

Maria Letizia Zanier

The Legality Principle within the Italian Criminal Justice System: Normative Principles and Practical Adaptations

In: *Beyond the statute law: the “grey” government of criminal justice systems. History and Theory in the modern age*, edited by Luigi Lacchè, Monica Stronati, Macerata, eum, 2011, pp. 95-124.

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1. *Introduction*

Normative principles necessarily need to adapt to certain factual contexts. These practical adaptations vary according to the legal actors and the legal context within which normative principles are applied. Thus, it is crucial to study legal actors' professional culture, in order to grasp the complexity and the structure of contemporary legal systems.

As it is acknowledged, in some systems of civil law – for instance, the Italian one – the prosecution is compulsory, even if this principle often represents more a myth than a real fact. A similar compulsoriness is not normatively prescribed in common law systems, but it must not imply that the prosecutor renounces to remain neutral when taking decisions. The Italian criminal justice system is chronically affected by lack of resources and a substantial backlog that influence *magistrati's*¹ job. This pushes prosecutors to take discretionary decisions that, *de facto*, affect the legality principle. In particular, they can define the crime problem by determining priorities in prosecuting (Nelken, Zanier 2006; Zanier 2007; 2009).

Thanks to a theoretical review and the presentation of empirical data concerning Italy², this paper aims to contribute

¹ Prosecutors and judges are both regarded as belonging to the same professional category (called *magistratura*) and they are both called *magistrati*.

² The research, whose results are partially presented in this text, is based on the empirical study of subjective practices realised by the operators of the law in the

to the debate about the relevant topic of compulsory prosecution in the penal system in our country. Then, we will focus on other practices and, in particular, on the discretionary powers that legal actors retain in the everyday work. Firstly, we will analyze the role of specialized units. Prosecution offices and, sometimes, courts are organized according to specialized units dealing with specific crimes (e. g. white-collar crimes, organized crimes, etc.). Secondly, the implementation of the *riti alternativi* will be discussed. These are special proceedings, like plea-bargaining, that are triggered by the parties and were designed to combat the perennial case backlog of the Italian criminal justice system. The criteria to apply these proceedings do not seem to be homogeneous in every prosecution office. Finally, the importance of the *prescrizione*³ will be taken into consideration. This may vary depending on the legal and factual context, the crime committed and even the social position of those involved in the investigation and trial.

In essence, legal actors' professional and legal culture is vital information to understand and to construe the theoretical

field of socio-legal contexts. It was conducted by the Author under the guidance and coordination of Prof. David Nelken through interviews with privileged witnesses at different Italian courts. Thereby, between June and December 2002, we interviewed operators of law such as the President of a penal section, the President of a section *G.i.p.* (Preliminary Investigation Judge) – *G.u.p.* (Preliminary Hearing Judge), the Chief Attorney (or his Associate or Substitute), the Director of the penal chancellery and two criminal Lawyers in each court. The data were collected by the research “The reasonable length of the trial. Guarantees and efficiency of criminal justice” conducted as a base of a project co-financed by the Italian Ministry of Education, University and Scientific Research. All told, the study, of which we are presenting some results in this paper, was object of further publications (Nelken, Zanier 2006; Zanier 2006, 2007, 2009).

³ 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 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 (*Consiglio Superiore della Magistratura*) disciplinary hearings.

framework of a legal system. In this sense, the academic debate on criminal procedures should also take into consideration legal actors' point of view, because they are the "front line" that everyday has to face the challenges connected with the practical adaptation of normative legal objectives. And they are also partially responsible for the good functioning of the criminal justice system or, at least, a part of it.

2. *Prosecution in the systems of common law and civil law*

It may turn out to be useful, even if done synthetically, for the understanding of the principle of discretionary prosecution in these systems, to retrace the modalities of the organisation of prosecutorial structures in a country of common law, for instance in the United States.

Regarding the American prosecutorial organs, it is important to highlight that their nomination is carried out politically, when it comes to the district attorney. A counterbalance for this constitutes the accredited independence given to this person who is strengthened by the awareness of being able to leave the office and return almost always successfully to the private profession (Eisenstein 1979). The American Prosecutor's Department, that exercises a wide discretion in deciding if and how the prosecution takes place, also assumes the fundamental role of regulating the flow of cases entering the system (demands for justice). Guarnieri (1984), quoting Reiss (1976), recalls that in the United States the prosecutor⁴ adopts behaviours oriented to discretionary power in at least five ways: in deciding whether or not to carry out a prosecution; in the relevant option to charge defendant with which specific offense; in the decision whether or not to archive an ongoing trial via the procedure called *nolle prosequi*; in the negotiation with the accused for an admission of his guilt in return of a benignant attitude from the prosecutors and eventually from the court (plea-bargaining); in the settling of what kind of strategy should be sustained during the trial.

⁴ A figure in some aspects superposable with the one of the public prosecutor of the systems of civil law.

From the illustrated characteristics derives the inevitable, more than outstanding, autonomy of the prosecutor, but also the accentuation of the local disparity in criminal policies. Like that, even the American system wished reforms mostly go in the direction of a greater uniformity of the discretionary decisions of the prosecutor, of a higher centralisation of the federal organisation of the prosecution offices and of a more systematic control from the judges. Some academics have suggested a greater commitment of professional career prosecutors. Nevertheless, the extreme decentralisation and influence exerted by the political community remain peculiar aspects of the prosecutorial system in the United States.

Just like the prescriptions by norms, even the non-normative standards that impact the behaviour of the prosecutor (mechanisms of informal type by taking decisions, public judgment, political contextual situation – important above all for the American reality – inner and administrative organisation of the system even at local level) present characteristics that are not at all homogenous in the systems of the common law in comparison to those of the civil law. By following a comparative approach, we can derive precious indications to understand the philosophical meaning, and the legal one, that rules the thesis of discretion/compulsoriness, its setbacks in the evolution and its time in the criminal proceeding (Zanier 2009).

As we have anticipated, the prosecutor in the Anglo-Saxon systems does not apply criminal law mechanically; on the contrary, forms of discretion pervade a lot of aspects of his work, starting with the investigations, with the acceptance of the rites of alternative type (plea-bargaining) or with the decision to go to trial. Nevertheless, the discretion does not imply that such strategies are random or lacking regularity in decisional standards⁵. We could add that the prosecutor proceeds incorrectly

⁵ «Note that the decisional ‘principles’ have nothing to do with ‘policies’. The ‘policies’ relate to another series of rules and standards specifically used to take particular categories of decisions. The prosecutor’s offices, especially the ones that deal with a big number of similar cases, often adopt particular policies in order to bring consistency and administrative efficiency [...]. The ‘principles’, however, refer to normative fundamental premises concerning the modalities to take decisions from the

whenever his actions lack of neutrality, even if the dimensions of such a concept remain to be identified. As Zacharias and Green (2004) indicate, a first aspect of neutrality of the prosecutor – on which lies the substantial accord between scholars – is the one that defines it as an non-biased behaviour, uninfluenced by external factors when taking decisions. The presumed distortions could affect actions that are determined by ethnic, racial or religious prejudices – subjects that have for a long time been very sensitive issues in the United States – and that start, even in our country, to gain importance with the increase of immigration and the criminality linked to it. More simply, the behaviours of the prosecutor could also be indulged by personal interests in whom he is involved. Secondly, the neutrality of the prosecutor foresees that non-partisan decisions are taken. In this case, the outlines of the concept appear less clear and concrete regarding the preceding dimension, because the second one has to do with notions of independence from other actors, the objectivity in the valuation of evidences, the autonomy from the political agenda. The third condition of neutrality requires that the prosecutor founds its decisions on criteria that can be instantly identified and that are consistently applied. In essence, all dimensions of neutrality of the accusation share the latent premise that the prosecutor exerts the discretionality in a non-arbitrary way. As Zacharias and Green conclude, such an objective is in theory not attainable, unless on a very general and abstract level. We probably all agree on the fact that this part of the trial has to be “neutral”, just like it should be “honest” and generally “follow the aims of justice”. Nevertheless, none of these propositions present an unambiguous meaning, because it deals with a proxy of a constellation of other normative expectations, most often vague, concerning the modalities of the decisional behaviour.

Therefore, the theoretical analysis suggests the necessity to rethink the role of the prosecutor in the light of a series of principles and under-principles that have been publically listed to orientate the action. At this point, it is useful to come

side of the prosecutor and should constitute the ideal requirements to the policies and to the decision to take *ad hoc*» (Zacharias, Green 2004, p. 8).

with a similar approach to suggest a critical discussion of the penal system in Italy and of its eventual reforms. The concept of “neutrality” of the prosecutors can adopt a wide range of meanings, but theoretically each concept refers to the decision-taking based on a consistent application of rules that are founded in the law and in the way of understanding society from the side of its members. Even if the standard of “neutrality” does not procure a dividing line to define the “good” behaviour of the prosecutors in specific cases, it offers nevertheless the cue to criticize eventual inadequacies of realising the consistency/coherency of his actions.

The empirical material that we have collected by interviewing the operators of law reveals that the main difficulty resides in the fact that in our penal system the public prosecutors (*pubblici ministeri*) are not given the possibility to identify normatively a series of decisional criteria, if not on an informal level and territorially delimited⁶. The interviews with privileged witnesses confirm that a similar modality would rather be welcomed by many. Rethinking about the consideration concerning the American system, potential reforms should go in the direction of providing the articulation of standardised guiding-criteria to orientate the actions of the prosecutors in the single offices. Such principles are partially elaborated at local level in order to better adhere to demands coming from the actions of legal culture in each juridical office. The principles should relapse in the orbit of normative criteria and be identified at a superior level (from the side of politicians, lawyers, representatives of the operators of law), to which the consensus of the public opinion also converges (Nelken, Zanier 2006; Zanier 2007, 2009).

Considering in more details the reality of the Italian penal system, it emerges that, despite the introduction of the adversarial system with the new code, some columns of the

⁶ Among the very few empirical researches on the subject of compulsoriness/discretionality of prosecution that were conducted in Italy, considering the practical role of the operators of law and using non-standard techniques (direct and participative observations), the one of Fabri (1997) merits to be quoted because it highlights how the discretion of the prosecutors is spread, significantly, further than locally and individually discontinuous.

old inquisitorial system continue to persist. Among them, the principle of compulsoriness of prosecution takes a pre-eminent position from the point of view of the legal theory as well as of the relaxed practices on the management of procedures. Among the other things, this aspect of the law is seen by some lawyers and operators as one of the causes that contributes to determine the excessive length of Italian trials⁷. Nevertheless it is not for this reason that many representatives of both the categories, even the quite important ones, support the abolition or mitigation of the principle⁸. The compulsoriness should not be abolished, but rather reformed, because in reality it is a myth. As everyone knows, a widespread discretion pervades the actions of the prosecutor in manifold areas regarding the “if”, “when” and “how” of the procedure. In fact, even if we continue to present prosecution and the acts of the prosecutors as a living incarnation of the principle legality-compulsoriness, many motivations have avoided the practices of such an attitude (Vicoli 2003).

⁷ On the commixture of the two systems in Italy, says Maddalena (2005, p. 130): «a trial system that manages to mix the inquisitorial with the adversarial, like ours, without the presumptions of the adversarial system that can be found in the United States, multiplying the warranties of one and another, contrasts on full hands with the principle of reasonable length of the trial. Hence we need to have the preliminary investigations, the preliminary audience, the first grade, the appeal, the recourse, the judgment for postponement. Think of all the people who decide at the same trial, even leaving aside the incidental procedures, hence of the ones in front of the ‘Court of Freedom’ (*Tribunale della Libertà*). And yet, our adversarial system, on top of the compulsory prosecution and the wide usage of impugnments, continues to make use of other typical principles of the inquisitorial system, like the primacy of substantial truth, the free believe of the judge and other».

⁸ «One of the ways that is used abroad to try to solve the problem of the ratio between offer and demand [of justice] regards just the prosecution. We know that in other countries the prosecution is discretionary, and that discretionary choices are also influenced by the concrete possibility to obtain a result and therefore by a perspective of effectiveness in the activation of jurisdiction. In my way of viewing things, the discretionality of prosecution is not a solution, even regardless the many good reasons that suggest continuing the support of the principle of compulsoriness. [...]. I rather believe, that in this sector (I say it particularly as for the principle of discretionality in the prosecution, but the observation is generally valid for the whole system of criminal justice) the systematic use of criteria such as econometric ones could lead to paradoxical results» (Illuminati 2005, p. 88).

A famous criminal Lawyer, nowadays Judge of the Constitutional Court (*Corte Costituzionale*), stated about this subject in his speech at the important meeting concerning the reasonable length of criminal trials in Padua (May 2003): “I directly say that I have always been [...] in favour of compulsory prosecution [...]. Even if we are convinced that the compulsoriness is a myth, they are sometimes useful to strengthen our convictions. But realistically we note a nearly inescapable discretion of-fact; and then the transparency in priority criteria is for sure a step forward compared to the situation in which we are today” (Frigo 2005, p. 142).

If such criteria were transparent, as introduced by the Republic’s Chief Prosecutor on the base of the indications of the Parliament, probably some form of priority could be accepted. But in Italy until today, this has not happened. And often, in everyday-reality it occurs that criteria of this kind are not even made homogenous in the same office, because left up to the discretion of the individual prosecutors. For example, a situation that we pointed out while researching at an averagely big court of the Centre-North where we have investigated, among others, a Prosecutor:

So, there is no... here in X there is no indication in order to a priority in the carrying out of the investigations. [...] The gravity of the crime [...] anyhow there are no criteria of official priority. [...] That doesn’t remove – let’s say – any of us if he gives some priorities.

The main problem originates from the demand to render the priority criteria that are currently confined at a purely informal level, homogenous among courts and clear, even at an individual level⁹. The same Prosecutor continues:

⁹ Concerning the formulation of explicit priority-criteria in the conduction of the preliminary investigations about crimes, a very interesting case is the prosecutor’s office of Turin, the first one to have introduced the criteria in 1990 thanks to the Republic’s Prosecutor of Turin of that time. It is about the so called “circular Zagrebelsky”, in base of which the procedures were subdivided following a descending order of priority in three categories: the ones in which precautionary measures were adopted (prison); the ones related to crimes that were considered severe on basis of the personality of the suspected person, of the lesion undergone by the penal protected interest, of the reiteration of the crime, of the damage (patrimonial or not)

So, you see, I believe that we can't choose the criteria. [...] And then, it could have been good that in this occasion it had been considered if the prosecutor's office would provide manifest criteria of priority, i.e. to notify the public about the base of these priority criteria. [...] We would have got the same priority criteria that were criteria of priority, not criteria of dismissing criminal proceedings, but that would have been uniform and coming from the highest legislative authority in our country. Instead they were not.

Other privileged witnesses who were interviewed sustained the point of view that it would not be convenient to fix the criteria preventively: the priorities should be inspired exclusively by the "common sense" and by the valuations done case by case. A Chief Prosecutor of a medium-sized court in Centre-Italy stated like this:

They are criteria of common sense. [...] Subjective [...] To establish priorities based on abstract schemes means to claim the right to exclude crimes from penal sanctions that the legislator deems as to be relevant.

As you can guess from those small interview bits, similar operative modalities have for important corollary the fact that the applied order of priorities is nor unambiguous nor obvious in front of the public opinion, as the Chief Prosecutor of Venice has claimed at the meeting in Padua: «In today's situation [...] the compulsoriness is, in fact, seen as a tendencial principle, but we are in front of a substantial discretionality. I believe that it is inescapable to think about establishing some criteria that allow the Republic's Prosecutor to direct himself towards the number of crimes that arrive daily. [...] You cannot assign such a power to the Ministry, whose duties, fixed by the Constitution, concern the organisation of the service, in other words, means and resources that are necessary to a well-functioning of the legal system. It also seems difficult to me to assign such a power to the 'Supreme Council of Judges' (*Consiglio Superiore della Magistratura*). [...] Another way that should be taken into consideration is an intervention of the Parliament to fix by law the criteria that are to be followed by the Republic's Prosecutors in order to be coherent with the constitutional principles –

caused and not compensated; and the other ones (Zagrebelsky 1991).

not arbitrary, not responding to incidental logics or logics of impunities in given areas» (Borraccetti 2005, pp. 147-148).

As Zagrebelsky (1984) argues, the affirmation that prosecution is compulsory entails the exclusion of the fact that the prosecutors can discretionarily decide whether or not to involve the judges of a crime; moreover, it means necessarily to provide instruments of control that don't permit the prosecutors to elude the obligation to proceed. But, in reality, it is impossible to exclude *a priori* certain spaces of discretion in the actions of this legal actor, no matter how the principle of compulsoriness is defined. During the last years, we can observe an increase of the crime load as well as a qualitative modification (e.g. the spread of criminality among white-collar workers and, on the other hand, of crimes linked to clandestine immigration) that have forced the prosecutor's offices to "choose" which crimes have first to be proceeded. In this regard, the informally-applied discretionality would not depend a lot on legal-normative principles, but more on a series of organisational characteristics (excessive crime load, complexity of the crimes – associative, economic and financial, against the public administration, white-collar worker – low level of standardisation of the prescribed behaviours, lack or inefficiency of the controls on what is done by the prosecutor).

It is exactly the considerations about the irremovable discretion of prosecution that help us to understand how in the practices the difference between legal systems with the principle of compulsoriness and legal systems with the principle of opportunity is so much less clear than what you may think in theory. The systems regulated by the principle of opportunity are not characterised by the arbitrariness because of that, but rather by the fact that, even in presence of factual presumptions or of law, a crime cannot be prosecuted if there are valuable reasons for not doing it (Guarnieri 1984)¹⁰.

In this perspective, an accurate analysis cannot be restricted to the consideration of principles that regulate the prosecutorial

¹⁰ In this regard, see the already quoted concept of "neutrality" of the prosecutor in Zacharias, Green (2004).

activities, but has generally to bring into focus the behaviours of the prosecutors and of the judges in the everyday reality. Like this, the true mechanisms that concretely regulate decisions and behaviours should come to light. In other words, we have to try to answer to the following questions: to what extent do the practices correspond to the normative prescriptions? Which normative ideals inspire really the behaviour of the prosecutors and the judges?

3. An approach from the inside: the privileged witnesses

The relation between norms and practices and, in particular, the modalities of integration of the latter in the field of legal systems can be efficiently analysed sociologically by starting from an empirical approach of the type “law in action”. In this way, a social scientist who is devoted to the analysis of how law works is able to highlight aspects that would not emerge from a study exclusively using instruments of legal sciences (Friedman 1975; as far as the Italian situation is concerned, see Treves 1987 and Ferrari 1997)¹¹. As Guarnieri (1984) stated, on a methodological and substantial level, the “pure” legal studies can fall into a series of limitations when they postulate a more or less perfect parallelism between legal norms and regularities of behaviours in their application and, at the same time, they don’t take into account the practical implications of such a relation. Thus, it often finishes by considering that when expected behaviours follow to the legal norms, the first being a consequence of the latter. Consequently, the simple establishment of norms would reflect back to the behaviours that they regulate. On the other side, it happens that only little attention is given to the comprehensive effects of the use of law, effects that are different from the simple and pure observation of a norm, given that from the beginning those effects are wanted and underestimating the unexpected

¹¹ Among the few Italian empirical studies that are based on such a prospective are to mention especially the ones conducted by the group of scholars of Di Federico (Berti, Mestitz, Palmonari, Sapi gnoli 1998; Sapi gnoli 1999; Di Federico, Sapi gnoli 2002).

results. Those aspects entail that, in the field of the sociology of law, descriptions based only on “legal data” often result to be either misleading or of little relevance on a substantial level.

The differences between norms and practices are sociologically – concrete – not comprehensible, when comparing exclusively, on the base of the legal theory, the systems that are based on the principle of legality and the systems that are based on the principle of opportunity, i.e. the choice to prosecute on the base of political criteria. The advantages linked to an empirical qualitative approach, that makes use of original data coming from interviews with main social actors of the reality of criminal trials, are rather manifold. First, such a type of research permits to avoid predictable answers or interpretations of phenomena based on common sense. But instead, it is really important to consider and understand why the operators of law put certain strategies to use and which fundamental factors are guiding their choices (Nelken, Zanier 2006).

Potential projects to reform the penal code have to be considered in the light of empirical analyses of what’s happening daily at the courts, in order to attribute the right importance to the contribution of the privileged witnesses that work professionally in the criminal-law system. In other words, if you want that the suggested changes can have, at least to some extent, the effects the legislator hoped for, the possible reforms and their articulation should lie upon observable or hypothetical relations between social phenomena.

4. *The Italian case: the prosecution subjectively discretionary*

4.1 *The taboo of the discretionary prosecution*

Let’s take again in more details the discussion about some empirical material obtained from conversations with operators of law about the issue of exercise of prosecution. As said above, the principle of compulsoriness of prosecution is for many magistrates sacred and untouchable, even if they admit that they are rarely respected because of practical needs. For some, this principle could even be surpassed normatively, but

the conditions and the characteristics of the Italian legal system and of our country in general (politics, culture, society) avoid the introduction of forms of discretion, just like it is intended in the systems of other countries.

The “Substitute General Prosecutor” (*Sostituto Procuratore Generale*) of a quite important court in the South, who puts the principle of compulsory prosecutions at the same level as the one of equality of all citizens in front of law - both sanctions by our Constitution – argues like that:

The Constitutional Court has clearly recognised that it is evidently a fundamental principle, unchangeable, the one of equality, that is a fundamental unchangeable principle the one of the compulsory prosecution, that is linked to the one of equality.

The President of the section of “Preliminary Investigation Judge” (*G.i.p.*) at a medium-sized court in the Centre-North highlights historic, political and cultural Italian specificity, that blocks a reform of the compulsory prosecution:

I don't have any difficulties to say that with a... with a different history on the shoulders of the Italian State, with a less young democracy than ours, I would be less biased towards the discretionality of prosecution, but since the political situation is not like that [...] I would consider it very difficult to move to discretionality, even if I now fully realize that to carry out or not a trial – in the mass of all things to be considered – is an exercise in discretion.

A Judge exerting the same role in another medium-sized court of the Centre, agrees by saying:

The discretionality as such exists already for a while. [...] But as to affirm it normatively... the affirmed principle *a priori*, written, is scary, all in all.

In the daily reality even the judges are endowed with discretionality, especially when considering the choice for which trails to treat first. A Judge, President of a “penal section” (*sezione penale*) who was interviewed in a small court in the North observes that it is becoming an operative necessity, that is in practice impossible to ignore. The same privileged witness introduces the important matter of the opportunity to establish criteria:

Without a normative deflation, i.e. without the legislator, we should make ourselves an operative deflation or, better said, choose ourselves the priority criteria [...]. We acknowledge that the idea to do all trials, as it would seem to postulate the principle of compulsory prosecution, is not possible. Hence, well, we have to agree on these selection criteria. Which trials we conduct and which ones we don't.

Could these criteria be established locally?

When you say to a judge: look, in this trial you know what we are doing... we take it and we store it in a closet... It's like I amputated his arm because it takes a lot of efforts to come off that idea, really off-limits, so for many years we thought of the article 112 of the Constitution in terms of... so that... of absolute cogency, of irremovable benchmark. So now we have difficulties to say: listen, if we put this file in a closet it is because it is of a lower priority than another. It's a very critical question.

Another President of a "penal section", who was interviewed at a large court in the North, agrees about the discretion *de facto* that exists also in the decision of what trials to conduct. The fact that the criteria linked to such a choice are not at all territorially homogenous renders it even more severe:

Yet the enormous abundance of criminal hypothesis that are, still now, expected to increase in the field of the Italian penal system, manages well to leave many trials unfiled and is therefore there a sort of, by now, uncritical acceptance of the fact that the exercise of prosecution is in reality performed on an optional base and not in an obligatory manner.

As the same Judge continues, such criteria should be orientated to the constitutional principles and values, like they tried to do at the prosecutor's office of Turin with the already quoted "circular Zagrebelsky":

To establish priority criteria on the base of constitutional values, so to say for example that the protection of the physical and psychic integrity of a person prevails on the protection of the pure and exclusively intended patrimony. Thus, to avoid making arbitrary decisions, but to make decisions that anchor the priorities of which trials to carry out by using constitutional values. The operation was attempted at a local trial court of Turin by a prominent magistrate, Vladimiro Zagrebelsky.

That the principle of compulsory prosecution in practice is a myth is confirmed by a penal Lawyer of defendants and victims

(*parte civile*), who was interviewed in a small court in the North. He specifies the criteria that, in his opinion, influence the choices of the prosecutor:

Of course, all crimes linked to organised criminality have priority; I'd say the blood-crimes or also voluntary homicide, all the crimes against a person that were particularly severe, I am talking about sexual assault, crimes against the public administration, extortion and corruption and many others.

4.2 *Discretion or common sense?*

A privileged witness who is working as a “Preliminary Investigation Judge” (*G.i.p.*) claims that in his point of view the question of priority does not exist, because he rigorously follows the chronological order, by arranging a hearing the first available day, when it's necessary. But, in continuing this discussion, we will fall again on the crucial subject of “common sense” linked to the decision taking: the effective possibility to file trials and to sentence the culprit should be taken into account when establishing the order of the hearings. In other words – the interviewee continues – in the case of procedures with non-EU (immigrants) defendants securely out of reach, it would even be useless to carry on with the trials. How could someone argue that it is not an operative strategy marked by discretion, and even a quite large one?

Like for everything, you'd need to have a bit of common sense. Then, if we send ahead a series of trials with unreachable non-EU citizens – we have already sent ahead thousands of trials that are useless because those people will never be found and because this is all ‘paper’ that is past, we've made statistics and we are all happy.

When the Author expressed her objection about the discretion that informs about a similar type of procedure, the answer was as follows:

It's nonsense; those are so practical things that they don't carve on the discretionality of the prosecution. [...] According to me, it is not a matter of discretion, it is really a question of common practical sense.

Openly, even the Chief Prosecutor of a medium-sized prosecutor's office in the Centre of Italy talks about those criteria that are formally not foreseen, but inspired by the common sense:

Naturally, about the trials that fall on each prosecutor, choices are made and have always been made. [...] The colleague gears towards criteria of common sense that should be a bit... that should follow a bit the... so ... the seriousness of the case. If there is an abuse in a family, a person that lives for years... or even a violation of the duties of the family members... I am very sensitive to those things. [...] And then what happens? What happens is... if there is a violation of the duties of family members, the parents, usually the father, who – unless he leaves – doesn't give money for his children... so well... a colleague that is sensitive to such a problem takes care of such a matter before a case of fraud, that's it. But if now the fraud lays the economical capacity of a family, then... then you'd give priority to the fraud. But these things can't be fixed *a priori* because of the very serious error, to me, in my foolish opinion, is not to consider that the seriousness of the case is not defined by an article of the law, but by the circumstances of the concrete case, isn't it?

Such points of view come directly from operators of law and inform us about the everyday reality of the application of norms in various courts. That is exactly why they give the opportunity to investigate the concepts of compulsoriness and of discretionality *de facto* of prosecution in order to deepen the definition, the meaning, and the important impacts on the whole system of criminal justice.

4.3 *The criterion of the seriousness of the crime*

From these statements we can identify some principles that influence the decisions-criteria, that we have seen quite a few times as “discretionary”, taken by prosecutors. The exercise of prosecution is obligatory, but in reality it is often the seriousness of the crime that points the choices of the prosecutor about proceeding and about the priority of the treatment of the *notitiae criminis*. The Chief Prosecutor of a small court in the Centre-North of Italy said:

Therefore, this should be the principle, it goes without saying that the abused little girl and the precautionary measures that are taken, or, I don't

know, even kidnapping of a person, or murder... To those cases we give priority.

As a penal Lawyer who works at the same court confirms, at the prosecutor's office more or less formal criteria are established in order to decide about when to proceeding crimes:

Criminal offences linked to environmental pollutions often remained quite immobile/steady, and financial crimes, tributaries, cases of bankruptcy... budget frauds and crimes of this kind. The crimes that are sent to trial quite hastily are the crimes... well, the crimes implying prison inmates – obvious – because drug-crimes without inmates have also long waiting-times. Offences of medical faults, matters like that... let's say, maybe even crimes with civil interests are privileged by the prosecutors., where you know that there is an offended person.

Even if at an important prosecutor's office in the Centre-North no indication from the side of the Chief Prosecutor concerning the criteria about the carrying-out of investigations can be found, it does not mean – as a Prosecutor argues – that each component of the pool is not being given himself priorities, in the meaning that procedures regarding particularly relevant interests, on economic and personal level, are treated first:

Homicides, personally, I consider them obviously as proceedings of high priority.

The “Assistant Prosecutor” (*Procuratore Aggiunto*) of a small office in the North of Italy confirms that, in practice, priority criteria are used when choosing the crimes to proceed. Most of the time, they overlap with the seriousness of the committed crime:

The seriousness of the crimes, the social warning that they can provoke, the danger by the defendants, the repeating offences by criminal associations, these are about the types of offences that make us say, those trials have priority compared to others.

It may happen that the discretion in the exerting the prosecution arrives to a point where it fails to proceeding certain crimes that are considered less severe or less likely to awaken social warning among the population. The following quote contains quite serious affirmations of a penal Lawyer of

defendants and victims from a court in the South. As you can guess, this privileged witness is quite critical towards such a modality of acting of the prosecutor's office. Note that in his words the suspension of the actual prosecution arrives to adopt the connotation of "local amnesty". Furthermore, consider the importance of the local legal culture in the interpretation of these practices:

I think, how shall I say, it seems to me that you can find confirmations for your judgment in the decision of the local prosecutor's office to suspend the prosecution especially regarding less severe crimes. Some time ago, the chief prosecutor decided, during a period when everyone was talking about amnesty, to indulge, a bit like nowadays, maybe with less conviction, that the excessive caseload [...] would have merited kind of a local amnesty and would have entailed a suspension of the prosecution *de facto* [...]. It's true: a minor seriousness, of course, condemns them into a *limbo*.

4.4 *The "good" and the "bad" faith of the prosecutor. To interpret the norms in practices that are useful?*

Could prosecutors use the wide discretion they have in prosecuting to their advantage? In this direction point the serious affirmations of some lawyers who were interviewed at several courts, and that lead one to suspect that the prosecutors can act, under some conditions, in "bad" faith. To avoid having to proceed immediately, the prosecutor can use the strategy of not indicating the name of the person who is to investigate, even if he knows him or that person would be easily identifiable, just by opening an investigation "against unknowns" (*contro ignoti*), which is usually done last, following the chronological order.

A Lawyer at a medium-big-sized court in the Centre-North has put it like this:

A specific case? Well, it happens that... in more or less abstract examples, without giving names, yes, it happens that Tizio complains about the fact that Caio has fooled him into a certain corporate issue; normally the prosecutor, if he's busy as he should be, considering the number of proof about crimes there are, normally takes the case, puts it aside and says: 'as soon as I can, I'll have a look'. It may happen that he doesn't look at it for a long time. To avoid having to look at it with a certain attention,

or at least not to be too much constrained by norms, the prosecutor has several systems: one is not to indicate the name of the person that should be subject to investigations, so that there'll be an obliged investigation against unknowns... such as people to identify... with other possibilities, other times, other administration.

As this Lawyer goes on, the majority of the criminal offences that are reported to the prosecutor's office pertain to burglaries by unknown people, thefts on the streets, denunciations for stolen car radios, bicycles, motor bikes, or even more important and serious matters. But:

However it happens that even in cases where the culprit could be found easily, the person is shelved as unknown, as 'to identify', just because he/she was not directly identified when the complaint was lodged; and by 'identify' we mean: first name, last name, address, date of birth, etc.

And about this strategy, he adds a "small technical annotation":

There was a moment when someone thought that if the prosecutor files a subject who had previously been identified, as unknown or not identified, the judge could say later on... could rap the prosecutor's knuckles and say: dear prosecutor, you claimed that... this one was unknown and therefore you filed him as unknown, you wrote his name seven months after, but in reality you knew it already five months before that, so I'm going to back-date everything to that time. [...] Recently the 'Supreme Court' (*Corte di Cassazione*) has said: no, no, the prosecutor can do whatever he wants; that means, it's his prerogative to identify a person and he does it when he thinks it is necessary, appropriate; if he messes up, he could be subject to disciplinary sanctions, but otherwise, from the point of view of the trial, everything is alright. This entails that the technique of using the unknowns has gained ground.

Another Lawyer of a big court in the North has also been very critical about the exercise of forms of discretion in the handling of crimes from the side of the prosecutor's offices, highlighting the strong differences of these practices:

So then, I personally, but also everyone that thinks about it like me, and we're many, we are absolutely not willing that the prosecution is not compulsory anymore but surreptitious, in the meaning that the single offices decide when they make the tables, saying: those crimes shall be proceeded instead of other ones, or those ones are proceeded before the

others... there are various groups A, B, C and D. This means that there are some crimes, that are assigned to a prosecutor and we know that he will never look at them, and they will nicely become time-barred (*prescritti*), even if these crimes often become a tragedy for the offended person, he/she can complain as long as he wants, but...

5. *Practical adaptations of the legality principle*

As noted, the perennial lack of resources of the Italian criminal justice system is one of the reasons that forces prosecutors to determine priorities and to define the crime problem. Amongst the subjective criteria that shape the way legal actors define the crime problem there are: the organization of courts and prosecution office in specialized units, the *riti alternativi* and the *prescrizione*. In essence, the *riti alternativi* are “speedy trials” that can quickly push out of the system certain cases. Normally, these imply a reduction of the accused person(s) rights but, at the same time, a reduction of the punishment. The *prescrizione* suspends the proceedings.

In this sense, the analysis of the law in action can suggest observations that would be useful for possible future reforms aimed at tackling the major problem affecting Italian criminal procedure: hearings within a reasonable time (Nelken, Zanier 2006).

5.1 *Specialized units*

Specialized units for judges and prosecutors normally deal with the vast majority of the crime reports. They are designed to treat these cases within a reasonable time. Moreover, this substantially reduces the risk of *prescrizione*.

The Turin prosecution office seems to be an interesting case-study to understand the specialized units’ functions. As noted by Sarzotti (2007), this prosecution office is not organized as a *condominio*, and it is more efficient. A *condominio* is composed by different rooms within which the actors have a great degree of autonomy and do not often interact with each other. This kind

of organization is, in theory, not very efficient. In Turin there are 9 specialized units: sexual crimes and vulnerable victims (i.e. disabled persons, old people, etc.), organized crime, DDA (mafia and other big crime organizations), white-collar crimes, urban safety (e.g. street crime), copyright and informatics crimes, terrorism, public administration and industrial security. Each unit is managed by a deputy chief prosecutor. In general, the team of prosecutors working in each unit meets regularly and they seem to be well co-ordinated.

The interviewees claim that the reasons behind the creation of certain specialized units have to be found in the local legal culture. The most important criterion is, probably, the size of the prosecution office, because specialized units are not efficient in very small offices. In a small prosecution office in the Centre-North of Italy crime reports are allocated according to the *turno posta*¹². Under the *turno posta*, for a fixed period (which, 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. The Chief Prosecutor explained the problems linked to specialized units when the prosecution office is small:

If the office is small, I will have a specialized unit with one assistant prosecutor. He or she will be the specialized unit.

In a big prosecution office there are more prosecutors allocated to each unit. The local Chief Prosecutor said:

In this prosecution office there are 5 units: CSF sexual crimes and domestic violence, COR organized crime, CEC white-collar crimes, CPA public administration and CRT tax evasion.

¹² This means: "internal mail turn". It is called like this because files move within the prosecution office as a sort of internal mail.

An Assistant Prosecutor remarked that, for crimes like prostitution and illegal immigration, the specialized units are useful to monitor the different ethnic groups and the criminal activities they may be involved with.

The problem is that specialized units within prosecution offices do not always mirror judges' units. Courts and prosecution offices are not organized in the same way. A *Magistrato* interestingly notes that in Milan both the prosecution office and the court have a specialized unit dealing with white-collar crimes. This does not happen in the area where he works now. So, legal culture does not only concern the size of the prosecution office and/or court. It is also linked to the local crime problems:

I worked in Milan and we had a specialized unit dealing with white-collar crimes [...] the same had the court of appeal. The President of the court is responsible for the way the court has to be organized.

The organization is similar in another big size court and prosecution office in the North. The President of the criminal court said:

Specialized units have been created following an agreement between the prosecution office, the preliminary investigation judge office (*G.i.p.*) and the preliminary hearing judge office (*G.u.p.*). [...] Specialized units were created in each office. So, criminal proceedings are divided between an area, that we can call miscellaneous, that includes the crime reports that do not fall into any specialized units. Then there are the specialized units: white-collar crimes, sexual crimes and crimes against minors, organized crime, etc. Then there are the old specializations: town planning, pollution, industrial accidents.

5.2 *The riti alternativi*

As many academics have noted¹³, the structure set out in the 1989 adversarial reform of Italian criminal procedure requires substantial resources and is very time consuming. In other words: it can be somewhat less efficient and it could sometimes not be fully applied. This is why the legislator also provided for the *riti alternativi*. These may also increase the discretionary powers

¹³ See, for example, Aimonetto 1997.

retained by legal actors because they can, *de facto*, simplify or even cancel a phase of the criminal proceeding.

In essence, the most economical of the *riti alternativi* is the proceeding by penal decree. This is basically a unilateral offer by the prosecutor to avoid the trial and to accept a discounted fine. If there is no opposition, there is no trial. Both the *giudizio direttissimo* (accelerated trial) and the *giudizio immediato* (immediate judgement) circumvent the preliminary hearing. Finally, the trial can be also avoided through plea-bargaining and/or *giudizio abbreviato* (summary trial). These are triggered by an agreement between the parties.

Recent socio-legal research illustrates that prosecutors' legal culture and the organizational structure of the prosecution office influence the *riti alternativi* implementation. Where there are specialized units, practice appears to be more homogeneous and more efficient. At the same time, the local crime problems become relevant. Legal actors' decisions are also very important. Some Authors have argued that, sometimes, lawyers choose to go to trial (instead of using the *riti alternativi*) in order to increase their salary and to delay the proceeding to reach the *prescrizione* (Fabri 1997).

The case of the Turin prosecution office is, once again, a good example of good practices that effectively tackled the problem of time consuming criminal proceedings. The interviewees listed three conditions that are instrumental to the good functioning of the prosecution office. Firstly, the investigation must be accurate and complete. Secondly, the prosecutor who directed the investigation should be the same that represents the accusation before the first instance court. Finally, when one of the *riti alternativi* is triggered, the punishment reduction should be carefully considered, so that it really becomes an incentive for the accused person(s). The Chief Prosecutor said:

This surely is useful in practice. Here in Turin the 1/3 reduction of the punishment is effective, not just on paper.

Further research should concentrate on the potentialities of these practices in other prosecution offices and on the necessary conditions for their applications.

A high ranked Prosecutor (Nannucci 2000,1885-1888) in Florence criticized these practices: «Today we do the *abbreviato* following the accused person(s) request [...] they just have to ask and they get a punishment reduction. And the prosecutor cannot appeal. This is not equality of arms. [...] The question concerns the effectiveness of this system, if it can cure the original sin: this should be a trial for those who cannot afford it. They get a reduction and they agree to be tried on the basis of the evidence collected by the prosecutor, who was considered the opponent. The real trials are for those who can afford it, because they are expensive and time consuming».

The *riti alternativi* carry, thus, a risk: the bifurcation of the criminal process. The quick trials (*abbreviato* and plea-bargaining) are for those who cannot afford a real trial. These are, for example, the immigrants who are accused of illegal immigration (the Bossi-Fini Act) or those who are caught red-handed, and no investigation is required. The real trials, that are very time consuming, are for those who can afford it, like accused person(s) involved in white-collar crimes. These have financial and cultural resources and can afford a proper defence. These trials are normally more respectful of the accused person(s) rights and, because they are very time-consuming, they can lead to the *prescrizione*.

A Lawyer explained the crimes that normally trigger the *riti alternativi*:

Normally the *giudizio abbreviato* works well for crimes involving drug. This is really a problem for the society [...] both the victims, both the accused persons, because they are 20, 22 years old [...] and they get 13, 14, 15 years of imprisonment [...] everyday there are so many cases whereby we use the *abbreviato*.

Another Lawyer discussed the financial problems:

For the clients, plea-bargaining is less expensive than a trial. This means that there are certain crimes and perpetrators. [...] I mean the foreigners.

The same Lawyer explained that wealthy clients are in a different position:

I rarely have very wealthy clients. But I may lose them immediately if I explain them that, for example, plea-bargaining would cost much less. They say: who do you think I am?

5.3 *The prescrizione*

Within the Italian criminal justice system time is a crucial issue. Criminal proceedings are very time consuming and, as noted in the outset, *prescrizione* may block the prosecution of crimes and trials as well. So, the legal rules must be also analyzed in the light of *prescrizione's* practical impact in the criminal justice system. For example, lawyers can try to delay the proceedings and simply wait for the *prescrizione*.

A *Magistrato* working in the Centre-North of Italy described the extent to which the *prescrizione*, in practice, influences the way proceedings will develop:

Something strange happened [...] the most serious crimes have been postponed because the *prescrizione* is really long. [...] For example, the *prescrizione* for bankruptcy arrives after twenty two years and a half.

Similar opinions were expressed by the President of a big criminal law court in the North of Italy:

If one has to consider the *prescrizione*, less serious cases have to be treated first [...] this is because the *prescrizione* is quicker. In this way, you do not consider cases like white-collar crimes and crimes against public administration. You wait a long time, because the *prescrizione* is longer.

A Counsel confirmed this view:

I now have a case in front of the court of appeal that will be blocked because of the *prescrizione*, these are serious crimes. [...] I have a false accounting, the *prescrizione* arrived last year. The court still has to decide, but you just have to look at the dates...

Some Authors focused on the *prescrizione* as one of the criteria for the decision-making that can shape prosecutors' discretionary choices. In essence, the *prescrizione* can undermine the legality principle, because it is a potential criterion to choose

the crime reports that will be prioritized¹⁴. Prosecutors may act promptly whenever the *prescrizione* is about to block the proceedings (Fabri 1997). Some other crimes are just left to the *prescrizione*, as noted a *Magistrato*:

I mean, the crimes like resisting a constable, I do not deal with them, I wait for the *prescrizione*.

A Lawyer believes that judges (and not prosecutors) have the real discretionary power to determine how important the *prescrizione* will be:

The role of *prescrizione* is strongly influenced by the judge. This is because he or she can decide on mitigating circumstances that determine the punishment and as a consequence the length of the *prescrizione*.

Finally, many Lawyers believe that the *prescrizione* is one of the aims for a good counsel. This is not illegal, they just exploit the legal resources as much as they can:

One of the first things to do is to look at the *prescrizione*.

The counsel always relies on time. It is a very good advisor.

I would be a liar, if I say that time is not one of the defence strategies.

One Lawyer said that the *prescrizione* is “a part of the life”:

Yes, it is part of the life. Now, I am not sure who said that: there is always time to die, to pay and to be convicted. Something like that.

6. Concluding remarks

Analysing the motivations and references of the internal legal culture (national and/or local) that affect the operative strategies of prosecutors on the topic of prosecution, but also of judges on the order of trials, has a significant impact on the theoretical as well as practical implementation of the criminal policies. This is because the introduction of a discretionality *de facto* not only violates a constitutional principle, but also implies a seri-

¹⁴ See, for example, Giunta and Micheletti 2003.

ous consequence, that causes a local discontinuity of the applied priority orders, so that the citizens are not equal in front of the law.

As the empirical data that we have presented show, the compulsory prosecution is a myth, but, at the same time, also a taboo that is daily violated by the ones that are supposed to carry it out. In the case of subjective discretion, the principle of “common sense” is invoked, the only possibility for many prosecutors to face the amount of work, that is rightly accounted as excessive. The common sense appears, for example, when considering the seriousness of a crime as informal, but acceptable, criteria.

I tried to make a distinction between good and bad practices. There are different reasons that shape their implementation: impossibility to apply certain legal rules, time-consuming proceedings, backlog of cases, legal actors’ interests and professional values, and many others. Certainly good practices have a vital role and should be preserved. Moreover, this research has emphasized the need for more structured rules that should define the framework within which the good practices operate. Reforms are certainly difficult to frame. The complexity is also linked to legal actors’ discretionary powers. This is one of the crucial issues: the mechanisms that shape legal actors’ discretionary powers. There are different conditions, like local crime problems, that determine the way a case will be treated. Similar cases can be treated in a very different way. The Italian criminal justice thus can appear bifurcated and accused persons with different social and financial situation are sometimes treated differently by the legal system.

The need to rethink about those problems regarding the prosecution and the institutional position of the prosecutor is becoming more and more urgent, especially in the light of facts. The key-point is to identify the direction to choose: to continue sticking to the duo independence of the prosecutor/compulsory prosecution, or to insist on a radical change towards the opposite duo: dependence-opportunity? Apart from the possible risks of political interferences on the activity of the prosecutors/elected following the American model (Chiavario 1998), according to

prominent jurists¹⁵ the abolition of the constitutional principle of the compulsory prosecution would have a series of impacts on a large part of the values that make up the whole Italian Constitution. But on the other hand, once you approve the principle of compulsoriness, it will be necessary to improve the implementation by taking adequate measures.

What measures could be suggested in order to restrict the workload of the prosecutor's offices that are overloaded with the daily flood of criminal offences? If we want to learn from the American lesson and from the opinions of many law-experts and operators, perhaps we should consider the suggestion about the introduction of priority criteria and orders in the handling of offences, but without conceding a discretionary prosecution. The aim should be to reveal and regulate the discretion from which essentially the prosecutor profits in proceeding crimes, so that his initiatives become clear and controllable. Such criteria are nothing else than work-planning modalities at the prosecutor's offices, according to priority schemes the rationalisation of the management of criminal offences through objective parameters that are reasonable and especially recognisable by everyone.

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Beyond the statute law: the “grey” government of criminal justice systems

History and Theory in the modern age

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ISBN 978-88-6056-278-4
pp. 150, f.to 14x21, € 13,00