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

**Intervention by Mr. Gherardo COLOMBO
Prosecutor, Milan (Italy)**

In 1948 the Italian Constitution entered into force. An undemocratic period followed (we had 20 years of fascism, during the latter period of which, like all European countries, we went through the second world war), and the Constitutional legislator was concerned with the risk that an authoritarian regime might rule again.

The Constitutional legislator thought that the new Republic should be a democracy governed by the rule of law, and laid down the Constitution, basing it on two fundamental principles: that inviolable human rights had to be recognized and guaranteed by the Republic, and that all citizens were equal before the law.

It believed that democracy could be guaranteed by strictly applying the separation of powers principle, in particular looking at the independence of the Judiciary from the other State powers, the Legislative and the Executive.

With this objective, some sections of the Constitution were dedicated to the Judiciary. It was provided that a new, completely independent body (the Superior Council of Magistrates), regulating the career and discipline of magistrates, should be introduced into the Italian system, that magistrates had to be appointed by means of an exam, that magistrates could not be removed without their consent, that judges and prosecutors were to be distinguished only by their functions (this meant that there was to be one single career and no hierarchy among magistrates was provided for), and that other similar rules guaranteed their independence.

In the criminal field the constitutional legislator had to solve a very serious problem. If public prosecutors were to be independent, they could not be subject to monitoring by other powers. However, if no monitoring was provided for, there would be a lack of accountability in the system. Indeed, accountability is strictly connected to discretion, and so the legislator thought it would solve the problem by preventing prosecutors from having any discretion in starting up a criminal action. It provided for mandatory criminal action.

The outcome is that the legality principle makes the fundamental principles of our Constitution more effective.

On the surface it may appear that there are certain disadvantages in the scheme of the Italian constitution. Some of these are solved by the general organization of the judiciary provided by law.

For instance, it may be supposed that if a magistrate does not work enough, there are no remedies; or, that it is impossible to check whether magistrates are impartial because of a lack of accountability.

These are only apparent disadvantages, as the general system provides for remedies. The Superior Council of Magistrates (CSM), on the one hand, can check whether magistrates work by means of the disciplinary procedure, and both the Minister of Justice and the General Prosecutor at the High Court can initiate the procedure. This means that a political power can ask the CSM to supervise the general behaviour of magistrates when it is claimed that they have

betrayed their duties as regards diligence, and behaving correctly with the other parties and so forth.

On the other hand, the contents of their decisions can be monitored by appeal to the Court of Appeal or directly to the Supreme Court.

In brief, these and other similar situations are not a problem because a remedy is specifically provided.

Only one serious disadvantage can be found: that this system can be effective only if all information on the commission of a crime is actually investigated. This takes a long time, requires very precise organization of the offices, many magistrates and so forth.

The advantage, on the contrary, is that the independence of magistrates, and particularly of prosecutors, is completely guaranteed. This means that people can be really equal before the law, and that nobody can choose whether a crime has to be pursued or not. In other words, it means that the fundamental principles of the Constitution are safeguarded and, along with these principles, the fundamental rights of people are protected.

At present in Italy a widespread debate about the advisability of maintaining this system is in progress. As it is difficult for mandatory action to be completely effective, some have suggested that the rule be changed and discretionary action introduced. This point of view has given rise to discussions on the method to be employed in choosing the system of accountability.

One problem is which kind of body is to be set up - a body to which prosecutors are accountable or a body responsible for giving prosecutors guidelines on the use of discretion, or a body with both functions. This body should, in any case, work without jeopardizing the independence of magistrates. If we choose the second or the third option, the risk of limiting independence is evident, especially if the Parliament or the Minister of Justice is given the task. In fact, you are subject to the same risk when the body is not independent from the other powers of the State or any other power, even if the first option is taken.

So, it is a little difficult to set up a body which does not interfere with the independence of magistrates. None of these problems can be solved by setting up a body which is part of the judiciary, such as the Superior Council of Magistrates or some other similar body. In this case, internal independence would be breached.

The system needs to be organised in such a way that discretion works by categories of crimes rather than by individual cases. Otherwise, the constitutional principle that every citizen is equal before the law is definitively breached.

However this system is contradictory. Is it reasonable to threaten by law that a specific behaviour will be punished as a crime, and at the same time to rule openly that a criminal action will not be started regarding this crime?

In this situation it could be useful to glance at another opportunity. The question is: are we completely sure that the mandatory system cannot work efficiently? Do we need to change the Italian system, or can we keep it and find a way that allows it to be effective?

Very briefly, as my time is nearly over, the mandatory system can work better if the law provides fewer crimes than it does. Administrative sanctions can be more effective against less serious illegal behaviour. Widespread decriminalisation can be suggested, so that the work of prosecutors and courts is reduced. Furthermore, the offices of both should be better organised. By avoiding waste of time, the mandatory action can be made effective, and the independence of magistrates guaranteed.