CHAPTER 6

PRE-TRIAL PROCEDURE IN ITALY

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ABSTRACT

The Italian Constitution obliges public prosecutors to conduct preliminary investigations to verify the validity of the *notitiae criminis*. Whenever the verification is positive, prosecution is mandatory regardless of any assessment of convenience and/or expediency. Mandatory prosecution under Article 112 of the Constitution is part of the DNA of the Italian criminal justice system, along with other fundamental principles such as equality, procedural legality, presumption of innocence, fair trial and 'good administration'. However, mandatory prosecution is put to the test when being implemented due to the heavy workloads public prosecutors must handle. Prosecutors' offices use guidelines, criteria and practices which end up mitigating mandatory prosecution at law enforcement level. Moreover, for minor offences, the Italian legislation grants the victim the power to influence the activity of the public prosecutor through the filing of a complaint. Finally, in order to prevent miscarriages of justice caused by prosecutorial choices, under the Italian Code of Criminal Procedure the victim is entitled to exercise specific supervising powers with regard to the judicial decisions of the public prosecutor.

This chapter provides an overview of the preliminary phase of the Italian criminal procedure, the fundamental principles and rules governing it, and the main issues that arise from a practical standpoint. The goal is to identify the characteristic features of the preliminary phase from both a normative and applicative perspective, paying particular attention to the work of public prosecutor's offices. The goal is not only to provide an overview of the theoretical foundations of the Italian procedural model, but also to pinpoint the virtues and flaws of the exercise of the public prosecutor's powers.

Keywords: Penal action, mandatory prosecution, discretional prosecution, public prosecutors' offices, organisation and management of workloads

1. Introduction

This chapter considers the essential framework of preliminary investigations and criminal prosecution in the Italian legal system, in the light of the relevant constitutional principles and of the procedural tradition that has grown out of the latter. It also sheds light on the dynamics underlying mandatory prosecution in the law in action. In order to make it suitable for comparative research, a pragmatic and functional approach aimed at outlining the main features of preliminary investigations in the Italian legal system and identifying the main practical problems that arise from the receipt of a *notitia criminis* to the decision to charge (or dismiss charges) is adopted. This approach makes it possible to faithfully illustrate the initial dynamics of Italian criminal proceedings and construct a model that is less anchored to dogmatic analysis,[1] but can be immediately used for comparison with other legal systems.[2] Moreover, field research consisting in the collection of data and information directly from Italian prosecutors through a uniform questionnaire supplements the analysis of the Italian constitutional and legal framework carried out in this chapter.[3] This approach favours legal comparison by highlighting strengths and weaknesses of the Italian model, thus giving a reliable representation of preliminary investigations and mandatory prosecution at national level.

In section 2, Giulia Ducoli analyses the accusatorial (adversarial) setting of Italian criminal procedure and its constitutional framework. The author illustrates the crucial 1988 law reform that profoundly transformed Italian criminal procedure by separating both the prosecutor (in charge of preliminary investigations) from the judge, and investigations themselves from trial. In sections 3 and 4 (to 4.2), Giuseppe Schena addresses mandatory prosecution from the perspective of Italian prosecution offices. The latter enjoy some degree of autonomy as regards the internal organisation of workloads, which proves to be a fundamental mechanism

1 On the persistent heterogeneity of national dogmatics, see Jesús-Maria Silva Sánchez, *L'espansione del diritto penale. Aspetti della politica criminale nelle società postindustriali* (Giuffrè 2004). On the difficulty of declining purely dogmatic approaches and methods in the field of legal comparison (in particular in criminal matters), see Francesco Palazzo and Michele Papa, *Lezioni di diritto penale comparato* (Giappichelli 2013). On the relationship between national dogmatics and legal comparison, see Albin Eser, *Comparative Criminal Law* (C.H. Beck 2017) 11 ff.

2 'Hermeneutical and empirical knowledge, systematic analysis and international comparison must be combined': Massimo Donini, *Europeismo giudiziario e scienza penale. Dalla dogmatica classica alla giurisprudenza-fonte* (Giuffrè 2011). This method is aimed at assessing 'the best reasoning or result in relation to the problem to solve': Alessandro Bernardi, *L'europeizzazione del diritto e della scienza penale* (Giappichelli 2004). Comparative law fosters the critical review of national criminal justice systems within an open and competitive market which can provide a 'ranking of legal systems': Francesco Parisi and Barbara Luppi, 'Quantitative methods in comparative law', in Pier Giuseppe Monateri (ed.), *Methods of Comparative Law* (Edward Elgar Publishing 2012).

3 See Giuseppe Schena, *Organizzazione delle procure ed esercizi selettivi dell'azione penale*, PhD thesis, available online at *amsdottorato.unibo.it* from April 3, 2020. The research methodology included interviews with public prosecutors.

for the proper functioning of the procedural machinery as required under Article 97 of the Constitution.[4] Indeed, an unconditional implementation of mandatory prosecution is impossible for structural, practical and even juridical reasons.[5] However, the quest for a balanced and rational mandatory prosecution still remains an open issue. One might mention especially the insufficient coordination between prosecution offices, the administrative (rather than legislative) nature of the principles and rules on coordination, the current phase of consolidation of the relevant practices, and the need to implement constitutional principles in the best possible way (consistently with the structural capacity of the prosecution offices). In this regard, as will be argued, the exercise of the prosecutor's powers should be subject to express legislation, so that they are not immune from judicial review by the Constitutional Court.

In sections 5 to 5.3, Giulia Ducoli addresses those rights (to information, to lodge a complaint and to challenge the prosecutor's request to dismiss) victims of crime are entitled to exercise in order to orient the prosecutor's decision. The participation of the victim in the course of preliminary investigations aims to check the fair exercise of prosecutorial powers with a view to penal action. In the Italian criminal justice system, the involvement of victims of crime makes the criminal proceedings abstractly more efficient and allows for more intensive cooperation between the public and the private party[6].

2. The Constitutional principles and procedural tradition of the Italian criminal justice system

In the Italian criminal justice system, Article 112 of the Constitution states that 'the public prosecutor has the obligation to institute criminal proceedings. In other words, in the Italian criminal justice system prosecution is mandatory.[7]

Only public prosecutors are entitled to exercise penal action, in compliance with the law and without any influence by external powers (Article 104, § 1 of the Constitution). As outlined in this chapter, the constitutional principle set out by Article 112 does not imply an unconditional duty to charge and prosecute, but rather to carry out investigations in

4 In particular, § 2: 'Public offices shall be organised in accordance with the provisions of law, so as to ensure the efficiency and impartiality of administration'.

5 See especially *Corte costituzionale*, judgment of 15 February 1991, no. 88.

6 Valeria Rey, 'Modifica alla disciplina delle indagini preliminari', in Andrea Conz and Luigi Levita (eds.), *La riforma della giustizia penale* (Dike 2017) 51.

7 Procedural law sets out the compulsory form and content of criminal charges, which may vary according to the type of proceeding (*procedimento ordinario* or *riti speciali*). For example, in ordinary proceedings (*procedimento ordinario*) criminal charges take the form of a request for indictment (*richiesta di rinvio a giudizio*). In any case, all types of indictment must clearly and precisely describe the charges, which consist of two elements: the fact and its legal qualification.

accordance with the general principle of completeness.[8] However, to prosecute with regard to all the *notitiae criminis* that reach the prosecutors' offices would produce two negative consequences. Firstly, the criminal justice system would collapse before such a large number of proceedings. Secondly, in some cases the *notitia criminis* is false, evidence cannot be collected, or the perpetrator of the crime is unknown. Therefore, the Italian Code of Criminal Procedure provides parameters, so as to ensure that mandatory prosecution does not cause the system to be overburdened with baseless cases.

First and foremost, the public prosecutor can request that a case be dismissed.[9] In light of the obligation imposed by Article 112 of the Constitution, the public prosecutor cannot dismiss the case autonomously, but must submit a specific request to a judge for preliminary investigations[10] in the event that the findings of preliminary investigations are not adequate to confirm the charge before the competent court (Article 125 of the implementing provision of the Code of Criminal Procedure: *disposizioni attuative*).

In practice, other remedies to modulate moderate mandatory prosecution have also been developed. In particular, each prosecutor's office sets out priority criteria for prosecution in order to ensure a more efficient functioning of the criminal justice system.[11] First, for less serious offences, Italian law grants the victim the power to influence the activity of the public prosecutor by filing a complaint. In addition, at the end of the preliminary investigation, the victim is entitled to oppose any decision by the public prosecutor not to prosecute.[12] In the context of a comparative study, before addressing the procedural mechanisms designed to implement mandatory prosecution, the key principles enshrined in the Constitution the Italian criminal trial is based on need to be recalled.

The Italian procedural system of the 1988 Code (*Codice Vassalli*) is inspired by the so-called accusatory model,[13] which separates the functions of the *public prosecutor* (in charge

8 See below, § 4.1.

9 Glauco Giostra, 'Archiviazione', *Enciclopedia Giuridica* (1992) 1.

10 The preliminary investigation judge (*Giudice per le indagini preliminari*) is the single-judge competent to exercise judicial functions during the preliminary phase. He has no power of initiative with regard to investigations: he is only called upon, in the cases provided for by law, to rule on requests from the public prosecutor, private parties and the victim of crime. It guarantees fundamental rights of the individual (e.g. in case precautionary measures are applied).

11 See below, § 4 and 5.

12 Therefore, victims of crime take part in the choice between prosecution and dismissal, which lies in the hands of the public prosecutor: see below, § 6.

13 On the change from the inquisitorial model of the 1930 code to a procedural system of a predominantly accusatory nature, see Daniele Negri, 'Modelli e concezioni', in Alberto Camon (and others), *Fondamenti di Procedura penale* (CEDAM 2019).

of preliminary investigations and the exercise of penal action), the *judge* (responsible for ruling on the criminal liability of the defendant) and the *defendant* (whose legal counsel by a lawyer is mandatory, thus implementing the right to defence enshrined by Article 24 of the Constitution). The trial mainly involves these three subjects, each one entitled to exercise specific powers and fulfil given duties verging on an adversary model of criminal procedure.[14] The previous code, which came into force in 1930, provided for an inquisitorial system. In summary, the investigations were conducted by the investigating judge (*giudice istruttore*) in almost total secrecy and minimal grounds for intervention were provided for the defence. At the trial stage, writing was preferred to orality. After the republican Constitution entered into force in 1948, liberal democratic principles had to be recognised and applied in criminal proceedings. Initially, the framework of the 1930 Code was maintained, while approving specific amendments to make it compatible with the new constitutional principles. However, afterwards, the absolute incompatibility of the authoritarian paradigm of criminal procedure set out by the 1930 code with the above principles required the legislator to adopt a new code, which is based on the accusatory model.

Another distinctive feature of the accusatory model is the separation between preliminary investigations, where evidence (*elementi di prova*) is gathered, and trial, where evidence is formed in the adversarial process (the defendant and the prosecutor being in an equal position before an independent and impartial judge as third party). Pursuant to Art. 111, § 4 of the Italian Constitution, criminal trial is governed by the principles of adversary hearings (*principio del contraddittorio*): the parties form evidence before the judge, whose powers to investigate are limited. It follows that in the Italian criminal justice system judges rule on the basis of the evidence obtained at the trial stage by a thorough adversarial method.[15]Article 24, § 2 of the Italian Constitution provides that 'the right of defence is inviolable at every stage and level of the proceedings.' The principle applies especially to criminal proceedings, including preliminary investigations.

Article 13 of the Constitution is the highest rank parameter for all forms of deprivation of liberty, which applies also to preliminary investigations.[16] The Article enshrines that 'personal

14 See Renzo Orlandi, 'The Italian Path to Reform: Italy's Adversarial Model of Criminal Procedure' [2019] The Italian Law Journal 565.

15 The principle of due process (or fair trial), which embraces the adversarial procedure and its exceptions, was introduced into the Italian Constitution by Constitutional Law no. 2 of 23 November 1999: see Article 111, § 4 and § 5.

16 E.g., to the rules on pre-trial detention, as well as searches and personal inspections, the collection of biological material, etc.

liberty is inviolable.'[17] This principle represents one of the pillars of the Italian criminal justice system and permits the restriction of personal liberty only in the cases and forms provided for by law (*riserva assoluta di legge*) and by reasoned judicial measures (*riserva di giurisdizione* and *obbligo di motivazione*: Article 13, § 2 of the Constitution). Personal liberty shall be restricted only in so far as it is necessary to protect other constitutional principles or rights and complying with the principle of proportionality. In cases of particular necessity and urgency, the judicial body of the police (*polizia giudiziaria*) shall adopt provisional measures restricting personal liberty. Such measures must be communicated to the judicial authority within the next forty-eight hours and validated by the latter within further 48 hours (Article 13, § 3 of the Constitution). In any case, no form of physical or moral violence is allowed on the restricted person (Article 13, § 4 of the Constitution).

Article 27 § 2 of the Constitution, enshrines the presumption of innocence, stating that sets out that 'the defendant is not considered guilty until the final sentence is passed.' At the pre-trial stage, the presumption of innocence is above all a binding 'rule of treatment':[18] by prohibiting from treating the suspect as guilty, no restriction on personal liberty prior to the final conviction can be considered a symptom of the criminal responsibility of the defendant. This chapter focuses on the preliminary investigation phase, which begins when the Public Prosecutor's Office receives the *notitia criminis* and may end with a request for either dismissal or indictment of the suspect. Article 326 of the Italian Code of Criminal Procedure sets out that 'the public prosecutor and the judicial police carry out, within their respective powers, the investigations necessary for the determinations inherent to the exercise of penal action'.

17 Article 13 of the Constitution reads: '1. Personal liberty is inviolable. 2. No form of detention, inspection or personal search nor any other restriction on personal freedom is admitted, except by a reasoned warrant issued by a judicial authority, and only in the cases and the manner provided for by law. 3. In exceptional cases of necessity and urgency, strictly defined by the law, law-enforcement authorities may adopt temporary measures that must be communicated to the judicial authorities within forty-eight hours. Should such measures not be confirmed by the judicial authorities within the next forty-eight hours, they are revoked and become null and void. 4. All acts of physical or moral violence against individuals subject in any way to limitations of freedom shall be punished. 5. The law establishes the maximum period of preventive detention'.

18 The presumption of innocence is also a 'rule of judgement': in case of doubt concerning criminal liability, the defendant must be acquitted. Indeed, Article 533 of the Code of Criminal Procedure sets out that 'the judge shall convict if the defendant is guilty (…) beyond any reasonable doubt' (unofficial translation). See Giulio Illuminati, 'Presunzione di non colpevolezza', *Enciclopedia Giuridica* (1991) 1.

3. Beyond constitutional principles: is mandatory prosecution fully in action?

3.1. Main causes of mild prosecution

Securing effective and efficient prosecution is a pivotal issue in the Italian criminal justice system[19] and the constitutional principle enshrining mandatory prosecution is still one of the most debated topics regarding judicial protection. First, the term 'prosecution' should not be defined as the strict meaning of charging. Rather, prosecution includes all the activities that form the prosecutor's investigative function, such as organising, directing, managing, and conducting preliminary investigations. Scholars have traditionally focused on the theoretical meaning and corollaries of mandatory prosecution rather than on its practical dimension[20]. Ever since the new code of criminal procedure came into force, the enthusiasm for the accusatorial model was strong and the goal of ensuring its functioning through the implementation of the rule of law in criminal matters was promptly assigned to prosecution by the Constitutional Court[21]. Therefore, the debate surrounding the extent to which the Constitutional principle of mandatory prosecution has been fairly implemented in the context of the exercise of the prosecutor's powers is barely limited to the prosecutor's role who must enforce it.

In the Italian criminal justice system, public prosecutors have the duty to enforce the law, this meaning that they watch over observance of the law through preliminary investigations which arise in the event of a violation of the law itself.[22] In this field, some scholars argue that public prosecutors enjoy 'physiological discretion'.[23] In particular, public prosecutors can organise and schedule the preliminary investigations workload towards the decision to charge or dismiss the case autonomously.[24] However, if the workload exceeds the structural capacity of the prosecutors' office, it follows that the capacity of the single public prosecutor

19 Already in the mid-1960s, see Paolo De Lalla, *Il concetto legislativo di azione penale* (Jovene 1966).

20 See Francesca Ruggieri, 'Azione penale', *Enciclopedia del diritto* III (2010) 132; Oreste Dominioni, 'Azione penale' *Digesto delle discipline penalistiche* I (1987) 409. About the gap between the theoretical side of the principle of mandatory prosecution and reality, see Mario Chiavario, 'L'obbligatorietà dell'azione penale: il principio e la realtà' [1993] 11 Cassazione penale 2658.

21 Judgment of 15 February 1991, no. 88. See Giulio Illuminati, 'Modello processuale accusatorio e sovraccarico del sistema giudiziario' [2018] 2 Revista Brasileira de Direito Processual Penal 545.

22 See Articles 73 and 74 of R.D. of 30 January 1941, no. 12 (*Ordinamento giudiziario*).

23 See Paolo Barile, 'L'obbligatorietà dell'azione penale', in Augusto Barbera (and others), *Scritti in onore di Aldo Bozzi* (CEDAM 1992).

24 See Massimo Nobili, 'Accusa e burocrazia. Profilo storico-costituzionale', in Giovanni Conso (ed.), *Pubblico ministero e accusa penale. Problemi e prospettive di riforma* (Zanichelli 1979); Serena Quattrocolo, *Esiguità del fatto e regole di esercizio dell'azione penale* (Jovene 2004).

to settle all proceedings within a reasonable time is reduced, and the obligation to completely ascertain the facts diminishes accordingly.[25]

From a purely normative standpoint, mandatory prosecution must be implemented regardless of any contingency at practical level. Nevertheless, to implement Article 112 of the Italian Constitution without any mitigation proves to be impossible. In this regard, several proposals have been made to challenge and review mandatory prosecution (or even to replace the latter with discretionary prosecution). Actually, discretionary prosecution does not comply with the fundamental principle of procedural legality the Italian procedural system is built on.[26] Therefore, regardless of the assessment of its actual usefulness, providing for discretional prosecution would require (formally) a constitutional change and (substantially) a rethink and upset of the whole criminal justice system. Thus, consistent with the rationale and purposes of the constitutional principle at hand,[27] to balance mandatory prosecution by objective means and techniques suitable for managing the prosecutors' offices workload would be preferable.[28] In addition to mandatory prosecution, other interests call for a criminal justice system to be effective, including *the great social demand for proper criminal proceedings*.[29] This increases the workload of prosecutors' offices. As such, in the following sections, we argue that the exercise of the prosecutor's powers should be regulated. For instance, it is suggested that the making of the internal criteria and practices adopted in the prosecutor's offices uniform in order is vital to implement the canons of fairness, consistency and accuracy of criminal prosecution.

3.2. Possible choices in the hands of the public prosecutor

Given the highlighted need to soften mandatory prosecution, this section will briefly outline the alternatives available to public prosecutors in exercising their own powers and carrying out preliminary investigations. In light of the Italian constitutional framework, the activity of the public prosecutor is marked by precise sequences of preparatory conducts that are not discretionary.[30] Public prosecutors are not allowed to suspend or delay the

25 Mandatory prosecution is massively affected by workloads, see Guido Neppi Modona, 'Commento all'art. 112 cost.', in Giuseppe Branca (ed.), *Commentario della Costituzione*, IV, *La magistratura* (Zanichelli 1987).

26 See Daniele Negri, 'Splendori e miserie della legalità processuale. Genealogie culturali, "èthos" delle fonti, dialettica tra le corti' [2017] 2 Archivio penale 421.

27 Stefano Catalano, 'Articolo 112', in Francesco Clementi and others (eds.), *La Costituzione italiana. Commento articolo per articolo*, II, *Ordinamento della Repubblica (Artt. 55-139) e Disposizioni transitorie e finali* (Il Mulino 2018).

28 See Roberto E. Kostoris, 'Per un'obbligatorietà temperata dell'azione penale' [2007] 4 Rivista di diritto processuale 875.

29 See below, § 7.

30 See Edmondo Bruti Liberati, 'Le scelte del pubblico ministero: obbligatorietà dell'azione penale, strategie di indagine e deontologia' [2018] 1 Questione giustizia 16.

investigations and charge for reasons of mere convenience. In that event, the public prosecutor would be sanctioned (disciplinary liability) on the grounds of 'inexcusable negligence',[31] in so far as the conduct privileges or damages the parties. Notably, in the largest prosecutors' offices, the amount of work assigned to each prosecutor reduces the chance of concluding the investigations within the time limits set out by Articles 405- 407 of the Italian Code of Criminal Procedure. As a result, prosecutors could be sanctioned even for evaluating the expediency to schedule the cases to investigate on according to the seriousness of the crime allegedly committed, in order to prevent limitation period, for having prioritised their workload by means of autonomous decisions.[32]

(i) In such cases, in order to implement mandatory prosecution efficiently by ensuring a rational organisation of prosecutor's offices and complete investigations, mainly four good practices and guidelines can be issued internally by the Chief Prosecutor (*Procuratore della Repubblica* or *Procuratore Capo*[33]) and thus be put at public prosecutors' disposal. The *Procuratore della Repubblica* may set a list of priorities all prosecutors shall align themselves when organising and scheduling preliminary investigations. In other words, cases classified as urgent will be investigated before those that are deemed to be of a lower priority.

(ii) Alternatively, in the absence of priority criteria, the prosecutor in charge of the case may himself set out independently that kind of criteria and investigate accordingly.

(iii) A further option is to adjust the workload by proceeding according to the conditions and contingencies of the prosecutor's office. In that event, the prosecutor does not investigate according to previous internal regulation but can achieve minimum performance goals.

(iv) Finally, the prosecutor may choose not to carry out any activity in relation to the

31 Mala praxis of the public prosecutor implies State liability as well, as reported by Alessandro Palmieri, 'Responsabilità dello Stato per omissioni nell'attività di indagine da parte del pubblico ministero: il ruolo chiave dell'indagine sul nesso causale' [2019] Questione giustizia, May 15, 2019 <http://www.questionegiustizia.it/articolo/responsabilita-dello-stato-per-omissioni-nell-atti_15-05-2019.php>. See also Andrea Nocera, 'Responsabilità del P.M. per il ritardo nello svolgimento delle indagini preliminari. I limiti al sindacato sull'attività giudiziaria' [2017] 6 Diritto penale contemporaneo 5.

32 See Article 2, 1 a) and 1 g) of d.lgs. of 23 February 2006, no. 109 (*Disciplina degli illeciti disciplinari dei magistrati, delle relative sanzioni e della procedura per la loro applicabilità, nonché' modifica della disciplina in tema di incompatibilità, dispensa dal servizio e trasferimento di ufficio dei magistrati, a norma dell'articolo 1, comma 1, lettera f), della legge 25 luglio 2005, n. 150*).

33 Articles 70, 70-*bis* and 76-*bis* of *Ordinamento giudiziario* (above, nt. 23). See Renzo Orlandi, 'L'organizzazione della giustizia penale', in Paolo Biavati (and others), *Assetti della giustizia civile e penale in Italia* (Il Mulino 2008). Recently, about the practices adopted by the Italian offices, see Giuseppe Di Federico (ed.), *Ordinamento giudiziario. Uffici giudiziari, Csm e governo della magistratura* (Bononia University Press 2019).

pending cases in order to give priority to other proceedings, given the lack of general and objective criteria set out by law or the *Procuratore della Repubblica*.

However, decisions of the public prosecutor must not be arbitrary. The prosecutor may act according to the guidelines issued by the *Procuratore della Repubblica*, or select priorities under his own responsibility, or adapt its activity to the heavy workloads and other contingencies. In these situations, the prosecutor's conduct would be lawful, i.e. excusable (although it may appear undesirable that a prosecutor leaves many pending cases unsolved). Rather, doubts arise in relation to the legitimacy of the decision-making and the exercise of the power regarding the selection of the criteria suitable for handling pending cases and proceedings.

3.3. Current examples of selective prosecution

Having shown the main possibilities available to the public prosecutor in handling heavy workloads, this section will pinpoint the methods prosecutors' offices adopt to manage the flaws of pending cases and criminal proceedings. As argued, behind the curtain public prosecutors select the *notitiae criminis*.[34] Here, the term 'selection' refers to the result of widespread guidelines implementation aimed at ensuring the complete and rational management of case files cropping up in almost all prosecutors' offices, through enhanced specialisation and prioritisation of investigating activity. These guidelines have been endorsed by the Superior Council of the Judiciary (*Consiglio Superiore della Magistratura*) in November 2017[35] as examples of best practice and consist of investigative techniques and organisational strategies as parts of an operative model aimed at implementing mandatory prosecution in compliance with the principles of 'good administration' (Article 97 of the Constitution) and fair trial (Article 111 of the Constitution).

Specialised individual and teamwork skills are enhanced, not least to cope with the greater technological evolution, complexity and transnational dimension of crime, which urged prosecutors and police officers to gain further knowledge in addition to their classical education, with precedence being afforded to urgent case files. In Italy, specialised prosecution officially arose with the establishment of the Anti-Mafia Districts and the relative Directorate at central level (*Direzione Nazionale Antimafia*, whose competence also embraces terrorist offences since 2015). With reference to other

34 This 'selection' is necessary for Oreste Dominioni, 'La corte assediata' [2013] 12 Diritto penale e processo 1385.

35 *Consiglio Superiore della Magistratura*, 16 November 2017, *Circolare sulla organizzazione degli Uffici di Procura,* in www.csm.it [June 2020].

crimes, specialisation was implemented by establishing working groups (pools) within the prosecutors' offices. Today, the possibility of setting up further specialised structures based on the model of Anti-Mafia and Terrorism Districts is being discussed, in order to strengthen judicial protection in the fight against corruption, money laundering, safety at work, and environmental crimes.

Priority criteria aim to ease trials and avoid the limitation period by identifying preferential lanes.[36] Nevertheless, since prioritizing means recognizing urgency (i.e. the precedence of some issues over others that appear less compelling), some scholars argue that investigating in the light of priority criteria may cause discrimination.[37] Furthermore, other scholars argue that specialisation and prioritization of public prosecution pursues political goals, and that prosecutors enjoy too broad discretion.[38] However, priorities should not be understood as the arbitrary privilege of certain proceedings.[39] Their order is not based on purely temporal factors, such as limitation periods, nor on prognoses of pure convenience. Rather, they aim to prevent the automatic shelving of minor proceedings whenever it is difficult as a matter of fact to handle all pending cases. Without specific regulations, however, the prosecutor's offices draw up priority guidelines by adopting, among others, the criteria provided for by article 132-*bis* of the implementing provisions of the Code of Criminal Procedure (which is basically addressed to the judges: *disposizioni attuative*). Therefore, the exercise of to hinge the physiological margin of discretion in the hands of public prosecutors shall be made uniform, by establishing methods and principles of selective management of case files under national law. Indeed, the guidelines and practices currently being implemented are provided for by administrative acts whose compliance with fundamental principles enshrined by the Constitution (in particular equal treatment and proportionality) cannot be judicially reviewed.

36 The need to introduce priority criteria in criminal proceedings has been pinpointed by Giovanni Conso, 'Introduzione', in Giovanni Conso (ed.), *Pubblico Ministero e Accusa Penale. Problemi e prospettive di riforma* (Zanichelli 1979).

37 In this regard, the legislator must strike a correct balance of the conflicting interests at stake. See Novella Galantini, 'Il principio di obbligatorietà dell'azione penale tra interesse alla persecuzione penale e interesse all'efficienza giudiziaria' [2019] Diritto penale contemporaneo < https://www.penalecontemporaneo.it/upload/3900-galantini2019b.pdf> accessed 7 September 2020; Stefano Catalano, 'Rimedi peggiori dei mali: sui criteri di priorità dell'azione penale' [2008] 1 Quaderni costituzionali 65.

38 See, in this regard, Francesco Mollace, 'Vincoli di politica criminale e azione del pubblico ministero', in Filippo Giunchedi (coord.), *La giustizia penale differenziata,* I*, I procedimenti speciali* (Giappichelli 2010).

39 Daniele Vicoli, 'L'esperienza dei criteri di priorità nell'esercizio dell'azione penale: realtà e prospettive', in Giuseppe Di Chiara (ed.), *Il processo penale tra politiche della sicurezza e nuovi garantismi* (Giappichelli 2003).

4. The management of workloads in criminal proceedings

4.1. Striking a balance between mandatory prosecution, prosecutorial discretion, and compliance to criminal procedure and legality

The previous sections argued that prosecutors' decision-making and management of case files play a pivotal role in the effective and efficient implementation of the constitutional principle of mandatory prosecution. Unlike the European scenario, where prosecution is commonly and expressly discretionary, the unbending body of rules concerning mandatory prosecution set out by the Italian Code of Criminal Procedure holds.[40] While the Council of Europe has been harmonising criminal procedure laws of the State parties towards the shared recognition of discretional models of prosecution since Recommendation No. 18 of 1987, in 1988 the Italian legislator followed the opposite path by reinforcing the mandatory nature of prosecution enshrined by Article 112 of the Constitution (meaning that the government has nothing to do with prosecution).[41] Over time, the interpretation of the mechanisms and features of Italian criminal procedure in light of the Constitution has consolidated a legal tradition that still lessens (or even rejects) any mitigation of mandatory prosecution. Certain exegesis of fundamental principles such as equality and independence of the judiciary (including prosecutors) stands in the way of the express recognition of a fully or partially discretional model of prosecution from both a juridical and ideological standpoint. As a result, public prosecutors investigate carrying out present operational dynamics that cannot be discretionally disregarded.

Apart from prosecutorial autonomy in the trial phase,[42] the only form of discretion allowed by the law regards the management and internal organisational of prosecutor's offices. However, the margin is so strict that, because of increased workload, the criminal justice system has almost succumbed to the volume of cases. This pushed the Chief Prosecutor to invest more efforts and resources in specialisation and elaboration of priority guidelines. Nevertheless, the result appears paradoxical. On the one hand, the Italian Constitution reads

40 See Mario Chiavario, 'Obbligatorietà dell'azione penale: il principio e la realtà', in Francesco Saverio Borrelli and others (eds.), *Il pubblico ministero oggi* (Giuffrè 1994).

41 See Ennio Amodio, 'Giuliano Vassalli processualista' [2016] 5 Cassazione penale 2289; Luca Luparia and Mitja Gialuz, 'Italian criminal procedure: thirty years after the great reform' [2019] 1 Roma Tre Law Review 24; Michele Caianiello, 'The Italian Public Prosecutor: An Inquisitorial Figure in Adversarial Proceedings?', in Erik Luna and Marianne Wade (eds.), *The Prosecutor in Transnational Perspective* (Oxford 2011); Caterina Scaccianoce, 'The principle of mandatory criminal prosecution and the independence of public prosecutors in the Italian criminal justice system' Revue électronique de l'Association International de Droit Pénal [2010] A-01:1.

42 Article 53, § 1 of the Code of Criminal Procedure sets out that public prosecutors autonomously exercise their powers at hearings.

that prosecution is mandatory. On the other hand, in practice, prosecutor's offices self- regulate and carry on their activity according to pragmatic criteria that are not even harmonised at national level. Indeed, the lack of any rational and homogeneous legislation undermines the principle of legality.[43]

4.2. A limited enrolment justice system: Courts' structural capacity to proceed after criminal investigations

The call for pure prosecutorial discretion is based on a realistic understanding of criminal prosecution.[44] By contrast, in Italy the replacement of mandatory with discretional prosecution some scholars suggested only pursue major efficacy of the criminal justice system,[45] without balancing this goal with the Italian constitutional framework. In other European and common law systems, discretional model of prosecution is a corollary of the constitutional status and institutional role of public prosecutors, which reflect different (historical, cultural, legal, etc.) identities with regard to the ties between citizens, politics, and the judiciary.

The heavy amount of work affects both prosecutor's offices and courts. Over time, pending cases increase a backlog limiting Court's structural capacity to manage, proceed and rule on the case files within a reasonable time. Knowing that Courts will not manage to schedule as many hearings as the number of *notitiae criminis*, charges and requested indictments, in practice the Chief Prosecutor does not forward all the file cases to the single prosecutor working at his office or recommends his colleagues to follow up on only the amount which corresponds to (or slightly exceeds) the actual capacity of the courts to proceed. This choice is based on mechanisms for the selection of case files to transmit which worsen the problematic relationship between mandatory prosecution and prosecutorial discretion during preliminary investigations: from both a practical and financial perspective, to investigate and charge without a chance to follow-up in court would prove to be even counterproductive. Such workload disposal mechanism is not legitimate. Its effect is not to lead ongoing prosecutions to the most complete and rational results, but rather to disregard the constitutional principles of equal treatment, procedural legality and mandatory prosecution which govern Italian

43 See Giuseppe Monaco, *Pubblico ministero ed obbligatorietà dell'azione penale* (Giuffrè 2003); Giuseppe Di Chiara, 'Legalità dell'agire, ordine nel procedere e governo del carico giudiziario', in Giovanni Conso (ed.), *Il diritto processuale penale nella giurisprudenza costituzionale* (Edizioni scientifiche italiane 2006).

44 See Alfredo Bazoli (and others), *L'azione penale in Italia: obbligatorietà o discrezionalità?* (Arel 2016).

45 See Piero Gualtieri, 'Oltre la separazione delle carriere: un P.M. elettivo ad azione penale discrezionale' [2019] 1 Il Foro Malatestiano < http://www.ilforomalatestiano.it/wp-content/uploads/2019/08/Oltre-la-separazione-delle-carriere.-Un-p.m.-elettivo-ed-azione-penale-discrezionale-di-Piero-Gualtieri.pdf> accessed 7 September 2020. *Contra*, see Massimo Ceresa-Gastaldo, 'Dall'obbligatorietà dell'azione penale alla selezione politica dei processi' [2011] 4 Rivista italiana di diritto e procedura penale 1415.

criminal procedure, given the lack of appropriate legislation, safeguards and remedies capable of preventing arbitrary choices not to investigate on minor file cases and scheduling prompt trial hearings. Prosecutorial discretion as it is currently implemented in the initial stage of proceedings contributes to the structural inefficiency of the Italian criminal justice system. Moreover, fundamental rights of the defendant and the victim of crime cannot be jeopardised by unregulated discretional (or even arbitrary) choices of public prosecutors.

5. The participation of the victim in preliminary investigations and its check function

The victim plays a key role in the preliminary investigation[46]. For what is relevant for the purpose of this chapter, the victim is entitled to exercise a supervisory role with regard to the decisions taken by the public prosecutor at the end of the preliminary investigations. The Code grants the victim a set of rights whose purpose is to ensure that the victim can intervene and thus check the exercise of prosecutorial power.[47] In particular, victims shall receive information about their rights[48] (especially to lodge a complaint[49] and oppose to the request of dismissal[50]) and the state of play of the criminal proceeding.[51] Defence investigations can be carried out by the lawyer in the interests of victims.[52] To exercise all these prerogatives, the victim needs to be aware and kept up to date of the current situation of the proceeding. Moreover, throughout the proceeding it is possible to conduct defensive investigations in the

46 A terminological foreword is necessary. The Italian Code of Criminal Procedure does not define the concept of 'victim' of crime (as a result of recent law reforms, the term 'victim' fragmentarily appears in the Code of Criminal Procedure only in four cases: articles 90-*bis*, 316, 498, 539), but distinguishes between the person harmed by the crime committed (*persona offesa dal reato*) and the civil party (*parte civile*). Although in most cases these two types of subjects coincide, they abstractly indicate two different *statuses*. *Persona offesa* is the person whose legal goods or interests protected by criminal law are affected (i.e., who suffered the crime). *Parte civile* is the person who has suffered damage caused by the crime and is entitled to exercise the right to compensation as a civil party in the criminal proceeding (Articles 74 ff. of the Code of Criminal Procedure). This paper will focus on the rights of *persona offesa*, as this subject is substantially the most similar to the concept of victim of crime from a legal standpoint. See Mariangela Montagna, 'Vittima del reato', *Digesto discipline penalistiche* (2018) 962; Clelia Iasevoli, 'Persona offesa dal reato, *Enciclopedia giuridica* (2007) 1.

47 See Pier Paolo Paulesu, 'Vittima del reato e processo penale: uno sguardo d'insieme (informazioni, diritti, tutele)', in Marta Bargis and Hervé Belluta (eds.), *Vittime di reato e sistema penale* (Giappichelli 2017).

48 See below, § 5.1.

49 See below, § 5.2.

50 See below, § 5.3.

51 Article 335, § 3-*ter* of the Code of Criminal Procedure establishes that 'without prejudice to investigative secrecy, after six months from the date of bringing an action, the person harmed by the crime may ask to be informed by the authority in charge of the proceeding about the state of the latter' (unofficial translation).

52 The lawyer may to carry out investigations to seek and identify evidence in favour of his client (art. 327-*bis* of the Code of Criminal Procedure). Forms and purposes of defensive investigations are set out by Articles 391-*bis* ff. of the Code of Criminal Procedure.

interests of the injured party.[53] A general precondition for the exercise of these prerogatives is that the injured party must have knowledge of the proceedings. In most cases, the victim is aware of the proceedings because they are the one lodging a complaint; in any case, the Code provides for that a series of procedural acts must be notified in order to ensure participation of the victim.

5.1. The right to be informed

The victim has the right to be informed about the rights provided for by law and the forms to exercise them. In the original setting of the Code, the victim was given a marginal role. In addition to exercising the rights expressly granted to it by law, the victim could only submit reply briefs (*memorie difensive*) at any state and level of the proceedings and indicate evidence (except for the proceeding before the Court of Cassation: Art. 90 of the Code of Criminal Procedure). The increasing attention paid to victims of crime in particular by EU institutions[54] has induced the Italian legislator to introduce several additional rights. In particular, Article 90-*bis* of the Code of Criminal Procedure[55] establishes that from the very first contact with the prosecuting authority, the victim must be provided with a series of information in an understandable language relating to the above-mentioned rights and faculties. The information regards, for example, the procedures for lodging a complaint, the role they can play during preliminary investigations and trial, but also other forms of individual protection such as health facilities in the territory, family homes, etc. With specific reference to the topic of this study, the rationale of the right to receive information of the victim is to ensure the full participation in the criminal proceeding.

5.2. The right to lodge a complaint (*querela*)

As mentioned, the Italian legislator has attempted to modulate the principle of mandatory prosecution by also granting the victim the power to condition the activity of the Public Prosecutor. The victim has the right to lodge a complaint (*querela*: Article 120 of the Criminal Code and Article 336 Code of Criminal Procedure) against the perpetrator of the

53 The lawyer, from the moment he is assigned the task, has the right to carry out investigations to seek and identify evidence in favour of his client (art. 327-*bis* of the Code of Criminal Procedure). Forms and purposes of defensive investigations are governed by Articles 391-*bis* ff. of the Code of Criminal Procedure.

54 See Council Framework Decision of 15 march 2001 on the standing of victims in criminal proceedings (2001/220/JHA); Directive 2012/29/EU of the european parliament and of the council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing council framework decision 2001/220/JHA. Marta Bargis-Hervé Belluta (eds.), *Vittime di reato e sistema penale* (Giappichelli 2017); Luca Luparia (ed.), *Lo statuto europeo delle vittime del reato: modelli di tutela tra diritto dell'Unione e buone pratiche nazionali* (CEDAM 2015).

55 Article 90-bis of the Italian Criminal Code was introduced by Legislative Decree no. 212 of 15 December 2012, transposing Directive 2012/29/EU.

crime committed in any known language (Article 107-*ter* of Code of Criminal Procedure).[56] *Querela* is a formal request for punishment which entitles the judge to rule (*condizione di procedibilità*)[57] in cases determined by law, generally with regard to either less serious crimes or crimes related to the individual's most intimate sphere (e.g. sex crimes). In such cases, the criminal justice system is concerned only if the victim shows a personal interest for prosecution and punishment. The form and content of *querela* are provided for by law. Firstly, the purpose of *querela* is to bring a crime to the attention of judicial authorities. Secondly, it expresses the will for the crime to be prosecuted. In any case, the fact that Italian law provides for cases in which only a procedural act of persona offesa allows Court to rule complies with Article 112 of the Constitution. Indeed, prosecutor's obligation is conditioned by law, which sets out that a complaint is necessary to proceed.[58]

5.3. Request of dismissal and right to oppose

As mentioned above, at the end of preliminary investigations the prosecutor is called upon to decide whether to prosecute or request to the judge for preliminary investigation that the case be dismissed. In the latter case, the victim is granted powers to stimulate prosecution. The Public Prosecutor may request that proceedings be dismissed in so far as the *notitia criminis* is unfounded: i.e., if the accusation is not considered supportable at trial on the grounds of the evidence gathered (Articles 408 of the Code of Criminal Procedure and Article 125 of its implementing provisions: *disposizioni attuative*). The public prosecutor may also request that the case be dismissed if charging is not permitted by law for procedural reasons (for example, in the event that procedural conditions are not met, or the crime is already time-barred: Article 411 of the Code of Criminal Procedure) or if the perpetrator is unknown (Article 415 of the Code of Criminal Procedure).[59] Lastly, the public prosecutor may request for the case to be dismissed in so far as the crime committed is particularly tenuous (*particolare tenuità*

56 Article 120 of the Criminal Code specifies how to exercise this right with regard to underageg or other types of vulnerable subjects. The general time is three months, starting from the day of the *notitia criminis* (Article 124 of the Criminal Code). For specific crimes (for example stalking or sexual assault), the time limit is six months.

57 *Querela* is a procedural condition which may be presented by *persona offesa* (Article 336 of the Code of Criminal Procedure). It must be distinguished from the report (*denuncia*) regulated by Article 333 of the Code, which sets out that whoever has knowledge of a crime may inform the authorities. In practice, both tools convey the *notitia criminis* to the Public Prosecutor.

58 The obligation under Article 112 of the Constitution is not violated because in any case the request for dismissal of the Public Prosecutor must be examined by the judge, who verifies the actual absence of the procedural condition.

59 If the offender is not identified, the public prosecutor may, within six months of the date of the recording of the offence, either submit a request for dismissal or ask the judge for preliminary investigations to be authorised to carry out further investigations. In any case, if the judge considers that the offence being prosecuted is attributable to a specific person, he may order the public prosecutor to enter that person's name in the register of criminal records.

del fatto: Article 411 of the Code of Criminal Procedure).The dismissal procedure varies depending on whether there is or not a *persona offesa*.

If not, the procedure is more streamlined. The public prosecutor requests the judge for the preliminary investigation that the case be dismissed and the latter, deeming the above-mentioned circumstances to exist, orders dismissal by accounted decree.[60] On the contrary, if dismissing the case is not considered necessary, the judge for preliminary investigations sets a closed chamber hearing (*in camera di consiglio*) and informs the suspect. Pending the decision, a number of mechanisms useful to orient the judge's decision are provided for by the Code. The judge for preliminary investigations could oblige the public prosecutor either to carry out further investigations (*i*) or to charge (*imputazione coatta*) (*ii*); otherwise, the judge dismisses the case by order (*iii*). Whenever the victim must be involved in the dismissal procedure, the latter is more complex. In particular, *persona offesa* plays a pivotal role in so far as dismissal is requested because the public prosecutor considers the *notitia criminis* unfounded. First of all the victim may demand – in the *notitia criminis* or after its submission – notification in the event that the public prosecutor requests that the case be dismissed (Article 408 of the Code of Criminal Procedure).[61] Once notified, victim may challenge the request within twenty days to prove the *notitia criminis* is well-founded (*opposizione alla richiesta di archiviazione*).

The Code provides for that this act must state the purpose of further investigation (*i*) and the related 'elements of evidence' (*elementi di prova*). In the absence of these two requirements, the *opposizione* is inadmissible (Article 410 of the Code of Criminal Procedure). If the opposition is not inadmissible, the judge for preliminary investigations sets a date of a hearing chamber and inform the Public Prosecutor, the suspect and the victim thereof. The possible epilogues of the hearing correspond with those described above. Before the law reform of 2017 ('*riforma Orlando*'),[62] the victim could challenge the measure before the Court of Cassation in case of invalidity of the dismissal measure. Under the law in force, instead, Article 410-*bis* of the Code of Criminal Procedure sets out a limited number of grounds to declare the dismissal measure's nullity. The victim can challenge this measure before the single-judge Tribunal (*Tribunale in composizione monocratica*). Beyond the cases of null and void dismissal measure, the latter can only be reviewed in so far as the public prosecutor submits an accounted request to reopen investigations to the *giudice per le indagini preliminari*.

60 Neither the suspect nor the offended person is involved in these cases: the request for dismissal should be notified only to the suspect in custody in order to claim compensation for wrongful imprisonment.

61 In the case of crimes committed with violence to the person and in the case of theft in the home and burglary, the notice must be served regardless of the request of the injured party.

62 Law no. 103 of 23 June 2017.

6. Mandatory prosecution in the Italian criminal justice system: an overview

From a broader perspective, with a view to efficaciously comparing different legal systems, Italian preliminary investigations must be described and evaluated also in the light of their interplay with substantive criminal law's policy. The joint analysis of criminal procedure and the body of substantive rules it aims to apply provides a thorough understanding of the Italian criminal justice system's compliance with constitutional principles and the social need for justice. Both substantive and procedural criminal law are called into question in relation to two issues: crime prevention and the effectiveness of judicial protection (from pre-trial detention to sentencing and punishment), in particular in the case of the crimes that cause the greatest social alarm.[63] Both issues tend to be assessed mainly from the perspective of the actual or potential victims of crime, whose needs for protection have changed the classical essence of criminal law and criminal procedure. In substantive criminal law, the increased focus on victims of crime has led to a 'reinterpretation of the functions of criminal sanctions.'[64]

These issues and changes are particularly felt today in Italy at a social, political and legislative level. In everyday life, every unpunished crime and every criminal sanction that is inapplicable (or considered insufficient) exacerbates an already widespread sense of injustice and is invoked (sometimes even exploited) against the criminal justice system, which is increasingly perceived as unable to adequately meet the social demands for security and punishment. It is no coincidence that the Italian legislator has recently adopted (and is still striving to adopt) a number of criminal law reforms geared towards ensuring an earlier, faster, and clearer response to crime.

The reforms of the aforementioned Article 132-*bis* of the implementing provisions of the Italian Code of Criminal Procedure (*disposizioni attuative*) regarding the organization and distribution of workloads, and the order in which pending cases must be handled, might be seen as a positive starting point. Article 132-*bis* effectively orients the administrative discretion of the *Procuratore Generale* (the district head of the Italian prosecutors' offices), thanks also to a well-established organisation of workloads by areas of specialisation. This

63 Because of their seriousness, their frequent commission (or publicity by the media) and/or their unpredictability.

64 Also for further references, Vittorio Manes, 'Diritto penale *no-limits*. Garanzie e diritti fondamentali come presidio per la giurisdizione' [2019] 3 Questione Giustizia, < http://www.questionegiustizia.it/articolo/diritto-penale-no-limits-garanzie-e-diritti-fondamentali-come-presidio-per-la-giurisdizione-_26-03-2019.php> accessed 7 September 2020; Marco Venturoli, *La vittima nel sistema penale. Dall'oblio al protagonismo?* (Jovene 2015).

improves consistency in terms of subject matter and speeds up the assignment of cases to prosecutors and their administrative staff. The legislator subsequently attempted to streamline the criminal justice system (in particular by reforming the rules of pre-trial investigations, trial, and judicial review of judgments and orders),[65] while at the same time seeking to address the widespread social demands for greater punishment.[66] However, what has been done does not seem sufficient to achieve the objectives pursued. In particular, with regard to the topic examined here, the trend towards broadening the scope of criminal law (hardly ever offset by incisive decriminalisation measures) keeps the workload of prosecution offices unchanged or even risks increasing it.[67] If one assesses the Italian criminal justice system in terms of efficiency, the trade-off between the current penal inflation and the recent initiatives aimed at simplifying and accelerating criminal proceedings is negative. The number of cases taken to court is increasing, but the time limits within which prosecutors are required to carry out preliminary investigations have been reduced. Therefore, prosecutors may find themselves forced to make unsatisfactory choices. They may strive to carry out their investigations in a timely manner, but at the same time more sloppily (and in the worst cases negligently, thus jeopardising the completeness of investigations themselves).[68] Otherwise, prosecutors may decide to prolong their investigations beyond the deadline set by law, but this would

65 Especially the 'Orlando Reform' ('*Riforma Orlando*': see above, nt. 48), which amended both substantive and procedural criminal rules. With regard to the many changes made to procedural rules, some of the most relevant ones concern the rights of the injured party to receive information and participate in criminal proceedings (Articles 90-*bis*, 335 § 3-*ter*, 408 and 409 of the Code of Criminal Procedure) and the activities and duration of preliminary investigations (Articles 360 § 4-*bis* and 5, 407 § 3-*bis*, 409, 410-*bis*, 412, 415 § 2-*bis* of the Code of Criminal Procedure).

66 Just to mention a few of the most recent pieces of legislation, the 'Red Code' ('*Codice rosso*': Law no. 69 of 19 July 2019, coping with violent crimes against women and revenge porn: '*Modifiche al codice penale, al codice di procedura penale e alter disposizioni in materia di tutela delle vittime di violenza domesticate di genere*') and '*Spazzacorrotti*' law (intended to fight corruption and other crimes against the public administration: Law no. 3 of 9 January 2019, '*Misure per il contrasto dei reati contro la pubblica amministrazione, nonché in mareria di prescrizione del reato e in materia di trasparenza dei partiti politici*'). Emblematic in this regard, above all, is the long-awaited reform of the statute of limitation period in criminal matters (the issue of the limitation period lies somewhere between substantive and procedural criminal law: Domenico Pulitanò, 'Tempi del processo e diritto penale sostanziale' [2005] Rivista italiana di diritto e procedura penale. 44; Fausto Giunta and Dario Micheletti, Tempori cedere. *Prescrizione del reato e funzioni della pena nello scenario della ragionevole durata del processo* (Giappichelli 2003). The government and the parliament have been clashing over the issue for a long time: besides the controversial impact it would have on legal practice, the proposal put forward by some members of the government (especially the current Minister of Justice, Alfonso Bonafede) to paralyse the progress of limitation period once the first judgment has been delivered is aimed, according to the supporters of the reform, at reducing impunity and denials of justice while at the same time ensuring a reasonable duration of criminal proceedings.

67 See Adelmo Manna, 'Rapporti tra diritto penale sostantivo e processo penale a trent'anni dal Codice Vassalli' [2019] 3 Archivio Penale <http://www.archiviopenale.it/File/DownloadArticolo?codice=f94958cd-d6aa-4329-8fcb-253d87fbbbf1&idarticolo=21718> accessed 7 September 2020.

68 See Cristiana Valentini, 'La completezza delle indagini, tra obbligo costituzionale e (costanti) elusioni della prassi', [2019] 3 Archivio Penale <http://www.archiviopenale.it/File/DownloadArticolo?codice=1084b0d9-d7a3-4d5b-b323-c2263eeb108f&idarticolo=19686> accessed 7 September 2020.

expose them to the risk of disciplinary proceedings initiated by the Italian High Council of the Judiciary (*Consiglio Superiore della Magistratura*).[69] Moreover, all of this is taking place within a framework characterised by a continuous reduction of individual safeguards.

7. Conclusion

In the Italian criminal justice system, the demands for an effective judiciary are back in focus. More than three decades ago, the radical change from an inquisitorial to an adversarial criminal procedure took place in Italy in order to protect the fundamental rights of the defendant, ensure fair trials and thus comply with the principles and rights enshrined by the Constitution. Currently, a rather different evolution of Italian criminal procedure appears to be proceeding. Following the failure of the national criminal justice system to strike an adequate balance between mandatory prosecution, prosecutorial discretion, and compliance to criminal procedure and legality, the law is gradually granting a broader floor to victims of crime. In Italy, their claims during preliminary investigations can in fact orient the public prosecutor's judicial decision to exercise or not to exercise penal action. Together with the changing paradigm of the criminal law, which both in Italy and elsewhere shifts from 'welfare'[70] to 'securitarian' punishment[71], the above role is rebalancing the status of suspects during preliminary investigations and defendants standing trial with that of victims of crime. The evaluation of the latest set of reforms is still provisional. They raise doubts at least as to whether they are actually capable of relieving prosecutors' offices of part of the current unsustainable workloads. Moreover, in Italy, the political debate has been focusing on whether the rules already in force should be modified, instead of on identifying which (legal, but also factual) prerequisites actually need to be met in order for those rules to work.

Mandatory prosecution postulates a much more rigorous implementation of the principle of *extrema ratio*. Inevitably, mandatory prosecution also requires greater financial and structural investment in prosecutors' offices, as well as investment in human resources, at least in terms of hiring staff and updating their professional training. Due to a number

69 With reference to the recent '*Disegno di legge recante deleghe al governo per l'efficienza del processo penale e disposizioni per la celere definizione dei procedimenti giudiziari pendenti presso le Corti d'appello*' of 14 February 2020, see Elvira Nadia La Rocca, 'La prima delega del decennio per la riforma del processo penale: una corsa folle contro il tempo, che ora scorre senza contrappesi' [2020] 1 Archivio Penale <http://www.archiviopenale.it/la-prima-delega-del-decennio-per-la-riforma-del-processo-penale-una-corsa-folle-contro-il-tempo-che-ora-scorre-senza-contrappesi-di-e-nadia-la-rocca/contenuti/11116> accessed 7 September 2020.

70 Francis Bailleau, Yves Cartuyvels, 'Juvenile justice in Europe. Between continuity and change', in Sophie Body-Gendrot, Mark Hough, Klara Kerezsi, René Lévy, Sonja Snacken (eds.), *The Routledge Handbook of European Criminology* (Routledge 2014), 465-466.

71 Ulrich Sieber, 'Blurring the Categories of Criminal Law and the Law of War: Efforts and Effects in the Pursuit of Internal and External Security', in P. Bárd (ed.), *The Rule of Law and Terrorism*, Budapest 2015.

of factors (such as the transnational dimension of many of the most serious contemporary forms of crime, security concerns and the increase in the demand for punishment, the spread of populism and the tendency to use criminal law as a primarily symbolic tool, serving to reassure citizens and gain electoral consensus),[72] the problem of *penal inflation* and the resulting overburdening of prosecutors' offices seems increasingly common in the European context. Therefore, the search for one or more legal models on the long road towards the harmonisation of procedural legislations[73] should take into account not only institutions and mechanisms that are implemented with positive results by individual countries (such as restorative justice),[74] but also the best guidelines and practices regarding the organisation and management of workloads of prosecutors' offices. Further strengthening the repressive side of the criminal justice system without any counterweight no longer seems to be a sustainable strategy. In order to improve its effectiveness and efficiency, comprehensive reforms are needed to adapt and improve not only the rules of substantive and procedural criminal law, but also the structures that administer the machinery of justice and the rules and guidelines governing their activity. This would help to reduce the growing pressure on the judiciary, restore greater confidence in the latter, and strengthen its legitimacy from below.

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72 See Enrico Amati, 'Insorgenze populiste e produzione del penale', [2019] DisCrimen <https://discrimen.it/insorgenze-populiste-e-produzione-del-penale/> accessed 7 September 2020; Simone Spina, 'Il diritto penale nella stagione dei populismi', [2019] 3 Questione Giustizia <https://www.questionegiustizia.it/articolo/il-diritto-penale-nella-stagione-dei-populismi_02-04-2019.php> accessed 8 September 2020; Lucia Risicato, Domenico Pulitanò, Adelmo Manna, Carlo Sotis, Antonino Sessa, Sergio Bonini, Gaetano Insolera, Nicola Mazzacuva, Tommaso Guerini, 'La società punitiva. Populismo, diritto penale simbolico e ruolo del penalista', [2016] 21 December Diritto penale contemporaneo< https://www.penalecontemporaneo.it/upload/DibattitoAIPDP.pdf> accessed 7 September 2020; Carolina Antonucci, 'Una prospettiva italiana del populismo penale', [2016] 3 XI Studi sulla questione criminale 77. With reference to Italian case law, see Alessandro Bernardi, 'Populismo giudiziario? L'evoluzione della giurisprudenza penale sul *kirpan*', [2017] Rivista italiana di diritto e procedura penale 671. About the widespread phenomenon of penal populism, see also John Pratt, *Penal Populism* (Routledge 2007); Denis Salas, *La volonté de punir. Essai sur le populisme pénal* (Fayard 2013).

73 The triggers, the expediency and the different types of European harmonisation of national criminal justice systems are analysed, *ex multis*, by Alessandro Bernardi, 'Politiche di armonizzazione e sistema sanzionatorio penale', in Tommaso Rafaraci (ed.), *L'area di libertà, sicurezza e giustizia: alla ricerca di un equilibrio fra priorità repressive ed esigenze di garanzia* (Giuffrè 2007).

74 To the extent that they are compatible with the fundamental principles and rights enshrined in national Constitutions and supranational Charters, and at the same time beneficial in terms of effectiveness and efficiency.

Alfredo Bazoli (and others), *L'azione penale in Italia: obbligatorietà o discrezionalità?* (Arel 2016).

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