



City Research Online

City, University of London Institutional Repository

Citation: Montana, R. and Nelken, D. (2011). The Ambivalent Role Of Italian Prosecutors And Their Resistance To 'Moral Panics' About Crime. In: Smith, C. J., Zhang, S. X. and Barberet, R. (Eds.), Routledge Handbook of International Criminology. (pp. 286-297). Routledge. ISBN 041577909X

This is the accepted version of the paper.

This version of the publication may differ from the final published version.

Permanent repository link: <https://openaccess.city.ac.uk/id/eprint/13102/>

Link to published version:

Copyright: City Research Online aims to make research outputs of City, University of London available to a wider audience. Copyright and Moral Rights remain with the author(s) and/or copyright holders. URLs from City Research Online may be freely distributed and linked to.

Reuse: Copies of full items can be used for personal research or study, educational, or not-for-profit purposes without prior permission or charge. Provided that the authors, title and full bibliographic details are credited, a hyperlink and/or URL is given for the original metadata page and the content is not changed in any way.

City Research Online:

<http://openaccess.city.ac.uk/>

publications@city.ac.uk

6540 WORDS

CHAPTER 27

THE AMBIVALENT ROLE OF ITALIAN PROSECUTORS AND THEIR
RESISTANCE TO 'MORAL PANICS' ABOUT CRIME

Riccardo Montana and David Nelken

INTRODUCTION

The following study is intended to illustrate the value of empirically informed approaches to comparative criminal justice -requiring close analysis of rules, roles and procedures- as a way of throwing light on central criminological topics (Nelken, 2000, 2010a). The issue considered here has to do with the rise of 'punitiveness' internationally and the part played by criminal justice actors in this process. On the basis of empirical research in Italy this chapter shall be focusing on the role of prosecutors in responding to political and public calls for more severity against crimes by illegal immigrants. After first providing a historical and theoretical context for our research we shall analyze the ambivalent role of Italian prosecutors and then go on to explain how this affects the part they play in the way the criminal justice system responds to such crimes.

Like many other countries, Italy is facing the problems of risk and insecurity that late modernity brings in its wake. In Italy public discussion of these problems emerged later than in some other Western countries (in the second half of the nineties). This is seen, for example, in the fact that until quite recently, everyday crime in Italy was referred to as 'micro-criminality'- thus distinguishing it from the objectively greater threats to the state posed by terrorism, organized crime and political corruption. Although these major problems have by no means disappeared, worries about security reported in the media are increasingly linked to illegal immigration (or even immigration as such). Illegal immigrants are said to be disproportionately involved in so called street or diffuse crimes such as mugging, drug pushing and burglary.

The center-right and the center-left political coalitions propose different solutions to these crime problems. The former are more focused on repression, the latter point more to the underlying social conditions that create social conflicts. But even the mass media that are ideologically on the center-left, and normally criticize law and order campaigns, do acknowledge that there is an issue of crime and security, and center-left administrations use rhetoric that is increasingly indistinguishable from their political opponents. Public opinion surveys also suggest high rates of

public concern.¹ In addition, citizen committees have been elected in the districts of many cities and towns so as to report and discuss problems concerning crime and deviance within their areas. Their efforts are not only directed against specific crime problems, but incivilities, deviance, immigration, and disorder in general appear to be crucial issues as well.

All this means that there is the potential in Italy as elsewhere for an explosion in prison numbers. And, in fact, the number of immigrants in prison has gone up exponentially since they started arriving in the 1990's (and this does not include those being held in special prisons that until recently were called places of temporary permanence). This is because illegal or irregular immigrants now provide the workforce for crimes such as drug pushing that, if associated with recidivism, are often punished with a custodial sentence. However, despite legislative measures that are clearly designed to tackle street crime and illegal immigration, overall numbers in prison in Italy (around 100 per 100,000 of the population) remain within the average range of what leading comparative penologists have dubbed the 'Continental Corporatist' societies (Cavadino & Dignan, 2006). By comparison 'neo-liberal' societies such as the U.S.A. (700 per 100,000), or even the U.K. (150 per 100,000) show much higher rates of incarceration.

Southern European countries generally have higher rates of immigrants in prison than do neo-liberal societies (Solevitti 2010). What needs to be understood is why numbers in prison have not risen even higher in places such as Italy. For many authors (e.g. Cavadino & Dignan, 2006; Waquant, 2009, 2010a, and, with more nuance, Lacey, 2008) differences in the organization of politics and the economy are the crucial explanatory variables. However, this ignores a crucial intermediate variable that affects how many people actually end up in prison - the operation of the criminal justice system. This requires giving close attention to the roles of legal actors, such as prosecutors, and the types of criminal procedure that shapes their roles (Nelken, 2009, 2010).

The significance of differences in the role of prosecutors in continental and common law systems was at the center of the classical debate in comparative criminal procedure between Goldstein and Marcus (1977) and Langbein and Weinreb (1978). But this concerned the extent to which prosecutors and judges in France, Germany and Italy really exercised control over how police conducted their investigations. However, the parties to the controversy may have been largely speaking past each other. If the question was how Continental methods of control over the

police would work in the U.S.A., then Goldstein and Marcus were right that such methods would be insufficient to avoid potential misbehavior by the police. But, insofar as the issue was trying to understand what other places were actually trying to do -and sometimes succeeding in doing- in the context of their own structures and expectations, then Langbein and Weinreb had the better of the argument.

The research presented here has to do with trying to characterize these (changing) structures and expectations as they currently apply to prosecutors in Italy. But the issue addressed is not the traditional one, their role in supervising the police. Rather it is the less discussed question of whether, when, where, why and how prosecutors in continental legal systems exercise their powers so as to blunt trends towards increasing punitiveness of the weak and marginal sectors of the society. Taking Italian prosecutors as a case-study is particularly interesting and instructive for this purpose as for the past twenty years their status is supposed to have been made more like that of prosecutors in the common law world. The findings come from 54 semi-structured interviews that were conducted between April and October 2006.² Five consultants, two prosecutors, one police officer and two lawyers were first interviewed as informants. Then, the actual interviews were carried out with 27

prosecutors, 11 police officers and 11 lawyers. These interviews were conducted in 10 prosecution offices (and with lawyers and police officers working in the same area) of various sizes located mainly in the north, but also in the center and in the south of Italy.

THE AMBIVALENT ROLE OF PROSECUTORS IN ITALY

The 1989 reform of the Italian Code of Criminal Procedure famously sought to reshape a mainly inquisitorial into an accusatorial system.³ The trial stage became central to the determination of guilt, and defense lawyers saw their role increased and were given the power to gather their own evidence. Most important for our purposes, the reform also changed the prosecutors' institutional role from being quasi-judicial figures to state accusers. In practice, however, the Italian criminal justice system is still in many respects embedded in the continental inquisitorial tradition. For example, judges have the power to request further investigation basically at every stage of the criminal process. Constitutional Court decisions (in a context in which organized crime made it dangerous for witnesses to rely only on evidence that comes out in trial) and various legislative reforms have reaffirmed the probative value of the preliminary investigation at trial.

In many Italian textbooks the traditional interpretation that depicts prosecutors as responsible for the correct application of the law as neutral quasi-judicial figures is still well entrenched. And it is crucial too that, institutionally and organizationally, judges and prosecutors are both part of the judiciary. They share the same career path and can- subject to certain conditions- switch functions as their careers develop. Prosecutors, like judges, are also fully independent of any other constitutional powers including the government. They are subject to the legality principle- the obligation to prosecute where evidence is available is a constitutional principle that cannot be compromised even for supposed reasons of 'public interest'.

But, after the 1989 reform reconfigured the role of prosecutors as responsible for constructing a case that will stand scrutiny at trial, the continued accuracy and validity of this traditional inquisitorial model of the quasi-judicial role for prosecutors has been widely criticized both by academic commentators and - for their own reasons- by politicians. Prosecutors have been accused many times over the last twenty years- often misleadingly- of going out of their way to use their powers to attack members of some political parties, as well as Premier Berlusconi. However, in a country like Italy, where there is considerable suspicion of

political corruption it has so far not been possible for politicians to deny that placing prosecutors under government control would lead to (even greater) abuse of their powers.

At the very least it can be said that prosecutors now occupy an especially ambivalent role, still possessing many of the attributes of quasi-judicial actors searching for the truth whilst being inserted in a new legal architecture intended to cast them on one side of a contest over the guilt of the accused. Surprisingly, there has been little research into this ambivalence. The only large scale empirical study of prosecutors in Italy is that conducted by Di Federico and Sapignoli (2002). But their concern - part of a larger agenda that considered judges and prosecutors too willing to interfere in politics - was that prosecutors did not in practice respect the legality principle and that obligatory prosecution was in practice no more than a myth. In their views prosecutors can and do choose, sometimes on politically influenced criteria, which matters to prosecute. Thus they see prosecutors as effective crime fighters - targeting politically relevant cases. Our study, which focuses more on their de-prioritizing of a large number of normal cases, also shows that prosecutors have their own priorities about what gets dealt with as crime. But we see this not so much as a matter of them exercising political preferences and more as a result of them

continuing to see their role in a traditional way. Even though prosecutors cannot formally decide which cases deserve to be prosecuted in a regime where prosecution is obligatory, choosing which cases to handle first is an indirect way of achieving the same result because after a certain point the case becomes time-bound - what Italians describe as 'prescrizione'⁴ (Nelken & Zanier, 2006).

It could be said that, in general, all prosecutors occupy an ambivalent position with respect to the different value systems that compete in criminal justice systems, as set out in Packer's famous distinction between crime control and due process (Packer, 1968). 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. Adjudicative fact-finding, by contrast, is more linked to due process values. Almost all criminal justice systems have features that belong to both of these models, although the mix of the elements varies. What makes the Italian case special, however, is the superimposition of a model with a mix more favorable to crime control values over a previous one with, formally speaking, much more bias

towards due process values- and the way these two models continue to co- exist.

For Italian prosecutors, this superimposition heightens their ambivalent status between the role of crime fighters and judicial figures. Whereas crime fighters are clearly linked with the concept of crime control related to efficiency, high rate of conviction, and administrative fact-finding model, the judicial task is related to the concept of due process involving legal controls, the primacy of the individual, adjudicative fact-finding model and so on. When asked about their views, a large majority of the Italian prosecutors interviewed insisted that their professional values have nothing in common with that of the crime fighter. Twenty-two prosecutors said that they did not act like crime fighters. One did not answer clearly. Four said that they did act like crime fighters. They explained that they looked for both inculpatory and exculpatory evidence so as to establish the legal and factual truth while, in their opinion, crime fighters search only for a conviction. By contrast, they share the same professional culture as judges. As a number of prosecutors put it: 'it is the law that fights the crime.'

Functionally it is clear that there are important differences in the tasks of prosecutors and judges in Italy. When prosecutors receive a report, they have to determine if a crime has been committed and if the evidence collected is capable to stand scrutiny at trial. This phase continues during the investigation when more evidence is collected by the police and prosecutors directly and it terminates when prosecutors decide to refer the case to trial or to drop the file. As with all prosecutors, they have to filter out reports that do not actually include a crime as defined by the law, and evidence that has not been legally obtained and 'predict' whether there is a 'realistic likelihood' of conviction. Such legal filtering then enables judges to make decisions on legally relevant evidence. This means that they deal with cases before judges do, have direct contact with the police and have to build up a case that will be then presented at trial. Unlike judges, prosecutors are inevitably influenced by information that will never reach the trial stage and rely on police reports that often include the police officers' perceptions and considerations about a specific crime.

Sometimes an official report is not even necessary and there are informal communications between prosecutors and the police that then lead to an investigation. When prosecutors deal with cases they participate in the investigation and interact with the police- and so -to some extent- have to

recognize what are priorities for them (Montana, 2009). One prosecutor gave this as an example:

“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 the chief of the police in that village. So, in three 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 to me that a case is serious.”

The role of prosecutors as intermediaries between the police and the courts means that they see much that is prejudicial, irrelevant or partially irrelevant and emotionally charged. The overall goal of the criminal justice process is to render the judge impartial, not the prosecutor. Judges, by contrast, only evaluate the evidence. Although, in Italy, they can still order new investigations, they do not actually direct the police or directly carry out investigation activities. So, compared to judges, prosecutors search for

the truth under different conditions. Some admit this. Five prosecutors emphasized in various words that the judges “cannot see very much”. Judges do not understand the practical difficulties of carrying out an investigation and they only have a partial idea of the factual scenario. This is partially connected to the difficulties created by the ambiguous legal rules that shape prosecutors’ and police’s investigative powers, not to mention the backlog of cases and the financial and organizational problems. But there is another reason. Prosecutors have a different knowledge of the case because they have a different and more direct contact with the social reality in which a crime has been perpetrated.

The various types of information that prosecutors collect and receive during the investigation contribute to create their own image of a crime. Their close contact with social reality reduces the degree of “detachment” that, in prosecutors’ view, judicial culture guarantees. 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. In the end, 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.

Nonetheless, these functional differences do not seem to affect prosecutors' image of themselves as quasi-judges. On the one hand prosecutors try to assess and increase the possibilities to obtain a conviction for utilitarian reasons - because it is a waste of time to put cases before judges to have them rejected. They have to evaluate the evidence with enough judicial distance to anticipate a judge's reaction. As one prosecutor explained (but many others concurred): "So, in general, when I decide to begin a prosecution, 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 [...] I always try to foresee what can happen." But Italian prosecutors go beyond this in claiming to have a similar duty of neutrality and impartiality to judge. They value due process and legal values in themselves and place more faith in criminal procedure than administrative fact-finding.

Even in common law regimes public prosecutors in theory are required to do more than partisanly present the prosecution case before the court

(Jackson, 2004, p. 112). But, for Italian prosecutors, impartiality is what defines their cultural proximity to judges. Despite the 1989 reform, prosecutors still act in some ways as if they were fulfilling the role of examining magistrates in the inquisitorial tradition. As three of the interviewees saw it, the “prosecutors’ aim is to transfer as many documents as possible from their *dossier* to the judge’s *dossier*.” This emphasis on prosecutors’ sense of themselves as guardians of the law, their independence and discretionary powers help to distance prosecutors from the pressure of political and popular definitions of the crime problem.

PROSECUTORS 'RESISTANCE' TO THE FIGHT AGAINST ILLEGAL IMMIGRATION

Over the last 15 years different governments have taken a number of steps to tackle street crime and illegal immigration and reassure the public that they are protecting their security. Arguably, the most draconian of the measures taken to tackle illegal immigration is the Bossi-Fini Act was passed in 2002 by the then center-right government. It sets out that a non-Italian national who does not comply with a deportation order shall be arrested and immediately sent for trial. In these cases the punishments range from a minimum of six months to a maximum of four years

imprisonment, excluding mitigating and/or aggravating circumstances. In theory, prosecutors cannot postpone dealing with these cases. The code of criminal procedure requires that the prosecutor is immediately informed when an arrest has been carried out by the police. The Prosecutor then has to review the arrest procedure in order to decide if the arrested person(s) must be set free immediately or the arrest is lawful.

If the arrest is validated the Bossi-Fini Act requires the trial thus follows a procedure called *direttissima*, that circumvents the need for a preliminary hearing. For the vast majority of the crimes a trial needs to be held before the preliminary hearing judge to determine if there is a case that needs be referred to the judge. At this stage new investigations can be ordered, or the case sent on to trial. The *direttissima* trial by contrast, has to take place within forty-eight hours of the arrest before the same judge who also decides if the arrest is lawful or not. As a result, prosecutors have no choice, they must deal with the Bossi-Fini cases immediately. Arguably, such legislation aims to circumvent the 'legality' principle by which the executive has no legal power to impose priorities to prosecutors. The Bossi-Fini Act tries to force the criminal justice system to treat immigration as a priority. This is because as the minister of justice at the time explained, "criminality grows around the clandestine immigrants".⁵

The reality of what prosecutors do, however, is often quite different. The Prosecutors interviewed insisted that that they do not consider these crimes as high priorities. In particular, when it comes to the Bossi-Fini Act, prosecutors admit that they are not interested in investigating illegal immigration unless they can spot a link with organized crime. The relatively low priority is clearly illustrated by the way prosecutors deal with incarceration of accused persons and sentences. In general, one of the criteria prosecutors take into consideration to request pre-trial custody is recidivism. But this does not seem to be relevant when it is only linked with violation of a deportation order under the Bossi-Fini Act. The consequence is that prosecutors never ask for pre-trial custody, unless the accused person(s) has committed other crimes. Moreover, during trials, prosecutors are not interested in asking for a severe punishment. 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 three months, others six), but the sentence will be suspended. In practice, this means that illegal immigrants will be set free and, given that they normally have neither documents nor any official residence in Italy, they will disappear.

This lack of prioritization may be further illustrated by the way medium or large prosecution offices use specialized units of prosecutors who only deal with certain categories of crime. Such units are created to tackle in a more structured way crimes that are considered more serious and/or more difficult to investigate. In practice, these units increase co-ordination between prosecutors that, in this way, have a better understanding of the crime problem in the geographical area where they work. None of the prosecution offices included in this study had a unit dealing with illegal immigration -or for that matter street crime, though they were found to be dealing with environmental, organized, corruption and white-collar crimes.

That the Bossi-Fini Act has so far failed to impose its priorities on prosecutors becomes even clearer if examining the conditions that the law imposes on the arrest and prosecution of illegal immigrants. Article five *ter* states that the crime is committed when the immigrant remains in Italy without having a 'reasonable reason' to do so. If there is such a reason, prosecutors can set the arrested person(s) free. Prosecutors interpret this concept in a wide variety of ways. One interviewee explained that only a pregnant woman has a reason to remain in Italy. But another argued that the accused person's financial situation must be carefully checked to understand if they have enough money to leave the country and one

young prosecutor said that every immigrant who does not have a real home has a justification not to leave, because he or she cannot possibly afford it!

It could be argued that what we have here is further evidence of socio-political considerations influencing prosecutors' definition of the crime problem. But this desire to distance themselves from political or public definitions does not only concern illegal immigration: it is linked to any crime policy indication that prosecutors perceive to be influenced by emotional and populist 'moral panics' (Cohen, 1972). Although this term as such is not used by the media, politicians, public or prosecutors, an expression that comes near to it that is used is *allarme sociale*. *Allarme sociale* literally means social alarm and defines the reaction (often disproportionate) that society has to certain crimes and/or certain perpetrators or victims. This reaction may be targeted against a particular group of people, like immigrants, but can also be spontaneous and linked to moral and political issues. Crime of course is not the only source of social alarm; disorder and incivilities can also influence the public perception of security (Chiesi, 2004).

Italian prosecutors are well aware of public perceptions about the connection between street crime and illegal immigration. But they assume that *allarme sociale* over these matters is in large part a result of media exploitation of public fears. Prosecutors have their own conception of the sort of *allarme sociale* that merits inclusion in their priorities for prosecution. According to the interviewees, these are crimes that are particularly dangerous, that jeopardize people's sense of security in going about their everyday life, that involve certain kinds of victims (e.g. women, children and elderly people) and, in general, that have a great impact on the society. *Allarme sociale* counts only if it is linked with "the objective seriousness of the case."

In general, the more the legal punishment is severe, the more the crime is serious. Crimes which threaten life are more important than crimes which threaten property. Finally, the damage suffered by the victim can be a relevant parameter as well. These are some of the 'objective' criteria that determine if a crime is serious and, as a consequence, if it has caused social alarm. Deliberately leaving a case on one side and allowing a case to fall into *prescrizione* can have consequences for a prosecutors' career and can involve ministerial and CSM disciplinary hearings. Nonetheless there are ways around this. As one prosecutor said: "The legality principle

is a false problem. There are many ways not to apply it. Then you can say you are sorry, there will be disciplinary proceedings, but how do they prove this was intentional? You just made a mistake.”

Italian prosecutors accept that they have a responsibility to assuage public fears, but, at the same time, they believe they have to decide if the supposed crime problem is commensurate with its level of social alarm. As one of the lawyers interviewed put it, *allarme sociale* is a volatile concept that evokes different images for the public and for prosecutors.

Prosecutors compare these two images and filter these external influences, which do not disappear, but they are substantially moderated by other internal considerations. The public perception of social alarm is not sufficient to determine priorities. Prosecutors depict the criteria they use as purely legal and objective but, in practice, they are also subjective and intertwined with socio-political considerations about the problem of crime. The clearest example is the Bossi-Fini Act, which, in theory, is punished strictly but which has a low priority for them.

On the other hand, there is a limit to such 'resistance.' Prosecutors admit, as we have seen, that they are inevitably influenced in choosing what to investigate by the crimes that the police report to them. If the police decide

to carry out a particular operation prosecutors have to deal with the legal consequences that this creates (e.g. a large number of arrested persons). Because the police have the right to arrest, this triggers a procedure that binds prosecutors. One of the prosecutor interviewed explained that: “for arrested persons caught red handed, it depends 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.”

The police for their part follow directives on anti-crime policies that come to them from their organizations at the top of which are the Minister of Interior and the Ministry of Defense. Thus, although the government cannot directly influence prosecutors because the legality principle prevents the government from determining any sort of prosecutorial priority, they do have an indirect impact on the prosecutors’ job.

Prosecutors do not have any real opportunity to discuss the directives or co-ordinate their priorities with police priorities. The importance of police decisions at this stage of the criminal proceedings is heightened by the fact that police officers are evaluated on the basis of quantitative indicators. Amongst the parameters used to make statistical evaluations are arrests, deportations, denunciations and the controls police perform on persons and vehicles. As a result, street crime and illegal immigration

cases make up between fifty percent and seventy percent of the crimes that prosecutors process.

This places a high burden on the criminal justice system not only because of their number but because prosecutors must always discover the official and fixed residence of all the accused persons so as to deliver the necessary legal notifications during the investigation phase. When immigrants are involved this is difficult because often the residence cannot be found. Prosecutors admit that even if street crime and illegal immigration are more priorities for the police than for them they cannot easily stop the constant stream of street crime and illegal immigration cases. And the number of immigrants in prison has increased dramatically.

But we nonetheless disagree with those academic commentators who argue that this means that prosecutors have come to share public concerns about law and order and common sense notions about crime, such as stereotypes of immigrants as criminals (Sarzotti, 2006a; Faiella et al., 2005; Quassoli, 1999). Instead, it may be true at the level of heads of prosecution offices who, in their 'political' role as court spokespersons, have to echo political and public concerns. But this does not necessarily affect the views of single prosecutors. Due account, therefore, should also be

taken of the way prosecutors try to minimize the impact of moral panics reflected in legislation such as the Bossi-Fini Act.

As far as initiating investigations is concerned, there may not be very much prosecutors can do. But as the criminal proceedings go on, prosecutors can decide how and where to commit resources during the investigation. A Bossi-Fini case or any form of street crime that did not actually cause serious consequences (e.g. injuries) will rarely be given a detailed investigation. In practice, prosecutors do not see illegal immigration (and even less serious street crimes) as 'problems' that deserve to be tackled aggressively. Prosecutors seek to preserve the criminal justice system from interference that would stop what they consider more serious crimes from being prosecuted and punished. As in many other continental European countries, Italian prosecutors' see themselves as the experts responsible for defining the priorities of the criminal justice system. As a consequence, they try hard to maintain a cultural distance from different forms of external pressure from victims, communities, or politicians, including legislation such as the Bossi-Fini Act. Legal filtering is not confined to the construction of cases that will stand scrutiny at trial. It also may be seen as filtering out certain forms of political pressure and with it certain forms of social anxiety.

CONCLUSION

This account of how Italian prosecutors respond to moral panics over immigrant crime has shown how legal actors can maintain some separation from dominant political cultures and dominant legal cultures. This form of resistance stems to a large extent from prosecutors' way of thinking of their role. Independence, the legality principle and cultural proximity with judges are the bricks in the wall that prosecutors have constructed to protect their sense of their own neutrality. Prosecutors certainly also have their own political views about the prosecution (or persecution) of illegal immigrants. But, they do not all think the same way. The findings in this chapter suggest that it is the prosecutors' role in defining substantive priorities that determines their reaction towards this crime problem- political disagreement is more a consequence than a cause.

Despite the 1989 reform of criminal procedure, prosecutors are reluctant to move to an accusatorial conception of their role. They are still attached culturally to the idea of their role as neutral and impartial. Abandoning this conception would also diminish their credibility when they prosecute in political sensitive cases. Various socio-legal conditions have favored this

outcome. Prosecutors' independence is well established in the constitution and, though increasingly under political threat, this provides at least formal protection for prosecutors from suspicions or allegations of prosecuting a case for reasons other than the purely legal. Italian prosecutors are not in a position to halt the evolution (or involution) of contemporary criminal justice. But they certainly try to balance external pressures by mediating, and not simply executing, anti-crime policies that seek to reassure (or excite) public opinion.

On the other hand, a number of issues remain very much still to be clarified. Most important for present purposes, there is insufficient evidence available to show the actual consequences of current prosecutors' resistance to the campaign to prioritize crimes of illegal immigrants. There is an acute shortage in Italy of reliable statistical information on the functioning of criminal justice agencies that goes beyond records of what kinds of crimes are referred by the police or seen by the courts. Though it would be easy to show that there has been a large increase in the processing of illegal immigrants, it would be tricky to say how much higher this could have gone under different circumstances. The research described in this chapter is limited to interviews with prosecutors, although it was supplemented with interviews with others

involved in the criminal process, such as lawyers and police. To engage with the 'counterfactual' - of what would have happened if prosecutors indeed had changed their priorities in line with governmental indications- we would need to have examined a large number of case files over time and see what happened to them. Certainly, giving a low priority to such cases should mean that the cases that prosecutors put forward are less strong than they might otherwise be. In addition *de facto* many cases will not make it through the system in time. On the other hand, relative unwillingness to invest time in such matters may also result in such cases going to court quickly and thus not risking prescription- exactly as the governmental legislation intended.

It is also difficult to predict the future. Prosecutors' dislike of the Bossi-Fini law may be seen as over- determined- and it is not certain how they would react to other kinds of cases. Many have objections to the way governments have chosen to try and condition their actions on this substantive issue, for example including the high penalties that have been attached to the status crime of being an illegal immigrant so as to make it an arrestable offence for which offenders can be kept in custody before trial. But they also disagree in principle with any interference with their autonomy. We also do not know how much what we are describing is a

result of the recency of the 1989 reform and the persistence of the earlier inquisitorial legal culture. Certainly changes in their institutional role, as proposed by center- right governments in particular, intended to separate their role from that of judges and bring it more into line with the accusatorial architecture of the 1989 reform, would make such resistance more difficult.

FUTURE RESEARCH QUESTIONS:

1. What are the actual consequences of current prosecutors' resistance to the campaign to prioritize crimes of illegal immigrants?
2. Why do they give lower priority to the crime of being an illegal immigrant?
3. There is an acute shortage in Italy of reliable statistical information on the functioning of criminal justice agencies that goes beyond records of what kinds of crimes are referred by the police or seen by the courts. What data should be collected to reliably demonstrate that the processing of illegal immigrants has increased

at a greater or lesser rate because of the attitudes of the prosecutors?

4. What are the differences between the way that Italian prosecutors and those in common law systems see their role? How does it affect prosecution of immigrants?
5. What influence should political direction or public concern over the crime problem have on choices made within a criminal justice system?

REFERENCES

Cavadino, M. & Dignan, J. (2006). *Penal systems: A comparative approach*, London, Sage.

Cohen, S. (1972). *Folk devils and moral panics*. Harmondsworth, Penguin.

Di Federico, G. (1998). Prosecutorial independence and the democratic requirement of accountability in Italy: Analysis of a deviant case in a

comparative perspective. *British Journal of Criminology*, 38(3), 371-387.

Di Federico, G. & Sapignoli, M. (2002). *Processo penale e diritti della difesa*. Rome: Carocci.

Faiella F., Paduanello, M. & Sbraccia, A. (2005). La costruzione dell'identità dell'imputato nel corso della fase dibattimentale. In G. Mosconi and D. Padovan (Eds.), *La fabbrica dei delinquenti. Processo penale e meccanismi di costruzione del condannato* (p. 58-121). Turin: L'Harmattan Italia.

Garland, D. (2001). *The culture of control: Crime and social order in contemporary society*. Oxford: Oxford University Press.

Goldstein, A.S. & Marcus, M. (1977). The myth of judicial supervision in three "inquisitorial" systems: France, Italy, and Germany. *Yale Law Journal*, 87(1), 240-283.

Grande, E. (2000). Italian criminal justice: Borrowing and resistance. *American Journal of Comparative Law*, 48, 227-260.

Jackson, J. D. (2004). The effect of legal culture and proof in decisions to prosecute. *Law, Probability and Risk*, 3(2), 109-131.

Lacey, N. (2008). *The prisoners' dilemma: political economy and punishment in contemporary democracies*. Cambridge: Cambridge University Press.

Langbein, J.H. & Weinreb, L. (1978). Continental criminal procedure: myth and reality. *Yale Law Journal*, 87(7), 1549-1569.

Marafioti, L. (2008). Italian criminal procedure: A system caught between two traditions. In J. Jackson, M. Langer and P. Tillers (Eds.) *Crime, Procedure and Evidence in Comparative and International Context. Essays in Honour of Professor Mirjan Damaška* (p. 81-99). Oxford and Portland: Hart Publishing.

Montana, R. (2009). Paradigms of judicial supervision and co-ordination between police and prosecutors: the Italian case in a comparative perspective. *European Journal of Crime, Criminal Law and Criminal Justice*, 17(4), 309-333.

- Muratore, M. G, Tagliacozzo, G. & Federici, A. (Eds.). (2004). *La sicurezza dei cittadini. Reati, vittime, percezione della sicurezza e sistemi di protezione* [Online]. ISTAT informazioni n. 18. Available at: http://www.istat.it/dati/catalogo/20040915_00/La_sicurezza_dei_cittadini.pdf
- Nelken, D. (Ed.). (2000). *Contrasting criminal justice*. Aldershot: Ashgate.
- Nelken, D. (2009). Comparing criminal justice: Beyond ethnocentrism and relativism. *European Journal of Criminology*, 6,(4), 291-311.
- Nelken, D. (2010). Making sense of difference. In S. Shoham, P. Knepper and M. Kett (Eds.) *International handbook of criminology* (p. 60-80). London; Taylor and Francis.
- Nelken, D. (2010a). *Comparative criminal justice: Making sense of difference*. London: Sage.
- Nelken, D. & Zanier, L. (2006). Tra norma e prassi: Durata del processo e strategie degli operatori del diritto. *Sociologia del Diritto*, 143-166.

- Quassoli, F. (1999). Immigrazione uguale criminalità. Rappresentazioni di senso comune e pratiche organizzative degli operatori del diritto. *Rassegna Italiana Di Sociologia*, XXX(1), 43-75.
- Sarzotti, C. (2006). *Cultura giuridica e culture della pena*. Turin: L'Harmattan Italia.
- Sarzotti, C. (2006a). Le procure della Repubblica come attori del campo giuridico-penale. *Studi sulla questione criminale*, I(2), 67-86.
- Sarzotti, C. (2008). Le procure della Repubblica come attori nel campo penale. In C. Sarzotti (Eds). *Processi di selezione del crimine. Procure della Repubblica e organizzazione giudiziaria*. (p. 1-116). Milan: Giuffrè.
- Sarzotti, C. (Eds.) (2008a). *Processi di selezione del crimine. Procure della Repubblica e organizzazione giudiziaria*. Milano: Giuffrè.
- Solivetti, L. (2010). *Immigration, integration and crime: A cross-national approach*. London: Routledge.

Wacquant, L. (2009a). *Prisons of poverty*. Minneapolis: University of Minnesota Press.

Wacquant, L. (2009b). *Punishing the poor: The neoliberal government of social insecurity*. Durham, NC: Duke University Press.

¹ Italian citizens are mainly scared of theft, robberies, drugs and muggings. See Maria Giuseppina Muratore, Giovanna Tagliacozzo and Alessandra Federici (2004) *La sicurezza dei cittadini. Reati, vittime, percezione della sicurezza e sistemi di protezione* [Online]. ISTAT informazioni n. 18. Available at: http://www.istat.it/dati/catalogo/20040915_00/La_sicurezza_dei_cittadini.pdf [Accessed: 8/04/08].

² The empirical research was conducted for a doctoral degree at Cardiff University under the supervision of Dr. Stewart Field and Professor David Nelken.

³ For a recent discussion of the effects of introducing the new Italian code of criminal procedure, see L. Marafioti “Italian Criminal Procedure: A System Caught Between Two Traditions”, in J. Jackson, M. Langer and P. Tillers (ed.) *Crime, Procedure and Evidence in Comparative and International Context. Essays in Honour of Professor Mirjan Damaška* (Oxford and Portland: Hart, 2008), 81-99.

⁴ This legal concept indicates that prosecutors and courts have a time limit to bring an accusation to closure. This is not fixed but depends on the crime that has been committed (the more the crime is serious, the more time is allowed. If cases do not make it in time the accused is not formally innocent (sometimes they are clearly guilty) but cannot be prosecuted and/or tried further for that crime.

⁵ See, A. Biglia “Castelli: è la prova che i clandestini portano criminalità”. *Corriere della Sera*, 13/06/2005.