Essays

The Italian Path to Reform: Italy's Adversarial Model of Criminal Procedure

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Abstract

This paper illustrates the tortuous path that many years ago (October 1989) led to the entry into force of a new Code of Criminal Procedure in Italy. The idea that this reform was inspired by adversary experiences gained in the Anglo-American legal systems is widespread. The opinion finds only partial confirmation in the events that have conditioned the preparation of the 'first code of republican Italy'. Considerable weight on the contents of the procedural reform – have actually been the decisions of the Italian Constitutional Court, the heated doctrinal debates already started since the 1960s of the last century and the culture of comparison, not only with the Anglo-American legal systems. The author explains shortly the difficulties encountered in drafting the procedural reform and in its implementation over the course of thirty years.

I. Introduction

The 1988 Italian procedural law reform, that led to the approval of the new Code of Criminal Procedure, is often presented as a transition from an inquisitorial model to an accusatory one. There is some truth in this statement. It would be wrong, however, to think that this reform has created an adversary system that mimics common law models. It is true that with the 1988 Code, Italy abandoned the so-called mixed system, modeled on the French *Code d'Instruction Criminelle* (1808) and which had characterized the previous codifications starting from 1861, when the national unity was achieved. Such a system – the one called mixed – combined both inquisitorial and accusatorial aspects; however, with the result of making the former prevail. In practice, indeed, the findings of the pretrial phase (conducted by the investigating judge with inquisitorial methods) heavily influenced the subsequent trial, although formally inspired by accusatorial principles (public hearings, orality of the trial, wider recognition of the defense rights).[1]

In reality, the road that led to the 1988 reform is less linear than it appears to those who merely observed its 'last mile', during which efforts to imitate the English or American criminal procedure may have seemed preponderant. To

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[1] Eg, E. Grande, 'Italian Criminal Justice: Borrowing and Resistance' 48 *American Journal of Comparative Law*, 227 (2000).

correct this erroneous conviction, it is worth recalling here, with brief hints, from what doctrinal ideas and from which social-political reality (from post-war republican Italy to a progressive integration into the European Union) the reform of the Italian criminal trial arose. This will help to explain the difficulties that the reform has encountered in its already thirty-year-old application.

The original impulse came from the change of political regime after World War II and from the regained democracy regime, ratified with the entry into force of the Constitution in 1948. At that time, it was necessary to overcome the approach of fascist codifications, which in criminal policy showed its most authoritarian and liberticidal traits. In the political vision of fascism, the individual was conceived as a subject subordinated to the state, so that his/her rights were at the mercy of public powers. The Italian Republican Constitution reverses this approach, recognizing inviolable individual rights as prerogatives that pre-date the state itself. These are rights that the state must protect and respect (under Art 2 of the Constitution). Initially (in the second half of the 1940s and in the fifties of the last century) inspiration for this change of approach was sought in the pre-fascist past of liberal Italy. The Code of Criminal Procedure of 1913 was in fact devoid of those authoritarian and illiberal emphases that would come to characterize the fascist Code of Criminal Procedure that was enacted in 1930. A first attempt was therefore made to correct the fascist code by bringing back into force some legal protections already pioneered by the Code of Criminal Procedural (1913).[2]

However, this was not the only approach, as some tried instead to look for a different solution for the Code of Criminal Procedure reform. At the beginning of the 1960s, a group of young scholars, lawyers and magistrates, under the direction of an old, authoritative academic and renowned lawyer, Francesco Carnelutti, developed a draft of a new Code of Criminal Procedure. The proposal was limited to the procedure concerning trials of first instance but it introduced an epoch-making novelty for Italy: a strict separation between the pretrial and the trial phases.[3]

No reforms of the appellate process were contemplated nor were any changes planned to the organization of the office of the public prosecutor offices or to the judiciary.

The proponents intended to overcome the mixed model, of Napoleonic origin, which – as mentioned before – had characterized all previous Italian procedural codifications (not only the fascist one). The division of the process in the two phases of the *preliminary investigation* (characterized in an inquisitorial sense) and of the *trial* (inspired by the values of the accusatory system) had to be overcome.

[2] For a reconstruction of the recent history of the Italian criminal procedure see E. Amodio, 'Verso una storia della giustizia penale in età moderna e contemporanea' *Criminalia 2010 – Annuario di scienze penalistiche*, 11 (2011) and R. Orlandi, 'Diritti individuali e processo penale nell'Italia repubblicana', in D. Negri and M. Pifferi eds, *Diritti individuali e processo penale nell'Italia repubblicana* (Milano: Giuffrè, 2011), 3.

[3] See F. Carnelutti, *Verso la riforma del processo penale* (Napoli: Morano, 1962), 18.

According to this proposal, the information acquired by the police and prosecutors in the preliminary phase had to be used exclusively to draft the accusation and prepare the summons of witnesses and experts meant to present their testimony in a public trial before an impartial judge. Given the emphasis on live testimony, this project seems, at first glance, to replicate the Common Law procedural model. In reality, however, Carnelutti, who knew little about the English and American systems, was inspired by Italian civil procedure regulations. He had long been a Professor of Civil Procedure in several major Italian Universities and had devoted himself to the criminal procedure only in the terminal phase of his academic career, and during his practice as a defense lawyer in some famous cases of the 1950s.

For a long time, the 'Carnelutti project' remained only a proposal, receiving scant attention from the State or from the ministerial commissions established in the 1960s and 1970s to adapt the Code of Criminal Procedure to the new Constitution. Even back then, however, it remained a constant source of inspiration for many authors who were engaged with ongoing reform proposals.[4]

The main novelty of the 'Carnelutti project' was eventually enhanced by the 1988 reform, which embraced the idea that evidence should be presented live at trial, excluding much of the written case file police and prosecutors had developed during the preliminary phases of the criminal investigation.

II. The 1988 Procedural Reform

The original imprint of the new Italian Code of Criminal Procedure (inspired more by Italian civil procedure rather than by the American model) may be grasped above all in the attempt to achieve equality between prosecution and defense. This despite the awareness of the profound differences that in the Italian legal system continued and still continues to exist between the public prosecutor and the accused. This attempt, incidentally, also reveals the naive and unrealistic character of the reform.

Other influences on the 1988 reform also make it difficult to assimilate the new code to the traditions of the Common Law. For example, in drafting the procedural reforms, legal scholars and Parliamentarians had to take into account the copious jurisprudence of the Italian Constitutional Court from the 1960s and 1970s by which that body repeatedly intervened to protect fundamental rights, such as personal autonomy, privacy of correspondence and other

[4] Of particular importance is the elaboration of this proposal by Franco Cordero in a series of writings and interventions: see, above all, F. Cordero, 'Scrittura e oralità', in Id, *Tre studi sulle prove penale* (Milano: Giuffrè, 1963), 175-240; Id, 'Linee di un processo accusatorio', in Id et al, *Criteri direttivi per una riforma del processo penale* (Milano: Giuffrè, 1965), 61-88. See also P. Ferrua, *Oralità del giudizio e letture di deposizioni testimoniali* (Milano: Giuffrè, 1981). For an overview of the effects that the 'Carnelutti project' and on the 1988 procedural reform has had on Italian doctrine, refer to R. Orlandi, n 2 above.

communications, as well as defense rights and the presumption of innocence in ways that are peculiar to neither the common law nor the civil tradition.

Moreover, reforms included few changes to the judiciary or to the tasks assigned to judges and to prosecutors (who remain members of the judiciary, not the executive branch of Government). In contrast to most Common Law jurisdictions, the principle of compulsory prosecution was kept in place, since it derives from our Constitution (Art 112), whose rejection of prosecutorial discretion is designed primarily to protect prosecutors from political interference. The jury, an essential component of Common Law models, was not introduced. It is true that our *Corti d'Assise*, which adjudicate the most serious charges, assign fact-finding to panels that include lay judges; but lay judges in Italy have different powers than Common Law jurors. In fact, Italian jurors have the same decision-making prerogatives as judges do. They do not issue the verdict, but they weigh in on sentencing, following the German model of *Schöffengerichte*.

Anyone who insists that the 1988 Italian procedural reform has drawn inspiration from the experience of Common Law often refers only to a specific procedure: The application of the penalty at the request of the parties, which somewhat resembles common law plea bargaining.[5] Here too, however, I would avoid hasty conclusions. The Italian 'plea bargain' is not really a novelty of the Code passed in 1988. It existed, in an embryonic form, in a law of 1981 (Art 77 of legge 24 November 1981 no 689) which decriminalized many former offenses and sought to reduce the scope of custodial sanctions, replacing shorter prison terms with fines or probation. One of the pre-conditions for the new procedure – like that of its older variant – is that the prosecutor and the accused must agree on the penalty. Despite modern comparisons to Common Law plea bargaining, the new provision more closely resembles a Civil Law procedural mechanism called 'oblation', which permits prosecutors to close out prosecutions for minor, non-jailable offenses.[6] The 1988 reform limited itself to considerably extending the scope of plea bargaining, which now applies to crimes punishable by up to two years' imprisonment. All this occurred in a regulatory context in which prosecutors remain subject to the principle of compulsory prosecution, which prohibits prosecutors from renegotiating either the charge of the legal construction placed on a fact (practices that are called charge-bargaining and fact-bargaining

[5] See E. Grande, n 1 above, 251.

[6] Art 162 of Italy's Code of Criminal Procedure provides: 'With regard to contraventions, for which the law only authorizes only fines as a penalty, the offender is allowed to pay, before the opening of the trial or before the decree of conviction, a sum corresponding to a third of the maximum sentence established by the law for the offense committed, in addition to the costs of the proceedings. The payment extinguishes the crime'. Access to obligation was extended to punishable offenses with alternative punishment (custodial or pecuniary), if the judge chooses to opt for a fine (Art 162-*bis* Code of Criminal Procedure, first introduced in 1981), and to offenses prosecuted by the filing of a criminal complaint, if the defendant has fully compensated the victim (Art 162-*ter*, introduced in 2017).

in the United States).[7]

It should also be borne in mind that the legal debate and with it the regulatory evolution in Italy are affected by other European legal experiences, first of all German ones, especially with regard to the criminal sector. Indeed, Germany has a recent history very similar to the Italian one: It was unified in 1871, ten years after Italy (1861), and again like Italy gathering together several former autonomous States; it knew the totalitarian experience of Nazism, while Italy was in the hands of the fascist regime; it emerged from this traumatic experience with a democratic Constitution not dissimilar to the Italian one in inspiration and substance, and the German Basic Law was enacted in 1949, that is to say one year from the entry into force of the Italian Constitution (1948). It is therefore not surprising that these two Countries have influenced each other for more than a century. This also because of the intense contacts between Italian and German scholars who have developed in all areas of law since the end of the 19th century.

Some choices made Italy's 1988 Code of Criminal Procedure reform[8] may in fact be found in the German procedural law. For example, Germany's removal of the investigative judge (*Untersuchungsrichter*) dates back to 1975, when reforms replaced the investigative judge with the prosecutor as the official in charge of the preliminary investigation. The same can be said of the so-called *incidente probatorio,* which permits the pretrial acquisition of evidence that may not survive until trial. This reform can be traced to the analogous *richterliche Nothandlung* regulated in § 165 StPO. German influence also accounts for the victim's right to oppose the prosecutor's request to dismiss charges, now provided for by our Art 410, in imitation of § 172 StPO (*Klageerzwingungsverfahren*). German criminal procedure is certainly characterized by a more pronounced inquisitorial trait, since, even now, the *Ermittlungsrichter* (preliminary investigation judge) can *ex officio* acquire evidence that may otherwise be lost, while, in Italy, the pre-trial judge can intervene only at the request of the public prosecutor or of the

[7] It would be questionable and, I believe, wrong, to consider Italian plea bargaining practices as indicators that Italy has adopted the Common Law procedural model. Almost all the legal systems of continental Europe have adopted some means of terminating criminal proceedings early, when the accused voluntarily gives up his right to fight the case against him. This happened, eg, in France, thanks to the reform in 2004 which regulated the *Comparation sur Reconnaissance Préalable de Culpabilité* and in Germany, which in 2009 introduced the negotiations between the defendant, the public prosecutor and the judge on the commensurate sentence (so-called *Absprachen*). I believe that this openness to negotiated adjudication is a byproduct of increasing procedural guarantees for defense rights, not an imitation of Common Law procedure (though plea bargaining, in the US, also increased with the advent of greater procedural and evidentiary protections at trial). In other words, the expansion of defense rights lays the groundwork for a negotiated waiver of these rights in exchange for some advantage. For more details and information on this phenomenon, see R. Orlandi, 'Plea bargaining in den kontinentaleuropäischen Ländern' *Österreichische Juristische Zeitschrift*, 404 (2009). It should also be noted that the Italian plea bargaining does not imply the defendant's declaration of guilt.

[8] The text of the new Code of Criminal Procedure, in *Gazzetta Ufficiale* 24 October 1988, entered into force exactly one year later, on 24 October 1989.

defendant. However, this does not challenge my conclusion that, if I had to identify among foreign legal systems the criminal process system that is closer to the Italian one, I find the closest to be the German one (and certainly not in the American or English systems).

The political and social climate in which the Italian reform matured was in fact decidedly hostile to magistrates, due, among other things, to a resounding case of miscarriages of justice in the mid-1980s (Tortora case), which had long polemical repercussions in the media.[9]

The fallout over the Tortora scandal culminated, in 1987, in a popular referendum convened to repeal Italian legislation on civil liability of magistrates for injuries they inflicted on individuals in the exercise of their official functions, as the public viewed the law as excessively lenient.

It can be said that the reform of the Code of Criminal Procedure – which was being worked on for more than twenty years – would likely have never come into force if it had not been for this significant decline in the popularity of the Italian criminal justice system. The intrinsic weakness of the reform, however, resides precisely in its origin as an effort to limit the investigative power of prosecutors.

III. The Counter-Reformation of 1992

Perceived as an act of mistrust towards the judiciary, the 1988 reform that came into force in October 1989 was immediately criticized above all by prosecutors. A committee of public prosecutors spontaneously organized itself, with the explicit intention of rethinking an approach that devalued the investigative work of the public prosecutor. The main target of the committee and of its criticism were the exclusionary rules of the code that prohibited the direct use for the conviction at trial of information collected during the investigation by the police and the public prosecutor. Numerous questions of constitutional legitimacy were proposed emphasizing the unreasonableness of these prohibitions.

Addressing these concerns, in three judgments published between February and May 1992, the Constitutional Court hit the heart of the reform that had just come into force, leading to a sharp reversion to the inquisitorial system and its reliance on written reports that the prosecutor compiled during the preliminary

[9] Enzo Tortora was a very popular TV presenter. In June 1983 he was arrested for allegedly dealing drugs on behalf of the Camorra in the artistic environment he attended. He was accused by two Camorrists who became collaborators with Neapolitan magistrates. Tortora was sentenced in the first instance (September 1985), but managed to prove his innocence in the appeal proceedings (September 1986). Due to the notoriety of the character, the case became the occasion for a long political battle, culminating in the 1987 referendum, called to repeal a law that excessively protected judges and prosecutors for errors committed in the exercise of their functions. It is in this climate of strong delegitimization of the criminal magistracy that the reform of the Code of Criminal Procedure is completed, in October 1988.

investigation.[10] As a result of these judgments, almost all records of pretrial investigative acts (mainly statements made to the police or prosecutor by defendants or witnesses) could easily be admitted at trial, displacing the live testimony which the reforms were designed to elicit. turn into evidence at trial. Written testimony prevailed again over the oral examination of witnesses by the parties before the Court. The right of the accused to challenge the indictment through cross-examination was effectively sacrificed. Consequently, the judicial collaborations of defendants who, in exchange for accusations against co-defendants, received favorable treatment from prosecutors and judges were encouraged. The defense was therefore marginalized. The equilibrium between accusation and defense was compromised, in the sense of a supremacy of the prosecution. The criminal trial thus regained its inquisitorial character.

Two powerful factors, capable of shaking up public opinion and so as to make the public receptive to greater grants of power to prosecutors helped to legitimate this reversion to inquisitorial norms.

The first of these factors was – in February 1992 – the start of an investigation for a case of political corruption: an investigation that extended to the point of discrediting and bringing down all the governing parties, practically marking the end of the political cycle that had started a quarter of century earlier.

The second factor was the popular reaction to two serious mafia massacres (which took place in Sicily between May and July 1992), in which the Sicilian Mafia killed two very well-known prosecutors who had long been involved in the fight against organized crime.

These events rehabilitated the image of prosecutors in the eyes of the public. The latter began to look favorably on reforms designed to help prosecutors fight public corruption and organized crime, welcoming as unavoidable the aforementioned judgments of the Constitutional Court and the legislative reform that, also in 1992 (decreto legge 8 June 1992 no 306, converted into legge 7 August 1992 no 356), confirmed their holdings, consolidating the inquisitorial overruling by incorporating it into legislation.[11]

The figure of the public prosecutor came out enormously strengthened by this counter-reform. The real center of the criminal proceeding became once more the phase preliminary to the trial, as it already had been under the 1930 Code, with the difference that evidence was now gathered by the police and the public

[10] Corte costituzionale 31 January 1992 no 24; Corte costituzionale 3 June 1992 no 254; Corte costituzionale 3 June 1992 no 255. All decisions of the Italian Constitutional Court are available at www.giurcost.org or www.cortecostituzionale.it.

[11] In particular, has been reformed the text of Art 500 Code of Criminal Procedure, that is, of the rule that regulated the use of statements collected in the pre-trial phase, when the witness made different statements to the trial judge. In the original version of the Code (1988) the statements made to the police or the public prosecutor could only be used to deny the witness who contradicted himself before the trial judge. After the 1992 reform, those statements could also be used as evidence for the guilt judgment. In this way the separation between pre-trial and trial on which the 1988 procedural reform had been built fell.

prosecutor, while in the previous epoch this task was allocated to a judge (the investigative judge), inclined to act with greater impartiality than one can expect from a public prosecutor.

At the same time, the figure of the defense lawyer suffered a mortifying marginalization in the dynamics of criminal trial. The already mentioned imbalance between accusation and defense produced a growing hostility by defense lawyers towards the judiciary.

The high level of conflict manifested in that period among the main actors of the criminal justice system caused diffidence and difficulties of mutual understanding that still persist. Towards the end of 1999, however, a constitutional reform aimed at affirming the principles of due process helped to partially ease the tensions between lawyers and judges. The growing importance, also for internal procedural law, of the European Convention on Human Rights and the corresponding jurisprudence of the Court of Strasbourg also led the Italian legislator to incorporate the principles of fair trial contained in Art 6 of the European Convention on Human Rights into the Italian Constitution.

In order to affirm these principles, it was necessary to modify the Italian Constitution, with a reform that had the effect of eliminating/amending the legal basis on which the Constitutional Court had founded the mentioned inquisitorial overruling in 1992.

It is thus worthwhile to briefly dwell on the main aspects of this reform in order to grasp more precisely its importance for the purposes of my presentation.

IV. The So-Called Constitutional Reform of the 'Due Process'

The reformed version of Art 111 Constitution acknowledges first of all the principles of due process already affirmed in the European Convention on Human Rights:[12] the right of the accused to be kept informed of the nature and the reasons for the accusation against him; the right to dispose of the necessary time and conditions to prepare her/his defense. These were rights already sufficiently safeguarded by the Italian criminal procedural law.

Other rights affirmed in the new text of Art 111 were instead previously barely guaranteed or had been even sacrificed by the regulatory situation that had been defined after the 1992 inquisitorial overruling. In particular, the accused have the same right to question their own witnesses that prosecutors have to elicit evidence from their own. This right is reinforced by the affirmation of a principle, undoubtedly coherent with the culture of the adversary process, according to which evidence only counts as such when it is presented through live testimony at trial, in front of the parties. This implies that no one can be convicted on the

[12] Legge costituzionale 23 November 1999 no 2. The impact of this constitutional reform on the criminal trial is well described by P. Ferrua, *Il giusto processo* (Bologna: Zanichelli, 2012).

basis of evidence in whose acquisition and presentation they have not been allowed to participate actively. Nor may convictions be grounded in statements made by subjects who have 'always voluntarily avoided answering questions of defendant or his or her lawyer'.[13] This last prohibition should be read as a reaction to the inquisitorial practices that had characterized numerous trials in Italy in the 1990s.

In particular, such practices were favored by the singularly wide scope that Italian criminal procedure afforded to the right to silence. Co-defendants could also benefit from this right with regard to statements by which they incriminated other defendants. After implicating co-defendants during the pretrial investigation, a defendant could simply refuse to submit to further questioning, thus paving the way for their statements to be read into the record at trial. In other words, relying on the right to silence, co-defendants willing to collaborate with the public prosecutor deprived the defendant of the right to cross-examine their accusers. The constitutional revision of Art 111 was designed (1999) to put an end to these practices. This was its main contribution to defense rights.

Thanks to this reform, the Italian criminal justice system has assumed an adversary coloring, modeled however on the principles of the European Convention on Human Rights, rather than on the imitations of Common Law experiences.

Art 111 specifies the situations where the adversarial principle in the formation of the proof can now be waived.

Criminal evidence can be acquired without the active participation of the defendant and his/her lawyer if:

- the defendant allows its use even in *malam partem*, that means also against himself (perhaps in exchange for a penalty discount);[14]

- the acquisition of the evidence may not be replicated before the Court (ie if there is an 'ascertained impossibility of an objective nature', according to Art 111 para 5), as when the testimony cannot be taken before the trial judge, because the witness is dead or cannot be found; a witness is subjected to illicit pressures before being examined in Court ('proven unlawful conduct'): for example, the witness suffers threats or offers of money to retract statements against a defendant.

[13] Art 111, para 4, Constitution. The theme is extensively treated by S. Lonati, *Il diritto dell'accusato a "interrogare o far interrogare" le fonti di prova a carico* (Torino: Giappichelli, 2008).

[14] This exception justifies, on the constitutional level, the reductions of punishment applied with special proceedings like *giudizio abbreviato* (shortened judgment: Arts 438-443); *patteggiamento* (Italian plea bargain: Arts 444-448 Code of Criminal Procedure); *decreto penale di condanna* (proceedings by decree: Arts 459-464 Code of Criminal Procedure); *sospensione del processo con messa alla prova* (suspension of proceedings pending probation: Arts 464-*bis* - 464-*novies* Code of Criminal Procedure).

V. A Nod to the Evolution of Italian Criminal Justice in the Last Two Decades. The European Impetus to Reform Criminal Procedure

The era followed by the revision of Art 111 Constitution can be defined as that of a 'securitarian obsession' that coincided with a progressive opening of the internal criminal justice system to the jurisprudence of the European Court of Human Rights. This ushered in a new season at the dawn of the new century.

The tragedy of 11 September induced almost all Western States to adopt special laws to face international terrorism. Investigative techniques that meet new challenges had to be studied and adopted. The stakes were so high that it seemed necessary to prepare exceptional means to head off terrorist attacks before they occurred instead of waiting to punish it after the fact. The resulting emphasis on anticipating threats and managing risks favored greater autonomy and a more proactive approach to police and intelligence operations, reducing the prosecutorial and judicial oversight.[15] Public safety seemed to demand new sacrifices and a new framework for judicial cooperation and oversight. No politician is insensitive to the electoral appeal of new initiatives aimed at increasing the electorate's sense of security. The argument also applies to the criminal policies promoted by the European Union. For example, I believe that – without the shock of 11 September – the legislation on the European arrest warrant would never have been launched (2002). The same is true of other rules facilitating cooperation between EU police and judiciary, which are designed to assist in the fight against transnational crime.

The pursuit of security – degenerated into a virtual obsession due to the impact of social media, which encouraged a greater level of public hysteria about national security than publicity about transnational crime has in the past been able to generate. Concern with security fuels changes to Italian criminal law.[16] In particular, substantive criminal law is revised in ways that move criminal liability back to ever earlier preparatory stages of inchoate offenses, while criminal procedure relies ever more on preventive and precautionary measures to neutralize threats.

This tendency is particularly evident in Italy, where a special preventive procedure (now regulated by decreto legislativo 6 September 2011 no 159) has been in use for years. This procedure is entrusted to prosecutors and judges, who implement it (1) through control orders limiting the freedom of movement of dangerous persons and (2) by confiscating to confiscate assets derived from

[15] The Italian criminal system, as well as other contemporary legal systems, is developing powerful prevention apparatus to face the most dangerous forms of crime (mafia, terrorism, corruption). Preventive measures can be taken before the crime is committed outside the criminal trial. See, in this regard, R. Orlandi, 'Il sistema di prevenzione fra esigenze di politica criminale e diritti fondamentali', in A. De Caro ed, *La giustizia penale preventiva* (Milano: Giuffrè, 2016), 5.

[16] The literature on the phenomenon of the progressive expansion of criminal law towards the advanced protection of legal assets is very wide. For an updated presentation of the problem, see M. Donini and L. Foffani eds, *La materia penale tra diritto nazionale ed europeo* (Torino: Giappichelli, 2018).

certain crimes that are considered especially dangerous for the society (including organized crime, terrorism, drug trafficking, corruption).

The result is a greater emphasis on crime prevention and risk management rather than crime-fighting. This reduces legal protections for suspects, as traditional safeguards apply only to formal criminal proceedings, since protections for individual rights have traditionally been confined[17] to criminal investigations rather than preventive operations. Abundant examples of this new emphasis on risk management and prevention may be found in pieces of legislation (not just Italian) concerning illegal immigration, job security, road traffic, environmental pollution, domestic violence and gender relationships. In the current political-social context, liberties at risk for reasons of public interest are mainly those threatened by State agencies that pursue social control through administrative interventions that lack the procedural protections attendant on formal criminal charges. In addition to the above-mentioned procedures, special preventive measures include controls on illegal immigration, as regulated by decreto legislativo 15 July 1998 no 286, repeatedly amended by emergency legislative measures, the most recent of which dates back to October 2018.

On closer inspection, a securitarian criminal law threatens individual rights in much the same way as other traditional forms of criminal law do. The European Court of Human Rights plays a very important role in protecting these rights, as it has plenty of experience in not being deceived by 'label scams' when it comes to defending the rights of persons threatened by acts of the public authority. Guarantees for the rule of law and basic safeguards of criminal procedural cannot be circumvented simply by designating coercive or restrictive measures as administrative rather than criminal.

The European Court of Human Rights has over time developed a careful approach to the 'substance' of fundamental rights, and one that serves as a counterweight to illiberal tendencies.[18] The fact that the Court looks at the concrete action of public authority attributes to its decisions a character of individualization (typically judicial), that is to say, adherence to the alleged violation of the law in the particular case, unknown to the jurisprudence of our Constitutional Court, whose judgments are an expression of the (political) power of control over the activity of the legislator.

I therefore think that judicial efforts to adapt Italian case law to European jurisprudence[19] should be welcomed, and the same goes for the 'almost

[17] See W. Hassemer, 'Sicherheit durch Strafrecht' *Strafverteidiger*, 322 (2006).

[18] From over forty years (since Eur. Court H.R., *Engel and Others* v *the Netherlands*, Judgment of 8 June 1976) the European Court of Human Rights also attributes criminal nature to sanctions classified as administrative or disciplinary by the national States, if their size is markedly afflictive.

[19] A defendant can challenge his conviction and reopen proceedings against him if his conviction stems from the violation of a right guaranteed by the European Convention on Human Rights, provided that the right is cognizable by the European Court of Human Rights (Art 630

constitutional' *status* of the norms enacted by the European Convention on Human Rights and of the principles they enshrine.[20] In other words, the jurisprudence of the European Court of Human Rights contributes to completing the protection of individual rights, through the control also of the judgments (not only of the laws) unconstitutional.

Another characteristic feature of current Italian criminal justice – as previously mentioned – is its transnational vocation, especially within the European Union. Many of reforms to Italian criminal law and procedure are designed to facilitate cooperation between European judicial authorities, who can now speak directly with each other, without the need for discretionary intervention by political-governmental authorities.

Thus many Italian reforms have been undertaken with the aim of 'harmonizing' the criminal and procedural systems both by the Council of Europe and by the European Union, imposing minimum standards for individual guarantees and the protection of fundamental rights, with the aim of facilitating international cooperation to prevent and suppress transnational crime.

The main ones worth mentioning here are:

- The Budapest Convention on Cybercrime of 23 November 2001, undertaken both to sanction, in a generally uniform manner, the conduct of private individuals in the use of information technology, and to limit the investigative prerogatives of public security agencies and their right to monitor computers and information systems;[21]

- The already mentioned Council Framework Decision on the European arrest warrant of 13 June 2002, which allows the extradition of persons arrested or convicted of serious crimes with simplified procedures compared to those provided for in extradition agreements;[22]

- The Council decision 2008/615/JHA of 23 June 2008 on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime. The decision provides for closer coordination of genetic investigations and for the establishment of DNA databases to collect and preserve genetic profiles that could be useful to police and judiciaries of other European States;[23]

Italian Code of Criminal Procedure, as modified by the ruling of Corte costituzionale 4 April 2011 no 113).

[20] Corte costituzionale 24 October 2007 no 348 and Corte costituzionale 24 October 2007 no 349 treat rights protected by the European Convention as so-called 'interposed norms', meaning that they are relevant to interpreting rights protected by the Italian constitution and can be used to assess the constitutionality (under the Italian Constitution) of provisions in the Italian Code of Criminal Procedure. It should also be noted that, as of 1 December 2009, the norms of the European Convention on Human Rights have become an integral part of the law of the European Union, thanks to their incorporation into Art 6 TFEU (as recognized by the same Constitutional Court in decision no 138/2010).

[21] Available at https://tinyurl.com/hj27afn (last visited 30 December 2019).

[22] Available at https://tinyurl.com/y3ug6x2c (last visited 30 December 2019).

[23] Available at https://tinyurl.com/y3b4qbug (last visited 30 December 2019).

- The Council of Europe Convention, on preventing and combating violence against women and domestic violence (The Istanbul Convention of 11 May 2011);[24]

- European Parliament and Council Directive 2012/29/EU of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA;[25]

- European Parliament and Council Directive 2014/41/EU of 3 April 2014, regarding the European Investigation Order in criminal matters, by which courts of EU Member States must accord validity to investigative acts carried out in other EU Countries;[26]

- Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union.[27] The directive also obligates member States to enact common rules governing the seizure and confiscation of assets deriving from a crime, and to facilitate the execution of the coercive or confiscation measure even outside the state territory;

- Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016, on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings. This directive is part of a concerted effort to enforce minimum procedural protections for defendants in the legal systems of all member States.[28]

The European Public Prosecutor's Office plays a similar harmonizing role in implementing laws designed to address crimes against the Union's financial interests.[29] An investigative body intended to become operational after October 2020 and composed by national representatives from each Member State of the European Union, the European Public Prosecutor's Office will be able to initiate its own criminal prosecutions for financial crimes against the European Union he task of prosecuting the crimes that harm the financial interests of the Union, as part of a first attempt to create a European federal criminal justice system. Italian procedural reforms must thus be seen as part of a wider European effort to overcome national differences and to pursue supra-national interests at the European level.

VI. Conclusions

The recent history of Italian criminal procedure belies easy analogies or kinship

[24] Available at https://tinyurl.com/y2rzulr8 (last visited 30 December 2019).
[25] Available at https://tinyurl.com/y6qcw2wn (last visited 30 December 2019).
[26] Available at https://tinyurl.com/y32faktm (last visited 30 December 2019).
[27] Available at https://tinyurl.com/y4plts2o (last visited 30 December 2019).
[28] Available at https://tinyurl.com/y2dahsr4 (last visited 30 December 2019).
[29] European Parliament and Council Directive (EU) 2017/1371 of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law, available at https://tinyurl.com/yxqakep6 (last visited 30 December 2019).

with common law accusatory models. The procedural reform implemented towards the end of the 1980s of the last Century was the fruit of a long evolution that relied only partially on the rather distant adversary models of Common Law systems.

This reform – undoubtedly characterized by accusatorial features that accompanied the expanded procedural rights accorded to the accused – was realized by profiting from a political-institutional constellation peculiar to the second half of the 1980s: the sudden decrease in the prestige of judicial authorities in the eyes of the public opinion, as a result of a sensational miscarriage of justice, made it possible for political authorities to overcome decades of resistance to reforming the criminal process.[30]

Shortly after the entry into force of the reformed code, a series of episodes of political corruption and terrorist attacks altered public opinion sufficiently to rehabilitate the image of prosecutors, thus favoring – towards the beginning of the 1990s – an inquisitorial counter-reform of our legal system.

The imbalance between prosecution and defense derived from this shift has accentuated the conflict between public prosecutors and criminal defense lawyers.

Only the Constitutional reform of 1999, raising some typical features of the adversarial system to the rank of constitutional principles, helped to loosen the tension between the main actors of the criminal justice system. These included the right of the accused to confront the prosecution witness (right to confrontation), the right to form of the penal evidence in the contradiction between the parties, the condition of trendy equality between prosecution and defense.

The start of the new century brings with it new challenges related to the emergence of transnational crime, deflecting law enforcement policies of the European states, including Italy, in two radically different directions.

First, law enforcement agencies emphasize the anticipation and prevention of serious offenses over the prosecution of crime after the fact, through efforts to control dangerous people and to confiscate their assets. This favors the evolution of a preventive criminal justice, implemented with inquisitorial techniques before the crime is committed, without the procedural safeguards attendant on criminal investigations for completed criminal offenses.

Second, the transnational character of numerous offenses (international terrorism, criminal association by organized crime, drug trafficking, human trafficking, money laundering, international corruption, pedo-pornographic organizations, etc) has intensified judicial cooperation between EU Member States. This has been made possible by a series of regulations that allow State judicial authorities to communicate directly with each other, bypassing more cumbersome intergovernmental channels.

The European Union, the Court of Justice of the European Union and the European Court of Human Rights are contributing, each in its own role, to the slow and gradual emergence of criminal procedure systems which, while respecting

[30] E. Grande, n 1 above.

the different state sovereignties, guarantee minimum procedural safeguards necessary to make reinforced judicial cooperation reasonable and therefore legitimate.

Today, the most significant *impetus* to criminal and procedural reform come from the European institutions and from the delicate interactions that are established between them and the judicial and law enforcement authorities of the single States.

The nationalist wind that is now blowing in many States of the European Union, including Italy, has, in Italy, not yet reached the point of casting doubt on the viability of European safeguards for fundamental rights. Nonetheless, we are witnessing a vigorous resumption of security-oriented policies, particularly against waves of migrants from the Middle East and Africa, who are perceived as sufficiently dangerous to warrant both preventive and repressive measures designed to abate this 'threat' to national security.[31]

Lastly, the European push for greater defense rights is being called into question by an anti-corruption campaign propelled forward by a large sector of the current parliamentary majority, who are seeking to enact a new law that weakens defense rights and that is designed, instead to strengthen the powers of prosecutors.[32]

All this in a social-political climate where legislators are very careful to pander to moral panics that mobilize public opinion, which is continually whipped up by media campaigns that warn of social dangers which are often over-blown with respect to the frequency of their occurrence, while giving scant attention to the rights of the accused, continually alarmed by media campaigns that signal social dangers, which are often over-emphasized with respect to the frequency of their occurrence.

The new governing coalition has announced plans for further reforms to the Code of Criminal Procedure. These should address the problem that has long affected the administration of Italian criminal justice: the pathological and unsustainable duration of trials. This is likely to prove the umpteenth opportunity to sacrifice individual rights on the altar of procedural efficiency.

[31] The decreto legge 4 October 2018 no 113, converted into legge 1 December 2018 no 132, effectively compels many thousands of immigrants to live in hiding, making their condition even more precarious and paradoxically accentuating the danger of their stay in Italy.

[32] The legge 9 January 2019 no 3 (on the subject of combating corruption) facilitates the investigative activity aimed at ascertaining the most serious crimes of corruption through the provision of a particular case of non-punishment for those willing to cooperate with the public prosecutor. It also simplifies the techniques of interception of communications (also through the use of computer malware), assimilating the crimes of corruption to the crimes of organized crime (mafia, terrorism) and makes it possible to use agents under cover, which Italian procedural legislation allows only for particular crimes (drugs and arms trafficking, terrorism). The aforementioned legge no 3 of 2019 has also amended the rules of limitation (with regard to all crimes) in a way that is clearly unfavorable to the defense. The limitation period is intended to remain suspended after the first instance sentence, so that the judicial authority has all the time it needs to close the process in the following phases (appeal and appeal by cassation).