.79		30.32 (.01)	21.41		32.34 (.01)
Democrats under Clinton	21.75	-10.96 (.003)		32.05	-10.64 (.01)	
<i>Private Citizen Defendants</i>						
Republicans under Bush	22.6			31.03		
Democrats under Bush	20.31	2.29 (.42)		29.64	1.39 (.45)	
Republicans under Clinton	14		-.64 (.52)	23.43		-1.18 (.53)
Democrats under Clinton	11.08	2.92 (.68)		20.86	2.57 (.64)	

*Notes:* Sentences and differences in columns (1) through (3) denote months of incarceration placing zero value on probation; sentences in columns (4) through (6) are calculated as 0.2 times the number of months of probation in the sentence if the sentence is solely probationary, and 12 plus the number of months of incarceration plus 0.2 times the number of months of probation if the sentence includes imprisonment (see text for additional explanation). One-tailed *p* values in parentheses.



# TANGENTOPOLI

# Why is this called this?



- In Italian, *tangente* is a bribe. "-opoli" is a post-fix which just indicates that it took place in a city. (e.g. after Watergate, every scandal has a -gate attached)
- English translations include "**Bribesville**"
- People also talk about the **Mani Pulite** (Clean Hands) investigation, after the name the prosecuting judges gave it.
- In both cases (Tangentopoli, Mani Pulite) people use these labels to cover corruption cases which were not strictly related (outside of Milan; not formally part of the same investigation)

# It starts in a nursing home...



- It's February 1992, twenty-odd months after the fall of the Berlin Wall, and two months before Italian general elections
- Mario Chiesa was a politician in the Italian Socialist Party, and also ran a (publicly owned and operated) nursing home
- Chiesa's nursing home had a cleaning contract
- This contract went out to tender, but it was generally known that companies would only be successful if they sent a portion (say, 10%) of the value of the contract back to the party (i.e., a **kickback**)
- Existing contractor Luca Magni got annoyed at having to pay this, and prosecuting magistrate Antonio di Pietro heard about it
- Magni wore a wire to his next meeting, and Chiesa was arrested whilst trying to flush a bundle of cash down the toilet

# It spreads nationwide



- Kick-backs of this kind were fairly common, and provided a way for parties to gain funds without a system of public party funding
- The system is viable as long as people believe there is no alternative
- The Mani Pulite investigations disrupted this belief; prosecutors in other cities started getting lots of leads
- By 1994, around 200 parliamentarians were under investigation

# Characteristics of the prosecution



- Formally part of the judiciary
- Career progression is through seniority
- Disciplinary matters and senior administrative roles handled through the **Consiglio Superiore della Magistratura** (2/3rds elected by *magistrati* themselves)
- Constitutional *obligation* to prosecute cases
  - **"The public prosecutor has the obligation to institute criminal proceedings"**  
(art. 112, Italian constitution)
- Before 1999, much more along the inquisitorial style
- Early moves towards an adversarial system included the **notification of investigation** (*informazione di garanzia*)



**"The judges who had to decide on the preliminary validity of the Public Prosecutor's case were often insufficiently independent from the Prosecutor's office. Preventive imprisonment, or the threat of it, was widely used as an instrument of pressure in order to extract confession. Extracts from interrogations had an uncanny habit of being reprinted in newspapers and weeklies. Some magistrates, in their eagerness to take action, made unpardonable errors... a minority of Italian magistrates, led by those in Milan, tried to break the vicious circle of corruption in public life. Sometimes they used methods that were questionable. Sometimes they made mistakes. Nearly always their actions led to personal tragedy of a greater or lesser kind. None the less, it is difficult to conclude, in overall terms, that they acted in bad faith, or to deny the impelling and important contribution they made to Italian democracy" (Ginsborg, 2003, p. 269)**



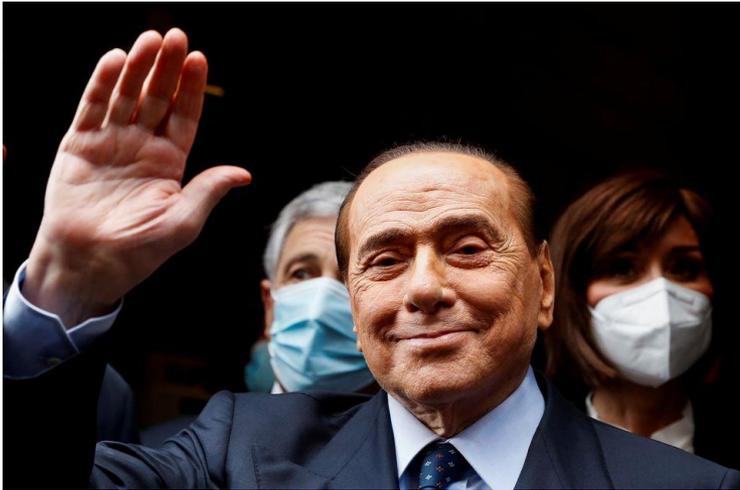
## In other words....

- The new Code of Penal Procedure was aimed at **increasing the rights of defendants**, and at **destroying the old 'inquisitory' character of the Public Prosecutor**.
- However, in the heated atmosphere of 1992-3 it did not really function that way. The 'informazione di garanzia', the Notice which informed a person that he or she was under investigation, was more of a pre-emptive sentence.
- Defendants felt strongly that they had **insufficient possibilities to exercise their rights of defence**.
- The **judges** who had to decide on the preliminary validity of the Public Prosecutor's case were often **insufficiently independent from the Prosecutor's office**.
- **Preventive imprisonment**, or the threat of it, was widely used as an **instrument of pressure** in order to extract confession.
- Extracts from interrogations had the habit of being reprinted in newspapers and weeklies. Some magistrates, in their eagerness to take action, made unpardonable errors.



Antonio di Pietro, prosecutor in the Mani Pulite team, later Minister of Public Works (1996, 2006 - 2008)

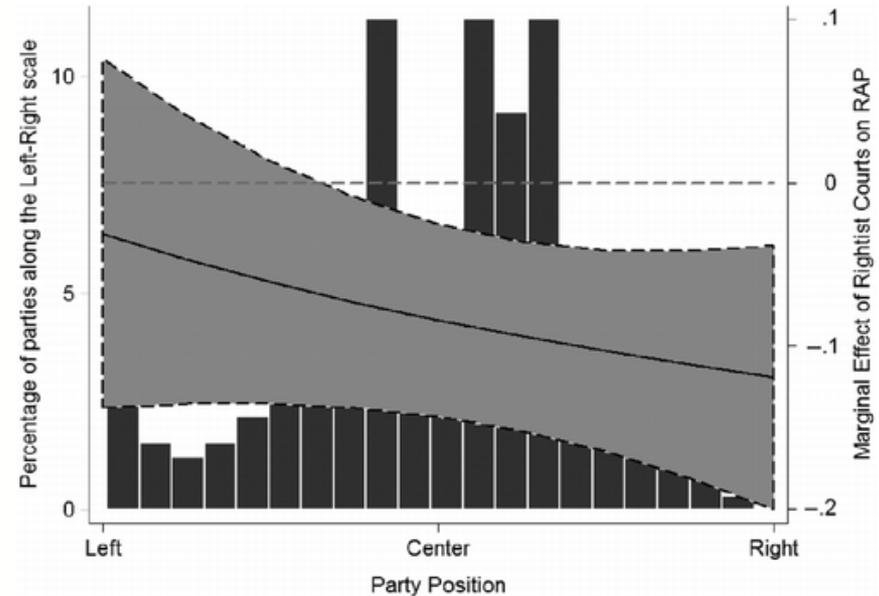
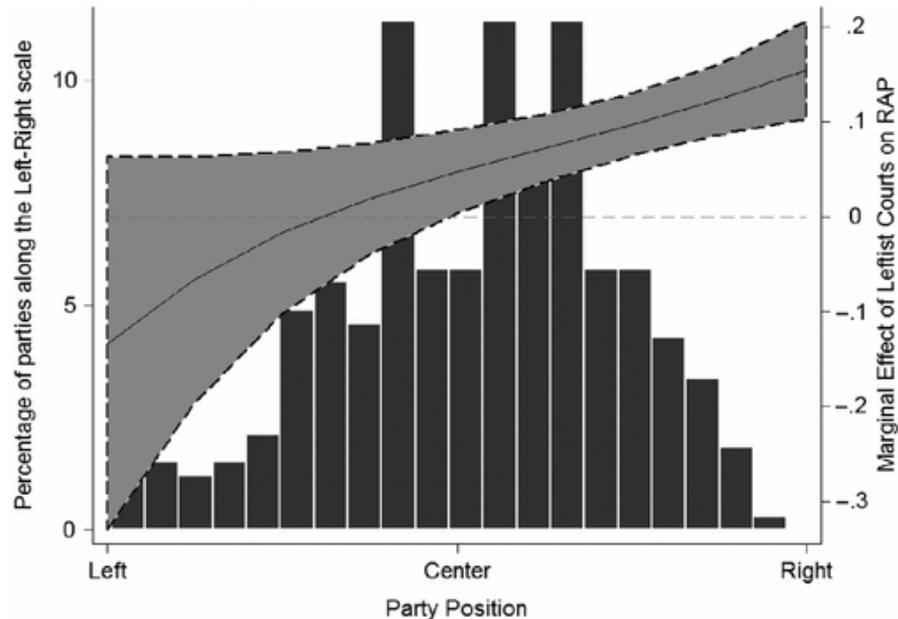
- Tangentopoli made heroes out of some magistrates (like Antonio di Pietro), just as the campaign against the mafia had made martyrs of others
- The existing party system collapsed between 1992 and 1994
- Some figures from those investigations entered into politics: Di Pietro became Minister of Public Works in the 1996 - 1998 Prodi government, and later set up his own party (Italia dei Valori, 1998 -).
- Ironically, the principal beneficiary was someone who had his own legal troubles: **Silvio Berlusconi**



Silvio Berlusconi, Italian prime minister  
(1994, 2001 - 2006, 2008-2011)

- Berlusconi has often faced legal difficulties
- In his time in office, he used his position to resolve these difficulties (by decriminalizing certain actions, changing rules on admissibility and proscription periods, and rules on office holders appearing before courts)
- Some of these attempts were blocked by the Constitutional Court
- He was however convicted of fraud in relation to his media company; this sentence became definitive in 2013.
- In office, Berlusconi accused the judges of being "red robes" (*toghe rosse*)

# Research on prosecutorial quasi-discretion in Italy



- Ceron and Mainenti (2015) analyse the proportion of each party's MPs who were subject to a "request to proceed" (a qualified form of parliamentary immunity)
- When left-wing factions do better in the CSM, there are **more** requests to proceed (of everyone, but the increase is greater for MPs from parties on the right)

# Research on prosecutorial quasi-discretion in Italy



Ceron and Mainenti (2015)

- Look at what happens over time when left- or right-wing factions do better in elections to the CSM.
- They demonstrate that **ideology affects judicial decision-making**, even when the judiciary is supposedly independent of political control.
- They estimate judicial orientations according to the **support for factions** within the National Judiciary Association.
- The results show **that ideology affects trial court activity against deputies**. As the support for left-wing factions increases, prosecutors are more likely to investigate right-wing parties. Conversely, as the share of right-leaning factions grows, investigations of moderate or rightist parties decrease.



# Pro-refugee Italian mayor sentenced to 13 years for abetting illegal migration

**Domenico Lucano, who welcomed migrants to tiny town of Riace, also convicted of 'irregularities'**



📷 Domenico 'Mimmo' Lucano sits with bowed head yesterday as the judge in Locri, southern Italy, sentences him to 13 years and two months in jail. Photograph: Marco Costantino/EPA



# LAVA JATO

# Why is it called this?



- Prosecuting judges called their operation *Operação Lava Jato*, or Operation Car Wash (lava = wash; jato = jet)
- They called it this because two key figures in the operation -- Petrobras executive Paulo Roberto Costa, and financier Alberto Youseff -- used to arrange business affairs at a car wash.
- When transcripts of the deliberations of the Lava Jato team were published, this was dubbed Vaza Jato (jet leak)

# The basic outlines of the case



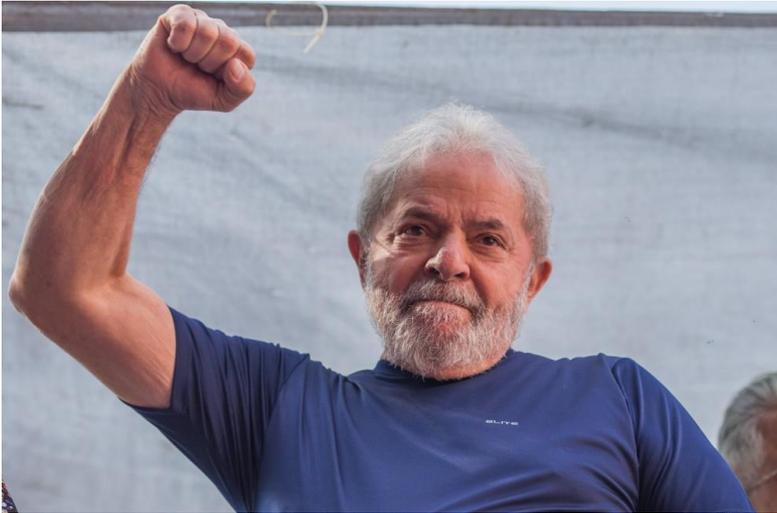
Sergio Moro, lead prosecutor in the Car Wash operation

- Petrobras (the Brazilian state owned oil company) was awarding contracts to constructors at inflated prices
- The constructors would then kick-back some of the money to parties controlling Petrobras
  - Workers' Party (Lula, Rouseff)
  - Brazilian Democratic Movement (Temer)
  - Brazilian Social Democratic Party (in opposition, but in power at local level)
- Investigations began in 2014; high point is impeachment of Rouseff in 2016 / conviction of Lula in 2017
- Key figure from the prosecution side is **Sergio Moro**

# The position of prosecutors



- Independence of the *Ministerio Publico* (public prosecutors' office) is recognised in the Constitution (Art. 127)
- At federal level, short term (two years) and presidential appointment (albeit from within the institution) suggest low independence...
- But prosecutors within the Ministerio have high independence from superiors (Art 127-2), with life tenure and protection against removal to other offices
- Other working practices were modelled on the *Mani Pulite* team



Luiz Inacio Lula da Silva, President of Brazil  
(2003-2010)

- When Lula was arrested, he called Rousseff. Rousseff said she would investigate bringing him into the cabinet (which would give him a greater degree of legal protection)
- Moro had had Lula's phones tapped, and released the call the same night
- Unfortunately, Moro had already ordered an end to the wire-tap, so the call wasn't legally recorded



“Although the subsequent Operation Car Wash investigation was widely regarded as remarkably successful, supposedly buttressing the rule of law through high-profile prosecutions of leading politicians and businesspersons, the article argues that legal due process, wider constitutional law, and the political process were undermined. While the use of media leaks to strengthen the investigation proved tactically successful, when coupled with new legal instruments it undermined the presumption of innocence and contributed to a climate in which political and legal debates themselves became increasingly subordinated to simplistic polarizing anti-corruption discourses, thereby undermining an already fragile political and institutional environment”.

George Mészáros (2020)



- In 2019, The Intercept published a large number of internal documents and text messages between members of the prosecution team
- These messages revealed considerable animosity against Lula and the Workers' Party candidate for the next presidential election, Fernando Haddad
- For example: prosecutors tried to prevent Lula from conducting a newspaper interview from prison because they were worried it would generate sympathy for Haddad in the 2018 election

# Evidence of bias from post-prosecution careers



- In 2018, after Jair Bolsonaro won the presidential election, Sergio Moro was invited to become Minister of Justice
- Moro didn't last long: he exited in 2020 complaining about interference in the work of the Ministry
- Brazil is currently undergoing Presidential elections, the first round (2 October) saw Lula receive 48% of the vote, and Bolsonaro 43%....

# Conclusions



- There are different choices about how to structure public prosecutors
- Some of these choices lead to greater de facto and de jure independence
- Independence promoting features -- legality principle, inquisitorial role -- can be particularly high in countries with high levels of corruption
- Prosecutors in these countries can therefore face a particularly bad independence/accountability trade-off
- Post-prosecution careers for politicians are indirect signs of how prosecution can become mired in politics (cf. Keir Starmer?)



Ceron, A. and M. Mainenti (2015). "Toga party: The political basis of judicial investigations against mps in italy (1983-2013)". In: *South European Society and Politics* 20.2, pp. 223-242.

Nelken, D. (2013a). "Can prosecutors be too independent? An Italian case-study". In: *European Penology Hart, Oxford*, p. 249.

Tonry, M. (2012). "Prosecutors and politics in comparative perspective". In: *Crime and Justice* 41.1, pp. 1-33.

Gordon, S. C. (2009). "Assessing partisan bias in federal public corruption prosecutions". In: *American Political Science Review* 103.4, pp. 534-554.

Ginsborg, P. (2003). *Italy and its Discontents 1980-2001*. Penguin UK.

Di Federico, G. (1998). "Prosecutorial independence and the democratic requirement of accountability in Italy: Analysis of a deviant case in a comparative perspective". In: *The British Journal of Criminology*, pp. 371-387.