THE STRANGE CASE OF ITALIAN CRIMINAL PROSECUTION

Rocco Neri[*]

Abstract: *Mandatory prosecution doesn't mean automatic sequentiality between the report of crime and trial, not even the duty of the prosecutor to start the trial for any "notitia criminis" when it is objectively superfluous. This rule places preliminary investigations outside the scope of the trial, establishing that, at their outcome, the obligation to prosecute arises only if the lack of the conditions that make it necessary to dismiss a case has been verified: in the circumstance of doubt, the prosecution must be exercised and not omitted. A reckless use of the criminal initiative can have negative consequences on the social, economic, family, political and health status of the suspected, or defendant. Consequences that aren't remedied by an acquittal sentence that often is pronounced years later. In various democratic countries, the rules about the exercise of criminal prosecution are also specifically aimed at preventing trials that aren't based on solid evidence in a way to avoid that citizens may be seriously damaged by this. On these assumptions arises the need to understand if the mandatory prosecution is still a principle respected in the actual Italian legal system.*

Keywords: *Mandatory prosecution, Fair trial, Rule of law, Judicial power, Equality*

1. INTRODUCTION

Principles

The judgement of the Italian Constitutional Court no. 88/1991[1] represents the milestone in relation to the mandatory prosecution and it implements what in doctrine is called *"favor actionis"*:[2] in case of doubt, the action must be exercised and not omitted.[3] However these considerations mustn't lead to the misunderstanding that the Public Prosecutor (P.M. pubblico ministero) has to exercise penal action for any reports of crime, as the trial cannot be superfluous and on the basis of assumptions that would justify the dismissal of a case in according to *"Cassazione Penale* , judgement n. 249/1992*"*. In fact, the prosecuting body in the trial pursues the public interest, indeed protects it.[4] The problem arises in the event that the Public Prosecutor also decides to prosecute the case, whose fate seems obvious due to the groundlessness of the *"notitia criminis"* or lack of proof of the

---

[*] Dr. Rocco Neri, Legal Consultant, Master's Degree in Law, at University of Teramo, Teramo, Italy

[1] The sentence of Italian Constitutional Court 88/1991 says: "the principle of the mandatory nature of criminal proceedings requires that nothing be removed from the judicial review of legality."

[2] According to the principle, all crimes are prosecuted without evaluation that are different from the need to ascertain the fact and arrive at the detection/ punishment of the offender. This is supported by pre-trial investigations of a potential duration of two years; a criminal prosecution placed on the line of discrimination that separates, with the choice of the public prosecutor, the passage of the matter in the hands of the Trial's Judge (Giudice del dibattimento).

[3] The provisions of the ordinary law must be read in "favor actionis" key, that is rejection of legislative choices of opportunities and the prosecution must be exercised and not omitted despite there is a doubt as to the actual validity according to the most correct interpretation of Article 112 Constitution.

[4] The interests underlying the substantive criminal law rules are of a public nature, so that the choice of whether to act in order to give rise to a concrete legal order is entrusted to a public body, the public prosecutor, and this choice is qualified in a precise sense from the principle of art. 112 Constitution.: the action is an impulse to the concretization of the legal system.

historical fact. Contrary to what is thought the *"agere penale"*[5] is closely related to the general theory of punishment and crime. The Public Prosecutor acts when he recognizes that the historical fact is in conformity with the incriminating norm and that the social order is consequently disturbed, therefore not spontaneously realized.[6] The reason for the penal action resides in the violated criminal law that tends to guarantee the constitutionally legal assets of the public interest, protected by the Public Prosecutor. The mandatory nature of the prosecution is full of meanings.[7] It is manifested in discretion, but it is concretized in rule of law.[8] Already in the phase of pre-trial investigations, the discretion[9] of the Public Prosecutor makes concrete or not the judicial intervention that exists in two cases:

- in the case of opposition to the dismissal of a case (the rule of law comes to the rescue),
- in the case of a request for committal to trial.

Naturally, the Public Prosecutor's assessments of the merits of the crime deal with the principles underlined by Article 25.2 of the Italian Constitution. In the phase of this opposition the judgement of the Constitutional Court finds its best application. This control is aimed towards *"favor actionis"* and the opposition to the dismissal of a case[10] is a tool for the manifestation of this principle, as well as the reason for its institution.

The *"favor actionis"*:

- on the one hand, rejects the principle of opportunity, which invests procedural systems in which criminal prosecution is optional, with strong discretionary tints, and it allows the prosecuting body not to act even on the basis of assessments unrelated to the objective groundlessness of the *"notitia criminis"*;[11]
- on the other hand, accepts the principle that the penal action in case of doubt must be exercised and not omitted (C. Cost., judgement n. 88/1991). This also justifies the dismissal of a case in terms of manifest unfoundedness, which circumvents the principle of mandatory and controls the legality of the prosecution's absence on a case-by-case basis (lack of prosecution), thus avoiding an unnecessary trial.[12] The principle

[5] Understood as a provocation of a judicial decision, as an expression of the need for a third party and impartial judge to cover the last "piece" to meet the condition of existence of the trial, so that the Public Prosecutor can put forward his reasons.

[6] The reference is to the principles of criminality and prevention of punishment so that the public prosecutor prosecutes in the public interest the social order violated and avoids a repetition of such injurious behavior.

[7] Article 112 Cost. expresses the principle of mandatory prosecution of the prosecutor which is further explained in the judgment in question. The heart of the principle can be traced back to the principle of legality art. 25. 2 Cost: substantial in the repression of crimes, conduct violating criminal law, then in proceeding.

[8] Legality is the subordination of the public authorities to the law with the consequent invalidity of the imperative act not in conformity with the law. See FIANDACA, G., MUSCO E. *Diritto penale, Parte generale*. Bologna: Zanichelli, 2018, p. 47 ss.

[9] The discretionary power is identified in a case of duty, only characterized by the need to integrate the case through apprehension of concrete facts, and then decide (rationally) on the basis of them.

[10] The opposition to the dismissal serves to one of the parties for its determinations concerning the promotion of the criminal application.

[11] AZZARITI, G. *Dalla discrezionalità al potere*. Padova: Cedam, 1989, p. 34 ss.

[12] VALENTINI, C. *Le forme di controllo sull'esercizio dell'azione penale*. Padova: Cedam, 1994 p. 25 ss.

of mandatory prosecution is therefore configured as the concretization of criminal legality in the legality of proceeding, thus becoming the point of convergence of all the basic principles of the Constitution (Cost.) and the Italian Code of Criminal Procedure (cpp).

1.1. Criminal prosecution: issues

Criminal prosecution means identifying the duties of the Public Prosecutor relevant to the constitutional precept. Criminal prosecution is structurally and essentially identified in an *"agere"*(action), in a provocation of judicial pronouncement that replaces spontaneous self-justice. The prosecution is therefore mandatory when the social order postulated by a substantive criminal law is not spontaneously realized (based on the preventive function of the penalty and the principle of offensivity): the prosecutor must provoke a judicial ruling that declares that in the specific case, an abstract criminal behavior worthy of "x" penalty has been realized. The reason is in the fact that the interests underlying the criminal rules are of a public nature and therefore the choice is left to a public subject with authority according to article 112 of Italian Constitution, unlike civil law, where the plaintiff is a private citizen. The exercise of criminal prosecution presupposes the necessary intervention of the Judge to verify the correspondence between the concrete event and the abstract criminal case in order to affirm the effective legality of the system. The Public Prosecutor doesn't have to act if he hasn't traced the appropriate material to put the Judge in a position to give a ruling: the action is superfluous when the probative material is missing. The Public Prosecutor must prosecute when there are no grounds for dismissing of a case, according to article 405.1 of the Italian Criminal Procedure Code (cpp) that are in the groundlessness of the reports of the crime according to articles 408.1 cpp and to the article 125 of the Provisions Implementing the Code of Criminal Procedure (disp. att. cpp). The typical discretionary case makes it necessary for the Public Prosecutor to have precise knowledge of all the facts necessary to assess the groundlessness of the reports of the crime. He decides whether or not to postulate judicial intervention only in the case of material that is suitable to express its own evaluation of the criminal reports. This is where discretion lies. The activity of the Public Prosecutor is physiologically discretionary, because it is a necessary activity on the ascertainment of the facts. Of course, the absence of investigative results could be a false assumption of a pathological absence of prosecution, whose remedy is the opposition to the dismissal of a case towards the victims of a crime in the case of acceptance by the Judge for Pre-trial investigation (GIP, Giudice per le indagini preliminari) after the request of the Public Prosecutor. Naturally, discretion is mandatory. Article 112 of the Italian Constitution expresses the principle of mandatory prosecution by the Public Prosecutor, which is further clarified in the Constitutional judgment in question. The heart of the principle can be traced back to the principle of legality according to Article 25. 2 of Italian Constitution:

- substantial in the repression of crimes, of the conduct violating the criminal law;
- procedural in terms of penal action.

Safeguarding the principle of legality means protection of the principle of substantial quality from the point of view of substantive criminal law ("Citizens are equal before the law") and procedural criminal law (the mandatory prosecution of the Public Prosecutor).

The realization of legality in equality leads to the necessary independence of the body in this case, the Public Prosecutor. This independence and this autonomy in addition to the art. 104 Cost. Is reconducible in art. 53 cpp.

In a speech given to the Federal Prosecutors of the United States in 1941, the U.S. Attorney General Robert Jackson, who later became a well-known Supreme Court judge, recalled that if you leave the prosecutor the possibility to choose the cases to be prosecuted you also leave him the possibility to choose the people to be prosecuted and then direct the investigation in search of evidence for possible crimes committed by him / her. He stated that for the citizen and democracy, this is the greatest danger inherent in the role of the prosecutor.[13] The poker granted to our public prosecutor, all of which are in various ways connected to the principle of obligation, are such as to make that danger much more serious and imminent than in any other country with a consolidated democracy.

In fact, it is fully legitimate that, if they so wish, our prosecutors conduct, on their own initiative and in absolute independence, investigations of any kind on each of us, directing the various police forces and using all available means of investigation, without spending limitations, to ascertain crimes that they themselves (more or less justifiably) believe to have been committed. They cannot in any way be held responsible for these decisions, even when they have devastating effects on unjustly investigated or accused citizens and their families. As already mentioned, the principle of mandatory prosecution turns all their initiatives, at their discretion, into “due acts”.

1.2. Rule of law and mandatory in the Court Constitutional’s jurisprudence

The Public Prosecutor is the “arbitrator, master of the pre-trial investigations”, sir of this phase (as it determines the fate of the proceedings): this is justified by the fact that the Judge for pre-trial investigations is only a possible body that must provide guarantees regarding the correct determination of the Public Prosecutor:

- through the opposition to the dismissal of a case or to the its acceptance through request of Public prosecutor without the intervention of the injured party;
- from the probative point of view, the Judge following an *“incidente probatorio”* (evidentiary incident) must ensure the formation of evidence in contradictory as there are means of evidence that cannot be postponed;
- in case of application of precautionary measures and validation of precautionary measures.

About preliminary investigations, the Judge for Pre-tial Investigation , following opposition to the dismissal of a case, can order the forced indictment[14] (*“imputazione coatta”*)

[13] JACKSON, R. H. The Federal Prosecutor. *Journal of the American Judicature Society*. 1940, Vol. 24, No. 19, p. 5 ss.

[14] The abnormality (abnormità) of the order for compulsory indictment (imputazione coatta), see Cass. pen. 3010/1996, was the subject of discussion in Court of Cassation’s judgment no. 4319/2013 which goes beyond the powers of the Pre-trial investigation’s judge (Giudice per le indagini preliminari) and it constitutes an abnormal act both the order of forced indictment pursuant to art 409.5 cpp and the same order reported to the suspect for facts other than those for which the prosecutor has requested the dismissal. This interpretation, unlike judgment 3010/1996, contains all the principles involved. On the one hand the autonomy of the Prosecutor is protected, on the other there are defensive guarantees of the defendant or person offended by a crime.

for the respect of the principle of mandatory prosecution. Is the principle of mandatory protected? If on the one hand there is the judicial control that requires the registration and urges the Public Prosecutor to carry out further investigations, on the other hand if the Public Prosecutor neglects to carry out the investigations following the registration? What would be the constraint deriving from the judge's order? What would be the effectiveness of control in compliance with the principle of mandatory prosecution? In case of failure of the Public Prosecutor to comply with an order of Judge for Pre-trial investigation, the remedy may be the extension to this case and the consequent "avocazione"[15] according to the article 412 cpp. The principle of the Constitutional Court is deficitory for the ineffectiveness of the control because the obligatory becomes discretionary also for necessity. The constitutional legitimacy of the article 409.5 cpp. is therefore embellished by the constitutional principles to which the Court of Cassation refers in sentence 4319/2013 retracing the principle that nothing is removed from the control of legality carried out by the judge. The review of legality must cover the entire results of the investigation, excluding any possibility of believing that such an assessment should be limited to the boundaries drawn by the notitia criminis deliberated by the Public Prosecutor (Cass. pen., judgement n. 478/1993) Therefore, the formulation of the indictment is the responsibility of the Public Prosecutor, while the order of forced indictment of the Judge for Pre-trial investigation is only an act of impulse that cannot be challenged despite its abnormality. Article 112 of the Constitution is necessarily related to the principles of equality, legality and independence of the Public Prosecutor and their implementation can be found:

- in the controls of the Public Prosecutor's inaction by the Judge for pre-trial investigation (articles 408 cpp and 125 disp att cpp); or in the preliminary hearing phase (ex art. 421-bis, 422,425 cpp) in case of "reckless endangerment charge"
- of the Public Prosecutor or abuse in the exercise of the public demand[16] there is a control by the Preliminary hearing Judge (GUP, Giudice dell'udienza preliminare).

Mandatory principle presents considerable problems, including unequal treatment of all reports of crime with considerable prejudice on the timing of their consideration, which depends on the different organizational policies that each Public Prosecutor's Office adopts.[17]

In addition, the trials on juvenile defendants and the one before the Justice of the Peace, which establish new limits of mandatory prosecution, shouldn't be underestimated. The first consequence is the presumed obligation to prosecute which generates a paralysis of all Prosecutors' Offices. The second is that the limitation of excesses and abuses, of the reckless indictment of the Public Prosecutor entrusted to a control in preliminary hearing gives the Judge an autonomous power of probative acquisition, typical of an inquisitorial model.

[15] Power of the Attorney General at the Court of Appeal who invokes, or self-assumes, a proceeding managed by a public prosecutor in the event in which either the public prosecutor has failed to perform a dutiful activity, or the criminal proceedings risk paralysis due to its inactivity, passivity.

[16] BRUTI LIBERATI, E. Le scelte del pubblico ministero: obbligatorietà dell'azione penale, strategie di indagine e deontologia. *Questione Giustizia*. 2018, Vol. 4, No. 1.

[17] We can see a compulsion that doesn't protect equality, but only the politics of the action itself. The principle of equality is frustrated by the uncertainty about the effective compulsion and the undeclared discretion reserved for certain crimes and by the choices of individual prosecutors on the basis of their "priority criteria".

1.2.1. The consequences in the Pre-trial Investigation and preliminary hearing phases

The relationship between legality and mandatory prosecution presupposes the principle of completeness of the pre-trial investigations,[18] which erroneously takes as a point of reference the evidentiary framework to issue a judgment on the merits of the indictment and not, as it is more correct to believe, the evidentiary framework to decide on the prosecution. However, the question of the completeness of the investigation is "burdened" by constitutional jurisprudence (C. Cost n. 115/2001) that considers the *"Giudizio abbreviato"* (alternative trial) a requirement that the accused may have and that the Public Prosecutor must respect in conducting the investigative phase and in collecting evidence to implement the principle in question.[19] This orientation is contradictory on several fronts. In primis accepting the interpretation of the Constitutional Court would evidence a "favor" for the investigation to extremes,[20] without considering the enormous expenditure of time and costs. In addition, the principle of cross-examination in the acquisition of evidence between the parties would disappear and this would imply the unusability of the elements acquired otherwise and would thus lack the guarantees of fair trial.[21] Moreover the Code of Criminal Procedure with the provisions that authorize the investigator to resume the investigative activity after the formulation of the indictment, doesn't cause a state of unclearness on all the fact *"ante actionem"* but emerges later a new necessary research activity.[22] Understanding the meaning of the *"sentenza di non luogo a procedere"* (judgement of no need to proceed) and resolving the arcane interpretation of its nature is necessary to underline the total relevance of the prosecution and therefore whether or not it is mandatory. Naturally, the answer would tend towards the principle of mandatory because the need for a preliminary hearing and the relative concluding acts would disappear.

1.3. The Court of Cassation's jurisprudence.

The Supreme Court of Cassation with the judgment no. 17459/2019 has ruled that the judgement of no need to proceed can't be challenged with an appeal per saltum (*"ricorso per saltum")*.[23] It is clear from the outset that this judgment, while presenting a structure similar to that of acquittal of not having to proceed, conclusive of the judgment[24] (by this expression we mean the phase following the trial), performs a function of ritual and not

[18] According to the judgment no. 81/1991 C. Cost the choice of the exercise of the prosecution of the Prosecutor depends on the duration of the pre-trial investigations that must lead to a complete identification of the means of proof. In this way the Public Prosecutor would adopt an unequivocal judgment on the exercise of criminal proceedings which is manifested in the non-essential nature of the trial in an accusatory key.

[19] NACAR, B. Sui poteri del Pm in sede di esposizione introduttiva. *Cassazione Penale*. 1998, Vol. 38, No. 4 pp. 1680–1688.

[20] GIOSTRA, G. *Indagine e prova: della non dispersi a nuovi scenari cognitive in AA.VV. Verso la riscoperta di un modello processuale*. Milano: Giuffré, 2003, pp. 45–65.

[21] CONSO, G. *Il concetto e le specie di invalidità, Introduzione alla teoria dei difetti negli atti processuali penali.* Milano: Giuffrè, 1972, p. 47 ss.

[22] FERRUA, P. Garanzie del giusto processo e riforma costituzionale. *Critica del diritto*. 1998, 1, Vol. 3, p. 189 ss.

[23] Immediate appeal to the Court of Cassation.

[24] It means by this expression the post-trial phase, see SIRACUSANO D., GALATI A., TRANCHINA G., ZAPPALÀ V. *Diritto processuale penale*. Milano: Giuffrè, 2018, pp. 3–7.

of merit, as it is irreproachable to say that the preliminary hearing is configured as a judgment of interference between ritual and merit.[25] If the first is the expression of a decision that follows more the profiles of rite than merit, the second is an acquittal sentence that is therefore the expression of a probative phase that took place during the trial. The different location within the code is not random at all. This peculiarity is relevant to the inadmissibility of the *"ricorso per saltum"*. While on the one hand the "appeal per saltum" (art. 569 cpp) is provided for judgments of acquittal or conviction of first instance as they are the result of the effective application of the profiles of legitimacy in relation to the ontological substance of procedural law[26] (in this case criminal) and therefore, on the other hand it is certainly necessary at least an effective assessment of the merits of the issue that is formed primarily in the probative proceedings during the evidentiary instruction. The jurisprudence of legitimacy is therefore applied with reference to the cognition phase. These are aspects that we do not find in the preliminary hearing because:

- if, on the one hand, it is the filter to a reckless indictment, a request for indictment or a forced indictment: it is an assessment of the investigative activity (criminal prosecution not initiated or continued);
- on the other hand, it is an evaluation of the concrete usefulness of future evidence to support the burden of proof that may be assumed in the trial (if the fact is not provided for by law as a crime).

These considerations can be inferred from article 425.1 cpp in the part in which the Judge pronounces the *"sentenza di non luogo a procedere"* (judgement of no need to proceed) in the presence of the case that extinguishes the crime or for which the criminal action shouldn't have been initiated or should not be continued, if the fact is not provided for by law as a crime.

1.4. The future of criminal prosecution

Identifying a new and a possible concept of criminal prosecution implies understanding what activities the norm qualifies as the duties of the public prosecutor relating to the constitutional precept. Penal Action is the only way to affirm the order, through judgment: right or power of action, (i.e. the power to act in order to provoke that intervention of the jurisdiction that makes the legal system exist, affirming it through a measure issued by a Judge); the order doesn't live in the abstract, but in the concrete and this concreteness is found at every moment in the human action that adapts itself to it. Hence the absolute inseparability of the order from action. The judge and the judgement appear as the personification of the order, they exist only if and to the extent that the human action that hasn't taken place, or the agere directed to self-justice, is replaced by the agere in provocation of the judicial intervention. The need to concretize the system comes not from the private subject, but from the system itself, which, for this reason, expresses not only the

[25] Dismissal is the dark side of Article 112 of the Constitution. The current meaning of mandatory status is necessarily assigned to the "priority criteria".

[26] VALENTINI, C. La completezza delle indagini tra obbligo costituzionale e costante elusioni della prassi. *Archivio Penale*. 2019, Vol. 6, No. 3, pp. 1–23.

other person who is the judge, but also the subject of his action, which is the public prosecutor, who represents the interests and the rights underlying the substantive criminal rules of a public nature,[27] so that the choice of whether to act in order to provoke the concretization of the legal system, is entrusted to a public subject and this choice is qualified in a precise sense by the principle of Article 112 of the Italian Constitution. The action is therefore an act of impulse to the concretization of the legal system. The discretionary power of the Public Prosecutor, can't be identified with a free or uncontrollable power, but with a case of duty, only characterized by the need to integrate the case through research and accurate knowledge of concrete facts, and then decide rationally on the basis of them.[28] Ultimately, the impossibility of subsumption or legal qualification, in the hypothesis of application of the discretionary rule, leads to the inapplicability of the judicial syllogism, as it is clear as soon as it is reflected on the difference between the subsumption (however varied of discretion) that the judge operates when he defines a certain act as obscene, under the Criminal Code (typical evaluation formula) and the identification of the needs for precautionary measures, whose case (art. 274 c.p.p.) doesn't indicate any class of conduct whose performance can be ascertained merely by observation. Criminal prosecution is always "physiologically" discretionary, because it presupposes an activity of due ascertainment of facts, called to fulfill the concept of validity.[29] Penal action, on the contrary, according to the command of art. 112 Cost. can not and must never be profiled by the legislator or interpreted by the judge as "opportunistic" but there must be a duty logically and unavoidably implied to act: the duty to take action to verify the existence of the assumptions of the action. The Chief Prosecutor of Turin, Marcello Maddalena, has set analytical criteria of priority in the exercise of criminal prosecution, suggesting to his substitutes to "favour the way of the request for dismissing of a case (even generous) whenever it appears feasible or even possible" and also indicating which cases "to set aside" temporarily, in order to regulate the discretion of individual prosecutors and economize the resources of his office.[30] This initiative of Prosecutor Marcello Maddalena was discussed, and approved by a majority of the Superior Council of the Judiciary (C.S.M., Consiglio Superiore della Magistratura) in the afternoon session of 15.5.2007. Also enlightening in this regard is a disciplinary decision of June 20, 1997 by the Superior Council of the Magistrate, which acquitted a substitute prosecutor who, having moved to another office, had left a large number of cases unresolved. The Disciplinary Section of the C.S.M. acquitted him because, as the judgment tells us: "in the absence of indications of priorities coming

[27] Not a private right or interest as in substantive and procedural civil law.

[28] RUGGERI, F., MILETTI, M., BOTTI, C., MENZIONE, D., MARZADURI, E. Il principio di obbligatorietà penale oggi: confini e prospettive. *Criminalia*. 2010, Vol. 5, No. 1, pp. 3–48.

[29] DOMINIONI, O. Azione penale. *Digesto delle discipline penalistiche*. 1987, Vol. I, p. 409. The codicistica rule that orders the public prosecutor to exercise the penal action when the presuppositions of the dismissal don't exist (art. 405.1 c.p.p.) and then identifies these last ones in the groundlessness of the news of crime (art. 408, paragraph 1 c.p.p. and 125 disp. att. c.p.p.), is a typical discretionary case, making it obligatory for the public prosecutor to apprehend all the facts that are indispensable to assess the "soundness" of the report of crime.

[30] See the document of the Prosecutor of Turin, prot. n. 58/2007, 10.1.2007 from the title *"Direttive in tema di trattazione dei procedimenti in conseguenza dell'applicazione della legge che ha concesso l'indulto"*, which sets in an analytical way the priorities'to be followed.

from the Prosecutor of the Republic, it is inevitable that these criteria of priority are identified by the individual substitutes."[31] A prosecutor had been blamed for having neglected a considerable number of cases that, after his transfer to another office, had been redistributed severely aggravating the workload of his former colleagues. In the judgment, after recalling that in the prosecutor's office "...the demand for justice is considerably greater than the capacity.... to examine the relative proceedings..."[32] and that therefore "...the task of developing priority criteria cannot be evaded...",[33] the Public Prosecutor's Office is acquitted because "in the absence of indications of priority coming from the Public Prosecutor, it is inevitable that these priority criteria will be identified by the individual substitutes."[34] Having saved the accused, the sentence also saves the principle of obligation. In fact, he adds immediately afterwards "this doesn't sound offensive to the mandatory prosecution"[35] because "... it does not derive from considerations of opportunity ... ."[36] In other words, since only in very few cases the heads of the prosecutors fix those criteria in an articulated way, fixing the priorities is for a prosecutor very expensive because in fact the C.S.M. would not approve priorities on which the assent of all the substitutes of the office (and, if necessary, of the deputy prosecutors) doesn't converge. The C.S.M. recognizes that as a rule it is legitimate for each substitute to set his priorities.

CONCLUSIONS

The separation of careers between Public Prosecutor and Judge would seem the best solution.

The Prosecutor would depend on the Public Administration and it would become *"primus inter pares"* with the other defendants in accordance with the principle of equality of arms in a trial. Only the Judge would be part of the Judiciary power. Interesting is the proposed constitutional law for the reform of Title IV of the Constitution formulated by the Italian criminal lawyers chambers. In particular, article 112 Constitution would be configured as follows "The prosecutor has the obligation to prosecute in the cases and in the ways provided by law. The mandatory prosecution and the choices of the Public Prosecutor would be regulated by law avoiding an excessive doctrinal and jurisprudential redundancy. It can be concluded that the mandatory prosecution frustrates the constitutional principle of equality of the citizen before the law. This can only generate for the citizen serious inequalities before the criminal law. Inequalities can only be remedied by regulating the means of investigation and the priorities of criminal prosecution within a unitary structure of the prosecutor's office similar to that of other democratic countries, in a way

---

[31] D'ELIA, G. I principi costituzionali di stretta legalità, obbligatorietà dell'azione penale ed eguaglianza a proposito dei 'criteri di priorità' nell'esercizio dell'azione penale:osservazione a C.S.M., sez. disc., 20 giugno 1997. *Giurisprudenza costituzionale.* 1998, Vol. 43, No. 1, pp. 1878–1890.

[32] CSM, 20.06.1997.

[33] CSM, 20.06.1997.

[34] CSM, 20.06.1997.

[35] CSM, 20.06.1997.

[36] CSM, 20.06.1997.

to make prosecutors responsible for respecting them and carrying out checks on their compliance at both local and national levels. Paradoxically, therefore, the principle of mandatory prosecution to protect the equality of citizens before the law, is the main impediment to its regulation, while it is only through its regulation at the national level that equality can be promoted, as far as humanly possible. The only attempt made so far to establish binding forms of coordination at the national level, albeit limited to organized crime offences, has been defeated because considered by the associated judiciary and the C.S.M. to be contrary to the operational independence of individual prosecutors. Then some solutions arise that can be adopted. The first is the separation of careers between Public Prosecutor and Judge so as not to undermine the principle of independence and autonomy of the judiciary, through the classification of the public prosecutor within an executive power, while only the judge would fall within the judiciary, in full implementation of Article 111 Constitution. A second solution would result from a concrete decriminalization of typical conduct through penalties only rapid and effective administrative sanctions. In this way, on the one hand there would be a lightening of the burden of the files that each judicial office is delegated to receive, on the other hand it would solve the absolute ineffectiveness of the penalty that characterizes many trials. Another important solution is the exercise of the criminal prosecution of crime's victims, since the constitutional obligation of the prosecutor doesn't mean that he also has total control of it.