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MODEL CODE OR BROKEN DREAM? THE ITALIAN CRIMINAL PROCEDURE IN A COMPARATIVE PERSPECTIVE

CONTENTS: 1. The Italian justice re-founded: international significance of the Code and its sphere of influence. – 2. True and false in the ways of representing the Italian model. – 3. The rugged path of the new system: some factors overlooked in the construction of the Code. – 4. What remains of the Code, twenty five years after the great reform?

1. The Italian justice re-founded: international significance of the Code and its sphere of influence

In the second half of the twentieth century few procedural reforms have had such a remarkable impact as that of the Italian Code of 1988, which raised widespread interest among scholars across the world[1].

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[1] Among the first comments in the international literature, E. AMODIO – E. SELVAGGI, *An Accusatorial System in a Civil Law Country: The 1988 Italian Code of Criminal Procedure*, in 62 *Temple L. Rev.*, 1989, p. 1211; E. AMODIO, *Das Modell des Anklageprozesses im neuen italienischen Strafverfahrens-gesetzbuch*, in *Zeitschrift für die gesamte Strafrechtswissenschaft*, 1990, p. 171; L. FASSLER, *The Italian Penal Procedure Code: An Adversarial System of Criminal Procedure in Continental Europe*, in 29 *Columbia J. Trans. L.*, 1991, p. 245; W. PIZZI – L. MARAFIOTI, *The New Italian Code of Criminal Procedure: The*

The act of surpassing the continental century-old tradition and the strong acceptance of the values of the common law system immediately aroused an exceptional interest in the Italian Code, which many comparatists viewed as a stimulating laboratory to test classical categories of the theory of the criminal process[2]. For the first time in the old Europe there was, in fact, a sharp transition from the inquisitorial to the accusatorial system[3]. Likewise, there was a substantially unprecedented introduction into a European system of principles that had always been deemed incompatible with the sensitivity of the "civil law" criminal justice model, such as the *patteggiamento* (application of punishment upon request)[4]

Difficulties of Building an Adversarial Trial System on a Civil Law Foundation, in 17 *Yale J. Int. L.*, 1992, p. 1; A. STILE, *Die Reform des Strafverfahrens in Italien*, in 104 *Zeitschrift für die gesamte Strafrechtswissenschaft*, 1992, p. 429; M. VOLCANSEK, *Decision-Making Italian Style: The New Code of Criminal Procedure*, in 13 *West European Politics*, 1990, p. 33.

[2] Many recent articles remark the still persistent interest for the Italian reform as a unique example in its genre. For instance: J. OGG, *Adversary and Adversity: Converging Adversarial and Inquisitorial Systems of Justice – A Case Study of the Italian Criminal Trial Reforms*, in 37 *Int. J. Comp. Appl. Crim. Just.*, 2013, p. 31.

[3] G. ILLUMINATI, *The Accusatorial Process from the Italian Point of View*, in 35 *N.C. J. Int'l L. & Com. Reg.*, 2010, p. 297.

[4] See M. LANGER, *From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure*, in 45 *Harv. Int'l L. J.*, 2004, p. 1; J. MILLER, *Plea Bargaining and Its Analogues under the New Italian Criminal Procedure Code and in the United States: Towards A New Understanding of Comparative Criminal Procedure*, in 22 *N. Y. Univ. J. Int. L. & Pol.*, 1989, p. 215; R. ORLANDI, *Absprachen im italienischen Strafverfahren*, in *Zeitschrift für die gesamte Strafrechtswissenschaft*, 2004, p. 123; R.A. VAN CLEAVE, *An Offer You Can't Refuse? Punishment Without Trial In Italy and the United States: The Search for Truth and an Efficient Criminal Justice System*, in 11 *Emory Int'l L. Rev.*, 1997, p. 419. The Italian choice has, in some way, influenced the extension of negotiated criminal justice in Germany: U. BOGNER, *Absprachen im deutschen und italienischen Strafprozessrecht, Verfahrensbeschleunigung durch die applicazione della pena su richiesta delle parti und das giudizio abbreviato, ein Modell für den künftigen deutschen Strafprozeß?*, Marburg, 2000; M. FROMMANN, *Regulating Plea-Bargaining in Germany: Can the Italian Approach Serve as a Model to Guarantee the Independence of German Judges?*, in 5 *Hanse L. R.*, 2009, p. 197.

and the *inutilizzabilità* (unlawfully gathered evidence)[5], which were mainly inspired, respectively, by the Anglo-American plea bargaining and exclusionary rules.

Moreover, scholars in the field soon realised that this historic turn allowed them to see, from a privileged perspective, the reactions of courtroom operators to a sudden change of the modalities of judicial ascertainment or, as in this case, of the actual mental approach to the idea of criminal justice. It was indeed possible, for instance, to assess the adaptive capacity of a "French-style" judge[6] that was transformed into an impartial referee in a process that was managed by defence and prosecution; of a public prosecutor who was used to holding a position of supremacy during proceedings and was now placed at the same level of the accused person's lawyer; of a lawyer who could now, unprecedentedly, take part in evidence gathering. This aspect played a significant role in ensuring the success of the change to the regulations[7] and also in providing useful indications in view of possible reforms in other systems[8].

It is thus not surprising that the Code (including preparatory studies and the preliminary project[9]) soon became the point of reference for the legislators of Countries that wished to leave the French model behind (from the investigating judge[10] to the

[5] T. ARMENTA DEU, *La prueba ilícita (un estudio comparado)*, Madrid, 2011, p. 42; S. THAMAN, *"Fruits of the Poisonous Tree" in Comparative Law*, in 16 *Sw. J. Int'l L.*, 2010, p. 333.

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

[7] On this issue, M. VOGLIOTTI, *La "rhapsodie": fécondité d'une métaphore littéraire pour repenser l'écriture juridique contemporaine. Une hypothèse de travail pour le champ pénal*, in *Rev. interd. etud. jur.*, 2001, p. 141.

[8] See C. LI, *Adversary System Experiment in Continental Europe: Several Lesson from Italian Experience*, in 1 *J. Pol. & L.*, 2008, p. 14; W. PIZZI, *Lessons From Reforming Inquisitorial Systems*, in 8 *Fed. Sent. R.*, 1995, p. 42.

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

[10] Even France has studied and still pays attention to Italy with regard to the role of the investigating judge, particularly in the framework of the Reform Commissions that have recently considered the possible abolition of this role: S. GLESS – J. LEBLOIS-HAPPE – C. MAURO – F. MESSNER – V. MURSCHETZ, *Regards de droit comparé sur la phase préparatoire du procès*, in *La réforme du Code*

freedom of proof[11]) or to introduce a concept of proceedings that steered away from the authoritarian models similar to those of the previous Italian Code of 1930, the fruit of fascism[12]. The role the Code took, which could be defined as that of a "model Code", had profound effects not only in Central and South America[13], where the Italian doctrine has often had remarkable influence[14], but also in other parts of the world where inspiration was drawn from the choices made by the Italian Code, which must be undoubtedly acknowledged as having highly technical quality and bravery in the modalities of transition from the inquisitorial to the accusatorial approach. Numerous commissions studying the Italian system have "copied" the solutions adopted by the 1988 Code and many works

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pénale et du Code de procédure pénale. Opinio Doctorum, Paris, 2009, p. 203. In Spain, the current debate on whether the role of the *juez de instrucción* ought to be abolished often makes reference to the Italian Code as a positive approach to be imitated: J. BURGOS LADRÓN DE GUEVARA, *Modelo y propuestas para el proceso penal español*, Sevilla, 2012, p. 11.

[11] See J. PRADEL, *Criminal Evidence*, in *Harmonisation in Forensic Expertise: An Inquiry into the Desirability of and Opportunities for International Standards*, ed. by J.F. Nijboer – W. Sprangers, Leiden, 2000, p. 441.

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

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

[14] A. PELLEGRINI GRINOVER, *A influência do direito italiano no Brasil*, in *Rev. Câm. Ítalo-Brasileira Com. Ind.*, 2005, p. 22.

of individual scholars have paved the way for transplants of the model abroad.

One need only mention the Albanian[15], Turkish and Croatian experiences, which show traces of influence of the Italian model. It is also worth remembering the Chinese study Commissions that showed interest in the Italian Code in view of their first systematic reform of 1996[16]. Even single legislative solutions are (or have been) the object, as models, of comparative studies or analyses of reform commissions across the world, from the *incidente probatorio* (special evidentiary hearing) to the *patteggiamento,* from the *giudizio abbreviato* (summary trial) to the *giudice per le indagini preliminari* (preliminary investigation judge), to mention a few[17].

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

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

[17] The following articles may be consulted: V. KHATUAEVA, *"Plea Agreement" in Foreign and Russian Criminal Procedure Law: Comparative Analysis*, in 18 *Middle-East J. Sc. Res.*, 2013, p. 1402; P. PIKAMÄE, *Italian Criminal Procedure as a Possible Model for Reforming Estonian Criminal Procedure*, in *Juridica*, 1999, II, p. 82; R. STRANG, *"More Adversarial, but not Completely Adversarial": Reforms of the Indonesian Criminal Procedure Code*, in 32 *Fordham Int. L. J.*, 2008, espec. p. 217 about the importance of the concept of "preliminary investigation judge" in the reform Commission; T. WEIGEND, *Reform Proposal on Dutch Criminal Procedure. A German Perspective*, in *The Reform of the Dutch Code of Criminal Procedure in Comparative Perspective*, ed. by M. Groenhuisjen – T. Kooijmans, Leiden, 2012, p. 160.

THE ITALIAN CODE OF CRIMINAL PROCEDURE: A READING GUIDE

Mitja Gialuz*

CONTENTS: 1. Historical premise. – 2. The subjects of the criminal process: relinquishing the investigating judge and transforming the Public Prosecutor in an actual party. – 2.1. The criminal police as the operative right-hand support of the Public Prosecutor. – 2.2. The private parties. – 3. Law of evidence: fundamental principles. – 3.1. The introduction of the standard of "Proof Beyond a Reasonable Doubt". – 4. An organic and innovative regulation: precautionary measures. – 5. A pragmatic approach: special proceedings as an alternative to the ordinary process. – 6. A "vertical" criminal justice system: the hypertrophic system of appellate remedies. – 7. An appendix: enforcement and jurisdictional relations with foreign authorities.

1. Historical premise

Since the Italian Republican Constitution came into force in 1948, the problem of reforming the Code of Criminal Procedure of 1930 has been at stake. The Rocco Code was indeed a product of fascism and reflective of a traditionally inquisitorial criminal justice system[1].

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[1] For more information on the Italian 1930 Code, see L.F. DEL DUCA, *An Historic Convergence of Civil and Common Law Systems. Italy's New*

The new Constitution overturned the ideological postulates typical of the fascist regime and placed the individual at the heart of the justice system. The Constitution thus expressly recognised a series of fundamental rights to the accused person (personal liberty in Article 13[2]; the right to defence in Article 24[3]; the right to a lawful judge in Article 25[4]) and ratified – despite the confused formulation – the presumption of innocence, placing the burden of proof on the prosecution (Article 27, paragraph 2[5]).

After a decade of small changes made to the Rocco Code by Parliament (Law no. 517/1955), in the early Sixties two processes were set in motion. On one hand, the Constitutional Court acted to eliminate the norms of the Code that clashed with the above-mentioned constitutional principles and to provide greater protection to the accused in the pre-trial phase; on the other hand, an intense doctrinal debate on the reform of the Code of Criminal Procedure began, with the aim of leaving behind a criminal procedure system built by a totalitarian regime and bring Italy's criminal justice system in line with liberal democratic political structures.

"Adversarial" Criminal Procedure System, in 10 *Dick. J. Int'l*, 1991, pp. 75-81; G. ILLUMINATI, *The Frustrated Turn to Adversarial Procedure in Italy (Italian Criminal Procedure Code of 1988)*, in 4 *Wash. U. Glob. Stud. L. Rev.*, 2005, p. 567.

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

[3] According to Article 24, par. 2, Const. «Defence is an inviolable right at every stage and instance of proceedings».

[4] According to Article 25, par. 1, Const. «No one may be removed from the lawful court previously established by law».

[5] According to Article 27, par. 2, Const. «The accused person shall be considered not guilty until a final judgment has been passed».

Parliament approved a first enabling act in 1974; due to the terrorist threat of the time, however, the decree was never implemented[6]. In 1987 a second enabling act was approved whereby the Government committed to adopting a Code of Criminal Procedure that «ought to implement the principles of the Constitution and conform to the norms of international conventions ratified by Italy on the rights of the individual and on the criminal process». It also had to «introduce in the criminal process the features of the accusatorial system», according to a series of fundamental principles defined in the enabling act[7].

In October 1989 the new Code of Criminal Procedure (hereinafter referred to as the CCP) came into force, which «represented the most serious attempt to transfer adversarial criminal procedures into an inquisitorial jurisdiction since 1791, when the French attempted to import the English system during the heat of the Revolution»[8]. Indeed, many Italian legal scholars talked of a «revolutionary turn»[9]; abroad it was believed that Italy had adopted a more accusatorial system of criminal procedure that sought to codify «many aspects of the American Supreme Court's 'criminal procedure revolution' of the 1960's»[10] and it was recognised that «no other country with a continental system,

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[6] R. LAWSON MACK, *It's broke so let's fix it: using a quasi-inquisitorial approach to limit the impact of bias in American criminal justice system*, in 7 *Ind. Int'l & Comp. L. Rev. 63*, 1996, p. 86.

[7] On the accusatorial model from an Italian perspective, G. ILLUMINATI, *The Accusatorial Process from the Italian Point of View*, in *35 N.C. J. Int'l L. & Com. Reg.*, 2005, p. 310.

[8] M. LANGER, *From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure*, in *World Plea Bargaining. Consensual Procedures and the Avoidance of the Full Criminal Trial*, ed. by S.C. Thaman, Durham, 2010, p. 60. See also E. AMODIO – E. SELVAGGI, *An Accusatorial System in a Civil Law Country: The 1988 Italian Code of Criminal Procedure*, in 62 *Temple L. Rev.*, 1989, p. 1211.

[9] G. ILLUMINATI, *The Frustrated Turn to Adversarial Procedure in Italy*, cited, p. 571; M. PANZAVOLTA, *Reforms and Counter-Reforms in the Italian Struggle for an Accusatorial Criminal Law System*, in 30 *N.C.J. Int'l L. & Com. Reg.*, 2005, p. 578.

[10] L. FASSLER, *The Italian Penal Procedure Code: An Adversarial System of Criminal Procedure in Continental Europe*, in 29 *Columbia J. Trans. L.*, 1991, p. 246.

including Japan, can compare with the Italian's reform with respect of depth and strength of the reform»[11].

The ambitious relinquishment of the inquisitorial tradition and the introduction of a rather accusatorial system brought about a crisis of rejection. Although the political forces and the lawyers met the new Code with approval, judges and public prosecutors expressed some opposition[12]. Judges raised many questions of constitutional legitimacy and the Constitutional Court accepted them: at a time of major attacks by organised crime[13], the need for an efficient criminal justice arose once more and the tip of the scale shifted again from the "due process model" to the "crime control" model[14].

Hence, a proper counter-reformation was launched: in the name of the principle styled as "non-dissipation of evidence"[15], the Constitutional Court first and then the legislator dismantled the principle of separation between the preliminary phase and the trial, which was the architrave of the new process[16].

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[11] C. LI, *Adversary System Experiment in Continental Europe: Several Lessons from the Italian Experience*, in 1 *J. Pol. & L.*, 2008, p. 20.

[12] See R. MONTANA, *Adversarialism in Italy: Using the Concept of Legal Culture to Understand Resistance to Legal Modifications and its Consequences*, in *Eur. J. Crim. Criminal L. and Crim. Just.*, 2012, p. 115-116. See M. DAMAŠKA, *The Uncertain Fate of Evidentiary Transplants: Anglo-American and Continental Experiments*, in 45 *Am. J. Comp. L.*, 1997, p. 839, who indicates the Italian experience as an example of the problems that arise when fact-finding arrangements from the common law family are incorporated into the institutional milieu of civil law.

[13] See E. CREEGAN – C.J. HATFIELD, *Creeping Adversarialism in Counterterrorist States*, in 29 *Conn. J. Int'l L.*, 2013, p. 22; S. MAFFEI – I. MERZAGORA BETSOS, *Crime and Criminal Policy in Italy: Tradition and Modernity in a Troubled Country*, in 4 *Eur. J. Criminology*, 2007, p. 471.

[14] Reference is made to the classic distinction proposed by H. PACKER, *Two Models of the Criminal Process*, in 113 *U. Pa. L. Rev.*, 1964, p. 1.

[15] Which is «a novel disguised version of the 'material truth' principle at the root of Continental criminal justice»: E. AMODIO, *The accusatorial system lost and regained: reforming criminal procedure in Italy*, in 52 *Am. J. Comp. L.*, 2004, p. 493.

[16] C. LI, *Adversary System Experiment*, cited, p. 17; S. FRECCERO, *An Introduction to the New Italian Criminal Procedure*, in 21 *Am. J. Crim. L.*, 1994, p. 345; E. GRANDE, *Italian Criminal Justice: Borrowing and Resistance*, in 48 *Am. J. Comp. L.*, 2000, p. 238; M. PANZAVOLTA, *Reforms and Counter-Reforms in*

Paradoxically, the Code that had been created to implement the constitutional principles was dismantled by the Constitutional Court in favour of other constitutional standards[17].

In order to react to this step back to the past, Parliament amended Article 111 of the Constitution, reaffirming strongly the principle of adversarial adjudication that formed the basis of the 1988 Code[18]. With this reform the principles of a fair trial upheld by Article 6 of the European Convention of Human Rights (hereinafter referred to as the ECHR) were expressly adopted. In the following years, the CCP underwent other modifications aimed at implementing the said principles and restoring – and, in some respects, improving – its original structure[19].

The legislative text that is published in this work is thus the result of a very long and complex reformative process. After twenty five years of theoretical elaborations that led to the 1988 reform, more than eighty changes have been made to the Code in the following twenty five years.

The aim of this paper is to provide a guide on how to read the Italian system of criminal procedure by taking a look at the various books of the CCP.

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the Italian Struggle, cited, p. 577; T. PIZZI – L. MARAFIOTI, *The New Italian Code of Criminal Procedure: The Difficulties of Building an Adversarial Trial System on a Civil Law Foundation*, in *Yale J. Int'l L.*, 1992, p. 1; T. PIZZI – M. MONTAGNA, *The Battle to Establish an Adversarial Trial System in Italy*, in *Mich. J. Int'l L.*, 2004, p. 429.

[17] See L. MARAFIOTI, *Italian Criminal Procedure: A System Caught Between Two Traditions*, in *Crime, Procedure and Evidence in a Comparative and International Context. Essays in Honour of Professor Mirjan Damaška*, Oxford – Portland, 2008, p. 85.

[18] For the text of the new Article 111 Const. See *supra*, L. LUPÁRIA, *Model Code or Broken Dream? The Italian Criminal Procedure in a Comparative Perspective*, footnote 36.

[19] E. AMODIO, *The accusatorial system lost and regained*, cited, p. 496; G. ILLUMINATI, *The Frustrated Turn to Adversarial Procedure in Italy*, cited, p. 576; T. PIZZI – M. MONTAGNA, *The Battle to Establish an Adversarial*, cited, p. 460.

2. The subjects of the criminal proceedings: relinquishing the investigating judge and transforming the Public Prosecutor in an actual party

The Italian Code has a clear structure. It is divided into two parts: the "static" one and the "dynamic" one. The first part (Books I, II, III, IV) deals with those aspects of the criminal process that could be considered "independent" from the actual procedure and sets out "functional" notions and elements to the procedure itself. The second part (Books V, VI, VII, VIII, IX, X, XI) regulates the development of the proceedings through the different stages. Within each book, the Code is divided into Titles, Chapters and Sections.

It may be convenient to start the analysis from the first book of the Code, which sets out who the subjects of the criminal process are. This book has introduced some important new elements compared to the past version.

With reference to the public subjects involved in the process, the Code has adopted the principle of making a clear distinction between the functions of the prosecution and those of the judges[20].

To this end, the Code has first and foremost eliminated one of the most negative symbols of the inquisitorial model, that is the investigating judge (*giudice istruttore*). An ambiguous figure who was, at the same time, both a judge and an investigator: he had wide decision-making and investigative powers and had to provide evidence in order to discover the "Truth" (Article 299 of the 1930 CCP).

In the preliminary phase, the functions of guarantee are assigned to a new type of judge, the "preliminary investigation judge" (*giudice per le indagini preliminari*), who only intervenes when the law provides for it, i.e. essentially in three cases: firstly, to adopt measures restricting a person's fundamental rights (precautionary detention, house arrest, prohibition to leave the country, obligation to appear before the criminal police,

[20] See E. AMODIO, *The accusatorial system lost and regained*, cited, p. 490; G. ILLUMINATI, *The Accusatorial Process from the Italian Point of View*, cited, p. 311.

interception of communications, etc.) (Articles 267, 279); secondly, to impartially verify if the Public Prosecutor acted in compliance with investigation deadlines and with the mandatory nature of the prosecution (Article 408); finally, in the exceptional cases where evidence must be collected immediately in the special evidentiary hearing – e.g. testimony of a dying person (Article 392). In all these cases the preliminary investigation judge only intervenes when one of the parties – generally the Public Prosecutor – requests it and makes a decision on the basis of the information given by the parties, because he has no dossier of his own.

One can easily note that, in this way, the legislator has willingly created a powerless figure, an "unarmed judge" without file – a judge whose role has been outlined to be substantially different from that of the investigating judge.

Secondly, the Code has transformed the role of the Public Prosecutor in the process. The inquisitorial tradition of the Public Prosecutor being a neutral quasi-judicial figure with wide decision-making powers on personal liberty has been relinquished; he is now conceived as a party in the proceedings, who is responsible for the investigation (Article 326) and for the prosecution (Articles 50, 405)[21].

The Code gives the Public Prosecutor an active role as a leader of preliminary investigations.

Firstly, the Italian Public Prosecutor can actively search informations relating to the offence (*notitiae criminis*), and not just passively receive information provided by the police (Article 330).

Secondly, when he finds or receives a report of a criminal offence, he leads the investigations and directs the criminal police (Article 327).

Upon conclusion of investigations, the Public Prosecutor continues to be bound by the compulsory prosecution principle (Article 112 of Italian Constitution)[22]. The rule whereby the Public

[21] See A. PERRODET, *The Italian System*, in *European Criminal Procedures*, ed. by M. Delmas-Marty and J.R. Spencer, Cambridge, 2005, p. 361.

[22] See A. DI AMATO, *Criminal Law in Italy*, Alphen aan den Rijn, 2011, p. 33.

Prosecutor is obliged to exercise criminal action if investigations lead to believe that a criminal act has been committed is aimed at preventing any opportunistic assessment on the part of the Public Prosecutor: on conclusion of the investigations, he must only express a fact- and law-based judgment, which appears to be similar to what is expressed by the judge. During investigations, however, the Public Prosecutor exercises wide discretionary powers.

Firstly, with regard to the development of investigations, he may decide to perform certain investigations and not other, whenever there are reasoned functional needs.

Secondly, with the new Code, compulsory prosecution takes place at the end of investigations. Therefore, there is no automatic consequential connection between the *notitia criminis* and the proceedings: Article 125 of the Provisions for the implementation of the CCP, in fact, establishes that the Public Prosecutor must not exercise his power of prosecution when «the pieces of evidence gathered during preliminary investigations are not suitable to uphold the accusation at the trial stage».

However, the most delicate issue concerns the fact that, in light of the over-criminalisation of the Italian system, the Public Prosecutor cannot initiate investigations – and then exercise the power of prosecution – for every *notitia criminis*[23]. He is clearly obliged to make some choices and give priority to some *notitiae criminis* over others[24]: in the Italian system it all generally depends on the individual choices made by each Public Prosecutor. Some pilot experiences have shown that the Public Prosecutor of the Republic has adopted some guidelines in order to guarantee uniformity in the choices made by the office's prosecutors. But

[23] It has been observed that the Public Prosecutor finds himself in a condition where he is unable to deal with all the *notitiae criminis*: M. CAIANIELLO, *The Italian Public Prosecutor: an Inquisitorial Figure in Adversarial Proceedings?*, in *The Prosecutor in Transnational Perspective*, ed. by E. Luna and M.L. Wade, Oxford, 2012, p. 256.

[24] On the prosecutors' role as gatekeeper of the criminal justice system, see R. MONTANA, *Prosecutors and the definition of the crime problem in Italy: balancing the impact of moral panics*', in 20 *Crim. Law Forum*, 2009, p. 471, 477.

these guidelines are not expression of criminal policy options, because they are not adopted by bodies that have a political mandate.

This structure thus translates into a situation where compulsory prosecution «is little more than a dogma» and Public Prosecutors «exercise discretion without any checks and balances at a hierarchical or political level»[25].

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

Under the old Code, there was a very feeble link between the Public Prosecutor and the criminal police. Consequently, in 1988, to give effect to Article 109 of the Italian Constitution[26], the new Code completely modified the relationship between these subjects[27].

In terms of personnel relations, criminal police officers and officials report to the criminal police corps they belong to, and, ultimately, to the competent Ministry (e.g. the Ministry of Home Affairs for the State Police; the Ministry of Defence for the *Carabinieri*); but the Code has strengthened the functional dependence of criminal police upon Prosecutors.

In particular, the Italian Code has created criminal police departments established at each Office of the Public Prosecutor of the Republic (Article 58 CCP) and made up of personnel coming from the various law enforcement corps (*Polizia di Stato, Carabinieri, Guardia di Finanza, Corpo Forestale dello Stato*). The members of these departments are police officers, who can only play a criminal investigation activity and the Public Prosecutor can command them (Article 59 CCP). In this way, a

[25] Literally, L. MARAFIOTI, *Italian Criminal Procedure*, cited, p. 95. See also M. CAIANIELLO, *The Italian Public Prosecutor*, cited, p. 261.

[26] According to it «the judicial authority directly command the criminal police».

[27] See R. MONTANA, *Paradigms of Judicial Supervision and Coordination between Police and Prosecutors: the Italian Case in a Comparative Perspective*, in 17 *Eur. J. Crim. Criminal L. and Crim. Just.*, 2009, p. 309.

very close relationship is created between Public Prosecutors and policemen[28].

The CCP has strengthened functional dependence also from a dynamic point of view: it establishes that the criminal police must transmit to the Public Prosecutor any *notitiae criminis* "within forty-eight hours" by means of a simple information note (Article 347).

The goal of such rule was indeed to reduce the investigative autonomy that the 1930 Code granted to the police. In the past, the law allowed the police to investigate on their own initiative and to transmit the report of the criminal offence only at the end of their inquiry by means of a detailed report with the results of the investigation. The new Code establishes a very strict time limit expressly to allow the Public Prosecutor to immediately access the core of the investigations.

It should be said that such a provision was modified in 1992 by a decree-law that was adopted only a couple of days after the murder of Giovanni Falcone: the peremptory time limit of forty-eight hours was substituted by a softer "without delay"[29]. This means that the timeliness of such transmission will depend on its context: the delay will be generally short in case of serious offences – Article 347 (3) CCP establishes that extremely serious offences require an immediate communication, even by phone or face-to-face – or when the police perform acts requiring the support of a defendant's lawyer (in which case the time limit of forty-eight hours still applies, as per Article 347 (2-*bis*) CCP). The delay will be longer for misdemeanours requiring standard investigations. In this case, the intervention of the Public Prosecutor is postponed and the police are more autonomous.

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[28] M. CAIANIELLO – G. ILLUMINATI, *The Investigative Stage of the Criminal Process in Italy*, in E. CAPE – J. HODGSON – T. PRAKKEN – T. SPRONKEN, *Suspects in Europe. Procedural Rights at the Investigative Stage of the Criminal Process in the European Union*, Antwerp – Oxford, 2007, p. 134.

[29] See L. LUPÁRIA, *La police judiciaire dans les procès pénal italien: questions anciennes et scenario inedits*, in *Arch. pol. crim.*, 2011, p. 165.

Article 186
Failure to comply with tax rules

1. If an act is subject to a tax by law, the failure to comply with tax provisions does not make the act inadmissible nor does it prevent its completion, without prejudice to the financial sanctions provided for by law.

Book III
EVIDENCE

TITLE I
GENERAL PROVISIONS

Article 187
Facts in issue

1. Facts concerning accusations, criminal liabilities and the determination of either the sentence or the security measure are facts in issue.

2. Facts on which the application of procedural rules depends are also facts in issue.

3. Facts concerning the civil liability resulting from an offence are also facts in issue if a civil party joins the criminal proceedings.

Article 188
Moral freedom of the person during evidence gathering

1. Methods or techniques which may influence the freedom of self-determination or alter the capacity to recall and evaluate facts shall not be used, not even with the consent of the person concerned.

Article 189
Evidence not regulated by law

1. If evidence not regulated by law is requested, the judge may introduce it if it is deemed suitable to determine the facts and does

not compromise the moral freedom of the person. After hearing the parties on the methods for gathering evidence, the judge shall order the admission of evidence.

Article 190
Right to evidence

1. Evidence shall be admitted upon request of a party. The judge shall decide without delay by issuing an order, excluding any evidence that is not allowed by law or manifestly superfluous or irrelevant.

2. The cases in which evidence shall be admitted *ex officio* are set by law.

3. Decisions concerning the admission of evidence may be revoked after hearing the parties.

Article 190-*bis*
Requirements of evidence in particular cases

1. In proceedings regarding one of the crimes referred to in Article 51, paragraph 3-*bis*, should a request be made for the examination of a witness or one of the persons referred to in Article 210 and should such persons have already provided statements during the special evidentiary hearing or at trial in the cross-examination with the person against whom the same statements will be used or have provided statements whose minutes have been gathered under Article 238, the examination shall be admitted only if it concerns facts or circumstances other than those included in the previous statements or if it is requested by the judge or a party by virtue of specific needs.

1-*bis*. The same provision shall apply when the case being prosecuted regards one of the offences provided for in Articles 600-*bis*, paragraph 1, 600-*ter*, 600-*quater*, even if it concerns the pornographic material referred to in Articles 600-*quater*.1, 600-*quinquies*, 609-*bis*, 609-*ter*, 609-*quater*, 609-*quinquies* and 609-*octies* of the Criminal Code, if the requested examination concerns a witness under the age of 16.

Article 191
Unlawfully gathered evidence

1. Evidence gathered in violation of the prohibitions set by law shall not be used.

2. The exclusion of evidence may be declared also *ex officio* at any stage and instance of the proceedings.

Article 192
Evaluation of evidence

1. The judge shall evaluate evidence specifying the results reached and the criteria adopted in the grounds of the judgment.

2. The existence of a fact cannot be inferred from circumstantial evidence unless such evidence is serious, precise and consistent.

3. The statements made by either the co-accused charged with the same offence or a person accused in joined proceedings according to Article 12 shall be corroborated by the other elements of evidence confirming their reliability.

4. The provision of paragraph 3 shall apply also to the statements made by a person accused of an offence that is joined to the one being prosecuted, in the case referred to in Article 371, paragraph 2, letter *b)*.

Article 193
Limits of evidence set by civil laws

1. In criminal proceedings the limits of evidence set by civil laws are not observed, except for those regarding family status and citizenship.

TITLE II
MEANS OF EVIDENCE

Chapter I
TESTIMONY

Article 194
Object and limits of testimony

1. The witness shall be examined on the facts constituting the object of evidence. He shall not testify on the morality of the accused, unless such testimony concerns specific facts that may be suitable for qualifying his personality in connection with the offence and his social dangerousness.

2. The examination may be also extended to the relations of kinship or interests that exist between the witness and the parties or other witnesses and to circumstances that need to be ascertained to assess their reliability. The testimony on the facts that may be useful in defining the victim's personality shall be admitted only if the criminal act must be evaluated in connection with the victim's behaviour.

3. The witness shall be examined on specific facts. He shall not testify on public rumours nor give his personal opinions, unless they are an inseparable part of the testimony.

Article 195
Hearsay testimony

1. If a witness reports information on facts he has been told of by other persons, upon request of a party, the judge shall order to summon these persons to testify.

2. The judge may order, also *ex officio*, the examination of the persons referred to in paragraph 1.

3. Failure to comply with the provisions of paragraph 1 results in the exclusion from the proceedings of the statements related to the facts of which the witness has been informed by other persons, unless the examination of these persons is impossible because they are dead, ill or untraceable.

4. Criminal police officials and officers shall not testify on the content of the statements gathered by witnesses following the procedures referred to in Articles 351 and 357, paragraph 2, letters *a)* and *b)*. The provisions of paragraphs 1, 2 and 3 of this Article shall apply to the remaining cases.

5. The provisions of the previous paragraphs shall also apply if the witness is informed of the fact by means other than oral notification.

6. Witnesses shall not be examined on facts heard from the persons referred to in Articles 200 and 201 in relation to the circumstances provided for in the same Articles, unless the aforementioned persons have testified on the same facts or have disclosed them in some other way.

7. The testimony of persons who refuse or are not able to indicate the person or source that informed them of the facts under examination shall not be used.

Article 196
Capacity to testify

1. Every person has the capacity to testify.

2. If the physical or mental suitability to testify needs to be assessed in order to evaluate the witness's statements, the judge may order, also *ex officio*, the appropriate ascertainment through the means allowed by law.

3. The outcome of ascertainments that are ordered prior to a witness examination, under paragraph 2, shall not prevent the taking of testimony.

Article 197
Incompatibility with the witness's role

1. The following persons shall not testify:

a) persons co-accused of the same offence or accused in joined proceedings under Article 12, paragraph 1, letter *a)*, unless a final judgment of dismissal, conviction or application of the punishment upon request of the parties under Article 444 has been delivered against them;

b) without prejudice to Article 64, paragraph 3, letter *c)*, the persons accused in joined proceedings under Article 12, paragraph 1, letter *c)*, or charged with a joined offence according to Article 371, paragraph 2, letter *b)*, before a final judgment of dismissal, conviction or application of the punishment under Article 444 is delivered against them;

c) the person with civil liability for damages and the person with civil liability for financial penalties;

d) the persons who in the same proceedings perform or have performed the function of judge, Public Prosecutor or their assistants, as well as the lawyer who has performed defence investigations and the persons who have drafted the records on the statements and the information gathered as evidence under Article 391-*ter*.

Article 197-*bis*
Persons accused or tried in joined proceedings or for a joined offence undertaking the duty of witnesses

1. The person accused either in joined proceedings under Article 12 or in a joined offence under Article 371, paragraph 2, letter *b)* may be heard as witness if a final judgment of dismissal, conviction or application of the punishment under Article 444 has been delivered against him.

2. The person accused either in joined proceedings provided for in Article 12, paragraph 1, letter *c)* or in a joined offence provided for in Article 371, paragraph 2, letter *b)* may be heard as witness also in the case provided for in Article 64, paragraph 3, letter *c)*.

3. In the cases provided for in paragraphs 1 and 2, the witness shall be assisted by a lawyer. If the witness has no retained lawyer, he shall be assisted by a court-appointed lawyer.

4. In the case provided for in paragraph 1, the witness shall not be obliged to testify on facts related to the offence he was convicted of at trial if he had denied his own liability or had not made any statement during the proceedings. In the case provided for in paragraph 2, the witness shall not be obliged to testify on facts concerning his own liability in the offence he is being or has been prosecuted for.

5. The statements made by the subjects referred to in this Article shall not be used against the person who has made them in the proceedings against him, in the revision proceedings and in any civil or administrative trial related to the offence that has been prosecuted and ascertained in the aforementioned judgments.

6. The provision of Article 192, paragraph 3 shall apply to the statements made by the persons undertaking the duty of witnesses under the provision of this Article.

Article 198
Obligations of the witness

1. The witness is obliged to appear before the judge, follow the judicial indications regarding the procedural needs and answer truthfully to the questions addressed to him.

2. The witness shall not be obliged to testify on facts which may unravel his own criminal liability.

Article 199
Right of abstention of next of kin

1. The next of kin of the accused shall not be obliged to testify, but they must in any case testify if they have submitted a report, complaint or petition or if they or one of their next of kin are the victims.

2. Under penalty of nullity, the judge shall inform the aforementioned persons of their right to abstention and ask them if they intend to exercise such right.

3. The provisions of paragraphs 1 and 2 shall also apply to whoever is related to the accused by adoption ties. They shall also apply to the following persons, exclusively in relation to the facts that either occurred or were learned by the accused person during marriage:

a) the cohabitee of the accused person, even if not a spouse;

b) the spouse separated from the accused person;

c) the person against whom a judgment annulling, dissolving or ceasing the civil effects of the marriage contracted with the accused person has been delivered.

KEY TERMS

a porte chiuse	in closed court
accertamento tecnico	technical ascertainment
accompagnamento coattivo	compulsory appearance
acquisizione della prova	evidence gathering
ammissione della prova	admission of evidence
appello	appeal
applicazione della pena su richiesta delle parti	application of punishment upon request of the parties
archiviazione	drop the case
arresti domiciliari	house arrest
arresto in flagranza	arrest *in flagrante delicto*
assente	absent
assoluzione	acquittal
assunzione della prova	evidence gathering
astensione	abstention
atto	act/action/document
autorizzazione a procedere	authorisation to proceed
avocazione	advocation
avvertimento	warning
avviso	notice
avviso della conclusione delle indagini preliminari	notice on the conclusion of preliminary investigations
azione penale	criminal prosecution
camera di consiglio	in closed session/in chambers
cancelleria	Clerk's office of the judge
casa circondariale	district prison
casellario giudiziale	Criminal Records Office
citazione	summons

cognizione	cognisance
coimputato	co-accused person
colpa grave	gross negligence
condanna	conviction
condizioni di procedibilità	requirements for prosecution
confisca	confiscation
confronto	confrontation
connessione	joining/connection
consulente tecnico	technical consultant
contestazione	challenge
contraddittorio	hearing of the parties
contravvenzione	misdemeanour
controesame	cross-examination
contumace	absent by default
convalida	confirmation
corpo del reato	*corpus delicti*
corte di appello	Court of Appeal
corte di assise	Court of Assizes
corte di cassazione	Court of Cassation
cose pertinenti al reato	items related to the offence
costituzione delle parti	joining of the parties
costituzione di parte civile	joining of proceedings by the civil party
custodia cautelare	precautionary detention
custodia cautelare in carcere	precautionary detention in prison
danneggiato dal reato	injured person
decreto	decree
decreto che dispone il giudizio	decree for committal to trial
decreto penale di condanna	criminal decree of conviction
deliberazione	deliberation
delitto	crime
denuncia	report
detenzione domiciliare	home detention
dibattimento	trial
difensore	lawyer