The Continuation of Criminalization by Other Means: The Role of Judicial Agency in the Italian Policing of Humanitarian Assistance at Sea

Over the last few years, many of the civil society organizations engaged in search and rescue activities in the Central Mediterranean have been targeted in different ways by public authorities. This phenomenon, widely described in terms of 'policing', has been central in the EU's and the member states' migration governance. Scholars have increasingly considered various aspects of it, mostly focusing on legislation, practices and consequences of policing. This article contributes to the existing scholarship by shifting attention to the policy dimension and specifically considering the policy-making process. I focus on the Italian case, in the context of the broader EU policing dynamics, adopting an actor-centred institutionalist perspective, with a view to explaining how and why such policies emerged and evolved over time. To do so, I focus on the policy influence of the judiciary, as enabler of both expansive and repressive dynamics, in the broader context of European and national migration policy-making dynamics. Based on extensive research encompassing different governance layers, the case at hand offers interesting empirical and analytical reflections related to the policing of humanitarian assistance and on the role of the judiciary as a complex and ambivalent driver of the policy process.

Keywords: policing humanitarian assistance, Mediterranean Sea, migration policy-making, search and rescue, judicial agency

Introduction

Criminalization and, more broadly, policing of humanitarian assistance in border areas is a widespread phenomenon which affects many different actors, from civil society organizations (CSOs) and political activists to ordinary citizens acting out of compassion.

Examples of that in the Central Mediterranean context have attracted particular attention, mostly due to the size of migration flows and to the many controversies related to search and rescue (SAR) activities (Carrera et al., 2018a; Cusumano & Gombeer, 2020; Fekete, 2018; Tazzioli, 2018. See also Gordon & Larsen, 2020 on the Greek context).

A wide body of scholarly literature has addressed the policing of humanitarian actors at borders from multiple perspectives (Schack & Witcher, 2020: 3). In particular, many works have recently considered the Central Mediterranean route, discussing empirical cases (Cusumano & Villa, 2020), aspects of the EU legislation (Carrera et al., 2018b), as well as the concrete consequences of this policing process (Allsopp et al., 2020; Carrera et al., 2018a; Vosyliūtė & Conte, 2019).

However, although such scholarship has often included some important policy considerations (e.g. Cusumano & Villa, 2020: 6–12), it has not yet systematically considered the policy-making dynamics of criminalization/policing – such as by shifting attention from policing practices to the process that led to the adoption of specific repressive policy outputs.

With a view to filling this gap, I intend to offer a contribution to the existing EU migration scholarship by exploring the Italian policy-making process which, during the governments led by Paolo Gentiloni (2016-18) and Giuseppe Conte (I: 2018-19; II: 2019-21), led to the widespread and persisting policing of humanitarian assistance (PHA) in the Central Mediterranean. In so doing, I will address the reasons that allowed for the emergence and dissemination of the process and which drove its evolution.

I explicitly refer to 'policing' rather than to 'criminalization' of humanitarian assistance in the perspective outlined by Sergio Carrera, Jennifer Allsopp and Lina Vosyliūtė. They argue that the 'policing' concept does not merely relate to control practices and criminal law-based approaches, but it rather 'refers to the wider set of

practices and policies employed by the EU and member states which impact (directly or indirectly) CSAs [civil society actors] activities', mostly based on three modalities: 'suspicion/intimidation', 'disciplining' and 'criminalisation' (Carrera et al., 2018a: 239).

The concept of policing humanitarian assistance therefore includes different practices and policies, criminalization being but one of them. Consistently, the term 'criminalization' is used throughout the text to specifically describe 'all the discourses, facts and practices […] that hold immigrants/aliens responsible for a large share of criminal offences' (Palidda, 2011: 23).

Research Design

The systematic policing of humanitarian actors is a common practice across the EU, and is grounded in and reinforced by the EU migration politics and policies – and its framework against migrant smuggling in particular (Carrera et al., 2018a). However, specifically turning our attention to policy outputs – in terms of both their design and implementation – the member states' dimension becomes crucial, as the national and local levels are those where the most significant policing dynamics took place (Carrera et al., 2018b: 59–87).

In such context, Italy represents a salient and significant case, due to geo-political reasons, the impact of maritime migration and the magnitude of the policing policies and practices that have taken place (Cusumano & Villa, 2020: 6–12). Hence, it appears particularly relevant in the perspective of understanding EU-wide PHA dynamics in the Central Mediterranean.

Specifically considering the Italian case and the wide prosecutorial criminalization of humanitarian actors that took place (Carrera et al., 2018a: 247–251), hence, this study addresses the following questions:

(1) How and why did the policing of humanitarian actors emerge and rapidly become widespread and systemic?
(2) How and why did such practice evolve over time?

I contend that the way in which PHA emerged and rapidly became systemic at first, and rapidly evolved later, can be explained by considering the agency of the judiciary and its impact on the policy process, in terms of both on-the-ground and bottom-up dynamics and their direct and indirect effects (cf. Bonjour, 2016: 328–331). Judicial agency hence represents the key independent variable, whilst other EU and national policy-making dynamics in this field can still offer important contextual and concurrent explanatory elements.

This analysis is based on an actor-centred institutionalist approach, moving from the assumption that the policy-making process can effectively and thoroughly be captured by understanding the interactions between different actors within given institutional contexts (Scharpf, 1997). In so doing, I explore the agency of the judiciary as influenced (but not determined) by the existing institutional frameworks – also responding to a plurality of logics (March & Olsen, 2006).

Such framework is integrated with contributions coming from:

(1) Multi-level governance (MLG) scholarship – and namely its consideration of bottom-up elements of the policy process (Caponio & Jones-Correa, 2018: 2002);
(2) Judicial politics and policy-making scholarship – in particular with regards to the role played by courts in migration governance, both directly and indirectly, through their 'radiating effects' (Galanter, 1983. See also Bonjour, 2016).

In the light of the above, this heuristic case study (Eckstein, 1975: 104–108) empirically improves our understanding of the patterns of policing humanitarian actors

in the Central Mediterranean, by disclosing and explaining those elements that made the process at stake emerge and become systemic, and then drove its evolution. At the same time, however, it offers important analytical and theoretical arguments related to the role played by the judiciary in migration policy-making and, more broadly, on aspects of bottom-up policy-making.

My analysis is based on numerous documentary sources, which include judicial acts, EU and national policy documents, parliamentary proceedings, institutional reports, newspaper articles and secondary literature.

Semi-structured interviews and informal conversations with practitioners and policy-makers were also used. They contributed to providing a general frame to the issue at hand and to explore some aspects more into depth. Furthermore, they made it possible to assess, in some specific cases, whether and to what extent actors were aware of their agency and how they interpreted it – which resulted in an innovative insight into migration practices at the local level. Interviewees were selected on grounds of expertise and first-hand knowledge of the phenomena, on the basis of the information collected through preliminary desk research and of snowball sampling (see *List of Interviewees*).

Each type of source was included according to different rationales and entails different heuristic strengths, with a view to seeking 'convergence and corroboration through the use of different data sources' (Bowen, 2009, p. 28). Documentary sources made it possible to delineate policy processes as well as the roles played by different actors. Interviews, on the other hand, were particularly insightful and provided an understanding of 'the role of agency in events of interest' (Rathbun, 2008, p. 2).

Data were analyzed following an inductive approach and based on two different techniques: document analysis, for documentary primary and secondary sources (Bowen, 2009, p. 32); and qualitative content analysis in the case of interviews.

The paper is organized as follows. In the first part, I will unfold the context in which policies targeting humanitarian actors at sea were developed, with particular emphasis on patterns of EU and Italian politics and policy-making. In the second part, I will focus on judicial agency, distinguishing between features of criminalization, in a first phase, and of de-criminalization, in a second phase. In this context, I will show how this complex behaviour had an impact on the wider policing of humanitarian actors. I will then move to the discussion of the findings and, eventually, to the delineation of some conclusions.

The Context of PHA Policy-making in Italy

From 2017 to 2021, numerous policies contributed to the policing of humanitarian actors in Italy, either directly or by hindering CSO operations at sea. The resulting policy framework is essentially composed of this set of policies:

(1) The 2017 Code of conduct, aimed at disciplining – and de facto constraining – the agency of CSOs in the Mediterranean (Ministry of Interior, 2017);

(2) The 2018 'closing harbours' policy for CSO vessels (Cusumano & Gombeer, 2020);

(3) The 2019 directives of the minister of interior, again aimed at forbidding the docking/entry into territorial waters of CSO vessels (Minister of Interior, 2019a; 2019b; 2019c; 2019d);

(4) The three 'security decrees[1]', designed by the then minister of interior Matteo Salvini (the first two) and his successor Luciana Lamorgese (the last one). The

[1] Decree-Law n. 213/18 (converted with Law n. 32/2018), Decree-Law n. 53/2019 (converted with Law n. 77/2019) and Decree-Law n. 130/20 (converted with Law n. 173/2020).

2020 decree provided a slight improvement to the condition of CSOs involved in SAR activities, yet maintaining the same approach (Al Jazeera, 2020; CIR, 2020);

(5) The 2019-21 'administrative seizure' policy, with the progressively increased use of administrative measures rather than criminal law ones. Through that, numerous vessels have been repeatedly blocked in harbours on the basis of laws of navigation and safety at sea (FRA, 2021);

(6) The 'unsafe harbours' decree (Inter-ministerial Decree n. 150/2020), which was issued in the mid of the first wave of the Covid-19 pandemic in Italy. The decree stated that Italian harbours could no longer be considered safe places for the entire duration of the health emergency (Tondo, 2020b).

Several elements related to the EU and Italian political system and policy process are important contextual factors that contribute to explaining the emergence of this policy framework.

The EU Influence

Firstly, EU politics and policies directly affected the Italian approach to policing. This aspect is connected, among other things, to the EU overall approach to migrant smuggling. This de facto facilitates the emergence of cases of criminalization of humanitarian actors (Carrera et al., 2018b), insofar as it does not require the existence of a material gain, nor provides for a mandatory humanitarian exemption – according to Council Directive 2002/90/EC of 28 November 2002 (the Facilitation Directive). The overall supranational framework and its policy process did not meaningfully prevent the criminalization of humanitarian actors – although member states were left with significant room for action, and could have autonomously prevented criminalization.

In the context of European politics, EU agencies also exercised direct influence (CSO_1, May 2019), mostly in terms of securitization. The activities conducted by Frontex were particularly relevant not only in terms of border control and law enforcement, but also for the intelligence provided to judicial authorities – as we shall see below. In such perspective, Europol activities are also worth mentioning.

Secondly, a process of indirect influence also took place. This is not only associated with the support granted by EU institutions to the approach chosen by Italian policy-makers, such as in the case of the 2017 Code of conduct (European Parliament, 2018a), but also with the EU general approach to SAR. Observing what happened between 2014 and 2020, the following can be noted:

(1) The initial EU reluctance to a takeover in the Italian-led SAR operation Mare Nostrum (see Novaky, 2018: 200–202);
(2) The limited scope of the first EU naval operation Triton;
(3) The step forward taken with Operation Sophia – yet in the framework of a CSDP operation (Carrera & Lannoo, 2018) and maintaining Triton’s focus on undocumented migration, rather than search and rescue, in spite of the official rhetoric (Cusumano, 2019);
(4) Finally, the crisis of this mechanism, the withdrawal of naval assets and the replacement with Operation Irini, essentially useless in terms of search and rescue at sea (Alagna, 2020a).

Overall, the EU pursued a de-governmentalization of SAR, whilst Italy was no longer willing to directly engage in such responsibility. This, besides placing a heavy burden on the shoulders of CSOs, ended up fuelling the de-legitimization of these activities, which were de facto left to the spontaneous efforts of civil society.

Thirdly, the role played by the EU also generated side effects, insofar as the EU was strategically used, at times, as a scapegoat to justify certain policies and/or their unsatisfactory outcomes. This approach specifically marked the ministership of Matteo Salvini (Fabbrini & Zgaga, 2019), with the 'closing harbours' policies and the attempt to change the mandate of Operation Sophia, relocating migrants who were disembarked in Italy (RaiNews, 2018). Blaming arguments towards the EU were clearly acknowledged by practitioners (ITA_1, April 2019; JUD_3, April 2019; EUR_1, May 2019) and, altogether, helped legitimize the policing of humanitarian actors as well as 'muscular[2]' policies (ITA_1, April 2019) such as 'closing harbours' – justified as the only possible answers, after Italy was left alone by the EU. In this respect, the EU original sin was the failure to replace the Italian operation Mare Nostrum with an EU-led one (see above).

National Dynamics

The domestic political system was also crucial, in particular because of three main institutional dynamics of the policy process at stake.

The first dynamic is the executivization of PHA policies, in line with a general trend of the executivization of Italian policy-making, especially in the migration domain (Giuliani, 2008; Zincone, 2011). All the policy outputs concerning the policing of humanitarian help at sea are governmental, i.e. executive's decree-laws and, even more remarkably, non-legislative acts (see below). Furthermore, the government's role was also strengthened by its projection at an EU level, as co-legislator in the Council of the EU, in a policy field which has hardly become supranational.

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[2] Original Italian quotes were translated by the author to the best of his ability.

The second dynamic is the use of non-legislative, 'heterodox' tools and is strictly connected with the executivization of policies. Over the years, the policing of humanitarian help took place through tools other than laws or other legislative acts – the three 'security decrees' being an exception to that. This means that issues that would normally be regulated by laws, were addressed through administrative acts instead – or even through provisions with an unclear legal status. The 2017 Code of conduct, the 2019 directives and the 2019-21 administrative acts and decrees are all examples of that.

This pattern, which has raised concern since the beginning in terms of lawfulness and effectiveness (Cusumano, 2019; Cusumano & Gombeer, 2020), is not unique to the Italian level: the EU also made large use of it (Cardwell, 2018; Casolari, 2020). Non-legislative tools enabled policy-makers – and, essentially, executives – to avoid potentially long bargaining processes and to limit the involvement of parliaments, public opinion and judicial review (Carrera & Lannoo, 2018).

The third dynamic that can be observed is the overall continuity in the policing of CSO-led SAR activities, under three different governments of different political colour – and their respective ministers of interior: Marco Minniti, Matteo Salvini and Luciana Lamorgese (Strazzari & Grandi, 2019; Zotti & Fassi, 2020).

Even though some differences could be noticed in relation to specific aspects, the overall trend did not change significantly in this specific domain, following the patterns of restrictive external migration and border policies. Reporting the words of a CSO officer operating in the Mediterranean Sea (CSO_1, May 2019), 'Salvini would not exist without Minniti'.

Continuity is also a pattern of migration policies – particularly in the Italian case – and coexists with the apparently contradictory polarization of the migration parliamentary debate (see, for example, Chamber of Deputies, XVII Legislature, Session

n. 779, 12 April 2017, XVIII Legislature, Session n. 434, 27 November 2020; Session n. 440, 9 December 2020). Yet, the spectrum of stances, which are articulated in the political-symbolic arena, is rarely translated into different policy outputs (Giuliani, 2008; Zincone, 2011).

The Ambivalence of Judicial Agency

The dynamics that were explored above offer important contextual elements to understand the process which caused the policing humanitarian actors to emerge, become systemic and evolve (and they will be given due attention in the discussion). In line with my hypothesis, I shall now delve into the agency of the judiciary, with a view to fully disclosing the process at hand and answering the research questions. Before doing so, a few background explanations on the Italian judicial system are in order.

The Italian judiciary is comprised of both judges and prosecutors, whose careers are not separated. Prosecutors operate within the criminal justice system, whereas judges can be assigned to different jurisdictions. In the case at hand, both the ordinary (which includes criminal and civil) and the administrative jurisdictions are relevant, insofar as they were highly involved in PHA-related matters. Within the criminal justice system, judges can in turn be assigned to pre-trial or trial functions: the former decide, among other things, whether there are sufficient grounds for a case to go to trial, whereas the latter have adjudicating functions. Lastly, from a judicial politics perspective, the existence of judicial factions (‘*correnti*’), the margin of appreciation enjoyed by prosecutors in initiating investigations and the fact that several prosecutors have eventually ventured into politics are all elements that are worth mentioning to complete the present framework (on all the above aspects see Guarnieri, 1995; 1997).

Prosecutors were the first members of the judiciary to be involved in the issue at hand. As early as 2017, a few months before the first PHA policies were adopted, several Sicilian prosecutor's offices started investigating the role of CSOs working in search and rescue operations in the Mediterranean Sea. They were accused, in different proceedings, of being part of the smuggling system, de facto facilitating the irregular entry of migrants into Italy and even of being in direct contact with smugglers in Libya (Scavo, 2018).

Just before investigations started, Frontex had issued a confidential report on the potential involvement of CSOs in smuggling activities or their connection with smugglers. Cusumano & Villa (2020) offer a detailed reconstruction of its content and of the way in which it entered the political debate, alongside other suspicions and hypotheses, such as the alleged – and eventually disproven – pull factor nature of CSO activities. Based on this whole framework – and notwithstanding the fact that Frontex's original allegations were immediately scaled down (Campbell, 2017) – the first investigations on CSO activities along the Central Mediterranean route were launched (Ansa, 2017).

Over the course of months, courts started dismissing these cases in pre-trial hearings, sometimes even at the direct request of the prosecutors (see, among others, Prosecutor's Office of Palermo, 2018), acknowledging that CSOs acted out of a state of necessity (Scavo, 2018). In spite of that, new proceedings continued to be opened, on the same bases of those which were being dismissed; only one of them has led to an indictment, so far (Camilli, 2019; FRA, 2021; Marsala, 2019; Misculin, 2022).

Notwithstanding their limited success, these investigations still had substantive legal and judicial effects, which constrained CSOs' agency. Examples include the forced docking of ships – which were seized during preliminary investigations – or the time and resources spent in court to defend themselves from allegations. Interestingly, interviews

revealed that the judiciary, as well as law enforcement officers, tended to interpret their agency in this context as the mere application of law, while refusing the idea of exercising a discretional power (JUD_1, September 2018; LAW_1, October 2018). Yet, evidence shows several cases in which such discretion became extremely relevant – from the decision to exerting jurisdiction in high seas to specific investigative protocols (SIC_1, September 2018).

However, prosecutors' agency as such, in the judicial arena, would only be able to explain this far – i.e. the emergence of judicial investigation and prosecution. Their role as decisive driver of the policy-making of policing humanitarian assistance is rather connected with the impact they had outside the judicial arena, mostly in terms of bottom-up dynamics, which closely recalls the 'radiating effects' of the constructivist socio-legal scholarship (Galanter, 1983: 123–124, cited in Bonjour, 2016: 330).

Criminalization: Public Debate and Parliamentary Committees

The first dynamic through which these investigations had an impact on the political debate – and on the subsequent policy formulation – was the public communication of certain judicial actors, which contributed to the overall discursive criminalization of SAR CSOs (Cusumano & Bell, 2021). The Prosecutor of Catania, Carmelo Zuccaro, was a remarkable example of that.

Zuccaro was one of those who most strongly hinted at the connection between CSOs and smugglers – besides, and even before, the judicial investigation and prosecutorial activity of his office – through a number of speeches and interviews, using very clear words: 'We have evidence of direct contacts between some NGOs and human smugglers in Libya. We do not know yet whether and how to use this information in trials,

but we are sure enough of what we say' (Molinari & Albanese, 2017. See also Alvaro, 2017; Camilli, 2017; Ziniti, 2017, among others).

Public debate worked as a parallel track to judicial investigation, and they both ended up building the foundations of the policing of humanitarian assistance, regardless of the dismissals that were taking place in the judicial arena. This had concrete practical consequences, further discouraging CSO SAR activities (CSO_1, May 2019), as well as important indirect effects on policy choices.

In the context of public communication, CSOs were also criticized over allegations of direct involvement in smuggling activities. Namely, they were accused of constituting an impediment to the prosecution of actual smugglers, due to their refusal to embark police officers aboard their vessels and their unpreparedness to collect evidence (Camilli, 2019). In the perspective of a prosecutor, specialized in migration-related offences, this would have favoured a drop in the number of cases against smugglers (JUD_1, September 2018). Interestingly, however, another frontline criminal law practitioner disagreed with this point of view, expressing a positive perception of CSOs' agency (LAW_1, October 2018).This tension would persist over time (Cusumano, 2018) and would also inform some policy choices, such as the provision, in the 2017 Code of conduct, that CSOs should commit to grant access aboard to police investigators (Ministry of Interior, 2017).

The second, crucial dynamic of judicial influence on the policy process lies in the evidence and information upload from the local onto the national level – which specifically shaped policy-makers' agency and influenced policy outputs. The institutional framework played a central role in that.

Evidence and information upload essentially happened, indeed, through a peculiar institutional channel, i.e. parliamentary committees. For Italian policy-makers, these

represented a major source of direct – and in many cases privileged and confidential – information coming from the ground, and especially from prosecutors.

Exploring migration-related sessions during the Gentiloni, Conte I and Conte II governments, there is little doubt that the potential relationship between CSOs and smuggling networks and the very nature of CSO-led SAR operations were the most vastly addressed issues.

The Fourth Standing Committee of the Senate of the Republic (the Senate Defence Committee) dedicated an ad hoc inquiry to governmental and CSO-led missions in the Mediterranean Sea, hearing from numerous CSO officers, Sicilian prosecutors, institutional representatives and border guard agency directors and senior officers (Senate Defence Committee, XVII Legislature, from Session n. 217 of 6 April 2017 to Session n. 236 of 16 May 2017). The committee unanimously approved a conclusive report, in which it expressed the recommendation to elaborate 'ways of accreditation and certification that exclude at the origin any suspect', in a sort of burden of proof reversal (Senate of the Republic, 2017: 15–17).

Prosecutors were key players in parliamentary committees and provided members of parliament with direct information on several issues (Schengen Committee[3], XVII Legislature, Session n. 41, 22 March 2017, Session n. 49, 23 May 2017, Session n. 50, 31 May 2017; Senate Defence Committee, XVII Legislature, Session n. 227, 3 May 2017; Reception Committee[4], XVII Legislature, Session n. 83, 9 May 2017; Anti-mafia

[3] Abbreviation for Parliamentary Committee of Control for the Enforcement of the Schengen Agreement.

[4] Abbreviation for Parliamentary Committee of Inquiry into the reception, identification and expulsion system as well as into the migrant detention conditions and on the allocated public resources.

Committee[5], XVII Legislature, Session n. 203, 9 May 2017). The National Anti-mafia and Anti-terrorism Prosecutor was also invited to parliamentary committee hearings, where he could share with policy-makers the proceedings of the most significant meetings with members of the judiciary, law enforcement agencies and a wide array of practitioners (see, for example, Schengen Committee, XVII Legislature, Session n. 50, 31 May 2017).

However, notwithstanding the variety of evidence-based inputs, policing-related issues were by far the most vastly addressed and echoed.

The Prosecutor of Catania was, again, one of the most relevant figures, being particularly present in parliamentary committees, where he mostly focused on the search and rescue activities of CSOs, in line with his public communication (Schengen Committee, XVII Legislature, Session n. 41, 22 March 2017; Reception Committee, XVII Legislature, Session n. 83, 9 May 2017; Anti-mafia Committee, XVII Legislature, Session n. 203, 9 May 2017). It does not come as a surprise that Zuccaro's declarations had an enormous impact within the committees – and in the whole political debate afterwards. Remarkably, the substantial failure to produce any conclusive evidence related to the engagement of CSOs in criminal activities – as well as the limited judicial success of the prosecution cases – was easily disregarded in the parliamentary arena.

CSOs and their potential connection with smugglers and/or their liability for facilitating undocumented migration substantially informed plenary debates on migration, and represented the primary focus during the 2017-20 period. More critical views concerning the policing of humanitarian help and its consequences, on the other hand, did find some space in parliamentary committees, yet they almost completely

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[5] Abbreviation for Parliamentary Committee of Inquiry into Mafia-related and other criminal organizations.

disappeared in the following plenary debates (see, among others, the following parliamentary sessions: Chamber of Deputies, XVII Legislature, Session n. 779, 12 April 2017; Chamber of Deputies, XVIII Legislature, Session n. 20, 27 June 2018, Session n. 38, 3 August 2018; Senate of the Republic, XVII Legislature, Session n. 795, 29 March 2017; Senate of the Republic, XVIII Legislature, Session n. 11, 13 June 2018).

In analytical terms, judicial – and namely prosecutors' – agency was a strong driver of PHA policies, by influencing the public discourse and by directly uploading information and evidence to policy-makers, through the dedicated institutional channels.

Yet, it is important to note that policy-makers tended to make limited use of such evidence – with a view to strengthening pre-existing restrictive policy preferences – instead of acknowledging the complexity of the issue at hand and the overall weakness of the judicial allegations (as will be explained in detail in the discussion).

De-criminalization: From Dismissals to Humanitarian Stances

The second dynamic which can be explained through the agency of the judiciary is the evolution of PHA policies over time.

If we look at the first manifestations of this process, in 2017, these were essentially based on the challenges and shortcomings of the existing legislative framework against migrant smuggling, where the existence of a material gain is not a necessary element of the offence and a mandatory exemption of humanitarian assistance is not provided for, according to the Facilitation Directive (see above) and to article 12 of Legislative Decree 286/1998 (the Italian Consolidated Immigration Act). Under this framework, CSOs needed to prove that they actually acted out of a state of necessity, in order to save people in distress at sea and to comply with international law obligations (Carrera et al., 2018b).

Normative ambiguities left room for manoeuvre for judicial investigations and for the political policing of CSO activities.

However, PHA grounds progressively shifted towards administrative law and safety regulations: rather than being directly accused of violating migration laws, CSOs were prevented to act on the basis of other alleged violations of administrative and maritime norms. Namely, this is the essence of the 'administrative seizure' policy (see above), which has been widely criticized and opposed by CSOs and which led administrative courts to play a major role. The referral to the Court of Justice of the EU of the administrative detention of the vessels *Sea-Watch 3* and *Sea-Watch 4* – ordered by the Sicilian Regional Administrative Court – is a very interesting example of that, as it will help clarify the legitimacy of these practices under EU law (Sea-Watch, 2020).

Looking at this phenomenon, I contend that the agency of the judiciary is again the key variable to understanding the rationale of what happened, insofar as this policy shift can be considered an adaptation to widespread de-criminalization instances coming from judicial actors. Remarkably, rather than as a policing driver, the judiciary here acquired specific relevance in the opposite perspective. In several cases, it was indeed a prominent de-criminalizing actor and enforced the rights of civil society organizations engaged in humanitarian assistance, also protecting migrants. Such de-criminalizing process mostly involved the judicial arena, where the institutional prerogatives of judges became crucial elements in order to enable their agency.

De-criminalization essentially took place through the repeated dismissals of CSOs in all the cases that were decided in pre-trial hearings – which were discussed above (Camilli, 2019; FRA, 2021; Marsala, 2019) and represent, to a certain extent, the other side of the policing coin. In many of the decisions issued by courts, we can find a detailed explanation of the legitimacy of CSOs' actions, which clears any existing potential doubt.

An example of that is the release order issued by the Court of Agrigento, in the well-known case involving *Sea-Watch 3* captain Carola Rackete (Court of Agrigento, 2019. For an English summary of the case, see InfoMigrants 2019a; 2020). In this case, pre-trial judges thus were the key actors – as well as those prosecutors who decided not to file charges and to rather ask for dismissals.

Moreover, the judiciary proved to be extremely important in protecting the rights of CSOs (and of migrants) from the consequences of PHA policies, especially during the first government led by Giuseppe Conte, Matteo Salvini being minister of interior.

On various occasions, Salvini blocked the disembarkations of migrants or even refused to let CSOs' vessels enter Italian territorial waters (BBC 2018a; Minister of Interior, 2019a; 2019b; 2019c; 2019d). As a response to that, the agency of the judiciary appeared relevant in several cases and in different ways. The following examples can be recalled:

(1) The overcoming of Salvini's 'closing harbours' measures. This includes the prosecutor's order to immediately disembark those migrants stuck for days on a rescue vessel (Al Jazeera, 2019) and juvenile prosecutors' requests to allow the disembarkation of minors (Avvenire, 2019; la Repubblica, 2019);
(2) The administrative court's overruling of governmental acts that would not allow CSOs' vessels to enter Italian territorial waters (Regional Administrative Court of Lazio, 2019. See also Hauswedell, 2019);

(3) The prosecution and indictment of Salvini for forcedly and unlawfully holding migrants aboard the CSO ship *Open Arms*[6] (BBC, 2020).

If, on the one hand, judicial cases had worked as a strong policing driver, especially in the period 2017-19, on the other hand the failure to prove these accusations in court – as well as the acknowledgment of the human rights violations caused by policy implementation – were a decisive factor for changing the grounds of policing. At this point, a shift took place from open criminalization to the use of administrative measures, with the new tendency to adopt policies that would prevent CSO-led SAR missions *tout court*, rather than closing harbours and/or prosecuting humanitarian actors in court.

Hence, somewhat paradoxically, the response to the repeated failures of the investigations on alleged violations of migration laws was not the acknowledgment of CSO activity's lawfulness, at the very least. Rather, it was the start of new proceedings which were based on different grounds but led to the same practical effects. Paraphrasing Clausewitz's famous quote, this was but the continuation of criminalization by other means.

At the wider EU level, the 2020 European Commission recommendation, and namely its para. 2, can also be read in this perspective, as a way to further regulate CSO-led SAR by way of technical/maritime norms, rather than on grounds of security and criminalization (see European Commission, 2020a: 4). Remarkably, minister Lamorgese took credit for the initiative (Luciana Lamorgese, Minister of Interior, Senate of the Republic, XVIII Legislature, Session n. 228, 11 June 2020).

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[6] See also the similar cases involving the two Italian coast guard units *Diciotti* and *Gregoretti* (Tondo, 2020a).

In fact, the maintenance of the existing criminalization approach (2017–19) seemed particularly unsustainable for the second government led by Giuseppe Conte (2019–21), which was supported by a different political majority. This was particularly the case in light of the desire to mark a *formal* discontinuity with the previous government(s), mostly coming from the left-wing component of the coalition. Consistently, the new executive repeatedly stressed the ascertained unlawfulness of the existing criminalization paradigm, as well as the lack of foundation of investigations concerning CSOs (see, for example, the parliamentary debates on Lamorgese's 'security decree': Chamber of Deputies, XVIII Legislature, Session n. 434, 27 November 2020; Session n. 440, 9 December 2020; Senate of the Republic, XVIII Legislature, Session n. 284, 17 December 2020; Session n. 285, 18 December 2020).

In such way, de-criminalization practices in the judicial arena become a decisive component to understand the new (old) course, characterized by the deep ambiguity of the Conte II government towards CSOs – illustrated by the initial dialogic attempt (InfoMigrants, 2019b), soon replaced by the accusation of continuity with Salvini's policies (Ricciardi, 2020).

Figure 1 illustrates this whole process, also highlighting the (chrono)logical interaction between judicial agency and PHA policies.

[Figure 1 around here]

Figure 1. Judicial agency and its impact on policy outputs: A timeline

Source: Elaborated by the author

Hence, formal discontinuity in policy outputs did not lead to an actual discontinuity in policy outcomes. In an EU perspective, such situation calls for a critical

reading of the recent European Commission guidance on the implementation of the facilitation directive, which reaffirms the obligation not to criminalize humanitarian assistance (European Commission, 2020b). This document will not necessarily be enough to avoid PHA, not only due to its soft law nature, but also for the shift in the accusations moved to CSOs.

Explaining Judicial Agency: 'Anti-mafia Mind-set', Politics of Litigation and the Broader Context

In the context of an institutionalist approach, the dynamics which were showed in the previous sections can be explained by looking at the interplay of three key elements:

(1) The characteristics of prosecutor's offices in Sicily, and particularly the way in which they have been deeply shaped by the experience of the fight against the mafia;
(2) The increasing engagement of civil society actors in litigation;
(3) The inter-relationship between judicial agency and the broader context of EU and national dynamics, which was characterized by a pre-existing policy preference towards the policing of humanitarian actors.

The first element is strongly associated with initial criminalization dynamics. In this context, prosecutors emerged as the main judicial actor, rather than pre-trial or administrative judges. Remarkably, trial judges essentially remained out of the picture, for only in one case defendants were indicted – and the trial began in May 2022 (Misculin, 2022). Looking at prosecutors' agency, it can be well argued that this was shaped by a sort of an 'anti-mafia mind-set', which has facilitated – since a very early phase in the prosecution of migrant smuggling – an organized crime-oriented perception of the phenomenon, in line with the dominant narrative in Europe (cf. Alagna, 2020b).

Interviews made it possible to understand how several practitioners were essentially aware of such an approach – even within the judiciary – and of its shortcomings (this in particular emerged in the interviews with JUD_3, April 2019; ITA_1, April 2019; CSO_1, May 2019). This mind-set is substantiated in both institutional and actor-related aspects.

On the one hand, the institutional organization of the prosecutor's offices created a connection with anti-mafia prosecutorial activities. The Italian main prosecutor's offices are also designated as *Direzioni Distrettuali Antimafia* (District Anti-mafia Prosecutor's Offices) (DDAs, in Italian), co-ordinated by a central *Direzione Nazionale Antimafia e Antiterrorismo* (National Anti-mafia and Anti-terrorism Prosecutor's Office) (DNA, in Italian), which has played a major role also in migrant smuggling investigations in Italy (Campbell & D'Agostino, 2021) and in the definition of the international co-operation of the Italian judiciary (JUD_3, April 2019). Major cases where a criminal association is thought to be involved in smuggling activities are always investigated by DDAs, according to Italian law – and this is what happened in most CSO-related cases.

On the other hand, such mind-set may also derive from actors themselves, insofar as most leading prosecutors and their deputies, in Sicilian major cities, come from anti-mafia experiences, and were thus widely exposed, over time, to the logics and patterns of these types of investigation.

The organized crime-oriented understanding of smuggling, grounded in the two dynamics which were explored above, can be seen in numerous examples, such as the 2014 guidelines released by the DNA – with a view to coordinating the activity of the prosecutor's offices and based on the approach followed by the Prosecutor's Office of Catania – or the use of specific investigation techniques (Campbell & D'Agostino, 2021). This aspect also emerged in interviews – and so did the degree of discretion exercised by

prosecutors, even though they seemed not to be fully aware of it (SIC_1, September 2018; JUD_1, September 2018).

Intervention in public debates also falls within this approach, considering that forms of dialogue with the public opinion and actions of awareness-raising are very common for anti-mafia prosecutors.

Overall, judicial agency in the criminalization phase seemed oriented by a logic of appropriateness (cf. March & Olsen, 2006) of the given behaviour in light of the public function of prosecutors. Further research could substantiate these findings, and would also shed light on a particularly critical element, such as the fact that the manipulation and the on-purpose misuse of these investigations made by some policy-makers did not lead to significant reactions from the members of the judiciary that were concerned.

Moving to de-criminalization dynamics, these – on the one side and as was widely explored – are the result of cases decided in pre-trial hearings, and are institutionally associated with the separation, within the judiciary, between prosecutorial and adjudication activities. This element also reinforces the 'anti-mafia mind-set' explanation, which appeared to be present in prosecutorial activities and not in adjudicating ones. In turn, this also calls for further elaboration on the intra-judicial cleavage between prosecutors and judges with regards to the issue at hand and, more broadly, to the organisational dynamics connected to the judiciary and to elements of judicial politics.

However, such de-criminalization dynamics were further and decisively strengthened by our second explanatory element, i.e. the increasing engagement of CSOs in litigation – which took place in nearly all the examples in which the judiciary acted to protect CSOs' rights. Civil society actors seem indeed to have progressively become aware of the opportunities in the judicial field. This has facilitated the emergence of a

politics of litigation, where CSOs strategically use the judicial field – and the opportunities within – with a view to challenging EU and national practices which are considered to be in violation of human rights and international law.

Said increasing engagement of CSOs in litigation is likely to have facilitated the emergence of humanitarian stances in the judiciary, as well as the prosecution of policy-makers for some PHA policies. Both of them were key drivers of de-criminalization. This approach reveals rational-bound elements in a judicial approach which is otherwise widely based, as was discussed above, on a logic of appropriateness. An example of that is the case of the 2019 order to disembark people from a rescue vessel, which was made possible through the prosecutorial seizure of the ship (see above, Al Jazeera, 2019).

Remarkably, CSOs' politics of litigation could have inaugurated a third phase in the role of judicial agency in PHA (see the *Conclusions* below).

Lastly, the inter-relationship between judicial agency and the wider context of EU and national dynamics allows us to understand why the changing patterns of judicial agency did lead to a change in policy outputs, but did *not* entail a change in policy outcomes – what I called the continuation of criminalization by other means.

Overall, PHA policies and its evolution under the Gentiloni, Conte I and Conte II governments were decisively influenced by the role that the judiciary played, also far beyond the judicial arena, informing the political debate and the parliamentary discussion. On the other hand, however, policy-making was strongly informed by one-way selective evidence-based dynamics, which ended up reinforcing pre-existing restrictive policy preferences, while neglecting undesired evidence (cf. Baldwin-Edwards et al., 2019).

This process took place across different governance levels. On the one hand, this happened during the bottom-up process, by limiting access to parliamentary committees or more generally ignoring specific requests or evidence from practitioners on the ground.

On the other hand, this exclusion took also place at a later stage, throughout the policy formulation and adoption stricto sensu, by ignoring inputs collected in institutional channels of communication, such as parliamentary committees.

Policy evolution clearly highlighted this process, through the adaptation of PHA policies, under the Conte II Government, to the strong de-criminalization inputs coming from the judiciary – and to the connected aspiration to mark discontinuity from Salvini's approach. This explains why, after the first judicial criminalization wave, the subsequent de-criminalization process did not lead to the disappearance of PHA policies, but rather to their adaptation, based on a policy preference towards the policing of humanitarianism (cf. Allsopp et al., 2020; Cusumano & Villa, 2020). A comparative diachronic approach further supports this understanding and the relevance of pre-existing policy preferences: other important CSO policing cases, previous to 2014, show that judicial criminalization did not always lead to such systemic consequences – the 2004 well-known Cap Anamur case is a remarkable example of that (Lindsay, 2009).

In sum, judicial agency (and the reasons that drove it) offers an interesting explanation of how PHA policies emerged, became systemic and evolved over time. Yet, in order to fully grasp the generation of policy outputs and outcomes, such agency needs to be read in conjunction with the broader EU and national institutional dynamics, which have informed migration policy-making in Italy over time and are important concurrent explanatory elements of the process at stake.

Conclusions

In this paper I approached the policing of humanitarian actors in the Central Mediterranean, focusing in particular on the policy-making dynamics, which tend to be neglected in the existing scholarship. I considered the Italian case, with a view to

explaining how and why PHA policies emerged, became systemic and changed over time, under the Gentiloni, Conte I and Conte II governments.

To do so, I firstly explored the contextual elements pertaining to the EU and Italian political system and policy-making style – which, however, could explain the existing PHA dynamics only this far and were maintained as concurrent explanations.

I then focused on the ambivalent agency of the different components of the judiciary, as the key variable apt to explain the emergence, the systemic consolidation and evolution of PHA. In so doing, I did not only acknowledge the importance of on-the-ground dynamics as policy inputs, but I also disentangled and explained the subsequent 'radiating effects'.

The 'anti-mafia mind-set' of prosecutors, the CSO's politics of litigation and the concurrent existence of a policy preference towards the policing of CSOs in the Central Mediterranean (within the broader European and national political context) are all crucial elements that help us understand and interpret the distinctive phases of criminalization and de-criminalization.

Remarkably, a new phase seems to have been inaugurated with the Draghi government – Luciana Lamorgese having been confirmed as minister of interior – and the progressive decline in the use of administrative sanctions upon CSOs. It is too soon to say if this trend will persist over the next months and to clearly identify its causes – all elements which overall call for further research into the subject. However, the available evidence seems again to point to judicial agency and to the negative outcomes of administrative judicial proceedings, as well as to the further CSO engagement in the politics of litigation (Merli, 2021).

In terms of empirical analysis, this study contributes to the current academic debate, insofar as it enriches the understanding of CSO policing dynamics, by

innovatively looking at this phenomenon from a policy-making perspective and unfolding its main drivers.

Moreover, this paper also brings important contributions from a theoretical point of view. Namely, it contributes to the understanding of the role of the judiciary in making migration policies, in particular by exploring:

(1) The multi-level nature of judicial agency, which relates to both on-the-ground and bottom-up dynamics, particularly facilitated by the activity of intermediate bodies such as parliamentary committees – which is widely stressed in the context of an institutionalist approach;
(2) The 'radiating effects' that are generated by judicial agency and the way in which policy-makers strategically use them – fostering the dialogue between judicial politics and migration policy-making scholarships;
(3) The co-existence of both expansive and repressive effects within judicial agency – which is connected with the different institutional settings and opportunities, as well as with the agency of other actors, such as was showed by CSOs' engagement in the politics of litigation (cf. Bonjour, 2016).

As detailed in the discussion, these aspects call for further research into the logics that lie behind judicial agency, with a view to understanding actors' awareness and the way in which they frame their agency. The cultural component connected to the anti-mafia experience of Sicilian prosecutors – which was briefly explored – seems to be an interesting avenue. This hypothesis-generating element can hence be seen as a further theoretical contribution of this study.

Acknowledgments

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List of Interviewees

1. SIC_1, Lawyer, Sicily, 26 September 2018 (phone)
2. JUD_1, Member of the judiciary, Sicily, 28 September 2018 (in person)
3. LAW_1, Senior law enforcement officer, Sicily, 1 October 2018 (in person)
4. JUD_2, Member of the judiciary, Sicily, 17 October 2018 (informal conversation, in person)
5. SIC_2, Lawyer, Sicily, 17 October 2018 (phone)
6. JUD_3, National Deputy Anti-mafia Prosecutor, 17 April 2019 (in person)
7. ITA_1, Former leading official, Ministry of Interior – Department for Civic Liberties and Immigration, 17 April 2019 (in person)
8. EUR_1, Italian MEP, 2 May 2019 (Skype)
9. CSO_1, CSO officer, Mediterranean Sea, 22 May 2019 (Skype)

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