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The evolution of the principle of mandatory prosecution in Italy. A problematic case of gradual institutional change

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ABSTRACT

Drawing on historical institutionalism, the paper shows how the principle of mandatory prosecution, enshrined in the Italian Constitution, has been incrementally reconfigured over the last 50 years through a process of layering carried out by judicial actors, without being formally amended. The result is that the principle of mandatory prosecution has been de facto replaced by an opposite principle of discretion, which attributes to public prosecutors the power to define priorities in the exercise of the penal action. This transformation raises serious concerns about the respect for the principle of equality of citizens before the law and about the preservation of the traditional balance of power between political and judicial institutions.

1. Introduction

Italy is the only Western country where the principle of mandatory prosecution is enshrined at the constitutional law level (Newman, 2010; Sluiter et al., 2013; Ruggeri, 2018). Article 112 of the 1948 Italian Constitution, indeed, states that "the public prosecutor has the duty to initiate criminal proceedings". This means that Italian public prosecutors have the obligation to commence a formal investigation every time that a notice of crime is brought to their attention and sufficient evidence exists. Today, however, it is widely recognized, even by judicial actors, that the constitutional principle of mandatory prosecution is actually not applied in Italy, due to the huge number of crime reports and the chronic lack of resources available to public prosecutors' offices. Flooded with over 2 million crime reports every year,[1] and crippled by the shortage of personnel, resources and technological means, public prosecutors are not in the position to investigate all criminal violations and must give priority to only a small amount of all criminal complaints, at the expense of others.

This is confirmed by the high number of prosecutions that fail due to the expiry of the time limit specified under the statute of

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[1] According to the 2019 Official Statistical Yearbook of the Italian Ministry of the Interior, the number of crimes communicated to the judicial authority in 2018 was 2.371.806.

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limitations: more than half of all crimes are declared expired during the preliminary investigation phase, that is before going to trial.[2] In other words, "in spite of the constitutional provision that requires our magistrates to prosecute all criminal violations, penal action in Italy is de facto just as discretionary as in other countries, and perhaps more" (Di Federico, 1998: 378; see also Chiavario, 1993; Fabri, 1994; Kostoris, 2007; Verzelloni, 2014).

The gap between the principle provided by the Constitution and the practice is made even more evident by the fact that today the priority criteria in the exercise of the penal action are established by public prosecutors themselves through the adoption of official regulatory measures. That is to say that the principle of mandatory prosecution has been completely overturned over the last decades. How has this happened?

Drawing on historical institutionalism and on the theory of gradual institutional change, this paper explains how the principle of mandatory prosecution provided by the Italian Constitution has not undergone a disruptive process of change, but rather it has been substantially reconfigured through a process of gradual institutional change, which has taken the form of layering: the constitutional principle of mandatory prosecution has not been displaced nor amended, but it has gradually been altered through the addition of new rules. Moreover, these new rules have not been adopted by political actors and enforced by courts, but rather they have been adopted by judicial actors and enforced by the self-governing body of the judiciary, namely the Higher Council of the Judiciary (HCJ, *Consiglio Superiore della Magistratura*).

This process has generated two problematic and far-reaching consequences. Firstly, the definition of priorities by individual public prosecutors has made the exercise of the penal action in Italy non-homogeneous, resulting in a risk of violation of the principle of equality of citizens before the law. Secondly, it has undermined the balance of power, by assigning to public prosecutors and the HCJ the de facto power to control and define a consistent share of public policy in the criminal sector, without any form of democratic accountability and at the expense of the political bodies.

This paper is structured as follows. The following section presents a literature review on historical institutionalism and on gradual institutional change, stressing that the principle of mandatory prosecution can be considered as an institution. The subsequent section consists of the analysis of the evolution of the principle of mandatory prosecution, in three temporal stages. The final section provides concluding remarks about the impact of this transformation and on the process of gradual institutional change.

2. Theoretical framework

Over the last 25 years, historical institutionalism (HI) has become one of the most influential research approaches in the field of comparative politics and analysis of institutions (Hall and Taylor, 1996; Pierson, 2004; Streeck and Thelen, 2005; Mahoney and Thelen, 2009; Capoccia, 2016; Fioretos et al., 2016).

Despite the several differences between HI and the other two major versions of new institutionalism (NI) – rational choice institutionalism (RCI) and sociological institutionalism (SI) –, all these approaches generally share the same definition of institutions, treating them "as relatively enduring features of political and social life (rules, norms, procedures) that structure behavior and that cannot be changed easily or instantaneously" (Mahoney and Thelen, 2009: 4). Institutions can be formal, such as rules written down and adopted through formal procedures, or informal, such as conventions, routines and codes of behavior (North, 1990; Knight, 1992; Helmke and Levitsky, 2004). It is possible to consider as formal institutional also public policies that introduce rules which assign rights and responsibilities to actors outside the policymaking arena and which need to be implemented and possibly enforced by public authorities on behalf of the whole society (Streeck and Thelen, 2005; Pierson, 2006). Hence, in institutional analysis, the term *institutions* broadly refers to organizations, formal and informal rules, public policies, political regimes and also political economies (Capoccia, 2015). In this sense, the principle of mandatory prosecution can clearly be considered as an institution, due to the fact that it establishes rules which assign rights and responsibilities, which need to be applied by actors different from policy makers (that is magistrates) and are enforced by jurisdictional bodies, such as the Constitutional Court and, as it will be shown later, also the Higher Council of the Judiciary.

Historical institutionalism draws on a perspective that tries to combine both the calculus approach held by rational choice scholars, and the cultural approach of sociologists, seeing individuals as "*both* norm-abiding rule followers *and* self-interested rational actors" (Steinmo, 2008: 126; see also Hall and Taylor, 1996). Therefore, HI focuses on how institutions structure not only actors' expectations, interests and strategies, but also their ideas, goals and worldviews, and on how institutions constitute, in turn, the outcome of individuals' strategies and choices (Steinmo and Thelen, 1992; Zysman, 1994; Hall and Taylor, 1996; Fioretos et al., 2016). Furthermore, a particular attention is put on the "relational nature" of institutions, that is on how certain institutional configurations shape power relations between social groups, and, most notably, on how these institutional arrangements distribute power unequally across the groups, generating situations which do not benefit everyone, but instead create winners and losers. Such situations also represent

[2] Data provided by Directorate general of statistics and organizational analysis of the Italian Ministry of Justice. See https://webstat.giustizia.it. The high number of cases that pass the statute of limitations is mainly due to the inability of the Italian judicial system to manage all the criminal proceedings. Time limit for criminal prosecution, indeed, is not low: prosecution is time-barred after a period equal to the maximum penalty provided for by law for the offence itself (e.g., the limitation period for the different types of corruption ranges from 12 to 30 years). In any case, the limitation period cannot be less than six years for serious offences and four years for other offences, even when the latter are punishable only by a fine. The problem of the slowness of the Italian judicial system has serious implications for the lives of the people accused of offences. Cases cannot be dismissed if preliminary investigations are not carried out by prosecutors. Hence, the accused people often have to wait for a long time, until their cases pass the statute of limitations, to be exonerated from the offences.

sources of conflicts and, therefore, rooms for institutional reconfigurations (Steinmo and Thelen, 1992; Hall and Taylor, 1996). But the feature that distinguishes HI from the other new institutional approaches is the conception of institutions. While rational choice scholars tend to view institutions as coordinating mechanisms adopted in order to sustain a strategic equilibrium, and sociologists see institutions as norms that rule social interactions, historical institutionalists conceive institutions as the legacy of historical processes (Hall and Taylor, 1996; Pierson, 1996; Thelen, 1999). In other words, HI "brings questions of timing and temporality in politics to the center of the analysis of how institutions matter" (Orren and Skowronek, 1994/2018 :312). Saying that history matters, as noted by Steinmo (2008), means at least three things: first, the events occur within a historical context, which has direct consequences for the events themselves; second, actors can learn from past experiences, hence it is not possible to understand behaviors or decisions without taking into account the temporal dimension and the particular social, political, economic and cultural context in which they occur; third, the past also shape current actors' expectations.

On the base of these assumptions, HI scholars have extensively investigated the concept of "path dependence", that is the idea that the choices made when an institutional path is taken (or a policy is initiated) will have a determinate influence on the development of the institution (or policy) itself (Peters, 1999; Skocpol, 1992). As underlined by Thelen (2004), the analysis of this concept has led to the emergence of two large literatures, one focused on "critical junctures" (crucial moments of institutional formation that determine and shape the developmental paths of institutions) and one concerned on "feedback effects", that is mechanisms through which institutions, once adopted, evolve in reaction to changing environmental conditions and structure their own future developmental path by constraining successive choices. The latter aspect has been analyzed by HI scholars by recourse to arguments about positive feedbacks and "increasing returns", understood as situations in which once a particular set of institutions is chosen, actors adapt their strategies and behaviors to the existing institutions in ways that reinforce the prevailing pattern, making the other previously possible alternatives increasingly remote (North, 1990; Collier and Collier, 1991; Mahoney, 2000; Pierson, 2000, 2003, 2004; Capoccia and Kelemen, 2007; Mahoney and Thelen, 2009).

The notion of path dependence has prompted historical institutionalists to separate the critical junctures moments in which institutions originate from the long periods of institutional continuity. Therefore, the main tendency in HI scholarship has been to conceive institutional change in "punctuated equilibrium" terms, that is assuming that institutional development is characterized by long periods of institutional stability or stasis, periodically disrupted by episodes of sudden innovation, usually associated with some kind of exogenous shock, such as wars, revolutions or economic crises, which opens possibility for agency and institutional transformation (Streeck and Thelen, 2005; Mahoney and Thelen, 2009; Thelen and Conran, 2016).

However, in the last two decade a novel theoretical framework for institutional change has emerged in HI literature, focusing on how institution may often change in an endogenous and incremental way. The fundamental idea behind this new approach is that institutions do not necessarily undergo processes of dramatic transformation, opened by exogenous shocks, but they may be reconfigured through gradual and incremental moments of change, which are produced endogenously and result in substantive institutional change (Hacker, 2005; Streeck and Thelen, 2005; Mahoney and Thelen, 2009). In this view, two endogenous factors provide the potential for change: the power-distributional component of institutions and the extent of compliance.

Regarding the former, Mahoney and Thelen emphasize how "institutions are fraught with tensions because they inevitably raise resource considerations and invariably have distributional consequences" (Mahoney and Thelen, 2009: 9). Formal and informal rules, indeed, implicate unequal allocation of resources, and this is particularly true for political and political-economic institutions, which mobilize significant and highly valued resources. This means that the process through which institutions are designed reflects the conflict between the different power groups and results in institutional arrangements which may benefit some specific groups and meet their interests and goals, at the expense of another, or constitutes the outcome of "ambiguous compromises" between the actors. This uneven distribution of power makes institutions always subjected to contestation from the coalition: the groups who benefit from the current institutional arrangement will try to maintain it, whereas those who are disadvantaged will try to reconfigure it. In light of this, "there is nothing automatic, self-perpetuating, or self-reinforcing about institutional arrangements"; on the contrary, institutions "are always vulnerable to shifts", because they constitute the outcome of variable compromises and coalitional dynamics (Mahoney and Thelen, 2009: 8; see also Thelen, 2004). In this perspective, shifts in the balance of power represent a significant source of institutional change.

As far as the second source of change is concerned, that is compliance, it emerges from the inevitable "gaps" between the rules and their interpretation and enforcement (Streeck and Thelen, 2005). As outlined by Mahoney and Thelen (2009), the crucial role of compliance variable in explaining institutional change is linked to at least four factors. Firstly, rules can never be precise enough to regulate all the possible complex situations that occur in the real world, hence their enforcement is complicated and opened to interpretation and contestation. Secondly, at the time when rules are defined, actors face informative and processing constraints and

Table 1
Types of gradual institutional change.

	Displacement	Layering	Drift	Conversion
Outcome	Removal of old rules Introduction of new rules	Introduction of new rules	Neglect of old rules Changed impact or enactment of old rules	Changed impact or enactment of old rules
Veto possibilities	Weak	Strong	Strong	Weak
Level of discretion in interpretation or enforcement	Low	Low	High	High
Types of change agents	Insurrectionaries	Subversives	Parasitic symbionts	Opportunists

cannot anticipate possible future situations. Thirdly, institutions are always embedded into a set of shared understanding, which may exist to differing degrees and may change over time. Fourthly, another door for change to occur in rule's implementation is opened by the fact that the actors who design rules are usually different from those who will be asked to apply and enforce them.

Scholars in this new tradition identify four main types of endogenous institutional change: displacement, layering, drift and conversion (see Table 1). Displacement refers to the process through which existing rules are removed and replaced by new ones. This may happen when new institutions are introduced and come into conflict with the previous set of institutions (Streeck and Thelen, 2005). Layering occurs when new rules are added to the existing ones in order to change the ways in which the original rules structure behavior. This process does not lead to the displacement of the original rules, which instead are altered by amendments, revisions or addition of new rules, that are attached to the existing ones (Schickler, 2001; Mahoney and Thelen, 2009). Drift occurs when original rules are deliberately not adapted to changing external conditions, with the result that their impact changes (Hacker, 2005). Conversion indicates situations in which old rules are not changed but are interpreted and applied in different ways (Mahoney and Thelen, 2009).

Based on Mahoney and Thelen (2009).

According to Mahoney and Thelen (2009), the different types of institutional change are associated with two explanatory dimensions: differences in the political context (in particular the presence of strong or weak veto possibilities) and characteristics of the targeted institution (in particular the level of discretion in interpretation and enforcement). Displacement and conversion are more likely to occur when veto possibilities are weak, whereas they are improbable when there are strong veto players, that is actors who can rely on strong institutional and extra-institutional means to block change attempts, because agents who push for change face several difficulties in mobilizing resources and assembling a coalition that can displace or convert existing institutions. In those cases, instead of displacement and conversion, change agents can resort to drift and layering, because they do not require changing the old institutions or altering their enactment. The kind of institutional change is determined also by the extent to which institutions are opened to contended interpretations and different enforcement. In this view, drift and conversion are more likely to happen when rules are ambiguous, allowing a high level of discretion in their interpretation and enforcement. On the contrary, layering and displacement are likely to occur when rules do not permit discretion in their own interpretation or enforcement, and, consequently, change actors cannot exploit the distance between rules in the books and rules in the practice.

2.1. The evolution of the principle of mandatory prosecution

2.1.1. Institutional creation

The principle of mandatory prosecution was introduced in Italy in 1948, with the adoption of the republican Constitution. The principle was established with the aim of avoiding that the public prosecutors' powers were exercised in a discriminatory way or influenced by the political power, as happened during Fascism, therefore guaranteeing the equal treatment of all citizens before the law. For that purpose, prosecutors were also empowered to supervise the judicial police during investigations (Article 109 of the Italian Constitution).[3]

The principle of mandatory prosecution did not constitute a complete novelty in relation to the then-existing judicial system. The Royal Legislative Decree no. 288/1944, indeed, had already reformed the 1930 Italian code of criminal procedure, removing the right of public prosecutors to autonomously dismiss criminal proceedings and requiring for such a decision the judicial authorization (Ruggeri, 2018). That reform had not introduced a strict duty for public prosecutors to initiate criminal proceedings, but, anyway, it had diminished the complete autonomy of prosecutors in the exercise of the penal action.

In the Constituent Assembly, elected in June 1946, the need to enshrine in the new republican Constitution the principle of mandatory prosecution emerged clearly. "It is necessary that we affirm in the Constitution a fundamental principle of the modern State, namely that the public prosecutor cannot exercise a discretionary activity in deciding whether or not to prosecute", declared Giovanni Leone in the Constituent Assembly. "In other terms – he added – when the public prosecutor becomes aware of a *notitia criminis*, he does not possess a discretionary power, but must bring the issue of whether or not to prosecute to the attention of a jurisdictional body" (cited in Fiandaca and Di Chiara, 2003: 239–40).

In the Constitutional Commission of 75 members, entrusted of elaborating the Constitution's general layout, parties of liberal orientation and the Christian Democratic party (which was the largest party in the Constituent Assembly) agreed on the introduction of the principle of mandatory prosecution, despite having divergent views on the institutional status to be attributed to the public prosecutor (in particular, on whether he should be considered representative of the executive power or the judicial authority). In

[3] In Italy criminal and civil cases are conferred to ordinary courts, which are organized in three instances: tribunals, courts of appeal and Court of Casssation (which adjudicates on points of law only). Public prosecutor's offices are attached to each of the ordinary courts. Italian public prosecutors are part of the judicial body and enjoy de facto the same institutional guarantees of independence as judges. Consequently, between the various public prosecutors' offices there not exists any hierarchical relationship: the prosecutorial system is characterized by a decentralized organization and does not provide for any authority at the top of the system empowered to give instructions about the exercise of the penal action in the country. Each public prosecutor's office, however, is hierarchically organized internally. Each office is headed by a chief magistrate who has the task to organize and coordinate the activity carried out by the other members of the office. Starting from 1960s, the hierarchical power of the chief prosecutor has been gradually weakened, through legislative reforms and initiatives of the Higher Council of the Judiciary. Nevertheless, the chief prosecutor still retains some supervisory powers on the office members, in particular in order to guarantee the efficient exercise of the penal action. For an overview on the Italian judicial system see Fabri (2008).

contrast, the leftist parties (communists and socialists) were afraid that the judiciary could become an "uncontrolled power" and decoupled from the popular will. Consequently, they proposed to recognize the discretionary character of the penal action and to put the public prosecutor under the executive power as a form of control of the judicial activity. After all, according to Ferdinando Targetti, representative of the Socialist party, "in certain cases of popular movements, delaying or suspending the penal action may be the only way to restore legality" (cited in Rigano, 1982: 134; see also Monaco, 2003).

However, the proposal made by the leftist parties was quickly abandoned and the rule which established the opposite principle of mandatory prosecution was accepted without any contest (Rigano, 1982). The debate on this issue took place quickly and without conflict also in the Constituent Assembly, leading to the approval of the current Article 112 of the Constitution (Neppi Modona, 1987).

The interpretation of the principle of mandatory prosecution as the obligation of public prosecutors to initiate criminal proceedings for any crime report has never been disputed, and it has always been enforced by the Italian Constitutional Court (ICC) over the decades.

With ruling no. 22 of 1959, the ICC has reminded that "the Constitution has explicitly declared the principle of mandatory prosecution, excluding the opposite principle of discretion of the public prosecutor on whether or not the criminal proceeding should be initiated". With ruling no. 155 of 1974, the Court has reaffirmed that "the principle of mandatory prosecution is aimed at excluding any discretion of the public prosecutor". With ruling no. 84 of 1979, the Court has defined the principle of mandatory prosecution "as the element that contributes to guarantee, on the one hand, the independence of the public prosecutor in the exercise of his own function, and, on the other, the equality of citizens before the law".

The strict interpretation of the rule has been confirmed even after the entry into force of the 1988 new code of criminal procedure, which introduced an adversarial-inspired trial system in Italy. With ruling no. 88 of 1991, the Constitutional Court has indeed reiterated that the principle of mandatory prosecution "constitutes the point of convergence of a complex of constitutional system's basic principles, so that its breach would alter the overall structure. Consequently, the introduction of the new trial model has not scratched it, nor could have scratched it". The basic principles mentioned by the Court are represented by the principles of legality, of equality of citizens before the law and of independence of the public prosecutor. According to ruling no. 88 of 1991, this interpretation:

Involves not only the rejection of the opposing principle of opportunity which operates, to varying degrees, in the systems with discretionary penal action, allowing the prosecution body not to act on the basis of judgments that are unrelated to the objective groundlessness of the *notitia criminis*; but it also implies that in doubtful cases the penal action should be exercised and not omitted.

In other words, the investigations cannot fail to be carried out on the basis of assessment of opportunity, but only when the crime report manifests itself as clearly unfounded (Catalano, 2008).

2.2. Institutional layering

Despite the low level of discretion in the interpretation of the principle of mandatory prosecution and its constant enforcement by the Italian Constitutional Court, the level of discretion in implementation of the principle has always been high. In practice, the rule has been applied in a very flexible manner, because of the limited resources available to the public prosecutors' offices, which are forced to give priority to only certain crimes and to put aside the rest, so much that the principle of mandatory prosecution is now considered just a "myth" and it is possible to affirm the existence of a hidden principle of discretion in Italy (Di Federico, 1991, 1998; Chiavario, 1993; Grande, 2000).

In light of this awareness, an active debate has developed amongst scholars and also magistrates on this issue since the 1970s. In 1976, Di Federico emphasized that, in fact, penal actions in Italy are largely discretionary (Di Federico, 1976). In 1979, Giovanni Conso, who later became judge of the Italian Constitutional Court, Minister of Justice and member of the Higher Council of the Judiciary, recognized that "it is not possible to talk in concrete terms about obligatoriness, given the range of countless offences that allow, rather require the public prosecutors' office to ration the times and the ways of its intervention" (Conso, 1979: XVI). According to Conso, what is mandatory "is not so much the exercise of the penal action", but rather "the making of priority choices", which however means that all the non-priority cases are set aside and evidently will end up failing due to the expiry of the time limit specified under the statute of limitations.

The gap between the interpretation of the rule and its concrete application, characterized by the use of priorities by public prosecutors, opened the door for a reconfiguration of the rule itself. The actors who exploited this opportunity were not political but rather judicial. This has been made possible by not only the incapacity of the parliament to deal with this issue and reach an agreement able to meet the supermajority required for approval of constitutional amendments,[4] which constituted a significant veto point, but also by the process of substantial expansion of judicial power which has occurred in Italy starting from the 1960s (in particular since the Italian Higher Council of the Judiciary, established by the Constitution, became operative in 1959; Guarnieri, 1995).

The causes of the expansion of the judicial power in Italy are several: the strengthening of the judicial independence, the dismantling of the traditional system of judicial career and the erosion of the hierarchical structure within the judiciary, the spread of

[4] Article 138 of the Italian Constitution declares: "Laws amending the Constitution and other constitutional laws shall be adopted by each House after two successive debates at intervals of not less than three months, and shall be approved by an absolute majority of the members of each House in the second voting. Said laws are submitted to a popular referendum when, within three months of their publication, such request is made by one-fifth of the members of a House or five hundred thousand voters or five Regional Councils. The law submitted to referendum shall not be promulgated if not approved by a majority of valid votes. A referendum shall not be held if the law has been approved in the second voting by each of the Houses by a majority of two-thirds of the members".

the practice of judicial review among ordinary courts, the development of a more activist conception of the judicial function, the expansion of the institutional and political role played by the Higher Council of the Judiciary, the acquirement of full control over police forces by prosecutors (Di Federico, 1998; Guarnieri and Pederzoli, 2002).

In particular, since 1959 the Higher Council of the Judiciary has progressively expanded its role beyond the management of judicial personnel and has acquired a growing influence over the decisions adopted by the executive and legislative powers on all matters concerning the magistrates and the judicial system, also through the development of organized factions inside the judiciary (Guarnieri, 1994; Di Federico, 2012; Piana and Vauchez, 2012).[5] This expansion has been determined by a combination of factors: legislative reforms passed by Parliament, the development of new interpretations of the existing laws by the HCJ, and autonomous initiatives of the Council (Di Federico, 2012). Since 1960s, for instance, the HCJ started to adopt acts which are not provided for by neither Constitution or law, such as directives, resolutions, circular letters (Zanon and Biondi, 2006).

The first step in the process of reconfiguration of the principle of mandatory prosecution was made exactly by the Higher Council of the Judiciary, which, on July 31, 1977 passed a directive which urged public prosecutors to plan their activity "in order to permit in the first place the examination of the most serious proceedings" (cited in Zagrebelsky, 1991: 364–5).

The next steps, and the most crucial ones, were made by individual public prosecutors. On March 8, 1989, the president of the Court of Appeal and the prosecutor general of Turin issued an internal memo, in which for the first time he emphasized the need to define priorities in the management of criminal proceedings:

It is necessary to avoid wasting time, effort and money of the State in activities that are practically useless, such as the meticulous and scrupulous undertaking of procedures destined inevitably to expire under the statute of limitations. This requires a scrupulous filter of priorities to be assigned to individual criminal proceedings so that the most important proceedings can move forward quickly, without the fear of reaching the statute of limitations, and without engulfing offices, which are already structurally weak, with large masses of useless work destined to be completely thwarted (cited in Zagrebelsky, 1989: 1616–7).

In line with these indications, on November 16, 1990, the chief prosecutor of Turin, Vladimiro Zagrebelsky, passed, for the first time in Italy, an internal memo explicitly aimed to set "criteria in the conduct of preliminary investigations regarding crime reports" (Zagrebelsky, 1991). In this document, Zagrebelsky stated that "it is necessary to recognize that the impossibility of treating all the crime reports received by the office (about 180 thousand per year, author's note) implies that the task of setting priority criteria cannot be shirked". He also admitted that "actually, non-priority crime reports – in the foreseeable future – are destined not to receive adequate consideration". Zagrebelsky added that the definition of priority criteria does not conflict with the obligation provided for in article 112 of the Constitution, because the failure to exercise a prompt and properly prepared penal action for all the crime reports which are not unfounded, does not derive from assessments of opportunity related to individual crime reports, but finds its grounding in the objective limited capacity of the entire judicial system, and this office in particular, to cope with all the workload.

For these reasons, Zagrebelsy ordered all magistrates of his office to manage the criminal proceedings on the basis of the following scale of priorities: 1) firstly, the proceedings in which the suspect has been subjected to pre-trial detention; 2) then, the proceedings related to offences to be considered serious because of the suspect's personality, the harm suffered by the criminally protected interest, the reiteration of the crime, the material and non-material damage that has been caused and has not been compensated or removed; 3) finally, the residual proceedings.

To justify his decision, Zagrebelsky mentioned the directive adopted by the Higher Council of the Judiciary in 1977 and emphasized that the need to define priority criteria had not been determined by the entry into force of the new code of criminal procedure, which actually had only "made the need to face this issue more evident and urgent", since "the consequences of the belated management of crime reports, in contrast to what happened with the previous code, can immediately be contested by the parties in trial and by the public" (Zagrebelsky, 1991: 362–8).

Starting from Zagrebelsky's initiative, it has gradually become common practice for chief prosecutors to define priority criteria in the management of crime reports. At the beginning, the phenomenon was not always easily observable, since these decisions were made through the adoption of internal memos, but also through oral communications within the public prosecutors' offices (Fabri, 1997). Anyway, similar internal memos were adopted by the chief prosecutors of Padua (October 4, 1993), Genoa (April 22, 1995), again, Turin (May 27, 1999), Bologna (November 4, 2002; see Ichino, 1997; Mollace, 2010). After the 2006 reform of the judicial system (Legislative Decree no. 106/2006), which gave chief public prosecutors the powers to determine the internal organization of their offices, the tendency to define priority criteria in the exercise of the penal action has become even more evident, so much so that the Higher Council of the Judiciary itself recognizes that today "almost all the organizational projects of the public prosecutors' offices includes an explicit reference to priority criteria" (HCJ 2016, 5).

Some of these organizational projects are public and available online, and allow to understand how the various public prosecutor's offices end up defining different priority criteria in the exercise of the penal action. For instance, the 2018 organizational project of the public prosecutor's office of Turin orders the magistrates of the office to manage criminal proceedings following this scale of priorities: 1) proceedings with suspects subjected to pre-trial detention; 2) offences committed in violation of the laws on health and safety in the workplace, offences against the laws on road safety, offences committed in the field of immigration; 3) offences carrying a penalty of

[5] The Higher Council of the Judiciary is composed of 27 members. It is presided over by the President of the Italian Republic. The President and the General Prosecutor of the Supreme Court of Cassation also sit on the council by right of office. The other 24 members of the council are elected: two-thirds are elected by magistrates among their colleagues and one third is elected by Parliament from among law professors or lawyers with at least 15 years of professional experience. The elected members serve a term of four years. The HCJ is entrusted by the Constitution with all decisions concerning magistrates (promotions, transfers, discipline and so forth).

more than four years in prison; and so forth (Public Prosecutor's Office of Turin, 2018).

The 2018 organizational project of the public prosecutor's office of Lamezia Terme provides a different scale of priorities: 1) proceedings with suspects subjected to pre-trial detention; 2) cases of manslaughter and serious injuries, with particular attention to vulnerable people; 3) violations of environmental and construction laws; 4) violations of the laws on safety in the workplace; and so forth (Public Prosecutor's Office of Lamezia Terme, 2018).

The 2016 organizational project of the chief prosecutor of Bergamo identifies another different scale of priorities: 1) proceedings with suspects subjected to pre-trial detention; 2) cases in which jurisdiction is conferred to the Assize Courts; 3) cases in which jurisdiction is conferred to the tribunals in collegiate composition; 4) cases in which jurisdiction is conferred to the tribunals in monocratic composition; and so forth (Public Prosecutor's Office of Bergamo, 2016). The result is a very heterogeneous exercise of the penal action among the different territories of the country.

The legislator has never taken decisions on this matter. All attempts made by parliament in order to regulate the de facto discretionary exercise of the penal action by the public prosecutors' offices have failed.

In 1993, the Commission for the reform of the judicial system, appointed by the Minister of Justice Giovanni Conso, and composed mostly of magistrates, recognized the impossibility of prosecuting all the crime reports and therefore stated that it was necessary to set priorities in the exercise of the penal action.

Even the initial draft reform drawn up in 1997 by the Joint Committee for the reform of the second part of the Constitution provided that the penal action continue to be mandatory, but also that the law should have determined the rules necessary to make this principle effective. However, the final version of the draft of the constitutional reform submitted to the parliament confirmed, with minor variations, the current wording of Article 112 (Catalano, 2008). Moreover, the reform project was never approved by parliament.

On December 5, 2001, the Senate passed a motion which committed the government to allow the parliament to lay down priority criteria in the exercise of the penal action, at the proposal of the Minister of Justice and the prosecutor general of the Court of Cassation. However, even this indication has never been implemented.

On April 7, 2001, Italian Prime Minister Silvio Berlusconi and Minister of Justice Angelino Alfano submitted to the Chamber of Deputies a constitutional bill for the reform of the section of the Constitution dedicated to the judiciary. The bill also included the reform of Article 112 of the Constitution, maintaining the principle of mandatory prosecution, but adding that "it is regulated by criteria established by law". Nevertheless, even this reform attempt failed due to the fall of the government seven months later.

If the Italian legislator failed to regulate the use of priority criteria in the management of crime reports, it was able to introduce priority criteria in the scheduling of criminal proceedings by courts (Vicoli, 2003). The first intervention occurred in 1998 with the approval of Legislative Decree no. 51, article 227 of which established the single judge of first instance. With the aim of providing a transitional regulation to ensure the speedy disposal of pending proceedings, the rule dictates that three criteria should be taken into account in the scheduling of court hearings: the seriousness and the offensiveness of the crime; the prejudice that could have arisen from the delayed fact-finding; the interest of the offended person. The second paragraph of the aforementioned article also required public prosecutor's offices to timely inform the Higher Council of the Judiciary about the priorities that were adopted.

The second intervention on this matter, this time not of a transitory but of a permanent character, is represented by the introduction in 2000 of article 132 bis into the implementing provisions of the code of criminal procedure (Decree Law no. 341, converted into law through Law no. 4/2001 and then amended and supplemented in 2008, 2013, 2017 and 2019). The rule provides for a series of priorities in the scheduling of criminal proceedings on account of the seriousness and social alarm (*allarme sociale*) of crimes. Article 132 bis also states that "court managers adopt the organizational measures necessary to ensure that criminal proceedings for which priority is claimed to be finalized quickly".

These interventions have clearly had an indirect impact on the activity carried out by public prosecutors' offices. However, they aim to define priority criteria for criminal proceedings which have already been initiated, and not for crime reports which still need to be investigated (and which call into question the principle of mandatory prosecution laid down in Article 112 of the Constitution; see Kostoris, 2007; Verzelloni, 2014).

2.3. Enforcement of the new institutional setting

The principle provided by Article 112 of the Italian Constitution, as explained earlier, has been reconfigured through a process of gradual institutional change, which has taken the form of layering and has seen individual public prosecutors as change actors. In this process, a crucial role has been played by the Higher Council of the Judiciary, which promoted the definition of priority criteria by public prosecutors with the 1977 directive, and then enforced the internal memos adopted by the latter.

On June 20, 1997, the Disciplinary Section of the HCJ declared that a magistrate, who – in the absence of priority criteria set by the chief prosecutor – had created a conspicuous backlog by having given priority to crime reports characterized by greater seriousness and social alarm (*allarme sociale*), had not committed any disciplinary offence. In the decision, the HCJ held that "the impossibility of promptly managing all crime reports […] implies that one cannot escape the task of defining priority criteria", grounded on the seriousness and offensiveness of each species of crimes (cited in Russo, 2016: 8). The HCJ Disciplinary Section added:

This does not sound like an insult to the principle of mandatory prosecution so far as this solution does not derive from assessments of opportunity, but finds its grounding in the objective limited capacity of the entire judicial system, and the public prosecutor's office, to cope with all the workload.

Curiously, the last part of this sentence echoes exactly the words with which in 1989 Zagrebelsky had justified the adoption of the first internal memo which established priority criteria in the exercise of the penal action.

After the entry into force of the 2006 reform of the judicial system, the HCJ, in its resolution of November 9, 2006, framed the

concept of priority criteria in organizational terms: "The managers of courts and prosecution offices can and must, as part of their powers in the administration of justice, adopt initiatives and measures suitable for streamlining the handling of matters and the use of the (scarce) available resources" (cited in HCJ, 2016: 2).

With the resolution of July 21, 2009, the HCJ established that, in order to ensure the reasonable duration of trials:

> The managers of public prosecution's offices perform a careful, constant and detailed analysis of the flows of proceedings and the pending proceedings, and (…) in compliance with the principle of mandatory prosecution, after hearing the presidents of the courts, they draw up criteria for the handling of criminal proceedings. (cited in HCJ, 2016: 4)

With the resolution of July 9, 2014, the HJC gave managers of courts the task of indicating, in the organizational charts, priority criteria for the management of criminal proceedings, while with regards to prosecution offices it stated:

In the absence of a system of priorities, determined by the legislator, the identification of guidelines aimed at avoiding disparities in the exercise of the penal action must be left to the individual managers of public prosecution offices, taking into account the criteria adopted by the corresponding courts (cited in Russo, 2016: 10).

The process of enforcement of the reconfigured principle of mandatory prosecution has been strengthened in 2016 by the adoption by the HCJ of the "Guidelines on priority criteria and management of the flows of proceedings – relations between prosecution offices and courts". In the document, the HCJ stresses that "the president of the court and the chief prosecutor are tasked with identifying, in application of the principles of coordination and loyal collaboration, the plans which permit the implementation of priorities and the management of the flows of proceedings" (HCJ, 2016: 11).

But the most important content of these guidelines is that the HCJ explicitly states the new interpretation of the principle of mandatory prosecution, defined as "sustainable obligation in the presence of inadequate resources and hypertrophic demand for justice" (HCJ, 2016: 7).

3. Conclusions

This paper has shown how the principle of mandatory prosecution, enshrined in the Italian Constitution, has been incrementally reconfigured over the last 50 years, through a process of layering, characterized by the widespread adoption by public prosecutors' offices of internal memos which establish priority criteria in the exercise of the penal action, and by the enforcement of those internal measures by the self-governing body of the judiciary, namely the Higher Council of the Judiciary. The research has identified the main sources of this transformation in the shift in balances of power between the executive and the judiciary, and in the gap between the interpretation of the principle and its concrete application.

Even if the process of reconfiguration has been incremental rather than disruptive, and it has not been headed by the legislator, but by judicial actors, the change has been substantial, so much that it is possible to claim that the principle of mandatory prosecution has been de facto replaced by an opposite principle of discretion, which attributes to public prosecutors the power to define priorities in the exercise of the penal action. This process raises serious problems.

Firstly, the definition of priorities by individual public prosecutors makes the exercise of the penal action in Italy non-homogeneous. Each public prosecutor's office can establish its own priorities, with the consequence that a crime can be considered a priority (and then prosecuted) in one area under the jurisdiction of a particular prosecution office, but not in another area covered by a different office. This situation clearly leads to an indirect violation of the principle of equality of citizens before the law, creating a huge paradox, given that the principle of mandatory prosecution was enshrined in the Italian Constitution with the aim of guaranteeing the equal treatment of citizens before the law (Di Federico, 1998: 378).

Secondly, and more importantly, at the end of this process, public prosecutors and the HCJ have gained a substantial and de facto power to control and define a consistent share of public policy in the criminal sector, without any form of democratic accountability and at the expense of the political bodies which, in a system with discretionary prosecution, should be entitled to do so (Di Federico, 1998; Vicoli, 2003). That is to say that the traditional balance of power between political and judicial institutions has been undermined to such an extent that many Italian legal scholars now refers to public prosecutors as the "fourth power', along with the legislative, the executive and the judicial ones (Grande, 2000: 241).

This paper provides some insights to better understand the process of gradual institutional change, and in particular its potential sources, especially those related to the issue of rule compliance. Indeed, there could be cases, such as the one described here, where institutions may be subject to strict interpretation and strong enforcement by the entrusted authorities, but, at the same time, they may not be applied in practice.

The case study also shows that the new institutional layers may be enforced by authorities that are different from those which have enforced existing institutions. The internal memos adopted by public prosecutors' offices to reconfigure the constitutional principle of mandatory prosecution have been enforced by the Higher Council of the Judiciary, which during that time has acquired an increasing power over decisions related to the judicial system. This particular scenario, therefore, seemingly needs to be associated with a shift in the balance of power in order to open the door for a process of institutional change.

Another useful insight is provided by the long-term effects created by the process of institutional creation of the principle of mandatory prosecution. It has been noted, indeed, that "none of the founding fathers of our constitution doubted that such a provision could be de facto observed, none doubted that all penal violations could be actually and equally prosecuted" (Di Federico, 1998: 375; see also Neppi Modona, 1987). Indeed, this paper has explained how the principle was approved without any contest or doubt in the 1947 Italian Constituent Assembly. That decision was mainly based on a reaction to the Fascist period, during which the activity of public prosecutors had been strongly politically influenced by the regime. However, driven by the desire to finally ensure the

independence of the judiciary, the Italian Constituent Fathers agreed to enshrine in the Constitution a principle that is just an ideal, which is almost impossible to achieve. It is precisely this gap between the principle and the practice that, as outlined in this paper, in the first place has opened the door for a process of institutional reconfiguration. This case demonstrates that there could be cases where political actors generate institutions which may be merely ideal and completely unrelated to pragmatic considerations.

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