

Cultural Resistance to Moral Panics and the Definition of the Crime Problem

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1. Introduction

The following study is intended to illustrate the value of empirically informed approaches to comparative criminal justice -requiring close analysis of rules, roles and procedures- as a way of throwing light on central criminological topics. The issue considered here has to do with the rise of 'punitiveness' internationally and the part played by criminal justice actors in this process. On the basis of empirical research in Italy this paper shall be focusing on the role of prosecutors in responding to political and public calls for more severity against crimes by illegal immigrants. Common sense, experience and stigmatization of crime and deviance seem to be the basis on which the crime control policies are debated and eventually implemented. Insecurity and fear of crime are the enemies for an effective legal system. What is left for specialist crime control agencies? The Italian case can demonstrate that legal actors, in particular prosecutors, can still effectively participate in the developing of the criminal justice discourse. I will argue that prosecutorial practice can possibly provide the information to understand the socio-legal conditions that shape prosecutors' role during the pre-trial phase. This role is far from being merely reactive to certain social, historical and cultural developments. Prosecutors' reactions appear to be aimed at restating their role of guardians of the law. While they react to external influences they try not to adapt to them. In this way they partially mediate the impact of moral panics.

The findings come from 54 semi-structured interviews that were conducted between April and October 2006. Five consultants, two prosecutors, one police officer and two lawyers were first interviewed as informants. Then, the actual interviews were carried out with 27 prosecutors, 11 police officers and 11 lawyers. These interviews were conducted in 10 prosecution offices (and with lawyers and police officers working in the same area) of various sizes located mainly in the north, but also in the center and in the south of Italy.

2. Crime and criminality in Italy

Like many other countries, Italy is facing the problems of risk and insecurity that late modernity brings in its wake. In Italy public discussion of these problems emerged later than in some other Western countries (in the second half of the nineties). This is seen, for example, in the fact that until quite recently, everyday crime in Italy was referred to as 'micro- criminality'- thus distinguishing it

from the objectively greater threats to the state posed by terrorism, organized crime and political corruption. Although these major problems have by no means disappeared, worries about security reported in the media are increasingly linked to illegal immigration (or even immigration as such). Illegal immigrants are said to be disproportionately involved in so called street or diffuse crimes such as mugging, drug pushing and burglary.

The center-right and the center-left political coalitions propose different solutions to these crime problems. The former are more focused on repression, the latter point more to the underlying social conditions that create social conflicts. But even the mass media that are ideologically on the center-left, and normally criticize law and order campaigns, do acknowledge that there is an issue of crime and security, and center-left administrations use rhetoric that is increasingly indistinguishable from their political opponents. Public opinion surveys also suggest high rates of public concern. In addition, citizen committees have been elected in the districts of many cities and towns so as to report and discuss problems concerning crime and deviance within their areas. Their efforts are not only directed against specific crime problems, but incivilities, deviance, immigration, and disorder in general appear to be crucial issues as well.

All this means that there is the potential in Italy as elsewhere for an explosion in prison numbers. And, in fact, the number of immigrants in prison has gone up exponentially since they started arriving in the 1990's (and this does not include those being held in special prisons that until recently were called places of temporary permanence). This is because illegal or irregular immigrants now provide the workforce for crimes such as drug pushing that, if associated with recidivism, are often punished with a custodial sentence. However, despite legislative measures that are clearly designed to tackle street crime and illegal immigration, overall numbers in prison in Italy (around 100 per 100,000 of the population) remain within the average range of what leading comparative penologists have dubbed the 'Continental Corporatist' societies (Cavadino & Dignan 2006). By comparison 'neo-liberal' societies such as the U.S.A. (700 per 100,000), or even the U.K. (150 per 100,000) show much higher rates of incarceration. Southern European countries generally have higher rates of immigrants in prison than do neo-liberal societies. What needs to be understood is why numbers in prison have not risen even higher in places such as Italy. For many authors differences in the organization of politics and the economy are the crucial explanatory variables. However, this ignores a crucial intermediate variable that affects how many people actually end up in prison - the operation of the criminal justice system. This requires giving close attention to the roles of legal actors, such as prosecutors, and the types of criminal procedure that shapes their roles. The significance of differences in the role of prosecutors in continental and common law systems was at the center of the classical debate in comparative criminal procedure

between Goldstein and Marcus (1977) and Langbein and Weinreb (1978). France, Germany and Italy really exercised control over how police conducted their investigations. However, the parties to the controversy may have been largely speaking past each other. If the question was how Continental methods of control over the police would work in the U.S.A., then Goldstein and Marcus were right that such methods would be insufficient to avoid potential misbehavior by the police. But, insofar as the issue was trying to understand what other places were actually trying to do -and sometimes succeeding in doing- in the context of their own structures and expectations, then Langbein and Weinreb had the better of the argument.

The research presented here has to do with trying to characterize these (changing) structures and expectations as they currently apply to prosecutors in Italy. But the issue addressed is not the traditional one, their role in supervising the police. Rather it is the less discussed question of whether, when, where, why and how prosecutors in continental legal systems exercise their powers so as to blunt trends towards increasing punitiveness of the weak and marginal sectors of the society. Taking Italian prosecutors as a case-study is particularly interesting and instructive for this purpose as for the past twenty years their status is supposed to have been made more like that of prosecutors in the common law world.

3. Prosecutors' cultural resistance to moral panics

Over the last 15 years different governments have taken a number of steps to tackle street crime and illegal immigration and reassure the public that they are protecting their security. Arguably, the most draconian of the measures taken to tackle illegal immigration is the Bossi-Fini Act was passed in 2002 by the then center-right government. It sets out that a non-Italian national who does not comply with a deportation order shall be arrested and immediately sent for trial. In these cases the punishments range from a minimum of six months to a maximum of four years imprisonment, excluding mitigating and/or aggravating circumstances. In theory, prosecutors cannot postpone dealing with these cases. The code of criminal procedure requires that the prosecutor is immediately informed when an arrest has been carried out by the police. The Prosecutor then has to review the arrest procedure in order to decide if the arrested person(s) must be set free immediately or the arrest is lawful.

If the arrest is validated the Bossi-Fini Act requires the trial thus follows a procedure called *direttissima*, that circumvents the need for a preliminary hearing. For the vast majority of the crimes a trial needs to be held before the preliminary hearing judge to determine if there is a case that needs be referred to the judge. At this stage new investigations can be ordered, or the case sent on to

trial. The *direttissima* trial by contrast, has to take place within forty-eight hours of the arrest before the same judge who also decides if the arrest is lawful or not. As a result, prosecutors have no choice, they must deal with the Bossi-Fini cases immediately. Arguably, such legislation aims to circumvent the 'legality' principle by which the executive has no legal power to impose priorities to prosecutors. The Bossi-Fini Act tries to force the criminal justice system to treat immigration as a priority. This is because as the minister of justice at the time explained, “criminality grows around the clandestine immigrants”.

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

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

That the Bossi-Fini Act has so far failed to impose its priorities on prosecutors becomes even clearer if examining the conditions that the law imposes on the arrest and prosecution of illegal immigrants. Article five *ter* states that the crime is committed when the immigrant remains in Italy without having a 'reasonable reason' to do so. If there is such a reason, prosecutors can set the arrested person(s) free. Prosecutors interpret this concept in a wide variety of ways. One

interviewee explained that only a pregnant woman has a reason to remain in Italy. But another argued that the accused person's financial situation must be carefully checked to understand if they have enough money to leave the country and one young prosecutor said that every immigrant who does not have a real home has a justification not to leave, because he or she cannot possibly afford it!

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

Italian prosecutors are well aware of public perceptions about the connection between street crime and illegal immigration. But they assume that *allarme sociale* over these matters is in large part a result of media exploitation of public fears. Prosecutors have their own conception of the sort of *allarme sociale* that merits inclusion in their priorities for prosecution. According to the interviewees, these are crimes that are particularly dangerous, that jeopardize people's sense of security in going about their everyday life, that involve certain kinds of victims (e.g. women, children and elderly people) and, in general, that have a great impact on the society. *Allarme sociale* counts only if it is linked with "the objective seriousness of the case." In general, the more the legal punishment is severe, the more the crime is serious. Crimes which threaten life are more important than crimes which threaten property. Finally, the damage suffered by the victim can be a relevant parameter as well. These are some of the 'objective' criteria that determine if a crime is serious and, as a consequence, if it has caused social alarm.

So, Italian prosecutors accept that they have a responsibility to assuage public fears, but, at the same time, they believe they have to decide if the supposed crime problem is commensurate with its level of social alarm. As one of the lawyers interviewed put it, *allarme sociale* is a volatile concept that evokes different images for the public and for prosecutors. Prosecutors compare these two images and filter these external influences, which do not disappear, but they are substantially

moderated by other internal considerations. The public perception of social alarm is not sufficient to determine priorities. Prosecutors depict the criteria they use as purely legal and objective but, in practice, they are also subjective and intertwined with socio-political considerations about the problem of crime. The clearest example is the Bossi-Fini Act, which, in theory, is punished strictly but which has a low priority for them. On the other hand, there is a limit to such 'resistance.' Prosecutors admit that they are inevitably influenced in choosing what to investigate by the crimes that the police report to them. If the police decide to carry out a particular operation prosecutors have to deal with the legal consequences that this creates (e.g. a large number of arrested persons). Because the police have the right to arrest, this triggers a procedure that binds prosecutors. One of the prosecutor interviewed explained that: "for arrested persons caught red handed, it depends whether the police decide to focus on areas where there is drug trafficking or prostitution or where there are illegal immigrants. This is how it works." But we nonetheless disagree with those academic commentators who argue that this means that prosecutors have come to share public concerns about law and order and common sense notions about crime, such as stereotypes of immigrants as criminals. Instead, it may be true at the level of heads of prosecution offices who, in their 'political' role as court spokespersons, have to echo political and public concerns. But this does not necessarily affect the views of single prosecutors. Due account, therefore, should also be taken of the way prosecutors try to minimize the impact of moral panics reflected in legislation such as the Bossi-Fini Act.

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

4. Conclusion

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

Despite the 1989 reform of criminal procedure, prosecutors are reluctant to move to an accusatorial conception of their role. They are still attached culturally to the idea of their role as neutral and impartial. Abandoning this conception would also diminish their credibility when they prosecute in political sensitive cases. Various socio-legal conditions have favored this outcome. Prosecutors' independence is well established in the constitution and, though increasingly under political threat, this provides at least formal protection for prosecutors from suspicions or allegations of prosecuting a case for reasons other than the purely legal. Italian prosecutors are not in a position to halt the evolution (or involution) of contemporary criminal justice. But they certainly try to balance external pressures by mediating, and not simply executing, anti-crime policies that seek to reassure (or excite) public opinion.

On the other hand, a number of issues remain very much still to be clarified. Most important for present purposes, there is insufficient evidence available to show the actual consequences of current prosecutors' resistance to the campaign to prioritize crimes of illegal immigrants. There is an acute shortage in Italy of reliable statistical information on the functioning of criminal justice agencies that goes beyond records of what kinds of crimes are referred by the police or seen by the courts. Though it would be easy to show that there has been a large increase in the processing of illegal immigrants, it would be tricky to say how much higher this could have gone under different circumstances. The research described in this study is limited to interviews with prosecutors, although it was supplemented with interviews with others involved in the criminal process, such as lawyers and police. To engage with the 'counterfactual' - of what would have happened if prosecutors indeed had changed their priorities in line with governmental indications- we would need to have examined a large number of case files over time and see what happened to them. Certainly, giving a low priority to such cases should mean that the cases that prosecutors put

forward are less strong than they might otherwise be. In addition *de facto* many cases will not make it through the system in time. On the other hand, relative unwillingness to invest time in such matters may also result in such cases going to court quickly and thus not risking prescription-exactly as the governmental legislation intended.

It is also difficult to predict the future. Prosecutors' dislike of the Bossi- Fini law may be seen as over- determined- and it is not certain how they would react to other kinds of cases. Many have objections to the way governments have chosen to try and condition their actions on this substantive issue, for example including the high penalties that have been attached to the status crime of being an illegal immigrant so as to make it an arrestable offence for which offenders can be kept in custody before trial. But they also disagree in principle with any interference with their autonomy. We also do not know how much what we are describing is a result of the recency of the 1989 reform and the persistence of the earlier inquisitorial legal culture. Certainly changes in their institutional role, as proposed by center- right governments in particular, intended to separate their role from that of judges and bring it more into line with the accusatorial architecture of the 1989 reform, would make such resistance more difficult.