The Accusatorial Process from the Italian Point of View

Guilio Illuminati

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The Accusatorial Process
from the Italian Point of View

Giulio Illuminati†

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I. Meaning and Value of the Principle

Any debate on comparative law, especially in the field of criminal procedure, requires clearly defined concepts. Although it is broadly used, the concept of an accusatorial system is one of the most difficult to understand and scholars offer very different explanations. What is certain is that the notions of accusatorial and inquisitorial processes are abstractions.¹ As a matter of fact, the traditional dichotomy alludes to two hypothetical models obtained by making a generalization from some real features of existing and no longer existing systems.² It follows that it is not a matter of how the law is interpreted that defines the dichotomy; rather, the concept depends on the choice of an ideologically

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¹ See Giulio Illuminati, Accusatorio e Inquisitorio (Sistema), I ENCICLOPEDIA GIURIDICA 1 (1988).
² See id.
oriented scale of values. The features of the accusatorial system are determined only through contrast to those of the inquisitorial system and vice-versa; therefore they represent only ideal models that, in practice, can combine in different ways in relation to several variables.

In order to establish whether a given legal system belongs to one legal model or to the other, scholars tend to compare the real system with a reference model so that the outcome depends on the presence of features considered essential to the definition. Usually, a series of general principles is identified a priori, representing the outline of the reference model. This reconstruction is based on evaluative propositions and dependent on the scholar's subjective viewpoint.

To better clarify: The distinction between accusatorial and inquisitorial systems contains both historical and theoretical-dogmatic analytical structures, which, though not mutually exclusive, do not always coincide. In other words, some features that can be observed in a specific legal system classified as either accusatorial or inquisitorial may not be essential to the integration of the theoretical model; or they may no longer be significant, because they have become a common heritage of all modern systems. As we will immediately observe, an example of the first type is the public or private nature of prosecution; an example of the second type is the separation between the accuser and the judge.

The historical approach is essential not only to identify the real origins of the dichotomy, but also to fully understand the meaning of the parameters of the opposition and the way they have changed in the course of time. Under the historical perspective, it is particularly relevant which party is given prosecutorial power and whether the judge can initiate proceedings motu proprio. On the

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3 See id.
4 See id.
6 See id.
7 See id.
8 See id.
9 Motu proprio is a Latin term for "on his own impulse," which is usually used to describe a rescript initiated by the pope without consult. Webster's Third New World
contrary, the dogmatic framework, although unavoidably conventional and questionable to a certain extent, requires the creation of a logically coherent and technically correct conceptual structure where emphasis is placed mainly on the method for ascertaining criminal responsibility. This paper assumes, as a fundamental component of the theoretical model of accusatorial system, the principle of parties' confrontation (principio del contraddittorio), in which evidence is collected before the judge at trial.

II. Historical References: Private and Public Prosecution under Roman Law

The structure of the criminal process contains different notions of the State—how it functions within the administration of justice; how it relates to the autonomy of the individual; and how it limits such autonomy. The historical development of criminal law is marked by the development of a differentiation between private and public interests. In the beginning, Roman law lacked a clear distinction between those interests. The State legitimated private revenge as an ordinary reaction to a crime and provided only for direct punishment by the public authority for the most serious crimes against the State.

The passage from private revenge as a source of justice to the provision of a real criminal process was initiated by the establishment of an impartial office with judging functions. Although the trial was public, its initiation remained in the hands of private individuals who were entitled to the prosecution: the victim, or whenever a State interest was affected, any other citizen

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10 FERRAJOLI, supra note 5, at 574.
11 Giuseppe Pugliese, Processo Privato e Processo Pubblico, in 3 RIVISTA DI DIRITTO PROCESSUALE 63, 72-75 (1948); see also Piero Fiorelli, Accusa e Sistema Accusatorio (Diritto Romano e Intermedio), in I ENCICLOPEDIA DEL DIRITTO 330, 331 (1958).
12 Fiorelli, supra note 11, at 331.
13 See id.
14 See id.
15 FERRAJOLI, supra note 5, at 576.
In this phase, features that would later be considered typical of the accusatorial system emerged and were associated with the private nature of the prosecution, including the discretionary power to start a prosecution; the burden of proof on the prosecutor; the equality of arms between the parties and their control of the evidence; the principle of publicity and orality of the trial; and, finally, the judge's passive role as the arbitrator of the dispute. The private accuser was left in charge of gathering the evidence. The Praetor could authorize him to use coercive powers in his investigations. European reformist lawyers, beginning in the 18th century, viewed the criminal process of the Republican time of Rome as a bulwark of the citizen's individual liberties and began to consider the accusatorial system a typical expression of a democratic regime.

With the coming of the Roman Empire, criminal prosecution left only to the citizens' initiative proved to be insufficient in protecting imperial absolute power. Thus, besides traditional proceedings, public officers began to carry out a new form of extraordinary jurisdiction which spread across the Empire. At first, it applied only to crimes against the Emperor but gradually extended to other crimes. Although private prosecutions remained in force, criminal charges were brought ex officio as well. The state magistrates, who acted as delegates of the society, were allowed to bring criminal proceedings

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16 See id.
17 See, e.g., GIOVANNI CARMIGNANI, IV TEORIA DELLE LEGGI DELLA SICUREZZA SOCIALE 46-49 (1832) (discussing the role of the judge); LUIGI LUCCHINI, ELEMENTI DI PROCEDURA PENALE 19 (1895) (discussing the function of the parties within criminal process).
18 See CARMIGNANI, supra note 17.
19 The Praetor was an elected magistrate during the ancient Roman period. For discussion of the evolution of the Praetor, see BARRY NICHOLAS, AN INTRODUCTION TO ROMAN LAW 19-21 (1962).
20 See CARMIGNANI, supra note 17.
21 See id.; see also LUCCHINI, supra note 17, at 19.
22 PIERO FIORELLI, I LA TORTURA GIUDIZIARIA NEL DIRITTO COMUNE 16-17 (1954).
23 See id.
25 Ex officio is a Latin term meaning by virtue of office or position. In other words, as a state magistrate, these officers were allowed to bring criminal proceedings
Emperor, were entrusted with the authority to seek and investigate crimes and gather evidence. The trial became written and was held in secret. The accused was used as a source of evidence and was imprisoned; torture, banned during the Republican age, was introduced as a means of extricating the evidence from the accused. The ordinary procedure remained in force but gradually lost ground in favor of the inquisitorial procedure that finally prevailed.

III. The Medieval Criminal Process and the Establishment of the Inquisitorial System in the Modern Age

The collapse of the Roman Empire heralded in Italy the introduction of an accusatorial procedure of Germanic origins that stemmed from judicial combat. This procedure was destined to evolve into the English adversary system, but it did not entirely replace the inquisitorial model which remained in force throughout the Middle Ages. The inquisitorial model survived through Canon Law, which perpetuated the bureaucratic tradition inherited by the Roman Empire. Especially in regard to the repression of heresy, where God is the offended party and the goal is the salvation of souls, the truth should be found by any means; thus, the Church could not tolerate private prosecution and the right of confrontation. As a consequence, the public authority reserved the right to investigate the crime and to decide the consequent punishment. Such authority acted for the sake of the

against private citizens as a part of their duties. See, e.g., WEBSTER'S, supra note 9, at 171.

26 See LUCCHINI, supra note 17, at 38.
27 See FERRAJOLI, supra note 5, at 577; see also Fiorelli, supra note 22.
28 See FERRAJOLI, supra note 5, at 577; see also Fiorelli, supra note 11, at 332.
29 See FERRAJOLI, supra note 5, at 577.
30 See id.
31 Canon Law is the law of the Roman Catholic Church. See generally RHIDIAN JONES, THE CANON LAW OF THE ROMAN CATHOLIC CHURCH AND CHURCH OF ENGLAND: A HANDBOOK (T&T Clark, Ltd. 2000) (elaborating canon law under both the Roman Catholic Church and the Church of England).
32 See ILLUMINATI, supra note 1; see also LUCCHINI, supra note 17, at 38.
33 FERRAJOLI, supra note 5, at 577.
34 FRANCO CORDERO, PROCEDURA PENALE 21-22 (8th ed. 2006) [hereinafter PROCEDURA].
accused, who, for this reason, was obliged to cooperate.\textsuperscript{35} Furthermore, torture gained a salutary function in the process insofar as, through suffering, the guilty could repent and save his soul.\textsuperscript{36} Although the accusatorial procedure remained the ordinary procedure in the Italian Municipal Statutes of the 13th and 14th centuries,\textsuperscript{37} once the rule—exceptional in theory—allowing judges to proceed \textit{motu proprio} caught on, their functions progressively widened to the extent that the inquisition became compulsory for a high number of crimes.\textsuperscript{38} Although the two systems coexisted, eventually it was the inquisitorial process that became the ordinary, or dominant, system.

Under this process, the prosecution and the acts of inquisition were set forth in writing and the judge would secretly hear the witnesses, while the accused could only attend the witnesses' oath-taking.\textsuperscript{39} In the presence of enough evidence, torture could be used to extract a confession.\textsuperscript{40} At the end of the inquisition, witness records were disclosed to the defense, which was then granted a period of time, generally very short, to submit its own objections.\textsuperscript{41} Finally, without public trial, the judge would pronounce his decision without giving reasons for it.\textsuperscript{42} Setting aside the use of torture, such a procedure can be viewed as an extremely efficient method of quickly achieving an exemplary punishment.

It is easy to understand why in the modern age, with the evolution of Italy from free Municipalities (\textit{liberi Comuni}) to Signories (\textit{Signorie}), the inquisitorial system continued to develop and become the standard process, as it certainly better suited the new power structures.\textsuperscript{43} Private prosecution completely

\textsuperscript{35} See FERRAJOLI, \textit{supra} note 5, at 577; see also FRANCO CORDERO, \textit{GUIDA ALLA PROCEDURA PENALE} 49 (1986) [hereinafter GUIDA].

\textsuperscript{36} See GUIDA, \textit{supra} note 35.

\textsuperscript{37} See Fiorelli, \textit{supra} note 11, at 333.

\textsuperscript{38} See id.

\textsuperscript{39} See id.

\textsuperscript{40} See GUIDA, \textit{supra} note 35.

\textsuperscript{41} See Fiorelli, \textit{supra} note 11, at 333.

\textsuperscript{42} See GUIDA, \textit{supra} note 35, at 361-62; FERRAJOLI, \textit{supra} note 5, at 639.

\textsuperscript{43} See LUCCHINI, \textit{supra} note 17, at 37-38; Fiorelli, \textit{supra} note 11, at 333.
disappeared while the inquisition prevailed throughout Continental Europe and eventually received codification with the French *Ordonnance criminelle* of 1670.\(^{44}\)

It is possible to observe that, at this stage, the lack of an accuser and the ability of the judge to activate proceedings *motu proprio* was no longer a peculiar mark of the system.\(^{45}\) The prosecution was formally performed by an officer separated from the judge—the public prosecutor—but this one aspect could not change the inquisitorial nature of the entire process.\(^{46}\) It is in this era that the modern dichotomy between the accusatorial and inquisitorial systems emerged, represented by the different methods for collecting the evidence and fact-finding. Within the accusatorial system, fact-finding is performed in a public judgment characterized by orality and confrontation and while, within the inquisitorial system, it is conducted during a written and secret investigative stage.

**IV. The French Revolution and the Napoleonic Code**

For over five centuries the inquisitorial process in its different variants prevailed in the European Continent.\(^{47}\) As a natural reaction, the French Revolution, taking inspiration from the principles of the Enlightenment, led—at least in the beginning—to the adoption of an accusatorial system, founded on the participation of citizens in judicial bodies, in accordance with the rediscovery of the individual’s centrality and the affirmation of his fundamental rights.\(^{48}\) The reference model was the English one—authentic heir of the Roman accusatorial process—whose main characteristic was the presence of the jury, considered a tool to

\(^{44}\) *Ordonnance Criminelle du Mois d’août 1670* (August 26, 1670) (Fr.), available at http://ledroitcriminel.free.fr/la_legislation_criminelle/anciens_textes/ordonnance_criminelle_de_1670.htm. The *Ordonnance criminelle* still represents a significant example of the inquisition in European legal history.


\(^{48}\) *Id.* at 400.
protect the citizen from the authority's will.\textsuperscript{49} As a logical consequence, the presence of the jury was accompanied by the principles of orality and of confrontation, the principle of publicity and the principle of intimate conviction (\textit{intime conviction}) of the judge.\textsuperscript{50}

From 1789 to 1792, the grand jury and the trial jury were introduced in France, as well as such rights and practices as the right to defense, cross-examination in collecting evidence in front of the trial court, public hearings, and the election of both judges and prosecutors.\textsuperscript{51}

The accusatorial experience and the rejection of the bureaucratic tradition did not last for long. Because the political climate had radically changed at the time of the Thermidorian Code of 1795,\textsuperscript{52} the written and secret investigation was re-established and the public election of prosecutors was soon abolished.\textsuperscript{53} Napoleon then accomplished the task of re-establishing the inquisitorial practice.\textsuperscript{54}

The Napoleonic \textit{Code d'instruction criminelle} of 1808 developed the ancient \textit{Ordonnance criminelle} into a completely new system, which represented the archetype of the 19th and 20th century continental codes.\textsuperscript{55} This system was later called a "mixed system" and was characterized by two phases—an investigative-inquisitorial one and an accusatorial one.\textsuperscript{56} In the first phase,

\textsuperscript{49} \textit{Id.} at 399.

\textsuperscript{50} \textit{Id.} at 408-19.


\textsuperscript{53} Nobili, \textit{supra} note 51, at 164-71; Ferrajoli, \textit{supra} note 5, at 578.

\textsuperscript{54} \textit{See infra} notes 55-58 and accompanying text.


\textsuperscript{56} \textit{See} Illuminati, \textit{supra} note 46, at 567.
evidence was collected through a written and secret procedure by the investigating judge (juge d'instruction). It is important to note that it was the judge himself who carried out the investigation. If the judge collected enough evidence to assume that the accused had committed the crime, the case was sent to the trial court to be dealt with.

The public and oral phase took place before the court with the participation of the defense and the right of the parties to introduce evidence. Nevertheless, the accusatorial character of the trial was more apparent than real. Witnesses testified orally but all inconsistencies with the previous statements given to the investigative judge were recorded. Reading from the records contained in the investigative dossier, even though not formally permitted by law, did not invalidate the entire trial. Consequently, evidence collected through the inquisitorial method would acquire a determinant value in the court’s decision.

V. The Italian Criminal Procedure in the Unified States

The French Code of 1808 expanded rapidly throughout Europe. In Italy, as well as in other countries, it was introduced during the Napoleonic period and suddenly transformed into the reference model. In the first codes of criminal procedure of the Italian State (1865 and 1913), the investigating judge remained

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57 See id.
58 See id.
59 See id.
61 See Illuminati, supra note 46, at 568.
62 Id.
63 See GUIDA, supra note 35, at 72-74; PROCEDURA, supra note 34, at 66-67.
64 See Illuminati, supra note 46, at 568.
65 See generally RÉVOLUTIONS, supra note 55 (discussing the influence of the French system throughout the European Continent); see also Xavier Rousseaux, Une Architecture Pour la Justice. Organisation Judiciaire et Procedure Pénale (1789-1815) 37, 57 in RÉVOLUTIONS, supra note 55, at 57 (noting that the codes introduced between 1808 and 1811 introduced an enduring tripartite scheme).
66 See, e.g., Panzavolta, supra note 60, at 579 (discussing the influence of the French model).
the key figure. Even the fascist legislature of 1930 deemed it unnecessary to radically alter the previous code, since it met the needs of the regime perfectly. Under fascism, all the most authoritarian aspects of the previous code were emphasized and the public prosecutor’s powers (who was subject to the Ministry of Justice and, therefore, an instrument of the Executive) increased, while the defensive rights and protection of the accused’s personal freedoms were heavily limited and the jury was abolished. This new code of criminal procedure remained in force despite the collapse of fascism and long after the issuing of the democratic Constitution of 1948. Although revised to ensure a higher protection of the individual guarantees, the basic structure remained unchanged until the reforms of 1988.

According to the traditional view, the so-called mixed system, as provided for in the Italian legislation, represented an appropriate conciliation between the accusatorial and inquisitorial system, in order to match the public interest with the protection of individual rights. However, a system providing for a public and oral trial stage based on a written and secret investigation does not exemplify systematic coherence at all. Furthermore, the disadvantages of the two systems are compounded by the insufficiency of personal freedom guarantees on one the side and the complexity of the procedure on the other side.

One cannot deny that it was an original solution, even in the abstract, since a pure accusatorial or inquisitorial process does not exist, and any variance from the ideal model inherently gives rise to a mixed

67 Id.

68 For further reading on the rise of fascism in Italy, see generally R.J.G. Bosworth, Mussolini’s Italy: Life Under the Fascist Dictatorship, 1915-1945, 93-120 (Penguin Books 2007). See also Illuminati, supra note 46, at 566.

69 CODICE DI PROCEDURA PENALE [C.P.P.] (1930). See also Illuminati, supra note 46, at 566.

70 See Illuminati, supra note 46, at 566.

71 See Panzavolta, supra note 60, at 579, fn. 5 (“The new Code was enacted by Delegated Decree n. 447 of Sep. 22, 1988 (published in Gazz. Uff., No. 250 (Oct. 24, 1988)).”).

72 See Illuminati, supra note 46, at 570.

73 See id.

74 See Giovanni Conso, Accusa e Sistema Accusatorio, in I ENCICLOPEDIA DEL DIRITTO, supra note 11, at 334, 336-37.
process, regardless of how individual elements of the systems are combined. In a two stage proceeding, outcomes depend on the relationship between the first and the second stage.\textsuperscript{75} The nature of a trial changes completely based upon whether the investigating magistrate's actions have a determinant value at trial, or the decision is based on evidence collected during the trial in front of the judge.\textsuperscript{76}

From this perspective it is clear that the Italian system prior to the 1988 reforms is a remake— with due updates— of the inquisitorial process, in the manner of the French model from which it derives.\textsuperscript{77} As a matter of fact, within the Italian system, the trial held comparably less weight than the investigative phase in the final decision.\textsuperscript{78} Although formally characterized by the principles of parties' confrontation, orality and immediacy, the trial stage tended to produce a recapitulation of the investigating dossier, at best, or to mirror a futile play put on to provide the semblance of an accusatorial process, at worst.

VI. The Movement for Reform and the New Code

The enactment of the new constitution heralded calls for an organic reform of Italian criminal procedure.\textsuperscript{79} Among the prospects for the reformed code, the choice for an accusatorial system was preferred as it was considered modern and more in line with the needs of a democratic society.\textsuperscript{80} The general idea was to eliminate the investigating judge and, as a consequence, the trial stage would recover its key role.\textsuperscript{81}

In the new code of criminal procedure, which entered into force in 1989, the overall structure of the process was modified.\textsuperscript{82}

\textsuperscript{75} See Illuminati, supra note 46, at 567.
\textsuperscript{76} Id. at 568.
\textsuperscript{77} See id. at 567.
\textsuperscript{78} See id. at 568.
\textsuperscript{79} See id. at 570.
\textsuperscript{80} See id.
\textsuperscript{81} See id. at 571.
Once the investigating judge was abolished, the public prosecutor was left exclusively in charge of the preliminary investigations, which served only to decide whether to bring formal charges against the accused.\textsuperscript{83} The preliminary investigation stage was given a completely different function from the trial, as the materials collected in the investigation could no longer be used in the decision-making process.\textsuperscript{84} Not only are investigative records now barred from being read at trial, save when it is impossible for a witness to testify,\textsuperscript{85} but the parties also have free access to the investigative dossier while the judge does not.\textsuperscript{86}

If during the investigation the need arises to collect evidence in advance due to a serious risk of loss before trial, the public prosecutor and the accused may request that the judge obtain evidence in advance according to trial protocols (\textit{incidente probatorio}).\textsuperscript{87} The records will be submitted to the trial court and may be used in the decision process. At trial, evidence is collected orally and the parties, in principle, can use the records contained in the public prosecutor’s dossier only to challenge a witness’ veracity.\textsuperscript{88}

The turn to the accusatorial process was not initially welcomed, especially by judges, since the majority of them were familiar with the traditional inquisitorial system.\textsuperscript{89} During its first years, the new code suffered more constitutional exceptions than those raised under the previous fascist code. In 1992, several Constitutional Court decisions overturned the basic structure of the system and the relationship between the investigative and the trial stage. The Court allowed the substantive use of out-of-court statements collected during the preliminary investigations at trial, basing its decisions on the assumption that the judge should be

\textsuperscript{83} See Illuminati, \textit{supra} note 46, at 571.
\textsuperscript{84} See id. at 569-70.
\textsuperscript{85} See id. at 572.
\textsuperscript{86} See id.
\textsuperscript{87} C.P.P. art. 392 (1988). The \textit{incidente probatorio} implies the incidental gathering of evidence in a stage other than the trial stage. Generally, a witness deposition is taken in front of a judge under the same rules of procedure as followed in trial. See Panzavolta, \textit{supra} note 60, at 588; see also Stephen C. Thaman, \textit{Comparative Criminal Procedure} 35-37 (Michael Corrado ed., 2002).
\textsuperscript{88} See Illuminati, \textit{supra} note 46, at 572.
\textsuperscript{89} See id. at 573; see also Panzavolta, \textit{supra} note 60, at 596-97.
permitted to access and use all evidence, regardless of where it is acquired.\textsuperscript{90}

To overcome the conflict with the Constitutional Court, the Parliament finally decided to modify the Constitution. In 1999, it amended Article 111 of the Constitution,\textsuperscript{91} introducing the principles of the fair trial and, in particular, the principle of parties' confrontation in the collection of evidence.\textsuperscript{92} In 2001, a new statute redesigned the trial stage, restoring the original accusatorial choices and codifying the new constitutional rights into the criminal code.\textsuperscript{93} At this point, the Constitutional Court was forced to adapt to the new model.\textsuperscript{94}

VII. Basic Characteristics of the Italian Accusatorial System

In light of the current Italian code of criminal procedure, the accusatorial system can be defined as the system where only the evidence produced in a public trial, which grants cross-examination, may be used as a basis for the judge's decision. This stands in opposition to the inquisitorial system, where the decision is grounded upon evidence gathered unilaterally and secretly during the preliminary investigation by the magistrate in charge, with little difference as to whether the investigation is carried out by a judge or prosecutor.

As previously remarked, this approach concerns a fundamental and basic methodological choice.\textsuperscript{95} The assessment of facts is considered reliable only if it is obtained from the confrontation of parties, each one attempting to persuade the judge of its own

\textsuperscript{90} Corte Cost., 3 June 1992, n.254, Giur. Cost. 1932 (permitting the admission of out-of-court statements of a severed co-defendant, notwithstanding the co-defendant's decision to exercise his right to silence); Corte Cost., 3 June 1992, n.255, Giur. Cost. 1961 (permitting the use of out-of-court statements for substantive purposes once the statements had been invoked against a witness' credibility on cross-examination).


\textsuperscript{95} See supra notes 1-3 and accompanying text.
However, the fact that both parties are heard in trial is not enough. If debate is carried out over evidence acquired out of court, it will be limited to a critical review of evidentiary outcomes not achieved through confrontation at trial. In this instance, the debate will not bear upon the finding of relevant facts. On the contrary, the parties should be given the right to participate and to confront when evidence to be used for the decision is gathered, as provided by the Constitution.

The method adopted by the 1988 code, which was based on the Anglo-American model, is a cross-examination technique. The Constitution indirectly refers to this method in Article 111. Section 3 of Article 111 further grants the accused the right to examine or have examined witnesses against him.

But the most typical aspect of the accusatorial process, strictly linked to the principle of parties' confrontation, is the orality of the trial. This term refers not only to the technique for the examination of the witnesses but primarily to the fact that evidence is submitted in front of the trial Court (orality-immediacy). The evidence must be presented directly in front of the trial judge, allowing him to form a personal perception of the statements to be evaluated, rather than relying on records drawn up by others. A corollary of the principle of orality-immediacy is the completion of the trial in one hearing, so that the decision is rendered as closely as possible to the actual representation of the facts, as proven by the evidence. This is one of the critical points of the present Italian

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97 COST. art. 111 § 4.
98 C.P.P. art. 498.
99 The Constitution thus requires that the accused or his lawyer has the opportunity to cross-examine the victim or accuser. COST. art. 111 § 4; see also Panzavolta, supra note 60, at 611 (discussing procedural amendments to the Constitution, including the introduction of a confrontation clause).
100 COST. art. 111 § 3 (amended 1999). This is viewed as the adversarial pillar of the accusatorial process, allowing the accused the same right to present evidence as the prosecution. See Panzavolta, supra note 60, at 611.
102 Id.
103 See CHINNICI, supra note 101, at 11-12.
accusatorial system, given that the trial stage may last several months, and hearings are often held far from one another.\textsuperscript{104} A consequence of this kind of process is that the direct perception of the judge may fade by the time of the decision, creating the risk that the decision will be grounded on the probative outcomes reported in the trial records.

Another distinctive aspect of the accusatorial system is the separation of functions between the judge and the prosecutor,\textsuperscript{105} which is essential to the proper implementation of the principle of parties’ confrontation. A fair trial requires that the judge remain equidistant from the parties. To maintain his neutrality, he cannot be the person responsible for elaborating a hypothesis of guilt in relation to a suspected criminal offense or for gathering the evidence that supports it.\textsuperscript{106} For this reason, the power to collect evidence during the investigative stage belongs exclusively to the public prosecutor,\textsuperscript{107} and the judge may become involved only upon request of the parties.\textsuperscript{108}

The separation of functions is accompanied by the separation between the phases of the proceedings, which act as structural pillars.\textsuperscript{109} Whereas a mixed system bending more towards an inquisitorial system provides for substantial continuity between the investigative stage and the trial, with the investigative stage determinative in the trial stage, an accusatorial system’s full observance of the principles of orality and immediacy and of the parties’ confrontation requires separation of the investigative and trial stages, where evidence is ultimately collected.\textsuperscript{110} If the investigation records are given as much weight as the evidence collected orally, the affirmation of the aforesaid principles would be largely illusory and the system would lose its coherence.\textsuperscript{111}

\textsuperscript{104} See Illuminati, supra note 46, at 580.


\textsuperscript{106} See Illuminati, supra note 46, at 571.

\textsuperscript{107} See Grande, supra note 105, at 233.

\textsuperscript{108} See Lina Caraceni, Poteri D’ufficio in Materia Probatoria e Imparzialità del Giudice Penale 229-30 (2007).

\textsuperscript{109} See Illuminati, supra note 46, at 571.

\textsuperscript{110} See Panzavolta, supra note 60, at 582-85.

\textsuperscript{111} See Franco Cordero, Linee di un Processo Accusatorio, in CRITERI DIRETTIVI PER UNA RIFORMA DEL PROCESSO PENALE 61, 76 (1965).
Only in exceptional cases, therefore, will the judge in the accusatorial system be able to use evidence which was not collected at trial.\(^{112}\)

Without separation between phases, the prosecutor could establish the evidence to be used for the decision in advance, without any confrontation. This would transform the search for elements to prepare the prosecution into fact-finding, which constitutes the exclusive competence of the trial judge. The powers of investigation conferred to the accuser must be balanced by the irrelevance within the trial of the acts carried out during the investigation,\(^{113}\) otherwise the final decision would suffer the determinative influence of one single party, as it would be in \textit{ex parte} proceedings.

The principle of separation of phases is exemplified by the separation of the dossiers.\(^{114}\) The investigation records are not submitted to the judge and remain in the public prosecutor’s dossier, at the disposal of the parties only.\(^{115}\) When before the judge, investigative records may be used only to challenge the credibility of a witness’s statement during trial.\(^{116}\) The judge may then take into account the out-of-court statements to evaluate the witness’s credibility, but he may not base his decision on them.\(^{117}\)

The separation between phases cannot be applied too strictly because it would result in the loss of the possibility to prove the facts, considering that the trial normally occurs long after the investigations.\(^{118}\) In order to prevent the dispersion of evidence, it

\(^{112}\) C.P.P. art. 526 (1988) (outlawing the judge from basing his decision on information contained within the dossier). Exceptional circumstances may include those in which a witness is unable to testify at trial for reasons independent of the parties’ will, C.P.P. art. 512 (1988), amended by Law n. 63 of 2001, where a witness was threatened, C.P.P. art. 500/4 (1988), amended by Law n. 63 of 2001, or where both parties are in agreement, C.P.P. art. 500/7 (1988), amended by Law n. 63 of 2001.

\(^{113}\) See generally Giulio Illuminati, \textit{Giudizio, in COMPENDIO DI PROCEDURA PENALE} 684-86 (Giovanni Conso & Vittorio Grevi eds., 4th ed, 2008) [hereinafter \textit{Giudizio}]..\(^{114}\)

\(^{114}\) See C.P.P. arts. 431-33 (1988). See also Panzavolta, \textit{supra} note 60, at 586-89, for an explanation of the so called “double-dossier system.”\(^{115}\)

\(^{115}\) See Panzavolta, \textit{supra} note 60, at 587 (citing Grande, \textit{supra} note 105, at 243). The dossier is referred to as the “investigative-dossier.” \textit{Id}.\(^{116}\)

\(^{116}\) See \textit{id.} at 587 (citing MASSIMO NOBILI, \textit{LA NUOVA PROCEDURA PENALE} 262 (1989)). See also \textit{Giudizio, supra} note 113, at 726.

\(^{117}\) C.P.P. art. 500/2 (1988).\(^{118}\)

\(^{118}\) Illuminati, \textit{supra} note 46.
is essential to collect evidence at risk of loss during the course of the investigation in order to preserve the parties’ confrontation, known as the *incidente probatorio*.\(^{119}\) Furthermore, the reading and consequent substantive use of investigation records should be permitted any time a piece of evidence cannot be reproduced at trial for compelling and unexpected reasons,\(^{120}\) even though the evidence will not be subject to cross-examination. Similarly, if a witness called to testify at trial is illegally pressured to refrain from testifying or pressured to make a false declaration, prior statements used to challenge the deposition can be used as evidence.\(^{121}\) Such exceptions to the principle of parties’ confrontation in the collection of the evidence are permitted in cases of “absolute impossibility of obtaining evidence at trial... [and]... proven illicit conduct on the witness” (e.g., the witness was threatened or coerced).\(^{122}\)

**VIII. The Equality of the Parties and the Right to Present Evidence**

The concept itself of parties’ confrontation implies the equality of arms of the parties.\(^{123}\) In the criminal process, however, the equality of arms of the parties cannot be perfectly achieved, because the prosecutor is a public party who acts in the general interest for the implementation of justice, having coercive powers and police assistance at his disposal.\(^{124}\)

The process must guarantee that the accused and his counsel have equivalent, but not identical, powers to ensure the necessary balance is maintained. The equality of arms is a guarantee of the individual before the public authority and, thus, should provide the accused with powers *at least* equivalent to those of the public

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\(^{119}\) *See supra* note 86 and accompanying text.

\(^{120}\) *See* C.P.P. art. 512; *see also* Claudia Cesari, *L'Irripetibilità Sopravvenuta Degli Atti di Indagine* 113-15 (1999) (investigation records can be admitted at trial when evidence was once available, but cannot be reproduced due to unexpected circumstances).

\(^{121}\) *See* C.P.P. art. 500; *see also* Fabio Grifantini, *L'Utilizzabilità in Dibattimento Degli Atti Provenienti dalle Fasi Anteriori, in* La Prova nel Dibattimento Penale 203-09 (3d ed. 2007).

\(^{122}\) *Cost.* art. 111, § 5.

\(^{123}\) *Id.* art. 111, § 2 (expressly confirming the equality of arms of the parties).

\(^{124}\) *See* Grande, *supra* note 105, at 237, 239.
prosecutor. This implies that the law may grant the accused a beneficial position if reasonably justified.

A corollary of the principle of equality of parties' confrontation is the affirmation of the parties' right to evidence. Evidentiary rights include the right to have the requested evidence assumed at trial, the right to have such evidence evaluated by the judge, and, in particular, the right to introduce evidence in rebuttal where the judge must equally consider both the incriminating and exculpatory evidence offered. This also implies that the evidence requested by the parties should be disclosed to the adverse party in advance, in order to provide him with the opportunity to present an effective rebuttal.

To fully ensure the exercise of the right to evidence, the code permits the defense attorney to carry out parallel investigations to those of the public prosecutor, albeit without the direct use of coercive powers. The defense investigations are afforded the same value as prosecutorial investigations.

The recognition of a defense attorney's right of investigation is not indispensable to the implementation of the accusatorial model. It is enough that the investigative acts remain outside of the trial. A lack of defense investigation—rather frequent in practice—does not impede the formation of evidence introduced by the public prosecutor through confrontation.

It is the parties' duty to submit evidence and request its admission. The judge should not assume responsibility to either identify or introduce the elements essential to the decision. His lack of involvement in the collection of the evidence, strengthened by his lack of knowledge of the investigative acts, helps to avoid problems.

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126 Id.
127 See id.
128 C.P.P., art. 495. See generally RAFARACI, supra note 125 (discussing evidentiary trial rights).
129 See RAFARACI, supra note 125, at 96.
130 C.P.P. art. 391; see also Illuminati, supra note 46, at 569.
131 C.P.P. art. 391.
133 See id.
bias on his part.\textsuperscript{134}

The parties direct the fact-finding process according to their own strategies, based on the premise that a conflict of opposing interests represents the best method to ensure that nothing escapes the judge’s evaluation.\textsuperscript{135} It does not mean that they have the power to determine the subject matter of the judgment,\textsuperscript{136} in accordance with the logic that is peculiar to the civil process. The criminal process involves rights that in systems such as the Italian one cannot be completely left to private autonomy.

However, the fact that the judge may play a somewhat active role in trial is not incompatible with either the accusatorial system or the parties’ right to evidence, provided that it does not eliminate or alter the parties’ confrontation. The judge’s intervention should not interfere with his independence and impartiality.\textsuperscript{137} The judge should not be prohibited from questioning the witnesses directly if he believes it necessary to obtain clarifications or to investigate new or wider topics.\textsuperscript{138} He may then do so only so long as the parties have already concluded their examinations and are permitted to pose further questions following his interjection.\textsuperscript{139}

Furthermore, the judge may also introduce evidence \textit{sua sponte} when it is absolutely necessary at the end of the trial investigation, i.e. once all the parties’ evidence has been presented.\textsuperscript{140} The exercise of such a power may risk the appearance of favor or prejudice towards either of the parties, thus weakening the judge’s neutrality.\textsuperscript{141} It is therefore essential that the judge exercise the power to introduce evidence with extreme caution and only in order to integrate the parties’ right to evidence and not to substitute it. If the judge replaces one of the parties (in particular the public prosecutor, who risks losing the trial if he does not satisfy the burden of proof), he betrays his function and

\textsuperscript{134} See Illuminati, \textit{supra} note 46, at 571.

\textsuperscript{135} Di Bitonto, \textit{supra} note 132, at 73-77.

\textsuperscript{136} See \textit{id}.


\textsuperscript{138} Pizzi & Montagna, \textit{supra} note 82, at. 429, 448 (2004).

\textsuperscript{139} See Panzavolta, \textit{supra} note 60, at 591-92.

\textsuperscript{140} C.P.P. art. 507.

\textsuperscript{141} See Pizzi & Montagna, \textit{supra} note 82, at 434.
transforms into an inquisitor.\textsuperscript{142}

IX. The Italian Accusatorial and Adversary Systems

Although it takes inspiration from the rules of the accusatorial system, the Italian criminal process moves considerably away from the Anglo-American model of the adversary system. In the Anglo-American model, the judge's passivity is essential in order to maintain his role as umpire in a competition between the parties.\textsuperscript{143} This model conceives of the trial as a means to resolve conflicts, which is reminiscent of the civil trial model.\textsuperscript{144} Such a conception is foreign to the systems of continental Europe, which clearly distinguish between civil and criminal justice and conceive of the latter as an instrument for the State to implement its criminal policy preferences.\textsuperscript{145}

The Italian accusatorial system, therefore, exhibits peculiar features that derive from the continental tradition and do not permit complete assimilation into the adversary system.\textsuperscript{146}

Some of the differences depend on the structure of the legal organization. For example, in Italy, the trial takes place either before professional judges or before a mixed panel (\textit{Corte d'Assise}) of professional and lay judges who have the same powers to decide questions of fact and law.\textsuperscript{147} There is no separate judicial body for fact-finding, before which evidence is given orally with testimony preferable to written documents, and which requires protection from the possible negative influence of inadmissible or unreliable evidence.\textsuperscript{148} Whereas a jury issues a verdict that does not explain the logical grounds of the decision, each Italian court, including the \textit{Corte d'Assise}, is required to provide written reasons for its decisions.\textsuperscript{149} Enumerating the

\begin{footnotesize}
\begin{enumerate}
\item[142] Giulio Illuminati, \textit{Ammissione e Acquisizione della Prova Nell'Istruzione Dibattimentale, in LA PROVA NEL DIBATTIMENTO PENALE} 96 (3d ed. 2007).
\item[144] See id. at 1018.
\item[146] Panzavolta, \textit{supra} note 60, at 591.
\item[147] See id. at 592.
\item[148] See id.
\item[149] See COST. art. 111, § 6; \textit{see also} Panzavolta, \textit{supra} note 60, at 592.
\end{enumerate}
\end{footnotesize}
reasons for a judgment both requires the involvement of a professional judge in all cases, including cases heard by a mixed panel, and favors the control of the decision as to the facts on appeal. But the main departure from the Anglo-American adversarial system can be recognized in the principle of compulsory prosecution.

Discretionary prosecution provides the public prosecutor with wide power to control the trial, beginning with the decision of whether to go to trial and ending with the power to dismiss charges. Compulsory prosecution instead requires a constant monitoring by the judge of the prosecutor's actions, whose conclusions are never binding. The judge may convict a defendant where a public prosecutor requests acquittal, may apply a harsher punishment than the one requested, or may affirm that the charged facts fall within a different offense provided for by the law.

Special procedures, such as plea bargain or settlement procedures, which terminate the proceedings in advance by avoiding the trial stage and are aimed at reducing the case-load and thus the duration of trials, mirror these dynamics. Plea bargaining is an essential tool for deflating English courts' case-loads and even more so for the American courts. Since the adversarial trial is very expensive in terms of money and time, both systems need the majority of cases to be resolved outside of trial. In Italy this procedure, known as the application of punishment upon request of the parties (applicazione della pena su

\[150\] See generally Pizzi & Montagna, supra note 82, at 433 (explaining that in Italy the "issues on the model" are decided by mixed panels of lay people and professional judges).

\[151\] COST. art. 112.

\[152\] See Grande, supra note 105, at 251-52.

\[153\] Id. at 251-52 (disagreeing with the proposition that judicial activism is a necessary consequence of compulsory prosecution).

\[154\] Id. at 233.

\[155\] See e.g., Panzavolta, supra note 60, at 594 (stating that the cost of the accusatorial trial is very high in Italy and, so, measures such as the applicazione della pena su richiesta delle parti, which is similar to the practice of plea bargaining in the United States, have been introduced to conserve resources).

\[156\] See Grande, supra note 105, at 246 (explaining how the Anglo-American system handles judicial overload by resolving matters outside of trial).
as well as other simplified consensual alternatives, have been introduced. However, the principle of compulsory prosecution prevents a real out-of-court settlement between the defendant and the prosecution. Compulsory prosecution requires, in all cases, an evaluation on the merits by a judge and a monitoring on the content of the agreement, in accordance with the legality principle. Although this kind of procedure does not represent a characterizing aspect of the accusatorial system, it may be found in the systems that embody the paradigm. Regardless of whether such bargains are essential from a practical point of view to permit the proper functioning of the accusatorial procedure, they could never bring the Italian system to a real privatization of criminal justice.

158 Panzavolta, supra note 60, at 595.
159 See id. at 591.