

ITALIAN CRIMINAL PROCEDURE:  
THIRTY YEARS AFTER  
THE GREAT REFORM

**ABSTRACT.** *The Italian Code of Criminal Procedure of 1988 is considered a point of reference for its technical quality and the solutions adopted to transpose several rules typical of the Anglo-American accusatory model into a traditionally inquisitorial criminal justice system. It should therefore come as no surprise that it is one of the most influential and studied legislations in comparative law. The aim of this paper is to provide a guide to the Italian system of criminal procedure by considering the provisions of the CCP on the one hand and exploring the rugged path of the practical implementation of the new Code in its first thirty years of application on the other.*

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## 1. Introduction

### 1.1. The international significance of the Italian Code of Criminal Procedure and its sphere of influence

Since the second half of the twentieth century, few procedural reforms have had such a remarkable impact as that of the Italian Code of 1988, which has raised widespread interest among scholars across the world.<sup>1</sup> The act of surpassing the continental century-old tradition and the strong acceptance of the values of the Common Law system immediately aroused an exceptional interest in the Italian Code, which many comparatists viewed as a stimulating laboratory to test classical categories of the theory of the criminal process.<sup>2</sup> For the first time in Old Europe there was, in fact, a sharp transition from the inquisitorial to the accusatorial system.<sup>3</sup> Likewise, there was a substantially unprecedented introduction into a European system of principles that had always been deemed incompatible with the sensitivity of the “Civil Law” criminal justice model, such as *patteggiamento* (application of punishment upon request)<sup>4</sup> and *inutilizzabilità* (unlawfully gathered evidence),<sup>5</sup> which were mainly inspired, respectively, by the Anglo-American plea bargaining and exclusionary rules. Moreover, scholars in the field soon realized that this historic turn allowed them to see, from a privileged perspective, the reactions of courtroom operators to a sudden change of the modalities of judicial ascertainment or, as in this case, of the actual mental approach to the idea of criminal justice. It was indeed possible, for instance, to assess the adaptive capacity of a “French-sty-

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1 Among the first comments in the international literature, E. AMODIO – E. SELVAGGI, *An Accusatorial System in a Civil Law Country: The 1988 Italian Code of Criminal Procedure*, in *Temple Law Review*, 62, 1989, p. 1211; E. AMODIO, *Das Modell des Anklageprozesses im neuen italienischen Strafverfahrensgesetzbuch*, in *Zeitschrift für die gesamte Strafrechtswissenschaft*, 102, 1990, p. 171; L. FASSLER, *The Italian Penal Procedure Code: An Adversarial System of Criminal Procedure in Continental Europe*, in *Columbia Journal of Transnational Law*, 29, 1991, p. 245; W. T. PIZZI – L. MARAFIOTI, *The New Italian Code of Criminal Procedure: The Difficulties of Building an Adversarial Trial System on a Civil Law Foundation*, in *Yale Journal of International Law*, 17, 1992, p. 1; A. M. STILE, *Die Reform des Strafverfahrens in Italien*, in *Zeitschrift für die gesamte Strafrechtswissenschaft*, 104, 1992, p. 429; M. L. VOLCANSEK, *Decision-Making Italian Style: The New Code of Criminal Procedure*, in *West European Politics*, 13, 1990, p. 33.

2 For instance: J. T. OGG, *Adversary and Adversity: Converging Adversarial and Inquisitorial Systems of Justice - A Case Study of the Italian Criminal Trial Reforms*, in *International Journal of Comparative and Applied Criminal Justice*, 37, 2013, p. 31.

3 G. ILLUMINATI, *The Accusatorial Process from the Italian Point of View*, in *North Carolina Journal of International Law & Commercial Regulation*, 35, 2010, p. 297.

4 See J. J. MILLER, *Plea Bargaining and Its Analogues under the New Italian Criminal Procedure Code and in the United States: Towards A New Understanding of Comparative Criminal Procedure*, in *New York University Journal of International Law & Politics*, 22, 1989-1990, p. 215; R. ORLANDI, *Absprachen im italienischen Strafverfahren*, in *Zeitschrift für die gesamte Strafrechtswissenschaft*, 116, 2004, pp. 120-123; R.A. VAN CLEAVE, *An Offer You Can't Refuse? Punishment Without Trial in Italy and the United States: The Search for Truth and an Efficient Criminal Justice System*, in *Emory International Law Review*, 11, 1997, p. 419. *The Italian choice has, in some way, influenced the extension of negotiated criminal justice in Germany*: U. BOGNER, *Absprachen im deutschen und italienischen Strafprozessrecht, Verfahrensbeschleunigung durch die applicazione della pena su richiesta delle parti und das giudizio abbreviato, ein Modell für den künftigen deutschen Strafprozeß*, Marburg, Elwert, 2000; M. FROMMANN, *Regulating Plea-Bargaining in Germany: Can the Italian Approach Serve as a Model to Guarantee the Independence of German Judges?*, in *Hanse Law Review*, 5, 2009, p. 197.

5 T. ARMENTA DEU, *La prueba ilícita (un estudio comparado)*, Madrid, 2011, p. 42; S. C. THAMAN, “Fruits of the Poisonous Tree” in *Comparative Law*, in *Southwestern Journal of International Law*, 16, 2010, p. 333.

le<sup>6</sup> judge that was transformed into an impartial referee in a process that was managed by defence and prosecution; of a public prosecutor who was used to holding a position of supremacy during proceedings and was now placed at the same level of the accused person's lawyer; of a lawyer who could now, unprecedentedly, take part in evidence gathering. This aspect played a significant role in ensuring the success of the change to the regulations<sup>7</sup> and also in providing useful indications in view of possible reforms in other systems.<sup>8</sup> It is thus not surprising that the Code (including preparatory studies and the preliminary project)<sup>9</sup> soon became the point of reference for the legislators of countries that wished to leave the French model behind (from the investigating judge<sup>10</sup> to the freedom of proof)<sup>11</sup> or to introduce a concept of proceedings that steered away from the authoritarian models similar to those of the previous Italian Code of 1930, the fruit of fascism.<sup>12</sup> The role the Code took, which could be defined as that of a "model Code", had profound effects not only in Central and South America,<sup>13</sup> where

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6 About this critical aspect of continental procedure: M. R. DAMAŠKA, *Evidence Law Adrift*, New Haven, 1997, p. 95.

7 On this issue, M. VOGLIOTTI, *La "rhapsodie": fécondité d'une métaphore littéraire pour repenser l'écriture juridique contemporaine. Une hypothèse de travail pour le champ pénal*, in *Revue Interdisciplinaire d'Etudes Juridiques*, 2001, p. 156.

8 See C. LI, *Adversary System Experiment in Continental Europe: Several Lessons from the Italian Experience*, in *J. Pol. & L.*, 1, 2008, p. 13; W. T. PIZZI, *Lessons From Reforming Inquisitorial Systems*, in *Fed. Sent. R.*, 8, 1995, p. 42.

9 Portuguese legislators, for instance, took inspiration from the preliminary Italian project to write their new 1987 Code.

10 Even France has studied and still pays attention to Italy with regard to the role of the investigating judge, particularly in the framework of the Reform Commissions that have recently considered the possible abolition of this role: S. GLESS et al., *Regards de droit comparé sur la phase préparatoire du procès*, in V. MALABAT et al, *La réforme du Code pénale et du Code de procédure pénale*. *Opinio Doctorum*, Paris, 2009, p. 203. In Spain, the current debate on whether the role of the juez de instrucción ought to be abolished often makes reference to the Italian Code as a positive approach to be imitated: J. BURGOS LADRÓN DE GUEVARA, *Modelo y propuestas para el proceso penal español*, Sevilla, 2012, p. 11.

11 See J. PRADEL, *Criminal Evidence*, in J. F. NIJBOER & WIM J.J.M. SPRANGERS, *Harmonisation in Forensic Expertise: An Inquiry into the Desirability of and Opportunities for International Standards*, Amsterdam, 2000, p. 441.

12 It may be useful to remember that the Code of criminal procedure is the only one among the "four Codes" (namely the Civil Code, Code of Civil Procedure, Criminal Code and Code of Criminal Procedure) that was approved during the Republican era. The other Codes, though modified and improved, still maintain the structure that was decided in the Fascist era, when they were approved.

13 M. LANGER, *Revolution in Latin American Criminal Procedure: Diffusion of Legal Ideas from the Periphery*, in *American Journal of Comparative Law*, 55, 2007, p. 617. Amongst others, Chile and Brazil are two examples worth remembering. With regard to Chile, it is sufficient to read the official report of the reform to understand how much influence the Italian Code has had on the work of the Commission: *Historia de la Ley N° 19.696 Establece Código Procesal Penal, 12 de octubre del año 2000*, in *Diario Oficial de fecha 31 de mayo de 2002*, Santiago, 2002. As for the Brazilian experience, see the recent publication A. PELLEGRINI GRINOVER, *A reforma do Código de Processo Penal brasileiro. Pontos de contato com o direito estrangeiro*, in P. CORSO & E. ZANETTI, *Studi in onore di Mario Pisani*, Piacenza, 2010, II, p. 969. See also, for an updated overview of the various procedural systems in South America, T. ARMENTA DEU, *Sistemas procesales penales. La justicia penal en Europa y América*, Madrid, 2012, p. 193.

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the Italian doctrine has often had remarkable influence,<sup>14</sup> but also in other parts of the world where inspiration was drawn from the choices made by the Italian Code, which must undoubtedly be acknowledged as having highly technical quality and bravery in the modalities of transition from the inquisitorial to the accusatorial approach.

Numerous commissions studying the Italian system have “copied” the solutions adopted by the 1988 Code and many works of individual scholars have paved the way for transplants of the model abroad. One need only mention the Albanian,<sup>15</sup> Turkish and Croatian experiences, which show traces of influence of the Italian model. It is also worth remembering the Chinese study Commissions that showed interest in the Italian Code in view of their first systematic reform of 1996.<sup>16</sup> Even single legislative solutions are (or have been) the object, as models, of comparative studies or analyses of reform commissions across the world, from the incidente probatorio (special evidentiary hearing) to the patteggiamento, from the giudizio abbreviato (summary trial) to the giudice per le indagini preliminari (preliminary investigation judge), to mention a few.<sup>17</sup>

### ***1.2. True and false in the ways of representing the Italian model***

When approaching the current Italian system, any simplistic classification ought to be avoided, such as the one that depicts the system as an “American-style” mo-

14 A. PELLEGRINI GRINOVER, *A influência do direito italiano no Brasil*, in *Revista de la Câmara Ítalo-Brasileira de Comércio e Indústria*, 2005, p. 22.

15 On the issue of the new Albanian Code drawing inspiration from the Italian reform: B. PAVIŠIĆ, *Overview*, in B. PAVIŠIĆ & J. PRADEL, *Transition in Criminal Procedure Systems*, Rijeka, 2004, p. XXXII. The same volume underlines how successful the figure of the “preliminary investigation judge” has become across the whole of Eastern Europe (p. XLIX).

16 See M. CUI, *Several Debated Issues During the Discussions on the Revision of the Criminal of the Criminal Procedure Law*, in *Gongan Daxue Xuebao (Police University Academic Journal)*, 1995, p. 64; S. LIU – T. C. HALLIDAY, *Recursivity in Legal Change: Lawyers and Reforms of China’s Criminal Procedure Law*, in *Law & Social Inquiry*, 34, 2009, pp. 911-919; L. LUPÁRIA, *Quelques réflexions d’un observateur européen sur le procès pénal chinois*, in *Cahiers de défense sociale*, 2006, p. 123. On the last reform in 2012: J. CHEN, *Criminal Law and Criminal Procedure Law in the People’s Republic of China*, Leiden, 2013.

17 The following articles may be consulted: V. VLADIMIROVNA KHATUAeva, “Plea Agreement” in *Foreign and Russian Criminal Procedure Law: Comparative Analysis*, in *Middle-East Journal of Scientific Research*, 18, 2013, p. 1402; P. PIKAMÄE, *Italian Criminal Procedure as a Possible Model for Reforming Estonian Criminal Procedure*, in *Juridica*, II, 1999, p. 82; R. R. STRANG, “More Adversarial, but not Completely Adversarial”: *Reforms of the Indonesian Criminal Procedure Code*, in *Fordham International Law Journal*, 32, 2008, pp. 118-217, about the importance of the concept of “preliminary investigation judge” in the reform Commission; T. WEIGEND, *Reform Proposal on Dutch Criminal Procedure. A German Perspective*, in M. GROENHUIJSEN & TIJS KOEIJMANS, *The Reform of the Dutch Code of Criminal Procedure in Comparative Perspective*, Leiden, 2012, p. 160.

del. Its interpretation is, on the contrary, rather more complex.

The introduction of new safeguards protecting the accused, for example, has been surely determined by a sort of reaction to the authoritarian features of the old Code rather than by the intention to adopt Common Law principles, even though the Anglo-American model was viewed as the most “prestigious” by Italian jurists.<sup>18</sup> It was therefore imperative, at that historic moment, to distance the system from the past and reject whatever could be related to the inquisitorial system, even despite its actual demerits.<sup>19</sup>

After all, the systems that were established in imitation of the accusatorial archetype did not, paradoxically, take inspiration from the actual set of norms that existed in England or the United States at the time, but rather from a sort of “timeless,” abstract vision of their procedural devices. The result has hence been, for some aspects, that the Italian criminal process bears some of the characteristics of the Anglo-American models of the past, rather than of the proceedings that are conducted today in Anglo-American courtrooms.<sup>20</sup> The right to silence, for instance, is to some extent more safeguarded in the Italian Code than in the current system in England, despite being its

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18 E. GRANDE, *Legal Transplants and the Inoculation Effect: How American Criminal Procedure Has Affected Continental Europe*, in *American Journal of Comparative Law*, 64, 2016, p. 583. On the importance of the prestigious nature of models for their circulation in the comparative scenario: W. EWALD, *Comparative Jurisprudence (II): the Logic of Legal Transplants*, in *American Journal of Comparative Law*, 43, 1995, p. 489; U. MATTEI, *Why the Wind Changed: Intellectual Leadership in Western Law*, in *American Journal of Comparative Law*, 42, 1994, p. 195; A. WATSON, *Legal Transplants: An Approach to Comparative Law*, Athens GA, 1993; W. WIEGAND, *The Reception of American Law in Europe*, in *American Journal of Comparative Law*, 39, 1991, p. 229.

19 That this was a reaction, partly ideological and partly emotional, has been underlined by many scholars, since the previous system – though highly deficient – did not justify a complete demonisation. After all, one must not forget that many studies are even describing the inquisitorial system as offering remarkable safeguards to the accused despite the completely negative reputation it has gained: M. R. DAMAŠKA, *The Quest for Due Process in the Age of Inquisition*, in *American Journal of Comparative Law*, 60, 2012, p. 919; D. ALAN SKLANSKY, *Anti-Inquisitorialism*, in *Harvard Law Review*, 122, 2009, p. 1639 and, in the French literature, A. ASTAING, *Droits et garanties de l'accusé dans le procès criminel d'ancien régime (XVI-XVIII siècle). Audace et pusillanimité de le doctrine pénale française*, Aix-en-Provence, 1999.

20 There has certainly been acceptance of the approach in the criminal proceedings that emerged during the great season of the American Supreme Court in the 1960s, under Warren's presidency. See L. FASSLER, *The Italian Penal Procedure Code: An Adversarial System of Criminal Procedure in Continental Europe*, in *Columbia Journal of Transnational Law*, 29, 1991, at 246. However, the true theoretical coordinates lie on the traditional pillars of the adversarial process and, equally, they are well-rooted in the English Courts of the 1700s (on this “hard core” of principles, which can still be taken as a model today: R. VOGLER, *A World View of Criminal Justice*, Hants, 2005, p. 129).

motherland.<sup>21</sup> Similarly, hearsay evidence, which has inspired the Italian Code, differs from what is practiced today in the USA.<sup>22</sup>

From a different perspective, it is also worth remembering those systematic profiles that persist in the Italian model and can be markedly linked to the continental tradition (the judge's partial *ex officio* powers, rules on precautionary measures that differ from the theory of bail),<sup>23</sup> as well as those choices that have been affected by the Italian historical parabola, which are incompatible with the Anglo-American tradition (among others, the rejection of forms of discretion in prosecution). Against this backdrop, however, there are also original solutions that were achieved by the reformers in 1988 which cannot be viewed as the result of one single juridical experience. In practice, there is no doubt that the Italian Code of criminal procedure has looked to the tradition of Common Law, also as a symbolic, historic step away from the inquisitorial system that was established during the dictatorship. However, despite this pre-packaged label, today's system still bears the traces of a past that it has not rejected completely<sup>24</sup> and some theoretical concepts that have been formulated by single scholars, whilst showing a strong connection with the fundamental values endorsed by the

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21 As is known, the legislation related to the Irish issue has led to the Criminal Justice and Public Order Act of 1994 whereby inferences against the accused could be drawn if the latter invoked the right to silence. Since then, to the present day, numerous norms of similar caliber have succeeded one another, such as, amongst other: the Criminal Justice (Terrorism and Conspiracy) Act of 1998, the Terrorism Act of 2000. See M. BERGER, *Reforming Confession Law British Style: a Decade of Experience with Adverse Inference from Silence*, in Col. H. R. L. Rev., 31, 2000, p. 243; J. D. JACKSON, *Interpreting the Silence Provisions: the Northern Ireland Cases*, in *Criminal Law Review*, 1995, p. 587; M. REDMAYNE, *Rethinking the Privilege against Self-Incrimination*, in *Oxford Journal of Legal Studies*, 27, 2007, p. 214.

22 Particularly in light of concrete judicial practices and some important judgments of the Supreme Court on the right to challenge incriminatory witness evidence, including *Crawford v. Washington* 541 U.S. 36 (2004). See I. DENNIS, *The Rights to Confront Witnesses: Meaning, Myths and Human Rights*, in *Criminal Law Review*, 4, 2010, p. 255; H. LAI HO, *Confrontation and Hearsay: A Critique of Crawford*, in *International Journal of Evidence & Proof*, 8, 2004, p. 147; L. HEFFERNAN, *Calibrating the Right to Confrontation*, in *International Journal of Evidence & Proof*, 20(2), 2016, p. 103.

23 A recent overview with a comparative analysis with the other European systems is provided by S. RUGGERI, *Personal Liberty in Europe. A Comparative Analysis of Pre-Trial Precautionary Measures in Criminal Proceedings*, in S. RUGGERI, *Liberty and Security in Europe. A Comparative Analysis of Pre-trial Precautionary Measures in Criminal Proceedings*, Osnabrück, Göttingen, 2012, p. 185. See M. GIALUZ – P. SPAGNOLO, *Reasonable Length of Pre-trial Detention: Rigid or Flexible Time Limits? A study on Italy from a European Perspective*, in *European Criminal Law Review*, 3, 2013, p. 220.

24 For G. J. MIRABELLA, *Scales of Justice: Assessing Italian Criminal Procedure Through the Amanda Knox Trial*, in *Boston University International Law Journal*, 30, 2012, p. 229, the inquisitorial roots of the Italian system still prevail.

European Convention of Human Rights.<sup>25</sup> Indeed, the Code is a body of sources and influences that have made it an unprecedented laboratory that could help test the possible balances between the Anglo-American and European legal worlds.

It is a fundamental model for scholars across the world at a historical moment when England and the United States are looking to the process occurring in the old continent<sup>26</sup> to redress the faults of a system that is too linked to a partisan<sup>27</sup> and negotiated<sup>28</sup> vision of justice. At the same time, many European and non-European States are trying to stray from the distortions of an approach that is aimed at finding a material truth at all costs<sup>29</sup> to the detriment of the safeguards established to protect the accused.<sup>30</sup> Thirty years after the great reform, it may be useful to look into the reactions that were triggered by the introduction of the new criminal justice system and its subsequent evolutions brought about by Supreme Court's decisions and by legislative reforms.

The third part of this essay focuses on the analysis of the criminal justice system that is in force in Italy today.

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25 On the criminal trial in an international human rights context, S. SUMMERS, *Fair Trials: The European Criminal Procedural Tradition and the European Court of Human Rights*, Oxford and Portland, Hart, 2007; S. TRECHSEL, *Human Rights in Criminal Proceedings*, Oxford, 2005.

26 "A quasi-inquisitorial system of justice, patterned after the revised Italian Code of Criminal Procedure, would provide a more fair, equitable distribution of justice while also promoting the goal of seeking truth in the criminal justice system" (R. LAWSON MACK), *It's Broke So Let's Fix It: Using a Quasi-Inquisitorial Approach to Limit the Impact of Bias in the American Criminal Justice System*, in *Indiana International & Comparative Law Review*, 7, 1996, p. 67.

27 W. T. PIZZI, *Trial without Truth. Why Our System of Criminal Trials Has Become an Expensive Failure and What We Need to Rebuild It*, New York, 1999.

28 See R. P. BURNS, *The Death of the American Trial*, Chicago, 2009; M. GALANTER, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, in *Journal of Empirical Legal Studies*, 1, 2004, p. 459.

29 E. GRANDE, *Dances of Criminal Justice: Thoughts on Systemic Differences and the Search for the Truth*, in J. JACKSON, M. LANGER & P. TILLERS, *Crime, Procedure and Evidence in Comparative and International Context. Essays in Honour of Professor Mirjan Damaska*, Oxford and Portland, 2008, p. 145; T. WEIGEND, *Should We Search for the Truth, and Who Should Do it?*, in *North Carolina Journal of International Law and Commercial Regulation*, 36, 2011, p. 389.

30 On the current relationship between common Law and civil Law systems in the field of criminal justice, in the light of the general path of convergence, see J. D. JACKSON – S. SUMMERS, *The Internationalisation of Criminal Evidence. Beyond the Common Law and Civil Law Traditions*, Cambridge, 2012; M. JIMENO-BULNES, *American Criminal Procedure in a European Context*, in *Cardozo Journal of International & Comparative Law*, 21, 2013, p. 409.

## 2. Genesis, extent and evolution of the great 1988 reform

### 2.1. The new Code of Criminal Procedure

Since the Italian Republican Constitution came into force in 1948, the problem of reforming the Code of Criminal Procedure of 1930 (so called Rocco Code) has been at stake. The Rocco Code was indeed a product of fascism and reflective of a traditionally inquisitorial criminal justice system.<sup>31</sup>

The new Constitution overturned the ideological postulates typical of the fascist regime and placed the individual at the heart of the justice system. The Constitution thus expressly recognized a series of fundamental rights to the accused person (personal liberty in Article 13;<sup>32</sup> the right to defence in Article 24;<sup>33</sup> the right to a lawful judge in Article 25<sup>34</sup>) and ratified – despite the confused formulation – the presumption of innocence, placing the burden of proof on the prosecution (Article 27, par. 2).<sup>35</sup> After a decade of small changes made to the Rocco Code by Parliament (Law no. 517/1955), in the early Sixties two processes were set in motion. On one hand, the Constitutional Court acted to eliminate the norms of the Code that clashed with the above-mentioned constitutional principles and to provide greater protection to the accused in the pre-trial phase; on the other hand, an intense doctrinal debate on the reform of the Code of Criminal Procedure began, with the aim of leaving behind a criminal-procedure system built by a totalitarian regime and bringing Italy's criminal justice system in line with liberal democratic political structures. Parliament approved

31 For more information on the Italian 1930 Code, see L. F. DEL DUCA, *An Historic Convergence of Civil and Common Law Systems. Italy's New "Adversarial" Criminal Procedure System*, in *Dickinson Journal of International Law*, 10, 1991, pp. 73-75-81; G. ILLUMINATI, *The Frustrated Turn to Adversarial Procedure in Italy (Italian Criminal Procedure Code of 1988)*, in *Washington University Global Studies Law Review*, 4, 2005, p. 567.

32 According to Art. 13 Italian Constitution "1. Personal liberty is inviolable. 2. No one may be detained, inspected or searched nor otherwise subjected to any restriction of personal liberty except by order of the Judiciary stating a reason and only in such cases and in such manner as provided by the Law. 3. In exceptional circumstances and under such conditions of necessity and urgency as shall conclusively be defined by the Law, the police may take provisional measures that shall be referred within 48 hours to the Judiciary for validation and which, in default of such validation in the following 48 hours, shall be revoked and considered null and void. 4. Any act of physical and moral violence against a person subjected to restriction of personal liberty shall be punished. 5. The Law shall establish the maximum duration of preventive detention."

33 According to Art. 24, par. 2, It. Const. "Defence is an inviolable right at every stage and instance of proceedings."

34 According to Art. 25, par. 1, It. Const. "No one may be removed from the lawful court previously established by Law."

35 According to Art. 27, par. 2, It. Const. "The accused person shall be considered not guilty until a final judgment has been passed."



a first enabling act in 1974; due to the terrorist threat of the time, however, the decree was never implemented.<sup>36</sup> In 1987 a second enabling act was approved whereby the Government committed to adopting a Code of Criminal Procedure that “ought to implement the principles of the Constitution and conform to the norms of international conventions ratified by Italy on the rights of the individual and on the criminal process.” It also had to “introduce in the criminal process the features of the accusatorial system”, according to a series of fundamental principles defined in the enabling act.<sup>37</sup> In October 1989, the new Code of Criminal Procedure came into force, which “represented the most serious attempt to transfer adversarial criminal procedures into an inquisitorial jurisdiction since 1791, when the French attempted to import the English system during the heat of the Revolution.<sup>38</sup>” Indeed, many Italian legal scholars talked of a “revolutionary turn<sup>39</sup>” and it was recognised that “no other country with a continental system, including Japan, can compare with the Italian’s reform with respect of depth and strength of the reform.<sup>40</sup>”

## ***2.2. The rugged path of the new system: the inquisitorial reaction to the new Code and the amendment of Article 111 of the Constitution.***

Despite the mentioned scientific enthusiasm, the practical implementation of the new Code has followed a rugged path:<sup>41</sup> the ambitious relinquishment of the in-

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36 R. LAWSON MACK, *It’s Broke So Let’s Fix It: Using a Quasi-Inquisitorial Approach to Limit the Impact of Bias in the American Criminal Justice System*, 1996, p. 86.

37 On the accusatorial model from an Italian perspective G. ILLUMINATI, *The Accusatorial Process from the Italian Point of View*, 2010, at 310; M. PANZAVOLTA, *On hearsay and beyond: is the Italian criminal justice system an adversarial system?*, in *International Journal of Human Rights*, 20, 2016, p. 617.

38 M. LANGER, *From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure*, in S. C. THAMAN, *World Plea Bargaining. Consensual Procedures and the Avoidance of the Full Criminal Trial*, Durham, 2010, p. 60. See also E. AMODIO – E. SELVAGGI, *An Accusatorial System in a Civil Law Country: The 1988 Italian Code of Criminal Procedure*, 1989, p. 1211.

39 G. ILLUMINATI, *The Frustrated Turn to Adversarial Procedure in Italy (Italian Criminal Procedure Code of 1988)*, 2005, at 571; M. PANZAVOLTA, *Reforms and Counter-Reforms in the Italian Struggle for an Accusatorial Criminal Law System*, in *North Carolina Journal of International Law & Commercial Regulation*, 30, 2005, p. 577.

40 C. LI, *Adversary System Experiment in Continental Europe: Several Lessons from the Italian Experience*, 2008, at 20.

41 M. FABRI, *Theory versus Practice in Italian Criminal Justice Reform*, in *Judicature*, 77, 1994, p. 211; J. T. OGG, *Italian Criminal Trials: Lost in Transition? Differing Degrees of Criminal Justice Convergence in Italy and Australia*, in *International Journal of Comparative and Applied Criminal Justice*, 36, 2012, p. 229.

quisitorial tradition and the introduction of a rather accusatorial system brought about a crisis of rejection. Despite being the fruit of the work of the best professors and the most learned legal experts, the Code aroused distrust in some Italian judges and public prosecutors since the beginning and so some of its provisions in favour of the accused have been distorted by the application of the law.<sup>42</sup>

Indeed, many judges, who were used to the old 1930 system where the judge was the driving force of the adjudication and the defence had limited powers, ill-adapted to the new roles assigned by the reform of the criminal justice system. The same can be said about the interpretation of the new role of public prosecutors.<sup>43</sup> It can be stated that the impact of the practical implementation of the reform was in some way underestimated by the reformers who perhaps did not take into account one of the fundamental rules of the criminal justice system. As the most attentive comparatists remark, using a metaphor taken from music, replacing the musical score is generally not enough if the instruments and the musicians remain the same.<sup>44</sup>

The consequence has thus been that judicial life has been filled with deviating practices, sometimes aimed at not applying some norms, and that judges raised many questions of constitutional legitimacy. The Constitutional Court accepted them:<sup>45</sup> at a time of major attacks by organized crime,<sup>46</sup> the need for an efficient criminal justice

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42 See R. MONTANA, *Adversarialism in Italy: Using the Concept of Legal Culture to Understand Resistance to Legal Modifications and its Consequences*, in *European Journal of Crime, Criminal Law & Criminal Justice*, 20, 2012, p. 99 and *Procedural tradition in the Italian Criminal Justice System. The Semi-adversarial Reform in 1989 and the inquisitorial cultural resistance to adversarial principles*, in *International Journal of Evidence & Proof*, 20(4), 2016, p. 289.

43 Some authors believe that another factor to be taken into consideration would be a political interpretation of their role on the part of many public prosecutors: M. R. FERRARESE, *Penal Judiciary and Politics in Italy*, in *Global Jurist Topics*, 1, 2001, p. 1535. On the regulations establishing the role of the public prosecutor in Italy: M. CAIANIELLO, *The Italian Public Prosecutor: An Inquisitorial Figure in Adversarial Proceedings?*, in E. LUNA & M. WADE, *The Prosecutor in Transnational Perspective*, Oxford, 2011, p. 250; G. ILLUMINATI, *The Role of the Public Prosecutor in the Italian System*, in P. TAK, *Tasks and Powers of the Prosecution Services in the EU Member States*, Nijmegen, I, 2004, p. 303; S. RUGGERI, *Investigative and Prosecutorial Discretion in Criminal Matters: The Contribution of the Italian Experience*, in M. CAIANIELLO – J. S. HODGSON, *Discretionary Criminal Justice in a Comparative Context*, Durham, 2015, p. 59.

44 M. R. DAMAŠKA, *The Uncertain Fate of Evidentiary Transplants: Anglo-American and Continental Experiments*, in *American Journal of Comparative Law*, 45, 1997, pp. 839-849.

45 See M. PANZAVOLTA, *Reforms and Counter-Reforms in the Italian Struggle for an Accusatorial Criminal Law System*, 2005.

46 See E. CREEGAN – C. J. HATFIELD, *Creeping Adversarialism in Counterterrorist States*, in *Connecticut Journal of International Law.*, 29, 2013, at 22; S. MAFFEI – I. MERZAGORA BETSOS, *Crime and Criminal Policy in Italy: Tradition and Modernity in a Troubled Country*, in *European Journal of Criminology*, 4, 2007, pp. 461-471.

arose once more and the tip of the scale shifted again from the “due process model” to the “crime control” model.<sup>47</sup> Hence, a proper counter-reformation was launched: in the name of the principle styled as “non-dissipation of evidence,<sup>48</sup>” the Constitutional Court first and then the legislature dismantled the principle of separation between the preliminary phase and the trial, which was the architrave of the new process.<sup>49</sup>

Paradoxically, the Code that had been created to implement the constitutional principles was dismantled by the Constitutional Court in favour of other constitutional standards.<sup>50</sup>

In order to react to this step back to the past, Parliament amended Art. 111 of the Constitution,<sup>51</sup> reaffirming strongly the principle of adversarial adjudication that formed the basis of the 1988 Code.<sup>52</sup> With this reform, the principles of fair trial

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47 Reference is made to the classic distinction proposed by H. L. PACKER, *Two Models of the Criminal Process*, in *University of Pennsylvania Law Review*, 113, 1964, p. 1.

48 Which is “a novel disguised version of the “material truth” principle at the root of Continental criminal justice”: E. AMODIO, *The accusatorial system lost and regained: reforming criminal procedure in Italy*, in *American Journal of Comparative Law*, 52, 2004, pp. 489-493.

49 C. LI, *Adversary System Experiment in Continental Europe: Several Lessons from the Italian Experience*, 2008, at 17; S. P. FRECCERO, *An Introduction to the New Italian Criminal Procedure*, in *American Journal of Criminal Law*, 21, 1994, p. 345; E. GRANDE, *Italian Criminal Justice: Borrowing and Resistance*, in *American Journal of Comparative Law*, 48, 2000, pp. 227-238; M. PANZAVOLTA, *Reforms and Counter-Reforms in the Italian Struggle for an Accusatorial Criminal Law System*, 2005; W. T. PIZZI – L. MARAFIOTI, *The New Italian Code of Criminal Procedure: The Difficulties of Building an Adversarial Trial System on a Civil Law Foundation*, 1992; W. T. PIZZI – M. MONTAGNA, *The Battle to Establish an Adversarial Trial System in Italy*, in *Michigan Journal of International Law*, 25, 2004, p. 429.

50 L. MARAFIOTI, *Italian Criminal Procedure: A System Caught Between Two Traditions*, in J. JACKSON, M. LANGER & P. TILLERS, *Crime, Procedure and Evidence in Comparative and International Context. Essays in Honour of Professor Mirjan Damaška*, Oxford and Portland, 2008, at 85.

51 This evolutionary parabola is analysed by E. AMODIO, *The accusatorial system lost and regained: reforming criminal procedure in Italy*, 2004, at 489; E. GRANDE, *Italian Criminal Justice: Borrowing and Resistance*, 2000; W.T. PIZZI – M. MONTAGNA, *The Battle to Establish an Adversarial Trial System in Italy*, 2004.

52 Art. 111 It. Const. the following paragraphs have been added: “1. The judicial function should be carried out according to the principle of due process of Law. 2. Every trial should be carried on giving the parties the right to offer evidence or counterproof and counterarguments against unfavourable evidence, on equal standing in front of an impartial judge. The Law guarantees the reasonable length of the trial. 3. In the criminal trial the Law guarantees that everyone charged with a criminal offence should be privately informed as soon as possible of the nature and cause of the accusation against him; that the accused should be assured to have adequate time and facilities for the preparation of his defence; that the accused should be allowed the opportunity, before the judge, to examine or to have examined any witnesses against him; that the accused have the right to have favourable witnesses summoned for being examined at trial on an equal basis with the prosecution, as well the right to produce other evidence in his favour; that the accused have the free assistance of an interpreter if he cannot understand or speak the language used in court. 4. The criminal trial is based on the principle that evidence should be heard in front of the parties and each party should be able to offer contrary evidence and to challenge opposing evidence. The accused person’s guilt shall not be proved on the basis of statements made by the person who deliberately chose not to be examined by the accused or his lawyer. 5. The Law regulates cases in which evidence is not presented in a manner such that the accused may challenge the evidence at trial by reasons of the accused person’s consent or of an objective impossibility or of a proved unlawful conduct”.

upheld by Art. 6 of the European Convention of Human Rights (hereinafter referred to as the ECHR) were expressly adopted. In the following years, the CCP underwent other modifications aimed at implementing the said principles and restoring – and, in some respects, improving - its original structure<sup>53</sup>.

In particular, Law no. 63 of 2001 strengthened the right to confrontation with the adverse witnesses and limited the application of the right to silence by reducing the incompatibility to witness and by introducing “assisted testimony”. After twenty five years of theoretical elaborations that led to the 1988 reform, more than eighty changes have been made to the Code in the following thirty years; one of the last of which is the so-called “Orlando Reform,” which modified thirty-nine Articles.

### ***2.3. Some external factors overlooked in the construction of the Code***

The difficulty of implementing, over the years, the project conceived by the reformers is related to different and more profound causes than to the dynamics hitherto described: the reasons, so to speak, are to be found “outside the Code.”<sup>54</sup> In particular, it was the lack of a parallel reform of the Judiciary that hindered the practical and efficient implementation of the values of the accusatorial system. The judge’s impartiality and the levelling of roles between defence and prosecution, though fully affirmed and safeguarded by the articles of the Code, were bound to become vulnerable in a system that favoured the same career for the prosecuting authority and the judging authority, where, basically, the public prosecutor and the judge are colleagues, they can, so to speak, exchange their jobs during their professional careers, and most of the time they work in the same offices, thus in close contact with one another.<sup>55</sup> These circumstances are anything but banal, and may mitigate the adversarial approach of the system.<sup>56</sup>

53 E. AMODIO, *The accusatorial system lost and regained: reforming criminal procedure in Italy*, 2004, at 496; G. ILLUMINATI, *The Frustrated Turn to Adversarial Procedure in Italy (Italian Criminal Procedure Code of 1988)*, 2005, at 576; W. T. PIZZI – M. MONTAGNA, *The Battle to Establish an Adversarial Trial System in Italy*, 2004, at 460.

54 Clearly, sociological and cultural features of the Italian society also ought to be considered: D. NELKEN, *Telling Difference: Of Crime and Criminal Justice in Italy*, in D. NELKEN, *Contrasting Criminal Justice: Getting from Here to There*, Aldershot, 2000, p. 233.

55 M. LANGER – D. A. SKLANSKY, *Prosecutors and Democracy: A Cross-National Study*, Cambridge, 2017.

56 On this opinion, see L. MARAFIOTI, *Italian Criminal Procedure: A System Caught Between Two Traditions*, in J. JACKSON, M. LANGER & P. TILLERS, *Crime, Procedure and Evidence in Comparative and International Context. Essays in Honour of Professor Mirjan Damaška*, 2008, at 95.

Indeed, it is misleading to believe that at the “*boutique*” of foreign law you can purchase only some of the items available in one specific model: any partial and confused import of the original structure may prevent reaching the desired effects.<sup>57</sup>

This is what has occurred with the Italian experience where the system of safeguards with an accusatorial imprint should have been flanked by a mitigation of the principle of compulsory prosecution, which, by nature, sets into motion a large mass of proceedings that can be hardly managed, thus causing an unacceptable delay in the justice system.<sup>58</sup> Moreover, special proceedings, which are necessary to ensure that trials are conducted solely for those cases that do require further analysis, have turned out to be of little attraction to the accused persons who, despite the existence of strong proof of guilt, are tempted to go to trial in the hope that their offence may no longer be prosecutable because of the statute of limitations, which in Italy is conceived in a completely different way compared to the other systems.<sup>59</sup> The limited application of negotiated justice, after all, hinders the effective functioning of the accusatorial model.<sup>60</sup> In addition, the civil party and the system of appellate remedies are residues of the continental tradition (markedly French) which have not excelled in terms of compatibility with the accusatorial choice made.<sup>61</sup> From another perspective, the enthusiasm for the adversarial process has, in some way, brought about a stereotyped vision of the “challenge” between prosecution and defence that resulted in an inadequate consideration of other subjects involved in the management of justice, such as for example the victim,

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57 With this view, M. R. DAMAŠKA, *The Uncertain Fate of Evidentiary Transplants: Anglo-American and Continental Experiments*, 1997. See also J. D. JACKSON, *The Effect of Human Rights on Criminal Evidentiary Processes: Towards Convergence, Divergence, or Realignment?*, in *Modern Law Review*, 68, 2005, p. 737, who underlines that legal transplants sometimes do not have the intended effects, citing Italy as an example

58 A wide range comparative analysis is performed by Y. MA, *Prosecutorial Discretion and Plea Bargaining in the United States, France, Germany, and Italy: A Comparative Perspective*, *International Criminal Justice Review*, 12, 2002, pp. 22-40.

59 See N. BOARI, *On the Efficiency of Penal Systems; Several Lessons from the Italian Experience*, *International Review of Law & Economics*, 17, 1997, p. 115. An aspect that ought to be taken into account is also that the criminal Code, as mentioned above, still dates back to 1930: though amply modified and rendered compliant with the Constitution over the years it clearly reflects an approach to criminal justice that does not fully conform to that of the Code of Criminal Procedure of 1988.

60 Similarly, G. ILLUMINATI, *The Frustrated Turn to Adversarial Procedure in Italy (Italian Criminal Procedure Code of 1988)*, 2005.

61 These issues can be further studied in the publications that analyse the Italian Code as a whole: V. CIRESE – V. BERTUCCI, *The New Italian Criminal Procedure for Foreign Jurists*, Rome, 1993; P. CORSO, *Italy*, in CHRIS VAN DEN WYNGAERT, *Criminal Procedure Systems in the European Community*, 1993, p. 223; S. P. FRECCERO, *An Introduction to the New Italian Criminal Procedure*, 1994; A. PERRODET, *The Italian System*, in M. DELMAS-MARTY & J. R. SPENCER, *European Criminal Procedures*, Cambridge, 2005, p. 348.

who is rather forgotten in the balances of the Code.<sup>62</sup> A critical issue has been the introduction by the legislature of new norms solely for proceedings concerning organized crime: a parallel way of fact-finding and performing investigations has progressively taken shape, with less guarantees and no compliance with the philosophy of 1988.

A last aspect concerns the model of precautionary measures,<sup>63</sup> which, not surprisingly, has undergone continuous modifications over the past decades (the last one in 2018). The system – which was meant to enhance as much as possible the presumption of innocence – has fallen far short of its objectives, due to the excessive slowness of proceedings<sup>64</sup> and the incomplete assimilation of the rule that defines freedom as the ordinary status while awaiting judgment. Almost half of prisoners in Italian jails are accused persons who, often, stay in prison for an unreasonable period of time. Understandably, this circumstance has created an imbalance also in the penitentiary system, becoming the main cause of prison overcrowding, a problem on which the European Court of Human Rights has taken a firm stance.<sup>65</sup>

#### ***2.4. Changes deriving from the transposition of European stimuli***

As we have seen, during the Nineties and at the beginning of 2000, the Italian system underwent important adjustments due to the inquisitorial counter-reform first, and then due to the reaffirmation of the principles of the accusatorial system in the Constitution. This evolution of the system was flanked by two other important reforms aimed at completing the 1988 reform from an accusatorial viewpoint. The first one was the Law that introduced a well-constructed system of defence investigations (Law 397

62 M. CHIAVARIO, *The Rights of the Defendant and the Victim*, in M. DELMAS-MARTY & J. R. SPENCER, *European Criminal Procedures*, p. 543; L. LUPÁRIA, *Reflexiones sobre el estatuto de la víctima en el proceso penal italiano*, in *Revista de Derechos Fundamentales*, 2012, p. 99. For comparative remarks on the status of the victim of crime in the Italian, French and Spanish system see the volume L. LUPÁRIA, *Victims and Criminal Justice. European standards and national good practices*, Milano and Padova, 2015.

63 See G. DI CHIARA, *Italy*, in S. RUGGERI, *Liberty and Security in Europe. A Comparative Analysis of Pre-trial Precautionary Measures in Criminal Proceedings*, 2012, at 121. On preventive detention, see M. PELISSERO, *The Doppio Binario in Italian Criminal Law*, in M. CAIANIELLO & M.L. CORRADO, *Preventing Danger. New paradigms in criminal justice*, Durham, 2013, p. 107.

64 More than once Italy has been sanctioned by the European Court of Human Rights. Among the most recent decisions: ECHR, 26 November 2013, *Francesco Quattrone v. Italy*; ECHR, 6 March 2012, *Gagliano Giorgi v. Italy*; ECHR, 16 October 2007, *Capone and Centrella v. Italy*

65 ECHR, 8 January 2013, *Torreggiani and others v. Italy* (the “pilot” judgment condemns Italy for inhuman and degrading treatment in overcrowded jails).

of 2000) and the other was the Law that limited the Public Prosecutor's right to appeal and introduced in the code the beyond-any-reasonable-doubt evidentiary standard (Law 46 of 2006).<sup>66</sup>

Over the past twenty years, other changes have occurred, which have stemmed from two different guiding principles.

The first principle underlies reforms inspired from the concept of "crime control."<sup>67</sup> Among these reforms it is worth mentioning those deriving from the need to make proceedings more efficient and from the necessity to give an immediate answer to criminal phenomena that were considered alarming. In this framework, the following were introduced: the Justice of the Peace to deal with minor cases (legislative decree 274 of 2000), the single first instance judge with the abolition of the "*pretore*" (Law 479 of 1999), a wider application of plea bargaining (from two to five years of imprisonment) (Law 134 of 2003), a nearly compulsory detention system for more severe offences (decree Law decree 11 of 2009).

The second principle underlying the evolution of the Italian criminal justice system is linked to a new event, that of the increasing integration of the Italian system into the European one, with reference to the so-called "large Europe" (that is the Council of Europe) on one hand, and the so-called "small Europe" (that is the European Union) on the other.

With regard to the former, the Italian system has opened up to the conventional system with a series of decisions by the Constitutional Court<sup>68</sup> which have established that the ECHR norms, as interpreted by the Court in Strasbourg, are superior in rank to ordinary laws because they integrate the constitutional parameter. Therefore, the national criminal justice system has to adjust to the binding indications that come from Strasbourg: national judges are to provide a conventionally-oriented interpretation of national norms<sup>69</sup> and Parliament must adopt the necessary legislative changes

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66 See *infra*, § 3.5.

67 See H. L. PACKER, *Two Models of the Criminal Process*, 1964.

68 See Corte costituzionale, 22 October 2007, n. 348; Corte costituzionale, 24 October 2007, n. 349; Corte costituzionale, 26 November 2009, n. 311; Corte costituzionale, 4 December 2009, n. 317

69 See *infra*, § 3.4.

to adapt the domestic system to the standards set by the European Court. Of the legislative changes worth mentioning is the historic reform with which Italy has removed the proceeding in absentia (Law 67 of 2014): a reform ultimately brought about by decisions holding against Italy in the *Sejdovic* and *Somogyi*<sup>70</sup> cases. Secondly, reference must be made to legislative decree no. 159 of 2011, regulating the application of preventive measures in the first instance and in the instances of appellate remedies, which transposed the judgments of the Court of Strasbourg on the right to have a public hearing.<sup>71</sup>

With regard to the restriction of personal liberty, the Italian Parliament responded to the heavy censure contained in the judgment *Torreggiani v. Italy* by reducing the area of application of precautionary detention in jail, establishing that it can only be adopted in the event of offences that are punishable with a maximum term exceeding five years (and no longer four) (Art. 280, par. 2) and increased the penalty limits within which enforcement of the conviction and use of measures other than detention may be suspended (decree Law 78 of 2013). With regard to the demands made by the “small Europe”, reference must be made to the changes stemming from the implementation of European Union directives. In 2014, the Italian Government adopted at least two reforms with this aim: legislative decree no. 32, aimed at implementing “the First EU Fair trial Law,<sup>72</sup>” that is Directive 2010/64/EU, of 27 October 2010, and decree no. 101, aimed at implementing Directive 2012/13/EU, of 22 May 2012.<sup>73</sup> The need to transpose the euro-unitary law has been met by taking various actions which have strengthened, over the past few years, the position of the victim of the offence. The Italian legislator has excluded that the victim may take on the status of party in the proceedings, but he has progressively recognized the victim a wider set of rights, such as the right to information, assistance and participation.<sup>74</sup>

70 See *infra*, § 3.3

71 ECHR, 13 November 2007, *Bocellari and Rizza v. Italy*; ECHR, 8 July 2008, *Perre v. Italy*; ECHR, 5 January 2010, *Bongiorno v. Italy*; ECHR, 2 February 2010, *Leone v. Italy*; ECHR, 17 May 2011, *Capitani and Campanella v. Italy*.

72 See S. LUDFORD, *European Parliament, debate*, 14 June 2010.

73 See *infra*, § 3.3.

74 See *infra*, § 3.3



### **3. A reading guide to the current Italian criminal justice system**

#### **3.1. The subjects of the criminal proceedings**

The Italian Code has a clear structure. It is divided into two parts: the “static” one and the “dynamic” one. The first part (Books I, II, III, IV) deals with those aspects of the criminal process that could be considered “independent” from the actual procedure and sets out “functional” notions and elements to the procedure itself. The second part (Books V, VI, VII, VIII, IX, X, XI) regulates the development of the proceedings through the different stages. It may be convenient to start the analysis from the first book of the Code, which sets out who the subjects of the criminal process are. This book has introduced some important new elements compared to the past version.

With reference to the public subjects involved in the process, the Code has adopted the principle of making a clear distinction between the functions of the prosecution and those of the judges.<sup>75</sup> To this end, the Code has first and foremost eliminated one of the most negative symbols of the inquisitorial model, that is the investigating judge (*giudice istruttore*). An ambiguous figure who was, at the same time, both a judge and an investigator: he had wide decision-making and investigative powers and had to provide evidence in order to discover the “Truth” (Article 299 of the 1930 CCP).

In the preliminary phase, the functions of guarantee are assigned to a new type of judge, the “preliminary investigation judge” (*giudice per le indagini preliminari*), who only intervenes when the law provides for it, i.e., essentially in three cases: firstly, to adopt measures restricting a person’s fundamental rights (precautionary detention, house arrest, prohibition to leave the country, obligation to appear before the criminal police, interception of communications, etc.) (Arts. 267, 279); secondly, to impartially verify if the Public Prosecutor acted in compliance with investigation deadlines and with the mandatory nature of the prosecution (Art. 408); finally, in the exceptional cases where evidence must be collected immediately in the special evidentiary hearing – e.g. testimony of a dying person (Art. 392). In all these cases the preliminary investigation judge only intervenes when one of the parties – generally the Public Prosecutor

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<sup>75</sup> See E. AMODIO, *The accusatorial system lost and regained: reforming criminal procedure in Italy*, 2004, p. 490; G. ILLUMINATI, *The Accusatorial Process from the Italian Point of View*, 2010, p. 311.

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– requests it and makes a decision on the basis of the information given by the parties, because he has no dossier of his own. One can easily note that, in this way, the legislator has willingly created a powerless figure, an “unarmed judge” without file – a judge whose role has been outlined to be substantially different from that of the investigating judge. Secondly, the Code has transformed the role of the Public Prosecutor in the process. The inquisitorial tradition of the Public Prosecutor being a neutral quasi-judicial figure with wide decision-making powers on personal liberty has been relinquished; he is now conceived as a party in the proceedings, who is responsible for the investigation (Article 326) and for the prosecution (Articles 50, 405).<sup>76</sup>

The Code gives the Public Prosecutor an active role as a leader of preliminary investigations. Firstly, the Italian Public Prosecutor can actively search information relating to the offence (*notitiae criminis*), and not just passively receive information provided by the police (Art. 330). Secondly, when he finds or receives a report of a criminal offence, he leads the investigations and directs the criminal police (Art. 327).

Upon conclusion of investigations, the Public Prosecutor continues to be bound by the compulsory prosecution principle (Art. 112 of Italian Constitution).<sup>77</sup> The rule whereby the Public Prosecutor is obliged to exercise criminal action if investigations lead to believe that a criminal act has been committed is aimed at preventing any opportunistic assessment on the part of the Public Prosecutor: on conclusion of the investigations, he must only express a fact- and law-based judgment, which appears to be similar to what is expressed by the judge. During investigations, however, the Public Prosecutor exercises wide discretionary powers. Firstly, with regard to the development of investigations, he may decide to perform certain investigations and not other, whenever there are reasoned functional needs. Secondly, with the new Code, compulsory prosecution takes place at the end of investigations.

Therefore, there is no automatic consequential connection between the *notitia criminis* and the proceedings: Art. 125 of the Provisions for the implementation of

<sup>76</sup> See A. PERRODET, *The Italian System*, in M. DELMAS-MARTY & J. R. SPENCER, *European Criminal Procedures*, p. 361.

<sup>77</sup> See A. DI AMATO, *Criminal Law in Italy, Alphen aan den Rijn*, 2011, p. 33; S. RUGGERI, *Investigative and Prosecutorial Discretion in Criminal Matters: The Contribution of the Italian Experience*, in M. CAIANIELLO – J. S. HODGSON, *Discretionary Criminal Justice in a Comparative Context*, 2015, p. 59.

the CCP, in fact, establishes that the Public Prosecutor must not exercise his power of prosecution when “the pieces of evidence gathered during preliminary investigations are not suitable to uphold the accusation at the trial stage.” However, the most delicate issue concerns the fact that, in light of the over-criminalisation of the Italian system, the Public Prosecutor cannot initiate investigations – and then exercise the power of prosecution – *for every notitia criminis*.<sup>78</sup> He is clearly obliged to make some choices and give priority to some *notitiae criminis* over others:<sup>79</sup> in the Italian system it all generally depends on the individual choices made by each Public Prosecutor. Some pilot experiences have shown that the Public Prosecutor of the Republic has adopted some guidelines in order to guarantee uniformity in the choices made by the office’s prosecutors. But these guidelines are not expression of criminal policy options, because they are not adopted by bodies that have a political mandate. This structure thus translates into a situation where compulsory prosecution “is little more than a dogma” and Public Prosecutors “exercise discretion without any checks and balances at a hierarchical or political level.”<sup>80</sup>

### ***3.2. The criminal police as the operative right-hand support of the Public Prosecutor***

Under the old Code, there was a very feeble link between the Public Prosecutor and the criminal police. Consequently, in 1988, to give effect to Art. 109 of the Italian Constitution,<sup>81</sup> the new Code completely modified the relationship between these subjects.<sup>82</sup>

In terms of personnel relations, criminal police officers and officials report to

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78 It has been observed that the Public Prosecutor finds himself in a condition where he is unable to deal with all the *notitiae criminis*: M. CAIANIELLO, *The Italian Public Prosecutor: An Inquisitorial Figure in Adversarial Proceedings?*, in E. LUNA & M. WADE, *The Prosecutor in Transnational Perspective*, p. 256.

79 On the prosecutors’ role as gatekeeper of the criminal justice system, see R. MONTANA, *Prosecutors and the definition of the crime problem in Italy: balancing the impact of moral panics*, in *Criminal Law Forum*, 20, 2009, pp. 471-477.

80 Literally, L. MARAFIOTI, *Italian Criminal Procedure: A System Caught Between Two Traditions*, in J. JACKSON, M. LANGER & P. TILLERS, *Crime, Procedure and Evidence in Comparative and International Context. Essays in Honour of Professor Mirjan Damaška*, 2008, at 95. See also M. CAIANIELLO, *The Italian Public Prosecutor: An Inquisitorial Figure in Adversarial Proceedings?*, in E. LUNA & M. WADE, *The Prosecutor in Transnational Perspective*, at 261.

81 According to it, “the judicial authority directly commands the criminal police”.

82 See R. MONTANA, *Paradigms of Judicial Supervision and Coordination between Police and Prosecutors: the Italian Case in a Comparative Perspective*, in *European Journal of Crime, Criminal Law & Criminal Justice*, 17, 2009, p. 309.

the criminal police corps they belong to, and, ultimately, to the competent Ministry (e.g., the Ministry of Home Affairs for the State Police; the Ministry of Defence for the *Carabinieri*); but the Code has strengthened the functional dependence of criminal police upon Prosecutors. In particular, the Italian Code has created criminal police departments established at each Office of the Public Prosecutor of the Republic (Art. 58 CCP) and made up of personnel coming from the various law enforcement corps (*Polizia di Stato, Carabinieri, Guardia di Finanza, Corpo Forestale dello Stato*). The members of these departments are police officers, who can only play a criminal investigation activity and the Public Prosecutor can command them (Art. 59 CCP). In this way, a very close relationship is created between Public Prosecutors and policemen<sup>83</sup>.

The CCP has strengthened functional dependence also from a dynamic point of view: it establishes that the criminal police must transmit to the Public Prosecutor any *notitiae criminis* “within forty-eight hours” by means of a simple information note (Art. 347). The goal of such rule was indeed to reduce the investigative autonomy that the 1930 Code granted to the police. In the past, the law allowed the police to investigate on their own initiative and to transmit the report of the criminal offence only at the end of their inquiry by means of a detailed report with the results of the investigation.

The new Code establishes a very strict time limit expressly to allow the Public Prosecutor to immediately access the core of the investigations.

It should be said that such a provision was modified in 1992 by a decree-law that was adopted only a couple of days after the murder of Giovanni Falcone: the peremptory time limit of forty-eight hours was substituted by a softer “without delay.”<sup>84</sup> This means that the timeliness of such transmission will depend on its context: the delay will be generally short in case of serious offences – Art. 347 (3) CCP establishes that extremely serious offences require an immediate communication, even by phone or face-to-face – or when the police perform acts requiring the support of a defendant’s

83 M. CAIANIELLO – GIULIO ILLUMINATI, *The Investigative Stage of the Criminal Process in Italy*, in E. CAPE, J. HODGSON, T. PRAKKE & T. SPRONKEN, *Suspects in Europe. Procedural Rights at the Investigative Stage of the Criminal Process in the European Union*, Antwerpen – Oxford, 2007, p. 134.

84 See L. LUPARIA, *La police judiciaire dans les procès pénal italien: questions anciennes et scenario inediti*, in *Archives de Politique Criminelle*, 2011, p. 165.

lawyer (in which case the time limit of forty-eight hours still applies, as per Art. 347 (2-bis) CCP). The delay will be longer for misdemeanours requiring standard investigations. In this case, the intervention of the Public Prosecutor is postponed and the police are more autonomous.

### **3.3. Private parties**

With regard to the private parties, it may be more convenient to start the analysis from the accused. In compliance with the separation of the phases of the criminal process, the Italian Code clearly distinguishes between two statuses: during preliminary investigations, the subject who is suspected of having committed a crime is referred to as the “person undergoing investigations” (suspect) and his name is entered in the register referred to in Art. 335 (Register of *notitiae criminis*). Only after criminal prosecution is performed, that is when the trial phase begins, does the suspect become the accused (Art. 60). With regard to the accused, the Code translates some fundamental rights recognised by the Constitution and International Charters into accurate provisions.<sup>85</sup>

The most important one is surely the right to defence, which acquires a two-fold value.

On the one hand, it corresponds to the right to the assistance of a lawyer, who may be either retained (Art. 96), or appointed or appointed by the court: if no lawyer is chosen by the accused, a lawyer must be appointed by the proceeding authority (Art. 97). Contrary to reference models, the Code has thus confirmed the choice of compulsory technical defence as a form of objective guarantee.<sup>86</sup> During investigations, the suspect has the right of access to a lawyer who must be informed in advance of any que-

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85 M. CAIANIELLO – GIULIO ILLUMINATI, *The Investigative Stage of the Criminal Process in Italy*, in E. CAPE – J. HODGSON T. PRAKKEN & T. SPRONKEN, *Suspects in Europe. Procedural Rights at the Investigative Stage of the Criminal Process in the European Union*, 2007, at 138.

86 M. CAIANIELLO, *Italy*, in E. CAPE – Z. NAMORADZE – R. SMITH – T. SPRONKEN, *Effective Criminal Defence in Europe*, Antwerp Oxford – Portland, 2010, p. 395.

stioning, inspection, identification of persons and line-up (Art. 364),<sup>87</sup> non-repeatable technical ascertainment (Art. 360); the lawyer may be present without notice during criminal police searches, upon the immediate opening of the envelope authorized by the Public Prosecutor under Art. 353, par. 2, in the event of urgent checks on the scene or of objects and persons (Art. 356), as well as in case of searches or seizures carried out by the Public Prosecutor (Art. 365).

On the other hand, the right to defence corresponds to the right to silence of the accused. This is a cornerstone principle of the Italian criminal process system. It is expressly recognised by Art. 64, par. 2, let. b, which obliges the authority to inform the accused of his right to remain silent before commencing the interview.<sup>88</sup> But he is also given an anticipated safeguard through the norm on incriminating statements, whereby “if a person who is not accused or suspected makes statements before the judicial authority or the criminal police that raise suspicion of guilt against him, the proceeding authority shall interrupt the examination, warn him that, following such statements, investigations may be carried out on him, and advise him to appoint a lawyer. Such statements shall not be used against the person who has made them” (Art. 63). Moreover, if the person should have been heard from the beginning as the accused or suspected person, his statements shall not be used, even against third persons.

In addition, it must be highlighted that the Italian Code has erected a barrier against the police using the pretext of “informational interviews” to circumvent the necessity of advising a suspect of the right to counsel and the right to remain silent: Art. 350, par. 7 of Italian CCP makes even spontaneous statements to the police in the absence of counsel inadmissible in court.

Furthermore, the right to silence cannot be sacrificed for the repression of crimes. In fact, an authoritative doctrine has recognized that “the Italian Code of Cri-

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87 Reference to the identification of persons was introduced in Italy with legislative decree no. 101 of 15th September 2016, implementing Directive 2013/48/EU, of 22 October 2013, on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty. On the Directive, L.B. WINTER, *The EU Directive on the Right to Access to a Lawyer: A Critical Assessment*, in S. RUGGERI, *Human Rights in European Criminal Law*, Heidelberg, 2015, p. 111.

88 M. CAIANIELLO – GIULIO ILLUMINATI, *The Investigative Stage of the Criminal Process in Italy*, in E. CAPE – J. HODGSON T. PRAKKEN & T. SPRONKEN, *Suspects in Europe. Procedural Rights at the Investigative Stage of the Criminal Process in the European Union*, 2007, at 139.

riminal Procedure of 1988 contains the most radical protections for criminal suspects when confronted with interrogation, whether by police, public prosecutors or judicial authorities.<sup>89</sup>”

Nonetheless, the right of the accused to take part participate in the proceedings has not always been safeguarded effectively by the CCP, though expressly established in Art. 14, par. 3, let. d, International Convention on Civil and Political Rights and the Strasbourg laws.<sup>90</sup> Until the reform adopted in 2014, at the beginning of the preliminary hearing, in case of absence of the accused person, the judge had to ensure that notifications were made correctly: if this were the case and the accused was absent for causes other than a legal impediment, the judge had to declare the accused “absent by default” and proceedings against him continued even though he was not physically present.

In brief, it was presumed that by merely providing a regular notification the accused – even if he could not be found – was aware of the existence of the proceedings.

To make up for the practical possibility – consciously accepted by the system – that subjects convicted in absentia could be actually unaware of the proceedings, the Parliament introduced the subsequent remedy in article 175, par. 2, which granted a new time limit to appeal against the judgment issued in absentia. According to this mechanism, the accused person was not entitled to a new trial, but to a judgment in second instance, where he could ask for new evidence to be gathered. This system was condemned copiously by the European Court of Human Right over time, and needed a radical reform.<sup>91</sup>

By passing Law no. 67 in 2014 the legislator eliminated the historic concept of absentia. The new norms established that the service of the summons be provided in person, because it was a better way of ensuring that the accused was aware of the

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89 S. C. THAMAN, *Contributing Authors: Miranda in Comparative Law*, in *Saint Louis Law Journal*, 45, 2001, p. 592.

90 See D. HARRIS – M. O’BOYLE – E. BATES & C. BUCKLEY, *Law of the European Convention on Human Rights*, Oxford, 2009, p. 247; S. SUMMERS, *Fair Trials: The European Criminal Procedural Tradition and the European Court of Human Rights*, 2007, at 66; S. TRECHSEL, *Human Rights in Criminal Proceedings*, 2005, at 252; P. VAN DIJK – F. VAN HOOF – A. VAN RIJN & LEO ZWAAK, *Theory and Practice of the European Convention on Human Rights*, Antwerp – Oxford, 2006, p. 589.

91 ECHR, 12 Juny 2007, *Pititto v. Italy*; ECHR, 8 February 2007, *Kolkaku v. Italy*; ECHR, 1 March 2006, *Sejdovic v. Italy*; ECHR, 28 September 2006, *Hu v. Italy*; ECHR, 21 December 2006, *Zunic v. Italy*; ECHR, 18 May 2004, *Somogyi v. Italy*.

proceedings (Art. 420-bis, par. 2).

The new rule divided the old “*absentia*” into two different institutions: on the one hand, in the cases where the summons is delivered in person to the addressee or another symptomatic fact confirms that the accused is aware of the proceedings, the latter continues against the accused who is declared absent (Art. 420-bis); on the other hand, in the cases where there are no elements that allow to presume that the accused is aware of the proceeding and that he cannot be found, the proceedings is suspended (Art. 420-querter). Despite the new rule, however, proceedings may nonetheless be carried out against a subject who is actually unaware of the proceedings: in this case the legislator has introduced remedies that entail the regression of the proceeding to the first instance and readmission of the accused person’s rights in that phase.

For example, the new Art. 420-bis, par. 4, establishes that the order to proceed has to be revoked – even *ex officio* – when the accused appears before the decision is delivered. Moreover, in the cases where the accused demonstrates his guiltless unawareness of the proceedings, he regains important rights in the proceedings – after the hearing has been adjourned. Similarly, arts. 604 and 623, par. 1, set forth similar measures in the stages of the appeal or cassation trial. Finally, the Parliament has introduced the new extraordinary appellate remedy of the rescission of the final judgment available against final judgments of conviction (or dismissal with which a security measure has been applied) (Art. 625-ter, now, after Law no. 103 of 2017, Art. 629-bis).

With reference to the various rights to information recognised to the accused by the Directive 2012/13/EU, of 22 May 2012,<sup>92</sup> the Government has adopted legislative decree no. 101 of 1 July 2014, which, however, has not innovated substantially the pre-existing system, becoming a lost occasion for the implementation of obligations towards Europe. The new rule mainly establishes that the officer in charge of enforcing the order directing precautionary detention (Art. 293) or a precautionary measure (Art. 386) hands to the accused a copy of the decision together with a written notification –

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92 G.L. CANDITO, *The Influence of the Directive 2012/13/EU on the Italian System of Protection of the Right to Information in Criminal Procedures*, in S. RUGGERI, *Human rights in European Criminal Law*, 2015, p. 231; S. CRAS – LUCA DE MATTEIS, *The Directive on the Right to Information. Genesis and Short Description*, in EUCRIM, 2013 (1), p. 22; S. QUATTROCOLO, *The Right to Information in EU Legislation*, in S. RUGGERI, *Human Rights in European Criminal Law*, 2015, p. 84.



translated into a language he understands if he is not Italian mother tongue –, which informs the accused of his main prerogatives in the proceedings.

Consequently, with reference to the right to information, it must be pointed out that still today the CCP has a particularly complex set of rules.

Firstly, various letters of rights are to be sent as provided for in Art. 369 (Notice of investigation), Art. 369-bis (Notice to the suspect about his right of defence) and Art. 415-bis (Notice to the suspect on the conclusion of preliminary investigations).<sup>93</sup> Secondly, the Code establishes that these notices, the suspect's request as per Art. 335, par. 3, and the summons to the examination (Art. 375, par. 3) must include a summary description of the offence being prosecuted.

Thirdly, the Code recognises the right of access to the materials of the case: with regard to precautionary measures, the rule established in Art. 293 CCP stands out, and in particular, the obligation to file with the Clerk's Office the order directing the precautionary measure together with the request of the Public Prosecutor and the enclosed documents. In the framework of preliminary investigations and notwithstanding the adoption of provisions affecting the liberty of the subject concerned, the discovery referred to in Art. 415-bis, par. 2 plays an utterly significant part. With regard to the safeguards set out in Directive 2010/64/EU, of 20 October 2010, on the right to interpretation and translation in criminal proceedings,<sup>94</sup> Art. 143 CCP has been modified by legislative decree n. 32 del 2014. On the one side, the new paragraph 1 expressly recognises the right to having an interpreter during the trial, in the preliminary phase and – for the first time in Italian history – during the communication between suspected or accused persons and their legal counsel. On the other side, Art. 143, par. 3 recognises the right to the translation of the significant documents: among them are

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93 M. CAIANIELLO, ITALY, IN E. CAPE – Z. NAMORADZE – R. SMITH & T. SPRONKEN, *Effective Criminal Defence in Europe*, 2010, p. 390.

94 J. BRANNAN, *Raising the Standard of Language Assistance in Criminal Proceedings: From the Rights under Article 6(3) ECHR to Directive 2010/64/EU*, in *Cyprus Human Rights Law Review*, 1, 2012, p. 128; S. CRAS – L. DE MATTEIS, *The Directive on the Right to Interpretation and Translation in Criminal Proceedings. Genesis and Description*, in *EUCRIM*, 2010(4), p. 153; S. MONJEAN-DECAUDIN, *L'Union européenne consacre le droit à l'assistance linguistique dans les procédures pénales. Commentaire de la Directive relative aux droits à l'interprétation et à la traduction dans les procédures pénales*, in *Revue Trimestrielle de Droit. European*, 2011, p. 763; C. MORGAN, *The new European Directive on the rights to interpretation and translation in criminal proceedings*, in S. BRAUN & J. TAYLOR, *Videoconference and Remote Interpreting in Criminal Proceedings*, Antwerp-Oxford, 2011, p. 5; T. RAFARACI, *The Right of Defence in EU Judicial Cooperation in Criminal Matters*, in S. RUGGERI, *Transnational Inquiries and the Protection of Fundamental Rights in Criminal Proceedings*, Berlin-Heidelberg, 2013, p. 336.

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the notice of investigation (Art. 369), the notice to the suspect about his right of defence (Art. 369-bis), the decision directing personal precautionary measures (Arts. 280-290), the notice to the suspect on the conclusion of preliminary investigations (Art. 415-bis), the decree ordering preliminary hearings (Art. 418) and the decree for direct summons for trial (Art. 552), the judgment and the decree of conviction (Art. 460).

Notwithstanding the new norms, the main problem of the Italian system is whether the linguistic assistance provided is effective, as it is often assigned to subjects who lack any form of qualification:<sup>95</sup> the reform did not solve this problem. In an attempt to overcome the criticism raised by the doctrine, the Government passed a second legislative decree in 2016, no. 120, to implement Directive no. 64 and create a national list of interpreters and translators to be made available to all judicial authorities (Art. 67-bis of the Provision for the implementation of the CCP).

The issue of language assistance to the victim was sorted with the adoption of Directive 2012/29/EU, of 25 October 2012, establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA.<sup>96</sup> The right to interpretation and translation for the person affected by the offence was recognised through legislative decree 212 in 2015 which added a new provision in Article 143-bis CCP: language assistance must be provided for the translation into Italian of any document that is written in a foreign language or when the person who has to make a statement (for example the witness) does not know the Italian language.

As for the victim, the Code has confirmed the traditional distinction between the person who has suffered the crime (victim) and the person who suffers harm as a result of the offence (injured person). Such distinction has led to underestimating the

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95 M. CAIANIELLO, ITALY, IN E. CAPE, Z. NAMORADZE, R. SMITH & T. SPRONKEN, *Effective Criminal Defence in Europe*, 2010, pp. 411-412; IMPLI, *Improving Police and Legal Interpreting* (2011-2012), Final Report, 2012, p. 90.

96 See S. ALLEGREZZA, *Victim's Statute within Directive 2012/29/EU*, in L. LUPÁRIA, *Victims and Criminal Justice*, 2015, p. 5; S.R. BUCZMA, *An overview of the Law concerning protection of victims of crime in the view of the adoption of the Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime in the European Union*, in *ERA Forum*, 2013, p. 1. About the impact of the Directive on the Italian legal system, see G. ALVARO - A. D'ANDREA, *The impact of Directive 2012/29/EU on the Italian System of Protecting Victims of Crime in Criminal Proceedings*, in S. RUGGERI, *Human Rights in European Criminal Law*, 2015, p. 307.

victim's stance,<sup>97</sup> which has instead been enhanced from the year 2000 onwards particularly at the European level.<sup>98</sup> The victim's rights to information were remarkably strengthened with the adoption of Directive 2012/29/EU whereby the victim is to receive general information regarding his rights (Art. 90-bis) and specific information when the person remanded in custody, prosecuted or sentenced for criminal offences affecting the victim is released from or has escaped detention (Art. 90-ter). For the first time, the status of victim with specific protection needs during criminal proceedings was introduced.

This status is assessed by taking into account the personal characteristics of the victim, the type or nature of the crime and the circumstances of the crime (Art. 90-quater) – in line with article 22 of Directive 2012/29/EU.

The norms regarding the victim play an important role particularly during preliminary investigations: the Code recognizes to the victim the right to information (Arts. 90-bis, 90-ter, 299, 335, par. 3, 360, 369, 406, par. 3, 408, par. 2, 415-bis, 419), rights of participation, which translate into control powers over the non prosecution of the Public Prosecutor (Arts. 406, par. 3, 408, par. 2, 413),<sup>99</sup> as well as the right to urge the Public Prosecutor (Arts. 90, 394, 572) and, finally, rights of protection - particularly for victims with specific protection needs (Art. 90-quater)<sup>100</sup> - which correspond to measures of protection during the criminal trial (Arts. 282-bis, 282-ter) and measures of protection from the trial (Arts. 190-bis, 351, par. 1-ter, 362, par. 1-bis, 392, par. 1-bis, 398, par. 5-bis, 5-ter, 5-quater, 472, par. 3-bis, 498, par. 4-quater). The 2015 reform did fill some gaps in the safeguard of victims, but did not deal with a major problem that persists in the Italian system: the victim may not acquire the status of

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97 See G. TODARO, *The Italian System for the Protection of Victims of Crime: Analysis and Prospects*, in L. LUPÁRIA, *Victims and Criminal Justice. European standards and national good practices*, 2015, at 101: "with eyes focused on the guarantees to be granted to the defendant – whereby to overcome the inquisitorial drifts of the old system – very little attention has been dedicated to the injured party, in fact relegated to the margins".

98 D. ATKINSON, *EU Law in Criminal Practice*, Oxford, 2013, p. 137; R. LETSCHER – C. RIJKEN, *Rights of Victims of Crime: Tensions between an Integrated Approach and a Limited Legal Basis for Harmonisation*, in *New Journal of European Criminal Law*, 4, 2013, p. 226; S. PEERS, *EU Justice and Home Affairs Law*, Oxford, 2011, p. 744.

99 See A. NOVOKMET, *The Right of a Victim to a Review of a Decision not to Prosecute as Set out in Article 11 of Directive 2012/29/EU and an Assessment of its Transposition in Germany, Italy, France and Croatia*, in *Utrecht Law Review*, 12, 2016, p. 95.

100 See, before legislative decree no. 212 of 2015, H. BELLUTA, *Protection of Particularly Vulnerable Victims in the Italian Criminal Process*, L. LUPÁRIA, *Victims and Criminal Justice. European standards and national good practices*, 2015, p. 251.

party in the proceedings and therefore does not have the right to evidence. If the victim wishes to play an active role in proceedings he must join proceedings as a civil party (Arts. 75 *et seq.*).<sup>101</sup>

### 3.4. *Law of evidence: fundamental principles*

Evidence has been one of the issues which the reform of the Italian criminal justice system has tackled with more effectiveness. Systematically, it is worth noting that the Code dedicates an entire book on evidence – the third Book – which represents an actual microsystem that has no precedent in the codifications of the European continent.<sup>102</sup> Book III sets out rules on evidence from a static perspective and is divided into three Titles, respectively dealing with the general principles (Arts. 187-193), the single means of evidence (Testimony, Examination of the parties, Confrontation, Formal Identification, Judicial Simulation, Expert Evidence, Documentary Evidence: Arts. 194-243) and the means for obtaining evidence (Inspections, Searches, Seizures, Interceptions: Arts. 244-271).<sup>103</sup> From a dynamic perspective, the norms of Book III ought to be integrated with those contained in Book V which concerns the phase of obtaining elements of evidence (Preliminary Investigations), the possible gathering of evidence that cannot be postponed in the framework of the Special evidentiary hearing (Arts. 392-404) and the possible gathering of evidence in the preliminary hearing (Arts. 421-422). With regard to the actual phase of evidence gathering at trial, the norms are outlined in Book VII (Trial). In this paper, it is worth mentioning some of the most innovative choices made by the Code with regard to three profiles: firstly, the distribution of evidentiary powers; secondly, evidence gathering at trial and, finally, standard of proof.

With reference to the first profile, it is worth mentioning that – unlike the former criminal procedure model – the Code entrusts the parties with evidentiary

101 See A. DI AMATO, *Criminal Law in Italy*, 2011, p. 195; W. T. PIZZI – L. MARAFIOTTI, *The New Italian Code of Criminal Procedure: The Difficulties of Building an Adversarial Trial System on a Civil Law Foundation*, 1992, at 14.

102 E. AMODIO, *The accusatorial system lost and regained: reforming criminal procedure in Italy*, 2004, at 491.

103 A. PERRODET, *The Italian System*, in M. DELMAS-MARTY & J. R. SPENCER, *European Criminal Procedures*, 2005, at 377; F. RUGGIERI – S. MARCOLINI, *Italy*, in K. LIGETI, *Toward a Prosecutor for the European Union*, Oxford and Portland, I, 2012, p. 370.

power,<sup>104</sup> in all the stages of the fact-finding process. With regard to the search for sources of evidence, the Italian system recognises to the public and private parties wide investigative powers. Specifically, the Public Prosecutor has the power-duty to perform preliminary investigations with the criminal police. The suspect's and victim's lawyers have the power to perform defence investigations (Art. 327-bis): Title VI-bis of Book V governs the defence investigations that are aimed at finding sources of evidence to be taken to trial or to be directly used as evidence in special proceedings.

With regard to the phase of admission of evidence, Article 190 states that “evidence shall be admitted upon request of a party. The judge shall decide without delay by issuing an order, excluding any evidence that is not allowed by law or manifestly superfluous or irrelevant”.

Finally, with regard to the gathering of evidence, the Italian CCP has introduced the tool of cross examination and governs the various stages of the gathering of oral evidence (Arts. 498-499). Nonetheless, the Italian trial is not entirely party-controlled: there are some significant departures from a purely adversarial approach to fact-finding.<sup>105</sup>

The Code also includes some cases in which evidence gathering is performed on the initiative of the judge (i.e., Art. 195, par. 3; Art. 224), among which the most prominent hypothesis is that of Art. 507, which reads “upon completion of the gathering of evidence, the judge may order, also ex officio, the admission of new means of evidence, if absolutely necessary”. It is a controversial and criticized norm,<sup>106</sup> which was firstly ideologically interpreted<sup>107</sup> and, more recently, it has been pragmatically viewed as a tool to guarantee the completeness of criminal ascertainties.<sup>108</sup> The second funda-

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104 E. GRANDE, *Italian Criminal Justice: Borrowing and Resistance*, 2000, at 244; W. T. PIZZI – M. MONTAGNA, *The Battle to Establish an Adversarial Trial System in Italy*, 2004, at 435.

105 E. GRANDE, *Italian Criminal Justice: Borrowing and Resistance*, 2000, at 245; J. HERRMANN, *Models for the Reform of the Criminal Trial in Eastern Europe: A Comparative Perspective*, in *Saint Louis-Warsaw Transatlantic Law Journal*, 1996, pp. 127-137.

106 M. PANZAVOLTA, *Reforms and Counter-Reforms in the Italian Struggle for an Accusatorial Criminal Law*, 2005, at 605.

107 Corte costituzionale, 26 March 1993, n. 111 (an English version is published in S. C. THAMAN, *Comparative Criminal Procedure. A casebook approach*, 2008, p. 180). See also Corte di Cassazione, Sez. Un., 6 November 1992, Martin, in *Cassazione penale*, 1993, p. 280. See also L. MARAFIOTTI, *Italian Criminal Procedure: A System Caught Between Two Traditions*, in J. JACKSON – M. LANGER & P. TILLERS, *Crime, Procedure and Evidence in Comparative and International Context. Essays in Honour of Professor Mirjan Damaška*, 2008, at 92-93.

108 Corte di Cassazione, Sez. Un., 17 October 2006, Greco, in *Cassazione penale*, 2007, p. 952.

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mental principle underlying the Italian evidentiary system is the golden rule – sculpted in Art. 111, par. 4, Const. – which sets forth that, in criminal cases, “evidence should be heard in front of the parties and each party should be able to offer contrary evidence and to challenge opposing evidence”. In addition, the reformed Art. 111 of the Italian Constitution establishes a confrontation clause:<sup>109</sup> on the one hand, paragraph 3 copies down the rule contained in Art. 6, par. 3, let. d, E.C.H.R. and recognises that the person charged with a criminal offence has the possibility, before the judge, to examine or to have examined the witnesses against him; on the other hand, paragraph 4 clearly sets out that “the accused cannot be proven guilty upon declarations of anyone who willingly avoided being examined by the accused or by his lawyer”.

These constitutional principles are implemented by different norms of the Code. Of primary importance is the exclusionary rule outlined in Art. 526, which established that “for the purposes of deliberation, the judge shall not use evidence other than that lawfully gathered during the trial”. This rule, thus, leads to understand that out-of-court statements may not be used as substantive evidence, for the truth of the matter asserted. The prior statement of a possible future witness may be invoked only to challenge the witness’s credibility (Art. 500, par. 2).

In order to ensure that the trial judge approaches the case as a *tabula rasa* and to create a solid barrier between investigations and trial, the Italian Code established a “double dossier-system.”<sup>110</sup> On conclusion of a preliminary hearing with a committal to trial, two dossiers are created. On one hand, the trial dossier is formed (Art. 431) which includes all the documents the trial judge may have knowledge of, i.e., those documents the trial judge may read and use as proper grounds for the decision. This dossier contains only the documents that are strictly provided for by Art. 431: it is mainly evidence which is *ab origine* impossible to reproduce in court (let. b-c: i.e., interceptions of communication; searches; seizures; crime scene analysis provided for by Art. 354; non-repeatable technical ascertainties provided for by Art. 354); the

109 S. MAFFEI, *The Right to Confrontation in Europe. Absent, Anonymous and Vulnerable Witnesses*, Groningen, 2012.

110 E. GRANDE, *Dances of Justice: Tango and Rumba in Comparative Criminal Procedure*, in *Global Jurist*, 9, 2009, p. 10; G. ILLUMINATI, *The Frustrated Turn to Adversarial Procedure in Italy (Italian Criminal Procedure Code of 1988)*, 2005, at 572; M. PANZAVOLTA, *Reforms and Counter-Reforms in the Italian Struggle for an Accusatorial Criminal Law System*, 2005, at 586.

minutes of the evidence gathered during the special evidentiary hearing (let. e); evidence gathered abroad (let. d and f); the general certificate of the criminal record of the accused (let. g); the corpus delicti (let. h). On the other hand, the investigative dossier is created (Art. 433), which contains all the documents referring to actions carried out during the preliminary phase that are not filed in the first dossier.

The judge does not have access to the investigative dossier and the parties cannot take the initiative of reading at trial any prior statements or other investigative records included in this dossier (Art. 514).

The basic rule whereby the judge shall not use evidence other than that lawfully gathered during the trial has some exceptions which can be found in Art. 111, par. 5, Const. and regard the consent of the accused, an objective impossibility to gather evidence during the trial or a proved unlawful conduct. The Code provides for an accurate implementation of this hypothesis.

A first hypothesis forming an exception to the principle of adversarial adjudication is that in which the accused gives his consent to using the out-of-court statement as substantive evidence. This exception to the hearsay rule is clearly found in the Code which establishes that “the parties may agree to gather in the trial dossier documents contained in the investigative dossier, as well as the records of defence investigative activities” (Art. 431, par. 2); secondly, Art. 500, par. 7 sets out that “upon agreement of the parties, the statements contained in the investigative dossier that had been previously made by the witness shall be included in the trial dossier” and, therefore, shall be used as proper ground for decision.

The second exception to the principle of adversarial adjudication coincides with the objective impossibility to gather evidence at trial. If this impossibility is caused by the evidence itself (as in the case of interceptions), as already mentioned, the report will be included in the trial dossier right from the beginning (Art. 431, let. b-c) and may be read in line with Art. 511. If, however, the impossibility to gather evidence is due to unforeseeable circumstances (for example the witness suddenly dies because of a car accident), Art. 512 establishes that the out-of-court statement may be read and that it may be used as substantive evidence. According to a conventionally oriented

interpretation<sup>111</sup>, the Supreme Court of Cassation has specified that the untested declaration cannot constitute the sole or decisive evidence against the accused<sup>112</sup>: it must be corroborated by other evidence.

If the impossibility to gather evidence at trial is not related to the evidence but it was equally foreseeable (e.g., because the witness was terminally ill), the testimony shall be taken, from the beginning, in the special evidentiary hearing and the report shall be included, from the beginning, in the trial dossier (ex Art. 431, let. e).

The third exception to the principle of adversarial adjudication is related to a proved unlawful conduct by a third against the witness (e.g., the witness was threatened). Art. 500, par. 4, in this respect, establishes that “if, also on the basis of the circumstances emerged at the trial, there are concrete elements to believe that the witness has been subject to violence, threat, an offer or promise of money or other benefits to prevent him from testifying or to force him to give a false testimony, the statements contained in the investigative dossier that had been previously made by the witness shall be included in the trial dossier.”

In any case, whether evidence has been taken during the trial or, in the above mentioned case, it is an out-of-court statement, it must be lawfully gathered. It is worth noting that the Italian Code of Criminal Procedure has introduced what appears to be “an ironclad exclusionary rule.”<sup>113</sup> Art. 191 establishes that “evidence gathered in violation of the prohibitions set by law shall not be used”. Surely, the norm has not been interpreted extensively – the Supreme Court has rejected the doctrine known as the “fruit of the poisonous tree” with regard to the relation between illegally performed search and evidence subsequently seized<sup>114</sup> –, but, still, it is one of the most important innovations of the Italian evidentiary system which aims at guaranteeing the principle of legality in evidence gathering.

111 See ECHR, 18 May 2010, *Ogaristi v. Italy*; ECHR, 8 February 2007, *Kollcaku v. Italy*; ECHR, 19 October 2006, *Majadallah v. Italy*; ECHR, 5 December 2002, *Craxi v. Italy*; ECHR, 27 February 2001, *Lucà v. Italy*; ECHR, 14 December 1999, *A.M. v. Italy*; ECHR, 7 August 1996, *Ferrantelli and Santangelo v. Italy*.

112 Corte di Cassazione, Sez. Un., 14 July 2011, n. 27918.

113 See S. C. THAMAN, *Contributing Authors: Miranda in Comparative Law*, 2001, at 604; S. C. THAMAN, “Fruits of the Poisonous Tree” in *Comparative Law*, 2010, at 375.

114 See Corte di Cassazione, Sez. Un., 27 March 1996, Sala, in *Cassazione Penale*, 1996, p. 3268. See C. M. BRADLEY, *Symposium on the Fortieth Anniversary of Mapp v. Ohio: Mapp Goes Abroad*, in *Case Western Reserve Law Review*, 52, 2001, pp. 375-393.



### **3.5. The introduction of the standard of “Proof Beyond a Reasonable Doubt”**

The last highly innovative profile of the evidentiary system introduced in the Italian Code of Criminal Procedure concerns standards of proof. In 1988, the CCP adopted some standards for the application of precautionary measures (Art. 273: “serious indications of guilt”), the authorization to interceptions (Art. 267: “serious indications for suspecting that an offence has been committed”), the committal to trial (Art. 425: “suitability of the evidence to sustain the prosecution before the trial judge”).

With regard to the final decision, the CCP instead has solely eliminated the acquittal for insufficient evidence, which was inherited from the inquisitorial system based on the presumption of guilt. The Code only established that “the judge shall deliver a judgment of acquittal also in case of insufficient, contradictory or lacking proof that the criminal act occurred, the accused committed it, the act is deemed an offence by law, the offence was committed by a person with mental capacity.” It was not clear, however, which was the required standard to convict a person and therefore Art. 530 was considered one of the least successful provisions of the 1988 reform. Despite this failure, since the Nineties the Supreme Court has made reference to the beyond-any-reasonable-doubt standard (B.A.R.D.): firstly to differentiate the standard required for conviction from that established to adopt a precautionary measure; then to clarify the evidentiary standard with regard to the issue of medical responsibility.

This was the situation until, in a historic decision taken by the Joint Chambers in 2002, the B.A.R.D. standard was declared to be fundamental as standard of proof for conviction<sup>115</sup>. Hundreds of decisions followed which used the formula in the way indicated by the Joint Chambers. In 2006, Law no. 46 embodied this evolution and changed Art. 533, par. 1, by introducing a norm whereby “the judge shall deliver a judgment of conviction if the accused is proven to be guilty of the alleged offence beyond a reasonable doubt.”<sup>116</sup> This change has represented a step towards completion, from an accusatorial viewpoint, of the Italian criminal justice system.

As it is known, the literature has underlined the ambiguity of the B.A.R.D.

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115 Corte di Cassazione, Sez. Un., 10 July 2002, *Franzese*, in *Cass. pen.*, 2003, p. 1175.

116 See F. PICINALI, *Is “Proof Beyond a Reasonable Doubt” a Self-Evident Concept? Considering the U.S. and the Italian Legal Cultures towards the Understanding of the Standard of Persuasion in Criminal Cases*, in *Global Jurist*, 9, 2009, p. 9.

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standard.<sup>117</sup>

Nonetheless, the Italian legislature has transposed it in a clear manner. Unsurprisingly, the formula fits in a criminal system that is characterised by the presence of a professional judge and, mostly, by an obligation to motivate the judgment, which is ratified by the Constitution<sup>118</sup> and is regulated in detail by the Code.<sup>119</sup> Hence, the B.A.R.D. standard in the Italian system<sup>120</sup> does not acquire that subjective and intuitive value that it has in the American one, but rather it is considered an objective criterion.

It is a rule that imposes on the judge to accept the accusatorial hypothesis only and exclusively if the evidence that has been legitimately gathered at the trial stage is such that it can dispel either any internal doubts (self-contradiction of the prosecution's reconstruction or its explicative inability) or any doubts external to the evidence (the existence of an alternative hypothesis based on rationality and practical plausibility).<sup>121</sup>

### 3.6. *An organic and innovative regulation: precautionary measures*

One of the most important innovations of the Italian Code of Criminal Procedure is represented by Book IV, which deals with precautionary measures. It is a proper “code in the code” which contains a comprehensive set of rules on the measures that

117 See L. LAUDAN, *Truth, Error, and Criminal Law. An Essay in Legal Epistemology*, Cambridge, 2006, at 30: “the concept of proving guilt beyond a reasonable doubt (...) – the only accepted, explicit yardstick for reaching a just verdict in a criminal trial – is obscure, incoherent, and muddled”; and, also “Beyond reasonable doubt” has become a mantra rather than the well-defined standard of proof that it once was” (ivi, p. 54). See also T. V. MULRINE, *Reasonable Doubt: How in the World is it Defined?*, *American University Journal of International Law & Policy*, 12, 1997, pp. 195-210.

118 According to Art. 111, par. 6, It. Const. “reasons must be given for all judicial decisions”.

119 Not only does the Code underline the obligation of motivation in Art. 125, but it establishes in an analytical way to support the motivation: on the one hand, Art. 192 states “the judge shall evaluate evidence by specifying the results reached and the criteria adopted in the grounds of the judgment”; on the other hand, Art. 546, let. e, states that the judgment shall contain “a brief description of the de facto and de jure grounds upon which the decision relies, as well as the indication of the evidence on which the decision is based and the exposition of the reasons for which the judge believes that rebuttal evidence is unreliable”. Finally, the Code establishes the possibility to propose to appeal to the Court of Cassation if “the grounds of the judgment are lacking, contradictory or manifestly illogical” (Art. 606, let. e).

120 See D. ACCATINO, *Certezas, dudas y propuestas en torno al estándar de la prueba penal*, in *Revista de Derecho de la Pontificia Universidad Católica de Valparaíso*, 37, 2011, p. 507; A. RYAN, *Towards a System of European Criminal Justice. The problem of admissibility of evidence*, Abingdon, Rutledge, 2014, at 229; M. TARUFFO, *Conocimiento científico y estándares de prueba judicial*, in *Boletín Mexicano de Derecho Comparado*, 38, 2005, p. 1305; R. W. WRIGHT, *Proving Causation: Probability versus Belief*, in R. GOLDBERG, *Perspectives on Causation*, Oxford and Portland, 2011, p. 198.

121 See *ex multis* Corte di Cassazione, Sez. I, 21 October 2014, n. 48260; Corte di Cassazione, Sez. I, 18 April 2013, n. 23882; Corte di Cassazione, Sez. I, 8 November 2012, n. 41466; Corte di Cassazione, Sez. I, 26 April 2012, n. 1190.

may be adopted during the criminal process to neutralise a *periculum in mora*.

Particularly relevant is Title I, which sets the rules for the personal measures, that is those measures that are aimed at preventing that the accused, if released, either interferes with the course of justice (Art. 274, let. a), flees (Art. 274, let. b),<sup>122</sup> or commits a serious offence (Art. 274, let. c). They are applicable only where there are serious indications of guilt (Art. 273) related to serious offences (Art. 280).<sup>123</sup> The norms of Title I are particularly important because they aim at implementing some fundamental constitutional principles (Arts. 13, 27, par. 2),<sup>124</sup> which may be summed up in what the Constitutional Court defined the principle of the “least necessary sacrifice” for the personal liberty of the accused.<sup>125</sup> Under this principle, the restriction of the personal liberty of a suspect or an accused presumed innocent during the criminal proceedings must be applied within the minimum limits necessary to meet the precautionary need that ought to be satisfied in the specific case. For the fulfilment of this rule, the Code sets forth a wide range of alternative measures of increasing severity in relation to their incidence on personal liberty.<sup>126</sup>

Secondly, the CCP has eliminated the cases of compulsory detention and has given a discretionary power to the judge in the choice of measure to be applied. The Public Prosecutor requests the application of a measure and the judge, once it has assessed the preconditions, must choose the most adequate measure in line with the precautionary needs to be satisfied in the specific case (adequacy test) and the most proportionate to both the seriousness of the offence and the sentence that has been or shall be imposed (proportionality test) (Art. 275).

One of the various changes made to the norms of the Code since it came

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122 Clearly, they are the *pericula libertatis* referred to in par. 7 of the *Recommendation Rec (2006)13 of the Committee of Ministers to member states on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse*.

123 P. LAMBERTINA, *Italy*, in A. VAN KALMTHOUT, *Pre-Trial Detention in the European Union. An Analysis of Minimum Standards in Pre-trial Detention and the grounds for Regular Review in the Member States of the EU*, Oisterwijk, p. 552.

124 G. DI CHIARA, *Italy*, in S. RUGGERI, *Liberty and Security in Europe. A Comparative Analysis of Pre-trial Precautionary Measures in Criminal Proceedings*, 2012, at 123-125

125 Corte Costituzionale, 21 July 2010, n. 265.

126 Prohibition to leave the country (Art. 281), Obligation to appear before the criminal police (Art. 282), Injunction to stay away from the family home (Art. 282-bis), Injunction to stay away from the places attended by the victim (Art. 282-ter), Prohibition and obligation of abode (Art. 283), House arrest (Art. 284), Precautionary detention in prison (Art. 285).

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into force was the modification by Parliament of the second part of Art. 275, Par. 3, introducing a regime of semi-obligation for a heterogeneous series of offences: when several judgments by the Constitutional Court declared this mechanism partially illegitimate,<sup>127</sup> Law no. 47 of 16th April 2015 maintained it only for offences related to mafia-type activities, and subversive and terrorist associations.

Regarding the procedure, the measures are applied after a highly structured order is issued *inaudita altera parte* (Art. 292): after enforcement, a “discovery” of the elements of evidence submitted by the Public Prosecutor takes place, following the request which is filed with the Registry of the court that has issued the order (Art. 293, par. 3). Pursuant to Art. 5, par. 3, ECHR, the Italian CCP establishes that, in the five days following enforcement, the person subject to a precautionary detention in prison must be questioned (Art. 294): if the court does not question the detained person within the time limit, the precautionary detention immediately ceases to be effective.

Moreover, within ten days of the enforcement or service of the order directing a coercive measure, the accused may submit a request for the re-examination, even on the merits, of the decision (Art. 309): this is an unprecedented appeal remedy in Italian tradition, which recognizes to anyone deprived of his liberty the right set forth in Art. 5, par. 4, ECHR. The re-examination shall take place within a few days of the request by the accused (Art. 309, par. 9); otherwise, the order ceases to be effective and shall not be renewed, unless there are exceptional grounds for precautionary measures that must be explicitly specified.

With regard to the duration of precautionary measures, the Constitution imposes a rigid model of time limits (Art. 13, par. 5).<sup>128</sup> To implement this model, Art. 303 sets forth a highly complicated system of maximum duration of precautionary detention, including some elements of flexibility.<sup>129</sup>

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127 Corte Costituzionale, 25 February 2015, n. 48; Corte Costituzionale, 23 July 2013, n. 232; Corte Costituzionale, 18 July 2013, n. 213; Corte Costituzionale, 12 February 2013, n. 57; Corte Costituzionale, 3 May 2012, n. 110; Corte Costituzionale, 22 July 2011, n. 231; Corte Costituzionale, 19 April 2011, n. 164; Corte Costituzionale, 21 July 2010, n. 265.

128 “The Law shall establish the maximum duration of preventive detention”. On the Constitutional model of rigid time limits, see M. GIALUZ – P. SPAGNOLO, *Reasonable Length of Pre-trial Detention: Rigid or Flexible Time Limits? A study on Italy from a European Perspective*, 2013, at 226.

129 M. GIALUZ – P. SPAGNOLO, *Reasonable Length of Pre-trial Detention: Rigid or Flexible Time Limits? A study on Italy from a European Perspective*, 2013, at 228.

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Another significant innovation of the Italian CCP is the introduction of a mechanism of compensation for unfair detention. For the first time, the Italian procedural system recognises the right to compensation not only in the event of wrongful conviction (Art. 643-645), but also in the event of wrongful detention during proceedings.

It must indeed be noted how this right is recognised more extensively than Art. 5, par. 5, ECHR. The right to compensation is in fact recognized both in the event of unlawful detention – that is when it is ascertained, by final decision, that the decision ordering the measure was issued or maintained although the conditions of applicability provided for in Arts. 273 and 280 were not met (Art. 314, par. 2) – and in the event of unjustified detention: Art. 314, par. 1, establishes the right to compensation if the accused is dismissed by a final judgment because the criminal act did not occur, or he did not commit it or the act does not constitute an offence or it is not deemed an offence by law.<sup>130</sup> In conclusion, the system of precautionary measures appears to be rich in guarantees for the accused: preconditions are defined clearly and the guarantees provided during the trial extend beyond what is established by the ECHR. Nonetheless, the Italian practice resorts widely to precautionary detention,<sup>131</sup> mainly due to the inefficiency of the Italian criminal process. The unusual length of the trial and the unreasonable system of the statute of limitations, in fact, cause the judges to abuse of precautionary detention in prison not as a measure to neutralize a *periculum libertatis*, but rather as an improper sanction. And this corresponds to disowning that precautionary nature that is the fundamental element of the measures set forth in Book IV.

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130 From this viewpoint, the Italian jurisdiction seems to offer more guarantees compared to ECHR, which excludes the right to compensation in the case of *unjustified detention*: see S. TRECHSEL, *Human Rights in Criminal Proceedings*, 2005, at 497.

131 According to the statistics annexed to the Green Paper Strengthening mutual trust in the European judicial area - A Green Paper on the application of EU criminal justice legislation in the field of detention, COM(2011)327, final, eur-lex.europa.eu/procedure/EN/200571, the percentage of pre-trial detainees in Italy amounted to 43.6%, on a European average of 24.7%. It is worth pointing out that the statistics must be read taking into account that in Italy detention after a first-instance conviction is also a precautionary detention. As at 31 May 2018, detainees awaiting the first trial amounted to 16.5% of the total of detainees in Italian prisons: appellants were 8.6% and detainees awaiting trial in cassation amounted to 6.3% ([https://www.giustizia.it/giustizia/it/mg\\_1\\_14\\_1.page?contentId=SST119037&previousPage=mg\\_1\\_14](https://www.giustizia.it/giustizia/it/mg_1_14_1.page?contentId=SST119037&previousPage=mg_1_14)). For more updated statistics, see *Council of Europe Annual Penal Statistics SPACE I – Prison Populations*, <http://wp.unil.ch/space/files/2018/03/SPACE-I-2016-Final-Report-180315.pdf>, at 74.

### ***3.7. A pragmatic approach: special proceedings as an alternative to the ordinary process. The ordinary first-instance criminal process is divided into three phases***

The first comprises preliminary investigations, which have a limited duration (six months or twelve months for more serious offences, extendable to eighteen months or one year: Arts. 405-407). They begin with the registration of the *notitia criminis* in the register provided for in Art. 335 and finish with the request for committal to trial (Art. 416), filed by the Public Prosecutor if no request to drop the case is to be filed under Arts. 408 and 411. The groundlessness of the *notitia criminis* is the most important instance for discontinuing the case, to which decree no. 28 of 16th March 2015 has recently added the triviality of the alleged offence.

The second phase is the preliminary hearing, which is regulated by Title IX of Book IV<sup>132</sup>: the preliminary hearing can end with a judgment of no grounds to proceed (Art. 425) or with a decree for committal to trial (Art. 429). If the latter is issued, the third phase starts which is represented by the trial that is regulated by Book VII.

This is the ordinary procedure followed in proceedings before the Tribunal sitting as collegial court and the Court of Assizes. It is evident that this complex procedure cannot be guaranteed for every criminal case. In order to ensure that an efficient judicial response is given within reasonable times the Italian Code has introduced some streamlined mechanisms. A distinction is made between differentiated proceedings and special proceedings.

The former refer to criminal proceedings for less serious offences. The Code regulates one in Book VIII for proceedings before the single judge Tribunal: in cases of misdemeanours or crimes punishable with the penalty of imprisonment not exceeding a maximum term of four years, the preliminary hearing is excluded and the Public Prosecutor shall prosecute by means of a direct summons for trial (Art. 550). It is worth remembering that petty offences dealt with by the Justice of the Peace are regulated by a smoother procedure set forth in D.Lgs. 274/2000.

Special proceedings may instead be applied to serious offences. They are regu-

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132 For more details on the three aims of the preliminary hearing, see E. GRANDE, *Italian Criminal Justice: Borrowing and Resistance*, 2000, at 241.

lated in Book VI and they do not feature at least one phase of the ordinary process. On one hand, the Direct trial (Arts. 449 *et seq.*) and the Immediate trial (Arts. 453 *et seq.*) skip the preliminary hearing phase and lead directly to trial, because they are based on clear and strong evidence (arrest in flagrante delicto or confession for Direct trial; indisputable evidence or precautionary detention for Immediate trial). On the other hand, the Summary trial (Arts. 438 *et seq.*) and the Application of punishment upon request of the parties (Arts. 444 *et seq.*) do not envisage the trial, while proceedings by decree (Arts. 459 *et seq.*) skip both the preliminary hearing and the trial, as long as the Public Prosecutor requests that the decree be issued during preliminary investigations if he holds that only a financial penalty should be applied.

Undoubtedly, the most innovative and significant mechanisms, from a systematic point of view, are the Summary trial and the Application of punishment upon request of the parties. They are trial-avoidance devices based on the enhancement of the accused person's consent. They are justified by the already mentioned exception set forth in Art. 111, par. 5, Const., which allows the accused to waive the trial. With a pragmatic approach, the Code provides a premium in order to encourage the accused to provide his consent and waive the constitutional right to a public trial. In the case of the Summary trial, the accused requests, during the preliminary hearing (Art. 438), to be judged on the evidence unilaterally gathered during preliminary investigations and defence investigations (Art. 442).<sup>133</sup> The "beyond-any-reasonable-doubt" rule is applied and, in case of conviction, the official concession is the reduction of the sentence by one third (Art. 442).

With regard to the Application of punishment upon request of the parties

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133 L. MARAFIOTI, *Italian Criminal Procedure: A System Caught Between Two Traditions*, in J. JACKSON – M. LANGER & P. TILLERS, *Crime, Procedure and Evidence in Comparative and International Context. Essays in Honour of Professor Mirjan Damaška*, 2008, at 90.

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(so-called patteggiamento), it is an original form of negotiated justice.<sup>134</sup> During preliminary investigations (Art. 447) or at the preliminary hearing (Art. 446) or at the first hearing before a single judge (Arts. 555-556), the Public Prosecutor and the accused person may request the judge to apply a sentence they have agreed on. The judge's task is to carry out a two-fold verification: on the one hand, he must rule out that the accused person's innocence has been positively proven; on the other, he must verify that the legal definition of the criminal act is correct,<sup>135</sup> the application and the comparison of the circumstances adduced by the parties are proper and the requested sentence is adequate<sup>136</sup>. The negotiated judgment issued upon request of the parties shall be considered equivalent to a conviction. No appellate remedy may be invoked against the negotiated judgment, and an appeal to the Court of Cassation is admissible only in certain cases (Art. 448, paragraph 2-bis).

It must be pointed out that the original text of the Code provided that the accused and the Public Prosecutor may request the application of a sentence of imprisonment where, considering all of the circumstances and the one-third reduction provided by Art. 444, the final punishment would not exceed two years. In order to widen the scope of application of the mechanism of sentencing at the parties' request, the above-mentioned limit has been extended to five years by Law no. 134 of 2003: today scholars talk of a wider patteggiamento (large plea bargaining) and of a traditional

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134 On the Italian model of negotiated justice, see H.J. ALBRECHT, *Settlements out of Court: A Comparative Study of European Criminal Justice Systems, in South African Law Commission, Research Paper*, 19, Pretoria, 2001, p. 38; V. FANCHIOTTI, *Negotiated Justice in Italy*, in *Arch. Iur. Cracoviense*, 30-31, 2000, p. 31; M. LANGER, *From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure*, 2010; Y. MA, *Prosecutorial Discretion and Plea Bargaining in the United States, France, Germany, and Italy: a Comparative Perspective*, in *International Criminal Justice Review*, 2002, p. 46; S. MAFFEI, *Negotiations "on Evidence" and Negotiations "on Sentence". Adversarial Experiments in Italian Criminal Procedure*, in *Int. Crim. Just.*, 2, 2004, p. 1052; J.J. MILLER, *Plea Bargaining and its Analogues under the New Italian Criminal Procedure Code and in the United States: Towards a New Understanding of Comparative Criminal Procedure*, 1989-1990, p. 215; W. T. PIZZI – M. MONTAGNA, *The Battle to Establish an Adversarial Trial System in Italy*, 2004, p. 437; R.A. VAN CLEAVE, *An Offer You Can't Refuse? Punishment Without Trial in Italy and the United States: the Search for Truth and Efficient Criminal Justice System*, 1997, at 430; D. VICOLI, *Critical Aspects on the Italian Features Concerning "Negotiated Justice"*, in M. CAIANIELLO – J. S. HODGSON, *Discretionary Criminal Justice in a Comparative Context*, 2015, p. 141.

135 No form of charge bargaining is indeed admitted (R. LAWSON MACK, *It's Broke So Let's Fix It: Using a Quasi-Inquisitorial Approach to Limit the Impact of Bias in the American Criminal Justice System*, 1996, p. 88): this is forbidden by the compulsory criminal prosecution principle (Art. 112 of Italian Const.).

136 On the role of the judge and also on the issues of constitutional compatibility [constitutional challenges] of the device, see S. MAFFEI, S. MAFFEI, *Negotiations "on Evidence" and Negotiations "on Sentence". Adversarial Experiments in Italian Criminal Procedure*, 2004, at 1053; R.A. VAN CLEAVE, *An Offer You Can't Refuse? Punishment Without Trial In Italy and the United States: The Search for Truth and an Efficient Criminal Justice System*, 1997, at 445-449.



patteggiamento (traditional plea bargaining). Despite its peculiarity, the patteggiamento has been immediately recognised as being one of the most significant expressions of negotiated justice and has become “one of the main models for guilty plea mechanisms which have been introduced in Europe.<sup>137</sup>” Nationally, it has been one of the most controversial mechanisms in the first thirty years of application of the Code. It has, in fact, led to an endless series of decisions issued by the Joint Chambers of the Supreme Court and the Constitutional Court which were to find solutions to the crisis of “rejection” that was gradually produced by the transplant into the Italian legal culture of an institution that did not belong to that culture: an authoritative source has written that “despite ingenuous attempts of Italian lawyers to reconcile the guilty plea with traditional domestic institutions, it stands apart from them as a *corpus alienum*.<sup>138</sup>” Actually, it must be acknowledged that – thanks to the work of the Supreme Courts – the patteggiamento has always been saved. Indeed, it has been considered an essential tool to guarantee a minimum of efficiency in an overburdened criminal justice system.

With a view to encouraging the application of the agreed punishment, the CCP sets forth a very wide range of official concessions (Arts. 444-445). Despite the numerous incentives and the wider scope of application obtained with the 2003 modification, the patteggiamento has not even remotely achieved the American percentages: in the 2001-2010 period, this procedure was applied by the preliminary investigation judge and the preliminary hearing judge to settle 13.6% of proceedings; by the single judge Tribunal to settle 17.3% of proceedings. These results depend mainly on the overall inefficiency of the criminal justice system and on its rate of indulgency. Statistical analyses have shown that the accused gives his consent to bargaining especially when he perceives that it may be the sole alternative to a sentence to certain or very likely imprisonment.<sup>139</sup> Another hindrance to the ample application of alternative procedures based on the accused person’s consent is the statute of limitations. There is indeed an

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137 S. C. THAMAN, *Plea-Bargaining, Negotiating Confessions and Consensual Resolution of Criminal Cases*.

138 M. R. DAMAŠKA, *Negotiated Justice in International Criminal Courts*, in *International Journal of Criminal Justice*, 2, 2004, pp. 1018-1026.

139 A clear confirmation is given by the rate of bargaining concluded after the Direct trial: when the accused is taken before the direct trial judge (because he was arrested in *flagrante delicto* or because he confessed), the bargaining is concluded in 54.8% of cases (average of the years 2001-2010).

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inverse correlation between the rate of application of patteggiamento and the rate of application of the statute of limitations.

One more factor underlying the partial failure of the Italian version of negotiated justice is the institutional structure of the Public Prosecutor's office and the lack of actual incentives for Public Prosecutors.<sup>140</sup>

These factors related to substantial law, the inefficiency of the system as a whole and the institutional framework within which the Public Prosecutor works have prevented consensual practices from providing a contribution to deflation similar to that of plea bargaining in Anglo-Saxon systems. The fact remains that their function is nonetheless essential in the Italian criminal justice system. In fact, in 2014, the Italian Parliament introduced a new form of probation, called "*sospensione con messa alla prova*" (Arts. 464-bis-464-novies).

This special proceeding was not introduced by the legislature only for deflation, but also to ensure a more rapid social reintegration to those accused of minor offences. Indeed, the test calls for numerous obligations to be met by the requesting party: behavior that eliminates damaging or dangerous consequences deriving from the offence; compensation of damage; entrustment of the accused to the social services to carry out a programme and perform socially-useful work (Art. 168-bis, par. 2 and 3).

The new proceedings can be ascribed to a special procedure and focuses on the will of the accused person. The request of a probation must be submitted within the time limit set to formulate the conclusions of the preliminary hearing (Art. 464-bis) or until the declaration of opening of the first instance trial with direct summons for trial (Art. 464-bis, par. 2). The request may be submitted also during preliminary investigations.

The request must include the treatment programme, set together with the External Criminal Enforcement Office. In the event where the programme has not been drawn up, submission of the request is sufficient.

The court orders the suspension of the proceedings with probation, if the sub-

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140 For an economic perspective on Law, see, N. BOARI – G. FIORENTINI, *An economic analysis of plea bargaining: the incentives of the parties in a mixed penal system*, in *International Review of Law and Economics*, 21, 2001, pp. 213-218.

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mitted treatment programme is deemed suitable and if it is believed that the accused will not commit other offences (Art. 464-quater, par. 3).

In the order establishing the suspension of the proceedings, the judge sets the time within which the provisions and obligations regarding the redeeming behavior must be fulfilled (Art. 464-quater, par. 5).

During suspension, the court acquires, if requested by the party and in the ways set for the trial, non-deferrable evidence and evidence that may lead to the dismissal of the accused person (Art. 464-sexies).

Upon conclusion of the period of suspension of the proceedings with test, “the court shall declare by judgment that the offence extinguished if, considering the behaviour of the accused and his compliance with the established rules, it believes probation has been successful” (Art. 464-septies). If the test has a negative outcome, the judge orders that the proceedings recommence. Finally, the so-called “*Orlando Reform*” (Law no. 103 of 2017) has re-introduced, in a new Art. 599-bis, the “Agreement also with waiver of the arguments for appeal”. It is particular form of negotiated justice, in force in the original version of the Code of 1988, that was abrogated in 2008.

### ***3.8. A “vertical” criminal justice system: the hypertrophic system of appellate remedies***

The judgment issued at the end of the first-instance trial may be appealed by the parties by invoking appellate remedies. The system of appellate remedies is regulated in Book IX of the Code and it has been widely recognised as being one of the least innovative parts of the Code.<sup>141</sup> Surely, some innovations have been introduced for some procedural details, but the overall structure has remained unaltered. Unfortunately, despite the clear choice of favouring a process based on an accusatorial approach that viewed the first-instance trial as the key component of the process, the rights to

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<sup>141</sup> See R. LAWSON MACK, *It's Broke So Let's Fix It: Using a Quasi-Inquisitorial Approach to Limit the Impact of Bias in the American Criminal Justice System*, 1996, at 89; L. MARAFIOTI, *Italian Criminal Procedure: A System Caught Between Two Traditions*, in J. JACKSON, M. LANGER & P. TILLERS, *Crime, Procedure and Evidence in Comparative and International Context. Essays in Honour of Professor Mirjan Damaska*, at 87.

appeal were overlooked.<sup>142</sup>

Failure to reform this part of the system is justified firstly by an idea of justice that still differs greatly from the Common Law systems. It has been said that in Common Law jurisdictions the limited scope of appeals can be explained as a consequence of the internal logic of the adversarial system – since the jury’s verdict gives no reasons for its conclusions, there is little to review in appeal – but “also with the adversarial ‘interpretive’ conception of truth: whenever fair rules have been applied in the trial contest between adversaries, the result is necessarily just;<sup>143</sup>” on the contrary, continental justice “with the discovery of the ‘ontological’ truth implies the need for direct reconsideration of the trial adjudication by a higher court.<sup>144</sup>” Secondly, the power of tradition has taken its toll with its hierarchical continental model based, for centuries, on a comprehensive and wide system of appeals.<sup>145</sup> Moreover, this “vertical” structure of the criminal justice system is, to a certain extent, recognized by the Constitution: conceived to comply with the 1930 inquisitorial model, the Constitution strengthened the system of controls. It did so by establishing, on one hand, that the presumption of innocence is extended until final judgment of conviction and, on the other, by imposing the appeal in cassation against all the judgments and decisions on personal liberty (Art. 111, par. 7).<sup>146</sup> Regrettably, this constitutional structure was not even modified when, at the end of Nineties, the option of supporting the accusatorial system was introduced in the Constitution. Upon formalizing the principles of fair trial – including that of a reasonable duration of the criminal proceeding – no change was made to ease the constitutional restrictions that impose numerous appellate remedies which can be invoked without any filter whatsoever. To sum up, Book IX regulates mainly ordinary appellate remedies which prevent the judgment from becoming final. The first remedy

142 M. PANZAVOLTA, *Reforms and Counter-Reforms in the Italian Struggle for an Accusatorial Criminal Law System*, 2005, at 593; W. T. PIZZI – L. MARAFIOTI, *The New Italian Code of Criminal Procedure: The Difficulties of Building an Adversarial Trial System on a Civil Law Foundation*, 1992, at 15.

143 E. GRANDE, *Dances of Justice: Tango and Rumba in Comparative Criminal Procedure*, 2009, at 15.

144 E. GRANDE, *Dances of Justice: Tango and Rumba in Comparative Criminal Procedure*, 2009, at 16.

145 On the hierarchical model and its connection with the wide system of appeals, M. R. DAMAŠKA, *Structures of Authority and Comparative Criminal Procedure*, in *Yale Law Journal*, 84, 1975, p. 480.

146 “Appeals to the Court of Cassation in cases of violations of the Law are always allowed against sentences and against measures affecting personal freedom pronounced by ordinary and special courts”.

is the appeal (Art. 593), which continues to have a hybrid two-fold function of control and *novum iudicium*, particularly if new evidence is gathered (Art. 603).<sup>147</sup> In 2006, the aforementioned Law no. 46 abolished the power of appealing judgments of dismissal by the Public Prosecutor and the accused. The Constitutional Court, however, declared that the modification to Article 593 was illegitimate due to a violation of the principle of equality of arms.<sup>148</sup>

The judgment that is issued at the end of the second instance of the proceedings may be appealed in cassation to challenge any *errores in procedendo* (Art. 606, let. c-d), *errores in iudicando* (Art. 606, let. b) or the fault of motivation (Art. 606, let. e).

Extensive access to the Court of Cassation and the right to challenge also defects that concern the plausibility of the grounds underlying the decision entails an absolutely enormous load of appeals, compared to the experiences of other European countries.<sup>149</sup>

When the judgment becomes final, some extraordinary appellate remedies may be invoked under the Code. Over the past year, the said remedies have been widened.<sup>150</sup>

The traditional revision (Arts. 629 ff.) has been flanked, firstly, by the extraordinary appeal in Cassation due to a clerical or factual error (Art. 625-bis) and, then, by the so-called “European revision”: the Constitutional Court declared Article 630 unconstitutional and added the possibility to request revision when it is necessary to reopen the proceedings in order to comply with a final judgment of the European Court of Human Rights.<sup>151</sup>

Finally, with Law no. 67 of 2014 which completed the reform that eliminated *in absentia* proceedings, the legislature introduced a new extraordinary appellate remedy, called “rescission of the final judgment” (Art. 625-ter), then moved in a new Art.

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147 See C. CALLAHAN, *American Adversarial Transplants in the Italian Criminal Justice System: An Analysis of Italian and American Criminal Procedure through the Amanda Knox Trial*, in WULR, 5, 2012, pp. 23-44; G. J. MIRABELLA, *Scales of Justice: Assessing Italian Criminal Procedure Through the Amanda Knox Trial*, 2012, pp. 229-253.

148 Corte costituzionale, 6 February 2007, n. 26, 4 April 2008, n. 85. See M. CAIANIELLO, *Italy* – in E. CAPE – Z. NAMORADZE – R. SMITH & T. SPRONKEN, *Effective Criminal Defence in Europe*, 2010, at 406.

149 In the period 2004-2012, the Court of Cassation had to deal with an average of 48,158 appeals per year.

150 See M. GIALUZ, *Remedies for Miscarriage of Justice in Italy*, in L. LUPÁRIA, *Understanding Wrongful Conviction. The protection of innocent across Europe and America, Milan and Padua*, 2015, p. 117.

151 Corte costituzionale, 7 April 2011, n. 113.

629-bis by Law no. 103 of 2017. This mechanism allows the concerned party who has become aware of the proceeding against him only after the judgment of conviction has become final to request to the Court of Appeal to “rescind” the final judgment, that is to revoke the judgment. If the appellate remedy is accepted, “the case file is transmitted to the first instance court” (Art. 629-bis, par. 3) and it should serve as an actual remedy aimed at redeeming the rights, in the proceedings, of the person convicted in absentia, not for negligence, with delivery of a final judgment.

#### ***4. Model code or broken dream? What remains of the Code thirty years after the great reform***

It is not easy to weigh the great aspirations of the reformers and the overall outcome of the introduction of the new Code. Certainly, the general structure of the system, namely the details and coordination of single parties, still seems to be of an excellent quality today, and the language used is one of clarity and logic. It has been recently stated that “the Code of Criminal Procedure of 1988 is (...) a thing of beauty. It is logically arranged and clearly written. And in consequence, it enables anyone who can read the language, even imperfectly, to discover without difficulty how Italian procedure operates.<sup>152</sup>” Undoubtedly, the value of a Code ought to be measured against its degree of efficiency in the pursuit of both goals of criminal justice, that is the prevention of conviction of innocent persons on one hand,<sup>153</sup> and, on the other, the conviction within a reasonable time of those people who have been proven to be guilty. On the latter issue, the Code may not be assessed favourably. The reasons behind this, as already mentioned, are to be sought in factors external to the Code and in its limited flexibility despite the thrusts hinted by the practice.<sup>154</sup> Being a Code built “in a laboratory” and not moulded around the practice, the Italian model has demonstrated it can function correctly if each and every element remains balanced, if the ingredients of the mixture are not adulterated.

152 It is the opinion of J. R. SPENCER, *The Codification of Criminal Procedure*, in J. CHALMERS & F. LEVERICK, *Essays in Criminal Law. In Honour of Sir Gerald Gordon*, Edinburgh, 2010, p. 310.

153 See L. LUPÁRIA, *Understanding Wrongful Conviction. The Protection of the Innocent across Europe and America*, 2015.

154 One of the fathers of the reform, E. AMODIO, has – not surprisingly – talked about a “fragile perfection” of the Code in a recent paper (*Inviolabilità della libertà personale e coercizione cautelare minima*, in *Cassazione penale*, 2014, p. 20).

The opposite scenario would not develop well-rooted antibodies and would lead to an accentuated degeneration, which is what has partly occurred.

The Code is, nonetheless, still functional, it is applied every day in the courtrooms and, despite the adversities of the past thirty years, it has maintained its renowned nature of being a revolutionary project in a sector – that of criminal procedure – where it is extremely difficult to implement radical reforms.<sup>155</sup> The dream of transplanting an accusatorial model in continental Europe, thus, does not seem to have been in vain and it is now entrusted to the new generations, who have not lived an inquisitorial past and may, with a free mind, fully implement the ideal impetus given by jurists at the end of the twentieth century.

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155 See S. FIELD, *Fair Trial and Procedural Tradition in Europe*, in *Oxford Journal of Legal Studies*, 29, 2009, p. 365; J. D. JACKSON, *Playing the Culture Card in Resisting Cross-Jurisdictional Transplants*, *Cardozo Journal of International and Comparative Law*, 5, 1997, p. 51; P. J. SCHWIKKARD, *Convergence, Appropriate Fit and Values in Criminal Process*, in PAUL ROBERTS & MIKE REDMAYNE, *Innovations in Evidence and Proof*, Oxford and Portland, 2007, p. 331.