This article deals with the role of public prosecution and the necessity of combining at the operational level two functional needs that are difficult to reconcile: (a) to ensure prosecutorial independence; (b) to ensure that prosecutorial discretion be subject to the democratic principle of accountability. While a trend to redress the balance in favour of prosecutorial independence seems to be gaining momentum in several countries, the author uses the Italian case to demonstrate that the need for prosecutorial accountability be protected. In particular he shows that Italy by ignoring the need to render prosecutorial discretion accountable has de facto delegated to a totally independent prosecutor the definition of a good part of its criminal policy. The manifold dysfunctional consequences for the efficient control of crime and for the effective and equal protection of civil rights are outlined.

Jurists, political scientists and sociologists interested in the working of judicial systems have until now focused their attention primarily on the role of the judge. Little attention has been paid to the role of public prosecutors, in spite of the fact that this role has progressively acquired greater and greater political relevance in our society for at least two reasons. The first of these has to do with the crucial function that public prosecution plays in crime sanctioning. We all know that public prosecutors are the gate-keepers of criminal justice, because without their intervention judicial sanctions cannot occur. Furthermore, their role has acquired ever-growing importance due to the increase in the magnitude and complexity of crime experienced by all countries in recent decades. The second reason for the mounting importance of their role has to do with the devastating consequences that undue, improper or partisan use of criminal proceedings may entail for protection of civil rights, to safeguard the social, economic, familial and political status of citizens and their equal protection in relation to criminal law (as we all know prosecution often is, de facto, a manifold sanction by itself, hardly ever remediable by a judicial acquittal that follows months or years later).

No wonder then that the UN Congresses on the Prevention of Crime have often dealt with this subject and have adopted a wide array of resolutions. Among other things, such resolutions require that high standards of professional training should be required, that prosecutors’ selection and career (where such system exists) should be based on merit and regulated by fair and impartial procedures, that codes of professional ethics be established, that guidelines for the regulation of their
discretionary powers be adopted and made effective, that 'the office of prosecutors be strictly separated from judicial functions', that 'effective co-operation with the police be assured'1 and so on.

The discussion guide of the Ninth UN Congress on the Prevention of Crime and the Treatment of Offenders (topic 3 on prosecution, items 76, 77, 78) inter alia stresses, on the one hand, that the importance of prosecutors be independent and on the other, that prosecutorial discretion be subject to the 'democratic requirement of accountability'. Unfortunately those two values, though both important, cannot easily be reconciled at the operational level. The difficult relation between independence and the democratic requirement of accountability is the subject of the paper.

In what follows I shall very briefly recall the basic reasons that make both independence and accountability important 'ingredients' of the proper exercise of prosecutorial functions and provide relevant examples of the institutional mechanisms through which various democratic countries try to strike a workable balance between those two values. I shall then portray the peculiar characteristics of public prosecution in Italy, an example which is uniquely appropriate to illustrate some basic misunderstandings related to the role of public prosecution in democratic countries. Among such misunderstandings particular attention will be given here to the widespread idea (not only in Western continental Europe but also elsewhere) that the more one reinforces the independence of public prosecutors at the expense of democratic accountability, the better it is for the proper functioning of prosecution in a democratic country, especially with curtailing political and administrative corruption. I shall use the Italian case as the one example that allows us, through the analysis of a 'deviant case', to expose the many negative consequences of totally disregarding the value of democratic accountability in the name of the prevailing value of independence. Finally, I shall provide a few concluding remarks on the reasons why the analysis here presented lends additional support and substance to the various recommendations on public prosecution formulated so far by the UN Congresses on the Prevention of Crime.

*Independence and Accountability: A Difficult Balance to Strike*

Although the role of public prosecutors has not received the attention devoted by scholars to the role of the judges, existing research clearly indicates that public prosecutors do wield a substantial amount of discretionary power in the daily performance of their official duties, actively participating in the actual definition of public policy in the criminal sphere. True enough, their discretionary power may vary from country to country, and with it also the political relevance of their role. It is

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1 For these and other recommendations on the same subjects see *Seventh and Eighth United Nations Congresses on the Prevention of Crime and the Treatment of Offenders* (1985: 73–4, 1990: 191–4). The UN recommendations might seem quite obvious to English readers but in fact in several countries they do not apply. Some of them do not apply even to countries of Western continental Europe. For example in Italy, as we shall see, as well as in France, judges and prosecutors are jointly recruited, belong to the same organization and can move from one function to the other, even several times, in the course of their career. It is worth noting that a recent deliberation of the European Parliament echoes the recommendations of the UN Congress on the Prevention of Crime on this very subject. In fact its Resolution A4-0112/97, no. 58, states among other things that it is '. . . necessary to ensure the impartiality of judges by distinguishing between the career of examining magistrate and that of judge, in order to ensure a fair trial'. For another example in which the European Community echoes the recommendations of the UN, see note 2.
certainly more ample, for example, where prosecutors in various ways supervise the police during investigations (as they do in countries of continental Europe), than in countries where prosecutors are totally excluded from the investigative phase, as in England and Wales. Whether their discretionary powers are circumscribed to decisions concerning criminal proceedings or are, instead, extended to include decisions on how to conduct investigations, their discretionary powers are in any case substantial. It is a phenomenon that is becoming all the more visible as a consequence of the dramatic surge, in quantity and complexity, of crime, and of the ever more disruptive threat it poses to our national and local communities.

From what we have said so far it should come as no surprise that public prosecution has recurrently been the subject of controversy and/or revisions in democratic countries (for example, the United States, England, France, Spain and Italy). In devising or revising the institutional role of public prosecution, democratic countries have to accommodate at the operational level two conflicting values of great relevance. On the one hand, there is awareness that public prosecution contributes substantially to the definition and implementation of criminal policy. This requires that mechanisms be devised to ensure that the active role played in that crucial area be somehow directed and controlled in the context of the democratic process. On the other hand, the need to guarantee that public prosecution be exercised with rigour, consistency and fairness makes it necessary to ensure that too close a tie with the political process be not unduly used by the existing majority to influence the conduct (actively or by omission) of public prosecution for partisan purposes; more generally to ensure that citizens be treated equally.

Various solutions have been adopted by several countries, mainly in recent decades, to accommodate such conflicting needs. Among such solutions are provisions intended to remedy any inactivity by public prosecutors, such as private prosecution in England and Spain, the possibility of requesting a judge to order that criminal proceedings be initiated as in Germany; the development of bodies of written rules intended to establish priorities that prosecutors must observe with reference both to types of criminal violation and to means of investigation, as in the UK and the Netherlands; provisions intended to protect public prosecutors from the use of indirect pressure, like the participation of representatives of public prosecutors in the decision processes concerning their promotion, appointments, and discipline, as in France, Italy, Portugal and Spain; and the creation of special independent agencies to prosecute high level public officials, as in the United States.

Taking into account the ongoing debate on the role of public prosecution and considering the modifications introduced in its set-up in various countries, one can certainly say that the balance between the two values of independence and...
accountability is in a state of 'unsteady equilibrium'. Limiting our observations to Europe, France provides a clear illustration of such a phenomenon (but independence and accountability of public prosecutors have recurrently been the subject of heated debate in other European countries, for example, in Spain and Belgium). In France the most recent reforms concerning public prosecution occurred in 1993 and 1994. These were intended to limit the discretionary powers of the Minister of Justice both with regard to his hierarchical supervision of prosecutorial activities and with regard to his decisions concerning the status of public prosecutors (promotions, discipline, etc.).

The first reform, approved by the French Parliament in January 1993, provides that the Minister of Justice can give instructions to public prosecutors only in written form. This measure was intended, on the one hand, to render more transparent the exercise of the Minister's hierarchical powers and, on the other, to respond to the many critics expressing the conviction that the Minister of Justice had at times utilized his discretionary powers unduly to influence, for partisan purposes, the conduct of public prosecutors in initiating criminal proceedings.

The second and more complex reform came into effect in 1994, and required the approval of both a constitutional amendment and of an 'organic law'. It provides that the Minister of Justice cannot adopt any decisions on the status of public prosecutors without an ad hoc advisory opinion expressed by a newly instituted section of the Higher Council of the Magistracy (opinions that the Minister cannot easily ignore, due to the competence and high standing of those called upon to pronounce them).

But apparently such reforms did not satisfy the underlying expectations—so much so that less than three years later, in January 1997, the President of the French Republic, M Chirac, appointed a Commission de réflexion sur la justice, with the task, among others, to reconsider once more the role of public prosecution and its independence from the Minister of Justice. As President Chirac stated:

The independence of the justice system is assured by the guarantees provided by the Constitutional and statutory norms, among which are those deriving from the reform of 1993. However, demands are continuing to be made for a clear-cut separation between public prosecution and the Minister of Justice. Such a position deserves to be examined with the greatest attention and without prejudice. I ask that you study the modalities and consequences of a new set-up in which public prosecution would no longer be subject to the supervision of the Minister of Justice and perhaps even no longer organized along hierarchical lines of control.

Looking at the experiences of various democratic countries, one can certainly observe the tendency to redress the balance between the values of independence and accountability through measures intended to render public prosecution less dependent on the expectations of the governing majority. Such a tendency, however, is never carried so far as to disregard the 'democratic requirement of accountability'. And it is worth noting that the Commission de réflexion sur la justice itself clearly took this very orientation:

In the first place [the Commission] has observed that the judicial policies of the nation must, in a democracy, be maintained among the responsibilities of the executive in the person of the Minister of Justice and, as a consequence, it has decided against total autonomy for public prosecution.

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5 Loi constitutionnelle n. 93–952 (27 July 1993); Loi organique n. 94–100 (5 February 1994).
In this panorama Italy stands as a deviant case: absolute priority is given to the value of independence. No relevance is accorded to the democratic value of accountability for the choices that prosecutors are in any case called upon to make in the crucial area of criminal policy. A discussion of the Italian set-up of public prosecution, therefore, acquires relevance beyond national boundaries because it allows us to analyse the possible consequences ensuing from such a set-up, both for the functioning of the criminal justice system and for relations between the judicial subsystem and other components of the political system. (Of course here I can indicate only the main consequences in a summary fashion).

The Italian Case: The Prevailing Value of Independence and its Negative Implications

From a formal point of view the 'solution' adopted in Italy appears absolutely perfect and certainly appealing to a superficial observer. In preparing the text of our Constitution after World War II, our founding fathers devoted a great deal of attention to public prosecution. To avoid the powers of public prosecution being used in a politically discriminating fashion, as had occurred during the previous Fascist period, they felt it necessary to sever the traditional tie that had until then made public prosecutors hierarchically linked to the Minister of Justice. Our constitutional fathers did not deem it necessary, however, to divide judges and prosecutors into different bodies ('magistrate' is the term that indicates them both), and indeed they are recruited through the same public competition. As a consequence, once a 'magistrate' begins his or her career, generally around the age of 26, with no previous professional experience in law practice, he or she may be assigned to either of those two roles and during that career can switch, even several times, from one function to another.

Further to ensure the actual independence of prosecutors and judges, the Constitutional Assembly decided to adopt a proposal for wide-ranging 'self government' of the magistracy by providing that all decisions concerning the magistrates (i.e. judges and prosecutors), from recruitment to retirement, should be concentrated in the hands of the Higher Council of the Magistracy, and that a two-thirds majority of that body should be composed of magistrates elected by their own colleagues (such a body became operative only at the very end of the 1950s). The Constitutional Assembly decided that prosecutors should have a monopoly over initiating criminal proceedings and at the same time should be empowered to supervise the police during the investigative phase. It specifically wanted such a monopoly to be exercised in full independence, i.e. without any of the direct or indirect forms of political responsibility existing in other constitutional democracies.

Somewhat naively, it also decided, in order to avoid a discretionary or arbitrary, and therefore politically relevant, use of prosecutorial powers, that it would be sufficient to prescribe that commencing criminal proceedings should be mandatory for all criminal violations. To our knowledge, 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. They firmly thought, furthermore, that independence and mandatory prosecution, two faces of the same coin, would be the
safest guarantee of the constitutional precept of the equality of all citizens before the criminal law.6

One cannot fully appreciate the overwhelming prevalence accorded in Italy to the value of independence at the expense of accountability without further considering a series of legislative innovations, passed by Parliament between the 1960s and the 1980s, that were formally justified as necessary steps fully to implement the constitutional provisions concerning the independence of prosecutors (and judges), innovations that in many respects served the function of further accentuating the independence of public prosecutors and further strengthening the system of self government of the magistracy. Moreover, these innovations have substantially contributed in further differentiating the status of Italian public prosecutors from that of their counterparts in other democratic countries and most obviously from their colleagues serving in those countries of continental Europe which, like Italy, recruit their prosecutors among young law graduates with no previous professional experience. Suffice it here to recall the most relevant effects of those innovations.

First, prosecutors (and judges) currently enjoy, and have done so for about 30 years, a de facto 'automatic' career, based on seniority. All of them, short of very grave disciplinary sanctions, reach the highest rank and salary 28 years after recruitment. The new laws on promotions passed in the late 1960s and early 1970s have been interpreted by the self-governing body of the magistracy with such an extreme self complacency as to amount to a de facto refusal to enforce any form of professional evaluation (Di Federico 1976: 1: 40-55, 1987: 3-47); promotions 'for judicial merit' being granted even to prosecutors (and judges) that take prolonged leaves of absence to perform other activities in the executive or legislative branches of government (Di Federico 1981: xiii-Ixxvii). As to the major implications of such measures, officially justified as constituting the goal of better protecting prosecutorial (and judicial) independence, two are worth mentioning. The first is that at present the only guarantee of the professional qualifications of our prosecutors (and judges) for the entire period of 40-45 years of service (retirement age being 72) resides in the initial entrance examination taken at the age of 22-24 and testing only 'theoretical' knowledge of various branches of the law, at a very low level of reliability (Di Federico 1987: 10-14). The second is that as career evaluations are no longer based on judicial performance,
prosecutors (and judges) can successfully pursue additional extra-judicial appointments and other activities remunerated from outside sources (Di Federico 1981: xiii–lxxvi), a phenomenon that, among other things, has blurred considerably the borderlines between the magistracy and the political class. Suffice it here to mention that in the last national elections over 50 prosecutors and judges were running for a seat in Parliament on behalf of various political parties, and that 27, having been elected, are now on leave of absence with no adverse consequences for the regular course of their judicial career. Furthermore, one of them has also been appointed as a Minister and three as undersecretaries (why these and many other much sought after positions are being offered to prosecutors will become understandable later when considering the exceptional powers they actually wield).

Secondly, through a complex combination of judicial initiatives, judicial decisions and powerful pressures on Parliament, prosecutors and judges obtained (in 1984) salaries, pensions and retirement bonuses that are by far the highest in the public service. They have furthermore obtained that the increases in their salaries, pensions and retirement bonuses be based on an automatic mechanism that year after year increases to their advantage the difference between their economic status and that of other sectors of the public service (Di Federico 1985: 2: 331–73; Zannotti 1989, 1995: 181–204). These measures were, once again, requested, justified and obtained as a means to further guarantee the independence of prosecutors (and judges) from possible, even indirect, pressures from the legislative and/or executive branches of government.

Thirdly, for the entire period of 40–45 years of their service, prosecutors, just like judges, cannot be transferred to another office (as prosecutors or judges) unless they themselves ask for it. The constitutional principle of inamovibilità ('unremovability'), intended to protect judicial independence, has not only been extended to prosecutors, but has become so wide-ranging as to cover, if they so wish, the entire period of their prolonged working life. In other words, though prosecutors are recruited to satisfy the functional needs of the entire network of judicial offices, they can remain in a post of their liking, whatever the reasons for that preference might be, for just as many years as they wish (but not of course beyond the retirement age of 72).

Fourthly, prosecutors have requested and progressively acquired full control over police activities in the course of the investigation of offences (Di Federico 1989, 1995). The new 1988 code of criminal procedure has explicitly placed in the hands of prosecutors the responsibility for all decisions concerning police investigations as a means to ensure that the full independence of prosecutors in implementing the constitutional principle of mandatory prosecution would not be hindered by autonomous decisions adopted or initiatives taken by the police. Prosecutors can,

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7 Article 381 of the 1988 Code of Criminal Procedure originally provided that the police had to report all criminal violations to the competent prosecutor within 48 hours. Article 56 provides that investigations are to be conducted by the police under the direction and the hierarchical supervision of the prosecutor. The immediate consequence was that the police would report all notices of criminal violations to prosecutors and wait for their instructions before undertaking any further investigation. To lessen the delays and the other negative consequences that such a situation was causing to the effective conduct of investigations, Article 381 of the code was later slightly changed, providing that the police had to report criminal violations 'without delay'. It is worth noting that recently General Luigi Federici, in command of the main police force, has repeatedly and publicly argued that such a stifling dependence on prosecutors was gravely undermining the professional competence of the police in the conduct of investigations.
therefore, choose from case to case and according to their personal views whether or not to exercise substantially and in full independence police functions; and can decide from case to case also the scope and the means of investigation (and with it the destiny of the case).

Prolonged field research on the actual working of the Italian justice system and parallel research conducted in other democratic countries have repeatedly led us to unravel the manifold implications and negative consequences of such an extreme dominance accorded to the value of independence over that of accountability, as if independence were an end in itself, indistinguishable in nature for both prosecutors and judges alike. These implications and negative consequences inevitably bear upon the effective and efficient performance of prosecutorial functions, protection of civil rights in actual criminal proceedings, indeed the proper functioning of the basic mechanisms of checks and balances typical of democratic systems for all decisions concerning the judicial sector.

Let us now consider very briefly some of the main results of our research work, concentrating in particular on those that are most directly connected to the utter disregard for 'the democratic requirement of accountability' in the set-up of public prosecution in Italy.

The first clear element that emerges from our research is that, 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. It is de facto discretionary due to the unfortunate circumstance that a constitutional provision, mandatory criminal prosecution, cannot change the hard fact that in Italy, just as in all other countries, the magnitude of criminal phenomena is such as to preclude the prosecution of all criminal violations, even less that they be prosecuted with equal attention and effectiveness. As a consequence, and as our research findings on the matter clearly show, in Italy too discretion de facto permeates prosecutorial decisions throughout the process that prosecutors have to perform (in relation to, for example, relative priorities in pursuing cases simultaneously, part of the prosecutor's workload, the amount and nature of investigative resources to employ in each case, restriction placed on personal freedom and assets (Di Federico 1991; Fabri 1997)). Paradoxically enough, the interconnected constitutional provisions of prosecutorial independence and mandatory criminal prosecution in many ways impede the very pursuit of the ultimate goal, the equal treatment of all citizens before the criminal law, which our constitutional fathers wanted to protect through those same measures. The provisions have de facto opened the way to a more ample, unrestricted use of prosecutorial discretion than in those democratic countries where the discretionary powers of prosecutors are in various ways exposed and restricted by open regulation, through decisions taken within the democratic process, of the priorities to be followed and by rendering, therefore, prosecutors accountable for their violations. In Italy, instead, when prosecutors' decisions are publicly criticized, as often happens, for being discriminatory or partisan, they are recurrently and successfully defended as the 'mere', 'unavoidable' application of the constitutional principle of mandatory criminal prosecution. Furthermore, those that have raised doubts regarding prosecutors' conduct have invariably been accused of conspiracy against the constitutional principle of prosecutorial independence for devious, particularistic or political reasons. Yet one cannot appreciate in full the implications and negative
consequences deriving from the absolute prevalence accorded to the value of prosecutorial independence over that of accountability without considering another facet of the set-up of public prosecution in Italy.

A second, relevant aspect of our research findings is that in the course of the last 25 years action on criminal cases has tended to become more an attribute of individual prosecutors than that of the office to which they belong, in spite of the fact that hierarchical power is formally vested in the head of the office (Di Federico 1991; Di Federico et al. 1996). Various factors have contributed to this evolution. Among them is the tendency of the Higher Council of the Magistracy to undermine the supervisory powers of the heads of prosecutors' offices as a means of promoting an independent, unfettered development of mandatory criminal prosecution. This policy has even been given a name: the 'personalization of prosecutorial functions'. This complicates the practical difficulties of reconciling the de facto unattainable, but still formally valid, principle of mandatory criminal prosecution with the hierarchical power of co-ordination. After all, any directive or order that the chief prosecutor might give on priorities to follow, on how to deal with single cases, on the investigative means to employ, or on whether to restrict the personal liberties of suspects, could in any particular case be represented as a limitation of prosecutorial independence and as a malicious interference in the full-fledged application of the constitutional duty binding every prosecutor to mandatory criminal prosecution. The supervisory powers of the chief prosecutors have recurrently and successfully been challenged by their subordinates (they are officially called 'substitutes') in front of the Higher Council of the Magistracy. As a consequence, chief prosecutors have tended to use such powers less and less. Some of the innovations introduced by the 1988 code of criminal procedure and ordinamento giudiziario have further reinforced this tendency. The end result is that each prosecutor can initiate criminal proceedings not only on receiving a request from other agents (police, other public authorities, citizens, etc.), but also on his or her own initiative. In other words, it is quite legitimate for each of them to start and carry out, with the utmost independence, investigations of any kind, on any citizens, using the various police forces to verify whether the offences they (more or less justifiably) assume to exist have actually been committed. In no way can they be held accountable for these decisions, not even when their accusations, as happens, turn out to be totally ungrounded at the trial level. Furthermore, in no way is the consistency with which their decisions are taken in identical or similar cases exposed to public scrutiny.

Under such conditions it should come as no surprise that independence as an attribute of single prosecutors has led to a use of their de facto ample discretionary powers in a way that differs substantially according to their personal drives or ambitions. Such a phenomenon, often highlighted by the press in the last 20 years,
emerges very clearly from our interviews with members of the magistracy and even, occasionally, from the official statements of some of our most well-known prosecutors, who have outspokenly denounced the negative consequences deriving from the total absence of a binding judicial policy. In this regard it is worth quoting from the writings of Giovanni Falcone (1994: 173-4), a world famed prosecutor of transnational organized crime, assassinated by the Mafia in May 1992. After having illustrated the widespread phenomenon of the different orientation of various prosecutors’ offices and of their members, he states:

How can it be conceivable that in a liberal democratic regime we do not yet have a judicial policy, and everything is left to the absolutely irresponsible decisions of the various prosecutors’ offices and often even to the personal decisions of their members? In the absence of institutional controls on the activities of public prosecutors, [there is] the peril that informal influences and hidden connections with hidden loci of power might influence their activities. It seems to me that the time has come to rationalise and co-ordinate the activities of public prosecutors rendered de facto unaccountable by a fetishistic conception of the principle of mandatory criminal prosecution.9

He adds:

Judicial policies cannot be left in the hands of the head of the [prosecutors’] offices, or worse in the hands of each member of the various offices, without any institutional control. Such a system does not favour the effectiveness of the judicial function in terms of a real, co-ordinated, generalised control of crime, nor is it conducive to equal protection of citizens under the law . . . nor does it favour the image of justice, which . . . [thus] appears to public opinion as a wild variable of the system. (Falcone 1994: 180-1)

Such a ‘fragmentation’ of prosecutorial independence, such an extended lack of accountability for a personalized exercise of an often wide-ranging prosecutorial discretion has further accentuated the propensity for unequal treatment of citizens before the law that in any case derives from an unregulated exercise of prosecutorial discretion. It has created the most favourable condition for a distorted use of what Justice Jackson has described as the ‘most dangerous power of the prosecutor’, i.e. ‘that he will pick up people that he thinks he should get, rather than cases that need to be prosecuted’,10 an accusation that, in fact, is levied against our most active prosecutors.

Our research data indicate two other dysfunctional consequences connected to the ‘personalization of prosecutorial functions’ that I can only hint at here: on the one hand, it has often created serious impediments to investigations that require co-ordination among various prosecutors, and on the other it has placed in the hands of


10 R. Jackson, The Federal Prosecutor, address delivered at the Second Annual Conference of United States Attorneys, 1 April 1940. (At the time R. Jackson was US Attorney General.) The piece from which the quotation is taken is worth quoting further for the clarity with which Jackson states the problem: ‘Law enforcement is not automatic. It isn’t blind. One of the greatest difficulties of the position of prosecutor is that he must pick his cases, because no prosecutor can ever investigate all the cases in which he receives complaints . . . If the prosecutor is obliged to choose his case, it follows that he can choose his defendants. Therein is the most dangerous power of the prosecutor; that he will pick people that he thinks he should get, rather than cases that need to be prosecuted. With the law books filled with a great assortment of crimes, a prosecutor stands a fair chance of finding at least a technical violation of some act on the part of almost anyone. In such a case, it is not a question of discovering the commission of a crime and then looking for the man who has committed it, it is a question of picking the man and then searching the law books, or putting investigators to work to pin some offence on him.’
each prosecutor a much feared 'contractual power'\textsuperscript{11} that is certainly among the primary causes of the many gratifying extra-judicial appointments bestowed in the last 25 years on our prosecutors from outside sources (a phenomenon that, needless to say, not only runs against the very reasons traditionally given in support of prosecutorial independence but also gravely erodes one of the basic pillars of democratic government, i.e. the division of powers\textsuperscript{12}).

The relevance and diffusion of the 'fragmentation' of prosecutorial powers and of its many negative implications is further confirmed by the answers to a series of questions we recently asked of a sample of 1,000 defence lawyers with regard to their personal experience of criminal proceedings: around 70 per cent answered that there are substantial differences in the way individual prosecutors define priorities in the exercise of their functions; around 55 per cent of the lawyers also said that there are substantial differences in the way individual prosecutors decide 'in very similar cases' as to the nature and extension of the means and measures at their disposal during the investigative phase (Di Federico et al. 1996). In this regard it is well worth recalling that, while conducting investigations, prosecutors have available to them, as already indicated, a very large array of preventive measures to restrict the personal liberty, privacy, and use of personal property of suspects. To illustrate fully the weight of prosecutorial independence in these very delicate areas for the protection of civil liberties I have to resort, once again, to our research findings on the implications of another peculiar characteristic of the Italian judicial system, i.e. the organic link that 'ties' prosecutors and judges as members of the same organization.

As we have already said, judges and prosecutors are recruited through the same public competition soon after graduation from university. They can initially be destined to serve either as prosecutors or judges and thereafter can switch, even several times, from one function to another. They follow the same career, receive the same salary, belong to the same professional association (very active and effective for the protection and promotion of their common interests). They elect jointly their representatives to

\textsuperscript{11}The high 'contractual power' of the Italian magistracy (prosecutors and judges) vis-à-vis the political class is closely connected to the fact that, as we have already said, prosecutors can, in total independence, initiate criminal action, conduct investigations for years on any citizen, and even use the media to render the content of their initiatives known to the public. Certainly there are quite a few examples of political leaders at the national and local level whose careers have been irremediably truncated by criminal proceedings that years later turned out to be totally ungrounded. Our interviews with parliamentarians conducted in the last 30 years during the discussion of the various bills that have granted consistent privileges to our prosecutors and judges (on matters like career and salaries) clearly show an orientation to acquiesce so as to avoid the risk of unwanted criminal proceedings directed against them and/or their collaborators and/or their political party. On some occasions this phenomenon has been publicly acknowledged by authoritative political leaders, like a former President of the Republic, Francesco Cossiga (for his statement and those of other political leaders on the same subject see Di Federico 1996: 194). The existence of such a phenomenon is, on the other hand, recognized also by a prominent member of the judiciary, more then once president of the powerful association of the Italian magistracy, A. Beria d'Argenune who, in order to explain why an increasing number of prosecutors and judges were being elected in Parliament as representatives of the major political parties, has written: 'the real explanation is that political parties are convinced, more or less correctly, that the magistracy is a seat of real, heavy power, often brutal power... and that therefore it is convenient to have with it personalized channels of communication . . .' (Corriere della Sera, 28 April 1979). For a less cursory representation of the various causes that make for the high contractual power of the magistracy in the Italian political system, and for the exceptionally high number of extra-judicial appointments our magistrates more or less directly receive from the political class, and for the many negative consequences ensuing therefrom, see Di Federico (1981, 1996: 193–211) and Zannotti (1989).

\textsuperscript{12}At present 27 members of Parliament, one minister, three state undersecretaries, two presidents of regions, three mayors and various assessors of local governments elected as representatives of various political parties are members of the magistracy (i.e. public prosecutors and judges) on leave of absence. Furthermore in the last 30 years the number of extra-judicial appointments granted more or less directly by the political class to members of the magistracy runs to several thousand. For a description of this phenomenon and its many negative implications, see the bibliographical references indicated in the preceding note.
the self-governing body of the magistracy. In sum, they develop through a very effective, prolonged process of socialization, a strong sense of common belonging and of common destiny. No less important is the fact that both judges and prosecutors have their offices in the same building and, naturally, also have daily occasion for informal contacts. In other words, such close ties create the most favourable conditions to render those who temporarily play the role of the judge particularly sensitive to the expectations of their colleagues that temporarily play the role of prosecutors, mainly during the investigative phase, when decisions have to be made by the judge on the request of prosecutors concerning among other things restrictions on the privacy, personal freedom of suspects and the use of their assets. Our field research findings confirm the existence of informal ex parte communications between prosecutors and judges with reference to decisions that the latter have to take on matters concerning the measures to be adopted during the investigative phase. We have also collected some documentary evidence not only on the inclination of judges to satisfy the expectations of their 'colleagues' acting as prosecutors during the investigative phase, but also to the effect that such a phenomenon is de facto considered as a violation of judicial ethics like it is in other countries. Obviously, due to the informal nature of such phenomena, we are not in a position to specify their frequency and distribution simply on the basis of direct observation and official documents. Two concurring elements clearly suggest, though, that these phenomena are frequent and widespread. One of these elements is the exceptionally high rate with which judges decide in conformity with the requests of their 'colleagues' (prosecutors), both during the investigative phase (including those concerning the limitation of personal liberty of suspects, like preventive detention) and at the end of such a phase when they have to decide whether to terminate the case or 'send it' for a full public trial. The second element is the fact that the overwhelming majority of our sample of 1,000 defence lawyers indicates both that ex parte informal communications on the substance of the cases at hand between prosecutors and judges do take place, to the exclusion of the defence, as a matter of daily occurrence, and that the decisions of judges during the investigative phase and at the end of it consist, with rare exceptions, in a passive, almost rubber stamp acceptance of the requests formulated by their colleagues-prosecutors (Di Federico et al. 1996).

More generally, lawyers maintain that the vast amount of unregulated discretionary power exercised by prosecutors in full independence cramps the role of the defence and renders the protection of the civil rights of their clients during the lengthy phase that precedes the public trial far more dependent on the gracious good will of prosecutors than on their own professional capacity as lawyers. Furthermore, lawyers also indicate that prosecutorial independence serves de facto as an all encompassing

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13 Di Federico (1995b: 421–2 and n. 50). As to the prohibition of ex parte communications one can consider, as an example, canon 3, s. B, n. 7, of the American Bar Association Model Code of Judicial Ethics, adopted by most of the states of the US, which provides that: 'A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding.' With reference to actual disciplinary cases tried under that provision the most authoritative commentators of the Code say: 'Ex parte communications deprive the absent party of the right to respond and be heard. They suggest bias or partiality on the part of the judge. Ex parte conversations or correspondence can be misleading; the information given to the judge may be incomplete or inaccurate, the problem can be incorrectly stated. At the very least, participation in ex parte communications will expose the judge to one-sided argumentation, which carries the attendant risk of an erroneous ruling on the law or facts. At worst, ex parte communication is an invitation to improper influence, if not outright corruption' (see Shaman et al. 1995: 149–50).
shelter that covers up decisions which are actually motivated by personal ambitions or political orientation, or else by the desire to acquire public fame and the benefits that might go with it (ibid.). In particular, defence lawyers claim that prosecutors often use prolonged preventive detention as an effective way to obtain confessions that correspond to the investigative objectives they are pursuing or which confirm their working hypothesis (91.5 per cent of the lawyers maintain that preventive detention is actually used for devious reasons) (ibid.). Such accusations, I must add, are widely shared, have recurrently been the subject of heated debates in the media and in the political arena, and have found receptive ears even in the Bureau de la Fédération Internationale des Droits de l'Homme (1992). Defence lawyers have recurrently organized, to no avail, demonstrations and even prolonged strikes to protest against the progressive erosion of their role.

Certainly the level of discretion that characterizes Italian prosecutors' initiatives in criminal proceedings and the coercive measures at their disposal have progressively led them to acquire de facto the control and definition of a consistent share of public policy in the criminal sector and with it an ever more visible role as 'problem solvers' for a considerable part of the political, social and economic issues of the day in the last 30 years or so, be they safety in the work place, environmental pollution, tax evasion, bank frauds and similar economic crimes, terrorism, organized crime or corruption of public officials and politicians. In practice, their successful initiatives in the area of political corruption have determined substantial changes in the political leadership and party structure of the country, and have also constantly occupied, for the past six years, the front pages of our national newspapers and television news programmes. Their initiatives have also elicited great attention and interest in many other countries, nourishing in many the conviction that the Italian model of prosecutorial independence and the exceptional measures adopted for its protection may be the effective answer to the plague of political and administrative corruption everywhere. There is no doubt that in the last few years our prosecutors, particularly in some geographical areas, have uncovered a wide-ranging network of political and administrative corruption—corruption that, as it turned out, had developed, undisturbed, for various decades to such an extended degree as to have substantially altered, if not indeed erased, the basic mechanisms of a market economy in the sector of public works of national and local interest. Nevertheless, it would be simplistic and certainly misleading to draw from the Italian example the conclusion that the greater the independence enjoyed by prosecutors, the lower their accountability within the democratic process and the greater the success one might expect in the repression of political and administrative corruption. I need only one brief observation to induce caution on the matter and expose the fallacy of such simplistic assumptions: during the decades in which political and administrative corruption flourished, developed and progressively spread extended roots, our prosecutors were just as independent as they are at present, and no one can be held institutionally accountable for that prolonged period of inactivity on such diffused, pervasive and dangerous violations of criminal law. Obviously the complex problem of corruption cannot be faced by rendering

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prosecutors more and more independent within the democratic process, by totally excluding from the 'democratic requirement of accountability' a function, that of prosecution, bearing responsibilities of great and increasing political relevance.

In describing the main dysfunctional consequences deriving from the exceptional, unique measures protecting prosecutorial independence in Italy, I have so far stressed only those that relate most directly to the topic of my report as stated at the outset, i.e. only those that on the one hand limit the effectiveness of prosecutorial activities and on the other substantially impinge on the protection of civil liberties in the course of criminal proceedings. Data from our 30-year-long research activities show other negative consequences connected thereto. One is worth mentioning before moving on to a few concluding remarks: the highly persuasive contractual powers acquired by prosecutors in our political system, the fact that their widely publicized criminal proceedings and investigations have recurrently and definitively put an end to the political career of a considerable number of political leaders and parliamentarians (even of those that years later have been found innocent at the trial level) has somehow altered the very working of the institutional mechanisms of checks and balances by giving to the magistracy as a whole, through the pressures of a very active professional association, great influence on legislative decisions. This influence has proven to be highly effective not only in obtaining advantages not enjoyed by prosecutors in any other country (like, for example, the already mentioned automatic career and the periodic, automatic, substantial increases in salary and pensions), but also an unfailing veto power on any (undesired) proposal concerning the magistracy and its powers that is not of their liking.  

**Conclusion**

One can certainly say that the description of the 'Italian case' confirms the great relevance of one of the topics submitted to our attention by the discussion guide of the Ninth UN Congress, i.e. that public prosecutors should be independent but at the same time that prosecutorial discretion should be subject to the 'democratic requirement of accountability'. In particular it shows how total disregard for the democratic principle of accountability carries with it a series of very grave consequences, both for the protection of civil liberties and for the effective working of the prosecutorial function. It shows furthermore that legislative provisions, even constitutional provisions, cannot change reality, a notion that certainly will not surprise the common citizen but that often seems hard to reckon with for many jurists—as is certainly the case regarding the idea that all criminal violations, in spite of all the empirical evidence to the contrary, will be equally prosecuted simply because the law says so. To be sure, the idea that the principle of mandatory criminal prosecution should be adopted as one of the main implications of the so-called 'principle of legality' is widely cultivated and diffused not only among Italian jurists and magistrates but also among many of their colleagues in other countries which have a civil law tradition. When such an orientation prevails, the consequences may in many ways be very harmful, as we saw, for the protection of values

\[15\] For a summary presentation of some of the causes of such an influence and related bibliographical references see notes 11 and 12 above.
of fundamental importance in democracy, and even run counter to the very intentions of those who cultivate such doctrinaire, dogmatic orientations. The Italian case illustrates such a phenomenon. By justifying full prosecutorial independence on the empirically false assumption that criminal prosecution should be mandatory, a vast amount of unregulated, politically relevant decisions have been de facto forced into the hands of the members of a bureaucratically recruited corps, that of prosecutors. In the absence of any formal regulation of such wide-ranging discretionary power, any formal regulation being in contradiction to the constitutional provision of mandatory criminal prosecution, prosecutors are left to themselves in deciding how to use it from time to time and from case to case. The result is that such powers end up being used in a different way by the various prosecutors’ offices and even by each prosecutor within an office. Paradoxically, therefore, such an extreme version of prosecutorial independence inevitably carries with it at the operational level the defeat of one of the ultimate goals it is intended to guarantee, i.e. the equality of all citizens before the criminal law. By the same token the many negative consequences that, as we saw, derive from the adoption of an extreme vision of prosecutorial independence, underline the need, suggested by the discussion guidelines of the UN Congress, that prosecutorial independence should always be balanced by measures safeguarding 'the democratic requirement of accountability'.

The description of the Italian case, though presented briefly and deprived of all the nuances that usually characterize scholarly presentations, suggests also that there should be greater care in defining the meaning and implications of the concept of independence. Can it have exactly the same meaning and implications, and does it serve the same purposes for both judges and prosecutors, as has been assumed in Italy? As an example to the contrary, I will limit myself to recalling that it would certainly be a violation of the independence of the judicial function if the president of a court were to co-ordinate substantially, i.e. on their merits, the judicial decisions of the judges of his court. Does the same implication for the concept of independence apply to a prosecutorial office? Alternatively, as the Italian case clearly suggests, is the very lack of any substantial form of hierarchical co-ordination of prosecutors highly dysfunctional for the proper and efficient exercise of prosecutorial functions, above all in countries where prosecutors closely supervise police investigations? Let me add that I would not have posed such a question were it not for the fact that, looking both at previous resolutions of the UN Congresses on the Prevention of Crime and at the existing literature, one can observe that the term 'independence' is used imprecisely from time to time, with reference to both judges and prosecutors. True enough, neither in the literature nor in the context of the UN Congresses has it ever been stated that the meaning of 'independence' should be the same for both functions. Nevertheless no effort has been made so far to specify the differences in analytical terms. In my opinion it would be well worthwhile to pursue the subject.

At the outset of my article I stated that the description of the Italian case would lend additional support and substance also to several other recommendations on public prosecution discussed and approved in previous UN Congresses on the Prevention of Crime. Let me briefly indicate why:

(a) The analysis certainly confirms the importance of the recommendation concerning the adoption of guidelines for the regulation of the discretionary
powers of prosecutors, as one of the most relevant means to be used in the
difficult search for a satisfactory balance between prosecutorial independence
and the democratic principle of accountability. Certainly the same purpose can
be served by another previous recommendation to the effect that standards of
professional ethics for prosecutors be established and enforced.

(b) Our brief and certainly incomplete description of the grave limitations on the
role and rights of the defence deriving from a judicial set-up in which judges and
prosecutors belong to the same body16 certainly confirms and further validates
the previous recommendation to the effect that 'the office of prosecutors be
strictly separated from judicial functions'.

Finally a brief comment on two other recommendations of previous UN Congresses on
the Prevention of Crime that have been disregarded in Italy for the past 30 years, i.e.
that 'the selection and career (where such system exists) should be based on merit' and
that 'high standards of professional training should be required'. As we saw, at present
no substantial evaluation based on merit is provided for in Italy during the 40–45 years
of service of our prosecutors (and judges), due to the fact that the self-governing body of
the magistracy de facto decides on career advancement on the basis of seniority. Such
an 'evolution' of our system toward a completely automatic career mechanism has been
justified as a necessary step to avoid evaluations of merit limiting, even indirectly, the
independence of our prosecutors (and judges). Such an orientation, not surprisingly
shared by prosecutors and judges of other countries adopting a career system similar to
the Italian one, poses another dilemma involving the concept of independence, i.e. to
what extent protection of independence should be pursued at the expense of real,
substantial guarantees of professional qualification and quality?

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