The public prosecutor in the major contemporary legal systems: checks and balances of criminal prosecution. An introduction

di Simone Lonati e Saulle Panizza

Abstract: In the Italian legal system the "suffering" of the mandatory principle enshrined in Section 112 of the Constitution has led to an heated debate on the role of public prosecution and the organizational structure of its office. DPCE's special edition adopts a comparative approach to the issue which aims to provide an overview of 17 legal systems through a common path of analysis in order to help the debate on the topic. Despite the specific features of each jurisdiction analysed, a common trend emerges: in front of an increasing blurring of the bipartition between compulsory and discretionary systems, an "enlightened" hybridization establishes itself through the provision of guidelines and systems of control.

Keywords: Criminal Procedure; Constitutional Law; Public Prosecutor; Mandatory and Discretionary Prosecution; Comparative Approach

1. A common denominator in the evolution of criminal justice systems: the emergence of the office of public prosecutor and the task to prosecute criminal offences

It is far from simple to frame the topic of criminal prosecution[1], "one of the most elusive and puzzling issues"[2]. Not less articulated have been the developments that have led to the identification of the body in charge of its exercise and the ways in which this task is carried out still generate heated debates to this day.

The origins of prosecution can be traced back in the mists of time to the earliest moment when man felt he was authorized to inflict punishment

[1] For an overview of the topic of prosecution, see, for all, F. BENEVOLO, voce *Azione Penale*, in *Dig. It.*, Vol. IV, t. II, 1926, pp. 907 ff.; M. CHIAVARIO, *L'azione penale tra diritto e politica*, Cedam, Padova, 1995; ID., *Appunti sulla problematica dell'«azione» nel processo penale italiano: incertezze prospettive limiti*, in *Riv. trim. dir. e proc. civ.*, 1975, p. 864 ff.; O. DOMINIONI, voce *Azione penale*, in *Dig. disc. pen.*, vol. X., p. 409; G. GUARNERI, *Azione penale* (Diritto processuale penale), in *Nss. Dig. It.*, II, 1958, p. 64 ff.; G. LEONE, *Azione penale*, in *Enc. dir.*, IV, 1951, pp. 851 ff.; E. MARZADURI, voce *Azione (IV) Diritto processuale penale)*, in *Enc. giur.*, Aggiornamento, 1996, p. 9; R. ORESTANO, *Azione (L'azione in generale: a) storia del problema)*, in *Enc. Dir.*, IV, 1959, pp. 785 ff.; G. UBERTIS, voce *Azione (II) Azione penale)*, in *Enc. giur.*, vol. IV, 1988, p. 3.

[2] M. CHIAVARIO, *L'azione penale tra diritto e politica*, cit., p. 3.

on he who had caused him an offence[3]. In such a wholly primitive punitive system, standing to prosecute was attributed to the offended party and the action was not subject to any specific forms or time limits, thereby proving, in most cases, to be incapable of restoring order among men; on the contrary, it generated a potentially endless series of reactions to the offences caused, which in fact led to greater social instability. Over time the need to free the exercise of criminal prosecution from the passions of the victim and attribute it to a distinct party began to take hold.

Moving through the attribution at times to the sovereign[4] or to members of the clergy[5] and the connection of this function to the political[6] and state spheres, it was a long path the one that finally led to a de-privatization of criminal prosecution and the emergence of an office assigned to it in the interest of the state. In this evolution – triggered by the acknowledgment of criminal misconduct as harmful not only to a private interest, but also to that of the state, insofar as it determines a violation of the rules imposed by it and an offense against the public order – a turning point was marked, with the strengthening of the monarchies, by the introduction of the king's prosecutor[7], progressively entrusted with the protection of all the monarch's rights and thus with the task to perform a

[3] For a more detailed reconstruction of the history of prosecution, see F. BENEVOLO, voce *Azione Penale*, cit., pp. 907 ff. and G. MONACO, *Pubblico Ministero ed obbligatorietà dell'azione penale*, Giuffrè, Milano, 2003, pp. 3 ff.

[4] This is, for example, the case in ancient India, in the alternating phases of its evolution, the concentration of this power periodically re-emerges in the hands of the ruler or in offices representing articulations of his power (such as, for instance, in imperial Rome and later with the strengthening of the monarchies, see G. MONACO, *Pubblico Ministero ed obbligatorietà dell'azione penale*, cit., p. 9 e F. BENEVOLO, voce *Azione Penale*, cit., p. 909).

[5] The Egyptians had already chosen to entrust such power to the priests since the accusation was also considered an offense against the Gods, and this choice was also taken up by the early Jewish populations (strongly influenced by their long stay in Egypt).

[6] Back in the ancient Greek republics, prosecution was already linked to the political sphere: in Athens with regard to criminal offences, referred to as "public", every Athenian had the right to present their accusation before the Archons, who had to publish it in order to ensure that all other citizens had control over the allegations and could present further evidence against the accused, and in the period of Solon it goes so far as to provide for an obligation on the accuser not to set aside the action until final judgment; in Sparta it was provided that if a crime against political freedom and the Constitution had not been the subject of a citizen's complaint, special magistrates (the Ephors) were to prosecute said crime. See G. MONACO, *Pubblico Ministero ed obbligatorietà dell'azione penale*, cit., p. 5.

[7] In these terms see G. MONACO, *Pubblico Ministero ed obbligatorietà dell'azione penale*, cit., pp. 17 ff. who also highlights how the first evidence of the existence of this function is found in Philip the Fair's grand ordinance of reform of the kingdom in 1302, where it is referred to as an already existing function; see, among others, F. CORDERO, *Procedura penale*, 2ª ed., Giuffrè, 1993, pp. 175 ff.; G. BORTOLOTTO, voce *Ministero pubblico (materia penale)*, in *Dig. it.*, vol. XV, t. 2, 1906, p. 514; F. SIRACUSA, voce *Pubblico Ministero (dir. proc. pen.)*, in *Nuovo Dig. it.*, vol. XIV, 1939, pp. 978 ff. In particular, reference is made to M. COLOZZA, *Sulle origini dell'istituto del Pubblico Ministero*, in *Giust. pen.*, 1943, I, cc. 32 ff. for a full analysis of possible alternatives to the reconstruction that the first role closest to that of public prosecutor should be identified in the French King's Prosecutor.

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series of public duties on his own initiative (which gradually expanded to include criminal prosecution[8]).

In the 18th century, we then came to refer to the holder of this function (but also to the office to which it is attributed and to the individual magistrates composing it)[9], with the term "public prosecutor": *prosecutor* to indicate the activity performed and *public* as it is exercised in order to protect the interests of the entire community.

Moving from a diachronic to a synchronic analysis, this function is now found in all contemporary legal systems in each of which, however, as the different contributions will highlight, it is enriched with specific features as to how the prosecutor's office is structured, its relations with the powers of the state, the extent of its power, the methods by which prosecution is exercised and the survival of private prosecution alongside the public one.

2. Mandatory v. discretionary prosecution: an increasingly attenuated dualism

Firstly, we are faced with a largely heated debate regarding the traditional bipartition between mandatory and discretionary prosecution. While there has been no shortage of interpretations of the two models[10], we seem by now to have found, in terms of definition, a common ground in the view that what draws the line between the two is the subordination of prosecution to assessments of opportunity and expediency by the prosecuting body. In other words, it would appear that prosecution may be considered discretionary (and, conversely, mandatory) not when it is subordinated to the assessment of specific requirements being met, but only when, although in the presence of a fact that the prosecuting authority considers to constitute a criminal offence, the latter is left room not to prosecute for reasons of opportunity and expediency[11].

The contributions will clearly highlight how, while the traditional bipartition between systems that have opted for one or the other of the two models remains – at least formally – current systems are increasingly undergoing a hybridization of the original model that leads – at the substantive level – to a convergence toward systems at times of controlled discretion, at times of tempered compulsoriness, where the differences are much less marked. On the one hand, prosecutorial discretion has been subject to forms of delimitation; on the other, there has been a contamination

[8] In this regard, see once again G. MONACO, *Pubblico Ministero ed obbligatorietà dell'azione penale*, cit., pp. 17-18 which also recalls how prosecution then became the prerogative of the King's Prosecutor by an order of Francis I in 1539, which granted the prosecutor the possibility, at the end of the investigation, to choose between two possible alternatives: the initiation of proceedings or dismissal of the case.

[9] See G. MONACO, *Pubblico Ministero ed obbligatorietà dell'azione penale*, cit., p. 21.

[10] A thorough examination of the meanings attributable to the term "discretion" is provided by G. MONACO, *Pubblico Ministero ed obbligatorietà dell'azione penale*, cit., pp. 191 ss.

[11] On this aspect, see, among others, E. FORTUNA, *Pubblico ministero (III) Diritto processuale penale*, in *Enc. giur.*, vol. XXV, 1991, pp. 5-6.

– more or less pervasive – by elements of discretion[12]. In particular, in this gradual rapprochement between the two "worlds", the instrument of guidelines has lent itself to a dual role: the introduction of guiding criteria for prosecution has resulted at times in the provision of orders of priority for prosecution, mitigating the rigidity of the mandatory prosecution rule, at times in an attempt to channel and thus curb the prosecutor's opportunity assessment.

Beyond the search for the reasons that may have prompted this convergence movement (which are sometimes attributed to an overall "proper 'collapse of the models,' a gradual loss of confidence in numerous categorizations established by scholars over the centuries – and still to this day – with the purpose of distinguishing between the different types of prosecution"; sometimes to an unsuitability of the traditional classificatory dualism to bring out the far less sharp reality that is recorded in practice in the different systems), the distinction, in fact, has been increasingly blurred as a result of the gradual mitigation of one principle and the other. Thus, against the two abstract models, procedural systems present a whole series of contaminations and variations that paint the current international landscape as composed of many "hybrid" systems[13].

3. The strengths and weaknesses of the different systems as drivers of rapprochement

It is in the limitations of one system and in the advantages of the other that the animating centripetal force of this hybridization process must be identified.

[12] See L. LUPÁRIA, *Obbligatorietà e discrezionalità dell'azione penale nel quadro comparativo europeo*, in *Giur. it.*, 2002, p. 1751 ff. according to which, with particular reference to the European landscape, there is a need to "distance ourselves from the rigid dichotomy according to which the legal systems of this area should be divided into two opposing families" and which traditionally included "Austria, Germany, Greece, Italy, Spain, Sweden and Portugal" in one and "Belgium, Denmark, Finland, France, Ireland, Iceland, Luxembourg, the Netherlands, Poland, Norway and the United Kingdom" in the other. See also E. BRUTI LIBERATI, *Il dibattito sul pubblico ministero: le proposte di riforma costituzionale in una prospettiva comparata*, in *Quest. giust.*, 1997, fasc. 1, p. 142 which notes how "the distance between the systems of compulsoriness and discretion tends to be strongly attenuated": on the one hand, it highlights "the affirmation of the so-called principle of legality even in systems that do not know the principle of mandatory prosecution"; on the other, while "the protection of equality before the law drives toward opting for the principle of legality," "the realization of the unsustainable overload of the criminal justice systems, imposes adjustments, but of a general nature" and R. E. KOSTORIS, *Per un'obbligatorietà temperata dell'azione penale*, cit., p. 876 which notes how "there is an increasing convergence at the centre between systems inspired by compulsoriness and those characterized by discretion: in the former, the acknowledgement of increasingly pressing deflationary needs has led to grant wider margins of discretion on whether or not to prosecute; in the latter, there is an increasing need for legality, which has led to the restriction and control of prosecutorial discretion".

[13] See L. LUPÁRIA, *Obbligatorietà e discrezionalità dell'azione penale nel quadro comparativo europeo*, cit., p. 1751 ff.

DPCE online
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It has always been recognized that the criterion of compulsoriness or – for some countries – of legality of prosecution represents an expression of fundamental guarantees[14], such as certainly that of equality of all men before the law[15] and the principles of legal certainty and binding specificity of the law itself[16].

In order to avoid inequality of treatment, it is necessary that "discretionary options regarding the opportunity for trial"[17] be excluded, that the ascertainment of the crime and the identification of its perpetrators not be subordinated to or conditioned by reasons of expediency or opportunity, and that no discrimination be made on the basis of assessments regarding the personal and social conditions of both suspects/defendants and offended parties[18].

In other words, the principle stands to safeguard an impartial administration of criminal justice, insofar as the judge is not being "activated" as a result of a more or less arbitrary decision of the prosecuting authority[19].

Not only that. The model would also ensure the principle of legality, given that prosecution would depend solely upon the meeting of the requirements established by the law[20]. In particular, the principle of mandatory prosecution would entail, as a corollary, that by which "criminal cases are non-negotiable", thereby "denying the decisive value of the accused's confession or the absolving power of the prosecuting authority and, in general, the relevance of settlements, acceptances or waivers between the parties to the case" beyond those strictly provided for by the law[21].

[14] The Italian Constitutional Court has expressly recognized how the provision contained in Section 112 of the Constitution, which imposes on the prosecutor the obligation to prosecute, turns out to be "the point of convergence of a set of basic principles of the constitutional system" (Constitutional Court No. 88 of 28 January - 15 February 1991, in *Giur. Cost.*, 1991, p. 586).

[15] Regarding the relationship between the principles of mandatory prosecution and equality, see G. GIOSTRA, *L'archiviazione. Lineamenti Sistematici e questioni interpretative*, Giappichelli, Torino, 1994, pp. 7 ff. and F. CAPRIOLI, *L'archiviazione*, Jovene, Napoli, 1994, pp. 511 ff.

[16] In this regard see M. SCAPARONE, *L'ordinamento giudiziario*, cit., p. 44.

[17] L. FERRAJOLI, *Diritto e ragione*, Laterza, Bari, 1989, pp. 574ff.

[18] In this regard see G. ICHINO, *Obbligatorietà e discrezionalità dell'azione penale*, cit., p. 291 and L. MAGLIARO, *Discrezionalità e obbligatorietà nell'esercizio dell'azione penale*, cit. p. 144.

[19] See G. UBERTIS, *Azione (II) Azione penale)*, cit., p. 4. In the Italian legal system, the Constitutional Court has clearly acknowledged that the principle of mandatory prosecution contributes to the effectiveness of the principle of equality (Constitutional Court No. 84 12-26 July 1979, in *Giur. cost.*, 1979, I, p. 640).

[20] In this regard, see M. GIALUZ, sub *Art. 112*, cit., p. 1011. See also M. CHIAVARIO, *Obbligatorietà dell'azione penale: il principio e la realtà*, in AA.VV., *Il pubblico ministero oggi*, Giuffrè, Milano, 1994, p. 71.

[21] The statement from L. FERRAJOLI, *Diritto e ragione*, cit., p. 582 is shared by G. ICHINO, *Obbligatorietà e discrezionalità dell'azione penale*, cit., p. 291 and L. MAGLIARO, *Discrezionalità e obbligatorietà nell'esercizio dell'azione penale*, cit. p. 145. With regard to the provision contained in Section 112 of the Italian Constitution, it has gone so far as to say that for the prosecutor it would constitute the parallel of the provision contained in Section 101(2) of the Constitution, which prescribes that judges are subject only to the law: in other words, just as judges are subject only to the law, the prosecutor is

Moreover, it has also been pointed out that another corollary principle of mandatory prosecution is that of the independence of the prosecuting authority, since "ensuring legality in equality is not possible in practice if the body entrusted with the action depends on other powers"[22]. In other words, compulsoriness would thus guarantee, on the one hand, functional independence, by preventing prosecutors from making expedient choices and, on the other, the institutional independence of the same prosecutors[23].

However, the main risk associated with the full implementation of the aforementioned guarantees ensured by the principle of legality in prosecution lurks in the work overload of the investigating authority and the consequent inability to cope with all complaints and information laid, which, in turn, results in a series of system inefficiencies (such as, among others, lengthy investigations and deficits in the quality and thoroughness thereof, as well as in a high rate of offences being declared statute-barred) and in a de facto discretionary nature of prosecution[24]. In other words, the

subject only to the obligation to prosecute (see F. CORBI, *Obbligatorietà dell'azione penale ed esigenze di razionalizzazione del processo*, in *Riv. it. dir. e proc. pen.*, 1980, p. 1058. Along these lines see M. GIALUZ, sub *Art. 112*, cit., p. 1011; L. DAGA, voce *Pubblico Ministero. I) Diritto Costituzionale*, in *Enc. Giur.*, vol. XXIX, 1991, p. 3; G. UBERTIS, voce *Azione*, cit., p. 4. Furthermore, the Constitutional Court (Constitutional Court No. 420 of 6-8 September 1995, in *Cass. pen.*, 1995, p. 3274 with notes by G. AMATO, *In tema di indipendenza del pubblico ministero* and Constitutional Court No.84 of 12-26 July 1979, in *Giur. Cost.*, 1979, p. 637) has held that the public prosecution authority, like the judicial body, is subject only to the law).

[22] In Italy, it was highlighted by the Constitutional Court itself (Constitutional Court No. 88 of 28 January - 15 February 1991, cit.). In literature, G. PISAPIA, *Relazione introduttiva*, in AA.VV., *Il pubblico ministero oggi*, Giuffrè, Milano, 1994, p. 15 who believes that "this rule can also be seen as a way to explicitly put down the Constituent's intention to clearly separate the prosecutor's office from the executive power." and V. GREVI, *Pubblico Ministero e azione penale: riforme costituzionali o per legge ordinaria?*, in *Dir. pen. e proc.*, 1997, p. 495 which, in reaffirming the intangibility of the principle enshrined in Section 112 of the Constitution, points out how said principle, in addition to implementing from a procedural standpoint the principle of legality, constitutes, as noted by the Constitutional Court (Constitutional Court No. 420 of 6-8 September1995, in *Cass. pen.*, 1995, p. 3274), "the «proper source» of the guarantee of independence of the public prosecutor".

[23] On this matter see M. CHIAVARIO, *Obbligatorietà dell'azione penale: né un mito da abbattere né un feticcio da sottrarre a ogni discussione*, in *L'obbligatorietà dell'azione penale. Atti del XXXIII Convegno nazionale dell'Associazione tra gli Studiosi del Processo penale*, Giuffrè, Milano, 2020, p. 11 which identifies in Section 112 of the Italian Constitution an instrument for "shielding" the prosecution authority against "claims (of the powerful and bullies) to enjoy immunity privileges, free zones, for their conduct," of "robust support for prosecutors by sheltering them from yielding to conditioning, seductions and even outright threats, whether more or less veiled". See also M. GIALUZ, sub *Art. 112*, cit., p. 1011.

[24] In this regard see P. Gualtieri, *Azione penale discrezionale e P.M. elettivo per superare le inefficienze del processo penale* in *L'obbligatorietà dell'azione penale. Atti del XXXIII Convegno nazionale dell'Associazione tra gli Studiosi del Processo penale*, Giuffrè, Milano, 2020, p. 33 ff. where, in particular, it is pointed out, with regard to the Italian system, the high percentage of acquittals on the merits rendered by trial courts reveals how "the quality of investigations, in terms of thoroughness and prognostic evaluations, is very low, and that many citizens have to wait a significant amount of time, nearly 5 years, for their innocence to be acknowledged – albeit presumed until proven otherwise

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mandatory nature of prosecution would be "shattered by the unbearable weight of complaints and information reaching the Prosecutor's Office", thereby establishing a de facto discretion, untethered from uniform choice criteria throughout the system and completely left to the sole choice of the prosecuting authority. To avoid this risk, some systems have formally introduced limits to the principle[25].

Discretionary prosecution systems, speculatively, have always been recognized to be better able to manage the load of complaints and information laid at the expense of doubts that the guarantees of equality before the law and legality might crack[26]. Precisely to avoid dangerous drifts in this respect and, therefore, in order to curb the degree of prosecutorial discretion, instruments of control and constraints over the prosecution's choices were soon introduced in many systems. It is with this in mind that hierarchical, judicial or executive control is envisaged and strong prosecuting powers are ensured to the victim[27]. In addition, guidelines are

in accordance with Section 27 of the Constitution – and meanwhile they are forced to endure severe suffering, media pillories, property attachments and deprivations of liberty, with a macroscopic violation of the principle of reasonable duration of trials".

[25] A case in point is the German legal system - which has always been associated with the principle of mandatory prosecution, affirmed on a federal basis by the *Strafprozessordnung* of 1877, although never carved into the Constitutional charter (where, however, it is derived from the principle of equality of citizens before the law) - where there is a strong institutional dependence of the prosecutor on the executive power (see, among others, R. JUY-BIRMANN, *Il processo penale in Germania*, in M. CHIAVARIO (a cura di), *Procedure penali d'Europa*, Cedam, Padova, 2001, p. 184) and where the mentioned principle was quickly tempered: the "Emminger Reform" of 1924 already introduced the first exceptions to the general principle in relation to minor offences, but starting with the 1975 criminal procedure reform substantial exceptions to the principle of mandatory prosecution were grafted in through the provision of two grounds for dismissal: dismissal for mere reasons of expediency (on the grounds of minor guilt and where there is a lack of public interest in the prosecution thereof) and conditional dismissal, with the consent of the accused, subject to compensation for damages to the victim, to the payment of a sum to the state or to a public interest entity, community service or the payment of food subsidies (see, among others, V. H. JUNG, *Le rôle du ministère public en procédure pénale allemande*, in RSC, 1985, p. 225; A. PERRODET, *Il pubblico ministero*, in M. CHIAVARIO (a cura di), *Procedure penali d'Europa*, Cedam, Padova, 2001, p. 404 s.).

[26] There has always been – and still is, as shown in the contribution analysing this system – great concern in the U.S. system, which, traditionally, has granted the maximum degree of discretion and extensive and penetrating powers to the prosecutor, to the point of leading to the observation that the prosecutor "has more control over life, liberty, and reputation than any other person in America" (v. R.H. Jackson, *The Federal Prosecutor*, in 31 *J. Crim. L. & Criminology* 3, 3, 1940).

[27] This is the case, for example, in the French system, historically based on the discretionary prosecution model, where prosecutorial discretion is subject to a "double limitation by the organizational structure of the public prosecutors' office and [...] by the ubiquitous procedural presence of the victim" (v. C. MAURO, *Dell'utilità del criterio della non punibilità per particolare tenuità del fatto in un sistema di opportunità dell'azione penale. Esperienze francesi*, in S. QUATTROCOLO (a cura di), *I nuovi epiloghi del procedimento penale per particolare tenuità del fatto*, cit., p. 156). Specifically, here each prosecutor is under an obligation to comply with the directives regarding prosecution and the conduct of investigations coming from his or her superior. The directives not only concern "criminal policy" in general, but can also be specific with regards to

provided with indications aimed at uniformly directing the prosecuting authority's assessment regarding prosecution and, at the same time, at giving greater certainty to the application of the rule of law[28].

Thus, in an attempt to mitigate the risks of the two systems, the merits of the other model have been drawn upon with the result of a mutual influence that, over time, has led to the establishment of systems of tempered compulsoriness and controlled discretion.

An international framework has therefore been outlined where, regardless of the model chosen – and maintained at the formal level – recurring features can be discerned: forms of control over prosecution and guidelines aimed at times to curb the prosecuting authority's discretion, at times to acknowledge its margin of assessment but within predefined parameters.

As will be gathered from the individual contributions herein, this common basis in each system has been developed, in line with the peculiarities of that system, with diversified solutions as to the identification of the authority in charge of issuing the guidelines, the organizational structure and system of responsibilities relating to the public prosecutor's office, and its interrelations with the other powers of the state.

4. The comparative approach as a necessary starting point for an "enlightened" hybridization

For years now in Italy, in the face of the observed "suffering"[29] that afflicts the principle established by Section 112 of the Constitution, there has been

procedural choices, according to the type of litigation, or even how to handle a single specific case. (see V. DERVIEUX, *Il processo penale in Francia*, in M. CHIAVARIO (a cura di), *Procedure penali d'Europa*, Cedam, Padova, 2001, p. 109 ff.).

[28] Even the U.S. system - where it is recognized that prosecutorial discretion finds maximum breathing space - found itself, as early as the late 1970s, coexisting with attempts - on several fronts - to guide the prosecutors' choice of whether or not to prosecute. On the one hand, case law has sought to contain the public prosecutor's free appreciation by prohibiting selective prosecution and vindicative prosecution, drawing on the principle of equal protection of the laws enshrined in the Fourteenth Amendment and aimed at preventing, respectively, the discriminatory and retaliatory use of the sanctioning instrument (see L. B. SHEER, *Preliminary Proceedings - Prosecutorial Discretion*, in *Annual Review of Criminal Procedure, Vol. 27*, pp. 1356-1357). Furthermore, in some offices of the state apparatus, mechanisms have been put in place to promote uniformity: at the County or District level, many offices have adopted policies or guidelines; at the federal level, all prosecutors are part of a department led by the President that provides a framework where national priorities are stated and protocols and procedures may be established (V. S. S. BEALE, *Prosecutorial Discretion in Three Systems: Balancing Conflicting Goals and Providing Mechanisms for Control*, in M. Caianiello – J. S. Hodgson (a cura di) *Discretionary Criminal Justice in a Comparative Context*, Carolina Academic Press, Durham, 2015, p. 27 ff.). Specifically, the Principles of Federal Prosecution, contained in the U.S. Attorneys' Manual, drafted in the early 1980s and supplemented over the years, which contain factors that should guide federal prosecutors in deciding whether or not to prosecute (available for consultation at: *https://www.justice.gov/jm/jm-9-27000-principles-federal-prosecution*).

[29] The metaphor is from A. SPATARO, *Le "priorità" non sono più urgenti e comunque la scelta spetta ai giudici*, in *Cass. pen.*, 2015, p. 3405.

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a heated debate on the introduction of "adjustments" to the rule of mandatory prosecution, which also involves the broader debate regarding the organizational structure of the public prosecutor's office. This debate also has been animated by the realization that, in the impossibility of coping with the entire demand for justice, the prosecutor's office has autonomously begun to set forth criteria for establishing the order in which the reports of crimes received are to be processed[30], thus giving rise to the practice, which quickly took hold and became widely debated, of the so-called "priority criteria"[31]. In this context there have been several attempts to affect the constitutional dictate in such a way as to temper the criterion of mandatory prosecution and provide for the adoption of priority criteria[32].

[30] Some of the best-known circulars include the "Pieri-Conti Circular," dating from the period between the approval of the "new" Code of Criminal Procedure and its entry into force (Circular of the Court of Appeal of Turin and the General Prosecutor's Office at the Court of Appeal of Turin, prot. no. 850/S and prot. no. 223/12/89, 8 March 1989, in *Cass. pen.*, 1989, p. 1616 introduced by a short comment by V. ZAGREBELSKY, *Una «filosofia» dell'organizzazione del lavoro per la trattazione degli affari penali*, *ivi*, 1989, pp. 1615 ff.); the "Zagrebelsky circular", the first issued after the entry into force of the "new" code (Circular of the Public Prosecutor's Office at the Court of Turin 16 November 1990, in *Cass. pen.*, 1991, pp. 362 ff.); the "Maddalena circular" where explicit reference is made to the possibility of "shelving" certain proceedings and openly urging prosecutors to "favour the path of moving for (even a "generous") dismissal, whenever this option appears practicable or even possible" (see Circular of the Public Prosecutor's Office of Turin no. 50/07, 10 January 2007, published in *Quest. giust.*, 2007, fasc. 2, p. 621 introduced by a brief comment by G. SANTALUCIA, *Obbligatorietà dell'azione penale e criteri di priorità*, *ivi*, 2007, fasc. 2, pp. 618 ff.) with regard to which the High Council of the Judiciary considered the arguments adopted "fully compliant with the legal framework on the matter of organization of the public prosecutor's office as now provided by the law, offering realistic, rational and controllable solutions, and overall compatible with the constitutional principle of mandatory prosecution" (see Resolution no. 50 of 15 May 2007, in *Quest. giust.*, 2007, fasc. 2, p. 631 ff. with comment by G. SANTALUCIA, *Obbligatorietà dell'azione penale e criteri di priorità*).

[31] For an overview of the development of this practice and the reactions elicited, see, among others, S. CATALANO, *Rimedi peggiori dei mali: sui criteri di priorità nell'azione penale*, in *Quad. cost.*, 2008, fasc. 1, pp. 65 ff.; V. PACILEO, *Pubblico ministero. Ruolo e funzioni nel processo penale e civile*, Utet, Milanofiori Assago – Torino, 2011, pp. 209 ff.; S. PESCI, *Organizzazione delle Procure e criteri di priorità: scelta di trasparenza o stato di necessità?*, in *Quest. giust.*, 2014, fasc. 4, pp. 99 ff. e D. VICOLI, *L'esperienza dei criteri di priorità*, in G. DI CHIARA (a cura di) *Il processo penale tra politiche della sicurezza e nuovi garantismi*, Giappichelli, Torino, 2003, pp. 228 ff.

[32] Among the different projects, which varied with regard to the identification of the authority to be entrusted with the power to lay down the priority policy, mention should be made of some that aimed at a legislative definition - at least of the frame of reference - of the criteria and priorities for prosecution (see bill d.d.l. no. 2059, *Atti Senato*, XIII leg. at the initiative of senators La Loggia and others; bill d.d.l. no. 2060, *Atti Senato*, XIII leg. at the initiative of senators La Loggia and others; bill p.d.l. no. 3121, *Atti Camera*, XIII leg. at the initiative of senators Pisanu and others; bill p.d.l. n. 3122, *Atti Camera*, XIII leg. at the initiative of members of Parliament Berlusconi and others. On these project reforms see V. BORRACCETTI, *L'obbligatorietà dell'azione* penale, in *Quest. giust.*, 1997, fasc. 1, pp. 146 ff.; E. BRUTI LIBERATI, *Il dibattito sul pubblico ministero: le proposte di riforma costituzionale in una prospettiva comparata*, *ivi*, 1997, fasc. 1, pp. 137 ff. e V. GREVI, *Pubblico ministero e azione penale: riforme costituzionali o per legge ordinaria*, in *Dir. pen. e proc.*, 1997, pp. 493 ff. Cfr., inoltre, d.d.l. n. 1256, in *Atti Senato*, XIV leg., d.d.l. n. 182, in *Atti Senato*, XVI leg. and d.d.l. n. 1030, in *Atti Senato*, XVI leg.,

The so-called "Cartabia" Reform filled the void caused by the denounced legislative inertia in order to regulate the praetorian practice, by expressly providing – with the constitutional framework unchanged – that Parliament shall periodically establish the general criteria necessary to ensure effectiveness and uniformity in prosecution, on the basis of which the judicial authorities shall establish priority criteria – which are to be transparent and predetermined – taking into account the actual local reality, with a view to ensuring the concrete effectiveness of the indications issued by Parliament[33]. These criteria, however, in a context of imbalance between

all at the initiative of senator Cossiga); in other cases, however, it was envisaged that the provision of the criteria would always come from Parliament but at the direction of other bodies (in the bills d.d.l. no. 1935, in *Atti Camera*, XVI leg. at the initiative of senator Pera; p.d.l. no. 3278, in *Atti Camera*, XVI leg. at the initiative of member of Parliament Versace; p.d.l. no. 3122, in *Atti Camera*, XVI leg. at the initiative of the member of Parliament Santelli, for example it was envisaged that directions would have to come from the Minister of Justice, after consultation with the Minister of Internal Affairs); in other cases, there were plans to constitutionalize the prosecutors' choice thereof that would transcend the boundaries of individual offices (see bill p.d.l. no. 250, in *Atti Camera*, XVI leg. which proposed the development of national guidelines by the Minister of Justice to which the General Prosecutors at the Courts of Appeal should adhere when choosing priorities for their district, or bill p.d.l. no. 1407, in *Atti Camera*, XVI leg. at the initiative of member of Parliament Nucara which instead entrusted the task of laying down guidelines "to a Conference of General Prosecutors of all courts of appeal chaired by the General Prosecutor of the Court of Cassation", or bill p.d.l. no. 5179, in *Atti Camera*, XVI leg. at the initiative of member of Parliament De Girolamo which assigned the task to the General Prosecutor of the Republic at the Court of appeal).

[33] See in particular, Section 1(9)(i) Law No. 134 of 27 September 2021, containing a "Delegation of power to the government for the efficiency of criminal proceedings as well as in the area of restorative justice, and provisions for the speedy settlement of legal proceedings", in Official Gazzette No. 237 of 4 October 2021, Serie generale. Among the comments, see R. APRATI, *Criteri di priorità e progetti organizzativi delle procure*, in *Legisl. pen.*, 24 maggio 2022, p. 1 ff.; G. BUONOMO, *La crescente procedimentalizzazione dell'atto parlamentare di indirizzo politico*, in *Quest. giust. - Speciale, 4/2021*, p. 96 ff.; S. CIVARDI, *La lenta erosione del principio di obbligatorietà dell'azione penale. Prime note ai "criteri di priorità" indicati dal Parlamento*, in *Giust. insieme*, 29 October 2021; P. CORSO, *L'efficienza del processo penale: l'altare e le vittime*, in *Arch. nuova proc. pen.*, 2022, p. 493 ff.; F. DI VIZIO, *L'obbligatorietà dell'azione penale efficiente ai tempi del PNRR. La Procura tra prospettive organizzative, temi istituzionali e scelte comportamentali*, in *Quest. giust. Speciale 4/2021*, p. 55 ff.; M. DONINI, *Efficienza e principi della legge Cartabia. Il legislatore a scuola di realismo e cultura della discrezionalità*, in politica dir., 2021, p. 592 ff.; P. FERRUA, *I criteri di priorità nell'esercizio dell'azione penale. Verso quale modello processuale?*, in *Proc. pen. e giust.*, 2021, 4, p. 1141; M. GIALUZ - J. DELLA TORRE, *Il progetto governativo di riforma della giustizia penale approda alle Camere: per avere processi rapidi (e giusti) occorre un cambio di passo*, in *Sist. pen.*, 2021; K. LA REGINA, *Riforma Cartabia: modifiche strutturali al processo penale - Notizia di reato: priorità, struttura, iscrizione e controlli*, in *Giur. it.*, 2023, p. 1188 ff.; V. MAFFEO, *I criteri di priorità dell'azione penale tra legge e scelte organizzative degli uffici inquirenti*, in *Proc. pen. giust.*, 2022, 1, p. 61 ff.; A. MARANDOLA, *Molti interlocutori e plurimi criteri: il difficile punto di caduta della priorità delle indagini*, in *Dir. pen. proc.*, 2021, p. 1162 ff.; S. PANIZZA, *Se l'esercizio dell'azione penale diventa obbligatorio nell'ambito dei criteri generali indicati dal Parlamento con legge*, in *Quest. giust.-Speciale, 4/2021*, p. 105 ff.; A. RICCIO, *I criteri di priorità: verso una declinazione realistica del principio di obbligatorietà dell'azione penale*, in *Dir. pen. proc*, p. 957 ff.; N. ROSSI, *I criteri di esercizio dell'azione penale. Interviene «Il*

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the "demand" for prosecution and the resources necessary to meet it, run the risk of turning from mere organizational tools to manage the workload of the prosecutors' offices into actual selection criteria for the reported offences to be prosecuted.

The examination of the Italian "emergency" and the consequent recent responses of the legislator as well as any further *de iure condendo* assessments – such as the analysis of the issues faced by every other system – cannot but start from a comparative assessment. It is only by looking over across borders that one may not only fully understand the extent of the domestic issue, but also assess, through the experiences of other criminal justice systems, whether the remedies adopted and being adopted can prove to be effective and compatible with respect to fundamental guarantees.

It is this awareness that sparked the drafting of this special edition of DPCE, which aims to provide an overview – as extensive as possible – of other (17) European, Asian, North and South American legal systems originating in the common and civil law traditions.

The goal is to paint a picture of the different models of prosecution that can lend itself as a starting point for further debate and insights on this area of topic.

In order to aid the comparison, the description of the different systems and the peculiarities of the contexts in which they are set has been guided by a common path of analysis.

The authors have thus traced the design of the legal system entrusted to them, firstly by identifying the applied prosecution model and reconstructing the reference legal framework. The contributions have then necessarily included considerations regarding the intercurrent relations between the prosecuting authority, the executive and the judiciary, as well as considerations on the definition of guidelines to bind discretion or of priority criteria to organize prosecution where prosecution is mandatory. One analysis perspective was also represented by the provision of non-retroactivity of criminal prosecution and the justice system's choice for *ex officio* prosecution or prosecution upon complaint by the victim. The review of the system also addresses the prosecutor's office organizational structure, its powers of investigation, the provision of control over its work, including a system of responsibilities, as well as its relations with the judiciary.

To briefly mention some of the reflections emerging from the stimulating overview painted by the experts in this field, one may note that, on the one hand, there is an initial adherence to one of the two prosecution models, which is often formalized in an act of ordinary legislation. The provision of Section 112 of the Italian Constitution comes across as "a rare bird in the landscape of contemporary Constitutions. Textually, it seems to take to the extreme, in terms of the absoluteness expressed – the moment it

Parlamento con legge», in *Quest. giust.-Speciale, 4/2021*, p. 76 ff.; F. SIRACUSANO, *Produttività, efficienza ed efficacia della giustizia penale: l'insidiosa logica economica della "riforma Cartabia"*, in *Riv. it. dir. pen. proc.*, 2023, p. 159 ff.; A. SPATARO, *La selezione delle priorità nell'esercizio dell'azione penale: la criticabile scelta adottata con la Legge 27 settembre 2021, n. 134, a*, 4/2021, 86 ff. as well as S. LONATI, *I criteri di priorità nell'esercizio dell'azione penale: verso un sistema ad azione pilotata legislativamente?*, in *Arch. pen.*, 2023, 1.

crystallizes it at the highest level of the system – a principle that elsewhere is legislatively translated into much softer terms and with a much more 'relative' significance"[34]. On the other hand, several jurisdictions have opted for a hybridization of the original choice, by providing, on the one hand, the tempering of the principle of mandatory prosecution in order to cope with the judicial burden and, on the other, a curb on prosecutorial discretion so as to ensure the most uniform application of criminal law. In an international context where the traditional bipartition between compulsoriness and discretion of prosecution is increasingly blurring, the comparative analysis also shows how, in practice, a common denominator – albeit in a variety of implementation methods – can be found, on the one hand, in the provision of guidelines to which the prosecuting authority must adhere and, on the other, in the provision of a system of control over its work, differently articulated according to the specific reality.

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[34] See M. CHIAVARIO, *Obbligatorietà dell'azione penale: il principio e la realtà*, in AA.VV., *Il pubblico ministero oggi*, Giuffrè, Milano, 1994, p. 7. Similarly, cfr. also G. MONACO, *Pubblico Ministero ed obbligatorietà dell'azione penale*, Giuffrè, Milano, 2003, pp. 273 ff. which calls the Italian choice a unicum on the international scene. And, in fact, as will be shown by the contributions to this collective work, out of the fifteen jurisdictions examined, only the Colombian jurisdiction has opted to constitutionalize the principle of mandatory prosecution.