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THE FRUSTRATED TURN TO ADVERSARIAL PROCEDURE IN ITALY (ITALIAN CRIMINAL PROCEDURE CODE OF 1988)

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I. THE TRADITIONAL MODEL OF CRIMINAL TRIAL (CODE OF 1930)

In accord with the continental civil law tradition, the Italian criminal justice system has long employed an inquisitorial procedural model. Beginning in the nineteenth century, Italian criminal procedure was built on the 1808 French Code d'instruction criminelle.[1] The Italian Kingdom, established in 1861, promulgated the first Italian code of criminal procedure, in 1865.[2] This code, and the subsequent codification of 1913,[3] were heavily influenced by the Napoleonic Code.

The Code of 1930,[4] drafted in the fascist era, also suffered a strong influence from the Napoleonic Code: criminal proceedings were divided into two phases, the investigative stage ("*istruzione*") and the trial stage ("*dibattimento*"), with the investigative stage holding more influence over the proceedings. The Code provided for an investigating judge ("*giudice istruttore*") with extensive powers. On recommendation of the public prosecutor, the investigating judge would direct the investigation in order to "ascertain the truth."[5] He would hear witnesses and experts, perform searches, seizures and experiments. The investigating judge could also summon and question the accused. All the evidence obtained in the course of the investigation would be recorded in the investigative dossier, upon which the trial judge based his decision.

Originally the defense was forbidden to participate in the investigative phase. Later reforms[6] and a series of decisions of the Constitutional Court in the 1970s[7] allowed the defense opportunities to challenge or contradict

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1. Code d'instruction criminelle, *in* LES CINQ CODES DE L'EMPIRE FRANCAISE: REUNIS EN UN SEUL VOLUME, SUIVE DE LA TAXE DES FRAIS ET DEPENS (Ferra, Ainé 1812).
2. C.P.P. (1865).
3. C.P.P. (1913).
4. C.P.P. (1930).
5. C.P.P., art. 299 (1930).
6. Bill n.517/1955 and Decree n.2/1971.
7. Corte cost., 10 Dec. 1970, n.190, Gazz. uff. n.324, 23 Dec. 1970; Corte cost., 13 Apr. 1972, n.63, Gazz. Uff. n.110, 26 Apr. 1972; Corte cost., 13 Apr. 1972, n.64, Gazz. Uff. n.110, 26 Apr. 1972.

information that was gathered. However, confrontational and adversarial initiatives were permitted in the trial phase, which took place only if the investigation had collected sufficient evidence. The principles of orality[8] and immediacy were granted in court. But those same principles were frustrated by the trial judge having access to the investigative dossier and being able to base a decision upon the records contained therein.

It is easy to understand why the preliminary investigative phase served as the central process of criminal proceedings, as this was when evidence was actually collected. In most cases the trial phase did not add to what had been done in the investigative phase or disavow the conclusion reached during the investigation. The trial simply functioned as a control on what had been previously decided. The trial often turned out to be merely an occasion for the "official reading" of the record formed during the investigative stage.

It is true that witnesses could be called to trial to testify and their testimony could differ from that given to the investigating judge. But the decision still could be based solely on the investigative dossier, disregarding the evidence presented during the trial phase. Moreover, in most cases the witness was asked to simply "confirm" the statements given to the investigating judge. The ability of the trial judge to rely exclusively upon the investigative dossier is determinant in establishing the inquisitorial profile of this system.

The Code of 1930 remained in force until 1988.[9] Even though many amendments were promulgated in an effort to update the procedure, the Code of 1930 and its inquisitorial nature was unfit in light of the supervening Constitutional system.

II. THE LINE BETWEEN ACCUSATORIAL AND INQUISITORIAL SYSTEMS

In order to understand the inquisitorial system of criminal justice (in force in Italy from 1930 until 1988 in different graduations), it is important to draw a clear distinction between inquisitorial and accusatorial procedures. The distinction has suffered a certain loss of significance and it is widely discussed, if not considered as being of purely historical interest. With no pretense of giving a universally valid definition, we will

8. "The principle that evidence must be given orally and subject to cross-examination unless affidavit evidence is admissible." OXFORD DICTIONARY OF LAW (Elizabeth A. Martin ed., 5th ed. 2002).

9. C.P.P. (1988).

assume for this report a meaning that is generally agreed upon among scholars and lawyers in Italy.

From a historical perspective, the dividing line between the two models derives from the nature of the accuser; a private citizen in the accusatorial process as opposed to a public officer in the inquisitorial process. From this point of view the distinction is now obsolete, as all countries have centralized the duty of prosecution with the state and local government.

Following another point of view, any system which does not conceive of a distinction between judge and prosecutor may be called inquisitorial; but this is an out-of-date criterion, as the distinction between the two functions is now assured in the majority of countries (at least in western democracies).

The perspective taken in this report views as accusatorial any model that strictly separates the investigating phase from the trial. In such a model, only the evidence collected in a public trial granting the right of confrontation may be used as a basis for the judge's decision. In contrast, under the inquisitorial model, decisions are based on evidence gathered unilaterally and in secret during the preliminary investigations by the investigating judge. It makes little difference whether the investigation is carried out by a judge or rather by a prosecutor, acting either as a party or as a neutral officer.

On the other hand, it must be stressed that an accusatorial process does not necessarily imply a full adversarial procedure-trial where the parties determine the issues to be decided and the evidence to be presented. The adversarial procedure is the best way to ensure the defendant's right to hear and to confront the evidence against him, but it is not the only way. At the same time, the existence of a two-sided investigation, in particular the right of the defense attorney to carry out a parallel investigation should not be a decisive factor in determining a system to be accusatorial. As an example, under Italian law, defensive investigation, which had been forbidden prior to the 1988 reform, later[10] assumed importance equivalent to that of the official investigation of the prosecutor in determining the outcome. Even so, it is not widely used by lawyers with the only preliminary inquiry usually directed by the prosecutor.

Therefore, an accusatorial process can be regarded as one that draws a clear barrier between the investigatory stage and the following trial phase, so that at the trial the information collected in the preliminary stage is not

10. Law n.397, 7 Dec. 2000, Gazz. Uff. n.2, 3 Jan. 2001. This was introduced as Bill n.397 of 2000.

the basis for the decision. Consequently, it is ensured that evidence will be produced and discussed in court, in observance of the principles of orality and immediacy.

Mixed procedure provides for a public trial where the right of confrontation can be formally granted, but still allows the judge to base a decision on the investigative dossier. In this sense, a mixed procedure is substantially inquisitorial. The same conclusion applies to the original model of the Napoleonic Code.[11]

Applying these definitions, the Italian Code of 1930[12] could be regarded as a kind of mixed procedure; originally was strictly inquisitorial, but the Code later shifted to a milder version. In any case, the trial judge was entrusted with a truth-seeking duty and could decide on the basis of the investigative dossier. A public trial was provided for, but in practice served as a mere formality.

III. THE REVOLUTION OF 1988

Since the early 1960s, the need for a new procedure better suited to the constitutional system established in 1948 was considered essential. The Constitution did not impose a precise model for criminal proceedings, but an adversarial-accusatorial process better protected the values inherent in the Constitution. This was true even before the 1999 amendment to the Constitution, which will be discussed below.

Article 24 section 2 of the Constitution protects the right to counsel, the right to an effective defense and the right of the accused to be promptly informed of the charge filed.[13] Article 27 section 2 requires a presumption of innocence, which consequently places the burden of proof upon the prosecution and necessitates a cognitive judgment in the ascertainment of the facts.[14] Article 101 section 2 affirms that judges should obey only the law, thus guaranteeing judicial impartiality.[15] Judicial impartiality is also assured by Article 112, which requires a separation of functions between judges and prosecutors.[16] Article 101 section 1 is also relevant: it states that justice should be administered and given in the name of the Italian people.[17] It imposes the maximum transparency on the procedures and

11. Code d'instruction criminelle, *supra* note 1.
12. C.P.P. (1930).
13. COST., art. 24, § 2.
14. *Id.* art. 27, § 2.
15. *Id.* art. 101, § 2.
16. *Id.* art. 112.
17. *Id.* art. 101, § 1.

excludes proceedings typical of the inquisitorial model that are held in secret. The recognition of these rights necessitated an accusatorial-adversarial procedure.

The effort to reform criminal procedure began in the 1960s and was promoted by eminent scholars. In 1978, the first reform code was drafted, but it did not come to fruition. The criminal reform did not stop its course, however, and ten years later a second reform code was successful.[18]

The new Code of Criminal Procedure of 1988 represented a revolution, inspired by the Anglo-American adversarial system. The break with the past was clear: abolition of the investigating judge; preliminary inquiry conducted by both parties; adversarial presentation of evidence and cross-examination at trial; strong reduction of the judge's ability to introduce evidence (limited to the case of absolute necessity, such that he could not otherwise decide in favour of either party). Another primary difference is the strict separation of the trial phase from the preliminary investigation, which had previously been put forth in the 1978 draft reform code.

The goal was to prevent judicial prejudice founded on knowledge of the investigations conducted by the prosecutor and by the police. Therefore, the results of the preliminary inquiry were withheld from trial, in an attempt to avoid influencing the trial judge. Both the transit of investigative files and the narration of the protagonists of the investigation were to be forbidden. The strong separation between phases (trial and investigation) was ensured by two rules: (1) the prohibition against investigative records at trial, except when used to impeach a witness; and (2) the prohibition against police testimony at trial regarding the statements collected in the investigating stage.

As to the first rule, the system operates in the following way. At the end of the investigation the prosecutor files the charge, which is screened by a judge during a preliminary hearing. After sending the accused to trial, the same judge forms the dossier for the trial judge. This dossier contains very few records taken from the prosecutor's file including only evidence which is objectively impossible to reproduce in court; evidence that may be lost before trial; records regarding the *corpus delicti*; and prior convictions of the accused.[19]

In other words, the preliminary judge selected from the investigative dossier those very few records which the Code allows the trial judge to have access to and then placed these records in the distinct trial dossier

18. C.P.P. (1988).
19. C.P.P., art. 431 (1988).

(*"fascicolo per il dibattimento"*). This system, called the "double dossier-system" ("*doppio fascicolo*"), was created in order to avoid bias to the trial judge's "virgin mind," guaranteeing that the judge would acknowledge only the evidence produced in court and decide only on that basis. The trial judge is never allowed to look at the prosecutor's file; out-of-court statements could be used only on the issue of the witness' credibility, without any substantive use (that is, to prove the truth of the matter asserted therein). In other words, they could never be proper grounds for the decision.[20]

As to the second rule, it should be pointed out that the Code of 1988 did permit (and still does) hearsay testimony by ordinary witnesses, although providing for a specific discipline.[21] The only prohibition on hearsay was for the police who had conducted investigations.[22]

These two rules were established to guarantee a perfect shield, isolating the judge from the information gathered during the investigations. As a consequence, the only evidence upon which the judge could ground his decision was that presented in court.

The reason for these rules is not simply that evidence at trial should be introduced by the parties. After all, to some extent this happened under the Code of 1930. Rather, evidence at trial is evidence that is produced in the presence of the other party to allow cross-examination. Moreover, the opposing party could contradict the evidence and put forth an opposing point of view. Evidence at trial is heard directly by the judge who can carefully weigh and evaluate the witnesses' reactions and, therefore, their credibility. In other words, it is evidence collected in accordance with the principles of orality and immediacy.

Of course, some exceptions were introduced to the principle that the only legitimate evidence is that produced at the trial, either directly or through the reading of the records placed in the trial dossier. In cases where the witness had died or it was impossible to call him to testify, the Code of 1988 granted the right of using prior statements of the witness.[23] Another exception was introduced for cases where the accused remained silent at trial once the other party had requested his examination.[24] Besides these exceptions, however, the principle that the decision could be based

20. C.P.P., art. 500 (1988).
21. C.P.P., art. 195 (1988).
22. The prohibition of hearsay does not apply to the prosecutor since he cannot testify at all.
23. C.P.P., art. 512 (1988).
24. C.P.P., art. 513 (1988).

solely on in court statements was strict. This displays the clear will of the legislature to introduce an accusatorial system.

However, some features of the traditional continental model have not been abandoned. For example, the judge still has the power to introduce evidence. No jury trial is provided for and adjudication remains primarily in the hands of professional judges (with the pre-existent exception of the "court of assise", a mixed panel composed of six lay judges and two professionals, having jurisdiction only over the most serious felonies). The decisions require a written statement of the reasons, and there are broad rights of appeal. Proceedings commence under the principle of legality (or of compulsory prosecution), which excludes any legitimate prosecutorial discretion. The prosecutor is asked to investigate both against and in favor of the defendant. But these traits are not considered as betraying or jeopardizing the accusatorial process.

IV. CRITICISMS AND 1992 JUDICIAL TURN-OVER

Transplanting judicial systems across legal cultures is always difficult. Success lies on large-scale acceptance of the values implied by the new system. When such support is lacking, the risk of rejection is high. The fault of the 1988 codification was that it had not been adequately prepared in cultural terms. The bar and judiciary were not fully involved in the reform. This is especially true for the judiciary, where the deepest changes were imposed.

Italian judges were accustomed to having an almost unlimited power to introduce evidence, to having full knowledge of the investigative dossier and the freedom to use any document from that dossier for the decision. Judges conceived of their role as one of seeking the truth, where they were supposed to search in all possible ways and with all the permitted means in order to accomplish their duty. Judges were accustomed to being the active protagonists of the trial; the focus now shifted to the parties' initiatives and arguments.

The first criticisms to the new Code were, not surprisingly, made by prosecutors and judges concerned over a perceived loss of efficiency. But it is apparent that the real disappointment was grounded in a belief that the newly introduced accusatorial context was useless. That is to say, the same—if not better—results could have been reached more expeditiously under the old procedures. It is evident that those who complained of inefficiency did not share the same values on how facts should be ascertained and how the judge should come to the decision. Yet the way justice is administered is as important as the rendering itself. In other

words, quantity does not match quality. This cultural diversity soon came to surface in the courtrooms.

The first interpretations given to the provisions of the Code of 1988 were not in line with the accusatorial spirit. Court decisions tended to expand the exceptions to the principle that evidence should only be produced in court. Other rulings interpreted expansively the judge's powers to introduce evidence, which the Code had confined into narrow limits.[25] Many judges challenged the provisions of the Code of 1988, alleging that they conflicted with the Constitution. Far more constitutional claims came before the Constitutional Court in the first years after the reform than were ever referred to the Court during the preceding four decades under the provisions of the Code of 1930,[26] which had been issued in the fascist era before the introduction of the Constitution.

These remarks demonstrate the failure of the new Code to garner general approval. But the strongest attack on the Code came in 1992, when the Constitutional Court and the legislature struck down the accusatorial construction.

The Constitutional Court delivered the first hit by tearing down both pillars that sustained the accusatorial process. In January of 1992, the Court held that the prohibition of hearsay by police officers violated the constitutional equality clause, as a similar ban did not apply to other witnesses.[27] Five months later the Court delivered Decision 254/1992 and Decision 255/1992.[28] Decision 254/1992 allowed the use of out-of-court statements of an accomplice (tried separately) who is called to testify in the defendant's trial. These statements may be used when the accomplice does not show up in court or when he invokes the right to remain silent. Decision 255/1992 permitted the substantive use of prior statements recalled by the parties during cross-examination for impeachment purposes. Such statements could be inserted in the trial dossier and the judge could base his decision on them.

The rationale that supported these rulings manifested the underlying ideology. On several occasions the Court referred to the duty of the judge to seek the truth, noting that such a duty is not subject to restrictions or limitations. The Court believes that any opportunity to enhance the judge's knowledge should be permitted.

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25. Cass., sez. un, 11 June 1992.
26. C.P.P. (1930).
27. Corte cost., 22 Jan. 1992, n.24, Gazz. Uff., 5 Feb. 1992.
28. Corte cost., 18 May 1992, n.254, 103 Racc. uff. corte. cost. 1992; Corte cost., 18 May 1992, n.255, 104 Racc. uff. corte. cost. 1992.

The Court also recalled the principle of reasonableness.[29] The Court espoused that a procedure that suffers from such a loss of information is unreasonable. The constitutional judges reviewed the existence of an implicit constitutional principle, the "principle of non-dispersion of evidence." The principle, in the opinion of the Court, resolved not to waste any information available in a case, no matter where it had been collected. The principle of non-dispersion disregards the principles of orality and immediacy.

Parliament passed a bill in August of 1992 that implemented the Court decisions and increased the exceptions to the rule that the only evidence admissible was that collected at trial[30]. For example, the parties were allowed to introduce records of other proceedings[31] and decisions taken in collateral cases.[32] Also, out-of-court statements of witnesses not present at trial could be used more extensively.[33] This legislation was enacted by the State in response to attacks by organized crime. In the same year, two leading public prosecutors investigating the Mafia in Sicily had been assassinated. This justified the need for emergency legislation aimed at strengthening the evidentiary powers available to law enforcement officials.

The end of summer 1992, saw the definitive cancellation of the accusatorial process. What remained was a mixed system, which permitted extensive use of information gathered by the prosecutor during his investigations, while simultaneously denying the judge the power to seek "material truth." This hybrid system, far removed from the accusatorial process, failed to affirm the inquisitorial process. Investigative records were available for the decision only in some occasions. It is not possible to explain the reason for such a disparity. The Court operated by nullifying single provisions that collided with the Constitution. This did not permit the replacement of accusatorial processes with new inquisitorial ones. Replacement was not made by the legislature either. The legislature's intervention was limited to widening the exceptions to the principles of orality and immediacy, not assessing the use of the investigative dossier.

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29. The principle of reasonableness is derived from the equality clause of the Italian Constitution. Cost., art. 3.

30. Law n.397, 7 Aug. 1992, Gazz. Uff. n.185, 7 Aug. 1992.

31. C.P.P., art. 238 (1988), as amended by Law n. 397/1992, *supra* note 30.

32. *Id.* arts. 238 *bis*, 511 *bis* (1988), as above.

33. *Id.* arts. 512 *bis*-512, 413 (1988), as above.

V. THE CONFLICT BETWEEN PARLIAMENT AND JUDICIARY

In 1997, Parliament decided to re-establish the original accusatorial choice. Law 267/1997 abolished some of the many exceptions to the principles of orality and immediacy in order to place the trial stage at the center of criminal proceedings again.[34] In particular, the reform stated previous statements of an accomplice, are separately inadmissible for determining the defendant's guilt as long as the accomplice remained silent at trial.[35]

The reform moved toward a restoration of the accusatorial process, preserving the defendant's right of confrontation. However, the Constitutional Court reviewed the revised provisions and concluded that they were an unconstitutional violation of the equality clause.[36] The provision forbid the use of an accomplice's previous statements where the accomplice was silent at his trial, but did not forbid the previous statement of a witness. The reasons stated for the decision display the ideology of the Constitutional Court. The Court again recalled the principle that no judicial activities should be wasted and no evidence should be lost.[37] Parliament and the judiciary were now in open conflict and the judiciary was prevailing.

VI. PARLIAMENT'S REACTION AND CONSTITUTIONAL REFORM

The Constitution, as we have already pointed out, did not prohibit an accusatorial system, contrary to the beliefs of the constitutional judges. In fact, the Constitution favored a system based on the parties' initiative and on evidence drawn out by cross-examination in front of an impartial judge.

The Constitutional Court's systematic misinterpretation of the Constitution made it clear that Parliament would have to amend the Constitution to explicitly state the intended procedural system.

Constitutional Law 2/1999 reformed Article 111 of the Constitution by introducing five new sections.[38] The reform goes under the label "the fair trial reform," as the added provisions state the principles of a fair trial.[39] In particular, the revised Article 111 states that evidence in criminal cases

34. Law n.267, 7 Aug. 1997, Gazz. Uff. n.187, 11 Aug. 1997.
35. C.P.P., art. 513 (1988), as amended by Law n. 267/1997, *supra* note 34.
36. Corte cost., 2 Nov. 1998, n.361, Gazz. Uff. la serie speciale, 4 Nov. 1998.
37. *Id.*
38. Constitutional Law n.2, 23 Nov. 1999, Gazz. Uff. n.300, 23 Dec. 1999.
39. *Id.* art. 1. These principles correspond to the adversarial and accusatorial model.

should only be heard in front of the parties and an impartial judge.[40] This assures the trial takes center stage in criminal proceedings.

Additionally, Article 111 grants the accused the right of confrontation by the accuser.[41] This article provides that guilt can not be proven by declarations of the accuser who had not undergone cross-examination by the accused or by his lawyer.[42] The only exceptions to this rule allow the use of out-of-court statements where, the defendant consents, illicit conduct of a witness is proven, or obtaining the evidence at trial is not possible.[43]

VII. THE SUBSEQUENT REFORM OF THE CODE

After modifying the Constitution, the Code of Criminal Procedure was next in line. In 2001, Parliament promulgated Law n. 63/2001.[44] This law restored most of the provisions struck down by the Constitutional Court in 1992 including, the prohibition of hearsay by police officers called to testify and the inadmissibility of out-of-court statements.[45]

As for out-of-court statements, the legislature reintroduced the "golden rule" that they shall only be used for the impeachment of witnesses.[46] Prior statements may only be used substantively where examination of the witness is impossible for reasons independent from the parties' will; when the witness has been threatened; when evidence has been tampered with; and both parties agree to such use.[47] Additionally, an accomplice's out-of-court declarations, accusing the defendant, could not be read in trial or be put in the trial dossier.[48]

To enforce the effectiveness of the right of confrontation, in the Code of Criminal Procedure the legislature reproduced the new constitutional provisions, which declared that guilt could not be proven solely by declarations of the accuser where the defendant or his lawyer has not cross-examined the accuser.[49]

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40. COST., art. 111, § 2. These principles are referred to as "*contraddittorio*."
41. *Id.* § 3.
42. *Id.*
43. *Id.* § 5.
44. Law n.63, 1 Mar. 2001, Gazz. Uff. n.68, 22 Mar. 2001.
45. *Id.*
46. C.P.P., art. 500, § 3 (1988), as amended by Law n. 63/2001, *supra* note 44.
47. *Id.* §§ 4, 6.
48. C.P.P, art. 513 (1988), as amended by Law n. 63/2001, *supra* note 44. The legislature has tried to solve this problem by providing that accomplices may be compelled to take the stand as witnesses, thus eliminating their right to remain silent about the defendant's guilt. Such a provision guarantees cross-examination and preserves the right of confrontation.
49. C.P.P., art. 526, § 1 *bis* (1988), introduced by Law n. 63/2001, *supra* note 44. *See also* Cost.,

The Constitutional Court examined the recent amendments, with a far different result. In Decision 439/2000 the Court confirmed the separation between the investigate and the trial phases by refusing to admit prior statements of a witness exercising his familial privilege at trial.[50] Decisions 32/2002 and 36/2002 swept away any doubt over the successful return to the accusatorial-adversarial system.[51] In Decision 32/2002, the Court held that the prohibition of hearsay for police officers questioned at trial[52] is in accord with the Constitution.[53] In Decision 36/2002, the Court confirmed the constitutionality of the use of prior statements solely for impeaching the credibility of a witness.[54] This holding certified the existence of a barrier between investigation and trial.

VIII. THE ALTERNATIVE WAY OF "SPECIAL PROCEEDINGS"

Restoring the accusatorial spirit in the Code of 1988 does not guarantee that reality will follow. An accusatorial-adversarial system is hardly efficient. Rather, it is a time-consuming and expensive procedure. It demands a duplication of activities because the inquiry is significant only in view of the trial, where the parties will have to elicit the information from the witnesses they have called. Additionally, trials can be lengthy proceedings. From this standpoint, the inquisitorial system is cheaper and quicker as it solves the issues of guilt with a single investigative effort. However, the results and the way results are reached are far different from those reached under the accusatorial procedure. Unfortunately, the accusatorial procedure needs efficiency. Because cross-examination of the witness and the perception of the trial judge are so important, trials should be held soon after the alleged crime. Otherwise witnesses might not remember important details.

In light of the difficulties, the Code of 1988 was grafted to accommodate a system with a huge backlog. It tried to solve this problem by providing many simplified procedural alternatives. These so-called "special proceedings" were introduced to shorten and expedite decisions in

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art. 111, § 4.

50. Corte cost., 25 Oct. 2000, n.439, Gazz. Uff. la serie speciale, 2 Nov. 2000.

51. Corte cost., 26 Feb. 2002, n.32, Gazz. Uff. la serie speciale, 6 Mar. 2002; Corte cost., 26 Feb. 2002, n.36, Gazz. Uff. la serie speciale, 6 Mar. 2002.

52. C.P.P., art. 195, § 4 (1988), as amended by Law n. 63/2001, *supra* note 44.

53. Corte cost., 26 Feb. 2002, n.32, Gazz. Uff. la serie speciale, 6 Mar. 2002; Corte cost., 26 Feb. 2002, n.36, Gazz. Uff. la serie speciale, 6 Mar. 2002.

54. Corte cost., 26 Feb. 2002, n.36, Gazz. Uff. la serie speciale, 6 Mar. 2002. *See* C.P.P., art. 500, § 2 (1988), as amended by Law n. 63/2001, *supra* note 44.

criminal cases by allowing the avoidance of trials and the preliminary hearings when there is strong evidence against the accused.

To promote judicial efficiency, the Code of 1988 sought to encourage the use of consensual procedural alternatives that permitted the avoidance of trials. The purpose of these special proceedings was to relieve the judicial system of a number of trials that it could not afford to handle.

One such proceeding is the so-called "*patteggiamento*" or "deal"[55] where the defendant and the prosecutor agree to a penalty reduced by up to one third. The agreed upon penalty cannot exceed five years' imprisonment, implying that crimes that cannot be reduced to five years are excluded from the deal. However, as a consequence of the deal, trial is avoided. This is similar to common law plea bargaining, although there are some significant differences. First, a defendant's agreement to the deal does not equate to a guilty plea. A defendant is not obliged to admit his guilt, as this would break the presumption of innocence. Second, the powers of the judge also differ in that he must analyze the investigative file to verify that there are no grounds for an acquittal nor anything in the record proving defendant's innocence. The judge should also verify that the agreed upon penalty is congruent with the nature of the crime charged.

Another special proceeding available to the defendant is the "*giudizio abbreviato*" or "abbreviated trial," which is available for any kind of crime, regardless of its seriousness. The accused asks to be judged solely on the pre-trial file. In other words, the defendant trades off his right to trial for a one-third diminution of the eventual penalty he would receive if found guilty. The issue of guilt and the extent of the penalty are not parts of the deal, and the judge makes such determinations based on the investigative dossier.

For lesser crimes, a prosecutor may request "*procedimento per decreto penale*" or "proceedings by penal decree." The judge imposes the fine based on the investigative dossier. The judge decides *in camera*, and the parties are not present. The defendant is not given a chance to speak, nor may he/she introduce evidence. However, he is entitled to a penalty that is half of the legally established minimum. Additionally, the defendant can oppose the sentence and may request a trial.

These alternative procedures were created to permit the system to afford the accusatorial-adversarial process. The plan was to have no more than 20–40% of judicial proceedings follow the ordinary course, leaving

55. The formal denomination is "*applicazione della pena su richiesta della parti*" which, translated, means "application of punishment upon the request of the parties."

the rest for the aforementioned expedited alternatives. The expectation was to emphasize the consensual proceedings that bypass the trial.

Another step toward increasing the efficiency of criminal justice has been the reform of the judging panels of the tribunal. In 1998, Parliament passed a bill that provided that a single judge, rather than the traditional panel of three magistrates, would hear most crimes, other than serious felonies. This should have allowed courts to handle a greater number of proceedings and to reduce the existing backlog.

Under the same rationale, the legislature granted criminal jurisdiction to the justices of the peace over petty offences. This grant of minor closeup jurisdiction, beginning in January 2002, should have relieved the tribunals of a portion of their heavy caseload.

IX. THE PRESENT SITUATION

Existing data can help describe the present situation.[56] The jurisdiction of the justices of the peace absorbs about 10% of total cases. About 15% of decisions are by way of "*patteggiamento.*" The "*giudizio abbreviato*" handles 10% of the proceedings not dismissed.

The average length of a criminal trial is less than encouraging. A typical case spends 381 days in the prosecutor's office. Then, after the charge is filed, the preliminary hearing takes place 324 days later. The trial in front of the tribunal lasts 341 days or 398 days if the trial is in front of the "*Corte d'assise*", or court of ordinary jurisdiction for very serious crimes. Up to 543 days are needed for an appeal. Furthermore, additional time may be required if the decision of the court of appeal is submitted to the "*Corte di cassazione*", or court of last appeal, for review.

Indeed, efficiency is the primary problem with the Italian justicial system; this assertion becomes even more tragically apparent in light of the tremendous backlog within the system. Moreover, this scenario exists in a system where the financial resources made available to criminal justice have always been grossly insufficient. To make things worse, financial funds face further reductions.

The recent attempts by the legislature to stimulate the use of special proceedings have not yet achieved significant results in expediting the average trial. Furthermore, there is a danger in pushing these special proceedings too far, as bargaining for justice may sacrifice the principles of legality and the presumption of innocence. On the other hand, the

56. The data is taken from the 2003 annual report of the chief prosecutor of the Supreme Court of Cassation.

proceedings used to expedite criminal justice, notably, those that dismiss insignificant offenses are limited in application to juvenile cases and, to some extent, to the cases submitted to the justices of the peace.

The inefficiency of the judicial system raises greater concern. As mentioned earlier, the trial, so remote in time from the crime, fails to fulfill its role in the fact-finding process. The extended duration of the average trial creates an incentive for defendants to avoid consensual alternative proceedings in favor of trial, where they can reasonably expect to benefit from the statute of limitations. Moreover, no sentence may be imposed until final judgment is passed.

This situation encourages attorneys to employ all possible strategies to delay the conclusion of the process, thereby creating a vicious cycle. Rather than shortening the length of proceedings, consensual simplified proceedings tend to encourage defendants to resort to lengthier trials. Reversing this trend would require a considerable investment in the administration of justice, which is not, at least for now, the main concern of the government.

CONCLUSION

After a challenging fight, the accusatorial-adversarial model has now been completely assimilated. The accusatorial "return," however, is better in concept than in practice. An accusatorial system that does not work is not really accusatorial, especially, if it cannot grant exactly what it should, a better way of rendering justice. The present malfunctions in the system partially betray the process provided by and codified in the law.

The first step towards ensuring a working accusatorial system is to seriously increase the resources available. The second step presents two possible options, either increase the forms of diversion, or drastically reduce the number of punishable crimes. A better solution would bring the two actions together.