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« Discretionary powers of public prosecution: opportunity or legality principle - Advantages and disadvantages »

Contribution by Italy

May 24, plenary session - discussion - Italy

Whenever a comparison is made between discretionary and mandatory systems of criminal prosecution, Italy is cited as an example where the principle of mandatory prosecution is most evident and where it is guaranteed by a constitutional provision. We do not claim that it is absolutely the best system, but we believe we can say that it is the most suitable for us, given our history and institutional approach, in a "balance of power" constitutional arrangement that gives the justice system an essential role, in respect of the roles of the Parliament and the executive power, while not being subordinate to them.

However, I believe that areas of compatibility between the two systems should be explored. Council of Europe recommendation 19/2000 tries to identify the "major guiding - common to both types of system - that ought to govern Public Prosecution as it moves into a new millennium. At the same time it sought to recommend practical objectives to be attained in pursuit of the institutional balance upon democracy and the rule of law in Europe largely depend".

The EU Commission presented its Green Book "On Criminal-law protection of the financial interests of the Community and the establishment of a European Prosecutor" in December 2001 and the document clearly addresses this point when it states that "The hybrid mandatory and discretionary system is now typical of the situation in the Member States." (see item 6.6.2.1 of the Green Book)

Despite the objections that have been raised in general and the risk that a mandatory system is less flexible and rapid, and might be easily blocked by the quantity of proceedings it involves, we need however to note that in its Green Book the EU Commission, after having supported the insertion of the principle of the independence of the European public prosecutor "shall neither seek nor take any instruction" (proposed in Article 280b), expressed a preference for a system of obligation in the exercise of criminal proceedings. It is also favoured a compromise which essentially fries to avoid wasting energy carrying out criminal proceedings in three categories of cases: those of minor importance, those which are marginal and those involving compensation.

Besides this, it is essential that the ability of the public prosecutor to shelve a case is subject to the decision of a judge. The variety of opinions expressed on this point, and noted in the follow up report of 19th March 2003, shows the delicate nature of this topic, although it seems to me that opinions converge on a particular point: making the prosecutors' decisions subject to screening by a judge (whether to have a European pre-trial chamber or not is still under discussion).

Article 42 of the International Criminal Court's statute provides for an independent public prosecutor who takes instructions tram no-one external to his office, and in the International

Criminal Court system the public prosecutor also fulfils a role of protecting general interests with regard to the law. Now that the Court has been given its own rules of procedure and evidence, a system of control by a judge over decisions of whether or not to initiate proceedings has been established, allowing the judge in some cases to order the prosecutor to proceed.

The principle of obligation is closely linked to the principle of independence and both are necessary to achieve the principle of equality before the law. The recommendations contained in item 26 have particular value to this respect: the prosecutor must take equal account of the elements for and against the accusation and be vigilant about the equality of individuals before the law (a cardinal principle in our criminal code). Equally, recommendation 20 which imposes the same duty on the first level court also has particular value.

In reality, the possibility of fully achieving the objective of mandatory prosecution only exists in theory and, being impossible to always take action in time against all crimes, we need to establish criteria which do not cause the application of he principle to become restricted or arbitrary.

If statement of the principle is not accompanied by systems to make it effective we will obtain the exact opposite, that is, maximum arbitrariness.

Possible corrections can be identified in the recommendations and we in Italy have been reflecting on these for some time and have made some steps in this direction. On the one hand it is possible to change the organisation of the public prosecutor's office, while on the other it is possible to identify criteria that are sufficiently rigorous and verifiable.

I would like to draw attention to this second aspect since we often fall into the trap of thinking that the obligation to proceed is incompatible with any evaluation of expediency. If expediency coincides with the internal requirements of a trial (that is, with the same requirements which justify a criminal trial) and can be verified by a judge, then making provision for it is not incompatible with the principle of obligation.

Item 36 of the recommendations concerning the public prosecutor takes account of the variation in national situations and advises favouring hierarchical structure for the public prosecutor's office and the identification of general policy lines so as to ensure uniformity of treatment. I want to draw attention to the last point of paragraph a) of item 36 where it suggests establishing principles and general criteria that would serve as points of reference in individual decisions. If such principles and general criteria are provided for first by law and then by office organisational criteria, then certainly guaranteeing equality of treatment for the public will be strengthened. Recommendation 20 also addresses this objective.

A strengthening of the hierarchical structure of the Public prosecutor's office is subject to considerable discussion in Italy at the moment, and Italian magistrates (both prosecutors and judges) are opposed to such a solution. A system of mandatory prosecution and a fixing by law of its operating criteria do not make it necessary to strengthen the hierarchy of the office and, if we look at our past, a greater hierarchy has always in fact been part of a greater conditioning on the part of the executive power. This does not mean that we should not favour the adoption of directives, principles and criteria by the heads of the public prosecutor's office, as indicated in item 36 point b), or of control systems, or of sanctions when such directives etc. are not observed and when the High Council of Magistracy (in Italy CSM) should have the power of final decision over such aspects.

Returning to the possibility of adapting the obligatory principle, we need to remember that even when all the elements of a crime are present, taking account of the gravity of the individual event of the evolution of the technical discussion.

The principle of offensiveness is already present in our criminal code (Article 49) but, until now, has had a very limited application because it is generally held that any damage to the interest being protected is punishable. However, things are changing.

In trials involving minors (Article 27 DPR 448/88) the decision not to proceed on grounds of the insignificant nature of the facts is permitted at the request of the prosecutor after having heard the minor involved, the person with parental responsibility, and the injured party.

Article 34 of the special procedure for trials before a Justice of the Peace, who deals with I matters of minor gravity, introduces a similar power that allows the judge to terminate proceedings at the request of the prosecutor if the facts are particularly tenuous and bearing in mind the extent of their casual nature and the interests of the injured party.

The introduction of such a possibility for all proceedings had reached an advanced stage of discussion in Parliament during the drafting of the 1999 reform bill which proposed a radical modification of the criminal trial, but the amendment was not included in the final wording of the bill. However, it would have allowed the public prosecutor to evaluate insignificance, even if the prosecutor's request had to be sent to the judge for a decision, and it naturally fixed the criteria for establishing when a case was of little importance. First of all it allowed such an evaluation to take place only for crimes where the penalty was below a certain pre-determined level, and secondly, it took account of the slight nature of the damage, of the personality of the offender and of the casual nature of the crime. Besides, we need to note the interests of the victim and of the fact that, for example, the offender had compensated for the damage, or had made reparations. This corresponds to the needs expressed by item 33 of the recommendations and also to the contents of recommendation 11/85 and to the undertakings assumed at European

level where a commitment was made under Article 10 of the March 2001 framework decision to favour mediation between the victim and the offender.

The last proposal referring to the need to introduce a mechanism of this type was drawn up by a Ministerial commission at the end of the last legislature as part of a criminal code reform project (the discussion between those wishing it to have an exclusively trial oriented nature as a reason to proceed, or those wanting it to have a substantial nature as a condition for punishment need not concern us here). What counts is to fix the evaluation criteria on which a prosecutor can decide not to take action, so as to preserve the obligatory principle but at the same time to limit the principal objection against it, i.e. of creating an excessive number of cases.

Even in systems based on discretion require criteria and directions to be firmly established. Also here criteria need to be established. However, this does not mean that radical differences do not exist. First of all, in systems where discretionary action is present, discretion is possible, i.e. the decision whether to act or not, to be subject to powers other than the judicial one. This is impossible in a system of mandatory prosecution, but we can see from the recommendations how this may possibly be avoided. All the ideas in the recommendations are directed to protect the public prosecutor from external influences, above all with regard to individual cases, and certainly this is an advantage which systems of mandatory prosecution and independent public prosecutors have in this respect.

The second difference is that supervision by a judge is not always needed in fully discretionary systems. The fact that the decision not to proceed may in any case be subject to judicial supervision is the only way to permit a compromise over the obligatory principle without totally denying it. We also maintain that from this standpoint the obligatory system is more in line with the suggestions coming from both the Council of Europe and the European Commission.

The third difference is that, with this system (establishing criteria and judicial supervision), it is more difficult to imagine a situation of discretion being determined exclusively by investigative needs (not to proceed so as to obtain, for example, the collaboration of the accused), or by the marginal nature of the legal action required (not to proceed, for example, against a minor offence requiring complicated investigations when there is a reasonable certainty of finding the accused guilty of a more serious offence). This is a difference that remains and that implies basic options for criminal systems and trials, even though we have seen that the Green Book also indicates a margin of compatibility with mandatory prosecution in this case.

For these reasons we maintain that there should be means of limiting the waste of resources that is generally found in a system of mandatory prosecution, while we are pleased to note that the new systems are really orientated to a “mandatory prosecution system, modified by exceptions” as the EU Commission says in the Green Book (point 6.2.2.1).