

**‘Between crime-fighter and judge: a study
of the legal and cultural influences on the
pre-trial role of the Italian prosecutor with
particular reference to the definition of the
crime problem’**

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Abstract

The Anglo-Saxon literature on Italian prosecutors (and the Italian criminal justice system in general) is limited. Moreover, the literature using a socio-legal approach and trying to understand what prosecutors do in practice is almost inexistent. This study seeks to fill, partially, this gap. Legal actors are, obviously, an extremely important focus for those who intend to study criminal justice and criminal procedure. Legal systems are applied and interpreted (translated to use Langer's words) according to different legal cultures. Amongst the judicial actors who appear to be, legally, in the position to determine the way the legal system works there are prosecutors. Prosecutors carry out many functions and, in Italy, they are involved from the beginning of the investigation till the end of the trial. In other words: Italian prosecutors play a very important part during both the pre-trial and trial phase. We will concentrate on the former trying to answer one main question: what prosecutors do in practice? In particular, this is a study of the legal and cultural influences on the role and function of Italian prosecutor with particular reference to their gate-keeping role. In this sense the thesis brings out the distinctive impact of both the legal framework and prosecutors' professional culture and identity on the prosecutors' capacity to mediate of 'crime control' policies. While we will study this we will also analyze Italian prosecutors' legal and professional culture and their relationship with the police. This will be crucial to understand the way prosecutors take gate keeping decisions. The analysis of the Italian case seems to be very important. It shows that, when it comes to definition of the crime problem, prosecutors still play an important and distinct role. Important because their decisions still influence the definition of priorities (i. e. they do not seem to be mere executors of anticrime policies). Distinct because prosecutors appear to be able to mediate the impact of external influences. So, they have a (partially) different idea of priorities compared to the dominant political culture. This puts them in a different (distinct) position. To sum up: in Italy the prosecutors' role during the pre-trial phase of being 'between' crime fighter and judge is visible. There is room for prosecutors' choices and decisions. To corroborate this thesis we used the examples of street crime, immigration and the impact of moral panics on prosecutors' decisions. These are all issues which concern very much the "fight against insecurity" which is considered, in the western capitalistic countries, a

crucial problem for the central state, the public and the media. We will try to demonstrate that, although Italian prosecutors are affected by the “problem of security” and, certainly, can not block the evolution (or involution) of the criminal justice system, they are in the position to limit the impact of these external influences.

Acknowledgments

I would like to thank those who supported me during these four great years.

My parents, because they believe in me and always encouraged me to do something different.

My friends, because they shared with me the joy and the pain of doing a PhD. I am sure I will forget someone, please forgive me. Dr. Elen Stokes, Dr. John Coggon, Dr. Richard Williams, Mr. Mauro Barelli and Mr. Ho-Sam Bang, because they have been wonderful colleagues. Ms. Annette Morris and Dr. Lewis Bott, because they taught me a lot about academia (and I was teaching about wine and food).

Obviously, the three wonderful ladies: Sharron Alldred, Helen Calvert and Sarah 'Google' Kennedy, because they helped me through the administrative jungle that comes with the PhD full package.

I am also deeply thankful to the Cardiff Law School for giving me the opportunity of doing a doctorate. And I also want to thank my very first tutor in Cardiff Prof. Thomas Watkin, who has always given me very valuable advice in the last ten years.

The examiners, Prof. John Jackson and Prof. David Miers and Prof. Richard Lewis who chaired my viva. I learnt a lot while I was defending my thesis.

Finally, I must thank all the persons that helped me with my research. In particular: Mr. Francesco Parisoli, Prof. Valerio Marotta, Ms. Maddalena Padovan, Mr. Antonio Colonna and Ms. Lucia Russo.

I did not forget my supervisors: Dr. Stewart Field and Prof. David Nelken. They have been patient with me and taught me a lot. It has been a privilege to work with them. I will not forget it.

Comparative law, especially the study of legal institutions and procedures, should be ranked among the most illuminating branches of legal science. When teaching a course that emphasizes comparative procedure, I remind students of the justification that was given them when they were asked to learn Latin in school: We study Latin to learn English. So with comparative law... The purpose of comparative study is to help understand what is distinctive (and problematic) about domestic law.

John H. Langbein ("The Influence of Comparative Procedure in the United States" 43 *American Journal of Comparative Law*, 545)

**To Mum and Dad, my teachers and my friends,
with admiration**

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Abbreviations

- ANM - *Associazione Nazionale Magistrati* (Italian national association of magistrates)
- Corte cost. – *Corte costituzionale* (Italian constitutional Court)
- cost. – *costituzione* (Italian constitution)
- cp - *codice penale* (Italian criminal law code)
- CPP – *code de procédure pénale* (French code of criminal procedure code)
- cpp - *codice di procedura penale* (Italian code of criminal procedure)
- CPS - Crown Prosecution Service
- CSM - *Consiglio superiore della magistratura* (Italian higher Council of the judiciary)
- CJA - Criminal Justice Act 2003
- disp. att. - *norme di attuazione del codice di procedura penale* (Italian provisions to implement the criminal procedure code)
- D. L. - *decreto legge* (Italian delegated legislation)
- D.Lgs - *decreto legislativo* (Italian delegated legislation)
- d. P. R. - *decreto Presidente della Repubblica* (Italian delegated legislation)
- GG – *Grundgesetz* (German constitution)
- GIP - *giudice per le indagini preliminari* (Italian preliminary investigation judge)
- GUP - *giudice per l'udienza preliminare* (Italian preliminary hearing judge)
- GVG – *Gerichtsverfassungsgesetz* (German law on judicial organization)
- ord. giud. - *legge ordinamento giudiziario* (Italian judicial law order)
- PACE – Police and Criminal Evidence Act 1984
- PG - *polizia giudiziaria* (Italian judicial police)
- sent. - *sentenza* (sentence of the Italian constitutional Court)
- StPO – *Strafprozeßordnung* (German code of criminal procedure)
- VPO - *vice procuratore onorario* (Italian law graduates who are entitled to represent the prosecution in minor cases)

**CHAPTER I. INTRODUCTION: SUBJECT,
PURPOSE AND STRUCTURE OF THIS STUDY**

1. Subject

This study seeks to provide a better understanding of Italian prosecutors' functions during the pre-trial phase. This will not be a normative analysis. We intend to focus on what prosecutors do in practice during the pre-trial phase. This involves empirical (see chap. 3 for the methodology), comparative and socio-legal research. But the reader will not find (most of the times) direct comparison between different legal systems (e. g. in Italy and in England and Wales). We intend to study the Italian case using concepts (e. g. legal culture, definition of the crime problem etc.) which are familiar and mostly developed within the Anglo-American academic literature. These will help to categorize information and conclusions. Moreover, this is not an attempt to develop and reconsider the Italian literature on prosecutors. This will be briefly outlined where relevant, but our focus is different. The Italian literature mainly concentrates on the analysis of the legal rules (with some remarkable exceptions that will be explained). We want to concentrate on what prosecutors do in practice. The argument is not that the legal context has no influence. On the contrary we will try to outline the situations where legal procedures *de facto* limit prosecutors' power to take discretionary decisions. But our primary aim is to consider all the factors which are useful to understand prosecutors' role and functions during the pre-trial phase. Amongst these legal rules certainly play a very important role, but, of course, they are not the only criterion we need to look at to understand prosecutors' position. Finally, this study does not encompass an analysis of prosecutors' roles within the whole Italian criminal justice system. The subject is the prosecutor within a specific environment: the pre-trial phase. We will examine the practice of prosecution decision-making, with a particular focus on the way they define their priorities. But this can not be fully understood if we do not provide a broader image of prosecutors during the pre-trial phase. To do this we will examine three issues: the organizational relations within prosecution offices, prosecutors' professional and legal culture and the relationship with the police during the pre-trial phase.

Why is this subject significant? There are various reasons. The most obvious is that there is very little empirical research on Italian criminal justice. The empirically-based literature in English has studied other continental jurisdictions (mainly France), but has not concentrated very much on Italy. Furthermore, a general state prosecution

service has only existed in England and Wales since 1985. So, state prosecutors are relatively new legal figures. It is interesting to analyze what prosecutors do in another jurisdiction in which, in 1989, there was an important reform which modified criminal procedure, which is now (or should be) adversarial in nature. Third, there is a huge academic literature which focuses on the way legal actors take discretionary decisions. But the Italian case is peculiar. This is because there is the legality principle. This study does not intend to engage with the internal Italian debate about the merits and demerits of the legality principle nor with debates as to how it might be reformulated. However, it is interesting to analyze how prosecutors define the crime problem within a legal system where there are no legal provisions aimed at imposing priorities and/or suggesting criteria that prosecutors should use to determine priorities. Finally, in discussing these issues we will also examine *allarme sociale*¹ as a criterion that prosecutors use to determine priorities. The focus will be on how and how much the sense of insecurity, the fear of crime and the images of crime of the dominant political cultures (i. e. media, the central state and the civil society) can influence prosecutors. These are surely significant issues given that insecurity, street crime and the impact of immigration are key problems in any western capitalist country. In this regard, the Italian case looks particularly interesting in that prosecutors seem to be able to limit the impact of these influences.

2. Purpose

The purpose of this thesis is, as we have just said, to identify prosecutors' role during the pre-trial phase. We want to demonstrate that, at this stage, this legal actor is not a mere executor of anti-crime policies decided by the central government and implemented by the police. Italian prosecutors are not simply vehicles to bring into courts the cases that the police have decided to investigate. During the pre-trial phase

¹ This literally means social alarm. Its meaning in practice is similar to moral panics. This means that social alarm is addressed towards 'suitable enemies' who do not fit with certain established societal values (i. e. immigrants). However, 'moral panic' has stronger connotations of disproportionality (for a more extensive definition of *allarme sociale* see chap. 10). According to the Sage dictionary of criminology (McLaughlin E. and Muncie J. (compiled and edited by). "*The Sage dictionary of criminology*". 2001. London: Sage, p. 175) moral panic is defined as a "disproportionate and hostile reaction to a condition, person or group defined as a threat to societal values, involving stereotypical media representations and leading to demands for greater social control and creating a spiral of reaction". See also Cohen S. "*Folks Devils and Moral Panics. The Creation of the Mods and Rockers*". 2002. 3rd ed. London and New York: Routledge.

there is room for prosecutors' discretionary decisions. These legal actors play a substantial role in what criminologists call the social construction of crime (see chap. 9). To understand this we will discuss how prosecutors define their priorities. This is a complicated issue and the meaning of priorities and the difference amongst these will be explained (chap. 9). Moreover, we will describe the criteria for decision-making that prosecutors use to determine priorities (and the differences between them) (chap. 9). Social alarm is one of these criteria so that analysis of the way prosecutors treat social alarm is particularly important. We intend to demonstrate that Italian prosecutors are in the position to mediate the impact of certain forms of social anxiety. It appears that the perception they have of social alarm is different when compared to the perception evident within the dominant political cultures. In other words, the image that the dominant political cultures have of the crime problem (and of the insecurity this creates) is different to the image that prosecutors have. Prosecutors seem to be able to mark this difference and their contribution (as experts) to the definition of the crime problem seems visible. Of course, we are not claiming that these legal actors are not affected at all by external influences. Prosecutors are not formidable walls which can keep the Italian criminal justice system insulated from any major change. In Italy, like in the other western capitalist countries, social alarm (mainly linked with street crime and immigration) has strongly influenced the political agenda and governments (mainly the centre-right coalitions) have passed legislation to deal with these problems. In particular, in the last 10 years there have been various attempts to suggest priorities (mainly street crime and immigration) to prosecutors. The consequence is that now there are procedures that have been de facto imposed on prosecutors as to how to treat certain crimes (see chap. 8, 9 and 11). However, by an analysis of the way Italian prosecutors deal with street crime and immigration, we will be able to demonstrate that the impact of these legal and administrative rules² (as much as forms of social pressure) is mediated by prosecutors.

We said above that, in order to deal properly with these difficult questions, we need to provide a broader image of prosecutors' role during the pre-trial phase. The first issue concerns organizational relations within prosecution offices. The purpose is to describe the meaning of prosecutors' legal independence in practice. This will substantially contribute to the defining of the environment in which prosecutors work

² These are de facto a form of administrative guidance within the prosecution office.

(and take decisions on the definition of priorities). Moreover, legal independence is one of the key characteristics of prosecutors' professional and legal culture. This is the second issue. We will describe and analyze prosecutors' professional self image and their professional and legal culture in practice. Here we aim at demonstrating that prosecutors are in a 'different position' compared to other legal actors (and the police in particular). The last issue regards the relationship with the police during the pre-trial phase. This is relevant because the police are directly involved in the investigation and carry out investigative activities. So, they provide information to prosecutors. Here the aim is to show that prosecutors use two distinct approaches to the supervision of investigations; that these imply a different relationship with the police; and that the choice of the approach depends on the seriousness of the case (in the prosecutors' view). But, we will also begin to describe the elements which influence prosecutors' definition of priorities, in particular, the impact of the police decisions. This is certainly an external influence on decision-making (something that prosecutors did not create themselves, see chap. 9). But at the same time we will try to demonstrate that prosecutors do not simply swallow police priorities. They are, again, in a position to mediate these.

Finally, here it is important to describe briefly the approach we aim to use in this thesis. As already indicated, we do not intend to carry out a systemic analysis of the Italian criminal justice system. In other words, our considerations will not specifically concern the direction (e. g. repression, due process etc.) that the Italian criminal justice system is taking or has taken. Some reflections about, for example, the real significance of the legality principle or of supervising the investigation will be made. However, these will only be complementary to our main focus: the role and practices of the Italian prosecutor in defining the crime problem. Ultimately the aim is to develop an independent perspective on prosecutors' work but one that is informed by their perspective on what they do developed through semi-structured interviews (see chap. 3 for methodology). This will eventually lead us to outline some peculiar characteristics of the Italian criminal justice system. But our focus will always be the analysis of the role and the functions, in practice, of a specific legal actor.

3. Structure

The first chapter (after this brief introduction) will deal with a short comparative analysis of prosecutors in Italy and other continental jurisdictions. This will help to understand the issues that have been raised within the English literature with regards to prosecutors in Italy (and, more generally, in the continent) and to outline some of the key features of Italian prosecutors in a comparative context. Then (chap. 3) we will outline the research questions we want to deal with in this thesis. Moreover, we will also explain (briefly, at this stage) the methodology we have used to carry out our empirical research.

Subsequently we will move to the first substantive part of the thesis: the legal and socio-political context. In particular, the fourth chapter will be dedicated to the analysis of the legal principles and rules that are relevant for this study. But this will not only be a mere legal description. This chapter will substantially help to define more precisely the issues we will discuss later. But while the legal context is certainly important, it is not sufficient to understand the socio-political conditions which influence prosecutors' working environment. So, chapter five will deal with images of crime and prosecutors of the dominant political cultures. Italian politics are, to say the least, always evolving. We began this research in 2005 when there was a centre-right government, which then lost the 2006 elections. The newly elected centre-left government only lasted for two years. Finally, in 2008 there were elections again and the centre-right coalition³ won. So, Italian politics are quite difficult to catch, but certainly not boring. The last three governments passed very important pieces of legislation. These directly concerned prosecutors' working environment and aimed at tackling street crime and immigration as major crime problems. These issues certainly have a strong political flavour (justice and security are amongst the matters which determine the outcome of general and local elections). And they have been matter of strong confrontation between the centre-right government and the judiciary (sometimes, as now, the political tone is that of a mild dictatorship). We will summarize all the legislative interventions (and their socio-political consequences) which are relevant for this thesis. Moreover, we will explain how and why there is this

³ This is pretty much the same coalition which governed Italy from 2001 till 2006, Berlusconi is still the Prime Minister.

clash between part of the political world and the judiciary. However, the reader should note that we stopped collecting information on August 31 2008. Finally, chapter five will not only deal with the central state. It will also examine the images of crime and prosecutors within the media and the civil society. In general, this chapter is aimed at understanding the potential external influences which might affect prosecutors' legal culture and their decisions on the definition of priorities.

With chapter six we will be moving into the very core of this thesis. Part II (which includes chapters six, seven and eight) is dedicated to the analysis of prosecutors' working context. Three issues will be discussed: organizational relations within the prosecution office (chap. 6), prosecutors' professional and legal culture (chap. 7) and the relationship with the police during the pre-trial phase (chap. 8) (see above for the purpose of these chapters). Part III (chapters nine, ten and eleven) is dedicated to prosecutors' construction of priorities. The argument will be built around three issues: the definition of priorities (chap. 9), prosecutors and social alarm (chap. 10) and prosecutors, street crime and immigration (chap. 11) (see above for the purpose of these chapters). The division between these two parts will sometimes be blurred. This is because in part II we will already begin to outline some of the influences which might partially determine the way prosecutors define their priorities (i. e. the police influences). Moreover, prosecutors' professional and legal culture and the way legal independence works in practice will be crucial to understand how prosecutors determine priorities. Finally, these chapters (from chap. 6 to chap. 11) will all have a peculiar structure. We have decided to concentrate the literature review and its discussion at the beginning of the chapters. This is for two reasons. First, the Italian literature (the English one is limited) is mainly focused on the legal rules and it was not, of course, designed for common law lawyers (e. g. the debate on the legality principle). So, it needs to be carefully explained. We believe (second reason) that if we had incorporated the literature within the main body of the chapters the reader could have lost some of the points we wanted to make. In other words, without the literature the key sections of the chapters read better and are less cumbersome.

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CHAPTER II. THE PROSECUTOR IN CONTINENTAL EUROPE AND IN ITALY

1. Introduction

In this chapter we want to provide a brief description of the fundamental characteristics of continental prosecutors (as identified by the Anglo-Saxon academic literature). Subsequently we will concentrate on the English literature on Italian prosecutors. The aims of this chapter are basically three-fold. First, to set out a range of comparative perspectives upon prosecutors in continental Europe. This will help (second aim) to develop a better understanding of certain distinctive features of Italian prosecutors. Thirdly, we will outline the major issues dealt with by the (not very extensive) literature in English on Italian prosecutors.

2. The prosecutor in continental Europe: the fundamental characteristics according to the Anglo-American literature

The literature in English on the continental prosecutor emphasizes certain distinctive ways that prosecutors work in continental Europe. Germany and France are two good examples because the criminal procedure system is still broadly inquisitorial (at least during the pre-trial phase). At this stage, studying these two legal systems will be useful to outline some classical characteristics of the continental prosecutor. In particular, even if there are clear differences (e. g. legality principle applied in Germany; expediency applied in France) we can identify four common features: (a) the prosecutor is included in an hierarchical system; (b) the prosecutor disposes of the case (prosecution or dismissal); (c) the prosecutor directs the investigation and supervises the police; and (d) the prosecutor may act as a sentencer (conditional diversion powers).

In Germany prosecutors belong to the executive and they must follow the instructions of their superiors (§ 146 *Gerichtsverfassungsgesetz*, law on judicial organization, GVG). However, this subordination is not absolute. First, the legality principle (§ 152 II *Strafprozeßordnung*, code of criminal procedure, StPO) forbids any directive aimed at preventing the continuation of a prosecution. Second, the Minister of Justice is bound to respect the law and justice (art. 20 para. 3, *Grundgesetz*,

German constitution, GG).¹ On the other hand, in France the discretionary power of prosecutors is limited by the guidelines issued by their superiors (art. 31, Criminal Procedure Code, CPP). At the top of the hierarchy there is the Minister of Justice. The guidelines can be general (e. g. policy) or individual (e. g. the way a case is treated).² Thus, in France, the prosecutor is part of a hierarchical system which should lead to the following strict rules. But what is the real nature of the relationship between prosecutors and their superiors? For example, in France there is little control over the application of guidelines issued by the Minister of Justice.³ In theory, the Minister himself can issue an instruction to prosecute a particular case, but he may never instruct prosecutors not to prosecute a case (art. 36 CPP). However, these rules are not always applied. In 1989, the Minister of Justice Henri Nallet wrote to the public prosecutor for the court of appeal of Aix-en-Provence instructing him to drop a case.⁴ In continental Europe it is the prosecutor who decides whether or not commence a prosecution (i. e. disposal of the case). This power used to mark a clear distinction with the Crown Prosecution Service (CPS), who had the power to discontinue prosecutions but not to initiate them. This is no longer true. Now, under the statutory charging scheme,⁵ the CPS has the power to charge suspects in all but very minor cases.⁶ This has certainly enhanced the role of the CPS. However, unlike on the continent, the police are still in charge of the investigation and they still have a crucial “gate-keeping” role.⁷

In Germany and France, by law or de facto, the decisions to prosecute are implemented on discretionary basis. For example, in Germany the legality principle is limited by relevant exceptions. The prosecutor dismisses a case if there is not enough evidence to obtain a conviction. Furthermore, a case can be dropped if there is sufficient evidence, but the prosecutor believes that there is no public interest in

¹ Juy-Birmann R. “*The German system*”. In Delmas-Marty M. and Spencer J. eds. “*European Criminal Procedures*”. 2002 (reprinted in 2004). Cambridge: Cambridge University Press. p. 299.

² Dervieux V. “*The French system*”. In Delmas-Marty et al eds. (2002) *op. cit.* p. 224.

³ Elliott C. and Vernon C. “*French Legal System*”. 2000. Harlow: Longman. p. 152.

⁴ *Ibid.* pp. 153-154.

⁵ PACE s. 37B (as amended by the Criminal Justice Act (CJA) 2003).

⁶ S. 28 and Sched. 2, amending PACE s 37 (creating the new s 37B). See also Sanders A. and Young R. “*Criminal Justice*”. 2007. 3rd ed. Oxford: Oxford University Press. pp. 332-333; and Brownlee I. D. “*The statutory charging scheme in England and Wales: towards a unified prosecution system?*”. 2004. Criminal Law Review. Nov. 2004. pp. 896-907.

⁷ This is because it is up to the custody officer to decide which cases should be considered for prosecution. In this sense police officers still retain the power to release detainees with no further action being taken (NFA). This involves a large number of suspects (20-25%) and police officers have no duty to report non-prosecuted cases to the CPS. See Sanders and Young (2007) *op. cit.* pp. 328-329.

commencing a prosecution (e. g. the offence is a minor one). In these cases the prosecutor, following the consent of the judge (which is normally a formality),⁸ may dismiss a case either conditionally or unconditionally. Unconditional dismissals are authorized by the StPO (§ 153) and include all the misdemeanours and all the offences not carrying a mandatory minimum sentence (StPO § 153, as amended in 1993). In these cases the consent of the judge is not necessary. Conditional dismissals concern offences not carrying a mandatory minimum penalty. In these cases the prosecutor, with the necessary consent of the accused person(s), suspends the prosecution if the offender complies with certain requirements (e. g. providing some form of compensation for the victim StPO § 153 a). In most of the cases enunciated by § 153 a there is no longer need for the court's consent. However, even when this is required it is "rarely withheld".⁹

The analysis of these legal provisions leads us to the conclusion that the prosecutor has a pivotal role in criminal proceedings.¹⁰ The statistics concerning France underline that only 5.3%¹¹ of the cases are treated by an investigating judge. All the other offences are supervised by the prosecutor himself. This datum becomes even more important if we think that in 1998 the cases sent to the investigating judge were 6.5%¹² and that in 1971 they were 14.5%.¹³ This situation stems from the fact that French prosecutors tend to investigate cases which are particularly serious or/and complicated. In 1971 Goldstein and Marcus described a procedure called *correctionalization*. Through this procedure French prosecutors can ignore aggravating circumstances, so that a *crime* (which must be investigated by the *juge d'instruction*) becomes a *délit* (which can be investigated by the *juge d'instruction*).¹⁴

⁸ Fionda J. "*Public Prosecutors and Discretion: a Comparative Study*". 1995. Oxford: Clarendon Press. New York : Oxford University Press. p. 136.

⁹ *Ibid.* p. 137.

¹⁰ For a comparative analysis of prosecutors' pivotal functions during the pre-trial phase see: Jackson J. D. "*The effect of legal culture and proof in decisions to prosecute*". 2004. Law, Probability and Risk. Vol. 3 N. 2. pp. 109-131. The author analyzes ideal types of prosecutorial fact finding and he compares European continental jurisdictions (and Scotland) with England and Wales and other common law countries.

¹¹ Ministère de la Justice. *Les chiffres-clés de la Justice* [Online]. 2004. Available at: http://www.justice.gouv.fr/art_pix/1_chiffrescles2004.pdf [Accessed: 15/05/06]. The data refer to the activity of prosecutors in 2003. p. 16.

¹² Ministère de la Justice. "*Les chiffres-clés de la Justice Chiffres-clés.*". As cited in Verrest P. "*The French Public Prosecution Service*". 2000. European Journal of Crime, Criminal Law and Criminal Justice. Vol. 8/3. pp. 210-244. p. 234.

¹³ Goldstein A. S. and Marcus M. "*The Myth of Judicial Supervision in Three "Inquisitorial" Systems: France, Italy, and Germany*". 1977. The Yale Law Journal. Vol. 87. pp. 240-283. p. 251. This article was (also) based on interviews with prosecutors and judges.

¹⁴ *Ibid.*

The authors gave a clear example of this process: a theft committed at night (or in a home or with a weapon), which is a *crime*, can be converted into a simple theft, which is a *délit*.¹⁵ To conclude: the *correctionalization* procedure is a good example of prosecutors' power to take decisions on anti-crime policy. This is because the prosecutor has, in practice, the opportunity to decide how serious a crime is. In Germany this is even clearer, because on one hand we have the legality principle. On the other one we have exceptions to this principle. These are based on broad principles such as "public interest". In other words, the prosecutor still retains substantial powers to define what is a crime and the seriousness of this.

Within an inquisitorial system the prosecutor is usually the supervisor of the investigation. He may indeed be seen as the most important investigator and, sometimes, he retains adjudicative powers. As a consequence prosecutors have authority over the police. The law is clear. For example, in France the activities of the police are divided into *mission de police judiciaire* and *mission de police administrative*. The latter is aimed to maintain public order, while the former concerns investigation of offences. The adjective *judiciaire* (judicial) has a clear meaning: the investigation is part of a judicial procedure, as a consequence it must be directed by a judicial figure, which is, in the vast majority of the cases, the prosecutor. However, empirical research undertaken by Marcus and Goldstein and by Hodgson designs a different scenario, where the police complete "the whole job of the investigating magistrate".¹⁶

Thus, the prosecutor in legal theory supervises the police during the investigation. This principle is clearly stated in Germany and France. But, what is the meaning of this supervision? In France, due to an increase of criminal provisions and crimes, *procureurs* may not directly deal with the investigation of all crimes.¹⁷ In fact, the police often conduct the investigation and the prosecutor takes a decision without any direct participation in the investigating activities. For example, in France, where possible, decisions about a case (dismissal, prosecution, or alternative ways such as reparative measures) may be made by phone.¹⁸ Therefore, in practice, the prosecutor relies on activities which have not been undertaken or directed by him. This idea is

¹⁵ *Ibid.*

¹⁶ *Ibid.* p. 255.

¹⁷ Verrest (2000) *op. cit.* p. 233.

¹⁸ *Ibid.* p. 234.

even clearer if we look at the empirical research undertaken by Hodgson, who reports that 85% of prosecutors said that they “would never see the police”.¹⁹

The fourth issue that we underlined above concerns the sentencing powers of the prosecutor. Following the distinction that Fionda made, we can say that prosecutors have indirect sentencing powers (e. g. deciding charges or suggesting a punishment) and direct sentencing powers (e. g. the prosecutor de facto makes an adjudication of guilt and issues a penalty).²⁰ In legal form these powers may often be described as power of conditional diversion. For example, in Germany, the prosecutor can drop a case on the satisfaction of particular conditions. In these cases the prosecutor de facto decides that the accused is guilty and decides upon a sort of punishment (i. e. compensation for the victim). The defendant can always refuse to accept the ‘condition’ or de facto punishment, in which cases there will be a prosecution and trial. Moreover, there are cases which are prosecuted but they do not reach the court. These are dealt with under the penal order system. Penal orders are documents prepared by the prosecutor including: the details of the fact, the offence committed and the punishment suggested.²¹ To be legally binding these orders require the consent of the judge.²² However it is clear that the merits of the decision are handled by the prosecutor, who takes decisions on his own: he does not have to ask the judge’s opinion. We must note that now even the CPS has powers of conditional diversion.²³ Prosecutors can decide to warn rather than to prosecute an offender. This power can be used if the interests of the suspect, the victim and the community can be better achieved by the suspect complying with certain conditions. The objectives that conditional diversion has to serve are: rehabilitation, reparation and punishment.²⁴

The English literature has examined these questions and underlined the contradictions that we outlined above. The conclusion was that the prosecutor in continental Europe follows technical rules which are different to those typical within

¹⁹ Hodgson J. “*The police, the prosecutor and the juge d’instruction. Judicial Supervision in France, Theory and Practice*”. 2001. *British Journal of Criminology*. Vol. 41(2). pp. 342-361. p. 351. See also: Hodgson J. “*French Criminal Justice*”. 2005. Oxford and Portland, Oregon: Hart Publishing.

²⁰ Fionda (1995) *op. cit.* pp. 1-2.

²¹ *Ibid.* p. 141.

²² *Ibid.* p. 142.

²³ See CJA 2003 Pt 3.

²⁴ Brownlee I. D. “*Conditional cautions and fair trial rights in England and Wales: form versus substance in the diversionary agenda?*”. Feb. 2007. *Criminal Law Review*. pp. 129-140. In particular pp. 129-130.

the Anglo-American criminal justice tradition. However, in practice these differences may be less significant than in theory and indeed may be becoming even less so with recent reforms (see above CPS's charging and conditional diversion powers).²⁵ In fact, as in Germany and France, English prosecutors dispose of the case and rely on the investigation implemented by the police. But this is one interpretation. Langbein and Weinreb argued that the differences are consistent and significant. For example, the French dossier about the investigation is not a mere police report. And the *procureur* has supervision powers over the police (e.g. of evaluation of police officers under his supervision).²⁶ In a similar way Field (et al.), while they analyze prosecution practice in Holland, underline that prosecutors' responsibility for the construction of the file has a different significance within the inquisitorial tradition compared to the adversarial one. This means that prosecutors (together with judges and defence counsels) have the power to influence the way the file will be shaped.²⁷

3. The prosecutor in Italy: the English literature

The Italian tradition in criminal justice has traditionally been strongly inquisitorial. Following the French model, there was an investigating judge (*giudice istruttore*) and the trial was the place where the dossier compiled during the investigation was presented and evaluated by a judge. The pre-trial phase was secret and the defence could not participate in this phase.²⁸ In 1989, 35 years after the Parliament began to debate wholesale reform of criminal procedure, the new criminal procedure code was approved (d. P. R. n. 447/1988).²⁹ This reform radically changed the Italian tradition. Now the system is meant to be adversarial. The *giudice istruttore* no longer exists, the investigation is undertaken by the prosecutor who supervises and directs the police

²⁵ See, for example, Goldstein and Marcus (1977) *op. cit.*

²⁶ Langbein J. H. and Weinreb L. L. "Continental Criminal Procedure: 'Myth and Reality'". 1978. The Yale Law Journal Vol. 87 n. 8. pp. 1549-1569. pp. 1553-1555.

²⁷ Field S., Alldridge P. and Jörg N. "Prosecutors, Examining Judges, and Control of Police Investigations". In Fennel P., Harding C, Jörg N. and Swart B. eds. "Criminal Justice in Europe A Comparative Study". 1995. Oxford: Clarendon Press. New York: Oxford University Press. p. 235.

²⁸ See, for example, Pizzi T. and Marafioti L. "The New Italian Code of Criminal Procedure: The Difficulties of Building an Adversarial Trial System on a Civil Law Foundation". 1992. The Yale Journal of International Law Vol. 17 n. 1. pp. 1-40. pp. 3-5.

²⁹ This means *decreto del Presidente della Repubblica*. It is a piece of delegated legislation issued (formally, the government prepares and is responsible for delegated legislation) by the President of the Republic. In this case the dPR was implementing the *legge delega* n. 81/1987. A *legge delega* is a parent act enabling the government to pass measures which have the force of law. Of course, the aim of this *legge delega* was to reform the code of criminal procedure.

(*polizia giudiziaria*, PG) and the trial is an open confrontation between the parties. Such a reform appears revolutionary in Continental Europe. In fact, we have seen that in Germany and France the inquisitorial approach is still alive.

The Italian prosecutor has always represented a particular legal actor in the European panorama. This is because of the principle he has to follow when he disposes of a case. The constitution is clear: penal action is mandatory (art. 112). This means that in Italy the legality principle is in theory fully implemented: unlike in Germany, there are no exceptions to this rule. On the other hand, there are also important similarities between the Italian prosecutor and his German and French colleagues. In Italy prosecutors retain indirect³⁰ and direct³¹ sentencing powers. Moreover, and more important for us, Italian prosecutors are the leading investigators during the pre-trial phase and they supervise and direct the police.

The literature in English has addressed some of the issues above. In general authors emphasized three points: (a) prosecutors' functions are normally highly influenced by the police; (b) prosecutors have huge discretionary powers when they act as gate-keepers; and (c) the legality principle, in practice, does not exist. However, the volume of work in English is limited. In particular, there is very little empirical research.

In 1977 Goldstein and Marcus studied the pre-trial phase and the discretion of judicial actors in situations which could give rise to criminal proceedings (e. g. prosecute or dismiss, mode of trial etc.). The authors reached the conclusion that even if the prosecutor (and the examining judge) in theory is supposed to supervise the investigation, the reality is that police actions are not subject to any real review.³² At that time (1977) prosecutors had discretionary powers to decide whether or not to refer a case to the examining judge. They were taking this decision according to very broad principles such as "there is no need for complex inquiries and difficult verifications".³³ As a consequence, Marcus and Goldstein estimated that the prosecutor investigated 70% to 90% of the cases.³⁴ So, under the former inquisitorial code the prosecutor had a pivotal role during all the pre-trial phase. But these powers had become merely formal in relation to investigation, because in these situations the

³⁰ I. e. suggesting a sentence to the judge.

³¹ E. g. there is a procedure similar to the German penal order system.

³² Goldstein and Marcus (1977) *op. cit.* p. 258.

³³ *Ibid.* p. 257.

³⁴ *Ibid.*

prosecutor normally relied on police reports.³⁵ Thus, the theory of prosecutorial supervision obscured the reality of police autonomy in investigation.

The authors also analyzed the way the principle of legality was implemented in Italy. The conclusion was that the prosecutor had a wide discretion regarding prosecution or dismissal of a case. This was determined by three factors. First, the prosecutor evaluates evidence and can decide that there is not enough to put forward a prosecution or that the evidence supports a particular charge but not another. Second, the prosecutor might simply decide not to gather evidence. Third, the police did not report some crimes because these are too petty.³⁶ Finally, Goldstein and Marcus also underlined the de facto adjudicative powers of Italian prosecutors. Briefly, in the Italian criminal justice system guilty plea and plea bargaining procedures did not formally exist. All crimes had to be prosecuted to trial. However, uncontested trials were de facto possible through arrangements between the prosecution and the defence. In other words, the prosecutor and the counsel reach an agreement before the trial, so that evidence and the sentence requested will not be challenged.³⁷

Since 1977 there has not been real empirical research (by those working in Anglo-Saxon contexts or, at least, writing in English) about Italian criminal procedure in general and about the prosecutor in particular. However, some papers analyzing the peculiar characteristics of the Italian prosecutor (before and after the 1989 reform) have been written. For example, Guarnieri has compared the legality principle applied in Italy with the expediency one applied in France. The author says that even if the Italian constitution states the legality principle, the prosecutor has strong discretionary power. In particular, due to the fact that it is very difficult to prosecute all the cases and that prosecutors are not part of a hierarchical organization, they will de facto decide the prosecution policy. On the other hand, in France the expediency principle is qualified by the fact that prosecutors are part of a hierarchical system (see above).³⁸

Some other works have focused on the adversarial reform in 1989. They have mainly underlined the adversarial nature of this reform, the reasons which led to the creation of the new code and the problems that this created. Within this scenario they

³⁵ *Ibid.* p. 263.

³⁶ *Ibid.* pp. 271-272.

³⁷ *Ibid.* pp. 264-270.

³⁸ Guarnieri C. "Prosecution in Two Civil Law Countries: France and Italy". In Nelken D. eds. "Comparing Legal Cultures". 1997. Aldershot: Dartmouth. pp. 183-190.

briefly described the characteristics of the Italian prosecutor.³⁹ In particular, Grande underlined “the lack of separation between adjudicating and prosecuting members of the judiciary”⁴⁰ (e. g. they follow the same bureaucratic career, enjoy the same economical treatment etc.) and that, during the preliminary investigation, the prosecutor has an enormous power compared to the other parties.⁴¹ Moreover, she too commented on the difference between the legality principle stated by the law and its application.⁴² To conclude, she emphasized the lack of accountability of the prosecutor for his work (e. g. length of proceedings, numbers of acquittals or convictions).⁴³ The author believes that the prosecutor is the real leader of the criminal procedure in Italy (i. e. total discretion in disposing of a case). This leads to the consequence that prosecutors are a “fourth power next to the legislative, the executive and the judicial ones”.⁴⁴

Giuseppe Di Federico has specifically written about the unfettered powers of prosecutors and their proximity to judges. Again it is stated that legality principle is not implemented, that prosecutors are de facto creating criminal policy in Italy and that they are not accountable to anybody.⁴⁵ Di Federico’s conclusions were corroborated by huge empirical research. They involved interviews with 1000 defence lawyers and 70% confirmed that there was substantial difference in the way prosecutors “define priorities in the exercise of their functions”.⁴⁶ Regarding the proximity between judges and prosecutors, Di Federico is very clear when he writes that judges have inclination “to satisfy the expectations of their colleagues

³⁹ See, for example: Miller J. J. “Plea bargain and its analogues under the new Italian criminal procedure code and in the United States: towards a new understanding of comparative criminal procedure”. 1989-1990. 22 N. Y. U. Journal of International Law and Politics. pp. 215-251. Pizzi and Marafioti (1992) *op. cit.* Fassler L. J. “The Italian Penal Procedure Code: An Adversarial System of Criminal Procedure in Continental Europe”. 1991. 29 Columbia Journal of Transnational Law. pp. 245-278. Del Duca L. F. “An Historic Convergence of Civil and Common Law Systems-Italy’s New “Adversarial” Criminal Procedure System”. 1991. Dickinson Journal of International Law. Vol. 10:1. pp. 73-92. Freccero S. P. “An Introduction to the New Italian Criminal Procedure”. 1994. American Journal of Criminal Law. Vol. 21 n. 3. pp. 345-383. And Amodio E. and Selvaggi E. “An Accusatorial System in a Civil Law Country: the 1988 Italian Code of Criminal Procedure”. 1989. Temple Law Review. Vol. 62. pp. 1211-1224.

⁴⁰ Grande E. “Italian Criminal Justice: Borrowing and Resistance”. 2000. 48 American Journal of Comparative Law. pp. 227-260. p. 237.

⁴¹ *Ibid.*

⁴² *Ibid.* pp. 240-241.

⁴³ *Ibid.* pp. 255-256.

⁴⁴ *Ibid.* p. 242.

⁴⁵ Di Federico G. “Prosecutorial independence and the democratic requirement of accountability in Italy Analysis of a Deviant Case in a Comparative Perspective”. 1998. British Journal of Criminology. Vol. 38(3). pp. 371-387. pp. 378-380.

⁴⁶ *Ibid.* p. 381.

[prosecutors]” and that, in Italy, this is not considered a violation of ethics.⁴⁷ This view was supported by the lawyers interviewed who reported that there are “informal communications on the substance of the cases at hand between prosecutors and judges”.⁴⁸ So, the author argues that Italian prosecutors have enormous powers, which are not counterbalanced by any form of accountability.⁴⁹

To conclude this rapid analysis we can say that the literature in English has suggested the following issues regarding the Italian prosecutor. First, the 1989 reform put the prosecutor within an adversarial system, the only such case in continental Europe. But there is little work on how the reform has affected the nature of the prosecutor’s work. Secondly, a pure legality principle applies in theory (the only such case in continental Europe), but commentators are sceptical about its real force in the Italian legal system. Thirdly, the prosecutor supervises the investigation, like in Germany and France. However, this is seen to be a merely bureaucratic function in practice. The police have substantial powers to influence prosecutors’ decisions during the pre-trial phase. Fourthly, the Italian prosecutor is fully independent and he/she does not work within a hierarchical system. In particular, Italian prosecutors are not accountable to anyone and they seem to be judicial actors like judges.

⁴⁷ *Ibid.* p. 382.

⁴⁸ *Ibid.*

⁴⁹ *Ibid.* p. 383.

CHAPTER III. RESEARCH AND METHODOLOGY

1. Researching the Italian prosecutor

As we have seen the literature in English concerning the Italian prosecutor is limited. In particular, there is a substantial lack of empirical data. This is because academics (in particular Italian ones) have preferred to analyze the ‘black letter’ legal rules. Thus, the question is: what does the prosecutor do in practice? We saw that the Italian prosecutor has a fundamental role during both pre-trial and trial phases. Our intention is to focus on the former. In particular we want to analyze four aspects:

1. Prosecutors and their working context.
2. Prosecutors’ professional and legal culture.
3. The prosecutor’s role in supervising the investigation.
4. The prosecutor and his role in defining the crime problem.

The first issue will give us the opportunity to discuss the operation of prosecutors’ legal independence. We will analyze the strategies of persuasion implemented within prosecution offices (in contrast to a pure hierarchical system). This will not only be a description of the relationship of superior-inferior within the prosecution office. In fact, this analysis will also seek to provide a first introduction to prosecutors’ professional culture.

Subsequently we will specifically focus on professional and legal culture. Here we will try to outline prosecutors’ professional self-image. In particular, we will concentrate on the differences between crime fighters and legal filters. Italian prosecutors see themselves as legal filters (i. e. real judicial figures) and not as crime fighters (i. e. the police, in prosecutors’ view). Moreover, and probably more important, we will compare prosecutors’ professional self image with the practice. What does it mean, in practice, legal filtering? And what is the real nature of prosecutors’ judicial self professional image? These are the main questions we will try to answer at that stage. The meaning of legal filtering is particularly important. This is because, through the analysis of this concept, we will begin to define prosecutors’ functions during the pre-trial phase. In particular, we will start to emphasize prosecutors’ different ‘position’ compared to that of other legal actors (and particularly the police).

Concerning the investigation phase we will focus on the police-prosecutor relationship. This issue was only really discussed by Goldstein and Marcus in 1977. Their conclusion was that supervision of investigation was a passive activity. Prosecutors relied on police reports. However, the authors wrote in 1977, before the reform. Thus, it would be useful to verify if the conclusions are the same now, because the new code set out a particular relationship between the police and prosecutors (see chap. 4). Moreover, Goldstein and Marcus say that police officers are the real investigators. This was based on empirical research, but they say very little about the activities that prosecutors undertake everyday. In other words, they use an approach where the lack of supervision is determined by the fact that the police implement investigation activities. We will analyze these issues from a different angle. We want to focus on the meaning of supervising (or directing) an investigation. In fact, although it is undeniable that the police have a pivotal role during the pre-trial phase, we believe prosecutors can still take substantial decisions. In particular, by determining the way the investigation has to be supervised, prosecutors decide how much they can modify what Hodgson calls the “case parameters set by police”.¹

In relation to the final question, conclusions about the dichotomy between legality principle stated by the law and legality principle in practice need to be supplemented. It is clear that the Italian prosecutor has *de facto* a huge discretionary power. However, this is only the first step. There is a need to go further and understand the social elements that the prosecutor takes into account when he/she decides to prosecute a case. These elements could be the media pressure or the influence of the local community or national or local state (i. e. the images of crime of the dominant political cultures). Moreover, the relationship with the police seems to be important as well. Finally, prosecutors’ political and social values may also influence their choices. This analysis will also provide a better understanding of prosecutors’ functions and professional culture. Prosecutors’ ‘filtering action’ seem to be also aimed at mediating external influences (i. e. filtering out certain forms of social anxiety).

To analyze these issues we will also take into account the approach and the conclusions used in modern empirical studies about the prosecutor in continental Europe. In particular, Hodgson’s work about the French prosecutor raises some key

¹ Hodgson (2005) *op. cit.* p. 169.

issues, such as: (a) the supervision mechanisms (e. g. bureaucratic, ‘hands on’ etc.); (b) the extent to which prosecutors are dependent on police reports; and (c) the difference between prosecutors and the police during the pre-trial phase. The answers to these kinds of questions are important. They will help us to outline some of the key features we need to know in order to understand the way Italian prosecutors work in practice.

Moreover, these problems must be approached in the light of the debate about prosecutors in Italy. In particular, the centre-right governments (the current and the 2001-2006 one) had never hidden their view that prosecutors are politically orientated and that their aim is to provoke ‘political revolutions’ as during the *tangentopoli* episode. This was a anti-corruption operation begun in the nineties by some prosecutors in Milan. The consequences have been significant. A generation of corrupt politicians was removed by the work of prosecutors (and judges). The former centre-right government (2001-2006) proposed a radical justice reform (the *ordinamento giudiziario* reform, see chap. 4) whereby prosecutors would have lost part of their independence. This reform was then modified by the centre-left government. However, the bill proposed by the Berlusconi’s government provoked a strong reaction from prosecutors, judges and lawyers. So, in Italy we have been witnessing a real conflict (still very much alive) between the judiciary and the political power. This scenario will have to be taken into account when we discuss the role, the powers and the functions of Italian prosecutors.

2. Methodology

For this research I conducted 54 semi-structured interviews between May and October 2006. These have all been qualitatively analyzed using ATLAS (creating codes and families). First of all I interviewed 5 ‘consultants’ (2 prosecutors, 1 police officer and 2 lawyers). The aim of these interviews was to understand the kind of questions that needed to be asked to obtain the information needed. In other words: we could be more open and, partially, reveal to the ‘consultants’ what it was that we wanted to find out. Then we analyzed these interviews and defined the questions we wanted to ask the interviewees. Moreover, this provided a better understanding of the way interviewees might react to our questions. The problem is that, in Italy, legal actors

are not normally used to answering questions about what they do in practice. They normally expect to discuss the general principles of law. So, we learnt how to put questions in such a way as to avoid long answers on, for example, the case law of the constitutional Court. However, did not prove to be particularly difficult. In general, we were very well welcomed and prosecutors, police officers and lawyers were happy to talk about what they do everyday.

There were 49 interviewees (27 prosecutors, 11 police officers and 11 lawyers). I conducted the interviews in 10 prosecution offices (lawyers and police officers working in the same areas) located in the north (mainly), in the centre and in the south of Italy. The size of the prosecution offices (determined according to the number of prosecutors) was: large, medium-large, medium and small. The statistical data we will report in this thesis are only based on the interviewees. But interviews with 'consultants' will be quoted and used as examples were appropriate. Finally, interviews normally lasted 45 min. (1 h. with consultants). Some were longer, some others only lasted 30/35 min. In general, the more I learnt about Italian prosecutors the more I could lead the conversation to the issues I was interested in. So, short interviews were probably the most productive.

The abbreviations that we will use in this thesis refer to both consultants and interviewees:

CP (chief prosecutor)

DCP (deputy chief prosecutor)

AP (assistant prosecutor)

APApI. (assistant prosecutor at the court of appeal)

L (lawyer)

Pol. (police)

Of course we will also identify (roughly) the geographical area where interviewees and consultants were working:

N (north)

S (south)

C (centre)

So, for example AP(N1) means: assistant prosecutor who works in a prosecution office located in the north. We also numbered interviews (from 1 to 54, including the consultants). The size of the prosecution offices is not reported but, if relevant, we

will emphasize it in the text. Sometimes we will specifically identify the prosecution office (and, in one case, the name of the prosecutor). But this will only be done when the information is well known and nothing confidential has been said (e. g. it is known that the urban safety group is in Turin or that the chief prosecutor in Bolzano, Cuno J. Tarfusser, launched a project to improve the organization of this prosecution office). We committed ourselves to anonymity and we will comply with that. More information about the methodology will be included later in the methodological appendices.

We chose to carry out semi-structured interviews because the questions allow open answers. As we said (chap. 1), we wanted to have the point of view of the legal actors, trying to emphasize the peculiar characteristics of the Italian case and, where possible, trying to avoid the risks of ethnocentrism. However, the open-endedness of this research does not mean that the information collected is totally unstructured. As we explained (chap. 1), we tried to analyze issues which are familiar to Anglo-Saxon socio-legal lawyers (e. g. legal culture). So, we had to rely very much on legal actors' opinions. However, questions were designed to identify possible contradictions (particularly when it comes to the way prosecutors treat street crime and immigration). Moreover, given that we first interviewed consultants, we already had an idea of the answers we might get. This was very important because the more we knew about prosecution practice, the more the interviewees were ready to talk about it (and not to give standard answers). Finally, we must not forget that we did not only interview prosecutors. The answers given by police officers and lawyers provided a good test (or at least a different point of view) for the information we obtained from prosecutors. So, the questions we prepared and the strategy we used to carry out the research were not only aimed at understanding what prosecutors say that they do. We wanted to know what they do in practice. In this sense the differences between prosecutors' professional self-image and the practice is probably the best example. Certainly this methodology has some limits. In particular, we did not carry out direct observation or any analysis of case files. But we have doubts that this would have provided better information. The problems with direct observation are, of course, that people can act differently while they know they are observed. The analysis of files can be useful, but this would probably give more information about the criminal justice system in general. We wanted to analyze a specific legal actor. For example, if we

look at the files dealing with immigration and street crime we would probably realize that these cases are dealt with as soon as possible and they are the majority of the cases treated by prosecutors. But can we really say that these are priorities for prosecutors? Moreover, interviews allow us to see what legal actors say they are doing (and want us to think they are doing). This prevents us attributing intentions to them on the basis of what is done elsewhere. Clearly, outcomes cannot be inferred from intentions any more than the opposite. But there are some obvious indicators we can use (eg. what we know about the time spent on different sorts of cases). Finally, this is an empirical research within the context of a PhD. We wanted to cover a number of prosecution services across Italy that it simply was not practicable to do observation and file analysis as well as interviews. Furthermore, access negotiation would probably have been more difficult.

PART I: THE LEGAL AND SOCIO- POLITICAL CONTEXT

CHAPTER IV. THE LEGAL CONTEXT

1. Introduction

This chapter will focus on two main questions. First, we need to explain the legal context. Three issues will be discussed: the legality principle, the organization of prosecution offices and the police-prosecutor relationship during the investigation. Although our aim is not to deal with purely legal questions (i. e. by analysis of the legality principle), we need to define the ‘legal environment’ within which Italian prosecutors work (at least those legal principles which are relevant here). This is because, as McBarnet has argued, “the law itself, not just the people who operate it, must be put under the microscope for analysis”¹ and, more importantly, “the law itself is also one of the contextual elements of decisions”.² Our aim is to investigate the way in which prosecutors take decisions. So, the examination of these rules will be crucial to the understanding of the issues we will discuss later. Second, this legal analysis should lead to other considerations. We will be able to analyze in greater detail some of the key problems discussed by the literature in English (see chap. 2). These do not simply concern prosecutors, but, more generally, those legal issues which characterize the Italian criminal justice system and influence prosecutors’ functions (e. g. the legality principle).

2. The legal framework of the legality principle within the Italian legal system

As indicated above (chap. 2), in Italy prosecutors are legally required to prosecute all the criminal offences. Indeed, the Italian constitution specifically states that the legality principle applies within the Italian legal system (art. 112 cost.).³ This is unusual amongst European jurisdictions. The expediency principle is applied, for example, in England, France and in the Netherlands. In Germany criminal action is mandatory, but, as we saw (see chap. 2), this principle is qualified by significant exceptions (i. e. where there is no public interest in commencing a prosecution). In contrast, formally speaking in Italy the prosecutor does not have any discretionary

¹ McBarnet D. J. “*Conviction : law, the state and the construction of justice*”. 1981. London: Macmillan. p. 6.

² *Ibid.* p. 7.

³ Art. 112 says: “The public prosecutor has the duty to initiate criminal proceedings”.

power which can be used in the pre-trial phase to decide to drop a case. In this section we will explain the social and political reasons behind Italy's formal adoption of the legality principle and the impact that this provision has during the pre-trial phase.

The Italian constitution and Acts of Parliament set out a system whereby prosecutors (and judges) are fully independent. In particular, prosecutors have an 'external independence' from all the other constitutional powers.⁴ This means that prosecutors should not be subjected to any form of external pressure when they execute their functions. Moreover, the Italian constitutional fathers thought that "independence and mandatory prosecution [are] two faces of the same coin".⁵ As the Constitutional Court has stated, the principle set out in art. 112 cost. is intended to guarantee equality before the law within the penal process. This is because institutions subject to the legality principle act only in the interest of the law and, as we have said, may not be subjected to any external pressure.⁶ The Court has also specified that this independence does not just apply to the moment when the prosecutor decides upon penal action. The prosecutor is fully independent (from any external interferences) even during the investigation phase.⁷

The reasons why the Italian constitution seeks to use the legality principle as a tool to protect the 'external independence' of the prosecutor are mainly historical. During the Fascist period prosecutors were not part of the judiciary, but rather belonged to the executive, in particular to the Minister of Justice who, for example, nominated and dismissed them.⁸ They were an arm of a dictatorial regime, which widened their powers as defenders of public order.⁹ Of course that public order was fascist in nature. Thus, the aim of the drafters of the 1948 Italian constitution was to re-design a system where impartiality and equality before the law were not limited by any executive pressure. According to the Italian constitutional fathers, this aim could be achieved through a complete independence of the judiciary. Now prosecutors are part of the judiciary and the legality principle is seen as fundamental to guarantee this

⁴ This interpretation rises from the wording of different articles in the Italian constitution. These are: art 104 para. 1, art. 108 para. 2, art. 109 and art. 112 (legality principle). See, for example, Voena G. P. "Soggetti". In Conso G. and Grevi V. eds. *"Compendio di Procedura Penale"*. 2003. 2nd ed. Padova: CEDAM. p. 58-59.

⁵ Di Federico (1998) *op. cit.* p. 375.

⁶ Corte cost. sent. n. 88/1991, stated also in Corte cost. sent. n. 111/1993. See also, for example, Voena (2003) *op. cit.* p. 59.

⁷ Corte cost. sent. n. 420/1995. See also, for example, Voena (2003) *op. cit.* p. 59.

⁸ Cordero F. *"Procedura penale"*. 2003. 7th ed. Milano: Giuffrè. p. 193.

⁹ *Ibid.* p. 425.

independence. Two elements (related to art. 112 cost.) seem to corroborate this thesis. First, as we said, the legality principle is intended to ensure that the prosecutor is not influenced by external pressures when he decides to prosecute or not. Secondly, if the prosecutor is bound to prosecute all crimes, as a consequence, formally he can not take decisions based on personal values (i. e. to prosecute or not a case because of political issues). This very brief introduction has explained why the legality principle operates in the Italian legal system; let us now analyze the way this provision is implemented.

When the prosecutor is informed that a crime has been committed, he must act (but there are exceptions, see later). In particular, after a preliminary investigation (if necessary) he must instigate penal action through a specific request to the preliminary hearing judge (*giudice per l'udienza preliminare*, GUP). This is so unless he can drop the charge in accordance with the law by making an *archiviazione* request (request for dismissal of charge) addressed to the preliminary investigation judge (*giudice per le indagini preliminari*, GIP).

The provision stated in the constitution at art. 112 has been restated in the criminal procedure code (*codice di procedura penale*, cpp) (art. 50 cpp). The code specifies that the prosecutor implements penal action on his own authority, or after the fulfilment of particular requisites (e. g. a complaint from the victim, called *querela*, which is necessary to begin the prosecution of certain crimes such as defamation) (art. 50 para. 2 cpp). Moreover, art. 50 para. 3 cpp states the *irretrattabilità* of the penal action. This means that a prosecution cannot be interrupted or suspended (after the penal action has been formally implemented), unless this is provided for by the law (e. g. when the penal decision depends on the resolution of a dispute about citizenship). This is seen as a logical consequence of the adoption of the legality principle.¹⁰ Otherwise a prosecutor could easily get round the provision by dropping a prosecution immediately after commencing it. Thus, the prosecutor is formally bound. The legality principle forbids the creation of a provision which formally gives to the accuser the discretionary power that a prosecutor has in England or in the USA.¹¹ In other words: when a prosecution begins it should in law end in a judicial decision on guilt unless the law states differently.

¹⁰ *Ibid.* p. 402.

¹¹ *Ibid.* p. 401.

Of course, prosecutors do not have to initiate a prosecution every time they receive a crime report or after all investigations. According to art. 50 para. 1 cpp this needs not happen when the prosecutor requests *archiviazione*. The *archiviazione* can be requested in five different situations. First, when the *notizia di reato* (crime report) is groundless (art. 408 para. 1 cpp). Secondly, if a legal condition for the commencement of the prosecution (*condizione di procedibilità*, e. g. lack of *querela*, see later) is missing (art. 411 cpp). Thirdly, if the offence has been ‘extinguished’ (art. 411 cpp) (e. g. when the offender has died, art. 150 *codice penale*, Italian criminal law code, cp.). Fourthly, when the facts do not in law constitute a crime (art. 411 cpp). Fifthly, when the perpetrators are (after the investigation) unknown (art. 415 par. 1 cpp). A groundless crime report is explained in art. 125 of the provisions to implement the criminal procedure code (*norme di attuazione del codice di procedura penale*, disp. att.)¹². This says that the report is groundless when the evidence collected during the investigation is not sufficient to support an accusation during the trial. This is so when the investigation has disclosed that the facts did not happen, the accused did not commit them or that the facts do not constitute a crime. Moreover, this occurs when the evidence that the facts happened, that the accused committed it or that the fact is a crime is insufficient, contradictory and it is believed that sufficient consistent evidence cannot be acquired through the criminal process.¹³

These rules define the decisions that prosecutors must make in the first instance to implement art. 112 cost., but their actions are subject to the review and intervention of other legal actors. There is one procedure which entitles the general prosecutor attached to the court of appeal to take over the investigation carried out by a prosecutor: this is called *avocazione* (taking over of the conduct of the prosecution, see later). This tool can be used when certain conditions occur, in particular the *avocazione* is automatic when the prosecutor does not request *archiviazione* but neither does he or she exercise penal action within the terms fixed by the law (art. 412 para. 1 cpp). In this way the legislation seeks to ensure the application of the legality principle. More importantly, and closely connected to the correct implementation of the legality principle, is the role of the preliminary investigation judge. As we said before, penal action is formally set in motion (*rinvio a giudizio*, sending the case to

¹² This means Italian provisions to implement the criminal procedure code.

¹³ See, for example, Scaparone M. “*Indagini preliminari e udienza preliminare*”. In Conso et al. eds. (2003) *op. cit.* pp. 455-552. pp. 522-523.

trial) at the *udienza preliminare* (preliminary hearing, see later). However, the GIP may take decisions which mean penal action is not taken (*archiviazione* requests).¹⁴ In particular, if an *archiviazione* application is made by the prosecutor (art. 408 para. 1 cpp) the GIP, after the examination of the file containing all the evidence collected during the investigation, will decide whether there is insufficient evidence to support a prosecution. If he/she disagrees with the application, the GIP can require the prosecutor to carry on the investigation (art. 409 para. 4 cpp), to formulate a particular charge (art. 409 para. 5 cpp) or to charge a particular accused (art. 415 para. 2 cpp).

Thus, the legislator has given to a separate judicial actor (the GIP is a real judge) a power to regulate the prosecutor's implementation of the legality principle.¹⁵ In particular, this judge ensures through the *archiviazione* procedure that the prosecutor is not evading the duty stated in art. 112 cost.¹⁶ This prerogative is not merely formal. In particular, the GIP can require the prosecutor to record a person(s) as accused when this is not identified by the prosecutor, but his identity seems clear (to the GIP) from the investigative acts (art. 415 para. 2 cpp). Furthermore, when the charge seems clear from the investigation (art. 409 para. 5 cpp) the GIP orders the prosecutor to formulate it. There are legal arguments in the Italian literature that the power thus conferred on the GIP does not comply with the legal requirements of impartiality and neutrality that a judge's status requires.¹⁷ This is because the judge de facto determines the charges. It has been argued that this should only be done by the prosecutor, who, in the Italian system, is the only judicial actor entitled to put forward an accusation. However, this encroaching between the separate domains of different legal actors is said to be justified by the aim to preserve the legality principle, which is a constitutional principle.¹⁸

The last judicial actor involved with the implementation of the legality principle in the pre-trial phase is the preliminary hearing judge. As indicated above this actor is called into action when a *rinvio a giudizio* request is made. The GUP does not formally verify whether art. 112 cost. has been correctly applied (this is only a GIP's task, in the case where the prosecutor wants to drop the charge). This judge has "to protect the accused and the good functioning of the justice system from rash

¹⁴ The penal action is never set in motion before the GIP, this is why this legal actor is said to have a "jurisdiction without action". See, for example, Scaparone (2003) *op. cit.* p. 460.

¹⁵ Scaparone (2003) *op. cit.* p. 522.

¹⁶ *Ibid.*

¹⁷ *Ibid.* p. 526.

¹⁸ *Ibid.*

requests for trial”.¹⁹ However, in implementing this function the GUP will judge if there is sufficient evidence to support an accusation during the trial.²⁰ He/she hears the parties, then he/she may decide to drop the prosecution (*sentenza di non luogo a procedure*, art. 425 cpp) or to send the case to trial (*rinvio a giudizio*, art. 424 cpp). Moreover, if the judge believes that the investigation is not complete, he/she may indicate to prosecutors the investigations that they have to carry out (art. 421 *bis* para. 1 cpp). Thus, the GUP’s main task is to verify that the investigation is complete,²¹ and not that the prosecutor has correctly implemented penal action. However, this verification is, obviously, based on the same issues (whether there is evidence to support the charge) that the prosecutor takes into account in deciding to prosecute.

To conclude, we have outlined a complicated system whereby the implementation of the legality principle is the subject of intervention by different judicial actors during the pre-trial phase. It appears clear that decisions on prosecutions are constrained within strict legal rules and subject to close judicial monitoring. However, as we said “it appears”. This study aims at understanding whether this is more appearance than reality.

2.1. Legality principle: the legally defined exceptions

There are exceptions which exempt the prosecutor from acting when a crime report is received and in which circumstances the legality principle is not regarded as having been violated. It is the law which binds the prosecutor, in certain circumstances, not to prosecute.²² This happens when one of the four *condizioni di procedibilità* stated by the law is missing. For example, if A reports that B has been slandered the prosecutor may not intervene if there is no *querela* (a formal complaint made by the victim, who, in this case, is B). In this case the prosecutor does not begin the investigation and ask for *archiviazione* because a condition (in this case the *querela*) that the law requires to implement the penal action is missing (art. 411 cpp).²³ The prosecutor can begin an

¹⁹ *Ibid.* p. 522 and 534.

²⁰ *Ibid.*

²¹ *Ibid.* p. 534.

²² Scaparone (2003) *op. cit.* p. 469. See also Cordero (2003) *op. cit.* pp. 407-408.

²³ The *condizioni di procedibilità* (art. 345 cpp) are: *querela* (complaint from the victim) (art. 336 cpp), *istanza* (another form of complaint made by the victim) (art. 341 cpp), *richiesta* (complaint made by the competent organ, for example the Minister of Justice, in some circumstances) (art. 342 cpp) and

investigation only if he/she believes that the condition may be fulfilled in the future (art. 346 cpp).²⁴ Thus, we can say that when one of these conditions is missing the crime report is de facto groundless because no crime can be prosecuted. In these cases it is the law which requires the decision. The prosecutor does not have a real discretionary power. So, the system allows exceptions to the legality principle.

There are a number of justifications advanced for these exceptions. In Italy it is recognized that under certain circumstances discretion is legitimate and under others not.²⁵ Moreover, these remedies are linked to precise decisions taken by the legislator. For example, the reasons for requiring the *querela*²⁶ may be that the crime is so petty that the prosecution should be dependent on the victim's will. Moreover, crimes concerning the honour or the 'sexual freedom' of the victim should require his/her consent to be prosecuted, because the publicity deriving from the proceedings may intensify the consequences of the crime itself.²⁷ The Constitutional Court has made it clear that the legality principle is not compromised by these exceptions. This is because the penal action must be implemented if the condition is fulfilled.²⁸

2.2. Legality principle: implicit discretionary judgements

In this section we deal with the extent to which discretion remains implicit within the legal rules and structures outlined before. First, let us consider the start of the criminal process. The crime report has just been received, penal action has neither been instigated nor discontinued (through the *archiviazione* or *rinvio a giudizio* requests). At this specific moment some crime reports may be manifestly groundless from the beginning.²⁹ We are talking about all these cases where the facts reported obviously do not constitute a crime. A typical example is when A claims that B owns him some

autorizzazione a procedere (assent) (art. 343 cpp). There is no need to explain in detail these provisions. Suffice here to say that, without these conditions, a case can not be prosecuted.

²⁴ This provision is important because the *condizioni di procedibilità* may be necessary to prosecute serious crimes, such as rape (art. 609 septies cp), which require the *querela* from the victim.

²⁵ For example, Cordero (Cordero (2003) *op. cit.* p. 407) clearly explains that a system needs selective remedies to make it work better.

²⁶ Not all the *condizioni di procedibilità* are aimed to decrease the backlog of the penal system. For example, the *autorizzazione a procedere* is a procedure in which the prosecutor obtains the permission (from a public body) to begin a proceedings or to implement certain investigation activities. This happens, for example, when members of the Parliament are involved.

²⁷ Scaparone (2003) *op. cit.* p. 470-471.

²⁸ *Ibid.* p. 470.

²⁹ Cordero (2003) *op. cit.* p. 422.

money. This is not a crime, unless the prosecutor believes that there is a fraud behind it.³⁰ In these situations we can assume that no file will be opened and there will not be an *archiviazione* request before the GIP. Here we can say that prosecutors have a sort of discretionary power, in that there is no need to begin proceedings when the crime report is without legal foundation. The reasons for the necessity of this form of discretion are clear. The legality principle can not avoid the logical necessity of assessing the legal quality of particular acts.

What happens when the crime report has some legal foundation? Prosecutors have the duty to record in a specific register every crime report (this will not happen for the example just given, because the fact is not a crime) that they receive or that they discover (art. 335 cpp).³¹ The denunciation is particularly important. All citizens (not only the victim) have the right to make a denunciation (written or oral) when they know about a crime (for some crimes this right becomes a duty) (art. 333 cpp). The *denuncia* (written) is compulsory for public officials who come across a crime while they are exercising their functions (art. 331 cpp). This document includes the essential elements. In particular: it explains the facts, the day the crime was discovered, the evidence already known and information (e.g. address) about the person who may have committed the crime, the victim and all the other persons who may know something about the crime (art. 332 cpp). Thus, when prosecutors receive (directly or through the police) these documents they must act. These kinds of crime reports are specifically set out by the law and they represent the stimulus to begin proceedings. The same function can be served by some *condizioni di procedibilità* (e.g. *querela*): in this case the documents act as both *condizioni di procedibilità* and crime reports as well.³²

These documents do not represent the only opportunities that the prosecutor has to begin an investigation. Crime reports may come in different forms which are not specified by the law; for example: information published in newspapers or through confidential channels. These are called 'innominate' crime reports, because

³⁰ *Ibid.* p. 424.

³¹ At this stage the proceedings is not technically started, in fact the crime report recording is only a premise to begin a penal proceedings. This will formally start with the first investigation act made by the prosecutor or by the police. See Scaparone (2003) *op. cit.* p. 465. The law defines certain forms of crime reports, the *denuncia* (denunciation) and the *referto* (report) (art. 330-334 cpp), the latter has to be filled by persons who work in the health area.

³² Scaparone (2003) *op. cit.* p. 465.

they do not have a specific name and specific characteristics. In these cases the prosecutor decides if they need to be formally recorded in the register and investigated. In other words: the prosecutor decides if they are real crime reports, in which case he/she must record them (art. 335 cpp). An example, given by Cordero, of this form of crime reports is the news. The author is very clear when he says that if the prosecutor does not believe that these crime reports are reliable he “ignores them”.³³ For example, prosecutors may read an article about a crime, but if they believe that the account given by the journalist is not correct, they will not record it in the register. Thus, in these circumstances prosecutors de facto also have a discretionary power. Because a crime report must be based on concrete evidence, prosecutors need not pay attention to someone simply expressing their own opinion that a crime has been committed, particularly if the crime has been already investigated.

The existence of prosecutorial discretion in these situations is not regarded as compromising the legality principle. In fact, it is true that such a provision can only be fully implemented if this action is preceded by an adequate investigation. However, we can not ask prosecutors to act upon every allegation of crime that comes to their report. The consequences of this solution might be catastrophic. Everyone who has a slight suspicion will refer it to the authorities, who will be forced to act. This would eventually clog up the system. This may be true of another situation: the anonymous denunciation. The code is clear these kinds of crime reports can not be used, unless they represent the *corpo del reato*³⁴ or they come from the accused (art. 333 para. 3 cpp related to art. 240 cpp). However, it is recognized that prosecutors and the police may use anonymous denunciations to discover the crime itself.³⁵ It is clear that if the system were to give automatic legal status to these types of anonymous crime reports the backlog of cases to investigate and prosecute could become unsustainable. Moreover, a denunciation, even if it is anonymous, implies a responsibility. If one makes a false allegation of crime (citing a specific accused) and the person who made it knows that it is not true he or she can be prosecuted for *calunnia* (false allegations, art. 368 cp). For these reasons the law prevents the prosecutor from formally using these types of information. But it seems logical to tolerate an unofficial use of these denunciations, because they might be important (e.g. somebody might be too scared to

³³ Cordero (2003) *op. cit.* p. 428.

³⁴ These are the objects through which or on which the crime was committed and the fruits of crime (see art. 253 para. 2 cpp, for example: a gun used to commit murder, stolen goods).

³⁵ Scaparone (2003) *op. cit.* p. 466.

sign an official allegation, but the report may look reliable). In this way we can speak of a form of discretionary power. It is left to the prosecutor as to how to use the anonymous denunciation.

There is another form of implicit discretion that we need to analyze. Here we are at a different procedural moment. We are still at the very beginning, but the prosecutor has already recorded the crime report. For a number of reasons (mainly linked to the impossibility of coping with the amount of work, see chap. 8) he/she can not investigate all the cases in the same way. As a consequence prosecutors may prioritize the most serious.³⁶ As Franco Cordero says: this is a “discretion of the priorities”.³⁷ Prosecutors are allowed to choose the when and the how, but, sooner or later, they must begin an investigation concerning all recorded crime reports. Prosecutors seem to agree with this concept. An important prosecutor (cited in Nelken and Zanier’s work) explained that this is a marginal discretionary power, which is not incompatible with the function they have to carry out.³⁸ Again this is logical and it enables the sensible use of resources in order to help the system to work better. No one wants a system where a simple theft and a murder are investigated with the same amount of resources. This is clear when prosecutors have to make obvious choices (murder-theft). However, it becomes more complicated when they have to prioritize, for example, white collar crimes over street crime or vice-versa. In these situations, if a decision has to be made (e. g. due to lack of resources), it will necessary involve value-judgements. These are expressly prohibited under the legality principle. Thus, how do prosecutors cope with these situations? Are there uniform and general criteria? How important are external influences (e. g. police’s decisions)?

2.3. The legality principle in the English literature

As we saw before (see chap. 2) there is literature from the Anglo-Saxon world which has considered the real extent of the application of the legality principle in Italy. Goldstein and Marcus underlined the fact that prosecutors are “relatively passive” and

³⁶ Cordero (2003) *op. cit.* p. 428.

³⁷ *Ibid.*

³⁸ Nelken, D. e Zanier, M.L. “*Tra norme e prassi: durata del processo penale e strategie degli operatori del diritto*”. 2006. *Sociologia del Diritto*. N.1. pp. 143-166. This article is also based on interviews with prosecutors and other legal actors.

they rely completely on the information reported by the police (see later).³⁹ Thus, if the police decide not to report a case this will not be prosecuted. Moreover, even if the case is brought to the prosecutor, he/she can decide to gather no further evidence: as a consequence the case will be dropped because it appears that there is no crime. Finally, the prosecutor can decide to put forward certain charges and to drop others.⁴⁰ Thus, Goldstein and Marcus argue that these factors effectively qualify the legality principle because in practice, during the pre-trial phase, it allows the police and prosecutors to drop or to put forward a case on a discretionary basis. The authors give one very clear example to illustrate this concept. A prosecutor who receives a report from a woman of dubious reputation, who alleges that she has been raped by a man who has no previous record, may decide, after an evaluation of the elements, that he should not be prosecuted because of a lack of victim credibility.⁴¹

Goldstein and Marcus suggest that Italian prosecutors have discretionary powers when they define the crime problem, but they do not explain the socio-legal elements on which this discretion may be based. The authors also do not seem to consider prosecutors' powers to mediate police influences when they determine priorities. So, the question could be: do prosecutors simply "swallow" the priorities imposed by the police or can they consider other (personal) criteria which limit the impact of police's decisions?

Finally, the authors wrote their articles in 1977. At that time there was a fully inquisitorial system whereas now (after the 1989 reform) the Italian criminal procedure has turned to a more adversarial system. This has produced some practical effects. Generally speaking this transition is characterized by the fact that the guarantees of an adversarial system have been added to those of an inquisitorial system.⁴² For our purposes the most important change is that the instructing judge does not exist anymore so that now only prosecutors are entitled to prosecute.⁴³ Furthermore, prosecutors clearly appear to be the main legal actors during the pre-trial phase. The new code clearly states that the police are at their disposal for the investigation (see later).

³⁹ Goldstein and Marcus (1977) *op. cit.* p. 250.

⁴⁰ *Ibid.* p. 271.

⁴¹ *Ibid.*

⁴² Nelken and Zanier (2006) *op. cit.*

⁴³ Judges preliminary investigation judge and preliminary hearing judge, (see later) still participate during the pre-trial phase, but with no real investigative powers.

The more recent literature in English from Italian authors mainly reflects the conclusions of Marcus and Goldstein. In particular, they underline the fact that, in practice, the legality principle leaves substantial discretionary powers to prosecutors. This literature also studied the consequences that prosecutors' discretion have for the system. According to Boari prosecutors seem to make "indiscriminate use of dismissals for a large range of crimes".⁴⁴ Moreover, Grande suggests that the de facto unfettered freedom that prosecutor retains in deciding where and when to use his/her powers leads to "opposite results [compared to the system designed by the Italian constitution, see later] in terms of equality before the law".⁴⁵ Fabri speaks of "prosecutors' huge discretion" during the investigation phase.⁴⁶ Finally, Di Federico says that prosecutor decides from case to case "whether or not to exercise substantially and in full independence police functions; and can decide from case to case also the scope and the means of investigation".⁴⁷ The author supports the thesis that "penal action in Italy is de facto just as discretionary as in other countries, and perhaps more".⁴⁸

Ultimately, the literature in English (both from Anglo-Saxon and Italian authors) has identified that Italian prosecutors take "gate keeping decisions", and have suggested that this does not comply with the implementation of the legality principle. We know that these decisions "determine whether or not a case enters in the criminal justice system".⁴⁹ The authors, although they focused on what happens in practice, did not consider specifically the factors which shape these decisions. The approach of this thesis is to examine the practice of prosecution decision-making rather than confining discussion to the theory.

⁴⁴ Boari N. "*On the Efficiency of Penal Systems: Several Lessons from the Italian Experience*". 1997. *International Review of Law and Economics*. 17. pp. 115-126. p. 121.

⁴⁵ Grande (2000) *op. cit.*, p. 241.

⁴⁶ Fabri M. "*Theory versus practice of Italian criminal justice reform*". 1993-1994. *Judicature* 77. pp. 211-216. p. 212.

⁴⁷ Di Federico (1998) *op. cit.* p. 378.

⁴⁸ *Ibid.*

⁴⁹ Ashworth A. and Redmayne M. "*The criminal process*". 2005. 3rd ed. Oxford: Oxford University Press. p. 138.

2.4. The legality principle: some brief considerations

In the last sections we have analyzed the legal framework of the legality principle within the pre-trial phase in the Italian legal system and some exceptions to its application. We have reached certain conclusions. First, the legality principle is set out in a clear legislative provision which requires the prosecutor to implement it.⁵⁰ Secondly, this strongly expressed principle does not preclude exceptions where failure to prosecute is clearly not regarded as contrary to the principle, the *condizioni di procedibilità* system representing a clear example. Moreover, the legality principle seems to leave room for forms of discretion that are not explicitly created by particular legal rules. In particular: the prosecutor excludes all manifestly ill founded crime reports: these are treated as groundless from the beginning. Further, prosecutors have to evaluate the ‘innominate’ crime reports and information that does not constitute crime reports at all (i. e. anonymous denunciations) and they ignore those that they judge groundless. Lastly, the prosecutor has a ‘discretion to prioritize’: the more the crime is serious, the more resources are allocated to investigate and to prosecute it.

At this point we have described the legal environment where the prosecutor works. It is clear that this is shaped by the legality principle, but this does not exclude the existence of certain forms of discretion which appear implicit within the system (e. g. the fact reported is clearly not a crime). In order to explain adequately how prosecutors exercise their discretion and thus define the crime problem we need to investigate the elements which, in practice, condition prosecutor’s decisions on the crime problem. The literature in English has clearly argued that Italian prosecutors retain these discretionary powers. But the authors have not investigated the decision-making criteria used by prosecutors. Moreover, we will see that these issues have only been partially analyzed by the Italian academic literature as well.

⁵⁰ Cordero (2003) *op. cit.* p. 402.

3. The prosecutor's office and the limits of hierarchical control⁵¹

The aim of these sections is to explain the legal rules which define the organization of Italian prosecution offices. Moreover, here we will try to make some observations about hierarchy and its limits in prosecution offices in Italy.

Previously we have indicated that the Italian constitutional fathers radically changed the relationship between the executive power and the prosecutors. The latter are now 'externally' independent from any other power; they are part of the judiciary as much as judges and they share the same status (art. 104 para. 1 cost.). Thus, prosecutors are only responsible before the law.⁵² Moreover, judges and prosecutors are both subject to the *Consiglio superiore della magistratura* (higher Council of the judiciary, CSM) (art. 105, 106, 107 cost.).⁵³ This suggests that prosecutors are not subject to any form of external pressure. In particular, only the CSM, which is a judicial body, is able to affect their careers. It is also important to underline the new relationship between the Minister of Justice and the prosecutor. Before 1946, when this provision was introduced, the prosecutor exercised its functions under the direction of the Minister of Justice, whereas now the latter has only a power of supervision (art. 69 *legge ordinamento giudiziario*, judicial law order, ord. giud.). However, this is a 'light supervision', whereby the Minister has responsibilities for the good functioning of the justice system, but there is no hierarchical relationship between him and the prosecutors. Thus, the Minister can no longer instruct prosecutors to prosecute or not to prosecute cases, and, further, he/she can not issue guidelines of any kind.

The function of prosecutor is exercised, at the first instance courts, by the *magistrati*⁵⁴ attached to the *procura della Repubblica* (prosecution office attached to the first instance court) (art. 51 para. 1 let. a cpp); at the court of appeal by the *procura generale presso la corte d'appello* (prosecution office attached to the court of

⁵¹ This section will not deal with the organization of the national prosecutor's office which handles organized crime investigations and prosecutions.

⁵² Voena (2003) *op. cit.* p. 59.

⁵³ In particular, art. 105 cost. says that the CSM "has the exclusive competence to appoint, assign, move, promote, and discipline members of the judiciary" and art. 107 para. 1 cost. says that: "Members of the judiciary may not be removed from office. They may not be dismissed, suspended, or moved to other jurisdictions or functions except either by decision of the Higher Council of the judiciary".

⁵⁴ In Italian this name indicates both prosecutors and judges.

appeal); at the *corte di cassazione* (the Italian supreme court) by the *procura generale presso la corte di cassazione* (prosecution office attached to the *corte di cassazione*) (art. 51 para. 1 let. b cpp). But prosecutors at a lower court are not subject to guidelines or orders issued by prosecutors working in a higher court. There is no hierarchical relationship. Prosecutors attached to the court of appeal and his colleagues attached to the *corte di cassazione* are only competent for proceedings before these courts.⁵⁵ They do not interfere with the *procure della Repubblica*'s job. In particular, the *procuratore generale presso la corte d'appello*, who is entitled to oversee the prosecutor's offices in his/her district,⁵⁶ does not have any power to take an "autonomous initiative" concerning proceedings.⁵⁷ Moreover, this legal actor may not develop any preliminary investigation even if the crime report comes directly to his office;⁵⁸ in such cases he/she will inform the competent prosecutor. Finally, the general prosecutor attached to the court of appeal can not discipline the prosecutor who does not act after receiving a piece of information that he/she believes is not (yet) a crime report.⁵⁹ As indicated above, this decision is only taken by the prosecutors (chief prosecutor, deputy chief prosecutors and assistant prosecutors) at the *procura della Repubblica*. Thus, the *procuratore generale presso la corte d'appello* does not direct the prosecutor's offices within the court of appeal's district. Information channels may be opened during the preliminary investigation between the *procura della Repubblica* and the prosecutor's office at the court of appeal. For example, art. 118 *bis* disp. att.⁶⁰ enables the general prosecutor, when prosecutors are working on connected cases but without coordination or effective coordination, to put together those prosecutors (art. 118 *bis* para. 3 disp. att.).⁶¹ However, in these cases, if prosecutors continue the inquiry without coordination, the *procuratore generale* has no power to require them to do so. There are no remedies provided by the law, nor can

⁵⁵ Voena (2003) *op. cit.* p. 63.

⁵⁶ *Ibid.* p. 64.

⁵⁷ Cordero (2003) *op. cit.* p. 203.

⁵⁸ Voena (2003) *op. cit.* p. 63.

⁵⁹ *Ibid.*

⁶⁰ If prosecutors are working on particular serious crimes stated in art. 407 para. 2 let. a cpp (e. g. mafia organized crime) they inform the general prosecutor. This, if he realizes that these investigations are connected, informs the competent prosecutors (art. 118 *bis* para. 1 disp. att.). Moreover, prosecutors general are informed when prosecutors work, spontaneously or following the information as stated in art. 118 *bis* para. 1 disp. att., on connected investigations (art. 118 para. 2 disp. att.).

⁶¹ Voena (2003) *op. cit.* pp. 63-64.

the prosecutor general (as a real superior within a hierarchical system might do) commence a disciplinary action.⁶²

There is only one exception to this scenario in which the roles between prosecutors are strictly separated. This is the *avocazione* (taking over of criminal proceedings). In case of *avocazione* all the functions of the substituted prosecutor goes to prosecutor general.⁶³ We saw above that through this procedure the prosecutor general automatically takes over the investigation when the prosecutor does not act (implementing penal action or *archiviazione* request, art. 412 para. 1 cpp). There are two other cases of automatic *avocazione*. First, when, within the *procura della Repubblica* office, it is not possible to replace promptly a prosecutor in case of abstention or incompatibility⁶⁴ (art. 372 para. 1 let. a cpp). Second, when the chief prosecutor has not replaced the prosecutor in one of the situations set out in art. 36 para. 1 let. a, b, d and e cpp (art. 372 para. 1 let. b cpp) (see later in this section).⁶⁵ There are cases where the *avocazione* is not automatic but optional. First, when the GIP disagrees with the *archiviazione* request and fixes a hearing to discuss it (art. 412 para. 2 cpp in relation to art. 409 para. 3 cpp). Secondly, when the GIP agrees with the victim's objection to the prosecutor's *archiviazione* request (art. 410 para. 3 cpp in relation with art. 409 para. 3 cpp). Thirdly, when the GUP decides that the prosecutor must perform further investigations (421 *bis* para. 2 cpp). Fourthly, the general prosecutor can begin the *avocazione* procedure during the investigation of certain cases of organized crime. This happens when, if there are connected investigations, the coordination under art. 371 para. 1 cpp is not effective (art. art. 372 para. 1 *bis* cpp). The *avocazione* order must include the reasons for the choice. Furthermore, this is sent to the Higher Council of the Judiciary and to the interested prosecutors, so that they can make a complaint to the general prosecutor attached to the *corte di cassazione*.⁶⁶ Thus, the *avocazione* procedure gives to the general prosecutor substantial powers to intervene within a proceedings started by a prosecutor attached at a first instance court. However, the cases are strictly fixed by the law and there is

⁶² Cordero (2003) *op. cit.* p. 206.

⁶³ *Ibid.* p. 204.

⁶⁴ The prosecutor can abstain every time there are serious reasons to believe that this is convenient. Incompatibility (art. 16 - 19 ord. giud.) concerns specific cases indicated by the law (i. e. reasons of kinship).

⁶⁵ These are the same situations where a judge must withdraw himself from the case and the parties can recuse him. For example, the prosecutor has an interest in the trial.

⁶⁶ Voena (2003) *op. cit.* p. 65.

no general power to direct the prosecutor. As a consequence the *avocazione* procedure is not a sign of a hierarchical relationship between the *procuratore generale presso la corte d'appello* and the *procura della Repubblica*.⁶⁷ We can say that this procedure is necessary for the efficiency of the system when the prosecutor(s) does not act properly given that the system (generally speaking) is not hierarchical.

In this brief overview two points have been emphasized. First, there is no hierarchical chain from the Minister of Justice to the ordinary prosecutor, passing through the prosecution offices attached at the court of appeal and at the *corte di cassazione*. Secondly, whenever there are exceptions (*avocazione* cases) to this rule these are really the last resort (e. g. when within the *procura della Repubblica* office it was not possible to substitute the incompatible prosecutor). Moreover, these procedures are aimed at increasing the effectiveness of the legality principle, not to create a hierarchical relationship between prosecutors. However, in 2005 the centre-right government passed an Act which substantially amended the *ordinamento giudiziario* law. This reform was subsequently suspended (2006) and then partially amended (2007) by the centre-left government (which lasted from 2006 till 2008). These provisions did not bring the system back to the fully hierarchical pre-1946 situation. In particular, the Minister of Justice still does not have direct influence on prosecutors. And a clear separation between the executive and prosecutors (and the judiciary in general) has been maintained. But the superior-inferior relationship between prosecutors within the prosecution office seems to have changed.⁶⁸ The 2005 reform (despite further amendments in 2007) has clearly increased chief prosecutors' hierarchical powers. So, the *ordinamento giudiziario* reform partially qualifies the previous legal regime. In the next section we will try to outline the key features of the superior-inferior relationship between prosecutors before and after 2005. We will only discuss the organizational relations of prosecution offices attached to the first instance courts (i. e. *procure della Repubblica*). These are the prosecutors who receive crime reports, supervise the investigation and implement the penal action.

⁶⁷ *Ibid.* p. 64.

⁶⁸ These reforms treat a wide range of topics, such as, for example: separation of career and functions between prosecutors and judges, career progression, the institution of a school for *magistrati* etc. However, for the purposes of the current study we will concentrate on the legal provisions which deal with the organizational relations within prosecution offices attached at the first instance courts (i. e. *procure della Repubblica*).

3.1 The prosecutor's office – micro-level

Every prosecution office is composed of a chief prosecutor (*procuratore della Repubblica*),⁶⁹ and some *magistrati*, who work as prosecutors. These are the deputy chief prosecutors (*procuratori aggiunti*, if the office is not too small) and the assistant prosecutors (*sostituti procuratori*).⁷⁰ These are the legal actors entitled to prosecute (i. e. to act as *pubblico ministero*).⁷¹ The chief prosecutor directs (art. 70 para. 3 ord. giud.) and organizes the office according to the principles of impartiality and *buon andamento* (good functioning) stated in art. 97 para. 1 cost.⁷² The chief prosecutor can issue guidelines in relation to pre-trial investigation (in order to improve the working of the *procura della Repubblica* or other directives (e. g. requirements that he/she be informed of the development of investigations)).⁷³ In theory, the *pubblico ministero* who does not follow these rules may be replaced.⁷⁴ Thus, during the investigation there seems to be a real hierarchical relationship between the chief and his/her assistant prosecutors. Every prosecutor is fully autonomous during all hearings (art. 70 para. 4 ord. giud. and 53 para. 1 cpp). This is because of the oral nature of the hearing: prosecutors must be free,⁷⁵ for example, to change their views and tactics during the trial. This does not prevent the chief prosecutor issuing directives about decisions taken prior to the hearing (e. g. decisions about the charge to put forward in the *udienza preliminare*).⁷⁶ These directives are regarded as normal and appropriate to the relationship chief-*pubblico ministero*.⁷⁷ Furthermore, the prosecutor is not fully autonomous at hearings which take place before the prosecution is commenced (e. g. hearings before the GIP for 'precautionary' measures).⁷⁸ In these situations art. 70 para. 3 ord. giud. applies. This states that the chief prosecutor appoints a prosecutor to work on a specific case. As a consequence we can assume that, theoretically, during the investigation this appointment can be cancelled and another prosecutor selected to

⁶⁹ Of course for the prosecution office attached at the court of appeal the chief prosecutor is the *procuratore generale presso la corte d'appello*. For the prosecution office attached at the *corte di cassazione* the chief is the *procuratore generale presso la corte di cassazione*.

⁷⁰ Voena (2003) *op. cit.* p. 71.

⁷¹ Effectively the translation of *pubblico ministero* is prosecutor.

⁷² Voena (2003) *op. cit.* p. 72.

⁷³ *Ibid.* p. 74.

⁷⁴ *Ibid.*

⁷⁵ *Ibid.* p. 73.

⁷⁶ *Ibid.*

⁷⁷ Cordero (2003) *op. cit.* p. 213.

⁷⁸ Precautionary measures are pre-trial controls on the accused, like pre-trial custody or stay at home.

work on a case. This can happen without following the rules stated in art. 53 para. 2 cpp about the substitution of a *pubblico ministero* (see later).⁷⁹

It is particularly important to examine the way the chief prosecutor designates a *magistrato* (or a group of *magistrati*) to investigate and prosecute a case (art. 70 para. 3 ord. giud.). Before the 2005 reform this happened through a “*designazione*”⁸⁰ rather than a delegation of powers.⁸¹ This means that the power to prosecute is not simply a power held by the chief prosecutors. All the prosecutors have this power, the chief only decides who has to deal with which individual cases.⁸² Thus, the *procuratore della Repubblica*, as art. 70 para. 3 ord. giud. states, really had mere “job organization prerogatives” over the *magistrati*. But according to Cordero, the verb “*designare*” implies a choice made by the chief prosecutor, so that the *magistrato* is not automatically designated.⁸³ However, Voena has written that this procedure is ruled by fixed mechanisms.⁸⁴ If this is the case the chief prosecutor’s prerogatives would be more limited in their practical effect. It is difficult to know which approach is correct. The reality may vary in different prosecution offices according to three variables. First, the internal culture of prosecutors: what would be regarded as an appropriate method for appointing a prosecutor? But decision-making may not only be shaped by prosecutors’ views. In fact (second element), the approach to take may be determined by the size of the *procura della Repubblica*. A chief prosecutor working in a big city may find it difficult (because of the backlog of cases, of the numbers of prosecutors to co-ordinate etc.) to take a decision on the allocation of every single case. While a *procuratore della Repubblica* working in a small-medium town may find it easier to decide case by case (because he/she knows much better his substitutes etc.). The third element regards the geographical location of prosecution offices. In Italy, even if prosecutors are working in areas of similar dimensions, there can be huge differences in terms of criminality. Thus, in areas where the problems are often similar and not too serious the chief prosecutor may find it more efficient to set up fixed rules. Whereas if criminality is more heterogeneous and problems are more

⁷⁹ Voena (2003) *op. cit.* p. 72-73.

⁸⁰ Though the chief can decide to prosecute himself.

⁸¹ Cordero (2003) *op. cit.* p. 212. See also Voena (2003) *op. cit.* p. 72.

⁸² Cordero (2003) *op. cit.* p. 212.

⁸³ *Ibid.*

⁸⁴ Voena (2003) *op. cit.* p. 72. A fixed mechanism means that superior prosecutors do not decide where to allocate the case. There is a turnover and, prosecutors who are on duty on a specific day receive the file (see chap. 6).

serious the *procuratore della Repubblica* may want to consider carefully the decision. There may be circumstances (other than those we just explained) where the *procuratore della Repubblica* may replace the prosecutor initially allocated to deal with a case. These are indicated by the law (art. 53 para. 2 cpp). First, the chief prosecutor may decide to do so if there is a serious obstacle (i. e. preventing the substitute from working properly) or if there are *rilevanti esigenze di servizio* (i. e. significant reasons related to the correct implementation of the job), which mean that it is necessary to replace the prosecutor (eg. the prosecutor is seriously ill). Second, the prosecutor will be replaced (automatically) in certain circumstances (art. 36 para. 1 let. a, b, d and e cpp) which are the same as those requiring a judge to withdraw from a case or the parties to recuse him/her (e. g. when he/she has an interest in the proceedings). Third, the *magistrato* can be replaced if he/she agrees.⁸⁵

These were and in part are still (after the *ordinamento giudiziario* reform) the rules. They suggest that in legal theory there exist certain limited forms of hierarchical powers. But how have prosecutors applied them? According to Di Federico in the last 30 years we have witnessed a practice called “personalization of prosecutorial functions”.⁸⁶ This means that the initiation of the criminal action is an attribute of the single prosecutor and not of his/her office.⁸⁷ Thus, a prosecutor can begin an investigation and a prosecution any time he wants. These actions will be only based on his personal views. Moreover, Di Federico says that this trend also applies to directives on how to deal with single cases, on the investigative means to use and on whether to restrict personal liberties of suspects.⁸⁸ Prosecutors are not in practice bound by any rule and are not accountable to their superiors for any of the decisions they have to take about a case (including to prosecute or not and to ask for precautionary measures). Moreover, *pubblici ministeri* can manage the investigation the way they want (in terms of expense or restrictions of the accused person(s)’s liberty etc.). In particular, the author argues that directives concerning a single case are unacceptable when they seem to undermine prosecutorial independence.⁸⁹ In such cases assistant prosecutors have successfully challenged the chief’s power to issue these directives before the CSM. As a consequence, chief prosecutors have started to

⁸⁵ *Ibid.* p. 73.

⁸⁶ Di Federico (1998) *op. cit.* p. 379.

⁸⁷ *Ibid.*

⁸⁸ *Ibid.*

⁸⁹ *Ibid.*

use this power less and less.⁹⁰ Di Federico's statements about "personalization of prosecutorial functions" are supported by a survey involving 1000 defence lawyers. In particular, 55% of these said that there is "a substantial difference in the way prosecutors decide in very similar cases".⁹¹

Three observations need to be made about Di Federico's conclusions. First, as the author says, prosecutors' independence is fundamental within the Italian constitutional and criminal justice system.⁹² Thus, it seems plausible that this would prevail over any other principle (i. e. hierarchical relationship chief-assistant). Secondly, the empirical research undertaken by the author did not involve prosecutors. Thirdly, we still do not know how the relationship between chief and assistant prosecutors is shaped in practice. We can say that it does not appear hierarchical, but if that is so what kind of relationships do exist (e. g. are they based on strategies of persuasion)?

As indicated above, this was the scenario before the 2005 reform. The *legge delega* (parent Act) n. 150/2005 enabled the former centre-right government to modify "the organization of prosecution offices".⁹³ Subsequently the government issued a *decreto legislativo*⁹⁴ (D.Lgs. n. 106/2006) which implemented this provision. This piece of legislation set out principles which were revolutionary when compared to the previous legal rules. The chief prosecutor is now the only legal figure entitled to carry out a prosecution (i. e. implementing the penal action). However, given that a few persons can not possibly deal with all the cases, this power can be passed to assistant prosecutors. The wording of the D.Lgs. was clear: now the *procuratore della Repubblica* does not "appoint" a *magistrato* to deal with a case, but he "delegates" the power to him/her.⁹⁵ Thus, there is a power which passes from the chief to the prosecutors, who do not have this power before the delegation.

The initial reforms were amended. During the electoral campaign (in 2006) the centre-left made clear that one of their priorities was the amendment of the

⁹⁰ *Ibid.*

⁹¹ *Ibid.* p. 381.

⁹² *Ibid.* p. 375-376.

⁹³ Act n. 150/2005 art. 1 par. 1 d.

⁹⁴ These are like statutory instruments and count as primary legislation. In particular, the Parliament (through the *legge delega*) authorizes the government to enact legislation (the *decreti legislativi*) on the basis of fixed principles and limits.

⁹⁵ D.Lgs. n. 106/2006 art. 2 para. 1.

ordinamento giudiziario reform passed by the centre-right. In October 2006, the government (elected the previous May) passed an Act (n. 269/2006). This is important for two reasons. First, it suspended the effects of the 2005 reform.⁹⁶ Later, in July 2007 (just before the end of the suspension period) another Act was passed (n. 111/2007). This eventually amended the 2005 reform (that still exists) again (and the subsequent delegated legislation linked to these provisions) and gave powers (it served as *legge delega* as well) to create delegated legislation making further amendments to the *ordinamento giudiziario*. The centre-left government collapsed at the beginning of 2008 and little use was made of the power to make further delegated legislation (see D.Lgs. n. 35/2008).⁹⁷ Second, and more important, the 2006 Act dealt with the organization of prosecution offices (and many other issues). In particular, D.Lgs. 106/2006 was amended. The chief prosecutor is still the only legal figure entitled to implement penal action. However, he/she does not do it “under his/her responsibility” and assistant prosecutors are no longer “delegated” to prosecute, but rather they are “assigned”.⁹⁸ As Pepino underlines, this is not a mere semantic distinction. The use of the verb “*assegnare*” (to assign) implies that *pubblici ministeri* are not mere executors. On the contrary they have a certain degree of autonomy when they prosecute cases. However, the author recognizes that, even after these amendments, prosecution offices (and the implementation of penal action) seem organized on substantially hierarchical rules.⁹⁹ In fact, these were the only amendments concerning the organization of prosecution offices (other very important and substantial amendments were made, but they are not relevant here). The situation remains very similar to that established by the 2005 reform passed by the centre-right.

So, the former centre-left government did not cancel the 2005 reform. Some of the provisions are still applicable. All of these were clearly intended to increase the hierarchical relationship within the prosecution office. In particular, five points seem relevant. First, the chief not only organizes the prosecution office, he/she determines the criteria to organize the office and those that he/she will follow in assigning the cases to the prosecutors. In particular, chief prosecutors will have to establish for

⁹⁶ Act n. 269/2006 art. 1.

⁹⁷ Basically, the provisions enacted (included those which were in the Act n. 111/2007) concerned *magistrati*’s career (e. g. public competition, progression etc.).

⁹⁸ Act n. 269/2006 art. 1 para. 2.

⁹⁹ Pepino L. “*Quale giudice dopo la riforma dell’ordinamento giudiziario?*”. 2007 . *Questione giustizia*. Vol. 4. pp. 651-676. pp. 660-661.

which area of crimes the designation will be based on fixed rules.¹⁰⁰ Second, the *procuratore della Repubblica* can determine the criteria that the prosecutors delegated to deal with a case have to follow. Moreover, if they do not follow these rules or they do not agree with them, the chief has the power to annul the delegation.¹⁰¹ Third, the *procuratore della Repubblica* can set out the general criteria that the *magistrati* must follow in: using the *polizia giudiziaria* (judicial police, see later), using financial and technical resources and planning the investigation.¹⁰² Fourth, measures which may affect personal freedom or *diritti reali* (rights on a thing, e. g. property) must be taken following the assent of the chief prosecutor or of the *magistrato* delegated for this function.¹⁰³ Fifth, the chief prosecutor is now the only representative of the prosecution office before the press.¹⁰⁴

It is not surprising that the newly elected centre-left government (closer to *magistrati*'s ideas about justice reforms compared to the centre-right) blocked and amended the 2005 reform so quickly (the government started to operate in June 2006 and the first Act was enacted the following October). The 2005 reform passed by the centre-right created a vehement reaction from prosecutors and judges. This was arguably the most acute confrontation between *magistrati* and a part of the political world for more than 15 years. We will go back to this issue in the next chapter. The point we want to underline here concerns the legal consequences of this reform. This is because, despite some relevant modifications (see above), chief prosecutors seem to have acquired a strong power to influence the organizational relations within prosecution offices. But what does it mean in practice? Are prosecutors ready to accept this? Do chief prosecutors want to use this power? In other words: studying the practical impact of the *ordinamento giudiziario* reform will be crucial to outline the principles which shape organizational relations on the ground within the prosecution office.

¹⁰⁰ D.Lgs. n. 106/2006 art. 1 para. 6.

¹⁰¹ *Ibid.* art. 2 para. 2.

¹⁰² *Ibid.* art. 4.

¹⁰³ *Ibid.* art. 3.

¹⁰⁴ *Ibid.* art. 5.

4. The police-prosecutor relationship during the pre-trial phase

Before we begin to explain in detail the legal rules shaping the relationship between the police and prosecutors we need to focus on three preliminary issues. The first is the distinction between *polizia amministrativa* and *polizia giudiziaria*. The former has the function of preventing crime; while the *polizia giudiziaria* (PG) deals with the investigation together with prosecutors. This does not mean that these are two distinct police forces. All police officers may be called upon to perform either function. So, the PG are police officers (just like the *polizia amministrativa*) but who primarily deal with crime investigation.¹⁰⁵ The PG works closely with, and is functionally dependent, upon prosecutors (see later). Their functions¹⁰⁶ are: receiving notifications of crime and discovering crimes; managing the consequences of a crime (e. g. restoring public order); conducting investigations; securing evidence; performing any act useful to the prosecution; and limiting the consequences of a crime (art. 55 cpp).¹⁰⁷ We will be looking at the role, functions and powers of the PG during the investigation but the impact of the *polizia amministrativa* during the pre-trial phase should not be underestimated: they too (like the PG) come across and collect crime reports.¹⁰⁸

The second important conceptual distinction to make is between *dipendenza funzionale* (functional dependence) and *dipendenza organizzativa* (organizational dependence). The former means that superiors have the right to determine the functions that subordinates should carry out. The latter means that superiors have the right to manage the organization (e. g. career, promotions, transfers, allocation of resources, disciplinary matters etc.) of their subordinates. PG officers are functionally dependent on prosecutors and organizationally dependent on police hierarchical superiors (prosecutors have no powers in relation to *polizia amministrativa*).¹⁰⁹

The third point concerns the personnel composing the PG. In Italy there are three police forces: *polizia di Stato*, *carabinieri* and *guardia di finanza*. Police officers

¹⁰⁵ Scaglione A. “L’attività ad iniziativa della polizia giudiziaria”. 2001. Torino: Giappichelli. pp. 15-19.

¹⁰⁶ Which, in certain circumstances, can also be carried out on their own initiative, see art. 55 and 348 cpp.

¹⁰⁷ See, for example, Voena (2003) *op. cit.* pp. 80-84. See also (in general for the role and the functions of PG) Scaglione (2001) *op. cit.*

¹⁰⁸ In Italian a crime report is called *notizia di reato*. This literally means crime notice.

¹⁰⁹ Voena (2003) *op. cit.* pp. 88-90.

belonging to each of these three police forces can be *polizia giudiziaria* (art. 57 cpp).¹¹⁰ The main distinction (not particularly relevant here) between these police forces concerns the way they are organized (and their uniforms!). They have different hierarchical superiors which determine their promotions, transfers, disciplinary matters etc. However, the same legal rules apply to all of them. So, there are no legal differences with regards to the relationship with prosecutors during the pre-trial phase.

During the investigation prosecutors have a right to determine the activities that the police have to carry out. This has a legal basis: *pubblici ministeri* have power to direct the investigation and the police during the investigation (art. 56 and 327 cpp).¹¹¹ This is the basic principle informing the relationship with the police at this stage of the proceedings. However, there are still some legal rules we need to clarify. First, the PG may carry out investigative acts on its own initiative from the moment they receive notification of a crime to the moment the prosecutor begins to direct the investigation (art. 55 and 348 cpp.). Second, the police can perform investigative acts under prosecutors' delegated authority (art. 370 cpp. the so called *delega*¹¹²). Third, prosecutors can directly carry out investigative acts (art. 370 para. 1 cpp.). Fourth, the PG have the duty to communicate to prosecutors 'without delay'¹¹³ (immediately in some situations) the crime reports they discover (art. 347 para. 1 cpp, see later). Finally, even if prosecutors start to direct the investigation, the police still retain some powers to take discretionary decisions about the investigative acts to perform (art. 348 para. 3 cpp.).

Moreover, when the police arrest someone they must immediately inform the prosecutor who can decide to set free the arrested person immediately or to ask,

¹¹⁰ PG can also be, for example, the majors of places where there are not police forces offices, the *guardie forestali* (state guards controlling forests and, in general, protecting wildlife) etc. However, these do not normally play a major part in the investigation. Anyway, they do not have a special status. So, the same legal rules apply for these as for the other PG officers.

¹¹¹ For comparative purposes it is interesting to note the similarities between the Italian and the Scottish system. In Scotland the investigator is subordinate to the procurator fiscal (White R. M. "*Investigators and Prosecutors or, Desperately Seeking Scotland: Re-formulation of the 'Philips Principle'*". 2006. *The Modern Law Review*. Vol. 69 N. 2. pp. 143-182. p. 145). To describe prosecutors' role during the pre-trial phase in Italy we could borrow White's conclusion that in Scotland, unlike England and Wales, the prosecutor is the climax of the investigation and not a final hurdle (White (2006) *op. cit.* p. 182).

¹¹² The *delega* is very similar to the French *commission rogatoire*. When prosecutors issue a *delega* it means that they delegated to the police the authority to perform investigative acts (a *delega* is, of course, not necessary when police officers retain autonomous powers to investigate, see above).

¹¹³ The original version of this article was saying "within 48 hours" and not "without delay". This was amended in 1992 (see chap. 8).

within 48 hours, the judge to confirm that the arrest was lawful and necessary. The decision to arrest is the police's right (although in some circumstances the arrest is compulsory) (art. 379-391 cpp). But the point is that, whenever there is an arrest, prosecutors must be immediately involved and they have to treat the case immediately. If they do not do this the arrested person(s) will be set free.

So, prosecutors direct the police during the investigation. But the degree of functional and organizational dependence on PG may vary depending on the type of police officer.¹¹⁴ Here we need to distinguish between the terms *sezioni* and *servizi*. The *sezioni*¹¹⁵ of PG are immediately and directly dependent on prosecutors.¹¹⁶ This means that prosecutors can use these police officers without the prior intervention of police hierarchical superiors.¹¹⁷ The number of allocated PG officers should be, at least, double the number of prosecutors in the prosecution office to which the *sezione* is attached. So, in practice, there should be at least two police officers for each *pubblico ministero* (art. 6 disp. att.). Moreover, the officers working in the *sezioni* can only be removed from their (investigative) functions following a decision by the chief prosecutor (art. 59 para. 1 and 3 cpp). Police officers belonging to the *sezioni* exclusively carry out investigative functions (i. e. they never work as *polizia amministrativa*). The *servizi*¹¹⁸ of PG also mainly (but not exclusively) deal with investigations. However, the degree of organizational and hierarchical dependence upon prosecutors is substantially reduced compared to the *sezioni*. Nevertheless, the police officers who direct the local *servizi* are responsible to chief prosecutors for the correct and efficient organization of the *servizi* (i. e. of the investigative activities they carry out, art. 59 para. 2 cpp). Moreover, chief prosecutors (and the prosecutor general attached at the court of appeal) retain some rights concerning appointments, transfers and promotions of police officers working in the *servizi* (art. 12, 14 par. 1 and 2 and 15 para. 2 disp. att.). The *servizi* only become functionally dependent on *pubblici ministeri* when they are involved in an investigation.¹¹⁹ So, the difference between *servizi* and *sezioni* stems from the different degree of dependence that the PG have on

¹¹⁴ For a general discussion about functional and organizational dependence of PG's officers see, for example, Voena (2003) *op. cit.* pp. 84-90.

¹¹⁵ This literally means sections.

¹¹⁶ Voena (2003) *op. cit.* pp. 86-87.

¹¹⁷ *Ibid.* p. 87 and 89.

¹¹⁸ This literally means services.

¹¹⁹ Voena (2003) *op. cit.* pp. 84-90.

prosecutors. As Voena said, prosecutors can directly use the *sezioni*, there is no ‘filter’ from police officers’ hierarchical superiors.¹²⁰ But prosecutors have to ask if *servizi* can be made available for the investigation. In practice, if the investigation is or becomes complicated (e. g. involve many accused persons, certain difficult investigative acts have to be carried out etc.) *pubblici ministeri* will have to contact the *servizi*. The reasons are both quantitative and qualitative. In fact, the *servizi* comprise a much higher number of police officers than the *sezioni*. They also include some specialized units like, for example, those dealing with organized crime.¹²¹ So, the *servizi* become essential every time certain complicated cases have to be investigated. Finally, there are the other police officers who carry out functions of *polizia giudiziaria*. In relation to these police officers prosecutors’ functional and organizational superiority is extremely limited.¹²²

The last important issue we want to discuss here concerns disciplinary matters. The main point is that prosecutors are involved in disciplinary proceedings but they can not impose disciplinary sanctions of their own initiative. On the contrary police hierarchical superiors have the power to determine these measures (for both *servizi* and *sezioni*). This shows, once again, the limits of police dependence on prosecutors. Art. 16 disp. att. defines the behaviours which can lead to disciplinary proceedings (e. g. when police officers omit to carry out activities ordered by judges or prosecutors). Moreover, the same provisions set out the sanctions. These can be quite strong: e. g. police officers can be suspended from their functions, those working in the *sezioni* can be removed. Finally, art. 17 and 18 disp. att. set out the procedure for disciplinary matters. This is initiated by the prosecutor general attached at the court of appeal (competent for the area where the accused police officer(s) works) and then the accusation will be discussed before a panel (composed by judges and high ranked police officers). However, as we said, this does not automatically trigger (or block) any internal disciplinary police proceedings). Prosecutors have no power in this sense.

If this is the legal framework, what is the real nature of prosecutors’ powers during the investigation? We want to understand the criteria which determine the way cases are supervised in practice. In other words: what are the methods of supervision?

¹²⁰ *Ibid.* p. 87.

¹²¹ *Ibid.* pp. 85-86.

¹²² *Ibid.* p. 87. For *sezioni*, *servizi* and other PG officers see art. 56-59 cpp.

This may provide a better description of the police-prosecutor relationship during the investigation. However, this is not just a matter of methods of supervision (i. e. directing the investigation). We must also examine the way the police interact with prosecutors when they have to define their priorities. Goldstein and Marcus, when they discussed the real extent of the legality principle, concluded that prosecutors are “relatively passive” and they rely completely on the information reported by the police. The authors underlined the problems related to the application of specific legal provisions (i. e. the legality principle). However, they leave a number of questions unanswered. They say that prosecutors are passive, but they do not adequately explain the nature and significance of this passivity. Moreover, they underline that the trial dossier is based on investigative acts performed by the police and that the prosecutor makes only a limited contribution to that.¹²³ The authors do not explain how this happens (e. g. through the delegation of all/part of the investigation to the police? Through informal agreements? And does the prosecutor make a contribution when the file has been prepared (e. g. revising/acting upon police reports on investigation? Asking for extra investigations?). These issues need to be discussed for two reasons. First, this is important to understand the nature of prosecutors’ professional culture (are they law-enforcers or a sort of barrister who deals with the trial (i. e. bringing police’s work to the courtrooms)?). Second, if we know the intensity of prosecutors’ interventions during the investigation, we can understand how much control they have on the information they receive.

¹²³ Goldstein and Marcus (1977) *op. cit.* p. 280.

**CHAPTER V. IMAGES OF CRIME AND IMAGES
OF PROSECUTORS: THE DOMINANT
POLITICAL CULTURES**

1. Introduction

In the previous chapter we outlined some of the legal rules (those which are relevant for this thesis) which shape prosecutors' working environment. In this section we will focus on other elements which are not legal in nature, but which can still influence the way prosecutors take decisions. These are neither logistical nor institutional, but could be very influential when the prosecutor takes 'gate keeping' decisions. We will divide this chapter in two parts. First, we will list and explain the images of crime found within dominant political cultures (i. e. the state, the public and the media). These are external influences that might affect prosecutors when they define the crime problem. Second, we will discuss the image of prosecutors' professional culture. We will focus on the socio-political elements which shape this image. Moreover, and more important, we will outline the differences between different images of prosecutors' function and role.

2. Images of crime and the crime problem: the media

There are many factors to be taken into account to understand the Italian media, for example, the Catholic cultural tradition or the strong influence of Communism in Italy.¹ However, here we will not focus on these general issues. Here we want to describe how media represent crime in Italy.

In Italy, radio, television and newspapers are, generally speaking, politically orientated. This means that it is possible, from the reports provided, the questions asked and the people interviewed, to identify the political approach (mainly related to the political division between centre right and centre left). Furthermore, commentaries are very important within the Italian media and generally they have a political connotation. The majority of the media (particularly TV) try (very badly) to hide their political flavour, but it is clear that there is no real neutrality in them performing of their functions (this is true for state television as well). More precisely, the first two channels of state television are traditionally close to the government (whether right, left or centre), while the third supports the left (in the past the communists). The three

¹ See, for example, Nelken D. "*Telling Difference: of crime and criminal justice in Italy*". In Nelken D. eds. "*Contrasting Criminal Justice*". 2000. Aldershot: Ashgate. pp. 252-253.

private channels, belonging to Berlusconi, do not support the centre-right coalition, but only *Forza Italia* (Berlusconi's political party). There is another TV channel called La 7. This can not be referred as partial. But it is probably true to say that it is closer to the centre-left. Amongst the most important newspapers (excluding those which belong to political parties) there are similar distinctions. For example, the *Corriere della Sera* is considered impartial (in the past closer to the centre-left, now to the centre-right), while *La Repubblica* is seen as supporting the centre-left. Moreover, there is a newspaper, called *Il Giornale*, which belongs to Berlusconi, which, like the TV channels, does not support the centre-right generally, but specifically *Forza Italia*. Finally, it should be pointed out that in Italy there are no tabloids. All the newspapers are similar, for example, to The Times or The Guardian. Even these quality newspapers are more tabloid than Italian ones, though the differences are normally not substantial. Thus, although Italian newspapers tend to underline the emotional side of crime stories and to personalize the news² (e. g. where does the criminal live? Is he/she rich? How is his/her family?), sensationalism is less important compared to a tabloid.

These are the general characteristics, but is crime important for the media? Crime news is always an important issue for the Italian media. This includes not just news directly related to a particular crime, but inquiries about causes and solutions for crime problems. Inquiries about justice and its problems seem to be important as well. For example, in 2002 the six most important TV news, monitored during the prime time edition, dedicated about 18% of their time to crime and justice news.³ For example, sport and labour issues, which are very sensitive topics for the typical Italian, took up 8.4 % and 3.7%.

How crime is presented in the Italian media? Of course stories are important. In Italy there is a category called *cronaca nera* (black chronicle) which implies a detailed examination of the facts and of the people involved in a crime, with particular emphasis on the investigation and on brutal details. Moreover, some criminal processes are followed step by step. This happens, when Berlusconi or other important members of the society (bankers, politicians, entrepreneurs etc.) are

² *Ibid.*

³ Osservatorio di Pavia. "L'agenda dei telegiornali del prime time nel 2002" [Online]. 2005. Available at: http://www.osservatorio.it/cares_visual1.php?R=OK [Accessed: 20/09/2005].

involved or when the crime is particularly emotional (e. g. the victim is a child). In these cases, particular emphasis is put on the argument of the parties and on the judge's decisions (including decisions taken by the GIP and the GUP). In fact, the main newspapers mainly rely on the reports of prosecutors and judges during the investigations,⁴ while in the UK the police are more important as 'primary definers'.⁵ When the case is not so important the process is not followed step by step, but still information coming from judges and prosecutors is very important to shape the news.

What are the sources that the Italian media use? At the first glance the primary definers seem to be the legal actors. In Italy reports of judges and prosecutors during the investigations represent "the major source of empirical information about crime".⁶ Police officers speak about the investigation they undertook, but, unlike in Britain, they do not deal with the crime problem. On the other hand, prosecutors are interviewed to explain the characteristics of the crime as such and to give opinions about the problems of justice. Thus, the visibility of prosecutors in the media is a distinctive characteristic of the Italian case (particularly in comparison with the CPS). One of the conclusions drawn in the 2002 analysis of the crime news in the major Italian TV news was that "media give a lot of visibility to legal actors".⁷ However, other organizations⁸ may be involved as primary definers. This happens when legal actors (mainly the police) appear not to have behaved correctly (e. g. abuse of power) or a crime problem related to a specific area is discussed (e. g. mafia crimes in Sicily). Moreover, media give importance to all the documents concerning investigation which become public (everyone can have a copy, included telephone tapping). But journalists (at least some of them) have access to many other sources of information (which, sometimes, should be secret) which could come from the prosecutor's office

⁴ Nelken (2000) *op. cit.* pp. 242-243.

⁵ See, for example, Reiner R. "Media-made criminality: the representation of crime in the mass media". In Maguire M., Morgan R. and Reiner R. "The Oxford Handbook of Criminology". 2007. 4th ed. Oxford University Press. p. 325. See also, Hall S., Critcher C., Jefferson T., Clarke J., Roberts B. "Policing the Crisis: Mugging the State and Law and Order". 1977. Basingstoke: Macmillan.

⁶ Nelken (2000) *op. cit.* pp. 242-243.

⁷ Osservatorio di Pavia. "Rappresentazione della giustizia e sua tematizzazione in un anno di telegiornali". [Online]. 2005a. Available at: http://www.osservatorio.it/cares_visual1.php?ID=0000000037&pos=10&visual=OK&num=1&pub=archivio [Accessed: 20/09/2005].

⁸ These could be international organizations like Amnesty International or, for example, local organizations (eg. committees of citizens, see later).

compared to common law countries".¹² Until the 1990s crimes such as robbery, burglary and rape were referred as "micro-crimes".¹³ But the situation now may be different. Street crime started to be an issue in the 1990s when demands for safety increased.¹⁴ The studies conducted have shown that Italian citizens are mainly scared of theft, robberies, "drugs" and muggings.¹⁵ Moreover, the first national victimization survey (conducted at the end of 1997 by the Italian National Institute of Statistics (ISTAT) and involving 50,000 families) concluded that lack of safety exists and it is "a serious social phenomenon".¹⁶ The second survey made in 2002 basically confirmed this picture.¹⁷

The Italian media seem to reflect this evolution. For example, newspapers contain, almost everyday, articles about robberies, thefts and muggings. These are written in such a way that the risk of insecurity is easily perceivable. A good example concerns robberies in villas. A few years ago the newspapers (and media in general) reported that some villas were robbed: quickly robberies in villas became a "phenomenon" and it seemed that living in a villa was not safe anymore.

Is there a relationship between deviance (i. e. behaviours which may not be strictly criminal but which do not fit with societal standards) and crime in the Italian media? There seems to be. For example, the mafia is often described as the anti-state, to indicate that it follows rules and values that are rejected (at least formally) by the Italian state and society. When it comes to street crime this is even clearer. Immigrants are assumed to be, most of the time, the perpetrators of these crimes. Some authors have agreed that "in the same way in which foreigners have replaced Italians at the lower end of the legal job scale, so they seem to have replaced Italians at the lower end of illicit traffics".¹⁸ Media tend to reflect this scenario. In particular,

¹² Nelken D. "Italy: A lesson in tolerance?". In Muncie J. and Goldson B. eds. "Comparative Youth Justice: Critical Issues". 2006. London: Sage. p. 172.

¹³ *Ibid.*

¹⁴ Melossi and Selmini (2000) *op. cit.* p. 151.

¹⁵ *Ibid.* p. 152.

¹⁶ *Ibid.*

¹⁷ Muratore G. et al. eds. "La sicurezza dei cittadini. Reati, vittime, percezione della sicurezza e sistemi di protezione" [Online]. 2004. ISTAT informazioni n. 18. Available at: http://www.istat.it/dati/catalogo/20040915_00/La_sicurezza_dei_cittadini.pdf [Accessed: 8/04/08]. See also, Blandry A. C. and Tagliacozzo G. "La percezione della sicurezza nella zona in cui si vive". In: Muratore G. et al. eds. (2004) *op. cit.* p. 114. It is interesting to note that, according to this survey, the crimes which create more fear within the Italian society are thefts at home (60,7%), followed by car thefts (46,2%), muggings (44,2%), robberies (43,0%) and sexual offences (36, 3%) (Blandry and Tagliacozzo (2004) *op. cit.* p. 113).

¹⁸ Melossi D. "In a peaceful life". 2003. Punishment & Society. Vol. 5(4). pp. 371-397. p. 379.

newspapers and television (especially those supporting the centre-right) often underline that immigrants live, as they say, on the “fringes of society”. Thus, the picture they portray appears clear: they do not fit into our standards and values. This is not (normally) the case for the huge amount of white collar crime perpetrated in the last few years. The media (at least the majority of them) are clear in condemning these crimes. However, they do not describe the perpetrators as people living on the “fringes of the society”, even when they have not only committed a crime but created a network involving many people which conducts business according to rules clearly rejected by society (e. g. using bank’s money as if these were their personal money).

Lastly, media agenda may be concentrated on particular types of crimes. For example, in 2001, after the Novi Ligure case where a young girl (minor), together with her boyfriend (minor as well), killed her mother and her little brother, the media concentrated a lot of attention on juvenile crimes and problems. Of course, these were issues which had concerned Italian society in the years before. However, until that particular crime, the media had never focused much attention on these problems.¹⁹ Thus, the characteristics of a crime (in this case: the victims, the offenders and the brutality of the crime), pushed the media to investigate the more general category of juvenile crime.²⁰ These kinds of considerations could lead the media to overestimate or underestimate a crime problem.²¹ If a crime is overestimated this could create social alarm.²² So, the media contribute (together with other actors, see later) to the creation of a dominant political culture of crime. Are prosecutors influenced by this? Can they mediate these external influences? These are the questions that we will need to address.

2.1. Images of crime and the crime problem: central state and the political class

In Italy we are witnessing a substantial change. During the 1970s and the 1980s political parties and representative institutions concentrated on mafia and political

¹⁹ Osservatorio di Pavia. “*L’agenda dei telegiornali sulle notizie di criminalità e immigrazione: un confronto fra il 2000 e il 2001*”. [Online]. 2005b. Available at: <http://www.osservatorio.it/download/criminalità.pdf> [Accessed 20/09/2005].

²⁰ *Ibid.*

²¹ *Ibid.*

²² *Ibid.*

terrorism crimes.²³ Social alarm was linked to the fact that the state as an institution was threatened by these kind of crimes. In the 1990s the situation changed: mafia, corruption and, sometimes, political terrorism still remained important issues, but security started to emerge on the agenda of political forces.

In 2005, in an interview about the possibility of giving an amnesty (the Parliament decides),²⁴ the former Minister of Justice (centre-right) said that he did not agree with the idea and that the priority was the “security of citizens”.²⁵ Of course this related to legislative choices, but it may also have been a message for legal actors. Moreover, the same Minister, when a goldsmith was acquitted for killing (shooting) two burglars, said that finally “after four years of cultural battles” (to make clear that victims have the right to protect themselves in any situation) victims are properly protected.²⁶ Here the message is even clearer: we must protect, whatever happens, people who defend themselves and their properties. Another example concerns a murder which happened in 2005, where an illegal immigrant from Albania killed a 23 year old Italian who was trying to break up a brawl. Again the former Minister of Justice was very clear, he said: “Criminality grows around the clandestine immigrants”.²⁷ One day after the murder, during a manifestation of solidarity for the victim’s family, the former Minister of Welfare (currently the Minister of Interior) said: “It is now the moment for zero tolerance [with clandestine immigrants]”.²⁸ Finally, the importance of security issues for Italian politics can be very well demonstrated if we analyze the results of the 2008 elections (won by the centre-right). The *Lega Nord* (Northern League, the secessionist party, supporting the centre-right coalition) obtained a remarkable result (around 8-9% of the votes, but this was all concentrated in the north, because this is a territorial party which does not exist in the

²³ Melossi and Selmini (2000) *op. cit.* p. 149, 150.

²⁴ Art. 79 cost. states that the amnesty is given through an Act.

²⁵ Sarzanini F. “Castelli: resto contrario la priorità è la sicurezza”. *Corriere della Sera*, 03/04/2005.

²⁶ Di Gianvito L. “Uccise i banditi, orafo assolto. Castelli: era ora”. *Corriere della Sera*, 12/03/2005. “The cultural battles” led to an important reform which modified the self-defence law. Briefly, the law (art. 52 cp) provides that there must be proportionality between the offence and the defence. The proposed bill intended to derogate from the proportionality principle in two situations. First, when the victim has to defend himself or those close to him. Second, when property is seized and the offender does not give up and there is a risk for a person. This bill was eventually enacted with some support (or lack of express criticisms) from the centre-left.

²⁷ Biglia A. “Castelli: è la prova che i clandestini portano criminalità”. *Corriere della Sera*, 13/06/2005.

²⁸ Del Frate C. “Varese, caccia agli immigrati per vendetta”. *Corriere della Sera*, 14/06/2005.

south of Italy) focusing on two issues: devolution and ‘fighting’ against immigration and insecurity (which is seen as deriving from immigration).²⁹

Thus, the central political image of crime is now focused on the security of citizens. We are still far away from the “culture of control” as it has developed in the Anglo-Saxon world.³⁰ However, it is undeniable that security is an issue for the political class. This concerns not only the centre-right coalition. We find the first trace of this emerging issue in 1997 when a speech was given by Romano Prodi, who, at that time, was the prime minister supported by a centre-left coalition. During this discourse Prodi spoke about “the problem of safety in the country” and he said that this “seems to be no longer one of *external* safety, but *internal* safety: the safety of citizens in their everyday life”.³¹ In the end, we could say that the centre-left approach is similar to the left-realist perspective, while the centre right approach is more authoritarian (particularly from the National alliance, the post-fascist party) or populist (particularly the Northern League).

In Italy, law and order campaigns have had success when they have been politically motivated (terrorism, corruption and mafia).³² This means that all these crimes were directly (terrorism and corruption) or indirectly (politicians who were mafiosi as well or killed by the mafia) affecting the stability of the political world. Here we are witnessing a new law and order campaign. We can not say now where this campaign will lead, but it might be that the need for control, which has never been a feature of the Italian system,³³ could become its distinctive characteristic in the future. For example, the perceived need for control is clear when immigrants are involved. Recent legislation provides a good example of social control targeted at a particular group which is seen as behaving in a particular way. The so called Bossi-Fini Act³⁴, which was passed in 2003, provides that, under certain conditions, illegal immigrants have to be arrested just for being illegally in Italy (see chap. 8). More

²⁹ The language used by this party against immigration is often characterized by a strong racism. In fact, for example, radio *Padania Libera* (the official radio of the *Lega Nord*) has once said that “unfortunately, it is easier to kill rats than getting rid of gypsies”. See Lerner G. “*Il Nord del Senatur*”. [Online]. 2008. Available at: <http://www.repubblica.it/2008/04/sezioni/politica/elezioni-2008-uno/nord-senatur/nord-senatur.html> [Accessed 16/04/2008].

³⁰ Nelken (2006) *op. cit.* p. 172.

³¹ Melossi and Selmini (2000) *op. cit.* p. 157.

³² Melossi D. “*The cultural embeddedness of social control*”. 2001. *Theoretical Criminology*. Vol. 5(4). pp. 403-424. p. 412.

³³ Nelken (2006) *op. cit.* p. 163.

³⁴ Bossi is the Northern League leader, Fini is the National Alliance one.

recently the current centre-right government passed an Act (n. 125/2008, inspired by Maroni the Minister of Interior and one of the leaders of *Lega Nord*) which deals specifically with security and immigration. This provides, *inter alia*, that being an illegal immigrant becomes an aggravating circumstance (punishment can be increased up to one third) and that soldiers can be used to guarantee, together with the police, the security of certain areas.³⁵ However, the Bossi-Fini Act still remains the fundamental piece of legislation regulating immigration in Italy.

It must be underlined that, even before the Bossi-Fini, it was the centre-left that enacted two pieces of legislation which revealed the perceived need for control in relation to immigrants. The first measure was passed in 1995 (*decreto* Dini) and, as Del Lago says, it stigmatized migrants as a “social problem”.³⁶ This measure introduced two principles: borders have to be closed and deportation (for illegal immigrants) is the answer to the ‘immigrants’ emergency.³⁷ The second measure was the Turco-Napolitano Act (n. 40/1998, both are former communists and were ministers at that time, Napolitano is now the President of the Republic), which was the precursor for the Bossi-Fini one. This piece of legislation reinforced the idea of deportation as the solution to the control of illegal immigrants and created detention camps for those who are waiting to be deported (where immigrants are controlled for 24 hours a day by the police).³⁸ Moreover, at the end of 2007, following the murder of an Italian woman by a Romanian citizen, urgent measures were taken by the former centre-left government (this was mainly supported by the same coalition which was in power from 1996 to 2001). In particular, a *decreto legge*³⁹ (D.L.) was issued immediately and this was (generally) based on the principle that those who may be a threat to the security of the state should be deported (even EU citizens, because

³⁵ There are also other important provisions. First, deportation (in general not only for illegal immigrants) is now easier. Second, if a false identity is given (this widely regards immigrants) the punishment goes from 3 to 6 years imprisonment. Third, local authorities (e. g. majors) will have more powers to deal with security and public order. Fourth, fake goods (like designer clothes, DVDs etc. a crime normally committed by immigrants who sell these products in the street) will be immediately destroyed.

³⁶ Dal Lago A. “*Non-persone*”. 2005. 2nd ed. Milano: Feltrinelli. p. 26.

³⁷ *Ibid.* p. 27.

³⁸ *Ibid.* p. 27-28.

³⁹ Delegated legislation enacted by the government for urgent matters. The Parliament must adopt the *decreto* as a primary piece of legislation within 60 days, otherwise it is declared invalid *ex tunc* (the *decreto* never existed). See art. 77 cost.

Romania is now part of the EU).⁴⁰ However, this piece of legislation was eventually quashed by the Parliament and, at the moment, it has not been replaced.

Thus, the perceived need for control appears clear; at the same time it is clear that these measures are targeted at a particular group. In 2005 Berlusconi, who was (as he is now) the prime minister, started a campaign to change the rules for telephone tapping.⁴¹ In particular, the centre-right coalition intended to create stricter rules for the use of telephone tapping during the investigation. They wanted to forbid the making public of transcripts (at certain stages of the criminal proceedings these become public, e. g. when they are used to justify a request for pre-trial control measure (precautionary measure). This campaign started when some of these documents were published by newspapers dealing with the Banca Popolare Italiana and Unipol cases and they involved certain politicians. Berlusconi said: “it is better to have a murderer free than everybody being under surveillance”.⁴² We know that this is a complicated issue and that published telephone tapping may lead to political consequences, even if no crime has been committed. Moreover, we do not want to compare different things: crimes related to immigrants are different to white collar crimes or corruption. However, it seems that in Italy the perceived need for control has not been, until now, a general characteristic of criminal justice policy, it has only been used in some situations.

To conclude, it appears that from the 1990s the political world has promoted the security of citizens as one of the main issues on its agenda. This is mainly concentrated on street crime and towards a particular social group: immigrants. This has led to increased social control and to different attempts (particularly when more conservative political forces are involved) to suggest street crime and immigration as major crime problems. However, for the purposes of this study, the question will be whether or not prosecutors deal with street crime and immigration as priorities.

⁴⁰ Sarzanini F. “*Il Viminale è pronto a mediare non sull’allontanamento d’urgenza*”. *Corriere della Sera*, 11/06/07.

⁴¹ The same campaign started again in 2008 as soon as the centre-right government was re-elected. This became a very important matter when some recorded telephone calls (evidence in a criminal proceedings for corruption brought against Berlusconi by prosecutors in Naples) were put on the net (by *L'Espresso*, a magazine close to the centre-left). These involved Berlusconi who spoke on the phone (many times) with a very important manager of the state television (Agostino Saccà). They were exchanging information about a senator belonging to the centre-left (the centre-right was still the opposition and Berlusconi wanted to convince some senators to switch coalition). Moreover, they discussed managerial and editorial strategies. Basically Saccà (who has now been fired) was passing information to Berlusconi. Berlusconi was also suggesting actresses for fictions and soap operas.

⁴² Martirano D. “<<*Meglio un omicida in libertà che tutti spiati*>>”. *Corriere della Sera*, 17/08/2005.

2.2. Images of crime and the crime problem: local community

In the 1970s and 80s, when mafia and political terrorism were at the centre of the attention, community based reactions to crime were an exception.⁴³ Even though at that time social alarm was considerable (i. e. terrorists wanted to start a civil war) there was a substantial difference. As Melossi and Selmini say: at that time “public opinion did not orient its requests towards more punishment, death penalty, and so on”.⁴⁴ This is happening now.

Sometimes local communities want to express their view about the crime problem and the way criminality should be tackled. Generally speaking they do it through demonstrations aimed to push the forces of law and order to take specific measures. For example, in the eighties in Milan, people living in a specific area protested against prostitutes working in the streets. During some of these demonstrations, although nothing serious happened, the police had to intervene.⁴⁵ The demonstrators threatened the prostitutes, the police arrived and convinced them to stop it. Local citizen committees may also express local opinion. These committees, elected in every city district to report problems and comment on developments in that specific area, have produced documents about crime issues. For example, (again, in Milan in the 1980s) the committees underlined that prostitution problems pushed people to ask for more control, but that the forces of law and order replied that they had different priorities.⁴⁶ Similar situations can be found in Genoa where anti-gipsy committees were created and in Turin where these organizations were set up to complain about crime (e. g. drug trafficking, prostitution and street crime in general) and incivilities (e. g. homeless people, drug addicts, prostitutes etc. in general behaviours which are not strictly criminal) in some areas of the city centre.⁴⁷ Thus, these committees seem to have in common the idea of order.⁴⁸ The problems are not so much about crime, it is more a matter of disorder and incivilities. For example, a

⁴³ Melossi and Selmini (2000) *op. cit.* p. 150.

⁴⁴ *Ibid.*

⁴⁵ Dal Lago (2005) *op. cit.* p. 87 and 90.

⁴⁶ *Ibid.* p. 87-88.

⁴⁷ *Ibid.* p. 76-91.

⁴⁸ Melossi and Selmini (2000) *op. cit.* p. 159.

leader of one committee in Modena (Emilia Romagna) said: "It's also the way they behave in public places".⁴⁹

Why do local communities seem so much more involved now? The answer to this question may depend on different factors. Immigration may play an important role. People do not know these "new criminals" and feel more threatened. Moreover, at the beginning of the 1990s in Italy a new historical period started known as the second Republic. This happened following the collapse of the USSR (Italy had the biggest communist party in Western Europe) and *tangentopoli* which undermined two of the biggest political parties in Italy (the Socialist party and the Christian Democrats). During the second Republic new political issues became important. In particular, devolution and the federalist reform of the state have become quite important. Thus, there is a policy *de jure*⁵⁰ and de facto to delegate tasks to local communities. This also concerns "safety" as Pier Luigi Bersani, former governor of the Emilia Romagna regional government, said in 1994:

"[the safety issues] are strictly and increasingly related to the new functions that Regions and Municipalities may assume in many fields, in the general framework of a federalist reform of the State, which gives pre-eminence to the role of the Regions".⁵¹

In Emilia Romagna this attitude led to the creation, in 1994, of a programme called *Città Sicure*. This was "the first Italian attempt to develop a general programme about urban safety and crime prevention, through research, promotional activities and co-ordination and elaboration of new strategies for reduction of fear and crime prevention".⁵² It is interesting to see that amongst the guidelines on which this programme developed there is "the mobilisation of community participation in safety policies and crime prevention".⁵³

To conclude, nowadays in Italy the dominant political cultures seem to have a clear idea of the crime problem. One of the priorities (or the main priority) is security. The security of the civil society is mainly seen as threatened by street crime and immigration. Sometimes legal actors are said to be taking decisions which are

⁴⁹ *Ibid.* p. 150. See also: Melossi (2003) p. 384.

⁵⁰ Both the centre-right and the centre-left government have passed federalist reforms of the constitution.

⁵¹ Melossi and Selmini (2000) *op. cit.* p. 153.

⁵² *Ibid.* p. 154.

⁵³ *Ibid.* p. 155.

unresponsive to communities' needs. Thus, this form of pressure exists, but what are the consequences, in practice, that this has on prosecutors' decisions and on their professional culture (i. e. do they feel they have to respond to the claims of civil society)?

3. Images of prosecutors: prosecutor self image and occupational culture

Generally speaking we can say that when Italians think about prosecutors they have in mind great men and women fighting corruption, mafia or terrorism. Sometimes prosecutors themselves seem to corroborate this image. For example, Antonio Ingroia, a *pubblico ministero* working in Palermo and appointed to prosecute Marcello Dell'Utri (a senator), said after the accused was convicted (not yet a final conviction): "a dream came true, after many insults a powerful man has been judged".⁵⁴ This seems to be the picture of the Italian prosecutor. However, it can only be a stereotype. There might be several elements shaping the conception that a prosecutor has of himself/herself (e. g. previous experiences of life, education, cases treated etc.). Here we will not analyze these micro-elements. We will concentrate on one macro-category: the prosecutor's institutional characteristics.

We have already pointed out (see chap. 4) that the Italian constitution and the Italian criminal justice system provide a framework whereby prosecutors are fully independent as a body (governed by the CSM) and as individuals. This independence is constantly underlined by prosecutors who do not seem to tolerate any form of influence which is aimed at shaping their professional conduct (e. g. being tougher on particular crimes).⁵⁵ But prosecutors' independence is not the only institutional characteristic. In analyzing the Italian system a question arises: are prosecutors crime fighters or do they tend to think and act more like judges? Prosecutors have a monopoly on prosecuting crime and do not have to maintain the same degree of

⁵⁴ Mignosi E. "<<Il sogno si è avverato dopo tanti insulti giudicato un potente>>". *Corriere della Sera*, 12/12/2004.

⁵⁵ For example, see Cavallaro F. "*Castelli a Palermo, magistrati all'attacco*". *Corriere della Sera*, 16/01/2005. Here, during a speech gave for the beginning of the *anno giudiziario*, the *procuratore della Repubblica* in Palermo underlined that a justice reform should not be aimed to reduce the *magistrati's* independence and the autonomy.

detachment as judges.⁵⁶ However, there is a cultural proximity between these two judicial actors. To become a judge or a prosecutor it is necessary to pass a public competition (art. 106 cost.). If the exam is passed it is necessary to do a period of training (*uditore giudiziario*) (art. 121 ord. giud.), later one will decide to become a judge or a prosecutor. Moreover, the recruitment status and initial training are the same. Both prosecutors and judges follow the same route. Thus, both judges and prosecutors are recruited in the same way, trained in the same way, they share the same status (both part of the judiciary and only subject to the CSM), receive the same salary, have offices in the same building and, more important, they belong to the same professional association (ANM, see later). The distinction begins when a candidate takes a decision (to become judge or prosecutor).

Cases where a *magistrato* during his career has exercised both functions are not infrequent. Di Federico calls this cultural proximity a “process of socialization”, and refers to the creation of “a strong sense of common belonging and of common destiny”.⁵⁷ Further evidence of cultural proximity is provided by Di Federico’s field research. This concludes that there are informal communications between judges and prosecutors concerning the decisions the former have to take during the investigation (e. g. apply a precautionary measure).⁵⁸ Moreover, the authors also collected evidence that judges tend to satisfy prosecutors’ expectations and that such a phenomenon is not considered as a violation of the judicial ethics.⁵⁹ Di Federico supports his thesis with two elements. First, the exceptionally high rate with which judges decide in conformity with prosecutors’ requests. Second, the vast majority of the lawyers (1,000) questioned indicate that this is what happens in practice.⁶⁰ However, Di Federico’s conclusions are not completely convincing for four reasons. First, as we said before (see chap. 4), prosecutors were not part of this empirical research. Second, it may be that prosecutors tailor their requests according to what they know they can get. Third, particularly during the pre-trial phase, prosecutors have an advantage over the defence (e. g. they begin the investigation before and they can use investigative means, like telephone tapping, which are precluded to the defence). This could make their arguments, especially before the GIP, more convincing. Fourth, Di Federico was

⁵⁶ See, for example, Grande (2000) *op. cit.*

⁵⁷ Di Federico (1998) *op. cit.* p. 381.

⁵⁸ *Ibid.* p. 382.

⁵⁹ *Ibid.*

⁶⁰ *Ibid.*

a member of the CSM (from 2002 till 2006) supported by *Forza Italia*, thus not the most impartial judge of prosecutors. Finally, we should not forget that, before 1989, the Italian system was fully inquisitorial. How much of that inquisitorial attitude is felt by prosecutor, especially if they worked or they studied with the aim to become a *giudice istruttore* (investigating judge)?

The scenario we described above suggests that prosecutors and judges are extremely close. But what does it mean in practice? In other words: if prosecutors work like judges, what do they do? Di Federico underlined that the “socialization” between these two legal actors leads to an unequal system (mainly for accused persons), where judges tend to agree with prosecutors. Here we are not directly interested in the Italian criminal justice system as a whole. We want to explain how and if this “common destiny” may influence prosecutors’ professional and legal culture.

3.1. Images of prosecutors: public representations – political class

In Italy the relationship between politics and prosecutors (and judges) is extremely complex. It has not always been like this. In the past there was no sign of the tremendous conflict we are witnessing now between the judiciary and part of the political world (i. e. the centre-right). Before, the relationship was based generally on reciprocal respect and strict distinction between the roles. The current situation represents the evolution of a political process which began with *tangentopoli*. This process is aimed at demonstrating that *magistrati* are inadequate for the task they have to carry out.

In the last fifteen years there has been a constant clash between the judiciary and centre-right coalition (which is currently governing Italy) and its leader Berlusconi. Thus, there are some politicians who accuse judges and prosecutors (the latter more than the former) of having undermined a political system which had been legitimately and democratically elected. In particular, they refer to *tangentopoli*. This was a huge anti-corruption operation (called *Mani Pulite*, clean hands) started in February 1992 (though there were beginnings in 1989) and concluded between 1997 and 1998. It was undertaken by some prosecutors in Milan and it brought to light the

fact that the political parties used to be financed through illegal operations. Moreover, part of the centre right coalition believes that the *magistrati* want to continue this “revolution”, their aim being to attack Berlusconi.⁶¹ In fact, he was and he is still involved in many proceedings. On the other hand, the *magistrati* protest that they are only doing their job, that they are not politically orientated and that they are not acting to destroy a political system in order to help the centre-left coalition. Thus, for the politicians the problem was and is that the judiciary was and is trying to influence the political world; while for legal actors the problem is the opposite.⁶²

Some examples can better explain this scenario. In 2001, during a speech in the Senate, the former Minister of Justice Castelli (belonging to the Northern League coalition within the centre-right government) said that two politicians (Bossi and Berlusconi, who were a Minister and the Prime Minister, and now they are again) had more than 100 penal proceedings started against them. According to the Minister this meant that the judiciary wanted a “political battle”.⁶³ Moreover, he said that there were some *magistrati* who wanted to overturn the results of the election through judicial proceedings.⁶⁴ Thus, for the former Minister of Justice the situation was clear: the fact that some politicians are subjected to a relevant number of penal proceedings implies that there is, as he says, “legitimate doubt” that some *magistrati* are working for “political purposes”.⁶⁵ In 2002, the same minister was even more explicit, he said that there were *magistrati* who were using their power to help the centre-left to take power.⁶⁶ As we saw, Castelli generally mentioned the *magistrati*, however it is clear that he mainly refers to prosecutors, because it was they who investigated the politicians and began the proceedings toward them. More recently (just to underline that little has changed) Berlusconi said that he was being persecuted (not anymore now, he can not be prosecuted, see later).⁶⁷ Moreover, a very important member of

⁶¹ For example, see Zuccolini R. “*L’ira del premier: è una persecuzione*”. *Corriere della Sera*, 13/11/2004. Here many and important representatives (including Berlusconi) of the centre-right explicitly say that the request made by the prosecutor in Milan, Boccassini, to convict Berlusconi (he will be acquitted) for corruption are motivated by a political persecution.

⁶² Nelken D. “*Legitimate Suspicion? Berlusconi and the judges*”. in Segatti P. and Blondel J. eds. “*Italian Politics: a review*”. Vol. 18. 2003. New York: Oxford: Berghahn. p. 113-114.

⁶³ Associazione Nazionale Magistrati (ANM). “*Il Ministro della Giustizia parole e fatti*”. [Online]. 2004. Assembleia Nazionale Roma Available at: http://www.abusi.it/ordinamento/libro_bianco_aggiornato.pdf [Accessed 04/08/08].

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*

⁶⁶ *Ibid.*

⁶⁷ Fuccaro L. “*Il premier: persecuzione finita. E sul petrolio critica gli arabi*”. *Corriere della Sera*, 24/7/2008.

National Alliance, which is supporting the current government, called the CSM a sewer.⁶⁸

The centre-right coalition not only attacked the *magistrati*, they also introduced new procedural rules which undermined the credibility of the judiciary. These were formally introduced to create new guarantees for citizens. However, many felt that the “unconfessable aim” was to save some accused (like Berlusconi) from the consequences of a trial.⁶⁹ For example, the law to move a trial to another court in a different place (i. e. *remissione*) on ground of legitimate suspicion was reintroduced,⁷⁰ while there already are sufficient guarantees based on two procedures: *ricusazione* and *remissione*. These are designed respectively to substitute potentially biased judges and to move the trial in a different place. Now, the (unconfessable) aim has been achieved. A recently enacted Act (Act n. 124/2008) provides that the Prime Minister, the President of the Republic, the President of the Senate and the President of the Chamber of Deputies can not be prosecuted. Criminal proceedings are suspended and there is a, de facto, immunity.

The judiciary in general, and prosecutors in particular, did not accept these attacks. In 2005, in a speech making the inauguration of the judicial year, the *procuratore della Repubblica* in Palermo said that it is not possible to have a dialogue with someone who believes that there is a plot behind every judicial decision which is not welcome.⁷¹ The prosecutor general in Palermo went even further. He said that we should hope that this year will not be remembered “as the year in which the political power settled the score with the judiciary”.⁷² Moreover, the judiciary has also protested against some legislative choices made by the Parliament. For example, the chief prosecutor Di Nicola, speaking generally about laws which do not help to prosecute serious crimes (e. g. the false accounting law passed by the centre-right government in 2001), said: “We [magistrate, including prosecutors] want to maintain the right to be indignant about these things”.⁷³ Of course, politicians do not appreciate

⁶⁸ Fuccaro L. “Pdl contro il Csm: è una cloaca. Mancino: basta guerre e clamori”. *Corriere della Sera*, 19/7/2008.

⁶⁹ Nelken (2003) *op. cit.* p 113-114.

⁷⁰ Basically the aim was to slow down the trial as much as possible, so that the crime is not prosecutable anymore because of limitation of actions (i. e. *prescrizione*, see chap. 7).

⁷¹ Cavallaro F. “Castelli a Palermo, magistrati all'attacco”. *Corriere della Sera*, 16/01/2005.

⁷² *Ibid.*

⁷³ Interview given for: Report [TV program]. “*Dei Reati e delle pene*”. In “*I confronti tra Italia e USA*”. RAI 3, 10/04/2005.

this attitude. Again Castelli said that the CSM should think about its problems and should not spend time questioning the job of the Parliament.⁷⁴ Two days before, the higher Council of the judiciary had strongly criticized a bill partially aimed at reducing the *prescrizione* of crimes (time limit for prosecution, see chap. 7). Today the reactions of the judiciary seem to be less strong. Criticisms of the new Acts which deal with security and immunity have been made. But these are surely less vehement (at the moment) compared to the past.

Finally, we should underline that there are political distinctions (which surely fed the centre-right's image of prosecutors acting for political purposes) between members of the judiciary. In Italy there is an association called *Associazione Nazionale Magistrati* (national association of *magistrati*, ANM). This association was founded in 1906 and its purposes are "to protect the independence and the prestige of the *Magistratura* and to take part in the debate within the society to put forward necessary reforms and to ensure a better service of justice".⁷⁵ At the moment (2008) 8284 *magistrati* out of 8886 are part of this association.⁷⁶ The ANM has a central committee composed of 36 members. This is elected every four years using a proportional system. The members of this committee (as the vast majority of the ANM members) belong to other association of *magistrati* which have different ideas and purposes. At the moment, of the central committee members, 12 belong to *Unità per la Costituzione* (united for the constitution), 10 to *Magistratura Democratica* (democratic *magistratura*), 7 to *Magistratura Indipendente* (independent *magistratura*), 5 for *Movimento per la giustizia* (movement for justice) and 2 to *Articolo 3- I Ghibellini* (article 3, which is the article of the constitution where is stated that all the citizens are equal before the law).⁷⁷ These associations seem to have different political flavours. For example, *Magistratura Democratica* is considered the radical association and close to the left, *Magistratura Indipendente* is considered to be close to the right and *Unità per la Costituzione* (*Unicost*) to the centre.

Political issues are not the only matter of debate and of confrontation. The centre right governments (both the former and the current) have underlined two other

⁷⁴ Martirano D. "<<Il Csm pensi a lavorare>>". *Corriere della Sera*, 25/02/2005.

⁷⁵ Art. 2 statuto ANM. [Online]. 2008. Available at: <http://www.associazionemagistrati.it/articolo.php?id=3#art01> [Accessed 30/06/2008].

⁷⁶ Statistic available at: <http://www.associazionemagistrati.it/articolo.php?id=2> [Online]. [Accessed 30/06/2008].

⁷⁷ *Ibid.*

problems related to the prosecutors' image. First, the judiciary has been attacked for its inefficiency, lack of managerial skills, incompetence and laziness.⁷⁸ So, for example, judges and prosecutors were described as solely responsible for the backlog and slowness of the legal system.⁷⁹ Second, centre-right politicians have remarked on the distance between legal actors' decisions and what people need. For example, in 2005 a Romanian gipsy was accused of having attempted to kidnap a 5 month old child while he was with his mother (literally she tried to take the child from the pushchair). The gipsy was arrested, but no decision to remand on custody was taken, as a consequence the accused was set free. In this case the *pubblico ministero* did not request measure (this is a necessary presupposition to apply a pre-trial measure, art. 292 para. 1 cpp). The Minister of justice was asked to comment on the decision, he said that this was another decision which is distant from the people.⁸⁰ Again in 2005 a famous prosecutor, Carlo Nordio, who was the president of the committee created by the centre-right government (2001-2006) to amend the criminal law code, did not ask the judge to confirm the arrest of an Albanian who attempted a theft and obstructed the officer who was trying to arrest him. He justified his decision saying that if he would not have taken the decision in the case of an Italian, he should not do so for an immigrant.⁸¹ A senator, belonging to the Northern league, replied that the judiciary continued to fail to listen to the people's needs and that it was thanks to these *magistrati* that the "new barbarians" were coming to Italy.⁸²

To conclude, there is a particular political grouping (more conservative) which is attacking prosecutors in relation both to their practices (e. g. the way they apply the law, inefficiency etc.) as well as their motivation (i. e. decisions taken for political purposes). The centre-left coalition tends to criticise these attacks, but at the same time they do not want to be the guardian of judiciary's independence. In particular, when prosecutors take controversial decisions like those we just analyzed, they tend to be very cautious. We must not forget that, especially when immigrants are involved, the centre-left has agreed that "safety of citizens" is an important issue. This is a topic which could be extremely important in the gaining or losing of votes. This thesis will not specifically focus on the relationship between politics and prosecutors. Moreover,

⁷⁸ Nelken (2003) *op. cit.* pp. 122-123.

⁷⁹ *Ibid.* pp. 122-125.

⁸⁰ Acquarone A. "Libera la rom rapitrice. Fini: intervenga Castell". *Il Giornale*, 31/10/2005.

⁸¹ Fumagalli M. "Libero dopo la rapina, bufera su Nordio". *Corriere della Sera*, 02/11/2005.

⁸² *Ibid.*

we did not specifically ask in the interviews about prosecutors' opinions about the clash between the judiciary and the centre-right (though these were, sometimes, spontaneously given). However, we believe an account of political perceptions of prosecutors is necessary for three reasons. First, the reader must not only know the legal rules, but must also understand the socio-political context within which prosecutors work. Second, this information may be useful to understand some of prosecutors' distinctive features (e. g. the function of the legality principle). Third, it is clear that there is a substantial and powerful part of the central state that (like the media and the public) has a particular idea of prosecutors' professional culture. This seems to collide with prosecutors' self professional image. But are prosecutors, in practice, influenced by the image of the dominant political cultures? In other words: what is, in practice, prosecutors' professional and legal culture?

3.2. Images of prosecutors: public representations – media

The media implicitly promote a particular image of the prosecutor. For example, through the media the public learnt all about the prosecutors working in Milan, who dealt with *tangentopoli* and who deal with proceedings involving Berlusconi. Moreover, prosecutors working in Sicily, or in other areas where fighting against organized crime is a priority, capture a lot of attention from the media (everybody remembers Falcone and Borsellino). Generally speaking we can say that (particularly after *tangentopoli*) prosecutors were represented as incorruptible civil servants who perform difficult and dangerous functions. Prosecutors who did not behave according to these principles are generally referred as "bad apples".

However, in the last ten years part of the media (particularly newspapers related to the centre-right political grouping) has changed its approach. Like the political parties associated with these media they tend to describe prosecutors (and the judiciary in general) as "*politicizzati*" (taking decisions according to political values and ideas), thus as not impartial, or inefficient. Even those prosecutors who fight against the mafia in Sicily have been widely discredited by some media. Again this happened when prosecutors started to prosecute some politicians because of their link with organized crime. This attitude became clear when prosecutors accused and tried a politician, called Marcello Dell'Utri, who is very close to Berlusconi. These

procuratori were described as inefficient, because they are not able to put down the “real” mafia; *politicizzati* because their ultimate aim was to capture Berlusconi; and unjust, because of the way they used the *pentiti* (former, mafiosi who decided to cooperate with judges).⁸³ This is unusual. These prosecutors, because of the dangerous job they do, have always been considered untouchable by the media. Thus, we can say that some newspapers (e. g. *Il Giornale*), as well as other media, underline the conflict between the judiciary and the centre-right coalition. But they also take a clear position in favour of part of the political world, against the judiciary.

This does not happen for other newspapers. As we said the *Corriere della Sera* was the first medium to give the news that Berlusconi was accused back in 1994. However, we can not say that this newspaper has supported the prosecutors or the politicians. For example, in the Dell’Utri case they reported the decision, how it was difficult to take it, the political implication and, of course, the conflict between centre-right politicians and prosecutors.⁸⁴ It is difficult to call this approach “neutral” (criticisms of the centre-right are substantial), but clearly they did not choose to constantly support one side. More recently (since the centre-right won the elections in 2008) the *Corriere della Sera* seems to have changed its editorial line. It is too early to analyze where this is going. However, criticisms of *magistrati* (and cases brought against Berlusconi) have increased. Newspapers closer to the centre-left (like *La Repubblica*) seem to welcome every judicial decision which hits the centre-right. They show great respect for the judiciary and for prosecutors. For the Dell’Utri case they were very happy to support the prosecutors’ thesis, to underline that it was not a persecution and that the accused had real relations with the organized crime.⁸⁵ Moreover, they emphasized (and always emphasize) the attacks that the government have made on the judiciary.⁸⁶ However, once again, we must remark that, in general, they did not choose one party (the prosecutors) even if they do not believe that the *magistrati* are prosecuting these accused persons for political reasons.

⁸³ Jannuzzi L. “Dopo 42 pentiti trovato quello giusto”. *Il Giornale*, 12/12/2004.

⁸⁴ See for example: Bianconi G. “Il nodo del <<concorso esterno>> in un processo basato sui fatti”. *Corriere della Sera*, 12/12/2004. Cavallaro F. “Il verdetto di Palermo: 9 anni a Dell’Utri”. *Corriere della Sera*, 12/12/2004. Michilli L. “Torna lo scontro tra I poli. La Cdl: errore giudiziario. L’Ulivo: legami inquietanti”. *Corriere della Sera*, 12/12/2004.

⁸⁵ See for example: Scalfari E. “Quando la giustizia funziona”. *La Repubblica*, 12/12/2004. D’Avanzo G. “Il mediatore di Cosa Nostra”. *La Repubblica*, 12/12/2004. Pecoraro A. “Dell’Utri non sfugge: nove anni”. *Il Manifesto*, 12/12/2004. See also, Nelken (2003) *op. cit.* pp. 124-125.

⁸⁶ See for example: Jerkov B. “Il Polo all’attacco delle toghe”. *La Repubblica*, 12/12/2004. Jerkov B. “Applausi a Milano, fischi a Palermo sui magistrati due linee in 15 ore”. *La Repubblica*, 12/12/2004.

There is another issue which deserves to be treated here. The media belonging to the centre-right portray a picture of prosecutors as not focused on the real criminality problems. We have already seen (see above) that this is also exactly what some politicians do. Thus, these media support the thesis (mainly put forward by the Northern League and by National Alliance) that what people really need is not on the prosecutors' agenda. What are these needs? For the media this is mainly linked to the "lack of safety", normally in relation to street crimes committed by immigrants. What do other media do? If they are close to centre-left coalition they tend to be very cautious, especially if the debate concerns a controversial decision taken by a prosecutor (i. e. the case of the attempted kidnap in Florence, see above). They generally act like the centre-left politicians (see above), who, we must not forget, agree that security is an important issue and that their position on this point could determine a loss or a gain of votes. An example may better explain this scenario. The attempted kidnap in Florence was an issue for many elements of the mass media, but it was treated differently. *Il Giornale* reported the facts and had a long article explaining that the former vice Prime Minister (Fini, leader of National Alliance, currently the President of the chambers of Deputies) protested and asked the Minister of Justice (Castelli) to intervene.⁸⁷ Moreover, the day after there was an interview with Castelli who said that if an Italian had attempted to kidnap a baby he or she would still be in jail.⁸⁸ On the other hand, *La Repubblica* had a different approach. The facts were explained and they put emphasis on Castelli's and Fini's reactions. Furthermore, once again, they underlined that the government was attacking the judiciary.⁸⁹ However, *La Repubblica* did not indicate if they believed that the prosecutor's decision was right or wrong. This is the substantial difference compared to *Il Giornale*, where the position is clear: the prosecutor was wrong.

To conclude, Italian media not only have their own image of crime, they also have an idea of what prosecutors should do to tackle the crime (i. e. prosecutors' function). In many cases this reflects the political division between centre-right and centre-left. More generally, this is, as we said above, part of the images of crime and prosecutors of the dominant political cultures.

⁸⁷ Acquarone A. "Libera la rom rapitrice. Fini: intervenga Castelli". *Il Giornale*, 31/10/2005.

⁸⁸ Zurlo S. "<<I rom? Ormai sono I nuovi barbari>>". *Il Giornale*, 01/11/2005.

⁸⁹ Bologni M. "Nomade scarcerata, l'ira di Castelli". *La Repubblica*, 31/10/2005.

4. Conclusion

In the last two chapters we tried to focus on some key characteristics of prosecutors' working environment. These are both socio-political and legal. The point is that provide external influences. This means that prosecutors did not create these influences themselves, but they may potentially influence the way *pubblici ministeri* take decisions and their professional culture. In the next chapters we will move to the very core of this thesis: prosecutors. As we said (chap. 1), we will analyze their working environment, their professional culture, their relationship with the police and the way they define priorities. The images of the dominant political cultures (together with other external influences) will play an important part (particularly for the definition of priorities).

PART II: PROSECUTORS' WORKING CONTEXT

CHAPTER VI. ORGANIZATIONAL RELATIONS

1. Introduction

The academic literature dealing with organizational relations within Italian prosecution offices is mainly based on legal arguments rather than matters of organizational practice.¹ In particular, the legal analysis explains the legal and constitutional transformation towards dispersed powers. Basically this analyzes the way legal provisions have shaped the relationship superior-inferior prosecutor, with a particular focus on the fact that there are not substantial centralized powers. It also explains the more recent developments of powers to determine organizational priorities through formal documents (i. e. *ordinamento giudiziario* reform). More generally all these authors have explained what the law says, how the law should be interpreted and it has been interpreted and have suggested what works and what does not work. The purpose of the current study goes beyond the legal and normative focus. It starts from but goes beyond the legal context and it seeks to understand not how organizational relations should work, but how they actually work on the ground and are understood by the participants.

A key argument of the academic literature is that prosecutors are not part of a hierarchical organization and are not accountable to anyone.² The consequence of this organizational form is that prosecutors are de facto creating their own criminal policy despite the legality principle;³ and that Italian prosecution offices are inefficient.⁴ Moreover, Vogliotti explains how the organizational relations within prosecution offices have gradually evolved since 1948, when the constitution came into force, till now. He describes the transition from a hierarchical Napoleonic model (similar to the French model of organization); to a system based on dispersal of power. This system gave to prosecutors the power to deal with cases in the way they want and, as a

¹ See for example: Di Federico G. eds. *"Manuale di Ordinamento Giudiziario"*. 2004. Padova: CEDAM and Zanon N. and Biondi F. *"Il sistema costituzionale della magistratura"*. 2006. Bologna: Zanichelli.

² See for example: Grande E. (2000) *op. cit.*; Di Federico G. (1998) *op. cit.*; Guarnieri C. (1997) *op. cit.*; Watkin T. G. *"The seeds of revolution"*. 1994. New Law Journal. Vol. 144 (6641).

³ See for example: Grande E. (2000) *op. cit.*; Di Federico G. (1998) *op. cit.*; Guarnieri C. (1997) *op. cit.*

⁴ Di Federico G. (1998) *op. cit.*

consequence, dramatically reduced the discretionary powers that the chief prosecutor had.⁵

So, this literature emphasizes that prosecution offices are not organized on hierarchical relations between superior and inferior prosecutors. But what is the meaning, in practice, of this lack of hierarchical relations? What can prosecutors do and what can they not do? And, more important, if hierarchy is not an option, is there any other principle which informs organizational relations within prosecution offices?

If the aim is to study the relations between superior and inferior prosecutors it is fundamental to investigate the impact that the *ordinamento giudiziario* reform has had on this organization. This deals with many topics which concern the status and the career of prosecutors and judges (see chap. 4). And it (re)introduced hierarchical principles within the *procure della Repubblica* (see later). The Italian literature is focused very much on this reform. In particular, two issues have been discussed. First, some authors have concentrated on a legal analysis of how the reform should work, the differences with the previous regime and whether these provisions are consistent or not with the constitution.⁶ Second, some other comments have focused on the ideological conflicts between *magistrati* and the former centre-right government (see chap. 5). Some authors like Pepino have underlined that this reform threatens prosecutors' independence. In their view this will affect the legality principle and the equality of citizens before the law. Moreover, they believe that this reform is another step in the direction of a more substantial influence for the executive over the judiciary. These publications are written by academics and by members of the judiciary as well.⁷ And the commentators appear more interested in understanding the concerns of prosecutors and, ultimately, what they think are the best conditions to carry out their tasks.⁸ Finally, we should not forget the ideological connections of some authors' views (as we should remember Di Federico's strong political

⁵ Vogliotti M. "*Les relations police-parquet en Italie: un équilibre menacé*". 2004. *Droit et Société*, n. 58. pp. 453-476. Clearly, this article was written in French, for a French journal. However, the author is an Italian academic working in Italy.

⁶ For example see: Menditto F. "*L'Organizzazione delle Procure nella Stagione della Controriforma*". 2006. *Questione Giustizia*. Vol. 6. pp. 890-908. pp. 890-908.

⁷ For example, see: Pepino L. "*Introduzione*". 2006. *Questione Giustizia*. Vol. 1. pp. 53-56. pp. 53-55; Pepino L. "*Editoriale*". 2006. *Questione Giustizia*. Vol. 1. pp. V-VI; Santalucia G. "*Il Pubblico Ministero*". 2006. *Questione Giustizia*. Vol. 1. pp. 103-118; Erban S. "*La Giustizia Disciplinare*". 2006. *Questione Giustizia*. Vol. 1. pp. 128-138.

⁸ For example see: Pepino (2006) *op. cit.* pp. 53-55; Pepino L. "*Editoriale*". 2006b. *Questione Giustizia*. Vol. 2. pp. V-VI; Santalucia (2006) *op. cit.* pp. 103-118; Erban (2006) *op. cit.* pp. 128-138.

connections, see chap. 5). For example: Pepino is a prosecutor and an important member of *Magistratura Democratica*, the left wing *magistrati*'s association (see chap. 5). Moreover, most of the critiques against the *ordinamento giudiziario* reform are published in a journal called *Questione Giustizia*, which is run by *Magistratura Democratica* (and directed by Pepino). Now, this debate is clearly important to understand the consequences, from a strictly legal point of view (i. e. losing independence), that the reform could have on the Italian criminal justice system. But no literature seems to deal with the consequences in practice. This is what we intend to do in this chapter.

Finally, when the literature turns to matters of organizational practice it tends (unsurprisingly) to the normative and prescriptive: it suggests how the prosecution office should be organized. The key elements were said to be the correct allocation of resources, working as a team, setting out priorities without forgetting that crimes considered less important (e. g. theft of a car) must not be ignored, formalizing tasks, flexibility and willingness to search for better procedures.⁹ Moreover, files should be allocated according to automatic and standardised methods. Within this context the chief still retains the power to organize the office, to co-ordinate prosecutors and to take back (following a formal procedure which requires to the chief to give reasons) a file which was previously allocated.¹⁰ However, as we said, our approach will be different. The key question is: how are prosecution offices organized in practice? Why? What are the consequences? And what are the conclusions we can reach (in terms of prosecutors' legal culture)?

To answer these questions we will examine prosecutors' legal independence in operation. We chose the focus on independence for two reasons. First, because the legal rules state that independence is the fundamental principle on which the *magistratura* (not only prosecutors) is organized (see chap. 4 and see later). Second, because our research shows that this concept shapes the way prosecutors see the significance of legal rules. However, the practical application of independence is only

⁹ Zagrebelsky V. "L'organizzazione del lavoro: esame delle notizie di reato, i flussi di lavoro e le sezioni specializzate". 1995. in "Corso di aggiornamento sulle tecniche d'indagine 'Paolo Borsellino'". Vol. I: "Attività e organizzazione del pubblico ministero Reati contro la pubblica amministrazione Reati contro il patrimonio la fede pubblica e l'economia". In Quaderni del Consiglio Superiore della Magistratura n. 78. pp. 17-45. pp. 17-23.

¹⁰ *Ibid.* pp. 28-29.

part of the construction of our argument. In fact, we intend to start from the operation of the legal rules to understand prosecutors' legal culture. It is at this point that we will introduce our analysis on the *ordinamento giudiziario* reform, which appears to be a clear example in which, even if legal rules have changed, legal culture has remained the same. Subsequently, we will concentrate on the consequences that this system has for the organization of the prosecution office. At this point, we will analyze the way superior prosecutors organize the *procure* and set out the strategies and principles which shape prosecutors' working environment. Of course we will not forget prosecutors' independence which, in the end, appears to be the pillar that supports other organizational principles.

2. Operation of legal independence: file allocation and specialized units

The file allocation system and the way specialized units are formed are the two first examples of the way independence operates within prosecution offices. We will treat them together, because the file allocation system changes depending if there are specialized units or not.

In Italy the CSM regularly produces documents on the organization of courts and prosecution offices.¹¹ These are not detailed directives, but they state general principles to be followed. In particular, when it comes to file allocation, the circular provides that although the chief is responsible for this task, the system must be based on predetermined criteria which limit chiefs' discretionary powers¹².

In practice, files can be allocated in two different ways, depending on whether the prosecution office has specialized units of prosecutors dealing with specific crimes. These units, of course, can only be formed in medium-large or large prosecution offices (normally when there are at least 7/8 prosecutors).

There are two main patterns: *turno posta* (or *turno interno*)¹³ and *turno reperibilità* (or *turno esterno*)¹⁴. Under the *turno posta*, for a fixed period (which,

¹¹ For our purposes the most important documents are the circulars on the organization of *uffici giudiziari* (courts and prosecution offices) which are enacted every two years.

¹² CSM. Circolare n. P-27060 enacted Dec. 19th 2005. Capo IX. points 65.1 and 65.2. This document is about the organization of *uffici giudiziari* for the years 2006/2007.

¹³ This means: "internal mail turn". It is called like this because files move within the prosecution office as a sort of internal mail.

normally, goes from a few days to one week repeated during the year), a particular prosecutor takes all the files which arrive. In practice, during that fixed period, all the crime reports which arrive from private citizens (and their lawyers), the police and, occasionally from prosecutors who decide to start an investigation, go to the prosecutors taking the *turno posta*. These will read the crime reports and they will set up the files (even if they only want to drop the case). Under the *turno reperibilità* cases are again allocated to each prosecutor for a fixed period, but the aim of this pattern is to designate a prosecutor who deals immediately with emergencies. There is not a fixed list of emergencies. A good example is the arrest procedure (see chap. 4): the police need a prosecutor to review and validate their arrests, and this has to be done as soon as possible. Another case concerns seizures, which need to be authorized by a prosecutor. Prosecutors' authorization is also needed to move a dead body (i. e. when there has been murder or manslaughter). The *turno reperibilità* is aimed at dealing with emergencies and not necessarily with priorities (at least not necessarily with personal priorities, see chap. 9). So, for example, if the police come across a crime report that they consider very important, they will not send it to the prosecutor taking the *turno reperibilità* (unless there is an emergency). However the police will usually try to make clear that the case is a priority by, for example, writing it down on the papers attached to the crime report (see chap. 8). In some prosecution offices *turno posta* and *turno reperibilità* coincide, so there are one (or more) prosecutors doing both at the same time. This is the way files are allocated in small prosecution offices where there are no specialized units.

When there are specialized units the system works in a slightly different way. The *turno posta* and the *turno reperibilità* still exist, but when a case concerns a specialized matter, this is sent to the specialized group. So, prosecutors who are doing the *turno posta* read the file and either deal with it or they pass it to the specialized group. Prosecutors who are doing the *turno reperibilità* deal with the emergency and then they pass the case to the specialized group. If the crime does not fall in a specialized group, and the turns coincide, they will deal with the case, otherwise they will pass it to the prosecutor(s) who are taking the *turno posta*.

So, the general criteria on which the file allocation system is based are twofold: rotated distribution of files and specialization. Chiefs and deputy chiefs do

¹⁴ This means "emergency turn". It is called like this because there is a duty prosecutor(s) who takes all the emergencies.

not always take a turn. It depends very much on the organizational form they want to give to the office. For example, in a small prosecution office in the north (maximum 5 prosecutors), the chief takes the *turno posta* but not the *turno reperibilità*. On the other hand, in a big prosecution office in the north, only deputy chiefs do the *turno posta*, but this does not mean that they deal with all the cases. They read the files, divide those which have to go to specialized units, and then they allocate (equally) the remaining cases to assistant prosecutors.

The CSM allows exceptions to the “predetermined criteria” which govern file allocation. Once again the principle on which this exception is based is very broad. In particular, the chief can directly allocate a file when a prosecutor with specific knowledge is required.¹⁵ However, such an action must be clearly motivated in writing.¹⁶ This exception gives substantial power to the chief, at least when difficult cases have to be allocated. However, interviewed prosecutors never mentioned cases in which a file was directly allocated by the chief (later we will see that they believe this will not happen under the *ordinamento giudiziario* reform either). Only one lawyer said something like that:

My experience as an external observer, who has had continuous relations [with the prosecution office], [tells me] that the chief plays a role when files have to be allocated. There is a sort of automatic system that a prosecution office can use: it is a kind of distribution based on objective criteria [...] However, this is not a rigid system, because there are cases which are more important. Maybe this is because the cases relate to a particular topic [and/or] because there are some assistant prosecutors who specialize in that topic [...] So, leaving aside the *ordinamento giudiziario* reform, the chief has already now a substantial power to deal with file allocation, because he has the last word. However, it is true that, particularly in small prosecution offices, where the relationship between prosecutors is depersonalized, because there are not many prosecutors, these choices are the result of a co-operation between prosecutors. I mean: it is difficult for an imposition or an *avocazione*¹⁷ to be in contradiction with the internal rules¹⁸ that the prosecution office has.¹⁹

¹⁵ CSM. Circolare n. P-27060 enacted Dec. 19th 2005. Capo IX. Point 65.3.

¹⁶ *Ibid.*

¹⁷ This is the formal procedure to take back a case which was previously allocated to a prosecutor (see chap. 4).

¹⁸ The internal rules dealing with file allocation. This is basically what we just explained: *turno posta*, *turno reperibilità* and specialized units.

¹⁹ L(N 18).

This lawyer works in a small prosecution office (between 3 to 5 prosecutors) and it could be that the chief has more power to control file allocation. However, he is not saying that the chief is directly allocating files. He talks about decisions which are based on “co-operation between prosecutors”. This means that decisions are taken collectively, rather than by hierarchical imposition (see later).

There are two other exceptions to these basic principles on file allocation, which are not codified anywhere, but which appear to be important. First, if some prosecutors are dealing with particularly important and difficult cases (i. e. organized crime, white collar crimes involving huge companies etc.), they are temporarily exempted from the ‘turns’. In particular, one lawyer, working in a big city in the north of Italy, told us that these prosecutors are considered “important” and they do, at the very least, fewer turns than the others.²⁰ This was confirmed by a prosecutor who referred to white collar crimes in general, and to one very famous case in particular.²¹ The second exception concerns file allocation itself. This was explained by a lawyer and by one very high ranking police officer who had experience in many prosecution offices all over Italy.²² They said that police officers tend to work with the same prosecutors. Thus, when they have a crime report, they tend to wait until they know that the automatic system will mean that the file goes to the prosecutor with whom they want to work.

Turning to specialized units, the CSM indicates two criteria that the chief needs to follow in order to set up these groups. First, the commitment of prosecutors to deal with specific crimes must be taken into account. This has to be assessed on the basis of what they have dealt with in the past and on unspecified other elements which have to be objective and verifiable. Second, seniority, which means that the more one has worked as a *magistrato* and/or as prosecutor the more one will have the opportunity to join one’s preferred specialized unit.²³ A chief prosecutor working in a big prosecution office in the south confirmed that seniority is a very important criterion.²⁴ In fact, he has introduced a formal procedure so that, when there is a place

²⁰ L(N21). Similar opinions were expressed by AP(N28) and by AP(N11).

²¹ AP(N28).

²² L(N21) and Pol(N34).

²³ CSM. Circolare n. P-27060 enacted Dec. 19th 2005. Capo IX. Point 64.5. On the importance of these principles see also Borgna P. and Maddalena M. “*Il giudice e i suoi limiti*”. 2003. Bari: Laterza. P. 119. See also Vladimiro Zagrebelsky (1995) *op. cit.* p. 29.

²⁴ CP(S4). See also CP(N43).

to allocate in a specialized unit, those who are interested send a sort of CV and the chief will look at it taking into account seniority as the primary criterion. Other prosecutors underlined that specific knowledge (including specific studies) and/or commitment are necessary.²⁵ Only one said that she chose that specialization because it was the only available place, but she added that she was happy to do it.²⁶

These considerations seem to confirm that the criteria indicated by the CSM are, in practice, important. However, we still do not know anything about the mechanism for taking these decisions. The CSM leaves this responsibility to the chief prosecutor,²⁷ but our research shows a more complicated system. The usual answer we had was that the decision to form specialized units came from the chief (and deputy chiefs) and then all prosecutors participated in the final decision and had the chance to express their preferences.²⁸ However, the clearest explanation on how these decisions were taken was given by one prosecutor with more than 15 years of experience who said:

Specializations change every two, three years, because you can not do always the same thing. However, some continue with the same specialization, for example: I have always been part of the group dealing with industrial accidents [in general this deals with companies which do not comply with certain standards of industrial security] and I changed my second group²⁹ three times [...] Anyway, the chief does not decide on his own. I think he takes into account the preferences and the commitment of the prosecutor, like, for example, for sexual offences [...] We can say that there is a congruence between what the assistant prosecutors want and the chief's evaluations. I chose the last specialization [environmental crimes], I chose it and I wanted it.³⁰

She explains a system where not only all prosecutors participate in the final decision to create and/or to join a specialized group; some of them can choose the specialization they like more and decide what and when to change. This is particularly interesting because the CSM states that there must be a turnover so that prosecutors

²⁵ AP(C47). See also, for example, AP(N45), CP(N43) and AP(N28).

²⁶ AP(N28).

²⁷ CSM. Circolare n. P-27060 enacted Dec. 19th 2005. Capo IX. Point 64.5.

²⁸ See, for example, CP(S4), L(N24), AP(N38), AP(N39), AP(N41) and CP(N40).

²⁹ If prosecution offices are medium size (around 8-10 prosecutors) all prosecutors are part of different groups (normally 2, sometimes 3), because otherwise specialized units are formed only by one prosecutor.

³⁰ AP(N38).

can specialize in different topics.³¹ This system should be based on a fixed rotation period, but this is not what seems to happen. Another prosecutor said:

I joined this group because I knew there were some places. This is because the trend is to have groups with the same number of prosecutors [...] I would have chosen it anyway because I like it [...] They try to satisfy prosecutors' preferences. However, there are some groups which are considered more prestigious, like public administration [crimes against public administration, in particular corruption] and white collar crimes.³² It is more difficult to go there, because no one wants to leave and there are no places. The rule [the CSM circular] says that no one should stay in the same group for more than ten years, but it is not very much respected.³³

This quotation came from a prosecutor working in a big prosecution office in the north, while the earlier quotation came from a prosecutor working in a medium-size *procura*. However, both the systems described are based on two principles. First, the chief does not unilaterally decide how specialized units are formed and who will be part of it. Second, the decision to change specialization is mainly left to prosecutors.

Finally we need to add that within the units files are allocated to prosecutors, following, for example, criteria like the first letter of the accused person's name (i. e. prosecutor X does from letter A to letter M)³⁴. This seems a logical consequence of the fact that the file allocation system in general must be based on "predetermined criteria".

2.1. Operation of legal independence: absence of mandatory priorities

Chief prosecutors write internal documents about many topics. Some of these indicate the cases which should be prioritized. Here we want to explain that these do not seem to be binding directives but persuasive guidelines.

³¹ CSM. Circolare n. P-27060 enacted Dec. 19th 2005. Capo IX. Point 64.1 and 64.7.

³² The implications that this can have on crime priorities will be discussed later (see chap. 9).

³³ AP(N28).

³⁴ On this particular point see AP(C46). For other examples of "predetermined" criteria see AP(N28), AP(N38) and AP(C54).

The first and most famous directive was issued in 1990 by the chief prosecutor in Turin Vladimiro Zagrebelsky and then later amended. This was based on a mix of specific criteria, partly determined by the law, (i. e. whether the accused is in pre-trial custody, recidivism etc.) and partly general criteria which nevertheless left to the single prosecutor a substantial amount of discretion (i. e. assessing the *in abstracto* seriousness of the offence). But, some of the priorities were also linked to the relevant penal issues of the moment (i. e. environmental crimes).³⁵ Turin is not the only place where internal documents on priorities have been generated.

We conducted interviews in a medium size prosecution office in the north, where the chief introduced a circular similar to the one introduced in Turin.³⁶ Specifically, the chief said that every prosecutor must treat the following as priorities:

- 1) Crimes which have to be judged by the *corte di assise*³⁷ by the *tribunale collegiale* [composed by a panel of three judges], because punishments are more severe and, as a consequence, there is a greater *disvalore*³⁸.
- 2) Crimes which have to be judged by the *giudice monocratico* [a single judge] and for which the *udienza preliminare* [preliminary hearing, see chap. 4] is required³⁹.
- 3) Crimes which offend common goods and common interests.⁴⁰
- 4) Top priorities must be: accused people who are in detention; investigation developments which could require pre-trial custody (for example, when there is a robbery and you catch one accused who starts to speak about other people who participated in the robbery, so you have to try to understand what happened without waiting four months); if delay may cause problems in gathering evidence or understanding what happened (for example, if you have to do the *incidente probatorio*⁴¹, you have to do it immediately); seriousness of the crime; victim's interest.⁴²

³⁵ For a more detailed analysis see, for example, Vogliotti (2004) *op. cit.* p. 469.

³⁶ We interviewed prosecutors in 10 different sites. We found only two cases in which there was a detailed set of priorities: one is Turin (see later in this section) and the other one is this case we are treating now.

³⁷ The *corte di assise* deals with the most serious criminal offences and is the only court in Italy (excluding youth crimes) in which there is a jury of laymen (directed by a professional judge) who acquits or convicts.

³⁸ In this case the word *disvalore* means that the crime is considered by the legal system as particularly serious. As a consequence punishments are more severe.

³⁹ Some crimes which are considered less serious (for example those for which the punishment can not exceed four years imprisonment) can be directly sent to trial, without the preliminary hearing. See art. 550 para. 1 cpp. For a more detailed explanation see, for example, Marzaduri E. "*Procedimento davanti al tribunale in composizione monocratica*". In Conso et al eds. (2003) *op. cit.*

⁴⁰ These include all the interests of the people in general (i. e. environmental crimes), rather than those related to a specific individuals or groups.

⁴¹ The *incidente probatorio* is a procedure which, de facto, anticipates the trial. This is done when there is a risk that an evidence will be lost (i. e. the witness is dying). The parties discuss the evidence in

Crimes included in point one are not necessary the first priority. These are not priorities placed in ranking order. Only in point 4 there are stricter criteria (the document says: “top priorities”). However, we need to understand the impact that such documents can have when prosecutors establish their priorities. We interviewed assistant prosecutors in the site where this document was produced. They were all aware that common priorities had been established,⁴³ but it seemed that everyone chose between following these principles and other, personal, principles. In fact, one said:

We can say that if the crime is the same and if the victim has suffered a similar damage, one prioritizes those crimes who can be rapidly dealt with, those which do not need a long and difficult investigation to carry out [...] However, it is clear that murder or manslaughter are always a priority, but when there are so many cases, if you have to choose between cases which have the same conditions, you choose that crime which can be dealt with in a short time or with accelerated proceedings,⁴⁴ so that it is one case less to deal with.⁴⁵

Another assistant prosecutor had a different view:

There are priority criteria determined by the chief. But, these are very general, everyone is free to make his/her own decisions. But, we all determine our priorities depending on the urgency.⁴⁶

Then he explained that, at the moment, illegal immigration was considered an urgent matter, but not a priority (or at least not a personal priority, see chap. 9).

Finally, the most experienced assistant prosecutor we interviewed in this prosecution office said:

We have some common rules. Accused persons in custody are the priority, but this is clear: if somebody has been caught red handed and arrested you have to hurry up, because if you do not he can go out,⁴⁷ and this is not good for a prosecutor. However,

front of a judge, everything is recorded and will be used during the trial. See art. 392-404 cpp. For a more detailed explanation see, for example, Scaparone (2003) *op. cit.* pp. 502-508.

⁴² CP(N40).

⁴³ AP(N38), AP(N39), AP(N41) and AP(N42).

⁴⁴ For example, plea bargaining. These fast proceedings are designed in the code of criminal procedure. See art. 438-464 cpp.

⁴⁵ AP(N41).

⁴⁶ AP(N42). On the relationship between urgency and priorities see chap. 9.

⁴⁷ When someone is arrested there are 48 hours to ask the judge to validate the arrest, if the prosecutor does not do it the accused is free (see chap. 4).

you always have to look at the victim's interests and the way these have been affected, [...] at least this is the criterion I use. But this is the criterion that the CSM used as well when the organizational principles for the prosecution offices were modified.⁴⁸ So, I think that if it was valid before it can still be valid now.⁴⁹

This prosecutor decided to use one of the criteria included in the document: victim's interests. However, this decision was based both on personal reasons (she says: "the criterion I use") and on the CSM circulars. Thus, common criteria seem to have a variable impact depending on the personal preferences of the individual prosecutor. As we saw one prosecutor said that, at the end, "everyone is free to orientate his decisions".⁵⁰

If the prosecution office does not have a formalized set of priorities the situation does not change very much. A prosecutor with 30 years of experience said:

In 99% of the cases it is experience which helps us to solve these practical problems [to determine the file to prioritize].⁵¹

Later this *pubblico ministero* said that his personal criterion was based on time. The first case to arrive has the priority. He also added that the exceptions to this principle were determined by urgency (i. e. accused is in jail).

Another assistant prosecutor said:

These [priorities] are part of our common sense. I mean, these are part of our professional culture. There is no need to talk about that, because they are part of our professional culture.⁵²

⁴⁸ We are talking about the *Circolare sul Giudice Unico di Primo Grado e Sezioni Stralcio-Criteri generali per le variazioni tabellari*. CSM. Circolare n. P-99-06928 enacted April 12 1999. This circular (point 6) referred to art. 227 of D.Lgs n. 51 enacted in 1998. This piece of delegated legislation will be discussed more precisely when we will deal with prosecutors' definition of priorities. Suffice here to say that this was done because a previous reform unified the *preture* (these were offices in which less serious crimes, determined by the law, were prosecuted and judged, see chap. 8) with prosecution offices (see chap. 9). The consequence was that prosecutors (and judges, because the *pretori*, who were the legal figures running the *pretura*, had the power to investigate and judge at the same time) suddenly had many more cases to deal with. The solution was (it was the only case since the end of the Second World War) to determine some priorities. The government did it and the principles were: seriousness of the crime and its practical consequences; if delay can jeopardize investigation; and victim's interest.

⁴⁹ AP(N38).

⁵⁰ AP(N42).

⁵¹ AP(Apl.(N50).

⁵² AP(C47).

At this stage we do not intend to analyze prosecutors' professional culture. What we want to underline here is that there is no sign of formal and/or informal mandatory directives in which the chief or the deputy chief prosecutors imposes rules on priorities. Prosecutors have some criteria on priorities, but these are only partially influenced by internal documents. Perhaps, the best evidence of this is that none of our interviewees ever indicated that the chief or the deputy chief prosecutors ever went to their office to ask them to do a case before another one.

We did not find any instance of the imposition of mandatory priorities. However, in one case prosecutors' discretionary powers seem to have been limited. This happened in Turin, where the Zagrebelsky circular was amended and now there are category A crimes, which are, de facto, the priorities. These are all the crimes that require the preliminary hearing. More importantly, these include the specialized units: sexual crimes and crimes committed against persons who can not defend themselves (i. e. disabled persons, old people etc.), organized crimes, DDA⁵³ (mafia and other big crime organizations), white collar crimes, public administration and industrial security. In practice, specialized unit are the priorities. As we can see this is a detailed document. Moreover, the fact that specialization was associated with category A crimes has, as one prosecutor said, "codified the priority".⁵⁴ In practice: prosecutors will prioritize crimes which will be allocated to their specialized unit.⁵⁵ This is because, in general (and not only in Turin), specialized units reflect the crimes that prosecutors consider more serious (see chap. 9).

This appears to be an exception, but assistant prosecutors are, in fact, still very much in charge of the decisions on priorities. First, as we said, here, like in the other prosecution offices we visited, neither the chief nor the deputy chiefs tell prosecutors what to do first. This is not only true for category A crimes, but for all the crimes

⁵³ This means *Direzione Distrettuale Antimafia*. This is the local branch of the DNA (*Direzione Nazionale Antimafia*) which is a national organization. In particular, these specialized units are created only within the prosecution offices attached at the first instance court located in the cities where there is the court of appeal (but they are not managed by the prosecution office attached at the court of appeal). Moreover, every DDA is part of the prosecution office where it was set up and refers to the chief prosecutor and to the deputy chief prosecutors working in that office. The DNA (and the DDAs) was created to be more effective against organized crime and to coordinate investigations which may involve many prosecutors located in different prosecution offices. The DNA is directed by a prosecutor who has the power to coordinate investigations and to give inputs on the if, the how and the when to investigate organized crime. See Voena (2003) *op. cit.* pp. 74-80. See also art 70 bis ord. giud. and 371 bis cpp.

⁵⁴ AP(N1).

⁵⁵ AP(N1), AP(N2) and AP(N3).

allocated to them. Second, although there is this circular, assistant prosecutors identified other informal common principles to determine priorities: urgent matters (i. e. accused in jail, deaths, victim is in danger etc.),⁵⁶ common sense⁵⁷ and, even if it is not officially into force anymore, principles stated in the Zagrebelsky circular.⁵⁸ Moreover, one prosecutor reported that no documents have been enacted to specify the meaning of these informal criteria or to introduce new concepts.⁵⁹ From this angle, the situation in Turin does not seem very different to other prosecution offices. In fact, the system in Turin may be assessed in this way: general principles on priorities are broad and their interpretation is left to prosecutors; but, if two cases are considered (by assistant prosecutors) otherwise to have the same priority, category A crimes should be prioritized.⁶⁰

2.2. Operation of legal independence: the aim of the system

What we described above shows that chief prosecutors and deputy chief prosecutors have limited power when it comes to file allocation and determining priorities. Chiefs produce internal documents on these matters. However, these documents are not intended to set up strict criteria to limit prosecutors' discretionary powers. But what is the purpose of having this system?

Marcello Maddalena (who is currently the chief prosecutor in Turin) has written that the reason for having an automatic system for files allocation is to avoid the suspicion that files are allocated so as to favour specific prosecutors.⁶¹ Moreover, Maddalena added that:

Although some directives of the CSM authorize the chief to allocate a file to a determined prosecutor, this never happens, because this would mean taking a value judgement on the prosecutor who had the file and, more important, on the prosecutor who should have had the file.⁶²

⁵⁶ AP(N1), AP(N2) and AP(N3).

⁵⁷ AP(N2).

⁵⁸ AP(N1).

⁵⁹ AP(N2).

⁶⁰ AP(N1), AP(N2) and AP(N3).

⁶¹ Borgna and Maddalena (2003) *op. cit.* p. 120.

⁶² *Ibid.* p. 122.



So, it seems that the purpose of having such a system is to avoid the chief and deputy chief prosecutors taking decisions based on the *merito*⁶³ of the cases. In fact, this can lead to distinctions being made (based on a “value judgment”) between prosecutors. This was also confirmed by one of our interviewees who, talking about file allocation within specialized units, said:

All the cases within specialized units are randomly allocated, this is in order not to have distinctions and evaluations based on the *merito*.⁶⁴

Thus, we have seen that the concept of prosecutors’ independence has strong practical implications for organizational relations within the prosecution office. Moreover, we have seen that this independence seems to be aimed at avoiding superior prosecutors taking decisions on the *merito*. However, we still do not know the reason why prosecutors’ independence has such an impact. To understand this we need to start to analyze prosecutors’ office culture (as part of their professional and legal culture). We can do this through the analysis of the *ordinamento giudiziario* reform.

3. Legal rules and legal culture: the *ordinamento giudiziario* reform

As we explained (see chap. 4), this reform is related to many issues, like separation of functions between prosecutors and judges, the powers of the Minister of Justice, and, more importantly for us, the hierarchical relationship between prosecutors-assistant prosecutors. The possible consequence of this reform might have been a strong limitation of prosecutors’ independence. Later the reform was partially amended by the new centre-left government, which abolished the provisions making the chief the only the ‘responsible’ prosecutor for the implementation of the penal action, but the new hierarchical principles remained in force. We conducted our interviews when the centre-left government had just won the election and during the time when amendments (passed in 2006) to this reform were being discussed. At this point we do not want to evaluate the impact that these legal amendments had on the reform. The

⁶³ Literally this means merits. In particular, in this context means all those decisions which are taken on personal criteria. For example, there is a case for murder and I will not allocate it to prosecutor X because I believe he will not be tough enough with the accused person.

⁶⁴ AP(N38). A similar opinion was expressed by AP(N39). In particular, this prosecutor said that discretionary choices (for files allocation in general) would be contrary to the CSM indications, because these impose “predetermined and objective” criteria.

purpose here is to study the impact of the initial *ordinamento giudiziario* reform in order to understand prosecutors' office culture.

The first point to make is that, although the reform (re)introduces hierarchical relations between the chief (and deputy chief prosecutors) and assistant prosecutors, the organization of prosecution offices did not seem to have changed very much. The vast majority of our interviews made it clear that the reform did not bring any major practical change.⁶⁵ However, in two cases we recorded that new formal rules had been introduced. An assistant prosecutor working in a big prosecution office of the north, said:

Now, from a formal point of view, there are requirements that we did not have before: the chief (and the deputy chief prosecutors who has been delegated authority by the chief himself) has to countersign some measures [like pre-trial custody requests] for which, before, the signature was previously not required.⁶⁶

However, he immediately added:

I have to say that I have not yet seen the danger that prosecutors talked about: the *avocazione*, assistant prosecutors deprived of their power, I have not seen it [...] In practice, I do not want to speak too early, but if I have a look at the way this office is organized, I am not worried.⁶⁷

Another prosecutor working in the same office said that this signature system had a practical impact. She reported that some other prosecutors had had to rethink *archiviazione* requests because the deputy chief prosecutor refused to sign the paper.⁶⁸ But, in fact, this is not directly related to the *ordinamento giudiziario* reform. A prosecutor working in the same prosecution office said that, even before the reform, he has had to rewrite certain measures because the deputy chief refused to countersign

⁶⁵ 24 clearly said that nothing has changed. 18 did not clearly say that nothing has changed, but they preferred to speak about what could happen as opposed to what had happened. They did not report any practical major change compared to the pre-reform situation. 3 did not know. 1 was not asked (due to time limits). 2 were not clear at all.

⁶⁶ AP(N30). A similar system has been introduced in another site where we conducted interviews (see CP(N40) and AP(N42)). However, we have not been reported major practical changes. In particular, prosecutors did not refer that their autonomy to deal with the case has been affected. In another big prosecution office in the south a similar system was already operating before the reform came into force (see CP(S4), DCP(S5) and AP(S6)). Even in this case we have not been reported that prosecutors' autonomy was affected. In particular, the chief said that independence will always be the fundamental principle (CP(S4), see later in this section). Moreover, we have been said that there have never been contrasts between assistant prosecutors and superior prosecutors (see AP(S6)).

⁶⁷ AP(N30).

⁶⁸ AP(N32), but she also added that she thinks that prosecutors' autonomy will not be affected.

them.⁶⁹ However, these situations seem regarded to be as part of the relations between deputy chief prosecutor and assistant prosecutor and the final decisions are never imposed by superior prosecutors (see later).⁷⁰ So, even where new (formal) rules have been introduced these do not seem to have substantially influenced prosecutors' activities. It is clear that from a theoretical point of view, the refusal to countersign a measure appears to be a right of veto. However, the practical application is different. In the next sections we will see that these decisions are not the result of an imposition from above. The aim of these provisions is not to formalize a right of veto, but to provide a sort of supervision aimed at providing advice and consultation for less experienced prosecutors.

What we have just described suggests that the purpose of the reform to organize prosecution offices on hierarchical principles has not generally been successful. There are different reasons for this. The conflict between the former centre-right government and the *magistrati* created a situation where the reform was seen by prosecutors as an attempt to attack them as autonomous *magistrati* (see above). Moreover, the fact that the government (former centre-left government) changed and wanted to change further the reform made the scenario uncertain:⁷¹ can superiors start to exercise a power which might be withdrawn in the near future?

However, we believe that the main reason why the reform has not been successful has to be found in the clash that this legal rule had with prosecutors' legal culture.

One prosecutor commented on the reform by saying:

This is a radical change compared to the previous set of legal rules. This has hierarchicalized the prosecution office and transformed it. In fact, before the *procura* was an institution which considered the *giurisdizione*⁷² as a diffused tool, which means that every single assistant prosecutor held on element of the *giurisdizione* and, as a consequence, he had constitutional prerogatives, like art. 112 [legality principle]. Now,

⁶⁹ AP(N30).

⁷⁰ AP(N30).

⁷¹ The scenario is still uncertain. The newly elected centre-right government has immediately passed substantial legislation to amend the criminal justice system (i. e. immunity for the Prime Minister, the President of the Republic, the President of the Senate and the President of the Chamber of Deputies, see chap. 4). A reform has been announced, but it is not clear what this will be.

⁷² This word means "to apply the law" (see Toniatti R. "*Le interazioni della giurisdizione ordinaria con la giurisdizione costituzionale e con le giurisdizioni europee comunitaria e convenzionale*". In Di Federico eds (2004) *op. cit.* p. 229). Thus, if a prosecutor is part of the *giurisdizione* he has the power to apply the law. The reform concentrates the *giurisdizione* in the chief's hands.

the prosecution office is an institution in which the chief is the one only responsible [for the *giurisdizione*].⁷³

Then, talking about the application of the reform in the prosecution office where he works, he added:

The application [of the *ordinamento giudiziario* reform] depends on the program that the chief prosecutor decides at the beginning of the year. Here, the chief gave it an exemplary interpretation, which, de facto, preserves assistant prosecutors' powers and prerogatives.⁷⁴

We had similar comments from the interviewees who believe that nothing has changed since the reform came into force and that, probably, nothing will change in the future.⁷⁵ In fact, they realize that the *ordinamento giudiziario* reform, as enacted by the centre-right government, creates a clash between their autonomy and new chief prosecutors' hierarchical powers. Moreover, they underline that the changes required by this piece of legislation are in opposition with the way prosecution offices have been organized until now (i. e. radical change). However, they seem quite confident that their autonomy will always be preserved.

Chief prosecutors seem to be aware of this clash:

In any event, the general criterion is that the office must be hierarchically organized. This means that the chief is the only person responsible; [but] if the chief is the only person responsible he must have the powers to organize the office as he wants [...] Thus, when we say that the chief is responsible that is fine, but what happens if I allocate a case and then there is a conflict on the *merito*, for example when the prosecutor believes that something has been proved and I do not agree? Shall I take the case back? If so, what about prosecutors' autonomy? It is possible that I will have to face these situations and the law says that I am responsible. In fact, theoretically, cases are always dealt with by prosecutors and me, but there is prosecutors' autonomy to be taken into account [...] [because] you have to evaluate the *merito* of the case, which means the legal

⁷³ AP(N30).

⁷⁴ AP(N30).

⁷⁵ We already explained that the vast majority think that nothing has changed (see above). 14 of these clearly made reference to the future. They said that something could change, but, in fact, they were just explaining what the legal rules could allow the chief to do. Moreover, 4 said that things could change if the chief wants to do it, but it was referred as an event very unlikely to happen. In particular, AP(N32) said that that nothing will change "unless the chief is a criminal".

⁷⁶ Which crime it is, who are the accused persons, if there are aggravating and/or mitigating circumstances etc.

classification of the fact,⁷⁶ I believe that prosecutors' independence must be respected.⁷⁷

So, the reform has created a real dilemma for chief prosecutors. In fact, if the consequence is that they are responsible for everything, they must also have the (hierarchical) power to organize the office and direct prosecutors the way they like⁷⁸ (and this is what the reform prescribes). However, our evidence shows that chief prosecutors did not use this power. When the decision concerns an evaluation of the facts which led to a crime and/or the interpretation of the law in relation to these facts, the chief does not intervene.

This suggests us that in Italy the tension between professional independence and the need for hierarchical supervision, which is an important issue, for example, in France,⁷⁹ is clearly solved by prioritising independence. More precisely: prosecutors know that if hierarchical powers increase, independence will decrease, but they solve this problem by recognizing independence as the fundamental principle.

The reason why independence is prioritized over hierarchical control does not only stem from the legal rules included in the constitution,⁸⁰ in the code of criminal procedure⁸¹ and in the CSM circulars,⁸² which have not been altered by the *ordinamento giudiziario* reform. This principle seems to be a substantial part of prosecutors' legal culture. In fact, while legal rules have been changed (and clearly prioritized hierarchical control over independence), the *ordinamento giudiziario* reform has not been successful. Prosecution offices are, de facto, still organized in a way which preserves prosecutors' autonomy. This did not happen just because assistant prosecutors refused to comply with the new rules, but also because chief prosecutors decided not to change their approach. This leads us to another important

⁷⁷ C(S4). We interviewed two other chief prosecutors. CP(N43) did not directly refer to the clash between the reform and prosecutors' independence. However, when he talked about common criteria to organize the office, he remarked that these will never have to limit prosecutors' independence. CP(N40) did not mention prosecutors' independence and made very clear that the reform concentrates on the chief all the responsibilities and, as a consequence, he will have to take many decisions that before were left to the assistant prosecutors. However, in this prosecution office, like in the others, nothing has changed since the reform came into force, prosecutors did not feel that their independence was limited (see AP(N38), AP(N39), AP(N41) and AP(N42).

⁷⁸ C(S4) and CP(N40). See also Borgna and Maddalena (2003) *op. cit.* p. 142.

⁷⁹ Hodgson J. "Hierarchy, Bureaucracy, and Ideology in French Criminal Justice: Some Empirical Observation". 2002. *Journal of Law and Society*. Vol. 29(2). pp. 227-257. p. 241.

⁸⁰ See art 104 para. 1, art. 108 para. 2, art. 109 and art. 112 (legality principle) cost., which are the legal base to state that prosecutors are "externally independent". See, Voena (2003) *op. cit.* p. 58.

⁸¹ Art. 53 para. 1 cpp. See also Voena (2003) *op. cit.* p. 74.

⁸² See for example, CSM. Circolare n. P-27060 enacted Dec. 19th 2005, capo IX. In particular, point 89.3.

consideration: assistant prosecutors, deputy chief prosecutors and chief prosecutors do not seem culturally distinguishable, even if they have different functions. The principle of independence appears to be fundamental for prosecutors' office culture, no matter if some are high ranking prosecutors and have the power and the responsibility to organize and direct prosecution offices.

4. Consequences of legal independence: strategies of persuasion

In the previous sections we analyzed what superior prosecutors cannot do and do not want to do. Now we want to look at what they can do to organize prosecution offices. This will be part of our analysis of organizational relations. However, this will also try to explain the consequences of having a system in which independence seems to forbid hierarchical relations between prosecutors. In particular, we will look at two different strategies of persuasion which seem to have been generated by this system: harmonization and advice and consultation.

Even if independence is a fundamental concept for prosecutors' legal culture, prosecution offices are not left to anarchism. A certain degree of uniformity is important in order to make effective equality before the law. This concerns both the accused and the victim. Moreover, uniformity also appears important during the investigation, because standardised investigation practices could render more efficient the prosecution office. The strategies of persuasion we are explaining here also try to solve these problems.

4.1 General relations: harmonization

Harmonization is a procedure which aims at setting up common criteria within the prosecution office. This does not concern single decisions in specific cases. The principles are general and they are designed for and applied by a large group of prosecutors (at least those who form one specialized unit).

The majority of our interviewees confirmed that harmonization creates common principles for decision-making within the prosecution office.⁸³ Normally

⁸³ 24 explicitly talked about harmonization. 14 said that prosecutors do not tend to harmonize their practices. 4 did not give a clear answer, even if they talked about a sort of co-ordination between prosecutors. 3 did not know. 2 were not asked (time limits).

these criteria are the result of regular meetings between prosecutors. Sometimes, (generally where the prosecution office is small or medium size) all the prosecutors meet together with the chief and, if they exist, the deputy chief prosecutors.⁸⁴ On the other hand, if the prosecution office is very big (sometimes with more than 100 prosecutors) decisions are taken within the specialized unit. In particular, meetings are not held by the chief, but by the deputy chief who directs the unit.⁸⁵

Harmonization may relate to interpretation of legislation and/or practices. Meetings can be held to discuss the interpretation of new acts.⁸⁶ However, one prosecutor said that this is mainly done for those topics which require a very detailed knowledge of difficult pieces of legislation (e. g. white collar crimes).⁸⁷ In fact, for other specialized units (e. g. organized crime) legislation does not require complex interpretation, but it is necessary to know how to investigate (see chap. 9).⁸⁸

Harmonization of practices may relate to both investigative techniques and how to calibrate the prosecutors' final *richieste di pena*.⁸⁹ When it comes to investigation, common principles may focus, for example, on when to ask for pre-trial custody⁹⁰ and how to deal with a particular criminal organization.⁹¹ However, there seem to be no strict rules. This is mainly related to the fact that each case is seen as different⁹² and that prosecutors must be left free to investigate the way they want.⁹³ So, these principles of harmonization are persuasive rather than binding.

Turning to prosecutors' final requests it appears that harmonization can lead to very precise parameters. One prosecutor said:

There are some *reati seriali*⁹⁴ [...] these will have to be treated in the same way by all prosecutors. I am thinking about sentence requests, it does not make sense that I ask for €500 and my colleagues ask for €800. In this way harmonization guarantees equality before the law. We had already started to do something, without waiting for any input coming from the [former] chief, for example: drunken driving, we met and we designed

⁸⁴ See, for example, AP(C53), AP(N45) (this is a case of a big prosecution office) and AP(N42).

⁸⁵ See, for example, AP(N33), AP(N31), AP(N1), AP(N2), AP(N3).

⁸⁶ AP(N39).

⁸⁷ AP(N49).

⁸⁸ AP(N49).

⁸⁹ These are literally prosecutors' sentence requests. In fact, Italian prosecutors, unlike English prosecutors, suggest appropriate punishment at trial.

⁹⁰ AP(Apl.(N50).

⁹¹ AP(N49).

⁹² See, for example, AP(Apl.(N50). Similar comments were made by AP(N48).

⁹³ See, for example, CP(S4) and AP(N49).

⁹⁴ These are "volume crimes". In particular, these are crimes which are, normally, perpetrated in the same way and which do not require a difficult and long investigation. They can also be called *ordinaria amministrazione*.

a series of possible punishments, taking into account the typical situations in order to guarantee equality before the law for the accused persons.⁹⁵

What it is interesting here is that the aim of harmonization seems to be uniformity and, ultimately, equality before the law. This is the kind of comment we had from other interviewees who work in different prosecution offices,⁹⁶ and this was linked to both harmonization of practices and of interpretation of legislation. Moreover, in the quotation we just reported, the interviewee recognized that harmonization is such an important aim that prosecutors decided to seek it themselves, without waiting for inputs from the chief.

Perhaps the clearest example of a *procura* organized on common principles which are the result of harmonization practices, is in Bolzano. Here the chief prosecutor decided to launch a project (started in 2004 and founded by the European Social Fund) to study some efficiency principles that might be applied to the prosecution office. Subsequently, he employed a project manager who set up a team (including sociologist, experts in human resources etc.) who started to study the way a prosecution office works to find the most efficient and cost saving practices. The aim of this project seems clear, as the chief prosecutor wrote in the official budget of the prosecution office in 2005: “if we want to provide a justice-service we need to put at the centre of the attention the citizen-user who asks for a more effective service, and the citizen-taxpayer who asks for a more efficient and transparent service”.⁹⁷ To do this they are studying criteria which might measure the effectiveness and the efficiency of the prosecution office.⁹⁸ In particular, they are implementing two schemes, which are closely related to each other. First, they want to identify the “primary clients”, those who normally ask the prosecution office to intervene.⁹⁹ Second, they are analyzing the internal practices of the office, in order to write reports to be given to the superiors who will study solutions to improve these practices.¹⁰⁰

The second scheme appears to be directly related to harmonization. We interviewed the chief prosecutor in Bolzano who said:

⁹⁵ AP(C53). See also AP(C47).

⁹⁶ CP(N43), AP(N48) and AP(N32).

⁹⁷ Procura della Repubblica di Bolzano. “*Bilancio Sociale 2005*”. [Online]. 2005. Available at: http://www.procura.bz.it/fileadmin/Documenti/Bilancio_sociale_2005.pdf [Accessed 05/08/08].

⁹⁸ *Ibid.* p. 19.

⁹⁹ *Ibid.* p. 23.

¹⁰⁰ *Ibid.*

I produced a circular which says that within specialized units coordination is done by the most experienced prosecutor. [...] This is the only principle. I do not issue any further guideline. I decided not to do this thing, I leave them [free] [...] However, in order to harmonize, we did something new at the beginning of the year, because I believe that it is important to harmonize our actions. I mean, it is not possible that, for the same fact, because somebody has one prosecutor and somebody else has another prosecutor, solutions be different. I am not saying that we all have to do everything in the same way, but we need to have some guidelines. This is why I created the “office of the *pubblico ministero*”:¹⁰¹ I gave to each of them 4 police officers. So, I created a little organization within the prosecution office with every prosecutor who manages his police officers in the way he wants, so that they deal with the *ordinaria amministrazione*¹⁰², because we need to take into account that the 80, 90% of what we do is *ordinaria amministrazione*. Thus, I created this organization [...], and I recommended to both, colleagues and police officers, to speak to each other to find the best practices. I mean, they have to ask to each other: “how do you do this, how do you do that etc.” Eventually, in a few months, we will try to find a uniform way to deal with similar facts, but, clearly, we will try to get the best [practices] we can have.¹⁰³

Moreover, he explained:

We want to establish criteria for efficiency, which are mainly related to economic and temporal issues. With these we want to measure the file in terms of cost and delay: we would like to introduce standards to deal with files. However, these are very complicated issues, because they are not part of the *magistrati*’s way of thinking, these are managerial issues. Moreover, there is a clash with the objection, which could be made, that *magistrati* are autonomous and independent. Thus, we can go as far as we can and we have to try to be balanced, we do not want to become a company, but we want to have some criteria.¹⁰⁴

We found another case, in a big prosecution office in the north, where a very experienced prosecutor tried to create the “office of the *pubblico ministero*”.¹⁰⁵ However, this was only limited to his own activities, this prosecutor simply decided this was the best way to work. In Bolzano they went further. They want to create standardized practices which can be used for the whole prosecution office. The first

¹⁰¹ This literally means prosecutor’s office.

¹⁰² These are routine files which do not need to be investigated very much and can be dealt with using standard practices, again the example is the drunken driving. In fact, this is a different name for “volume crimes” (see above).

¹⁰³ CP(N43).

¹⁰⁴ CP(N43).

¹⁰⁵ AP(N31).

practical results of this new system were mainly economic. In one year (from 2004 to 2005) the *procura* claimed to have saved, in total, 552.909 euros (9% less than 2004).¹⁰⁶ Moreover, they claim to have saved 582.244 euros (42% less) in “*costi dell’attività*”, which includes all the investigation activities.

The case of Bolzano is interesting and shows how far harmonization can go. However, the chief clearly said that prosecutors’ autonomy is very important and that they will always have to find a balance between independence and standardization. The best practices will be determined within the specialized units and, as the chief said, no indication was given from him.¹⁰⁷ Superiors will intervene only later, but it is unlikely that they will impose measures which have not been agreed with assistant prosecutors. In fact, the chief said that he believes that consensus is an important value (see later).¹⁰⁸ Moreover, while he was talking about the way specialized units are formed, the chief remarked how important is not to create division when one directs a prosecution office.¹⁰⁹ As a consequence, in Bolzano, like in the other prosecution offices we visited, harmonization appears to be a negotiated agreement between the chief and the assistant prosecutors, rather than something imposed from above.

4.2 Individual relations: advice and consultation

Advice and consultation is a different strategy of persuasion compared to harmonization. Like harmonization, this is carried out through meetings between prosecutors. However, unlike harmonization, advice and consultation involves only two (or, rarely, a few) assistant prosecutors who are not discussing general principles, but exchanging opinions on particular decisions (normally concerning individual cases).

This strategy of persuasion appears to have an impact when the case is complicated and/or considered important by *pubblici ministeri*. In these situations

¹⁰⁶ Procura della Repubblica di Bolzano (2005) *op. cit.* p. 61.

¹⁰⁷ CP(N43).

¹⁰⁸ CP(N43).

¹⁰⁹ CP(N43).

prosecutors tend to share their opinions with more experienced colleagues.¹¹⁰ One prosecutor, working in a big prosecution office, said:

However, I got used to being supervised, to having a *direzione pregnate*¹¹¹ from the chief [...] Look, for important cases I try to discuss my opinions with the most experienced prosecutors [...] apart from this we always have the chance to discuss our opinions with the deputy chief or the chief. However, I have to say that, maybe I have been lucky, but when it comes to decisions on the way to deal with a case, we are free. It never happened to me to have a conflict with superior prosecutors.¹¹²

So, she regards this form of persuasion as very influential, but this prosecutor also remarks that they are free to take the decisions they want. This is, once again, the confirmation that prosecutors' independence always prevails, even when there are cases in which a prosecutor can influence decisions which are taken by another colleague (see later in this section).

When it comes to small prosecution offices the persuasive force of advice and consultation appears stronger compared to bigger *procure*. This was explained by a very experienced prosecutor who currently works in a big prosecution office, but who had experiences in small offices as well. He said:

Generally speaking I have to say that in 18 years I have never seen a chief who substantially wanted to influence the way a case was dealt with. They can give you advice, they can tell you to keep them informed [...] I think that the chief can be particularly influential in small prosecution offices, where prosecutors just joined the *magistratura* and they need, and ask for, advice. In fact, very often, it is the young assistant prosecutor who asks the chief what to do. But this is what the chief is there for: to discuss investigation practices, what to do in a particular situation [...] So, if the prosecution office is small, there can be these elements [...] Here, or in other big prosecution offices, where all prosecutors have a good amount of experience, it would be very difficult for the chief to push an assistant prosecutor to do what he/she does not want to do.¹¹³

This example is very much focused on the size of prosecution offices. However, it also confirms that, more than the size, it is prosecutors' experience which

¹¹⁰ See, for example, AP(N30), AP(N32) and AP(N49).

¹¹¹ With this expression she is underlining that there is a strong supervision. In particular, superior prosecutors give directives on how to deal with a case.

¹¹² AP(N49).

¹¹³ AP(N48).

determines how much influential the advice of superiors to assistant prosecutors will be. In particular, if the chief is the only prosecutor with substantial experience (case of small prosecution offices) he/she will have greater power to persuade assistant prosecutors to do what he thinks is right. However, we must add that we did not find any case, either in big or in small prosecution offices, where prosecutors complained that they were forced to do what superiors asked to do. When assistant prosecutors changed their decisions, this was the result of a meeting in which equals discussed their opinions (see later).

So, experience is one reason why advice is influential. If there is a substantial difference of experience between the superior prosecutor and the assistant prosecutor, it is more likely that the latter will accept the former's advice. This approach is surely encouraged by the fact that experienced prosecutors have acquired a strong professional authority which can practically influence the investigation. One prosecutor said:

Now, for an urgent matter, I work on a file together with the deputy chief, in order to get better cooperation from the police. I have noticed, and I am surely not upset with it, that if you work with an influential deputy chief prosecutor, even the police [regard the case as important].¹¹⁴

Thus, experience and professional authority, and not hierarchical superiority, seem the reasons why advice and consultation works. This is the nature of this strategy of persuasion, but we need to explain better the implications which arise from this statement.

Previously we discussed the situation, in a big prosecution office, where some measures (i. e. *archiviazione* requests) issued by assistant prosecutors have to be countersigned by the deputy chief prosecutor directing the specialized unit.¹¹⁵ We also found situations where cases which are considered to be important are allocated, sometimes, to one prosecutor who is required to deal with the file together with the chief or the deputy chief.¹¹⁶ In these cases superior prosecutors seem to have

¹¹⁴ AP(N30).

¹¹⁵ AP(N30).

¹¹⁶ AP(N30), CP(N40), AP(N41) and AP(49). These prosecutors clearly referred to this possibility. However, it could happen everywhere, because, as AP(N49) confirmed, if a case is very complicated it is necessary to have more than one prosecutor who deals with it. This is also related to the fact that in

substantial power. However, even when this power was used, and counter-signature refused, prosecutors did not have the feeling that a decision was imposed.¹¹⁷ Moreover, one prosecutor said that if the deputy chief tried to force a decision that she does not like, she would refuse to do it and she would ask the deputy chief prosecutor to take responsibility for it.¹¹⁸

So, if imposition is not an option, how do they solve these disagreements? One prosecutor talked about a meeting with the deputy chief who disagreed with him and made him think about his decision.¹¹⁹ In this case the assistant prosecutor recognized that the deputy chief was right and changed his opinion.¹²⁰ In fact, we did not find a single case where disagreements led to a conflict between prosecutors; as one *pubblico ministero* said: “a common solution was always found”.¹²¹ The point here is to understand how these common decisions are taken. The fact that there is no imposition suggests that superior prosecutors do not use a hierarchical power. This is consistent with the fact that, as we saw, advice and consultation does not seem to be based on hierarchical relations and, more important, when the law (*ordinamento giudiziario* reform) gave hierarchical powers to chiefs they did not use them. So, meetings are between equals. However, this does not mean that superior prosecutors’ opinion has the same value as assistant prosecutors’ opinion. The same prosecutor (AP(N32) who said that she would refuse impositions, also said (talking about the countersignature that deputy chief prosecutors have to make):

I have always accepted deputy chief’s criticisms and suggestions. It is a guarantee, for me, to have someone who has more experience, and who is different from me, who looks at what I did; and who can tell me if he/she agrees or, if he/she disagrees, why he disagreed.¹²²

So, those who have more experience are regarded as having the professional authority to give very valuable advice. But this does not mean that these suggestions

Italy procedural requirements are very time consuming and difficult to handle (see, for example, APN44).

¹¹⁷ AP(N30) and AP(S6).

¹¹⁸ AP(N32).

¹¹⁹ AP(N30).

¹²⁰ AP(N30).

¹²¹ AP(N30). A similar comment was given by AP(N6), who explained that there have never been contrasts between superior and assistant prosecutors.

¹²² AP(N32).

are always applied. All our interviewees, not only prosecutors, confirmed that the prosecutor who is dealing with the case is free to take the decisions.¹²³

Amongst my little professional successes I include a case of a person who originally was convicted for 15 years, and who has been in jail for 7 or 8 years, then he was released, because he did not commit that crime. I thought so and I obtained a retrial, the court of appeal said I was right [and released the accused]. I said to the chief that I was going to do it, because I think that for all the important and difficult matters the assistant prosecutor needs to inform the chief. I informed him, he was a different chief at that time, and I remember that he told me: "Are you sure? We have to do so much work to accuse someone and you want to defend that person, he has a lawyer, can't he do it?" I ensured him that I would not have left aside other important matters [and I started to deal with that case].¹²⁴

This was an informal meeting. If the procedure is formal, and the superior prosecutor must countersign an act, it is more difficult for the assistant not to follow his/her advises. However, we must repeat, even in these cases the different opinions are discussed on a basis of equality.¹²⁵

To conclude, strategies of persuasion are the consequence of the operation of legal independence within prosecution offices. Negotiated agreements and meetings between equals are the vehicles through which these strategies are delivered. But they are even more important. These are the principles on which the relationship superior-inferior prosecutor is defined and their impact is not limited to some topics. They can concern: the criminal policy (i. e. priorities), the investigation (i. e. harmonization of practices) and even single decisions (i. e. advice and consultation).

¹²³ On this point it is very interesting to note what lawyers said (for a more detailed explanation of lawyers' perception of the way cases are dealt with by prosecutors see, for example, Sapignoli M. *"Il processo penale nella percezione di magistrati e avvocati"*. 1999. Padova: CEDAM). In fact, although they complain that harmonization criteria either do not exist or are ineffective (because each prosecutor has a different way to choose priorities and to deal with the case), they also refer as important that prosecutors are free to choose. In particular, L(N17), who is part of a political party which helped (from 2001 till 2006, now it is not part of the coalition anymore) Berlusconi in his battle against judges and prosecutors, said that a very strong hierarchical relation is needed, but this should not influence the *merito* of the file, because for these sorts of decisions the assistant prosecutor should be free from directions and impositions.

¹²⁴ AP(N49).

¹²⁵ On this point see Sarzotti who explains that, in Italy, individual prosecutors have substantial discretionary powers when they deal with cases. However, he also suggests that the leadership of superior prosecutors can influence the way prosecution offices are organized (in particular he uses the example of Maddalena the very charismatic former chief prosecutor in Turin). Sarzotti C. *"Le procure della Repubblica come attori nel campo penale"*. In Sarzotti C. eds. *"Processi di selezione del crimine. Procure della Repubblica e organizzazione giudiziaria"*. 2008. Milano: Giuffrè. pp. 27-33 and 75-93.

5 Italian prosecution offices: an organizational system

The *procuratore della Repubblica* and the deputy chief prosecutors are not in practice responsible for the criminal justice policy of the *procura* and for the way files are dealt with. They use strategies of persuasion aimed to create a certain degree of uniformity within the office, but they certainly cannot impose outcomes. This is a significant difference compared to, for example, the *procureur de la République*, the Director of Public Prosecution, the assembly of prosecutors-general in Belgium who are responsible for the elaboration of criminal policy and the rights of German superior prosecutors to interfere in case processing.¹²⁶ If we want to find a similar situation in Europe we probably need to look at the Netherlands where prosecutors “should to a high degree be independent when it comes to working and deciding on a concrete criminal case”.¹²⁷ However, unlike in Italy, Dutch prosecutors are bound by directives made by the procurators-general, which stipulate “that the prosecutor must, or must not, prosecute under certain circumstances”.¹²⁸

But how can we describe the Italian system? Damaska says that when organizations are hierarchically organized “authority is only delegated [...] and its exercise must be closely watched”.¹²⁹ Moreover, he says that directives must be rigid and standardization and formalization are demanded.¹³⁰ Finally, “officials are ‘servants’, members of the service class merely administering normative standards which are supplied to them”.¹³¹ As we saw this is not what happens within Italian prosecution offices. Prosecutors are not ‘servants’, but independent and autonomous legal figures. Thus, if it is not hierarchical what is it? Using again Damaska’s models

¹²⁶ For all these see, for example: Hodgson (2002) *op. cit.*; Ashworth A. “*Developments in the Public Prosecutor’s Office in England and Wales*”. 2000. *European Journal of Crime, Criminal Law and Criminal Justice*. Vol. 8(3). pp. 257-282; Albrecht H.-J. “*Criminal Prosecution: Developments, Trends and Open Questions in the Federal Republic of Germany*”. 2000. *European Journal of Crime, Criminal Law and Criminal Justice*. Vol. 8(3). pp. 245-256; Parmentier S., Fijnaut C. and Van Daele D. “*From Sisyphus to Octopus: Towards a Modern Public Prosecutor’s Office in Belgium*”. 2000. *European Journal of Crime, Criminal Law and Criminal Justice*. Vol. 8(3). pp. 154-186. p. 161.

¹²⁷ de Doelder H. “*The Public Prosecution Service in the Netherlands*”. 2000. *European Journal of Crime, Criminal Law and Criminal Justice*. Vol. 8(3). pp. 187-209. p. 195.

¹²⁸ Brants C. “*Consensual Criminal Procedures: Plea and Confession Bargaining and Abbreviated Procedures to Simplify Criminal Procedure*”. May 2007. *Electronic Journal of Comparative Law*. Vol. 11.1. p 9. [Online]. Available at: <http://www.ejcl.org/111/art111-6.pdf> [Accessed 07/08/08].

¹²⁹ Damaska M. “*Structures of Authority and Comparative Criminal Procedure*”. 1975. *The Yale Law Journal*. Vol. 84. pp. 480- 544. p. 484.

¹³⁰ *Ibid.* p. 485.

¹³¹ *Ibid.*

we can say that in Italy there is a coordination model, where crucial decisions are taken by independent prosecutors, even if “the need for a degree of uniformity is recognized”.¹³²

This is an exception within the conventional tendency to categorize continental traditions (inquisitorial) as hierarchical.¹³³ Although a detailed investigation on the reasons why this happened is far beyond the purpose of the current study, we need to make some brief remarks.

The coordination model is only partially linked with the 1989 reform which rendered the Italian criminal justice system more adversarial. In fact, it was already working before 1989.¹³⁴ There are different reasons for that. First of all, as we already explained (see chap. 4), the Italian constitution, which came into force in 1948, made clear that prosecutors were externally independent. At the beginning this principle was not fully implemented. The CSM was created in 1958 and only in 1991 the Constitutional Court finally stated that *magistratura*’s autonomy must always prevail.¹³⁵ Turning to the internal independence we can identify two moments which helped to break the hierarchical chain within judicial offices. First, the career progression criteria changed radically between 1963 and 1973. Before it was only based on merit (now it mainly depends from the seniority of the *magistrato* and the progression is automatic unless there are reasons not to do it). This left a lot of powers in the hands of high ranking judges and prosecutors who were the majority in the CSM and had the power to decide on career progression.¹³⁶ Second, between 1967

¹³² *Ibid.* p. 510.

¹³³ See, for example, Goldstein and Marcus (1977) *op. cit.* particularly p.47.

¹³⁴ Of course it is impossible to give an exact date when prosecution offices stopped from being organized on hierarchical principles. However, Vogliotti describes very well this transition and he points out that the period going from 1963 to 1975 was crucial to establish prosecutors’ internal independence. See Vogliotti (2004) *op. cit.* especially p. 457-462.

¹³⁵ See sent. n. 379/1992. In this case there was a conflict between the CSM and the Minister of Justice. In particular, art. 11 para. 3 of Act 195/1958 states that the decision to appoint high ranking *magistrati* (e. g. chief prosecutors, president of the court of appeal etc.) is taken by the CSM together with the Minister of Justice (there is a joint commission). Now, the constitutional Court was asked to intervene (in Italy the constitutional Court is also competent to decide on the conflicts between constitutional powers) because the CSM and the Minister disagreed on the name of the judge to appoint as president of the court of appeal in Palermo. The Court stated that when there is a disagreement the CSM’s decision always prevails. See Vogliotti (2004) *op. cit.* p. 460. The implications of this decision are clear: the Minister can not impose his decisions to the CSM, because the *magistratura* is externally independent.

¹³⁶ Vogliotti (2004) *op. cit.* p. 460. For a more detailed explanation see, for example, Guarnieri C. “*L’indipendenza della Magistratura*”. 1981. Padova: CEDAM. pp. 209-227; Guarnieri C. “*Magistratura e politica in Italia*”. 1993. Bologna: Il Mulino. pp. 87-97; and Guarnieri C. “*Giustizia e Politica: i nodi della Seconda Repubblica*”. 2003. Bologna: Il Mulino. pp. 94-106.

and 1975 the electoral system for the CSM changed and it became more proportional. The consequence was that high ranking *magistrati* were no longer in the majority.¹³⁷ These were normally the more conservative ones and they preferred a hierarchical system. On the other hand, the young *magistrati* who, in the fifties, did not have very much power within the CSM, were pushing for more internal independence.¹³⁸

These are the legal reasons why a continental and inquisitorial system is not based on hierarchical relations. But, there are historical reasons as well. During the fascist period prosecutors and judges started to become a body belonging to the fascist party only in the thirties.¹³⁹ However, political influences have always been substantial. In particular, *magistrati*'s jurisdiction was limited with the creation of special tribunals like the *Tribunale speciale per la difesa dello stato*,¹⁴⁰ which was controlled by the party. Moreover, police powers increased.¹⁴¹ So, the fascists did not remove all the "dangerous" judges and prosecutors, they simply did not provide them with the tools to fulfil their mission.¹⁴²

Within this scenario the hierarchical chain was fundamental to implement political influences. Jemolo explained very well this procedure: political pressure was starting from the minister, passing through all the hierarchical chain and then reaching a single *magistrato*. If somebody did not agree the case was taken back by the hierarchical superior and given to someone else. The *magistrati* who did not follow the indications given by the superiors did not lose their job, but could not progress in their career.¹⁴³ So, having a hierarchical chain was not the only problem, but surely it was a major problem. Moreover, the fascists did not need to control all the prosecutors and judges, they just had to put pressure on those who were holding the high ranking positions.

To conclude, the reasons why the post-fascist inquisitorial Italian system was not supported by hierarchical relations appear to be both legal and historical. Moreover, the legal transition seems also linked to a generation change. The old, high

¹³⁷ See, for example, Guarnieri (1981) *op. cit.* pp. 209-227; Guarnieri (1993) *op. cit.* pp. 87-97; and Guarnieri (2003) *op. cit.* pp. 94-106.

¹³⁸ *Ibid.*

¹³⁹ Guarnieri (2003) *op. cit.* p. 94.

¹⁴⁰ This tribunal had to decide on crimes which could have had a political consequence.

¹⁴¹ Guarnieri (1993) *op. cit.* p. 86.

¹⁴² *Ibid.* The author reports that only 16 out of around 4000 *magistrati* were removed.

¹⁴³ Jemolo A. C. "La magistratura italiana: constatazioni e proposte". In Jemolo et al. "Per l'ordine giudiziario". 1946. Milano: Giuffrè. p. 29.

ranking and conservative *magistrati*, who were used to work in a system based on hierarchical relations, were substituted by a new generation of judges and prosecutors who put independence and autonomy at the core of their legal culture.

6 Conclusion

We have analyzed organizational relations within Italian prosecution offices and we found three important principles. First, no matter what the legal rules say, prosecutors' independence is always the key principle. Second, the consequence is that common criteria can not be imposed, they are the result of strategies of persuasion. Third, strategies of persuasion and the relationship between superior and assistant prosecutors are built around negotiated agreement and meetings between equals. The concept of meetings between equals could be the door to introduce a, de facto, hierarchical relationship. However, although experience and moral authority determine that some prosecutors can strongly influence single decisions, assistant prosecutors are still very much free to choose. In fact, even when prosecutors are obliged to refer to superiors, they are still in the position to refuse to do something they do not want to do. This means that decisions are discussed on a basis of equality in order to find (if consensus is not possible) a common solution which takes into account the different opinions. This is why we did not find cases of conflict between superiors and assistant prosecutors. However, this works because prosecutors' independence is the key principle for both superior and assistant prosecutors who do not appear culturally distinguishable. In this sense prosecutors' independence is the pillar which supports other organizational principles.¹⁴⁴ But independence also seems to be a key feature of prosecutors' professional and legal culture (in particular of their office culture). It is part of what Friedman calls 'internal' legal culture, which is the legal culture of "those members of society who perform specialized legal tasks".¹⁴⁵ In the next chapter will continue the analysis of prosecutors' legal culture. In particular, we will concentrate on their professional culture and values.

¹⁴⁴ As we explained in chap. 4 it is the constitution which states that prosecutors are independent. This can certainly influence prosecutors' professional culture and it could be one the reasons why chief prosecutors refrain from exercising more powers. However, we also explained that the *ordinamento giudiziario* can potentially affect and reduce prosecutors' independence.

¹⁴⁵ Friedman L. M. "The Legal System: A Social Science Perspective". 1975. New York: Russel Sage Foundation. p. 233.

CHAPTER VII. PROFESSIONAL ATTITUDES AND VALUES

1. Introduction

In the previous chapter we emphasized the importance of the operation of legal independence to an understanding of prosecutors' office culture. In this chapter we want to focus on another aspect of prosecutors' legal culture: their professional attitudes and values. Moreover, we want to mark the differences, at this stage of the proceedings, between prosecutors, judges and, more importantly, the police.

Italian prosecutors' professional culture has been studied both through the interpretation of the legal rules and through the analysis of the law in action. In particular, accounts of prosecutors' professional culture have been constructed around three concepts: the cultural proximity between judges and prosecutors, the legality principle (not in relation to the way priorities can be determined, but to the way it shapes prosecutors' role in the criminal justice system) and prosecutors' function. Moreover, the impact of the 1989 reform appears particularly important. As we have pointed out (see chap. 2), this reform introduced adversarial principles into the Italian criminal justice system which, as a consequence, partially modified the status and the function of prosecutors.

Prosecutors are considered, especially after the 1989 reform, to be a party to criminal proceedings from the beginning of the investigation.¹ However, supporting the prosecution is not the only function of prosecutors. Prosecutors are also responsible for the correct application of the law (art. 73 and 74 ord. giud.).² This seems to give to prosecutors a more neutral status: *pubblici ministeri* are parties because they must, now, be distinguished from the judges. But they should not prosecute at any cost, they should carry out their functions impartially.³ So, although prosecutors are functionally distinguishable from judges, both are seen as impartial figures.⁴ This is the traditional interpretation of prosecutorial functions.⁵ This interpretation developed under the pre-1989 code of criminal procedure and it was

¹ See, for example, Della Casa F. "Soggetti". In Conso et al eds. (2003) *op. cit.* pp. 57-58.

² Della Casa (2003) *op. cit.* p. 58.

³ See, for example, Zanon and Biondi (2006) *op. cit.* p. 126.

⁴ *Ibid.* p. 132.

⁵ See, for example, Vassalli G. "la potestà punitiva". 1942. Torino: UTET. p. 180. See also Zanon and Biondi (2006) *op. cit.* p. 132.

confirmed by the Italian constitutional Court⁶ (the Court did not change its approach even when the adversarial reform took place in 1989⁷). This interpretation can be supported by the fact that, in the current system, judges and prosecutors belong to the same professional category, share the same career path and can switch functions (see chap); the principle of compulsory prosecution applies; and prosecutors, like judges, are fully independent. Maddalena, who was the chief prosecutor in Turin and is considered to be a conservative (politically speaking) *magistrato*, believes that judges and prosecutors are and should always be part of the same professional category.⁸ He has said that it is crucial that the prosecutor is seen to act as a judge. This is vital when the investigation concerns persons who are important in the economic and/or political life of the country.⁹ Moreover, impartiality is fundamental during the investigation. If the investigation is not carried out impartially, it is not possible to search for and find the truth, which, in his view, should be prosecutors' and judges' aim.¹⁰

The legality principle is also understood as protecting prosecutors' independent and neutral status and it seems to support the traditional interpretation of prosecutorial functions. This is considered to be the projection of the principle of equality within the Italian criminal justice system.¹¹ Furthermore, art. 112 states that prosecutors are fully independent. This means that when they decide to prosecute a case or to drop a prosecution they are not subject to any external (i. e. executive) and/or internal power pressure (eg. from within the prosecution office or from other higher judicial bodies, e. g. a chief prosecutor attached to the court of appeal).¹²

The traditional interpretation has been criticized. For example, Grande believes that, after the 1989 adversarial reform, prosecutors became "straight accusers".¹³ In particular, she claims that art. 358 cpp¹⁴ does not ensure that

⁶ Zanon and Biondi (2006) *op. cit.* p. 133. See Corte cost. sent. n. 190/1970; n. 123/1971; n. 63/1972; and n. 96/1975.

⁷ Zanon and Biondi (2006) *op. cit.* p. 133. See Corte cost. sent. n. 88/1991.

⁸ Maddalena said these things in 1993, in the middle of *tangentopoli* (see chap. 3 and 5). In particular, he referred to a famous prosecutor (Antonio Di Pietro, who is now a politician) who was one of those who started and conducted *tangentopoli*. Maddalena said that the country needs more "judges" like Di Pietro. This is in order to underline the importance of prosecutors' impartiality in carrying out such difficult investigations.

⁹ Maddalena M. "*Il ruolo del pubblico ministero nel processo penale*". In Centro Nazionale di Prevenzione e Difesa Sociale. Convegni di studio <<Enrico De Nicola>>: Problemi attuali di diritto e procedura penale. "*Il pubblico ministero oggi*". 1994. Milano: Giuffrè. pp. 49-53.

¹⁰ *Ibid.* pp. 47-53.

¹¹ See, for example, Zanon and Biondi (2006) *op. cit.* p. 135.

¹² *Ibid.* p. 137. See also, Della Casa (2003) *op. cit.* p. 59. See also sent. Corte cost. n. 88/1991.

¹³ Grande (2000) *op. cit.* p. 235.

prosecutors act like neutral legal figures.¹⁵ This article has been interpreted as asking the prosecutor to collect the evidence in favour of the suspect only for the very limited purpose of deciding whether to prosecute or not. When the prosecutor has decided that the case is strong enough to go to trial, he has under no further obligation to search for exculpatory elements.¹⁶ Zanon and Biondi agree with this point of view¹⁷ and, like Grande, refer to Cordero who says: “if the prosecutor disregards [evidence favourable to the suspect], looking just in one direction, he/she risks a failure at trial or even before at the preliminary hearing; that the prosecutor must also consider the suspect’s side is a matter of elementary caution”.¹⁸ So, for these authors, after the 1989 adversarial reform, prosecutors are not under the obligation of being impartial. They must pay attention to exculpatory evidence only to determine if they can obtain a conviction or not. So, in practice, prosecutors do not have to search for the legal and factual truth, they just have to assess inculpatory and exculpatory evidence in order to decide if the case can be sent to trial or the accusation has to be dropped.

The legal analysis that Grande makes of the 1989 reform is not only important to determining if prosecutors are neutral figures or not. Grande claims that the reform has failed because of the strong Italian continental legal tradition which has created an institutional resistance that, together with remnants of old procedural inquisitorial tradition, have rendered the 1989 adversarial reform unsuccessful.¹⁹ Grande suggests that this reform was not ambitious enough and failed to modify the institutional structure.²⁰ In particular, she refers to the fact that prosecutors and judges are still part of the same professional category (they are both *magistrati*) and that, as a

¹⁴ This article says that: the prosecutor completes every activity which is necessary to comply with art. 326 cpp and also takes into consideration the information favouring the person under investigation. Art. 326 says that the prosecutor and the police perform activities aimed at implementing the penal action. In particular, prosecutors carry out investigation activities, supervise police’s investigation and, at the end, decide if the prosecution can be continued or if it has to be dropped.

¹⁵ The pre-1989 inquisitorial code of criminal procedure focused more on prosecutors’ and examining judges’ neutrality. In fact, art. 299 stated that one of the duties of the examining judge was that of searching for the truth. The same principle applies for prosecutors (see art. 391 of the pre-1989 code of criminal procedure; see also Goldstein and Marcus (1977) *op. cit.* p. 256). The *pretore* had a slightly different position. This figure has now been abolished (see chap. 9), but in the past it was dealing with the majority of the cases. He was conducting the examination and he was also the judge (but there was a prosecutor as well). However, he was still considered an impartial figure (see Goldstein and Marcus (1977) *op. cit.* p. 256).

¹⁶ Grande (2000) *op. cit.* p. 235.

¹⁷ Zanon and Biondi (2006) *op. cit.* p. 134.

¹⁸ Cordero F. “*Procedura penale*”. 2000. 5th ed. Milano: Giuffrè. p. 742.

¹⁹ Grande (2000) *op. cit.*, p. 256.

²⁰ *Ibid.*

consequence, they both share the same professional culture.²¹ In Grande's view this situation denies defendants a fair trial according to adversarial principles.²² As she says: "given such a close relationship, can the defendant really be conceived of as benefiting from a level playing field with the Italian prosecutor in a situation in which the fact-finder is one of the prosecutor's 'colleagues'?"²³ So, the point that Grande tries to make is that the Italian criminal justice system is a hybrid one, where, together with adversarial principles, there are still strong inquisitorial features. The author claims that this is demonstrated by some of the legal rules introduced after 1989 and by constitutional Court decisions as well.²⁴

Turning to the law in action, Di Federico claims that prosecutors are only formally neutral legal figures. Di Federico and Sapignoli conducted a large empirical study (involving 1000 lawyers): 48.8 % of the lawyers interviewed reported that prosecutors do not comply with article 358 cpp which, as we have said, requires them to search for exculpatory evidence.²⁵ The conclusions are, for example, that prosecutors do not respect the legal rules that require them to finish the investigation in a fixed time; that pre-trial custody is used to put pressure on accused persons even when there are no lawful justification to do so; and that witnesses are not free to report what they saw and heard, because prosecutors put a lot of pressure on them in order to be sure that they will support the prosecution's version of events. However, as Di Federico says, his research is only analyzing the lawyers' perspective.²⁶

So, a number of authors claim that, de facto, during the pre-trial phase prosecutors do not act like neutral and impartial legal figures. The conclusion that Di Federico and Sapignoli reach from these elements is that the stance of the prosecutor within the Italian criminal justice system is that of the police officer. In particular, prosecutors are independent police officers who are free to investigate in the direction they want (so, the legality principle is not properly implemented).²⁷ Di Federico

²¹ *Ibid.* pp. 236-237.

²² *Ibid.* p. 237.

²³ *Ibid.* p. 236.

²⁴ *Ibid.* p. 238. See also, for example, Corte cost. sent. n. 254/1992; n. 255/1992; and n. 24/1992.

²⁵ Di Federico G. and Sapignoli M. "*Processo penale e diritti della difesa*". 2002. Roma: Carocci. p.16. See also that 19.5% of the lawyers said that prosecutors search for exculpatory evidence only when the counsel pushes them to do so. Finally, only 2.1% of the lawyers said that prosecutors always search for exculpatory evidence.

²⁶ Di Federico and Sapignoli (2002) *op. cit.* p. 17.

²⁷ *Ibid.* p. 16. See also, Di Federico G. "*Il pubblico ministero: indipendenza, responsabilità, carriera separata*". In Di Federico eds. (2004a) *op. cit.* p. 435.

claims that this creates strong inequalities for accused persons and victims. This is because cases will not be treated in the same way. As a consequence, on one hand some accused persons can be subject to a more intensive investigation. On the other some victims may not be adequately protected, because the *pubblico ministero* has not chosen to concentrate on that specific case. In Di Federico's view this implies that prosecutors are not impartial figures.²⁸ Finally, the author considers that even the cultural proximity between judges and prosecutors does not render prosecutors impartial figures. On the contrary, judges are very much influenced by the decisions taken by prosecutors (with the consequence that the rights of the accused persons appear affected).²⁹ So, in general, Di Federico's analysis is aimed at demonstrating that those principles which should legally support prosecutors' impartial status (i. e. the traditional interpretation) are, de facto, misapplied. According to the author, prosecutors abuse their investigative powers and influence judges in order to be sure that they will support the accusation. In the end, prosecutors appear to be directly focused on obtaining a conviction, with little consideration for the legal rules which require them to be more neutral.

Di Federico has also analyzed the mission that prosecutors believe themselves to have in the Italian criminal justice system. Research undertaken between 1964 and 1966 showed that prosecutors (and instructing judges) perceived their function as something very much "detached" from the investigation. In particular, prosecutors almost considered it improper to involve themselves in the investigation and left these tasks to the police. On the other hand, research undertaken in the eighties and in the early nineties showed that young *magistrati* were much more interested in prosecutorial and investigating activities compared to the past and that the mission of prosecutors had changed. Prosecutors not only decide if a crime was committed, but they also search for crime.³⁰

Both the legal and the law in action analysis suggest interesting considerations. The tension between the neutral/not-neutral status of prosecutors is clearly very important and it will be taken into account in this chapter. Moreover, Di Federico's research on the way prosecutors work in practice provides a critical point

²⁸ Di Federico and Sapignoli (2002) *op. cit.* pp. 107-112. See also, for example, Grande (2000) *op. cit.* pp. 240-241.

²⁹ *Ibid.* pp. 122-133. See also, Di Federico (2004a) *op. cit.* pp. 446-450.

³⁰ Di Federico (2004a) *op. cit.* pp. 447-448.

of view on the efficiency and efficacy of the practical application of some legal rules. In other words: Di Federico is suggesting that reality is very different from theory and that reality offends certain due process principles.

In this chapter we do not want to deny the importance of detailed legal analysis or of lawyers' opinions to an understanding of prosecutors' professional culture. However, we want to address different questions. First, what is prosecutors' professional self-image? How do prosecutors understand their own professional culture? What is, in prosecutors' view, the cultural proximity between them and judges (what we have called judicial culture)? Finally, is the legality principle really important to understanding and supporting prosecutors' professional culture? And why? Subsequently we will move from prosecutors' self-image to prosecutors' professional values in practice. In particular, we will try to answer two questions. First, what is the aim of an investigation for prosecutors? Are they searching for the truth or trying to obtain a conviction? And, if they are searching for the truth, what are the differences between the truth prosecutors search for and find and the truth that judges try to find? Second, what is the meaning, in practice, of prosecutors' judicial culture? In fact, we will see that this concept does not seem to be linked to impartiality, but to the attempt to construct and emphasize the chances to obtain a conviction.

Prosecutors' professional culture will be also analyzed in the light of the 1989 reform. Here we want to understand the impact that adversarial principles have had on prosecutors' professional culture. Furthermore, we will try to explain how and why prosecutors have tried and try "to resist" the reform. Grande talks of institutional resistance, but she refers to the legal rules which show that adversarial principles are not entrenched in the Italian legal culture. In this chapter we want to do something different. We will exclusively concentrate on prosecutors and on the way they have reshaped adversarial principles to re-state their, de facto, inquisitorial professional culture.

2. Legal filters, not crime fighters

In the next two sections we will start to delineate prosecutors' own image of their professional culture. We will try to explain the image that prosecutors have of

themselves and of their mission in the Italian criminal justice system. We will use two images that represent different forms of cultural pressure, crime fighter (in this section) and judge or judicial culture (in the next section), as terms of comparison. Crime fighters are clearly linked with the concept of crime control (related to efficiency, high rate of conviction, administrative fact-finding model etc.). On the other hand, the idea of judicial culture is more closely related to the concept of due process (legal controls, primacy of the individual, adjudicative fact-finding model etc.).³¹ No prosecutor is entirely a crime fighter or a judge: they all have elements of both tendencies which create a continuing tension in their professional practice. But the mix of the elements varies. To suggest that one image/model/concept could completely dominate the other would be as excessive as to suggest that functioning criminal justice systems can be either due process or crime control.³² Moreover, the tension between crime control-due process will be taken into account, but our aim is not only to apply these concepts to the Italian case. These will be used to understand how and why prosecutors' self professional culture is different to that of the crime fighter. Moreover, we want to investigate the consequences of this cultural tension for prosecutors' self image of their function.

The vast majority of the prosecutors we interviewed said that they are not crime fighters.³³ Prosecutors indicated different reasons to support this assumption. The first one stems from the fact that prosecutors need to look and search for both inculpatory and exculpatory evidence:

³¹ There is a contrast between administrative and adjudicative fact-finding. They represent different value systems. In particular, administrative fact-finding serves the aims of crime control values. So, repression of criminal conduct is the most important function performed by the criminal process. As a consequence, this must be efficient and facts must be established as quickly as possible with routine procedures which do not rely on a formal process of examination. As we said, adjudicative fact-finding is more linked with due process values. In particular, the adjudicative fact-finding module rejects informal administrative fact-finding procedures aimed at discovering the factual guilt. The possibilities of error are high, so further scrutiny is necessary. This is why the importance of formal procedures which are not primarily focused on the efficiency of the criminal process is emphasized. Borrowing Herbert Packer's words we could say that adjudicative fact-finding tries to correct the mistakes which could have been done in administrative fact-finding contexts. However, we must say that, although these two systems are clearly different, they are interconnected. In fact, it would be very difficult to find a criminal process system only based on administrative fact-finding or, vice versa, only based on adjudicative fact-finding. Within legal systems we can find features which belong to both these modules. See Packer H. L. "*The limits of the criminal sanction*". 1968. Stanford: Stanford University Press. pp.149-173.

³² Packer (1968) *op. cit.* p.154. See also, for example, See Sanders and Young (2007) *op. cit.* pp. 19-27.

³³ 22 prosecutors said that they do not act like crime fighters. 1 did not answer clearly. 4 said that they act like crime fighters (see later).

I believe that one of the most important elements of the Italian legal system is the culture of *giurisdizione*,³⁴ which must involve both judges and prosecutors. I like very much being a prosecutor, but I believe that I am working like a *magistrato* and that this approach does not change just because I am a prosecutor. I believe that this [working like a *magistrato*] leads me to search, also, for exculpatory evidence. And every time I discover that a crime was not committed I am very happy. I am very happy that my job is not evaluated on the numbers of convictions I get [...] No, not at all: neither prosecutors, nor the *magistratura* fight anything.³⁵

Here there is also another important reason why prosecutors do not see themselves as crime fighters: the judicial culture of prosecutors. Prosecutors believe that judges are their “colleagues”³⁶ and that they share the same professional culture (i. e. the culture of *giurisdizione*). In the next section we will analyze in depth the concept of prosecutors’ judicial culture and we will see how important this is in shaping the perception that prosecutors have of their function and of the activities they have to carry out.

Another element that, according to Italian prosecutors, marks the difference between them and the crime fighters is the search for the truth:

No, he/she [the prosecutor] is not a crime fighter [...] I am not a guard dog; at the same time I believe we are paid to do a job and we have to do it as well as we can. The good thing is that prosecutors are part of the judiciary and that [as a consequence] we have to search for the truth, not to obtain convictions [as the crime fighter does].³⁷

Prosecutors seem themselves as searching for the truth, and they perceive a cultural distance from the crime fighter because they believe these work to obtain convictions and not to search for the truth. So, Italian prosecutors see crime fighters as sort of partisan figures (legal actors who are not neutral and impartial);³⁸ while their self professional culture designates them as impartial legal figures. Moreover, they

³⁴ We already explained (see chap. 6) that *giurisdizione* means “to apply the law”. However, in this case it is also used to remark that (according to this prosecutor) prosecutors and judges have the same professional culture (i. e. *giurisdizione*’s culture based on impartiality, see later).

³⁵ AP(N31). Similar opinions were expressed by other prosecutors. See, for example, AP(C47), CP(N43) and AP(N11).

³⁶ AP(N29). See also AP(N38). This prosecutor said that she would not be happy if they are seen as police officers’ colleagues, because “we [prosecutors] studied to become prosecutors or judges”.

³⁷ AP(N48). Similar opinions were expressed, for example, by AP(C53), and AP(N10).

³⁸ AP(N10) defined the crime fighter as “that one who supports the accusation even if there are not enough elements”. And he said that this is not prosecutors’ function.

believe that within the Italian legal system the crime fighting function is fulfilled by the police.³⁹

Now, we have explained why prosecutors do not see themselves as crime fighters, but that raises the positive question, what is their function? And, more important, why is this different to that of the crime fighter? The analogy of the filter seems to be the best way to describe the way Italian prosecutors perceive their functions compared to crime fighters:

I do not think that we can be described in this way [as crime fighters], because prosecutors' function is to be a filter between the police and crime repression.⁴⁰ The prosecutor must be lucid, calm and objective. This, probably, can not be done if you stay in the "front line" [as crime fighters do].⁴¹

I think that I am 50% investigator and 50% the person who has to read [and evaluate] the evidence. Yes, I think we are interfaces, who stay in between [the police and judges].⁴²

The crime fighter is the police. I work very close to the crime fighter because I have to *controllare*⁴³ that crime fighters follow the [legal] rules. So, I am very close to them, but I look at the things from a different angle.⁴⁴

They [the police] have to discover and repress the crimes. We have to judge the persons who have been denounced.⁴⁵

You must be very well-balanced and you have to try to remain, and the majority [of prosecutors] do it, a *magistrato*. This is because when the police call and they say that the accused person is a criminal, we are slightly influenced. So, a prosecutor must say: he might be the worst criminal on earth, but we have legal rules which must be applied to everybody. No, I do not think I am acting like a crime fighter. On the contrary, I think that prosecutors' function is to check that crime fighters follow the legal rules.⁴⁶

³⁹ See, for example, CP(N43), AP(N30), AP(N28) and AP(N44).

⁴⁰ Here crime repression means the judge that, through the sentence, is repressing a crime.

⁴¹ AP(C53) Similar opinions were expressed, for example, by CP(N43) and AP(N32).

⁴² DCP(N45).

⁴³ In this context this means to monitor and supervise and if necessary direct so as to ensure that crime fighters follow the legal rules.

⁴⁴ CP(N43).

⁴⁵ AP(N41).

⁴⁶ AP(N42). Similar opinions were expressed, for example, by AP(N41) and AP(N28).

So, it seems that the meaning of filtering is strictly linked with the duty to provide legal supervision and to control the information that the police discover and the necessity to link the world inhabited by the police with the courtroom. The last example is interesting because it shows the stages through which a crime report and investigative results (provided by the police) need to pass. Moreover, and more important, it provides the prosecutors' representation of when they intervene and what, according to their self-image of their professional culture, they have to do. In particular, it seems that prosecutors have to determine if the evidence collected is admissible.⁴⁷ This is in order to fulfil their duty to ensure that crimes are investigated and prosecuted following the legal rules. Crime fighting must be mediated through the controls of the law. In fact, one prosecutor said: "it is the law which fights the crime, not the judge [prosecutor]".⁴⁸ This means that crime fighting is seen as one of the consequences of prosecutors' legal filtering, but it is not regarded as the immediate aim. In particular, it becomes a consequence when legal rules authorize crime-fighting.⁴⁹

From this perspective the cultural self-image of prosecutors appears to have a due process nature. Prosecutors' approach is based on an adjudicative-fact finding procedure, more than an administrative fact-finding one, which is typical of crime control figures.⁵⁰ In other words: prosecutors must decide if the evidence collected (mainly by the police, but the victim can play an important role as well (i. e. *querela*, see chap. 4) and the procedures used to discover them are legally acceptable. So, as legal filters, Italian prosecutors prevent cases which have not been legally investigated from becoming prosecuted cases. Moreover, prosecutors remark that one of their

⁴⁷ In Italy illegally obtained evidence is not admissible and the judge can, at any time, declare the inadmissibility of a piece of evidence (see art. 190 and 191 cpp.; for the legal criteria determining the admissibility of evidence see art. 62, 63, 103, 195, 197, 203, 234, 240, 254, 270 and 271 cpp.). However, we should not limit the discussion to illegally obtained evidence. In fact, art. 189 cpp provides for any evidence which is not listed in code of criminal procedure. These pieces of evidence are not a priori inadmissible. The judge decides on a single case basis and the parties can put forward their arguments. In any case, the judge can not accept evidence if this is not useful to determine the facts and/or if this prejudices the morality of the person involved. In particular, this means that evidence can not be accepted if it can incapacitate (even if it is for a short period) a person. So, for example, hypnosis can not be accepted (see Grevi V. "*Prove*". in Conso et al eds. (2003) *op. cit.* pp. 296-298). For the law of evidence in general see, for example, Grevi (2003) *op. cit.* pp. 283-362.

⁴⁸ AP(N33). Similar opinions were expressed, for example, by AP(C53) and AP(C46). It is also interesting to note that AP(N33) uses the word judges to indicate prosecutors. This is still quite common between *magistrati*, politicians, journalists and the man in the street (see, for example, Di Federico (2004a) *op. cit.* p. 437).

⁴⁹ See, for example, AP(C46) and AP(C53).

⁵⁰ See Sanders and Young (2007) *op. cit.* pp. 19-27. See also, Packer (1968) *op. cit.* pp.149-173.

functions during the pre-trial phase is to filter inadmissible evidence and that this puts them in a very different position compared to the crime fighter. This will be analyzed in detail in the next chapter when we will deal with the police-prosecutor relationship and we will see that *pubblici ministeri* not only filter and review information but they can also prompt and provide inputs on the way the investigation should develop.

Finally, there is another important consideration to make here. We said before that one of the reasons why Italian prosecutors do not believe that they act as crime fighters is that they have to search for the truth, while crime fighters are focused on obtaining convictions. But what kind of truth is that? This appears to be the “legal truth”. So, the facts must be analyzed and understood in the light of the legal rules. In other words, Italian prosecutors’ self-image of their professional culture is constructed in terms of searching for evidence of legal guilt (i. e. filtering, reviewing and prompting the search for information), which means that someone is not only guilty because the facts say so, but also because legal rules say that.⁵¹

3. Judicial culture

In this section we want to concentrate more on the judicial function of Italian prosecutors. By judicial culture one is referring to the claim of prosecutors to have the same professional culture that adjudicative magistrates have. This is what the majority of the prosecutors we interviewed said.⁵² And no matter that some prosecutors recognize that the function they carry out is different to the function the judge must carry out, they still perceive this strong cultural proximity with judges.⁵³ The consequence is that prosecutors consider that the decisions they take are taken as if they were judges. Moreover, we have already said that prosecutors’ judicial culture is one of the reasons why prosecutors refuse to be seen as crime fighters. In particular, prosecutors regard their professional culture as being the same as judges’ professional culture and very different compared to the police approach (which is, in prosecutors’ view, the approach that the crime fighter would have). In this section we will analyze

⁵¹ Packer (1968), *op. cit.* pp.166-167.

⁵² 16 prosecutors said that there is no difference between the approach that they have and that judges have. 7 said that there is a difference (see below). 3 said that they are partially different compared to judges. These claim to have a different approach (and a different “knowledge” of the case, see later) when they have to investigate, but that they act like judges when they have to evaluate the evidence collected. 1 did not clearly answer.

⁵³ See, for example, AP(N29), AP(Apl.(N50) and CP(N43).

the meaning that judicial culture has within prosecutors' professional cultural self-image and why prosecutors believe that, in practice, they act like judges.

The first question is: what do we mean by the prosecutors' judicial culture?

There could be a different approach [between judges and prosecutors] but this would be a problem. It is a matter of the function you are carrying out. So if I am a judge I have to think according to certain rules; on the other hand if I am a prosecutor I have to think in a slightly different way. However, there is something which must never change: impartiality. Both prosecutors and judges must be *terzi*⁵⁴ and impartial. The prosecutor is a third party⁵⁵ and must be above the parties. Prosecutors must, sometimes, judge like judges.⁵⁶

This example seems clear. Prosecutors eventually admit that the tasks they carry out are different compared to the tasks judges carry out. So, prosecutors are functionally different compared to judges. However, although the function is different, the cultural proximity between judges and prosecutors is still asserted because prosecutors must be (according to their professional self-image) impartial like judges. So, impartiality is what defines the cultural proximity between these two legal actors and, more important, appears to be the very nature of prosecutors' judicial culture. Moreover, the functional difference between judges and prosecutors and prosecutors' impartial status imply (for prosecutors' own professional culture) that, in Italy, *pubblici ministeri* are a party, but they are neutral and impartial:

In fact, even if prosecutors are a party to the proceedings, we are a body which is part of the state and which must be impartial [...] So, we are pursuing justice and the correct application of the law. As a consequence we are a party like the counsel, but we are a very particular party: we are a public party. So, our aim is to pursue the correct application of the law and we have to do it impartially. This is what we have in common with adjudicative magistrates.⁵⁷

The second question is: what is the link between prosecutors' judicial culture and their functions and aims? Prosecutors claim that there is no difference between their approach and judges' approach because they both search for the truth:

⁵⁴ This literally means third. In this context it means that prosecutors (and judges) must be independent and must not be influenced by the parties.

⁵⁵ This means that prosecutors are a party, but they are neutral and impartial like judges.

⁵⁶ AP(Apl.N50). Similar opinions on the fact that prosecutors must be impartial like judges were expressed, for example, by AP(N29), AP(N33) and AP(C47).

⁵⁷ AP(N39). Similar opinions were expressed, for example, by AP(N38), AP(C46) and AP(Apl.N50).

In fact, there should be no differences [between judges and prosecutors]. This is because the prosecutor is a *magistrato* who is searching for the truth [...] but the prosecutor is also a public body, as a consequence his ideas about a case should not be preconceived [i. e. to consider the accused person(s) guilty a priori] Sometimes, not often, I conclude the trial asking for an acquittal. We do not support a thesis because we have to, but because we are searching for the truth.⁵⁸

In the previous section we explained that searching for the truth is seen by prosecutors as one of their tasks and it is one of the reasons why they do not want to be seen as crime fighters. For Italian prosecutors, this aim can only be carried out by thinking and working like judges. Moreover, prosecutors seem sure that the truth they find is the truth the judge will find. They say that there are only very few cases when they send a case to trial and they have some doubts about the fact that the judge will convict the accused person(s).⁵⁹

Prosecutors also say that they must be impartial like judges because they do not support one side (the accusation), but rather present both inculpatory and exculpatory evidence:

I am a public body which is working for the state. So, I support the accusation when I have enough evidence, but, probably, I drop 90% of the cases. Moreover, I often take decisions to help the accused person(s); sometimes I even do it before the counsel or, often, without saying anything to the counsel, because sometimes there are not good lawyers or they do not have a good relationship with their clients. So, everyday I take many decisions which protect the accused person(s). This is an impartial approach.⁶⁰

We have already discussed this issue in explaining the difference between prosecutors and crime fighters. However, here (as we said above for the search for the truth) it is interesting to note that this prosecutor connects the function of searching for exculpatory evidence with his impartial approach to the cases; and not, for example, with the fact that this approach would give him a better idea about what to do during the trial and, as a consequence, to enhance his chances to obtain a conviction.

⁵⁸ AP(C53). Similar opinions were expressed, for example, by AP(N29) and AP(C46).

⁵⁹ See AP(N48), AP(N31) and AP(N38). Of course defence lawyers often argue that this is because adjudicative magistrates accept too readily arguments from their fellow magistrates the prosecutors. See, for example, Di Federico and Sapiñoli (2002) *op. cit.*

⁶⁰ AP(C47). Similar opinions were expressed, for example, by AP(N38), AP(N11) and AP(N31).

The very last issue we want to treat here concerns the point the prosecutors' remark that the cultural proximity between them and judges is stronger:

It is true that prosecutors must support the accusation, but before doing that they have to act and think like judges. Prosecutors must ask themselves the same questions that judges ask themselves [...] A good prosecutor must be the judge of himself and the judge of the case. If he solves the case, because he believes that the accused person(s) is guilty, he will support the accusation. However, before doing that he must be a judge. In fact, we do it [judging] when we decide to send the case to trial or to ask for the *archiviazione*.⁶¹

So, prosecutors' judicial culture appears particularly important during the pre-trial phase (i. e. the moment when they decide to send the case to trial or to ask for *archiviazione*). In particular, prosecutors believe that they act like judges when they have to evaluate the evidence collected during the investigation:

When the prosecutor has to evaluate the evidence he must be like a judge. He must say if there is enough evidence to support the accusation during the trial.⁶²

To conclude, judicial culture appears important to prosecutors' professional cultural self-image because it is the basic principle which they see as shaping their activities. The cultural proximity between judges and prosecutors is seen as the basis of prosecutors' impartial approach and of prosecutors' golden principle that they are a party but they are neutral and impartial. Moreover, as we saw, it is impartiality (i. e. the judicial culture) which requires prosecutors to search for the truth, to search for exculpatory evidence and to evaluate the evidence like a judge. So, prosecutors' professional cultural self-image seems, today, mainly judicial. This corroborates what we said in the previous section: prosecutors' cultural self-image is that of a due process figure. Moreover, it reinforces the idea that, for *pubblici ministeri*, legal filtering (the main prosecutors' function) is a judicial stage where legal issues deriving from the investigation are evaluated by prosecutors thinking like judges. Finally, the importance of prosecutors' judicial culture is not surprising, given that one common principle informing prosecutorial functions is their quasi-judicial status (i. e. "scrutinizing the weight of the prosecution evidence impartially and fairly").⁶³

⁶¹ AP(N41). Similar opinions were expressed, for example, by AP(N48), DCP(N45) and AP(N28).

⁶² DCP(N45).

⁶³ Jackson (2004) *op. cit.* p. 112. However, this quasi-judicial function can be interpreted in different ways, depending on resources, the institutional and legal framework and prosecutors' legal culture

These are the conclusions we can reach from the opinions of the majority of our interviewees. However, we found some exceptions.⁶⁴ In particular, three said prosecutors are accusers (but not crime fighters).⁶⁵ These are very important exceptions, because the reason given for the different perspective is linked to the view that, during the investigation, *pubblici ministeri* have a “different contact with reality” in comparison with judges. We will analyze the meaning of having a “different contact with the reality” (and the consequences that this creates) when we will deal with prosecutors’ professional culture in practice. Here we want to focus on different exceptions. Four prosecutors claimed to have a different approach to that of judges because they are not neutral and impartial:⁶⁶

The judge is *super partes*. I was a judge for 20 years and then I have been (and still am) a prosecutor for 20 years. It is a completely different function, because the prosecutor must search for the evidence. I think that a prosecutor must favour the prosecution: my duty is to develop all the elements which support the accusation, then, maybe, I ask for an acquittal.⁶⁷

This example is clear: prosecutors cannot be impartial and they have to develop the elements which support the accusation. This is the opposite of a judicial culture. The unsurprising consequence of this radically different approach is that these prosecutors see themselves as crime fighters.⁶⁸ So, judicial culture seems to mark the difference between prosecutors who, according to their cultural self image, act like judges and legal filters and prosecutors acting like crime fighters. Legal filters believe that their judicial culture is a fundamental principle which shapes their decisions and function. On the other hand, crime fighters believe that being impartial is not part of their professional culture.

We must add that three out of four prosecutors who said they considered themselves as crime fighters were born, studied, worked and currently work in a big prosecution office in the south of Italy. The fourth prosecutor is currently the chief of a *procura* based in the north, but he has spent most of his professional life in the south of Italy (and he was born there as well). All these prosecutors had to do or have to do

(*ibid.*, pp. 112-116). In the next sections we will try to explain (also) the practice of judicial culture in Italy.

⁶⁴ See above footnote n. 52.

⁶⁵ AP(N32), AP(N30) and AP(N42).

⁶⁶ DCP(S5), CP(S4), AP(N6) and CP(N40).

⁶⁷ DCP(S5). Similar opinions were expressed by CP(S4), AP(N6) and CP(N40).

⁶⁸ DCP(S5), CP(S4), AP(N6) and CP(N40).

with a criminal environment which is very much influenced by organized crime. In fact, these are the kinds of prosecutors who, in Italy, are considered to be “in the front line” fighting organized crime. The consequences are that they face a very violent form of criminality and they may fall into very dangerous situations.⁶⁹ Of course, prosecutors can be involved in dangerous investigation in the north of Italy as well.⁷⁰ However, there is no doubt that “the front line” is now (and has been for a long time) in the south.⁷¹ It is not the purpose of the current study to analyze in depth the consequences that organized crime can have on prosecutors’ professional culture. However, working and, perhaps more important, living in such a difficult environment may explain why these prosecutors have the feeling that they are fighting something.

4. Legality principle

The legality principle is, as we said, considered to be central in developing the concept of prosecutors’ external independence and it is the projection, within the criminal justice system, of the principle of equality. These are the legal rules. Here we want to understand the impact that this principle has in shaping prosecutors’ professional cultural self-image. But, at this stage, we will only briefly deal with the way prosecutors define their priorities (see chap. 9). In this section we want to explore the link between prosecutors’ view of the legality principle and their professional cultural self-image.

The faith that Italian prosecutors have in the legality principle is not affected by any of the common criticisms that one can make which question the extent to which the principle is reflected by practice. Even those prosecutors who admitted that there are systems to avoid prosecuting or fully investigating certain cases which are not considered important, are firmly convinced that the legality principle is

⁶⁹ One prosecutor CP(N40) was escorted for a few years and had soldiers guarding his house 24 hours a day.

⁷⁰ There are many cases of prosecutors who live and work in the north of Italy and are escorted by the police. Normally these *pubblici ministeri* have dealt with and/or are dealing with terrorism and/or organized crime. In particular, we interviewed a prosecutor (AP(N48) who was escorted for four years, because he dealt with an important organized crime case.

⁷¹ Another front line could still be, arguably, in Milan because of *tangentopoli*. The same could be said for all those prosecution offices where criminal proceedings involving high ranked politicians initiated.

necessary.⁷² Moreover, prosecutors do not believe that having a set of priorities (for example, decided within the office or based on personal reasons, see chap. 9) affects the legality principle.⁷³ In fact, the very nature of the legality principle does not seem to concern when and how a case is dealt with by them; rather it implies that, sooner or later, the case will be dealt with.⁷⁴

So, this [the legality principle] is [important] for prosecutors and for judges as well. This is because the law requires that all the crimes must be prosecuted. It does not really matter if some crimes are prosecuted before and better when compared to others. This is normal. The point is that, sooner or later, all crimes must be prosecuted.⁷⁵

The bottom line, the moment when the legality principle is affected, is when prosecution is blocked because of *prescrizione*⁷⁶:

If I leave the files in the closet for too long there will be *prescrizione*. This is a de facto violation of the legality principle, because there is *prescrizione*. It happens, it happens for sure.⁷⁷

A chief prosecutor, who directs a medium to large prosecution office in the north of Italy, claims to have achieved the remarkable result that, in his prosecution office, there are no offences for which prosecution becomes impossible because of *prescrizione*. He explained this result as a fully effective application of the legality

⁷² See, for example, AP(N10), AP(N38) and AP(N42).

⁷³ See, for example, AP(N41), AP(N1), AP(N2) and AP(N3). However, we can refer to all the prosecutors, because they all said that there are priorities, but that this does not conflict with the legality principle.

⁷⁴ Only one prosecutor, AP(N10), said: “the more the time passes, the more is difficult that a case is treated or that it is properly treated”.

⁷⁵ AP(C53). Similar opinions were expressed, for example, by AP(N30), CP(S4) and AP(Apl.(N50).

⁷⁶ This legal concept indicates that there is a limitation of actions. Prosecutors have a time limit to put forward the accusation. This is not fixed, but it depends from the crime which has been committed (the more the crime is serious, the more there is time, some crimes can always be prosecuted). It is also important to know that the fact that a trial has begun does not block the time limit. So, as it happened for some of the trials involving Italy’s Prime Minister Berlusconi (and for many other important and less important cases), a criminal process can arrive, for example, at the court of appeal and then is blocked (by the judge) because of *prescrizione*. In these situations the accused person(s) is de facto acquitted. He/she is not formally innocent (sometimes they are clearly guilty) but he/she can not be prosecuted and/or tried anymore (or any longer) for that crime. We should also add that *prescrizione* could have consequences for prosecutors’ career. Being seen to have allowed *prescrizione* to take place deliberately could involve ministerial and CSM disciplinary hearings. One prosecutor (APN38) said: “The legality principle is a false problem. There are many ways [including waiting until *prescrizione* arrives] not to apply it. Then you can be sorry, there is a disciplinary proceedings, but how can you prove this was intentional? You just made a mistake”. See also Sarzotti who claims that, in recent years, *prescrizione* has been a de facto amnesty (i. e. cases that are not considered important are not treated and *prescrizione* legally eliminates them after a certain period of time). Sarzotti (2008) *op. cit.* pp. 41-42.

⁷⁷ AP(N48). Similar opinions were expressed, for example, by AP(N41) and AP(N10).

principle, with no concern for the fact that some cases are treated before others and that the amount of time spent to deal with cases can be different.⁷⁸ This seems to confirm what Nelken and Zanier have found. In particular, the when and the how of prosecuting cases is regarded (by prosecutors) as a limited and acceptable discretionary power.⁷⁹

Why do Italian prosecutors have this great faith in the legality principle?

The legality principle is a very fair principle, because it creates a real equality before the law. This is a cause of pride for this country [Italy]. Moreover, this [equality] has been proved by famous cases, where important persons have been prosecuted.⁸⁰

This statement summarizes the aim that, in prosecutors' view, the legality principle must achieve. Prosecutors believe that art. 112 cost. is the projection in the criminal justice system of art. 3 cost., which states that all citizens are equal before the law.⁸¹ Moreover, prosecutors also believe that the legality principle protects prosecutors' external and full independence from the executive power.⁸² So, the prosecutors' view corresponds to the interpretation that the major legal academic commentary and the constitutional Court have of the legality principle (see above). The consequence, according to prosecutors, is that all cases will be treated in the same way, no matter who are the accused person(s) and/or the victim(s):

No, it [the legality principle] might seem an obstacle, but, in fact, it is an important help, because all the persons [involved in the investigations] and the investigations are equal.⁸³

However, even if prosecutors' faith in the legality principle remains untouched, some prosecutors recognize that this provision creates some problems:

In practice, given that our criminal law code is stuffed by too many crimes, it [the legality principle] is an obstacle. This is because I am obliged to deal, in the same way, with neighbours who had an argument and insulted each other and with robbers.⁸⁴

⁷⁸ CP(N43).

⁷⁹ Nelken and Zanier (2006) *op. cit.*

⁸⁰ AP(N33).

⁸¹ AP(N30) said: "I believe that the legality principle is a corollary of the principle which states that all the citizens are equal before the law [...] I put forward the state's demand for punishment; and I do it from the starting point that every citizen are equal before the law". Similar opinions were expressed, for example, by AP(N33), AP(N28) and AP(N10).

⁸² See, for example, DCP(N45) and AP(N29).

⁸³ AP(C47). Similar opinions were expressed, for example, by AP(N42), AP(C54) and AP(C46).

⁸⁴ AP(N32). Similar opinions were expressed, for example, by AP(N49), AP(S6) and CP(S4).

A chief prosecutor of a big prosecution office in the south gave more specific examples:

We are still dealing with things like *ricettazione* [handling or receiving stolen goods] of insurance forms⁸⁵ [...] you tell me if I have to spend time doing these things. Moreover, until a few years ago we were bound to prosecute those who did not pay the TV licence. So, at that time the TV licence was something like 1000 liras [around 30 pence, this was the value of 1000 liras] and the proceedings were costing 10.000 liras [around £3].⁸⁶ [Of course, these are not the exact figures; but they were used to explain the considerable amount of money which was wasted for these proceedings].

So, unsurprisingly, the problem is that there are too many cases to treat and that prosecutors do not have any power to drop the unimportant files. Prosecutors propose different solutions to these problems: the organization of the prosecution office could be improved to find the best practices to deal with volume crimes;⁸⁷ the government should pass legislation to provide tools to deal with volume crimes faster;⁸⁸ the government should provide more resources;⁸⁹ and, more important, the parliament should pass legislation aimed at de-penalizing certain minor offences.⁹⁰

However, it is important to underline that none of the prosecutors we interviewed said that amending the legality principle is an option to solve the problems that the application of this principle causes. In particular, it appears that, in general, there is a great resistance to solutions which imply substantial discretionary choices. Some prosecutors suggested that the legality principle could be partially moderated with the introduction of (more) exceptions, but still it has to remain the basic principle.⁹¹ Some others accept that the parliament⁹² and/or very high ranking *magistrati*, like chief prosecutors and the prosecutor general attached at the *corte di*

⁸⁵ In these cases people who did not pay their insurance (mainly car-insurance) create false forms which say the contrary. So, in practice, this is a fraud for the insurance company because they receive the documents which say that the customer has paid, but then they discover that he/she did not pay. Of course, this also has an impact in case of car accident, because the victim may believe that the perpetrator is insured. This prosecutor explained that, after years of case law, the trend is to label these crimes as handling and/or receiving stolen goods.

⁸⁶ CP(S4).

⁸⁷ See, for example, CP(N43) and AP(N33).

⁸⁸ See, for example, DCP(N45) and AP(S6).

⁸⁹ See, for example, DCP(N45) and AP(N29).

⁹⁰ See, for example, AP(C47), AP(N44), DCP(N45) and AP(N29).

⁹¹ See, for example, AP(N33) who suggests to apply the expediency principle only for certain (minor) crimes and to introduce the principle of *lieve entità del fatto* (limited damage caused by the crime); and AP(N44) who suggests to increase the number of crimes which can only be prosecuted under the condition of a victim's formal complaint (i. e. *querela*).

⁹² See, for example, AP(N49) and AP(N44).

*cassazione*⁹³, should be able to issue general guidelines on priorities. In one case one prosecutor even said that the Minister of Justice should be able to set priorities; but he also specified that these priorities should not constitute a “binding directive”.⁹⁴ In fact, prosecutors see more problems than positive aspects in a system based on the expediency principle (no matter who has to determine priorities) if this is based on binding inputs. In particular, they claim that, without the legality principle, equality before the law would be jeopardized:

Never the minister or the Parliament [to issue binding directives]. This would be the defeat of justice and of the principle of equality.⁹⁵

Moreover, inequalities are not only the result of decisions taken by political bodies. There could be unequal consequences even if priorities were set by high ranking *magistrati*:

Within our legal system it [the legality principle] is absolutely necessary, because, otherwise [if every prosecution office decides], there will be many little republics, where the chief prosecutor will set the priorities.⁹⁶

In this case the example of prosecution offices as “little republics” was used to underline the consequences in terms of inequality that the amendment of the legality principle would create.

The refusal of discretionary choices is just the consequence of the fact that, as we said, prosecutors’ view of the legality principle is based on the indissoluble link between compulsory prosecution and equality before the law. In other words: the expediency principle (the opposite of the legality principle) implies discretionary choices and this, in prosecutors’ view, would undermine equality before the law. So, for Italian prosecutors there is no equality without the legality principle. However, there seems to be another very important corollary which derives from prosecutors’ interpretation of art. 112:

I think it [the legality principle] is a guarantee, because it prevents very dangerous discretionary judgements. First of all, this is a guarantee for prosecutors, who can not be

⁹³ See, for example, AP(S6) and AP(N10). See also, AP(N38) who is very much in favour of CSM’s circulars which define priorities.

⁹⁴ AP(Apl.(N50). A similar opinion was expressed by AP(N41).

⁹⁵ AP(N33). See also AP(C46).

⁹⁶ AP(N48).

criticized for the decisions they take. They can not be suspected of playing a *doppio gioco*.⁹⁷

So, prosecutors believe that their cultural self-image of neutral and impartial legal figures is emphasized by the legality principle. This constitutional provision seems to provide a formal protection for prosecutors from suspicions or allegations of prosecuting a case for reasons other than the purely legal. This has not prevented prosecutors from being accused many times over the last 20 years of using their powers to attack members of some political parties (see chap. 5). However, in a country like Italy, where corruption is great, but the fear of being suspected of corruption is even greater, prosecutors have a strong formal legal basis for their actions which make it difficult to prove that they are serving interests which are not merely legal.

Thus, in the end, the legality principle is important to the construction of prosecutors' cultural self-image because, together with prosecutors' judicial culture, it is seen as formally expressing prosecutors' neutral and impartial nature. In prosecutors' view equality and neutrality are not only guarantees which protect victims and accused persons. These are principles that, through the interpretation and the application of the legality principle, protect and enhance prosecutors' professional cultural self-image.

So far our argument has been focused on prosecutors' self perception of their functions. In the next section we want to examine the extent to which prosecutors' practice reflects their own professional self-image. We have to remember that this analysis will be based on (and limited to) our empirical sources (i. e. interviews with different actors). So, although we have not been able to observe prosecutors in action nor to examine case-files, the interview evidence gives, at least, an indication of weaknesses in the self-image of prosecutors as an accurate portrayal of reality.

⁹⁷ AP(C53). Similar opinions were expressed, for example, by AP(N29), AP(Apl.N50), AP(N31) and DCP(N45). *Doppio gioco* literally means double game. In this context it means that prosecutors can not be accused to prosecute (or not to prosecute) a case to favour someone or something. The legality principle imposes them to prosecute all the crimes.

5. Practice and the prosecutors' professional self-image

Prosecutors' self professional culture is built around the dogma that prosecutors are a party, but they are neutral and impartial. This is clearly emphasized by concepts like judicial culture and by prosecutors' view of the legality principle. Here we want to analyze the elements which, in practice, may put into question prosecutors' professional culture and show the real nature of prosecutorial functions and of prosecutors' judicial culture. Eventually, this will also show that legal filtering does not appear to be a judicial stage where prosecutors act like judges, but the moment when opportunities to obtain a conviction are constructed.

As we said before the vast majority of the prosecutors we interviewed claim that the cultural proximity between them and judges is very clearly perceptible during the pre-trial stage, no matter if the function is different. However, can we really say that, in Italy, there is no difference between prosecutors' and judges' approach? We believe we can start answering this question by analyzing the nature of the truth for which prosecutors search: is this the same truth that the judge will, eventually, establish?

In fact, it seems that prosecutors consider that judges "can not see very much":

The judge sees what he can see and he does not see very much. We, as a party, should explain and demonstrate [to the judge] as much as we can, but, sometimes, it is difficult.⁹⁸

Another prosecutor emphasized the fact that the judge does not understand the difficulties of the investigation:

However, I think that the difference [between judges and prosecutors] stems from the different knowledge [of the case]. Moreover, the other side [the judge] does not understand the investigation [...] So, you feel that it is not possible [for the judge] to understand the difficulties of an investigation, and this is a problem because you feel that the other side [the judge] believes that you can do things that you can not do.⁹⁹

So, it seems that prosecutors believe that, compared to judges, they are aware of more and different elements which enable them to understand the case and to deal

⁹⁸ AP(N38). Similar opinions were expressed, for example, by AP(N1), AP(N44), AP(N2), AP(N48) and AP(N3).

⁹⁹ AP(N44).

with it. This means, in prosecutors' view, that they have more elements to find the truth, which is, as we said, prosecutors' aim. But can this "difference of knowledge" mark, at the end, a substantial difference between the truth that prosecutors find and the truth that judges will, eventually, find?

I believe that prosecutors, together with police officers, have a better contact with social reality [compared to judges]. This is definitely positive, because you realize what you have to do [...] Sometimes one can have the feeling that the judge is sitting there and he does not realize what is going on. So, he becomes a *teorico del diritto*.¹⁰⁰ As a consequence the judge does not realize that certain investigations cannot be carried out or that I did not start them because I know that they would not have led to anything and that they were useless [...] So, the majority of the judges are not connected with real life [...] The prosecutor does not have this problem.¹⁰¹

So, this *pubblico ministero* claims that prosecutors have a closer contact with the practical difficulties and consequences that a crime creates; while judges are sometimes more focused on the theoretical application of the law. One prosecutor explained her frustration when she has to communicate certain "feelings" to the judge:

Yes, during the last *turno arrestati*¹⁰² they [the police] had arrested an accused. Then they were thinking all night long about the technical legal typology of the crime he committed. At the end they arrested him for handling stolen goods. The judge did not validate the arrest¹⁰³ [and the accused was released]. The police officer said: "next time he [the judge] receives a false insurance form [see above], then he will validate the arrest". It seems that [...] if it does not happen to you, you do not realize how serious the situation can be. This is what the police perceive and this is what we perceive, because we see what is happening, they [judges] just read it.¹⁰⁴

So, it appears that, in practice, there is a substantial difference between the truth that prosecutors see and the truth that judges will find. Prosecutors perceive this difference and try to limit it. Prosecutors' approach to the crime is different compared

¹⁰⁰ This literally means a theorist of the law. In particular, here it means someone who knows the black letter of the legal rules, but who does not know the pre-existing context and the consequences of the practical application of the law.

¹⁰¹ AP(N32). See also AP(N49) who said that being a prosecutor means that you have more chances (compared to judges) to have an impact on the reality; AP(N30) who said that prosecutors have a more pragmatic approach; AP(N42) who said that judges are more "detached" from the case.

¹⁰² Another name for what some prosecutors called the *turno reperibilità* (see chap. 6) which consists in dealing with all the urgent matters like arrests, seizures etc.

¹⁰³ Prosecutors must (within 48 hours) bring the arrested accused person(s) before a judge who must validate the arrest (and maybe agree for pre-trial measures) otherwise the arrested person(s) are immediately set free (art. 379-391 cpp).

¹⁰⁴ AP(N2). See also AP(N1) and AP(N3).

to judges' approach because prosecutors are in a "different position". In particular, *pubblici ministeri* are very much influenced by their closer contact with 'reality', by the information they receive during the investigation (mainly from the police) and by the pressure that dealing with a criminal case creates:

The judge has a different position. This is because the judge has a *mente fredda*,¹⁰⁵ while the prosecutor acts under pressure, he has to deal with urgent matters and he is being pressured into doing something. The judge has the chance to apply the law as it has to be applied. So, the judge is more detached [from the case] and, as a consequence, he can interpret the law as it should be interpreted by everybody. This happens because the judge is detached from the reality of that particular case.¹⁰⁶

Another prosecutor said:

In fact, to be honest, when we prepare our conclusions we tend to be braver [compared to judges]. For example, it has happened, sometimes, with pre-trial custody measures. In these cases we have thought there were the conditions [to impose pre-trial custody] but the judge did not think so. This has mainly happened when we have to put together records of incoming and out-coming calls, telephone tapping, controls on where and when an accused person(s) has moved etc. In these cases we tend to interpret the facts in our favour. On the other hand, the judge, because there is a pre-trial custody to give, is much more careful. However, if there is a punishment to request there is not a huge difference [...] I believe that, in practice, there is a difference [between judges' and prosecutors' professional culture] [...] Anyway, sometimes you tend to interpret [in your favour] because of the investigation [...] Maybe this is a mistake, but there should be no difference between prosecutors' and judges' approach.¹⁰⁷

This example is very interesting. This prosecutor explained very clearly the link between the investigation and the way prosecutors take their decisions. Moreover, she, like the vast majority of the prosecutors we interviewed, claims that there should be no difference between prosecutors' and judges' professional culture. However, she also said that in practice the approach is different. This difference is determined by the way the investigation results are perceived and interpreted. Some other prosecutors were not as clear when they explained the impact that the investigation has on the decisions they have to take. But, as we said before, they

¹⁰⁵ This literally means cold mind. In this case this expression means that the judge is not immediately and directly involved in the case. So, he is "colder" (compared to the prosecutor) when he has to deal with the case.

¹⁰⁶ AP(N42).

¹⁰⁷ AP(N38). Similar opinions were expressed, for example, by AP(N31) and AP(N44).

talked about the “things that judges do not see”;¹⁰⁸ the “feelings that judges can not perceive”;¹⁰⁹ and that judges do not have the same contact with the reality.¹¹⁰

So, to see prosecutors as neutral and impartial judicial figures is problematic in that their relationship to criminal acts and investigations is crucially different to that of the judge. They supervise police investigations and determine what information gathered during the investigation should be passed to the judge. Thus, they present evidence to the judge to convince him or her that their interpretation of events is correct: they are thus functionally a party to proceedings. But prosecutors do not see this as meaning that they are not neutral and impartial. They see themselves as providing a neutral judicial filter which ensures that certain forms of information brought to them by investigators which is unduly prejudicial or fails legal tests for admissibility will not be seen by the judge. But while prosecutors see this legal filtering as a judicial role it inevitably means that their judicial distance from the prejudicial information and opinion thrown up by the police is compromised. In the end, the consequence is the prosecutors’ search for the truth takes place in a different context: that of an awareness of a wider-range of information, some of it illegally or unfairly obtained, some of it prejudicial or emotionally charged but not formally legally relevant or of doubtful or limited relevance, most of it untested by informed dialogue between parties. Judges search for the truth with an awareness of less information which has already received a preliminary legal filtering.

So, prosecutors’ impartiality, which is such an important feature of their self image, is eventually stained by the investigation and by the close relationship between prosecutors and the police. Now, the question is: what is left of prosecutors’ judicial culture? Surely this concept can not be interpreted as prosecutors’ self professional culture suggests. However, we do not believe that judicial culture is only the result of Italian prosecutors’ vivid imagination. This concept appears to have an important function even for prosecutors’ professional culture in practice:

At the end of the day I always try to take decisions as if I am a judge. So, let us say that I have 100 files, I will probably ask for the *archiviazione* for 50% of these files, because it

¹⁰⁸ See above, AP(N38) and, similarly, AP(N44).

¹⁰⁹ See above, AP(N2), AP(N1) and AP(N3).

¹¹⁰ AP(N32).

is the law which says that you have to drop the accusation if you do not have a high probability of obtaining a conviction¹¹¹ [...] So, in general, when I implement the penal action, I try to think like a judge and to decide according to the evidence that the judge will probably have. This is because it is useless to begin a prosecution which will end with an acquittal. If I implement the penal action I always try to foresee what can happen.¹¹²

This is a good example of what prosecutors see judicial culture as being for: it gives them greater capacity to evaluate the chances of obtaining a conviction. Of course, even this prosecutor claimed his impartial status, like a judge. But we saw that this does not seem to be possible. So, how can we put together judicial culture and prosecutors' exposure to a range of influences that erode their capacity to maintain judicial distance? Judicial culture's primary effect is not to preserve neutrality, but to enable *pubblici ministeri* to evaluate the evidence with enough judicial distance to anticipate a judge's reaction. This means to assess and increase the possibilities to obtain a conviction and, as a consequence, it can substantially help to have a better case. This seems to imply that prosecutors value their 'judicial culture' for utilitarian reasons based on efficiency. In other words: it is a waste of time to put cases before judges to have them rejected. However, this also appears to suggest that *pubblici ministeri* value their 'judicial culture' because they value due process and legal values themselves. Moreover, there is an effect for accused persons as well that their case will not only be treated from the police's perspective.

So, in practice, the effect of legal filtering is not that of emphasizing the neutrality of the investigation. This is because the specific context of prosecutorial decision-making makes neutrality problematic in practice (even assuming that neutrality and investigation are theoretically compatible). Illegally obtained evidence will be disregarded and legal filtering will still be the moment when prosecutors decide if a crime has been committed and if they have enough evidence to prove it. However, the aims of legal filtering are a) to enable judges to make decisions on legally relevant evidence which has been properly obtained (if the case goes to court) and b) to enable prosecutors to predict whether there is a 'realistic likelihood' of

¹¹¹ This prosecutor is referring to art. 125 disp. att. (see chap. 4), which specifies that, at the end of the investigation, the prosecutor drops the case (i. e. *archiviazione*) if there is not enough evidence which can support the accusation during the trial.

¹¹² AP(N48). Similar opinions were expressed, for example, by AP(N41), AP(Apl.(N50), AP(N38), AP(N33), AP(N42), DCP(N45), AP(N30) and AP(N28).

conviction.¹¹³ Prosecutors present this in terms of impartiality but the very nature of the role of prosecutor as filter between the information generated by the investigation and the judge means that the primary aim is to render the judge impartial not the prosecutor (in the sense of deciding only on legal relevant information that has been properly obtained).

In the end, prosecutors' self-image appears different compared to reality. It seems there is an ideology (based on impartiality) of being a prosecutor which does not represent the actual condition and function (based on familiarity with a wide range of prejudicial, irrelevant or partially irrelevant and emotionally charged information) that prosecutors have. However, this does not necessarily mean that there is no cultural distance between crime fighters and prosecutors. Is prosecutors' supervision merely formal or does it provide a detailed analysis of the legal aspects of the investigation? How do prosecutors direct an investigation? And what is the relationship between the police and-prosecutor during the investigation? These are the kind of questions we need to answer to understand if there is, in practice, a cultural distance between prosecutors and the police or if, as Di Federico and Sapignoli argue, prosecutors are just police officers who operate in a different environment (see above). But this will be discussed in the next chapter, which will be completely dedicated to the relationship police-prosecutor.

6. Lawyers

It is now interesting to have a look at what lawyers think of prosecutors' professional culture. Unlike Di Federico and Sapignoli our aim was not to understand how far the rights of the defence are effective and respected during a penal proceedings. We wanted to know what lawyers think about prosecutors' professional culture, function and aims.

¹¹³ As we said (chap. 4) even when prosecutors decide to drop the accusation (i. e. *archiviazione*), they have to make an application to the preliminary investigation judge (GIP, see chap. 4). So, even in these situations prosecutors' 'judgements' have to be put before a judge.

The majority of the lawyers we interviewed said that prosecutors do not act like crime fighters.¹¹⁴ However, all the lawyers agreed that there is a difference between the approach that prosecutors have and the approach that judges have:

It is clear that the prosecutor, particularly for the important cases that we mentioned before [e. g. white collar crimes, environmental crimes, corruption etc.] is pushed by the *cultura del sospetto*.¹¹⁵ On the other hand, judges can not act like this: they have a *cultura delle prove*.¹¹⁶ [...] A good prosecutor must have the *cultura del sospetto*. However, he must also perform a careful evaluation of what has to be sent to trial. Lawyers must be very careful when they speak with prosecutors. This is because we can say counterproductive things and, maybe, even if the clients are innocent, we can generate doubts. For example, for a lawyer it is very difficult to prepare a brief to support an *archiviazione* request. This is because the brief can be interpreted [by the prosecutor] as a support for the accusation.¹¹⁷

This example suggests pragmatism and a range of variables affect the issues. In white-collar crime where the offence is both serious and complex the prosecutor is prepared to commit resources that he/she is not prepared to commit where offences are less serious and simple. Of course this suggests that seemingly ‘objective and impartial’ decisions about whether there is enough evidence to go to trial will be shaped by views about the seriousness of offending. While there are legal criteria for assessing seriousness inevitably the gravity of a crime is a matter of assessing degrees of social harm which is inevitably shaped by social and political values. Moreover, the fact that prosecutors’ professional culture is based on suspicion¹¹⁸ (well explained by the example of the *archiviazione* brief), while judges base their decisions on evidence, seems to confirm what we said before: prosecutors are not neutral and

¹¹⁴ 5 lawyers said that prosecutors do not act like crime fighters. 2 said that prosecutors act like crime fighters. 2 said that sometimes prosecutors act like crime fighters. 2 did not answer clearly.

¹¹⁵ This literally means culture of suspicion. In particular, it means that prosecutors do not base their decision only on the evidence collected, but also on the suspicions that they have about the case and/or the accused person(s). This implies that prosecutors have an active role and that they search for all the elements which can lead to the discovery of evidence supporting the accusation.

¹¹⁶ This literally means culture of evidence. This is the opposite compared to the *cultura del sospetto*. In particular, it means that judges only base their decisions on the evidence they have, and not on their suspicions about the case and/or the accused person(s). This implies that judges have a more passive role compared to prosecutors.

¹¹⁷ L(N23).

¹¹⁸ L(N24) said: “I had this experience with a prosecutor, who is now a judge, and before this I had a lot of respect for him. My client said something which had to be interpreted in his [the client] favour. So, I said to the prosecutor: “do not forget that your mission is to pursue justice”; and he replied: “yes, but do not forget that this is also a proceedings [a dispute] between two parties”.

impartial legal figures.¹¹⁹ In particular, lawyers seem to perceive a difference between *pubblici ministeri* who need to search for all elements which can be useful to obtain a conviction; and judges who only look at the evidence they have been given. Finally, another interesting point concerns the “careful evaluation” of what has to be sent to trial:

For the less important crimes [frauds up to a certain value, thefts, drug trafficking in the street etc.] prosecutors evaluate if they can get a conviction or not. They send a case to trial if they have the 70, 80% chance of obtaining a conviction. For the complicated cases, like a big white collar crime which involves the whole board of a big company, the prosecutor sends to trial all the accused persons, even if he has some doubts. The prosecutor does not think that an accused person will be involved in a trial which can last 8 to 10 years. And this [sending all the accused persons to trial] happens even if the prosecutor believes that he can ask for the *archiviazione* for one particular accused person. So, he/she does not do it [to ask the *archiviazione*] because it is a matter of coherence: I [the prosecutor] send all of them [the accused persons] to trial and, eventually, the judge will decide who has to stay out. They believe that the trial will clarify what happened or that [during the trial they will realize that] the accused person who apparently did not do anything is, in fact, responsible. So, I [the prosecutor] will send him to trial. This happens for industrial accidents as well, because prosecutors want to have 2 or 3 options and they send to trial even those who do not seem very much involved, because they believe that the trial will clarify everything. In these cases the prosecutor wants to avoid the risk that, during the trial, a different perpetrator will be discovered; and, as a consequence, the criminal proceedings has to restart from the beginning. The prosecutor sends all the accused persons to trial and, often, amongst them there are some innocent persons.¹²⁰

So, prosecutors carefully evaluate the evidence they obtain, but they do not do it to give practical application of their neutrality and to act like judges in order to understand if the accused persons are guilty or innocent. Prosecutors evaluate the real likelihood to obtain a conviction, or, as a lawyer said, “they only see the final sentence”.¹²¹ Moreover, for the cases that they consider less important they do not go for the trial if they do not believe they have a very good chance of obtaining a conviction. On the other hand, when the case is regarded as being particularly important, they are ready to commit more resources and the evaluation of the chances to obtain a conviction does not seem so important. Prosecutors seem much more

¹¹⁹ See, for example, L(N16), LN(22) and L(N24).

¹²⁰ L(N23).

¹²¹ L(N37). Similar opinions were expressed, for example, by, L(N35) and L(N15).

focused on avoiding the possibility that accused persons who can be potentially guilty remain without charges. However, even in these cases if, at a certain point, the prosecutor believes that there is no chance of getting a conviction he/she will drop the accusation. In fact, the same lawyer we quoted above, who was one of the counsel in a very famous criminal trial dealing with an environmental crime, explained that, in that case, the prosecutor dropped the accusation because he realized (based on the evidence collected and on previous decisions taken by different courts) that “the accused persons would have all been acquitted”.¹²²

In conclusion, the opinions of the lawyers we interviewed are consistent with the view that the investigation is not, in practice, neutral. Moreover, they see prosecutors as parties to the proceedings and not as impartial referees. However, lawyers, although they admit that there is a difference between prosecutors’ professional culture and judges’ professional culture, still seem to perceive that there is cultural distance between prosecutors and crime fighters.

7. The 1989 reform and its impact

At this stage we believe it is important to discuss briefly the 1989 reform and its impact on prosecutors’ professional culture. As we said Grande correctly underlined that the institutional resistance created by the strong Italian continental legal tradition is one of the reasons why the reform failed. The author explained very clearly that the Acts which amended the 1989 code of criminal procedure and the interventions of the constitutional Court have limited and frustrated the adversarial reform of 1989. However, as we have said, Grande talks about the resistance created by the legal rules. Here we want to investigate the resistance coming from prosecutors’ legal culture and the way prosecutors reshaped adversarial principles to re-establish their inquisitorial nature.

Grande wrote that “the new code configures the prosecutor as a party to the proceedings and deprives him of the judicial powers he previously enjoyed in the preliminary enquiry. The prosecutor is no longer required to pursue the search of the truth in his investigation. Moreover, in presenting the evidence in court he is expected

¹²² See above L(N23).

to be partisan".¹²³ There are three important claims which need to be examined here: prosecutors are not judicial figures, they no longer search for the truth and they are not neutral and impartial. All these elements conflict with the principles which inform prosecutors' professional self-image. In particular, the judicial approach is, in prosecutors' view, still very clear during the investigation and pre-trial phase. Moreover, as we explained, Italian prosecutors see their role as that of impartial officials who investigate (both inculpatory and exculpatory elements) to find the truth; while a typical adversarial legal figure conceives criminal procedure as a dispute between two parties.¹²⁴ So, it appears that the 1989 reform has left prosecutors' professional culture relatively untouched, which still seems very inquisitorial. Prosecutors appear to be still influenced by the previous inquisitorial code which stated that prosecutors and instructing judges had to conduct an impartial enquiry.¹²⁵

If this is the (failed) impact that the 1989 reform has had on prosecutors' cultural self image, what has happened to prosecutors' exercise of their functions and professional values in practice? Here we need to look at the moment when prosecutors, acting as legal filters, evaluate the evidence collected to construct and enhance the chances of obtaining a conviction: can we really say that prosecutors are acting as a party in adversarial terms? As we explained above, the academic debate around prosecutors' status during the pre-trial phase (i. e. impartial or straight accuser) is substantial. The reform, which is, in practice, a mix of adversarial and inquisitorial principles (chap. 4), clearly stated that prosecutors are in charge of the

¹²³ Grande (2000) *op. cit.* p. 235.

¹²⁴ Langer M. "From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure". 2004. Harvard International Law Journal. Vol. 45(1). pp. 1-64. p. 4. In this chapter I am looking at the adversarial and inquisitorial traditions. The difference is determined by the nature of the information which has been sought and presented. If it is only inculpatory then this is clearly adversarial. If it is inculpatory and exculpatory then this is clearly inquisitorial in its assumptions. I am using these two different models to emphasize the fact that Italian prosecutors' professional and legal culture does not seem to fit with the adversarial tradition (see later). However, we must underline that adversarial principles has evolved to increase equality of arms, disclosure of evidence, looking for exculpatory evidence, that evidence is collected by fair and lawful means etc. So, for example, within the English legal system, which is adversarial in nature, "the CPS is also supposed to act as a neutral truth-seeking 'Minister of Justice' (Sanders and Young (2007) *op. cit.* pp. 334-335. See also, Young R. and Sanders A. "The ethics of prosecution lawyers". 2004. Legal Ethics 7. pp. 190-209). Moreover, para. 2.2 of the Code for Crown Prosecutors (2004) says: "Crown Prosecutors must be fair, independent and objective [...] They must not be affected by any improper pressure from any source". According to Ashworth and Redmayne "this aspect of an ethical orientation concerns fairness and impartiality" (Ashworth and Redmayne (2005) *op. cit.* pp. 203-204. For a more general account on adversarial and inquisitorial systems see, for example, Goldstein and Marcus (1977) *op. cit.*, in particular p. 247; and Goldstein A. S. "Reflections on Two Models: Inquisitorial Themes in American Criminal Procedure". 1974. Stanford Law Review Vol. 26. pp. 1009-1025.

¹²⁵ Grande (2000) *op. cit.* p. 234. See also, Goldstein and Marcus (1977) *op. cit.* p. 257.

investigation from the beginning (art. 327 cpp) and that they direct the police during the investigation (art. 56, 58 and 59 cpp). This may be seen as an inquisitorial feature. But some authors have pointed out that prosecutors are now intended only to have investigative functions and not to be neutral and impartial (see above).¹²⁶

Pubblici ministeri claim that one of their aims is to transfer as many documents as possible from their *dossier* to the judge's *dossier*:

Here [during the pre-trial phase] prosecutor's aim is to transfer as many documents as possible from his *dossier* to the judge's *dossier* [...] That is why we need to push the police to carry out investigation activities which are legally acceptable and can be used during the trial. This is the aim.¹²⁷

This is understandable given that prosecutors believe that judges "can not see very much" (see above). Moreover, within the context, to transfer documents from their *dossier* to the judge's *dossier* effectively means to try to recreate the examining judge's file as it has existed traditionally in inquisitorial systems. Italian prosecutors seem to act as if their investigation is the 'official investigation'. And, given their self-cultural image, they see this as an impartial investigation seeking both inculpatory and exculpatory information. This is clearly not adversarial, but more like an inquisitorial approach. However, as we explained, in practice, prosecutors cannot be neutral and impartial, because they are influenced by the opinion and information thrown up during the investigation. This does not seem to represent a big change when compared to the pre-1989 code of criminal procedure. As Goldstein and Marcus explain, even before prosecutors carried out an 'official investigation' which was (like now) very much influenced by police activity.¹²⁸

So, it appears that the 1989 reform had little impact on prosecutors' professional values. Italian prosecutors' self professional culture clearly does not fit into the criminal justice system designed by the reform. But even if we look at the way prosecutors' professional culture is put into practice we can perceive significant

¹²⁶ See, for example, Grande (2000) *op. cit.* p. 233.

¹²⁷ AP(N48). Similar opinions were expressed by AP(N38) and AP(C46).

¹²⁸ Goldstein and Marcus (1977) *op. cit.* pp. 256-259. During this thesis we have often expressed our concerns about Goldstein and Marcus's claims about the myth of judicial supervision. However, on this point, we can agree: prosecutors are influenced by the police. The point we have already started to make and that we will develop in the next chapters is that prosecutors can mediate police (and other) influences.

differences compared to the adversarial principles stated in the 1989 code of criminal procedure. The story of this reform seems (at least for prosecutors), more than a legal transplant. It is similar to what Langer called a legal translation.¹²⁹ The new provisions were applied and understood (in a word: translated) according to a legal culture which was not and is not adversarial, but strongly inquisitorial. Prosecutors seem to have interpreted their new role of being a party not as requiring them to prepare for a dispute against another party, but to organize a file so that the contending arguments at trial have little impact on judges' decisions. In other words: in prosecutors' view judges' main source of information should not be the trial hearing, but the dossier which includes detailed explanation of what happened during the investigation.

In 1989 something happened similar to what happened almost twenty years later with the *ordinamento giudiziario* reform. New and different legal tools have been provided, but legal culture did not change. Why did this happen? The cultural proximity between judges and prosecutors clearly did not favour the establishment of a partisan (as opposed to neutral and impartial) approach. Moreover, as we said before, the legality principle protected prosecutors' formal impartiality. Further, we should not forget that *magistrati's* professional culture is also the result of an historical evolution that, particularly in the sixties and in the seventies (see chap. 6), built up *magistrati's* full independence within the *magistratura* and from the executive power. Independence, the legality principle and cultural proximity with judges seem to be bricks in the wall that prosecutors have constructed to protect their sense of their own neutrality. And no matter that in practice prosecutors' impartiality is, at least, questionable. This is still the principle which, in prosecutors' view, gives them the opportunity to carry out properly their job. For example, how could prosecutors begin an investigation like *tangentopoli* which involved politicians, civil servants and entrepreneurs? As we saw, according to Maddalena, this was possible (also) because prosecutors are seen as impartial like judges and, as a consequence, they have the moral and legal status to carry out such a dramatic action. Moreover, when we explained the interpretation of the legality principle, we saw that prosecutors believe that it is their image of neutrality (which stems from the application and the

¹²⁹ Langer (2004) *op. cit.*

interpretation of the legality principle) which protects them when they have to deal with certain important cases.

It is within this scenario that the institutional resistance against the 1989 reform grew up. Prosecutors refuse to be considered as other than neutral and impartial because this would threaten their impartial status and, eventually, would diminish their credibility when they prosecute certain cases. This is why adversarial principles have been, de facto, interpreted to restate the pivotal role of prosecutors as the 'official' party of the criminal proceedings. In particular, it seems that these principles, which put investigation in prosecutors' hands, reinforced their inquisitorial duty to search and find for the 'official truth'.

8. Conclusion

Prosecutors' stance within the Italian criminal justice system appears that of an intermediary between the police and the judge. However, there seems to be a substantial difference between the way prosecutors believe they are carrying out this task and the way they do it in practice. In particular, the legal filtering function is perceived by prosecutors as a purely judicial stage, where they act impartially like judges. The reality seems different: the legal filtering is a judicial stage in the sense that prosecutors seem more concerned with the analysis of the legal issues arising from the investigation. However, the close connection between prosecutors and the investigation inevitably stains prosecutors' impartiality. The consequence is that prosecutors are not neutral and impartial.

Moreover, the 1989 reform did not have the effect of causing a shift from inquisitorial culture to adversarial tradition. But this is not only a clash between adversarial legal principles and inquisitorial legal culture. And, it is not only a problem of schizophrenic legislation (i. e. the de facto creation of a hybrid criminal justice system). There are issues concerning prosecutors' self image of their function which must be taken into account. Prosecutors believe that the only way to carry out properly their job is to preserve their image of neutrality. This principle is the very base of prosecutors' institutional resistance to adversarial principles.

Finally, the analysis of prosecutors' professional values has suggested some elements to describe prosecutors' 'different position' within the Italian criminal

justice system. Prosecutors can not be like judges, because their function and aim are different. In other words: Italian prosecutors' mission is not only that of bringing to the courtroom the results of the investigation, but to build up and direct an investigation strategy aimed at obtaining a conviction. However, prosecutors seem to have a 'different position' compared to the police as well. The legal filtering stage suggests that *pubblici ministeri* have not been absorbed by police functions. We will continue to analyze this issue in the next chapter when we will deal with the relations between police and prosecutor.

CHAPTER VIII. PROSECUTORS AND POLICE

1. Introduction

While we were constructing prosecutors' professional and legal culture we noticed some differences compared to the police. We said that prosecutors are in a 'different position'. Here we want to analyze what this means in practice. Or it might be better to say that we want to continue this analysis. In the previous chapter we focused on prosecutors working as legal filters. This already underlines a relevant difference when compared to the police. But there is something more. We want to describe how these two legal actors interact during the pre-trial phase and how much they can influence each other. In particular, we will examine the relationship between the police and prosecutors from two different perspectives. First, we will examine the police *pubblico ministero* relationship during the investigation (i. e. the way prosecutors supervise the investigation). Secondly, we will examine the impact that police decisions in relation to the reception of crime reports may have on the definition of the crime problem for prosecutors. But this chapter will not just deal with the description of the police-prosecutors relationship during the pre-trial phase. The analysis will continue our investigation into prosecutors' legal and professional culture in practice. Moreover, here we will begin to outline an external influence on decision-making that can shape the way prosecutors define the crime problem but which prosecutors have not created (on external influences on decision-making, see chap. 9). This is police decisions on priorities. At the same time we will be able to see that *pubblici ministeri*'s 'different position' gives them the power to mediate these influences. The investigation of prosecutors' criteria for decision-making and their powers to mediate external influences will then continue in the following chapters. Before we begin to deal with these core questions we will consider the established literature. This is in order to highlight a certain number of orthodoxies and debates about the police prosecutor relationship and isolate some issues that have not been addressed which our empirical material can cast light upon. Then it will be in the bulk of the chapter that empirical data will be presented and discussed. Finally, we should just remind the reader of the limits of our sources: the research is based on semi-structured interviews with legal actors and not on direct observation of prosecutors supervising the investigation. This proviso will influence our analysis.

1.1. Introduction: the legal rules

The analysis of the legal background is important for the purposes of this chapter because there are some conceptual distinctions (and their consequences) that we need to set out here. Moreover, the impact of the 1989 adversarial reform (and later amendments) needs to be considered because it is necessary to a close analysis of the meaning of the legal rules defining prosecutors as directors of the investigation. Lastly, legal analysis will provide an opportunity to underline some of the key issues which will be investigated here.

The legal rules governing the relationship between police and prosecutors in general and in the particular context of the investigation have already been discussed (see chap. 4). However, it is important to remind the reader of some of the key points to make sure that the legal background is clear. First of all, there is a distinction between the *polizia amministrativa*, which has the function of preventing crime; and the *polizia giudiziaria* (PG) which deals with the investigation together with prosecutors (prosecutors can directly carry out investigative acts). PG functions¹ are: receiving notifications of crime and discovering crimes; managing the consequences of a crime (e. g. restoring public order); conducting investigations; securing evidence; performing any act useful to the prosecution; and limiting the consequences of a crime.² More specifically, they retain substantial powers during the investigation. First, the officers of the PG may carry out investigative acts on their own initiative from the moment they receive notification of a crime to the moment the prosecutor begins to direct the investigation. Second, they can perform investigative acts under prosecutors' delegated authority (the so called *delega*³). Third, the PG have the duty to communicate 'without delay'⁴ the crime reports they discover to prosecutors (immediately in some situations) (see later). Finally, even if prosecutors start to direct the investigation, the police still retain some powers to take discretionary decisions

¹ Which, in certain circumstances, can also be carried out on their own initiative (see art. 55 and 348 cpp).

² See, for example, Voena (2003) *op. cit.* pp. 80-84. See also (in general for the role and the functions of PG) Scaglione (2001) *op. cit.*

³ The *delega* is very similar to the French *commission rogatoire*. When prosecutors issue a *delega* it means that they delegated to the police the authority to perform investigative acts (a *delega* is, of course, not necessary when police officers retain autonomous powers to investigate, see above).

⁴ The original version of this article was saying "within 48 hours" and not "without delay". This was amended in 1992 (see later).

about the investigative acts to perform. We will be looking at the role, functions and powers (in practice) of the PG during the investigation but the impact of the *polizia amministrativa* during the pre-trial phase should not be underestimated: they too (like the PG) come across and collect crime reports.⁵

In this chapter we will not deal further with the differences between *polizia giudiziaria* and *polizia amministrativa*, but will concentrate on the police prosecutor relationships during the pre-trial phase. So, we will use the word police to indicate both these categories (unless it is necessary to make a distinction). But in the first part of the chapter, when police-prosecutors relationships during the investigation are discussed, the relevant police are the PG. In the second part of the chapter, dealing with the way the police influence prosecutors' definition of priorities, the term police refers to both the PG and the *polizia amministrativa*.

The second important conceptual distinction to remember is between *dipendenza funzionale* (functional dependence) and *dipendenza organizzativa* (organizational dependence). The former means that superiors have the right to determine the functions that subordinates should carry out. The latter means that superiors have the right to manage the organization of their subordinates. As we explained (see chap. 4), PG officers are functionally dependent on prosecutors and organizationally dependent on police hierarchical superiors (prosecutors have no powers in relation to *polizia amministrativa*).⁶

Prosecutors legally have the power to direct the investigation and the police during the investigation (chap. 4). This is the basic principle informing the relationship with the police at this stage of the proceedings. But, the degree of functional and organizational dependence may vary depending on the type of police officer.⁷ In this sense we need to remember the key distinctions between the terms *sezioni* and *servizi*. The *sezioni*⁸ of PG are immediately and directly dependent on prosecutors.⁹ This means that prosecutors can use these police officers without the prior intervention of the police's hierarchical superiors.¹⁰ The *servizi*¹¹ of PG also

⁵ In Italian a crime report is called *notizia di reato*. This literally means crime notice.

⁶ Voena (2003) *op. cit.* pp. 88-90.

⁷ For a general discussion about functional and organizational dependence of PG's officers see, for example, Voena (2003) *op. cit.* pp. 84-90.

⁸ This literally means sections.

⁹ Voena (2003) *op. cit.* pp. 86-87.

¹⁰ *Ibid.* p. 87 and 89.

mainly (but not exclusively) deal with investigations. However, the degree of organizational and hierarchical dependence upon prosecutors is substantially reduced compared to the *sezioni*. The *servizi* become functionally dependent on *pubblici ministeri* when they are involved in the investigation.¹² The difference between *servizi* and *sezioni* stems from the different degree of dependence that the PG have on prosecutors. Prosecutors can directly use the *sezioni*, there is no ‘filter’ from police officers’ hierarchical superiors.¹³ But prosecutors have to ask if *servizi* are available (or more accurately, if the officers they want are available, see later) for the investigation. But, in practice, if the investigation is or becomes complicated (e. g. involve many accused persons, certain difficult investigative acts have to be carried out etc.) *pubblici ministeri* will have to contact the *servizi*. The reasons are both quantitative and qualitative. In fact, *servizi* include a much higher number of police officers compared to the *sezioni*. They also include some specialized units like, for example, those dealing with organized crime.¹⁴ So, the *servizi* become essential every time certain complicated cases have to be investigated.

The final issue we want to discuss here concerns disciplinary matters. There is no need to explain again the legal rules (see chap. 4). We just have to remind the reader that prosecutors are involved in disciplinary proceedings but they cannot impose disciplinary sanctions of their own initiative. On the contrary, it is for the police’s hierarchical superiors to take these measures (for both *servizi* and *sezioni*). This shows, once again, the limits of police dependence on prosecutors. This should not be underestimated, because one of the crucial issues to an understanding of the relationship between prosecutors and the police is the way prosecutors respond, in practice, to police officers who do not comply with their orders.

Although in this chapter we will mainly focus on the analysis of the law in action, it is interesting to underline the peculiar position that the adversarial reform of 1989 (and further amendments) seems to have given to prosecutors during the investigation. From 1989 till 1992, the code of criminal procedure made clear that the prosecutor was in charge of the investigation (i. e. the director). In particular, the police powers to carry out investigative acts on their own initiative were limited and,

¹¹ This literally means services.

¹² Voena (2003) *op. cit.* pp. 84-90.

¹³ *Ibid.* p. 87.

¹⁴ *Ibid.* pp. 85-86.

although they could be generally performed under the prosecutor's *delega*, this did not include interviewing the accused. Moreover, in order to emphasize the fact that one of the police's functions was to collect crime reports and refer them immediately to the *pubblici ministeri*, art. 347 para. 1 cpp stated that the crime report had to be delivered to prosecutors within 48 hours.¹⁵ In 1992 a D.L.¹⁶ amended the 1989 code and increased police powers during the investigation so that legal context became as described above. Prosecutors direct the investigation, but the police retain substantial investigative powers that can also be used on their own initiative.

According to Cordero, this has substantially reduced prosecutors' powers to govern and take charge of the investigation.¹⁷ Similar opinions have been expressed by Giostra: he emphasized that the *Relazione al progetto preliminare*¹⁸ of the 1989 code indicated that the meaning of art. 327 cpp (the article which states that prosecutors direct the investigation) was that the police no longer had the power to conduct an autonomous and antecedent investigation before the prosecutor's investigation (unless they had been empowered by the prosecutors' delegated authority).¹⁹ But the 1992 amendments de facto re-established the police's power to conduct investigations on their own initiative: art. 347 para. 1 cpp now states that *polizia giudiziaria* must refer the crime report to prosecutors "without delay" and does not specify within 48 hours.²⁰ The expression "without delay" (which certainly can extend to 48 hours) appears very broad and it potentially leaves the police with the power to take discretionary choices at the beginning of the investigation (before reporting to the *pubblico ministero*).²¹ In particular, Giostra claims that the police now have the right to determine the initial (and very important) strategy and direction of the investigation.²² The consequence is that these legal rules have created a substantial

¹⁵ Cordero (2003) *op. cit.* p. 808.

¹⁶ This *decreto* was the D.L. n. 306/1992 which was subsequently converted (with amendments) into the Act n. 356/1992.

¹⁷ Cordero (2003) *op. cit.* p. 808. See also, Chiusano V. "*Pubblico ministero e polizia giudiziaria nel processo di parti*". In Centro Nazionale di Prevenzione e Difesa Sociale (1994) *op. cit.* pp.155-165; and Nannucci U. "*Pubblico ministero e polizia giudiziaria nel processo di parti*" (Comments). In Centro Nazionale di Prevenzione e Difesa Sociale (1994) *op. cit.* pp. 169-178.

¹⁸ This literally means the report to the preliminary project (basically the bill). This is part of the *travaux préparatoires* of the 1989 code. In particular, this is the *Relazione al progetto preliminare*, in *Gazz. Uff.*, 24 of October 1998.

¹⁹ Giostra G. "*Pubblico ministero e polizia giudiziaria nel processo di parti*" (Comments). In Centro Nazionale di Prevenzione e Difesa Sociale (1994) *op. cit.* p. 179.

²⁰ *Ibid.* p.180. See also, for example, Cordero, (2003) *op. cit.* p. 808.

²¹ Giostra (1994) *op. cit.* p.180.

²² *Ibid.* See also Nannucci who claims that, one of the consequences of the amendments to the 1989 reform, is that there is not now one figure (the prosecutor) who is leading the investigation and one

distinction during the pre-trial phase: the police perform the investigative acts; prosecutors deal with the result of these.²³

Thus, although prosecutors direct the investigation, the legal rules seem to give the police important investigative powers which can be implemented on their own initiative. This leaves some ambiguities and unanswered questions: what does it mean in practice to say that prosecutors direct the investigation? Do prosecutors supervise all the cases in the same way? What are, in practice, the police's powers?

1.2. Introduction: analyses of the police-prosecutor relationship in action

The literature dealing with police prosecutor relationships is not so extensive in its analysis of the law in action. Authors have mainly focused on the influence that the police may have on prosecutors' decisions. In general, they have underlined the importance of the police during the pre-trial phase. But there is some controversy about the differentiation of prosecutor and police functions: authors like Goldstein and Marcus have emphasized the passivity of *pubblici ministeri* because of their dependence on police information. But Vogliotti (and partially Sarzotti) have been more cautious and emphasized the significance of the prosecutors' role as directors of the investigation. These authors have outlined the different methods of supervision that prosecutors use. Finally, the influence of police decisions on prosecutors' definition of the crime problem has been partially analyzed as well.

Goldstein and Marcus, who wrote their article in 1977, stated that "prosecutors [and examining judges] generally do little more than confirm what the police have already done".²⁴ They underline the active role that the police play during the investigation and that their actions are not subject to any real review by prosecutors (and, at that time, examining judges).²⁵ Goldstein and Marcus conclude that judicial supervision of the investigation is a myth and that investigation is a police function.²⁶

figure (police) who has important but subordinate powers (subordinate to prosecutors' directives). Both these figures are legally entitled autonomously to conduct investigative acts (Nannucci (1994) *op. cit.* p. 176).

²³ Giostra (1994) *op. cit.* p.181.

²⁴ Goldstein and Marcus (1977) *op. cit.* p. 249.

²⁵ *Ibid.* pp. 257-258.

²⁶ *Ibid.* p. 279.

When judicial supervision takes place this only concerns the most serious cases and only occasionally do prosecutors make an important contribution.²⁷ So, the authors see the police as playing an active role in the pre-trial process while prosecutors are passive and reactive. And they believe that this is very much linked to the fact that *pubblici ministeri* are designated (by the law) as judicial figures (although the authors argue that prosecutors do not regard themselves as truly judicial figures).²⁸

The role of prosecutors during the investigation has been also examined, from a different perspective, by Di Federico. As already explained in the previous chapter, Di Federico claims that, during the pre-trial phase, prosecutors act like independent police officers. So, in practice, during the investigation there is no difference between police and prosecutors' approach and functions. It is not necessary here to explain again in detail Di Federico's arguments. However, two points need to be underlined once more. First, Di Federico's and Sapignoli's empirical study is only based on interviews conducted with lawyers. Secondly, their study does not directly concern police prosecutor relationships, but rather the way accused persons' rights are respected by *pubblici ministeri*. In other words, the authors seem to be focused on demonstrating that the legal rules (which state that prosecutors must be impartial during the pre trial phase, see chap. 7) are not properly implemented. However, Di Federico's views are important here because he argues that the Italian criminal justice system clearly puts the prosecutor in charge of the investigation and that the consequence is that, de facto, prosecutors' functions become police functions.²⁹ So, in practice, the "*pubblici ministeri* acquire the typical characteristics that police officers have" (see chap. 7).³⁰ However, here we will try to demonstrate that prosecutors' functions have not been 'absorbed' by the police. Prosecutors' professional culture is perceivable at this stage of the proceedings and they can still take important decisions (e. g. as to how to supervise a case).

Sarzotti explains that *pubblici ministeri* consider themselves (during the pre-trial phase) to be the directors of the investigation, the judicial advisors of the police and the guardians of the investigation, which means that prosecutors are responsible

²⁷ *Ibid.* p. 280.

²⁸ *Ibid.* p. 282.

²⁹ Di Federico and Sapignoli (2002) *op. cit.* p. 16.

³⁰ *Ibid.*

for ensuring that investigation acts are performed according to the legal rules.³¹ But prosecutors' supervision of the investigation may vary depending on the case. In particular, prosecutors use two different systems to supervise the investigation. Volume crimes (i. e. street crime) are mainly investigated and dealt with by the police and the prosecutors' function becomes that of police legal advisor.³² On the other hand, for serious cases which have been prioritized (by prosecutors) the *pubblico ministero* becomes the director of the investigation, he/she coordinates the police and he/she exercises the power to take investigative initiatives.³³ In other words, when volume crimes are involved, police powers to investigate increase and the prosecutors' role appears to be that of 'routinized bureaucratic' review of the results of the investigation (aimed at implementing penal procedures).³⁴ Prosecutors exercise a broader range of powers more frequently when they consider that the case is more complicated and, as a consequence, the trial will be more complicated (e. g. legal issues are difficult, evidence is not clear and difficult to explain to judges etc.).³⁵ Finally, Vogliotti describes the majority of investigative acts (including interrogations) as being performed by police officers under *delega*.³⁶ This is because prosecutors trust the police's professionalism and, perhaps more importantly, because the volume of files is too great for the *pubblici ministeri* to conduct all investigative acts.³⁷ Moreover, the police do not just carry out investigative acts, but they may also prepare the documents to be included in the prosecution files.³⁸

These analyses are relevant because they focus on what happens in practice instead of upon the legal rules. Both Vogliotti and Sarzotti try to explain how prosecutors direct the investigation in practice. Their approach seems different compared to Godstein and Marcus and Di Federico. In fact these authors seem to have different opinions about who is the dominant player as between prosecutors and the police. Vogliotti and Sarzotti confirm that the police can strongly influence prosecutors but they also say (in particular Vogliotti) that *pubblici ministeri* still retain some relevant powers. These views have the merit of emphasizing that there seems to

³¹ Sarzotti C. "*Cultura giuridica e culture della pena*". 2006. Torino: L'Harmattan Italia. pp. 142-155, in particular p. 152.

³² Vogliotti (2004), *op. cit.* p. 495 and pp. 499-500.

³³ *Ibid.* pp. 500-501.

³⁴ Sarzotti (2006) *op. cit.* pp. 142-155.

³⁵ *Ibid.* p. 152.

³⁶ Vogliotti (2004) *op. cit.* p. 481.

³⁷ *Ibid.* pp. 481-482 and p. 502.

³⁸ *Ibid.* p. 482.

be two methods of directing the investigation: one for volume crimes and one for crimes that prosecutors consider particularly serious. However, it is noticeable that neither Sarzotti nor Vogliotti explain in detail how, in practice, the two different systems of supervision work. In other words, they do not describe the meaning of “directing the investigation”. So, we need to deal with three different issues: the meaning of “directing the investigation”; the way prosecutors supervise the investigation of cases that they do and do not prioritize; and the way the police can influence their choices.

The last element of the literature that we want to analyze here concerns the influence of police decisions as to priorities on prosecutors’ definition of the crime problem. As we said above this is one of the issues we will deal with in this chapter (and, more substantially, later). Sarzotti has emphasized the link between police prosecutor relationships during the investigation and the response of the Italian criminal justice system to the crime problem. In particular, he analyzed the *relazioni inaugurali dell’anno giudiziario*³⁹ and he suggested that prosecutors tend to rely very much on the police who deal with the impact that street crime has on the local communities. The consequence is that there is a close link between police activities and the implementation of the penal action, which is a prosecutors’ right.

The police certainly play a very important role before the beginning of the investigation, because they are, to borrow Vogliotti’s expression, “the prosecutors’ antennae in the field”.⁴⁰ This means that, traditionally, *pubblici ministeri* played a passive role which merely consisted in receiving crime reports discovered by the police.⁴¹ However, Vogliotti claims that, starting from the seventies, this scenario began to change.⁴² Prosecutors noticed that the police were acting like a filter: because they were not searching for certain types of crime and no crime reports were coming to the prosecutor.⁴³ For example, within the area of industrial accidents, the less visible cases of industrial diseases were not considered by the police.⁴⁴ The solution was to increase the degree of specialization of police and prosecutors dealing

³⁹ These are speeches that General Prosecutors attached at the court of appeal give every year (normally in January).

⁴⁰ Vogliotti (2004), *op. cit.* p. 482.

⁴¹ *Ibid.* pp. 484-485.

⁴² *Ibid.* p. 484.

⁴³ *Ibid.* p. 485.

⁴⁴ *Ibid.*

with certain cases (i. e. creating specialized units) and, more important here, to improve coordination between *pubblici ministeri* and the police during the pre-trial phase. So, for example, the *pretura*⁴⁵ in Milan issued a circular requesting the police to urgently report all the reports of industrial accidents which led to certain kind of injuries.⁴⁶ Over the years similar coordination systems were set up for environmental crimes, mafia, terrorism, corruption etc. All these actions had one common element: prosecutors were no longer mere passive receivers of what the police decided to pass on but were also determining inputs themselves.⁴⁷ So, police powers during the pre-trial phase are substantial because they filter out crime reports (acting like “gatekeepers *de la citadelle pénale*”).⁴⁸ However, prosecutors become more proactive when it comes to searching for certain forms of offending and in these types of crime they direct the investigation.

To conclude, Sarzotti pointed out that there is a connection between the perception of crime of the local communities, the police and prosecutors. The police influence prosecutors because they bring them the priorities that the public perceive (see chap. 10). Vogliotti’s account of the police *pubblici ministeri* relationship when crime reports have to be sought is certainly very important to underline that prosecutors can play an active role during the pre-trial phase. But he does not explain the impact of police discretionary decisions as to priorities on prosecutors’ definition of priorities. So, these views suggest that the police and prosecutors do not just interact when there is an investigation. Their relationship is also important to understand how prosecutors will determine their priorities. But one question has not been sufficiently addressed: can prosecutors mediate police influences? And if they can, how do they do it? In other words: how strong is the external influence of the police on prosecutors’ decision-making?

Finally, from a comparative point of view, it is also interesting to mention Hodgson’s conclusions about the method of judicial supervision in France. In fact, despite the 1989 reform that, legally, has moved the Italian criminal justice system from adversarial to inquisitorial, there are still important similarities between

⁴⁵ The *pretura* was (it was abolished in 1998, see chap. 9) the court dealing with not-serious crimes (similarly to the English Magistrates’ court). There was a prosecution office attached at the *pretura*.

⁴⁶ Vogliotti (2004) *op. cit.* p. 486.

⁴⁷ *Ibid.* p. 487.

⁴⁸ *Ibid.* pp. 492-495.

prosecutors in Italy and France. Namely, the *procureurs*⁴⁹ supervise the police during the investigation, they are supposed to play a more neutral role than that of a partisan prosecutor and they are (like judges) *magistrats* (similar to the Italian *magistrati*).⁵⁰ The author (while she is discussing judicial supervision of the *garde à vue*)⁵¹ defines the aim, for prosecutors, of judicial supervision of the police in France. This is “not to monitor closely the work of the police, but to provide a more general ‘legal orientation’ in order to ensure the construction of a legally coherent dossier that will withstand the scrutiny of the court”.⁵² More generally Hodgson carries out systemic observations which emphasize the limits of prosecutors’ powers in practice to direct and control the police during the investigation: the ideology of supervision is characterized by “the structural context in which the police-*procureur* relationship operates [which] makes control and direction both complex and problematic. In particular, the *procureur*’s functional dependence upon officers to conduct the investigation for which she is responsible makes almost impossible a model of supervision in practice, which challenges or goes beyond the case parameters set by police”.⁵³ In this chapter we will try to demonstrate that in Italy the situation is different. In particular, models of supervision seem to leave to prosecutors the opportunity (in some situations) to challenge “the case parameters set by police”.

2. Directing the investigation: the peculiar role of assigned police officers

Before we begin to explain the relationship, in practice, between prosecutors and police during the investigation, we need to explain the peculiar position of “assigned” police officers. “Assigned” police officers are part of the *sezioni* of PG. As we explained (see above) the *sezioni* are functionally and organizationally dependent on

⁴⁹ The French name for prosecutors.

⁵⁰ Hodgson (2005) *op. cit.* p. 75. For a general overview of French prosecutors (and French criminal justice system) see, for example, Dervieux (2002) *op. cit.* pp. 218-292.

⁵¹ *Garde à vue* literally means ‘holding for observation’, but in practice it means ‘detention for questioning’. In particular, where the investigation makes it necessary a police officer (of the *police judiciaire*, the police dealing with investigation, like the Italian *polizia giudiziaria*) may detain for questioning a suspect. The *garde à vue* can last, in principle, 24 hours. Further detention can only be authorized by prosecutors. See, Dervieux (2002) *op. cit.* pp. 277-278. See also, Hodgson (2005) *op. cit.* pp. 145-150.

⁵² Hodgson (2005) *op. cit.* p. 151. This research was based on interviews, questionnaires and direct observation.

⁵³ *Ibid.* pp. 169-170.

the prosecution office as a whole. These police officers perform functions which are not limited to investigative acts under prosecutors' initiative or on their own: they also prepare prosecution documents for the trial.

If the *procura* is of medium size or larger, each prosecutor has a certain number of police officers "assigned" to him (in the sites we visited the number varied from 2 to 4).⁵⁴ This means that they work exclusively for that specific prosecutor (in fact, *pubblici ministeri* normally call these police officers "my police officers"); and that they mainly conduct the investigations that the prosecutor assigns to them. So, for example, prosecutor X receives a crime report and then assigns the case to police officer A and/or B. However, "assigned" police officers clearly cannot deal with all the files. In particular, there are some cases that require a specific knowledge and/or preparation or they are simply too complicated and they have to be handled by many police officers. In these situations prosecutors will involve other police officers who do not exclusively work for them (i. e. the "external" police):

In this prosecution office every prosecutor has two police officers who exclusively work with him [i. e. assigned police officers]. Then there is also a police unit [not composed of assigned police officers] which deals with certain sorts of investigations, for example: handling stolen goods, frauds where the victim is an insurance company etc. [...] Prosecutors are always in contact with the two assigned police officers. This is because they work in the same office and they [assigned police officers] deal with the cases that the prosecutor assigns to them. But, if the case is too complicated, they [prosecutors] send it to the police unit [that we described earlier] or the investigation can be delegated to other police forces, like the *squadra mobile*,⁵⁵ *carabinieri*⁵⁶ etc.⁵⁷

This was the explanation of the chief prosecutor of a big prosecution office in the south. The difference between "assigned" police officers and "external" police seems clear. "External" police do not work closely with only one prosecutor. Rather they become involved when certain kinds of investigations have to be performed. Moreover, we should emphasize that the "assigned" police officers work in the same building as the prosecutors. This may strengthen the connection between these two

⁵⁴ The term assigned police officers is a literal translation of the wording used by prosecutors.

⁵⁵ The *squadra mobile* is one of the police's units specialized in dealing with investigation (in particular for robberies, drug trafficking, homicides etc.). So, they are part of the PG.

⁵⁶ *Carabinieri* are a police force, but they also perform military actions (like military interventions in Afghanistan and, formerly, in Iraq). They also carry out investigation activities (as PG, see chap. 4).

⁵⁷ CP(S4).

legal actors. In some situations, “assigned” police officers really seem to be part of a team managed by the prosecutor:

Every year I receive around 400 files of *noti*,⁵⁸ it is not very much. However, I have to say, and I do not think this is what generally happens, that I have a very efficient *ufficio*.⁵⁹ In fact, my collaborators are very well prepared, and I have spent some time training them, so that now they perform efficiently. This is why we do not have files which are waiting for too long. But until some months ago I had 3 [assigned] police officers, now I have only 2, but I hope they will give me back the third sooner or later, because we have some problems.⁶⁰ However, the point here is that I tried to apply that project, which has never really been applied, concerning the *ufficio del pubblico ministero*. This means that the prosecutor is the director of his *ufficio* and he [only] carries out the activities which can not be delegated; these are: the hearings and the preparation of the hearings. The vast majority of the other activities are performed by my collaborators; I only read, double check, correct and sign.⁶¹

We have already introduced the concept of “*ufficio del pubblico ministero*” in explaining the organizational relations within the prosecution office (see chap. 6). As we can see here, the idea seems to be that of setting up a team including administrative personnel and “assigned” police officers (i. e. “the collaborators”). The prosecutor becomes the manager of the team and the coach as well, because he/she

⁵⁸ These are the files where the name of the accused person is known.

⁵⁹ This literally means office, but the appropriate translation, in this context, would be team (see below the concept of *ufficio del pubblico ministero*).

⁶⁰ The analysis of prosecutors’ powers to impede (or to push for) the removal of police officers from their functions goes far beyond the purposes of this chapter. In fact, here we will deal with some of the consequences that a non hierarchical relationship between the police and prosecutors creates in practice (see later), but only for the purpose of explaining prosecutors’ powers when police officers do not properly perform investigation activities. However, it is interesting to note that Sarzotti underlines that prosecutors complain about the fact that PG officers directly depend on prosecutors, but they also depend on their hierarchical superiors within the police force who can change their functions and remove them from a *procura* (Sarzotti (2006) *op. cit.* pp. 153-154). Moreover, recently, in the prosecution office of Catanzaro, in the south of Italy, a prosecutor started to investigate some local entrepreneurs for corruption and later he, eventually, involved the minister of justice (now the former minister of justice) and the prime minister as well. During such an important investigation a local police officer, who apparently played a very important role, was removed from his office (the decision was taken when the investigation was still at the beginning, but it had to be applied after a few months) and transferred to another place. The point here is that it seems that the *pubblico ministero* could not block and/or delay this decision. In particular, he officially asked the police officers’ superiors to wait until the end of the investigation, but it did not obtain any result (see, Vulpio C. “*Trasferito il capitano dell’Arma <<braccio destro>> di De Magistris*”. *Corriere della Sera*, 31/10/2007). We just need to say that the way the *pubblico ministero* acted during the investigation was (and still is) very controversial (also because of the interviews he gave to TV and newspapers). The case was withdrawn from the prosecutor (*avocazione*, see chap. 4), he was removed from the prosecution office and a disciplinary action was brought against him before the CSM.

⁶¹ AP(N31). Similar opinions (particularly on the importance of the personnel working with prosecutors) were expressed by AP(N30).

has to train the persons working for him. Moreover, within the “*ufficio del pubblico ministero*”, “assigned” police officers (and the administrative personnel as well) not only carry out investigative acts, but they also prepare the documents which will be included in the file and then they submit them to the prosecutor who bureaucratically reviews the police’s activities (see later).

We have already indicated (see chap. 6) that, in another site that we visited (Bolzano, in the north of Italy), the chief prosecutor issued a circular in which he suggested that prosecutors set up and organize their office/team in order to find the best practices for dealing with volume crimes:

I created the *ufficio del pubblico ministero*. So, I gave to each prosecutor 4 police officers [the “assigned” police officers]. The consequence is that I created a little group [in fact, many little groups, each of them managed by one prosecutor] within the prosecution office. Every prosecutor directs one group and manages his 4 police officers the way he wants. This is aimed at dealing with volume crimes, because we have to take into account that 80, 90% of the cases we deal with that are volume crimes.⁶²

So, the *ufficio del pubblico ministero* appears to be a versatile system for organizing prosecutorial activities. In particular, it seems that prosecutors can train and use the “assigned” police officers in the way they want so as to develop the most efficient practices. This gives a substantial amount of discretionary power to prosecutors. However, the role of these police officers should not be underestimated: *pubblici ministeri* appear to be themselves partially dependent upon “assigned” police officers who not only carry out investigative acts but also prepare the documents which will be part of the prosecution (or *archiviazione*) file.

The multifunctional nature of “assigned” police officers seems also clear in the cases where the “*ufficio del pubblico ministero*” has not been set up. A police officer said:

Here I had a bad experience with one prosecutor who was not interested in using me to perform the investigation. In fact, he only wanted to have less files to deal with, so he was using me as a *passacarte*.⁶³ I did not like this job; and I saw colleagues who never carried out an interview! [...] That prosecutor was giving me a file so that I could put

⁶² CP(N43).

⁶³ This literally means: the person who passes the documents. In particular, it indicates someone who does not take any relevant decision and does not have power to take initiatives.

pressure on the *squadra mobile* or the *carabinieri* who were carrying out the investigation. Then he wanted me to write the *capo d'imputazione*!⁶⁴ [...] Some of us do it [writing the charges] better than prosecutors.⁶⁵

So, prosecutors seem to determine these police officers' function. They may be directly involved in investigations; they may prepare the files (including writing the charges);⁶⁶ and, finally, "assigned" police officers may play an important role even if the case is being investigated by the "external" police: in such situations, they can become the prosecutor's 'eyes' checking that the investigation is carried out properly and on time.⁶⁷

In the end, the activities that 'assigned' police officers carry out seem to be prompted, directed and managed by prosecutors. Yet prosecutors themselves seem to be dependent upon "assigned" police officers who shape investigations in important ways (either by carrying out investigative acts or by checking that these are properly performed) and/or preparing documents that prosecutors will bureaucratically review. So, there is a strong functional interdependence between *pubblici ministeri* and "their" police officers

2.1. Directing the investigation: prompting and reviewing

As we explained (see chap. 4), when the investigation begins the *pubblico ministero* is in charge of it. Legally this does not mean that the police have no powers to carry out investigative acts autonomously. However, the legal rules demand that prosecutors direct the investigation. In the next sections we want to describe the meaning, in

⁶⁴ The *capo d'imputazione* is a document which includes the name of the crime(s) for which a person is accused and the explanation of the reasons why he is accused of that specific crime(s). A lawyer (L(N20) who works in a big city of the north of Italy and mainly deals with white collar crimes) explained that once she worked in the office of an assistant prosecutor and she saw that there was a police officer who was dictating to the prosecutor the *capo d'imputazione*. She explained that certain cases (like those involving white collar crimes) are very complicated and, sometimes, the police have a better and more specific knowledge compared to prosecutors. However, she also said that some police officers do not have the necessary legal knowledge. In particular, she said that lawyers can recognize when the *capo d'imputazione* is done by the police because the points of law are not very well explained and, sometimes, the legislation quoted is out of date.

⁶⁵ Pol.(N26). Very similar opinions were expressed by Pol.(N27).

⁶⁶ See also L(N20) as explained above.

⁶⁷ AP(N1), AP(N2) and AP(N3).

practice, of the concept of directing the investigation.⁶⁸ In particular, we will explain how prosecutors supervise the investigation when they have prioritized a case (this section) and then when they believe the case is not important (next section). We will also focus on the police-prosecutor relationship when investigations are carried out (by the police) under *delega* and we will explain what happens when *pubblici ministeri* directly carry out investigation activities. Finally, we will examine prosecutors' approach when the police do not follow their directives (see later).

We must also add that here the key distinction is not between the way prosecutors supervise investigations carried out by 'assigned' police officers and investigations carried out by the 'external' police. Prosecutors are more involved in the investigation if they believe that the case is important and must be prioritized regardless of the type of police officer. The distinction between 'assigned' and 'external' police matters was discussed for two reasons. First, to illustrate the importance (just in the context of the investigation) of police activities during the pre-trial phase. Secondly, to understand how extensive prosecutors' powers to manage police officers can be (in certain circumstances). So, in the next sections we will simply use the word police unless it is necessary to distinguish between 'assigned' and 'external' police officers.

When prosecutors have prioritized a case the police prosecutor relations appear to be based on constant communications between these two legal actors:

If the case is more serious the prosecutor will try to co-ordinate the investigation and, for example, he/she will carry out the interviews [...] However, in the vast majority of the cases, the investigation is performed by the police under prosecutors' delegated authority [*delega*]. The only thing prosecutors do are the interviews [...] They never perform searches, seizures, *accertamenti tecnici*⁶⁹ etc. [...] Prosecutors intervene later. They act after every investigative act that the police have performed and that prosecutors *have told them to carry out* [emphasis added]. This is done in order to double check and *review* [emphasis added] what the police have done. So, prosecutors do not just step in at the end of the investigation. In particular, the police do not carry out all the investigative acts and then bring the results to the *pubblico ministero*. On the contrary, the police refer to the prosecutor after every single investigative act has been carried out. However, when the police actually perform the investigative acts, prosecutors have limited powers

⁶⁸ Here we will not consider the application of the law, but rather what prosecutors do in practice.

⁶⁹ These are literally assessments that prosecutors can do (alone or with some experts). This form of investigation can concern, for example: checking photographs, checking if a computer has been used or not etc.

[to control what the police are doing]. So, it is a continuous back and forward between the police and prosecutors.⁷⁰

He/she [the prosecutor] interviews witnesses, carries out some *accertamenti tecnici*, some particular searches (e. g. when they have to search a law firm) [...] There is a continuous contact with the police. In fact, it often happens that, while we [lawyers] are waiting to speak with prosecutors, we see police officers who have their file and they are waiting to speak with the *pubblico ministero* [...] However, this happens if there are serious cases, otherwise the prosecutor just looks at the papers [prepared by the police] and signs them.⁷¹

So, when the case has been prioritized, prosecutors and the police discuss the investigation on a regular basis. In particular, as one lawyer said, in practice, police officers keep going backwards and forwards between prosecutor and investigative activities, performing a particular investigative act and then reporting back to the prosecutor. This “backwards and forward” system is not one where the police carry out all the investigative activities and only then refer back to the prosecutor. On the contrary, the police must report to prosecutors regularly, and, sometimes, after every single act conducted. Furthermore, the *pubblici ministeri*’s function does not appear to be limited to reviewing police’s activities, because they may also indicate the investigations police have to carry out. Finally, within the “backwards and forwards” system, prosecutors can directly carry out some investigative acts (not all of them), but these appear to be more rare situations.

There are a number of reasons why *pubblici ministeri* do not directly conduct the investigation. In particular, the main problem is that prosecutors have to deal with a very large number of cases at the same time.⁷² However, we found some examples of situations where *pubblici ministeri* decided (and decide) to have a more active role:

⁷⁰ L(N20).

⁷¹ L(N21).

⁷² We asked to prosecutors the number of files they have to deal with in one year. The figures are different (between 300 and a few thousands files). Some prosecutors have less than 300 cases, but these are exceptions (CP(N43) and AP(N48)). Moreover, one prosecutor (APN(48)) explained that he has less cases, but that most of them are very complicated, so they take a lot of time. However, the vast majority of the prosecutors said that they have more than 1000 files to deal with every year. In particular, 18 prosecutors out of 27 said so. 2 did not know (but one said that they are a lot). One did not clearly answer. One was not asked (due to lack of time). 5 said that they have less than 1000 files to deal with every year. Finally, all the prosecutors apart from one (CP(N43)), who is a chief prosecutor and he claims that his prosecution office is very organized and he can deal with all the cases in the proper way, said that the large number of files is one of the reasons why they can not treat all the files

Of course we need to rely on the police [to carry out the investigation] [...] but, for example, the *collaboratori di giustizia* [former criminals who have informed on former colleagues]⁷³ are only interviewed by prosecutors.⁷⁴

Normally the investigation is conducted by the police, the prosecutor only directs it. However, if he/she [the prosecutor], when he/she has checked the results of the investigation, decides that he/she has to interview a person who has been already interviewed, he/she will do it personally. However, the police will carry out the investigation *sul campo*.⁷⁵ This is what normally happens, but, for example, if there is a murder, interviews will be carried out by prosecutors.⁷⁶

It often happens that, when there has been a rape, I interview the persons involved. This is because sometimes there is something that I do not understand and/or because the victim was too succinct; so, in these cases, I will not delegate [the interview] to the police, I will do it myself. In fact, you lose one morning, but, at least, I have seen the person I wanted to interview and I asked the questions I wanted to ask [...] This is the criterion I use; even when there are crimes [sexual abuses] involving minors, normally, I prefer to interview them personally.⁷⁷

The way Italian prosecutors define the crime problem and their priorities will be analyzed in the following chapters. However, here we want to underline that it seems that prosecutors only directly carry out investigative acts when the crime is very serious (in the view of the prosecutors). For example, *pentiti*⁷⁸ are normally implicated in cases concerning organized crime or terrorism. Moreover, minors who have been abused (sexually or not) are clearly involved in situations which require a lot of sensitivity. Prosecutors do not just decide *a priori* to perform investigative acts in particular types of cases (i. e. for murder cases). They may also choose to “step in”

in the same way. On the problems related to the lack of resources and the increase in number of crimes to deal with see. Sarzotti (2008) *op. cit.* pp. 34-48.

⁷³ These are also called *pentiti*. They are (ex) criminals who decide to testify (and they get benefits for this) against criminal organizations and/or single persons. These are normally involved in organized crime and/or terrorism cases. In fact, most of the important actions taken against mafia and the red brigades started from information released by *pentiti*.

⁷⁴ CP(S4).

⁷⁵ This literally means in the field. In particular, this prosecutor wants to underline that the police will actually perform the investigation activities and *pubblici ministeri* do not participate, but they intervene later.

⁷⁶ CP(N40).

⁷⁷ AP(N28). This prosecutor works in the specialized unit dealing (mainly) with sexual crimes and abuses.

⁷⁸ Repentant persons.

because they are not convinced by the evidence obtained by the police (or simply want to reanalyze it) or because they want to be sure that a particular investigative act is carried out in the way they want (i. e. specific questions are asked). Moreover, *pubblici ministeri* can also decide to perform investigative acts when the case is evolving a certain way:

It was my first case of homicide. It was during the night, the police called and said there was a dead man on the side of a road and that they thought it was an accident. I told them to check for evidence and to do, themselves, the routine activities (e. g. prevent people contaminating the area, search around etc.). Then they called me back to tell me that, close to the body, they had found a car. Again, I said to continue with the searching activities. Later they called me again to tell me that they found that the dead person had a hole behind the head (similar to a bullet hole). So, I said to close off the whole area and to wait for me. Then they sent me a car and I was there in 15 min.⁷⁹

This example, where personal intervention on site is eventually seen as necessary can be contrasted with another example given in interview. There the prosecutor received a call from a police officer reporting that they had found a dead man. Of course, the prosecutor started to ask for more details and, when the police officer said that they strongly believed it was an accident (apparently an old man was fixing his car, the car moved and fell on him), he said he wanted to be kept informed but that it was not necessary for him to be there. Moreover, he agreed with the police officer that they needed a doctor to double check the police's impressions. Then the *pubblico ministero* called the doctor (the one that prosecutors, in that prosecution office, normally contacted for expert advice) and asked him to go to check what happened and to let him have his opinion. Finally, the prosecutor called police officers to tell them to wait for the doctor.⁸⁰

So, it seems that prosecutors have, in practice, the right to decide to “step into” the investigation when they believe that the case may be particularly serious. However, the police seem to have a significant power to influence these decisions. In fact, it appears that *pubblici ministeri* mainly base their choices on police reports (in the cases above communications were made via phone).

Finally, we need to say a few words on the kind of investigative acts that *pubblici ministeri* perform. These are mainly interviews with the accused, victims,

⁷⁹ AP(N11).

⁸⁰ AP(N10).

witnesses and informers. The cases when they execute, for example, seizures, searches and *accertamenti tecnici* seem to be rare (e. g. the example made by L(N21) of searches carried out in law firms). So *pubblici ministeri* only carry out some investigative acts and, often, they do not perform any (see later). In fact, the prosecutors' main function during the investigation is to direct the police. But what does "directing the investigation" mean?

However, if during a routine investigation [concerning volume crimes, see later] it is necessary, for example, to perform a search, we contact the prosecutor: we describe the investigative acts we have performed and we explain why it is necessary to perform the search. [Moreover] for the most serious cases we constantly report, over the phone, to the prosecutor; sometimes we do it everyday. This means that it is the investigator [the police] who carries out the investigative acts and asks the prosecutor for instructions. Otherwise, it is the prosecutor who requests some news about the investigation.⁸¹

For the cases where the investigation is complicated we normally give instructions and then, every time we receive the results, we issue new instructions. So, we only directly intervene when the investigation is particularly difficult. These are those cases where we believe that the police need our input [...] This happens because many police officers do not know what a criminal trial needs. These crimes can be: bankruptcy, white collar crimes in general, even frauds which, if they are important, require us to issue instructions. Anyway, we decide case by case.⁸²

So, directing the investigation seems to mean that prosecutors issue instructions and the police implement them. Subsequently prosecutors will review the results and, if necessary, will issue new instructions. So, when the case is considered important, directing is not only a matter of performing a bureaucratic review of police's activities. It also involves *pubblici ministeri* prompting with inputs which shape the way police carry out the investigation. We believe this is the meaning of the "back (reviewing) and forward (prompting)" system that we described above.

A very important instrument that prosecutors use to communicate to the police their instructions is the *delega*, which is a written document:

First of all the *delega*. In fact, the more the *delega* is detailed the more the investigation will be shaped by the prosecutor [...] If the *delega* is not detailed the police's powers, which are already quite strong, will increase. I think that the *deleghe* [plural of *delega*]

⁸¹ Pol.(N19).

⁸² APAPl.(N50).

should be very detailed, even when the case is not so important; however I always leave a certain amount of freedom to the police⁸³ [...] If the prosecutor really wants to play his part he/she has to act like this. However, if the case is less important the *delega* will be less detailed, but still it has to be precise.⁸⁴

So, the *delega* seems to be a very important tool that *pubblici ministeri* can use to exercise their right to direct and shape the investigation. Moreover, it is interesting to note that one *pubblico ministero* said that in the past (before the 1989 reform, but it is difficult to determine a precise date) issuing a detailed *delega* was, apparently, a huge step and that police officers perceived this as a lack of trust in their capacity to perform a good investigation. On the contrary, he said, now the police are expecting detailed *delega* and this is considered (by prosecutors and the police) the right way to proceed.⁸⁵ However, in the next section we will see that, for the cases which have not been prioritized, *deleghe* are not always detailed and, sometimes, leave a great amount of initiative to the police.

Finally, the *delega* is not the only system prosecutors have to communicate with the police when the case has been prioritized. In fact, *pubblici ministeri* can also direct the police by phone and by setting up regular meetings as well.⁸⁶ This does not mean that, in these cases, the *delega* will not be issued, but that prosecutors will use the systems which are more suitable to guarantee that they will be always kept informed and that the police will execute prosecutors' directives.

In the end, when the case has been prioritized, "directing" the investigation seems to mean that prosecutors exercise the power to prompt through directives and to review the results of investigative acts. Sometimes *pubblici ministeri* direct the investigation and, also, carry out (alone or together with the police) investigative acts. However, the element which seems most to characterize this form of supervision is the fact that the police and prosecutors constantly interact and communicate. Finally, we should not forget that even when detailed *deleghe* have been issued, investigative acts will be mainly carried out by police officers. So, it appears misleading to look at the "prompting and reviewing" system as a method by which prosecutors eliminate

⁸³ On this point AP(N11) said that, in the *delega*, it is very important to specify (i. e. writing a sort of bullet points list) the activities that the police must carry out. The rest can be left to police's initiative.

⁸⁴ AP(N33). Similar opinions were expressed by AP(N11) and AP(C46).

⁸⁵ AP(N11). The same opinion was expressed by Pol.(N14).

⁸⁶ See, for example, AP(C46), AP(Apl.(N50) and AP(N32).

police influence. But it would be probably correct to see it as the best tool that *pubblici ministeri* have to mediate police influences during the investigation.

2.2. Directing the investigation: bureaucratic review

Bureaucratic review is a different form of supervision to the “prompting and reviewing” system. It concerns volume crimes that prosecutors, in general, do not prioritize; it does not imply that *pubblici ministeri* constantly interact and communicate with the police; and, sometimes, *deleghe* are not issued, so that, in practice, the police will have substantial powers to determine the investigative acts they have to carry out:

Prosecutors cannot direct the investigation for volume crimes; this is because they have so many cases to deal with at the same time (sometimes hundreds) [...] So, in practice, prosecutors will issue an initial *delega* or, even when they do not do so, the police will proceed to the investigation according to the rules included in the code of criminal procedure. In practice, if the investigative acts to carry out do not require the intervention of the prosecutor (e. g. seizures,⁸⁷ searches⁸⁸ and/or telephone tapping⁸⁹) the police will perform the investigation and then, at the end, will explain to the prosecutor the activities carried out and the results obtained.⁹⁰

The routine [volume crimes] is done on paper⁹¹ and you try to do as little as possible. I mean, if it is possible you base your decision (*archiviazione* or send the case to trial) on the information included in the denunciation; you do investigative acts only if it is absolutely necessary to solve the case. In particular, in those cases [where an investigation is necessary] you write [a *delega*] to say that the police should carry out a number of investigative acts and, later, after a few months, they will come back and you will decide whether to enter an *archiviazione* or *rinvio a giudizio* [...] This happens for

⁸⁷ Seizures (art. 253-265 cpp) need to be previously authorized by prosecutors. See, for example, Grevi (2003) *op. cit.* pp. 345-351.

⁸⁸ Searches (art. 247-252 cpp) need to be previously authorized by prosecutors, but there are exceptions (see below). See, for example, Grevi (2003) *op. cit.* pp. 340-345.

⁸⁹ Telephone tapping must be previously authorized by a judge and the request must come from the prosecutor. There are exceptions, but the police must always obtain prosecutors' previous authorization and judges' intervention can only be delayed (art. 266-271 cpp.). See, for example, Grevi (2003) *op. cit.* pp. 351-361.

⁹⁰ Pol.(N19). See also, APAPl.(N50).

⁹¹ In this context this means that prosecutors send and receive written documents (e. g. via fax, see AP(N32), but they do not normally make phone calls and/or set up regular meetings.

volume crimes, which are the vast majority of the crimes. These are, eventually, treated, but we do not have the time to deal with them in detail.⁹²

Anyway, there is always the power to decide: when they give me the *posta*⁹³ I read and then I decide. In particular, if I believe that no crime has been committed (e. g. the victim initiation of *querela* was after the time limit); then I can immediately take a decision, because the police have already done everything, I decide; otherwise I think about the crime which has possibly been committed and then I issue a *delega*. If the crime is a priority I go to the crime site and I start directing the investigation [...] In general [for volume crimes] the police perform the investigation and then they refer to me. However, if there is a priority my *deleghe* are very detailed, [in these cases] the police only have residual powers to take discretionary decisions about the investigative acts to carry out.⁹⁴

These examples seem to confirm what we said before: when the case has not been prioritized the interactions between the police and prosecutors are extremely limited. In fact, the police and *pubblici ministeri* do not discuss the case on a regular basis. There are only two moments when these two legal actors communicate: the initial *delega* and when prosecutors review the results of the investigation carried out by the police. However, the interactions between police and prosecutor may suddenly increase if certain investigative activities have to be carried out. The clearest example is arrest. When the police conduct an arrest, prosecutors must intervene (immediately) to review the arrest procedure (see later). But this does not necessarily mean that *pubblici ministeri* will be more involved (i. e. prompting and reviewing) in the investigation. As we will explain later, the legal procedure for arrest forces prosecutors to treat the case as soon as possible. But this does not mean that the case is regarded as a personal priority. For example, street crime often involves arrested persons, but it is not perceived as a serious crime by Italian prosecutors. So, in practice, an investigation can be bureaucratically supervised even when it requires a prompt intervention by the prosecutor.

Thus, the main consequence of the bureaucratic form of supervision is that prosecutors' power to prompt by directives seems to be limited (confined to the initial, generally not-detailed, *delega*). It appears that there are no subsequent

⁹² DCP(N45).

⁹³ This literally means mail. This is the word prosecutors use to indicate the files they receive when they are doing the turns we explained in chap. 6.

⁹⁴ AP(N11).

meetings, phone calls and/or *deleghe*. Moreover, sometimes a *delega* is not even issued. So, in these cases, prosecutors choose not to use their power to issue directives. However, as one prosecutor said: “there is always the power to decide” (see above, AP(N11)). What this means is that *pubblici ministeri* receive the report from police, review it and then must decide if the case can be sent to trial or if they should drop the accusation or if the case requires further investigation. But the significance of this “power to decide” should not be overestimated because the information on which prosecutors will base their decisions seems to depend very much on the police’s initiative and discretionary choices on the investigative acts to be performed.

One of the best examples of the prosecutors’ bureaucratic review form of supervision (and of the increase of police powers) is probably the SDAS⁹⁵ group in Milan. This is not a specialized unit, but a group which deals with cases which have not been prioritized (and which do not involve arrested persons). These can be defamations, small frauds, car accidents etc. Later we will explain in detail the way the SDAS group works (see chap. 9). Suffice it to say here that there are 6 prosecutors and one deputy chief prosecutor who manage the SDAS (but they do not only deal with this group) and that they claim to treat approximately 80% of the cases which arrive at the Milan prosecution office.⁹⁶ Here we want to analyze the functions that the police perform within the SDAS group:

The SDAS deals with volume crimes. In fact, crime reports [which have to be allocated to the SDAS, see chap. 9] are immediately assessed by 11 police officers, who are graduates⁹⁷ and who deal with the screening [of crime reports]. This means that they analyze the crime reports and they decide on those which have to be dropped [*archiviazione*] and those which can be immediately dealt with. All these files, once evaluated, are then submitted to the prosecutor who is on duty that day.⁹⁸ This prosecutor, who knows police officers’ opinion on the crime report, and, you know, you can trust them, because they know what they are doing; so, this prosecutor deals very quickly with the files, he can do something like 100, 150 files per day, and the three

⁹⁵ SDAS is the abbreviation of *Sezione Definizione Affari Semplici*. This means: unit specialized (but it is not like the other specialized units, see chap. 9) in dealing with simple matters. The decision to create this unit was taken by the prosecution office itself, in order to deal with the backlog of cases that the unification (in 1998) of the prosecution office attached at the first instance court with the prosecution office attached at the *pretura* has created (see chap. 9).

⁹⁶ AP(N32).

⁹⁷ These are law graduates.

⁹⁸ As we said there are 6 prosecutors, but they are not all on duty the same day, there is a turnover.

quarters of these are immediately finished with by *archiviazione* [...] The *capi d'imputazione con citazione diretta*,⁹⁹ if they can be immediately dealt with by this, are immediately done the day they arrive and everything is carried out by the police [...] Moreover, the police, according to our requirements, prepare everything: the report ex art. 415 bis cpp¹⁰⁰ and the *decreto citazione lista testi*,¹⁰¹ so, you do not need to check the file anymore [...] In fact, our function is to decide whether to issue the *archiviazione* or if the case has to be sent to trial [but the police have already expressed their opinion] and to sign the final measure. We only see measures which have been already prepared; we can ask them [police] to correct something, but it is very very rare.¹⁰²

So, within the SDAS group, not only do police provide prosecutors with the information they need to take decisions; the police also suggest the decisions *pubblici ministeri* should take. However, prosecutors still retain the power to review and check police acts; and they can also issue guidelines that police officers will follow when they will have to prepare the official documents which will form part of the prosecution file (e. g. report ex. 415 bis, *decreto citazione lista testi* etc.). But, in practice, prosecutors' power to review police activity appears limited, because it is strongly influenced by previous police decisions. *Pubblici ministeri* seem to rely very much on the police's opinion (i. e. "you can trust them, because they know what they are doing"); and the situations when *pubblici ministeri* review and correct the documents prepared by the police appear to be very rare. However, if prosecutors consider that a case does need further and deeper investigation, they can treat it personally and remove it from the SDAS group:

If I believe that a case is particularly important I can bring it up [to my office]¹⁰³ and I will treat it personally. Moreover, I will involve my personal police¹⁰⁴ with whom I have contacts everyday [...] So, if I ask my personal police to interview a person, they will do

⁹⁹ These documents include the charges (like normal *capi d'imputazione*, see above). However, in these cases the accused person is already known and, more important, the evidence is so strong that further investigation is not needed. In practice, everything is included in the crime report and the accused can be sent directly to trial (*citazione diretta*).

¹⁰⁰ This report must be sent to the accused person(s) when the investigation is finished.

¹⁰¹ This is the list of witnesses who will have to testify.

¹⁰² AP(N32).

¹⁰³ There is a room where police officers working in the SDAS stay. However, prosecutors have their personal offices in a different place. Moreover, the *pubblici ministeri* working in the SDAS are not all located in the same area of the prosecution office.

¹⁰⁴ These can be the "assigned" police officers. However, prosecutors can also set up strict relationships with police officers who are specialized in treating the same kind of cases that prosecutors deal with in their specialized units.

it, but this is the biggest effort I might make for SDAS cases. For my cases [the priorities] I spend much more time.¹⁰⁵

So, although police powers are clearly substantial, prosecutors still maintain their right to make important choices on the way the case has to be investigated. The consequence, in practice, seems to be that the form of supervision can change. In particular, when cases are removed from the SDAS group, prosecutors not only review the information provided by the police, but they can also prompt through directives (i. e. ask the police to interview someone). However, it seems clear that these cases will never have a high priority. As a consequence prosecutors' preparedness to use their rights to influence the way the investigation is performed and the case is treated is limited. This presents a rational image of a variable degree of intervention shaped by the necessities of the case. But we need to remember these conclusions are based on our interview evidence: by definition cases where prosecutors do not see that a case is less straightforward than it appears will pass them by.

Thus, within the bureaucratic review system of supervision the *pubblici ministeri*'s power to issue directives on the way the investigation should be carried out seems to be considerably reduced compared to the "prompting and reviewing" system. The main consequence is that prosecutors do not seem to have their "hands on" the investigation. However, as Hodgson underlines for the French case: "This bureaucratic form of supervision, although relatively passive, has the potential benefit of filtering out obviously weak cases where the basic elements of an offence are not made out or where there has been a failure to comply with or document basic procedural safeguards".¹⁰⁶ This conclusion could be borrowed for Italian prosecutors as well. In fact, the "bureaucratic review" method of supervision still leaves to prosecutors "the power to decide". This is based on a file which has been, in practice, constructed by the police, but *pubblici ministeri* can still decide if the prosecution has to be dropped or if the case can be sent to trial or if it requires further investigation. This seems consistent with prosecutors' filtering function that we explained before (see chap. 7). In particular, *pubblici ministeri* still appear in the position to filter out

¹⁰⁵ AP(N32).

¹⁰⁶ Hodgson (2005) p. 152.

cases which will not (in their opinion) pass scrutiny at trial. However, this power should not be overemphasized, because, as we saw, prosecutors' choices appear to be strongly influenced by the information and the opinion provided by the police.

2.3. Directing the investigation: disciplinary powers

What happens when the police do not carry out investigative acts according to the directives issued by *pubblici ministeri*? We will concentrate on the methods that prosecutors have and use to make clear that, in their opinion, the police have not performed properly their tasks during the investigation. Here we must remember the distinction between functional and organizational dependence on the police (see above). PG officers are functionally dependent on prosecutors but organizationally dependent on police hierarchical superiors. Moreover, prosecutors can not issue disciplinary measures of their own initiative. But police hierarchical superiors can issue these measures.

Prosecutors seem to be extremely cautious when they have to decide if a *delega* has to be revoked or not. Revoking a *delega* means that prosecutors have decided that particular police officers should no longer be in charge of the investigation, which will be assigned to a different police force(s). This is clearly a huge step, because it means that *pubblici ministeri* do not believe that the police officers are dealing with the case properly:

Normally we tell them what is wrong [...] so, if we realize that they did not do what we asked them to do, we tell them and we can say that, normally, they act as we want [...]
Not implementing the orders coming from the prosecution office amounts to a *violazione disciplinare*.¹⁰⁷ [But] revoking the *delega* is a traumatic measure, you can reach this point, but it is difficult.¹⁰⁸

The majority of the prosecutors we interviewed said that they had never had to revoke a *delega*.¹⁰⁹ Others said that they had revoked some *deleghe*, but that this

¹⁰⁷ This means disciplinary violation. It is not a criminal offence but it is a breach of a duty; in this case: the duty to implement prosecutors' orders. This can lead to the beginning of disciplinary proceedings (art. 16 para 1 disp. att., see chap. 4).

¹⁰⁸ DCP(N45).

¹⁰⁹ See, for example, AP(N48), AP(C46) and AP(N32). In total 12 prosecutors said that they never had to revoke a *delega*, 4 said that they did it sometimes (but not often). One said that he used to do it in the prosecution office where he previously worked. One said that revoking the *delega* is the first thing to

rarely happened.¹¹⁰ One *pubblico ministero* said that, in the past, it often happened that one might revoke the *deleghe*, but that, in the prosecution office where he is working now, it does not happen anymore.¹¹¹ However, the chief prosecutor of a big prosecution office in the south did suggest that revoking the *delega* was the first thing he does if he believes the police are not performing properly.¹¹²

Revoking the *delega* is not the only tool that prosecutors have to stigmatize police officers' behaviour. They can write letters,¹¹³ they can telephone and/or meet police officers to explain to them the reasons why they believe the investigation has not been (or is not being) carried out properly (e. g. the police are too slow).¹¹⁴ Sometimes, they contact the chief or the deputy chief prosecutor¹¹⁵ and/or police officers' hierarchical superiors¹¹⁶ (via mail and/or they set up a meeting) to report and discuss the problems they have with the police. Finally, sometimes, prosecutors can underline the strong link between the way the police has carried out the investigation and the direct (negative) consequence that this had on the outcome of the investigation itself:

It never happened to me, but I know that some colleagues have dropped the accusation explaining that the investigation was not performed properly. And, you know, it is the police who carry out the investigation.¹¹⁷

In some circumstances police officers can be removed from their function. This means that they will not be allowed anymore to work in a specific prosecution office:

So, if police officers do not perform properly or if they commit crimes, because this has often happened [...] so, if there is something wrong the first thing to do is to take the investigation back [i. e. revoke the *delega*]. Moreover, we begin a disciplinary procedure and, if he/she [the police officer] is one of my police officers,¹¹⁸ I officially report that

do. Finally, due to lack of time we did not ask this question to 9 prosecutors (see methodological appendix).

¹¹⁰ See, for example, AP(S6), AP(N41) and DCP(N45).

¹¹¹ AP(N33).

¹¹² CP(S4), see below.

¹¹³ See, for example, AP(N48), AP(N33) and AP(N31).

¹¹⁴ AP(N28). Similar opinions were expressed by AP(C53) and AP(Apl.(N50).

¹¹⁵ See, for example, AP(N33), AP(N31) and AP(S6).

¹¹⁶ See, for example, AP(Apl.(N50), AP(N48) and AP(S6).

¹¹⁷ AP(N32).

¹¹⁸ These are not only the "assigned" police officers, but they are, in general, the police officers who form the *sezioni* of PG. As we said (see above and chap. 4), the *sezioni* are attached at the prosecution office, they are directly linked to chief prosecutors and can not be removed from their functions (of *polizia giudiziaria*) if the chief prosecutor does not agree (art. 56 para. 1 and art. 59 para. 1 and 3 cpp).

we can not trust him/her anymore and I recommend that he is removed from his/her function [of *polizia giudiziaria* in a specific prosecution office].¹¹⁹

But this was the only prosecutor (chief prosecutor of a big prosecution office in the south of Italy) who said that problems with the police during the investigation often happen. It was he who thought that the first thing to do was to revoke the *delega* (certainly after informal communication with the police officer(s). Then, a disciplinary procedure can be initiated. This is clearly a huge step, because it can lead to the removal of the police officer(s) from his/her function. The causes which can trigger this reaction from prosecutors can be, apparently, extremely serious and specific (i. e. committing crimes), but also more general (i. e. the police are not working properly).

So, in the end, prosecutors have different tools that they can use to stigmatize police officers' behaviour when they believe that they have not properly carried out their tasks during the investigation. Prosecutors use these powers, but, in general, they seem to be very careful and reluctant when it comes to revoking a *delega*. Why does this happen? Or, in other words, why do prosecutors believe that revoking a *delega* is such a 'traumatic measure'? Sometimes *pubblici ministeri* said that such a measure was never necessary because police officers always follow their directives.¹²⁰ This does not mean that they never had to reproach the police, but that these situations always involved minor problems and, as a consequence, measures such as revoking the *delega* were not necessary. However, there could be another reason. Police officers are functionally dependent on prosecutors, but, as we explained in the previous two sections, prosecutors depend on the police when they have to take important decisions about the case. So, the police-prosecutor relationship is fundamental to carrying out a successful prosecution. *Pubblici ministeri* know that and, as a consequence, they may be particularly careful before taking measures which can compromise their relations with the police. As one prosecutor said: "No, I never shout at them, because I would never want to have a clash".¹²¹ In a way this seems to be similar to the police-prosecutor relationship in England and Wales, where "police

¹¹⁹ CP(S4).

¹²⁰ See AP(N31) and AP(C54).

¹²¹ AP(N32). It is also interesting to note that a high ranked police officer that we interviewed (Pol.(N34) complained about prosecutors who reproach too much the police. In particular, he said: "here we had one [prosecutor] who was used to call and scream at the chief of the local police station, this is a mistake [...] luckily she left. Now there are not similar cases, but sometimes it happens".

and prosecutors naturally avoid causing each other problems”.¹²² Finally, we should mention, once again, the limitation of our research. In fact, one issue that is hard to get at through these materials is the kind of errors or omissions that are not obvious to the prosecutor on the file.

2.4. Directing the investigation: some considerations on the interaction between police and prosecutors

In the previous sections we described two models of supervision. The first one, that we called the “prompting and reviewing” system, is based on constant interactions between prosecutors and the police. If prosecutors decide to direct an investigation in this way they will have two main powers: issuing directives and reviewing the results of the investigative acts carried out by the police. The second model of supervision is the bureaucratic review system. This appears very different to the “prompting and reviewing” system. In particular, the interactions between police and prosecutors are limited and prosecutors’ power to issue directives seems to be substantially reduced. However, both these models have something in common: police and prosecutors’ functions appear to be divided. In general, the police carry out the investigative acts; and prosecutors’ inputs consist (sometimes) of prompting on the way these should be performed and (always) of review of the results. So, in practice, prosecutors and the police seem to inhabit different worlds. However, this does not mean that these worlds cannot influence each other. Within the “prompting and reviewing” system *pubblici ministeri* can substantially influence the way the investigation is carried out, but they also depend on police implementing prosecutors’ directives. On the other hand, police’s power to influence prosecutors seems to increase considerably when it comes to the bureaucratic review model of supervision. But even in these cases, we should not forget that *pubblici ministeri* still retain “the power to decide”. In the end the type of prosecutorial fact finding model that best captures the way Italian prosecutors direct the investigation could be the hierarchical/investigative.¹²³ On one hand, *pubblici ministeri* are encouraged and certainly (at least when they consider the

¹²² Sanders A. “An Independent Crown Prosecution Service?”. Jan. 1986. Criminal Law Review pp. 16-27. p. 24.

¹²³ Jackson (2004) *op. cit.* pp. 116-124.

case a priority) can be “deeply involved in the investigation” (i. e. hierarchical).¹²⁴ On the other, prosecutors’ need to carry out an “official” and impartial investigation to find the truth (i. e. investigative)¹²⁵ and this is a distinctive feature of their self-professional culture (chap. 7). However, as Jackson explains, these are ideal-types and represent extremes that can resemble tendencies, but do not aim at describing in detail the practice.¹²⁶ So, for example, prosecutors in Italy are not always involved in the investigation and their impartiality is affected by information collected by the police.

It is difficult to say if in general during the investigation the prosecutors’ role is passive and reactive or proactive. Only observations and file analysis of a representative sample of cases could provide this information. *Pubblici ministeri* appear passive because they do not, generally, perform investigative acts; but they are active when they prompt via directives. What we can say is that the reality of supervision is variable. Certainly Italian prosecutors appear more passive and reactive within the bureaucratic review model of supervision compared to the “prompting and reviewing” system.

However, the point here is that looking at prosecutors’ role during the investigation within the dichotomy passive/active would be misleading and too narrow. In fact, we believe that in order to understand Italian prosecutors’ functions when they direct the investigation we also need to take into consideration their professional self-image. As we saw (see chap. 7), this is mainly judicial and it is also based on the principle that *pubblici ministeri* do not want to be “stained” by police’s (crime fighter) activities because they want to be seen as impartial officers. This may explain why prosecutors and the police seem to inhabit different worlds during the investigation. In particular, *pubblici ministeri* want to mark a clear difference between themselves and the police. However, this difference does not seem to have prevented the two legal actors from being functionally interdependent. In practice both sides need some way of negotiating this cultural distance.

In the previous chapter, we argued that, in practice, one of prosecutors’ role (during the pre trial phase) is that of filtering out cases which potentially can not withstand scrutiny at trial. A successful prosecution surely also depends on a good investigation. So, prosecutors’ power to review the results of the investigative acts

¹²⁴ *Ibid.* p. 117.

¹²⁵ *Ibid.*

¹²⁶ *Ibid.*

carried out by the police appears particularly important. In fact, this right seems to enable *pubblici ministeri* to check if the results of the investigation can support the accusation and, perhaps more importantly, if the evidence can be used during the trial. Finally, the analysis of the police-prosecutor relationship during the investigation also suggests that (particularly when the case has been prioritized) prosecutors' function is not limited to reviewing (filtering) the results, but they can also issue directives to shape the way the investigation has to be carried out.

3. Police influence on prosecutors' priorities: directives on anti-crime policies

In the previous sections we have focused on the interactions between police and prosecutors in the pre-trial phase and on the tactics of supervision and the way the police can influence *pubblici ministeri* during the investigation. We have stressed the significance of prosecutors' sense of the importance of a case to the reality of supervision. In the next sections we want to concentrate on influence going in the other direction. This is not so directly linked with investigative acts (even though there may be some connections). Rather it concerns directly the definition of priorities. In particular, we want to analyze the situations when police decisions on priorities can influence prosecutors' definition of the crime problem. In this first section we will focus on the impact of police anti-crime policies.

Because prosecutors and the police do not have the same hierarchical superiors (see above) and belong to different institutions, the police receive directives (from the police hierarchy) on anti-crime policies which are neither binding nor persuasive for prosecutors. Further *pubblici ministeri* do not seem to have any opportunity to discuss these directives or to coordinate their priorities with police priorities:

They [the police] have some objectives and they also have some priorities, for example: one month they receive a directive which says that they have to focus on copyright; and,
--

as a consequence, for one month we are flooded with crime reports which concern copyright breaches.¹²⁷ Another example is prostitution: if they decide to focus on prostitution we are flooded with files concerning prostitution. So, they have some priorities which I am not sure match with our priorities, but [...], to the best of my knowledge, there are no meetings between the *prefetto*,¹²⁸ the chief prosecutor and the *questore*¹²⁹ to coordinate the priorities [...] This means that we arrive later, we receive their crime reports. The only coordination is within the forces of law and order.¹³⁰

No [we do not decide the priorities together with the police], unfortunately we are *collettori*,¹³¹ we receive the urgent matters which are given to us. So, if the *questura* decides to put forward a police operation, for example in a farmstead¹³² or in another place, and they arrest 5, 10 or 15 people, we have to deal with it.¹³³

Issuing directives is not the only way to determine police priorities. For example, one high ranking police officer explained that sometimes the Ministry of the Interior offers to fund new special police units. But the Ministry also indicates the aim of the unit (i. e. street crime).¹³⁴ So, the local police officers are bound if they want the money.

Moreover, police power to take discretionary decisions on priorities seems to be accepted (by prosecutors) not only because *pubblici ministeri*, in practice, cannot influence police decisions (i. e. they are part of different institutions); but also because prosecutors seem to consider this function as a legitimate police function:

Yes, sure, the police have to guard the *territorio*¹³⁵ [...] yes, yes, this is a police function. We can only push the police to focus on certain problems, but we can not do it formally [...] We can also indicate specific investigative acts that the police have to perform, but

¹²⁷ In this case copyright breaches concern illegal copies of DVD and CD. In fact, this *pubblico ministero* works in a tourist area of Italy (at the seaside) and, particularly in summer, there are people (mainly foreigners, illegal immigrants) selling illegal copies of CD and DVD on the street.

¹²⁸ The *prefetto* is the representative of the government (directly dependent and answerable to the Minister of Interior) in specific areas (which are normally quite big). In particular, the *prefetto* is in charge of the coordination of police activities within the designated area (see Act n. 121/1981).

¹²⁹ The *questore* is the chief of the police at a local level. He is answerable to the Minister of Interior and he is responsible for the implementation of policies concerning public security and order (see Act n. 121/1981).

¹³⁰ AP(C53). See also AP(N41).

¹³¹ Literally collectors.

¹³² This prosecutor works in a rural area. So, farmsteads can be used as quiet places to carry out criminal activities (e. g. drug trafficking).

¹³³ AP(N42).

¹³⁴ Pol.(N14).

¹³⁵ The literal translation of the word *territorio* is territory. In this context it means the local area where the police are working.

we can not take decisions which the police have to take [decisions on priorities] [...] This is not our right; these are inputs which come from the *questore* or from the local chief of *carabinieri* [...] We are the terminus of police activity, we do not provide the inputs [...] they have to verify that crimes have been committed on the *territorio* and they have to repress them. We have to judge the persons who have been implicated [by the police] [...] This [guarding of the *territorio*] is not our function. There is a certain co-operation, *ma non siamo noi che andiamo sul territorio*.¹³⁶

The notion of “guarding the *territorio*” has a complicated meaning. In the prosecutors’ view, this concept seems to be linked to three structural features of the role of the police during the pre-trial phase (and even before the beginning of the investigation). First, the police have a very strong link with what is happening on the streets, because they have to control and assess the crime problem in the geographical area where they operate (i. e. the *territorio*). Secondly, the police have responsibility for prevention and repression of crime and the security of citizens in a specific area. Third, and following from the previous two points, the police take the very first discretionary decisions in relation to the definition of priorities.¹³⁷ This does not mean that *pubblici ministeri*’s functions cannot have an effect on prevention, repression and security. In fact, as we have indicated (see chap. 7), prosecutors aim to obtain convictions; and convictions have a deterrent effect which clearly has an impact on prevention, repression and security. Moreover, later (see chap. 9) we will see that prosecutors do not simply swallow police’s decisions on priorities: in practice, they also take discretionary and personal decisions on the definition of the crime problem. What we are arguing here is that *pubblici ministeri* seem to accept a strong functional differentiation between their role and that of the police before the start of a prosecution. Thus, in the example we gave above, AP(N41) said that prosecutors are the ‘terminus of police activity’, as if he wanted to suggest that they do not have control over police decisions (see also, above, AP(N42) who said: “unfortunately we are collectors”). Moreover, and more important, AP(N41) also said that: “they [the police] have to verify that crimes have been committed on the *territorio* and they have

¹³⁶ AP(N41). This means that prosecutors do not spend their time in the street. This also means that the police, and not prosecutors, will decide what is important in the street.

¹³⁷ Prosecutors used different words to explain the concept of “guarding the *territorio*”. For example, AP(53) and AP(N38) talked about the police dealing with public security; and AP(N50) said that the police must prevent and repress the crime. However, they all explained police’s functions (until they start performing investigation activities) using the same 3 concepts: connection with the street, prevention and repression of crime and taking discretionary decisions on crime problem.

to repress them. We have to judge the persons who have been implicated [by the police]”. This suggests an acceptance of the legitimacy of initial police establishment of priorities.

There are exceptions to the system we explained above. Sometimes, in small prosecution offices, prosecutors and the police communicate with each other and try to coordinate their different priorities:

Sometimes the police and the prosecution office have different priorities, but they discuss and compare these different opinions. The police try to influence [prosecutors], for example, they can say: “we did this, now we want to do that” [...] This happens here, also, because it is a small prosecution office [...] For example I know that in [he named a medium-big prosecution office in the north of Italy] the police cannot even talk with prosecutors. I think it is better to have a dialogue with the forces of law and order.¹³⁸

So, there seem to be cases when the *pubblici ministeri* are in the position to influence (or at least to discuss) police’s discretionary decisions on priorities. However, in practice, this does not mean that, for example, prosecutors actually search for crime reports together with the police or, as Vogliotti explained,¹³⁹ that police will implement prosecutors’ directives on priorities. This mainly seems to mean that *pubblici ministeri* can, sometimes, discuss (with the police) or at least be informed of when and how crime reports may be channelled to prosecutors and certain investigative acts will have to be carried out:

¹³⁸ AP(N11).

¹³⁹ Vogliotti (2004) *op. cit.* pp. 484-491.

Here we [the police] often communicate to prosecutors that we want to put forward these 'large scale police' operations.¹⁴⁰ This is because, when you do things like searches, these have to be validated¹⁴¹ [by prosecutors] [...] So, very often, we arrange agreements before; you call and you can say: "Listen, I am sorry, but there is this thing, we are not crazy, but we need to deal with a certain problem". So, we always give advance reports of these actions [large-scale police operations, see above] because it is a matter of correctness, it does not matter that the law does not say that you have to do it [...] So, given that our relations [with prosecutors] are based on correctness, we give advance reports of, for example, the fact we have to carry out some searches, so that the prosecutor will not get 10, 15 requests to validate searches [without knowing that they are arriving], because [otherwise] he/she will be perplexed. Openness and [exchanging] reciprocal information, are very important when the relations are based on mutual trust [...]

In the situations where, for example, there is a *concussione*¹⁴² involving a few thousands euros and they [suddenly] get these things [large-scale police operations], it happens that they say: "It is a difficult period and there is a very important case". For example, at the moment there is a very serious case of *concussione* at the military arsenal; so, they [prosecutors] asked us to avoid making requests of [for example] very complicated telephone tapping. This does not mean that we do not have to do these [investigative acts], but that we have to defer them for a few days, so that they can be pursued properly. I repeat: in a small place like this you can do it, because you have the opportunities to communicate a lot.¹⁴³

Police officers are aware of the fact that their work can be rendered useless if prosecutors are not ready to support them (i. e. validate seizures or arrests).¹⁴⁴ Moreover, as we can see, this form of co-operation does not just concern the moment when prosecutors receive crime reports. In fact, it seems to be more generally related

¹⁴⁰ This police officer has previously indicated as "quantitative police's actions" those involving, for example, drug trafficking at a low level. So, in practice, this means to arrest 10, 15 drug pushers.

¹⁴¹ We explained before that searches can only be carried out if previously authorized by prosecutors. However, there are important exceptions. Police officers retain autonomous powers to perform searches in certain situations (e. g. when they are dealing with drug trafficking). In these cases the police can carry out the searches but they have to refer immediately (and maximum within 48 hours) to the prosecutor, who, within 48 hours, will review and validate the searches made by the police (art. 352 para. 4 cpp). See also, for example, Grevi (2003) *op. cit.* pp. 344-345.

¹⁴² Blackmail of a public official.

¹⁴³ Pol.(N14). Similar opinions were expressed by AP(N11) and AP(C46).

¹⁴⁴ See also AP(C46) who said: "Yes, they call me to say that they will arrive soon with many arrested people [arrests performed by the police must be reviewed and validate by prosecutors and see chap. 4] because they had to carry out a police operation. This clearly helps us to organize our work, but this is important for them as well, because [what happens] if they arrest 50 people and the prosecution office is not ready? It is difficult that they do it on their own, normally they communicate before that they are dealing with these kinds of investigations. This is because, if the prosecution office is not ready to deal with 50 arrested persons, they do not obtain any result".

to important investigative acts which require prosecutors' intervention (e. g. telephone tapping) and which can lead to the discovery of a crime (i. e. after a search). The effect of the cooperation between police and prosecutors is that some crime reports may be collected and treated later or before others. However, even in these situations, *pubblici ministeri* do not seem to have the power to determine police's definition of priorities. Prosecutors can limit the impact of police's discretionary choices, but they cannot demand change in the definition of police anti-crime policies.

We found traces of this system of cooperation in two small sites (one in the centre and one in the north of Italy). So, this seems to be an exception (we visited 10 sites): in big or medium size prosecution offices, this form of co-operation does not work principally because there are too many prosecutors and too many police officers:

No, it has never happened that the police called me to say that they had to arrest 15 people for drug trafficking or similar things. This is, also, because the prosecutor who is doing the *turno arresti* [a different name for the *turno reperibilità*¹⁴⁵] always changes, so they should call before [to know who is doing the *turno arresti*] [...] In fact, it is a problem to find, suddenly, that you have 15 arrested people [to deal with].¹⁴⁶

To sum up, before the beginning of the investigation, the distinction between the prosecutor and police functions seems marked. The police provide prosecutors with the information (crime report) on which an investigation and (possibly) a prosecution will be based. There are exceptions, but even these do not give the *pubblici ministeri* the tools to control police decisions on the definition of priorities. Finally, it should be noted that there seems to be a substantial difference between the police and *pubblici ministeri* definition of the crime problem. Prosecutors in interviews were aware of police concerns in relation to crimes like street crime, illegal immigration (i. e. Bossi-Fini Act, see chap. 11), prostitution (not organized crime dealing with prostitution), drug pushing in the street and infringement of copyright (i. e. selling fake CDs and/or DVDs in the street). In the next chapters we will see that these do not seem to be priorities for prosecutors.

¹⁴⁵ As we said (chap. 6) under the *turno reperibilità* cases are randomly distributed to all prosecutors (this is again based on a fixed period), but the aim of this pattern is to have a prosecutor who deals immediately with emergencies (i. e. arrests).

¹⁴⁶ AP(N32). See also AP(N30).

3.1. Police influence on prosecutors' priorities: arrests

As we have explained before (see chap. 4) the decision to arrest is the police's right (although in some circumstances the arrest is compulsory); prosecutors intervene (must intervene) later, when they have to review the arrest procedure in order to check if this was lawful or not (they may decide to set the accused free immediately). Moreover, within 48 hours the *pubblici ministeri* must refer the case to the judge who will finally decide if the arrest was lawful. Of course, arresting is also a way to deliver crime reports to prosecutors (when someone is arrested because he/she has presumably committed a crime). So, the arrest procedure appears relevant to determining the cases that prosecutors will have to deal with. In fact, we saw that, within prosecution offices, there are prosecutors (there is a turnover) who exclusively deal with urgent matters (i.e. *turno reperibilità*, see chap. 6) and these are, normally, the product of arrests carried out by the police. In this section we want to analyze the impact that the police's right to arrest may have on the definition of prosecutors' priorities; while in the next chapters we will see how prosecutors can limit this impact. In particular, here we will mainly use the example of the Bossi-Fini Act: the effect that this piece of legislation has had on the prosecutors' job seems to explain well what can happen when the police carry out a substantial number of arrests.

As previously indicated, the Bossi-Fini Act (passed in 2002 by the former centre-right government) deals with illegal immigration. It includes different provisions and, in particular, it provides that a foreign national who does not comply with a deportation order must be arrested (compulsory arrest) and immediately sent for trial (see art. 14 para. 5 *bis*, 5 *ter*, 5 *quater* and 5 *quinquies* of the D.Lgs. 286/1998 as amended by the Act n. 189/2002). So, this is a crime that only illegal immigrants can commit. The vast majority of the prosecutors we interviewed said that this Act has created a substantial increase of the amount of their work, because they have to deal with a lot of arrests.¹⁴⁷

¹⁴⁷ 16 prosecutors out of 27 said that the Bossi-Fini Act increased very much the amount of work. 5 talked more generally about the fact that crimes committed by immigrants (not only crimes linked with the Bossi-Fini Act) increased very much. One chief prosecutor said that, in his prosecution office (middle big in the north of Italy), they can cope with the Bossi-Fini Act. One was not asked (due to lack of time). One did not know (because he is a prosecutor attached at the court of appeal). Finally, 3 prosecutors working in a big *procura* in the south of Italy said that they do not feel the pressure of the Bossi-Fini Act, because there is not very much immigration there.

For us this [the Bossi-Fini Act] amounts to a considerable increase in the backlog of cases. This is because the procedure is quite complicated. The arrest is compulsory, and we do not have enough cells where we can put the arrested person while we wait for the *direttissima* trial,¹⁴⁸ which is compulsory as well. So, sometimes, it happens that we have to transfer them to jail, because it is not possible to have the trial the day after, then you need to arrange an escort [to bring the arrested persons in jail] [...] you need to nominate a translator [because the arrested persons normally do not speak Italian], to pay him [...] [moreover] the difficulties are linked to the fact that you need to deal with many arrest procedures at the same time, for which you need to organize the hearing [the arrest procedure must be, eventually, reviewed by a judge], the charges¹⁴⁹ etc.¹⁵⁰

This piece of legislation, apparently, has not had the effect of creating a new priority for prosecutors. In fact, all the *pubblici ministeri* we interviewed said that the Bossi-Fini Act and illegal immigration were not perceived as priorities (see chap. 11). However, due to the fact that the number of arrests has dramatically increased (and that illegal immigrants must be immediately sent to trial), prosecutors can be, in practice, forced to treat these cases rapidly:

No [it is not a priority] [...]. However, the emergency, within the prosecution office, is produced by the fact that the act generates many arrests. This is why it becomes an emergency. In fact, [...] these are all files which must be taken to the end. That Act does not say that we have to treat those [crimes] as a priority, the priority is *de facto*.¹⁵¹

So, the fact that police officers are legally bound to arrest illegal immigrants eventually binds prosecutors as well, because they cannot choose to defer the case (they must refer it to the judge within 48 hours from the arrest, see above). In this sense a case becomes a “*de facto* priority”.

The police right to arrest (not only for illegal immigration) also seems important because police officers’ efficiency is evaluated on the base of their statistics:

We need to show some statistics, statistics about criminality [...] In particular, they [police local and national hierarchical superiors] need to evaluate the number of crimes

¹⁴⁸ This is a special proceedings, which allows prosecutors to send immediately to trial before the judge the accused (arrested) person(s) (art. 449-452 cpp.).

¹⁴⁹ Some immigrants are arrested for Bossi-Fini, but then prosecutors (and the police) discover that they are also involved in other criminal activities (e. g. theft, drug pushing etc.). So, they have to prepare the file being sure that the arrested person(s) is charged for all the crimes for which he/she is accused.

¹⁵⁰ AP(C47).

¹⁵¹ AP(C46). See also AP(N32).

and how we carry out our functions. Amongst the criteria used to make these evaluations there are: arrests, deportations, denunciations and the controls we perform on persons and vehicles. Sometimes, if the data do not look good we can receive instructions to perform more arrests. This normally arrives from the *questore*.¹⁵²

Thus, the number of arrests is one of the criteria used to evaluate the police officers' performance. So, if police officers need to show good statistics, they will presumably (also) try to carry out more arrests. Unsurprisingly this seems to have an impact on prosecutors' job:

Arresting is another important point, because, at the end of the month, they need to have a certain number of arrests. So, they push to arrest even when we do not agree.¹⁵³

In the last two sections we have described the way that the police can influence the prosecutors' definition of priorities, mainly in two ways: by implementing directives on anti-crime policy and through the arrest procedure. These forms of influence can sometimes be correlated with each other:

I have the strong feeling that they receive instructions to focus on certain things from their hierarchical superiors; and this is normal. We [prosecutors] certainly feel this influence; we particularly feel it in relation to arrested persons. In fact, for arrested persons, it mainly depends on decisions taken [by the police] [...] In particular, for arrested persons caught red handed, it depends on whether the police decide to focus on areas where there is drug trafficking or prostitution or where there are illegal immigrants. This is how it works.¹⁵⁴

So, directives push the police to focus on certain priorities; and, in order to execute properly these orders, the police (also) carry out arrests. Moreover, as we saw, the more arrests they perform the better the statistics are and, as a consequence, the better the directive will be seen as having been implemented.

The analysis of the impact that police's decision to arrest can have on prosecutors' definition of priorities also leads us to some important issues concerning the strict division between police and prosecutor functions within the arrest procedure:

¹⁵² Pol.(N14). Similar opinions were expressed by Pol.(N34), Pol.(C51) and Pol.(N52).

¹⁵³ AP(N28).

¹⁵⁴ DCP(N45).

You can not call [the police] to tell them to stop [arresting under the Bossi-Fini Act], so I decide on *archiviazione*. This happens for two reasons. First, because we do the *turno reperibilità* every two months, and we are 70 prosecutors [so we do not know police officers personally]. Second, the legal rules [for the Bossi-Fini Act] require that the arrest is compulsory when the accused is caught red handed,¹⁵⁵ and they do it! I can not question a police officer's act.¹⁵⁶

This [the fact that prosecutors do not interfere in police's decision to arrest] is fair enough: they [police] have to do it [to arrest] and we have to handle the situation. I do not know if other prosecutors do it, for me it is interference [...] Yes, if I am dealing with an environmental crime and I get 15 arrested drug pushers, I have to do them, I have to find a way to carry on.¹⁵⁷

No, I do not agree [...] The decision to arrest is a police officer's right and you have to respect it. The code of criminal procedure says that the prosecutor must be immediately informed and that he/she is the *dominus* of the investigation. So, if they ask me for a suggestion, I tell them my opinion, but I always conclude saying that the decision to arrest is a police's right and that I have different powers [i. e. to review the arrest procedure].¹⁵⁸

We interviewed a prosecutor who was doing the *turno reperibilità* (so she was responsible for the arrests).¹⁵⁹ The mobile rang a first time, the police explained the facts to the prosecutor and said that they were not sure if they could make an arrest (it was not clear exactly what had happened, it seemed to concern an attack on a police officer). The Prosecutor listened carefully and replied that she was not sure. Then the mobile rung again, because the police wanted to explain better what happened and they were still not sure if they could make the arrest or not. At this point the prosecutor (quite upset) said: "I can not decide for you. You are in charge of the arrests, this is your job. Then, if I am not happy, I will set the arrested person free".

As we have said, in the next few chapters we will see that prosecutors actually have the power to limit the impact police decisions to arrest. However, here, as in the previous section, we want to emphasize prosecutors' desire to stress the functional

¹⁵⁵ In the Bossi-Fini case the immigrant can be caught red handed (simply) because he/she is an illegal immigrant in Italy.

¹⁵⁶ AP(N30).

¹⁵⁷ AP(N42).

¹⁵⁸ AP(N33).

¹⁵⁹ AP(N39).

differentiation between police and prosecutor roles. It is presented as if there were no overlaps at all between the police (who decide on the arrest) and prosecutors (who review the procedure).

3.2. Police influence on prosecutors' priorities: individual cases

Until now we have analyzed the impact that the police decisions to focus on certain types of crimes (i. e. illegal immigration) can have on prosecutors' job. Now we want to concentrate on a different situation. We want to describe the police influence on prosecutors' decisions in individual cases.

Prosecutors seem to accept the fact that the police will normally advise them which cases appear more urgent and serious:

The police tell me the cases which look particularly serious [...] For example, I recently had a case of robbers operating in a small village [...] These are bullies who have crossed the line: they go to bars and they do not pay, they require their families to give them money, they blackmail friends and acquaintances and they become violent etc. this case was indicated to me by a *maresciallo*¹⁶⁰ belonging to the *carabinieri* and working in that village. So, in 3 days, I have to say that I had no other urgent matters, I prepared the documents applying [to the judge] for pre-trial custody and the judge decided [agreed with the request] in 15 days [...] Anyway, I have to say that, in general, I always intervene when the police report me that a case is serious.¹⁶¹

Although, some *pubblici ministeri* seem to rely very much on the police,¹⁶² it is difficult to say how important the police's opinion is for prosecutors.¹⁶³ In fact, some said that they always act upon a police's indication that there is an emergency.¹⁶⁴ However, in general, *pubblici ministeri* claim that police reports (written and/or oral) can only partially influence their decisions.¹⁶⁵ This becomes

¹⁶⁰ The name of the chief of *carabinieri* at the local police station.

¹⁶¹ AP(N30). Similar opinions were expressed by AP(Apl.(N50) and AP(N48).

¹⁶² See, for example, AP(N30) and AP(N48).

¹⁶³ It was impossible to elaborate reliable statistics. This is because prosecutors' considerations on the importance of police's opinions on specific cases were, most of the times, difficult to interpret. In particular, *pubblici ministeri* could not really describe how important police's influence is. They preferred to say that this was one of the parameters that they have to consider when they determine their priorities.

¹⁶⁴ See, for example, AP(C46), AP(N30) and AP(N48).

¹⁶⁵ See, for example, AP(N38), AP(N28) and AP(Apl.(N50).

particularly clear if we look at the cases in which police officers make references to prosecutors about the perception that the public has of the crime problem:

The initial impact [i. e. the consequences that criminality creates on the local community] is always upon the police [...] [and] they can tell me that the local community is worried. Sometimes this makes me aware of the problems and [in these cases] I pay a particular attention to the allegations. Sometimes they write it up, and they explain that people have complained repeatedly. In other words: they make me understand that they are prioritizing a case, because this is a priority for the people [...] Yes, they make me aware of the problems, but this only partially influences me.¹⁶⁶

The police have more direct relations with citizens, so they look at the things in a partially different way [compared to prosecutors] [...] [This happens] because they deal with security issues, while we intervene later [...] We have to be more detached.¹⁶⁷

Here it is interesting to note that *pubblici ministeri* want to mark the difference between themselves and the police who deal with “the initial impact” that criminality creates on local communities and prosecutors who have to be “more detached”. This seems to suggest that the police’s opinions will be taken into account but that prosecutors will also look at the case from a different angle (so they will be only partially influenced). In fact, sometimes, *pubblici ministeri* seem to be able to mediate police’s perceptions of the importance and seriousness of a case:

We have to be more balanced compared to the police, this is because we have to guarantee the *legalità*¹⁶⁸ more than them [...] So, this [the police reporting that local communities are worried] could influence us when we propose a particular sentence at trial [...] Yes we take into account that the police come to tell us that the local community is worried, but it depends on the case. [For example] if it is a brawl we consider: how many persons, injuries, the *allarme sociale* etc. So, if there are cases which have aroused great interest, I am partially influenced. But I always base my decisions on the injuries [suffered by the victim(s)] [...] Moreover, I never want to go for an exemplary punishment, I may ask for something more, but not excessively, because I always wonder: why these four poor devils and not all the others?¹⁶⁹

¹⁶⁶ AP(N28).

¹⁶⁷ AP(N38). Similar opinions were expressed by AP(N28) and AP(C46). See also AP(N32) who said: “Anyway, they [police] do not think about the trial, they just deal with the immediate consequences [that crime creates]”.

¹⁶⁸ This word literally means legality. So, in this context *legalità* means that prosecutors must guarantee that the investigation was lawful and that the rights of the accused person(s) have been respected (see chap. 7).

¹⁶⁹ AP(N38).

So, prosecutors take into consideration police opinions when they report that a crime is serious (e. g. that it has had a great impact on the local community). However, they also consider other criteria (e. g. the damage suffered by the victim(s)). We will see that differences in police and prosecutor views of what should be regarded as a priority may also limit the impact of police decisions to arrest and to focus on certain anti-crime policies (i. e. illegal immigration).

So what we want to underline is that the police's discretionary decisions on priorities can be mediated by the *pubblici ministeri*'s views. We are not arguing that, in practice, the police do not influence prosecutors when they decide if a case (or a type of crime) should be prioritized. But police influence seems to be just one of the factors that determine the way prosecutors establish their priorities.

Before we conclude we still need to describe two situations. The first one is not about the impact that the police's opinions may have on prosecutors' decisions in a specific case. It explains how the police's decision to prioritize a case can affect, in general, *pubblici ministeri*'s job:

If I need police forces for an investigation which is not perceived as a priority by police hierarchical superiors, it can be a problem. They will never tell you that they will not support you, but if you do not get the best men [...] Yes, it has happened, even for serious cases, but the point is: who considers these cases to be serious?¹⁷⁰

When a case has aroused great interest and you see it on the newspapers for many days, the police are focused to deal with that case as soon as possible. So, for example, I can not contact the police unit which is working for me because they are all doing that case.¹⁷¹

So, in these situations, the consequence is not that the police will influence the way *pubblici ministeri* define the crime problem, but that cases which have been prioritized by prosecutors may not be treated as a priority by the police. However, prosecutors can avoid these problems by trying to work with the same police officers.¹⁷² In fact, we explained before (see chap. 6) that there are systems that police officers use to be sure that a particular prosecutor will deal with a particular case. So, the strong connection between a prosecutor and the police officers he/she trusts the

¹⁷⁰ AP(N48).

¹⁷¹ AP(N31).

¹⁷² L(N35). Similar opinions were expressed by L(N21) and Pol.(N34).

most can, potentially, ensure that the case which has been prioritized will be carried out properly.

The second example concerns the fact that the police can have a sort of mediation function in stopping certain cases before they reach the prosecutor:

I think that, particularly in small places, the police still retain the right to try to find peaceful solutions and they also have cautioning powers. In the big cities this does not happen anymore. The *maresciallo* belonging to the *carabinieri* who operates in small places can feel the problems and, eventually, can caution people that they might be formally accused in the future. I think that this mediation function is very interesting.¹⁷³

The analysis of Italian police's cautioning powers goes far beyond the current study. We just need to say that, formally, this is not (unlike England and Wales) a police function. In Italy there is no formal power to caution (this is clearly a logical consequence of the legality principle). Moreover, this seems to be mainly concentrated in small places, where police officers are known¹⁷⁴ and where "lawyers are not so many and [as a consequence] they do not have to push so hard for a case".¹⁷⁵ So, the impact of this form of mediation seems to be geographically limited. However, here we have to underline that this function can increase even more police's powers to take discretionary decisions about the cases which will reach the prosecutorial stage.

To conclude, in these sections we have explained that the police not only influence *pubblici ministeri* during the investigation, but they also have an impact on the definition of prosecutors' priorities. Why does this happen? We explained that the police have to implement directives on anti-crime policies that prosecutors cannot discuss or influence; that they have the right to arrest and their job is also assessed according to the number of arrests they perform; and that they can advise prosecutors on single cases. However, we also pointed out that there are strong functional differences and that prosecutors claim to be "more detached" from the police at this stage of the proceedings. These differences (compared to the police) certainly do not prevent prosecutors from being exposed to, and influenced by, the police's discretionary choices on the definition of the crime problem. However, sometimes,

¹⁷³ AP(N31). Similar opinions were expressed by AP(N48) and AP(N30).

¹⁷⁴ AP(N30).

¹⁷⁵ AP(N48).

prosecutors seem to be able to mediate police's decisions by taking into consideration other criteria.

Finally, there is another consideration which deserves to be mentioned here. The strong functional differences and the "distance" between the police and prosecutors at this stage of the proceedings seem unsurprising if we look at prosecutors' professional culture. In fact, as we said (see chap. 7), the *pubblici ministeri* believe that the police act like crime fighters and that, on the contrary, they have to be impartial figures. So, it seems that prosecutors want to mark their cultural distance from the police officers who are described (by *pubblici ministeri*) as figures influenced by directives on anticrime policies and by "the initial impact" of the crime problem (i. e. complaints coming from the 'man in the street'). However, as we explained, the consequence, in practice, is not that prosecutors are uninfluenced by the police's decisions and opinions, but that they can mediate this form of influence.

4. Conclusion

There are two main questions we have tried to answer in this chapter. First: what are the key elements which describe the police prosecutor relationship during the investigation? We explained that "directing the investigation" does not seem to imply that *pubblici ministeri* carry out all the investigative acts or that they autonomously decide the strategy of the investigation, but that there are interactions between the police and *pubblici ministeri*. The number and the nature (prompting and reviewing or bureaucratic review) of these interactions will determine how effectively the prosecutors' right to direct the investigation becomes a reality in practice (i. e. to challenge what Hodgson calls "the case parameters set by police"). Moreover, the fact that prosecutors direct the investigation does not seem to affect their professional and legal culture. *Pubblici ministeri* keep emphasizing the functional and cultural differences (and distance) between them and the police. However, it seems that, in practice, prosecutors depend very much on police initiatives during the investigation.

The second question is: what is the impact (during the pre-trial phase) of police decisions on the definition of priorities? First, prosecutors are influenced by police discretionary decisions on the crimes to prioritize. Secondly, at this stage there is a strong distinction between the functions that these two legal actors have to carry

out. Third, it seems that prosecutors do not simply “swallow” police’s priorities, but they treat them as one of the parameters they need to take into account to define the crime problem. Thus, it seems that *pubblici ministeri* interpret their relations with the police during the pre-trial phase in terms of strong functional and cultural differences which, in prosecutors’ view, should mark the distance between these two legal actors. These differences are less clear during the investigation, but they appear unambiguous when the police collect crime reports and *pubblici ministeri* refer to the fact that they have to be “more detached”. However, as we explained, in practice, the result is not that prosecutors are unaffected by the police’s decisions.

Finally, the analysis of the police prosecutor relationship during the pre-trial phase also suggests important influences on prosecutors’ professional culture in practice. In particular, prosecutors’ culture is not simply reflected in their “filtering action” (see chap. 7). *Pubblici ministeri* can also review the results of the acts carried out by the police, prompt inputs to decide the strategy of the investigation and mediate the impact of police’s priorities. Filtering, reviewing and prompting can be strongly connected. This is because prosecutors can issue directives and review results for the purpose of shaping the investigation the way they want and to obtain more and better information to decide if a case can stand scrutiny at trial. Mediating police priorities may be regarded as a form of filtering, aimed not at deciding the cases which have to be sent to trial, but those who have to be prioritized. This issue will be discussed in the next chapters.

**PART III: PROSECUTORS’
CONSTRUCTION OF PRIORITIES**

CHAPTER IX. PROSECUTORS AND THE DEFINITION OF PRIORITIES

1. Introduction

We concluded the previous chapter by explaining the influence that the police can have on prosecutors' definition of priorities. But we indicated that *pubblici ministeri* also take into consideration other criteria which shape their decisions and limit the influence that the police have upon their decision-making. What are these further decision-making criteria? This is the question we want to answer here. So with this chapter we want to develop a particular focus on defining the crime problem. At its broadest 'defining the crime problem' has a sociological meaning which might be better captured by the phrase 'the social construction of crime'.¹ Clearly those who make prosecution decisions are a small part of this broader social process, being influenced by broader social discourses and in turn influencing them (i. e. the discourses) by their decision-making. This thesis has an especial focus on prosecutors' limited but significant part in this broader process. This is built around prosecutors' determination of priorities in prosecution. In order to understand this we need to examine their criteria for decision-making. This introduces two rather ambiguous concepts, that of a 'priority' and that of a 'criterion for decision-making'. Given the importance of these concepts to our subsequent analysis we start by defining them both and their interrelationship.

In this chapter the decision-making process will be categorised as respectively 'external influences' or 'personal considerations'. The 'external influences' are those that prosecutors have not created themselves but cannot in practice (and do not necessarily want to) completely disregard. Most obviously these are legal criteria (e. g. *prescrizione*). The personal considerations relate to prosecutors' personal discretionary choices, their own views of what is or is not important or urgent. How do these different types of criteria for decision-making relate to the idea of a 'priority'? In one sense the notion of priorities connotes a way of treating a case, giving it 'preferential treatment' by dealing with it first or according more care, time or resources to its treatment. But the term 'priority' also has another more personal connotation, relating to a personal attitude towards something such as a feeling that the case is serious or urgent in some sense (this might be termed a personal preference). Sometimes, perhaps often, a prosecutor's personal preference (a personal

¹ See, for example, Muncie J. "The Construction and Deconstruction of Crime". In Muncie J. and McLaughlin E. eds. "The Problem of Crime". 2001. 2nd ed. London: Sage. pp. 15-16.

feeling that something is important or urgent) may lead to their ‘prioritization’ of a case in the sense of according it earlier or more detailed treatment (or giving it more resources). But lawyers and sociologists are familiar with the idea that legal or social actors should not and cannot simply or always act on their own personal preferences. There are also the external influences (criteria) which may also shape decision-making (the law or relevant bureaucratic rules for example).

Now, at this stage we need to make a further conceptual clarification. In Italy there is only one legal principle which ‘externally’ imposes a clear choice (or a non-choice) on prosecutors. This is the legality principle. Prosecutors have to prosecute all cases. In formal legal terms, no discretion is allowed. So, when we describe other legal rules as external criteria this does not imply direct legal criteria for prosecutors’ decisions. The Italian criminal justice system does not have anything similar, for example, to the Code for Crown Prosecutors² or the Conditional Cautions Code of Practice³. This is because these are Codes which determine which cases shall be prosecuted. There can be no overt place for such Codes where there is the legality principle and prosecutors (and judges) are in constitutional theory externally independent (i. e. from the executive, see chap. 4).⁴ In Italy, legal criteria become important not because they are designed to bind prosecutors’ decisions on priorities but as a consequence of prosecutors’ professional culture: magistrates want to be seen as bearers of the law. As we have said (chap. 7), Italian prosecutors’ professional self-image is based on their sense of themselves as being judicial figures. Thus, while the influence of legal rules cannot be direct, it can be indirect. *Pubblici ministeri* choose to look at legal criteria as sources to determine priorities in the sense of treating cases first or with more resources or care. As a consequence, ‘the legal rules’ exert an influence on decision-making. However, we will argue that they do not exclude the influence of personal priorities: even where legal rules clearly have an influence, we will underline the importance of personal criteria based on prosecutors’ socio-political views. Our analysis of legal influences will be structured around two issues: the construction of urgency and the construction of seriousness. The former is related to procedural legal rules: *prescrizione*, arrest and pre-trial control measures. The latter

² <http://www.cps.gov.uk/publications/docs/code2004english.pdf>

³ <http://www.homeoffice.gov.uk/documents/cond-caution-cop?view=Binary>

⁴ Guarnieri writes: “In Italy [...] there is no formal political responsibility for criminal prosecutions: the compulsory principle is thought to make it superfluous, since it is said that the public prosecutor must ‘only apply the law’”. Guarnieri (1997) *op. cit.* p. 186.

relates to substantive legal criteria: legislation, the characteristics of the perpetrator and the impact of crime on society. We will argue that external influences are strongest in their construction of urgency. In contrast, the legal criteria constructing seriousness leave more room to the exercise of personal priorities.

Of course we will not only concentrate on legal influences. Bureaucratic criteria determined within prosecution offices will be analyzed as well. These criteria (like the legal ones) are not binding. Moreover, they appear, in general, to leave a great deal of room for the exercise of prosecutors' personal priorities (i. e. they are not strongly influential). The final criteria for decision-making that we will analyze have a strong practical nature. These mainly concern the investigation and seem to confirm that the influence of prosecutors' discretion can be substantial in making personal decisions on the definition of the crime problem in the pre-trial phase.

We would also remind the reader that in this chapter we will not deal with *allarme sociale*. This is certainly an important decision-making criterion. But it is an informal, politically contested or contestable and uncertain factor in decision-making that has a particular importance to the argument of this thesis. So, it will be treated in a separate (following) chapter to emphasize its characteristics and importance in the definition of the crime problem.

1.1. The debate in Italy

The Italian academic literature has mainly dealt with purely legal questions. The debate is around the tension between the legality principle and possible legislative reforms to determine prosecution priorities. Within this debate priorities are not treated as matters relating to personal preferences. The issues are about when one case might be treated as a priority (i. e. before another one) because this is the way to provide a more efficient service. A priority is never seen to reflect prosecutors' definition of the crime problem. This is because the legality principle (in its strict legal interpretation) is seen within the Italian literature as preventing the exercise of individual (even if widely shared) preferences. So, this literature has not really aimed at addressing the question of prosecutors' discretionary powers. But some interesting points about the prosecutors' legal environment can be made.

One of the main issues discussed by the Italian literature concerns legislative interventions to reduce the amount of cases that must be prosecuted. The proposals are various: there should be more legally defined exceptions to the legality principle (see chap. 4); depenalization; *archiviazione* should be easier; crimes should not be prosecuted if they only have minor consequences.⁵ But these changes should never affect the legality principle, which must be the basic legal rule. The expediency principle is not an option because, as Chiavario argues, it enables prosecutors to take discretionary choices.⁶ These authors are arguing that the system is not working properly. For example, Zagrebelsky explains that there is a substantial difference between what the system should do and what happens in practice.⁷ Citizens demand more justice, but prosecution offices are not able to provide this service. As a consequence, general criteria to reduce the number of prosecutions should be created.⁸ However, these have to be found within the existing legal structure based on the legality principle.

These legal reforms are certainly not the only method to deal with the problems caused by the number of cases to be prosecuted. Zagrebelsky claims that measures such as the depenalization of petty crimes have not been successful and the backlog of cases has increased. So, the author concludes that it is necessary to set out internal priorities within prosecution offices, or at least within those prosecution offices which cannot cope with the amount of work.⁹ But how can priorities be determined if, at the same time, the legality principle has to be respected? This is the second issue fundamental to the Italian academic debate. Prosecutors should not be given an unfettered discretion to discontinue or continue cases as they wish, or purely on the basis of the circumstances of the case. This would definitely undermine the legality principle. Discretion should be structured by pre-determined principles. So, a priority should be the result of the application of efficiency-based criteria aimed at

⁵ Chiavario M. “*Obbligatorietà dell’azione penale: il principio e la realtà*”. In Centro Nazionale di Prevenzione e Difesa Sociale (1994) *op. cit.* pp. 85-92; Neppi Modona G. “*Principio di legalità e nuovo processo penale*”. In Centro Nazionale di Prevenzione e Difesa Sociale (1994) *op. cit.* pp. 119-129; and Zagrebelsky V. “*Stabilire le priorità nell’esercizio obbligatorio della azione penale*”. In Centro Nazionale di Prevenzione e Difesa Sociale (1994) *op. cit.* pp. 101-118.

⁶ Chiavario (1994) *op. cit.* p. 83.

⁷ Zagrebelsky (1994) *op. cit.* p. 101.

⁸ Chiavario (1994) *op. cit.* pp. 84-85.

⁹ Zagrebelsky (1994) *op. cit.* pp. 103-104.

improving (and finding) the best practices to deal efficiently with cases.¹⁰ For example, petty crimes which can be dealt with in a brief and standardised way (e. g. road traffic offences) should be prioritized (i. e. treated before the others, not as a personal priority or preference).¹¹ Moreover, decisions on the definition of the priorities should be taken by Parliament and/or the CSM¹² and chief prosecutors should have the responsibility to organize their offices according to these (efficiency based) guidelines.¹³ However, the Minister of Justice must not be involved, otherwise *pubblici ministeri* might lose part of their independence from the executive power.¹⁴

Zagrebel'sky has not just set out the general 'rule' which could 'save' the legality principle and allow the determination of priorities (i. e. the application of general efficiency based criteria). He has also indicated some of the external legal criteria which, in practice, could be taken into account to determine the cases to prioritize. Again the author is not suggesting that these should be direct formal criteria for prosecution. Only the legality principle has this function (see above). However, they are legal provisions that might be used as criteria to determine priorities (i. e. act as external influences). In particular, the author indicates these criteria:

- a) The damage caused by the crime.
- b) The personality and dangerousness of the accused person(s) (both determined on the basis of his or her crime record).
- c) Whether the crime has substantially affected the property rights of the victim(s).
- d) Whether the accused person(s) did or did not eliminate or limit the effect of the crime (e. g. industrial accidents, environmental crimes etc.).

¹⁰ *Ibid.* p. 105; and Chiavario (1994) *op. cit.* pp. 95-97. See also, Neppi Modona (1994) *op. cit.* pp. 119-129. A very similar opinion (or better to say identical) was recently included in a resolution issued by the CSM. This document was approved November 9th 2006 and it dealt with the problems caused by the recent *indulto* Act (n. 241/2006, this is a piece of legislation granting pardon, but different compared to amnesty, because this cancels the crime, while the *indulto* simply eliminates part or all the punishment). The CSM remarked that the definition of priorities should not be the result of discretionary choices made by single prosecutors (resolution of the CSM November 9th 2006, as reported in *Questione Giustizia*. 2006. Vol. 6. pp. 1075-1081; see also Santalucia G. "*Obbligatorietà dell'azione penale e criteri di priorità*". 2007. *Questione Giustizia*. Vol. 3. pp. 617-621).

¹¹ Zagrebel'sky (1995) *op. cit.* p. 17.

¹² There is a clear difference between these two organs. The parliament has a democratic mandate; while the CSM's members are not elected. So, the power to take decisions on priorities would be allocated to the CSM because it is composed by experts, not because it represents the public.

¹³ Chiavario (1994) *op. cit.* pp. 95-97.

¹⁴ Neppi Modona (1994) *op. cit.* pp. 119-129.

- e) Whether a pre-trial measure has been issued: such cases must always have priority, because the consequences of these measures (for the accused person(s)) must be limited.
- f) The punishment which might be, in practice, inflicted.
- g) Aggravating and mitigating circumstances, because they can determine if a crime had a substantial or highly reduced impact.
- h) The constitution and the Acts of Parliament (including amnesty) because they may be relevant to determining how important certain interests are for the legislator.¹⁵

Zagrebelsky also said that time should not be an issue. So, the moment at which a prosecutor received a crime report should not be important.¹⁶ Moreover, he remarked that guidelines on priorities should never lead to the situation where certain crimes are never prosecuted.¹⁷

Finally, Zagrebelsky argued that the specialized units created within prosecution offices should reflect the priorities (still based on efficiency) of the prosecution office.¹⁸ In particular, the author claims that positive effects have been produced by creating the following specialized units: industrial accidents (injuries, manslaughter etc.); industrial safety and prevention of injuries; industrial diseases; environmental crimes; protection of consumers (e.g. food safety) and illicit medical practices (i. e. doctors unauthorized to perform certain activities); town planning; white collar crimes; certain crimes (like domestic violence and abuse) committed within the family and/or against elderly people; manslaughter and injuries if they do not involve car accidents and/or industrial accidents; thefts, handling stolen goods and forgery concerning cheques and frauds involving (as victims) insurance companies; different petty crimes (e. g. road traffic etc.); protection of artistic and archaeological goods and sites; intellectual property.¹⁹

Moreover, when Zagrebelsky was chief prosecutor in Turin, he issued a famous circular (in 1990) which was aimed at creating a hierarchy of priorities (still based on objective criteria):²⁰

¹⁵ Zagrebelsky (1995) *op. cit.* pp. 35-42.

¹⁶ *Ibid.* p. 35.

¹⁷ *Ibid.* p. 41.

¹⁸ *Ibid.* pp. 42-43.

¹⁹ *Ibid.* pp. 30-31.

²⁰ Zagrebelsky V. "Flusso delle notizie di reato, organizzazione delle risorse, obbligatorietà dell'azione penale". 1992. In "Procure circondariali (organizzazione del lavoro dei magistrati e rapporto con la polizia giudiziaria)". In Quaderni del Consiglio Superiore della Magistratura n. 56. pp. 175-176.

- a) Crimes where the accused person(s) is subject to pre-trial measures.
- b) Serious crimes (to be determined according to the criteria indicated above: personality of the accused person(s), punishment etc.).
- c) All other cases.

Zagrebel'sky argues that only chief prosecutors are entitled to issue guidelines on priorities. He believes this power stems from art. 70 para. 3 (ord. giud.) which confers on chief prosecutors the power to organize prosecution offices.²¹ However, he has also argued that, in order to ensure a certain degree of uniformity, the Parliament should make recommendations concerning the definition of priorities; and that chief prosecutors should ensure the conformity of the guidelines issued within prosecution offices with these recommendations. However, Parliament should not indicate the crimes for which the prosecution can be discontinued, but only those which should be prioritized.²²

Finally, we should underline that there have been criticisms of the argument that priorities can cohabit with the legality principle. The point, unsurprisingly, is that if priorities are created the legality principle is affected and prosecutors may be prevented from prosecuting (or may choose not to prosecute) certain crimes.²³ Moreover, Nannucci points out (after explaining that Italian prosecutors make, in practice, many discretionary choices)²⁴ that efficiency based criteria may be difficult to apply in practice. In particular, the author claims that cases where the *prescrizione* is shorter will be prioritized (otherwise the *prescrizione* blocks the prosecution), but these are, normally, the less serious crimes (*contravvenzioni*²⁵). On the other hand, if the seriousness of the case is the main criterion *delitti* should always be prioritized compared to *contravvenzioni*, because the law says that they are more serious.²⁶

²¹ Zagrebel'sky (1995) *op. cit.* p. 43.

²² Zagrebel'sky (1994) *op. cit.* pp. 115-116. See also, Chiavario (1994) *op. cit.*

²³ See, for example, Catellani G. "*Obbligatorietà dell'azione penale: tempi e metodi, costi e benefici*". In Centro Nazionale di Prevenzione e Difesa Sociale (1994) *op. cit.* p. 99 and pp. 117-118. Here we have to underline, again, that we were in the middle of *tangentopoli*. In fact, Catellani, who was at that time a prosecutor, posed a very clear question: could we still have *tangentopoli* if we modify (or mediate) the legality principle?

²⁴ Nannucci U. "*Flusso delle notizie di reato, organizzazione delle risorse, obbligatorietà dell'azione penale*". In "*Procure circondariali (organizzazione del lavoro dei magistrati e rapporto con la polizia giudiziaria)*" (1992) *op. cit.* pp. 180-185.

²⁵ In the Italian criminal law system the crimes are divided between *contravvenzioni* and *delitti* (art. 39 cp). The distinction concerns the punishment: *delitti* are punished more strongly. However, in practice, the differences are extremely limited (see, for example, Marinucci G. and Dolcini E. "*Corso di diritto penale*" (vol. 1). 2001. 3rd ed. Milano: Giuffrè. pp. 399-407).

²⁶ Nannucci (1992) *op. cit.* p. 187.

The Italian literature has certainly underlined the problems connected with the legality principle. Moreover, Zagrebelsky has outlined the influence that legal provisions can have on the definition of priorities. However, as we have said, the way Italian prosecutors use their discretionary powers has not been explored. This is because all these arguments start from the assumption (based on purely legal analysis) that prosecutors cannot take discretionary choices. In the authors' views, this means that some crimes may be prioritized because of general efficiency based principles. But, there certainly cannot be preferences. In other words: personal priorities are not acceptable within the legal structure of the Italian criminal justice system. In this chapter we will be approaching the issues from a different angle, arguing that the legality principle cannot, in practice, remove prosecutors' powers to take discretionary decisions. But, how far can external legal (and bureaucratic) influences shape prosecutors' decisions? Here we are not directly interested in the implications for the application of the legality principle (although some conclusions at the end of this thesis will be eventually made). Rather, we want to analyze the criteria for decision-making that prosecutors use to determine the crime problem. This includes both priorities influenced by external criteria and preferences determined by more personal considerations. How much does the academic debate in Italy tell us about these questions?

1.2. The debate in Italy: the law in action

There is a less substantial academic literature dealing with the way the legality principle is applied in practice and, more specifically, the way prosecutors define priorities. As we just said, we do not want to contribute to this debate. However, the analysis of this literature is certainly important here, because it concentrates on what prosecutors do in practice. The aims have been mainly two-fold: to explain that some legal rules, in practice, are not applied (i. e. the legality principle) and to determine the criteria prosecutors use to determine priorities.

The main argument is that the legality principle does not exist in practice. The consequence is that, as Grande (who did not use empirical evidence) claims: "the Italian prosecutor enjoys unfettered freedom in deciding where to concentrate his

activities and therefore whether or not to prosecute a case”.²⁷ So, the individual decision-making powers of *pubblici ministeri* involve the exercise of very broad discretion and they are not accountable for these decisions.²⁸ The legality principle does not exist and priorities substantially vary depending on the personal decisions of individual prosecutors.²⁹ Prosecutors have many opportunities, before and during the criminal proceedings, to determine priorities. They can influence the police by issuing guidelines about the crime reports that they do not want to receive; they can decide the amount of resources which should be allocated for an investigation; how long the investigation lasts;³⁰ and those cases for which it is worth using special proceedings.³¹

²⁷ Grande (2000) *op. cit.* p. 241. Here we also have to remember what we said (chap. 4) about the work of Goldstein and Marcus (1977) *op. cit.* p. 271). In particular, they claim that in Italy the prosecutor can decide to put forward certain charges and to drop others. Thus, Goldstein and Marcus argue that this effectively qualifies the legality principle because, in practice, during the pre-trial phase, it allows the police and prosecutors to drop or to put forward a case on a discretionary basis. The authors give a very clear example to illustrate this concept. A prosecutor who receives a report from a woman of dubious reputation, who alleges that she has been raped by a man who has no previous record, may decide, after an evaluation of the elements, that he should not be prosecuted because of a lack of victim credibility.

²⁸ Di Federico and Sapignoli (2002) *op. cit.* pp. 15-30. As we previously explained (chap. 4), the author based his research on interviews involving only defence lawyers. See also, Grande (2000) *op. cit.* pp. 240-241.

²⁹ Di Federico and Sapignoli (2002) *op. cit.* p. 17 and pp. 107-112. On this point see also Di Federico (1998) *op. cit.* pp. 379-381. As we explained before (see chap. 4), according to Di Federico, in the last 30 years we have witnessed a practice called “personalization of prosecutorial functions”. This means that the initiation of the criminal action is an attribute of the single prosecutor and not of his/her office. Thus, a prosecutor can begin an investigation and a prosecution any time he wants and these actions will be only based on his personal considerations. Moreover, Di Federico says that this phenomenon also regards: directive on how to deal with single cases, on the investigative means to use and on whether to restrict personal liberties of suspects. This means that prosecutors are not bound by any rule and are not accountable to their superiors for all the decisions they have to take about a case (including to prosecute or not and to ask for precautionary measures); and that they can manage the investigation the way they want (more expensive, more restrictive of the accused person(s)’s liberty etc.). In particular, the author underlines that directives concerning a single case are unacceptable when they seem to undermine prosecutorial independence. In these cases assistant prosecutors have successfully challenged the chief’s power to issue these directives before the CSM. As a consequence chief prosecutors have started to use this power less and less. Di Federico’s statements about “personalization of prosecutorial functions” are supported by a survey involving 1000 defence lawyers. In fact, 55% of these said that there is “a substantial difference in the way prosecutors decide in very similar cases”.

³⁰ The investigation should last maximum 6 months. There are exceptions and, more generally, prosecutors can ask the preliminary investigation judge to extend the limit. However, the investigation can never last more than 18 months (24 for some specific crimes) (art. 405-407 cpp). Fabri says that, in practice, prosecutors decide the length of the investigation. The author lists different systems that *pubblici ministeri* use to determine how long the investigation has to be. For example Fabri claims that, given that the 6 months limit starts when the name of the accused person(s) is written in a specific register, prosecutors can simply delay the registration and begin a sort of unofficial investigation before that (see Fabri M. “Discrezionalità e modalità di azione del pubblico ministero nel procedimento penale”. 1997. POLIS, XI. pp. 171-192. pp. 179-182).

³¹ Fabri (1997) *op. cit.*, in particular pp. 179-182. The special proceedings are those that, like plea-bargaining, are aimed at reducing the length of prosecutions and trials (art. 438-464 cpp).

Another issue which has been debated concerns the decision-making criteria used, in practice, by prosecutors. The literature identifies two categories: personal ideas and opinions of prosecutors and external influences.³² Prosecutors are said to base their decisions on their personal socio-political ideas.³³ This seems to be the logical consequence of the view that prosecutors have an “unfettered freedom” in deciding the cases to prioritize: every prosecutor is in the position to define his/her own personal priorities (i. e. preferences). However, these decisions may also be constrained by other factors. *Pubblici ministeri* will be subject to external (local community pressure and that of the dominant political cultures in general) and internal pressure (following CSM recommendations in order to improve their career).³⁴ This can limit the impact of prosecutors’ purely personal opinions. In other words, these can be external criteria for decision-making which may have de facto a strong influence. In this sense, Sarzotti’s point of view is important. The author argues that *pubblici ministeri* (when they determine the cases to prioritize) are influenced by the dominant political cultures and, as a consequence, they tend to focus on street crime.³⁵ We will deal with these issues (and we will explain better Sarzotti’s arguments) in the next chapters when we describe the way prosecutors treat street crime and immigration.

Finally, here we need to mention, again, the work of Vogliotti (who used empirical evidence, like, for example, Sarzotti and Di Federico). Although he did not focus on decision-making criteria, the author has indicated crimes that prosecutors tend to prioritize. As we explained before (see chap. 8), Vogliotti described some situations where prosecutors directed the police to search for some specific types of offences: industrial accidents, industrial diseases, environmental crimes, public health, white collar crimes, tax evasion, mafia, terrorism and corruption. As we have said, prosecutors started to be more active in searching for these kinds of offences from the beginning of the seventies.³⁶

³² Di Federico and Sapignoli (2002) *op. cit.*; Fabri (1997) *op. cit.*; Sarzotti (2006) *op. cit.*. See also, Sarzotti C. “*Le procure della Repubblica come attori del campo giuridico-penale*”. 2006a. Studi sulla questione criminale. Vol. I n. 2. pp. 67-86; and Sarzotti C. eds. “*Processi di selezione del crimine. Procure della Repubblica e organizzazione giudiziaria*”. 2008a. Milano: Giuffrè.

³³ Di Federico and Sapignoli (2002) *op. cit.* p. 20. See also, Fabri (1997) *op. cit.* pp. 179-182.

³⁴ Di Federico and Sapignoli (2002) *op. cit.* p. 110.

³⁵ Sarzotti (2006) *op. cit.* See also, Sarzotti (2006a) *op. cit.*

³⁶ Vogliotti (2004), *op. cit.* pp. 486-487.

There is a significant difference between the literature we have analyzed in this section and the literature we analyzed before. For the authors we have quoted in this section the legality principle does not play a pivotal role. However, this still leaves at least two questions unanswered. First, a structure of decision-making criteria for the definition of priorities has not been constructed. This is not surprising, because these arguments assume that each individual prosecutor will take purely personal decisions based on individual socio-political ideas. Certainly, decision-making is highly variable and dependent on personal political value-judgements. However, we believe that a more structured description of these criteria can be made. Second (and closely connected with the first issue), it seems that the academic literature has attempted to distinguish between external and personal criteria. But this distinction has not been developed substantially. External influences certainly play an important role. But what is, in practice, their impact? Can prosecutors mediate it? And if they can, how do they do it? Here we will mainly deal with legal influences. In the next chapters we will concentrate on the impact of the dominant political cultures. To conclude, some of the Italian literature has certainly underlined the extent of prosecutors' discretionary powers during the pre-trial phase. Here we want to explain more precisely the criteria for decision-making which inform the exercise of this discretion and to give empirical evidence from our interviews to confirm that these are the criteria.

2. Legal influence: the construction of urgency - arrest, pre-trial measures and *prescrizione*

In this section we will analyze procedural legal rules which may significantly influence prosecutors when they choose the cases to which they give priority treatment. These are external influences and, as we just said, they only have an indirect effect on prosecutors. So, these legal rules are general principles of legal procedure which, de facto, affect the definition of priorities. Here urgency means that the case has to be treated before others and as soon as possible. This does not necessarily create or reflect a personal priority or preference for prosecutors (i. e. see the discussion on street crime and immigration in chap. 11). Indeed we will see that these external influences still leave room for prosecutors' personal considerations.

The vast majority of the prosecutors we interviewed said that a case becomes urgent when the accused person(s) is in jail.³⁷ We can distinguish two situations. First, the police may have arrested the accused person(s): the prosecutor (immediately), and the judge (within 48 hours), must decide if the arrest was lawful (see chap. 4). Secondly, the accused person(s) may be in pre-trial custody, because this can only last for a limited period (art. 303 cpp).³⁸ So, procedural rules seem to provide external criteria, in practice, for some prosecutors' decisions about the cases which have to be treated urgently. Moreover, some *pubblici ministeri* also emphasize that the reason why these cases need to be dealt with immediately is because the personal freedom of the accused person(s) has been substantially limited.³⁹ This seems consistent with prosecutors' professional self image in which they see themselves as due process figures who (also) have to protect the rights of accused person(s) (see chap. 7). So, the external influence, which leads, in practice, to the urgent consideration of such cases, is reinforced by the internalisation by prosecutors of the values expressed in the legal rule. External factors often only operate through personal choices. In other words prosecutors are choosing to be influenced. Finally, we need to add that *pubblici ministeri* also seem to consider urgent the cases in which the pre-trial measure of seizure has been applied.⁴⁰ Here the urgency seems to be determined (also) on resource grounds. This measure limits a right (property) of the accused person(s), but it can also mean increases in expenses for the justice system in general.⁴¹ This is because seizure of goods can become expensive. For example, the sequestration of stolen cars means that they have to be kept in secure areas and guarded. This will cost money (and time).

³⁷ 23 prosecutors said that a case is urgent (i. e. prioritized) when the accused person(s) is in jail. 1 did not clearly answer (this question and questions about priorities in general). 3 did not mention accused person(s) in jail as one of the factors to take into account to determine priorities. This is because they preferred to talk about the cases they prioritize within their specialized matter (environmental crimes and industrial accidents, sexual crimes and crimes against the public administration). So, it seems that they did not refer to this criterion because, instead of discussing the general criteria, they preferred to concentrate on more specific issues concerning the specialized area (and their personal priorities, see later).

³⁸ Judges decide about pre-trial custody (and pre-trial measures in general). There is a proper proceedings where accuse and defence debate before a judge.

³⁹ See, for example, AP(N31), AP(N28) and AP(C47).

⁴⁰ See, for example, AP(C54), AP(C47) and CP(S4).

⁴¹ See in particular AP(54) said: "Now we are used to take into account [when we define the urgent matters] economical issues. So, a seizure of [for example] a big shed or of the goods which are deposited inside means a substantial increase of expenses".

A case also becomes urgent when *prescrizione* might become a problem. In these situations the urgency is clear, given that the *prescrizione* impedes/prevents the prosecution (see chap. 7):

The general criterion, which was my personal criterion, was based on time: the older the case, the higher was the priority. This could be mediated because of urgent matters. So, the fact that there were arrested persons was a reason to treat a case before another. The same happened for cases close to *prescrizione*, cases for which the 6 months deadline was about to expire, [cases] where there were problems in gathering evidence [etc.]. These were the general rules, but there could be other factors.⁴²

For example, I received a very big file [...] and I started to work very much on that because there is the risk of *prescrizione*; and dropping a case for *prescrizione* is really horrible.⁴³

The first example is particularly interesting because it brings together three factors which seem to determine urgency: the existence of arrested or detained suspects, the “fear” of *prescrizione* and the need to carry out investigative acts as soon as possible (e. g. because the evidence would otherwise be lost or be less probative). However, we should not be too seduced by the clarity of this explanation. As we have said (and as this prosecutor eventually admits: “these were the general rules, but there could be other factors”). There are a number of important criteria and they interact with each other. So, what happens in practice does not suggest a fixed hierarchical list of priorities. Here the interesting point is that these decision-making criteria are not mutually exclusive. They all interact with each other and they are assessed and balanced by prosecutors.

When the risk of *prescrizione* is limited (and there is no need for urgent investigative acts (see later) the treatment of a case can be delayed:

There are some files which do not need an investigation. So, for example, when the *guardia di finanza*⁴⁴ ‘denunciates’ [accuses] a person because he/she has made a false declaration about his/her income, maybe to obtain unemployment benefits, rent

⁴² APApI.(N50).

⁴³ AP(N30).

⁴⁴ The police mainly dealing with financial crimes and crimes against public administration (see also chap. 4).

discounts, books for the school etc. [...] These things do not need investigation; so the only criterion is the *prescrizione*. So, I only have to fill in the *capo d'imputazione*,⁴⁵ to send the notifications, to deal with the counsel [i. e. sending the documents the counsel must receive] [and] the only thing which can happen is that accused person(s) wants to be interviewed. Anyway, the criminal proceedings is done, there is no priority here, the only point is the *prescrizione*, but we are talking of years. So, I put these files aside and I treat them when I am free.⁴⁶

Finally, it seems that cases where *prescrizione* cannot be avoided tend to be considered as non-priorities and possibly they will not be treated at all:

There are crimes for which the *prescrizione* often arrives; for example: when the denunciation/accusation arrives too late. So, it is useless to spend time on these cases, because the *prescrizione* will arrive. In general these cases are put aside [and not treated].⁴⁷

Thus, in this section we have analyzed legal criteria (arrests, pre-trial measures and *prescrizione*) which influence prosecutors to treat certain cases as urgent. These certainly shape prosecutors' exercise of discretion when they make decisions about prosecution. The consequence is that the cases prioritized according to these criteria may not necessarily reflect personal priorities. However, prosecutors' personal discretion is not eliminated. First of all, *pubblici ministeri* choose to consider these as being external criteria for decision-making. There is no legal rule that requires prosecutors to treat these cases urgently for breach of which prosecutors could be held accountable. Secondly, we will see later (chap. 11) that crimes like street crime and illegal immigration are normally immediately treated and are not delayed (because they often involve arrested persons) but these do not appear to be cases that prosecutors regard as especially important (i. e. that reflect personal priorities or preferences). In particular, prosecutors do not seem to be ready to commit substantial resources (including time) to tackle these crimes. So, a case treated with urgency is not always a priority in the sense that it is personally perceived as important by the prosecutor; rather urgency is suggested by external criteria and the case becomes a priority in temporal terms alone. It must be dealt with now (or soon).

⁴⁵ The *capo d'imputazione* is a document which includes the name of the crime(s) for which a person is accused and the explanation of the reasons why he is accused of that specific crime(s) (see chap. 8).

⁴⁶ AP(S6). This prosecutor works in the specialized unit dealing with crimes against public administration.

⁴⁷ CP(S4). Similar opinions were expressed by, for example, AP(S6) and AP(N32).

2.1. Legal influence: construction of seriousness - constitution and legislation

This section is dedicated to the impact of political decisions taken by the legislator (and the constitutional fathers) concerning the seriousness of certain crimes (i. e. setting the level of punishment). Here we do not want to describe the way prosecutors interpret certain pieces of legislation but rather discuss whether they may be another external criterion that *pubblici ministeri* take into account when they define their priorities.

A crime may not be a priority if there is the possibility that it is no longer a crime (i. e. the *condono*). On the other hand, crimes which can result in (at least) 2 to 3 years of imprisonment are always treated:

Other situations may relate to crimes which are under the *condono*⁴⁸ and you have to determine if these are still crimes or not [...] Anyway, here crimes which involve punishments around (minimum) 2, 3 years of imprisonment are always treated.⁴⁹

Similarly other prosecutors emphasized the importance of legislative provisions:

The criterion to determine priorities is given, at least to me, by the legislator. In fact, [for example] a crime which is punished between 5 to 20 years of imprisonment is considered [by the legislator] to be more serious than a *contravvenzione*. This could be the first criterion to take into consideration.⁵⁰

We also determine the seriousness [of a case] from the interests and the rights protected by the constitution.⁵¹

⁴⁸ The effect of this piece of legislation is to grant pardon. However, this is normally subject to the payment of a fine. So, in practice, a person (or a company) can choose to pay a fine to avoid prosecution. The *condono* is normally enacted for matters like tax evasion and violation of town planning law when it would be too expensive to prosecute all the crimes. It is also, for the government, an easy way to obtain money. The last *condono* was in 2003 (former centre-right government) and it regarded tax evasion.

⁴⁹ AP(N10). Similar opinions on the fact that when the consequences (for the victim) of a crime are limited the priority can be lower were expressed, for example, by caused by AP(N41), AP(N38) and AP(N2).

⁵⁰ AP(N32).

⁵¹ AP(C46).

Thus, both the constitution and primary legislation seem to be sources that *pubblici ministeri* use when they decide the priority to be given to a case. Furthermore, the more severe the potential punishment, the more the crime will be prioritized. However, when we deal with street crime and illegal immigration we will see that crimes that the law punishes quite strongly are not always considered personal priorities by prosecutors. Moreover, decisions, for example, on the importance of the *condono* and on the levels of punishment which require a crime to be prioritized are clearly left to prosecutors. Legislation gives certain general indications, but legal actors can interpret these provisions in deciding what to do. In this case: to prosecute. So, decision-making criteria which might be said to be external (i. e. legislation) are given a meaning thought appropriate by the particular *pubblici ministeri*. Once again, external factors are operationalised through personal choices. This seems to suggest that the legislator has only limited and indirect powers to influence prosecutors (perhaps the clearest example is the D.Lgs. 1998 n. 51, see later). But we know that this is not always the case: some procedural criteria (e. g. setting up a time limit such as for the *prescrizione*) seem to influence *pubblici ministeri* more clearly (but still without binding, in practice, their decisions).

Finally, a very recent Act (n. 125/2008) introduces an interesting provision. The prosecution of crimes which are included in the recent *indulto* Act (n. 241/2006, see above) and which were committed no later than 2 May 2006 can be suspended (prosecutors decide) for maximum 18 months. Moreover, the Act also indicates crimes that should be prosecuted before others. These are: terrorism, mafia, industrial accidents (deaths), violation of traffic circulation (i. e. drink and drive), recidivists, arrested and detained persons, all the fast proceedings (like the *direttissima*, so the Bossi-Fini should be included) and, in general, all the crimes punished with, at least, 4 years of imprisonment. These crimes should be prosecuted before the others. Chief prosecutors are asked to implement these provisions (i. e. organize the *procura*). At the moment prosecutors seem to like these new legal rules.⁵² Certainly these are not impositions (as it was in the previous version of the Act).⁵³ Moreover, it seems that

⁵² See, for example, Guastella G. “Caselli: ora la norma va bene. Casa a fuoco, poi i pompieri”. *Corriere della Sera*, 12/07/2008; and Martirano D. “L’Anm apprezza, dal PD prime aperture”. *Corriere della Sera* 12/07/2008.

⁵³ The previous version imposed prosecutors to block (for one year) certain criminal proceedings. These also included serious crimes (up to 10 years imprisonment) and, de facto, imposed priorities to prosecutors. Amongst the crimes to be blocked there were those involving Berlusconi. This is not

prosecutors are, in practice, in charge of the application of these provisions. The Act includes some criteria (e. g. arrested persons) which, we believe, prosecutors are already using (see above and later). Finally, this potentially increases the powers of the chief prosecutors to suggest priorities. However, given that this Act has just been approved, we can not say very much about its impact in practice.

2.2. Legal influence: construction of seriousness - perpetrator

Here we want to discuss the situations where certain characteristics of the perpetrator can lead prosecutors to prioritize a case. In particular, we will concentrate on recidivism and social dangerousness.

First of all, we want to describe prosecutors' reaction when the perpetrator appears dangerous, not necessarily (and only) for a specific victim(s), but for the society in general:

I had a case where the husband shot 12 times his wife. She had little injuries, but, in terms of seriousness, it does not change very much compared to a murder. So, this is a serious crime, where there are problems of security and of *pericolosità sociale*.⁵⁴

When a crime is particularly serious, [which means that] it is dangerous because of the *pericolosità sociale* [and] there is a risk for the victim(s) and/or for other persons, the first thing to do is to impose a pre-trial measure. If you can not do that, but you realize that there is the *pericolosità sociale*, for example when a person is accused of having raped a neighbour [and there is not enough evidence to ask for pre-trial custody], you prepare a *delega* which imposes a sort of fast track procedure [for the investigation], maybe you also impose some time limits. Then, when you have enough evidence, you ask for the pre-trial measure. If there is substantial evidence, the first thing to do is to avoid recidivism.⁵⁵

[A case is prioritized] when the risk of recidivism is substantial, like for crimes against property [e. g. robberies], sexual crimes, crimes affecting life [e. g. injuries] [etc.].⁵⁶

necessary anymore given that the criminal proceedings against the Prime Minister must be suspended (see chap. 5).

⁵⁴ AP(N31). *Pericolosità sociale* means, literally, social dangerousness. More specifically, it means that a person is dangerous for the society.

⁵⁵ AP(N33).

⁵⁶ AP(N10).

There is always the need to stop recidivism. So, for example, a rape committed by an Italian or by an *extracomunitario*,⁵⁷ the difference is that to catch, and stop recidivism, in relation to the *extracomunitario* it is necessary to use a lot of police resources [because the *extracomunitario*, who is often an illegal immigrant, is more difficult to find]. However, the cases will not be treated differently [i. e. prosecutors are not tougher against the *extracomunitario*].⁵⁸

For example, I remember that in another prosecution office I had a problem [...] with *ingiurie* or harassments. [These were in fact] stalkers, former husbands and boyfriends. So, even if for these crimes we could not impose pre-trial measures, it was necessary to intervene [...] [So] I sent the cases to trial hoping that this might have a [deterrent] effect [...] Robberies [are the same]; there can be a need [to intervene] because you know that the accused person(s) will commit another robbery.⁵⁹

So, prosecutors seem to concentrate on two characteristics of the accused person(s): the risk of recidivism and the concept of *pericolosità sociale* which, in these cases, seems to be linked to the fact that the accused person(s) is dangerous for the society because his or her behaviour (e. g. shooting his wife 12 times) shows that he/she may commit serious crimes. So, the dangerousness is not necessarily linked to the actual effects of the current crime. In the first example, although the perpetrator shot 12 times, the victim did not seem to have suffered serious injury. In these situations the priority is not (only) the result of the actual consequences of a crime, but by the fact that the accused person(s) has acted in a certain way. In other words: prosecutors seem to prioritize these cases because they want to prevent the future actions of a certain perpetrator. However, the fact that prosecutors are focused on the characteristics of the accused person(s) does not mean that the crime committed is not important. In general, dangerousness seems to be related to facts which may affect life more than property (robberies affect property, but they also imply violence against persons, as stated in art. 628 cp).

Finally, this discussion of recidivism and *pericolosità sociale* shows the complex interrelationships between external criteria and personal criteria. The first is very clearly an external criterion: prosecutors merely have to look at the criminal

⁵⁷ This word should indicate all the persons who do not come from the EU. However, in practice, only people coming from third world countries are called like this. For example, an American will be called American and not *extracomunitario*.

⁵⁸ L(N20).

⁵⁹ AP(S6).

record of the accused person(s) to know whether it is applicable (although, we repeat, there are no legal requirements imposing the prosecution of recidivists as a priority).⁶⁰ While the second leaves *pubblici ministeri* more free to develop their own concept of dangerousness. This is not just linked to the criminal record of the accused person(s), but more generally, to the way he/she behaved. This evaluation will be necessarily left to *pubblici ministeri*. It is also important to say that this is where the distinction between external and personal criteria becomes difficult to draw. Is the prosecutor drawing on an external legal criterion 'social dangerousness' or is the prosecutor constructing his own personal criterion of 'crime seriousness'?

2.3. Legal influence: construction of seriousness - victim

The rights and the interests of the victim seem important to the determining of the crime problem. In particular, prosecutors seem to focus on the damage suffered:

Anyway, you always have to evaluate the damage suffered by the victim, I mean the importance of the victim's interest [...] At least this is what I do.⁶¹

Then you take into account the damage suffered by the victim. It is clear that the victim of a rape has suffered greater damage compared to the victim of a mobile theft.⁶²

I prioritize rapes and domestic violence. This is because I prioritize all the cases where the minor must be physically removed from the accused person(s). In fact, one minute more could cause more damage. So, the first thing to do is to check if the victim can be still reached by the perpetrator.⁶³

So, in these cases, the aim is to protect the interest of the victim. The more the victim may suffer damage, the more prosecutors will choose to prioritize the case. On the other hand, it seems that when the damage appears limited the priority will be lower:

⁶⁰ The importance of recidivism should not be underestimated. This is one of the criteria to determine if a pre-trial measure can be given or not (art. 274 para. 1 c cpp). So, for example, recidivism will be used by a prosecutor to request pre-trial custody. The judge will concede this measure and the accused person(s) will be imprisoned. As we explained above, this is one of the situations where a case becomes urgent and can be prioritized.

⁶¹ AP(N38).

⁶² AP(N32).

⁶³ AP(N33).

Sometimes you monitor the cases, then you take the files and you say: I will do this and I will not do that, because there is no time. Maybe they [the cases which will not be treated] concern *deleghe* issued months ago and you realize they [the police] did not respond; so you wonder if it is necessary to put some pressure or not, given that, maybe, the victim does not have an interest anymore. For example, you delegated an investigation concerning an *abuso edilizio*⁶⁴ which is not really serious and the competent office within the city council did not respond, so you put the case aside, even if, in general, they respond. Other situations may concern crimes which are under the *condono* and you have to determine if these are still crimes or not [...] Anyway, here crimes which involve punishment around (a minimum of) 2, 3 years imprisonment are always dealt with.⁶⁵

This example shows, once again, how the criteria for decision-making connect with each other to define priorities and preferences. Some cases may not be prioritized because the victim does not have any relevant interest and/or because the consequences of the crime (see later) are limited (i. e. a not very important *abuso edilizio*). Moreover, prosecutors' considerations about certain political decisions taken by the legislator (e. g. *condono*) can be important. So, effectively decisions are very strongly influenced by particular contexts and precise circumstances and cannot readily be predicted on the basis of pre-established rules.

We should also underline, once again, the importance of the role of the police. At least in some circumstances, they can decide how quickly a *delega* is implemented; and this may influence prosecutors when they choose to prioritize a case or not. However, *pubblici ministeri* always seem to retain the power to decide if there are reasons to continue the investigation (and, as a consequence, to push the police to implement a *delega*) or not.

2.4. Legal influence: construction of seriousness - consequences of crime on society

The previous section analyzed the situations when, in prosecutors' view, a crime creates substantial damage for the victim(s). Here we want to focus on the consequences of crime for society (and/or local communities). So, in these cases there

⁶⁴ Violation of town planning law.

⁶⁵ AP(N10). Similar opinions on the fact that when the consequences (for the victim) of a crime are limited the priority can be lower were expressed, for example, by AP(N41), AP(N38) and AP(N2).

may not be a specific recognizable victim(s). But the crime may affect the public more generally:

I, but I am not the only one, consider crimes against justice to be very important. This is because I consider them as the sign of great contempt for the rules of *vivere sociale*.⁶⁶ So, [for example] for me perjury is very important. [In fact] maybe these crimes do not damage anyone in particular, but they are the sign of a deformation of the *vivere civile*.⁶⁷ I think this has to be punished, because [otherwise] the *patti sociali*⁶⁸ are in danger.⁶⁹

A situation like that with the rubbish becomes important because there is a danger for the local communities. The rubbish became a problem because it directly affected the local communities. [In fact] when the collection [of rubbish] points was affected by a strike we had, at a certain stage, piles of rubbish which could reach [the windows] at the first floor of buildings.⁷⁰

These examples suggest that the importance of the consequences of a crime is often related to the impact on the society and/or on local communities. However, this is not only based on situations (like the rubbish) where there is an actual danger for the community. The consequences of a crime can also have some effects which, in prosecutors' view, can put into question the legal and social principles on which the society is based (e. g. when a crime may jeopardize the *patti sociali*). In this sense it appears important to report what a police officer said when we asked why white collar crimes are prioritized by prosecutors:

White collar crimes are important because the system is affected. The rules governing the market are violated. So, you do not only have to think about the specific crime, but to the chain reaction that [the accused person(s)] has triggered and which will affect the whole system.⁷¹

Thus, white collar crimes are prioritized because of the "violation of the system". where the word system seems to embody the rules which govern the market and that the society must respect. Another explanation was given by a lawyer:

Well, white collar crimes are considered more important [...] the point is that you

⁶⁶ This basically means "living together". So, the rules which permit that people live together (broadly similar to the social contract).

⁶⁷ Another expression which means "living together".

⁶⁸ Literally this means social pacts. Again these are the rules which permit that people live together.

⁶⁹ AP(N32).

⁷⁰ CP(S4).

⁷¹ Pol.(N14).

discover crimes committed by persons who did not commit crimes until a certain age [...] So, you have a bankrupt causing very substantial damage to savers [...] There is a big problem: white collar crimes often affect the interests of many different subjects.⁷²

This lawyer explained the prioritization of white collar crimes in different terms: the cases are normally more interesting, legal rules tend to suggest these crimes are more serious (i. e. heavier punishments)⁷³ and that these crimes are more difficult to discover and repress. However, the main focus is on the characteristics of the perpetrator (who starts to commit crimes when he/she is older) and, more important, on the impact that these crimes can have on the society. In particular, white collar crimes are prioritized because they can affect interests which involve a large amount of people.

To sum up, priorities seem also to be determined by the impact that a crime can have on society. However, when we will deal with street crime and immigration (and, more generally, with *allarme sociale*), we will see that (although external influences can surely be relevant) the decision as to whether a crime (or a number of crimes) has or is going to have a relevant impact on society seems to be left to prosecutors, who, once again, have substantial discretionary powers. So, in practice, the decision whether the principles governing the society (and/or the market) have been threatened or not is personal and it appears to be left to prosecutors: assessments are based on social value judgments. Once again an influence that might be seen as based on external criteria (i.e. derived from legal considerations) can only operate through personal choices. Moreover, the example of white collar crimes outlines a difference between Italy and Britain. In fact, there is a great deal of criminological literature in the Anglo-Saxon world which argues that white-collar crime is treated less seriously than street crime because it is not seen as a social threat in the same clear and unambivalent way.⁷⁴ Italian prosecutors seem to act in a different way (not the media, the public and the central state which considers street crime a greater social

⁷² L(N23).

⁷³ In 2002 (D.Lgs. 61/2002) the former centre-right government amended the law dealing with false accounting. It is not our purpose to explain the legal details of this reform. It is sufficient to say that it was very much criticized because, in practice, it made more difficult to prosecute this crime (See, for example, Bagnoli R. "*Falso in bilancio: oggi il sì alla nuova legge*". *Corriere della Sera*, 28/09/2001). One lawyer (L(N23) who mainly deals with white collar crimes) said that the reform had a great impact and that, now, prosecutors only treat the most serious false accountings.

⁷⁴ See, for example, Nelken. D. "*White-collar crime and corporate crime*". In Maguire et al. eds. (2007) *op. cit.*

threat, see chap. 10 and 11). White collar crimes are apparently perceived as more dangerous for the society compared to street crime.

3. Bureaucratic criteria: circulars

We need to discuss briefly circulars concerning the definition of priorities issued, not by prosecution offices attached to the first instance courts, but by the CSM and by the prosecution offices attached to the court of appeal. This is just to say that, although some prosecutors referred to these documents and considered them as significant decision-making criteria in determining priorities, the vast majority of the *pubblici ministeri* we interviewed said that such documents did not exist or that they were not intended to set out external criteria for decision-making.⁷⁵ In other words, prosecutors, in practice, seem to be in the position to decide if and how these guidelines can be followed.

One of these circulars⁷⁶ (which have existed since 1998) appears particularly important. Art. 227 of the D.Lgs. 1998 n. 51 (the act of delegated legislation which unified prosecution offices, see later) stated that, in order to deal properly with criminal proceedings which were outstanding at the moment when the D.Lgs. came into force, prosecutors had to take into account certain criteria for determining priorities. These were: the seriousness of the case, the problems that delay might create in collecting evidence and determining the facts, and the interest of the victim. This provision was enacted to deal with the substantial increase in the number of cases that the unification (unification of prosecution offices and courts) created (see

⁷⁵ 20 prosecutors said that these documents did not exist and/or they were not intended to set out (binding) priorities. 1 did not clearly answer. 1 was not asked (due to lack of time). 5 said that such documents existed and were intended to create priorities. In particular, 3 referred to circulars issued, by the CSM and by the prosecution office attached at the court of appeal, at the time when prosecution offices were unified (these mainly concern the application of the criteria included in art. 227 of the D.Lgs. 51/1998, see later). 1 referred to other circulars (not dealing with art. 227) issued by the prosecution office attached at the court of appeal, but clearly said that these were not mandatory provisions. 1 talked about circulars issued by the CSM, but could not give any example. We also need to add that the CSM did not only deal with priorities by issuing circulars concerning the application of art. 227. In fact, in 1977, this body enacted a document “aimed at prioritizing crimes [that at that time were] creating a substantial *allarme sociale*” (see *Questione Giustizia*. 2006. Vol. 5. p. 1078). However, once again, this was not a binding directive and specifically stated that less serious crimes had to be treated anyway.

⁷⁶ Circulars are advisory. Surely they do not have legal force and they are not binding. However, the CSM is, theoretically, in the position to begin a disciplinary proceedings against prosecutors (even chief prosecutors) who do not implement these guidelines.

later). But, it only concerns criminal proceedings which were initiated before the D.Lgs. came into force. Further, art. 227 also stated that prosecution offices must communicate to the CSM the criteria that they would use to determine priorities.

The CSM issued circulars which dealt with art. 227. So, these were implementing a provision set out in a piece of legislation which was, of course, legally binding. In particular, the circular n. P-27060 (2005) concerning the organization of the *uffici giudiziari* (courts and prosecution offices) for 2006/2007, talks about (capo VI, paragraph 57) priority criteria (that prosecution offices have to determine) under art. 227. Now, it is not the purpose of this study to carry out a legal analysis of art. 227, its aims and its impact when it was enacted ten years ago. We also do not want to discuss any tension between this provision and the legality principle (see chap. 1). However, here we want to underline that, although this legal rule still exists (the CSM circulars confirm it), its impact, in practice, appears now to be very limited. As it has just been indicated, only three prosecutors referred directly to art. 227 or to the circulars which deal with this provision. Thus, in practice, these external criteria for the decision-making seem to have (at least now) little impact on prosecutors' definition of priorities.

3.1. Bureaucratic criteria and specialization

Some of the elements of bureaucratic organization are included within legal rules. For example, the *ordinamento giudiziario* law (see chap. 4) defines some general principles that should shape the way prosecution offices are organized. Previously we have touched on part of these when we analyzed the organizational relations within prosecution offices (see chap. 6). Here we are talking about administrative guidance within the office. In particular, we will be looking at the circulars (advisory) establishing criteria for the decision-making which are issued within prosecution offices. We have already said (chap. 6) that priorities decided within the *procure* do not appear to be, in practice, mandatory and that *pubblici ministeri* can take into account other criteria.⁷⁷ This is because prosecution offices are not hierarchically

⁷⁷ The Turin prosecution office recently issued a circular (circular n. 58/07, 10 of January 2007, similar circulars were issued by the prosecution offices of Palermo (big prosecution office in the south of Italy) and Busto Arsizio (small place in the north of Italy), see resolution of the CSM May 15th 2007, in *Questione Giustizia*. 2007. Vol. 3. pp. 621-636) dealing with the cases which, because of the *indulto*, will lead to no punishment. In fact, given that the *indulto* cancels part of the punishment but not the

organized, but common criteria are the result of strategies of persuasion. Superior prosecutors have a lot of consideration for the independence of individual inferior prosecutors. This is confirmed by the little practical impact that the *ordinamento giudiziario* reform seems to have had.

Circulars on the definition of priorities may include a list of more serious crimes (e. g. category A crimes in Turin) and/or more general principles (e. g. crimes which offend common goods and common interests⁷⁸). Prosecutors are aware of these documents and they take them into consideration. However, they seem to treat them as purely advisory and not as binding.⁷⁹ They know that they ultimately decide when and how to use these criteria. Apparently superior prosecutors never impose a requirement to treat a case before another. So, these guidelines can be influential insofar as they are persuasive. They do not have, in practice, any binding force. Finally, we have to remember that we visited 10 prosecution offices, but only 2 had issued formal circulars determining a set of priorities.

So, we have an idea of the limited impact that guidelines on priorities established within prosecution offices can have on prosecutors. However, there are still issues which need to be investigated. These mainly concern specialized units. Is there a link between the creation of specialized units and other specialized groups (i. e. SDAS and urban safety group) dealing with certain crimes and the way prosecutors define the crime problem? In other words, can these, de facto, influence the way prosecutors determine their priorities, or not? Specialization should normally define, within this context, a group of prosecutors who mainly deal with certain crimes. However, here we will define specialized units according to the criteria that

crime (as the amnesty does), prosecutors must (because of the legality principle) treat these cases even if they know that, in practice, they will obtain no results. The circular basically allows prosecutors not to deal with some of these files. The CSM (resolution of the CSM May 15th 2007 (see above), see also Santalucia G. (2007) *op. cit.*) said that this document does not conflict with the legality principle because it is based on objective criteria which do not confer to *pubblici ministeri* the power to take discretionary decisions about single and specific cases (see above). The interviews we conducted in Turin (like all the other interviews) were previous to the circular and prosecutors did not mention this issue. However, some *pubblici ministeri* working in others prosecution offices (see, for example, AP(N49) and AP(C54) raised the problem of the cases which will not lead to any punishment, but could not really say anything about a possible solution (the interviews were conducted before and immediately after the enactment of the *indulto*).

⁷⁸ These include all the interests of the people in general (i. e. environmental crimes), rather than those related to a specific individuals or groups.

⁷⁹ As we explained, the *ordinamento giudiziario* reform increased the powers of chief prosecutors to organize the prosecution office. These powers appear hierarchical in nature. For example, chief prosecutors determine the way cases are allocated and can take cases back from assistant prosecutors (see chap. 4). However, as we explained (chap. 6), the relationship superior-inferior prosecutor does not seem, in practice, hierarchical in nature.

prosecutors used during the interviews. Specialized units have two main characteristics. First, they define, in general, the crimes which are considered (by prosecutors) more serious. Second, they relate to types of crime that require a specific technical (legal) and/or investigative (how to carry out and direct the investigation) knowledge. Thus, the SDAS and the urban safety group are not in these senses specialized units, though they involve prosecutors specializing in dealing with certain crimes.

The SDAS group in Milan was created to deal with certain kinds of volume crimes.⁸⁰ This is not a specialized unit in either of the senses set out above. In fact, prosecutors who belong to the SDAS also belong to a unit (e. g. crimes against property, public administration etc.) which is their ‘real’ specialized unit:

I retain my specialization [...] However, instead of receiving the <i>ordinario</i> ⁸¹ I receive the cases which go to the SDAS. ⁸²

So, *pubblici ministeri* working in the SDAS still deal with crimes which fit into their specialization. But, instead of dealing with non-specialized volume crimes via the *ordinario*, they take the cases which are allocated to the SDAS group. So, it seems that volume crimes have been, in practice, divided between the *ordinario* and the SDAS. Now, we have already analyzed the number and make-up of the cases this group treats and the substantial powers that the police have to influence prosecutors’ decisions (i. e. bureaucratic review, see chap. 8). Here we want to focus on the reasons why the group was created, on the crimes that the SDAS treats and on the way prosecutors consider them.

The SDAS group was created in 1998 to avoid the problems linked with the merger of prosecution offices: in 1998 (see D.Lgs. 1998 n. 51) prosecution offices attached to the *pretura*⁸³ were merged with prosecution offices attached to the first

⁸⁰ AP(N32). Similar opinions were expressed, for example, by AP(N30), AP(N28) and L(N20).

⁸¹ This indicates the ordinary cases. In particular, this means the cases which are not allocated to specialized units. In practice, these are the volume crimes, but they are not necessarily minor cases. For example, in Milan, like in other prosecution offices, murders (if they do not have to be allocated to specialized units, see later) are part of the *ordinario*.

⁸² AP(N32). We interviewed 6 prosecutors, 6 lawyers (2 were consultants) and 2 police officers working in Milan. They were all aware (and had similar opinions) about the way the SDAS operates, but only AP(N32) actually works in this group.

⁸³ Until 1998 the *pretura* was the first instance court competent for certain kinds of crimes; for example, crimes which could not be punished with more than 4 years of imprisonment. There was a prosecution office attached at this court and the judge was the *pretore* (see chap. 8).

instance courts which thus became the only prosecution offices (i. e. *procure della Repubblica*). Before 1998 prosecution offices attached to the *pretura* were treating the vast majority of the cases. So, the problem was that, with the merger, the number of cases, for the *procure della Repubblica*, suddenly increased:⁸⁴

This [the SDAS group] is an idea which was proposed by some prosecutors working at the *procura circondariale*.⁸⁵ They realized that the amount of work done by the *procura circondariale*, the merger was close, would have suffocated the prosecution office attached to the first instance court [i. e. the *procura della Repubblica*], which was only dealing with 5/6000 cases compared to the 150,000 of the *procura circondariale*.⁸⁶ This would have strangled prosecutors, creating two big risks: that the serious cases would not be treated properly and that the less serious cases would not be treated at all [...] So, this group was created with the idea of having a separate body [still within the prosecution office] which deals with minor crimes [and] which relieves prosecutors from the burden of minor cases.⁸⁷

Apparently, the main purpose of the reform was not to define a set of personal priorities in the sense of defining cases that were regarded as in and of themselves important. Rather they defined a preferred means of treatment for a particular category of case. The cases which are allocated to the SDAS group are considered minor cases and, as we saw (chap. 8), they will be mainly treated by the police which will take all the major decisions. Prosecutors will only bureaucratically review the results of the investigation. Now, what are the cases which will be treated within the SDAS and which, as a consequence, are considered as minor cases?

⁸⁴ Of course this problem did not only affect the Milan prosecution office.

⁸⁵ Another name to call the prosecution office attached at the *pretura*.

⁸⁶ These are not the exact figures. This prosecutor is using these numbers to underline the huge difference between the amount of cases the two prosecution offices were treating.

⁸⁷ AP(N32). Similar opinions about the fact that the SDAS cases are considered as minor cases were expressed by AP(N30), AP(N28) and L(N20). It is interesting to note that AP(N29), while he was trying to prove that all the cases are treated in the same way and that, because of the legality principle, there are no priorities, refused to refer to the cases allocated to the SDAS as minor cases. He preferred to call them simpler cases. However, he subsequently admitted that these are part of the minor criminal law and that these are petty crimes. In particular, he said: "No, the SDAS is not an archive where we put all the things which are not urgent, it is not like this [...] there are cases which can be treated in a simple way; so, for example, when there are no investigative acts to carry out, petty crimes [...] I mean, all the minor criminal law, but which is not minor [!]"

There are all the *ignoti*,⁸⁸ apart from those which have to be allocated to specialized units [...] There are no thefts, because there is another group, the *pool patrimonio*,⁸⁹ there are the false documents [persons who have showed false documents], all the *contravvenzioni*, forgery; Bossi-Fini only for art. 6, when the accused person(s) have failed to show identification documents, and art. 13 which [also] deals with immigrants who [illegally] come back to Italy after deportation,⁹⁰ art. 14 [of the Bossi-Fini Act], where the arrest is compulsory, goes in the *turno esterno*,⁹¹ then there is [also] small-scale drug trafficking. In practice, the SDAS deals with all those crimes which can be immediately treated, which do not require difficult and lengthy investigation. [However] if the drug dealer is arrested the case goes to the *turno esterno*. It rarely happens that pre-trial measures are imposed; it is really very rare [and] it may happen for harassment which then becomes *violenza privata*;⁹² [For example] stalking by a boyfriend. However, in these cases, I can say that my colleagues, who are responsible persons, do not leave the case in the SDAS, but they bring it back to their office.⁹³

[In order] to determine the cases which go to the SDAS the prosecution office has created a list. This, for example, includes: *ingiurie*,⁹⁴ arguments between joint owners, arguments between motorists, car accidents with little consequences, defamation, a denunciation which involves a doctor [medical responsibility] but it is not clear at all, environmental crimes which are not clear, such as, for example, someone believes that a nasty smell is coming out from a nearby factory. For these cases the *archiviazione* is not automatic, because, for example, when there is an *ingiuria*, the crime is visible [there is an insult]. However, there is the attempt to convince the parties to withdraw the complaint. So, there are very strong attempts to mediate, [Sometimes] the parties are [also] asked to attend a meeting. Anyway, in particular, there are [in the SDAS group] frauds, denunciations made by private citizens [e. g. *querela*, in general these are the cases where the investigation was not started by the police or prosecutors] and, in

⁸⁸ Cases where the name of the accused person is not known.

⁸⁹ This is not a proper specialized unit. In fact, it is a group (not only dealing with thefts) created within the specialized unit which treats crimes against property. In particular, AP(N30) said: "Within this specialized unit there is the *pool patrimonio* which is coordinated by one prosecutor, but, in practice, it is managed by 20 police officers. In this group there are all the *ignoti*, which concern crimes like car thefts, small thefts, mugging [etc.]. This is because it is known that these crimes are committed by persons who can not be found and they are really a lot. [So], these are *ignoti* and, in general, the prosecution is dropped [*archiviazione*]". It is interesting to note that the *pool patrimonio* seems to have some similarities with the SDAS. In particular, the powers of the police (who manage the group) appear substantial. This is also relevant to understand prosecutors' approach towards street crime (chap. 11).

⁹⁰ In these cases the arrest is not compulsory.

⁹¹ This is the "internal mail turn" and, as we said (chap. 6), prosecutors who are doing the *turno esterno* mainly have to deal with arrests.

⁹² This is a crime and it means using violence (or threatening violence) to force someone to do or not-to do something (art. 610 cp).

⁹³ AP(N32). Similar opinions were expressed by AP(N28).

⁹⁴ These are, in practice, insults (art. 594 cp).

general, all those matters which seem very personal [such as the arguments] [...] We have never seen white collar crimes in the SDAS [...] The small frauds will end up in the SDAS and then there is the *archiviazione* based on the fact that these are cases which should be dealt with by civil justice⁹⁵ [...] All the frauds which are below € 20/30.000 are matters for civil actions.⁹⁶

It appears difficult to identify a fixed and precise list of the cases which will be allocated to the SDAS. However, some general criteria can be derived from it. It often (but not always) includes offences which can only be prosecuted if there is a complaint by a victim (see the legal discussion of the legality principle, chap. 4). It also excludes crimes which involve an arrest, because if an arrest has been carried out prosecutors must immediately intervene (chap. 4 and chap. 6 for the *turno esterno* where *pubblici ministeri* are mainly dealing with arrested persons). Street crime is normally not included (because it often involves arrested persons, see chap. 11) but the *ignoti* are (if they do not fall into a specialized area). Also it includes crimes which do not fall into any of the specialized units (but not all, because there is the *ordinario* as well) and those which do not require a long and difficult investigation. Finally, quantitative issues seem important as well (i. e. frauds which involve a maximum amount of € 20/30,000). These are general criteria which help to determine the cases assigned to the SDAS and, as a consequence, which help us to understand how the Milan prosecution office identified these non-serious (or minor) cases. However, these criteria should not be understood and analyzed as fixed rules. In fact, as we have already explained (chap. 8), prosecutors working in the SDAS can always decide to spend more time on a case (e. g. stalking) when they believe this is serious.

How do prosecutors working in the SDAS group actually treat these cases? We have already explained that substantial police powers exist. But the prosecutors' aim seems to be that of dealing with as many cases as possible and as fast as possible: (AP(N32) claimed that the prosecution normally begins within 2 months of the case being allocated). So, this means that the less-serious prosecutions are normally dealt with (this does not always seem the case for frauds) and not just dropped. The differences when compared to cases which are seen to be real priorities for the prosecutors themselves are revealed in the way the investigation is supervised (see

⁹⁵ In practice, prosecutors say that these are not crimes, but issues which concern contracts and/or obligations between private parties (see L(N20).

⁹⁶ L(N20).

chap. 8). Prosecutors do not seem to be intent on focussing on the tackling of an especially important crime problem (as they perceive it), but on “getting rid” of these files (i. e. as many as possible, as fast as possible).

Turning to the urban security group in Turin there are certainly some similarities (and some differences as well) with the SDAS. In fact, this is not considered a specialized unit (but prosecutors who are part of this group are suspended from their specialized unit for 6 months). It deals with crimes which are not considered personal priorities by prosecutors (although the idea of the chief prosecutor seems to be different, see chap. 11); and the aim of the *pubblici ministeri* does not seem to be that of tackling a particular crime problem, but to deal with as many cases as possible and as fast as possible (so they can become urgent matters). However, as we said, we will describe the functioning and the aims of the urban security group in greater detail later, when we deal with street crime and illegal immigration.

So the SDAS and the urban safety group are not considered to be ‘real’ specialized units. The variety of cases they treat is huge and prosecutors, while they are working for these groups, still belong to a proper specialized unit. Now we want to discuss the connections between real specialization and the definition of priorities. Can the formation of specialized units influence the way prosecutors determine priorities? In other words: can these decisions, taken by superior prosecutors, create, in practice, some criteria for decision-making? It is clearly difficult to call these external criteria. This is because they are set up within prosecution offices and by prosecutors. However, they may be thought to be external in the sense that decisions taken by some superior prosecutors can influence the way assistant prosecutors work. These criteria (like legal ones) could, in practice, potentially limit prosecutors’ power to determine personal priorities.

In general, specialized units seem to have been created for 3 reasons: the need to take consistent and uniform decisions for similar cases,⁹⁷ the need for specific training (specific knowledge of complicated legal rules (e. g. white collar crimes) and/or specific preparation to supervise a difficult investigation (e. g. organized crime)⁹⁸ and as an attempt to determine some shared priorities.⁹⁹ Here priority seems

⁹⁷ See, for example, CP(N43), AP(S6) and AP(C46).

⁹⁸ See, for example, AP(S6), AP(N49) and AP(C47).

to be very much linked with the seriousness of a crime for prosecutors (i. e. preferences). This is why the SDAS and the urban safety group are not specialized units. They treat cases with urgency (as fast as possible) but they have not been set up to deal with crimes that prosecutors consider particularly serious.

Now, it is very difficult to say clearly whether prosecutors give preferential treatment to crimes which fall into their specialized units. In fact, only 8 prosecutors out of 26 expressly said that they consider the cases concerning their specialization to be more important.¹⁰⁰ A clear example of specialized units having a clear impact on the definition of priorities has already been indicated (chap. 6): Turin where category A crimes have been codified as priorities:

I tend to prioritize specialized matters [...] Now, here, because of the way the prosecution office is organized, the specialized matters are the category A crimes. Thus, priorities are codified. Specialized matters always come first [...] Specialized units mirror the crime problem.¹⁰¹

In this case there seems to be a close connection being made between priorities and specialized units. Certain categories of crimes (environmental, white collar etc.) are dealt with by specialized units. In Turin the category A crimes seem to reflect the preferences of the prosecution office (“specialized units mirror the crime problem”), but these are not the only personal priorities. *Pubblici ministeri* can consider other criteria (e. g. accused in jail, victim in danger etc., in general the criteria we are describing here). These can also be included in circulars (see chap. 6). The point is that prosecutors do not just deal with specialized matters and, within the unit, there is not a strict hierarchy of cases which have to be prioritized. So, the sense of prioritization is twofold: prioritization as category of crime and as individual case.

In other prosecution offices, where there is not a clear distinction between category A and category B crimes as there is in Turin, some *pubblici ministeri* still seemed to consider specialized units as a reflection of the crime problem in a certain area:

It is not necessary for prosecutors working in specialized units specifically to prioritize specialized matters. This happens because, given the two reasons I explained before [the

⁹⁹ See, for example, CP(S4), AP(N49) and AP(N28).

¹⁰⁰ We visited 10 prosecution offices and 9 had specialized units. AP(N10) works in a small prosecution office (between 3 to 5 prosecutors) where there are not specialized units. So, in this case, the statistical analysis will be based on the interviews of 26 prosecutors and not 27.

¹⁰¹ AP(N1). Similar opinions were expressed by AP(N2) and AP(N3).

reasons why, according to this prosecutor, specialized units were created: specific knowledge of complicated legal rules and/or specific preparation to carry out a difficult investigation], specialized units already include the most serious crimes and the most difficult criminal proceedings.¹⁰²

Specializations clearly reflect the local problems. For example, here there are a lot of environmental crimes. So I had to create a unit composed of a substantial number of prosecutors [...] On the other hand, here terrorism is not a quantitative large issue,¹⁰³ so I only allocated 2 prosecutors. In fact, [when you determine the specialized units and their composition] you need to take into account the complaints you receive and the crime problem [in general].¹⁰⁴

So for these prosecutors, the very existence of the specialized units was a reflection of the priority accorded to the relevant offences. On the other hand, *pubblici ministeri* who said that specialized units were not created to indicate priorities had a different approach. They did not deny the importance of these groups. But they say that that priorities are chosen on different general criteria (e. g. police decisions, *prescrizione*, *allarme sociale* etc.) which apply to all cases, no matter if they are part of their specialization or not. So, the decision is, normally, not between specialized matters and the *ordinario*. Both can be priorities depending on the circumstances:

I do not think that specialized matters are prioritized compared to the *ordinario*; it depends [...] there can be some attempted murders [which are part of the *ordinario*, unless they are the consequence of a crime which fall into a specialized unit] which are, objectively, not very serious. [On the other hand] some others [attempted murders] are serious because they were very close to become a murder [...] I think that you never have to decide between specialized matters and *ordinario*, the problem is different [...] Between a petty *ordinario* case, like fraudulent conversion, and domestic violence, I tend to prioritize the domestic violence.¹⁰⁵

¹⁰² AP(N49).

¹⁰³ This prosecutor is not saying that terrorism is not important in general. It is not a serious crime problem in that area (i. e. south of Italy).

¹⁰⁴ CP(S4).

¹⁰⁵ AP(N31). The example refers to domestic violence because this prosecutor works for a specialized units dealing with sexual crimes, harassments and, in general, all the violent crimes which involve victims who appear particularly vulnerable (e. g. minors). Similar opinions about the fact that non-specialized matters (i. e. the *ordinario*) can be priorities were expressed, for example, by AP(N33), DCP(N45) and AP(C54). In particular, AP(C54) said that the priority is not necessarily linked with the specializations, but it is surely connected with the “objective seriousness” of the single case.

In the end, the difference between Turin and other prosecution offices where preferences are less structured could be more apparent than real. Prosecutors are always in the position to consider other criteria than those established within the prosecution offices. The consequence is that (even in Turin) cases of the *ordinario* may become more important than specialized matters.

There seems to be a more indirect link between specialization and preferences. *Pubblici ministeri* are normally in the position to choose their specialization(s). If the prosecution office is of medium-large or just medium size, prosecutors are part of at least 2 specialized units (see chap. 6). So, these are likely to be the crimes they consider more important and more interesting because they have chosen to specialize in those offences. Furthermore, when prosecutors gave examples of the cases they considered more serious they tended to refer to: murders (even attempted),¹⁰⁶ white collar crimes,¹⁰⁷ sexual crimes (and domestic violence and harassment in general, which are normally grouped with the specialized unit dealing with crimes committed against vulnerable victims (e. g. women, minors etc)¹⁰⁸, environmental crimes,¹⁰⁹ industrial accidents¹¹⁰ and crimes against public administration¹¹¹. Excluding murders (for which there is not a specialized unit),¹¹² in the prosecution offices visited which had specialized units (which was 9 out of 10), there were specialized units dealing with all these crimes.¹¹³ This is illustrated below:

¹⁰⁶ See, for example, AP(N39), AP(C47) and AP(N31).

¹⁰⁷ See, for example, AP(C46), AP(N48) and CP(S4).

¹⁰⁸ See, for example, AP(N33), AP(N31) and AP(N28).

¹⁰⁹ See, for example, AP(N42), AP(N38) and DCP(S5).

¹¹⁰ See, for example, AP(N1), AP(N2) and DCP(N45).

¹¹¹ See, for example, AP(S6), AP(N28) and AP(N49).

¹¹² Murders may still be treated within a specialized group if, for example, a murder is the result of an industrial accident.

¹¹³ Organized crime and terrorism were also considered priorities (see, for example, AP(N49) and DCP(N45). Moreover, there are specialized units dealing with these crimes. However, as we explained (chap. 6), when it comes to organized crime specialized units can only be set up in the biggest prosecution offices and, although they are part of the *procura*, they also interact with a national body (the DNA). For terrorism the situation is different. In fact, a specialized organ like the DNA has not been created yet. The analysis of the way prosecutors deal with organized crimes and terrorism goes far beyond this work. Suffice here to say that, in practice, it seems that these crimes are specifically treated by the biggest prosecution offices.

	1(N)	2(N)	3(N)	4(N)	5(N)	6(NC)	7(NC)	8(C)	9(S)
White collar crimes.	√	√	√	√	√	√	√	√	√
Sexual crimes and harassments.	√	√	√	√	√	√	√	√	X
Environmental crimes.	√	X ¹¹⁴	√	√	√	√	√	√	√
Industrial accidents	√	√	√	√	√	√	√	√	X
Crimes against public administration.	X ¹¹⁵	√	√	√	X	√	√	X ¹¹⁶	√

So, the few exceptions generally relate to crimes against public administration. But the point we want to make here concerns the link between specialization and definition of the crime problem. It appears that it is the preference which, in practice, leads to the organization of specialist units and not vice-versa. Specialized units reflect prosecutors' cultural assumptions about the definition of the crime problem. As we have explained (see chap. 6) specialized units (and the way prosecutors choose their specialized units) are not imposed. All the prosecutors are allowed to participate when these decisions are taken. This is not surprising given that, as we said (see above and chap. 6), prosecution offices are not hierarchically organized and prosecutors' legal independence plays a pivotal role in shaping the organizational relations. Moreover, these relations seem to be based on strategies of persuasion.

To conclude, if there is a positive correlation between specialized unit status and prioritization it is because the special unit exists to express the fact that a

¹¹⁴ Here, environmental crimes do not seem to be part of the *ordinario* (see, AP(N1), AP(N2) and AP(N3)). However, apparently, there is not a specific unit dealing with them. So, from our interviews it is not clear if there is, at least informally, a group of prosecutors dealing with environmental crimes.

¹¹⁵ Here there is not a specialized unit dealing with crimes against public administration. However, there is a group, dealing with financial crimes, which also treats cases involving frauds against public institutions (e. g. the European Union). So, in practice, this unit seems to be able to absorb at least some of the crimes against public administration and public bodies in general.

¹¹⁶ In this prosecutors office there are some prosecutors who, de facto, specialized in treating crimes against public administration. However, there is not a formal specialized unit (see AP(C46)).

particular type of crime is a priority not because a crime is a priority because there is a special unit. So, special unit status is not a criterion for determining the seriousness of particular crimes. But seriousness of crime might be one criterion for determining whether to create a special unit. Furthermore, the units deal with general categories of crimes, but the decision about which case should have a preferential treatment amongst those which have been allocated to the specialized group is left to *pubblici ministeri*. This means that even if we assume, as some prosecutors suggest, that specializations do mirror the prosecutors' view of the crime problem, we still need to search for and analyze other personal criteria. However, the decision to create specialized units seems, in practice, to have institutionalized the general categories of crimes which are considered by prosecutors more serious. This could indicate the borders of the definition of the crime problem. But there may be influence in more than one direction. This is because there is a constant turnover of prosecutors. So, the young and the new *pubblici ministeri* arrive to find a structure of established special units. These may contribute to 'socializing' new prosecutors into a particular definition of the crime problem (for example, that white-collar crime is important). However, for the reasons we explained above (i. e. prosecutors' professional culture, legal independence and absence of hierarchical relations), it may well be that the structure of preferences reflected in special units will change if collectively prosecutors' definitions of the crime problem change.

Finally, these considerations only partially apply to the SDAS and the urban safety group. As we said, these are not specialized units. But they are composed of prosecutors who deal with a diverse range of cases with the aim of dealing with them as fast as possible. But, in the prosecutors' view, these groups were created to deal with non-serious crimes. So there is a correlation between the minor nature of the case and the creation of, for example, the SDAS. Even in these cases it is the (non) preference (together, surely, with efficiency issues) which leads to the organization and not vice-versa. This is what seems to have happened in practice.

4. Practical criteria: investigation

This section considers the relevance of the urgency of carrying out certain investigative acts. This is a different situation compared to those we have described

above. *Prescrizione*, arrests and pre-trial measures are linked with clear legal-procedural rules. On the other hand, when urgency is related to the investigation, prosecutors' discretionary powers to assess and decide on the different circumstances of a case appear more substantial:

It happens that [sometimes] when a serious crime has been committed you need to deal with it as soon as possible, because, otherwise, you will not find any evidence.¹¹⁷

Someone could say: environmental crimes are *contravvenzioni*, so we can put them aside. However, for example, it happened that the police realized that there was rubbish under the soil in an area where they were about to build [...] So, we started to investigate and we discovered that the rubbish could be toxic [...] So, in this case, even if, at the end, the punishment may not be substantial, it was necessary to act immediately, because they were about to build.¹¹⁸

Urgent matters can be determined by the fact that there are cases for which there is the need to carry out investigative acts as soon as possible. [So, for example] denunciations for personal injuries or deaths because of medical responsibility, attempted murders, industrial accidents [etc.]. [Also], situations where it is necessary to stop a criminal activity which is still going on.¹¹⁹

There are investigative acts which must be carried out immediately, otherwise they lead to no results. This happens for murders,¹²⁰ but there are also some cases which involve domestic violence or violence against minors. So, for example, when there is a paedophile. [In fact] the paedophile contacts the minor via internet and he changes the server to access the net every week. If we can not get him during the first week we lose him and we can not find him anymore.¹²¹

It is not possible to list all the reasons why certain investigative acts become urgent because it depends very much on the circumstances of the single case. However, it seems that three key criteria can be identified: investigative acts must be carried out immediately when the evidence must be collected as soon as possible; when there is the risk that the perpetrator will escape; and/or when it is necessary to

¹¹⁷ CP(S4).

¹¹⁸ AP(N38).

¹¹⁹ AP(C47).

¹²⁰ See AP(N39) who explained why murders are urgent matters. In particular, she said: "When the crime is particularly serious, like a murder, we do have to go to the crime scene and, for example, we have to authorize the removal of the body".

¹²¹ AP(C46).

prevent or limit consequences of the crime. Thus, while prosecutors' discretionary powers to determine that a case is urgent appear substantial, certain commonly cited principles exist concerning the urgency of the investigation just as there are common criteria taken into account in determining more general priorities. Prosecutors do not simply accept priorities determined by police officers; they are in the position to consider other elements and, as a consequence, mediate the influence of police's decisions on the definition of the crime problem (chap. 8). The analysis of urgency (of the investigation) as a criterion for determining priorities seems to confirm this argument. It seems to show that, in the pre-trial phase, prosecutors still have power to decide on the circumstances they consider relevant to define the crime problem. In other words: *pubblici ministeri* seem to be, in practice, in the position to assess and evaluate all the information they have obtained about a case. Prosecutors' power to resist the impact of external influences will be further explained when we will deal with prosecutors' approach to street crime and illegal immigration and we will see how *pubblici ministeri* seem to be able to filter certain forms of social anxiety.

5. Conclusion

Prosecutors' definition of the crime problem appears to be the result of complex considerations involving different criteria which interact with each other. This does not mean that decisions on priorities are anarchic and that general criteria cannot be determined. Substantive and procedural legal provisions may influence prosecutors' decisions (i. e. *prescrizione*). On the other hand, the existence of specialized units (and other groups like the SDAS) may indicate a priority accorded to particular types of crime. Finally, *pubblici ministeri* also take into consideration the urgency of carrying out investigative acts, the consequences of a crime, the characteristics of the perpetrator and the damage suffered by the victim. But there is no ranking of criteria. So, there are no cases which, a priori, are more important than others. Prosecutors appear to adopt a pragmatic, case by case approach to determining the weight of particular criteria (e. g. *prescrizione*, damages suffered by the victim etc.) in a particular case. Socio-political considerations and opinions of prosecutors appear important as well. In particular, a case can be prioritized if its consequences can

threaten the principles which govern the way society lives, even if there are no specific victims. But it is prosecutors who determine what is particularly threatening.

To conclude, although general criteria can be identified, prosecutors are in the position to take personal decisions on the definition of the crime problem. In other words: they have the power to determine preferences. This is linked to earlier comments and seems to confirm that *pubblici ministeri* retain the power to determine the influence of externally defined criteria such as legal rules. This also poses questions about the meaning, in practice, of the legality principle, but this will be discussed later (see chap. 12) when the analysis of the way prosecutors define the crime problem has been completed. Moreover, this mediating function seems to have the effect of reducing the effective impact of externally defined influences on prosecutors' discretion (though they remain relevant to decision-making). As a consequence, the *pubblici ministeri* retain the power to filter out (and treat later or drop) cases that they do not consider as priorities. This will be better analyzed in the next chapters when we will deal with the way prosecutors define *allarme sociale* and prosecutors street crime and immigration.

CHAPTER X. PROSECUTORS AND SOCIAL ALARM

1. Introduction

This section will set out the (limited) literature concerning prosecutors and social alarm and explain the questions we want to answer in this chapter. In addition, before we begin to describe the meaning of *allarme sociale* for prosecutors, we need to define this concept more generally and to examine other ideas connected to the definition of *allarme sociale*.

*Allarme sociale*¹ is an expression that, in Italy, is used by the media, by politicians, by ordinary people and by prosecutors (and legal actors in general) as well. As we said (chap. 8), it literally means social alarm and defines the reaction (possibly disproportionate) of society when certain crimes have been committed and/or certain perpetrators are involved. This reaction can be unjustified and directed against a particular group of people (mainly immigrants, see later), but it can also be spontaneous and linked to moral and political issues.² In particular, social alarm tends to identify those situations where a certain (criminal and/or non-criminal) phenomenon becomes a source of fear within the society and, as a consequence, it creates fear.³ As for the consequences that the public concern about *allarme sociale* can create, Cornelli argues that the fear of crime provides the opportunity to begin a political confrontation (i. e. political parties discuss security issues), to divert the attention of public opinion from other issues (e. g. economic recessions etc.) and to increase the level of control over society. So, social alarm does not just influence specific victims of crimes and/or those who actually live in dangerous areas.⁴ This seems to be a public issue which may involve institutions and ordinary people (i. e. the civil society in general) who do not live in places where certain crimes have been committed.

Social alarm also appears connected to events which are not necessarily crimes. Sometimes it is more a matter of disorder and incivilities (e. g. homeless

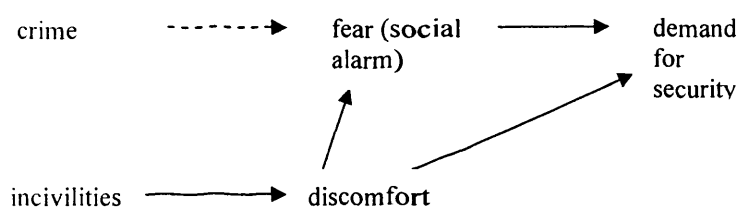
¹ For similarities and differences with the concept of moral panic see chap. 1.

² Cornelli R. “*Paura della criminalità e allarme sociale*”. In Selmini R. eds. “*La sicurezza urbana*”. 2004. Bologna: Il Mulino. p. 111. See also, Barbagli M. eds. “*Egregio Signor Sindaco*”. 1999. Bologna: Il Mulino.

³ Cornelli (2004) *op. cit.* p. 113.

⁴ *Ibid.* p. 114.

people, drug addicts, prostitutes etc.).⁵ For example, as we said (chap. 5), a leader of one of the committees of citizens in Modena (Emilia Romagna), talking about the lack of safety in a certain area, said: “It’s also the way they [immigrants] behave in public places”.⁶ So, as Chiesi explains, although in Italy criminality is not growing and the crime rate seems lower compared to the rest of Europe,⁷ social alarm remains and the demand for security keeps increasing, because incivilities have become a source of fear as well.⁸ The author explains this concept using a diagram:⁹



As we can see Chiesi links social alarm (together with crime and incivilities) with insecurity (or increase in the demand for security). This is not unusual. In fact, many authors remark on this connection.¹⁰ The argument is that the panic caused by an event(s) (not necessarily a crime, as we saw) increases the demand for security¹¹ from civil society. As we saw, recent (and less recent) statistical analyses seem to have proved that ordinary people really perceive this sense of insecurity. Moreover, mass media, politics and the public (i. e. the dominant political cultures) consider insecurity as a very important issue. We have already discussed these issues (chap. 5). However, here it is important to summarize what we said before and to underline the connections with social alarm.

⁵ Chiesi L. “*Le inciviltà: degrado urbano e insicurezza*”. In Selmini eds. (2004) *op. cit.* pp. 129-140. See also, Barbagli M. “*La paura della criminalità*”. In Barbagli M. and Gatti U. eds. “*La criminalità in Italia*”. 2002. Bologna: Il Mulino. pp. 205-212.

⁶ Melossi and Selmini (2000) *op. cit.* p. 150. See also: Melossi (2003) *op. cit.* p. 384.

⁷ See, for example, Chiesi (2004) *op. cit.* p. 131 and Barbagli (2002) *op. cit.* For a general idea about the crime problem in Italy see: Muratore et al eds. (2004) *op. cit.* See also chap. 5.

⁸ Chiesi (2004) *op. cit.* p. 131. See also, for example, Barbagli (2002) *op. cit.* pp. 207-209 and Corazziari I. and Federici A. “*La zona in cui si vive e il degrado sociale*”. In Muratore et al eds. (2004) *op. cit.* p. 129.

⁹ Chiesi (2004) *op. cit.* p. 131.

¹⁰ Melossi and Selmini (2000) *op. cit.* pp. 151-153. See also, for example, Maneri M. “*Il panico morale come dispositivo di trasformazione dell'insicurezza*”. January-March 2001. In RASSEGNA ITALIANA DI SOCIOLOGIA/ a. XLII. pp. 5-40.

¹¹ When we talk about security here we mean safety. In particular, insecurity is created by the (real and perceived) lack of safety (for us, our family and our properties). See, Naldi A. “*Mass media e insicurezza*”. In Selmini eds. (2004) *op. cit.* p. 118. See also, for example, Melossi and Selmini (2000) *op. cit.*

In Italy, like in many other western capitalistic countries, security (and crimes which create insecurity, like street crime and crimes committed by immigrants, see later) is a very important matter (but in Italy it became important later, in the 1990s). This involves the central state, the media and the man and the woman in the street. The importance of security issues for Italian politics can be very well demonstrated if we analyze the results of the 2008 elections. The *Lega Nord* (Northern League, the secessionist party, supporting the centre-right coalition) obtained a remarkable result¹² focusing on two issues: devolution and ‘fighting’ against immigration and insecurity.¹³ The ‘fight against crime and insecurity’ is not a monopoly of one or several political parties. Both the centre-right and the centre-left coalitions have put security and crime-control at the top of their agenda. However, their solutions are partially different: the centre-right coalition, as we have said, proposes more repression (against crime); the centre-left is more focused on solving social conflicts. So, in Italy, the differences between left and right still seem perceptible when it comes to defining the crime problem and how to find solutions to tackle crime. The mass media seem to reflect these political differences. In particular, the centre-right media tend to stress the need for repression, while the centre-left media emphasize social problems. However, in general, security issues (in particular the demand for more security) appear clearly important. Moreover, as Naldi claims, the media may have contributed to social alarm by its stereotypical representation.¹⁴ The lack of safety is very much an issue for civil society as well. In the last twenty years, local committees of citizens have been created; protests against lack of security have increased; and, in general, the public has started to be more involved when political institutions have had to define the criminal policy.

Thus, although, as Nelken says, in Italy there is much less “media exploited public fear of conventional crime as compared to common law countries”,¹⁵ security has clearly become an important issue within the Italian society. Moreover, insecurity and social alarm seem to be mainly related to street crime and immigration (chap.

¹² Around 8-9% of the votes, but this was all concentrated in the north, because this is a territorial party which does not exist in the south of Italy.

¹³ The language used by this party against immigration is often characterized by a strong racism. In fact, for example, radio *Padania libera* (the official radio of the *Lega Nord*) has once said that “unfortunately, it is easier to kill rats than getting rid of gypsies” (see Lerner G. “*Il Nord del Senatur*”. [Online]. 2008. Available at: <http://www.repubblica.it/2008/04/sezioni/politica/elezioni-2008-uno/nord-senatur/nord-senatur.html> [Accessed 16/04/2008]).

¹⁴ See, Naldi A. (2004) *op. cit.* pp. 117-128, in particular p. 118.

¹⁵ Nelken (2006) *op. cit.* p. 172.

11).¹⁶ In particular, immigration has become important because of the (street) crimes committed by *extracomunitari*, because some of these are illegal immigrants¹⁷ and, sometimes, because there are *extracomunitari* who behave in a certain way (i. e. incivilities). We will specifically deal with prosecutors, street crime and immigration in the next chapter. Suffice it here to say that, in relation to security issues, the dominant political cultures (media, politics and public opinion) seem to concentrate on these crimes as two of the most serious crime problems and as sources of *allarme sociale*.¹⁸

The literature on Italian prosecutors and social alarm does not appear particularly extensive. Authors have mainly focused on two (different) issues: the impact and influence of social alarm on prosecutors' job (the majority) and the way *pubblici ministeri* have used this concept.

Some authors have argued that legal actors (the police, prosecutors, judges and, sometimes, lawyers as well) are very much influenced by 'common sense' about crime. In particular, legal actors, like ordinary people, stigmatize the behaviour of immigrants and suppose that they are inclined to commit certain crimes (i. e. street crime). So, the views about crime within the dominant political cultures, which, as we explained, are very much based on social alarm and insecurity, are assumed to have a great impact on the way legal actors behave. In fact, for example, Faiella, Paduanello and Sbraccia say that (immigrant) accused persons are 'socially identified' by legal actors and that this identification determines the way the criminal proceedings will end.¹⁹ Thus, according to these authors, an *extracomunitario* is seen by the ordinary

¹⁶ See, for example, Chiesi (2004), *op. cit.*, p. 132. The author says that "fear of crime is mainly related to robberies and mugging compared to murders". On the connections between *allarme sociale*, immigration, insecurity, crime, deviance and mass media in Italy and in Europe see, for example, Melossi D. "Stato controllo sociale, devianza". 2002. Milano: Bruno Mondadori. pp. 255-299. See also Maneri (2001) *op. cit.*

¹⁷ Even being an illegal immigrant is, in practice, a crime, see the Bossi-Fini Act (chap. 11).

¹⁸ Ferrajoli says: "the security campaigns [from the central state] are made to deal with the diffuse feeling of social insecurity. This implies a mobilization against the deviant and the different persons, preferably if coloured or *extracomunitario*". (Ferrajoli L. "Principia iuris. Teoria del diritto e della democrazia" (vol. II). 2007. Roma-Bari: Laterza. P. 373.

¹⁹ Faiella F., Paduanello M. and Sbraccia A., "La costruzione dell'identità dell'imputato nel corso della fase dibattimentale". In Mosconi G. and Padovan D. eds. "La fabbrica dei delinquenti. Processo penale e meccanismi di costruzione del condannato". 2005. Torino: L'Harmattan Italia. pp. 58-121, in particular p. 70. In this book the authors analyzed files concerning criminal proceedings involving both Italians and foreigners (20 files each in the area of Padua, a wealthy town in the north of Italy). In particular, they selected proceedings which dealt with crimes against property and drug trafficking (small drug trafficking).

people as a source of crime and panic. This influences legal actors who tend to ‘socially identify’ immigrants as criminals.

Quassoli seems to have very similar opinions.²⁰ He says that “the stereotype of the illegal immigrant, who is socially and economically excluded [i. e. living at the ‘fringes of the society’] and systematically involved in criminal activities” plays an important part in shaping the decisions that legal actors take during criminal proceedings.²¹ In the next chapter we will explain in detail how, in Quassoli and others’ view, legal actors in general (and prosecutors in particular) focus on dealing with immigrant crime. Here we just want to remark that the author clearly wants to underline that there is no possibility (or at least only an increasingly limited one) for prosecutors to mediate the inputs and the opinions about crime and justice which come from civil society (i. e. ‘what everybody knows’).

The work of Sarzotti runs in the same direction. He analyzed the “*discorsi annuali dell’anno giudiziario dei Procuratori Generali*” from 1999 till 2002 (in total 87 speeches).²² These are speeches that the chief prosecutors of the prosecution offices attached to the courts of appeal make every year. These accounts describe (sometimes with statistics as well) the way prosecution offices are working. They include views about the problems of the justice system and, more importantly for us, considerations on crime and criminality.²³ As the author explains, these speeches were studied to investigate prosecutors’ professional culture and the way they define their criminal policy.²⁴ Sarzotti describes a scenario where *pubblici ministeri* appear very much affected by civil society which is in turn strongly influenced by the concept of law and order and by common sense about crime (stereotypes and stigmatizations concerning crime and criminals, i. e. *extracomunitari*). In other words: the author (similarly to Quassoli) claims that *pubblici ministeri* are strongly influenced by the images of crime within the dominant political cultures; and suggests that prosecutors’

²⁰ Quassoli F. “*Immigrazione uguale criminalità. Rappresentazioni di senso comune e pratiche organizzative degli operatori del diritto*”. January-march 1999. RASSEGNA ITALIANA DI SOCIOLOGIA/ a. XXX, n. 1. pp. 43-75. This article was based on the analysis of files concerning criminal proceedings involving non Italian nationals (i. e. *extracomunitari*) and on interviews with prosecutors, judges and lawyers (the location was Milan).

²¹ Quassoli (1999) *op. cit.* p. 59.

²² These speeches are official. This is the moment when high ranked prosecutors (each one representing the prosecution offices which are working within the area covered by the court of appeal) ‘officially communicate’ with the media, the central state and the civil society in general. This should be taken into account while we explain Sarzotti’s analysis of these speeches.

²³ Sarzotti (2006) *op. cit.* See also Sarzotti (2006a) *op. cit.* where the author interviewed prosecutors in two prosecution offices: Turin and Bari (big town in the south of Italy); and Sarzotti (2008a) *op. cit.*

²⁴ Sarzotti (2006) *op. cit.* p. 10.

professional culture does not seem to mitigate this effect.²⁵ However, Sarzotti eventually emphasizes that prosecutors try to appear, at the same time, on the one hand, as guardians of equality before the law who try not to be influenced by the populism behind social alarm and the need of security; and on the other, they want to be seen as legal figures which fight against street crime and insecurity (i. e. for whom social alarm is a relevant issue).²⁶ This is considered to be prosecutors' professional culture. But the author explains that, in practice, *pubblici ministeri* are extremely influenced by the populism behind the definition of the crime problem and that their vision of criminal justice is emotional and political as in the Anglo-Saxon world.²⁷ In particular, Sarzotti says: "We can presume [from the analysis of the speeches] that prosecutors' professional experience is filtered and influenced by the image of crime and criminals made by mass media".²⁸ In the author's view, the consequences are that Italian prosecutors tend to link certain crimes (mainly street crime) with immigrants and immigration. In fact, at least in some prosecution offices, street crime and immigration are defined as major crime problems. In particular, as we will describe better in the next chapter, Sarzotti explains that in Turin, where the urban safety group was created, street crime became a priority because it was necessary to deal with the lack of safety and the social alarm that these crimes were creating.²⁹ The author, unsurprisingly, concludes that, at least *pubblici ministeri* working in Turin appear to be strongly influenced by the inputs coming from the dominant political cultures in general and from the local community in particular (i. e. *allarme sociale* caused by street crime and immigration).³⁰

At this point it is also important to mention the research carried out by Field and Nelken. This concerned youth justice in Italy and Wales. The authors underline the cooler expert 'tone' of youth justice in Italy compared to the Anglo-Saxon world. This means that Italian judges and magistrates dealing with youth justice have a professional self image rooted in a notion of themselves as 'bearers of the law' whose actions are legitimated through legal values rather than representatives of the

²⁵ *Ibid.* p. 13 and 16.

²⁶ *Ibid.* pp. 70-71

²⁷ *Ibid.* p. 68. For the Anglo-Saxon world the author refers to Garland D. "*The Culture of control: Crime and Social Order in Contemporary Society*". 2001. Oxford: Oxford University Press.

²⁸ Sarzotti (2006), *op. cit.* p. 97.

²⁹ Sarzotti (2006a) *op. cit.*

³⁰ *Ibid.* p. 82.

community accountable to popular opinion.³¹ So, it seems that, according to Field and Nelken, the link between the definition of the crime problem and common sense about crime and justice is not as strong as it appears, for example, from Sarzotti's research. Similar (although more radical) ideas were expressed by De Cataldo. He claims that Italian legal actors are not influenced by the 'propaganda' carried out by the media (but not only the media) which tends to stigmatize *extracomunitari* as criminals and to create insecurity (and social alarm) within the civil society. The author specifically talked about judges, but, in general, he referred to all the *magistrati* (prosecutors and judges). In particular, Di Cataldo wanted to underline the role of legal actors as 'professional experts' who are not (never, for the author) affected by external influences.³²

Finally, we have to mention the work of Marco Fabri. This author did not focus on the impact of social alarm on prosecutors, but on how *pubblici ministeri* use this concept. The author describes *allarme sociale* as a sort of container which includes all the different considerations that prosecutors make when they determine priorities. Moreover, he claims that *pubblici ministeri* justify their decisions by saying that certain crimes cause (or do not cause) social alarm. Fabri explains that the consequence is that every prosecutor has a personal idea of the crime problem and common criteria cannot be identified.³³ In this sense the author seems to agree with Di Federico who, as we said, talked about the 'personalization' of prosecutorial functions and of the excess of independence that prosecutors have when they define priorities.³⁴ So, Fabri wants to underline how *pubblici ministeri* (mis)use the concept of social alarm and the consequences that, in his opinion, this creates. However, given that he claims that every *pubblico ministero* uses *allarme sociale* in a different way, he does not explain what this concept means for prosecutors.

In this chapter we want to answer two questions. First, we want to analyze the meaning of social alarm for prosecutors. Second, we want to understand how important this concept is when *pubblici ministeri* define priorities. Moreover, this

³¹ Field S. and Nelken D. "Early Intervention and Cultures of Youth Justice: a Comparison of Italy and Wales". In Gessner V. and Nelken D. eds. "European Ways of Law". 2007. Oxford: Hart publishing. pp. 349-373, in particular p. 364-365.

³² De Cataldo G. "La legge, la zingara e la propaganda". 2007. *Questione Giustizia*. Vol. 6. pp. 1265-1267.

³³ Fabri (1997) *op. cit.* pp. 178-179.

³⁴ Di Federico (1998) *op. cit.*

second question will give us the chance to describe the impact that social alarm seems to have on the prosecutors' job. As we have explained, these issues have been already partially addressed by some authors. However, our research leads to different conclusions when compared to the dominant academic literature. In fact, although social alarm is certainly one of the criteria prosecutors use to determine the crime problem, this does not appear, as Fabri claims, as a container. Furthermore, it seems possible to identify some characteristics of this concept which are common to different prosecutors. In other words: *pubblici ministeri* seem to have developed their own meaning of social alarm, which is only partially similar to the ideas developed within civil society. Finally, although here we do not want to deny that images of crime, security and social alarm within the dominant political cultures can influence *pubblici ministeri*, we will try to demonstrate that these legal actors are in the position to mediate this impact.

2. Prosecutors' sense of social alarm

As we have just explained, the approach of the media, the reaction of local communities and the response of the central state suggest that social alarm is now an issue in the Italian society. Public fear, the sense of insecurity, the social reactions and the attempt to identify a group (i. e. immigrants) as a threat to societal values are now perceptible. But what is social alarm in the prosecutors' view? And how does this affect their choices? In order to answer to these questions we will (also) refer to the examples of street crime and crimes committed by immigrants (including the fact of being an illegal immigrant), because these are crimes that, as we said, are supposed to create social alarm. However, we will not explain in detail how *pubblici ministeri* deal with these crimes. This will be done in the next chapter.

The vast majority of the *pubblici ministeri* we interviewed admit that street crime and illegal immigration create social alarm.³⁵ Prosecutors talk about local communities' reactions and media exploitation of public fear. However, they also said that street crime and crimes committed by immigrants have a medium-low priority

³⁵ 21 Prosecutors said that street crime and illegal immigration create social alarm (particularly for the local community). Two (one in a small prosecution office in the north and one in a big office in the south) believe that, in the area where they work, the local community is not so much affected by these crimes. Two were not asked due to lack of time. Two did not clearly answer.

(see chap. 11).³⁶ Moreover, *pubblici ministeri* do not seem particularly influenced by the perception within civil society of crime and social alarm (unless this is connected to a crime or a series of crimes which, in prosecutors' view, are serious, see later). This appears particularly clearly when we examine the way Italian prosecutors deal with pressure and claims which come from local communities (and civil society in general):

I think that [pressure coming from the civil society] does not influence us very much. The police can be more influenced because [for example] they see that in [he indicated a street] there are 150 Nigerian prostitutes who always stay there and [as a consequence] the local committees of citizens push them to intervene. They [police] intervene and then they send us a report; and we intervene. So, it [the pressure] is only indirect.³⁷

I mean, there are certain crimes. [For example] I remember that last year there has been a case of a car accident where the driver was drunk and two young girls died. There was a debate within the local community about traffic, drunken driving [...] We are necessarily in contact with people. I say that we work on people's flesh. I mean, there are the accused persons or the victims and we are in a situation which is always evolving. So, everything can require careful consideration and you may need to change your approach and your behaviour. However, we can not say that we determine our actions according to the pressure of public opinion, or any other form of pressure. We do not have to do it and we can not do it.³⁸

The fact that people write [to protest] does not influence me. But it depends on the case: if I have an indication that [for example] in a certain park there is a frequent and substantial drug trafficking I begin an investigation to understand if this is really happening or not. It does not matter if 10 people wrote to me; if I believe that the indication is reliable I begin an investigation. However, the fact that there are 50 signatures [he is making the example of a petition] does not determine that an investigation will begin or not begin, I can do it anyway.³⁹

So, prosecutors seem to take into consideration and they are aware that certain crime problems can affect society (e. g. pressure coming from committees of citizens, debate about drunken driving etc.) However, *pubblici ministeri* say that the pressure

³⁶ 22 prosecutors out of 27 said that street crimes and crimes committed by immigrants have a medium-low priority. One was not asked (due to lack of time) and one did not clearly answer. 3 said that these crimes are prioritized.

³⁷ AP(N30).

³⁸ AP(N39).

³⁹ AP(C54).

coming from ordinary people does not seem to be fundamental when they decide to focus on a particular crime problem.⁴⁰ In fact, only two prosecutors referred to pressure coming from civil society (and the media as well) as an important reason to prioritize a case:

The prosecution office surely has to take into account the *allarme sociale*. This is because, amongst its priorities, the *procura* has, as much as it is possible, that of dealing with people's security needs. So, maybe, a case which has created more social alarm is treated as soon as possible. Even a case of *teppismo*,⁴¹ a violent case of mugging which will be reported in the newspaper; you try to deal with them as soon as possible [...] We should not be influenced. The *magistratura*'s system should keep the *magistratura* [i. e. judges and prosecutors] as far as possible from political choices. However, as I said, the social alarm [is important] and it is clear that if something goes on and the newspapers and the media pay attention to that, you need to treat it as soon as possible. This is because it is not nice when they [the media] come to ask you [about the case] and you say that you do not have time to do it.⁴²

I believe that the citizen who does not feel safe when he/she is walking in the street needs to be protected [...] I think that, in general, security is a priority.⁴³

These seem to be relevant exceptions. In particular, here prosecutors refer to security, social alarm and the impact of the media and local communities as important issues that determine the way they will deal with crime. However, these differences could be more apparent than real. Neither of these *pubblici ministeri* consider street crime and immigration as priorities (and, as we will explain (chap. 11), there are no specialized units dealing with these crimes). Moreover, DCP(N45) does not seem to link social alarm to general crime problems, but to specific crimes which have had a great impact in the society. So, his aim does not seem to be that of tackling, for example, street crime (e. g. mugging and *teppismo*) because they create social alarm,

⁴⁰ 19 prosecutors said that they are not influenced (unless they consider these crimes serious) by the reaction of local communities when certain crimes have created (and create) social alarm (in the question we referred, as examples, to street crime and immigration). 2 said that local community pressure is important, even when it concerns street crime. However, they work in an area (south of Italy) where street crime is synonymous with organized crime, and they clearly linked the two issues. 2 were not asked due to lack of time. 2 did not clearly answer, but they said that, in general, street crime and crimes committed by immigrants are not the real crime problem. 2 said that community (and media) pressure is very important (see later).

⁴¹ This mainly refers to situations where a gang(s) or a single person has caused substantial property damages, but it can involve injuries as well (similar to hooliganism).

⁴² DCP(N45).

⁴³ AP(N32).

but to deal efficiently with single cases that have shocked society. Furthermore, AP(N32) talks about the need to guarantee the security of people “walking in the street”. This is surely linked with street crime. In fact, she mentioned, for example, the problems created by thefts. However, her idea of security does not seem to reflect, completely, the idea that civil society seems to have. For this prosecutor, the goal, as we said, is not to deal with street crime and immigration as priorities, but to ensure that these crimes are actually treated and not just abandoned (see chap. 11):

Now, it is a bit too much to say that *microcriminalità*⁴⁴ is a priority. The priority should go to other more important crimes which have bigger and devastating effects. The point is that it [the *microcriminalità*] should not be ignored. In a big prosecution office [where she works] there is always the risk that you only do the big things and you do not consider at all the medium-small ones.⁴⁵

Moreover, although she seems to apply strictly the Bossi-Fini legislation, she considers it to be a problem, because *pubblici ministeri* need to spend a lot of time on these cases; while they could focus on more important crimes. So, even in these situations, where prosecutors admit to being influenced by the opinions of civil society about crime and justice, we should be careful when we evaluate the impact, in practice, of these influences. In other words: *pubblici ministeri* still seem to retain the right to take important decisions about the crime problem. And they do not seem mere executors of anti-crime policies based on fighting against crimes which create social alarm.

So, in general, Italian prosecutors do not appear particularly influenced by dominant political cultures when they define the crime problem. What is the explanation for this? First of all, the influence prosecutors perceive is ‘indirect’. This is because it is the police that are directly in contact with civil society, whereas the involvement of *pubblici ministeri* comes later:

So, the police deal with public order. However, we feel that pressure, because people ask for more control. But we arrive later, because public order is a matter for the police and the *prefetto*. [So] we are involved, because we have more crime reports [coming from

⁴⁴ This literally means micro crimes. In Italian this expression is used (by legal actors, media, politicians and ordinary people) to indicate street crime (but it is becoming more common to call them *criminalità di strada* which means street crime).

⁴⁵ AP(N32).

ordinary people and the police], but it is indirect, through the crime reports [...] We can not do anything in terms of prevention, but when we receive a denunciation [we act].⁴⁶

In this case, the distinction between the police who deal with public order and general issues coming from the community and prosecutors who treat specific crime reports appears clear. This seems to confirm what we said before about police influence during the pre-trial phase (chap. 8). In particular, the police have to be in 'the street' and *pubblici ministeri* seem to accept police's role as initial establishers of priorities. However, prosecutors have to be more 'detached'. So, the effect of claims coming from 'the street' appears to have direct impact on the police and only an indirect influence on prosecutors who do not have a close contact with the society (at least not as close as the police have). It is interesting to note that police officers seem to confirm this view:

The *pattuglie appiedate*⁴⁷ were created for this purpose [to deal with people's sense of insecurity]. This [security and the claims coming from the ordinary people] is a police problem, prosecutors will decide later, but the impact on society does not involve the prosecutor. The police directly control; you do not need prosecutors for people's security [...] Prosecutors will act, but later⁴⁸

Again, this is consistent with what we explained before (chap. 8). Police officers deal with security (i. e. 'guarding the *territorio*'); prosecutors intervene later when there is a crime report to treat. However, what we want to underline here is that police officers' accounts seem to confirm the idea that images of crime and (dis)order coming from ordinary people do not substantially influence prosecutors. In fact, one

⁴⁶ CP(S4). On the fact that prosecutors only indirectly perceive the pressure coming from the civil society see, for example, AP(N10), AP(N28) and AP(N38).

⁴⁷ These are groups of police officers who control certain areas. The point is that, unlike the others, they do it by walking around.

⁴⁸ Pol.(N26). Similar opinions about the fact that prosecutors are not very much influenced by the pressure coming from the civil society were expressed, for example, by Pol.(N26), Pol.(N14) and Pol.(N12). Moreover, Pol.(N14) gave an example of a prosecution office (not located in the area where he works) where he believes the police and prosecutors have been influenced by the media and the public opinion. In particular, he said: "I know that in other prosecution offices they act in a different way [they are influenced]. For example, in [...] they used to arrest prostitutes' clients and to charge them for prostitution exploitation; prosecutors were supporting them [the police]! The media and the local community agreed. Then, one day, a well know entrepreneur was too much ashamed [because he has been arrested] and he killed himself. Since that moment everything has changed, the media and the prosecution office [did not focus anymore on these issues]".

police officer said: “in [...] citizens have a great power on the police; for the prosecution office it is different [citizens have much less influence]”.⁴⁹

Is this enough to explain that social alarm only partially influences prosecutors? As we said (chap. 8), police officers affect prosecutors’ decisions on the definition of priorities because they implement directives on anti-crime policies (often aimed at tackling street crime and illegal immigration) which have been determined by the central government (minister of interior) and high ranked local authorities (*prefetto* and *questore*). Moreover, the police have the right to arrest and this, as in the case of the Bossi-Fini, can have a great impact on prosecutors’ job. So, how can *pubblici ministeri* mediate the impact of these external influences which, indirectly, could require them to prioritize cases which create panic and fear within the society? Prosecutors take into consideration the fact that some crimes create *allarme sociale*. So, this is one of the criteria to be taken into account to determine priorities.

Yes, the impact on society [is important] because it creates a demand for justice that, maybe, we have to take into account [...] So, I prioritize the cases which are more important because of the investigation we need to carry out and because they had a great impact on society.⁵⁰

However, prosecutors’ idea of social alarm includes various concepts. In particular, for prosecutors, the crimes which create *allarme sociale* are those which are particularly dangerous,⁵¹ which jeopardize people’s sense of security in their everyday life,⁵² which involve certain kinds of victims (e. g. women and elderly people)⁵³ and, in general, which have a great impact on the society.⁵⁴ These elements are surely compatible with the idea that the ordinary person, the media and the central state have of social alarm. However, when the *allarme sociale* reaches prosecutors it suddenly loses part of its impact. In fact, Italian prosecutors do not seem to accept blindly the notion of social alarm fed by the media and/or social reactions which they regard as merely populist. In particular, to be influential, social alarm must be related to an offence which is, in the prosecutors’ view, serious:

⁴⁹ Pol.(N27).

⁵⁰ AP(C53). Similar opinions were expressed, for example, by AP(N31), CP(N43) and AP(C47).

⁵¹ See, for example, CP(S4).

⁵² See, for example, AP(N48).

⁵³ See, for example, AP(N10).

⁵⁴ See, for example, CP(N40).

I repeat: the impact [of a crime] on the community [local and/or national] is linked with the objective seriousness of the case. When the crime is objectively serious we have the duty to be as ready as possible to prosecute the guilty person(s). In this sense the impact on the society is transmitted to us, only in this sense. On the other hand, ‘stomach aches’ [that people have because of crime] which derive from frustrations or xenophobic approaches do not influence us at all.⁵⁵

Unsurprisingly, the criteria to determine the seriousness of a case are mainly those we identified in the previous chapter when we analyzed the criteria that prosecutors use to determine priorities. In particular, the seriousness of a crime may be defined by the law: the more serious the crime, the more severe the punishment (i. e. impact of legislation).⁵⁶ Moreover, the fact that the accused person is in jail (held in i.e. pre-trial custody)⁵⁷ or that measures like seizures have to be taken are important criteria as well.⁵⁸ A case can also be prioritized if there is the risk that the prosecution will be blocked because of the *prescrizione*.⁵⁹ Furthermore, the interests affected are also very important: crimes which threaten life are more important than crimes which threaten property.⁶⁰ Finally, the damage suffered by the victim can be a relevant criterion as well.⁶¹ However, in practice these objective criteria can be, sometimes, disregarded. The clearest example is the Bossi-Fini, which, for the violations of art. 14 (i. e. failure to comply with a deportation order) provides very strict punishments (from 1 to 4 years excluding aggravating and mitigating circumstances), but which has a low priority. Moreover, mugging, which could lead to substantial injuries for the victim (e. g. when an old person is mugged and falls on the ground), has a medium-low (often only low) priority, unless substantial injuries actually happen. In fact, in these cases, life can be threatened.

So, it seems that Italian prosecutors accept that one of their functions is to provide a response to public fear; but they also believe that they have to analyze what creates public fear and to decide if this is really a priority. As one of the lawyers we interviewed said: “‘judicial social alarm’ is very different compared to social alarm as

⁵⁵ AP(C53).

⁵⁶ See, for example, AP(C46).

⁵⁷ See, for example, DCP(N45).

⁵⁸ See, for example, AP(C47).

⁵⁹ See, for example, APApl.(N50).

⁶⁰ See, for example, CP(N40).

⁶¹ See, for example, AP(N38).

perceived in the society”.⁶² Here the word judicial is used to indicate the judiciary and those who are part of the judiciary. In particular, these are the *magistrati* in general and prosecutors in particular. The consequence is that the idea of social alarm for ordinary people, the central state and the media is different to the concept of *allarme sociale* for prosecutors. In particular, prosecutors seem to be in the position to filter these external influences, which do not disappear, but they are substantially moderated by other internal considerations:

We need to understand what we mean by influence. If someone, wrongly, believes that influence means to support the public's will, he/she is completely wrong. On the contrary, if it means to realize that there is a social problem and that we need to find the right measures to tackle it [it is fine]. It is clear that, if I work in an area where robberies are the major problem I will specialize in robberies [...] We do not have to follow the fashion [about crime] imposed by media or the fears of society [i. e. *allarme sociale*], otherwise this becomes *la caccia all'uomo nero*.⁶³

In this case the distinction seems clear between an emotional public opinion and prosecutors who have to analyze and determine whether the point of view of ordinary people about crime and justice corresponds to a real crime problem. This example also raises another question: who decides whether, for example, robberies are the major crime problem? In other words: are Italian prosecutors in the position to act like legal experts entitled to define the crime problem? This will be answered in the next section (prosecutors, street crime and immigration), here we want to focus on the way *pubblici ministeri* treat and filter social alarm. One very experienced prosecutor who works in a big prosecution office in the north of Italy said:

Now, the concept of *allarme sociale* is interesting. But this does not have to become a priority if it is only based on what people think in a particular moment. Judges and prosecutors must not follow the feelings of ordinary people. So, I only take into consideration the *allarme sociale* when this is created by a really serious crime or series of crimes [for example] a rape perpetrated by a group of people or in a street in the night. These attract a lot of interest from the media and the man in the street, but they are also very serious cases, so they become a priority.⁶⁴

⁶² L(N23).

⁶³ AP(N33). *La caccia all'uomo nero* literally means “hunting the black man”. In Italian you use this expression to indicate that you are searching, fighting against and scared of something which either does not exist or, at least, it is not so serious.

⁶⁴ AP(N31).

This prosecutor, like the vast majority of those we interviewed (see above), also said that he knows that street crime and illegal immigrations create social alarm, but that these are not priorities.

One prosecutor (working in a medium-size prosecution office in the north of Italy) gave a very good example of the way he puts together the impact that a crime has on the society with the interest affected by the crime itself:

The importance [of a case] stems from the importance of the interests affected; for example: once I had to deal with a case, which is still not finished, involving an environmental crime; basically they were illegally digging (during the night) on the banks of the Po river in order to remove the sand [and reuse it]. Moreover, some accused persons had been caught red-handed and arrested. This really had an impact on public opinion. Furthermore, the interest affected was the environment, which is protected by the constitution. As a consequence, one is emotionally involved by such a case [and will prioritize it].⁶⁵

The reasoning constructed by this prosecutor for the case of illegal digging does not apply for street crime and illegal immigration, because, as he said, the interests affected are not so important:

If you are talking about crimes committed within the area of illegal immigration [e. g. art. 14 of the Bossi-Fini] these are not really important. In fact, because of the reasons I explained before [i. e. accused in jail, urgency and, more important, the importance of interests affected like in the case of the illegal digging] they are not at the top of the agenda.⁶⁶

The consequence is that the impact of social alarm is seen as varying depending upon the crime committed. Moreover, these examples also show the attempt to put together personal considerations with legal rules. In fact, there is an obvious problem if the discourse of prosecutors is simply: I will take into account public fear as a priority when I personally think that public fear is real and it is based on a fact or a series of facts that I believe are important. So prosecutors try to link their choices with legal texts in order to put in more 'objective' terms their personal values.

⁶⁵ AP(N42). It is interesting to note that other prosecutors linked social alarm and environmental crimes. In particular, see, for example AP(C47), AP(C53) and AP(N48).

⁶⁶ AP(N42).

In this sense it is interesting to note what a prosecutor, who works for a specialized unit which also deals with organized crime not involving Italian organizations (i. e. criminal organizations set up by *extracomunitari*), said about the Bossi-Fini:

I have a personal opinion about the problem of illegal immigration, but my job is to apply the law [...] I can tell you that I think that certain parts of the Bossi-Fini are calling for revenge! Between 1 to 4 years imprisonment for the non national Italian who does not obey a deportation order [i. e. art. 14: all the prosecutors have to treat this crime, there is no specialized unit, see chap. 11], this [this legal provision] is a crime! Writing this piece of legislation is a crime! As a consequence, my interpretation of this Act is very strict [...] [However] The Bossi-Fini Act is [also] very tough against criminal organizations which organize networks to favour illegal immigration. This is reflecting an existing *allarme sociale*.⁶⁷

In the next chapter we will explain in detail how prosecutors can have a more or less strict approach when they apply the Bossi-Fini Act (especially art. 14). Here we want to underline the fact that this prosecutor refers to ‘existing social alarm’. In particular, *allarme sociale* only seems to exist in relation to certain crimes committed by illegal immigrants. This surely does not match (completely) with the idea that the dominant political cultures have about the sources of public fear. And it seems to confirm what we just said: prosecutors’ perception and the importance of *allarme sociale* can vary depending on the seriousness (in prosecutors’ view) of the crime committed. Moreover, the importance of personal considerations about crime and immigration, although mediated by objective principles (i. e. the duty to apply the law), is perceptible when this *pubblico ministero* talks about the application of the Bossi-Fini. This appears to support our argument that prosecutors do not simply ‘swallow’ the inputs coming from the civil society.

In one case a chief prosecutor working in a prosecution office where, he claims, all the cases are treated (but not in the same way) and, as a consequence, there are no problems with the *prescrizione* (in his view this amounts to a proper application of the legality principle, see chap. 7), said that social alarm becomes important even if it is not linked to extremely serious crimes:

⁶⁷ AP(N30).

The other criterion [to determine priorities] is the *allarme sociale*, this is clear. So, if there are some problems like, for example, robberies in villas [detached isolated houses] or a gang which is perpetrating some thefts in a certain area; you need obviously to prioritize these matters, like when something very serious happens [...] Yes, thefts as well, because when we look at the statistics, we can understand if there are areas which are particularly [afflicted by certain crimes]. So, in general, we tend to deal with crimes which create *allarme sociale*, even if these are not very serious, even drunken driving.⁶⁸

However, when it comes to street crime and immigration the idea of social alarm as a criterion to determine priorities does not appear so important anymore:

Turning to immigrants, I think that the situation, here, is similar to everywhere else. One year ago I organized a conference where we compared the crime rate for *extracomunitari* and the crime rate for non-*extracomunitari*, at the end we realized that the crime rate for *extracomunitari* was just a little bit higher; so, it was perfectly normal, taking into account that, with the Bossi-Fini, the *extracomunitario* can commit crimes that the others can not commit [i. e. art. 14] [...] So, I think this is normal: there is a high crime rate for crimes committed by *extracomunitari*, but it is not dangerous. I can think about the *extracomunitario* who is very unlucky [i. e. living 'at the fringes of society'], who needs to go stealing; but I do not believe this is as important as the newspapers say. If an Italian commits a theft you have a little tiny article on the newspaper; if the perpetrator is an *extracomunitario* you have half of a page.⁶⁹

The impact of the media and the fact that *extracomunitari* live in particular conditions and could be more inclined to commit certain crimes are not sufficient elements to determine that immigration is a priority. Moreover, this *pubblico ministero*, as in the other examples we just gave, seems to use objective criteria (i. e. crime rate) to explain and support his personal views about crimes committed by immigrants (i. e. there is a high crime rate, but it is not dangerous yet). Immigration can become important if, according to this prosecutor, there is a real crime problem corroborated by statistical evidence.⁷⁰ So, even in this situation, in practice, the impact of *allarme sociale* may vary and, although public fear is an important criterion to establish priorities, it is not enough to determine the seriousness of a crime.

⁶⁸ CP(N43).

⁶⁹ CP(N43).

⁷⁰ AP(C47) underlined as well that it is necessary to carry out a proper statistical analysis before deciding if crimes committed by immigrants are a problem or not. Moreover, he said that, at the moment, this information does not exist and that media tend to exaggerate the link between immigration and crime.

So, social alarm alone is not sufficient to determine priorities. Prosecutors seem to carry out a sort of balancing exercise in which *allarme sociale* is only one (and not the most important) factor. Moreover, for Italian prosecutors, the concept of social alarm appears to be something very much internal. They seem to have their own idea of social alarm which is also based on interactions with the other criteria *pubblici ministeri* use to determine priorities (e. g. accused person in jail, damage suffered by the victim etc.). The consequence is that external influences which define the crime problem do not seem to affect very much the way prosecutors define the crime problem. Here we are not saying that prosecutors are a sort of formidable wall which blocks entirely the influences of the dominant political cultures about crime and justice. In fact, as we said, the impact of public opinion may be indirect, but it exists and the police seem to be able to represent it very well. However, these influences appear to be mediated. Up to this point we have tried to demonstrate that this is what happens. We believe that the reason why this happens needs to be found in prosecutors' professional culture and self-image.

3. Prosecutors' professional culture and social alarm

In this section we will try to explain that the reasons why *pubblici ministeri* can resist the external influences stem from their professional culture. In particular, three issues will be (re)analyzed (we already discussed prosecutors' professional culture, see chap. 7): prosecutors' self image and professional culture in practice, the meaning of being 'legal filters' and the legal and institutional rules which shape prosecutors' professional culture.

As we explained, Italian prosecutors' professional culture or self-image is founded on their sense of themselves not as crime fighters but as judicial figures. In particular, *pubblici ministeri* see themselves as legal figures who perform a neutral and impartial investigation to find the truth; while they perceive a cultural distance between themselves and the crime fighter because they believe such a role implies exclusively working to obtain convictions. The consequence is that prosecutors consider that the decisions they take are taken as if they were judges. It does not matter if judges and prosecutors are functionally different, the key element is that, in prosecutors' view, they are culturally indistinguishable. Finally, prosecutors believe

that their sense of being impartial means that they do not support one side (the prosecution), but rather present both inculpatory and exculpatory evidence. However, as we have tried to demonstrate, in practice, prosecutors do not act as neutral and judicial figures. They are legal filters, who prevent cases which have not been legally investigated from becoming prosecuted cases. Moreover, the aim of prosecutors' filtering function seems to be that of presenting evidence to the judge to convince him/her that their interpretation of events is correct: they are thus functionally a party to proceedings. Finally, while prosecutors see this legal filtering as a judicial role it inevitably means that their judicial distance from the prejudicial information and opinion thrown up by the investigation is compromised. This is, in practice, the cultural difference between *pubblici ministeri* and judges.

Prosecutors' filtering action can also concern the definition of the crime problem. In fact, although external influences are perceptible (see above) and *pubblici ministeri* seem, at the beginning of the investigation, mere 'collectors' of crime reports, Italian prosecutors also appear to be able to mediate these external influences. In particular, the impact of public concern about crime and of police's priorities is mediated by other criteria (i. e. the seriousness of the case) which are both objective (e. g. procedural issues like *prescrizione*) and linked to prosecutors' personal values and decisions (see above). So, Italian prosecutors in their reaction through their prosecution practices to political and public concern about crime may also be seen to be filtering out certain forms of social anxiety. This will be further explained and demonstrated in the next chapter when we will deal with prosecutors' approach to street crime and immigration. What we want to underline here is not that Italian prosecutors can actually define the crime problem purely through legal principles or that they are impermeable to police decisions and opinions. Personal value-judgements about the social significance of different forms of criminality play their part and, as we said, external influences are perceptible. However, prosecutors see themselves as legal figures. Their 'cultural goal' is to maintain a distance between themselves and the external influences that might be seen to undermine their non-partisan role:

There could be a different approach [between judges and prosecutors] but this would be a problem. It is a matter of the function you are carrying out. So if I am a judge I have to think according to certain rules; on the other hand if I am a prosecutor I have think in a slightly different way. However, there is something which must never change:

impartiality. Both prosecutors and judges must be *terzi*⁷¹ and impartial. The prosecutor is a third party⁷² and must be above the parties. Prosecutors must, sometimes, judge like judges.⁷³

The police have more direct relations with citizens, so they look at the things in a partially different way [compared to prosecutors] [...] [This happens] because they deal with security issues, while we intervene later [...] We have to be more detached.⁷⁴

In particular, prosecutors seek to preserve a degree of judicial distance from the claims of victims, communities, politicians and from police decisions on the definition of the crime problem. Thus, prosecutors' professional culture in practice does not seem to be just focused on constructing a case which will stand scrutiny at trial. It also tends to emphasize the image of *pubblici ministeri* as legal experts who are by that very status entitled to determine the priorities of the criminal justice system.

These observations seem to run counter to Sarzotti's opinions who, as we said (see above), claims that Italian prosecutors' professional culture does not seem to mitigate the effect of the images of crime, order and security that the dominant political cultures express.⁷⁵ On the other hand, what we said seems to confirm what Field and Nelken explained about the cooler expert 'tone' of youth justice in Italy. In particular, prosecutors' self-image of legal figures legitimated to define the crime problem derives not from any claims to connection to popular opinion but rather from their role as bearers of the law (i. e. legal experts). As the authors underline, this seems to suggest that the move away from a cool expert-dominated vision of criminal justice to a more emotional and political criminal justice charted by Garland in the Anglo-Saxon world⁷⁶ may find less easy expression in Italy.⁷⁷

⁷¹ This literally means third. In this context it means that prosecutors (and judges) must be independent and must not be influenced by the parties (see chap. 7).

⁷² This means that prosecutors are a party, but they are neutral and impartial like judges.

⁷³ AP(Apl.(N50). Similar opinions on the fact that prosecutors must be impartial like judges were expressed, for example, by AP(N29), AP(N33) and AP(C47)

⁷⁴ AP(N38). Similar opinions were expressed by AP(N28) and AP(C46). See also AP(N32) who said: "Anyway, they [police] do not think about the trial, they just deal with the immediate consequences [that crime creates]".

⁷⁵ Sarzotti (2006) *op. cit.* p. 13 and 16.

⁷⁶ Garland (2001) *op. cit.*

⁷⁷ Field and Nelken (2007) *op. cit.*

Before we finish we just need to remind the reader that the professional image of Italian prosecutors as judicial, neutral and impartial legal figures is also rooted in institutional and legal principles which state *pubblici ministeri*'s independence. In particular, prosecutors have an 'external independence' from all the other constitutional powers (see chap. 4). This means that they should not be subject to any form of external pressure (particularly from the executive) when they execute their functions. Moreover, *pubblici ministeri* are part of the judiciary as much as judges and they share the same status (art. 104 para. 1 cost.). Furthermore, prosecutors and judges are both subject to the CSM, which is, as we said, an independent body governing the *magistratura* (art. 105, 106, 107 cost.). Finally, prosecutors' independence is also emphasized by the legality principle. In fact, as we explained (chap. 7) this provision may be seen as the projection into the criminal justice system of the principle of equality. But, in practice, it is also important to provide a formal protection to prosecutors from suspicions or allegations of prosecuting a case for reasons other than the purely legal. Thus, *pubblici ministeri* have strong legal base to protect their choices.

To conclude, in order to understand why social alarm has a limited impact on prosecutors' job we need to look at prosecutors' professional culture. Although *pubblici ministeri*'s sense of themselves as neutral judicial figures does not totally protect them from the external influences, their professional culture, in practice, puts them in the position to filter the pressure which comes from the civil society. In doing this, prosecutors do not eliminate *allarme sociale*. This becomes important when, in prosecutors' opinion, it is the result of a serious crime problem. In order to determine that a crime is serious and needs to be prioritized *pubblici ministeri* use different criteria which interact with each other (and with social alarm). This scenario suggests two considerations. First, prosecutors' sense of social alarm is linked to criteria which are not necessarily taken into consideration by the dominant political cultures. Second, prosecutors' filtering function seems to concern both specific cases to prosecute and general categories of crime to prioritize or not to prioritize. Within this context the *magistratura*'s legal and institutional framework appears to play an important part. This is because 'external independence' and the legality principle partially protect prosecutors from external pressure and criticisms about the way they define their priorities.

4. Conclusion

The story of Italian prosecutors and social alarm can be seen as a story about the way a partial separation can sometimes be maintained, albeit with difficulty, between dominant political cultures and dominant legal cultures. Italian prosecutors see themselves as legal figures who are entitled (together with judges) to define the crime problem. In their view they have the legal tools and the neutral and impartial approach which give them the legitimate authority to define the crime problem and thus to decide that street crime and immigration are not priorities, but that, for example, environmental and white collar crimes are. There are two main consequences. First, procedures which are aimed at imposing priorities on prosecutors (i. e. street crime and immigration) do not seem to be completely successful, if they do not fit with prosecutors' definition of the crime problem (see chap. 11). Second, although prosecutors' professional culture and self-image, rooted in notions of judicial 'distance' is, in practice, compromised by their lack of distance from the day to day realities of crime and policing, it still seems to be important to an understanding of why there is a distance between criminal policy as expressed by prosecution practices and the dominant political cultures. This does not mean that prosecutors are not influenced by external influences. But that they are not mere executors of anti-crime policies determined politically. On the contrary they still appear in the position to mediate the inputs of the dominant political cultures. In the end, the impact, in practice, of prosecutors' professional and legal culture seems to be that of 'creating room' for the choices and the evaluations of *pubblici ministeri*.

CHAPTER XI. PROSECUTORS, STREET CRIME AND IMMIGRATION

1. Introduction: the media, the central state and the public

This chapter develops issues raised in the previous chapter. Using the examples of the urban safety group and of the Bossi-Fini Act we intend to provide further evidence of the way prosecutors mediate the impact of external influences. However, before we address this and other important questions, we need to remind the reader what we have previously argued (chap. 5) about the way the media, the central state and the civil society have treated immigration and the crime problem. Moreover, in the following section we will review the way that the Italian academic literature has dealt with the relationship between prosecutors (and legal actors in general), street crime and immigration. We will then turn again to an analysis of our empirical data.

Street crime started to be an issue in the 1990s when demands for safety increased.¹ Now almost every day newspapers contain articles about robberies, thefts and muggings. This is done in a way that emphasizes the ‘risk of insecurity’.² Finally, immigrants are assumed to be, most of the time, the perpetrators of these crimes. The importance of the ‘fight against crime and immigration’ is even clearer if we look at the way the central state and the political class define the crime problem. The legislation enacted (even now, see chap. 5) shows that governments have tried to target a particular group: immigrants. This becomes clear with the Bossi-Fini Act (passed in 2002 by the former centre-right government and still the fundamental piece of legislation dealing with immigration) that, as we said (chap. 8), provides that a non Italian national who does not comply with a deportation order shall be arrested and immediately sent for trial.³ Surveys conducted have shown that Italian citizens are fearful of crime and are mainly scared of theft, robberies, ‘drugs’ and muggings.⁴ Moreover, through the role of the citizen’s committees that the local communities and the public can express their view of the crime problem and deviance and influence local politics and policy in relation to street crime, immigration and security issues.

¹ Melossi and Selmini (2000) *op. cit.* pp. 149-151.

² Naldi (2004) *op. cit.*

³ See art. 14 para. 5 *bis*, 5 *ter*, 5 *quater* and 5 *quinquies* of the D.Lgs. n. 286/1998 as amended by the Act n. 189/2002.

⁴ Melossi (2000) *op. cit.* p. 152. See also (chap. 5) the first and the second national victimization survey.

1.1. Introduction: the debate in Italy

When it comes to street crime, immigration and legal actors the Italian academic literature has mainly focused on one particular issue. Authors have tried to demonstrate that legal actors focus on street crime. Moreover, they have tried to show that the main reason that they do this is because they are influenced by the dominant stereotypes about crime and deviance (see above). Thus, immigration, deviance and *allarme sociale* seem, according to the dominant Italian academic literature, to merge together and to create a sort of ‘irresistible force’ which shapes the way Italian legal actors act. This approach is not surprising. As we explained (chap. 10), the same literature (and, most of the time, the same authors) emphasizes that Italian prosecutors (and legal actors in general) are strongly influenced by *allarme sociale*.

Who are the criminals that legal actors are searching for? This seems to be the main debate addressed by the Italian literature. These are the immigrants and, more generally, those who live at ‘the fringes of society’. This is because *extracomunitari* represent, in Melossi’s own words, ‘suitable enemies’ who are easily recognizable and who are perceived as deviant by the civil society (and the police).⁵ Melossi compared the results of research conducted in Emilia Romagna between 1997 and 1998 (based on interviews with 250 immigrants) with the results (limited to Emilia Romagna) of the first Italian national victimization survey. 49.7% of adult Italian males were stopped by the police in one year; for adult immigrants males the figure was only 43%. However, if we just consider the data for those who were stopped on foot (so, excluding traffic car stops), the likelihood of being stopped goes down to 1.4% for Italian males, but it is at 14% for foreign males.⁶ The significance of this relates to the fact that traffic car stops are normally random (the police do not know who is driving the car); while stops on foot patrol imply some sort of selection of the person(s) to stop.⁷ Melossi seems to suggest that Italian police forces have specifically chosen to concentrate on immigrants. *Extracomunitari* are what Campesi calls the ‘dangerous

⁵ Melossi (2003) *op. cit.* p. 388.

⁶ *Ibid.* p. 395. See also, Melossi (2002) *op. cit.* pp. 289-290.

⁷ Melossi (2002) *op. cit.* p. 290.

(social) classes'.⁸ The author argues that, in practice, police officers, prosecutors and judges will first determine the type of criminal they are dealing with; then they will try to find a suitable punishment (taking into account the type of criminal); and finally they will search for the legal basis to justify their decisions. In the end, the dominant type (or stereotype) of criminal is that of the *extracomunitario* and, more generally, those who live at 'the fringes of society' and commit certain crimes (i. e. street crimes, in particular small drug trafficking and thefts). These are, the 'dangerous classes' that the Italian criminal justice system wants to control. Legal actors (and prosecutors in particular) consider these crimes and these criminals as one of the major crime problems.

A related question is: how do legal actors determine the 'dangerous classes'? The academic literature has focused on the images of crime and criminals that prosecutors and the police (more rarely judges) use to define priorities. Italian legal actors are described as very much influenced by external stereotypes of crime and criminals (i. e. those created by the dominant political cultures). For example, Quassoli claims that prosecutors (like judges), for a number of reasons mainly linked with inefficiency of the Italian criminal justice system, do not normally have access to some crucial information. These are, for example, the *precedenti di polizia*.⁹ The consequence is that legal actors will mainly base their decisions (e. g. whether to ask for pre-trial custody or not) on external factors.¹⁰ So, in practice, prosecutors will be very much influenced by, for example, the fact that the accused person(s) has a job or not, a house or not etc. In other words, Quassoli says that *extracomunitari* are penalized not because their tendency to commit crimes, but because (as Campesi says) of their lifestyle (i. e. living 'at the fringes of society').¹¹ The author talks about a clear "ethnic construction of crime".¹²

⁸ Campesi G. "Il controllo delle nuove classi pericolose. Sotto-sistema penale di polizia ed immigrati". 2003. Dei Delitti e delle Pene, 1-3. pp. 146-243. This article was based on interviews with legal actors (the police, prosecutors, judges and lawyers) and on observation of case-files.

⁹ This is information kept by the police and it mainly deals with people involved in investigation activities. So, even when one does not have a real criminal record (e. g. the trial is not concluded), it is possible to check if he/she was involved in some criminal activities.

¹⁰ Quassoli (1999) *op. cit.* pp. 58-59.

¹¹ *Ibid.* p. 66. See also, Padovan D. and Padovano S. "Meccanismi di valutazione della moralità e dell'identità sociale degli attori soggetti a provvedimenti restrittivi", Mosconi et al eds (2005) *op. cit.* pp. 22-58, in particular p. 32; Campesi (2003) *op. cit.*; and Melossi (2003) *op. cit.* For a broad analysis of these issues see, for example, Dal Lago (2005) *op. cit.*

¹² Quassoli (1999) *op. cit.* p. 51.

Faiella (et. al.) has also discussed the connection between the position that the perpetrator has in the society and his/her criminalization. In particular, the author claims that legal actors take into account:¹³

- Documents (e. g. having or not a passport, a document establishing an official residence etc.).
- Socio-economic issues (a job, a house, a family etc.).
- Age and gender.
- Education.
- Race (colour of the skin, language(s) spoken etc.).

It is clear that, if these are the factors which determine the outcome of criminal proceedings, foreigners will normally be in a difficult position because *extracomunitari* (particularly illegal immigrants) often do not have a job, a house etc.¹⁴

Images of crime are said to influence prosecutors and the police in the same way. Both these legal actors have, at this stage of the proceedings, similar aims (i. e. a focus on street crime and immigration). Furthermore, they are said to be influenced by the same stereotypes on crime and deviance.¹⁵ In this sense, Palidda emphasizes the close connection between policing and civil society.¹⁶ Police decisions are the result of interactions and mediations between the law enforcement forces and the *attori sociali*.¹⁷ As a consequence the police will be strongly influenced by the images of crime of the *attori sociali*. Finally, Campesi argues that external influences which suggest how to define the crime problem can not be mediated by legal actors (prosecutors in particular). He sees both the police and prosecutors as acting to filter out cases which will not stand scrutiny at trial. But this idea of prosecutors' (and police) filtering action appears different to our arguments. Specifically, Campesi seems to suggest that, in practice, there are no relevant differences between the police and the prosecutorial stages. *Pubblici ministeri* simply continue what the police have

¹³ Faiella et al. (2005) *op. cit.* pp. 58-122, in particular p. 75.

¹⁴ *Ibid.* pp. 58-122, in particular p. 87.

¹⁵ Palidda S. "Polizia e immigrati: un'analisi etnografica". January-march 1999. RASSEGNA ITALIANA DI SOCIOLOGIA/ a. XXX, n. 1. pp. 77-114. In particular p. 94 and 101.

¹⁶ *Ibid.* See also, And Palidda S. "Polizia postmoderna. Etnografia del nuovo controllo sociale". 2000. Milano: Feltrinelli.

¹⁷ *Ibid.* p. 91. *Attori sociali* literally means social actors. In this context the social actors are the civil society (including, for example, the committees of citizens).

started.¹⁸ We believe that prosecutors' filtering function is highly influenced by the information obtained by the police (chap. 8). But we have tried to demonstrate that the legal filtering stage suggests that prosecutors have not been absorbed by police functions. Prosecutors may also be seen to be filtering out certain forms of political pressure and with it certain forms of social anxiety.

What are the consequences, in practice, of this approach? Clearly, these views drawn from the Italian literature seek to demonstrate that legal actors concentrate on street crime and immigration. The criminal justice system is now predominantly designed to punish particular criminals (*extracomunitari*) who have committed particular (street) crimes. This is the main thesis.¹⁹ But what happens in practice? How are these crimes treated? Prosecutors will try to deal with these cases as fast as possible. In particular, *pubblici ministeri* seem to use widely standardised legal (i. e. *direttissima*²⁰) procedures in order to deal with these cases as soon as possible,²¹ or, as Campesi says, to remove these criminals 'from the street'.²² In Palidda's view this is a sign that the police and prosecutors tend to discriminate against the perpetrators of these crimes. Legal actors may not consider immigrants and street crime as important issues, but this does not prevent them from focusing on these problems. In practice, these cases will be treated as priorities in order to 'get rid' of the criminals who, using Palidda's own words, the "police find repulsive"²³ (though he does not use the word priorities).²⁴ In other words, the author suggests that these cases are not regarded as important because they are not interesting (for legal actors). But they are still seen as

¹⁸ Campesi (2003) *op. cit.*

¹⁹ Chiodi explains that the police function (the author's main focus) is to respond to social pressure coming from the civil society. In particular, the police have to deal with social alarm and its sources (i. e. social construction of crime and deviance). The consequence is that, within the Italian criminal justice system, *extracomunitari* are discriminated against. So, the higher crime rates associated with immigrants (when compared to Italian nationals) are (also) the result of the fact that the police and *magistrati* tend to consider immigrants as deviant subjects. Moreover, the author underlines that, compared to Italians, immigrants are more likely to go to jail and they are normally incarcerated for a longer period. See, Chiodi M. "*Devianza e fenomeni migratori*". In Selmini eds. (2004) *op. cit.* p. 153-161. See also, Campesi (2003) *op. cit.*; Palidda (1999) *op. cit.*; Quassoli (1999) *op. cit.*; Melossi (2003) *op. cit.* p. 395; Natale L. "*Gli stranieri nelle carceri italiane*". 1990. POLIS, IV. pp. 325-352; and Padovan D. "*L'immigrato, lo straniero, il carcere: il nuovo razzismo nelle cittadelle occidentali*". 1993. *Dei Delitti e delle Pene*, 1. pp. 149-161.

²⁰ This is a special proceedings which is supposed to be very fast. In particular, the *direttissima* (also) allows prosecutors to send the accused (arrested) person(s) immediately to trial before the judge (art. 449-452 cpp.). It is normally an option, but, under art. 14 of the Bossi-Fini Act, it becomes compulsory.

²¹ Palidda (1999) *op. cit.* pp. 93-94.

²² Campesi (2003) *op. cit.*

²³ Palidda (1999) *op. cit.* p. 94.

²⁴ *Ibid.* p. 93. See also Padovan and Padovano (2005) *op. cit.* p. 40.

major crime problems. Finally, Palidda seems to imply that street crime and immigration have been, de facto, suggested by external influences (i. e. dominant political cultures) as priorities. And legal actors have chosen to focus on these issues. This is surely consistent with the fact that legal actors are strongly influenced by the images of crime of the dominant political cultures (and, as a consequence, by social alarm, see above and chap. 10).

We have already discussed the work of Sarzotti (chap. 8, 9 and 10). His conclusions (in terms of the connection between stereotypes of crime and deviance and the way legal actors treat street crime and immigration) are not dissimilar to those of the authors above. However, Sarzotti's work deserves to be treated separately because he specifically concentrates on prosecutors. While analyzing the *discorsi annuali dell'anno giudiziario dei Procuratori Generali* (chap. 9), the author remarks that some prosecutors (chief prosecutors attached at the courts of appeal) identify crimes committed by foreigners as a separate category (much like white collar crimes etc.).²⁵ The words *microcriminalità* (micro-crimes, see above), *extracomunitario*, *clandestino* (illegal immigrant) are often used during these speeches. In Sarzotti's view these expressions clearly identify particular (street) crimes and particular perpetrators (i. e. immigrants).²⁶ So, the author suggests that prosecutors have constructed a category of crime and criminals which mirrors the images of crime within the dominant political cultures. Street crime and immigration, together with environmental crimes, white collars crimes, sexual harassments etc., are now part of the crime problem. Prosecutors prioritize these crimes. This assumption is corroborated by two observations. First, *pubblici ministeri* recognize that street crime and immigration create social alarm.²⁷ Second, prosecutors support (or at least understand) the reactions of the civil society (e. g. citizens' committees).²⁸

Sarzotti also examined the way street crime and immigration was dealt with within the Turin prosecution office (i. e. the *gruppo sicurezza urbana*, urban safety group). This is particularly important, given that, in this chapter, we will (also) concentrate on the *gruppo sicurezza urbana*. The author treats this group as a specialized unit created in order to respond to the demand for more security coming

²⁵ Sarzotti (2006) *op. cit.* pp. 39-40.

²⁶ *Ibid.* pp. 58-61.

²⁷ *Ibid.* p. 94.

²⁸ *Ibid.* p. 96.

from the local community. The Turin prosecution office was organized (by the higher ranking prosecutors) so as to ensure that street crime (i. e. crimes which create social alarm) were always treated. This is because, in the past, the risk of *prescrizione* was very high.²⁹ The consequence is that this *procura* appears, now, to have substantially increased its attention on street crime.³⁰ In other words: Sarzotti claims that the creation of the urban safety group amounts precisely to a choice to prioritize these crimes. He claims that prosecutors who work for this group mainly have two tasks: to treat street crime with the *direttissima* trial and always to appeal against sentences which do not conform to prosecutors' requests.³¹ So, according to the author, there is a clear link between social alarm, the creation of the urban safety group and the way prosecutors determine their priorities. In Sarzotti' view this is confirmed by the impact of social pressure in the definition of priorities. In fact, he claims that, on one hand prosecutors (the prosecutors interviewed in Turin) emphasize their independence from external influences. On the other, they say that, when priorities have to be decided, it is necessary to take into account what the civil society wants.³²

Thus, the author's argument has three elements. First, *pubblici ministeri*'s power to take (discretionary) decisions on the cases they consider more serious is substantially affected by external influences (i. e. they have to focus on street crime and immigration). Second, prosecutors will treat street crime and immigration in a different way. In particular, they will deal with these cases as soon as possible (i. e. with the *direttissima*) without considering some of the due-process rules established by the criminal justice system. Third, this approach is creating two different ways to prosecute crime. The first seems to have a strong due process nature (i. e. prosecutors will carefully consider the position of the accused person(s)) but it concerns only a small number of cases. The second is based on the principle that certain crimes have to be treated as soon as possible and as fast as possible. These cases (which represent the vast majority of the cases treated by prosecutors) mainly involve immigrants who have committed street crimes.³³ Sarzotti concludes that Italian criminal justice system is experiencing a radical change and becoming more selective (acting against the

²⁹ Sarzotti (2006a) *op. cit.* p. 76.

³⁰ *Ibid.* p. 80.

³¹ *Ibid.* p. 81.

³² *Ibid.* p. 82.

³³ *Ibid.* pp. 82-84.

‘dangerous classes’) and repressive (i. e. crime control). Prosecutors’ professional culture is no longer a ‘formidable obstacle’ to this change.³⁴

A rather different analysis is presented by Borgna and Maddalena (two prosecutors; until 2008 Maddalena was the chief prosecutor in Turin and the creator of the urban safety group). They stress the importance of the *pubblici ministeri*’s external independence and of the legality principle. However, they say that Italian prosecutors are gatekeepers who play a very important role in determining the priorities of the criminal justice system. This right is exercised using substantial discretionary powers. According to Borgna and Maddalena prosecutors, using their discretionary powers, have chosen (in the past) not to focus on street crime. They seem to suggest that, by acting in this way, Italian prosecutors have not properly considered the demands for security coming from civil society. On the contrary, *pubblici ministeri* should take into consideration the sense of insecurity and the panic that certain crimes create. So, Borgna and Maddalena criticize prosecutors’ approach towards street crime and immigration. In particular, they emphasize the distance between what the legal actors do and what ordinary people want.³⁵

Thus, Italian academic literature, in discussing the images of crime and criminals which influence legal actors and the impact of certain legal procedures (e. g. *direttissima*), has dealt with how and why Italian legal actors focus on street crime and immigration. We do not intend to deny the big changes which have happened within the Italian criminal justice system: we will also underline (as we have already done, see chap. 9) the importance of legal and bureaucratic criteria which may shape prosecutors’ decisions. However, our argument, which has three elements, will be different. First, procedures which are aimed at imposing priorities on prosecutors (i. e. street crime and immigration) do not seem to have been completely successful. This is because they do not fit with prosecutors’ definition of the crime problem. Secondly, prosecutors may be seen to be filtering out certain forms of social anxiety. Thirdly, analysis of the way prosecutors treat street crime and immigration will help us to understand the difference between external influences and personal priorities. As we said (chap. 9), this is a rather crude distinction. In practice prosecutors’ decisions are never fully determined by external influences nor fully discretionary. However,

³⁴ *Ibid.* p. 68 and 84.

³⁵ Borgna and Maddalena (2003) *op. cit.* pp. 102-106.

external and personal priorities seem, de facto, to be treated differently by prosecutors.

2. Prosecutors, street crime and immigration: the urban security group

How have prosecutors reacted to this situation where street crime and illegal immigration are now at the top of the political agenda? First of all, in general prosecutors recognize that these crimes create many problems.³⁶ Moreover, they admit that the number of crimes committed by immigrants is also increasing rapidly (they claim these are between 50% to 70% of the crimes they deal with).³⁷ Furthermore, when immigrants are involved it is very complicated to trace their identity and, because they do not normally have a fixed residence, to deliver them all the official notifications.³⁸ But, despite this, these crimes do not seem to be perceived as priorities. In fact, the vast majority of the prosecutors we interviewed said that street crime and crimes committed by immigrants have a medium-low priority.³⁹ The exceptions were located in areas where crimes like mugging and robberies are treated in a different way because of the potential connection with organized crime:

Yes, [in general] they are treated [by prosecutors] as the crimes committed by Italians. However, for drug trafficking, immigrants [are more involved] [...] Then there is organized crime, because they use Albanians to make robberies. *Criminalità diffusa*,⁴⁰

³⁶ 21 Prosecutors out of 27 said that crimes committed by immigrants (mainly street crime and crimes related to illegal immigration and not organized crime, see later) create many problems. A chief prosecutor (CP(N43) working in a medium-big prosecution office in the north of Italy) said that they do not have big problems with immigrants committing crimes. In general, he claims that the prosecution office is very well organized and that they do not have particular problems with any crime. Two prosecutors (CP(S4) and AP(S6) who work in a big prosecution office in the south) said that they these crimes are not an issue (unless they are linked with organized crime, see later) because there is not very much immigration in the south of Italy. However, it is interesting to note that DCP(S5), who works in the same prosecution office, disagreed and he believes that crimes committed by immigrants have a substantial impact (street crime in particular). One was not asked (due to lack of time), one did not know (because he is a prosecutor attached at the court of appeal) and one did not clearly answer.

³⁷ Those who said that crimes committed by immigrants (i. e. street crime and illegal immigration) create problems also said these crimes increased in the last years, are increasing now and will, probably, increase in the future.

³⁸ See, for example, DCP(N45), AP(N49) and AP(N28).

³⁹ 22 prosecutors out of 27 said that street crimes and crimes committed by immigrants have a medium-low priority. One was not asked (due to lack of time) and one did not clearly answer.

⁴⁰ This literally means diffused crime. It is another expression to identify street crime and, more generally, crimes which happen quite often and that are diffused in a large area. This is why this

like robberies, thefts, blackmail, [etc.] is a priority, as much as the camorra is.⁴¹

Here the connection organized crime-immigration-street crime is clear. Noticeably, this prosecutor, while discussing priorities, treats street crime and camorra as equal. More broadly *pubblici ministeri* in general (whether in the north or the south of Italy) become interested in street crime and illegal immigration if they provide a chance to investigate and search for the organizations behind human trafficking, drug trafficking and organized crime in general.⁴² But this is to see them as means to pursue other ends rather than priorities in themselves.

This lack of prioritization may be further illustrated by the way medium or large prosecution offices use specialized units. As previously argued, (chap. 9) specialized units often reflect the crimes that *pubblici ministeri* consider more important and more interesting and which require particular investigative skills. We did not find any prosecution office where there was a specialized unit dealing with street crime. This seems to suggest three considerations: *pubblici ministeri* do not consider these as interesting and serious crimes; there is no need to have particular investigative and legal skills to deal with these issues; and street crime does not seem to be a (personal) priority.

There are two specific examples where procedures aimed at prioritizing street crime and illegal immigration have not really succeeded because prosecutors have tended to neutralize what are effectively attempts to ‘suggest’ priorities: these are the urban safety group in Turin (in this section) and the application of the Bossi-Fini Act (in the next section).

In 2001, in Turin, the chief prosecutor, together with the deputy chief prosecutors (and the assistant prosecutors who were asked to express an opinion), created the *gruppo sicurezza urbana* (urban safety group) to deal with street crime. This is made up of prosecutors who, for a fixed period of six months (which can be extended if prosecutors agree), only deal with street crime. All the assistant

prosecutor refers to blackmail as well. This is a crime that, in the south of Italy, is widely perpetrated by criminal organizations (i. e. mafia and camorra).

⁴¹ CP(S4) See also, AP(N48) and AP(N49) who work in a big prosecution office in the north and consider street crimes committed by immigrants a priority because they are linked with organized crime. However, this is not Italian organized crime which ‘employed’ foreigners; these are groups of foreigners (e. g. South Americans, people coming from former Yugoslavia, Albanians etc.) who had created their own organizations. Camorra is the equivalent of the mafia, but it is not located in Sicily.

⁴² See, for example, AP(C47), AP(N30) and AP(N49).

prosecutors have to do it, so there is a turnover. But, the urban safety group is not a specialized unit. In fact, as we said (see chap. 6 and 9) in Turin (and only in Turin: this is not a national division), specialized groups only exist in relation to the so called A category crimes (sexual crimes and crimes committed against vulnerable victims (e. g. disabled persons, old people etc.), organized crimes, DDA⁴³ (mafia and other big crime organizations), white collar crimes, public administration and industrial security. These category A crimes are the most serious crimes, whereas all the other crimes, called category B crimes, are not supposed to be less serious. However, in practice, this can not be seen as a fixed list of priorities (and non-priorities): assistant prosecutors can take into consideration other criteria (see above what we said about specialized units and priorities and see chap. 9).

If the urban safety group deals with street crime, like drug dealing, car thefts, mugging and crimes related to the Bossi-Fini Act (especially the failure to comply with a deportation order), why does its creation not establish street crime as a prosecutorial priority? This group was created for two reasons: the decision of the chief prosecutor and the external pressure coming from the media and the local community.⁴⁴ The chief prosecutor Maddalena wanted to put a clearer focus on street crime, because, he believed that in the past the choice not to focus on street crime had created “hateful consequences”. In particular, he claimed that this choice *de facto* denied “the status of victim” to those who suffered the consequences of street crimes and that some areas were deprived of a sufficient “*controllo di legalità*”.⁴⁵ The external pressures were very clear as well. Committees of citizens were created in two areas of Turin called San Salvario and Porta Palazzo. The protests mainly concerned the fact that immigrants did not comply with legal rules and kept committing street crimes. Moreover, the media amplified these complaints. In fact, some local

⁴³ This is the *Direzione Distrettuale Antimafia*. As we said (chap. 6) this is the local branch of the DNA (*Direzione Nazionale Antimafia*) which is a national organization. However, every DDA is part of a prosecution office and refers to the chief prosecutor and to the deputy chief prosecutors working in that office. The DNA (and the DDA) was created to be more effective against organized crime and to coordinate investigations which may involve many prosecutors located in different prosecution offices. The DNA is directed by a prosecutor who has the power to coordinate investigations and to give inputs on the if, the how and the when to investigate organized crime.

⁴⁴ Sarzotti (2006a) *op. cit.* p. 82

⁴⁵ Borgna and Maddalena (2003) *op. cit.* pp. 101-109, in particular, p. 103. In this context *controllo di legalità* means to ensure that single persons and/or groups of citizens are acting according to the legal rules.

newspapers and magazines were created purely to advertise the complaints coming from the local communities.⁴⁶

This is the scenario which led to the creation of the *sicurezza urbana* group; but how did prosecutors perceive the function of this group? They did not perceive it in the same ways as the chief prosecutor. In particular, they did not think that the urban safety group was designed to put a particular focus on street crime:

Now, with the urban security group, all these things [street crime] are dealt with; but these are not priorities, we do them because there is a procedure [to follow]. I mean: if it depended on me I would do other crimes first, and I would leave these where they were before: in the closet.⁴⁷

So, the urban safety group suggested a priority in the sense of a specified outcome (i. e. “we do them because there is a procedure”). But street crime is clearly not a personal priority for prosecutors, something perceived as particularly important. This is significant. It shows that even when certain external criteria (bureaucratic in this case) are established to define the crime problem, *pubblici ministeri* still maintain certain discretionary powers (see chap. 9). In this case the consequence is that prosecutors treat the *sicurezza urbana* group as a matter of practical application. They believe that, in practice, this group is aimed at improving the organization of the prosecution office and at least suggesting priorities. In Turin all the prosecutors, as well as dealing with crimes in their specialized unit, have to deal (for a fixed period) with B category crimes and with arrests.⁴⁸ The problem was and is that the police make many arrests (prosecutors say between 20 to 30 arrests every day) and that prosecutors need to spend too much time dealing with non-serious cases (i. e. street crime). So, in the prosecutors’ view, the urban safety group was created to solve this problem. Now there are prosecutors who only deal with arrests for the non serious

⁴⁶ AMAPOLA. “*L’insicurezza a mosaico. Estratto del rapporto di ricerca sulla in/sicurezza nella provincia di Torino nel 2002*”. [Online]. Available at: <http://www.provincia.torino.it/speciali/mosaico/pdf/estratto.pdf> [Accessed 5/08/08]. See also, more generally, Belluati M. “*L’in/sicurezza dei quartieri: media territorio e percezioni d’insicurezza*”. 2004. Franco Angeli: Milano.

⁴⁷ AP(N3). Similar opinions were expressed by AP(N1) and AP(N2).

⁴⁸ We have to remember, once again, that when the police arrest someone they must immediately inform the prosecutor who can decide to set free the arrested person immediately or to ask, within 48 hours, the judge to confirm that the arrest was lawful and necessary. The decision to arrest is the police’s right (although in some circumstances the arrest is compulsory).

crimes (i. e. the crimes which fall in the *gruppo sicurezza urbana*), so that the other prosecutors can spend more time on more serious cases:

These prosecutors [those who work for the urban safety group] deal with all the backlog of cases concerning street crime; so, small drug trafficking, car thefts etc. This is because our prosecution office is competent for an area where the number of arrests for these crimes is really high. [The consequence was that] the prosecutor who was doing the *turno arrestati*⁴⁹ could not properly deal with the arrests which required more work [i. e. the arrested person(s) involved in the most important cases]. This is because, for example, he/she had to deal with 10 arrested persons for small drug trafficking [i. e. pushing drugs in the street] [...] So, we tried to create this group which only treats these crimes.⁵⁰

According to the prosecutors interviewed another function of the urban safety group is to avoid street crime not being prosecuted at all. Prosecutors recall that in the past these crimes were just put aside (they tended to say they were ‘kept in the closet’). The consequences were that street crimes were not prosecuted because of the *prescrizione* and if they were prosecuted the approach was to ask for a lesser punishment in order to deal with the case as quickly as possible (this was a de facto abbreviated procedure or a plea bargaining in the sense that *pubblici ministeri* were offering a lesser punishment to deal with the case as fast as possible).⁵¹ Now, the urban safety group, de facto, pushes prosecutors to deal with street crime (i. e. suggests priorities); but they deal with these cases in a particular way. Their aim does not seem to be to deal with a particular crime problem (which has been prioritized) in order to find solutions which can limit its impact. Prosecutors say that the *gruppo sicurezza urbana* cannot solve these problems (one prosecutor said that: “it is like trying to empty the ocean with a tea-spoon”⁵²). On the contrary, the aim appears to be that of dealing with as many cases as possible and as fast as possible. In particular, the procedure to deal with these crimes (which was described by prosecutors as ‘automatic’⁵³), normally does not involve investigative acts carried out by prosecutors and/or by the police supervised by prosecutors. The accused person is immediately

⁴⁹ This literally means ‘arrested person(s) turn’ and it is another name prosecutors use to call the *turno esterno* (‘external mail turn’, see chap. 6). So, the name changes, but the function is the same: prosecutors who are doing the *turno arrestati* mainly have to deal with arrests.

⁵⁰ AP(N3). See also AP(N1) and AP(N2).

⁵¹ See, AP(N1), AP(N2) and AP(N3).

⁵² AP(N1).

⁵³ See, AP(N1), AP(N2) and AP(N3).

sent to trial (normally using a *direttissima*⁵⁴) on the basis of the information collected by the police when they carried out the arrest. This confirms what Sarzotti and other authors have argued. Prosecutors use particular legal procedures (i. e. *direttissima*) to treat street crime. However, the lack of prosecutorial intervention in the investigative processes expresses the relative lack of priority they accord to such offences.

Finally, external influences are also important to describe the aims of the *gruppo sicurezza urbana*. Prosecutors agree that the name was carefully chosen in order to show to the civil society, the media and the government (local and national) that the prosecution office was doing something to tackle street crime in Turin. Prosecutors seem very clear about the fact that the name of the group is just a label and it does not mean that street crime is now the priority:

If we had doubled the *turno arrestati*, we could have reached the same result. I mean, without labelling it, without specifically calling it urban safety group.⁵⁵

This does not mean that *pubblici ministeri* believe that the demand for security coming from the public is unjustified:

I read a book written by a GP who lives in San Salvario. I think the title was “Not on my stairs”. I was quite affected. I can objectively say that immigration is not a problem. However, he explained, and he is a citizen living in San Salvario, that some [*extracomunitari*] were urinating on his door, some were trafficking with drugs in the entrance hall, his wife was mugged etc. How can you say that this is not important? This can ruin your life! If you are scared to go out, scared to go in [your house], scared to stay on the stairs [...] These are persons that, more or less, can not defend themselves.⁵⁶

Moreover, prosecutors understand the importance of dealing with people’s sense of insecurity:

A few years ago we had some meetings with the committees of citizens of San Salvario [...] even now they asked us to meet the citizens’ committees. This is to say what the prosecution office can do to solve their problems, to show them that we acknowledged these problems. On the other hand, we have to explain the measures we can take, because, sometimes, the public is expecting something that we can not do.⁵⁷

⁵⁴ This is a special proceedings which is supposed to be very fast. In particular, the *direttissima* (also) allows prosecutors to send the accused (arrested) person(s) immediately to trial before the judge (art. 449-452 cpp.). It is normally an option, but, under art. 14 of the Bossi-Fini Act, it becomes compulsory.

⁵⁵ AP(N1). See also, AP(N2) and AP(N3).

⁵⁶ AP(N1). See also, AP(N2) and AP(N3).

⁵⁷ AP(N1). See also, AP(N2) and AP(N3).

Moreover, when it comes to finding solutions, prosecutors did not simply say that street crime and immigration are not priorities. They also noted that security issues have to be dealt with by the police:

For example, they put a police station in Porta Palazzo. This is very good, because, before that area was very disrupted [i. e. incivilities]. So, this is surely not our job, but this is what they [police] can do. They walk around, they increase the controls etc. This means that they have done a lot for that area. But you need to be on the *territorio*.⁵⁸

Once again the word “*territorio*” (i. e. stay in the street, see chap. 8) is used to mark the difference between police and prosecutors. The former have to directly treat the problems which affect the public. The latter intervene later. In other words: prosecutors see themselves as more “detached” when compared to the police. As argued in the previous chapter, this puts them in the position to reconsider some of the external inputs and, as a consequence, to mediate certain forms of social anxiety.

2.1. Prosecutors, street crime and immigration: the Bossi-Fini Act

The Bossi-Fini Act is another good example of how prosecutors treat street crime and immigration. As we said (chap. 8), this involves a procedure which requires the arrest and immediate trial of illegal immigrants who have not complied with a deportation order. How have prosecutors reacted in the face of this clear attempt (from the centre-right government) to prioritize illegal immigration as a crime problem? Unsurprisingly this is not regarded as a priority.⁵⁹ This despite the fact that, in prosecutors’ view, immigration (like street crime) creates social alarm (see chap. 10). However, as previously argued (chap. 8), the vast majority of the prosecutors we interviewed said that this Act had created a substantial increase in their amount of work, because the number of arrests had increased and the procedure stated in the Act is quite cumbersome.⁶⁰ One of the clearest quotations supporting this argument (see chap. 8) was this:

⁵⁸ AP(N3). See also, AP(N2) and AP(N1).

⁵⁹ No one of the prosecutors we interviewed said that the Bossi-Fini Act (art. 14 para. 5 *bis*, 5 *ter*, 5 *quater* and 5 *quinquies*) is a priority. Lawyers and police officers confirmed this.

⁶⁰ As we said in chap. 8 16 prosecutors out of 27 said that the Bossi-Fini Act increased very much the amount of work. 5 talked more generally about the fact that crimes committed by immigrants (not only crimes linked with the Bossi-Fini Act) increased very much. One chief prosecutor said that, in his

For us this [the Bossi-Fini Act] amounts to a considerable increase in the backlog of cases. This is because the procedure is quite complicated. The arrest is compulsory, and we do not have enough cells where we can put the arrested person while we wait for the *direttissima* trial, which is compulsory as well. So, sometimes, it happens that we have to transfer them to jail, because it is not possible to have the trial the day after, then you need to arrange an escort [to bring the arrested persons to jail] [...] you need to nominate a translator [because the arrested persons normally do not speak Italian], to pay him [...] [moreover] the difficulties are linked to the fact that you need to deal at the same time with many arrest procedures, for which you need to organize the hearing [the arrest procedure must be, eventually, reviewed by a judge], the charges⁶¹ etc.⁶²

We also said that *pubblici ministeri* are, in practice, forced to treat these cases rapidly because there is a procedure which binds them:

No [it is not a priority] [...]. However, the emergency, within the prosecution office, is produced by the fact that the act generates many arrests. This is why it becomes an emergency. In fact, [...] these are all files which must be taken to the end. That Act does not say that we have to treat those [crimes] as a priority, the priority is de facto.⁶³

None of the prosecutors we interviewed said they were interested in investigating these cases (unless there was a link with a criminal organization dealing with illegal immigration). Moreover, prosecutors did not appear to be interested in asking for a severe punishment (also because judges do not give severe punishments, see later) and for pre-trial custody for Bossi-Fini cases.⁶⁴ In fact, the accused (arrested) person(s) will normally remain in jail only in case of recidivism. When it comes to illegal immigration, recidivism seems to be connected to crimes which do not only regard the Bossi-Fini:

Speaking for myself, if I realize that the accused person(s) does not have a criminal record and there is a sort of reasonable reason, because you need to have a reasonable reason to arrest, I immediately set him/her free.⁶⁵

prosecution office (middle big in the north of Italy), they can cope with the Bossi-Fini Act. One was not asked (due to lack of time). One did not know (because he is a prosecutor attached at the court of appeal). Finally, 3 prosecutors working in a big *procura* in the south of Italy said that they do not feel the pressure of the Bossi-Fini Act, because there is not very much immigration there.

⁶¹ Some immigrants are arrested for Bossi-Fini, but then prosecutors (and the police) discover that they are also involved in other criminal activities (e. g. theft, drug pushing etc.). So, they have to prepare the file being sure that the arrested person(s) is charged for all the crimes for which he/she is accused.

⁶² AP(C47).

⁶³ AP(C46). See also AP(N32).

⁶⁴ See, for example, AP(N28), AP(N33) and AP(N10).

⁶⁵ AP(N28).

So, they are arrested and there is the *direttissima*. In 90% of the cases they are set free. This because, let us be honest, no one sends to jail someone who did not comply with a deportation order. Unless the accused person(s) has a huge criminal record.⁶⁶

In a moment we will explain what the ‘reasonable reason’ is. Here we want to make a different point. Recidivism appears to be one of the criteria for deciding how the Bossi-Fini cases will be treated (i. e. whether the arrested person(s) will remain in jail or not). This seems to confirm what we said before (chap. 9): recidivism is one of the decision-making criteria that prosecutors use to determine the seriousness of a crime. However, this is not enough to determine a priority. In fact, art. 14 of the Bossi-Fini is not a major crime problem for Italian prosecutors. As we said (chap. 9), priorities are determined by a variety of widely accepted general criteria and more personal political decisions which interact with each other. The example of recidivism and the Bossi-Fini shows how substantial *pubblici ministeri*’s discretionary powers can be. This is so even when they are working with external decision-making criteria (i. e. recidivism):

You can choose to ask for pre-trial custody or not. This is because, within the urban safety group [they also deal with the Bossi-Fini, see above], we leave this choice to the *vice procuratore onorario* [VPO].⁶⁷ But he/she can only ask for pre-trial custody if the accused person(s) has a huge criminal record for crimes which do not [only] concern the Bossi-Fini.⁶⁸

We rarely give pre-trial measures for the Bossi-Fini. This normally happens when we realize that someone has entered [Italy] many times [...]. I have sometimes asked for pre-trial custody just because the accused person went back and forward [from Italy] many times.⁶⁹

These are rather extreme opinions (prosecutors were not from the same *procura*), but they show how far prosecutors’ discretionary powers can go.

⁶⁶ AP(N32). See also, for example, AP(N30).

⁶⁷ These are law graduates who are, normally, preparing for the public competition to become a *magistrato*; and they are entitled to represent the prosecution in minor cases.

⁶⁸ AP(N3). Similar opinions were expressed by AP(N1) and AP(N2).

⁶⁹ AP(C47). See also, for example, CP(N40).

Recidivism loses or gains importance (also) depending on prosecutors' personal considerations about the crimes previously committed.

If the crime is only related to the Bossi-Fini Act, illegal immigrants are arrested and, normally, sentenced to a few months of imprisonment (some said 3 months, some other 6), but the sentence will be suspended.⁷⁰ This means that the illegal immigrant will be set free and, given that he/she has no documents nor any official residence in Italy, he/she will disappear. So, the aim of the Act, which is to deport illegal immigrants, is clearly being frustrated. Furthermore, in some prosecution offices, prosecutors do not themselves take Bossi-Fini cases to their conclusion. They read the arrest file and, if they do not set free the arrested person, they pass the file to a *vice procuratore onorario* (VPO).

The Bossi-Fini Act imposes certain conditions on the arrest and prosecution of illegal immigrants: article 5 *ter* says that the crime is committed when the immigrant remains in Italy without having a 'reasonable reason' to do so. When the police arrest someone prosecutors have to review the arrest procedure and can immediately set free the arrested person if they believe that there was no justification for arrest (see chap. 4). So, in the Bossi-Fini case, prosecutors can immediately set free the arrested person if they believe he/she had a reasonable reason not to comply with the deportation order. Prosecutors interpret the concept of reasonable reason in different ways. For example, one said that only a woman who is 8 or 9 months pregnant can have a reason to remain in Italy.⁷¹ Another one believes that his role is to check, carefully, if the arrested person had the money to leave the country. So, for example, even if the foreigner claims that he/she could not fly back home, he/she is arrested because he/she owns an expensive mobile, which is a sign that he has enough money.⁷² The point here is that the interpretation of the concept of 'reasonable reason' can lead to varying application of the procedure stated in the Bossi-Fini Act:

I have a very strict approach towards the Bossi-Fini Act, in particular art. 14 which has created many doubts about its interpretation. For the vast majority of the cases I

⁷⁰ See, for example, AP(C54), AP(Apl.(N50) and AP(N33).

⁷¹ AP(N32).

⁷² AP(C54).

immediately set free the arrested person, unless there is a strong criminal record or strong *precedenti di polizia*.⁷³ In other words: these have to be subjects that, in the past, have created a little 'social alarm', in these cases I can validate the arrest [...] However, the poor immigrant, without documents, who owns nothing, who has been caught in an abandoned house and they also arrest him/her! I set him/her immediately free and drop the accusation [i. e. *archiviazione*]. I have to say that no GIP [the judge responsible for verifying that the investigation is being (or has been) lawfully carried out] has ever refused [to allow the *archiviazione*] [...] In fact, this is based on [the interpretation of the concept of] reasonable reason, according to the law [...] within the Bossi-Fini Act, the reasonable reason includes: I [illegal immigrant] can not leave the country, I can not buy the ticket, I can not leave the country in a way which complies with the law etc. Then, leaving the country implies to go back to your own country, what about those who come from the far east?⁷⁴

For the reasonable reason the interpretation varies, because every one [prosecutor] is different. For me it has to be that he/she [the arrested person] is about to die, because, otherwise, everybody has a reasonable reason because they are illegal immigrants who, surely, live better here compared to the place where they come from. The fact that they do not have money is not, for me, a reasonable reason, because they are [often] caught with a mobile which costs €400, they have €300 with them, and they live here. The reasonable reason is a woman who is 8 months pregnant; it has to be something extreme.⁷⁵

These comments suggest, first, that although prosecutors try to relate their interpretation of the concept of reasonable reason to objective legal criteria, their considerations are inspired by personal value judgements and by socio-political views about the definition of the crime problem. Secondly, these two prosecutors work in the same big prosecution office in the north of Italy, but they clearly have very different opinions. As we have said (chap. 6 and 9) apparently there are no strict internal guidelines (produced within the prosecution office) which, de facto, impose a particular way in which prosecutors should deal with an offence or which sets priorities within the prosecution office. Finally, we have to underline that even those prosecutors who believe they strictly apply the procedure required by the Bossi-Fini

⁷³ This is information kept by the police. It mainly deals with people involved in investigation activities. So, even when one does not have a real criminal record (e. g. the trial is not concluded), it is possible to check if he/she was involved in some criminal activities.

⁷⁴ AP(N30).

⁷⁵ AP(N32).

Act did not consider (like all the prosecutors we interviewed) illegal immigration as a priority.

3. Some considerations on the urban security group and on the Bossi-Fini Act

Why are street crime and immigration not priorities for prosecutors? There are various reasons: they consider the law ineffective (i.e. the Bossi-Fini Act);⁷⁶ judges impose very light punishments or acquit the accused (e.g. the Bossi-Fini Act, where the accused persons are normally sentenced to a 3 months sentence, but the sentence is suspended); there are too many crimes to prosecute;⁷⁷ resources are insufficient;⁷⁸ there are technical legal problems (e. g. the impossibility of delivering official notifications because illegal immigrants do not have an official residence, the procedure for the Bossi-Fini Act is too complicated etc.);⁷⁹ moral doubts (i. e. should I seek pre-trial custody for someone who just has not left Italy?);⁸⁰ finally the interests affected are not substantial (i. e. street crime and illegal immigration are not regarded as serious crimes).⁸¹ These are all important reasons. In particular, the final reason shows, once again, how important are prosecutors' personal considerations about crime and justice. However, the analysis of the way the urban safety group and the procedure for the Bossi-Fini work suggests other considerations. These are not just connected to street crime and immigration: they concern more generally the difference between external and personal priorities.

⁷⁶ See, for example, AP(N32). But see also AP(N1), AP(N2) and AP(N3) who do not believe that, in Turin, the urban security group is effective against street crime.

⁷⁷ We asked to prosecutors the number of files they have to deal with in one year. The figures are different (between 300 and a few thousands files). Some prosecutors have less than 300 cases, but these are exceptions (CP(N43) and AP(N48). Moreover, one prosecutor APN(48) explained that he has less cases, but that most of them are very complicated, so they take a lot of time. However, the vast majority of the prosecutors said that they have more than 1000 files to deal with every year. 18 prosecutors out of 27 said so. 2 did not know (but one said that they are a lot). One did not clearly answer. One was not asked (due to lack of time). 5 said that they have less than 1000 files to deal with every year. Finally, all the prosecutors apart from one (CP(N43) who is a chief prosecutor in a medium big prosecution office in the north) who claims that his prosecution office is very organized and prosecutors can deal with all the cases in the proper way, said that the large number of files is one of the reasons why they can not treat all the files in the same way.

⁷⁸ Those who said that there are too many cases to deal with also said that they do not have enough resources. This mainly means police officers to investigate the cases and administrative staff to deal with the bureaucracy.

⁷⁹ See, for example, AP(N39) and AP(C47).

⁸⁰ See, for example, AP(N30).

⁸¹ See, for example, CP(N40).

First of all, our research supports the arguments of Sarzotti and other academics. Legal procedures force prosecutors to treat street crime and illegal immigration in a different way compared to other cases. There are three indicators which support this assumption: (a) the way prosecutors use the *direttissima*; (b) the fact that, in Turin, street crime and immigration can not now “be kept in the closet”; (c) the fact that these cases have to be treated as soon as possible and as fast as possible. Moreover, this also confirms that legal external decision-making criteria can have an impact on prosecutors’ definition of the crime problem (see chap. 9).

So, at this point the question is: could these procedures eliminate prosecutors’ discretionary powers to define the crime problem? In other words, have Italian prosecutors fully accepted the attempts to suggest street crime and immigration as priorities? Our research shows that the answer to this question is not as straightforward as the dominant academic literature (in Italian) seems to imply. Prosecutors appear to be in the position to mediate these external influences and to limit the impact of the legal procedures. Why does this happen? We believe the answer to this question has to be found in prosecutors’ professional and legal culture. As explained in the previous chapter, *pubblici ministeri* regard themselves as ‘the experts’ entitled to define the crime problem. Moreover, there is a partial separation between dominant political cultures and dominant legal cultures.

To understand this last point, we need to consider the consequence, in practice, of prosecutors’ power to filter and mediate certain external influences. Prosecutors do not just ignore street crime and immigration, but they do not treat them as personal priorities. One prosecutor said (about the cases which fall into the urban safety group):

[Those who work for the urban safety group], using a sort of automatic procedure, because this is routine, can deal with the volume crimes which can be immediately treated. This is because there is no investigation to do. The arrest is confirmed [ultimately by the judge], then there is the *giudizio immediato*⁸² or the *direttissima* or something else [...] [On the other hand] If something is urgent [and it is a personal priority] you do it personally, you spend much more time, you issue more *deleghe*, you are more involved in the investigation. You are only focused on that [...] you carry out activities like: requesting telephone tapping, pre-trial custody, searches etc.⁸³

⁸² This means ‘immediate judgement’. It is another kind of fast procedure that prosecutors (and accused person(s) can use (see art. 453-458 cpp).

⁸³ AP(N1). Similar opinions were expressed by AP(N2) and AP(N3).

So, an external priority (determined, in this case, by the creation of the urban safety group) can lead to an “automatic” response. This means that these cases are routinely treated without the sense of attempting to tackle a priority crime problem. The aim is to get rid of files as soon as possible and as fast as possible (as with the SDAS group, see chap. 9). Personal priorities are treated differently. Prosecutors are more involved in the investigation. As a consequence, their intervention during the pre-trial phase is particularly visible (i. e. telephone tapping, pre-trial measures etc.). In other words, the main difference (during the pre-trial phase) between external and personal priorities seems to be expressed through the different methods that prosecutors use to direct the investigation. Cases involving external priorities are bureaucratically supervised. This means that there are few interactions between prosecutors and the police; and few attempts to determine investigative strategies (i. e. the bureaucratic review system as discussed in chap. 8). On the other hand, for cases involving personal priorities, prosecutors choose to participate more effectively during the investigation. This implies more interactions with the police and more issuing of directives on investigative activities (i. e. the prompting and reviewing system, see chap. 8). The reference to the *delega* makes this clear: it is the tool prosecutors use to influence the investigation. The more they use the *delega*, the more they can effectively direct the investigation.

4. Conclusion

The main conclusion to be drawn, is that there is still room, during the pre-trial phase, for prosecutors’ legal and professional culture. This confirms what we said before (chap. 9 and 10). However, there is something more. The analysis conducted in this chapter completes our portrait of the prosecutor during the pre-trial phase. What are the effects, in practice, of *pubblici ministeri*’s power to mediate external influences (and to express their professional culture)? Prosecutors are not able to block the changes within the criminal justice system. They partially reflect the focus of the dominant political cultures (the central state in particular). This seems to be demonstrated by the impact of legal (i. e. the procedure for the Bossi-Fini) and bureaucratic (i. e. the urban safety group) external decision-making criteria. However, *pubblici ministeri* are still in the position to decide between external and personal

priorities. These decisions have substantial practical effects. First, they determine the way the investigation will be directed by prosecutors. Secondly, they effectively shape prosecutors' aims. In particular, *pubblici ministeri* seem to follow the dichotomy: treat cases as soon as possible and as fast as possible or make a real attempt to deal with a specific crime problem (e. g. environmental crimes, corruption etc.). Thirdly, by acting on their own sense of personal priorities, prosecutors can mediate the impact of police decisions. The police implement directives on anti-crime policies which are the direct product of political decisions taken by the central state. Prosecutors are influenced by the police: for example, the police can, de facto, push cases on prosecutors for treatment (i. e. via the arrest). However, by choosing their personal priorities, *pubblici ministeri* can mediate this impact. In other words: this seems to be one of the moments when prosecutors can modify what Hodgson calls "the case parameters set by police" (see chap. 8).

CHAPTER XII. CONCLUDING REMARKS

This study has tried to analyze the way crime is defined, investigated and prosecuted by Italian prosecutors. The point we tried to emphasize is that, during the pre-trial phase, there seems to be room for prosecutors' discretionary powers. And that they are in a different position compared to other legal actors. There are two moments when this seems to be particularly visible. First, prosecutors decide how an investigation has to be supervised. This is not a mere formal decision. Prosecutors determine the strategy of the investigation and how they will interact with the police. Effectively they decide how their right to direct the investigation becomes a reality. Secondly, prosecutors are in the position to mediate the impact of external influences. Their role as experts who are entitled to define the crime problem seems to be a reality. But this does not mean that influences disappear. So, in Italy, amongst the different legal and political structures within which crime is defined, investigated and prosecuted, prosecution is a distinct and different stage, where important decisions are taken by legal actors who have a peculiar legal and professional culture.

There are different reasons why prosecutors are in this position. As we remarked many times there are legal provisions which determine and protect certain distinctive features of Italian prosecutors. In particular: *pubblici ministeri* are part of the judiciary (like judges), they are fully independent from any other institutional power, they direct the investigation (and the police) and they have to comply with the legality principle. The study of these principles has not been our primary focus. However, we should not ignore that the law already gives a substantial amount of independence to prosecutors. But we wanted to look at the practice. In this sense, prosecutors' professional and legal culture seems fundamental to understand their position within the legal system. We underlined two issues. First, when it comes to legal independence prosecutors are culturally indistinguishable, no matter if they are superior or assistant prosecutors. The consequences in practice are substantial. Prosecution offices are not hierarchically organized and file allocation and guidelines on priorities are not imposed. The importance of legal independence as a key feature of Italian prosecutors' legal culture is demonstrated by the way the *ordinamento giudiziario* reform was applied. Although these provisions considerably increased the powers of chief and deputy chief prosecutors, this did not seem to have affected prosecutors' independence in practice. The second, and most important, characteristic regards the meaning of legal filtering. Italian prosecutors' professional self-image is

founded on their sense of themselves not as crime fighters but as judicial figures, magistrates with professional functions and culture similar to that of the adjudicative magistrates (judges). They supervise police investigations and determine what information gathered during the investigation should be passed to the judge. They see themselves as providing a neutral judicial filter which ensures that certain forms of information brought to them by investigators which is unduly prejudicial or fails legal tests for admissibility will not be seen by the judge. But while prosecutors see this legal filtering as a judicial role it inevitably means that their judicial distance from the prejudicial information and opinion thrown up by the investigation is compromised. So, legal filtering does not mean that prosecutors are impartial legal figures. But it means that they are in the position to look at the case from a different angle compared to the police: their aim is to build up a file which can stand scrutiny at trial. This also explains the meaning, in practice, of prosecutors' judicial culture: they are not impartial like judges, but they have to foresee the way the judge will look at the case. This is in order to enhance the chances of obtaining a conviction. However, prosecutors' professional self-image still has some practical effects. They believe that, in order to carry out properly their job, they have to preserve their image of neutrality. This principle is the very foundation of prosecutors' institutional resistance to adversarial principles (i. e. the 1989 reform).

The construction of prosecutors' special position has also been built around their relationship with the police. As we have explained, prosecutors determine the way the investigation will be supervised. This implies different interactions with the police. This has led to three conclusions. First, prosecutors' functions during the pre-trial phase are not always and only passive. Prosecutors have the power to review the investigation carried out by the police and to prompt directives. In this way they can have their hands on the investigation. Moreover, while prompting and reviewing, they can shape the investigation the way they want and can obtain more and better information to decide if a case can stand scrutiny at trial. In other words: the methods of supervision (prompting and reviewing more active; bureaucratic review more passive) effectively qualify the way prosecutors act as legal filters. Secondly, during the investigation there seems to be strong functional and cultural differences which, in prosecutors' view, should mark the distance between them and the police. These are less clear during the investigation, but they appear clear when the police collect crime

reports and prosecutors refer to the fact that they have to be “more detached”. However, this does not mean that, in practice, prosecutors are not influenced by the police. The point we want to make is different. During and after the investigation prosecutors are in the position to challenge and modify what Hodgson called “the case parameters set by police”¹ (third conclusion). They can do this in two ways: choosing how to supervise the investigation and mediating the impact of police decisions on the definition of priorities.

This directly leads us to another core question that we discussed in this thesis: the way prosecutors define their priorities. Of course there is no need here to list all the parameters we identified in the previous chapters. But it is important to underline that, although defying prosecutors’ priorities implies the analysis of complex considerations involving different criteria which interact with each other, one major distinction can be done. In practice there seems to be a difference between external and personal priorities. The former are linked to external influences that prosecutors have not created themselves. The latter are more based on prosecutors’ socio-political considerations. Now this seems to demonstrate that prosecutors are certainly not immune from external influences. Priorities can be, in practice, suggested by, for example, legislative provisions. However, by choosing their personal priorities, prosecutors mediate the impact of external influences. This has substantial practical effects. First, for a personal priority prosecutors will be more involved in the investigation (i. e. prompting and reviewing). This effectively shapes prosecutors’ aims (i. e. as between the choice to treat cases as soon as possible and as fast as possible or to make a real attempt to deal with a specific crime problem). Secondly, if a case is not a personal priority it may be dropped or treated later. Thirdly, by choosing their personal priorities prosecutors can mediate the impact of police decisions. Finally, the distinction between ‘external’ and ‘personal’ can become blurred in practice. Prosecutors appeal to external legal standards like the legality principle and other legal criteria seeming to want to give an objective basis to what is ultimately discretionary decision-making with a strong subjective element. But in practice, external influences only operate through personal choices. So the constraints and pressures, while real, may be less strong than the presentation suggests. Furthermore, the degree of consistency that existed in the definition of personal

¹ Hodgson (2005) *op. cit.* pp. 169-170.

priorities may well be more a product of shared social and political values into which magistrates are 'socialised' within the profession or local court culture.²

Amongst the criteria for decision-making that prosecutors use to determine priorities we have put a particular focus on social alarm. Social alarm certainly influences the images of crime within the dominant political cultures. Moreover, legislation and administrative guidance within prosecution offices which concern street crime and immigration have affected prosecutors' choices. However, through the analysis of the way prosecutors deal with social alarm, we can reach the conclusion that a partial separation can be maintained between the dominant political cultures and the dominant legal cultures. Street crime and immigration may become external priorities because there are legal and administrative procedures which, in practice, force prosecutors to treat these cases as soon as possible and as fast as possible. However, these will not be personal priorities, with the consequences we outlined above.

Now that we almost concluded we can not avoid some direct considerations about the legality principle. The legality principle is a legal provision which seems to have two aims: regulate discretionary decisions on the definition of priorities and protect prosecutors' image of neutrality and impartiality. As we said prosecutors are neither neutral and/or impartial. However, as we explained, in a country like Italy, where corruption is great, but the fear of being suspected of corruption is even greater, prosecutors have a strong formal legal basis for their actions which makes it difficult to prove that they are serving interests which are not merely legal. But this is not the only practical consequence of the legality principle. Prosecutors still seem to have substantial discretionary powers when they have to define the crime problem. This has already been explained (for Italy) by, for example, Goldstein and Marcus³ and, more recently, Guarnieri.⁴ However, the point we want to make is that prosecutors' discretionary powers, although based on complex interactions of criteria for decision-making and on their socio-political considerations, are not totally unstructured. This study seems to demonstrate that there is a common legal culture amongst prosecutors and that priorities are, in general, chosen according to common criteria. Of course,

² This may evoke image of 'red' and 'black' judges and could raise questions about prosecutors' political socialization. We thought about asking questions on political preferences and influences, but we eventually decided not to do it. The risk was to lose co-operation or access (see appendices).

³ Goldstein and Marcus (1977) *op. cit.* But the authors also say that prosecutors are passive legal figures and their decisions are strongly influenced by the police (see chap. 4).

⁴ Guarnieri (1997) *op. cit.*

there are exceptions, like, for example, the interpretation of the concept of reasonable reason for the Bossi-Fini. However, more general issues like the meaning of social alarm, the damages suffered by the victim and the importance of certain crimes (e. g. white collar and environmental crimes) seem to be treated by prosecutors in a very similar way. In this sense the legality principle seems to be one of the tools which can be used to give prosecutors discretionary powers. In other words: this principle still seems to protect prosecutors' role as experts entitled to define the crime problem. But, as the analysis of the Italian case suggests, this is only one of the conditions, and it may not be a necessary one. There are certainly other reasons such as Italian prosecutors' professional culture and the way legal independence operates in practice. We should also not forget the socio-political context in which Italian prosecutors work. The clashes between the judiciary and part of the political world, and the importance that prosecutors acquired in Italy (now reduced) during *tangentopoli* may also have legitimated (in prosecutors' view) prosecutors' powers. So, it is important to underline that we are not arguing that the legality principle can, alone, give to prosecutors the distinctive features we outlined in this thesis. Moreover, the legality principle surely does not protect prosecutors from all the external influences. For example, the impact of certain legislative measures is perceivable.

The study of criminal justice systems is also the study of legal actors who apply and interpret the system. In this sense, this thesis has tried to demonstrate that the practice of prosecution in Italy has distinctive features. Italian prosecutors do not seem to be mere executors of decisions (on anti-crime policies) taken by other legal, political and, more generally, social actors. If we compare this, for example, with France the significant differences are clear. Hodgson describes a system where prosecutors have little room to influence the way a case will be investigated and prosecuted. The author writes: "whilst judicial supervision is at the centre of the procedural model of criminal justice, in practice, it is police who dominate the process of case construction";⁵ and: "most cases that come before the courts [...] are the product of a police investigation which has been subject to the relatively distant and bureaucratic oversight of the *procureur*".⁶ For England and Wales the conclusions are not so dissimilar. The police are the only legal actors responsible for the investigation

⁵ Hodgson (2005) *op. cit.* pp. 245-246.

⁶ *Ibid.* p. 249. *Procureur* means prosecutor.

of crime and “continue to be the gatekeepers to the prosecution process in many instances”.⁷ Empirical research analyzing decisions to prosecute has remarked the difficulties that prosecutors have to influence and modify conclusions reached by the police. The case is, in practice, constructed by the police.⁸ Moreover, as we said, in Italy there is nothing like the Code for Crown Prosecutors or the Conditional Cautions Code of Practice which suggest decision-making criteria to determine priorities. This is because of the legality principle. However, it would be misleading to think that mere legal reforms might bring the Italian system closer to the French and/or the English systems or vice versa. Prosecutorial functions vary considerably depending on different legal cultures.⁹ Finally, in Italy the ruling class (politicians, entrepreneurs, academics etc.) has proved (particularly in the last 20 years) to be unreliable and corrupt. Within this scenario prosecutors and, more generally, the judiciary, are seen to make up for this lack of authority. This is not the case of, for example, England and France and it should be taken into account.¹⁰ In the end the analysis of Italian prosecutors’ role and functions in practice during the pre-trial phase shows that we may have underestimated the resources that enable prosecutors to mediate the influence of the dominant political cultures.

⁷ *Ibid.* p. 74.

⁸ McConville M., Sanders A. and Leng R. “*The Case for the Prosecution*”. 1991. Routledge: London.

⁹ Jackson (2004) *op. cit.*, in particular p. 110.

¹⁰ Here we are not arguing that, in order to give to prosecutors an important role in the definition of the crime problem, it is necessary to knock out (or at least to reduce the importance) of other members of the ruling class. This may help, but this issue is too complicated to be treated here and it goes far beyond the purpose of this study.

APPENDICES

Appendix A: methodology

We have already discussed the key methodological issues (see chap. 3). Here we will just add some more information. First of all, we did not seek any formal authorization to interview prosecutors and police officers. Everything was informal and started thanks to some friends (in particular a judge and a lawyer) and some other very supportive people (including one of my former professors in Pavia University). Then, it was a matter of public relations and of selling my research. It proved to be successful given that the interviews numbered 54 but could have been doubled or tripled (if we only had more time). Secondly, as I said (chap. 3) in general I was made very well welcome. Even those who were sceptical and defensive eventually gave interesting information. This showed that our questions were properly designed to identify key ideas and contradictions. We are talking about those prosecutors who wanted to deny that priorities exist. Moreover, given that, as we explained (see chap. 5), there is a strong confrontation between prosecutors (and the judiciary in general) and part of the political world, I always had to be very careful and explain that I was not looking for any secret and/or information on specific cases. The other interesting consideration is that the higher the rank of the interviewee (and we interviewed some very important prosecutors) the more they were ready to talk. The chief prosecutor in Bolzano even called me (20 minutes after I spoke with his secretary) to arrange a meeting as soon as possible. So, in general, interviewees found the research quite interesting. It was a bit more difficult with the police who were more formal than prosecutors and, normally, gave very politically correct answers. But, in the end, they were helpful as well. Finally, the more I interviewed people the more I got interesting information. This is because if I could show knowledge of what prosecutors do in practice, they were very happy to explain more and they avoided long and exhausting speeches about the very nature of legal principles.

Appendix B: summary tables of interviews

Size and geographical location of prosecution offices:

B (big)

MB (medium-big)

M (medium)

S (small)

N (north)

St. (south)

C (centre)

1. Consultants

LOCATION	PROSECUTORS	POLICE OFFICERS	LAWYERS
NB			2
NMB	1		
NS	1	1	

Prosecutors: 2

Police officers: 1

Lawyers: 2

In total: 5

2. Interviewees

LOCATION	PROSECUTORS	POLICE OFFICERS	LAWYERS
St.B	3 (1 chief pros.)	3	
NB	6	2	4
NMB	4 (1 chef pros.)	1	3
NS	1	3	4
NB	2		
NB	3 (1 pros. At the court of appeal)		
CM	2		
NB	3		
CM	2	2	
NMB	1 (chief pros.)		

Prosecutors: 27

Police officers: 11

Lawyers: 11

In total: 49

Total interviews (consultants and interviewees): 54

Appendix C: questions for consultants

Prosecutors

I. Prosecution office

1. How do you decide to allocate a file to a prosecutor? Or how does your superior allocate a file to a prosecutor? What did the new *ordinamento giudiziario* reform change?
2. How many dossiers in progress would you typically have to deal with at any one time? How do you deal with such a large number of cases? Do you deal with some types of cases first? If you think a particular offence or type of offence is a particular priority what would you do? How do you treat that offence or type of offence differently so as to make clear it is a priority?
3. How do you decide what requires this kind of treatment from you? Do you discuss local priorities with other prosecutors? Examples? How? Where? Are there rules to determine priorities? How and who determine these rules? Who control that these rules are properly followed?
4. Is there a specific procedure or register for cases which are considered less urgent or more urgent?
5. What do you do with the cases where the name of the accused is not known or in which the crime notice is not clear?
6. Do you have a particular archive? Do you just leave it? Do you deal with it as a normal case (no priorities compared to the cases where the accused is named)?
7. Does the chief prosecutor seek to co-ordinate or harmonise prosecution practice within this prosecution office? If so how does he/she do it? Does he/she use legal powers to do so or is the co-ordination based on consensus and agreement? Do you ever work from home? What about other colleagues?
8. Did it ever happen to you to be substituted from an investigation? Why? Do you know anyone else who had been substituted? What happened? How often? Will the new *ordinamento giudiziario* reform change something?
9. Did you ever issue a disciplinary measure? What happened? Have you ever been the addressee of a disciplinary measure? What happened?

10. What do you see as the most important crime problems facing your area?
11. Does crime by immigrants/youths pose particular problems for prosecutors (or the local area)? If so why?

II. Prosecutors and other legal actors

12. What is the difference between the cultural approach that prosecutors have and the cultural approach that judges have? Why? Examples. Have you ever served as a judge? How is the approach of a prosecutor to his/her job different? Does this ever produce tensions or conflicts with judges? Examples. How are they resolved? Are there informal channels of communication, such as meetings at which judges and prosecutors can resolve these differences? If he/she had the choice to be thought of an effective crime fighter or as a 'judicious' magistrate which would they choose? Why? Do they welcome greater separation between the role and career of prosecutor and judge or oppose it?
13. What are the arguments that you use to convince the GUP that a *rinvio a giudizio* is the right measure or the GIP that the case should be dismissed? What happens if the victim opposes to the *archiviazione* request? Does this change your approach?
13. Does the social alarm play a part when you ask for the *archiviazione* or for the *rinvio a giudizio*?
14. Do you discuss priorities with the police? How? Where? How do you convey your sense of priorities to the police? How do you deal with it if you feel the police do not share your sense of priority of a particular case or category of case? How does your relationship with the police work? By letters and files, personal meetings, on the telephone?

III. Prosecutors and external influences

15. Measures issued by the Minister of Justice. How does it work? Inspectors are sent straight away? There is an informal channel to communicate? For which reasons the inspectors are sent? Who are the inspectors (former *magistrati* etc.)? How does it work when you are called in Roma? Who is will speak with you?
16. Have you ever been involved in cases which had an impact in the local or national media? How did this affect the case? How did you deal with the media? Is there a

general policy within this prosecution office about dealing with the media? What about the investigation, will you be more involved (e. g. undertaking investigation activities that normally the prosecutor would not undertake)? Trying to use them? Giving information? Do you know if this happens in other prosecution offices?

17. Have you ever dealt with crimes or types of crime which have been a matter of acute local feeling amongst local community? How did you deal with that local feeling? Do you feel that such local concerns should be taken into account or excluded from decision-making? Do you ever meet representatives of local communities (citizens committees, major from small villages etc.)? What do you discuss? Does it happen in other prosecution offices?
18. Are you part of a *magistrati*'s association? What made you join and what made you choose that particular association? What do you see as the function of these associations? Are they a forum for discussing and co-ordinating priorities for prosecutors? How often do you submit questions or requests to the CSM? To which extent these questions or requests concern your job?

IV. Vignettes

19. Outside of a club there is a brawl involving 5 young Italians (all adults). The reason is futile (like arguing for a parking place) and when the police arrive they realize that the guys are drunk and under the effect of some drugs. Two of the guys are injured with minor damages, but an ambulance is called and the doctors say that the prognosis is for three days. Given that the guys did not lodge any *querela* for personal damages: would the police report this case to you? Why? Would you prosecute it? Why? What is the element that leads you to the decision to prosecute/not to prosecute? Would it be different if you had complaints from those living in that area, because these things often happen? And if some or all the guys were immigrants?
20. During a routine control the *guardia di finanza* discovers that there are some anomalies in the accounting records of a local entrepreneur (medium size). It appears that the crime of false accounting has been committed, however it is not clear if the crime had substantial consequences or not in the company's financial situation. Would the police report this case to you? Why? Would you prosecute it?

Why? What is the element that leads you to the decision to prosecute/not to prosecute?

Lawyers

I. Prosecution office

1. How are the files allocated in the prosecution office working in your area? What about cases where the name of the accused is not known and where the crime notice is not clear or it is anonymous? Do you know prosecution offices which use different systems?
2. How do prosecutors treat the offences differently so as to make clear that it is a priority? Could you make an example? What are the rules to determine priorities?
3. Do you know if the rules concerning priorities are decided by the chief, through common rules decided by all the prosecutors or every single prosecutor has his/her set of priorities? Do you know if in other prosecution offices the procedure is different?
4. Does the social alarm play a part when the prosecutor asks for the *archiviazione* or for the *rinvio a giudizio*?
5. Are prosecutors substituted from an investigation? How often? For which reasons? Could you make an example?
6. Do you meet prosecutors to discuss about cases? Only in formal occasions, informal occasions? For certain matters do you have to meet the chief? What are these matters?
7. What do you see as the most important crime problems facing your area?
8. Does crime by immigrants/youths pose particular problems for prosecutors (or the local area)? If so why?

II. Prosecutors and other legal actors

9. Do you often see judges talking with prosecutors (in the bars around the court, in the corridors etc.)? Do you know if they discuss, informally, about cases?
10. Based on your experience have you ever had cases (before the GIP, GUP or trial judge) where you felt that your requests were discriminated compared to the

prosecutors' requests? Have you ever heard about similar cases? Could you make an example (e. g. how often the judge accepts lawyers' requests (30%, 40% of the times, more)?

11. I have been told that sometimes the police literally dictates to prosecutors the charges to be reported in the file. Have you ever had this feeling? Do you know if this happened for a case you were dealing with?
12. Based on your experience: to which extent prosecutors control the police during the investigation? Could you make an example?
13. What are the investigative activities that prosecutors normally undertake and those that the police undertake? Could you make examples?
14. Did you ever complaint to prosecutors about something that the police did? Have you ever heard about something like this? Could you make examples?

III. Prosecutors and external influences

15. Measures issued by the Minister of Justice. How does it work? Inspectors are sent straight away? There is an informal channel to communicate? For which reasons the inspectors are sent? Who are the inspectors (former *magistrati* etc.)? How does it work when prosecutors are called in Roma? Who will speak with them?
16. Have you ever been involved in cases which had a great impact on the media? How did prosecutors behave? Did they look closer to part of the media (e. g. journalists belonging to a certain newspaper)? On the contrary, did they want to have nothing to do with the media? What about the investigation, will prosecutors be more involved (e. g. undertaking investigation activities that normally the prosecutor would not undertake)? Could you make an example?
17. Have you ever dealt with crimes or types of crime which have been a matter of acute local feeling amongst local community? Did the prosecutor behave in a different way (e. g. requests for stronger punishments, more involved in the investigation)? Do you feel that such local concerns have been taken into account or have been excluded from decision-making? Examples?
18. Do you know prosecutors who belong to ANM's associations? Why do they belong to that association? Is there a political reason, or something else?
19. Do you think that prosecutors belonging to different ANM's associations behave in a different way? Could you make an example?

IV. Vignettes

20. Outside of a club there is a brawl involving 5 young Italians (all adults). The reason is futile (like arguing for a parking place) and when the police arrive they realize that the guys are drunk and under the effect of some drugs. Two of the guys are injured with minor damages, but an ambulance is called and the doctors say that the prognosis is for three days. Given that the guys did not lodge any *querela* for personal damages: would the police report this case to the prosecutor? Would he prosecute it? Why? What is the element that leads the prosecutor to the decision to prosecute/not to prosecute? Would it be different if you had complaints from those living in that area, because these things often happen? And if some or all the guys were immigrants?
21. During a routine control the *guardia di finanza* discovers that there are some anomalies in the accounting records of a local entrepreneur (medium size). It appears that the crime of false accounting has been committed, however it is not clear if the crime had substantial consequences or not in the company's financial situation. Would the police report this case to the prosecutor? Why? Will it be prosecuted? Why? What is the element that leads the prosecutor to the decision to prosecute/not to prosecute?

Police

I. Prosecution office

1. How are the files allocated in the prosecution office working in your area? What about cases where the name of the accused is not known and where the crime notice is not clear or it is anonymous? Do you know prosecution offices which use different systems?
2. How do prosecutors treat the offences differently so as to make clear that it is a priority? Could you make an example? What are the rules to determine priorities?
3. Do you know if the rules concerning priorities are decided by the chief, through common rules decided by all the prosecutors or every single prosecutor has his/her set of priorities? Do you know if in other prosecution offices the procedure is different?

4. Does the social alarm play a part when the prosecutor asks for the *archiviazione* or for the *rinvio a giudizio*?
5. Are prosecutors substituted from an investigation? How often? For which reasons? Could you make an example?
6. What do you see as the most important crime problems facing your area?
7. Does crime by immigrants/youths pose particular problems for prosecutors (or the local area)? If so why?

II. Prosecutors and other legal actors

8. Do you often see judges talking with prosecutors (in the bars around the court, in the corridors etc.)? Do you know if they discuss, informally, about cases?
9. I have been told that sometimes the police literally dictates to prosecutors the charges to be reported in the file. Does it really happen? Could you make an example?
10. Based on your experience: to which extent prosecutors control the police during the investigation? Could you make an example?
11. What are the investigative activities that prosecutors normally undertake and those that the police undertake? Could you make examples?
12. During the investigation (from the moment when you communicate the crime notice till the end of the investigation) how do you communicate with prosecutors (written, oral)? How often? Do you have formal meetings to attend? On the contrary, is everything informal?
13. Do you meet prosecutors (when there is not any investigation involved)? What do you talk about? Only in formal occasions, informal occasions? For certain matters do you have to meet the chief? What are these matters?

III. Prosecutors and external influences

14. Measures issued by the Minister of justice. How does it work? Inspectors are sent straight away? There is an informal channel to communicate? For which reasons the inspectors are sent? Who are the inspectors (former *magistrati* etc.)? How does it work when prosecutors are called in Roma? Who will speak with them?

15. Have you ever been involved in cases which had a great impact on the media?
How did prosecutors behave? Did they look closer to part of the media (e. g. journalists belonging to a certain newspaper)? On the contrary, did they want to have nothing to do with the media? What about the investigation, will you be more involved (e. g. undertaking investigation activities that normally the prosecutor would not undertake)? Could you make an example?
16. Have you ever dealt with crimes or types of crime which have been a matter of acute local feeling amongst local community? Did the prosecutor behave in a different way (e. g. requests for stronger punishments, more involved in the investigation)? Do you feel that such local concerns have been taken into account or have been excluded from decision-making? Examples?
17. Do you know prosecutors who belong to ANM associations? Why do they belong to that association? Is there a political reason, or something else?
18. Do you think that prosecutors belonging to different ANM associations behave in a different way? Could you make an example?

IV. Vignettes

19. Outside of a club there is a brawl involving 5 young Italians (all adults). The reason is futile (like arguing for a parking place) and when the police arrive they realize that the guys are drunk and under the effect of some drugs. Two of the guys are injured with minor damages, but an ambulance is called and the doctors say that the prognosis is for three days. Given that the guys did not lodge any *querela* for personal damages: would the police report this case to the prosecutor? Would he prosecute it? Why? What is the element that leads the prosecutor to the decision to prosecute/not to prosecute? Would it be different if you had complaints from those living in that area, because these things often happen? And if some or all the guys were immigrants?
20. During a routine control the *guardia di finanza* discovers that there are some anomalies in the accounting records of a local entrepreneur (medium size). It appears that the crime of false accounting has been committed, however it is not clear if the crime had substantial consequences or not in the company's financial situation. Would the police report this case to the prosecutor? Why? Will it be

prosecuted? Why? What is the element that leads the prosecutor to the decision to prosecute/not to prosecute?

All the questions (different depending from the function: prosecutor, police or lawyer) have been asked to the consultants.

Appendix D: questions for interviewees

Prosecutors

I. Office culture: allocating work

1. How are the files allocated in this prosecution office? Are the files allocated through the *turno posta* or you have specializations as well? Who decided that this was the system to use? The chief, there was an informal agreement, a general consensus, a democratic discussion etc.? Who decides who and how many turns have to be done and the specializations? How are the files allocated between those who are specialized in a topic? What will the reform change?

➤ **This question was asked to 26 out of 27 prosecutors.**

II. Sorting files: the process

2. How many dossiers in progress would you typically have to deal with at any one time? How do you deal with such a large number of cases? Do you deal with some types of cases first? If you think a particular offence or type of offence is a particular priority/of particular significance/seriousness what would you do? How do you treat that offence or type of offence differently so as to make clear that it is more serious?

➤ **This question was asked to 26 out of 27 prosecutors.**

3. How do you decide what requires this kind of treatment from you? Do you discuss local priorities with other prosecutors? How? Where? How do you decide what cases are more important?

➤ **This question was asked to 26 out of 27 prosecutors.**

4. Are these priorities determined or influenced by the prosecution office (court of appeal or local) or by the CSM? How?

➤ **This question was asked to 26 out of 27 prosecutors.**

5. Does the chief try to harmonize or co-ordinate your approach to particular cases (by perhaps suggesting common rules about prosecuting particular types of crimes)? For example: does he ever come to say: “look, you should do the case X before the case Y”? Will he/she do it with the reform?
- **This question was asked to 26 out of 27 prosecutors.**

III. Sorting files: prosecutors' sense of 'priorities'

6. What types of crime seem to you particularly important to act quickly upon or supervise closely or do yourself what you normally delegate or ask for an expensive investigation act etc.
- **This question was asked to 26 out of 27 prosecutors.**
7. Why do you think these types of crime are more important (more social impact)? Do prosecutors with particular specialisms prioritise those types of crime?
- **This question was asked to 26 out of 27 prosecutors.**
8. Do you regard crimes committed by immigrants or street crime are not a priority? Why? Why not?
- **This question was asked to 26 out of 27 prosecutors.**
9. Is it true that the forces of law and order and/or the PG can have priorities which are different than yours? For example, in relation to street crime and immigrants, where there is persuasion/pressure on the forces of law and order to achieve results. What do you do if the investigating forces of law and order do not appear to share your sense of priorities?
- **This question was asked to 24 out of 27 prosecutors.**
10. Is it true that the forces of law and order directly deal directly with the local community's complaints (e. g. they break things, there are always brawls etc.)? Does this lead them to want to prioritise those offences which led to these complaints? Do they draw that public concern to your attention? Does this make any difference to your decision-making?
- **This question was asked to 24 out of 27 prosecutors.**
11. How do you supervise the PG during investigation (telephone, written reports, face to face)? What determines which methods you use? What happens when the police do not follow your orders? What do you do if you are unhappy with their

investigation but you do not want to revoke the investigation (perhaps because you believe this is too strong as a sanction)?

- **This question was asked to 22 out of 27 prosecutors.**

IV. Crime and social alarm

12. What are the most pressing crime problems in this area?

- **This question was asked to 25 out of 27 prosecutors.**

13. Does criminality linked to immigration pose particular problems? Why? What proportion of your cases involves immigrants? Does lack of official residence pose a problem?

- **This question was asked to 26 out of 27 prosecutors.**

14. What do you do with the Bossi-Fini?

- **This question was asked to 26 out of 27 prosecutors.**

15. Does the Bossi-Fini Act effectively mean that you have to treat immigrants as a priority? Do you feel this is appropriate?

- **This question was asked to 26 out of 27 prosecutors.**

16. Do you think that any of the following: a) crimes committed by immigrants, b) immigration itself with the Bossi-Fini, or c) street crime create particular social alarm within the local community? How, if at all does this affect your decision-making?

- **This question was asked to 24 out of 27 prosecutors.**

17. How, if at all is the approach of a prosecutor different to that of a judge? Do you see yourself as a crime-fighter? If someone suggested that you were known as a crime fighter would you be pleased or not? Why?

- **This question was asked to all prosecutors.**

18. Do you think the legality principle helps prosecutors to work effectively or hinders them? Do you think it should be abolished or moderated? Should the legislator or the Ministry of Justice set out the general priorities?

- **This question was asked to all prosecutors.**

19. Are you part of the ANM? Any particular group inside the ANM?

- **This question was asked to 20 out of 27 prosecutors.**

V. Managing the cases and efficiency (extra questions asked to the chief prosecutor in Bolzano)

- a) What is the meaning of the project you are putting forward here?
- b) What does a project manager do in a prosecution office?
- c) What are the sorts of cases where it is easier to introduce efficiency? What are the ones where it will not be able to work so easily?
- d) How will better management relate, if at all, to increasing the use of alternatives introduced by the new criminal procedure of 1989?
- e) How will managerial measuring influence how cases are handled? For example regarding priority? How, if at all, it is expected/intended to have this effect?
- f) Is there a difference between efficiency and effectiveness in your job? Is it possible that too much efficiency will undermine the effectiveness of your job?

Lawyers

I. Office culture

- 1. How do they allocate files in this prosecution office? In this prosecution office are the files allocated through the *turno posta* or they have specializations as well? Who decided that this was the system to use? The chief, there was an informal agreement, a general consensus, a democratic discussion etc.? Who decides who and how many turns have to be done and the specializations? How are the files allocated between those who are specialized in a topic? Do you know the lists of those who are part of the specialized units? What will the reform change?

II. Office culture: the priorities

- 2. Would you say that there are certain types of case that are regarded as priorities by the prosecution office? Cases which are processed immediately with substantial investigative resources if necessary? Do priorities reflect the specialization areas? Why do you think there are more important cases (more social impact)?
- 3. Are crimes committed by immigrants and street crime a priority or not? Why?

4. Do you know if the rules about priorities are decided by the chief together with the other prosecutors or every one is free?
5. Which is the role of the forces of law and order and of the PG in shaping/influencing priorities?

II. Office culture: how prosecutors deal with priorities

6. When a prosecutor prioritizes a case how is this reflected in the way he/she deals with the case? What does he/she do that he/she normally delegates?
7. To what extent, if at all, do chief prosecutors monitor the way prosecutors deal with cases or try to harmonize or co-ordinate their decision-making? Does he/she try to establish common policies about prosecution or enforce a particular set of priorities?

III. Crime and social alarm

8. What are the most pressing crime problems in this area?
9. Does criminality linked to immigration pose particular problems? Why? What proportion of prosecutors' cases involves immigrants? Does lack of official residence pose a problem?
10. What do prosecutors do with the Bossi-Fini?
11. Does the Bossi-Fini Act effectively mean that prosecutors have to treat immigrants as a priority? Do you feel this is appropriate?
12. Do you think that any of the following: a) crimes committed by immigrants, b) immigration itself with the Bossi-Fini, or c) street crime create particular social alarm within the local community? How, if at all does this affect prosecutors' decision-making?
13. How, if at all is the approach of a prosecutor different to that of a judge? Do they see themselves as a crime-fighter? If someone suggested that they were known as a crime fighter would they be pleased or not? Why?
14. Do you think the legality principle helps prosecutors to work effectively or hinders them? Do you think it should be abolished or moderated? Should the legislator or the Ministry of Justice set out the general priorities?

15. Do you think that the priorities of *magistrati* belonging to different associations are different?

All the questions have been asked to the lawyers. The only exception was question 15 that I asked to 8 out of 11 lawyers.

Police

I. Office culture

1. In this prosecution office are the files allocated through the *turno posta* or they have specializations as well? Who decided that this was the system to use? The chief, there was an informal agreement, a general consensus, a democratic discussion etc.? Who decides who and how many turns have to be done and the specializations? How are the files allocated between those who are specialized in a topic? What will the reform change?

II. Office culture: the priorities

2. Would you say that there are certain types of case that are regarded as priorities by the prosecution office? Cases which are processed immediately with substantial investigative resources if necessary? Do priorities reflect the specialization areas? Why do you think there are more important cases (more social impact)?
3. Are crimes committed by immigrants and street crime a priority or not? Why?
4. Do you know if the rules about priorities are decided by the chief together with the other prosecutors or every one is free?
5. Is it true that the forces of law and order and/or the PG can have priorities which are different than yours? I think about street crime and immigrants, where some results could be asked to the forces of law and order.
6. How do prosecutors do a *delega*? What happens when the police do not follow prosecutors' orders? What do prosecutors do if they want to punish a police officer but they do not want to revoke the investigation because you believe it is a too strong punishment?

III. Office culture: how prosecutors deal with priorities

7. When a prosecutor prioritizes a case what does he/she do that he/she normally delegates?
8. I have been told that in general the chief never goes to a prosecutor's office to ask: "Excuse me what are you doing with that case?" What does it mean? Does it mean that the chief does not try to harmonize or co-ordinate prosecutors' activity when they deal with a specific file (such as deciding common rules about prosecuting crimes)? For example: does he/she ever come to say (to prosecutors): "look, you should do the case X before the case Y"?

IV. Crime and social alarm

9. What are the most pressing crime problems in this area?
10. Does criminality linked to immigration pose particular problems? Why? What proportion of prosecutors' cases involves immigrants? Does lack of official residence pose a problem?
11. What do prosecutors do with the Bossi-Fini?
12. Does the Bossi-Fini Act effectively mean that prosecutors have to treat immigrants as a priority? Do you feel this is appropriate?
13. Do you think that any of the following: a) crimes committed by immigrants, b) immigration itself with the Bossi-Fini, or c) street crime create particular social alarm within the local community? How, if at all does this affect prosecutors' decision-making?
14. How, if at all is the approach of a prosecutor different to that of a judge? Do they see themselves as a crime-fighter? If someone suggested that they were known as a crime fighter would they be pleased or not? Why?
15. Do you think the legality principle helps prosecutors to work effectively or hinders them? Do you think it should be abolished or moderated? Should the legislator or the Ministry of Justice set out the general priorities?

All the questions have been asked to the lawyers. The only exception was question 8 that we asked to 9 out of 11 police officers.

Comments

There are two kinds of comments that we want to make here. First, we want to outline and explain the differences between the questions we asked to consultants and the questions we asked to interviewees. Second, we want to explain the reasons behind the choice of dropping some questions.

There are three main differences between the themes we developed with consultants and those we developed with the interviewees. First, we abandoned any question concerning the relationship with the executive. If we wanted to pursue this we would have had to add many more questions, and certainly there was not enough time. Moreover, this proved not to be very useful to analyze external influences and, also, prosecutors' working environment. Finally, these questions implied opinions on political choices taken by the government. This is a very difficult topic in Italy and we thought that too many questions on prosecutors' political opinions could have jeopardized cooperation and access. Secondly, we did not ask any specific question about the media. This did not disappear. Interviewees talked about this sort of external influence when they were discussing the impact of immigration (i. e. the Bossi-Fini Act) and street crime. So, it was included, more generally, in the influence of the dominant political cultures. The reason why we decided not to ask any specific question about the media is that this is a research on its own. This could have created two problems: interviews would have been too long and this study would have lost its focus. Third, the vignettes were abandoned because we could not get any interesting information from them.

There is one fundamental reason why I had to drop questions: time. This regarded prosecutors, police officers and lawyers as well. However, there is a more detailed explanation for prosecutors. The first thing I did to avoid wasting time was to limit question 1. Once I had clear in my mind the way cases are allocated (and the differences in each prosecution office) I was only asking for confirmation. But opinions on the impact on the *ordinamento giudiziario* law were always asked (with one exception). The same technique was used with police officers and lawyers. Another question that was not always asked is n. 19 (on political affiliations, see above). This was also a not very useful question. We could not clearly spot any link

between politics and the way prosecutors define their priorities. With lawyers (question n. 15) the results were different. They suggested some interesting considerations about prosecutors' personal priorities in general. However, even for lawyers this is a very sensitive issue that I had to introduce carefully. Finally, if I was really running out of time I dropped questions (for prosecutors) n. 9, 10, 11 and 16. The first three questions concern the police. I left them out for three reasons. First, I wanted to concentrate more on the definition of priorities. Second, and more importantly, these questions almost always received very similar (if not identical) and clear answers. So, the information could be understood and organized quite well, without further explanation. Third, in practice (and thanks to the fact that the questions were quite open), opinions on the police were always given. Similarly, question 16 out was left because, in practice, prosecutors answered this while they were discussing the Bossi-Fini. Finally, we decided to add some questions only for Bolzano because of the project launched by the chief prosecutor (see chap. 6). This was a very good chance to analyze in depth a very peculiar way to organize a prosecution office.

Why did we choose these questions? Obviously these were designed to achieve the purposes of this study (see chap. 1). So, we focused on 4 issues: the organization of the prosecution office, the definition of the crime problem (with a particular focus on social alarm), prosecutors' legal and professional culture and their relationship with the police. Why did we focus on street crime and immigration? We wanted to analyze the impact of social alarm. Street crime and immigration certainly create social alarm. This can not be said, for example, for white collar crimes. This can be a source of social alarm for prosecutors but, for sure, not for the dominant political cultures. Of course we would have liked to ask many other questions, but there was not the time. In the end, even if our empirical data clearly have some limits, we believe these were the clearest and sharpest questions we could have asked. Moreover, while this is not a totally unstructured (e. g. crime fighters/judges, social alarm etc.) work, we tried to avoid, as much as possible, the problems of ethnocentrism (see chap. 1 and 3). So, the questions were made also to discover and emphasize some distinctive features of Italian prosecutors (e. g. legal filters and the operation of legal independence).

Appendix E: families and codes used to analyze interviews (ATLAS)

Here we will indicate the families (I, II, III etc.) and the codes which were included in each family. This is to give a general idea about how we classified our information.

I. Difference between prosecutors sense of social alarm and other meaning of social alarm

1. Diff. Between pros. social alarm and other meanings of social alarm
2. Prosecutors and local community pressure.
3. Prosecutors: a formidable wall

II. Illegal immigration and street crime

1. Crime and immigration: a very difficult issue
2. exceptions
3. Illegal imm. is not a priority: impossibility to prosecute all these sort of cases
4. Illegal imm. is not a priority: interests affected are not substantial
5. Illegal imm. is not a priority: moral issues and technical prob.
6. Illegal immigration is not a priority
7. Street crime is not a priority.
8. Street crime is not a priority: impossibility to prosecute all these sort of cases
9. Street crime is not a priority: interests affected are not substantial
10. The Bossi-Fini Act and its applications

II. Is this prosecutors' sense of justice?

1. Immigration and street crime: a police matter
2. Lenient attitude
3. Prosecutors contesting political choices or seeking for justice?
4. prosecutors do not deal with security

IV. Organizational relations

1. All. files (non-specialized units)
2. All. files (specialized units)
3. Chief prosecutors and their hierarchical powers
4. Reform and its application

5. Spec. units and files allocation within these
6. The absence of external control.
7. The absence of internal control.

V. Priorities and external influences

1. Prosecutors and police: implications before the investigation.
2. Prosecutors and police: implications during the investigation
3. Prosecutors and police: which implications on priority issues?

VI. Priorities and the prosecutor

1. Shared rules
2. Other criteria
3. Crime problem (in general).
4. Non-priorities

VII. Priorities and working relations

1. Priorities and the leg. princ. in pros. view
2. SDAS and B categories crimes
3. Selective remedies for huge case load
4. Specialized units: priorities or needs?
5. Opinions on the leg. princ. by non pros.
6. Gruppo Sicurezza Urbana (TO)

VIII. Professional attitudes and values

1. A third kind?
2. Crime fighters.
3. Evaluating the faith in the leg. princ.
4. Expediency principle and interferences from the political world
5. Independence
6. Judging culture
7. Non quiescent politics and prosecutors' reactions
8. Prosecutors' proposals to improve the leg. princ.
9. Suppliers of authority
10. The impact of the 1989 reform
11. The purpose of the leg. principle now in Italy
12. Prosecutors and their political flavoured associations
13. Diff. between prosecutors and judges

IX. Prosecutors and social alarm

1. Social alarm as a priority issue
2. The concept of social alarm for prosecutors

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