Reforms and Counter-Reforms in the Italian Struggle for an Accusatorial Criminal Law System

Michele Panzavolta

Follow this and additional works at: https://scholarship.law.unc.edu/ncilj

Recommended Citation
Available at: https://scholarship.law.unc.edu/ncilj/vol30/iss3/2

This Article is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in North Carolina Journal of International Law by an authorized editor of Carolina Law Scholarship Repository. For more information, please contact law_repository@unc.edu.
Reforms and Counter-Reforms in the Italian Struggle for an Accusatorial Criminal Law System

Cover Page Footnote
International Law; Commercial Law; Law
Reforms and Counter-Reforms in the Italian Struggle for an Accusatorial Criminal Law System

Michele Panzavolta†

TABLE OF CONTENTS

I. Introduction ................................................................. 578
II. The Code of 1988: The Fruit of a New Ideology ............... 578
   A. The Italian Inquisitorial Tradition: The Code of 1930 .. 579
   B. Inquisitorial, Accusatorial, and Adversarial .............. 582
   C. The 1988 Reforms: Breaking with the Past ................. 583
   D. The Accusatorial Discipline of the 1988 Code: The
      "Double-Dossier" System ......................................... 586
   E. Coexistence of Accusatorial and Inquisitorial
      Features in the New System ...................................... 591
   F. Making an Accusatorial System Sustainable Through
      Trial Alternatives .................................................. 593
III. The 1992-1997 Counter-Reform .................................. 596
   A. The 1992 Decisions by the Constitutional Court .......... 596
   B. The 1992 Novel and the Full Return of the
      Inquisitorial System .............................................. 599
   C. The 1998 Show-Down ............................................. 601
IV. Factors Contributing to the Accusatorial System’s Failure . 602
   A. An Inquisitorial Constitution? ................................. 603
   B. Cultural Factors: The Search for “Material” Truth ....... 604
   C. Contradictions in the Legislature’s Plan of 1988 ......... 605
   D. Judicial Organization: The Common Background of
      Prosecutors and Judges .......................................... 606
   E. The Professional Status of Judges ............................. 608
   F. Reflections .......................................................... 609
V. The Re-Establishment of the Accusatorial Choice ............ 610
   A. The 1999 Constitutional Reform ................................. 610

† Ph. D. student, University of Urbino. I would like to thank Professor Giulio Illuminati (University of Bologna) for his careful remarks and enlightening comments. I also
would like to thank Professor Michael Corrado and the Editorial Board of the North Carolina Journal of International Law & Commercial Regulation for the outstanding job
done in reviewing and editing this article.
B. The Reform Following the Enactment of the Constitutional Reform ....................................................611
C. The Constitutional Court's Assent to the New Provisions ....................................................................615
D. Present Disputes Within the Accusatorial System ...........................................................................616
E. Is the Accusatorial System Sustainable? A Difficult Harmonization with Efficiency and the Resurrection of Inquisitorial Procedures Within the Accusatorial System ............................................................................618

VI. Conclusion .................................................................................622

I. Introduction

In 1988, Italy adopted a new code of criminal procedure (the Code) that scholars heralded as “revolutionary.”¹ The new Code marks a clear departure from Italy's inquisitorial civil law tradition and a decisive move towards an adversarial model of criminal procedure.² Although the Code is less than twenty years old, it has undergone many changes since its enactment.³ The odyssey of the Code represents the struggle for the written laws to become the laws in practice. The Code's story cannot be viewed only as a dispute between different criminal procedure ideologies, but also as an example of the notion that in order for laws to work as they are intended, a certain amount of acceptance is needed from those who must apply them.

II. The Code of 1988: The Fruit of a New Ideology

The 1988 Code marks a clear departure from Italy's prior inquisitorial tradition.⁴ To appreciate the magnitude of the change, a brief explanation of the historical antecedents to the 1988 Code is necessary.


² Amodio & Selvaggi, supra note 1, at 1212 (stating that “the 1988 Italian Code stands out as a historical turning point in the headway towards the adversary system”).

³ Parliament has enacted over forty reform bills since the new Code has come into force. Some bills made small adjustments, others brought major changes; the overall outcome is that of a code in constant transition. See, e.g., supra Part V.

⁴ Amodio & Selvaggi, supra note 1, at 1211.
A. The Italian Inquisitorial Tradition: The Code of 1930

The 1988 Code replaced the 1930 Code. The 1930 Code codified the main features of the codes of 1865 and 1913. Under the 1930 Code, the criminal process was split into two distinct phases. The first phase focused on the investigation of the crime while the second phase focused on the public trial.

The investigating judge dominated the first phase, while the prosecutor served an auxiliary role to the judge. It was the investigating judge's duty to oversee the collection of evidence. The judge could hear the testimony of witnesses, conduct searches and seizures, and gather documentary evidence. The investigating judge could also summon and question the accused. All information gathered by the investigating judge was then recorded in an investigative dossier.

Defense attorneys played only a minor role in the judge's investigation. Under the original 1930 Code, defense counsel could not participate in the investigative procedures conducted by the judge, including the questioning of the accused. Later

---

5 The new Code was enacted by Delegated Decree n. 447 of Sep. 22, 1988 (published in Gazz. Uff., No. 250 (Oct. 24, 1988)).

6 See Franco Cordero, PROCEDURA PENALE 78-89 (6th ed. 2001). All three codes suffered the influence of the French model; the Napoleonic codification inspired them directly. See infra note 42.


8 Id.

9 These were the roles assumed in the "formal instruction" phase, the ordinary way of investigating a crime. See Amadio & Selvaggi, supra note 1, at 1214-16. If the crime was evident, though, and there was little need for an investigation, "summary instruction" was conducted by the prosecutor alone. Id.

10 "The investigating judge has the duty to discharge promptly all, and only, those acts that appear necessary to the ascertainment of the truth in the light of the collected elements." CODICE DI PROCEDURA PENALE [C.P.P.] art. 299 (1930) (Italy); see Delfino Siracusano, Istruzione, in XXIII ENCICLOPEDIA DEL Diritto 177 (1973).

11 C.P.P. arts. 332, 337, 312 (1930).

12 Id. arts. 365, 366, 367 (1930).

13 Id. arts. 302, 336, 320 (1930).

14 No provision required the investigating judge to inform the defense counsel that
reforms and a series of decisions by the Constitutional Court allowed some participation by the defendant’s attorney in the investigation and allowed the defense attorney to challenge the investigating judge’s activity in certain situations. The investigative phase ended with the judge’s decision to either formally charge or acquit the accused.

The second phase of the criminal process under the 1930 Code was a public trial. Under the 1930 Code, the defendant had some opportunities to refute the prosecution’s theory of guilt at trial. During opening and closing arguments, the defense could present an assessment of the facts to counter the prosecution’s theory. The defense could also present evidence to support their position. Nevertheless, counsel was not allowed to cross-examine the witnesses. Instead, the parties could each pose their questions to the witnesses through the judge who would formally conduct the direct and cross-examination.

the investigation was being performed and no right of participation was guaranteed in the Code either.


17 C.P.P. art. 304 bis (1930). This article permitted the attorney to participate in the questioning of the accused, judicial experiments and other technical ascertainments, and local searches. Id. The provision also allowed the attorney to express any observation, disagreement, or question he wished. Id. Even after the reform of Article 304, however, the defense was not allowed to take part in the questioning of the witnesses, confrontations between witnesses, and personal searches. See CORDERO, supra note 6, at 88.

18 Acquittals would occur because of the absence or insufficiency of the evidence, because the accused could not be punished for certain reasons (e.g., mental illness), because the relevant criminal provision had been abolished or declared unconstitutional, or because of statutes of limitation (prescrizione). C.P.P. arts. 479, 152, 378 (1930).

19 Pizzi & Marafioti, supra note 7, at 3-4.

20 Some scholars in fact considered it an accusatorial trial. OTTORINO VANNINI ET AL., MANUALE DI DIRITTO PROCESSUALE ITALIANO 441 (1986).

21 C.P.P. arts. 438, 468 (1930).

22 Id. art. 415.

23 Id. art. 448.

24 Id. art. 467.
Although the defendant had some opportunities to rebut the prosecution's theory of guilt, the trial often did little more than serve as a repetition of the investigative phase. Under the 1930 Code, the prosecution could, without restriction, read the investigative dossier compiled during the investigative phase at trial.25 The investigations were conducted within a short time after the commission of a crime, whereas trials took place long after the alleged. Thus, the findings of the investigation were naturally given more weight than the facts presented at trial, thereby making the investigative dossier the crucial factor in determining guilt. The judge would read the investigative dossier just after the trial was formally opened.26 The fact that records had been unilaterally collected by the investigating judge without any opportunity for the defense to object was irrelevant.27 Under the 1930 Code, a trial was essentially a formal exercise used to legitimize the judge's investigation and subsequent decision to charge the defendant based on that investigation.28


27 Id.

28 See Paolo Ferrua, La formazione delle prove nel nuovo dibattimento: limiti all'oralità e al commtraddrlettorio, in Studi sul processo penale 79 (1990).
B. Inquisitorial, Accusatorial, and Adversarial

This Article takes the position that an accusatorial system of criminal procedure allows a judge to make decisions based only on evidence collected in oral form (the principle of orality), in his presence (the principle of immediacy), in a public trial containing adversarial dynamics. In other words, an accusatorial system clearly separates the investigation and trial stages. In an inquisitorial system, the judge's decisions are based on evidence, regardless of whether it was collected in oral form. Inquisitorial

29 One historical distinction between inquisitorial and accusatorial systems of procedure is the identity of the accuser. In an inquisitorial system, a public officer pressed charges against a defendant, whereas in an accusatorial system, a private citizen pressed charges against the defendant. Mirjan R. Damaska, The Faces of Justice and State Authority 3 (1986). This distinction is obsolete in the modern era, as most countries have centralized the duty of prosecution to the state. Giulio Illuminati, Accusatorio e inquisitorio (sistema), in Enciclopedia Giuridica 1 (Treccani ed., 1988).

Another historical distinction between inquisitorial and accusatorial systems of criminal procedure is the role of judges and prosecutors. Inquisitorial systems did not distinguish between the roles of judge and prosecutor. Damaska, supra, at 3. This distinction between the two systems is also now obsolete. In most countries, especially those in the West, the judge and prosecutor serve two distinct functions. Illuminati, supra, at 1.

Some scholars believe that the distinction between the two systems lies in the differences between common law and civil law jurisdictions. Kai Ambos, International Criminal Procedure: “Adversarial,” “Inquisitorial,” or Mixed?, 3 Int’l Crim. L. Rev. 5, 5 (2003). This position, however, does not explain the distinction between inquisitorial and accusatorial systems. Instead, it merely reframes the question to instead ask which traits distinguish the common law from civil law jurisdictions. See Raneta 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, 7 Ind. Int’l & Comp. L. Rev. 70-71; Cordero, supra note 6, at 25 (observing that the accused is in particular considered a determinant source: all the precious information he owns should be extracted from him). Matthew T. King, Security, Scale, Form, and Function: The Search for Truth and the Exclusion of Evidence in Adversarial and Inquisitorial Justice Systems, 12 Int’l Legal Persp. 218 (2002) (inquisitorial systems “seek the truth at all costs”).

30 Elisabetta Grande, Italian Criminal Justice: Borrowing and Resistance, 48 Am. J. Comp. L. 228, 243 (2000) (stating the principle of immediacy encompasses the notion that the judge who receives evidence in court is the same judge who decides the case upon its merits).

31 Ferrua, supra note 28, at 80.

32 Illuminati, supra note 29, at 1.

33 Id. at 2.
systems permit the inclusion of any evidence collected, even if the evidence was obtained in violation of the defendant's or witnesses' rights. Mixed procedure systems are those that provide for an adversarial trial but still allow the judge to make a decision based on evidence collected unilaterally by the judge or prosecutor during the investigative phase. In this sense, mixed procedure is essentially inquisitorial.

This Article intends the term adversarial to mean a procedure that depends on the parties' initiatives. While accusatorial implies adversarial, the opposite is not necessarily true. A trial could theoretically be fully adversarial, or initiated by the parties, but still allow the introduction of out of court evidence. For a trial to be considered accusatorial, it must be adversarial, but it must also use the doctrine of hearsay to exclude unreliable evidence.

According to these definitions, the original Italian Code of 1930 was an inquisitorial system of law that was later modified to become a mixed system. Under the 1930 Code, a judge was the finder of fact and at the same time had broad powers to introduce evidence. In addition, a judge could base a decision on evidence collected unilaterally during the investigation.

C. The 1988 Reforms: Breaking with the Past

The 1930 Code was based on the premise that all evidence should be available to a judge, regardless of how it was collected; no limit should be placed on the search for the truth. Truth
necessitated unlimited freedom to search. This rationale was explained by the following metaphor: "The judge is a croupier. He takes all the chips bet on the table."

The drafters of the 1988 Code, however, were driven by an opposite belief. The new Code is based on the premise that the probative value of evidence is affected by the manner in which it is collected. In order for evidence to be given full probative value at trial, it must be collected according to certain rules. The drafters believed the best method for developing evidence and discovering truth was a context in which opposing viewpoints are present.

Since truth was to be discovered in the investigation process, the 1930 Code required that the investigator be impartial. Thus, both the investigative and the trial stages were entrusted to subjects presumed impartial, the investigating judge and the trial judge. Because of their dual role, judges were given broad powers to introduce all evidence necessary to solve the case.

42 FRANCESCO CARNELUTTI, LA PROVA CIVILE 28-32 (1992). This does not mean that the 1930 Code permitted violation of people's rights (such as the use of torture or similar coercive means) in order to obtain truth. However, even if limited by the respect of human rights, the ideology of "truth with all possible means" still animated the 1930 Code. In other words, the evolution of democracy and civil liberties did limit the idea that the quest for truth necessitated the maximum amount of information possible, but this conception permeated the 1930 Code. The Code refused to waste any evidence gathered unless it was gathered by violating human liberties.


45 Amodio & Selvaggi, supra note 1, at 1217.

46 ANIELLO NAPPI, GUIDA AL NUOVO CODICE DI PROCEDURA PENALE 6, 11 (9th ed. 2004). Moving towards a relative concept of truth, the drafters believed that the "real" truth affirmed by the previous ideology was obsolete. See Giulio Ubertis, La ricerca della verità giudiziale, in LA CONOSCENZA DEL FATTO NEL PROCESSO PENALE 2 (G. Ubertis ed., 1992). Truth is what is proven best for the present; the future may bring changes resulting in a new and different truth. See id.

47 CORDERO, supra, note 6, at 25.

48 See supra Part II.A.

49 C.P.P. art. 457 (1930).
The drafters of the 1988 Code approached the issue of impartiality differently. They believed that no investigation could be completely impartial; all investigators are affected by their personal points of view and backgrounds.50 Furthermore, they believed that the act of investigating a crime itself creates bias on the part of the investigator.51 Because of this potential for partiality, the drafters of the new Code created a clear separation between criminal investigations and trials. Under the Code, the individual parties conduct investigations,52 effectively abolishing the investigating judge.53

Under the new Code, investigations are conducted by the prosecutor.54 He conducts his inquiry in order to deem whether to file a formal charge against the defendant or to dismiss the case. The investigative evidence collected should serve this purpose alone. The defense can also discharge a preliminary investigation. Under the original version of the Code such faculty was provided by a vague and generic norm.55 A statute issued in 200056 has clarifies the investigative powers held by the defense57.

50 See Glauco Giostra, Contraddittorio, in ENCICLOPEDIA GIURIDICA 3 (2001) (stating that the investigating actor elaborates a hypothesis to seek the truth but ends up seeking the truth of his hypothesis).
52 Grande, supra note 30, at 232-34.
53 The elimination of the investigating judge seem to be a point of convergence in many different civil-law countries: see Langer, supra note 44, at 27.
54 On the power of the public prosecutor during the preliminary investigations see Giulio Illuminati, Italy, in THE ROLE OF THE PUBLIC PROSECUTOR IN THE EUROPEAN CRIMINAL JUSTICE SYSTEM 113-115 (Tom Vander Beken and Michael Kilchling, eds., 2000). It should be added that the prosecutor's use of the more intrusive powers (e.g., wiretapping) control by the judge of the preliminary investigation is mandatory. It his his duty to assure the respect of judicial and constitutional guarantees throughout the preliminary investigations. See Enzo Zappali, Le nuove funzioni del giudice nella fase delle indagini preliminari, in LE NUOVE DISPOSIZIONI SUL PROCESSO PENALE 49 (Cedam, ed., 1989).
55 C.P.P., provisions for the implementation of the code, art. 38 (1988).
56 Law n. 7 December 2000, n. 397. See also Langer, supra note 44, at 34 note 164.
57 The defence can question witness and record the information gathered. C.P.P. art. 391 bis, ter (1988). The defence can also request documents to public administrations (Id. art. 391 quater), enter public and (with a judicial permit) private places to make measurements, surveys or any other technical ascertainment (Id. 391
But the results of the investigative efforts displayed by the parties should be kept outside of court. If the proceedings go on to trial, the case shall be deemed with the sole evidence produced in front of the impartial presiding judge.

D. The Accusatorial Discipline of the 1988 Code: The "Double-Dossier" System

Compared to the 1930 Code, the new Code had a completely different profile, inspired by the Anglo-American criminal procedure system. There were two main goals of the new code. First, the prosecution and defense were to be the main players in the criminal process. Second, the only evidence on which a decision can be based was the evidence collected orally at trial.

As for the first goal, the Code gives each party the right to introduce their own evidence at trial, so long as it is relevant and it does not violate the law. The solemn affirmation of this broad right granted to the parties stands in stark contrast to the old procedure, and is significant in that it reduces the judge's power to introduce evidence. This assures that the criminal process will lie in the hands of the parties, and that the judge's role will essentially be limited to that of an unbiased spectator.

The heart of the new system is the strict separation of the trial phase from the investigative one. The "double-dossier system"
(doppio fascicolo) is the mechanism the drafters created to ensure such separation. The system was so named in opposition to the single investigative dossier that characterized the old system. In the 1930 Code, any record of evidence collected by the investigating judge was placed into the dossier. This dossier was then brought to trial and had other records of the evidence formed at trial added to it. The drafters of the new Code wanted to prohibit any use of the prior record at trial. They also wanted to shield the trial judge from the investigative file so that he would not be biased by the records contained therein. The idea was to not prejudice the judge's mind at the commencement of trial, thereby guaranteeing only the evidence produced during the trial would influence the judge.

The mechanism used by the new Code to prevent the judge from seeing the investigative dossier is quite simple. During the preliminary stage of the criminal process, all records of evidence are collected in an investigative-dossier. At the end of the investigation, the investigative-dossier is set aside and is available only to the parties, who can then use it to prepare for trial or to challenge a witness' credibility during his or her trial testimony. The trial judge will never see the investigative-dossier. Instead, the trial judge is given a completely new dossier, the trial-dossier, to be filled only with the evidence collected during trial.

---


63 MASSIMO NOBILI, LA NUOVA PROCEDURA PENALE 262 (1989).

64 See supra note 13 and accompanying text.

65 C.P.P. arts. 492, 495 (1930).

66 Grande, supra note 30, at 237.

67 Id. at 243 (implementing the principle of immediacy); NOBILI, supra note 63, at 280.

68 NOBILI, supra note 63, at 279.

69 Grande, supra note 30, at 243.

70 Id. However, there are a few exceptions to this rule. One occurs when the trial judge has to decide on the prosecutor's request to keep the accused under restrictions during the proceedings; another takes place when the parties negotiate the penalty at trial. C.P.P., provisions for the implementation of the code, art. 139 (1988).

71 In other words, before trial, the investigative-dossier is split into two dossiers: one is the very 'thin' trial-dossier, the other is the 'thick' dossier containing the findings
In theory, the trial-dossier should be empty when given to the presiding judge. However, the Code provides some exceptions and allows some records to be removed from the investigative-dossier and placed into the trial-dossier before the beginning of trial. These exceptions include evidence which is objectively impossible to reproduce in court, evidence which has been produced by the parties during their confrontation in front of a judge during the investigation (incidente probatorio) because of a serious risk of not reproducing it at trial, records regarding the corpus delicti, and records of prior convictions of the accused.

In other words, the magistrate can select from the investigative-dossier the few records that the Code allows the judge access to and place these records in the trial-dossier.

At the end of trial, the trial-dossier should contain only the records available to the judge as proper grounds for his decision.

---

72 The insertion is made by the judge of the preliminary hearing or, in proceedings for minor crimes, which do not need a preliminary hearing, by the prosecutor. See C.P.P. arts. 431, 553 (1988). In the first case, at the end of the hearing in which he has filed a formal charge against the accused or in a hearing appositely called, the judge of the preliminary hearing decides which records meet the exceptions provided by law and therefore should be put in the trial-dossier. In the second case, the dossier is formed by the prosecution before the beginning of the trial. Id.

73 The "incidente probatorio" could be translated as an "incidental assumption of evidence" during the investigative stage. It is "incidental" because it occurs in a phase, namely the preliminary investigation, where evidence should not be collected. The incidente probatorio is the instrument that should provide for the gathering of evidence when there is a risk of losing such evidence (e.g., the witness might die within a short time) or a risk of losing genuine information (e.g., the witness might be corrupted or threatened). See id. art. 392 (1988). It consists of a hearing in front of the judge during which the parties take the deposition of the witness following the rules applicable at trial. The incidente probatorio is the device that should 'save' evidence at risk of being lost for trial. This instrument guarantees the adversary and orality principles of trial and safeguards the judicial assumption of evidence. Only the principle of immediacy is broken because the judge presiding at the incidente probatorio hearing is a different judge than the judge that will preside over trial. The trial judge will later read the files of the hearing which are placed in the trial-dossier. For a discussion on the incidente probatorio, see Grande, supra note 30, at 243; Pizzi & Marafioti, supra note 7, at 12. For a translated discussion of the incidente probatorio, see Stephen C. Thaman, COMPARATIVE CRIMINAL PROCEDURE 35-37 (Michael Corrado ed., 2002).

74 C.P.P. art. 431 (1988); Grande, supra note 30, at 243-44.
The judge may not base his decision on information contained in the trial-dossier. To ensure compliance with this rule, the Code requires the judge to explain his decision based only on the evidence contained in the trial-dossier.

The aforementioned description of the severance of the dossiers should guarantee that investigative evidence does not affect the judge's decision at trial. Nevertheless, the Code, when drafted, contained two additional rules to further ensure that the judge will be shielded from the investigative record. First, the parties, particularly the prosecutor, could not take the initiative to read any prior statements or other investigative records at trial, except for those few exceptions specifically provided by law. The second rule prohibited police officers from testifying at trial as to witnesses' statements collected during the investigation. These two rules guarantee what has been called the "accusatorial golden rule:" out-of-court statements may be used only to verify a witness' veracity; they cannot be used for the truth of the matter asserted. In other words, they could never be proper grounds upon which a decision may be based.

Despite these measures, the drafters of the Code feared that a system that excludes all investigative evidence could be too rigid and cause inefficiencies. For this reason, they provided some exceptions to the rule.

---

75 C.P.P. art. 526 (1988).
76 Id. arts. 546, 192.
77 In the Code, the term "reading" means the substantive use of the record in order to prove the truth of what it asserts.
78 C.P.P. art. 514 (1988).
79 Id. art. 195/4. It should be pointed out that the Code, except for this particular situation, did not prohibit hearsay testimony by ordinary witnesses. The investigation is conducted by the prosecution, but the prosecution can use the police for assistance. ITALY CONST. art. 109; C.P.P. art. 58 (1988). Questioning of witnesses can be conducted by the prosecutor or by the police when delegated. C.P.P. arts. 64, 375, 370 (1988). The police are not permitted to question the accused when in custody and after an arrest. Id. art. 370 (1988). For a discussion on the relationship between the prosecutor and the police, see Giulio Illuminati, The Role of the Public Prosecutor in the Italian System, in TASKS AND POWERS OF THE PROSECUTION SERVICES IN THE EU MEMBER STATES 308-10 (Peter J.P. Tak ed., 2004).
80 Paolo Ferrua, La regola d'oro del processo accusatorio, in IL GIUSTO PROCESSO TRA CONTRADDITTORIO E DIRITTO AL SILENZIO 11 (Kostoris ed., 2002).
81 C.P.P. art. 500/3 (1988).
One exception allows the parties to read a relevant portion of the investigative record when it has become absolutely impossible to otherwise present the evidence due to serious and unforeseen reasons (e.g., the witness' sudden death). This exception is the result of the frequent backlog in the Italian court system that often causes trials to take place long after the alleged crime occurred.

Another exception to the rule prohibiting the admission of investigative evidence at trial relates to prior statements of the accused. The parties can make substantive use of prior statements of the accused that were rendered to the prosecutor, not the police, once the statements are used at trial to discredit the accused. These statements can also be read at trial if the accused does not attend the trial or exercises his privilege against self-incrimination once his examination had been requested. If there are more than two defendants in the trial, a severed co-defendant has the duty to come to trial when summoned but can exercise his privilege against self-incrimination. As the Code was originally drafted, the severed co-defendant's prior statement to the prosecutor could be used for substantive purposes only if he failed to show up at the trial, but not if he attended and exercised his privilege against self-incrimination. A joint defendant (as opposed to a severed co-defendant) is simply treated like an individual defendant.

As can be readily observed, the 1988 Code as drafted did not allow readings of police collected evidence at trial. The Code, however, provides an exception to this general rule: if the statements were collected at the crime scene immediately after the action occurred, they can be used at trial for substantive purposes.

---

82 C.P.P. art. 512 (1988).
83 See infra notes 293-299 and accompanying text.
84 C.P.P. art. 503/5 (1988).
85 Id. art. 513/1.
86 Id. art. 210. A co-defendant is someone who is charged with a crime connected with that of others. According to Articles 12 and 371/2, the connection exists when two individuals have committed the same crime (i.e., accomplices), when they have committed distinct crimes one in the occasion of the other or one in order to commit the other, or more generally when the two crimes have common evidence. Id. arts. 12, 371/2.
87 Id. art. 513/2.
88 Id. arts. 208, 210, 513.
E. Coexistence of Accusatorial and Inquisitorial Features in the New System

Despite some significant differences, the 1988 Code did retain some features of the traditional continental model. It is clear that while the move to an accusatorial system was necessary, some features of the traditional system were worth retaining.90

One such feature is the legality principle, which the drafters confirmed for commencement of criminal proceedings. According to this principle, the prosecution is compelled to start the investigation after a crime has been committed and file the formal charge if the gathered evidence establishes probable cause.91 The prosecutor has no discretion in the matter. Mandatory prosecution is based on the principle that all citizens are equal before the law, and assures that all defendants will be treated equally regardless of their personal and social conditions.92

Another feature preserved in the Code is the judge’s power to introduce evidence when he cannot decide the case from the evidence introduced at trial. In such a situation, the judge may introduce evidence unilaterally93 or ask the parties to submit evidence on certain specific issues.94 According to the Code as drafted, the judge’s power could be exercised only at the
conclusion of the parties' case.\textsuperscript{95} This decision to leave the judge some power regarding evidence was essentially based on a fear of apathy of one or more parties.\textsuperscript{96} For example, a prosecutor who introduces no evidence at trial could violate the principle of legality and endanger the citizen's right to non-discriminator treatment within the criminal justice system. Additionally, a defense attorney may fail to introduce evidence in favor of his client, and thereby place the presumption of innocence at risk.\textsuperscript{97}

No attempts to create a jury system were made in the new Code. Rather, fact-finding remains in the hands of professional judges. The sole exception is the "court of assise," a hybrid panel composed of six lay judges and two professional judges. This body is competent to handle only major crimes, such as murders or crimes punishable by a penalty of more than twenty-four years imprisonment.\textsuperscript{98}

Another important feature of the traditional system that remains is that the judge's decisions must have written justification.\textsuperscript{99} This feature first appeared in the 18th century and has since been confirmed.\textsuperscript{100} The rationale for such a duty is complex, and exists to ensure judicial accountability.\textsuperscript{101} It grants greater control throughout the course of the criminal process.

\begin{itemize}
\item \textsuperscript{95} Grande, \textit{supra} note 30, at 245.
\item \textsuperscript{96} CORDERO, \textit{supra} note 6, at 939.
\item \textsuperscript{97} For a critical account of this reasoning, see GIULIO ILLUMINATI, \textit{LA PRESUNZIONE D'INNOCENZA DELL'IMPUTATO} 188-90 (1979).
\item \textsuperscript{98} See C.P.P. art. 5 (1988); Langer, \textit{supra} note 44, at 18 n. 60, 25 n. 104 (stating in these hybrid courts, the professional judges are still the most influential decision-makers).
\item \textsuperscript{99} ITALY CONST. art. 111, § 6; C.P.P. art. 546 (1988).
\item \textsuperscript{100} The duty for the judge to explain in writing the reasons for the decision he made was first prescribed in 1760 in the Kingdom of the Two Sicilies. See Mario Pisani, \textit{Appunti per la storia della motivazione nel processo penale}, in \textit{Ind. Pen.} 317 (1970). The original goal was to put the judges under greater control from the Executive power. Ennio Amodio, \textit{Motivazione della sentenza penale}, in XXVII ENCICLOPEDIA DEL Diritto 187 (1977). It was soon abolished because of the opposition of the barristers. \textit{Id.} The duty re-appeared during the French Revolution and has remained in civil law systems since that time. See Franco Cordero, \textit{Stilus curiae (analisi della sentenza penale)}, in \textit{LA SENTENZA IN EUROPA}, 302-03 (Cedam ed., 1988).
\item \textsuperscript{101} FRANCESCO MAURO IACOVIELLO, \textit{LA MOTIVAZIONE DELLA SENTENZA PENALE E IL SUO CONTROLLO IN CASSAZIONE} 9 (1997).
\end{itemize}
because it strengthens the control of the appellate judge.\textsuperscript{102} In addition, it increases the democratic aspects of the criminal justice system by making the reasons for the decision available to every citizen.\textsuperscript{103} Most of all, the duty of justifying decisions assures that the decision-making process follows a rational path: if the judge has to explain why he has decided in favor of one party, this should force him to make his decisions by using rational arguments.\textsuperscript{104} The judge must be able to persuade the reader that the decision made was the best under the given circumstances and not based on improper biases or resulting from corruption.\textsuperscript{105}

Another persisting traditional feature is the provision granting broad rights of appeal.\textsuperscript{106} Both convictions and acquittals may be appealed, the former by the defense, the latter by both the defense and prosecution.\textsuperscript{107} Regardless of whether a decision has been appealed, it can always be submitted to the Court of Cassation, which assures that the applicable law has been well interpreted and guarantees the uniformity of interpretations of the laws.\textsuperscript{108}

\textbf{F. Making an Accusatorial System Sustainable Through Trial Alternatives}

To get a better understanding of the 1988 Code as a whole, one needs to understand that accusatorial trials are quite expensive. In addition to monetary expense, accusatorial trials are time-consuming, since all of the evidence that a judge can base his

\begin{itemize}
\item \textsuperscript{102} Amodio, \textit{supra} note 100, at 186.
\item \textsuperscript{103} IACOVIELLO, \textit{supra} note 101, at 9.
\item \textsuperscript{104} Francesco Mauro Iacoviello, \textit{Motivazione della sentenza penale (controllo della)}, \textit{in} \textit{AGGIORNAMENTO IV ENCICLOPEDIA DEL DIRITTO PENALE} 750 (2000).
\item \textsuperscript{105} There is a vast literature in Italy on the justification of judicial decisions. \textit{See}, e.g., Amodio, \textit{supra} note 100, at 181; Iacoviello, \textit{supra} note 104, at 750; IACOVIELLO, \textit{supra} note 101; M. Menna, \textit{LA MOTIVAZIONE DEL GIUDIZIO PENALE passim} (Jovene ed., 2000); MICHELE TARUFFO, \textit{LA MOTIVAZIONE DELLA SENTENZA CIVILE passim} (1975).
\item \textsuperscript{106} Pizzi & Marafioti, \textit{supra} note 7, at 15.
\item \textsuperscript{107} C.P.P. arts. 570, 571 (1988).
\item \textsuperscript{108} ITALY CONST. art. 111, § 7 (stating all sentences and decisions restricting personal liberty can be appealed to the Court). The Court of Cassation is given the role of assuring the uniformity of judicial decisions in Royal Decree, No. 12 art. 65 (Jan. 30, 1941). On the role of the Court of Cassation in the Italian legal system, see MICHELE TARUFFO, \textit{IL VERTICE AMBIGUO} (Il Mulino ed., 1991).
\end{itemize}
In order to make sure all necessary evidence is admitted, each party has to prepare in detail before trial. The cost of accusatorial trials is even higher in Italy because of the large caseload of the Italian courts. For an accusatorial system to be sustainable in Italy, all proceedings cannot go on to trial or the system would implode. The drafters of the 1988 Code were aware of this risk and, in order to avoid it, they created various alternative means of resolving criminal cases.

One of these alternative means of resolving criminal cases is called the "deal at the request of the parties" (applicazione della pena su richiesta delle parti) and has some resemblance to the plea-bargaining conducted in the United States. In this deal, the defendant's attorney and the prosecutor agree on a penalty for the defendant. The defendant is then accorded a reduction of up to one third of this penalty. Under the original Code provision, the reduced penalty bargained for could not be longer than two years imprisonment. By reaching an agreement on the penalty, the accused waives his right to trial and to a full judgment.

The request of the defendant in the "deal at the request of the parties," however, does not correspond to the American guilty plea. The defendant does not admit any culpability, as this would otherwise defeat the presumption of innocence.

110 See infra notes 286-92 and accompanying text.
111 There are also other forms of alternative proceedings that allow the parties to go directly to trial, shortening the pre-trial phase. They are the giudizio direttissimo and the giudizio immediato. See C.P.P. arts. 449-52, 453-58 (1988). For a panorama on the Italian alternative proceedings, see generally Pizzi & Marafioti, supra note 7, at 18-26.
113 Id. Langer, supra note 44, at 49.
114 C.P.P. art. 444 (1988).
115 Id.
116 Pizzi & Marafioti, supra note 7, at 23; Langer, supra note 44.
117 Pizzi & Marafioti, supra note 7, at 22-23. Langer, supra note 44.
118 Id. at 23. Under the presumption of innocence, any conviction must have at least
Therefore, the judge must conduct a quick and minimal review of the investigative file to ensure that innocence is not clearly indicated by the records.\textsuperscript{119} This is not a full judgment, as would occur at trial. The judge does not evaluate each piece of evidence; he only ensures there is some evidence present in order to avoid the conviction of a clearly innocent person.\textsuperscript{120} The judge should also verify the congruence of the penalty and the nature of the crime (\textit{iura novit curia}).\textsuperscript{121}

Another alternative to a trial is the "abbreviated trial" (\textit{giudizio abbreviato}). In the original version of the abbreviated trial,\textsuperscript{122} the defendant and the prosecutor agreed to a judgement on the investigative file.\textsuperscript{123} In other words, both defense and prosecution waived their rights to trial but not to a judgment.\textsuperscript{124} The abbreviated trial serves the interests of both parties. The prosecution obtains a quicker resolution of the case,\textsuperscript{125} while the defendant, on the other hand, receives a reduction in penalty.\textsuperscript{126} If the defendant is found guilty, he is sentenced to a penalty reduced by one-third of the regular sentence.\textsuperscript{127}

In the "proceeding by penal decree" (\textit{procedimento per decreto}), the accused is charged on the records of the investigative-dossier on a prosecutor's written request.\textsuperscript{128} The judge's decision is made \textit{in camera}, without the presence of the parties.\textsuperscript{129} Since the accused is deprived of any chance of being

\begin{footnotes}
\item[119] Id. Pizzi & Marafioti, supra note 7, at 23.
\item[121] Id. The 1999 bill introduced the provision relating to the judge's control on the congruence of the penalty. An English version of art. 444, § 2 as amended is available in \textit{Thaman}, supra note 73, at 244.
\item[122] For the current version of the abbreviated trial, see infra notes 276-283 and accompanying text.
\item[124] Pizzi & Marafioti, supra note 7, at 23-24.
\item[125] Id. at 24.
\item[126] Id. at 25.
\item[127] Id.
\item[128] C.P.P. art. 459 § 1 (1988).
\item[129] The Code does not provide for any hearing for this proceeding.
\end{footnotes}
heard and of introducing evidence, the penalty may be reduced by up to one-half.\textsuperscript{130} This form of proceeding, strongly inquisitorial, is available only for minor crimes for which the only penalty is a fine.\textsuperscript{131} If the defendant opposes such inquisitorial judgment, he can oppose the prosecutor's request.\textsuperscript{132} By opposing the request, the penal decree is canceled and a regular trial will take place, but the defendant loses the opportunity for a penalty reduction.\textsuperscript{133}

These alternative procedures were created to afford an accusatorial-adversarial choice. The goal of the drafters was to have no more than 20 percent of all proceedings go to trial.\textsuperscript{134} Much reliance was placed on these alternative proceedings in order to meet this goal.

III. The 1992-1997 Counter-Reform

A. The 1992 Decisions by the Constitutional Court

The 1988 Code became effective on October 24, 1989.\textsuperscript{135} The drafters believed that from that date forward, substantive connections with the traditional inquisitorial model would be severed. The drafters operated under the presumption that fixing the written laws was sufficient to implement the change. After all, in civil law systems the law is codified; therefore, the provisions set forth in the text laws are determinative.\textsuperscript{136} Yet, even in such systems, the law as it is practiced differs from the written laws. The written laws require a certain amount of acceptance from the governed; otherwise, they will encounter resistance in their application and other forms of rejections.\textsuperscript{137} With this premise in

\begin{itemize}
  \item \textsuperscript{130} Pizzi & Marafioti, supra note 7, at 21.
  \item \textsuperscript{131} Id.
  \item \textsuperscript{132} C.P.P., art. 461 (1988). The motion has to be filed within 15 days. Id.
  \item \textsuperscript{133} Grande, supra note 30, at 254.
  \item \textsuperscript{134} NOBILI, supra note 63, at 279; Conso, supra note 109, at 175; Paolo Ferrua, Il ruolo del giudice nel controllo delle indagini e nell'udienza preliminare, in \textit{STUDI SUL PROCESSO PENALE} 73 (Giappichelli ed., 1990) (stating the goal was "a bit exaggerated").
  \item \textsuperscript{135} Art. I of Delegated Decree n. 447 of Sept. 22, 1988 (published in Gazz. Uff. No. 250 (Oct. 24, 1988)).
  \item \textsuperscript{136} Pizzi & Marafioti, supra note 7, at 7.
  \item \textsuperscript{137} Using different terms, we could say that "the internal point of view of the legal actors" should not be set aside, but taken in high consideration. On the concept of "internal point of view of the legal actors" (which also includes the "individual
mind, some early decisions that partly conflict with the new provisions seemed to result more from the effect of an inertial attitude to the old rules than specific symptoms of a possible ideological battle.¹³⁸

The extent of the controversy, however, soon became clear. In Italy, any provision of law can be submitted to the Constitutional Court for review to determine whether this law is consistent with or in violation of the Constitution.¹³⁹ These submissions can be made in the course of a judicial hearing only when there is doubt about a provision's validity.¹⁴⁰ The constitutionality issue can be raised by either the presiding judge or by parties provided that the complaint is not considered groundless by the judge.¹⁴¹ Prosecutors and judges submitted a large number of provisions of the new Code to the Constitutional Court. In particular, the allegations were directed against those rules that supported the sharp distinction between investigations and trials.

The Constitutional Court agreed with these complaints and delivered a first blow to the Code in Decision n. 24/1992. Here the Court invalidated the prohibition against police officers testifying about statements collected in the investigations.¹⁴² In the view of the Court, the provision violated the principle of equality because it prohibited police officers' hearsay testimony while a similar ban did not apply to ordinary witnesses.¹⁴³ Unfortunately, the Court failed to see the essential role this provision played in separating the phases of the criminal process.¹⁴⁴

¹³⁸ The most common attempt was that of widening the number of investigative records to place in the trial-dossier. See, e.g., Trib. Roma, 3 apr. 1990, Arafa, Foro It. II 1990, 446.

¹³⁹ ITALY CONST. art. 134.


¹⁴¹ Id.


¹⁴³ Id.

¹⁴⁴ Italian scholars reacted with unanimous dissent. See Glauco Giostra, Equivoci
The orality principle was struck down five months later when the Court declared two additional provisions in conflict with the Constitution. Decision n. 254 declared Article 513/2 unconstitutional, thus permitting the admission of out-of-court statements of a severed co-defendant called to testify in the other defendant’s trial, regardless of whether the severed defendant chose to exercise his right to remain silent. The Court justified its decision on the ground that it was unreasonable to treat a severed co-defendant and a joint co-defendant differently. If a joint co-defendant who attended trial but exercised his privilege against self-incrimination could have his prior statements read, a severed co-defendant should be treated in the same way.

The second blow to the orality principle was delivered when the Court permitted the substantive use of prior statements once they were invoked by the parties during cross-examination to test the witness’ credibility. In order to reach this conclusion, the Court relied on the exception in Article 500/4 that allowed the substantive use of excited utterances once they had been invoked to attack the witness’ credibility. The Court reasoned that if
these investigative statements could be proper grounds for a
decision, then all investigative statements should be, once used to
attack a witness' credibility in oral examination. In other words,
the Court discovered in Article 500/4 a provision that granted
credibility to the witness' prior statements and reasoned that the
rationale of the drafters had to be that all prior statements
contained this same amount of credibility, such that they should be
allowed to be read once used to impeach the witness.

The Court adopted an additional argument in support of this
position. The Court considered all the exceptions to hearsay (arts.
500/4, 503/5, 512, 513/1, and 513/2) and deduced from them a
"principle of non-dispersion of evidence," under which no
available information should be wasted, regardless of how it had
been collected. In justifying its decision, the Court referred to
the duty of the judge to seek the truth, and that such a duty should
not suffer restrictions or limitations.

B. The 1992 Novel and the Full Return of the Inquisitorial
System

The legislature responded to flow of decisions interpreting the
Code coming from the Constitutional Court. In August of 1992, a
bill was passed that increased the number of exceptions to the rule
against the admissibility of out-of-court evidence. After the
passage of the bill, the parties could introduce records of other
proceedings at trial as well as decisions made in collateral
cases. Also, the use of out-of-court statements of witnesses who
had not been present at trial was expanded.

---

151 Corte cost., 1992, n. 255, at 1968. For a criticism of this argument, see Oreste
Dominioni, Oralità, contraddittorio e principio di non dispersione della prova, in IL
153 Decree-Law n. 306 of June 8, 1992 (published in Gazz. Uff., No. 133 (Jun. 8,
7, 1992)).
not all amendments to the Code by the 1992 Novel were directed at tearing down blocks
of the accusatorial building. Some changes were motivated by the attempt to "soften the
In defense of the legislature, it is argued that Italy had more pressing priorities in 1992.\textsuperscript{157} At that time, the argument goes, the mafia was in open conflict with the Italian State and the legislature was forced to introduce the counter-reforms.\textsuperscript{158} Indeed, 1992 was a difficult year. Two valorous prosecutors\textsuperscript{159} were brutally assassinated by the mafia.\textsuperscript{160} All the institutions of the Italian State had to display their firm determination in fighting the mafia. Rather than being a convincing argument, this confirms how weak the choice of an accusatorial system actually was. All states have to face dangerous criminality. The mafia is not more dangerous than any other form of organized crime. In addition, the mafia operates not only in Italy but also throughout the world, and is probably a greater danger to the United States than to Italy.\textsuperscript{161} The measure of the strength of a state based on the rule of law is its ability to respond efficiently to the threat of crime without giving up the state's values and the rights of its citizens. The idea that particular forms of organized crime justify a restriction of civil rights or the concept that some crimes should undergo a different and fully inquisitorial procedure is simply a denial of the rule of law.

By the end of the summer of 1992, the accusatorial system of criminal procedure had been definitively weakened. All that remained was a confused system, one which permitted a vast use of the information gathered unilaterally by the prosecutor during his investigations but, at the same time, did not grant the judge all the powers for seeking "real truth" as the investigative judge had under the Code of 1930. The system was a hybrid where the accusatorial spirit became a thing of the past, but the inquisitorial focus was not really affirmed. Out of this confusion, a new decision led to coherence but in an inquisitorial direction.

\textsuperscript{157} Pizzi & Montagna, supra note 1, at 458. Along these lines, the legislature provided that prior evidence could not be a sufficient ground for a conviction without corroboration from other pieces of evidence. See arts. 192, 500/4 (1988), amended by Law n. 356 of Aug. 7, 1992.

\textsuperscript{158} Id. at 457.

\textsuperscript{159} Mr. Giovanni Falcone & Mr. Paolo Borsellino.

\textsuperscript{159} Pizzi & Montagna, supra note 1, at 457.

The Court of Cassation provided this coherence when it broadly interpreted the judge’s powers to introduce evidence, which the Code had tried to confine within narrow limits. According to the Court, a judge could introduce evidence at any point in the trial, even when the parties had presented no evidence, or before the introduction of the evidence the parties had requested. The Court ruled this way despite the fact that the Code was clear in allowing the judge to introduce evidence only once the parties had presented their cases, and in denying the judge this power when the parties had not introduced any evidence. After this decision, the judge’s power relating to evidence, which the Code had clearly envisioned as auxiliary to the parties’ powers, became widespread and autonomous.

C. The 1998 Show-Down

Five years passed before the Parliament decided to reassess the original accusatorial choice. In 1997, a bill was passed that reduced the use of investigative evidence in order to restore the principles of orality and immediacy. The reform included Article 513/2 and declared that previous statements of a severed co-defendant were inadmissible if he exercised his privilege against self-incrimination, as had been the case under the original

---

167 Note that the Constitutional Court also agreed with this interpretation of article 507, justifying its decision on the judge’s need to search for truth without any limits. Corte cost., 26 Mar. 1993, n. 111, RIVISTA ITALIANA DI DIRITTO E PROCEDURA PENALE 1062 (1994). The decision can also be read in English in THAMAN, supra note 73, at 174-76. For critical comments on this Constitutional Court decision, see Paolo Ferrua, I poteri probatori del giudice dibattimentale: ragionevolezza delle Sezioni Unite e dogmatismo della Corte Costituzionale, in RIVISTA ITALIANA DIRITTO E PROCEDURA PENALE 1073 (1994); Giorgio Spangher, L’articolo 507 c.p.p. davanti alla Corte Costituzionale: ulteriore momento nella definizione del “sistema accusatorio” compatibile con la Costituzione, GIURISPRUDENZA COSTITUZIONALE 919 (1993).
draft of the 1988 Code.\textsuperscript{169}

The reform did indeed move toward a restoration of the accusatorial system since it preserved the defendant’s right of confrontation. However, this attempt at reform was quickly attacked by the Constitutional Court in decision n. 361 of 1998.\textsuperscript{170} The Court scrutinized the revised provision and concluded that it was unconstitutional because it violated the principle of reasonableness entailed in the equality clause.\textsuperscript{171} Again, the Court justified its decision on the judicial duty of searching for the truth and repeated that no judicial activities should be wasted or evidence lost.\textsuperscript{172}

While decision n. 361 confirmed the return to a mixed-inquisitorial system, it also displayed new frontiers. An institutional conflict was now occurring: the new Article 513/2 was passed by Parliament only to have the Court strike it down a few months after it became effective. Parliament and the judiciary were clearly on opposite sides in an open conflict, and the judiciary had prevailed. It became clear that the only way to stop the trend back to an inquisitorial system was to amend the Constitution. The only problem with this, though, is a constitutional reform requires a higher majority in Parliament than a regular reform (two thirds of the Parliament).\textsuperscript{173}

\section*{IV. Factors Contributing to the Accusatorial System’s Failure}

A vast number of causes have been proposed to explain the

\begin{flushright}
\end{flushright}

\begin{flushright}
\end{flushright}

\begin{flushright}
\textsuperscript{171} Id. The argument is that after the reform, the Code permitted the use of previous statements of a joint co-defendant who had exercised the privilege against self-incrimination, while it forbade the use of previous statements of the severed co-defendant who exercised the same privilege. \textit{See supra} notes 89-91 and accompanying text.
\end{flushright}

\begin{flushright}
\end{flushright}

\begin{flushright}
\textsuperscript{173} ITALY CONST. art. 138.
\end{flushright}
failure of the incorporation of an accusatorial system into Italian criminal procedure.\footnote{See, e.g., Mirjan Damaska, The Uncertain Fate of Evidentiary Transplants: Anglo-American and Continental Experiments, 45 AM. J. COMP. L., 839, 840-41 (1997); Grande, supra note 30, at 227-58.} This Article will only discuss those factors which are considered the primary causes of the failure: 1) the cultural factor: the search for "material" truth; 2) contradictions in the legislature's plan of 1988; 3) the public prosecutor as an impartial actor; and 4) the professional status of judges. Before discussing these factors, though, it is necessary to analyze whether the Constitution required the aforementioned decisions.

A. An Inquisitorial Constitution?

Section III of this Article demonstrates that the main cause of the failure of the 1988 Code was the Constitutional Court. In all its decisions, the Court relied on the Constitution and stated that its conclusions were based on a constitutional background. It is unclear, however, whether this was an accurate assertion.

Prior to being amended, the Constitution did not impose a precise model for criminal proceedings, but an adversarial-accusatorial choice was a better fit for the values it protected. Article 24, section 2 guarantees the right to an attorney and an effective defense, and gives the accused the right to be informed as soon as possible of the charge filed.\footnote{ITALY CONST. art. 24, § 2.} Article 27, section 2 guarantees the principle of the presumption of innocence, thereby placing the burden of proof on the prosecution.\footnote{Id. art. 27, § 2 (stating "the accused is not considered guilty until the irrevocable decision of guilt").} Article 101, section 2 (affirming that judges should obey only the law) and Article 112 (providing a separation of functions between magistrates who judge and those who prosecute) assure the impartiality of the judge.\footnote{Id. arts. 101, § 2, 112 (stating "the public prosecutor has the duty to start criminal action").} In addition, Article 101, section 1 is relevant because it states that justice should be administered and given in the name of the Italian people, imposes maximum transparency in the procedures, and prevents secret proceedings, all factors typical of an inquisitorial model of criminal justice.\footnote{Id. art. 101, § 1.}
The recognition and affirmation of all these rights clearly shows that an accusatorial-adversarial criminal procedure model was more in line with the constitutional background. The Constitutional Court simply failed to see this reality.

B. Cultural Factors: The Search for "Material" Truth.

Cultural factors were the determinate factor limiting the effectiveness of the new Code. The ideology of the 1988 Code was the converse of the traditional model of criminal law and procedure in Italy. The traditional model was premised on the assumption that an impartial, capable researcher could best ascertain the facts of a case. By contrast, the new Code is rooted in the premise that there is not an objective way to ascertain facts or conclusions, but that truth is best found through confrontation of differing points of view.

The traditional view of the fact-finding process is still prevalent today in Italy, both among the judiciary, and among the public. The following opinion illustrates the cultural opposition the judiciary has toward the new accusatorial system:

There are two ways to conceive the criminal process, standing on opposite sides. On one side, the one that conceives the criminal process as the instrument for ascertaining the historical truth of the facts; on the other side, the one that conceives the process as a system to solve a controversy between two parties, as a competition where the winner is the party who is more capable, more persuasive, more brilliant.... The essential problem lies just here: what type of process do we want? That of the continental tradition, or that of [common-law]? The difference is abyssal, because if I choose the second option truth does not matter anymore.

179 ALESSANDRO GIULIANI, IL CONCETTO CLASSICO DI PROVA 231-53 (1960).
180 On induction in the inquisitorial tradition, see Paulo Ferrua et al., Il guidizio penale: fatto e valore giuridico, in LA PROVA NEL DIBATTIMENTO PENALE 218 (Paolo Ferrua et al. eds., 1999); Alessandro Giuliani, Prova, in XXXVII ENCICLOPEDIA GIURIDICA 570 (1988).
C. Contradictions in the Legislature's Plan of 1988

The 1988 Code did contain some weaknesses and deficiencies. For example, the choice of allowing the judge to introduce his own evidence, even though in a subsidiary role to the parties, was a sharp wound to the adversary profile. The risk of apathy and negligence of the parties in accomplishing their duties is relevant but it should have been cured in ways other than by giving the judge the chance to introduce evidence. When the judge introduces evidence, he is transformed into a researcher and loses his impartiality. In addition to this problem, the provision collides with the presumption of innocence and the related rule placing the burden of proof on the prosecution. In short, if the evidence is lacking to such an extent that the judge cannot make a decision, he should acquit the accused; the prosecution simply failed to meet its burden of proof. When a judge instead searches for evidence, it demonstrates his belief that the defendant is guilty.

The 1988 Code also had too many exceptions to the hearsay rule, particularly in permitting the substantive use at trial of witness's statement collected at or close to the commission of the alleged crime, even though this exception only applied after the statements had been used for impeachment purposes. This exception contradicts the strong intention of the drafters in creating a solid barrier between investigation and trial. In addition, the idea that statements given in the excitement of the moments after the crime are more genuine is far from true. It is not surprising that in one of its rulings, the Constitutional Court leaned on these many exceptions to the hearsay rule as justification for the principle that no evidence should be wasted.

The many exceptions to the hearsay rule were the result of an

183 Gilberto Lozzi, Il giusto processo e i riti speciali deflativi del dibattimento, in RIVISTA ITALIANA DI PROCEDEUERA PENALE 1163 (2002).
184 See supra note 181 and accompanying text.
185 See ILLUMINATI, supra note 97.
187 NOBILI, supra note 63, at 20.
188 See supra note 155-56 and accompanying text.
attempt by the drafters to find a half-measure solution so that the break with the past would not be too harsh. This compromise was indeed a weakness of the Code. When a revolution takes place, too many compromises can be a step backward. It would have been better for the drafters to be more courageous and create a full accusatorial system. Such a decision would probably not have avoided the ideological battle, but it would have at least made it more difficult for the inquisitorial faction to prevail.

D. Judicial Organization: The Common Background of Prosecutors and Judges

While the criminal procedure system in Italy underwent a major legislative change in 1988, no such innovation occurred within the judiciary. In Italy, both judges and prosecutors belong to the judiciary; they are all magistrates and are entitled to the safeguards that guarantee their independence. Of course, the two functions of judging and prosecuting are severed, but the common background is seen as a factor that threatens the independence and impartiality of the bench and creates an unfair disadvantage for the defense.

Some scholars view this common framework as a reason for the failure of the accusatorial system. The common framework induces the judge to look at the prosecutor as a party without a personal interest in the case. The judge views the prosecutor as a subject pushed by the sole interest of rendering justice and discovering truth. If the judge is impartial, the prosecutor must also be impartial since he is selected in the same manner and

189 NOBILI, supra note 63, at 57.
190 Ferrua, supra note 28, at 83-100.
193 Giulio Illuminati, La separazione delle carriere come presupposto per un riequilibrio dei poteri delle parti, in IL PUBBLICO MINISTERO OGGI 219-20 (1994).
194 Denis Salas, Il giudice, in PROCEDURE PENALI D'EUROPA 458 (Delmas-Marty et al. eds., 2d ed. 2001).
195 Grande, supra note 30, at 236 (criticizing this view); Langer, supra note 44, at 53.
enjoys the same guarantees and the same cultural formation as the judge.\textsuperscript{196} If the prosecutor is impartial, his investigation has to be impartial as well, so the evidence he has collected unilaterally in his inquiry and placed in the investigative-dossier is just as credible as the evidence collected in an adversarial trial.\textsuperscript{197} In short, the idea of the prosecutor’s impartiality leads to the belief that all the evidence he has gathered is credible evidence regardless of how it was collected.

But, if this is true, this means that having judges and prosecutors in the same category was not the reason for the failure of the Code’s provisions. In fact, the prosecutor can really be considered impartial only by disregarding the ideology of the Code, and by disregarding that anyone who is involved in searching is naturally partial, regardless of his judicial status.\textsuperscript{198} The fact that the prosecutor was conceived as impartial depended on embracing the old inquisitorial ideology: as long as the researcher is capable and impartial, he can reach the truth.\textsuperscript{199} The only way for the truth to be found, however, is by the presentation of two different perspectives at trial in front of a neutral judge.

Another argument raised is that the positioning of the prosecutor in the judiciary impairs the equal treatment of the parties. This argument is not convincing. The prosecutor and defense attorney will always have different powers during the investigation stage, regardless of whether the prosecutor is placed in the judicial or the executive branch. If the trial phase is impermeable to investigations, all that matters is equality of arms at trial. Under the 1988 Code, the prosecutor did not have greater powers at trial than the defense attorney did.\textsuperscript{200} In conclusion, the common status of magistrate for judges and prosecutors did not contribute to the accusatorial system’s demise.\textsuperscript{201}

\textsuperscript{196} For a description, perhaps a bit ungenerous, of the Italian prosecutor as “the Achilles’ heel of the Italian system,” see Pizzi & Marafioti, supra note 7, at 29-31. For a description of the prosecutor “as a fourth power,” see Grande, supra note 30, at 234-37, 241.

\textsuperscript{197} Grande, supra note 30, at 236.

\textsuperscript{198} See CORDERO, supra note 6, at 25.

\textsuperscript{199} See supra Part II.C.

\textsuperscript{200} See supra Part II.D.

\textsuperscript{201} At present, a reform of the judiciary is underway. Although the reform increases the separation of the functions of prosecutor and judge by providing for different
E. The Professional Status of Judges

Another aspect of the judicial organization that could have affected the accusatorial system is the professional status of the fact-finder. In Italy, except in the Court of Assise, crimes are judged by a panel of three professional magistrates.\footnote{202} The argument is that rules excluding evidence are designed to correct the problems that arise in a traditional jury system because of jurors' lack of experience with criminal affairs (e.g., jurors may be misled by the evidence).\footnote{203} Professional magistrates, on the other hand, are trained to render justice; they have significant experience in collecting and evaluating evidence. Therefore, the argument follows that professionals tend to believe that they do not need exclusionary rules because they can correctly appreciate the proper weight and value of each piece of evidence.

The rules of evidence, however, are not necessarily linked with the jury system, and some influential studies have demonstrated that the law of evidence is indifferent to the status of the finder of fact.\footnote{204} Exclusionary rules are created to protect the rights of people, particularly the accused, or to exclude evidence that is not reliable, regardless of the experience and ability of the judge. The evidence is inadmissible because it could not lead to a rational decision. There simply is not any conjunction between the law of evidence and the profile of the judicial panel, and to admit the evidence otherwise excluded by the rules would bring no benefit to the trial proceeding.

Even if Italian judges feel exclusionary rules are a formalistic exercise conducted in front of magistrates that are experienced and trained in managing evidence, they still have to apply those rules as the law provided. Note that while attacking the accusatorial system in the 1990s, judges could not choose to deny application of the hearsay rules but rather challenged their constitutional

\footnotetext{202}{C.P.P. arts. 5,6 (1988).}

\footnotetext{203}{This belief is particularly widespread among common law lawyers. See, e.g., \textit{MUELLER & KIRKPRATICK}, supra note 89, at 2.}

\footnotetext{204}{Alessandro Giuliani, \textit{The Influence of Rhetoric on the Law of Evidence and Pleading}, \textit{in JUD. REV.} 216 (1962); \textsc{Massimo Nobili}, \textsc{Il principio del libero convincimento del giudice} 13 (1974).}
validity. If the Constitutional Court confirmed the legality of the accusatorial provisions, the professional judges would have submitted to those provisions and applied them regularly. In conclusion, the professional status of judges was not a factor that led to the derailing of the accusatorial system.

F. Reflections

After analyzing the factors most often cited as leading to the downfall of the accusatorial system, it seems clear that the breakdown in the system was almost exclusively due to cultural factors. The magistrates not only kept thinking in terms of the old inquisitorial ideology, but they also strongly believed that such ideology was far better than the new one. This failure to adapt to the new ideology was the primary cause for the fall of the adversarial-accusatorial system.

It is true that the ideological conflict found both pretext and support in some deficiencies of the 1988 Code. If the legislature had been more courageous and taken a more coherent position, the traditional, inquisitorial ideology would have had a more difficult time in attacking the accusatorial system. But these deficiencies in the Code were not the cause of its demise. Rather, they only gave those against the new ideology a weapon with which they could launch their attack.

Additionally, it cannot be argued that the accusatorial system was destroyed because it only imported the law of evidence from the common law accusatorial system, and did not incorporate other essential features of the common law system such as the jury system, inclusion of the prosecutor within the executive branch, and the principle of prosecutorial discretion in commencing a criminal proceeding. While it is true that common law countries have an accusatorial system with the above features, this is simply a historical reference rather than a definition of an accusatorial system. In other words, every aspect of the American criminal justice system is considered accusatorial because it is part of an accusatorial system, and not because they are necessary elements

205 See supra Part III.

206 See supra Part IV.B.

207 See supra Part IV.C.
What makes a system accusatorial is the fact that evidence is collected in oral form with adversary dynamics in front of an impartial judge. Any other features of the common law system which surround the adversarial trial are not essential to the establishment of an accusatorial system.

V. The Re-Establishment of the Accusatorial Choice

A. The 1999 Constitutional Reform

As previously discussed, the Constitution did not prohibit an accusatorial system. On the contrary, the Constitution was more suited to a system based on the parties' initiatives and on evidence gathered by their cross-examination of the witnesses in front of an impartial judge. Despite this, the counter-attack of the Constitutional Court (i.e., systematically misinterpreting the Constitution) made it clear that the battle could not be won without amending the Constitution and clearly stating the procedural system that the legislature intended to establish.

Constitutional bill n. 2 of 1999 changed Article 111 of the Constitution by adding five new sections. The reform was labeled "the fair trial reform," because the added provisions intended to state the principles of a fair trial that are seen to correspond with the adversary and accusatorial model. In particular, revised article 111 states that evidence in criminal cases should only be that which was heard in front of the parties and an

---

208 It should be pointed out that the majority of scholars consider the patteggiamento (the type of proceeding which resembles American plea bargaining) as a form of inquisitorial justice. NAPPI, supra note 46, at 560; Paulo Ferrua, Il Nuovo Processo Penale e la Riforma del Diritto Penale Sostanziale, in STUDI SUL PROCESSO PENALE 30; FERRAJOLI, supra note 35, at 581 (2000). For the opposing viewpoint, see Paolo Tonini, I Procedimenti Semplificati, in LE NUOVE DISPOSIZIONI SUL PROCESSO PENALE 105-11 (Cedam ed., 1989). For a conception of plea-bargaining as a form of inquisitorial justice in the American literature, see Van Cleave, supra note 112.

209 See supra Part II.B.

210 See FERRAJOLI, supra note 35, at 574-75.

211 See supra Part IV.A.

212 Id.

213 See supra Part III.C.

214 Constitutional Law n. 2 of Nov. 23, 1999.

215 Id.
impartial judge. This assures the central position of the trial in criminal proceedings by imposing the respect of the principles of orality and of immediacy in the collection of evidence.

The reformed Constitution also provides the only legitimate exceptions to the substantive use of evidence collected outside of the trial: when the parties agree, when illicit conduct of the witness is proven, and when it is unavoidable and impossible to collect the evidence at trial. In addition, the reformed Constitution introduces a confrontation clause, providing that guilt cannot be proven based upon declarations of an accuser who has always willingly escaped examination by the accused or his lawyer.

Also, the adversarial pillar of the accusatorial building is codified. Section 3 of the revised article 111 grants the defendant the right to present evidence at trial under the same conditions of the prosecution and the right to examine directly all declarants.

B. The Reform Following the Enactment of the Constitutional Reform

The reformed constitutional provision only states general rules and principles. In order to apply these rules and principles, laws must be enacted. In 2001, the legislature finally passed a bill that transferred the new constitutional rights into the Code.

The first rule that was re-established was the "golden rule" of any accusatorial system: prior statements are available only for undermining the witness' credibility; they cannot be used to prove the facts they assert. The only exceptions to this "golden rule" are: when the examination of the witness is impossible for

---

216 *Italy Const.* art. 111, § 4. These are the features of the principle of "contraddittorio per la prova," which entails the essence of the accusatorial spirit.

217 *Id.* art. 111, § 5.

218 *Id.* art. 111, § 4.

219 *Id.* art. 111 § 3. This provision also grants the defendant the right to an interpreter in case he doesn’t speak the Italian language, the right to be informed with the minimum delay of time possible of the investigations against her, the right to discovery and to be given enough time to prepare her case. *Id.*


221 See supra note 89 and accompanying text.

objective reasons independent of the parties’ will,\textsuperscript{223} when the witness was threatened or corrupted,\textsuperscript{224} and when both parties agree.\textsuperscript{225} The legislature also reintroduced a sustaining pillar of the accusatorial system:\textsuperscript{226} the ban on police officer testimony regarding statements collected during investigations.\textsuperscript{227}

The rules on “accomplice evidence” were also partially rewritten. This time, though, article 513 was not the center of attention.\textsuperscript{228} Instead of focusing on the rules for use of prior statements, the legislature focused on the co-defendant’s right to remain silent. The legislature felt all the difficulties had arisen because of the broad right of silence granted to the co-defendant; the co-defendant could accuse others and then later refuse to respond in court.\textsuperscript{229} The legislature felt that permitting the use of prior statements of a co-defendant when he refuses to testify is an inquisitorial practice that should not be allowed by the system.\textsuperscript{230}

On the other hand, an attempt by a party (the prosecution, in particular) to use the prior statements for the truth of the matter asserted depended on the fact that it was frequent in Italy for the co-defendant to remain silent after having accused somebody. Therefore, it was necessary to prevent the co-defendant from remaining silent and exercising such influence on the process.

The legislature’s response to this dilemma was to make the co-defendant assume the position of a witness once he gives the prior statements accusing the defendant; therefore, he can be compelled to take the stand at any time to repeat what he said.\textsuperscript{231} This

\textsuperscript{226} See F. Caprioli, Palingenesi di un divieto probatorio. La testimonianza indiretta nel funzionario di polizia nel rinnovato assetto processuale, in IL GIUSTO PROCESSO TRA CONTRADDITTORIO E DIRITTO AL SILENZIO 59 (Kostoris ed., 2002).
\textsuperscript{228} See supra notes 95-97 and accompanying text.
\textsuperscript{229} Vittorio Grevi, Processo Penale, <<giusto processo>> e revisione costituzionale, CASSAZIONE PENALE 3321 (1999); Ennio Amodio, Giusto processo, diritto al silenzio e obbligo di verità dell’ imputato sul fatto altrui, CASSAZIONE PENALE 3589 (2001).
\textsuperscript{230} Paolo Ferrua, L’avvenire del contraddittorio, in CRITICA DEL DIRITTO 27 (2000).
\textsuperscript{231} C.P.P. arts. 64 § 3c, 197 § 1b (1988). The law expressly provides that the accomplice becomes a witness only in relation to and to the extent of the declarations
innovation has been strongly criticized because it substantially undermines the privilege against self-incrimination by forcing a co-defendant to respond to issues concerning a crime with which he is charged. This waiver of the privilege does not apply to co-defendants who are accomplices. If someone accuses his accomplice, he will not waive his privilege and become a witness. The reason for this exception is the highly intense connection of the positions of the accuser and of the accused; with accomplices, the connection is such that it would be impossible to speak of one's culpability without speaking of the other at the same time.

The co-defendant's prior statements can be used substantively without his oral testimony only when it is impossible to have the co-defendant be present at trial. Note that the prior statements of an individual defendant can be substantively used if he does not come to court or exercises the privilege against self-incrimination, or if they have been used to attack his credibility at trial.

The legislature focused particularly on enacting the defendant's right to confrontation introduced by the new Constitution. The Code now provides that a decision cannot be based on evidence from a witness who has willingly escaped rendered. C.P.P. art. 64 § 3c. Therefore, an accomplice can still exercise his privilege if asked about other circumstances. The reason for such a limitation is the fear that a full duty of testifying on any relevant detail could lead the co-defendant to self-incrimination. The resulting bizarre situation is that the co-defendant who has accused somebody can legitimately be questioned on what he previously said, though he cannot really be cross-examined. The cross-examiner, in fact, cannot ask the co-defendant anything different from what he said in the first place.

232 See Giulio Illuminati, L'imputato che diventa testimone, in L' INDICE PENALE 391 (Alessio Lanzi ed., 2002); OLIVIERO MAZZA, L'INTERROGATORIO E L'ESAME DELL'IMPUTATO NEL SUO PROCEDIMENTO 322 (2004). Other critics have been moved with regard to the discipline's complication. See Massimo Nobili, Giusto processo e indagini difensive, in DIRITTO PENALE E PROCESSO 6 (2001).

233 C.P.P. art. 197, § 1a; see Gilberto Lozzi, La realtà del processo penale ovvero il "modello perduto," in QUESTIONE GIUSTIZIA 1106 (2001).


Therefore, the out-of-court statements of a witness who fails to attend the trial cannot be used to prove the issue of guilt. The exclusionary rule linked to the right of confrontation also applies to trial in situations where the witness accuses the defendant during the prosecutor’s examination but remains silent in the defense attorney’s cross-examination. The latter provision has been criticized because it undermines the principle that all trial statements are proper grounds for decision. The argument is that statements given in trial are still collected with respect to the orality and immediacy principles; the evidence is formed in front of the judge who can decide on its reliability and on its probative weight. If the witness present at trial escapes cross-examination, his silence affects his credibility, not the admissibility of evidence. Other scholars defend the provision with the argument that accusatorial evidence is not simply evidence produced at trial, but also evidence that respects the confrontation clause.

Note that the Italian confrontation clause is different from the classic confrontation clause such as that imposed by article 6 of the European Convention of Human Rights to which Italy is a party. The Italian confrontation clause does not directly provide that the statements of an accuser cannot be proper grounds for a conviction if the defendant did not have a right to cross-examine the accuser, as does article 6. The Italian confrontation clause only states that if the accuser avoids cross-examination, no statements of his may be used in determining guilt. In other

---

240 See Ferrua, supra note 80, at 17.
241 Id.
244 Id.
245 See supra note 260 and accompanying text.
words, instead of focusing on the defendant’s right to confrontation, the Italian clause tends to punish the negligent accuser. This is why the Italian confrontation clause does not apply when out-of-court statements are introduced because of the impossibility of gathering the evidence from the accuser. For example, if the accuser suddenly dies because of a heart attack, he has not willingly escaped confrontation and his previous statements can be grounds for a defendant’s conviction.246

C. The Constitutional Court’s Assent to the New Provisions

Some of the articles of the recently amended Code have already been submitted for Constitutional Court scrutiny, but this time the results have been far different. First, decision n. 439 of 2000 confirmed that the separation between the investigative and the trial phase is now protected by the Constitution by refusing to admit prior statements of a witness exercising his parental privilege at trial.247 Any remaining doubts as to the successful return to the accusatorial-adversarial system were then swept away by decisions n. 32 and n. 36 of 2002.248 In the first decision, the Court upheld the prohibition against admitting statements collected by police officers during the investigation as constitutional.249 In the second decision, by confirming the constitutionality of the provision that permits the use of prior statements only for attacking the credibility of the witness, the constitutional judges finally certified the existence of a solid barrier between the investigation and the trial.250

246 This situation could result in Italy receiving a conviction from the European Court of Human Rights, whose duty is to enforce the Convention. Claudia Cesari, Prova irripetibile e contraddittorio nella Convenzione europea dei diritti dell'uomo, in RIVISTA ITALIANA DI DIRITTO E PROCEDURA PENALE 1456 (2003). For a discussion about the relationship between unavailability of the declarant and the confrontation clause under the new discipline, see Michele Panzavolta, Le letture di atti irripetibili al bivio tra “impossibilità oggettiva” e “libera scelta,” in CASSAZIONE PENALE 3974 (2003).


249 Corte cost., 2002, n. 32.

D. Present Disputes Within the Accusatorial System

Italian scholars have generally approved of the re-establishment of the accusatorial system of criminal procedure. Despite this general approval, some differences of opinion remain particularly concerning the exceptions to the rule of the inadmissibility of out-of-court statements.

The main dispute centers around the possibility, allowed by the Code and the Constitution, of admitting prior statements when it is impossible to collect the evidence orally during trial because the witness is unavailable (e.g., when the witness has suddenly died). Some scholars say that there is no reason for this exception. The simple fact that there is no chance to gather the evidence during trial does not increase the reliability of the out-of-court statements; if the chance is lost to gain the evidence in the proper manner, that does not mean that what was once improper evidence should now be deemed trustworthy. It is for these reasons that some scholars have proposed to ban the substantive use of such investigative evidence and to limit its use to attacking witness’ credibility.

In response to this argument, it is stated that the substantive use of prior statements because of the impossibility of taking the witness’ deposition during trial is a realistic and necessary exception in a slow criminal system such as Italy’s. Trials are normally commenced many years after the alleged crime and, due to the passing of time, the sources of evidence might naturally disappear (e.g., the witness dies) or lose their potential for providing relevant information (e.g., the witness simply cannot remember). The argument is that without these evidentiary exceptions, almost all Italian trials would end with acquittals.

---


253 Giostra, supra note 43, at 61; Ubertis, supra note 252, at 201.

254 See infra note and accompanying text.

255 Some scholars also affirm that the impossibility of repeating evidence at trial is a logical limit to the application of the rule against hearsay: NAPPI, supra note 46, at 23.
Another controversial point involves the provision that permits the substantive use of out-of-court statements when there has been criminal conduct against the witness (e.g. the witness was threatened). The controversy centers around who should be the source of the criminal conduct. Some believe that in order to allow the substantive use of these prior statements, the illicit wrongdoing on the witness should be committed by one of the parties. Others argue that it does not matter who exerted the criminal pressure on the witness, so long as there is clear evidence of it.

An additional controversial point involves the constitutional provision that permits the substantive use of out-of-court statements with the defendant’s consent. Literally read, the provision only requires the consent of the defendant. Such a view would clearly violate equality of arms between the defendant and the prosecutor. The defendant could take advantage of all out-of-court statements and records he wishes to invoke, while the prosecution would be strictly limited to trial evidence. Some scholars propose to interpret the provision as though it implicitly referred to a prosecutor’s request to use some out-of-court statements for substantive purposes. Others suggest that the defendant’s consent can be given only for investigative evidence collected by the prosecutor.

The legislature has enacted the Constitution by providing that a bilateral consensus is necessary for use of out-of-court statements. Even this rule, however, raises a significant debate. Some say that this consensual approach is a denial of a fair trial because the trial is no longer a search for truth but is purely a game. Accusatorial procedure is based on the belief that some evidence is improper evidence which, if considered in the decisionmaking, leads to a wrongful judgment. When the parties

256 See supra note 242 and accompanying text.
257 Conti, supra note 242, at 633.
258 See S. Corbetta, Principio del contraddittorio e disciplina delle contestazioni nell’esame dibattimentale, in GIUSTO PROCESSO. NUOVE NORME SULLA FORMAZIONE E VALUTAZIONE DELLA PROVA 482 (Tonini ed., 2001); Ferrua, supra note 80, at 18-21.
259 See supra note 243 and accompanying text.
260 Id.
261 Giostra, supra note 43, at 60.
agree to admit evidence that is not reliable, such as evidence collected unilaterally out-of-court, they permit the judge to base his decision on this dangerous material only for the purpose of winning the case.\textsuperscript{262} If the accusatorial system is the best way to ascertain the truth of facts, bargains on proof should not be permitted.

Other scholars feel that the bilateral consensus requirement to admit out-of-court evidence does not contradict the accusatorial goals. In fact, by agreeing on the admission of evidence, the parties show that they have no interest in reproducing such evidence at trial since they believe they would not gain any better result. In other words, the parties implicitly assume that the deposition at trial would be no different than what the previous statement asserts.\textsuperscript{263} This conception of the consensus requirement sweeps away the fear of loss of the cognitive character of the trial.

The aforementioned debate on the role that a consensus on evidence should have is heightened by the differences between the new system and the traditional view. According to the latter, none of the rights involved in a criminal trial can be subjected to waiver or other disposition.\textsuperscript{264} In addition, the debate is fueled by opposite points of view for criminal trials. On one side, there is the idea that trial should be completely left to the responsibility of the parties.\textsuperscript{265} On the other side, there is the fear that giving the parties more freedom in the ascertainment of the facts might give rise to inequalities. For example, poor defendants with inadequate attorneys might be more easily forced to waive their trial rights.

\textbf{E. Is the Accusatorial System Sustainable? A Difficult Harmonization with Efficiency and the Resurrection of Inquisitorial Procedures Within the Accusatorial System}

Now that the accusatorial spirit is on its way to being fully established, the new frontier is that of harmonizing the Italian

\textsuperscript{262} Id.

\textsuperscript{263} Glauco Giostra, \textit{Analisi e prospettive di un modello probatorio incompiuto, in QUESTIONE GIUSTIZIA} 1135-38 (2001).

\textsuperscript{264} MARIA LUCIA DI BITONTO, \textit{PROFILI DISPOSITIVI DELL'ACCERTAMENTO PENALE} 73-92 (2004).

system with the goal of efficiency.\textsuperscript{266} In fact, inefficiency causes a spiral of great malfunction. The more trials that take place many years after the alleged crime, the more defendants are willing to face trial and avoid alternative proceedings.\textsuperscript{267} A trial commenced long after the alleged crime will be less likely to fully ascertain the facts, and will more likely result in an acquittal.\textsuperscript{268} Moreover, since Italian legislation provides for statutes of limitation, the longer it takes to get to trial, the greater the chances the accused has in being able to take advantage of these limitations.\textsuperscript{269} Inefficiency produces a vicious cycle: as more defendants opt for trial, more trials result, and it takes longer and longer for each trial to commence.\textsuperscript{270}

The enormous caseload of the Italian system itself adds to this cycle of inefficiency. Various reforms have recently been adopted to cope with this backlog.\textsuperscript{271} One reform issued in 1998 provided that minor crimes be judged by a single judge rather than by the traditional panel of three magistrates.\textsuperscript{272} In 2001, the legislature also introduced justices of the peace to deal with petty offenses, thereby relieving the tribunals from deciding some cases.\textsuperscript{273}

Despite these reforms, there is still tremendous pressure on the system to be more efficient. It is essential that this pressure be alleviated in order to assure that the accusatorial system will be

\begin{itemize}
\item \textsuperscript{266} Pizzi & Marafioti, supra note 7, at 5-6.
\item \textsuperscript{267} Id.
\item \textsuperscript{268} Id.
\item \textsuperscript{269} Id.
\item \textsuperscript{270} The average length of a criminal case is not encouraging. The case sits 347 days in the prosecution office. Then, once the charge is filed, the preliminary hearing (when it is provided) takes another 324 days. Relation of the chief public prosecutor of the court of cassation on the state of the Italian justice in the year 2004, available at http://www.giustizia.it/uffici/inaug_ag/cass2005index.htm#ra17. The trial in front of the tribunal takes 377 days (398 days for the trial in front of the court of assise). Id. Finally, only 606 days are needed for the appeal (203 when the appeal is in front of the court of assise of appeal). Id.
\item \textsuperscript{271} For a comparison of the Italian and the American attempts to cope with their judicial backlogs, see Pizzi & Marafioti, supra note 7, at 15-26.
\item \textsuperscript{272} Decree n. 51 of Feb. 19, 1998 (published in Gazz. Uff., No. 66 (Mar. 20, 1988)).
\item \textsuperscript{273} Decree n. 274 of Aug. 28, 2000 (published in Gazz. Uff., No. 234 (Oct. 6, 2000)). On this subject see MICHELE CAIANIELLO, POTERI DEI PRIVATI NELL'ESERCIZIO DELL'AZIONE PENALE 149-223 (2003); IL GIUDICE DI PACE NELLA GIURISDIZIONE PENALE 3 (Glauco Giostra – Giulio Illuminati eds., 2001).
\end{itemize}
sustainable in the long run. In order to address this concern, the legislature has pushed the idea of increasing the applicability of alternative proceedings.

In December 1999, just a few months after the Constitution had been amended, bill n. 479 introduced major changes in the abbreviated trial. The bilateral agreement necessary in the original version to access this alternative proceeding was replaced by the unilateral will of the defendant. Now the defendant can ask to be judged on the investigative-file and the prosecutor can only observe, having lost any veto power. The defendant can now also raise a different type of request for abbreviated trial where, along with the demand for a judgment on the investigative evidence, he can also ask for the introduction of new evidence during the hearing. The judge must accept the demand for a judgment on the investigative evidence, but he can reject the demand for the introduction of new evidence if the evidence requested is not necessary or if the assumption of evidence would cause a significant loss of time.

There is no doubt that the new structure of the abbreviated trial was created to widen its range of application and relieve the current burden of trials. The reform has been strongly criticized, though. Since any defendant who chooses this inquisitorial form of procedure is guaranteed a reduction of any penalty by one-third, the system clearly creates an incentive for defendants to choose the inquisitorial form of criminal procedure over the accusatorial one. In short, the system seems to favor the inquisitorial form of criminal procedure in the name of greater

---

274 Law n. 479 of Dec. 16, 1999 (called "Legge Carotti") (published in Gazz. Uff., No. 296 (Dec. 18, 1999)).
275 See supra notes 133-34 and accompanying text.
276 C.P.P., art. 438 (1988), amended by Law n. 479, art. 27. An English version of this article can be found in THAMAN, supra note 73, at 243-4.
278 Id.
279 Id. After all, if the assumption of evidence takes a lot of time this would deny the abbreviated feature of this type of proceedings and any form of procedural economy would disappear.
280 Lozzi, supra note 233, at 1099-1100.
281 C.P.P., art. 438 (1988), amended by Law n. 479, art. 27.
efficiency.

In 2001, in a further attempt to reduce the pressure on the Italian trial system, the legislature enlarged the application of the patteggiamento, permitting the prosecutor and defendant to agree on a penalty of up to five years in prison.282 The penalty the parties agree on is reduced by one third, so the parties can reach a deal for crimes punishable by up to seven and a half years in prison and, if some mitigating circumstances apply, for crimes punishable up to eleven years in prison.283

The legislature has tried to increase special proceedings, a path that corresponds to the original intentions of the 1988 Code.284 Despite these legislative improvements, statistics show disheartening results. The patteggiamento covers about 15 percent of all sentences pronounced by tribunals and the abbreviated trial covers only 10 percent of the proceedings not dismissed.285

Many Italian scholars do not agree with this legislative trend. They believe that it reintroduces the inquisitorial style of criminal procedure from which Italy wanted to depart.286 This criticism of the alternative proceedings as a hidden inquisitorial system dates back to the origin of the Code.287 The criticism of the present expansion of the special proceedings is based on the right belief that having an accusatorial trial does not suffice to make a system accusatorial. Not only does the potential for an accusatorial trial need to be guaranteed, but also the effectiveness. After all, alternative proceedings such as the abbreviated trial alone should not play a more important role than the accusatorial trial in solving criminal cases. If more processes are handled in an inquisitorial

---

282 C.P.P. art. 444 (1988), amended by Law n. 134 of June 12, 2003 (published in Gazz. Uff., No. 136 (June 14, 2003)). For two different justifications (and a third hidden, political justification) of the increase of patteggiamento, see Langer, supra note 44, at 49 n. 236.


284 See supra Part II.F.

285 Lozzi, supra note 183, at 1159.


way, then the accusatorial system is rendered essentially inquisitorial. Since it is widely known that the Italian system can ill afford to have additional trials, critics of the expansion of alternative proceedings feel that the better way to reduce the caseload is to reduce the number of punishable crimes and allow the prosecutor to screen out all facts of minor relevance at the commencement of proceedings.\textsuperscript{288}

VI. Conclusion

In recent years, new legislative developments have set aside the re-establishment of an accusatorial system and have instead focused on different and disputable reforms whose effect on the system is yet to be understood.\textsuperscript{289} The hope is that the legislature will soon retreat from solutions of this type and focus more on its attempt to concretely affirm the accusatorial conquest over the inquisitorial system.

If the accusatorial system is on its way to being re-established in Italy,\textsuperscript{290} its most pressing challenges can be seen already. Should the legislature rely more and more on alternative proceedings or should it try to grant everybody a full trial, reducing the number of punishable crimes and introducing a prosecutorial screen? Regardless of the measures chosen, a mandatory step must be to eliminate the judge's power to introduce evidence. This is not only necessary for a full affirmation of the adversarial-accusatorial system, but this innovation would also impose on the parties a higher degree of effort and attention. It is essential that the judge sit in a neutral and impartial position. In addition, the legislature must assure consistency throughout the system; reform after reform has resulted in a Code lacking in essential coherence. The Code has a strange impressionistic dimension: one understands its inclination

\textsuperscript{288} See generally \textit{Diritto Penale Minimo} (U. Curi & G. Palombarini eds., 2000).

\textsuperscript{289} Two other reforms should be mentioned. One deals with the shift in the venue of the trial because of the fear of a biased judge. See Law n. 248 of Nov. 7, 2002 (published in Gazz. Uff., No. 261 (Nov. 7, 2002), \textit{amending} C.P.P. arts. 45, 47, 48, 49 (1988). The other deals with judicial cooperation with foreign authorities. See Law n. 367 of Oct. 5, 2001 (published in Gazz. Uff., No. 234 (Oct. 8, 2001)). Both reforms seemed to be more concentrated on the course of a few specific trials involving important politicians than on the benefit of the whole criminal system, though.

\textsuperscript{290} For an argument that it is not, see Lozzi, \textit{supra} note 233, at 1112.
for an accusatorial trial and its efforts to exclude evidence collected out-of-court, but when it comes to solving a specific matter, the Code offers hundreds of possible solutions that reflected a more inquisitorial manner. The courts’ and scholars’ efforts are presently aimed at assuring a minimum level of coherence to the procedures, but the situation is far from being stabilized.291

Some argue that the new frontier of the legislature is that of pragmatism.292 It moves without attention to the judicial categories and instead focuses on achieving straightforward results in the practice of handling criminal cases.293 If this is so, the duty of jurists must be to prevent this pragmatism from endangering the accusatorial system’s stability. An accusatorial system that does not work, because of its inefficiency or because of a lack of coherence, is not accusatorial in the first place.


293 Id.