Discretionary Criminal Justice in a Comparative Context
Discretionary Criminal Justice in a Comparative Context

Edited by

Michele Caianello
Jacqueline S. Hodgson

CAROLINA ACADEMIC PRESS
Durham, North Carolina
Contents

Acknowledgments xi

Chapter One · Introduction
Jacqueline S. Hodgson 3

PART I · INVESTIGATION AND PROSECUTION

Chapter Two · Discretionary Justice at the Initiation of a Criminal Investigation
Lorenzo M. Bujosa Vadell 13
1 Preliminary Considerations 13
2 The Decision to Initiate Criminal Investigation 14
3 Discretion in the Establishment of Criminal Policy and the Initiation of Criminal Investigation 15
4 Methods of Initiating Criminal Investigation in Spain 16
5 The Initiation of Juvenile Court Proceedings—Greater Discretion 18
7 Conclusion 23
Bibliography 23
Abbreviations 26

Chapter Three · Prosecutorial Discretion in Three Systems: Balancing Conflicting Goals and Providing Mechanisms for Control
Sara Sun Beale 27
1 Introduction 28
2 Prosecution in the United States 31
2.1 The Structure of Prosecutorial Authority and the Education and Selection of Prosecutors 31
2.2 Prosecutorial Discretion 34
3 Prosecution in France and Germany 37
Chapter Four · Investigative and Prosecutorial Discretion in Criminal Matters: The Contribution of the Italian Experience

Stefano Ruggeri

1 Introduction

2 The Enactment of the Principle of Legality into the Italian Legal System: A Historical Overview

3 Evolution of the Principle of Mandatory Prosecution under the Current Italian Procedural Legal System

3.1 Developments of the Principle of Legality in Relation to Criminal Prosecutions in a Strict Sense

3.1.1 The Enhancement of Charging Discretion

3.1.2 The Enhancement of Balancing Conflicting Interests in the Decision Whether to Prosecute

3.2 Developments of the Principle of Legality in Relation to Criminal Prosecutions in a Broad Sense

3.2.1 Prosecutorial Discretion during the Preliminary Investigations

3.2.2 Prosecutorial Discretion in the Criminal Process

3.3 From Prosecutorial to Judicial Discretion

3.4 Prosecutorial Discretion in Transnational Cases

3.5 Interim Result

4 Guidelines to Govern Investigative and Prosecutorial Discretion from the Italian Perspective

4.1 Premise: Models to Tackle Prosecutorial Discretion in Comparative Law

4.2 Basic Characteristics of the Organisation of the Judiciary in Italy

4.3 Proposals to Govern Prosecutorial Discretion in a Fair Criminal Procedure

5 Conclusions

Bibliography

Abbreviations
PART II · NEGOTIATED JUSTICE

Chapter Five · The Principle of Legality, Discretionary Justice and Plea Agreements: The Practice in Spain

Lorena Bachmaier

1 Introduction 89
2 Short Overview of Spanish Criminal Procedure 91
3 Discretionary Justice and Plea Agreements 95
   3.1 The Legal Framework of Guilty Pleas 97
   3.2 Judicial Control of the Plea Agreement 100
   3.3 Appeal against the Judgment Rendered upon Agreement 102
4 The Practice of Plea Agreements 103
5 Plea Agreements, and the Principles and Aims of Criminal Procedure 105
   5.1 Plea Agreements, Fairness, and the Principle of Legality 105
   5.2 Plea Agreements and the Search for the Truth 107
6 Conclusions 108
Bibliography 110
Abbreviations 113

Chapter Six · Beyond Legitimate Grounds: External Influences and the Discretionary Power Not to Prosecute in the People’s Republic of China

Yu Mou

1 Introduction 115
2 The Legal Regulation of Non-prosecution in China: The Contextual Account 117
3 Undue Influences and the Decision Not to Prosecute 120
   3.1 Prosecutorial Discretion, Vertical Instructions and Their Relationship to the Social Classes 120
   3.2 The Coordination of the Political-Legal Committee 125
   3.3 The Protest of the Victim 130
4 Conclusion 136
Bibliography 137
Abbreviations 139

Chapter Seven · Critical Aspects on the Italian Features Concerning “Negotiated Justice”

Daniele Vicoli

1 Introduction: “Negotiated Justice” in the Italian System 141
PART III · PROCEDURAL ERRORS

Chapter Eight · Water Always Finds Its Way — Discretion and the Concept of Exclusionary Rules in the Swiss Criminal Procedure Code
Sabine Gless & Jeannine Martin
1 Introduction 160
2 Terms and Rationale behind the Concept of Exclusionary Rules in Swiss Law 162
3 Exclusionary Rules — The Legal Framework 165
   3.1 Relevant Statutes — General Legal Framework 166
   3.2 Identifying Relevant Situations and Procedural Sanctions 167
      3.2.1 No Discretion Provided — Article 141 (1) CPC 167
      3.2.2 Some Discretion Provided — Article 141 (2) CPC 168
      3.2.3 Leeway in Decision-Making, but No Discretion — Article 141 (4) CPC 169
   3.3 Exclusionary Rules in Swiss Criminal Law — Interim Conclusion 171
4 Water Always Finds Its Way? Recent Case Law and Legal Reform 171
   4.1 Undercover Investigations v. Enquiries — The Emergence of a New Instrument 171
      4.1.1 The Case Law ‘Pulls a Trigger’ 172
      4.1.2 The Situation after the Adoption of the CPC 174
      4.1.3 The Pressure to Change the Law 175
   4.2 Fruit of the Poisonous Tree — Not So Deadly after All . . . 176
5 Findings 179
   Bibliography 181
   Abbreviations 183

Chapter Nine · Throw It All Out? Judicial Discretion in Dealing with Procedural Faults
Thomas Weigend
1 Introduction 185
## CONTENTS

2 Procedural Faults before Trial 187
3 Procedural Faults at Trial 197
4 Conclusion: Why Different Standards? 201
Bibliography 202
Abbreviations 204

**Chapter Ten · Procedural Sanctions in the EU Framework:**
**Toward a Harmless Error Doctrine and Practice?**
*Michele Caianiello* 207
1 The Importance of Sanction in Criminal Procedure 207
2 General Criteria for the EU Procedural Sanctions 208
2.1 Harmless Error Test 209
2.2 Proportionality 210
3 Specific Sanctioning Provisions 211
Bibliography 214
Abbreviations 215

**PART IV · SENTENCING**

**Chapter 11 · Death and Discretion: The American Experiment in Capital Jurisprudence**
*Erik Luna* 219
1 Introduction 220
2 The Rise of Capital Jurisprudence 222
2.1 Legal Origins 222
2.2 *Furman* 224
2.3 *Gregg* 227
3 The Modern Death Penalty 229
3.1 Principles and Structures 229
3.2 Cracks in the Framework 230
3.3 Problems of Aggravation and Mitigation 235
4 Death Penalty Actors 241
4.1 Discretion and Its Discontents 241
4.2 Prosecutors 242
4.3 Juries 246
5 Concluding Thoughts 248

Index 253
Acknowledgments

This book contains the results of a 2013 conference in Ravenna on the subject of discretionary justice. The conference was organized by the University of Bologna (campus of Ravenna), the University of North Carolina, the University of Warwick, and the University of Basel, all of which we sincerely wish to thank for their support in this initiative.

There are too many individuals to name, but we cannot fail to mention our friend and colleague Mike Corrado, Arch T. Allen Distinguished Professor of Law at the University of North Carolina, without whom this inspiring series of conferences would not have begun. His work and enthusiasm has ensured that these events continue to flourish, with the addition of a Young Scholars Section for the first time in 2013 in Ravenna.

We would also like to thank the European Union, the two Foundations of Ravenna, the Flaminia Foundation, the Foundation of the Mutual Savings Bank and the U.S. Department of Education, through the UNC Center for European Studies, whose co-funding, together with the four universities, made the conference possible.

We are also grateful to our publisher, Carolina Academic Press, for their support and their enthusiasm in taking up our project.

Comparative work can also be a test of linguistic skills and a special thank you must go to Nathan Shaal-Wilson, who assisted in language and copy editing, ensuring that nobody got left behind!