Il ruolo del Pubblico Ministero nel sistema giuridico argentino

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Abstract: The Role of Public Prosecution in Argentina's Legal System - The author starts by describing the constitutional and legal frame in which Argentina's Public Prosecution Service operates, the hierarchy and relationships between its members, and the system of recruitment and control of prosecutors. After detailing the general functioning of the Public Prosecution Service, the essay goes into the various options individual prosecutors have in order to exercise their powers, the different ways in which criminal proceedings may start in accordance to the offence indicted, and the new tools Argentina's Federal Code of Criminal Procedure incorporates so as to advance and regulate prosecutorial discretion. The article ends with some considerations about the unsteady relationship between the Public Prosecution Service and the press regarding political uproars and controversial cases.

Keywords: public prosecution; criminal procedure; mandatory and discretionary prosecution; opportunity principles; criminal prosecution and the media.

1. Legal framework of the Argentine prosecution service

Argentina's National Public Prosecution Service (*Ministerio Público Fiscal de la Nación*) derives its current form from the Constitution as amended in 1994. Article 120 describes it as "an independent body with functional autonomy and financial self-sufficiency, whose function is to promote the intervention of the judiciary in defense of the general interests of society's lawfulness in coordination with the other authorities of the Republic.

"It is composed of a National attorney general and a National chief public defender and the other members that the law may establish.

"Its members enjoy functional immunities and noninterference with their remuneration".

The phraseology of the first paragraph is said[1] to find its origin in concepts formulated by Italian jurists Chiovenda[2], Carnelutti[3], and

[1] By F. Junyent Bas, *El rol institucional del Ministerio Público Fiscal*, in *La Ley*, 2017-F-638.

[2] G. Chiovenda, *Principios de derecho procesal civil*, Madrid, 1922, v. I, 537: "The main role of the prosecutor's office is to promote the exercise of jurisdictional function in the public interest".

Calamandrei[4], about the role public prosecutors should fulfill in proceedings in general. This is also rephrased in the notion that "the participation of prosecutors is intended to ensure certain legal principles that society considers fundamental, and hence the legislator imposes their intervention"[5].

Due to Argentina's federal system of government, apart from the National Public Prosecution Service, there are as well regional Prosecution Services for each one of the 24 provinces and districts in which Argentina is divided, each one of them possessing its own structure and rules of procedure. Nonetheless, this article will be centered around the Prosecution Service active at the National level, which concerns itself only with the so-called *federal crimes* such as attacks against the country's constitutional order, terrorism, illegal drug trade, human smuggling, corruption in the federal government, and offences against firearms regulations.

The National Public Prosecution Service has been described as the *fourth branch of government*[6], or with more precision, as an *extrapower body*[7]; i.e., an entity that does not belong to any of the three traditional branches of government[8]. Its placement under the sphere of either branch was fiercely debated in the 1994 Constitutional Convention: some wanted it to remain under the Executive's authority, following our own tradition; others wanted to situate it within the judiciary since its main function would as well be the application of the law in legal cases; while a third group pretended to erect it within the Legislative's domains, "as it was the case in the former Soviet Union"[9]. The dispute was eventually settled by setting it as an "independent body". This independence is to be guaranteed, as mentioned in article 120 of the Constitution, by:

- its *functional autonomy*, meaning it can make its own decisions on how to fulfill its mission of applying the law;
- its *financial self-sufficiency*, thus being able to allocate its resources as it sees fit;
- its member's *functional immunities*, so they can not be found liable for

[3] F. Carnelutti, *Instituciones del proceso civil*, Buenos Aires, 1978, v. I, 306, who instead of "public interest" uses the expression "interest of the law".

[4] P. Calamandrei, *Instituciones de derecho procesal civil*, Buenos Aires, 1962, v. II, 29. According to this author, the prosecutor's role in the procedure constitutes "initiative, encouragement and boost for the jurisdiction".

[5] Junyent Bas, in *La Ley*, 2017-F-638.

[6] F. D. Obarrio, *El Ministerio Público: cuarto poder del Estado*, in *La Ley*, 1995-C-870.

[7] A. B. Bianchi, *El Ministerio Público: ¿un nuevo poder? (Reexamen de la doctrina de los órganos extrapoder)*, in *El Derecho*, 162-139. Although the same author had previsouly suggested placing the Public Prosecution Service under the sphere of the judiciary: *La conveniencia de que el Ministerio Público sea un órgano del Poder Judicial*, in *El Derecho*, 106-846.

[8] "In our opinion, the Public Prosecution Service fulfills a controlling role from outside of the three classic branches of government": G. J. Bidart Campos, *Tratado elemental de derecho constitucional argentino*, Buenos Aires, 1997, v. 6, 488.

[9] M. A. Ortiz Pellegrini, *El Ministerio Público Fiscal en la Constitución Nacional*, in *Doctrina Judicial*, 1997-2-1067.

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actions taken in the course of their official duties[10];
- the *prohibition* to *diminish*, or otherwise negatively alter their member's *remunerations* (the same is also established by the Constitution concerning the judges' salaries: article 110).

These guarantees were generally welcomed as a satisfactory innovation in favor of an independent Public Prosecution Service. Before the 1994 constitutional reform, it was generally understood that the Public Prosecution Service received little to no political nor legal attention, thus being called "the institutional Cinderella of our Republic"[11]. In other terms, "our historical constitution had a very important legal vacuum that was the lack of constitutional regulation of the Public Prosecution Service"[12]. Some judicial precedents, nevertheless, attempted to remedy that situation, particularly when two years before the constitutional reform the Supreme Court unanimously held that "it is not mandatory for prosecutors to follow the judges legal interpretations"[13]. This landmark decision was praised by different authors as the starting point of the Public Prosecution Service's autonomy and separation from the judiciary[14]. In a newer precedent, the Supreme Court reaffirmed the aforementioned decision[15].

2. Roles and hierarchy among prosecutors

At the federal level, according to article 120 of the Constitution, the Public Prosecution Service is headed by an Attorney General (*procurador general de la Nación*) who fulfills a variety of duties, both judiciary and within the Public Prosecution Service.

The Attorney General must produce a non-binding opinion for Argentina's Supreme Court to hear, for each case directly involving the interpretation of the Constitution or any international convention on human rights (art. 2, law 27.148). It is not uncommon that the Supreme Court chooses to adopt the Attorney General's proposed solutions by simply referencing its agreement in concise decisions. It is also customary that the Supreme Court requests the Attorney General to produce an opinion for highly resounding cases, particularly for cases with political connotations.

Its responsibilities regarding the public prosecution and the criminal system in general are, among others: setting the general policies and directives for the subordinate prosecutors, managing the prosecution

[10] It is added that such immunity should be guaranteed not only in relation to "political powers" but also against "any other group of influence": Junyent Bas, in *La Ley*, 2017-F-638. Similarly, "the aim of the Public Prosecution Service's autonomy is to protect it from wrongful pressures, either from individuals or from other state institutions": Ekmekdjian, v. 5, 633.
[11] F. J. Cafferata, *Nuevas instituciones en la Constitución Nacional*, Córdoba, 1996, 273.
[12] M. Á. Ekmekdjian, *Tratado de derecho constitucional*, Buenos Aires, 1999, v. 5, 632.
[13] CSJN, 6/10/1992, *Lamperter v. Baldo*, in *La Ley*, 1993-C-338.
[14] J. L. Monti, *Sobre el Ministerio Público y las instituciones republicanas*, in *La Ley*, 1994-C-1114.
[15] CSJN, 23/12/2004, *Quiroga*, in *Fallos*, 327-5863.

service's resources and drafting its budget, taking administrative decisions regarding other prosecutors' performance and working conditions (grant leaves, transfer personnel, take disciplinary measures).

The Attorney General also manages the extradition requests submitted by third countries (art. 3, law 27.148).

In order to fill a vacant for this office, the President must submit a nomination to the Senate, which in turn must confirm it by a vote of two-thirds of the members present. Due to a political stalemate in the Senate, the office has remained vacant since 2017 up to the present moment (June 2023). Thus, the position is currently being exercised by an acting Attorney General.

At the immediate lower echelon, there are general prosecutors (*fiscal general*) for each one of the 15 federal judicial districts in which the country is divided. These districts do not necessarily correspond to the areas of the 24 provinces in which Argentina is divided for political matters: some judicial districts encompass more than one province, while some provinces are divided into more than one judicial venue.

In addition to upholding the state's case before appellate courts and coordinating the work of the first instance district attorneys within their jurisdiction, the general prosecutors assist the Attorney General by heading a number of offices specialized in matters such as administrative investigations, defense of the Constitution, crimes against humanity, drug-related crimes, human trafficking (art. 22, law 27.148). The general prosecutors who head those positions are directly appointed by the Attorney General.

First instance district attorneys and deputy district attorneys conduct the day-to-day investigations, pronounce the first indictments, and represent the state before first instance courts from the initial hearings up until an appeal is accepted by the first instance judge after sentencing.

The Attorney General and the other prosecutors may remain in office "as long as their good conduct stands" up until they become 75 years of age. From that moment on, in order to continue in their positions, they need to be nominated again and confirmed by the Senate, for periods of 5 years (art. 62, law 27.148). There have been attempts to reduce the General Attorney's tenure to 5 or 6 years, although said attempts could not pass Congress. Most qualified legal opinions have come out against limiting the Attorney General's tenure, for reasons external and internal to the Public Prosecution Service: it makes the position dependent on the changing political powers, while it would also undermine its authority before the subodinate prosecutors, who would for certain remain in office much longer than their superior, making the Attorney General an "ephemeral figure, and a weak authority"[16].

In addition to the prosecutorial staff, there is also a variety of technical and auxiliary services that assist the district attorneys in their endeavours, but do not belong, strictly speaking, to the prosecutorial ranks (art. 57, law 27.148).

[16] G. Buigo, *Ministerio Público Fiscal. Un análisis a partir de los precedentes de la Corte Suprema*, Buenos Aires, 2022, 200.

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3. Recruitment, promotion, and control of prosecutors

Article 16 of the Constitution provides that "all its inhabitants are equal before the law, and admissible for public employment without any requirement other than their competency". The law establishes the minimum requirements in order to be admitted to different positions; e.g., the General Attorney needs to be an Argentine citizen, have a law degree, have at least 8 years of legal practice, and meet all other requirements needed to be a senator (art. 11, law 27.148). For general prosecutors, 6 years of legal practice are required; while district attorneys only need 4.

The Attorney General, as it happens with judges of the Supreme Court, is appointed following a political procedure as described in the previous section of this essay. All other prosecutors are selected following entrance examinations, in which a list of merits is drawn up considering the candidate's background regarding their previous experience in public service, or as an independent lawyer, postgraduate degrees, publications (art. 42, Regulation for the Selection of Prosecutors); and the result of written and oral examinations, in which the candidate, given a hypothetical case, shall defend their legal position as if they already held the position in question (art. 35, Regulation for the Selection of Prosecutors).

The examiners who prepare the list of merits are the Attorney General, an invited prosecutor, and an invited professor of law. The list is presented to the President, who chooses one of the first three candidates, and sends the nomination to the Senate for it to be discussed and eventually approved.

In order to be promoted, prosecutors must apply for examinations together with private attorneys, or any member of the public who fulfills the requirements for the position in question. Nevertheless, article 55 of law 27.148 acknowledges them the *right to the development of their career, opportunities for promotion, and expectations of progress following the principles of equality, competency, and capacity.*

Control over federal prosecutors all over the country is left exclusively to the Attorney General, who shall apply a variety of sanctions (reprimand, fine, suspension, and remotion[17]: art. 70, law 27.148) over prosecutors found to have incurred disciplinary transgressions. There are minor transgressions listed in the law, such as missing or being late for work on a regular basis; and also more serious ones: violating the prosecutorial secret, carrying out their duties in a negligent manner, giving legal advice to private persons, inflicting physical, psychological or verbal abuse against any person while conducting their official duties (arts. 69 and 68, respectively, law 27.148).

The Attorney General, meanwhile, can only be removed by Congress, following the same procedure established for the impeachment of the president, judges of the Supreme Court, and other high-ranking officials (arts. 76, law 27.148; 53 and 59 of the Constitution).

The High Council of the Judiciary (*Consejo de la Magistratura*) exercises no control nor supervision over the Public Prosecution Service,

[17] In the latter case, the effective remotion must be pronounced by the High Council of the Public Prosecution Service: art. 76, lay 27.148.

as the latter is independent of the three branches of government, and the High Council is in charge solely of the "administration of the Judiciary" (art. 114 of the Constitution).

4. Relations between the prosecutor's office and other penal agencies

Article 120 of the Constitution dictates that the Public Prosecution Service must fulfill its duties "in coordination with the other authorities of the Republic". As a general rule, article 90 of the Code of Criminal Procedure states that "all public agencies must provide prompt, effective and complete cooperation to the requests made by the representative of the Public Prosecution Service in the exercise of their duties". Being responsible for investigating and taking criminal cases to the courts, the Public Prosecution Service is naturally in constant contact with other actors of the penal system: the police and other law enforcement agencies, the criminal courts, and the correctional service. The Attorney General also produces non-binding opinions for certain cases that have reached the Supreme Court, being thus in direct correspondence with it and even influencing its decisions.

Concerning the police, the Public Prosecution Service can issue general instructions to coordinate the work of the different law enforcement agencies (article 97, Federal Code of Criminal Procedure). Officers must also assist, protect, and comply with the prosecutor's orders when investigating a particular case: "Being the district attorney personally responsible towards the victim, the courts, and society in general for the success of the investigation, they must naturally have the faculty to take the legal decisions when representing the state. And in order to take an informed decision, they need to be informed in a quick, complete, and intelligible manner by the police, who are also under the prosecutor's orders when they are directly involved in the investigation of a certain case"[18].

Perhaps the closest relationship, at least on a personal level, has been the one established between public prosecutors and criminal judges. Sharing the same studies and fields of knowledge, coming from similar social backgrounds, working together (albeit in different roles), the proximity between prosecutors and judges has been a constant complaint in Argentina's lawyerly circles. A common saying describes criminal courts as a scalene triangle, that is, a triangle in which all three sides have different lengths. The judge is placed at the top, with the prosecutor at the closest corner, both connected by the shortest side; meanwhile, the defense lawyer is left at the furthest corner. This scheme seems to be gradually put aside by the reforms of the criminal system, which establish an adversarial system in which the public prosecutor is considered less as a public official (a colleague of the judge, in a certain way), and more like a party to the trial; and in which the judge and the public prosecutor often find themselves in opposition, with the judge overruling some of the

[18] J. E. Chiappini, *Práctica policial penal y procesal penal*, Santa Fe, 2022, 115.

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prosecutor's motions. The triangle is thus acquiring a more equilateral shape[19].

Regarding the correctional service, public prosecutors must ensure that human rights are duly respected on correctional, judicial, police, and psychiatric premises so that internees are treated in accordance with the law and international human rights standards, and that they are provided with timely legal, medical, and other assistance as needed. For the fulfillment of this objective, they generally share these responsibilities with correctional judges (*jueces de ejecución penal*).

5. Three choices for an indictment

Article 71 of Argentina's Criminal Code determines that legal proceedings shall be conducted *ex officio* (*acción pública*) for all crimes, except those listed under articles 72 and 73. The general rule of official, mandatory prosecution for most crimes means that the procedure "shall not be suspended, interrupted, nor terminated, except in the cases expressly authorized by the law" (art. 25, Federal Code of Criminal Procedure). Thus, it can be safely interpreted that the cases in which the district attorney can exercise their prosecutorial discretion, as enumerated in the next chapter, shall be restricted to only those exceptions, otherwise, the general rule of mandatory prosecution applies. Thus, "being the *principle of officiality* the rule, its exceptions shall be interpreted restrictively, which means that no other cases should be admitted apart from the ones listed by the law"[20].

On the other hand, crimes listed under article 72 require a prior complaint as a means of authorization for the prosecution to take place (*instancia privada*). Once the complaint is filled, it cannot be retracted and the procedure continues in the name of the governmental authority. Sexual crimes, preventing contact between a parent and their child, and assault and battery in the least severe cases, are the crimes that need the victim's formal action in order to be prosecuted[21]. "Commotion, grief, and trauma are the general rationales for making the public prosecution dependent on the victim's will"[22]. Thus, the generally accepted reason for this category is what is called *strepitus fori*: ventilating these crimes' details within the

[19] In that sense is has also been observed that "in recent years the Public Prosecution Service has been developing its autonomy, with prosecutors distinguishing themselves and their role from the one of the judges. This has resulted in trials that are more fair and in accordance with the Constitution, and to a higher degree of efficiency in the penal system": M. H. Borinsky, *La autonomía de investigación del Ministerio Público Fiscal*, in *La Ley Revista de Derecho Penal*, 2011-5-819.

[20] O. Bregia Arias and O. Gauna, *Código Penal y leyes complementarias. Comentado, anotado y concordado*, Buenos Aires, 2007, v. 1, 659. And the same authors add, on the next page, that "mandatory prosecution is a necessity derived from the principle of legality".

[21] S. Soler, *Derecho penal argentino*, Buenos Aires, 1992, v. 2, 530, explains that "these cases are so closely connected to a private interest, that the right solution is to consider a private complaint as indispensable for the criminal prosecution to be promoted".

[22] J. E. Chiappini, *El delito de violación de domicilio*, Buenos Aires, 2021, 428.

frame of public proceedings can be detrimental to the victim's interests and well-being[23], so the decision to kickstart the procedure is left to their initiative[24]. In turn, this policy recognizes a few exceptions: if the crimes were committed against minors, or if there are reasons of public safety or general interest, the prosecutor shall carry out the indictment on their own, without any sort of previous complaint or authorisation.

A third group of crimes mentioned under article 73 are treated as lawsuits under civil law: the offended party must begin and continue the proceedings on their own, without any participation of the public prosecution. This is known as *acción privada*. The dispositive principle fully applies to these criminal trials, in which the plaintiff may freely reach an agreement with the defendant, withdraw the complaint, etc. The legal proceedings are nevertheless conducted before criminal courts. The offences which belong to this group are defamation, unfair competition, disclosure of private secrets, and the failure to provide spousal support. The logic in these cases is that the legal interests protected by the criminal law are of an entirely private nature: individual honour, privacy, personal finances. As such, the individual shall be free to seek or dismiss public protection for these kinds of affairs, as in these cases the victims themselves "are the ones who can and must decide about the necessity and opportunity of criminal punishment"[25].

It can thus be stated that in Argentina's legal system, some crimes give rise to public, semi-public or private prosecution, depending on the crime's nature and the victim's circumstances.

6. A road towards prosecutorial discretion

It has traditionally been proclaimed that "the prosecutor exercises the criminal action, but does not own it"[26], in the sense that the state entrusts prosecutors with the task of charging and advancing criminal procedures

[23] According with C. Fontán Balestra, *Tratado de derecho penal. Parte general*, Buenos Aires, 1980, v. III, 466, "the requirement of a previous complaint by the victim sets a limit to the rule of officiality, which is conducive to the protection of personal privacy and family decency".

[24] However, numerous difficulties arise from this legal solution. The validity of the complaint can be questioned if, for instance, the plaintiff suffered from temporary insanity at the moment of filing it; or the person making the complaint is not the direct victim of the crime. There are also cases in which the victim withdraws the complaint; this is generally not accepted as a means of ending the criminal procedure, which has already become public in nature, but some courts have ruled that the complaint is retractable if done shortly after filing it. The form of the complaint is also a contentious matter in the Argentine doctrine: some authors argue that it needs to convene every formal requirement set by the respective Code of Procedure, while others contend that an informal complaint, or even a comment or information made public by the victim to the press, enables the public prosecutor to start a criminal case. A recollection of these and other legal katzenjammers can be seen at J. E. Chiappini, *Los actos idóneos para habilitar la persecución penal y la retractación cuando la instancia privada*, in *Doctrina Judicial*, 7/10/2015, 1.

[25] E. Gómez, *Tratado de derecho penal*, Buenos Aires, 1939, v. 1, 689.

[26] N. Alcalá-Zamora y Castillo and R. Levene, *Derecho procesal penal*, Buenos Aires, 1945, v. 3, 292.

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in its different stages, but that, far from entailing a discretionary power, engenders an inescapable responsibility. Chiovenda, who was the original inspiration for Argentina's procedural system, stated the opinion that "the prosecutor's mission to exercise criminal action is mandatory and can not be made dependent on considerations of opportunity"[27]. Article 274 of the Argentine Penal Code punishes public officials *in genere* who, being in charge of the "prosecution and repression of criminals, fail to their duty unless it is proven that the omission stemmed from an insurmountable obstacle"[28].

This rather strict and legalistic view has been gradually abandoned in favor of allowing prosecutors a wider range of options when encountering a criminal case[29], up to a degree that an author describes it as *the privatization of criminal procedure*[30]

Article 30 of the Federal Code of Criminal Procedure enumerates four cases in which the Prosecutor's Office can "prescind from public criminal action"[31]. These cases are:

a) when an **opportunity criterion** (*criterio* or *principio de oportunidad*) is applicable. These criteria, or rather conditions, are listed under article 31:

– if the prosecuted offence is so insignificant that it does not seriously affect the public interest (*delito de bagatela*). This must be measured by multiple circumstances surrounding the offence in question; e.g., "a simple case of petty theft in a supermarket is of public interest if it's committed by the city's mayor"[32];
– if the defendant's participation in the crime is deemed to be of less relevance, and if a fine, occupational disqualification or a suspended sentence may apply;
– if the defendant has suffered from serious physical or moral injuries as a result of the offence, in which case the application of a criminal punishment would become unnecessary and disproportionate (*pena natural*).

"A typical example would be the driver who, due to recklessness,

[27] Chiovenda, v. 1, 536.
[28] According to D. E. Adler, *En camino hacia el acusatorio: implementación del principio de oportunidad reglada*, in *Jurisprudencia Argentina*, 6/5/2020, 64, this particular view about the procedure finds its origin in the "extreme punitivism's hypocrisy that sustained the principles of *officiality*, *indivisibility*, and *unrecantability* for public criminal procedures, while courts collapsed with endless cases. For the purest retributive doctrine, conciliation between the defendant and the victim is also unfeasible, as it would be a continuation of the conflict between the same protagonists".
[29] The mere possibility of such permissiveness would have caused just criticism by the classic authors, for it "would mean to elevate the will of the prosecutor to the very place of the law, to replace the stability of the law with the arbitrariness of human decisions": A. Chauveau y F. Hélie, *Théorie du Code Pénal*, Paris, 1888, v. I, 392.
[30] D. G. Rojas Busellato, *La privatización de la acción en el nuevo Código Procesal Penal de la Nación (ley 27.063)*, in *La Ley Derecho Penal y Criminología*, 2019-junio-120.
[31] The four cases constitute an exhaustive list that cannot be freely expanded by the prosecutor: Adler, 63.
[32] Adler, in *Jurisprudencia Argentina*, 6/5/2020, 65.

crashes their car producing small injuries to another person, while the culprit receives extremely serious injuries"[33];

– if the criminal punishment to be imposed has been left irrelevant due to other penalties already imposed on the defendant either by another Argentine court (civil, administrative), or by foreign courts.

The aforementioned conditions allow the procedure to be discontinued or even the criminal charges to be withdrawn. Article 59 of the Penal Code mentions the implementation of opportunity criteria as a way of extinguishing the criminal action, in accordance with local laws of procedure. This provision was recently added so that the codes of procedure sanctioned by the individual states can include this exception to the rule of mandatory prosecution[34]. Legal doctrine in general has been rather enthusiastic about the reception of opportunity criteria in the Federal Code of Criminal Procedure, to the point of signaling it as "getting us closer to a state fully respectful of human rights"[35].

b) if the victim, or offended party, asks for the **conversion of the criminal action** (*conversión de la acción*). Article 33 of the Federal Code of Criminal Procedure provides that, if the district attorney opts to cease the prosecution in application of an opportunity criterion, or for any reason asks the court for a declaration of innocence in favor of the defendant, the victim can petition to turn the criminal action from public to private. If granted, the proceedings can continue without the intervention of the public prosecutor, and the victim acting as an individual accuser, following the principles of the *private action* type of procedure, as described at the end of the previous chapter. This legal solution has been branded as unconstitutional by a number of authors, pointing out that the state has the exclusive right to prosecute public crimes, and no individual can substitute it in that role[36].

c) the criminal procedure can also end through **conciliation** between the defendant and the victim. This can only take place in cases of crimes against private property that did not involve serious violence, or were committed by negligence if no serious injuries nor death were caused. If the defendant does not comply with the terms of the agreement, the victim or the public prosecutor can ask for the proceedings to be reopened (art. 34, Federal Code of Criminal Procedure).

d) by implementing **probationary measures** over the defendant (*suspensión del juicio a prueba*). This institution was first introduced in the Argentine legal system in 1994, when a new section with four articles (76 to 76 *quater*) was added to the Penal Code, allowing

[33] G. O. Gatti, *Aproximación al principio de oportunidad en el nuevo Código Procesal Penal de la Nación desde su especial vinculación al modelo de solución de conflictos*, in *Jurisprudencia Argentina*, 4/11/2015, 62.

[34] Before that it had been ruled that the principles of opportunity sanctioned by local Codes of Criminal Procedure contradict the Penal Code, and therefore were unconstitutional: Criminal-Contraventional Ct. Apps., Sess. 1, 23/10/2009, *La Ley CABA*, 2010-55.

[35] Gatti, in *Jurisprudencia Argentina*, 4/11/2015, 55.

[36] E.g., Rojas Busellato, in *La Ley Derecho Penal y Criminología*, 2019-junio-120.

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criminal procedures to be suspended for a period in which the defendant would accept certain measures[37]. Provided that the defendant complies with the course of action imposed on them, duly compensates the victim, and does not commit a new crime, once the pre-established period ends[38], the criminal action for the offence in question expires: article 76 *ter*, fourth paragraph.

The article's final paragraph excludes the application of prosecutorial discretion when a public official is charged with offences committed in office, if the indicted offence might have been an episode in the context of domestic violence, or if it might have been motivated by discrimination. And it finishes: "Nor may the public prosecutor prescind of exercising public action when that is incompatible with international instruments, laws or general instructions issued by the Public Prosecution Service based on its criminal policy".

7. Criminal prosecution as a matter of conscience

The new powers given to prosecutors, by virtue of which they can relatively freely decide to carry on, suspend, or withdraw their indictments, in opposition to the traditional legalistic system of advancing public criminal procedures *ex officio*, under any circumstances and at all costs, provide for a prosecutorial order that heavily relies on individual conscience.

Prosecutors are no longer tied (or at least not as much as before) by the rigid impositions of the law, but they can study the particular cases, their circumstances, results erupting in the lives of both the defendant and the victim, and choose what course of action to take now with a wider range of options available. Thus, the public prosecutor is no longer an artisan of the law, but an artist of the case.

Several modern legal schools support this policy; e.g., the procedural conflict theory[39] advocates that "the public prosecutor shall enjoy broad prerogatives to terminate criminal cases when that can be useful to a better resolution of the conflict in question"[40]. The same author, a few pages later, praises prosecutorial discretion as allowing "a rational use of the state's scarce resourses, so that the public prosecutor can dedicate greater depth to

[37] These measures can consist of all or some of the ones required for obtaining freedom on parole. They are listed under art. 27 *bis* of the Penal Code, namely, to have a fixed residence, to refrain from going to certain places or interacting with certain people. to refrain from the use of narcotics or alcohol abuse, to attend primary school if they have not completed it, to attend courses necessary for their job or professional training, to undergo medical or psychological treatment, to adopt a trade, art, industry, or profession appropriate to their abilities, to perform unpaid work in favor of the state or public welfare institutions.

[38] Which ranges between one and three years: article 76 *ter*, Penal Code.

[39] Whose main principles have been incorporated in article 22 of the Federal Code of Criminal Procedure, as follows: "Conflict resolution. Judges and public prosecutors shall aim at resolving the conflict resulting from the punishable act, opting for the solutions that best suit the restoration of harmony between its protagonists and social peace".

[40] Gatti, in *Jurisprudencia Argentina*, 4/11/2015, 55.

the investigation of more relevant cases".

It has also been argued that, while mandatory prosecution was founded on the principles of "truth, sentencing and punishment", discretionary prosecution relies on "equity, agreement and reparation"[41]. In that sense, Francesco Carrara advocated that the prosecutors' duty was "not to pasively obey superior orders, neither to inquire only about facts that can conduct to the most exaggerated penalties, but to obey the voice of their conscience and become the defendant's first judges, by asking only what they consider true and fair"[42].

From the constitutional point of view, it has also been rightfully argued that "the prosecutors' mission is not constant charging and obtaining the highest possible penalties, but obtaining fair judicial decisions, defending the constitutional legality, and correcting judicial mistakes. They are, substantially, representatives of society"[43]. And an author even held that prosecutorial discretion is a constitutional principle[44].

Borinsky, after a detailed historical and comparative analysis of legislations based on the principle of *legality* in opposition to the ones based on the principle of *opportunity*, concludes that the clue for the latter one to succeed is "the control mechanisms that are fundamental in order to moderate the unavoidable discretion of those who have the power to exercise (or not) the public criminal action"[45].

The extended discretionary powers granted to prosecutors can indeed be beneficial when used adequately; but they can also be the source of abuse, arbitrariness, and instability. Concealed friendship, mutual favors, ideology, improper influences, and even basic human vices such as indolence or laziness, can divert the prosecutorial discretion away from its original and well-intentioned objectives. It could also be argued that it is contrary to the constitutionally proclaimed equality before the law (art. 16 of the Constitution), since two different defendants, having committed the same crime in similar circumstances, could be treated wildly unequally based on the prosecutor's disposition. An author has even labeled these broad permissiveness as "prosecutorial pardon"[46], in opposition to the presidential pardon regulated in article 99.5 of the Constitution.

Those risks can be reduced by multiple mechanisms. At the federal prosecutorial level, incumbent Attorney General Eduardo Casal signed resolution PGN 97/2019 with the aim of "creating an internal control system that assures the victims' rights and strengthens the institutional position of the Prosecution Service". Under this arrangement, the victim has the possibility to appeal to a superior prosecutor any discretionary decision taken by the district attorney withdrawing the charges or otherwise terminating the public criminal procedure.

[41] M. H. Borinsky, M. I. Catalano, *Sistema acusatorio*, Santa Fe, 2021, 125.
[42] F. Carrara, *Opúsculos de derecho criminal*, Bogotá, 1978, v. 5, 283.
[43] N. P. Sagüés, *Derecho constitucional*, Buenos Aires, 2017, v. 2, 459.
[44] Ekmekdjian, v. 5, 634.
[45] M. H. Borinsky, *Sistema acusatorio. Lineamientos del Código Procesal Penal Federal*, Santa Fe, 2021, 102.
[46] D. Pastor, *Lineamientos del nuevo Código Procesal Penal de la Nación*, Buenos Aires, 2015, 44.

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8. Public prosecution, politics, and the media

The Public Prosecution Service's work has enjoyed (or suffered from) the attention of the press, sometimes concerning the cases it handles, other times being the focus itself.

In 2012 Argentina's vice president and president of the Senate, denounced in a public conference held in Congress that a law buffet that had been founded by the Attorney General asked him for money in order to exercise leverage on "friendly judges". Such influence peddling could constitute a crime in accordance with article 256 bis of the Penal Code. A few days later, Righi resigned. The government then nominated an alleged business partner of the vice president for the position but had to withdraw the nomination after it was found out that the candidate blatantly lied in his *résumé*, adding several fictional achievements.

Meanwhile, in 2015 special prosecutor Alberto Nisman, in charge of investigating the AMIA case (1994 terrorist attack against a Jewish community centre in Buenos Aires), was found dead in his apartment. The next day he was scheduled to attend Congress in order to explain the reasons why he had recently decided to charge then-President Cristina Fernández, ministers, and other high-ranking officials, with covering up and protecting the perpetrators of the terrorist attack. Various investigations of the death, conducted under different administrations, alternatively concluded that he either died of a self-inflicted wound or that he was assassinated.

But putting political scandals aside, it is generally recognized that the greatest challenge the Public Prosecution Service faces in relation to the press and the general public is its handling of highly sensitive political cases. In a country plagued by rampant corruption and political division, any indictment against a politician or public official is met with rejection by half of the political spectrum: "In complex cases, of serious macroeconomic and institutional impact, society, whose interests the Public Prosecution Service represents, shows indifference while the prosecutor, who points the accusing finger, is shown as the villain"[47]. And "it is no secret that the executive power has sometimes interests at stake at different court proceedings"[48]. Criminal proceedings related to politically sensitive matters have been met with violent protests[49], intimidation[50], and even physical assaults against prosecutors[51].

Being the Public Prosecution Service's autonomy and modern institutional role relatively new, as they began with the 1994 constitutional reform, it should be understood that it is still transiting a road of self-affirmation, leaving behind attempts of political appropriation by the confronting factions, and gradually solidifying their conscience about its

[47] Borinsky, in *La Ley Revista de Derecho Penal*, 2011-5-819.
[48] Bidart Campos, v. 6, 488.
[49] *During a protest in favor of Milagro Sala, bags full of garbage were thrown against the Supreme Court building*, La Nación, 16/1/2021.
[50] *The Association of Prosecutors rejects threats in Rosario and asks for security guarantees*, Infobae, 21/12/2022.
[51] *District attorney Diego Luciani was assaulted at a resturant in Mar del Plata*, Infobae, 12/12/2022.

role as "the great defender of the Constitution, especially of the principles that guarantee the general interests of society... Social coexistence needs a Public Prosecution Service with a defined role"[52].

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[52] Junyent Bas, in *La Ley*, 2017-F-638.