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CHAPTER 9 ITALY*

1. Introduction

1.1. Basic demographic information

Italy is a founding member of the European Union. Notwithstanding its ancient roots, the Italian State can be considered quite young, dating back to 1861. After initially being a Kingdom, these then followed the Fascist period (1922-1943) and, in 1946, the Italian Republic was born, and its Constitution entered into force in 1948.

Italian territory measures approximately 301,200 square kilometres, with a population of almost 60 million (at 31 December 2008).[1] The number of settled immigrants is increasing: citizens of other countries holding a regular residence visa now number approximately 3.9 million, around 6.5 % of the population.[2] Compared to the data of previous years (2008), the foreign population has increased by about 434,000 (7.3 per 1,000 inhabitants). It is relevant to observe that, according to the Italian Institute of Statistics (*Instituto Nazionale di Statistica* – ISTAT),[3] the growth of the population is almost entirely due to immigration.

The largest foreign communities in Italy are, in decreasing order Rumanian, Albanian, Moroccan, Chinese, Ukrainian, Philippine and Tunisian.[4] The language mainly taught and spoken is High Italian (although in Alto Adige and Valle d'Aosta, German, French and Ladin are also spoken. Ladin is a Neolatin language,

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1 See 'Istat, la popolazione in Italia oltre il traguardo dei 60 milioni. La speranza di vita diventa più alta. Aumentano i decessi ma anche le nascite: 12mila bambini in più rispetto al 2007', *La Repubblica*, 26 February 2009, online at <http://www.repubblica.it/2009/02/sezioni/cronaca/istat-popolazione/istat-popolazione/istat-popolazione.html>.

2 See *supra* note 1. Recent studies have affirmed that the irregular immigrant population in Italy amounts to roughly 400,000 and this must be added to the 3.9 million of regular immigrants.

3 The Italian name is 'Istituto nazionale di statistica'.

4 For the complete list, see the Istat site, <http://demo.istat.it/str2007/index.html> (data of 31 December 2007).

spoken mainly in four valleys of the Dolomites.). Citizens are obliged to attend school until the 9th grade. A large majority of inhabitants are catholic (at least formally, since practising Catholics represent no more than one-third of the population); there is also a small group of Muslims (1.2%).

The average annual income per person is $ 26,476 (approximately 18,100 Euro) (data from International Monetary Found, World Economic Outlook, October 2007). As a member of the European Union and G8, and part of the European Union-Schengen area, in which all internal border controls have been abolished, Italy is among the most industrialized countries in the world. The official currency is the Euro.

1.2. The nature of the criminal justice system

Italy has a statutory legal system in the continental European tradition. At the peak of the hierarchy of the sources of law lies the Italian Constitution, which as part of the modern age, has a rigid form: it can only be amended after a specific and complex procedure – which is different from the ordinary procedure to approve new laws – and with a vote taken by the absolute majority of each Chamber of Parliament.[5]

The legislative power belongs to the Parliament alone. The government, however, has some subsidiary powers. According to the Constitution, the Council of Ministries has the power, to adopt *Decreti Legislativi* (Legislative Decrees), observing the following procedure: the Parliament can endorse an act – the so-called *legge delega* (delegating law) – which delegates the power to the government to regulate certain aspects of the system – including those of criminal law and justice (arts. 76 and 77(1) of the Italian Constitution). The *legge delega* must contain the principles and the general criteria that the government must respect in drafting any such legislative decree.[6]

Moreover, the government as provided for by article 77(2) & (3) of the Italian Constitution, may approve a *decreto legge* (law decree) in cases of 'necessity and urgency': the act has the force of law, but must be approved by both Chambers of

[5] According to art. 138 of the Constitution, acts amending the Constitution and other constitutional laws must be approved twice by each Chamber of the Parliament, and by the absolute majority of the members of each Chamber. Within three months of their approval, acts amending the Constitution can be submitted to a popular referendum, if one-fifth of the members of one Chamber, or 500,000 electors, or five Regional Councils present a formal request. In such a case, the entering into force of the amendments is suspended until the end of the popular vote: in case of negative outcome of the referendum, the amendments to the Constitution approved by the Parliament cannot be promulgated and do not enter into force. However, a referendum is not permitted when the amendments to the Constitutions are approved by a majority of two-thirds of the components of the each Chamber, in the second voting.

[6] If the act of the government in whole or in part exceeds or violates these principles or criteria provided by Parliament in the delegating law, then the legislative decree must be considered, in whole or in part, constitutionally illegitimate. Therefore, it may be declared null and void by the Constitutional Court.

Parliament within 60 days. If the decree does not receive the approval of the legislative branch, it loses its effectiveness *ex tunc* (*tamquam non esset*). For the last 30 years, the Government has often chosen to define new crimes through the means of a *decreto legge*.[7] Finally, a legislative initiative can be brought both by a Member of Parliament and a Member of Government.

Officially, political programs influence criminal justice only when they are translated into statutes by Parliament. Formally, such a system is conceived so as to not give political discretion to judges or the prosecutor. Both of these are not, in theory, permitted to set their own agenda; neither can they take autonomous moves other than those required by the law. As the system was inspired by the Enlightenment ideology, judges should limit themselves to applying mechanically the provisions of the law. In the framework drafted by the Italian Constitution, it is thus correct to observe that it is a task of the legislature to outline the criminal policy, while the judges simply must apply the law in each case that comes before them. This is, in theory, the reason why (formally, at least) the appointment of judges and prosecutors should not be affected by any political considerations or influences.

Judges do not make political choices; they simply carry out a technical activity from which political considerations are excluded. Of course, in putting into effect the meaning and scope of criminal provisions, judicial interpretation is allowed. Notwithstanding the formal role attributed to the legality principle and to the law as the governing source of the system foreseen in the Constitution, in reality the circumstances surrounding the 'moment of the application' have, in practice, assumed a more dominant role.

In other words, a provision cannot be rendered intelligible without taking into account the prior decisions of the courts. If this is common in almost every other system of law, it is, however, possible to say that in Italy, at least in some circumstances, the interpretation given to the law by the courts has completely changed the meaning attributed to it at the outset by the legislature, sometimes rendering ineffective a reform that was approved by Parliament.

The judiciary is not held politically accountable for the decisions of its members. Paradoxically, the legality principle has been shown to have the effect of shielding the prosecutors (and the judges) from any political responsibility. The consequence is that, in the Italian system, the judiciary – and particularly the

[7] Among other things, it is worth mentioning the crimes introduced by the *decreto legge* No. 306 of 8 June 1992, after the murder of Judge Giovanni Falcone, his wife and escort by the criminal organisation *Cosa Nostra*; in recent times, we can cite the *decreto legge* No. 259 of 22 September 2006, governing the illegitimate wiretapping performed by private citizen or companies. Concerning the *decreto legislativo*, it could be said that a large number of the reforms having a broad character introduced into the criminal justice system were realized through this kind of primary legislative act. For example, the new Italian Code of Criminal Procedure was endorsed with a legislative decree (No. 447 of 22 September 1988), after the approval by the Italian Parliament of a law providing for the general principles and criteria that the Italian Government would have to follow (law No. 81 of 16 February 1987 – *Delega legislativo al Governo della Repubblica per l'emanazione del nuovo codice di procedura penale*).

prosecutor – is independent, but not accountable, for most of the choices that are made. The unaccountability of the prosecutor, in particular, is the object of debate and is vehemently contested by a portion of Italian society.

In the last years, the most influential association of Italian criminal lawyers, the so-called Penal Chambers (*Camere Penali*) are fighting at the political and social levels for the separation of the prosecutor from the judiciary.[8] However, many scholars and politicians consider that separating the prosecutor from the judiciary could endanger the independence of the latter, giving too much power to the government. In fact, if it was separated from the judiciary, the prosecutor would be submitted in all probability to the executive. Therefore, considering that the prosecutor is deemed to be the 'gatekeeper' of the criminal justice system, the government could end by controlling the most powerful instrument in the administration of criminal justice, a perspective that it is not suitable, according to many, in the Italian context. For this reason, it is preferable that prosecutors remain part of the judiciary, as intended by the drafters of the Italian Constitution and provided for by articles 107(4), 108(2) and 112.

In recent years, to achieve a satisfactory compromise between an unaccountable prosecutorial independence and governmental control over prosecutorial policies, many scholars have supported the use of priority criteria. In the opinion of most researchers, priority criteria could be approved via specific acts of Parliament, so as to permit efficient management of prosecutions and trials.[9] In particular, it was observed that the adoption by the legislature of priority criteria for prosecutors and judges is not, as such, incompatible with the constitutional principles defending judicial and prosecutorial independence. However, only twice in past ten years has Parliament approved specific provisions to intervene in the concrete administration of criminal justice by indicating priority criteria.[10] The results of these new provisions were considered to be quite controversial.

8 In the past, more than one 'abstention from the judicial hearings' (a sort of strike) has been announced by the Penal Chambers to demonstrate their support for the separation of the office of the prosecutor from the judiciary. The argument put forward by the Penal Chambers is that the lack of separation of the prosecutor from the judiciary implies that the prosecution and defence are not substantially equal in the Italian criminal justice process. It is observed, indeed, that a judge usually tends to perceive himself more proximate to the 'colleagues' of the prosecution than to the defence. This appears particularly true – it is often said – in the initial phase of the criminal proceedings – that is, in the preliminary investigations. Moreover, it has been submitted that, being the gatekeeper of the criminal justice system, since he/she alone has the power to initiate a criminal proceeding, the prosecutor should be subject to some form of political accountability. Those who supports this opinion point out that the legality principle, which should in theory regulate all procedural phases and stages, including the filing of the indictment and the selection of the charges, relieving the prosecutor from having to make any discretionary choices, has proven itself to be quite ineffective.

9 Notwithstanding that the issues raised by priority criteria primarily involve prosecutorial discretion, they also concern judicial tasks, as, for example, the order in which cases for which a trial is fixed must be treated: see Vicoli 2003, p. 227; Vicoli 2003, p. 258-293.

10 In particular, some priority criteria were introduced with art. 227, Legislative Decree. n. 51, 19 February 1998, and with art. 2-*bis*, Act. No. 125, 24 July 2008. See on this matter *infra*, § 4.2.

Notwithstanding its inquisitorial traditions, Italy has, since 1988, had a new Code of Criminal Procedure (CCP), modelled on the adversarial system typical of common law.[11]

In 1955, Italy ratified the European Convention on Human Rights (ECHR). For a long period of time –until about the end of the 1970s – the efficacy of the ECHR at the national level was limited. Mostly, the value of the Convention was outlined in research,[12] while, at a practical level, it received little attention in judges' decisions and legislative choices.

The adoption of the new CCP was a turning point. In fact, article 2 § 1 of the Parliament Delegation Act 16 February 1987, No. 81 gave the Government the power to elaborate and adopt the new CCP, with the express purpose of giving effect and implementing the values and principles of the ECHR.

However, looking at the first decade after the CCP came into force, it is possible to find only a few practical references to the values of the Convention, as being useful to interpret and apply the CCP in coherence with ECHR standards. In addition, Italy has remained – at the European level – one of the worst countries in relation to the length of the proceedings, both in criminal and civil law matters.

In recent years, however, it is possible to affirm that the panorama appears to have radically changed. European sources – in a broad sense – are increasingly exercising their effect on the Italian System, so that it could be said that, at present, almost every aspect of the criminal process is strongly influenced by them, principally the ECHR. This change in the application of the European sources[13] is mainly due to a judicial activist approach to cases. It is also the consequence of reforms introduced by the legislator.

In 1999, the principles of article 6 ECHR were implemented at a Constitutional level.[14] When implementing the Convention, however, the legislator chose not to adopt the official text of article 6 ECHR. Instead, an Italian unofficial translation was preferred. This is in some passages the cause of discrepancy between the two texts. Moreover, Italian judges do not seem particularly aware of the power of article 111 § 3 of the Constitution.[15]

11 See Amodio & Selvaggi 1989, p. 1211-1240; Montagna & Pizzi 2004, p. 429-466; Illuminati 2005, p. 567-581. On the distinction between the inquisitorial and accusatorial systems, specifically referred to the Italian criminal process see Illuminati 1988; Illuminati 2008, p. 135-160; Panzavolta 2005, p. 577-622; Caianiello & Illuminati 2007, p. 129-133.

12 Among them, see Illuminati 1979, p. 26.

13 Among the European sources is the Law of implementation of the European Arrest Warrant (Act No. 69, 2005). After the *Pupino* case, we may say that all Framework Decisions of the European Union play an effective role within the Italian system, due to the principle of the conforming interpretation expressed by the European Court of Justice.

14 By Constitutional Act No. 2, 23 November 1999, art. 111 § 3 of the Italian Constitution.

15 For example, they have continued to interpret the right to be informed of the nature and causes of the charge as if it refers only to the process, and not to the legal definition (*nomen iuris*). It is only in the last few months that this jurisprudence seems to have been modified, and perhaps abandoned – at least in part - as a consequence of a decision adopted by the ECtHR with regard to an Italian case (ECtHR 11 December 2007, *Drassich* v. *Italy*, No. 25575/04. See on this decision Caianiello 2008, p. 165-176.). The accused had been convicted through an unexpected change in the legal definition of the charge, adopted by the Court of →

In 2005, article 175 of the CCP was reformed so to allow for the re-opening of the criminal process – if conducted *in absentia* – when the convicted affirms that he/she never received notice of the proceedings against him. In addition, more significantly, the Court of Cassation, since 2005 (the so-called *Cat Berro Decision*), has adopted a new line of interpretation, under which no conviction can be executed, nor sentence served, if the European Court of Human Rights (ECtHR) had declared that the process violated, in at least one provision, article 6 of the ECHR.[16]

Finally, in 2007, the Italian Constitutional Court declared that the ECHR must be interpreted by Italian judges as a source of the Italian system that is superior to the law, even if inferior to the fundamental principles of the Italian Constitution. Therefore, when a text of a legal provision appears to conflict with one or more provisions of the ECHR, the judges are asked to make every possible effort to interpret and apply the Italian provision in coherence with the ECHR – as interpreted by the ECtHR. If it is not possible to solve the conflict through interpretation, the judges must submit the problem to the Constitutional Court, which may declare the Italian source to be constitutionally illegal.

1.3. Structure and processes of the criminal justice system

1.3.1. Jurisdiction

In Italy, crimes are divided in two categories: *delitti* (felonies) and *contravvenzioni* (misdemeanours). Felonies are punished with imprisonment (from 15 days up to 24 years) or with life imprisonment; they can also be punished with a fine (*multa*) of between 5 Euro and 5,164 Euro. Misdemeanours are punished with arrest (from five days up to three years) and/or with a fine, different from that provided for felonies (*ammenda*) from 2 Euro up to 1,032 Euro.

Trial courts have a general jurisdiction over the felonies and misdemeanours. However, if the crime is punishable with a penalty not greater than 10 years imprisonment, the case is decided by a single professional judge (trial court in

Cassation at the last stage of the criminal process. The ECtHR found Italy in violation of art. 6 § 3 *a-b* of the Convention. After the ECtHR decision, in 2008, the Cassation recognised the right of the accused to be informed of the judge's intention to modify the legal definition of the charges. On the same problem, see Parlato 2008, p. 1584; De Matteis 2008, p. 215-233; Zacché 2009, p. 781-788. See on this issue *infra*, § 2.1.3.

16 Cass., Sect. I, 22 September 2005, n. 35616, *Guida al diritto*, n. 43, p. 84, with a comment by Selvaggi E., 'I dispositivi della Corte europea possono travolgere il giudicato', p. 86. Since then, other decisions have continued to develop the legal principle: see Cass., Sect. I, 18 May 2006, Somogyi, *Dir. e giust.*, 2006, n. 48, p. 51, commented by Ubertis G., 'Contumaci, doppia restituzione in termine. Ma la legge italiana non risulta ancora adeguata alla C.e.d.u.'. See, moreover, Cass. Sect. I, 1 December 2006, Dorigo, n. 2800 *Cass. pen.*, 2007, p. 1441, commented by De Matteis L., 'Le sentenze della Corte europea dei diritti dell'uomo ed il giudicato penale: osservazioni intorno al caso 'Dorigo''. On the same decision see Lonati 2007, p. 1538-1551. Finally, see Cass., Sect. I, 12 July 2006, n. 32678, S. T., *Dir. pen. proc.*, 2007, p. 85, with a comment by Epidendio T. E.

single composition); when the crime is punishable with a penalty greater than 10 years imprisonment, the case is adjudicated by a panel of three professional judges (trial court in panel composition).

For the most serious crimes, punishable with life imprisonment or with not less than 24 years imprisonment, the case is attributed to the Court of Assize, a mixed panel of two professional judges and six lay judges, drawn from a list prepared by any Municipal Authority of the Italian Republic and revised by the President of each Italian trial court, with the co-operation of the local Bar Association.

Less serious offences, including both misdemeanours and felonies of minor gravity – may be handled by the *Giudice di Pace* ('Justice of the Peace'). The Justice of the Peace, created in 2001, has an *ad hoc* jurisdiction. In other words, his/her jurisdiction is delimited *per nomina delicti*, because there are specific crimes – both *contravvenzioni* and *delitti* – expressly devolved to this judge. In general, crimes devolved to the jurisdiction of the Justice of Peace are prosecutable only if the victim lodges a complaint (*querela di parte*). In such cases, if the victim and the accused find an agreement, and the victim withdraws the complaint, the case must be closed. The jurisdiction of the Justice of Peace was conceived to promote reconciliation between victims and perpetrators of the crime, so to re-establish social concordance without, if possible, applying criminal penalties.

1.3.2. Structure of the Italian criminal process

The existing Italian CCP, the *Codice di Procedura Penale*, dates from 1988. The 1988 CCP entered into force on 24 October 1989, replacing the Rocco CCP of 1930. The Rocco CCP, which had been introduced under the fascist regime and was strongly inspired by the Napoleonic CCP, reflected the inquisitorial character of the Italian criminal procedure. After World War II, and particularly since the end of the 1950s, scholars increasingly began to criticise the CCP, which was considered to be a remnant of the inquisitorial model inherited from the fascist era of the 1930s.

The post war Constitution of the Italian Republic, established in 1948, was the starting point for the rights movement in the field of criminal law and criminal procedure. The protection of the rights of the accused soon became a political issue. The initial effect of this ideological paradigm shift was that some reforms improved the rights of the defence, in particular by permitting the counsel of the indicted person to participate in actions carried by the investigating judge. After more than 20 years of political pressure, academic studies and Parliamentary debate, the drafting of the 1988 CCP replaced the modified 'old system', with the new CCP derived from the adversarial model.

Compared to the 1930 CCP, the new CCP has a completely different profile, inspired by the Anglo-American criminal procedure system.[17] Investigations are

[17] Many scholars wrote of an 'Americanization' of criminal procedures, particularly in Europe. See, for example, Wiegand 1991, p. 229-248. A 'weaker' version of this Americanization thesis seems more appropriate, because the import of American legal aspects does not substitute for the traditional framework; rather, the new legislative products graft onto the old framework, →

carried out by the prosecutor and police, while the judge intervenes only whether requested by one or both parties. The CCP gives power to the defendant and to a victim's counsel to conduct private investigations. The judge for the preliminary investigations – usually defined as a 'judge without a file' – intervenes only in exceptional cases, when the restraint of fundamental rights is involved. This judge, however, does not have control of the investigation; on the contrary, he is a mere judge *ad acta*, who is involved only in specific acts at request of the parties (usually, at the request of the prosecutor).

The prosecutor has the responsibility for the conduct of investigations. He/she may initiate the investigation on his/her own and decide the manner in which it is to be conducted. When a complaint is lodged by a private person, or information is reported by the police, the prosecutor has the duty to investigate, in order to ascertain whether there is sufficient evidence to initiate a proceeding. Moreover, the Constitution gives the prosecutor the power to give orders directly to the police.

Consequently, in any trial court there is a 'judicial police station' whose staff is put under the authority of the prosecutor and who must comply with his/her orders and follow his/her directions. However, in practice, the police have a broad discretion in cases of relatively minor importance. In the ordinary course of the investigation, the prosecutor only conducts a brief supervision of police action: in reality, it is up to the police to set the agenda during the investigations, asking the prosecutor to issue the orders they need. Only in serious cases does the prosecutor exercise any real control over the work of the police. In these situations he/she actually directs the investigations.

Despite their general subordination to the prosecutor, and in addition to the discretion they enjoy *de facto*, the police have some formal autonomous powers during the investigation. For example, they may summon and question witnesses and the suspect.[18] In this case, the suspect has a duty to make him/herself available to the police, but also a right to remain silent. The questioning of the suspect cannot be conducted by a police officer without the presence of a lawyer, regardless of the gravity of the case: if the suspect has not yet appointed one, the police must appoint a duty lawyer. The questioning of the suspect by the police is not permitted if the suspect is under arrest, or subject to detention. However, at the moment of the arrest, the police are permitted to question the arrested person, but statements obtained can be used only to carry on the investigations. In other words, they cannot be used to adopt decisions of any sort by the judge, both during the investigations phase, as well as at trial.

At trial, the parties have the right to present evidence on their own behalf, to cross-examine witnesses, while those elements gathered during preliminary investigations and police are not admissible as evidence. The defendant may be convicted only if the judges consider him guilty beyond reasonable doubt.

creating a hybrid and unique mix. In fact, the consequence of this Americanization seems to be a 'fragmentation' of the traditional legal cultures: see Panzavolta, *supra* note 11, p. 578-585. See, for a clear distinction between the American adversarial model and any European Continental system, Kagan 2001.

18 Scaglione 2001, p. 91 s.

As a consequence of the reforms the new CCP distinguishes between the investigation and the trial phase. Most of the information collected in the first phase of the proceedings – the investigation – is not admitted or used as evidence at trial. The new CCP is based on the assumption that the probative value of evidence is affected by the manner in which it is collected. The drafters of the CCP believed that the best environment for proving the facts and discovering the truth is a context in which opposing viewpoints are presented: as a consequence, the only evidence on which a decision can be based is the evidence collected orally at trial, including the use of the cross-examination, which is inspired by the Anglo-American system of criminal procedure.[19]

The symbol of the separation between the trial phase and the investigative phase is the 'double-dossier system', as opposed to the single investigative dossier that characterised the old system until 1988.[20] During the preliminary stage of the criminal proceedings, all records of evidence are collected in an investigative-dossier. At the end of the investigation, or after the preliminary hearing, in case of crimes where judicial preliminary scrutiny of probable cause is required,[21] this dossier is set aside and is available only to the parties, who can use it to prepare for trial, or to challenge a witness' credibility during trial testimony.[22]

The trial judge will never see the investigative-dossier. Instead, the trial judge is given a completely new dossier, the trial-dossier, to be filled only with the evidence collected during trial, as well as the evidence that is objectively impossible to reproduce in court (*corpus delicti*, wiretappings, records of searches performed by the police, records of prior convictions of the accused).[23]

In the Italian system a form of guilty plea is provided for, namely *applicazione della pena su richiesta delle parti* (application of punishment at the request of the parties), also-called *patteggiamento* (bargaining). It is possible to find some similarities between this and the plea bargaining carried out in the United States. In this situation, the defendant and the prosecutor agree on a penalty, without a guilty plea. The penalty is reduced by up to one-third of the ordinary amount. The judge must conduct a rapid review of the investigative file so as to ensure that there is no clear indication of innocence within the records. The judge should also verify – as a

19 Giostra 2001, p. 1; Ubertis 1992, p. 2.

20 For a most relevant exception to the double dossier system when pre-trial detention is applied, see *infra*, under § 2.3.3.

21 The Italian Code of Criminal Procedure provides that, when prosecution is commenced for crimes punishable with more than four years imprisonment, a preliminary hearing is mandatory. This hearing is held by a single judge – the judge of the preliminary hearing – who, on the basis of the elements gathered by the prosecutor during the investigation, must ascertain if there is sufficient evidence to go to trial (see, on this issue, Daniele 2005). In such cases, the judge must dispose of the trial by a decree. After that, the same judge must separate the dossiers – the trial dossier and the prosecutor's one – according to the rules described above. When the judge considers that there is not sufficient evidence to dispose of the trial, he must acquit the defendant; however, the case can be re-opened, at the request of the prosecutor, if new evidence is presented that is sufficient to reverse the previous decision.

22 See, Illuminati 2008, p. 730-732.

23 See, Cesari 1999, p. 9.

consequence of the legality principle – the consistency of the penalty and the nature of the crime.

To render the system sustainable, the CCP provides for an alternative means to adjudicate the case, the so-called *giudizio abbreviato* (abbreviated trial). This can take place only under the request of the defendant, and the judgment is based on the investigative files. In other words, the defendant waives the right to trial, receiving a reduction of penalty: in the case of conviction, the penalty will be reduced by one-third of the regular sentence and life imprisonment will be converted to 30 years of imprisonment.

The adoption of these two tools is aimed at making the system sustainable, but they actually prove to be ineffective in reducing the number of trials. In general, these special proceedings are chosen in a very low percentage of cases (around 10-12 %). According to the data provided by the Ministry of Justice,[24] in 2003 the percentage of the proceedings adjudicated with the *patteggiamento* was 6.46 %, while those decided with the abbreviated trial was 2.40 %. In 2007, the results were slightly higher. 7.27 % with the *patteggiamento*, and 3.98 % with the abbreviated trial.

There is also a third procedural form for adjudicating criminal cases, which applies only to minor crimes. When the judge believes that the accused may receive only a fine, the CCP permits this third form special proceeding, called *procedimento per decreto* (penal decree proceeding). In this case, the judge, at the request of the prosecutor, *inaudita altera parte* (without submissions by the accused), following a quick review of the investigative file, may, by decree order the defendant to pay a fine (the amount may be reduced up to 50 % of the legal requirement). If the accused does not oppose the decree, the conviction becomes final. The percentage of cases adjudicated with the penal decree proceeding is around 5 % of the cases. In 2003 it represented 4 % of the all cases, in 2005 4.93 % and in 2007 5.93 %.

According to the Constitution (art. 112), the prosecutor is obliged to take action in criminal cases: the principle of legality applies strictly.[25] No matter how minor the offence is,[26] the law gives the prosecutor no discretion as to whether to prosecute or not, nor can the prosecutor suspend or withdraw the action, which must always end in a judicial decision. Also preserved in the CCP is the judge's power to introduce evidence when he/she cannot decide the case on the evidence submitted at trial.

Another important feature of the traditional inquisitorial system retained by the 1988 reform is that, in Italy, there is no jury system: fact finding remains in the hands of professional judges. The sole exception is the 'Court of Assise', a hybrid panel composed of six lay judges and two professional judges, which only processes major crimes. Moreover, the judge's decisions must always contain a written

24 The data is not freely available at the Ministry of Justice website. It was supplied by the Ministerial Offices only following our specific request.

25 On the issue concerning priority criteria, see *supra* under § 1.2.

26 It must be remembered that, after the coming into force of the Constitution, the Prosecutor is part of the judiciary, enjoying the same guarantees and safeguards of independence as the judges: see Illuminati 2004, p. 308-310; Caianiello 2003, p. 14-20; Caianiello & Illuminati, *supra* note 11, at p. 131.

statement.[27] The decision is also subject to the right of appeal, both for the defence as well as for the prosecutor.

1.3.3. Arrest and detention of a person suspected of a crime

When a person is discovered in the midst of committing a serious crime, the police have the power to arrest him provisionally (*arresto in flagranza*) but, within 24 hours, they must communicate the arrest to the prosecutor. In contrast to arrest, *fermo* ('stop') is permissible when the suspect is not caught red-handed, and the requirements set out in article 384 are met: in particular, in case of suspect's risk of flight. There must be a specific indication that the suspect poses a flight risk, as well as strong evidence of guilt (not mere suspicions). Finally, the committed offence must be a crime involving weapons or explosives, or a crime of similar degree.[28]

As noted above, *fermo* is possible only on the basis of a prosecutor's decree. Despite the different prerequisites, both *arresto* and *fermo* serve the same goals. These measures are used either to protect the public safety or for investigative purposes.

The proceedings following *arresto* or *fermo* are similar (see arts. 390-391 of the CCP). First of all, the police must make the suspect available to the prosecutor as soon as possible and, in any case, within 24 hours of the arrest or *fermo*. A person under arrest or *fermo* has the right to inform his/her counsel and family as soon as possible. It is up to the police to give notice to counsel and the family (the duty is usually observed and notice is given within 24 hours of the arrest or detention).[29] Subsequently, the prosecutor to whom the suspect has been made available should seek validation of the arrest or *fermo* by the judge of the preliminary investigation (art. 390 CPP).

To this end, article 390 § 1 of the CCP prescribes that the prosecutor shall bring the suspect before the judge of the preliminary investigation within 48 hours of his/her arrest or *fermo*, unless he/she has ordered the immediate release of the suspect by virtue of article 389. An arrest or *fermo* becomes ineffective if the requirements set out in article 390 § 1 are not met (art. 390 § 3).

The prosecutor who has requested the validation of the arrest or *fermo* may, at the same time, also request the judge of the preliminary investigations to order the pre-trial detention of the suspect (art. 391 § 3 and 291 of the CCP). The validation hearing should be held by judge within the following 48 hours (art. 390 § 2). In addition, article 391 § 6 of the CCP prescribes that the arrest or *fermo* will lose its effect, if the validation order has not been decreed within 48 hours after the suspect has been brought before the judge. The initial detention by the police may endure for a maximum of 96 hours (four days), starting from the moment that the suspect has been arrested or *fermato* (stopped).

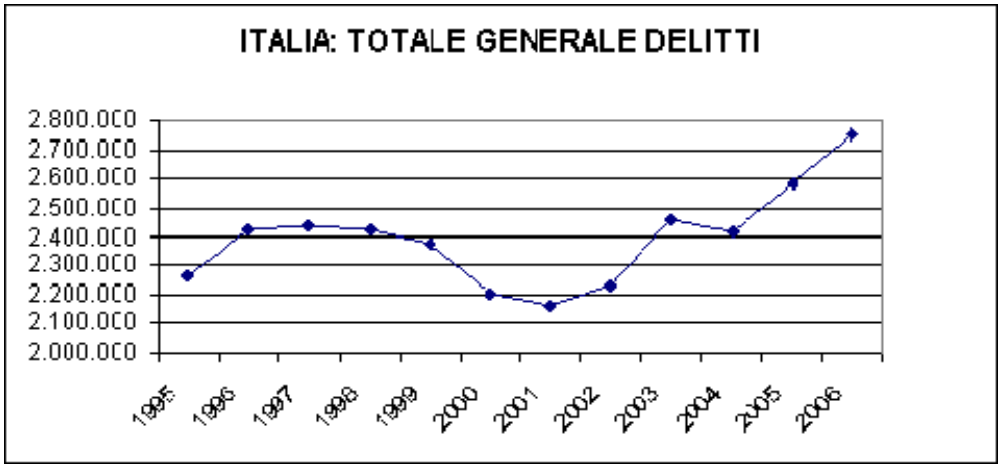
27 See Iacoviello 1997, p. 9 s.

28 For which the law sets a punishment of life imprisonment or imprisonment for no less than a minimum of two years and a maximum of six years

29 For more information on this point, see *supra,* under § 2.2.2.

1.4. Levels of crime and the prison population

Data relating to crime levels reveals that Italy does not demonstrate exceptional numbers, when compared with the other States of European Union.[30] Based on information from the Ministry of Home Affairs, set out below is a graphic representation of the trend of crimes in Italy in the period 2005-2006, based on the number of crimes recorded by the police.



Italy. Total amount of crimes

This upward trend has continued in 2007, according to the Ministry.

The total number of murders committed in 2005 was 601, and in 2006 it was 621.

Regarding violent crimes, such as serious personal injuries, kidnapping, robberies and sexual violence, it has emerged that the number of robberies has increased from 1985 to 2006. The average is 85 robberies per 100,000 inhabitants (there is a disproportion in the South, where the increase was much higher).

ISTAT conducted research concerning sexual violence against women during 2006. It emerged that 6,743,000 women suffered of acts of sexual violence, mostly committed within the family. The conclusion was that violence within the family is a national problem.

As a final consideration, the total number of crimes has not increased in the last 10 years. However, robberies and sexual violence have gone up significantly

30 Data from an investigation conducted by Parliament: CAMERA DEI DEPUTATI, Indagine conoscitiva sullo stato della sicurezza in Italia, sugli indirizzi della politica della sicurezza dei cittadini e sull'organizzazione e il funzionamento delle Forze di polizia (CHAMBER OF DEPUTIES, Investigation of security in Italy, and policies concerning crime control and fight and on police functioning), 24 April 2008, <http://www.ristretti.it/commenti/2008/aprile/pdf5/indagine_sicurezza_conclusioni.pdf>.

(even if, regarding the latter, some assert that the growth is due to the fact that these crimes in last years have been frequently reported by the victims to the police, while previously they largely remained unspoken).

In relation to organised crime, a recent inquiry[31] by a national statistical research centre – Eurispes – affirmed that the capability of criminal association to penetrate into civil society appears to be strengthening. In particular, the so-called *Indice di penetrazione mafiosa* (Mafia Penetration Index),[32] is 68.9 in the city of Naples and its surroundings, 60.4 in Reggio Calabria and 41.9 in Palermo. In general, the most exposed to this risk are four regions – Campania, Calabria, Sicilia and Puglia – but the entire country appears to be vulnerable to the influence of organised crime.

Finally, it should be noted that there is a dispute regarding the influence of migration on the levels of crime. One pre-eminent author[33] has asserted that migration has had a relevant impact on the rise of crime levels for certain types of crime, such as robberies, thefts and sexual violence. Others have objected to this argument, asserting that data was interpreted incorrectly. In particular, it was not taken into account that, according to other data, an immigrant has a much higher probability – around 10 times more – to be stopped, questioned and charged than an Italian.[34]

Prison overcrowding is one of the most serious problems in the Italian criminal justice system. On 31 December 2008, 58,127 persons were incarcerated in Italian prisons (as at November 2009, this rose to roughly 69,000 persons). In some cases, prison overcrowding has lead to convictions by the ECtHR, as in the recent *Sulejmanovic* case.[35] Women accounted for 2,526 prisoners, while men numbered

31 EURISPES, Rapporto Italia 2008. Giustizia, legalità e sicurezza, <http://www.scribd.com/doc/11570329/Sintesi-Rapporto-Italia-Eurispes-2008>.

32 This index is meant to measure the risk of penetration by organised crime into a specific territory. The parameters taken into account to elaborate the index are the unemployment rate, the number of crimes committed by criminal associations related to traditional criminal organisations, such as the *Mafia*, *'ndrangheta*, *Camorra* and *Sacra Corona*, the number of municipal administrations dismissed because of organised crime infiltration, the result of wiretapping activities and the act of terrorism.

33 Barbagli 2007, p. 53-58, 64.

34 See Melossi 2008, p. 9 and *passim*. In general, the entire issue of the review is dedicated to dispute, in many aspects, Barbagli's theses and to offer an opposite view of the immigration phenomenon.

35 ECtHR 16 July 2009, *Sulejmanovic* v. *Italy*, No. 22635/03. See Garibaldi 2009, p. 1 and 11. The prison system is under the administration of Ministry of Justice. Art. 59 Parliament Act 26 July 1975, No. 354, establishes four types of prisons: (i) *Istituti di custodia cautelare* (Preventive Detention Institutes: meant for the detention of person indicted in criminal cases, pending the investigation or trial); (ii) *Istituti per l'esecuzione delle pene* (Punishment Institutes, for the service of the sentence after the end of the criminal process); (iii) *Istituti per l'esecuzione delle misure di sicurezza* (Safety Measures Institutes, for the service of measures applied by the judge, at the end of the criminal cases, to dangerous persons either convicted or acquitted by reasons of mental insanity); (iv) *Centri di Osservazione* (Observation Centres, for the observation of the personality of detained persons. They can also be used for medical reports or psychiatric examination during the criminal process). The number of penitentiary institutions in Italy – including all of the different institutions indicated above – is 256. This →

55,601. Ethnic minorities are over-represented. The number of foreign persons in Italian prisons is 21,562 (around 37 %). Among them, the most part come from North Africa (Morocco 21 %, Tunisia 11 %. A rather high percentage of foreign prisoners also come from Balkans (Albania 12.1 %; Former Yugoslavia 4.8 %). In addition, 17.7 % come from other Countries of the European Union. The Italian rate of imprisonment is almost 97 per 100,000 citizens.

More than half of prison population – 29,836 detainees – is still awaiting the final sentence, meaning that they are in custody while their criminal proceeding is still pending.

In 2006, the number of detained drastically lowered – from 59,523 in 2005 to 39,005 in 2006 – due to the Legal Pardon Act approved by the Parliament (Act No. 241, 31 July 2006). However, in the few years since then, the prison population has increased up to the same level as existed before the 2006 Legal Pardon Act. From the data emerges the fact that the overcrowding level of prisons is astonishing. In fact, it amounts to 142/100 (142 detainees actually present per 100 beds). Moreover, 20 % of the prisons were built before the beginning of 20th Century.

Furthermore, 1,139 people are detained in 13 specific institutions – the so-called *Centri di Identificazione ed Espulsione* (Centres for Identification and Deportation) – used for the identification of illegal immigrants awaiting to be expelled from the Italian territory.[36]

Notwithstanding the fact that the number of crimes did not significantly increase during the same historical period, concern among the Italian population regarding crime has increased over the last decades.[37] During the 1990s, the most shared concern related to organised crime, which, as it is well known, is broadly present and developed in the Italian territory, and corruption of public officers, due to the famous inquiry called *Mani Pulite* (Hands Cleaned), which provoked a sort of earthquake in the Italian political establishment.

After 2001, the fear of crimes appears to have reduced and is often even confused with concerns regarding immigration policies. In other words, the alarm arising from the increasing immigrant population is easily expressed as apprehension for the potential risks related to the commission of crimes. This common perception has spread due to two factors. On the one hand, it is the consequence of the terrorist attacks of 11 September 2001. On the other hand, it is the result of new strategies pursued by political parties, particularly on the centre-right. In particular, one of the parties of the right hand coalition – the *Lega Nord* (Northern League) – focused its last political campaign on the fight against illegal migration, considered the main reason for social insecurity and the growth of crimes.

data is collected from the website of the Italian Ministry of Justice site, <http://www.giustizia.it/statistiche/statistiche_dap/det/detg11_presenti.htm>.

36 See 'Immigrazione, 13 Centri di identificazione ed espulsione con 1.752 posti', *Il Messaggero*, 14 August 2009, <http://www.ilmessaggero.it/articolo_app.php?id=20942&sez=HOME_INITALIA&npl=&desc_sez=>.

37 Barbagli *supra* note 33, at p. 53-58, 64.

Moreover, recent statistical research has confirmed that, in general, crime is overrepresented in the media, and that results mostly focused on news about crime.[38] This is particularly true with regard to the period of political campaign just before the elections. The time dedicated to crime on TV in 2008 was much higher than the norm[39] (which is, in any event, already, excessively concentrated on this issue).

1.5. Legal aid for persons suspected or accused of crime.

It is important to distinguish State funded legal assistance from the function of duty counselling (or, translating literally from the Italian, counsel appointed *ex officio*). The latter is a facility provided by the State to any defendant who is not assisted by defence counsel. Since legal assistance is mandatory in criminal proceedings, defendants are provided with a duty counsel if they do not have one of their own choice already.

Duty counsels are selected from a specific list. To be included on such a list, the attorneys must have attended a specific course conducted by the Bar Association, which also keeps up to date and amends the list.

When the prosecution, police or judge need to perform an act in the presence of the defendant's counsel, and the accused has made no choice of attorney, the authority (the prosecutor, the judge or the police) must ask the Bar Association for a duty counsel. The Bar selects duty counsel according to a computer based system, which is designed to select attorneys on the basis of the competences required by the case (for example, civil cases, criminal cases, juvenile justice, immigration law).

Duty counselling is not free, nor is it paid for by the State. Although the defendant did not make a choice of his/her own, he/she has the obligation to remunerate duty counsel. The State will only cover the expenses of duty counsel if the defendant is indigent. In other words, the counsel will be paid by the State only when the defendant cannot afford one of his/her own. In all other cases, whether the defendant has chosen a counsel of his/her own or has been given a duty counsel, the defendant is required to pay for the attorney's assistance.

The counsel is paid by the State when the suspect or accused cannot afford the expenses of a criminal proceeding: specifically, when their annual income is under 9,296.22 Euro.[40] The problem is that, when the annual income of the defendant is slightly above the limit established by the law for the provision of State funded legal assistance, counsel appointed by the court must carry out every step to obtain their payment from the client – even to sue their client – and the attorneys can only ask

38 On the over-representation of the crime in the media, see Lanzarini P., 'Come ti cucino la notizia', online at the website <www.lavoce.info>.

39 DEMOS – OSSERVATORIO DI PAVIA – UNIPOLIS, *La sicurezza in Italia: significati, immagine e realtà* - November 2008, <www.fondazioneunipolis.org> and <www.demos.it>.

40 For every dependent relative, the amount of income should be augmented by 1,032.91 Euro: however, if the person who asks to be admitted to free legal assistance lives with other relatives, the amount of annual revenue must be calculated by adding up the income of each cohabitant (art. 74 and 92 of President of the Republic Decree 30 May 2002, No. 115).

the State to cover their fee if every legal effort has been fruitless. It is easy to understand that the obligation for counsel to collect their fee from an almost indigent client makes it difficult to build a confidential relationship between court appointed counsel and the client.

On the other hand, the lowest annual income necessary to be entitled to legal aid implies that a person slightly over the limit – for example, earning 12,000 Euro on annual basis – is obliged to borrow to pay counsel. It is relevant to note that, if the defendant is entitled to legal aid, counsel cannot be paid by her/his client, not even partially. Accepting money from a client admitted to legal aid is a disciplinary offence.[41]

The distinction between mandatory counselling and free access to legal assistance should in theory imply one advantage: indigent people may elect and hire the counsel they prefer and are not obliged to accept the one appointed by the court. However, in practice, the fee paid by the State to counsel under the legal aid scheme is not very high: in a simple case (implying no more than three-five trial hearings), the average is around 1,000 – 1,500 Euro. As can be easily noted, this amount is much lower than that requested by an affirmed practitioner in the same case (which can be expected to not be less than 4,000 – 5,000 Euro). It follows that the possibility, for indigent persons, to hire the counsel they prefer is only a theoretical option.

It is possible, and it happens, that the lawyer contacted by the indigent accused refuses to take on the case, because the lawyer is aware that the fee paid by the state will be much lower than in normal cases. Formally, article 11 § II of the code of the Italian Lawyers punishes the 'unjustified' refusal of the lawyer to work for an indigent person under the provisions of legal aid. However, this provision is never applied in practice by the disciplinary authorities. In fact, in their decisions, they interpret in a broad sense the concept of 'justification', as implying that a lawyer may refuse to assist a client under the legal aid system.

If a person is facing criminal proceedings and is entitled to be under the legal aid system, he can appoint his preferred *available* counsel. In other words, there are in every Bar Associations counsel who routinely accept clients under legal aid provisions,[42] even if state remuneration for their work is lower than what they could ask (and earn) applying the ordinary fees.[43] This may happen for political reasons or for ethical ones. Lawyers often perceive it as their duty to accept cases under the

41 This is provided for in art. 19 of the code and 85 L § 3 of the President of the Italian Republic Decree 30 May 2002, No. 115.

42 For example, the association named '*Giuristi democratici*' (Democratic Jurists – see the internet site at <http://www.giuristidemocratici.it>), open to counsel and other non practicing jurists, is engaged in improving the legal aid system. Counsel who are part of that association, which operates quite widely in the Italian territory (with 25 local cells in different trial court districts), in general routinely accept to work under legal aid provisions.

43 Lawyers' fees are determined by a decree of the Ministry of Justice, which is reviewed periodically. In general, it provides for a minimum and maximum fee for every act a counsel may perform in her/his profession. In addition, as a requirement (see art. 43 par. II of the Deontological Code of Counsels), the fee requested by counsel must not be clearly disproportionate to the work accomplished.

legal aid system, even if the remuneration will be less than what they could have from cases in which the client has the economical resources to pay the fee.

As an example, for less serious cases, there has been a long practice to accept the defence and to apply for any remuneration at all. In general, this happens at trial, when the judge has the power to appoint on the spot a duty counsel readily available, if the accused has no counsel. At the trial, the judge asks if there is someone among the lawyers convened for a case who can accept the defence of a person who is without counsel, and usually there is always someone prepared to accept the defence (sometimes the lawyer is literally found in the corridor).

As will be discussed later, this is possible because there is a general lack of quality control on the legal profession in Italy. What matters, in other words, in such cases, is that at trial there was a lawyer of any sort; it does not matter whether the lawyer was prepared and sufficiently skilled to perform his/her duty. The accused cannot in any way appeal the issue of the incapacity or negligence of his/her counsel.

It is relevant to note that legal aid was introduced in 1990,[44] reformed in 2001, and finally settled in 2002 with Legislative Decree No. 115.

Some statistical data[45] may help to present a more detailed picture of the system. In recent years, the costs of legal aid in criminal processes have been increasing significantly, as well as the number of persons requesting legal aid and entitled to its benefits. Over the last 12 years, in 1996 there were 16,585 requests for legal aid (15,000 were accepted). In 2006, the total number of the requests was 98,329 (84,047 were accepted), and in 2007 (last available data) the number was 101,083 (accepted 94,041).

The national cost of legal aid in criminal proceedings has increased proportionally. In 1996 the Italian State spent 4,069,059 Euro; in 2006, the costs rose to 70,591,753 Euro, and in 2007 84,916,200 Euro. The *pro-capite* budget for each requesting party was 945 Euro in 1996, 754 Euro in 2006, and 879 Euro in 2007. It emerges that, with regard to 2007, the total cost was, for the North Italy 22.624,309 Euro, in the Centre 14,936,971 Euro, in the South 25,667,966 Euro and in the Islands 21,986,653 Euro (that is a sum proportionally much higher than those regarding the other areas).

Notwithstanding the increasing costs sustained by the State for legal aid and the correlative augmented number of persons admitted to it, it may be said that people do not frequently make use of legal aid, either in criminal or civil cases. Some detained persons are still perhaps not aware of their right to apply for legal aid. It may happen that counsels, too, are not prepared to properly inform their client of their right. In addition, to be paid by the State under the legal aid provisions, a counsel must be registered on a specific list kept and regularly reviewed by the local Bar Association of each trial court. Only a minimum number of the counsel practising within a trial court district is at the same time enrolled for

44 Parliament Act No. 217, 30 July 1990.

45 Data from the site of the Italian Minister of Justice, <http://www.giustizia.it/statistiche/statistiche_dag/2003/patrocinio.htm >.

legal aid. For example, with regard to the Milan Bar Association, of the 13,787 counsel who are part of the Bar Association – practising both in criminal and/or civil matters – only 1,258 are in the specific register.[46]

Regarding the nationality of persons requesting legal aid, in 2007, 80.6 % were nationals, while 19.4 % were foreigners. The proportion is not much different from that of 1995, when 79.9 % were Italians, and 21.1% were foreigners.[47]

2. Legal rights and their implementation

2.1. Right to information

2.1.1. Letters of rights

The right to be informed that one is under investigation in a criminal proceeding is the first, and probably the main right recognised by the CCP, as it affects the applicability of all other rights. It implies the duty of the police, the prosecutor and/or the judge to communicate as soon as possible to the suspect that criminal investigations are underway.[48] In particular, the CCP provides that the prosecutor must give notice of the proceeding to the suspect from the time of the first act of the investigation at which his/her counsel has the right to be present.[49] In practice, this means that, at the first appearance of the suspect in front of the judicial officers or the police, the police or prosecutor must formally inform suspects of their position in the proceeding.[50]

In the course of the criminal proceeding, the suspect is entitled to receive three letters of rights, as respectively provided under articles 369, 369*bis* and 415*bis* of the CCP. The first letter – called 'information of guarantee', article 369 – must inform the suspect[51] in written form of his/her right to appoint counsel when the prosecutor intends to carry out an act for which counsel attendance is permitted.

46 Data available at the site of Milan Bar Association, <www.ordineavvocatimilano.it>.

47 For non EU citizens, the application must be followed by a declaration of the competent consular authority; the authority must certify that the declaration presented by requesting party – asserting that he/she did not received a salary greater than the limits provided by the law for admission to legal aid – is true. This represents a practical problem for many foreign defendants, who are irregularly present in Italy. It is often not easy, or even possible, for the applicant to obtain the necessary declaration by the consular authority.

48 The right to be informed that one is a suspect has a different content with regard to questioning by the police and interrogation before the prosecutor: only in the latter case must the judicial officer communicate the facts for which the person is involved in the proceeding, while, in the former, the right provided by the code includes just the juridical qualification of the charge, but not the fact: see Caianiello & Illuminati, *supra* note 11, p. 135-136, and 138-139.

49 The main acts at which counsel has the right to attend during the investigation are the interrogation of the suspect, the inspection of the suspect or his/her premises, the confrontation between the suspect and another person, the search and the seizure. At the first act at which the counsel of the suspect has the right to attend, the prosecutor must also give notice of the pending proceeding to the victim.

50 Mazza 2004, p. 36.

51 On that occasion, the same information must be supplied to the victim as well.

Moreover, the information must mention the legal definition of the crime alleged, the date and place of the facts that the suspect allegedly committed,[52] and the bureaucratic data of the relevant criminal proceeding (number of the case, name of the prosecutor).

The 'letter of rights' provided for in article 369*bis* must mention the main rights of the defence in criminal proceedings: the right to appoint counsel, the right to access to legal aid, the right to an interpreter and to translation of documents, the right to silence. In particular, the letter should clearly explain the conditions for receiving State legal assistance for the costs of counsel. The letter must also inform the suspect of his/her right to hire counsel: if the defendant does not hire any, a counsel shall be appointed *ex officio*, whose name and whereabouts (firm address, telephone number) must be reported in the aforementioned document.

The right to be informed is absolute and a violation of the duty to inform the suspect of his/her position gives rise to various forms of procedural invalidity of the procedure (including nullity, inadmissibility of the statements). As can be seen, these two letters of rights are generally given to the suspect at the beginning of the investigation. The second letter contains much more information than the first, and was provided for in 1999 in order to provide the suspect more information in the initial stage of the criminal proceeding.

Finally, at the end of the investigation, according to article 415*bis*, the prosecutor must alert the accused that the prosecutor has completed all relevant investigations and intends to bring formal charges against the person (*avviso di conclusione delle indagini preliminary* – investigations closure information). The information must contain a description of the alleged facts and the legal definition of the alleged crime. It must also inform the suspect that, as from that moment, access to the Prosecutor's file is permitted, in practice without any limitations.

Failure to comply with this requirement may undermine the prosecution. In fact, the indictment filed by the prosecutor must be declared void, if it is ascertained that the suspect was not given notice of this information: in such a case, the proceedings must revert back to the investigation phase, and the prosecutor must give proper notice to the defendant of the act as provided for in article 415*bis*.

It cannot be said, at any rate, that the duty to inform the suspect during the investigation represents a continuing obligation. The duty to inform the suspect arises when it is necessary to perform an investigative act allowing for the attendance of his/her counsel. In theory, the prosecutor could conduct an investigation without carrying out a single act for which counsel attendance is requested or permitted. For example, the prosecutor could just question witnesses, or gather some documents from public offices. In such cases, the suspect would be informed only at the end of the investigation and before the presentation of the indictment, when the prosecutor must supply him/her with the investigation closure information (as provided for in art. 415*bis*).

It must be noted that each of the documents referred to in this paragraph must be translated into a language that the defendant understands. The principle also

[52] However, the suspect is not entitled to a full description of the alleged facts.

applies to the indictment formally filed by the prosecutor at the commencement of the prosecution.

2.1.2. Arrest and questioning before the police, the prosecutor and the judges

Before questioning the suspect, the police, prosecutor or judge must warn him/her of the right to remain silent and of the fact that, if a statement is made regarding other persons, the suspect may become a witness in relation to those facts (actually, a peculiar 'assisted witness', governed by rules that are, in many respects, different from that of ordinary witnesses): in these cases, the defendant loses the right to silence regarding the facts given that relate to others. However, even in the case of an 'assisted witness' the defendant has the right to remain silent in relation to the charges brought against them (art. 64 § 3).[53] The failure to give the warnings requested by the law makes any statements gathered inadmissible as evidence.

The rationale of the rights described above is that a person must be able to decide his/her own attitude towards the authority when under suspicion in a criminal proceeding and must be able to exercise his right to silence.[54]

If a person, who is questioned as a witness, gives self-incriminating statements, the prosecutor or police must immediately stop the interrogation and warn him/her that, as a consequence of the statements rendered, an investigation may begin against him/her. The person must also be notified that they have the right to appoint a counsel. Every statement given until that moment cannot be used against the defendant: instead, the declaration may only be used against other persons involved (art 63 § 1 of the CCP). If the police or prosecutor fail, either negligently or on purpose, to give the information provided for by the law, the statements gathered cannot be used at all in criminal proceedings (art. 63 § 2). This provision also applies when, from the beginning of the questioning, the police or prosecutor interrogate the suspect without informing him/her of the proceeding.

If the prosecutor intends to interrogate the suspect, he/she must summon the person, by writ, giving notice to counsel at least 24 hours in advance, except for cases of justified urgency. In general, the term provided for by the law is respected by the prosecutor, because the unjustified delay in the communication of the notice leads to the invalidity of the interrogation. If the suspect has not yet elected a lawyer, the prosecutor must appoint a duty lawyer and simultaneously inform that lawyer.

53 The distinction between facts involving others and one's own responsibility is quite problematic in practice. Actually, a statement regarding another person may present consequences, or give rise to inferences regarding the acts performed by the person making the declaration. It is not rare, in the case law, that, when in practice a clear distinction appears impossible or at least quite difficult, the judge decides to acknowledge to the accused the right to remain silent, not only on the questions regarding the specific charges brought against the suspect, but also on those concerning other persons whose responsibility is connected with the suspect.

54 See § 2.3.4.

The summons must contain an exposition of the facts for which the suspect is under investigation, and may also indicate the information that has already been gathered by the prosecutor. In practice, it is unusual for the summons to contain any reference to the evidence available to the prosecutor; more usually, the prosecutor communicates the elements at his/her discretion only at the commencement of the interrogation.[55] The presence of the lawyer is not mandatory (this is the main difference between police questioning, for which the attendance of the counsel is always mandatory, and the prosecutor's interrogation); instead, it is only mandatory for the prosecutor to give notice.[56]

After the arrest, the police must permit to the arrested person to contact a family member. In addition, the police must inform 'without delay' (in practice, within 24 hours from the arrest) the counsel of the suspect. However, in such cases, article 104 of the CCP allows the prosecutor – through a specific decree – to delay the contact between counsel and the defendant under custody for up to 48 hours, which constitutes the time that the prosecutor has at his/her disposition to interrogate the person. This provision is mostly applied for organised crime cases.

Article 104 permits the judge – except in arrest cases, in which the same power is given to the prosecutor – to prohibit any contact between counsel and his client for up to five days, when pre-trial detention is applied.[57] This constitutes the period of time within which, when pre-trial detention is applied, the defendant must be brought before the judge to be interrogated, according to article 294 CPP.

The rationale of article 104 is to avoid the suspect 'arranging' with his/her counsel a 'credible' version of the facts to be given to the prosecutor. In other words, the intent of the legislature is to stop the defendant building up his description of the facts in advance, before being interrogated, with the help of his counsel. Of course, counsel can attend the interrogation by the prosecutor, even if the prohibition provided for in article 104 is applied – he just cannot have contact with his client before the interrogations starts. In other words, what is denied to counsel is the mere possibility to contact the defendant – in custody – for a certain period of time (in practice, in the period before the interrogation by the judge or prosecutor).

By way of summary of the arguments raised in this section, the police can interrogate anyone who has not been arrested, including a person who is only suspected of an offence. In any case, the person has a right to silence of which he/she must be informed. The person has also a right to a lawyer and must be told of this right, as well as of the relevant legal aid provisions. Arrest is deemed to be 'consented' only in *flagrante delicto* (see 2.3.1), but not in any case in which there are strong elements proving the criminal responsibility of the suspect. In such cases, it is necessary to first obtain a judicial order, at the request of the prosecutor.

However, there is one case in which the police can question the suspect directly, without warning and without the presence of the lawyer. This is when the police are on the spot, performing an urgent act, such as arresting the suspect, or

55 See Mazza, *supra* note 50, at p. 148.
56 Cordero 2006, p. 803-804.
57 See *infra*, under § 2.3.1 for the distinction between arrest and pre-trial detention.

conducting a search or inspection. Under these circumstances, police can question the suspect without any formality (without counsel, and without previous warning), but it is prohibited to record this questioning and the results thereof can never be produced as evidence in the course of the entire criminal proceeding. The CCP states that the questioning on the spot of crime, or during a search or of an inspection can be used only 'to carry on the investigations', that is to find other sources of evidence, other persons involved, etc. However, during this questioning on the spot, the suspect can give some indirectly self-incriminating answer: for example, he can confess to be the owner of the *corpus delicti*, or can reveal where his accomplices are hidden, and so on.

Moreover, according to article 350 § 7 CCP, the suspect may give to the police 'spontaneous statements': that is to say, he/she may present him/herself before any police station and make declarations to a police officer. According to the Court of Cassation, and despite many critics by the scholars, in case of spontaneous statements the attendance of the counsel is not necessary, neither is necessary any previous warning. In other words, if the suspect goes spontaneously to the police to make some declarations relevant for the investigations, the police are not obliged to appoint a counsel and to warn him/her of his/her rights. They can gather and record, freely and without limits, the statements the suspect spontaneously renders. The practice of spontaneous statements represents of course a critical feature for the Italian system as it can be used to disregard the suspect's safeguards and rights during investigations. It may sometimes happen that police presents a declaration as 'spontaneous' that was at least implicitly compelled, or even forced. It is not easy, in such cases to detect the violation of suspect's rights and to obtain that those statements are struck out of the prosecution file.

The fact that, 'from the first moment in which elements of a crime emerge', a person questioned by the police or prosecutor must be warned of the possibility of becoming a suspect and must have the right to counsel should lead police and the prosecutor to be cautious, and, in case of doubt, to treat the person as a suspect. In fact, if the judge subsequently finds that the person should have been interrogated as a suspect, he/she can strike out the statement from the file and declare it inadmissible as evidence. After the suspect is arrested, police cannot question him, since only the prosecutor can interrogate him.

2.1.3. Trial

After the commencement of the prosecution – which takes place with the presentation of the indictment – the proceedings take the form of the preliminary hearing[58] and the trial. During these stages, the defendant must constantly, formally and precisely be informed of any amendments to the indictment by the prosecutor. When the prosecutor amends the indictment – *rectius*, when the prosecutor modifies the material facts described in the indictment – the defendant has the right to be informed; moreover, he can ask the judge to admit new evidence, if relevant with

[58] See, on the preliminary hearing *supra* § 1.3.

regard to the new allegation. Under certain conditions, the defendant is allowed to make a new plea (*applicazione della pena su richiesta delle parti*) or seek an abbreviated trial,[59] in case of modification of the indictment by the prosecutor.

It should be pointed out that the Italian system does not provide for a right to be informed of the amendments of the legal definition of the crime charged in the indictment. The accused does not have any right to be informed of modifications regarding the type of crime charged. The judge may, at any time, modify the legal definition of the alleged facts, because the principle of *iura novit curia* (judges know the law) applies without restriction. This appears in contrast with the interpretation of article 6 § 3 a-b of the ECHR. In fact, Italy has been found to be in violation of article 6 ECHR, in cases in which the judge modified the legal definition of the crimes without giving any previous advice to the accused, thus denying him/her the opportunity to discuss the legal profile of the allegations.[60]

2.2. *Right to defend oneself*

2.2.1. The right of a person to defend him/herself

The right to defend oneself is not recognised in the Italian criminal process. Article 24 § 2 of the Italian Constitution declares the right to defence as inviolable in any stage and phase of the proceedings. Judges and scholars believe that this cannot be derogated from or waived. The provisions of the CCP of 1930, as well as the one now in force, specified the right to defence as a rigidly mandatory one, implying the necessary attendance of a counsel for the defendant. It is interesting to observe that the right to represent and defend oneself is also not allowed in the civil process, with the sole exception of proceedings falling within the jurisdiction of the Judge of the Peace, when the value of the case is no greater than 5000 Euro. Even in those cases, however, the decision to allow self-defence is left to the discretion of the judge, who in practice rarely grants such request.[61]

2.2.2. The right to legal advice at the investigative stage

As mentioned above, the right to the assistance of a counsel finds protection under article 24 § 2 of the Italian Constitution, as a corollary to the more general right to defence. The right to counsel formally applies from the commencement of the criminal investigations against a person, that is when the person concerned is still a mere suspect. Moreover, article 220 of the implementation rules of the CCP provides that a person must be treated as a suspect – with all the consequent guarantees, including the right to counsel – from the first moment in which elements of a crime emerge (*criminis indicia*). This applies in particular during a non-

59 See *supra* § 1.3.

60 ECtHR 11 December 2007, *Drassich* v. *Italy*, No. 25575/04. See *supra* note 15.

61 Sometimes, the request is granted by the judge only when the person shows some juridical skills: for example, if the person appearing has undertaken some juridical studies during high school.

criminal enquiry (for example, an enquiry conducted by administrative bodies), when the first elements of a crime appear.

Both before and after the moment at which the prosecutor must inform the suspect of his/her rights, at any stage of the criminal proceedings, the suspect may appoint up to two counsel. The appointment of counsel can be effected by a written or oral declaration before the police, the prosecutor or the judge. If the declaration is made in oral form, the police or prosecutor must prepare a report, indicating the date of the appointment and other required matters (name of the counsel, name of the person under suspicion, number of the criminal proceeding, name of the prosecutor). The report must be signed by the police officer or prosecutor, as well as by the suspect. The appointment can also be made in a form sent to the prosecutor, in which case the form must be filed in the investigation dossier under the custody of the prosecutor.

The right to appoint a lawyer does not differ depending on the financial resources of the suspect/defendant and/or whether they are entitled to legal aid.

In some parts of the investigation, attendance of counsel is mandatory. This is so when a suspect under arrest is questioned by the judge, just after the arrest, or when a suspect is called by the police – not being under arrest – to be questioned. The validation hearing after the arrest – as well as the preliminary hearing – must also be conducted with the attendance of defence counsel.[62]

Some investigations can be performed without the attendance of defence counsel. In certain cases, however, counsel must be informed before the start of the act (at least 24 hours in advance), but he/she is not obliged to attend to it. This happens with regard to the prosecutor's interrogation of the suspect and for the personal searches. In some other acts, like local searches, defence counsel is allowed to attend, but does not have a right to be previously informed. In all cases, legal assistance may be waived in theory,[63] in practice, with the exception of searches and inspections (for which the attendance of counsel is most unusual), it is quite exceptional for counsel not to attend an investigative act involving the client, albeit without any obligation to do so. This is true regardless of the gravity of the case. There is no significant distinction with regard to cases in which counsel is permitted under legal aid. In any case, most counsel attend investigative acts in which they are entitled to participate.

The defendant can, at any stage of the proceedings revoke the appointment of counsel, and nominate another. If, for any reason, the defendant remains without counsel, the prosecutor during the investigations, or the judge, must appoint a counsel on duty, who ceases when the defendant appoints one. The revoked counsel remains in charge until the new counsel has been appointed, either by the defendant or *ex officio*.

62 As noted, under art. 104 of the CCP, the judge for the preliminary investigation, at the request of the prosecutor, may delay contact between counsel and his/her client who is under arrest for a period not longer than five days. When the suspect is arrested *in flagrante delicto*, such a decision is taken by the prosecutor and has an effect up to 48 hours.

63 The suspect may reject the attendance of counsel, or counsel may decide not to attend. In practice, the decision is taken between the client and the lawyer.

2.2.3. The right to legal representation at the trial stage

At trial, a defendant must have legal representation. If the defendant does not choose his/her own counsel, the judge is obliged to appoint one *ex officio*. The conduct of the trial – as well as any appeal stages – without the attendance of defence counsel, renders the proceedings null, requiring it to be recommenced from the moment where defence counsel must attend. In order to carry on with the trial when defence counsel is absent without any acceptable reason,[64] the judges must appoint a counsel *ex officio*.

Preparing carefully for trial is a crucial element under the present Italian criminal justice system, which attaches great importance to the principle of orality. Once the prosecutor has brought formal charges against the defendant, the attorney has a very difficult task: he/she must decide no later than the end of the preliminary hearing whether to opt for an 'alternative consensual proceeding' (the *giudizio abbreviato*, or the *applicazione della pena su richiesta delle parti*, which constitutes a form of guilty plea). This step is critical, because by choosing these consensual proceedings, the accused forgoes his/her right to go to trial and consents to being judged only on the evidence gathered during the investigation. In exchange, the accused is granted a reduction in the penalty he/she would normally receive (a reduction of one third in the *giudizio abbreviato*; a reduction up to one third in the *applicazione della pena*).

At the trial stage, counsel seeks to undermine the prosecution's case. It is quite common for Italian lawyers to attack virtually every point of the prosecutor's argumentation, even if it is supported by very strong evidence indicating the defendant's guilt or involvement. They will usually only give up the challenge when the accused has confessed. The attorney will first ask for the admission of evidence necessary to prove the issue of innocence, or to discredit the assertion of guilt.[65] When testimonial evidence is adduced at trial, the lawyer will cross-examine the prosecution witnesses, in order to challenge their veracity and credibility. He/she will then examine the witnesses he has presented for the defence. Finally, in the closing arguments, the lawyer will try to persuade the court that the prosecution's case is groundless, because it has insufficient evidence to support it, or because the arguments indicating the accused's innocence are more convincing.

64 When counsel is absent for a good cause, and the judges are aware of it because the defendant has duly notified them before the hearing day, the process must be adjourned. Refusal to adjourn the case can give rise to it being sanctioned as a nullity: this means that the hearing conducted notwithstanding the justified absence of defence counsel – leading to court appointed counsel *ex officio* – will be declared null and the process must recommence from that hearing.

65 Of course, this does not mean that the defendant is obliged to proof his innocence, since the presumption of innocence in Italy is duly regarded (see *infra* § 2.3.3). Actually, the defence may limit itself to undermining the prosecution case. However, when some evidence favourable to the defence arises, it will be asked to be admitted by defence counsel. The Italian trial is characterised by an adversarial structure, and it is up to the defence to build its case, while the Prosecutor must prove the defendant guilty beyond reasonable doubt.

There is no separation in Italy between judgment and sentencing, with the sentence determined by the judges at trial, in case of conviction, without any additional hearing. Defence counsel must therefore argue on sentencing at trial, and present relevant evidence on this issue. This aspect of the old inquisitorial system remains notwithstanding the adoption in 1989 of the CCP. The choice not to separate the trial phase from sentencing is heavily criticised by counsel, who argue that it is allowed without any restriction all evidence relevant to the previous conduct of the accused (the so-called 'bad character evidence' in common law systems) to be admitted.

However, rarely have these argument were taken into consideration. In general, those persons seeking to maintain the *status quo* observe that the separation between trial and sentencing is necessary when the jury adjudicates the case, while is superfluous when the decision is made by professional judges. Nevertheless, all lawyers accept that the criminal record of the accused, inserted in the judicial file since the beginning of the trial, does play a role in the adjudication of the case. The Court of Cassation itself has sometimes stated that the record of the previous convictions of the accused – as well as the one pending – can be freely evaluated by the judges, in the same manner as all the other evidence.

2.2.4. Independence and competence of defence lawyers

Criminal lawyers are not formally regulated as such. The profession, in every field of the law, has common disciplinary rules. To be admitted into practice, all counsel must belong to the Bar Association. It is necessary to have graduated in law and to have passed the bar exam, held every year in December. Italy has only one Bar Association, organised as a pyramid. At the peak, there is the National Bar Association and, at the bottom, there are local bar associations located in each trial court district. The local bar associations are submitted to the control and regulation of the National Bar Association. The National Bar Association, as well as the local bar associations at the district level, are recognized by the State. They are supervised, in some aspects, by the Government, which may have agreements with the National Bar Association in order to give directions to them in some field (for example, fiscal, contributions for retirement).

With special regard to criminal lawyers, they are for the most part – but not necessarily – associated with the Penal Chamber (*Camera Penale*), a private association organised at both the national and district level. In the last 10 years, the Penal Chamber has, in practice, exercised an important role in the reforms of criminal law and procedure: notably during the legislative drafting phase of the Constitutional reform of article 111. The Penal Chamber is not recognised as a public institution by the law: it is a mere private law association, and its lobbying influence operates only *de facto* (many of its higher representatives sit in the Italian Parliament).[66]

[66] See Caianiello & Illuminati *supra* note 11, at p. 148-149.

There is a code of professional behaviour, issued by the National Bar Association, and also a code of professional behaviour for criminal lawyers, drafted by the Penal Chamber. Both codes provide for a certain number of provisions concerning the ethical duty of counsel, in the course of his/her defence. For example, they provide for the duty to respect their counterparts and to keep secret information collected in the administration of the defence (client-counsel privilege). While the violation of the duties provided for in the Code of the Bar Association may lead to several sanctions for the counsel, the heaviest of which is a prohibition from practicing for a certain period of time or, in the most serious cases, forever, the violation of the Penal Chamber Code provisions usually only give rise to private consequences (at most, the expulsion from that association). The Penal Chamber is, in fact, regulated for the most part by the provisions of the Italian civil code. However, only the violation of the Bar Association rules may give rise to a disciplinary proceeding, whose effects, and outcomes, are officially recognised by State law and are published on the local journal of the Bar Association (no statistical data is available). The disciplinary proceeding takes place before the local Bar Association of which the counsel accused of malpractice is a number. At the end of the proceeding, the sanctions adopted by the local Bar Association may be appealed before the National Bar Association and, ultimately, before the Court of Cassation.

Despite the strict rules of the CCP and the deontological code, it is rare that a lawyer is sanctioned by his/her Bar Association and, when punished, that the sentence is heavy. In particular, it is rare that the outcome of a disciplinary proceeding consists of the exclusion of counsel from the profession. The expulsion from the Bar Association, and the prohibition to act in the profession (at least for some years, for minor crimes) is generally – but not automatically – issued only in case of conviction of criminal matters.

Formally, there is no provision of legal services limited to qualified lawyers: there is a radical lack of quality control concerning legal services in Italy, and this represents one of the points of weakness in the Italian legal profession.

In general, notwithstanding their huge number (they are at the moment 213,000), counsel in Italy are, on average, competent to undertake their work, and independent from any source of conditioning or intimidation.[67] They are insured for the damages suffered by their client from their mistakes. However, in practice, the risk is higher in civil cases than in criminal ones. The criminal process is characterised by many discretional choices left in the hands of counsel that, as such, may be disputable but rarely give rise to a judicial case. It should be noted that, under the provisions of the Italian Civil Code, a lawyer can be required to pay the damages only if he acted with intent (*dolus*) of grave negligence (*gravis culpa*).

[67] See also, for other considerations, *infra* § 3.

2.3. *Procedural Rights*

2.3.1. The right to release from custody pending trial

Arrest, Detention of a suspect, Pre-Trial Detention: Preliminary Distinctions

In the Italian system, a right to be released on bail or some similar condition is not provided for.[68] The current Italian CCP distinguishes between three types of preventive detention, namely: *arresto* (arrest), *fermo di indiziato di delitto* (stopping one suspected of a crime) and *custodia cautelare* (pre-trial detention). Both *arresto* and *fermo* can be categorised summarily as initial 'police detention' (actually, *fermo* can be issued only by the prosecutor, even it is executed by the police). By contrast, *custodia cautelare* may only be decreed by the court dealing with the case, or by the judge and, moreover, solely upon request of the public prosecutor (art. 279 and 291 of the CCP).[69]

Pre-Trial Detention

Pre-trial detention starts with a court order of detention. At the application of the prosecutor, the judge shall issue a court order for pre-trial detention (art. 292 of the CCP), if he/she considers the conditions required by the law to be met.[70] According to article 294 of the CCP, a person held in pre-trial detention during the preliminary investigation shall immediately be interrogated by the judge and, in any case, within five days after execution of pre-trial detention. The failure to do so by the judge within the time prescribed by the law implies the end of pre-trial detention. The person must be released (but a new pre-trial detention order can be issued by the judge).

The defendant and his lawyer, separately, may submit within 10 days of the notification or execution of the decision, a request to the Court of Freedom (*Tribunale della libertà*) for review of the initial decision to pre-trial detention, on the merits of the case (art. 309). Once such a request is presented, the Court is assigned 10 days to make a decision. The defendant and his/her counsel may also appeal the pre-trial detention judicial order before the Court of Cassation, either directly or after the decision of the Court of Freedom.

There are several ways in which pre-trial detention may end. For instance, pre-trial detention ends when there is no longer a ground for (further) detention. In addition, article 299 of the CCP prescribes the immediate cancellation of pre-trial detention once the general terms stipulated in article 273 of the CCP are no longer met, or the grounds for adopting such a measure (art. 274) cease to exist.

68 See in English on this issue, 'Italy', a paper presented by the European Commission entitled *An analysis of minimum standards in pre-trial detention and the grounds for regular review in the Member States of the EU* (JLS/D3/2007/01), 2009, <http://www.ecba.org/extdocserv/projects/JusticeForum/Italy180309.pdf>.

69 See *supra* § 1.3 *c.*

70 The court order should satisfy the formal requirements listed in art. 292 of the Code.

Nevertheless, if there are no longer grounds for pre-trial detention, detention will not end by operation of law. Cancellation of pre-trial detention may be decreed at the initiative of the judge, or upon request of either the public prosecutor or the accused. Subsequently, the judge should decide within five days of the request (art. 299 § 3).

Apart from the instant cancellation of pre-trial detention in default of the necessary justifiable conditions, pre-trial detention may also be replaced by another precautionary measure. Article 299 § 2 of the CCP regulates the replacement of pre-trial detention by a less severe measure, while article 299 § 4 regulates the replacement of pre-trial detention by a more severe measure. In addition, pre-trial detention should be replaced by a less severe measure (house arrest, the prohibition to leave the place in which the defendant resides, the withdrawal of the passport), or the conditions of detention should be lessened, if the grounds for detention have reduced, or if the measures are no longer appropriate or proportionate to the seriousness of the offences and the severity of sentence to be imposed.

By contrast, an aggravation of the grounds for detention may lead to the adoption of stringent precautionary measures. However, no such measure is more severe than pre-trial detention. Nonetheless, if the grounds for detention have increased, the public prosecutor may still request the judge to aggravate the conditions of pre-trial detention.

The institution of pre-trial detention allows for a person to be deprived of his/her liberty, even if not yet facing formal charges. The aim of the detention is to allow the prosecuting authority to gather sufficient evidence during the preliminary investigation phase (which can last for no more than two years). However, when imposing pre-trial detention, there are some essential legal principles that should be taken into account by the judge, including the presumption of innocence, the principle of adequacy, the principle of proportionality and the principle of last resort.

Regarding the presumption of innocence, with specific relevance to pre-trial detention, although pre-trial detention requires a certain degree of suspicion, a suspect or defendant must not be seen as guilty while under investigation. Therefore, innocence should be presumed even if the person has been convicted in the past. To this end, article 278 of the CCP prescribes that recidivism may not be taken into account, when deciding whether to adopt pre-trial detention.[71]

When opting for a precautionary measure, the judge should determine whether each of the available measures is appropriate, having regard to the nature and severity of the danger to be faced in the particular case (art. 275§ 1). Pre-trial detention should thus be appropriate and may in no case be disproportional to the seriousness of the offence and the likely sentence to be imposed (art. 275 § 2). Consequently, the judge may not impose pre-trial detention, if it is likely that the defendant could be granted a suspended sentence (art. 275).

Because of its severity, the law prescribes that pre-trial detention should remain a measure of last resort, to be ordered only when other lighter measures

[71] On this issue, see *infra* § 2.3.3.

prove inadequate (art. 275 § 3). Further, the rights of a suspect or defendant should be respected, even if the person is held in pre-trial detention. To this end, article 277 of the CCP prescribes that the modality of execution of pre-trial detention should safeguard the rights of prisoners, unless these rights are incompatible with the grounds for detention.[72]

2.3.2. The right of a defendant to be tried in his/her presence

In Italy, the accused can be tried in his/her absence. At the beginning of the preliminary hearing, in case of absence of the defendant, the judge must formally ascertain if this is due to some impediment, or to the fact that the defendant was not duly notified of the hearing. If a factual impediment is ascertained, or in case of doubt, the judge must adjourn the hearing and seek the advice of the parties. In the opinion of the Court of Cassation and most scholars, the defence is not under the burden to prove the facts, while it is up to the judge to conduct the necessary actions to ascertain the cause of the defendant's absence.

When neither an impediment nor a mistake in the notification of the defendant has occurred, the judge formally declares the defendant absent (*contumace*), and the proceeding can go on. If the defendant subsequently intervenes, the judge must revoke the previous formal declaration. If the defendant so requires, he/she must be interrogated, or can render spontaneous statements (arts. 420 to 420*quarter* of the CCP). If the defendant subsequently intervenes and proves that, at the beginning of the hearing, he/she cannot participate due to an impediment, the judge must renew 'the relevant acts' (in general this formula is interpreted as the acts that, in the opinion of the judge, may be crucial for the adjudication of the case). However, the previous acts are considered valid and cannot be revoked. The same conditions apply at the trial stage.

As is well known, Italy has in many cases been found in violation of its obligations by the ECtHR regarding trial *in absentia* in the criminal process. In fact, the system established by the legislature does not guarantee that the defendant was really aware of the criminal process against him/her. What specifically matters is that the judge is called upon to check only the formal requirements of the notices given to the accused by the registry. The court is not under a duty to ascertain if, in practice, the defendant knew that he/she was going to be tried.

Moreover, until 2005, the Italian rules required a defendant who appeared after the final conviction, to prove that it had been impossible for him/her to participate at the trial. If such proof was not provided, the case could not be re-opened. In addition, impossibility to intervene was not considered as sufficient, in cases where the defendant had been negligent. In other words, the law required that, to re-open a case, the defendant must prove that it was objectively impossible for him/her to attend the trial, and that he/she was not negligent (he/she did not provoke on purpose, or negligently, the cause of impossibility).

[72] For statistical data, see *infra* § 4.2 and 5.

After many violations found by the ECtHR,[73] which expressly asked Italy to change its system concerning trial *in absentia*, Italy modified article 175 of the CCP in 2005, in order to allow the re-opening of the criminal process – if conducted *in absentia* – when the convicted affirmed that he/she did not receive notice of the proceeding instituted against him/her. Under the new rules, a person convicted in a criminal trial can appeal the final conviction – and in so doing, re-open the case – when he/she asserts that he/she was not aware of the proceeding against him/her. The appeal must be presented within 30 days from the date when the person was informed about the conviction. The defendant is not under any burden to prove his/her unawareness, and it is up to the Court of Appeal to check the assertion.

The ECtHR has declared the new system as not being incompatible with article 6 of the ECHR.[74] However, Italian scholars have pointed out that the reform appears far from satisfactory. The main criticism is that the defendant enjoys a mere right to appeal, which means that the trial must not be completely renewed. In Italy, all the relevant evidence is admitted at trial, at which the parties have the right to examine and cross-examine witnesses. Moreover, at trial, the parties have the right to seek the admission of relevant evidence on their behalf. At the appeal stage, the admission of new evidence is the exception, and can be ordered by the court only when strictly necessary, or when it is new and newly discovered after the conclusion of the trial.

To recognise to a convicted person a type of enlarged right to appeal, therefore, in the opinion of many scholars, is not enough, because the defendant cannot enjoy the rights provided for by the system to persons accused in a criminal trial. In sum, the process is not completely re-opened, since what is allowed is simply the right to attack a conviction through a criticism to its motivation, as is usually the case at the appeal stage.

2.3.3. The right to be presumed innocent

The Italian Constitution recognizes the presumption of innocence in article 27 § 2, which provides that the defendant cannot be considered guilty until the final judgment of conviction.[75] This principle has found specific applications in the CCP, where it is provided that, in case of uncertainty, the defendant must be acquitted. In February 2006,[76] the 'beyond of any reasonable doubt' rule (BARD) was formally introduced in article 533 of the CCP, under which the defendant can be convicted only when his/her responsibility is proven beyond reasonable doubt. Commentators have observed that the reform has implemented a conclusion that had already been achieved in the opinion of the majority of the scholars and under Italian case law.[77] In fact, the Court of Cassation, in 2002, in its larger composition

73 The decisive conviction was adopted in the *Sejdovic* case. See, ECtHR 10 November 2004, *Sejdovic* v. *Italy*, No. 56581/00, First Section.

74 See ECtHR 1 March 2006, *Sejdovic* v. *Italy*, No. 56581/00, Grand Chamber.

75 Concerning the issue of when a conviction is legally final, see *infra* § 2.3.6.

76 Act No. 46.

77 See Caprioli 2007, p. 143.

(*Sezioni Unite*), acknowledged that the BARD rule must be considered the natural consequence of the presumption of innocence provided for in the Constitution.[78]

The BARD rule does not apply to pre-trial detention, notwithstanding the opinion of some scholars.[79] According to article 273, pre-trial detention can be issued when the evidence produced by the prosecutor shows, 'grave indicia of criminal reliability'. In the view of the Court of Cassation, this does not mean that, according to the evidence presented by the prosecutor, the defendant must appear responsible beyond reasonable doubt of the crimes with which he/she is charged, but rather more simply that his criminal responsibility must appear, *rebus sic stantibus*, more probable than not.

In other words, it is not necessary that the evidence produced by the prosecutor to obtain a judicial pre-trial detention order leaves no room for anything else than a judgment of conviction; on the contrary, pre-trial detention can be issued even if the prosecution evidence could be read as not being sufficient to consider the defendant guilty at trial. What matters at the pre-trial detention stage is that the prospect of conviction appears more probable that that of acquittal.

In conclusion, the presumption of innocence is not completely observed in phases apart from trial, and particularly when pre-trial detention is at stake. In addition, the law permits the trial judge to consult the pre-trial detention file at any time, including previous custodial orders issued during the proceedings and evidence collected by the prosecutor that, as such, would be inadmissible at trial because of the hearsay rule. According to the rules of evidence, hearsay elements inserted in the pre-trial detention file cannot be *used* at the trial to adjudicate the case; however, their capacity to influence trial judges *de facto* is undeniably strong. Due to the fact that judges can *consult* at any time the pre-trial detention file, the system of double-dossier, according to which, to preserve a trial judges' 'unbiased mind' at the end of the investigation, is derogated from. Elements gathered by the prosecutor should be conserved in a separate file that is not accessible by the trial judges.[80]

The reason for giving trial judges the possibility to consult the pre-trial detention file is that the trial judge could, at any moment of the process, amend the pre-trial detention order, or even release the defendant, if he/she thinks that there are no grounds to justify his provisional custody. In practice, however, this results in the establishment of two different levels of applying the presumption of innocence. At the first level, the presumption is respected in the most complete way when pre-trial detention was not ordered and there is no need for the trial judge to consult the pre-trial detention file. The second level, in which the principle appears

78 Cass., Sez. un., 10 luglio 2002, Franzese, *Cass. pen.*, 2002, p. 3652. See also Illuminati *supra* note 12; Stella 2003. For the beyond any reasonable rule as 'BARD', see, among many, Goldman & Goldman 2009, p. 55-66.

79 See, for example, Negri 2004.

80 See *supra* § 1.3 and *infra* 2.4.3. On the problem represented by the possibility – for trial judges – to consult the pre-trial detention file, see Todaro 2009, p. 1743-1776. See moreover Camon 1995, p. 166-180.

under attack, applies when, before the trial, the defendant has been placed in pre-trial detention.

2.3.4. The right to silence

A person involved in a criminal proceeding, either as a suspect or a defendant, must fully enjoy the right to silence, recognised in article 24 § 2 of the Italian Constitution, under which the right to a defence is inviolable at every phase and stage of the legal proceedings (both civil and criminal). As a consequence, the suspect and the accused have the right to remain silent, as well to give unsworn statements. A suspect/accused's lies are not sanctioned as such under the CCP, as opposed to what happens for the witness. Moreover, the suspect /accused must be warned of the risks and consequences related to the choice to give statements in a criminal proceeding.

When suspects are summoned, either by the police, prosecutor or judge, in order to be questioned or interrogated, they have the duty to present themselves, and to give their personal data to the relevant investigating authority. Before questioning the suspect, the police, prosecutor or judge must warn the suspect of the right to remain silent and of the fact that, if a statement is made regarding other persons, the suspect may become a witness in relation to those facts: in these cases, the defendant loses the right to silence regarding reported facts relating to others. However, as explained in § 2.1.2, even in this case, the defendant can maintain the right to remain silent in relation to the charges brought against them (art. 64 § 3).[81]

The rationale of these rights is that people must be able to decide their own attitude towards the authority, when under suspicion in a criminal proceeding. As noted in § 2.1.2, the failure to give the warnings requested by law makes the statements gathered inadmissible as evidence.[82] This is the reason why the Court of Cassation has sometimes declared inadmissible as evidence statements gathered by undercover police operations.[83] Following the same arguments, the Court of Cassation has also refused to admit police testimony on the declarations given by a suspect to undercover police officers.[84]

81 See note 53.

82 On the other hand, the CCP also provides that, when a person questioned as a witness gives self-incriminating statements, the police, prosecutor or judge must stop the interview and inform the person that investigations might be initiated against them. See *supra* § 2.1.2 and 2.2.2.

83 Cass., 31 March 1998, Parreca, *Cassazione penale*, 2000, p. 965.

84 It must be said that, on the defendant's statements given in the course of the proceeding, any testimony is forbidden (art. 62 of the CCP). This means that no one can testify on the statements of the suspects. The statements given by the suspect may be produced only via the written record, which may sometimes be audio or video recorded, signed by the officers who took part. The record must specify if the questioning was interrupted, at what time, and the time at which it was re-opened. To be clearer, admissions or confessions given by the suspect in an informal situation, for example at the coffee machine in the police station, are absolutely not admissible as evidence, either at trial or in the previous phases. See *supra* at the preceding note.

The decision to remain silent can be taken into account when deciding a case, both regarding pre-trial detention as well as at the trial. Until 1995, there were many decisions asserting that the silence of the accused could be considered as proof of his intention to tamper with the evidence. In 1995, the Parliament intervened to prohibit such a practice. However, it is not unusual to find decisions that order pre-trial detention observing that the silence of the accused shows how he/she is not yet conscious of the harm caused, and other similar issues. At trial, the judge may explain the conviction of the accused by basing his/her decision on the accused's silence, if this is confirmed by some other positive evidence of his criminal responsibility.

2.3.5. The right to a reasoned judgment

An important feature surviving from the traditional system is that the judge's decisions must incorporate written reasons. This feature first appeared in the 18th century. The rationale for such a duty is manifold, and exists to ensure judicial accountability. It grants greater control throughout the course of the criminal process, because it strengthens the control of the appellate judge. In addition, it enhances the democratic aspects of the criminal justice system, by making the reasons for a decision available to every citizen. Most of all, the duty to justify decisions assures that the decision making process follows a rational path: if the judge has to explain why he/she has decided in favour of one party, this should force him/her to make his/her decisions by reference to rational arguments. The judge must be able to persuade the reader that the decisions made were the best under the given circumstances, and not based on improper bias or resulting from corruption.[85]

2.3.6. The right to appeal

Another remaining traditional feature is the provision granting broad rights of appeal. Both convictions and acquittals may be appealed, either by the defence or the prosecutor, before the Court of Appeals (if the case was tried before the trial court), or before the Court of Assize of Appeal (if the case was tried before the Court of Assize). For cases tried before a Justice of Peace, the appeal is conducted by the trial court comprising one judge. The appeal is not a remedy provided for in the Italian Constitution; however, its tradition dates back centuries, and is unlikely to be abolished, even if many scholars and practitioners do not consider it to be consistent with the accusatorial model. The Court of Appeal may reverse the trial judgment, from conviction to an acquittal or, vice versa in case of appeal by the prosecutor. Moreover, under certain conditions, the Court of Appeal can declare the trial judgment null, ordering a new trial (or even a new prosecution, if the conditions provided for in art. 604 CCP are met).

[85] See Panzavolta, *supra* note 11, at p. 591-592; Illuminati *supra* note 11, at p. 567.

Regardless of whether or not a decision has been appealed, it can always be submitted to the Court of Cassation, which ensures that the relevant law has been correctly applied and guarantees the uniformity of interpretation of the law. The appeal in Cassation constitutes a remedy recognised by the Constitution in article 111 § 7 and cannot be abolished without amending the Constitution. Prior to the completion of all possible remedies, the judgment reached at trial cannot be considered as final. Therefore, the sentence imposed by trial judges in case of conviction cannot be carried out if one of the parties appeals, or it is submitted to the Court of Cassation. Only after the end of the appeal and Cassation stage – or, quite unusually, if no appeals at all are presented – does the judgment become final and the sentence must be served.[86]

With Act No. 46 of 20 February 2006, the Italian Parliament abolished the right of the prosecutor and the defence to appeal against acquittal in criminal proceedings. Even if formally designed as a reform limiting the right of appeal of both parties, it was clearly a modification that involved mainly – and almost exclusively – the prosecutor. In fact, the prosecutor has the strongest interest to appeal against an acquittal, while the defendant is, in practice, much less interested in amending the trial judgment; it may happen, albeit not often, that a defendant appeals to obtain a modification of the acquittal formula (for example, to change the acquittal based on lack of *mens rea* to an acquittal for not having committed the material fact charged in the indictment).

The Constitutional Court has since nullified this reform, declaring as a violation of the Constitution the prohibition to appeal against an acquittal for both the prosecutor and the defendant. In particular, with its decision No. 26 of 6 February 2007, the prohibition for the prosecutor to appeal against acquittals was nullified. The Constitutional Court based its reasoning on the equality of arms principle. In practice, the prosecutor would have been treated in an unreasonably unequal manner, because of the ban to appeal against acquittal, while the defendant maintained the right to appeal against convictions.

Subsequently, with its decision No. 85 of 4 April 2008, the Constitutional Court abolished the prohibition for the defendant to appeal against acquittal, asserting that this should considered to be in violation of both the equality of arms principle and the right to defence, as acknowledged in article 24 §2 of the Constitution.

There is no statistical data concerning the number of cases in which a trial judgment is amended or reversed at the appeal stage. However, it is commonly thought among lawyers that, in general, it is not difficult to obtain at least a slight reduction of the sentence at the appeal. Between 1983-2002, roughly one fourth of trial judgments (between 23-24 %) were amended at the appeal stage.[87]

86 Before the judgment has become final, a person can be kept in prison only if pre-trial custody is applied, according to the rules examined in § 2.3.1.

87 See Davigo & Mannozzi 2007, p. 136-138.

2.4. Rights relating to effective defence

2.4.1. The right to investigate the case

In 2000, the Parliament approved the Act of 7 December 2000, No. 397, which provided for comprehensive and detailed regulation of private investigations conducted by the defendant's, and victim's counsel. As a consequence, counsels are now allowed to seek evidence, including *inter alia* interview prospective witness, obtain expert evidence, have access to places not open to the public and ask public institutions to supply relevant documents.

Regarding the interview with persons who can provide information about facts, counsel may document the interview, using the specific forms provided for by Act No. 397/2000. The statement can be produced before the prosecutor or judge and have the same value as those produced by the prosecutor (with some slight distinction that fall outside the scope of this report).

Where a potential witness does not intend to give statements, counsel has two possibilities. First, he/she can ask the prosecutor to summon the witness. In this case, counsel has the right to be present at the witness interrogation, and is the first to ask him/her questions. Secondly, counsel can ask the judge to summon the witness for a deposition, in which case he/she will be examined and cross-examined before the judge by the prosecutor, the defendant and the victim's counsel.

In addition, counsel may obtain a warrant from the judge to enter private places, when the persons concerned do not give their consent.

Despite the undeniable improvement of defence prerogatives in criminal proceedings, the reform introduced with Act No. 397/2000 presented some problems. The Court of Cassation has stated that a counsel who reports unfaithfully the statements rendered by the potential witness – for example, omitting some answers or directly falsifying a declaration of the witness – must be considered as a public officer who falsifies a public document, and consequently punished (up to six years imprisonment).[88]

The power of counsel to conduct investigations is the same, whether the defendant is in custody or not. They do not vary depending on the charges (the real discriminating factor is money, because of the features of the Italian legal aid system).

In theory, the powers to conduct private investigations are the same, regardless of the financial resources of the defendant. The legal aid provisions, in fact, cover private investigations. If the defendant is permitted to use legal aid, his/her counsel can appoint a private investigator, as well as an expert witness. However, budget limitations tend to restrict *de facto* the power of the defendant. Taking into account that the average remuneration of counsel acting under legal aid was, in 2007, slightly less than 900 Euro, it is easy to understand how problematic it is to conduct effective private investigations under the legal aid program.

[88] Cass., S. U., 27 June 2006, n. 32009, Schera, *Cass. pen*., 2006, p. 3986.

The code of professional conduct for lawyers regulates the conduct of counsel in performing private investigations. Misbehaviour may be prosecuted and sanctioned under the relevant provisions.

An increasingly problematic issue relates to remedies, when the judge or prosecutor erroneously denies an application to conduct a private investigation. It is not unusual, in fact, for a specific application by counsel to be is denied, when it should be granted, according to the law. For example, article 391*bis* of the CCP provides that, in the case of a lawyer's formal request, the prosecutor is obliged to summon a person who refuses to render statements to counsel. However, it is not rare that the counsel request is not granted by the prosecutor, despite these provisions.

The Court of Cassation has stated that there is no remedy in such a case, because there is no way to overcome the discretionary powers of the prosecutor. The position is the same when the judge denies the lawyer's request to call a witness for a deposition, where he/she refused to give statements privately to the counsel. The Court of Cassation decided that the judge's denial could not be appealed. The only remedy, in such cases, should be at the disciplinary level.

In other words, the prosecutors or judges who contravened their duty should be sanctioned. In practice, this is a remote possibility, unless some other consequences are related to the illegitimate denial (for example, the defendant remained in custody and, if the evidence had been gathered, should have been released).

2.4.2. The right to adequate time and facilities for the preparation of the defence

The Italian CCP provides for a minimum period of time that must necessarily elapse between important hearings, such as the preliminary hearing and first trial hearing,[89] and notification of them to the defendant. In particular, the defendant must be notified of the preliminary hearing at least 10 days prior (art. 419 CPP), and at least 20 days prior to the commencement of the trial (art. 429 CPP). For cases of minor gravity, where a preliminary hearing is not provided for, the defendant must be notified of the indictment and of the date of trial, at least 60 days before the start of the trial.

Access to the prosecutor's file is permitted at the end of the investigation, when the suspect must be informed of the conclusion of the investigation (art. 415*bis* CPP).[90] In addition, the suspect must be reminded of his right to have access to the prosecutor's file and to make a copy. From that moment, the prosecutor's file is freely accessible to the defendant, as well as to victims, at all times throughout the criminal process. Moreover, access to the pre-trial detention file, which contains all actions, documents and evidence related to custodial issues leading to the proceedings, is always permitted. In particular, after the end of pre-trial detention – or after notification of a milder measure limiting personal freedom – the defendant

89 In Italy, the trial usually takes the form of several hearings. See on this issue *infra* § 4.1.

90 See, for more details on this matter, *supra* § 2.1.

may, at any time, consult the actions and evidence upon which the judge decided to order the restriction.

After the conclusion of the preliminary hearing, if the judge decides that there is sufficient evidence to go to trial, the parties have free access to the judges' file, which, as noted earlier, contains only a small part of the actions and evidence collected by the prosecutor during the investigation.

Finally, at least seven days before the commencement of the trial, the parties must present to the judge a written list of the witnesses they intend to call to testify at trial (art. 468 CPP). The list must contain the name and whereabouts of the witnesses, as well as the facts upon which the requiring party intends to examine him/her at trial.

2.4.3. The right to equality of arms in examining witnesses

The Italian CCP now provides that only evidence produced in a public trial, and tested through cross-examination, may be used as a basis for the judge's decision. Save for exceptional cases, the judge is not able to use evidence that was not collected at trial.[91] The assessment of facts is considered to be reliable only if it is obtained after challenge by the parties, each one attempting to persuade the judge of its own viewpoint. In other words, the fact that both parties are merely heard at the trial is not enough: what matters is that, in principle, only evidence produced at trial and tested by examination in chief and cross-examination can be used to asses the facts of the case.

In fact, if the discussion relates to evidence acquired out of court, without cross-examination by any counterpart, its function would be limited to a critical review of evidentiary outcomes not obtained at trial. On the contrary, the parties must be given the right to participate, and to actively challenge, when the evidence to be used for the decision is being formulated, as provided by article 111§ 4 of the Constitution.

The 1988 CCP (based on the Anglo-American model) adopts the cross-examination technique to which article 111 of the Constitution indirectly refers. Paragraph 3 of article 111 grants the accused 'the right to examine or have examined witnesses against him'.

However, the most typical aspect of the accusatorial process, strictly linked to the principle of adversarial hearing – is the orality of the trial. This refers not only to the examination of witnesses, but primarily to the fact that evidence shall be developed in front of the trial judge (orality-immediacy). In other words, there must be a direct relationship between the judge called to decide the case and the sources of evidence: the trial judge shall have a personal perception of the statements to be evaluated, rather than just by means of the records drawn up by others.

The separation between the phases finds a visible example in the previously noted separation of the dossiers. The records of the investigation are not submitted to the judge and remain in the public prosecutor's dossier, at the disposal of the

[91] See, on this matter, the issue concerning the pre-trial detention file, *supra* § 2.2.3.

parties only. Before the judge, investigative records may only be used to challenge witnesses' statements during the trial examination, to point out a contradiction or a variation with what has previously been stated by the witness during the investigative stage. The judge may take into account previous statements only to evaluate the witness's reliability, but he/she may not use in evidence what has been stated out of trial, even if he/she has subsequently gained knowledge of it (art. 500 CPP).

However, separation between the phases is not applied too strictly, because it would imply losing in many circumstances the possibility to prove the facts, particularly if we consider that the trial normally takes place long after the investigation. In order to prevent the dispersion of evidence, it is inevitable to collect it during the course of the investigation –observing the possibility of the parties' challenge – whenever obtaining it at trial is not possible. This is the case of the *incidente probatorio* (depositions), in which, during the investigation, the judge, at the request of the prosecutor or defence, may order a hearing to take the testimony of a witness, with a view to the trial.

Furthermore, the reading and consequent substantive use of investigative records are permitted any time where some evidence cannot be reproduced at trial for compelling and unexpected reasons, albeit being obtained without cross-examination (art. 512, 513 and 514 CPP). Similarly, if it emerges that a witness called to testify in trial was subjected to unlawful pressure to prevent him/her from answering, or to oblige him/her to make a false declaration, prior statements used to challenge the deposition can be used as evidence (art. 500 § 4-5). Such exceptions to the principle of parties' challenge in the collection of the evidence are permitted by article 111 § 5of the Constitution, in case of 'absolute impossibility of obtaining evidence at trial' and of 'proven illicit conduct on the witness' (for example, the witness was threatened or coerced).

2.4.4. The right to free interpretation of documents and translation

Article 143 of the CCP provides for the right of the free assistance of an interpreter for the suspect/accused. This right is recognised from the first moment that the suspect asserts not to speak or understand Italian. In that case, the judge or, during the investigation, the prosecutor, must appoint an interpreter to assist the accused. Failure to do so results in the nullity of the subsequent acts by the prosecutor or judge, more specifically, an 'intermediate nullity'.[92]

[92] The most typical sanction provided for by the Italian CCP, in accordance with the civil law tradition, is nullity. In general, when an act is declared null by the law, it means that it must be considered void, and for this reason must be struck out from the criminal proceeding. If one or more acts are based on one that is declared null, they are affected by the same form of invalidity. In other words, they are all void and must be repeated, if possible. There are three grades of nullity, depending on the gravity of the violation. The most severe is 'absolute nullity' (art. 179 CCP), which cannot be remedied. An objection concerning an act affected by absolute nullity can be raised by a party at any time. Absolute nullity, however, can also be recognised *proprio motu* by the judge until the end of the criminal process. At the second level, there is 'intermediate nullity' (art. 180), which must be objected by the party or recognised →

However, in practice, the right to an interpreter is sometimes disregarded. In fact, the Court of Cassation has affirmed that the judge or prosecutor has the power to ascertain if the concerned person does not speak or understand Italian. In other words, the simple assertion by the defendant is not sufficient for the appointment of the interpreter, because the judge or prosecutor must verify if he/she cannot understand Italian. This leads to a paradox; to enjoy the right to an interpreter, the defendant must prove that he/she does not to speak or understand Italian. This proof often – if not always – is quite problematic. As a consequence, the 'right' to have an interpreter formally proclaimed by the law often results in a concession left to the discretion of the magistrate. It sometimes happens that the judge, in an authoritative and severe way, may ask the defendant if he/she speaks, or at least understands, Italian, and the defendant answers affirmatively, being concerned not to upset the judge (whose question he did not perfectly understand).

Moreover, in the view of the Court of Cassation, the right to the assistance of an interpreter does not mean that the interpreter must be able to speak the language of the defendant, but only that the interpreter must speak a language that the defendant understands (for a northern African, it could be sufficient in practice that the interpreter speaks French, if no interpreter who speaks Arab is available).

The right recognised by article 143 includes the free translation of the process documents. However, the Court of Cassation has stated that not all documents must be translated under article 143, but only those destined specifically for the defendant. As a consequence, the judgment does not have to be translated, because it is not destined only for the defendant, being adopted in the name of the Italian people and for all the parties (prosecutor, *parte civile*, defendant).[93] The main actions that must be translated concern the indictment and advices relating to the preliminary hearing and trial, the prosecutor's order to serve the sentence applied to the convicted person, the warrant of arrest and the judge's decisions imposing pre-trial custody. The duty to provide a translation applies also to the letters of rights referred to in § 2.1.1.

Finally, the interpreter must give guarantees of competence and independence. He/she can be appointed from a list maintained by the trial court registry. He/she must comply with some prerequisites, without which his/her involvement is sanctioned by nullity under the CCP (art. 144). To be appointed as an interpreter, a person must not have been suspended from public office, or from private practice, as a consequence of a criminal conviction; moreover, he/she cannot be under a safety measure as a consequence of a criminal conviction. A person called to trial to render testimony cannot be appointed as an interpreter in the same proceeding.

proprio motu by the judge within a certain lapse of time (in general, the conclusion of the phase, subsequent to that in which nullified act was performed), after which the act can be considered as if it was correctly formed. Finally, there is 'relative nullity', whose existence must be objected in a motion by the interested party within a short time, otherwise the act is considered correct and valid. It cannot be recognised *proprio motu* by the judge.

93 Cass., Sez. VI, 22 October 2008, C.e.d., n. 242227. At least 15 other decisions of the Court of Cassation, dating back to 1997, confirm this.

Lastly, a person married to the defendant cannot be appointed as an interpreter, unless the defendant is deaf, mute, or both. An interpreter can be disqualified at the request of the parties, in cases provided for under article 144, or when other grave reasons occur. At the time of appointment before the judge or prosecutor, the interpreter is cautioned with regard to his/her duties, and asked if there exist any reason for disqualification p article 144.

3. The professional culture of defence lawyers

Counsels practising in criminal law tend to perceive themselves as a counterpart to the 'system', including both the prosecutor and judges. In other words, they tend to conceive their work as giving to their client the best possible defence, and are not keen to cooperate with prosecutors or judges, unless this is, at the same time, in the interests of their client.

If we look at the quality of criminal defence services, the main problems seem to be related to the legal aid system, and to counselling when appointed by the court. Regarding the latter, it may happen that lawyers appointed *ex officio* lack the necessary training and experience to prepare a good defence. Since 2001, the law has required the local bar associations to organise and control the training of lawyers who are eligible to be appointed *ex officio*. However, the services of counsel appointed *ex officio* only partially reach the same standard of quality of those carried out by hired counsel.

It is possible to say that sometimes the same practitioner works in a different manner, when engaged by a client, than when appointed by the court. As far as concerns the legal aid system, we already pointed out the reasons for this related to the inefficiency of the system.[94] This involves – or may involve– some unsuitable consequences. In particular, in cases with indigent clients, counsel is not as motivated as he/she should be in representing the interests of the defendant. We do not assert that this is the rule: there are many cases of lawyers working at their best regardless of their remuneration,[95] but of course, with such structural inefficiencies in the system, there remains the risk that counsels are not adequately motivated.

Another feature that may bear consequences on the quality of service is the low number of large firms that are used to dealing with a case from multiple points of view (criminal, fiscal, corporate).These firms are concentrated only in Rome and

[94] The right to mandatory legal assistance and to free legal assistance works differently in juvenile criminal proceedings: the law actually provides that the counsel appointed by the court is automatically remunerated by the State in any case. The State may recover the expenses sustained by the person assisted if they are able to afford them – if the annual income of the family unit is over the limit mentioned: see Caianiello & Illuminati *supra* note 11, at p. 143-144.

[95] When interviewed on the point, more than one counsel asserted that they do not care if the legal aid system remuneration is inadequate, or if they will receive any remuneration at all. When they have a case, they do their best, because 'our task is to undermine the case of the prosecutor and the police, making our best at this aim'.

Milan, and even then, they represent a small number even when compared to the overall number of lawyers in those cities.

According to recent research promoted by the Penal Chamber of Milan, and undertaken by AASTER, an Italian company working in the field of social sciences,[96] it emerged that lawyers tend to affirm that their corporation is in a period of crisis.[97] Notwithstanding their large number,[98] or perhaps because of it, the interviewed lawyers perceive as a critical problem the difficulty to create large firms, where work on single cases can be handled together with other colleagues. It must be observed that, in the criminal law field in Italy, co-management of the case is not readily practicable, due to the typical claim of the client, who usually does not accept the his/her case is managed by more than one or two lawyers at the same firm.

The large number of lawyers, as well as the necessity to work individually on single cases, has led to a myriad of small firms that are sometimes over specialised and lacking the ability to give adequate services on the multifaceted specific aspects of legal practice (civil, criminal, administrative, fiscal). In addition, the number of lawyers means that in some areas, practitioners are not able to earn enough to maintain a high standard of service.[99] The difficulty of earning an adequate salary for their work constitutes a factor that, at least indirectly, could undermine counsel independence. In fact, a traditional prerogative of the Italian legal profession – the discretion of counsel to refuse or accept cases for potential clients – could be drastically weakened if the main concern of practicing counsel was to find sufficient financial resources to reach a dignified standard of life.

4. Political commitments to effective criminal defence

4.1. Perception of criminal justice system

In general, confidence in criminal justice system has been decreasing in Italy over the last 10 years. During the 1990s, confidence in criminal justice reached a high point, due to the famous national inquiry into political and business corruption known as 'Cleaned Hands'. After that time, trust gradually lessened, due probably to disillusion provoked by the lack of change in the political system. Moreover, the

96 The online site is <www.aaster.it>.

97 Guastella 2009, p. 10-11. See on the same matter Caianiello & Illuminati *supra* note 11, at p. 147-149.

98 In Italy, there are more than 213,000 practicing lawyers, representing 36.8 lawyers per 10,000 inhabitants (the third in Europe after Liechtestein and Spain). See Guastella *supra* note 99. Regarding low number of large firms that are used to dealing with a case from multiple points of view, see Malatesta M., 'Le transformazioni dell'avvocatura italiana', online at <www.nelmerito.com>, 26 February 2010.

99 From the interviews conducted, it emerged that 68 % would favour severe restrictions to access to the legal practice, while 65 % would approve the *numerus clausus* policy in the Law Faculty of the State. Some 63 % would promote a system of external checks and certifications for the standards of services provided by legal firms. Among them, 23.6 % consider such checks necessary to protect the clients from the risks due to incompetent colleagues.

rise of Silvio Berlusconi, as a protagonist of the Italian political life, lead to a conflict between justice and Government, due to the numerous criminal proceedings pending against Berlusconi. At least seven *ad hoc* Acts were adopted by the Parliament to interfere with cases involving the Prime Minister;[100] in addition, the Prime Minister and the political forces in his alliance have raised strong polemics against those judges and prosecutors responsible for initiating a criminal process against him: sometimes it appeared that the fight moved by the right coalition involved the judiciary as a whole.

Above all, the first reason for the lack of confidence is the significantly unreasonable length of proceedings. The average length of a criminal process in Italy is 1589 days. In the period between 1 July 2001 – 30 June 2002, it amounted to 1,457 days.[101] The average length of a trial is 139 days for a case tried before a single professional judge (*Tribunale in composizione monocratica*), and 117 days for those tried before a panel of three professional judges (*Tribunale in composizione collegiale*).[102] The average time elapsing from the beginning of an investigation to the

100 The first was the reforms enabling the transfer of criminal proceedings to another district, where there is the risk that all the judges of the trial court before which the case is pending lack of the necessary impartiality (Act. No. 248, 7 November 2002). Secondly, the law reducing the time necessary for the efficacy of the statute of limitations (Act No. 251, 5 December 2005). Thirdly, the law prohibiting proceedings against the five most important charges of the Italian State: the President of the Republic, the President of the Council of Ministries, the Presidents of the two Parliament Chambers, the President of the Constitutional Court (Act. No. 140, 20 June 2003). Fourthly, the law prohibiting the prosecutor to appeal against an acquittal (Act. No. 46, 20 February 2006). It is interesting to observe that these four Acts were declared, in whole or in part, unconstitutional by the Italian Constitutional Court. Finally, Act. No. 124, 22 July 2008 – one of the first Acts of the new Parliament, elected the previous May – restored the stay of proceedings initiated against the most important charges of the Italian State, because the analogous provisions of Act. No. 140, 20 June 2003 had in the meantime been nullified by the Italian Constitutional Court. On 7 October 2009, with decision No. 262, the Constitutional Court nullified Act No. 124, 22 July 2008, because it violated the equality of citizens before the Law, provided for by art. 3 of the Italian Constitution and representing one of its most fundamental principles. To those Acts must be added Act No. 367, 5 October 2001, approved with the declared intent to interfere with the criminal process involving, among others, Cesare Previti, Berlusconi's former counsel and at the time Senator of the Italian Republic. The Act had the intent to impede to the prosecutor from producing as evidence numerous documents obtained via rogatory from the Swiss judicial authorities. Moreover, the Legislative Decree No. 61, 11 April 2002 amended the crimes *financial or accounting fraud*, so causing the acquittal of Silvio Berlusconi in the criminal process for charges including such conduct.

101 Data from the Official Site of the Italian Ministry of Justice <http://www.giustizia.it/ministro/uffstampa/articolo_cerrato.htm>. Of course, the outlined times are not all employed in hearings. Actually, it is quite the opposite. On average, a criminal trial does not take more that four -five hearings at the trial stage, one or two at the appeal and just one (two in exceptional cases) before the Court of Cassation. This means that, of the 1,589 days, the most part is spent waiting between one hearing and the other, or, what takes the most part of time, between the trial and the appeal stage.

102 EURISPES, *Rapporto sul processo penale. Sintesi*, September 2008, online at <http://www.astrid-online.it/--giustizi/Documenti/index.htm>, p. 2. In general, from one hearing to the next one pass various months, on average 2-3 months (but, in big forum as Rome, 6-7 months).

start of the trial is roughly three years:[103] this period must be added to the length of the criminal process. In sum, the average length of the Italian criminal proceeding as a whole, from the start of the investigation to the end of the process, amounts to roughly seven or eight years.

In addition, at trial, several months may elapse between one hearing and the next. The CCP prescribes at article 477 that, if the trial cannot be finished in one hearing, the judge must adjourn the case to the following day and, in any case, to fix the new hearing not later than 10 days later.[104] However, this provision is mostly – if not always – disregarded, because of the busy hearing schedules, and no sanction is usually imposed for its violation.[105]

From Eurispes Research it emerged that, at trial, the main reasons to adjourn the hearing are the impossibility for the accused or for his/her counsel to attend the trial (14.2 %), the request of the defence to better prepare the case (6.6 %), logistical problems (6.8 %), double booking of the hearing (3.1 %), error in notifying to the accused of the hearing (9.4 %), error in informing prosecution witnesses to attend trial to testifying (9.2 %), the unjustified absence of prosecution witnesses (39.9 %). Italy is at seventh place in the list of the Countries found by the ECtHR to be in violation due to the unreasonable length of the proceedings.

The excessive length of the criminal process – as well as civil, whose situation is perhaps even worse – dates back for decades. As an example, at the entry into force of the 1989 CCP, it was said by the political world that the new model of criminal process would favour the solution of the 'traditional problem' of the unreasonable duration of the proceedings.[106] Scandals sometimes arise. In January 2008, officers of the Minister of Justice, during an inquiry involving the Office of the Prosecutor of the trial court of Bologna, found a closet with more than 2000 files apparently forgotten, and for this reason destined to be sent to the archives due to the statute of limitations.[107]

Therefore, it is not surprising that 53.7 % of the interviewees, in a recent inquiry, said they were not confident in the criminal justice administration (while, in 2004, 52.4 % declared to have confidence),[108] and that 62.3 % of them claimed that the main problem of Italian justice is its excessive length.[109]

103 EURISPES, *Rapporto*, cit. *supra* note 31, p. 2.

104 An analogous provision was present in the previous Code of criminal procedure.

105 If ever prosecuted for the violation of art. 477 CPP, a judge could easily object that it is impossible to observe the mentioned provision, and that the violation was not voluntarily committed. Moreover, he could prove that the disregard for art. 477 CPP was due to his far overbooked schedule hearings, and that the overbooking dates back decades because of the huge amount of pending cases waiting to be decided (which is true for the most part of trial courts).

106 A group of Italian researchers dedicated two years to this issue. See on this subject Kostoris 2005.

107 DINO M., *Fascicoli dimenticati, scontro fra magistrati*, <http://archiviostorico.corriere.it/2000/gennaio/08/Fascicoli_dimenticati_scontro_fra_magistrati_co_*0_0001082806.shtmli*>.

108 EURISPES, *Rapporto Italia 2009*, <http://www.scribd.com/doc/11570329/Sintesi-Rapporto-Italia-Eurispes-2009>, p. 2-3.

109 EURISPES, *Rapporto Italia 2009*, *supra* at the preceding note, p. 63-64.

It is interesting to note that, while among the judiciary – judges and prosecutors – the view is that those most responsible for the delays in the administration of justice are on the Bar side, in the opinion of the latter it is just the opposite. It is probable that both opinions are in part true. On one side, Italy has an overwhelming number at the Bar, slightly greater then 213,000. This may give rise to some abuse[110] of the procedural provisions, and in general may lead to a growth of the level of litigation in the society. Moreover, it may lead to an excessive use of the appeal tools that represent, for the judiciary, one of the major reasons for the unreasonable length of the process.[111]
On the other hand, from the data mentioned above, it is possible to calculate that roughly 68 % of hearing adjournments are due to inefficiencies imputable to bad administration by the public officers delegated to follow the process, rather then the lawyers.

It should be noted that general amount of professional and non professional judges in Italy is not particularly low.[112]

The length of the proceedings is at the basis of the high number of acquittals in Italy, due to the statute of limitations rules. According to recent research on the trial stage in criminal proceedings,[113] at the national level, at the end of the trial, in 6.7 % of cases, the accused is released because of the expiry of the statute of limitations. The data does not take into account the hypotheses where the case is dismissed at the end of the investigation, because of the statute of limitations, and at the appeal stage, in which release is permitted.

To understand the problem, it is necessary to realise that the Italian system of statute of limitations is quite peculiar. According to the rules provided for in the CCP, there is no distinction between the period of time *before* the start of the prosecution, and the period *after* the prosecution commences until the end of the process. In other words, the statute of limitations accrues from the date of the commission of the crime, and do not stop at the initiation of the prosecution, nor after the trial judgment. In a summary, the terms concerning the statute of limitations continue throughout all of the criminal process subject to an extension by one quarter. As example, if a crime was committed in 2000, and the law provides

110 In this sense the Report of the General Prosecutor toward the Court of Cassation, 2009, online at <http://www.astrid-online.it/--giustizi/Documenti/Inaugurazi2/index.htm>, p. 40-45.

111 See Nunziata 2004.

112 In Italy there are 9037 professional judges and 8937 non professional judges (judges of peace, honorary prosecutor and judges. The last two categories are appointed by the Ministry of Justice, on application of the interested persons. Honorary prosecutors and judges are allowed respectively to prosecute and adjudicate cases of minor importance, concerning crimes punished up to 4 years of imprisonment). Data from the site of the Minister of Justice <http://www.giustizia.it/ministro/uffstampa/articolo_cerrato.htm>. The annual expenses for justice in Italy amount to 752,593,326,137 Euro that means 127 Euro per inhabitant. The sum represent the 1.0 % of the Italian National budget (from the Report of the General Prosecutor toward the Court of Cassation, 2009, p. 35. The report is freely downloadable <http://www.astrid-online.it/--giustizi/Documenti/Inaugurazi2/index.htm >).

113 EURISPES, *Rapporto sul processo penale. Sintesi*, September 2008, online at <http://www.astrid-online.it/--giustizi/Document/index.htm>, p. 4.

an expiry after of 10 years, if the prosecution starts in 2004, there are only six years to reach a final judgment on the merits (four years under the ordinary statute of limitation term, plus two years due to the commencement of the prosecution). However, this is not much, considering the traditional length of the Italian process.

Finally, a managerial approach in the administration of justice is considered controversial, even if scholars have more recently endorsed this as a solution at the legislative level to prosecute and try criminal cases.[114]

4.2. Political commitment to criminal justice

If we look at the reforms introduced in the field of criminal justice in Italy during the last 18 years, we see a fragmented and contradictory picture. Taking into account that any generalisation implies at least some mistakes, due to a subjective interpretation of a complex phenomenon, we can divide into three phases the political interventions in the field of criminal justice. At first, there was, at the beginning of the 1990s (1992-1997), a shift toward a more efficient fight against some traditional forms of crime, such as organised crime and corruption: this led to the diminution of some relevant safeguards for the defence. In particular, the so-called 'Martelli Decree' (decree No. 306 of 8 June 992, approved by the Parliament with Act. No. 356/1992), as well as some decisions of the Italian Constitutional Court, notably restricted the defendant's right to confrontation, by permitting the use of out of court statements collected during the investigation by police and the prosecutor.[115]

It is worth noting that, in those years, Italy was racked by two facts: on one hand, the famous inquiry started in Milan called 'Clean Hands', which led to the fall of the traditional political parties, such as the Christian Democrats and the Socialist Party (and the rise of new political leaders, the most famous of which is the current Prime Minister, Silvio Berlusconi); on the other, by the assassination – through two terrible bombing attacks – of famous judges involved in the fight against organised crime, Giovanni Falcone and Paolo Borsellino, and their respective escorts.[116]

In a second period (1999-2001), the Parliament re-introduced some safeguards considered fundamental for the accusatorial system: in particular, the Italian Constitution was amended to assure at the highest level the right to confrontation in criminal processes, and the prohibition of the use of statements collected unilaterally out of court prior to trial. Moreover, a new Act concerning private investigations in criminal proceedings by defendants and victim's counsel entered

114 See *supra* § 1.2.

115 See Panzavolta *supra* note 11, at p. 595-600; Illuminati *supra* note 11, at p. 573-576; Pizzi & Montagna *supra* note 11, at p. 449-460.

116 In the Capaci killings – in addition to Giovanni Falcone, three police officers and Falcone's wife, Francesca Morvillo, at the time a justice at Palermo's trial court, also lost their lives. In the D'Amelio Drive bombing, together with judge Paolo Borsellino, five police officers, who worked as his police escort, were assassinated.

into force. Other new Acts were also approved, improving both the legal aid system and the duty counselling.[117]

Finally, it is possible to categorise a third period (2001-2009), characterised for its 'unequal approach' in the field of criminal justice. On one hand, since 2001, numerous Acts were introduced to improve defence safeguards (mostly to intervene in criminal processes involving relevant political leaders);[118] on the other, new reforms were approved to strengthen the fight against particular crimes, such as street crimes/blue collar crimes and immigration, considered at the basis of the growing sense of insecurity among the Italian population.[119]

The policy followed by the political forces and the Government in recent years led to a distinction among the crimes. For some criminal conduct, the Government showed an intention to be tough, while for others it appeared not to favour – or at least to speed up – their prosecution. In particular, in 2008, a recent reform promoted by the Government and approved by the Parliament, named 'Security Pack' (*Pacchetto Sicurezza*),[120] introduced new provisions directing the judges to give priority to proceedings started with the arrest of the suspect,[121] and to proceedings in which pre-trial detention is applied.

Moreover, when arrest is applied, the prosecutor is now obliged to file an indictment against the arrested person within 30 days from the arrest; finally, even in the absence of an arrest, but when pre-trial detention has been applied and not revoked by the Tribunal of freedom, or by the Court of Cassation, a preliminary hearing must be dispersed with, no matter how serious is the crime charged, and the case is to go directly to trial. The reforms approved in 2008 had the effect of improving the enforcement of provisions against street crime, for which arrest and pre-trial detention are traditionally most common, and of immigration crimes, being the new area of concern for the political forces. With this aim, since 2002, with Act No. 189, 30 July 2002, new forms of crime concerning immigration have been introduced, all of which are punished with severe penalties, and permitting the police to arrest the suspect caught in the act of committing them.

Requiring the judges to give precedence to cases in which arrest took place or, at any rate, a pre-trial detention order is in force, the 2008 reforms had the effect – among others – of improving the enforcement of criminal provisions concerning immigration. Finally, in July 2009, with an Act again named 'Security Pack',[122] a new

117 Duty counselling was partially reformed by Act No. 60, 6 March 2001; legal aid was improved by Act No. 134, 29 March 2001.

118 See in this sense the Acts mentioned *supra* at note 100.

119 As noted above, despite the fact that the total number of crimes has not significantly increased in the last 10 years, the fear of crime has increased among Italian population. See *supra* § 1.4.

120 The 2008 Act named 'security Pack' is Act No. 125, 24 July 2008.

121 Or where the suspect is in custody. The reform was introduced with Act No. 125, 24 July 2008. See, on this subject, Valentini E., 'La poliedrica attività del nuovo giudizio immediato'; Allegrezza S., 'La nuova fisionomia del giudizio direttissimo'; Illuminati G. & Vicoli D., 'Criteri di priorità e meccanismi sospensivi: un difficile connubio in tema di accelerazione dei tempi processuali' direttissimo'. All the contributions are published in Mazza & Viganò 2008.

122 The 2009 Act named 'security Pack' is Act No. 94, 15 July 2009.

offence was approved by the Parliament criminalising the mere status of being an illegal immigrant. Notwithstanding the mild penalty provided for by the law (a fine from 5,000 Euro up to 10,000 Euro), a special proceeding was introduced, so as to permit to the judges of peace – who have jurisdiction over the new crime – to deal with cases involving illegal immigration in priority to other proceedings.

With respect to other crimes, such as corruption or general white collar crimes – for which arrest or pre-trial detention is much more unusual – political forces did not show the same determination. Of course, in theory, the fight against corruption and organised crime continues to represent a priority: in the 2009 Security Pack, Act No. 94, 15 July, 2009, some provisions concerning organised crime were introduced. However, by overburdening the schedules of Italian trial courts with street crimes and immigration crimes, which must be dealt with in advance of other crimes, means that *de facto* other forms of crime will only be treated later, with a higher risk of acquittal due to the statute of limitations.[123]

With such an approach, there is not much room for concern regarding effective criminal defence, particularly in relation to the traditional problems (counsel appointed *ex officio* system, legal aid, length of the proceedings). In particular, there is clearly no intention to intervene with reforms that could advantage, among other things, extra EU foreign indigent defendants.

5. Conclusions

The framework emerging from the considerations discussed above is far from coherent and, for this reason, far from satisfactory. On one hand, the Italian system has improved its safeguards in the field of the effective criminal defence in many respects. In particular, the protections recognised to the defendant at the investigation phases, during questioning before the police, the prosecutor and the judge, can be considered as positive aspects. Notwithstanding some exceptions, it is possible to affirm that the suspect called to give statements by criminal law enforcement agencies is usually aware of his/her rights and of the risks of his/her choices at that stage. The mandatory attendance of counsel during police questioning (as well as judge interrogation according to art. 294), the mandatory notice to counsel in cases of prosecutor interrogation, the necessity in all these cases to appoint a counsel *ex officio*, if the defendant has not chosen one, make it more unlikely that he/she might be subject to a trick or *escamotages* to undermine his right to silence.

In addition, there is the letters of rights that the prosecutor must give to the defendant during the investigation phase improve his/her level of awareness of the criminal proceedings. Moreover, access to the file is effectively assured (the problem often being the opposite: how to protect the right to privacy of the persons involved in a criminal processes); surprises or unexpected moves by the prosecutor at trial are quite rare.

123 This appears particularly true for corruption and financial crimes, which are not expressly mentioned in the new 2008 priority criteria provided for by Act No. 125/2008.

Finally, right to confrontation is effectively applied in Italian courts, as well as the prohibition against using investigative statements unilaterally made by one of the parties. This assures equality of arms among the litigants (this conclusion is strengthened if we look at the possibility for the defendant to conduct private investigations).

On the other hand, the Italian system does not show due regard to other fundamental features. Among them, the legal aid system is highly unsatisfactory, for at least two reasons. It is open only to persons with a very low annual income, and not appealing for the counsel, who are remunerated significantly less than when paid by the client. This renders unlikely, in general, the possibility to conduct private investigations for defendants admitted to legal aid.

Another feature that should be reconsidered is the right to an interpreter and the translation of documents, which is too frequently disregarded in practice by the case law, whose interpretation of the CCP is far from being consistent with the ECtHR standards in the same field. In too many cases, the interpreter is not appointed when he/she should be, and the translation of documents is not ordered. The minimum basis for an effective criminal defence thus seems irrevocably undermined.

Finally, the peculiarities of pre-trial detention, and of the recent reforms called 'Security Pack' in 2008 and 2009, make it clear that, when pre-trial detention is applied, equality of arms is far more difficult to achieve: in other words, the case of the prosecution has many more chances to win than that of the defence. The picture is probably more worrying if we consider that, often, most of the negative aspects outlined in this report are present at the same time: for example, when the defendant is a street criminal with previous convictions, with no salary (or a very low one); or when the defendant is an illegal immigrant, charged with crimes concerning immigration. In such cases, the chance that those defendants can enjoy an effective criminal defence does not seem very high.

Finally, not enough attention is paid to on the empirical aspects involved in the reforms introduced by the legislature in the field of criminal process. We have seen that, in general, there is a lack of official statistics on many aspects that deserve some monitoring. Moreover, it is very rare that any proposal for reform concerning criminal justice presented to the Parliament is accompanied with a study on the practical impacts it might have on the system (persons involved, costs, length of the proceeding).

In other words, reforms are conceived at an abstract and ideal level (or are used as a means for propaganda, as in the case of the crime of illegal immigration), but rarely accompanied with a field study regarding the practical consequences they could imply. Once again, this is not suitable for a system, such as the Italian one, which is not functioning well in practice (in which the outcome of the process may be formally correct, but substantially unfair).

6. Bibliography

Books

Barbagli 2007
Barbagli, M., *Immigrazione e criminalità in Italia*, Bologna: Il Mulino, 2007.

Caianiello 2003
Caianiello, M., *Poteri dei privati nell'esercizio dell'azione penale*, Torino: Giappichelli, 2003.

Conso & Grevi 2005
Conso, G. & Grevi, V. (eds.), *Commentario breve al codice di procedura penale*, Padova: Cedam, 2005.

Conso & Grevi 2008
Conso, G. & Grevi, V. (eds.), *Compendio di procedura penale*, Padova: Cedam, 2008.

Cordere 1966
Cordero, F., *Ideologie del processo penale*, Milano: Giuffrè, 1966.

Cordero 2006
Cordero, F., *Procedura Penale*, Milano: Giuffrè, 2006.

Davigo & Mannozzi 2007
Davigo, P. & Mannozzi, G., *La corruzione in Italia. Percezione sociale e controllo penale*, Bari: Laterza, 2007.

Di Bitonto 2004
Di Bitonto, M.L., *Profili dispositivi dell'accertamento penale*, Torino: Giappichelli, 2004.

Iacoviello 1997
Iacoviello, F.M., *La motivazione della sentenza penale e il suo controllo in cassazione*, Milano: Giuffrè, 1997.

Illuminati 1979
Illuminati, G., *La presunzione d'innocenza dell'imputato*, Bologna: Zanichelli, 1979.

Lozzi 2008
Lozzi, G., *Lineamenti di procedura penale*, Torino: Giappichelli, 2008.

Negri 2004
Negri, D., *Fumus commissi delicti. La prova per le fattispecie cautelari*, Torino: Giappichelli, 2004.

Nobili 2005
Nobili, M., *Il principio del libero convincimento del giudice*, Milano: Giuffrè, 1974.

Siracusano 2004
Siracusano, D. et al. (eds.), *Diritto processuale penale*, Milano: Giuffrè, 2004.

Chapters in Compilations

Caianiello & Illuminati 2007
Caianiello, M. & Illuminati, G., 'The Investigative Stage of the Criminal process in Italy', in: E. Cape, J. Hodgson, T. Prakken and T. Spronken, *Suspects in Europe. Procedural Rights at the Investigative Stage of the Criminal Process in the European Union*, Antwerp–Oxford: Intersentia, 2007, p. 129-154.

Articles in Journals

Amodio & Selvaggi 1989
Amodio, E. & Selvaggi, E., 'An Accusatorial System in a Civil Law Country: The 1988 Italian Code of Criminal Procedure', *Temple Law Review*, 1989, p. 1211-1240.

Grande 2000
Grande, E., 'Italian Criminal Justice: Borrowing and Resistance', *American Journal of Comparative Law*, 2000, p. 228-260.

Illuminati 2005
Illuminati, G., 'The Frustrated Turn to Adversarial Procedure in Italy (Italian Criminal Procedure Code of 1988)', *Washington Universal. Global Studies Law Review*, 2005, p. 567-581.

Panzavolta 2005
Panzavolta, M., 'Reforms and Counter-Reforms in the Italian Struggle for an Accusatorial Criminal Law System', *North Carolina Journal of International Law and Commercial Regulation*, 2005, p. 577-622.

Pizzi & Montagna 2004
Pizzi, W.T. & Montagna, M., 'The Battle to Establish an Adversarial Trial System in Italy', *Michigan Journal of International Law*, 2004, p. 429-466.

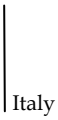
Statistical and Bibliographical References

Major statistical and research resources
Data on both criminal and civil justice may be found at the Italian Ministry of Justice site, <www.giustizia.it>, under the link *dati statistici* (statistical data). Some of the data was supplied through a specific application used for this research, and is not freely accessible online.

See the online site <http://www.astrid-online.it/>, a site dedicate to Italian juridical issues (many in administrative law). In particular, see under the link *Diritti e giustizia* (Rights and Justice).

See the reports of the Italian Centre for Social Sciences, Eurispes. In particular, the report regarding the length of the criminal processes in Italy may be consulted at the online site of the *Camere penali* (Penal Chambers), the Italian private association of criminal counsels (<www.camerepenali.it>), at the link *Rapporto sul processo penale* (Report on the Italian Criminal Process).

See also the issue No. 3 of the Review 'Studi sulla questione criminale. Nuova serie di', *Dei delitti e delle pene*, 3, 2008 entirely dedicated to the highly disputed relation between immigration and crime, edited by Dario Melossi, with subtitle 'Subordinazione informale e criminalizzazione dei migranti', p. 9-125.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