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Title

Adversarialism in Italy: using the concept of legal culture to understand resistance to legal modifications

Abstract

Based on the author's empirical study on Italian prosecutors, this article uses legal culture to analyze the reasons why prosecutors are resisting certain legal modifications. In so doing, this paper tries to offer a fresh perspective over (comparative) global issues, such as: the meaning of inquisitorial and adversarial in modern criminal justice systems, the impact of legal transplants and legal translations and the centrality of prosecutors' powers in contemporary criminal justice systems. In particular, the analysis of legal culture in a comparative perspective can stretch our imagination about what is the true extent of prosecutors' powers, and how these can be related and balanced against the defendant's rights.

1. Introduction

The reform of the Italian Code of Criminal Procedure (cpp) in 1989 was an ambitious attempt to transplant adversarial normative principles within a legal system that had always been inquisitorial. This attempt quickly failed. Subsequent Acts of Parliament and decisions of the Constitutional Court substantially limited the adversarialism that had been introduced in 1989. The result is a criminal justice system that mixes some features of adversarialism with the inquisitorial tradition.¹ There is quite a rich academic literature discussing and analyzing this interesting blend of inquisitorial and adversarial normative principles.² Authors have mainly tried to emphasize the extent

¹ M Illuminati, 'Giudizio', in G. Conso and V. Grevi (ed), *Compendio di Procedura Penale* (CEDAM, Padova, 2nd edn, 2003) p. 640.

² For a legal analysis of the new Italian code of criminal procedure see, for example, 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* (Hart Publishing, Oxford and Portland, 2008) pp. 81-99. JJ Miller, 'Plea bargain and its analogues under the new Italian criminal procedure code and in the United

to which adversarialism has influenced the Italian criminal justice system.³ The conclusion is straightforward: there has certainly been a strong degree of inquisitorial resistance that may have affected the impact of certain legal modifications. But there is a lack of empirical research in this area. In other words, previous literature has focused on the legal analysis of the reform in 1989 and on the impact of subsequent legislation and decisions of the Italian Constitutional court. While I discuss and draw on this literature, this study intends to focus on something different: the effect of legal culture on the internalization of adversarial principles. Lawrence Friedman described legal culture as the “ideas, values, expectations and attitudes towards law and legal institutions, which some public or some parts of the public holds”.⁴ The author also explains that ‘internal’ legal culture is the legal culture of “those members of society who perform specialized legal tasks”.⁵ David Nelken redefined the concept and argued that: “legal culture is about who we are, not just what we do”.⁶ Legal culture, like culture itself, is certainly a controversial term. As Nelken has put it, the coherence and uniformity of given national cultures “will often be no more than a rhetorical claim projected by outside observers, or manipulated by elements within the culture concerned”.⁷ This paper does not intend to challenge the limits of an analysis that heavily relies on legal culture. And, therefore, generalizations that are based on the explanatory force of legal culture will be corroborated and treated with caution.

I seek to use legal culture to explain why changes are not happening in the Italian legal system;⁸ and to interpret Italian prosecutors’ functions and role. This

States: towards a new understanding of comparative criminal procedure’(1989-1990) 22 N. Y. U. Journal of International Law and Politics 215. LJ Fassler, ‘The Italian Penal Procedure Code: An Adversarial System of Criminal Procedure in Continental Europe’ (1991) 29 Columbia Journal of Transnational Law 245. LF Del Duca, ‘An Historic Convergence of Civil and Common Law Systems-Italy’s New “Adversarial” Criminal Procedure System’ (1991) Vol. 10:1 Dickinson Journal of International Law 73. SP Freccero, ‘An Introduction to the New Italian Criminal Procedure’ (1994) Vol. 21 n. 3 American Journal of Criminal Law 345. And E Amodio and E Selvaggi, ‘An Accusatorial System in a Civil Law Country: the 1988 Italian Code of Criminal Procedure’ (1989) Vol. 62 Temple Law Review 1211.

³ See for example, E Grande, ‘Italian Criminal Justice: Borrowing and Resistance’ (2000) 48 American Journal of Comparative Law 227. M Langer, ‘From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure’ (2004) 45(1) Harvard International Law Journal 1. WT Pizzi and M Montagna, ‘The Battle to Establish an Adversarial Trial System in Italy’ (2003-2004) 25 Michigan Journal of International Law 429.

⁴ LM Friedman, ‘The Concept of Legal Culture: A Reply’ in D Nelken (ed), *Comparing Legal Cultures* (Aldershot, Dartmouth 1997) p. 34.

⁵ LM Friedman, *The Legal System: A Social Science Perspective* (Russel Sage Foundation, New York 1975) p. 233.

⁶ D Nelken, ‘Using the concept of legal culture’ (2004) 29 Australian Journal of Legal Philosophy 1.

⁷ D Nelken, *Comparative criminal justice* (Sage, London 2010) p. 50.

⁸ Ibid. p. 51. The author says that legal culture “can also explain the lack of change [in legal systems]”.

paper thus uses comparative criminal justice as a Trojan horse to discuss and analyse global legal issues such as the effect of legal transplants and the importance of legal culture as a heuristic device to understand how legal systems are developing. Why comparative law? The obvious answer is that legal transplants can only be studied in a comparative context. But I seek to do more than that and to use one case study to stretch the borders of criminal justice. In Nelken's words, I intend to use comparative law to stretch "our imagination about what is possible [with regards to criminal justice]".⁹ In particular, this paper focuses on what is possible when ideas (like the adversarial model of criminal process) spread between legal systems and how we can grasp the essence of these changes or lack of changes.¹⁰

Obviously legal actors can have different perspectives on what they do and who they are. In this article I have decided to focus on prosecutors' 'internal' legal culture. Prosecutors, together with the police, have a pivotal role during the pre-trial phase. They act as gatekeepers of the penal citadel. This means that they take crucial decisions on what and how to prosecute by filtering out cases. Prosecutors have therefore been allocated a great power that can potentially interfere with the defendant's rights. The difficulties of the criminal justice system to check and balance and, to a certain extent, position prosecutors' powers are common across jurisdictions.¹¹ Yet, the nature of prosecutors' powers differs depending on the procedural context. For example, in England and Wales, prosecutors charge the suspect(s), can ask the police to carry out further investigative acts and decide

⁹ Ibid. p 23.

¹⁰ Ibid. p 81. The author asserts that one important question that comparative criminal justice can help to answer is: "Does the spreading of ideas and practices encouraged by globalisation reduce differences among systems of criminal justice?"

¹¹ For example, in England and Wales, the Royal Commission on Criminal Justice (Runciman) in 1993 and the Auld report in 2001 discussed how to improve co-operation between the police and prosecutors during the investigation. Despite the movement towards a procedural structure where there is a partial co-ordination between these agencies of crime control, prosecutors are still not involved in the investigation. This strict separation between investigation and prosecution aims at protecting prosecutors' independence and objectivity; and, ultimately, it should prevent abuses of power that can undermine the defendant's right to a fair trial (see, for example, RM White, 'Investigators and Prosecutors or, Desperately Seeking Scotland: Re-formulation of the 'Philips Principle'', (2006) Vol. 69 N. 2 MLR 143-182; and S Field, 'Judicial Supervision and the Pre-Trial Process', (1994) 21 Journal of Law and Society 119). Japan is another interesting example. Following the arrest of Tsunehiko Maeda, a very famous prosecutor who allegedly fabricated evidence, there has been significant concern over a serious deterioration in the quality of public prosecutors that can lead to abuse of power. Japanese prosecutor's extensive power is now under scrutiny and some have argued that their decisions need to be checked by greater judicial and media oversight (M Dickie, 'Calls for curbs on Japanese prosecutors' *Financial Times* (London 15 October 2010) available at: <http://www.ft.com/cms/s/0/67f62b24-d875-11df-8e05-00144feabdc0.html> accessed 27 October 2010).

whether to take over or discontinue a prosecution. But they do not have their hands on the investigation, leaving crucial ‘gate-keeping’ decisions to police officers who manage the investigation and can refuse to carry out further investigative activities that are thought necessary by the prosecutor. In Italy, the importance of prosecutors’ decisions is emphasized by their power to conduct the investigation and to direct the police during the investigation.

There is however another reason why Italian prosecutors provide an interesting case study. The reform of the code of criminal procedure in 1989 was structural and, arguably, the most revolutionary modification was the abolition of the inquisitorial-style examining judge. In inquisitorial systems the accuser has a quasi-judicial status. In particular, Jackson says that “prosecutors within the inquisitorial tradition have been more easily able to assume judicial status because they were born out of the separation of powers relating to prosecution and investigation which were all originally exercised by the judge alone”.¹² Italy was not an exception and both prosecutors and judges had to act as impartial accusers. Today prosecution is monopolized by prosecutors but there are conflicting legal principles that make it quite difficult to understand their status in the criminal justice system. Grande adamantly argues that the criminal process is a dispute between parties, and prosecutors are a party to the proceedings under no duty to search for exculpatory evidence.¹³ By contrast, prosecutors belong to the judiciary and, therefore, it is arguable that they have retained their quasi-judicial status that binds them to act as impartial investigators. There is thus a tension between prosecutors’ institutional status and their functional role. But what do prosecutors do in practice? How, and to what extent, has the adversarial nature of the Italian criminal justice system influenced prosecutors’ legal culture? In answering these questions I try to cast light upon the meaning of adversarialism in Italy. In so doing, I partially compare the Italian and the English criminal justice systems, with a particular focus on the role and status of prosecutors. In this way I intend to highlight the distinctive features of Italian criminal procedure and to explain why it is problematic to isolate and analyze its adversarial characteristics. Then I analyze prosecutors’ status and functions in the context of the current criminal justice system and their legal culture as a form of

¹² J. Jackson, ‘The effect of legal culture and proof in decisions to prosecute’ (2004) Vol. 3 *Law, Probability and Risk* 109, p. 113.

¹³ Grande (n 3) p. 235.

resistance towards adversarialism. The argument is that prosecutors' perception of their status and of the aims of the criminal justice system is in conflict with some of the normative principles currently included in the Italian cpp. This tension must be examined to provide a more nuanced and contingent portrayal of prosecutors' stance in the Italian criminal justice system. Finally, I will focus on prosecutors' views on the principle of compulsory prosecution (or legality principle). This principle is stated in the Italian constitution and it is crucial to understand how and to what extent prosecutors' legal culture is insulated from adversarial principles.

This paper draws on the author's empirical study conducted in Italy between April and October 2006. Following some guidance from five consultants (2 prosecutors, 1 police officer and 2 lawyers), 49 semi-structured interviews were conducted with prosecutors (27), police officers (11) and lawyers (11). Whilst some interviews were conducted in the centre and the south of Italy, the study is mainly focused on practice in the north and 10 prosecution offices were visited (along with lawyers and police officers working in the same area).¹⁴

2. Adversarialism in Italy

The adversary model is based on a system "in which procedural action is controlled by the parties and the adjudicator remains essentially passive";¹⁵ on the contrary in the inquest model the parties play a minimal role that is "subordinate to the court's function of finding the truth".¹⁶ Today, it is no longer possible to grasp all the complexities of the different criminal justice systems by using the dichotomy accusatorial and inquisitorial. Consequently, a strict and clear categorization of contemporary criminal justice systems is not possible. Adversarial and inquisitorial are images which reflect a set of ideas and characteristics, but no criminal procedure system is, in practice, fully inquisitorial or adversarial.¹⁷ Likewise it is important to

¹⁴ The size of the prosecution offices was variable going from very small to very large. Size was determined according to the number of prosecutors working in the office and taking into account the area for which the prosecution office has jurisdiction. From now on abbreviations will be used to indicate the interviewees. These are: CP (chief prosecutor), DCP (deputy chief prosecutor), AP (assistant prosecutor), APApI. (assistant prosecutor at the court of appeal), L (lawyer) and Pol. (police).

¹⁵ M. Damaška, *Evidence Law Adrift* (Yale University Press, New Haven, London, 1997) p. 74.

¹⁶ J. Jackson, 'The Effect of Human Rights on Criminal Evidentiary Processes: Towards Convergence, Divergence or Realignment?' (2005) 68(5) MLR 737, p. 742.

¹⁷ Ibid. pp. 740-747. See also A Perrodet, 'The public prosecutor', in M Delmas-Marty and JR Spencer (ed) *European Criminal Procedures* (CUP, Cambridge 2002, reprinted in 2004) p. 416.

avoid caricaturing the role of legal actors in common law/adversarial and civil law/inquisitorial jurisdictions. This said, adversarial and inquisitorial traditions still embody images (or ideals) of criminal process that define partially different ways of dealing with crime control. These images reflect different patterns of values and principles, which are the foundations of the inquisitorial and adversarial traditions. There is thus a connection between values and principles and images of the criminal process. This connection is of great importance, because shifting to a different image means building on different foundations. And, although these images are not entirely satisfactory, they allow to recognise the value and principled choices (i.e. the foundations) that underlie the details of a criminal justice system. But why should we look at these images? Different ideals can be useful in analysing shifts in direction to a specific model of criminal process. We look at the images to analyse the choices (i.e. the shifts) that the legislator has made and, more important, to understand the consequences of these choices (for example, what are the consequences for legal actors and their legal culture?). But how can we carry out this analysis and what can we learn? Markovits has written that “dichotomies provide only two-dimensional slices through reality: they gave us black and white and – depending upon their degree of refinement – innumerable shades of grey [...] But they do not give us the reds and greens and blues”.¹⁸ It is difficult to disagree with this statement; but the usefulness of black and white images must be carefully considered. I believe that the traditional inquisitorial and adversarial images of process are useful to understand contemporary criminal justice systems if used as an axis of reference in relation to legal culture. But the aim should not be that of a new taxonomy which uses legal culture to categorize contemporary criminal justice systems; rather to analyse the resistance towards legal concepts and traditions that do not fit with the borders created by legal actors’ professional culture and the practical consequences that this resistance creates in a legal system.

In 1989 the Italian legislator tried to reform the criminal justice system by transplanting adversarial principles that traditionally inform Anglo-American justice. America was the polar star. The choice to transplant the American-style criminal process was a matter of prestige. Grande argues that the success of the American legal

¹⁸ I Markovits, ‘Playing the Opposites Game: on Mirjan Damaška’s *The Faces of Justice and State Authority*’ (1989) 41 *Stanford Law Review* 1313, p. 1340-1341.

model in Italy can be ascribed to two reasons. First, the strength of the United States' legal scholarship that has diffused its legal ideas around the world.¹⁹ Secondly, the capacity of the American adversarial system to protect individuals against abuses of power.²⁰ This is particularly important. The Italian legislator in 1989 believed that the inquisitorial system was not complying with the image of a fair trial and, more precisely, with the principle of equality of arms. The pre-1989 criminal justice system relied on the preliminary inquiry to discover evidence, that was then included in a pre-trial dossier. The view was that the trial court's review of the dossier inevitably "encouraged – consciously or unconsciously – the trial judge to accept the approach taken by the public official during the pre-trial phase".²¹

More generally, the 1989 cpp was designed to comply with due process principles rather than crime control. Following Packer's famous distinction,²² one can contrast administrative and adjudicative fact-finding. They represent different value systems. 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, proceedings 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. On the contrary, adjudicative fact-finding is related to due process values. This module rejects informal administrative fact-finding procedures aimed at discovering the factual guilt. The possibilities of error are high, so further scrutiny is necessary. For this reason, the importance of formal procedures which are not primarily focused on the efficiency of the criminal process is emphasized.²³ Almost all criminal justice systems have features which belong to both these models though the mix of the elements varies. In Italy, the choice was to converge on the adversarial system in order to mark the predominance of due process values over crime control.

2.1. Adversarialism in Italy: the preliminary investigation

¹⁹ Grande (n 3), p. 231.

²⁰ Ibid.

²¹ Ibid. p. 229

²² HL Packer, *The Limits of the Criminal Sanction* (Stanford University Press, Stanford 1968) p. 149-173.

²³ Ibid.

Several innovations were introduced in 1989 and the functions and status of prosecutors were substantially modified. But before prosecutors are put under the microscope it is necessary to outline some of the general characteristics of Italian criminal procedure.

Criminal proceedings are divided between preliminary investigation, preliminary hearing and trial. The *dominus* of the preliminary investigation is the prosecutor who directs the investigation. The examining judge has been eliminated, but there is a preliminary investigation judge (*giudice per le indagini preliminari*, gip). Moreover, since 2000, defence attorneys can conduct their own investigation (art. 391 *bis-decies* cpp), form their own pre-trial dossier and they can also disclose to the prosecutor and/or to the gip the exculpatory evidence they have discovered. The gip does not have any power to prosecute: his functions can be broadly defined as protecting the rights of those under investigation.²⁴ For example, it is the gip who decides on requests by prosecutors for pre-trial measures (including detention) (art. 279 cpp). The law does not, however, require a warrant issued by the gip to authorize coercive measures like searches and seizures (with some exceptions). The police and prosecutors are in control of the investigation, but the gip must authorize any kind of interception of communications (art. 267 cpp), including telephone tapping, which, according to prosecutors, are now the most effective investigative measures that prosecutors use against serious crimes such as corruption, organized crime and terrorism.²⁵

There are thus similarities between the functions of the gip in Italy and the role of the magistrates in England and Wales. Namely, they both have a crucial role to authorize detention when the defendant has been charged. But there are significant differences as well. For example, In Italy the gip must interview –immediately or within 5 days- any accused person who is subject to pre-trial detention during the preliminary investigation phase (art. 294 cpp). In this case, the gip’s aim is to verify that the legal conditions necessary for detention still exist. Moreover, at the end of the

²⁴ Grande (n 3), p. 233.

²⁵ The center-right government has recently tried to pass legislation to limit the use of interception of communications, claiming that there are too many citizens under control from the police and prosecutors. This attempt has been, so far, unsuccessful and, as it often happens, it was triggered by the publication on the press of telephone calls transcripts involving Prime Minister Silvio Berlusconi and some of his close political allies. Prosecutors vehemently protested against this bill, because, they argue, these limitations cause great problems to gather evidence during investigations for organized crime, corruption and terrorism.

preliminary investigation the prosecutor decides either to send the case to trial or to dismiss it. The principle of compulsory prosecution requires that the decision to dismiss a case is not taken on a discretionary basis. The legality principle is enshrined in the constitution (art. 112) and, as a consequence, the Italian criminal process provides for procedural mechanisms that legally ensure its implementation.²⁶ Prosecutors must objectively assess if enough evidence has been gathered in order to establish that a crime has been committed and to support the accusation (art. 125, provisions for the implementation of the cpp), but a form of judicial verification is also necessary. So, at this stage, judicial control is exercised by the *gip* who may agree with the prosecutor's request to dismiss the charges, order him to conduct further specific investigations or to charge the suspect (art. 409 cpp). Despite the shift to the adversarial model of process, the degree of judicial intervention in the investigation is still potentially great. And it is the legality principle that, at this stage of the proceedings, triggers judicial intervention.

2.2. Adversarialism in Italy: the preliminary hearing

The prosecutor's decision to send the case to trial does not automatically lead to the last stage of the proceedings. Prior to the trial there is the preliminary hearing where the prosecutor's decision is reviewed by the preliminary hearing judge (*giudice dell'udienza preliminare*, *gup*) who cannot be the same judge that acted as *gip* during the investigation (art. 34 par 2 *bis* cpp).

Full evidentiary disclosure takes place before the preliminary hearing; and the defendant and his counsel can inspect the pre-trial dossier that has been developed by the prosecution (art. 419 para 2 cpp). Then, during the hearing, the prosecutor summarizes the results of the investigation with the aim of justifying the request to send the case to trial. In other words, the prosecutor will argue that the defendant must be tried because he or she is guilty of a crime(s). The parties can argue their case as well and the defendant can ask to be submitted to interrogation. Obviously, the counsel is entitled to present the results of the defence investigation. In practice, this is a trial where the evidence is presented on paper (i. e. the dossiers), so there are no witnesses and, consequently, there is no examination and cross-examination (but the

²⁶ M Scaparone, 'Indagini preliminari e udienza preliminare', in Conso and Grevi (n 1) p. 526.

defendant can ask to be interviewed). At the end of the hearing the gup has three options: commit the case to trial, dismiss the case or inform the parties about the matters that still need to be addressed and investigated. But judicial activism is partially limited by the fact that the gup can only receive the additional evidence he deems necessary to decide whether to dismiss or send the case to trial.²⁷ In essence, the aim of the gup is to decide if there is enough of a case to justify the proceedings being sent on for trial. If the gup decides so, the counsel's and the prosecutor's dossiers form the investigation file that can be used at trial. However, not all the evidence collected in the pre-trial phase can be included in the trial dossier (art 431 cpp). For example, pre-trial statements given by witnesses can only be included in the dossier if the parties agree. But the rule against hearsay is relaxed by other provisions of the cpp which, for example, allow the parties to use pre-trial statements in order to challenge the witness' reliability during examination and cross-examination (art. 500 cpp). Finally, the trial dossier also includes the record of any investigative acts that cannot be repeated during the trial, such as examination of DNA samples that may be altered by the examination process.

In the English criminal justice system, the committal for trial historically had a similar function to the preliminary hearing, but today the comparison is not accurate anymore. The committal for trial is now a formality and magistrates Courts only decide on either way triable offences (the offences that can be tried by the magistrates or the Crown Courts). Therefore, if the offence is one triable only on indictment, there is no committal for trial and the case goes straight to the Crown Court. So, as for the preliminary investigation, the major difference between the Italian semi-adversarial system and the English adversarial model of criminal process is the degree of judicial intervention. In England judges are required not to step into the dispute between parties, while in Italy judges still exercise a potentially great form of control over the pre-trial phase.²⁸

²⁷ Grande (n 3) p. 242.

²⁸ Under section 69 of the Courts Act 2003, the Criminal Procedure Rule Committee is empowered to make Criminal Procedure Rules (by Statutory Instruments). These rules are created to ensure that criminal cases are dealt with by justly (Rule 1.1). In particular, they regulate, inter alia, the case management stage (Part 3, Rules 3.1-3.11), where the Court must actively manage the case (Rule 3.2). The court must, for example, establish, with the active assistance of the parties, what disputed issues they intend to explore (Rule 3.10); and may refuse to allow that party to introduce evidence if a party fails to comply with a rule or a direction issued by the Court (Rule 3.5). There is no possible comparison with judicial activism in Italy. The Criminal Procedure Rules are not designed to provide judicial scrutiny over prosecutors' decisions to dismiss or send a case to trial. However, it is interesting

2.3. Adversarialism in Italy: the trial

If the gup is convinced that there is enough evidence, the case is referred to trial. The trial hearing, more than any other stage of the criminal proceedings, is now envisaged in a form sharply contrasting with the previous inquisitorial model. In accordance with the common law tradition, there is a dispute between parties, evidence is produced to the judge in “its original form”²⁹ and, as a consequence, the importance of the pre-trial dossier is limited. The adjudicator is thus fully protected from the contamination of the pre-trial process. To emphasize that the trial was central to the Italian criminal justice system, the legislator introduced the principle of ‘orality’, whereby “no out-of-court previous statements should be read out in court for evidentiary purposes”.³⁰ This is in fact the rule against hearsay. There are however exceptions to this party-controlled system that allow the parties to use pre-trial statements. And judicial activism is clearly visible because the judge can not only question witnesses at the end of the examination, but can also indicate to the parties issues that need to be addressed during the examination. Moreover, art. 507 cpp allows the judge, when absolutely necessary, to examine evidence under his supervision. This means that the judge can call and question witnesses and/or the parties; but he or she does not commission further investigative acts such as interception of communications and search and seizures. Grande argues that initially this provision was an exception, but that art 507 has been broadly interpreted by the courts “who have essentially thrown open a half-closed door”.³¹

Finally, the architecture of the adversarial-style trial has been significantly dismantled by three decisions of the Constitutional Court in 1992.³² These decisions extended the available opportunities to use out-of-court statements in order to increase the fact finders’ capacity to find the truth.³³ The Court rejected the pivotal importance of the hearsay rule and stated that the criminal process must ensure that the truth is found by using, if necessary, the information included in the pre-trial dossier. This

to note that these rules are now a part of the English criminal justice system, that is traditionally adversarial.

²⁹ Grande (n 3) p. 243.

³⁰ Ibid.

³¹ Ibid. p. 246

³² The decisions are: n. 24/1992, n. 254/1992 and n. 255/1992.

view obviously conflicts with a model of criminal process controlled by the parties, and it shows the importance of inquisitorial institutional resistance. The Court acted at a very crucial historical moment, when, following the murder of judges Falcone and Borsellino, the state was under threat by organized crime. Later the parliament attempted to soften the impact of the court's decisions by limiting the use of prior statements, but the court in 1998 (decision n. 361/1998) ruled that these limitations to the use of such statements were too severe and, once again, extended the chances to use this evidence.

It is thus difficult to evaluate the extent to which adversarialism is a feature of the Italian criminal justice system. Defence investigation and disclosure of evidence, the principle of orality and the importance of examination and cross-examination tend towards the adversarial ideal. But judicial intervention, justified by the legality principle and the necessity to discover the truth, and the approach to the rule against hearsay, lean towards the inquest model. Langer has analyzed how plea bargaining (*patteggiamento* in Italian) was implemented in Italy, Germany, Argentina and France. The author argues that this procedural mechanism is a Trojan horse of the adversarial system because the prosecution and the defence must think of themselves as parties in a dispute.³⁴ With regards to Italy his conclusion is that no other civil law country has internalized to that extent the adversarial ideal. Langer accepts that in Italy there is a strong degree of institutional resistance. But the extensive use of the plea bargaining (between 17 and 21% of misdemeanours and between 34 and 42% of all crimes except the most serious, between 1990 and 1998)³⁵ and other indications, such as the possibility of defence investigation and the introduction of direct and cross-examination at trial, show that, to a certain extent, the model of dispute between parties is indeed advancing in the Italian criminal justice system.³⁶ It is unquestionable that the introduction of the *patteggiamento* has had a great impact but there are significant differences when it is compared with the Anglo-American idea of plea bargaining. As Langer points out, in Italy the *patteggiamento* is limited in scope and less flexible.³⁷ First, in Italy there is no guilty plea. This does not just apply to plea bargaining, it is a general principle of the criminal process that reflects one

³³ Pizzi and Montagna (n 2) p. 448.

³⁴ Langer (n 3) p. 38.

³⁵ Ibid. pp. 52-53

³⁶ Ibid. p. 53.

general aim: to find the truth. Secondly, plea bargaining can only be applied if, after reduction, the sentence does not exceed 5 years of imprisonment and the reduction cannot be greater than one-third of the regular sentence. Thirdly, the bargain cannot involve the charges, because the legality principle requires that every crime is prosecuted. Finally, judicial activism is still alive. The judge, after examining the dossier, may reject the agreement and acquit the defendant; and the defendant can ask the judge to give him the one-third reduction when the prosecutor has rejected a proposed agreement. In this case the judge will examine the case and the reasons why the prosecutor did not authorize the deal with the defendant.

Plea bargaining was part of a number of abbreviated procedures that can be triggered if the parties consent. These were introduced to improve the efficiency of the legal system and to avoid the delays of the regular trial. Amongst these measures there is the *giudizio abbreviato* (abbreviated trial) that, in practice, stops the proceedings at the preliminary hearing stage. This is effectively the pre-1989 inquisitorial process whereby the judge decides on the pre-trial dossier. There is no examination or cross-examination, but defence counsel can argue on the basis of his own defence investigation. This confirms that the Italian legislator has not clearly chosen the adversarial ideal, but rather that there is a superimposition of two different systems. There has been no clear shift to the values and principles supporting the adversarial image of criminal process. Adversarial style procedural mechanisms have been added to an inquisitorial structure that has remained untouched or has been restored by the Constitutional court and post-1989 legislation. Italian criminal procedure could be dubbed semi-adversarial or semi-inquisitorial; but none of these definitions seems to be satisfactory if one wants to capture the professional and cultural values that underpin the Italian criminal justice system. As I turn to examine prosecutors' institutional role and functions in the context of this ambiguous criminal justice system, I begin to highlight these values.

3. Prosecutors and the Italian criminal justice system

Italian prosecutors are part of the judiciary and they are fully independent from the executive. The Minister of Justice provides financial resources for the criminal justice

³⁷ Ibid. p. 50.

system. In England, the Crown Prosecution Service (CPS) is founded by the Law Officers Department, but, unlike in Italy, the Minister of Justice has the power to ‘superintend’ prosecutors. There are two other major differences between Italian prosecutors and the CPS. First, as above, in Italy prosecution is compulsory. This means that any consideration that is not purely legal, such as the public interest in prosecution or whether there is a realistic likelihood of conviction, cannot interfere with the prosecution of crimes. Guidelines that set priorities or criteria to define priorities are not legal and cannot be enforced by the government or high ranked prosecutors such as chief prosecutors and deputy chief prosecutors. Secondly, prosecutors direct the investigation and the police during the investigation. So, not only do Italian prosecutors charge the suspect, but they can also supervise the investigation and directly carry out investigative activities. This is effectively a form of judicial supervision that, in theory, gives to prosecutors the power to control the investigation.³⁸

It is apparent that the Italian and the English legislators have taken different paths when it comes to the definition of prosecutors’ functions. There is, however, one similarity. Following the abolition of the examining judge in 1989, Italian prosecutors, like the CPS, are now seen as a party to proceedings. But what does this mean in the Italian criminal justice system? Grande argues that, since the 1989 adversarial reform, prosecutors have become “straight accusers”.³⁹ But this interpretation clashes with the traditional view which still depicts prosecutors, in accordance with the inquisitorial tradition, as neutral quasi-judicial figures.⁴⁰ This interpretation is institutionally emphasized by including prosecutors in the judiciary and by the legality principle. In essence, prosecutors’ independence and the legality principle – which are meant to preserve prosecutors’ impartiality – are seen as logical

³⁸ R Montana, ‘Paradigms of Judicial Supervision and Co-ordination between Police and Prosecutors: the Italian Case in a Comparative Perspective’ (2009) 17(4) European Journal of Crime, Criminal Law and Criminal Justice 309.

³⁹ Grande (n 3) p. 235.

⁴⁰ Montana (n 36) p. 319. See also, for example, G. Vassalli, *La potestà punitiva* (UTET, Torino 1942) p. 180. And N Zanon and F Biondi, *Il sistema costituzionale della magistratura* (Zanichelli, Bologna 2006) p. 126. The traditional interpretation of prosecutors’ institutional status was confirmed by the Italian Constitutional court. See Corte cost. sent. n. 190/1970; n. 123/1971; n. 63/1972; n. 88/1991 and n. 96/1975.

implications within the criminal process of the constitutional principle of equality before the law (art. 3).⁴¹

The reasons why the Italian constitution seeks to use the legality principle as a tool to protect prosecutors' full independence are mainly historical. During the Fascist era prosecutors were not part of the judiciary, but rather belonged to the executive, in particular to the Ministry of Justice which, for example, nominated and dismissed them.⁴² They were an arm of a dictatorial regime, which widened their powers as defenders of public order.⁴³ Of course that public order was fascist in nature. Thus, the aim of the drafters of the 1948 Italian constitution was to re-design the system so that impartiality and equality before the law were not limited by any executive pressure. According to the Italian constitutional fathers, this aim could be achieved through a complete independence of the judiciary. A necessary corollary of this independence is the legality principle that legally prevents any form of discretion in relation to the decision to prosecute. Therefore: prosecutors are impartial because they belong to the judiciary; but impartiality can only be fully implemented if no other constitutional power (i.e. the executive) can impose criteria to define the offences that must be prosecuted.

Prosecutors' role and status are clearly ambiguous. There is a tension between different interpretations that are both rooted in legal principle. The confusion is caused, unsurprisingly, by the mix of adversarial and inquisitorial principles. Grande refers to prosecutors as the fourth power, alongside the judiciary, the legislature and the executive. This fourth power is not constricted in any way in practice, because although prosecutors are members of the judiciary, they are actually straight accusers and, more importantly, the legality principle is not applied in practice and, as a consequence, it allows prosecutors full discretion to choose the cases to prosecute. In Grande's view, prosecutors' extensive powers have increased since the reform in 1989. And today, prosecutors are enjoying all the benefits of the inquisitorial accusation model, like the centrality of the pre-trial dossier, but none of the responsibilities, because they are now required to act as party to the proceedings and not as impartial quasi-judicial legal actors. Another point raised by Grande is the

⁴¹ G Di Federico, 'Prosecutorial independence and the democratic requirement of accountability in Italy' (1998) 33 n. 3 *British Journal of Criminology* 371, p. 375.

⁴² F Cordero, *Procedura penale* (7th ed. Giuffrè, Milano 2003) p. 193.

⁴³ *Ibid.* p. 425.

suspicion that judges' impartiality is undermined by the lack of separation from prosecutors. In fact, both prosecutors and judges have to pass the same state exam and can switch functions. So, there is a common professional culture that potentially undermines the necessary degree of separation between the accuser and the adjudicator. These elements may deny the defendant a fair trial as it is conceived in an adversarial system.⁴⁴ Grande concludes that in the current legal system the defendant is less protected now from abuses of power than in the pre-1989 inquisitorial system.⁴⁵

Similarly, Di Federico and Sapignoli describe prosecutors as independent police officers who, in practice, do not fulfil their duty to be impartial investigators.⁴⁶ The authors conducted a large empirical study (involving 1000 lawyers): 48.8% of the lawyers interviewed reported that prosecutors do not comply with article 358 cpp which requires them to search for exculpatory evidence; 19.5% of the lawyers said that prosecutors search for exculpatory evidence only when the counsel pushes them to do so; and only 2.1% of the lawyers said that prosecutors always search for exculpatory evidence.⁴⁷ The authors describe prosecutors as straight accusers that are prepared to play with the interpretation of legal procedural rules to achieve a conviction. This means that, for example, prosecutors do not respect the legal rules that require them to finish the investigation in a fixed time; that pre-trial custody is used to put pressure on accused persons even when there are no lawful justifications to do so; and that witnesses are not free to report what they saw and heard, because prosecutors put a lot of pressure on them in order to be sure that they will support the prosecution's version of events. However, as Di Federico says, the case study only focused on the lawyers' perspective;⁴⁸ and, in general, his analysis is aimed at demonstrating that there is a sharp contrast between legal rules and practice.⁴⁹ So, the focus is quite narrow and there is little investigation of prosecutors' professional and cultural values. Di Federico and Sapignoli wanted to prove that there was some distance between prosecutors' institutional role and the practice. But they do not offer

⁴⁴ Grande (n 3) p. 237.

⁴⁵ Ibid. p. 232.

⁴⁶ G Di Federico and M Sapignoli, *Processo penale e diritti della difesa* (Carocci, Roma 2002) p. 16. See also, G Di Federico, 'Il pubblico ministero: indipendenza, responsabilità, carriera separata' in G Di Federico (ed), *Manuale di Ordinamento Giudiziario* (CEDAM, Padova 2004), p. 435.

⁴⁷ Di Federico and Sapignoli (n 44) p.16.

⁴⁸ Ibid. p. 17.

⁴⁹ See, for example, Di Federico (n 39).

any alternative model and they do not investigate prosecutors' self professional image and its consequences for the criminal justice system.

The arguments presented by these authors are certainly interesting, but these generalizations do not sufficiently consider certain features of the Italian criminal justice system and of prosecutors' legal culture. It is probably true that prosecutors enjoy great freedom in deciding whether to prosecute a case, but this discretion does not seem, as Grande has put it, "unfettered"⁵⁰ and fully unstructured. The analysis of prosecutors' discretionary powers in the light of the legality principle goes far beyond the purposes of this article. However, it should be mentioned that Italian prosecutors, acting as 'guardians of the law', share a common vision of the criminal justice system and, more broadly, of what criminologists call the crime problem.⁵¹ This vision is reflected by the criteria prosecutors use to determine the cases that they prioritise.⁵² So, decisions on priorities are not irrational or based on the personal political opinions of a single prosecutor; in general prosecutors share common professional values and similar socio-political views on the aims of the criminal justice system.⁵³ As Keith Hawkins has argued: "[...] much of what is often thought to be free and flexible application of discretion by legal actors is in fact guided and constrained by rules to a considerable extent. These rules, however, tend not to be legal, but social and organizational in character".⁵⁴ Prosecutors' professional values de facto constrict their discretion and give consistency to the decisions to prosecute.

The strength and the extent of the defendant's rights also need to be analyzed. In the Italian criminal justice system the resourceful defendant has a very effective weapon: the *prescrizione*. 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 depends on the crime which has been committed: the more serious the crime

⁵⁰ Grande (n 3) p. 241.

⁵¹ At its broadest 'defining the crime problem' has a sociological meaning which might be better captured by the phrase 'the social construction of crime' (see, for example, J Muncie, 'The Construction and Deconstruction of Crime' in J Muncie and E McLaughlin (ed), *The Problem of Crime* (Sage, London 2001) p. 15-16). Clearly those who make prosecution decisions are a small part of this broader social process, being influenced by broader social discourses and in turn influencing them (i. e. the discourses) by their decision-making.

⁵² R Montana, 'Prosecutors and the definition of the crime problem in Italy: balancing the impact of moral panics' (2009a) 20(4) Criminal Law Forum 471.

⁵³ Ibid.

⁵⁴ K Hawkins, 'The Use of Legal Discretion: Perspectives from Law and Social Science' in K Hawkins (ed), *The Uses of Discretion* (Clarendon Press, Oxford 1992) p. 13.

committed, the longer the time-limit (and some crimes can always be prosecuted).⁵⁵ Limitation of actions can be very important in a country where criminal proceedings take on average six years.⁵⁶ In practice, the resourceful defendant will have a good lawyer whose main task is not to prove their client's innocence, but "to make the case overrun its allocated time".⁵⁷ Moreover, there are effectively three trials before the defendant is legally guilty. And there are no effective filters that prevent cases from being re-heard by the Court of Appeal and, on points of law, by the *Corte di Cassazione* (the equivalent of the Supreme Court in England).

If the defendant does not have resources the scenario may change and he could be tried using one of the special procedures, like plea-bargaining or the *giudizio abbreviato*. As explained, these are speedy trials aimed at dealing with cases as fast as possible and they are mainly used to tackle street crime (e.g. burglary, street robberies (i.e. mugging) and drug trafficking (i.e. pushing drugs in the street)). In these cases the defendant does not enjoy all the rights that the ordinary trial ensures. For example, if the defendant opts for the *giudizio abbreviato* the criminal process ends at the preliminary hearing stage and, if he or she is convicted, the sentence is reduced by one-third. The *giudizio direttissimo* (very fast trial) has even more radical consequences on the defendant's rights. The cpp authorizes the prosecutor to use this speedy procedure when the defendant is caught *in flagranza di reato*,⁵⁸ or when he or she has confessed (i.e. the evidence is conclusive). If caught red-handed the defendant can be tried within 48 hours of arrest (but the prosecutor can wait for up to thirty days); during the same hearing the judge also verifies that the arrest was lawful. The decision to use this special procedure is taken by the prosecutor, the defendant cannot refuse but can opt for the *giudizio abbreviato* or plea-bargaining instead of the *giudizio direttissimo*.

⁵⁵ The beginning of the trial does not stop time running. As happened in relation to some of the trials involving Italy's Prime Minister Berlusconi and many other important and less important cases, a criminal process can arrive, for example, at the court of appeal and then the judge stops the process because of *prescrizione*. In these situations the defendant(s) is de facto acquitted. He is not formally innocent and sometimes they are clearly guilty; but the defendant can no longer be prosecuted and/or tried for that crime.

⁵⁶ C Nunziata, 'La Crisi del Processo Penale' (2004) <http://www.lavoce.info/articoli/pagina952.html> Accessed 28/05/10. The author points out that the statistics (up to 2004) include both ordinary criminal proceedings and those that follow a special very fast trial, like plea bargaining. This means that, in practice, an ordinary trial, that it is normally used for serious crimes like corruption, terrorism and organised crime, takes 9 years.

⁵⁷ Nelken (n 7) p. 17.

⁵⁸ In essence, this means that the defendant has been caught red handed.

Certainly these defendants cannot rely on *prescrizione* and these special procedures can have an impact on the efficiency of the criminal justice system. An efficient system can emphasize crime control and provide an effective tool to activate prosecutors' extensive powers. In other words, prosecutors could use these procedures to direct their powers towards certain defendants and to avoid the *prescrizione*. In this way, they implement their discretionary choices in relation to the crimes to prosecute.

However, even if we assume that these procedures are the first choice for prosecutors, there is no evidence that they have been particularly effective. The backlog of cases in prosecution offices and courts is still great. And, more important, overall numbers in prison in Italy (around a hundred per hundred thousand of the population) remain low compared, for example, to the UK (hundred and fifty per hundred thousand) and the USA (seven hundred per hundred thousand). This is very interesting. Like many other countries Italy is experiencing typical late-modern problems of crime and insecurity, though public discussion of these themes emerged later (mid-nineties) compared to the rest of the western world. Serious crimes like corruption, organized crime and white collar crimes have by no mean disappeared from public debate, but worries about security and crimes that involve immigrants are increasingly reported in the media. Illegal immigration and, often, immigration as such, are described as the major source of street crimes such as mugging, drug pushing and burglary. The fear of these crimes is confirmed by recent victimization surveys⁵⁹ and it has been one of the top issues in the political agenda of both the centre-right and centre-left coalitions for the last 15 years.⁶⁰ This public and populist vision of criminal justice was eventually translated into legislation that, like the Bossi-Fini Act, requires the arrest of illegal immigrants who do not comply with a deportation order and the prosecution of the case within 48 hours of arrest, using an accelerated trial (the *giudizio direttissimo*). All this means that in Italy there are the conditions for an explosion of the prison population and, to a certain extent, the number of immigrants (certainly not resourceful defendants) in prison has

⁵⁹ M G Muratore, G Tagliacozzo and A Federici (ed), 'La sicurezza dei cittadini. Reati, vittime, percezione della sicurezza e sistemi di protezione' (2004) http://www.istat.it/dati/catalogo/20040915_00/La_sicurezza_dei_cittadini.pdf accessed 21 October 2010. In particular, see A C Blandry and G Tagliacozzo, 'La percezione della sicurezza nella zona in cui si vive' in Muratore et al. (ed), (n 56) p. 113-114. The authors explain that, according to this survey, the crimes which create most fear within the Italian society are thefts at home (60,7%), followed by car thefts (46,2%), muggings (44,2%), robberies (43,0%) and sexual offences (36,3%).

⁶⁰ Montana (n 50) p. 471-476.

substantially increased since they started arriving in the 1990s. But the overall numbers tell us that the Italian system is less punitive compared to other countries.⁶¹

Prosecutors do not have sentencing powers, therefore the low prison population is not necessary a strong guide to prosecutorial power and discretion. But the conditions for an explosion of the prison population exist; and, assuming that, as Di Federico argues, prosecutors act as independent police officers, it seems logical that prosecutors would exploit these conditions to boost their uncontrolled powers and achieve the aim of obtaining more convictions. The low prison population, however, suggests that, on a factual level, prosecutors encounter obstacles that can moderate their uncontrolled discretion to interfere with citizens' lives. The Italian criminal justice system is, in practice, able to correct the imbalance between prosecutors and the defense. Prosecutors' status and powers must be put in the context of a very peculiar and complicated criminal justice system. Confusion causes lack of efficiency and, ultimately, this reduces prosecutors' crime control powers.

However, prosecutors might be powerful (i.e. the fourth power) but liberal, rather than powerful and punitive. In a similar vein, one can argue that the problem with prosecutors' enjoying unfettered discretionary powers is still potentially threatening, because the criminal justice system combines extensive powers with little checks and balances and because incarceration rate is low but it may reflect the population that prosecutors want in jail. The analysis of the prison population in Italy and the superimposition of inquisitorial and adversarial procedural mechanisms suggest that the reform in 1989 has not necessarily lead to a severe limitation of the defendant's rights. But this is not explanatory of prosecutors' institutional role and function within the criminal justice system: the "fourth power" can be ineffective, but it can exist. The analysis of prosecutors' legal culture and how this has become a form of resistance towards adversarialism may clarify their impact on the Italian criminal justice system and throw light upon the potential of their powers.

4. Cultural resistance: the 1989 adversarial reform

⁶¹ R Montana and D Nelken, 'Prosecution, legal culture and resistance to moral panics in Italy' in C Smith, S Zhang and R Barberet (ed), *Handbook of International Criminology* (Routledge, New York and London forthcoming March 2011).

Prosecutors' cultural self-image appears to have a due process nature.⁶² Their conception of criminal procedure can be compared to the image of an adjudicative-fact finding procedure. Cases are referred to trial if they are both legally and factually prosecutable. Prosecutors carry out the controls to decide if the evidence collected and the procedures used to discover it are legally acceptable. And, as legal filters, they prevent cases which have not been legally investigated from becoming prosecuted cases.⁶³ This professional self-image is firmly rooted in the sense of themselves as judicial impartial figures.⁶⁴ However, to see prosecutors as neutral and impartial figures is problematic because of their relationship to criminal acts and investigations. They supervise police investigations and determine what information gathered during the investigation should be passed to the judge. In so doing, they build up a case that will stand scrutiny at trial: they are thus functionally a party to proceedings. But prosecutors do not see this as meaning that they are not neutral and impartial. They see themselves as providing a neutral judicial filter which ensures that certain forms of information brought to them by investigators which is unduly prejudicial or fails legal tests for admissibility will not be seen by the judge. But while prosecutors see this legal filtering as a judicial role it inevitably means that their judicial distance from the prejudicial information and opinion thrown up by the police is compromised. The consequence is that the prosecutors' job takes place in a context where there is an awareness of a wider-range of information. This context can be highly influenced by illegally or unfairly obtained evidence; and by information that is not legally relevant but is prejudicial or emotionally charged.

There is an obvious conflict between Grande's image of prosecutors as 'straight accusers' and their professional self image. But there is also a tension between prosecutors' self image and their role in practice, acting as party to the proceedings and trying to build up a case that would stand scrutiny at trial. This tension needs to be analyzed if the aim is to understand how prosecutors reacted to the reform in 1989 and the extent to which this reaction has influenced the criminal justice system.

When prosecutors have filtered out the information that cannot be used during the trial they need to organize the evidence they have. In other words, prosecutors

⁶² Montana (n 50) p. 488-493.

⁶³ On Italian prosecutors' acting as legal filters in the context of moral panics see Montana (n 50).

have to deal with the results of the legal filtering stage in order to present these results during the trial. As one of the interviewed prosecutors said: “[at this stage the] prosecutors’ aim is to transfer as many documents as possible from their *dossier* to the judge’s *dossier*.” Effectively, this is an attempt to recreate the examining judge’s file as it has existed traditionally in inquisitorial systems. Thus, Italian prosecutors seem to act as if their investigation is the ‘official investigation’. This approach is not surprising given that prosecutors believe that the judge’s knowledge of the case is always limited. In the prosecutors’ view, the most effective way to solve this problem is not through a dispute between parties during the trial, but through the construction of a file that includes the evidence that has been collected during the investigation and that can stand scrutiny at trial.

Prosecutors therefore distrust a model of criminal process that is based on a dispute between parties. Adversarial principles do not seem to have modified prosecutors’ professional culture. In the end, the story of the 1989 reform seems (at least for prosecutors) to represent more than a legal transplant. It is similar to what Langer has called a legal translation.⁶⁵ The new provisions were applied and understood according to a legal culture which was not and is not adversarial, but strongly inquisitorial. This confirms the importance of inquisitorial resistance. But this resistance does not only stem from legislative provisions and the institutional quasi-judicial status of prosecutors. Prosecutors’ legal culture is proving to be strong and to have provided a source of cultural resistance to the internalization of the dispute between parties model of process. Prosecutors refuse to be considered as other than neutral and impartial (according to their inquisitorial viewpoint) because this would threaten their impartial status and, eventually, would diminish their credibility when they prosecute. This is why adversarial principles seem to have failed to transform prosecutors’ institutional role from official investigators to straight accusers.

This shows that the reform in 1989 has failed to modify prosecutors’ inquisitorial viewpoint towards their professional values. But the analysis of prosecutors’ legal culture and the tension between different images of prosecutorial functions suggest that the *mélange* of inquisitorial resistance and adversarial

⁶⁴ Ibid p. 489-490.

⁶⁵ Langer (n 3).

principles has not necessarily led to the limitation of defendants' rights. The superimposition of different legal principles did not create a superimposition of prosecutors' functions. Grande's image of prosecutors as the "fourth power" is based on the assumption that they combine the inquisitorial independence, with the adversarial model of the dispute between parties. But prosecutors do not choose to act as adversarial or inquisitorial figures depending on the way the investigation and the trial develop. Prosecutors' legal culture is firmly rooted in the sense of themselves as the impartial investigators. Therefore, they would not combine this image with new adversarial features that require them to act as "straight accusers".

In practice, during the investigation the prosecutors' perspective is that of the judge because they want to build up a case that will stand scrutiny at trial.

It is true that prosecutors must support the accusation, but before doing that they have to act and think like judges. Prosecutors must ask themselves the same questions that judges ask themselves [...] A good prosecutor must be the judge of himself and the judge of the case. If he solves the case, because he believes that the accused person(s) is guilty, he will support the accusation. However, before doing that he must be a judge. In fact, we do it [judging] when we decide to send the case to trial or to drop the accusation.⁶⁶

When the prosecutor has to evaluate the evidence he must be like a judge. He must say if there is enough evidence to support the accusation during the trial.⁶⁷

So, in general, when I prosecute, I try to think like a judge and to decide according to the evidence that the judge will probably have. This is because it is useless to begin a prosecution which will end with an acquittal. If I decide to prosecute a case, I always try to foresee what can happen.⁶⁸

As explained, prosecutors' commitment to act professionally and culturally like judges does not protect their impartiality. Hence, during the pre-trial phase, prosecutors' legal culture primary effect is not to preserve neutrality, but to enable them to evaluate the evidence with enough judicial distance to anticipate a judge's reaction. This means to assess and increase the possibilities to obtain a conviction and, as a consequence, it can substantially help to have a better case. Prosecutors present this in terms of impartiality but the very nature of the role of prosecutor as

⁶⁶ AP(N41). Similar opinions were expressed, for example, by AP(N48), DCP(N45) and AP(N28).

⁶⁷ DCP(N45).

⁶⁸ AP(N48). Similar opinions were expressed, for example, by AP(N41), AP(Apl.(N50)), AP(N38), AP(N33), AP(N42), DCP(N45), AP(N30) and AP(N28).

filter between the information generated by the investigation and the judge means that the aim is to render the judge impartial not the prosecutor (in the sense of deciding only on legal relevant information that has been properly obtained). In this way prosecutors try to achieve two objectives: a) to enable judges to make decisions on legally relevant evidence which has been properly obtained (if the case goes to court) and b) to enable prosecutors to predict whether there is a ‘realistic likelihood’ of conviction.

Despite the mere aspirational nature of prosecutors’ neutrality, their judicial distance from the investigation generates consequences for the defendant’s rights. While prosecutors build up the trial dossier the aim is not to prepare for a dispute between parties, but to search and find the truth.

The prosecutor is a *magistrato* who is searching for the truth [...] but the prosecutor is also a public body, as a consequence his ideas about a case should not be preconceived [i. e. to consider the accused person(s) guilty a priori] Sometimes, not often, I conclude the trial asking for an acquittal. We do not support a thesis because we have to, but because we are searching for the truth.⁶⁹

No, he/she [the prosecutor] is not a crime fighter [...] I am not a guard dog; at the same time I believe we are paid to do a job and we have to do it as well as we can. The good thing is that prosecutors are part of the judiciary and that [as a consequence] we have to search for the truth, not to obtain convictions.⁷⁰

The truth that prosecutors search and find is different compared with the truth that the judge will find. As explained, prosecutors have a different awareness of the case because of their relationship to criminal acts and investigations. Finding the legal and factual truth is, therefore, another aspirational aim. Nevertheless, when prosecutors search for the truth, they activate a number of due process formal procedures that acquire importance over crime control efficiency procedural mechanisms. The adversarial tradition sees due process in terms of legal procedural constraints on the exercise of power;⁷¹ while Italian prosecutors’ cultural commitment reflects an inquisitorial viewpoint, where the emphasis is not on constraints on abuse of powers, but on the importance of patterns of official activity that provide protection to the defendant’s rights.

⁶⁹ AP(C53). Similar opinions were expressed, for example, by AP(N29) and AP(C46).

⁷⁰ APN(48). Similar opinions were expressed, for example, by AP(C53), and AP(N10).

Therefore, the defendant is protected because, in prosecutors' view, they control (part) of a criminal process that is designed to find the truth and not to convict criminals. But, as the truth that prosecutors see is different compared with the truth the judge will see, what can they do to activate due process mechanisms? Prosecutors' legal culture ensures that the investigation and the prosecution enter a real process of legal normalization. In this way the defendant is partially protected from prejudicial information that could be collected during the pre-trial phase by the police. In particular, legal normalization ensures that prosecutors carry out an effective form of judicial supervision over the police and that the proceedings main focus is the legal guilt. In this context, legal guilt seems to have a twofold meaning. First, it is associated to compliance with procedural and substantial law. One interviewed prosecutor said that they closely supervise the police "because many police officers do not know what the criminal process needs"⁷² and he then referred to crimes such as: bankruptcy, white collar crimes in general and frauds, as crimes that require prosecutors' legal knowledge to be investigated and prosecuted successfully. This is, to a certain extent, similar to Packer's definition of legal guilt, whereby "factual determinations are made in procedurally regular fashion".⁷³ But focusing on the legal guilt also means that the judge will decide on the basis of legally relevant evidence (i.e. render the judge impartial)⁷⁴ and that the defendant will not be prosecuted if this evidence is missing.

Judicial supervision is a sort of pre-condition to legal guilt: if prosecutors can effectively supervise the investigation, they can prevent violations of procedural law and they can take crucial decisions on the construction of a case that will stand

⁷¹ Packer (n 21).

⁷² APApI.(N50).

⁷³ Packer (n 21) p. 166.

⁷⁴ In Italy illegally obtained evidence is not admissible and the judge can, at any time, declare the inadmissibility of a piece of evidence (see art. 190 and 191 cpp.; for the legal criteria determining the admissibility of evidence see art. 62, 63, 103, 195, 197, 203, 234, 240, 254, 270 and 271 cpp.). Moreover, art. 189 cpp provides for any evidence which is not listed in code of criminal procedure. These pieces of evidence are not a priori inadmissible. The judge decides on a single case basis and the parties can put forward their arguments. In any case, the judge can not accept evidence if this is not directly related to the case (i.e. useful to establish the facts) and/or if this prejudices the morality of the person involved. In particular, this means that evidence can not be accepted if it can incapacitate (even if it is for a short period) a person (e.g. hypnosis). See V Grevi, 'Prove' in Conso and Grevi (ed) (n 1).

scrutiny at trial.⁷⁵ Whether this takes the form of a hands on or rather passive form of supervision, the defendant is protected by prosecutors' scrutiny of the case.⁷⁶

However, cases can be prosecuted and tried using speedy procedures that enhance the routinization of the criminal process so that it may become an efficient crime control system to deal with crimes as fast as possible. As explained, this creates a sort of bifurcation (resourceful/not resourceful defendants) that can potentially lead to very different outcomes for criminal proceedings (e.g. trigger the *prescrizione* or not). But prosecutors also act as legal filters. Legal filtering applies to any case and, although it is mainly a passive form of review, it potentially protects defendants from prosecutions based on weak evidence. Moreover, prosecutors' professional culture and the sense of themselves as 'guardians of the law' create some sort of detachment from the police. Prosecutors adamantly claim their right to direct the investigation. Although this does not ensure that a hands on form of judicial supervision will always take place; the cultural distance from the police enables prosecutors to influence the criminal proceedings from the beginning.⁷⁷ In essence, prosecutors are influenced by the information collected by the police, but their sense of themselves as official investigators creates sufficient distance to ensure that the case will be scrutinised on the basis of an effective process of legal normalization. It is obvious that prosecutors cannot be closely involved in all the investigations; and the more the prosecutor is ready to commit resources (primarily his or her time) the more the scenario that has just been described become a reality. But even a passive review of the investigation (i.e. legal filtering) leaves prosecutors in charge of some crucial decisions (e.g. is further investigation needed? Do I need to interview the accused person(s)? Etc.).⁷⁸ These decisions are important to implement prosecutors' contribution to the investigation and to uphold the defendant's rights.

The reform in 1989 of the Italian criminal justice system does not seem to have created a "fourth power". As in every legal system, prosecutors have a crucial

⁷⁵ On judicial supervision in Italy see Montana (n 36).

⁷⁶ While discussing the French case Hodgson says that "[A] bureaucratic form of [judicial] supervision, although relatively passive, has the potential benefit of filtering out obviously weak cases where the basic elements of an offence are not made out or where there has been a failure to comply with or document basic procedural safeguards". J Hodgson, *French Criminal Justice* (Hart Publishing, Oxford and Portland 2005) p. 152.

⁷⁷ Montana (n 36).

⁷⁸ Ibid.

and a potentially very powerful role because, together with the police, they are the main actors of the pre-trial phase. And it is undeniable that in Italy prosecutors' gate-keeping role is emphasized by their power to direct the investigation and by the discretion that the legality principle allows in practice. But the danger of abuses of power is balanced by a legal culture that still prevents prosecutors from acting upon weak cases. In the end, in Italy the defendant may not enjoy the same rights that are normally accorded to defendants in adversarial systems; and if one accepts the disputable new interpretation of prosecutors' functions, the defendant is not even protected by prosecutors' neutral status. The practice of prosecution is however telling a different story where prosecutors' legal culture is still strongly inquisitorial, but nonetheless protects defendants and, to a certain extent, shapes the criminal procedure according to (aspirational) due process values.

5. Legality Principle

There are various reasons why prosecutors' legal culture is insulated from the influences of adversarial principles. Some have already been outlined: independence, proximity to judges and a schizophrenic legal system. But it is prosecutors' vision of the legality principle and its impact in the criminal justice system that provide the key to an understanding of prosecutors' cultural resistance.

The faith that Italian prosecutors have in the legality principle is not affected by any of the common criticisms that one can make which question the extent to which the principle is reflected by practice. Even the interviewed prosecutors who admitted that there are ways of avoiding prosecuting or fully investigating certain cases which are not considered important, are firmly convinced that the legality principle is necessary because it will always ensure more equality than any form of controlled discretion. Moreover, in prosecutors' view there is no tension between the legality principle and priorities. In fact, the very nature of the legality principle does not concern when and how a case is dealt with by prosecutors; rather it implies that, sooner or later, the case will be dealt with. A chief prosecutor, who directed a medium to large prosecution office in the north of Italy, claims to have achieved the remarkable result that, in his prosecution office, there were no offences for which prosecution became impossible because of *prescrizione*. He explained this result as a fully effective application of the legality principle, with no concern for the fact that

some cases were treated before others and that the amount of time and resources spent to deal with cases can be significantly different. This confirms what Nelken and Zanier have found: the allocation of resources, including time, is regarded by Italian prosecutors as a limited and acceptable discretionary power that is compatible with the legality principle.⁷⁹ Thus, only limitation of actions breaches the principle of compulsory prosecution. One of the interviewed prosecutors clearly said: “If I leave the files in the closet for too long there will be *prescrizione*. This is a de facto violation of the legality principle”.

Italian prosecutors’ strong belief in the legality principle reflects the aspirations of the constitutional fathers. One of the interviewed prosecutors talked about ‘real’ equality and independence that can only be achieved through the legality principle; he then emphatically added that this principle is “a cause of pride for this country [Italy]”. Prosecutors are however aware of the difficulties that, in practice, the compulsory prosecution causes. In particular, they need to use resources for crimes that they consider very petty. One interviewed prosecutor summarised this very well: “I am obliged to deal, in the same way, with neighbours who had an argument and insulted each other and with robbers”. So, unsurprisingly, the problem is that there are too many cases to deal with and prosecutors do not have any power to close unimportant files without prosecution. Prosecutors propose different solutions to these problems: the organization of the prosecution office could be improved to find the best practices to deal with volume crimes; the government should pass legislation to provide more special procedures to deal with volume crimes faster and should provide more resources; and, more important, the parliament should pass legislation aimed at de-penalizing certain minor offences and introducing forms of diversion.

None of the interviewed prosecutors said that amending the legality principle is an option to solve the problems that the application of this principle causes. In general, there is a great resistance to solutions which imply substantial discretionary choices. Some interviewed prosecutors suggested that the legality principle could be partially moderated with the introduction of (more) legally defined exceptions, but it has to remain the basic principle. Some others accept that the parliament and/or very high ranking prosecutors and judges should be able to issue general guidelines on

⁷⁹ D Nelken and ML Zanier, ‘Tra norme e prassi: durata del processo penale e strategie degli operatori del diritto’ (2006) 1 *Sociologia del Diritto* 143.

priorities. In one case one prosecutor even said that the Minister of Justice should be able to set guidelines; but he also specified that these guidelines should not constitute a “binding directive”. In prosecutors’ view, the guidelines should be persuasive, rather than binding. And they should merely concern how cases are prosecuted, rather than providing de facto exceptions to the legality principle. This is the only acceptable form of discretion.

So far, prosecutors’ image of the legality principle has been analyzed. But why are prosecutors so adamant that this principle must remain enshrined in the Italian criminal justice system? Compulsory prosecution is a formal protection for prosecutors from suspicions or allegations of prosecuting a case for reasons other than the purely legal. Over the last 20 years, this has not prevented prosecutors from being accused of choosing political sensitive cases in order to persecute some political parties. However, the legality principle still provides a strong formal legal basis for prosecutors’ actions. Legally it is very difficult to prove that prosecutors are serving political rather than merely legal interests.⁸⁰ The protection accorded by the legality principle is crucial to maintain prosecutors’ cultural self-image of neutral and impartial legal figures. In prosecutors’ view, equality and neutrality do not just protect victims and accused persons from abuses of power. These are values that, through the interpretation and the application of the legality principle, protect and enhance prosecutors’ professional cultural self-image. Without the legality principle, prosecutors’ role as ‘guardians of the law’ would be undermined, because they would not be seen as impartial anymore. The legality principle is thus necessary to protect prosecutors’ sense of their own neutrality. And, as explained, neutrality is, in prosecutors’ view, crucial to carry out properly their job. For example, Marcello Maddalena, who was chief prosecutor in Turin, has affirmed that only impartial prosecutors could have begun an operation like *tangentopoli* (bribesville) which in the nineties tackled corruption at the highest level - including the conviction of former Prime Minister Bettino Craxi. Maddalena believes this was possible (also) because prosecutors are seen as impartial like judges and, as a consequence, they have the moral and legal status to carry out such a dramatic legal action.⁸¹

⁸⁰ Montana (n 50) p. 490-491.

⁸¹ M. Maddalena, ‘Il ruolo del pubblico ministero nel processo penale’ in Centro Nazionale di Prevenzione e Difesa Sociale. Convegni di studio <<Enrico De Nicola>>: Problemi attuali di diritto e procedura penale, *Il pubblico ministero oggi* (Giuffrè, Milano 1994) p. 47-53.

It is within this scenario that the institutional resistance against the 1989 reform grew up. Prosecutors have a pivotal role as the party that directs and leads the ‘official’ impartial investigation. The fact that prosecutors cannot be impartial in practice is not really a problem in this context (but it raises questions about their professional self-image). Rather the question is: does legal culture influence the criminal justice system? The answer is positive. In the end, although the Italian criminal procedure reflects some of the traditional adversarial features, this ideal of criminal process has not been internalized.

6. Conclusion

John Jackson pointed out that “an analysis [of a criminal justice system] which probes deeper into what the rules mean to the actors themselves is more likely to detect cultural resistance to the changes that are being made”.⁸² The case study of Italy confirms Jackson’s interpretation but it also poses questions about the use of legal culture to understand contemporary criminal justice systems. The analysis of Italian prosecutors’ professional culture shows that when legal actors have a cultural commitment to an ideal of process, this inevitably leads to distrust traditions and images that conflict with their legal culture and, in turn, to mediate the impact of legal modifications. This casts light upon the potential and the limits of their powers in practice. In this way, detecting resistance to legal modifications becomes a way to grasp the values that underpin contemporary criminal justice systems and to understand how procedural mechanisms work. Legal culture is central to this analysis, but, as I said, the aim is not that of a new taxonomy of criminal justice systems, rather to understand how these react to both internal and external influences. If one wants to explain and interpret contemporary criminal justice systems, it is necessary to pay attention to the differences between the ‘law in books’ and the ‘law in action’.⁸³ And legal culture seems to be useful to explain if and why a distance between ‘books’ and ‘action’ is generated by legal actors’ commitment to a certain legal tradition; and how and how far this commitment influences the practice. This is not by any means an invitation to insulate the study of modern criminal justice from the impact of socio-

⁸² Jackson (n 15) p. 746.

⁸³ Nelken (n 7) p. 4-5.

economic dynamics. In their innovative work, Cavadino and Dignan claim that political economy, and in particular neo-liberalism, can influence responses to crime. The authors compared prison population to measure punitiveness. In sum, they claim that neo-liberal societies follow social and economical policies that emphasise exclusionary cultural attitudes towards deviant individuals. On the contrary, social-democratic and, as they call them, Continental European corporatist societies pursue more inclusionary socio-economic policies.⁸⁴ Nelken argues that this thesis can be a plausible candidate to explain punitiveness and the increase of prison population, but there are other independent variables, such as criminal procedure, that need to be considered.⁸⁵ In a similar vein, this paper has tried to demonstrate that legal rules and traditions must not be underestimated. Agencies of crime control perceive their role and respond to pressure in different ways. Investigating legal culture is crucial to explain and interpret these variable processes and, ultimately, to understand contemporary criminal justice systems and responses to crime.

⁸⁴ M Cavadino and J Dignan. *Penal Systems: A Comparative Approach* (Sage, London 2006).

⁸⁵ D. Nelken (n 7) p. 59-66.