

# Judging the Mafia: Categorization under Law and Moral Economies in Italy (1980–2010)

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Any procedure aimed at bringing the Mafia to justice is based on the ontological pre-supposition that ‘the Mafia exists’. The object of this article is to reveal the work of legal categorization and judicial testing that jurists, judges and experts have had to carry out in order to substantiate this claim. The article will also show what the implications of this are for the ‘moral economies’ of Italian society. I am borrowing here this concept – as revisited by Didier Fassin (2009) from the original sense of the word ‘*œconomia*’ picked up from Edward P. Thompson (1991) – for its capacity to describe the organization of a social space in which moral norms, values, emotions and sentiments are at play, and within its ambit to study the linkage between the different forces and actors involved.

While taking into account the whole range of the spheres involved in the ‘Mafia problem’ (the political, judicial and media arenas along with many others), this study will concentrate on the way in which the trials directed against the ‘Mafia’ and ‘mafiosi’ contribute to structuring the Italian moral landscape, mobilize ethical categories and their links with political values, and propose distinctions between what is acceptable and what is not within the Italian body politic. The controversies aroused by these trials in the courtroom or, prior to this, in the chambers of examining magistrates, demand that what is politically and morally at stake with any specific definition of the Mafia or its presumed members be clearly defined.

Given that law constitutes a powerful mechanism for the classification of what is criminal and what is not, since the beginning of the 1980s Italian society has found in law its solid base for defining and consolidating the boundary between what are Mafia-related acts and what are not. However, the anti-Mafia investigations and trials directed at the Mafia as a criminal organization show that this attempt to distinguish a corrupt side of society from a healthy side has proven extremely problematic. Whence the necessity, after the creation of the offence of ‘association with the Mafia’ and its inscription into the Italian penal code (1982), for creating intermediary categories such as ‘external assistance’ and ‘connivance’ (*favoreggiamento*) – ‘aggravated’ by the fact that it was directed towards the Mafia association – that were capable of imposing sanctions upon the relations that the outside world (the worlds of politics, economics or finance) could entertain

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with the Mafia as a whole and with ‘mafiosi’ individually. Put to the test through judicial procedures, these penal categories – which emerged out of new and more complex conceptions of what constituted the Mafia phenomenon – are continuing to give new shape to the descriptive models of the Mafia. Whether they derive from judicial documents (investigatory dossiers, arrest warrants, trial records, court judgments) or from social science research, all of these models pose one and the same question.

### ‘What is the Mafia?’

‘I don’t know what that means’, replied Carmelo Mendola in 1883, a defendant in the Amoroso trial, to the question put to him by the chief trial judge: ‘Were you not part of the Mafia?’ (Lupo, 1988: 463). A century later, the same question was put by a police officer to Gerlando Alberti when he was under arrest. ‘Mafia? What is Mafia? A brand of cheese?’ (Padovani, 1987: 9), he replied. Several times accused of murder, this Mafia chieftain was regularly acquitted ‘for want of proof’. The law had been pursuing him for nearly twenty years, but *U paccaré* (The Imperturbable One) as he was nicknamed, could not be charged for being a ‘mafioso’, as that categorization had no penal relevance; neither could he be considered as ‘co-responsible’ for the murders that he had ordered carried out from within the Mafia association without having personally taken part in their execution. Yet the principle of ‘co-responsibility’ was certainly enshrined in the Italian penal code.<sup>1</sup> However, the causal link associating those who order a murder with those who actually carry it out is extremely difficult to prove: for the moment, no description in law of this secret society, of its goals, its internal functioning, of the links between the individuals who are part of it and the way in which they undertake to commit a criminal offence is available.

The first descriptions of the Mafia phenomenon appeared after the unification of Italy (1861) in reports of State agents charged with studying social issues in the Mezzogiorno. Their conclusions were contradictory: whereas on the one hand, in a report dating from 1865, Filippo Gualterio, the prefect of Palermo, defined ‘the so-called Mafia’ as ‘a properly constituted association, furnished with proper statutes and with the capacity to provide services, including those to political parties’ (Dickie, 2006: 49–50), Bonfadini, the rapporteur of the parliamentary commission of enquiry into the social conditions of Sicily (1877), denied any structured and organized character to that form of ‘instinctive solidarity’ based on violence, deceit and intimidation (Marimo, 1964: 53). In contrast, however, the private parallel enquiry undertaken by two young right-wing intellectuals, Leopoldo Franchetti and Sydney Sonnino (1876), asserted the existence of an organization which was in effective control of the region, having infiltrated even its public institutions.

Descriptions at law of the Mafia in the 20th century were not any more uniform; in the early 1930s, Loschiavo firmly maintained the idea of the criminal and associative nature of the Mafia, whereas Puglia considered it as nothing more than an expression of local culture (1933).<sup>2</sup> At the end of the 1940s, the jurist Gaetano Mosca, in an essay entitled *Che cos’è la mafia?* [What is the Mafia?], distinguished the ‘Mafia spirit’, comprising certain behaviours (‘self-esteem, pride, arrogance’) embedded in social relationships, from that ‘collection of small associations pursuing different goals, ones which, quite frequently, cause their members to engage in marginally illegal activities and are, sometimes, truly criminal’ (Mosca, 2002: 4). In the 1960s, the jurist Francesco Antolisei, author of a celebrated *Manual of Penal Law* (1966), was still defining Mafia conduct as ‘illicit’ and ‘immoral’ without being necessarily ‘criminal’ nor arising out of any form of organized crime. On this point, Mosca (2002: 54) had been peremptory as well: ‘I have nearly reached the end of my speech, and I have not made any mention of any form of organization by which all the elements of the Mafia, or better, of the Mafia bands, are joined together and disciplined. I have not mentioned it for the simple reason that such a form of organization does not exist.’ The jurist does

admit that ‘occasionally, two or more bands, whether neighbouring or distant, unite to commit an offence’ (2002: 29). However, since the proper character of a criminal association, such as defined in the Italian criminal code, was the permanence of association for criminal ends, not attributing a permanent character to the Mafia organization amounted to exempting it from any possibility of being suppressed and leaving it to float in a legal vacuum.

Thus, constrained by its incapacity to pursue the Mafia organization in terms of its being a criminal association, the justice system turned its attack to individual ‘mafiosi’. Nevertheless, since this category was also absent from the criminal code, the latter could be pursued only for crimes that they had personally committed and which engaged their individual responsibility. The establishment of proof was also rendered very problematic by another factor: the dissociation between those who had ordered the crime and those who had carried it out, a mode of operation characteristic of the Mafia (2002: 42). The scene of the crime could, all things being equal, be reconstituted, whereas the ‘obscene’ – what played out ‘off scene’<sup>3</sup> – in the wings where the murders were decided upon, remained in the shadows.

It is the reason for which a good number of homicide trials pursued between the end of the 19th and the end of the 20th centuries were invalidated. The most famous of these was that during which a Sicilian politician, Salvatore Palizzolo, was accused of being the person behind the murder of the director-general of the Bank of Sicily, Leopoldo Notarbartolo, stabbed to death in a train by two railway workers. In that case as well – we are in 1904 – the defendant was acquitted for ‘insufficient evidence’ and could declare without fear: ‘If by Mafia you mean the sense of honour taken to its extreme, generosity of spirit which confronts the strong and is indulgent towards the weak, a loyalty towards friends which is stronger than anything else, even death; if by Mafia you mean these feelings and these attitudes, even with their excess, then you are dealing with distinctive markers of the Sicilian soul. I declare I am ‘mafioso’, and I am proud of being one!’ (Renda, 1997: 26).

This definition of the mafioso as the supreme expression of the Sicilian character echoes that which the folklorist Giuseppe Pitré affirmed on the occasion of the same trial so as to preserve the Sicilian culture from the attacks formulated by the ‘northerners’ who, by equating Sicily with the Mafia, threatened to criminalize the whole island. For that scholar, who deplored ‘the sad fate to which the term Mafia has been condemned, a term which still yesterday expressed good and innocent things but which is now forced into representing bad things’, ‘Mafia’ in its original sense was synonymous with ‘beauty, grace, perfection, excellence, [...] the sense of what it was to be a man, self-assurance, even taken to the extent of audacity, but never arrogance, never hubris’. And most notably he declared: ‘The Mafia is neither a sect nor an association. It has neither rules nor statutes. The mafioso is neither a thief nor a brigand ...’ (Pitré, 2002: 9–13). Being defined in this way, the Mafia and the mafioso were beyond the reach of justice.

It is easy to see how, in order to be operative, judicial descriptions had to effectively counter these definitions of a culturist nature which were given authority by the scholarly experts of the period and which were widespread among the local population. But until the end of the 1960s, the intuitions formed by judges and police who were dealing with these ‘brigands’ remained purely conjectural as to the organized and structured character of their crimes. Certain jurists, such as Vincenzo Manzini (1983) perceived the Mafia as an organization which was not only immoral but also committed to crime. But beyond this it still had to be proven that the Mafia associate was fully in touch with the criminal programme of his association. This proof was difficult to establish as long as the state of belonging to the Mafia organization and the acts that it implied remained covered in secrecy (Chinnici, 2006b: 60–61). Such secrecy was not only maintained within the Mafia itself, but, in the form of the ‘law of silence’ or *omerta*, it extended to a large part of the population.<sup>4</sup> Mafia murders were neither confessed to by their perpetrators nor were complaints

laid by the family and friends of victims. Even if those who were behind the murders were known by everyone, their names circulated only by the path of covert gossip.<sup>5</sup>

In certain rare cases, examining magistrates, such as Cesare Terranova, attempted to get around the intrinsic limits to an anti-Mafia enquiry and have dossiers drawn up for trials. But these judicial procedures proved fruitless, systematically concluding in the acquittal of the majority of the accused because of ‘insufficient evidence’<sup>6</sup> – an outcome which did not prevent, in 1979, the assassination of the examining magistrate.

The impunity of the Mafia was perpetuated for yet another reason: the judges belonged, for the most part, to the same system of notability as the chief landowners, the well-to-do or the politicians whose interests were defended by these ‘entrepreneurs of violence’ (Di Lello, 1995: 55). This conjuncture, which extended up until the end of the 1970s, prevented a satisfying response to be brought to the question ‘what is the Mafia?’, with the system of power implicitly relying on the ignorance of any solution to this problem.

### **‘What do mafiosi do?’**

The difficulty of bringing an accusation against the Mafia in terms of its being a criminal organization led a certain number of magistrates to shift their form of questioning. The latter was no longer ontological but pragmatic in nature. For want of being able to answer from the judicial point of view the question ‘what is the Mafia?’, the judges considered ‘what kind of offenders are the mafiosi? What do they do? In what way are their acts against the law?’ These considerations led to the developing of new techniques of investigation capable of circumventing *omerta* and the methods mafiosi used to dissimulate. Their victims and their accomplices might well remain silent, but their activities nevertheless left traces which were clues to be read and interpreted, veritable signatures allowing a link to be traced back to the authors of the crimes: ‘Although Mafia crimes can be programmed in the secrecy of the so-called ‘Mafia court’ and carried out by unknown killers, the investment of Mafia wealth must take necessarily place in the open, in obedience to certain uncircumventable laws of the market, and making use of the cooperation and intermediary role of individuals who do not necessarily belong to the Mafia themselves, thereby leaving indelible traces which just need to be sought and tracked down’ (Chinnici, 2006b: 67).

These new methods of enquiry which, in January 1983 – six months before his assassination – judge Rocco Chinnici set out before Italian magistrates meeting in the Palace of Justice of Palermo during the national congress of the *Associazione Nazionale Magistrati (ANM)* [the Italian National Magistrates’ Association], had been essayed from the end of the 1970s by Giovanni Falcone during the ‘Spatola enquiry’.<sup>7</sup> Following the traces left in banks by the clearance of cheques, funds transfers and financial transactions of two ‘Mafia’ families (the Gambino and Spatola-Inzerillo families), and constructing the map of the drug trafficking linking these two Sicilian clans with the United States and Canada, had allowed this Palermo judge to reveal – once the obstacles that national legal systems put in the way of his enquiry had been overcome – the international dimension of Mafia criminality. The Mafia was no longer just a cultural abstraction, a product specifically of Sicily, but a trans-national network of traffickers linked by blood ties or economic relationships. This new model, constructed by deductive logic after a labour of investigation as minutely detailed as it was monumental,<sup>8</sup> was validated by the verdict of the ‘Spatola trial’,<sup>9</sup> which concluded in 1982 with the conviction of the accused. This unprecedented success damaged the Mafia’s air of impunity and brought a new climate of confidence to the Sicilian magistrates engaged in the anti-Mafia battle.<sup>10</sup> These particular magistrates had emerged from an internal reform of the Italian magistracy which broke up the former system of class favouritism and overturned its corporatist hierarchies, and gave greater prominence to the examining magistrates – rather than the judges of

the courts of appeal and the Italian Supreme Court [Court of Cassation] – and to criminal court judges rather than civil court ones (Vauchez, 2004: 25–67). This change had already led a certain number of judges, who had been involved in conducting criminal enquiries and drawing up indictments against terrorist networks during the ‘leaden years’, to come to the fore nationally and to assume a role of expertise in the social sphere (2004: 50). At the beginning of the 1980s, it was anti-Mafia judges like Rocco Chinnici who publically spoke out to bring clear attention to the relations existing between Mafia networks and drug-trafficking, to clarify the place of the Mafia on the national and international criminal stages, and to bring up the thorny question of the relationship between the Mafia and the political world; and this, not only in institutional places but also within schools and universities, in certain service clubs like Rotary, or in encounters with the Catholic world, which had become more and more sensitive to the ‘Mafia question’.<sup>11</sup> Explaining what the Mafia was constituted for that Sicilian judge another way of fighting against a phenomenon which drew its strength from its prevailing secrecy.

The early 1980s thus marked a turning point in the elaboration and promotion of new jurisprudential solutions and unprecedented probatory strategies in the anti-Mafia field, but which had proved conclusive in the area of the struggle against terrorism from the middle of the 1970s. The northern magistrates who had dismantled the terrorist networks had reached a comprehensive single overview of this phenomenon by co-ordinating their investigations on a national scale through the institution of specialist work teams called *pools*, and through the cooperation of ‘repentant’ terrorists (2004: 69–169). In 1983, anti-Mafia judges set up an initial judicial pool whose purpose was to bring together all of the Mafia dossiers into a single wide-ranging enquiry which could illuminate the significance of criminal acts which had occurred at distinct times and places but which could be supposed to form part of a single criminal enterprise. The sharing of the results of various enquiries brought to light the co-ordination of Mafia crimes at the regional and national levels. As a consequence, the pool magistrates called for a law which would give official recognition to what they had discovered empirically: ‘Since the Mafia exists as a criminal and crime-generating reality, Chinnici declared (2006a: 28), the legislator cannot be exonerated from recognizing this fact and thus from enacting a new category of offence.’ When he was asked to provide a sketch of what characterized association with the Mafia in comparison to other criminal organizations, Chinnici identified four such characteristics: secrecy, total loyalty between associates, the connection between Mafia families and its relationship with the structures of power (2006a: 28–31).<sup>12</sup> Herein was the first sketch of a description in law of the Mafia which would lead, in 1982, to the formal establishment of the offence of ‘association with the Mafia’.

## Associating with the Mafia as an offence

The creation of this offence of Mafia association came in response to the necessity of giving a fixed definition to a social phenomenon whose parameters were ambiguous, being perceived on the one hand from a culturalist point of view (where the Mafia was seen as a way of being, the archetypal expression of the Sicilian nature), but on the other hand from a criminological point of view (seeing the Mafia as a loose association of malefactors without permanent links between each other). We have already noted how the difficulty of proving the durable character of any link between mafiosi and of demonstrating how much any associate knew about the criminal plans of their association rendered inoperative judicial attempts to impute to mafiosi an offence of belonging to a criminal association as foreseen by the penal code.

The Rognoni-La Torre law, promulgated in 1982 to define Mafia association in its specificity (article 416bis of the Penal Code) is an extension of article 416 which defines criminal association. The legislation postulates that what characterizes the Mafia association in comparison to simple

criminal association are its methods, and notably three of these: intimidation, the law of silence and submission. As a consequence, any individual may be defined as ‘mafioso’ who derives advantage from the power of intimidation emanating from the capital of violence inscribed in his association – even though this violence is not exercised in any systematic fashion – who protects his organization by his silence and who lives in a relationship of submission towards this institution which takes precedence over the State.

Clearly, such ‘Mafia-related’ behaviour was predicated on the presupposition that the Mafia had an existence. Much more than being a legalized instrument for the repression of the Mafia phenomenon, the Rognoni-Torre law represented the act by which the existence of the Mafia was recognized at law and socially. Mafia-type behaviours would henceforth be punished as such – with little importance given to whether the object achieved through these behaviours was legal or illegal. ‘Mafiosi’ were now subject to a penal sanction of between three and six years’ imprisonment from the simple fact that their belonging to the Mafia, proved by their conduct, was now an offence in itself (Turone, 2008).

This law circumvented the need for ontological proof of the Mafia by putting the accent on Mafia-type practices. Nevertheless, these practices remained difficult to prove. How could intimidation be demonstrated in the absence of evidence from the ‘victims’, and how could submission to Mafia authority be shown without the confessions of persons who were under the subjection of the Mafia organization, since both ‘victims’ and ‘mafiosi’ were subject to the same law of silence. What the magistrates lacked was therefore a term which would allow them to embody both the Mafia and ‘mafiosi’.

### The ‘Buscetta theorem’

At the beginning of the 1980s, the magistrates of the anti-Mafia pool collected a considerable quantity of data on Mafia criminality in Sicily. However, although these data had been brought together in a single database in order to get over the problem of their fragmentary character, the information collected remained difficult to interpret. Covered by the law of silence, the broad internal dynamic of the Mafia association remained opaque.

This weakness in the arsenal of the anti-Mafia investigators was to be overcome when a certain number of mafiosi – a number which would steeply increase over the course of the 1980s – decided to pass their secrets over to the judges. They were called the *pentiti* – repentant informers – borrowing a term which had been used for turncoat terrorists who had collaborated with the Italian state in the previous decade. The motivations of these *pentiti* were various (a crisis of conscience, a fear of being murdered by former associates turned enemies in the course of a ‘Mafia war’, a desire for revenge, opportunism, or other motives), but, following the approach adopted by the anti-Mafia judges, we will set aside<sup>13</sup> these issues to consider only the decisive part that they played in the construction of a new tool for repressing the Mafia phenomenon. This model was called by the media the ‘Buscetta theorem’, after the name of the informer Tommaso Buscetta, which enabled judge Giovanni Falcone to formulate it during the establishment of the indictment for the largest trial ever directed at the Mafia, which came to be known as the Maxitrial. It can be advanced in this context that this trial – which took place in Palermo between 10 February 1986 and 16 December 1987 – was simply the demonstration of this theorem in action.

The trial required first of all that the manner in which the Mafia phenomenon was to be tried had to be adapted to the circumstances: the evidence of the *pentiti* offered ‘a key to the interpretation of the inner process of the Mafia phenomenon’ which corroborated the observations made by the magistrates<sup>14</sup> (Stajano, 2010: 27). The Mafia, in terms of being a criminal macrostructure, required the creation of a special *ad hoc* tribunal. The holding of such a ‘Maxitrial’ necessitated the

construction of a ‘bunker’ where the 707 accused would be tried. The colossal dimensions of this trial reflected the heights of its ambition, as rendered explicit in the terms that inaugurated it: ‘This is the trial of the Mafia organization referred to as Cosa Nostra, a very dangerous criminal association which, by the use of violence and intimidation, has spread and does spread death and terror.’<sup>15</sup> The indictment document extended to 8607 typewritten pages, signed off by Giovanni Falcone and Paolo Borsellino as well as by the judges Leonardo Guarnotta and Giuseppe di Lello on 8 November 1985. It leads from the observation ‘that the Mafia association exists, to which entry is by the ritual swearing of an oath of allegiance, that the new inductee, from that moment, declares himself ready to pursue the goals of the association, among which are absolute loyalty between members, as well as to respect a set of rules of behaviour whose principles are blind obedience to leaders, complete secrecy and the law of silence.’<sup>16</sup> Three years had passed since the promulgation of the Rognoni-Torre law, years marked by feverish work in the construction of an argumentation capable of bringing to trial the top bosses of the Sicilian Mafia. Taking as its starting point a description of the Mafia – in a manner that the informant Tommaso Buscetta allowed to be rendered formal – as a secret society of an initiatory type, permanent in character, centralized and with a fixed hierarchy (and not dispersed in autonomous ‘families’), the examining magistrates asked that the members of its governing body – called the ‘commission’ or ‘cupola’ – be held responsible for all the homicides committed as part of a single criminal purpose, without it being necessary to establish the direct involvement of each one of these leaders in each murder.

The court pronounced nineteen sentences of life imprisonment and prison terms amounting to more than two thousand years. But these sentences which validated the ‘Buscetta theorem’ were immediately faced with several forms of criticism, coming from both the judicial world and the world outside. One remembers the sharp exchange of opinion between the Sicilian intellectual and author Leonardo Sciascia and the anti-Mafia judges, who were accused by him of blurring the elementary rules of the democratic state, driven by their own egocentrism.<sup>17</sup> Within the ranks of judges, the election of judge Antonino Meli to head the Office of Investigations of the Prosecution Service of Palermo, in the face of the candidacy of Giovanni Falcone, had the effect, following previous administrative practice, of dismantling anti-Mafia investigations, so annihilating the work of the anti-Mafia pool and the conceptual elaboration of a unitary Mafia model. This vision was once again damaged in 1990, when the Maxitrial appeal judges contested the decision of the previous jurisdiction on the grounds of an ‘uncircumventible principle of our legal system: the strictly personal character of criminal liability’ (Santino, 1992: 126). But a new twist occurred in January 1992 when the Italian Supreme Court reaffirmed the ‘Buscetta theorem’ and confirmed the sentences handed down at the initial High Court trial. For its part, the Mafia’s riposte was shown in the assassination of Giovanni Falcone on 23 May 1992, then in that of Paolo Borsellino on 19 July of the same year. These two murders, for which the Mafia adopted a ‘terrorist’<sup>18</sup> *modus operandi*, constituted in the eyes of Italian citizens a flagrant proof of its existence (Lupo, 2007: 46).

The Maxitrial marked an epistemological turning in the way the Mafia phenomenon was perceived. The descriptive models developed over the course of the 1970s and 1980s by social science researchers on the basis of archival studies (Hess, 1970) or anthropological and sociological fieldwork (Schneider and Schneider, 1976; Blok, 1974; Arlacchi, 1983), which all postulated the non-structured, opportunistic and discontinuous character of Mafia association, were shown to be obsolete. The judges firmly established their expertise on the Mafia question (Vauchez, 2004: 101–109), conferring on the existence of the Mafia as a unitary criminal organization a status that had both judicial and scientific veracity.

During the compilation of the indictment document for the Maxitrial, Giovanni Falcone had taken care to avoid extending enquires into the links maintained by mafiosi with the outside world where one contact led to another, for fear of diluting the Mafia’s specifically criminal character.

The judge on the contrary concentrated on searching out forms of liability that were clearly definable under the penal profile.<sup>19</sup> But if the objective of the examining magistrates was to isolate the Mafia in terms of being a 'social problem' (Blumer 2004), and to circumscribe this 'disease' so as better to 'treat it',<sup>20</sup> the results of their investigations undertaken in Sicily and in the rest of Italy uncovered 'the well-camouflaged and thus all the more insidious capacities for insertion of the Mafia element into vast sectors of society, at the heart of which they [the mafiosi] succeed in bringing about that entanglement of collusions and complicities which constitutes the fertile ground on which the Mafia entity has for a long time been able to prosper, grow stronger and become more widespread.'<sup>21</sup> Chapter 5 of the indictment in the Maxitrial, entitled 'Close contacts in the social, political and economic spheres' is entirely devoted to these forms of 'organic compenetration' (Santino, 1992: 113–114). Although the view of the Mafia phenomenon adopted by the judges had been constructed on the rejection of the culturalist paradigm and on making a separation between the Mafia – as a criminal organization – and the surrounding society, the evidence assembled by them revealed a multi-level structure entertaining a complex pattern of relations with the outside world (Santino, 1992: 117): a 'base-level' composing the 'actual executants of the offences'; a 'second level', composed of the 'behind the scene instigators, being the heads of the Mafia families'; a 'third level', 'politico-financial' in nature, which constituted the 'sphere of relationships between the Mafia and the political'. The anti-Mafia trials of the 1990s would attempt to give a juridical qualification to these relationships.

### **Criminal liability, political liability**

Since 1972, the date of the first report of the Parliamentary Commission into the Mafia phenomenon, the Mafia has been officially identified as being 'a part of the structure of public power' (Pepino, 2005: 18). During the 1980s, the Mafia question progressively became the basis of publicly-made denunciations by political personalities, by the press and within activist movements which incriminated the Christian-Democratic Party and the other parties which had participated in government (notably the Socialist Party). At the beginning of the 1990s, the treatment of the well-known issue of the corruption of politicians who assured the maintenance of their electoral base thanks to the capacity for fine penetration of the Mafia networks shifted on to the penal stage (Briquet, 2007: 82). The revelation of political complicities from which the Mafia benefited was therefore not new; what was unprecedented, however, was their transcription into relevant categories for the processes of law.

In 1992, a new offence was established by decree punishing the 'vote in return for Mafia favours' which came to complement the 1982 Rognoni-Torre law which centred upon the relations between the Mafia and economic activities (Grosso, 1994: 202).

In 1993, the Palermo prosecutor's office asked the Senate to lift the parliamentary immunity of Giulio Andreotti so as to authorize the pursuit of investigations into the Christian-Democrat life senator. The clamour aroused by the assassinations of Falcone and Borsellino prevented the Parliament from refusing that an action in justice be taken against that politician who had seven times been Prime Minister and who had been a leading figure in Italian history since the end of the Second World War. Andreotti was to be accused of the offence of 'association with the Mafia'. This charge was to be requalified in 1994 as one of 'external assistance to the Mafia association Cosa Nostra', an offence which did not necessarily imply a formal belonging to the association, but implied 'a knowing contribution to the maintenance and strengthening of the association'<sup>22</sup> (Grosso, 1994: 194).

The indictment against Andreotti consisted of a long narrative<sup>23</sup> weaving the pattern of the relationships between politicians, financiers, entrepreneurs and mafiosi where there was a direct or indirect link to the Christian-Democrat senator. Andreotti challenged the imputation that



this contained a ‘sort of collective crime performed by the Sicilian Christian-Democrat Party’ (Andreotti, 1995: 5). His line of defence led him to minimize the capacity for harm of the mafiosi: ‘We knew that they were not angels [...] but they nevertheless did not represent a national danger’ (Lupo, 2007: 47), and to withdraw behind his ignorance: of the Mafia in general and of the implication of eminent personalities of his party in that criminal association, whether as associates themselves or as accomplices (2007: 68). Beyond the stature of the accused, who was the only defendant in this trial, the stakes were significant, as it was no longer simply a new model of the Mafia, one which was broader and coextensive with its links to the outside world, but a new history – the ‘true history of Italy’ (Montanaro and Rutolo, 1995), read from the perspective of its dark and ‘obscene’ side – which was asking to be accredited by the judiciary institution.

On 23 October 1999, the High Court of Palermo acquitted Giulio Andreotti for ‘insufficiency of proof’. The existence of relationships between the Christian-Democratic senator and various personages of the political, economic and financial world linked to the Mafia was amply demonstrated; however, Andreotti’s actions were not significant from the penal point of view,<sup>24</sup> to the extent that it could not be proven that the accused had an ‘awareness of the nature of [these] links’ (Pepino, 2005: 38). The court concluded that ‘there was not sufficient proof that senator Andreotti had acted with full awareness and intent to bring a significant contribution to the Mafia association for the purpose of maintaining and reinforcing the organization of this association’ (2005: 76). This judgment was reversed on appeal: ‘Andreotti was fully conscious of the fact that his Sicilian interlocutors maintained friendly relations with certain Mafia chiefs.’ The court imputed to the defendant ‘a veritable participation in the Mafia association, which was noticeable and prolonged over time’ (2005: 142), that is to say, precisely, the offence of ‘external assistance’ (2005: 147). But this judgment of the Appeal Court of 2 May 2003, confirmed by the Italian Supreme Court in 2004, affirmed that the ‘availability of the accused to mafiosi was not extended beyond 1980’ (2005: 42). And since the offences committed before 1980 were prescribed under the statute of limitations, the defendant was acquitted.

Right throughout its course, the Andreotti trial was accompanied by controversies – within the body of judges, within the media and the political and academic worlds – as to the well-foundedness of the indictment. Consigning the Andreotti judgment ‘to the court of History’ (2005: 142), the Court of Appeal bequeathed to society the question of the boundary between politics and morality. If the relationships, certified to different degrees of judgment, between the senator and several political personalities linked to the Mafia did not engage the penal liability of the accused, they no less implied his ‘political liability’ (Macaluso, 1995). This latter concept is defined by the law. The Italian Constitution (art. 95/2) foresees in this regard forms of collegial political liability, in contrast to the principle of the individuality of criminal liability. In other words, a leading politician, even if he is not criminally responsible for the acts of his lieutenants, must answer for the behaviour of third parties with whom he is linked for political reasons and may face political sanction for these behaviours (Neppi Modona, 1994: 186). In fact, on 6 April 1993, the Parliamentary Anti-Mafia Commission – which since the previous year had been enquiring into the links between Cosa Nostra and the political system – did signal ‘the potential political liability’ of Andreotti and pronounced on its ‘incompatibility’ with the democratic order.<sup>25</sup> However, in the context of the crisis of the ‘First Republic’, where new political balances were being established upon a unanimous rejection of the practice of ‘filling in gaps in the law’ adopted by the judges,<sup>26</sup> the Italian Parliament did not judge it timely to take this recommendation on board.

The outcome of the Andreotti trial had the effect of calling into question the faculty of the magistracy to bring the law to bear upon the ‘grey zones’ of the power nexus connecting the Mafia to the political sphere. Nevertheless, this trial created a precedent of a judicial investigation for ‘external assistance’, which potentially could be used to pursue other politicians. A certain number of judges

continue to think that it is possible to go after these ‘powerful’ persons whom others before them definitively chose not to subject to enquiry, since the penal treatment of relationships between the Mafia and the political domain has henceforth passed within the limits of what is ‘doable’.<sup>27</sup>

## Who are the ‘mafiosi’?

The ‘Andreotti Trial’ brought about a split within the Anti-Mafia Directorate<sup>28</sup> of the Palace of Justice of Palermo – nicknamed, since the era of Falcone, the ‘palace of poisons’. Several magistrates were put off by what they considered as both a judicial and political failure, with Andreotti being totally absolved by a public opinion that was more and more hostile to ‘political trials’. Was one really obliged to indict a leading politician for ‘external assistance to a Mafia association’? It was this hybrid penal category, this ‘legal monster’<sup>29</sup> which has come under accusation: an offence of association being able to be applied to someone who is not associated with the organization. Every trial that was lost arrested the progress of the anti-Mafia investigators, who were accused of fomenting judicial plots for political ends. Tracing a demarcation line between political and moral truth on the one hand, and the – always partial – judicial truth on the other, a group of prosecutors,<sup>30</sup> who were opposed to the judges in charge of the Andreotti trial, were content to establish *a minima* heads of indictment, without trying to fulfil the role of experts of the social world that had fallen to the examining magistrates in the 1980s. But their adversaries considered the relation between the Mafia and the political domain to be structural, and saw in it the root of the Mafia problem. In their view, handing down light sentences did not take account of the gravity of that intertwined nexus of relationships with ‘normal’ society, which gave the Mafia its specific character in comparison to other criminal associations. It was in these peripheral connections that the vital organs of the Mafia resided. It was therefore in this sector that intervention was necessary if effective action was to be made with regard to this phenomenon, and in this sense the concept of ‘external assistance to a Mafia association’ was the only juridical category that could be mobilized. The political cost of this imputation mattered little in the face of the obligatory character of penal action, which was a fundamental principle inscribed in the Italian Constitution.

The contention between these two factions – through which were in conflict two different sociological models of the Mafia: on the one hand as a criminal association, on the other as a network (Sciarrone, 2006) – became even sharper on the occasion of a judicial enquiry implicating the President of the Sicily Region Salvatore Cuffaro.<sup>31</sup> ‘Operation Ice’ started out in the early 2000s, bringing to light a network of medical doctors linked to the head of Cosa Nostra, Bernardo Provenzano, the presence of operatives infiltrated within the police services which were carrying out telephone surveillance and the protection assured to these doctors by the President of the Region who informed them that they were under police watch. This operation was prematurely brought to an end: alerted by the regional President; the doctors adopted other means of communication. Once the judicial enquiry was closed, there remained the decision of what heads of indictment should be retained. The prosecutors were unanimous in wishing to accuse the doctors, Michele Aiello and Giuseppe Guttadauro, of the offence of ‘Mafia association’ and the ‘moles’ Riolo and Ciuro of ‘outside assistance to the Mafia association’ but were divided as to charges against the President of the Region. The ‘minimalist’ prosecutors proposed accusing him of *favoreggiamento aggravato* [aggravated connivence], a further category at law created after 1982, where ‘assistance in evading police investigations’ (article 378 of the Penal Code) was ‘aggravated’ by the fact of being accorded to the Mafia association Cosa Nostra. This polemic reached its height with the withdrawal of one of the deputy prosecutors in charge of the indictment of Salvatore Cuffaro, Antonino di Matteo, who on 15 December 2006 quit the trial of ‘Aiello + 14’ and demanded the opening of a new trial indicting the President of the Region for ‘outside assistance to a Mafia association’.

The ‘Aiello + 14’ trial concluded, in January 2008, with the sentencing of Salvatore Cuffaro to five years’ imprisonment for *favoreggiamento semplice*. This change in the charge retained was motivated by the court through the argument that Cuffaro may well have assisted certain ‘mafiosi’ to evade police investigations, but not the Mafia as such. In January 2010 the Court of Appeal increased this sentence to eight years, accepting that there were in fact aggravating circumstances relating to the Mafia. The Court declared that Salvatore Cuffaro was ‘fully aware of favouring the Mafia association’. The other trial indicting the President of the Region, referred to as the ‘Cuffaro B’ trial, concluded with the case being dismissed since the accused had already been convicted.

Over and beyond these judicial controversies, the ups and downs of these trials indicting members of the ‘Mafia bourgeoisie’ (Santino, 1994) demonstrate that although the question ‘what is the Mafia?’ has been able to be clarified on the judicial scene, the answer to the question ‘who are mafiosi?’ remains unclear. How should one measure the degree of criminal involvement of individuals who are not directly involved in the Mafia association? And how might one measure the degree of ‘awareness’ of that involvement? This is the same problem confronting magistrates in charge of trials for racketeering: what charges should be brought against commercial business people who, certainly, have been induced – sometimes even through the use of violent methods – into passing over money to malefactors, but who finally end up by associating with mafiosi, accepting their investments, laundering their money, taking on ‘friends of friends’ into their businesses and so on, and benefiting, in exchange for paying a ‘tax’ which in the end is quite modest, from all the advantages of the criminal economy (control of markets and calls for tenders, intimidation of competitors at public auctions, preferential tariffs, etc.). Many entrepreneurs who occupied the role of ‘victims’ in the extortion trials of the 1960s, are now appearing before the courts as ‘accomplices’, accused of ‘external assistance’, even of ‘association with the Mafia’ depending on the extent of their participation in the criminal enterprise. Herein lies the interest of the anti-Mafia trials as laboratories allowing the observation of the changing of the ‘moral economies’ that has taken place over the last thirty years in Italy.

In reality, these forms of interlocking between Mafia criminality and the dominant political or economic class in society are as old as the Mafia itself, just as is the presence of the liberal professions – the medical profession in particular<sup>32</sup> – within the Cosa Nostra. The ‘Aiello trial’ is a condensed slice of society which brings out the composite nature of the Mafia phenomenon and the sophistication of the processes of judgment that the anti-Mafia magistrates have to apply to unravel the various interconnected but different forms of responsibility. Well-known as a doctor, Giuseppe Guttadauro is the head of Brancaccio, one of the quarters of Palermo with the greatest Mafia concentration. By day his surgery is frequented by the well-to-do of Palermo, by night by killers, receivers and drug traffickers. Protagonist, for his part, of a colossal swindle at the expense of the Sicilian health system, Michele Aiello is one of the wealthiest medical practitioners in Sicily. Bernardo Provenzano designated him to his associates as ‘the same person as myself’,<sup>33</sup> which constituted an irrefutable proof of his belonging to the Mafia association. But should one not restrict oneself to the internal criteria of affiliation and consider as ‘mafiosi’ only those individuals who have been ritually inducted into the Mafia or considered as ‘the same thing’, Cosa Nostra, by its members? Or alternately adopt a more complex vision of this phenomenon, and seek to punish what is the most deleterious for the society: those interfaces which nourish the Mafia criminality?

In relation to the murder of Notarbartolo in 1904, Gaetano Mosca had distinguished the murderers properly speaking (whether the instigators or those who actually carried it out) from the crowd of swindlers who benefited from the acquittal of Palizzolo and of the ‘tolerators’ – those who consented to the frauds and so, actively or passively, abetted the fraudsters (Mosca, 2002: 64). These are the types of ethical questions that the Mafia trials, often stigmatized as ‘political trials’ raise in reality.

Translated from the French by Colin Anderson

## Notes

1. Indeed, the theory of equivalent conditions (art. 110 of the Penal Code) gives formal recognition to the co-responsibility of all those who participate in the same offence by whatever means, whether it be as an accessory, by commission or by simple collaboration. This principle equally applies to homicide (art. 575 c. p.).
2. G. G. Loschiavo, *Il reato di associazione per delinquere nelle provincie siciliane* (1933) and G. M. Puglia, *Il mafioso non è un associato per delinquere* (1933), are quoted by Turone (2008: 5, n. 4).
3. I am using this term in its etymological sense, as used by Roberto Scarpinato (Lodato and Scarpinato, 2008: 31–37), the examining magistrate of the ‘Andreotti trial’, and the current State Prosecutor in the court of Palermo.
4. Basing her conclusions on a long tradition, the anthropologist Maria Pia Di Bella (2008: 75–86) postulates that *omerta*, the supreme attribute of the mafioso, was rooted in a continuum and constituted the extreme growth-point of a local culture, encapsulated within a relationship of defiance towards a central State perceived as being foreign or inimical. Nearly a century before her, the political analyst Giuseppe Alongi (1977: 5) declared that the ‘the ways in which the Maffia [*sic*] seek to inhibit the legal process’ – since the notion of *omerta* prohibited appealing to the justice system to resolve disputes – simply exacerbated the reticence of all Sicilians, or almost all, to have recourse to the law.
5. Drawing on different case studies, Cyril Lemieux (2007) examined the conditions for an accusatory regime characteristic of ‘gossip’ or ‘scandal’ to pass into being a form of accusation that was publically put about and sustained. I for my part have shown how some ‘mafiosi’, designated by rumour as being responsible for the murder of a young anti-Mafia militant, came to be accused of homicide at the end of an off-again on-again judicial process and public affair which extended over quarter of a century (Puccio-Den, 2012).
6. See for example the *Sentenza contro La Barbera Angelo + 116*, 22 December 1968, in the Court of Assizes of Cantanzaro (Justice Pasquale Carnavale). This document is consultable in *Commissione Parlamentare Antimafia, Documentazione allegata*, 8th Legislature, doc. XXIII, 1/X, v. 4, t. 17: 1230–1232.
7. A copy of the ‘Spatola enquiry’ is consultable at the Giuseppe Impastato Sicilian Centre for Documentation in Palermo.
8. These methods have become standard. They are still in use today by prosecutors enquiring into the associations between the Mafia and the economy and are taught to students in law schools.
9. ‘Spatola Rosario + 119’, decision of the examining magistrate Giovanni Falcone, 25 January 1982.
10. Giuseppe Di Lello (an anti-Mafia judge himself as well) described the historical and social shifts which affected the role of the judges; shifting from effectively turning a blind eye to engaging in a struggle to curb the Mafia and to risking their lives (1994). It was to the new head of the Palermo Judicial Investigator’s office, Rocco Chinnici, that the mother of Giuseppe Impastato turned (see note 5) when she revealed to him the name of the person who had contracted the murder of her son: the mafioso Gaetano Badalamenti. This recourse was interpreted as being an historic transition ‘from vengeance to justice’ (Puccio-Den, 2012).
11. Rocco Chinnici’s addresses were published by Zingales (2006).
12. Address of Rocco Chinnici to the international Congress *Mafia e potere* [The Mafia and Power], Messina, 19–23 October 1981.
13. For the anti-Mafia judges, the prime need was to retain this essential source of their investigations by sheltering it from criticisms about how sincere each repentance was, which, by disqualifying some *pentiti* on moral grounds, would delegitimize their evidence, which was critical on the judicial level (Falcone, 1994: 33–65).
14. The examining magistrates of the Maxitrial were watchful of attributing to the evidence of the *pentiti* only a confirmatory value for the results already obtained through their enquiries (Stajano, 2010: 27). More generally, the judges rejected use of the expression ‘Buscetta theorem’ as this would have suggested a type of deductive reasoning which depended upon the word of a ‘mafioso’.
15. ‘Ordinanza-Sentenza contro Abbate Giovanni + 706’, Office of Investigation for Penal Trials, High Court of Palermo, 1985: 713.

16. 'Ordinanza-Sentenza contro Abbate Giovanni + 706', Office of Investigation for Penal Trials, High Court of Palermo, 1985: 1113.
17. The newspaper articles and the polemical texts of this author are collected together in Sciascia (1989).
18. I am using this work here in its literal sense, as these methods were aimed at leaving their mark on the population and at creating a climate of insecurity, but I have put 'terrorist' in inverted commas because it was also a local internal categorization, as the Mafia had progressively come to be seen by Italians in the course of the 1980s as a form of 'terrorism'. (Puccio-Den, 2012).
19. From 1982, Falcone had emphasized the necessity of achieving a 'meticulous reconstruction of the most specifically criminal aspects of the Mafia organizations' which must take priority over the investigation of 'networks of complicity and connivence' (Falcone, 1994: 221–228).
20. On the nosographic construction of the Mafia, I take the liberty of directing the reader to my 2009 book (Puccio-Den, 2009) and in particular to chapter V.
21. 'Ordinanza-Sentenza contro Abbate Giovanni + 706', Office of Investigation for Penal Trials, High Court of Palermo, 1985: 1204.
22. This juridical category was created through the application of art. 110 (which defined 'assistance towards the commission of a crime') to art. 416bis of the Penal Code.
23. The 1,915-page 'Memoir' summarizing the case of the 'Andreotti Trial' has been published in abridged form in Arlacchi (2005).
24. The High Court judgment of the 'Andreotti Trial' (High Court of Palermo, 23 October 1999) has been published in Pepino (2005).
25. Report of the Parliamentary Anti-Mafia Commission compiled by the deputy Luciano Violante, approved by the XI<sup>th</sup> Legislature, p. 29.
26. The 'First' Republic collapsed in 1994 in the wake of scandals brought to light by the '*Mani pulite*' [Clean Hands] investigation which implicated the whole political class which had been in power in Italy since the end of the war. The new political figures to come to the fore, such as the entrepreneur Silvio Berlusconi, then launched an 'anti-justicialist' campaign which would gain the support of the parties of the Left.
27. I am borrowing this expression [Fr. *jouable*] from Violaine Roussel (2002: 113), who uses it within the context of her analysis of the activist dynamic of the French judges who were engaged over the 1990s in enquiries into political scandals.
28. The *Direzioni Distrettuali Antimafia* (DDA) were created in 1992 under the impulse of Giovanni Falcone in all Italian cities where a Court of Appeal sits. These units, which carry out judicial anti-Mafia enquiries, are co-ordinated by the *Direzione Nazionale Antimafia* (DNA), located in Rome.
29. This term has been used a number of times in several press articles, but also in the parliamentary debate relating to the decision of the Supreme Court of 9 March 2012 quashing the conviction of the Forza Italia senator Marcello dell'Utri to seven years' imprisonment for 'external assistance', in order to discredit the standing of this offence and the judges who make use of it.
30. One should recall that a new code of judicial procedure was adopted in Italy in 1989 and that, under this new system, which is by nature accusatory, the examining magistrates have been replaced by the public Ministry of Justice.
31. This controversy is described by Lodato and Travaglio (2005: 387–443). It was also the object of some ethnographic fieldwork that I conducted in the Palermo Palace of Justice between 2006 and 2009, when I was able to meet – though not without difficulty – the magistrates of the two opposing camps.
32. The examples of mafioso doctors are numerous, from Melchiorre Allegra, who in 1937 left some evidence of his integration into the Mafia, to Michele Navarra, head of the Corleone 'family' from 1940 to 1958. This also comes about from the position, at the heart of various social networks, that their profession confers on them.
33. The *pentito* Giovanni Brusca, examined as a witness during the 'Aiello + 14' trial, stated that he had received a *pizzino* from Provenzano – one of the letters by which the head of Cosa Nostra, who was fleeing from justice, communicated with his associates (Puccio-Den, 2011) – where the latter asked him to treat the Sicilian entrepreneur 'as if he was the same person as he was'. Penal Trial n° 74/05 R.G. indicting

Aiello Michele, Rome, session of 7 June 2006. I followed a number of the sessions of the ‘Aiello + 14’ trial in Palermo. The deputy prosecutor, Maurizio de Lucia, put at my disposal the whole transcript of the trial, recorded and transcribed by the Cooperative of Indictment Services O.F.T. I take this opportunity to warmly thank him.

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