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### The Battle to Establish an Adversarial Trial System in Italy

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# THE BATTLE TO ESTABLISH AN ADVERSARIAL TRIAL SYSTEM IN ITALY

*William T. Pizzi\**  
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## INTRODUCTION

On October 24, 1988, the Italian Parliament adopted a new Code of Criminal Procedure<sup>1</sup> that comparative scholars viewed at the time as nothing short of revolutionary.<sup>2</sup> The reason for the interest in the Italian system was the fact that the new Code purported to introduce an adversarial system based on the Anglo-American model into a country that previously had a strongly inquisitorial system. Under the new system, judges at trial would have a greatly reduced role in the production of evidence and instead that responsibility would be shifted to the parties. And while previously, on the inquisitorial model, trial judges were permitted to use as evidence any information gathered in the investigatory stage, under the new trial system the use of such hearsay evidence would be sharply restricted. Instead, the parties would have to call the witnesses to testify—even if they had given statements to the police earlier—and the defendant would have the right to confront and cross-examine the witnesses and also to offer evidence contradicting the witnesses.

But events subsequent to the adoption of the new Code of Criminal Procedure have shown just how difficult it is to change a legal culture in radical ways. One of the problems with the reform in Italy has been the fact that the Constitutional Court in the decade after the adoption of the new Code issued a series of decisions that undercut some of the basic principles that were supposed to have been central to the new adversarial system. The result was a system that began to look more and more inquisitorial and less adversarial. The new trial system turned out to be not so different from the old trial system with judges entitled to use out-of-court statements of witnesses rather freely, and with much less emphasis on the right of the defendant to confront witnesses against him.

Transplants of judicial systems across legal cultures, like the transplant of plants across climates, are difficult matters.<sup>3</sup> A few such transplants make take hold and even thrive, but many may become weak and eventually die out. Some viewed the decisions of the Constitutional

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1. Provisions of the Code of Criminal Procedure will be cited in the Article using the standard Italian reference for the Code which is C.p.p. followed by the article number of the Code being discussed. C.p.p. is an abbreviation of the Italian name for the Code, the *Codice di Procedura Penale*. Where a Code provision in the 1988 version of the Code was subsequently changed, the citation to the original provision will be to 1988 C.p.p. followed by the article number.

2. See Ennio Amodio & Eugenio Selvaggi, *An Accusatorial System in a Civil Law Country: The 1988 Italian Code of Criminal Procedure*, 62 *TEMP. L. REV.* 1211 (1989) ("To a comparativist looking at different systems of criminal justice, the new Italian Code appears as the most outstanding event in the 20th Century.").

3. For an excellent discussion of the blending of different legal cultures, see John D. Jackson, *Playing the Culture Card in Resisting Cross-Jurisdictional Transplants: a Comment on "Legal Processes and National Culture"*, 5 *CARDOZO J. INT'L & COMP. L.* 51 (1997).

Court striking down key provisions of the Code of Criminal Procedure as the death knell for the legal transplant that was to have been an accusatorial and adversarial system.<sup>4</sup> But recent developments have shown that the battle over the future direction of Italian criminal procedure is not over. Unable to trump the Constitutional Court's decisions because they were based on the Italian Constitution, the Italian Parliament went to the source in 1999 and changed the Italian Constitution to mandate an adversarial trial system by strengthening the rights of defendants, especially the rights that guarantee defendants the right to confront and cross-examine witnesses against them. Once that constitutional change was in place, Parliament in 2001 changed the Code of Criminal Procedure to reflect the new constitutional rights of defendants.

This Article is intended to bring the U.S. legal community up to date on the attempt in Italy to put in place a more accusatorial trial system. The Article is divided into three sections. Section I describes the central provisions of the Code of Criminal Procedure that was adopted in 1988. It shows that a close look at the Italian system reveals that it was never intended to be an exact model of either the U.S. or English trial systems, because it always contained central features that are found in civil law systems on the continent. Rather, the changes in the 1988 Code of Criminal Procedure were only intended to adopt an adversarial system to the extent that power over the control of the criminal trial was to be shifted away from the trial judges and placed squarely on the shoulders of the public prosecutors<sup>5</sup> and the defense lawyers, who would have the primary responsibility for presenting evidence and for examining (and cross-examining) witnesses. Section I also discusses one of the main changes in the Italian system under the Code—the introduction of a form of plea bargaining whereby the public prosecutor and the defense attorney were permitted to seek a reduced sentence for a defendant in exchange for the avoidance of trial.

Section II looks at the series of decisions that were handed down by the Constitutional Court in the 1990s that held unconstitutional basic tenets of the system of criminal procedure that had been put in place by

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4. See Elisabetta Grande, *Italian Criminal Justice: Borrowing and Resistance*, 48 AM. J. COMP. L. 227, 256 ("The strong Italian continental legal tradition . . . has rendered the Italian transplant of the American adversary system generally unsuccessful.").

5. Throughout this Article, the authors will translate the term *pubblico ministero* as public prosecutor. The authors would prefer to use a term other than "prosecutor" as a translation for *pubblico ministero*. The reason for this is that there are fundamental differences between the *pubblico ministero* in Italy and the typical prosecutor in the United States that make it inappropriate to interchange the two concepts. For one thing, the *pubblico ministero* in Italy is a member of the judiciary, not a member of the executive branch. The important differences between the public prosecutor in Italy and a prosecutor in the United States will be discussed in more detail later in this Article. See *infra* pp. 445–447.

the Code. We explain those decisions as well as some of the pressures on the Constitutional Court at the time. The result of these decisions seemed to doom the adversary protections in the Code as control of criminal trials was shifted back from the parties to the trial judge. In addition, materials gathered during the pretrial investigation came to be much more easily admitted at trial than was intended under the original provisions of the Code.

Finally, Section III shows that the decisions of the Constitutional Court did not mark the demise of the adversarial system in Italy. Instead, pressure for an adversarial trial system took an unusual turn in Italy. Frustrated by the Constitutional Court's decisions in the early 1990s, the Italian Parliament decided to meet that challenge by changing the Constitution in a way that required adversary protections for defendants. This Section describes Article 111 of the Italian Constitution, amended in November of 1999. It will also explain the subsequent changes in the Code of Criminal Procedure that followed the amendments to the Constitution. Readers will see that there remains in Italy a strong desire for an adversarial trial system. Now, there is not only a Code that demands such a system but a Constitution that protects important adversarial values as well.

## I. ITALY'S ADVERSARIAL SYSTEM

### A. *Transferring Power from the Trial Judges to the Adversaries*

It is not always easy to categorize trial systems as "adversarial" as opposed to "inquisitorial" because there is no litmus test that can be applied to the features of a trial system to provide a definitive answer as to whether a trial system is adversarial or inquisitorial. Indeed, as this Article will emphasize throughout, the trial system in Italy has a mixture of features, some associated almost exclusively with inquisitorial trial systems and some that are found only in adversarial trial systems. For example, in trials on the continent, victims are often permitted to play an active role at trial even to the point of being represented by their own attorney who participates on a level not much different from the public prosecutor or the defense attorney.<sup>6</sup> Under the 1988 Code, Italy continues to allow those injured by a crime to participate at trial through counsel

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6. In Germany, for example, victims of sexual assault are permitted to participate at the criminal trial of the alleged defendant, even to the point that victims are afforded appointed counsel if they cannot afford to hire their own attorney. See generally William T. Pizzi & Walter Perron, *Crime Victims in German Courtrooms: A Comparative Perspective on American Problems*, 32 STAN. J. INT'L L. 37 (1996).

and to seek civil damages from the defendant for their injuries.<sup>7</sup> While almost all jurisdictions in the United States now allow victims to participate at sentencing hearings,<sup>8</sup> active participation by victims through counsel at the trial stage is not a part of the trial tradition in the United States. Nor is the participation of the victim allowed at trial in England.<sup>9</sup>

Another feature that is almost universal in continental trial systems is that the trial determines not just the defendant's guilt but also the sentence to be imposed if the defendant is found guilty.<sup>10</sup> This contrasts sharply with the United States and England where trials are limited to the determination of guilt with sentencing to take place at a separate proceeding with quite different evidentiary rules. In Italy, under the Code, trials continue to be concerned not only with guilt but also with imposing the appropriate sentence if the defendant is found guilty. The dual nature of the inquiry at continental trials has important strategic consequences for the defense because any evidence that might serve to mitigate the defendant's sentence will need to be presented at trial as there will be no later opportunity.

Another difference between trials under the Code in Italy and trials in the United States and England is the fact that the Code never intended to introduce a central feature of common law systems, namely, juries, to Italy. Lay people are involved in trials in Italy only for very serious crimes, such as cases of treason, murder, or kidnapping.<sup>11</sup> Even in those cases, the lay people (six) sit together with professional judges (two) to decide the issues on the model of so-called "mixed" panels of lay people and professional judges that one finds in France,<sup>12</sup>

7. Every criminal offense in Italy also constitutes a civil offense and, as such, there is a right to compensation for the injury to the person injured by the crime. CODICE PENALE [C.P.] art. 185. Article 74 of the Code of Criminal Procedure states that "the civil action to claim compensation or reparation provided for by Codice Penale art. 185 can be brought as part of the criminal trial by the person injured by the crime or by his/her general successors against the defendant or the person having a civil responsibility." Codice di procedura penale [C.P.P.] art. 74.

8. See Dina Hellerstein, *The Victim Impact Statement: Reform or Reprisal*, 27 AM. CRIM. L. REV. 391, 399 (1989) (listing the 49 states that permit victim impact statements at sentencing).

9. See A.T.H. Smith, *England and Wales*, in CRIMINAL PROCEDURE SYSTEMS IN THE EUROPEAN COMMUNITY 73, 81 (Christine Van Den Wyngaert ed., 1993) [hereinafter EUROPEAN CRIMINAL PROCEDURE SYSTEMS].

10. See JOHN H. LANGBEIN, *COMPARATIVE CRIMINAL PROCEDURE: GERMANY* 38, 71-72 (1977).

11. In Italy, the presence of lay people beside the judge is provided only in the Court of Assize and in the Court of Appeal of Assize. The Court of Assize has jurisdiction for crimes punishable by a life sentence or by imprisonment in excess of 24 years. C.P.P. art. 5. In addition to crimes carrying such severe punishments, the Court of Assize has jurisdiction over certain specified crimes, such as treason against the State. *Id.*

12. Sometimes European countries use the term "jury" to describe, what is in reality, a mixed panel of professional judges and lay people who deliberate together. France is such an

Germany,<sup>13</sup> and other continental countries. But the vast majority of criminal trials in Italy take place before professional judges only with no lay participation.<sup>14</sup>

### 1. Limiting the Admissibility of the Materials in the Dossier at Trial

But even though there are many aspects of the Italian trial system that remain true to Italy's civil law heritage, there were three interrelated reforms in the Code evincing Italy's attempt to introduce an adversary trial system. The first reform had to do with limiting the influence of the materials gathered during the pretrial investigation on the trial. In continental trial systems, all the materials gathered by the police and the parties during the investigation of the crime are put into an official file or "dossier" that plays a very important role at trial. Typically, the dossier will contain all the police reports, witness statements, documents relating to the crime, physical evidence, experts' reports, and other materials gathered during the investigation.

The dossier has great importance at the trial and, in some continental countries, such as the Netherlands, the trial usually consists of a discussion of the materials in the dossier in an attempt to determine the issue of guilt and the appropriate punishment.<sup>15</sup> But even in countries where the power of the dossier is more limited at trial, for example in Germany, where witnesses have to be called even though there are statements of those witnesses in the dossier, the presiding judge will have studied the dossier and will be very familiar with its contents.<sup>16</sup> One reason for the extensive use of the dossier relates to another feature of the civil law tradition, namely, that the presiding judge at trial has the responsibility for calling witnesses at trial and for the initial examination

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example. For a lively account of a murder trial in France in front of a "jury" in which professional judges sat with lay people, see Renee Lettow Lerner, *The Intersection of Two Systems: An American on Trial for an American Murder in the French Cour D'Assises*, 2001 U. ILL. L. REV. 791.

13. See Pizzi & Perron, *supra* note 6, at 43 n.25.

14. Trials before professional judges are either trials before a single judge or before a panel of three judges with one of the three judges referred to as the President of the court. See Piermaria Corso, *Italy*, in *EUROPEAN CRIMINAL PROCEDURE SYSTEMS*, *supra* note 9, at 223, 227-28. Originally, trials before a single judge were limited to offenses punishable by a sentence of up to four years in prison. *Id.* But Public Law n. 479 passed on December 16, 1999 changed the law to permit any offenses punishable by up to ten years in prison as well as all drug offenses to be tried in front of a single judge. Law n. 479 of Dec. 16, 1999, Racc. Uff. 1999, XIII, 6496, Lex. 1999, I, 4344. This means that most criminal trials will take place before a single trial judge.

15. See A.H.J. Swart, *The Netherlands*, in *EUROPEAN CRIMINAL PROCEDURE SYSTEMS*, *supra* note 9, at 279, 298.

16. See LANGBEIN, *supra* note 10, at 62.



of those witnesses at trial. For this reason, the presiding judge, not unlike a prosecutor in the United States, has to be thoroughly familiar with the materials gathered during the pretrial investigation.

The Italian Code attempted to limit the influence of the dossier at trial by creating a trial system that demanded the production anew of all the relevant evidence against the defendant.<sup>17</sup> Prior to the Code of 1988, the trial had been conceived of more as a ratification of what had been done and what evidence had been assembled during the pretrial investigation. But, after 1988, the trial became the heart of the system and the two contending parties were to produce the evidence and test the evidence at trial. To make that change, the trial judges were denied access to most of the materials gathered during the pretrial investigatory phase. This limitation on the trial judge's access to the dossier leads to the second part of the reform in the 1988 Code, namely the shift in responsibility for the production of evidence away from the trial judges to the parties.

## 2. Shifting Responsibility for the Production of Evidence to the Parties at Trial

In continental trial systems, the responsibility for controlling the conduct of the trial is placed on the trial judge who plays a very active role at trial. The trial judge or the presiding judge (when there is more than one professional judge, which is often the case)<sup>18</sup> decides what witnesses should be called at trial and undertakes the initial questioning of each witness. The public prosecutor, the defense attorney, and the victim's attorney (if the jurisdiction permits victims to participate) play a supplemental role in the conduct of the trial. They may suggest or request that the judge call additional witnesses and they may ask questions of witnesses after the judge or judges have finished questioning the witnesses. But in an inquisitorial system, the trial judge is really the person in control of the trial.

Italy wanted to change its system to ensure that the trial judge would come to the trial without extensive exposure to the dossier. This was accomplished by restricting the information that is routinely to be made available to the trial judge. Instead of simply making the entire dossier available to the trial judge, the Code sharply limited the material in the dossier that is given to the trial judge automatically.<sup>19</sup> If a party wishes

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17. See generally Delfino Siracusano, *Diritto di difesa e formazione della prova nella fase dibattimentale* [Right of Defense and Formation of the Evidence in the Trial], 29 CASSAZIONE PENALE 1591 (1989).

18. See LANGBEIN, *supra* note 10, at 61–62.

19. Article 431 of the Code now provides three categories of documents that must be given to the trial judge: (1) the charging documents, (2) documents concerning any related

some additional evidence to be made available to the trial judge before trial, the Code provides for a hearing at which the issue will be argued before the preliminary hearing judge who will decide whether to give the requested information to the trial judge.<sup>20</sup>

But, obviously, even if the trial judge is no longer allowed to examine all the information gathered during the investigation, it is still possible that the judge might have learned a great deal about the case if the judge heard many pretrial motions during the investigatory stage of the case or if the judge presided at a preliminary hearing in the case. This, of course, is often the case in the United States where a judge will usually handle the pretrial motions in a case as well as the trial.

Italy solves the problem of the trial judge with previous knowledge about the case by requiring that the judge who presides at the criminal trial be a different judge from the judge who has supervised the investigatory stage of the case or the judge who has heard the preliminary hearing in the case.<sup>21</sup>

The fact that the Code intends that the trial judge be shielded from the great bulk of the information in the dossier makes it necessary that the burden of calling witnesses be shifted to the parties at trial, who will be familiar with all of the evidence, as intended by the Code. The Italian Code states that, first, the public prosecutor presents the evidence against the defendant and then the other parties (this would include the victim if there is a civil claim against the defendant) have the opportunity to put on any evidence they wish to present.<sup>22</sup> As is common in adversary trial systems, it is the party calling the witness who conducts the initial questioning of that witness—not the presiding judge—with the other party or parties entitled to cross-examine the witness after the direct testimony has been completed.<sup>23</sup> Judges may ask questions, just as a trial judge in

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civil claim against the defendant, and (3) documentary evidence that was gathered during the investigative stage that would not possible to present at trial (such as the deposition of a dying witness taken before trial who is now deceased). C.P.P. art. 431.

20. *Id.*

21. What Italy does is actually distinguish three phases of judging: a judge who handles the preliminary investigation of the case, a judge who handles the preliminary hearing and determines whether the case should proceed to trial, and the trial judge. Article 34 provides that neither the judge of the preliminary investigation nor the judge of the preliminary hearing can be the trial judge in the case. C.P.P. art. 34. In addition, the same provision provides that the judge who has handled the preliminary investigation in the matter cannot be the judge who hears the preliminary hearing. *Id.*

22. In particular, Article 190, entitled "Right to evidence," states that the parties have the right to supply the evidence and that the judge can exclude only unlawful evidence or evidence that is clearly unnecessary and irrelevant. C.P.P. art. 190.

23. Article 498 states that the direct examination of the witness is to be done by the party calling that witness and then the other party or parties can conduct their cross-examination. C.P.P. art. 498. When the cross examination is finished, the party who called the witness is permitted redirect examination of the witness.

the United States may ask questions at trial,<sup>24</sup> but the major responsibility for presenting and testing the evidence was clearly intended to be that of the public prosecutor and the defense attorney.

One of the main objectives of the 1988 Code was to ensure that a defendant had a chance to hear the evidence against him or her and to ensure that the defendant had a chance to confront that evidence and, if appropriate, present evidence that challenged the initial evidence offered by the public prosecutor. Put another way, the intent of the Code was to make clear that the only evidence against a defendant that can be considered is evidence that has been presented and tested at trial, not evidence that may have been assembled during the investigatory stage.<sup>25</sup> For a country with a civil law heritage, where it was long felt that defendants had trouble testing the evidence against them and offering their own, the Code presented a very different way of conceptualizing the nature of a criminal trial.

### *B. Permitting the Parties to "Plea Bargain" in Italy under the Code*

The goal of the 1988 Code was to create a trial system that was more fair and open, and one that the drafters felt was more consistent with the values of an open democratic society.<sup>26</sup> But there was another reason for changing the old trial system—a secondary reason, but still an important one nonetheless: the hope to gain some much needed efficiencies in the system. To understand the pressure on Italy for great efficiency, one only has to look at the long string of cases in which Italy's slow criminal justice system has been condemned by the European Court of Human Rights for the tremendous delays defendants have suffered before their cases went to trial.<sup>27</sup> In all of these cases, the European Court of Human

24. Article 506 states that, after the direct examination and the cross-examination, the judge (the president, also on request of the other judge-members), can ask questions. C.p.p. art. 506. Along the same lines, C.p.p. art. 507 states that at the end of the presentation of evidence by the parties, the judge, if it appears to be absolutely necessary, can ask for the production of additional evidence. *See infra* p. 447.

25. One of the core ideas of 1988 Code was to transform the trial from a review of evidence gathered earlier to an adversary trial in which the evidence had to be produced anew through witnesses at the trial so it could be tested. *See generally* Siracusano, *supra* note 17, at 1591.

26. *See* MARIO CHIAVARIO, LA RIFORMA DEL PROCESSO PENALE [THE REFORM OF THE CRIMINAL PROCESS] 24 (2nd ed. 1990); Piermaria Corso, *Italy*, in EUROPEAN CRIMINAL PROCEDURE SYSTEMS, *supra* note 9, at 226.

27. *See, e.g.*, Oliviero Mazza, *Osservatorio della corte europa dei diritti umani*, 7 DIRITTO PENALE E PROCESSO 777 (2001); Giuseppe di Federico, *The Crisis of the Justice System and the Referendum on the Judiciary*, in 3 ITALIAN POLITICS: A REVIEW 25, 26–27 (Robert Leonardi & Piergiorgio Corbetta eds., 1989); Oliviero Mazza, *Corte europea dei diritti umani*, 6 DIRITTO PENALE E PROCESSO 1538 (2001).

Rights found that Italy had violated Article 6, section 1 of the European Convention of Human Rights and Fundamental Freedoms which provides that anyone charged with a crime "is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."<sup>28</sup> This series of decisions condemning the Italian system was embarrassing and it put pressure on the drafters of the 1988 Code to try to allow for some expedited procedures short of a full trial.

The Code provides for several expedited procedures,<sup>29</sup> one of which is a limited form of plea bargaining. The section in the Italian Code that permits plea bargaining is entitled "applicazione della pena su richiesta delle parti" and it translates roughly as "the application of punishment upon the request of the parties."<sup>30</sup> But lawyers and judges in Italy often refer to this provision by using the Italian word for a bargain—*patteggiamento*. Under this provision, the public prosecutor and the defense attorney can agree on a sentence to be imposed and ask the judge to impose that sentence.

We refer to this Code provision as "a form of plea bargaining," because it has similarities to plea bargaining in the U.S. system, but it also has some significant dissimilarities. For example, the provision does not permit "charge bargaining," where the criminal charge is reduced as part of the bargain to gain a lower sentencing range for the defendant. In the United States, it is not unusual for an armed robbery to be reduced to robbery or for murder to be dropped down to manslaughter as part of the bargain. Such bargains are not permitted in the Italian form of plea bargaining.

Another significant difference between plea bargaining in Italy and the United States concerns the range of cases that qualify for plea bargaining. In the United States, there are usually no limits to the sorts of cases that can be plea bargained—even a serial rapist or someone charged with murder and facing a possible death sentence may agree to a bargain that will lessen the range of punishment.<sup>31</sup>

Italy originally restricted plea bargaining to minor cases. The original Code provision did this by providing that after the one-third

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28. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. VI, § 1, 213 U.N.T.S. 221, 224, Europ. T.S. No. 5, at 10 (entered into force Sept. 3, 1953) [hereinafter European Convention].

29. For a fuller discussion of the provisions in the Code for a resolution of a criminal matter short of trial, see generally William T. Pizzi & Luca Marafioti, *The New Italian Code of Criminal Procedure: The Difficulties of Building an Adversarial Trial System on a Civil Law Foundation*, 17 YALE J. INT'L L. 1, 15–27 (1992).

30. See C.P.P. arts. 444–448.

31. See, e.g., *Brady v. United States*, 397 U.S. 742 (1970).

reduction, the final sentence could not be more than two years.<sup>32</sup> This meant that anyone charged with a crime that might involve a sentence in excess of three years could not enter into a plea bargain. This initial limitation should probably best be seen as evidence of Italy's nervousness about the general idea of plea bargaining, which will be explained more fully below.

But the range of cases eligible for a possible plea bargain was broadened in 2003 when the limitation on the final sentence after the one-third reduction was raised to five years.<sup>33</sup> This still limits plea bargaining—no crime carrying a sentence of more than 7.5 years can be plea bargained and there are also some specific serious crimes, such as organized crime cases, that the new Code provision states cannot be plea bargained.<sup>34</sup> But when it is considered that generally sentences in Italy and other continental countries are more lenient than those in the United States, plea bargaining will be available to many more defendants in Italy after this reform.

One might wonder, given Italy's serious problems with trial delays, why Italy has proceeded only incrementally to allow a form of plea bargaining and why even today this provision will not allow plea bargaining in some cases which will require extremely lengthy and costly trials. To understand Italy's nervousness about plea bargaining, one has to understand how much the concept of "bargained justice" conflicts with Italy's civil law heritage. European systems of criminal justice are deeply committed to the proposition that similar defendants, meaning those who have committed the same crime and who have the same sentencing background, should be treated similarly under the law. Some may say that the United States is also committed to equal justice under the law, but the commitment is in actuality not nearly as strong in the United States. In the United States, plea bargaining permits defendants, often even co-defendants, who have committed the same crime to receive very different sentences. For example, a defendant who has robbed a store and against whom the evidence is strong may receive a longer sentence

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32. 1988 C.p.p. art. 444 originally provided that the defendant and the public prosecutor may agree on a reduced punishment of up to one-third and they may ask the judge to impose it, but the section provided the final negotiated sentence could not be more than two years. About the juridical interpretation of the reduction of the punishment, see Pizzi & Marafioti, *supra* note 29, at 22.

33. C.P.P. art. 444. With the new rule even crimes like attempted murder, sexual assault and aggravated robbery can be plea bargained as long as there are extenuating circumstances that would lead a judge to impose a sentence not greater than 7.5 years.

34. C.p.p. art. 444 states that plea bargaining is not possible for crimes connected to organized crime, kidnapping to extortion, trafficking of drugs, and crimes of terrorism. The provision also states that plea bargaining is not permitted for defendants who are recidivists if the final sentence would exceed two year. *Id.*

in a plea bargain than a defendant who perhaps drove the getaway car and against whom the evidence is much weaker. Compromises of this nature are commonplace in the U.S. system.<sup>35</sup>

In the United States, it is even possible that two defendants may end up convicted of different crimes based on the same evidence because the U.S. criminal justice system often permits "charge bargaining" as well as "sentence bargaining." One defendant may take a plea to a lesser charge and the other may go to trial and be convicted of the greater charge.

The U.S. criminal justice system accepts these sorts of inconsistencies in the way similar defendants are treated. Perhaps this is in part because the system relies heavily on jury trials and juries add an element of uncertainty to trials. But whatever the source of the U.S. openness to plea bargaining, for continental countries the idea that similarly situated offenders should receive quite different sentences is deeply problematic.

A related problem in the two systems is the different way in which charging discretion is viewed. In the United States, prosecutors have broad charging discretion and may freely select those to be prosecuted and those who will not be prosecuted with the important caveat that charging someone solely on the basis of race, gender, or other suspect classification would violate equal protection. But other than that important limitation, prosecutors have broad charging authority.<sup>36</sup>

European countries take a very different view, in large part because of the strong belief that defendants who have committed the same crimes should be treated in the same way. For this reason, Italy and many other European countries have a doctrine of mandatory prosecution whereby the prosecuting authority must bring a criminal complaint against someone if they have reason to believe that person has committed a crime.<sup>37</sup> This, of course, does not mean that the case must proceed to the filing of formal charges and then to trial, but rather that a file has to be opened up and the matter investigated if a police officer or a member of the public gives evidence of a crime to the public prosecutor. In short, a formal investigation has to begin in the matter. If the public prosecutor later finds insufficient evidence to pursue the matter, the public prosecutor then

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35. See generally Welsh White, *A Proposal for Reform of the Plea Bargaining Process*, 119 U. PA. L. REV. 439 (1971) (describing the way plea bargaining works in New York City and Philadelphia).

36. See *United States v. Armstrong*, 517 U.S. 456, 464 (1996) ("[S]o long as the prosecutor has probable cause to believe the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.") (quoting *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978)).

37. For an excellent discussion of what mandatory prosecution means and how it works in civil law systems, see John H. Langbein, *Controlling Prosecutorial Discretion in Germany*, 41 U. CHI. L. REV. 439 (1974).

would seek judicial approval for the decision not to file a formal charge.<sup>38</sup>

In Italy, so important is the heritage of mandatory prosecution that there is a provision in the Italian Constitution that enshrines the principle of mandatory prosecution.<sup>39</sup> Of course, in Italy and in other continental countries, mandatory prosecution is more theory than reality these days and there have been occasional debates to amend the constitutional provision of mandatory prosecution.<sup>40</sup> In general, the Italian public does not see the principle of mandatory prosecution as a harsh provision threatening all who violate the law with full prosecution. (As just explained, if there is insufficient evidence to support charges or if the initial evidence presented has been found to be inaccurate, the matter will be quickly dismissed.) Rather, mandatory prosecution is seen as protection of citizens because it ensures equal treatment of offenders. Without this provision, it is felt that public prosecutors might be susceptible to political pressure to prosecute some offenders and not to prosecute those who are politically well connected.<sup>41</sup>

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38. One way to understand mandatory prosecution is to see it as requiring the filing of charges when there is a sufficient factual basis to support the charges. A public prosecutor would violate the principle of mandatory prosecution if he or she chose to prosecute some offenders but not others. See LANGBEIN, *supra* note 10, at 87–90.

39. Article 112 of the Italian Constitution (COST.) is a bit difficult to translate. It could be translated literally as “The public prosecutor is required to exercise mandatory penal action,” but it would be more correct with the intent of this Article to translate the provision as follows: “The public prosecutor is required to file a criminal complaint if he or she has reason to believe that a crime has been committed.”

40. See Giuseppe Di Federico, *Obbligatorietà dell'azione penale, coordinamento delle attività del pubblico ministero e loro rispondenza alle aspettative della comunità* [Mandatory Prosecution, Coordination of the Public Prosecutor's Activities and Their Correspondence to the Expectations of the Community], in ALFREDO GAITO, ACCUSA PENALE E RUOLO DEL PUBBLICO MINISTERO, [CRIMINAL CHARGE AND THE ROLE OF THE PUBLIC PROSECUTOR] 175 (1991) [hereinafter CRIMINAL CHARGE]; Alfredo Gaito, *Natura, caratteristiche e funzioni del pubblico ministero*. [Nature, Characteristics and Functions of the Public Prosecutor], in CRIMINAL CHARGE, *supra*, at 23; Vladimiro Zagrebelsky, *La riforma dell'ordinamento giudiziario in Commissione bicamerale*, [The reform of the judicial system in the Bicameral Commission], Foro It. 1997, V, 245.

41. Art. 112 of the Italian Constitution that provides for mandatory prosecution clause was adopted immediately in 1948 and it was mainly a political reaction to the performance of public prosecutors in the fascist period. During the fascist period, the public prosecutor had been considered a tool in the hands of the fascist government and it was really the government which decided who was to be charged with a crime and what the charges should be. As a result of this history, the Constitution of 1948 decided to protect citizens against such arbitrary power by being careful to limit political interference with the charging decisions of the public prosecutor. See Vladimiro Zagrebelsky, *Indipendenza del pubblico ministero e obbligatorietà dell'azione penale*, in PUBBLICO MINISTERO E ACCUSA PENALE: PROBLEMI E PROSPETTIVE DI RIFORMA, [PUBLIC PROSECUTOR AND PENAL CHARGE: PROBLEMS AND PERSPECTIVES OF REFORM] 3 (Giovanni Conso ed., 1979).

The concept of plea bargaining clashes with the values protected by the doctrine of mandatory prosecution because plea bargaining puts considerable control over the disposition of a case in the hands of the prosecutor. To understand just how much discretion there can be in the hands of the prosecutor in the United States, one need only recall the landmark Supreme Court case on plea bargaining, *Bordenkircher v. Hayes*.<sup>42</sup> In *Hayes*, the defendant was originally charged with uttering a forged instrument and faced up to ten years in prison if found guilty. The prosecutor offered to allow Hayes to plead guilty with a recommendation of a five year sentence, but, at the same time, warned Hayes that if he insisted on trial, the prosecutor would indict him as a habitual offender because of Hayes' past record and, if found guilty of that additional charge, Hayes' would receive a mandatory life sentence.<sup>43</sup>

For the continental mind, *Hayes* is a nightmare. First, the prosecutor is basically offering to see that Hayes receives only five years if he pleads guilty. Then the prosecutor is turning around and deciding to visit upon Hayes a mandatory life sentence if he refuses the plea bargain.

Rather than vest this sort of power in the prosecuting authority, continental systems prefer that any such discretion be limited and subject to judicial control. In part, this reflects the fact that public prosecutors in Italy and their counterparts in other continental systems are members of the judiciary,<sup>44</sup> not members of the executive branch and so different controls on their power are appropriate. It also reflects the strong concern that similar defendants be treated the same way. Too much discretion threatens that principle.

In the case of plea bargaining in Italy, the Code provision on plea bargaining contains important safeguards for defendants against the arbitrary refusal of a public prosecutor to allow the defendant to avoid trial and receive the discounted sentence that is possible under the Code. First, a public prosecutor who refuses a defendant's request for a reduced sentence under the plea bargaining provision must explain and justify his or her reason for refusing the bargain sought by the defendant.<sup>45</sup> A second protection for defendants against an arbitrary refusal to agree to a plea bargain is the fact that even if the public prosecutor refuses to agree to the reduced sentence, the defendant may make application to the

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42. 434 U.S. 357 (1978).

43. *Id.*

44. The nature of the public prosecutor in Italy is discussed *infra* pp. 445-447.

45. C.P.P. art. 446, § 6. The Code does not state the specific reasons that would permit a prosecutor to reject a proposed reduction in sentence through a plea bargain, but the reasons can be inferred from C.p.p. Article 444. Among those reasons would be situations where (1) the public prosecutor does not think the reduced sentence is adequate punishment for the crime or (2) the public prosecutor does not believe that the defendant's description of the crime is correct. See C.P.P. art. 444.



judge at the start of the trial for the discounted sentence and, if the judge thinks it is appropriate, the judge may agree to sentence the defendant according to the plea bargaining provision and give the defendant the reduced sentence.<sup>46</sup> And, thirdly, even after a full trial, if the trial judge comes to the conclusion that the refusal of the public prosecutor to enter into a plea bargain before trial was in error, the judge in sentencing may give the defendant the reduction in sentence allowed under the plea bargaining provision.<sup>47</sup>

This allows all defendants who wish to take advantage of the Italian plea bargaining statute and who should be allowed a reduced sentence under the provision to gain the benefits of that provision even if the public prosecutor has refused to agree to such a bargain prior to trial. In the United States, there is no such law—if a prosecutor refuses a plea bargain sought by the defense, that is a matter solely for the prosecutor. A judge has no authority to accept such a bargain over the prosecutor's rejection of the bargain.

Another aspect of Italy's hesitancy to fully embrace plea bargaining to the extent it exists in the United States has to do with the worry that plea bargaining threatens the independence of judges in a criminal justice system. In Italy, under the Italian Constitution, judges are guaranteed independence<sup>48</sup> and, in the context of plea bargaining, the power of judges to decide the appropriate punishment, free of other influences, may seem to be compromised if the judge feels that he or she must automatically ratify the agreement reached by the parties. To protect the independence of the judges, the plea bargaining provision in the Code requires that before the judge accepts a plea bargain, the judge must examine the evidence and see if it is possible, despite the defense agreement to the bargain, to enter a judgment of acquittal for the defendant.<sup>49</sup> If so, the judge must do so. If there is no possibility of acquittal, the judge must make sure that the crime fits the facts and that the punishment asked by the parties is adequate and fair for the offense.<sup>50</sup> And,

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46. C.P.P. art. 448.

47. C.P.P. art. 448, sec. 1, states that after the refusal of the public prosecutor to agree to a plea bargain, the defendant can renew the request for a reduced punishment in front of the judge at the start of the trial. The judge can agree to the request in which case there will be no trial. But even if there is a trial, at the end of the trial (or even when the case is on appeal), the judge may impose a discounted sentence on the defendant if the judge comes to the conclusion that the public prosecutor's initial refusal to agree to a plea bargain before trial was unjustified. *Id.* § 1.

48. COST. art. 101, § 2.

49. C.P.P. art. 444, § 2.

50. *Id.* This section was the result of a constitutional challenge to the plea bargaining provisions in the Code. The Constitutional Court upheld the general provision on plea bargaining, but it struck down the predecessor provision to C.p.p. art. 444, sec. 2, which it felt was not adequate to make sure that the judge made certain that the punishment was adequate to the

finally, the plea bargaining provision allows the judge to examine the defendant personally to make sure that the defendant has agreed to the disposition.<sup>51</sup> If, after all of this, the judge is satisfied that the sentence proposed is appropriate, the judge then imposes that sentence.

This may seem not terribly different from plea bargaining in the United States, where judges are permitted to review the plea bargain and have the power to reject the bargain if they feel it is not in the public interest. But the greater degree to which judges in Italy are expected to scrutinize the agreement to see if it is adequate is brought out by one very big difference between plea bargaining in the two systems: in Italy, there is no formal entry of a guilty plea in the process. The drafters of the Italian Code were worried that pressure on a defendant to enter a plea of guilty might undermine the provision of the Italian Constitution that guarantees that defendants are presumed innocent until proven guilty.<sup>52</sup> Instead, plea bargaining in Italy is supposed to function not as a request to the judge to "accept" a guilty plea as in the U.S. model, but rather as a request to the judge to evaluate the case from several different angles and determine if the defendant is indeed guilty and if the reduced sentence being sought is an appropriate way to avoid a trial and yet permit an adequate sentence. When viewed in this way, a formal entry of a guilty plea was thought unnecessary.<sup>53</sup>

Plea bargaining would be a challenge to any country with a civil law heritage. It is not surprising that Italy has only approached the topic gradually and that the Italian system is trying hard to soften the challenge that plea bargaining makes to the principle that similar defendants should be treated similarly as well as to the independent authority of the trial judge to see that the sentence of the defendant is adequate for the crime in question. To date, Italian plea bargaining has not sharply reduced the problem of trial backlogs because it is estimated that

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gravity of the offense, including the injuries caused by the crime. Corte cost., 2 July 1990, n. 313, Gazz. Uff. 1<sup>a</sup> serie speciale, 4 July 1990, n. 27, 35 Giur. Cost. 1981. The section was then modified to require the judge to independently determine that the punishment imposed was adequate taking into account the purposes of punishment and the circumstances of the crime. See Law n. 479 of Dec. 16, 1999, Racc. Uff. 1999, XIII, 6496, Lex. 1999, I, 4344, art. 32.

Despite the fact that the plea bargaining provision of the Code has been upheld as constitutional, there remain critics of those provisions who argue that the very fact that the sentence imposed by the judge is conditioned on the agreement of the parties violates the independence of the judiciary in the Constitution. See, e.g., Gilberto Lozzi, *La legittimità costituzionale del c.d. patteggiamento* [The constitutionality of the "patteggiamento"], 33 RIVISTA ITALIANA DI DIRITTO E PROCEDURA PENALE 1600, 1608 (1990).

51. C.P.P. art. 446, § 5.

52. COST. art. 27, § 2.

53. See Pizzi & Marafioti, *supra* note 29, at 23.

85 percent of all criminal cases go to trial.<sup>54</sup> This, of course, contrasts sharply with the U.S. criminal justice system where the plea bargaining rate is over 90 percent in most jurisdictions.<sup>55</sup> One factor that encourages defendants to avoid resolving their cases through a plea bargain is the tremendous backlog of cases awaiting trial in Italy. With such a backlog of cases, many defendants are likely to see it to their advantage to wait for a trial that may never take place or that may not take place for several years.

### *C. The Difficulty of Building an Adversarial Trial System on a Civil Law Foundation*

It needs to be emphasized that the task Italy set for itself was daunting in that it was attempting to make radical changes in its trial system while building on a foundation that was heavily civil law. We have already mentioned two features often found in the civil law tradition that were not changed in the 1988 Code: 1) the trial determined both guilt and sentence, and 2) victims are allowed to continue to play a role at trial independent of the public prosecutor. But there are other aspects of the prior procedures that one almost always finds in continental trial system and rarely in adversarial trial system. These aspects were carried over from the former trial system and may seem strange to those who have been trained only in the U.S. system.

The first concerns the figure of the public prosecutor. The Italian term for the person who presents the prosecution's case in Italy is *pubblico ministero* which roughly translates as minister for the public. For shorthand in this Article, we use the term "public prosecutor" to indicate the prosecutorial authority. But Italian has no specific word for "prosecutor" and that is because the *pubblico ministero* is conceptually different from a U.S. prosecutor. In continental systems, the public prosecutor is a

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54. Marco Fabri, *Theory Versus Practice of Italian Criminal Justice Reform*, 77 JUDICATURE 211, 213 n. 4 (1994).

55. See James A. Cramer et al., *The Judicial Role in Plea-Bargaining*, in PLEA BARGAINING 139 (William F. McDonald & James A. Cramer eds., 1980). This 90% figure is the figure typically put forward to show the importance of plea bargaining in our criminal justice system. But today it probably understates the role of plea bargaining in U.S. courts. To put some perspective on the importance of plea bargaining, consider the number of felony cases filed in Colorado, a state with a strong criminal justice system, in the year 2000, compared to the number of criminal trials that took place that same year. In 2000, there were 35,770 criminal cases filed in the district courts of the state, but that same year the district courts heard less than 1000 trials in criminal cases (768 jury trials and 58 bench trials). Colorado Judicial Branch Annual Statistical Reports, at <http://www.courts.state.co.us/panda/statrep/ar2000/table15.pdf> and <http://www.courts.state.co.us/panda/statrep/ar2000/table23.pdf> (last visited Nov. 12, 2003).

judicial figure and part of the same judicial system that includes trial judges and appellate judges.

This is quite different from the United States. U.S. prosecutors are members of the executive branch of government and usually elected. In European systems, like the Italian system, any member of the judiciary may apply for the position of public prosecutor if there is a vacancy. This means that there is movement from the position of judge to the position of public prosecutor and vice versa, as vacancies occur in different positions in different cities.

In Italy, members of the judiciary are selected based on their prior training and marks on a national qualifying examination. The judiciary includes prosecutors, judges who supervise the investigatory stage of criminal cases, trial judges, and appellate judges. They all belong to the same professional association, the *magistratura*, and move within the judicial system from position to position with few restrictions and the same economic remuneration.<sup>56</sup>

That the public prosecutor may be seen as having a judicial function is not as different from the United States as might appear at first glance. The U.S. system places ethical restrictions that demand that prosecutors place a high value on the public interest in making their decisions to the extent that the prosecutor should strive to achieve justice rather than simply convict. For example, the Comment to Rule 3.8 of the Model Rules of Professional Conduct states that a prosecutor "has the responsibility of a *minister of justice* and not simply that of an advocate."<sup>57</sup> Although prosecutors are usually elected public officials, they are directed by the ABA Standards for the Prosecution Function to "give no weight to the . . . political advantages or disadvantages which might be involved" when making the decision to charge someone with a crime.<sup>58</sup> Also the U.S. system places ethical and constitutional obligations on prosecutors that are different from those that are placed on other advocates. For example, a prosecutor must, as an ethical matter, disclose possibly exculpatory material to the defense even if such material has not been requested by the defense.<sup>59</sup>

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56. See Pizzi & Marafioti, *supra* note 29, at 23; Grande, *supra* note 4, at 236.

57. MODEL RULES OF PROF'L CONDUCT R. 3.8 cmt. 1 (2001) (emphasis added) [hereinafter MODEL RULES].

58. ABA STANDARDS FOR CRIMINAL JUSTICE, Prosecution Function and Defense Function, std. 3-3.9(d) (1993).

59. MODEL RULES, *supra* note 57, R. 3.8(d). This is also a constitutional obligation. See *Brady v. Maryland*, 373 U.S. 83, 86-88 (1963).

This compromise on the adversary model contrasts considerably with the role that public prosecutors would be expected to play on the continent: if there was admissible exculpatory evidence that had been overlooked by the trial judge, the public prosecutor would be expected to bring that evidence to the attention of the court, and not just turn it over to the defense at-

But because the public prosecutor in Italy is actually a member of the judiciary, this presents problems due to the close professional relationship that exists between public prosecutors and judges because they are members of the same professional organization.

The United States attempts to avoid this close relationship by putting the prosecutor in a different branch of government from the judiciary and through election of the prosecutors. But it would be difficult to convince continental countries, including Italy, that there are advantages to placing the public prosecutor under the sorts of political pressures that exist on prosecutors in the United States. It is part of the civil law tradition that those who occupy a position roughly analogous to a U.S. prosecutor are judicial figures with the obligation to see that the results of a prosecution are fair and just.

## II. THE FATE OF THE 1988 CODE IN THE CONSTITUTIONAL COURT IN THE 1990S

### A. *The Clash of Values in the 1990s*

It was not surprising that the Code ran into difficulties in the 1990s when the adversarial aspects of the Code clashed with Italy's civil law tradition. An introduction to the problems can be nicely highlighted by looking at a provision in the Italian Code that is very similar to a provision in the rules of evidence in the United States. The Italian provision of the Code is Article 507 and it permits the trial judge to call witnesses at trial.<sup>60</sup> It is substantially similar to Rule 614 of the Federal Rules of Evidence according to which a judge at a trial may sua sponte call witnesses and may also question witnesses at trial.<sup>61</sup> Rule 614 is not problematic in the United States because judges sparingly use the power to call a witness and because appellate courts have always strongly cautioned trial judges about asking too many questions at trial lest they appear to the jury to have abandoned their neutral role and to have endorsed one side of the case.<sup>62</sup>

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torney. John Langbein, in a famous book on criminal procedure in Germany, notes that the obligation of the public prosecutor to see that justice is done would extend even to the public prosecutor's appealing on behalf of a defendant if the public prosecutor thought that the judge's sentence at trial had been too severe. *See* LANGBEIN, *supra* note 10, at 90.

60. Article 507 states that at the end of the presentation of evidence by the parties, the judge, on his or her own initiative, can call for the presentation of additional evidence if it appears absolutely necessary. C.P.P. art 507.

61. FED. R. EVID. 614.

62. *See generally* MCCORMICK ON EVIDENCE § 8, 26-31 (John W. Strong ed., 5th ed. 1999).

But in Italy this provision became problematic in the years immediately following the adoption of the Code. In 1992, the Corte di cassazione, an appellate court that reviews legal issues,<sup>63</sup> ruled that the fact that the Code places the power of calling witnesses primarily in the hands of the parties does not preclude the trial judge from introducing other evidence that the judge believes is necessary for a just decision in the case.<sup>64</sup> The following year, the Constitutional Court handed down a decision that reached the same conclusion.<sup>65</sup> Both decisions emphasized that while the power of the parties to introduce evidence at trial is important, this power cannot preclude a judge from seeking additional evidence that the judge believes is necessary for a proper decision of the case.

These are controversial decisions in Italy<sup>66</sup> because the active seeking of the truth by the trial judge that these decisions permit seems inconsistent with an adversarial model where the judge plays a relatively passive role with the burden on the parties to produce evidence. But there are reasons why the Constitutional Court might have felt pressure to vest in the trial judge a broader power to call witnesses than would courts in the United States. First, there is the civil law tradition whereby the trial judge has always felt responsible for the accuracy of the trial verdict. With a strong civil law heritage, it is harder for judges in Italy to accept a more limited trial role. Secondly, the Code marked a rather abrupt break with the past, demanding a shift from a trial controlled almost completely by the judge to one controlled by the parties, and it was not always easy for each person in the system to make that adjustment. For example, if the public prosecutor negligently failed to call a witness who was perceived by the trial judge to be necessary to establish an ele-

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63. See Piermaria Corso, *Italy*, in *EUROPEAN CRIMINAL PROCEDURE SYSTEMS*, *supra* note 9, at 223, 256–57. Professor Corso translates the title of the Corte di cassazione as “Supreme Court” as it functions rather like the final appellate court, but it hears only issues involving the legality of what has taken place. *Id.* at 256.

64. Cass., sez. un., 6 nov. 1992, Foro It. 1993, II, 65.

65. Corte cost., 26 mar. 1993, n. 111, Gazz. Uff. 1<sup>a</sup> serie speciale, 31 mar. 1993, n. 14, Foro It. 1993, I, 1356.

66. See generally Paolo Ferrua, *I poteri probatori del giudice dibattimentale: ragionevolezza delle Sezioni unite e dogmatismo della Corte costituzionale* [*The Powers About Evidence of the Trial Judge: Reasonableness of the Plenary Session of the Supreme Court and Dogmatism of the Constitutional Court*], 37 *RIVISTA ITALIANA DI DIRITTO E PROCEDURA PENALE* 1065 (1994); Luca Marafioti, *L'art. 507 c.p.p. al vaglio delle Sezioni Unite: un addio al processo accusatorio e all'imparzialità del giudice dibattimentale* [*Art. 507 C.p.p. Submitted to Verification of the Supreme Court's Plenary Session: A Farewell to the Adversarial System and to the Impartiality of the Trial Judge*], 36 *RIVISTA ITALIANA DI DIRITTO E PROCEDURA PENALE* 829 (1993); Giorgio Spangher, *L'art. 507 c.p.p. davanti alla Corte costituzionale: ulteriore momento nella definizione del “sistema accusatorio” compatibile con la Costituzione* [*C.p.p. Art. 507 before the Constitutional Court: Further Movement to Define an “Adversarial System” Compatible with the Constitution*], 38 *GIUR. COST.* 919 (1993).

ment of the crime, the trial judge would feel compelled to call that witness rather than allow the case to collapse due to the prosecutor's negligence. A trial judge in the United States would probably be more likely to allow the prosecutor's case to collapse under such circumstances.

Thirdly, the pressure on the judge to call witnesses is especially strong when the judge believes that evidence that might support a defense has not been presented by the defense. This is a problem in any trial system that is concerned with justice. In the United States, for example, one often reads of death penalty cases in which the appointed defense attorney was very inexperienced or in which the defense attorney received so little funding that fully investigating the case and mounting a credible defense became nearly impossible.<sup>67</sup> Italy does not have a death penalty, but a trial judge in Italy has always been viewed as having a paternalistic obligation to protect the defendant. Thus, a judge may feel compelled, if the defense lawyer is not skilled, to call a witness who should have been called by the defense lawyer or to assist in the examination of a witness. Indeed there is a long line of cases in Italy, even under the 1988 Code, stressing the need for the trial judge to intervene if necessary to assure that the defendant's trial is fair and that any verdict at trial is accurate.<sup>68</sup>

The difficulties that arose in Italy over the appropriateness of a judge calling witnesses is symptomatic of the difficulties in building an adversarial trial system on institutions that are civil law by tradition.

## *B. The Battles Between the Constitutional Court and the Parliament*

### 1. Judgment n. 24/1992

In the 1990s, the 1988 Code led to a series of decisions that set the Constitutional Court against the Parliament over the new trial system. One of the aspects to this confrontation between the judicial and legislative branch that makes it especially interesting are the sides the two institutions took in the battle over the new adversarial system. When

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67. See Stephen B. Bright, *Gideon's Reality: After Four Decades, Where Are We?, in* CRIMINAL JUSTICE, Summer 2003, at 5 (describing many cases where innocent defendants were convicted and only exonerated after serving years in prison because their trial lawyers were inadequate in representing them); see also Stephen B. Bright, *Death in Texas*, THE CHAMPION, July 1999, at 16 (describing the woeful inadequacy of the fees that are allowed defense attorneys in investigating and defending death penalty cases in Texas often with disastrous results for their clients).

68. See generally Trib. di Milano, sez. II penale, ordinanza 8 nov. 2002, n. 37456, in 10 GUIDA AL DIRITTO 77 (2003); Cass., sez. III, 23 jan. 1997, n. 2542, Cass. Pen. 1998, 1130; Cass., sez. VI, 17 jan. 1994, n. 4616, Archivio della Nuova Proc. Pen. 1994, 522.

such confrontations occur in the United States, the Supreme Court has gone to great lengths to protect the rights of defendants even if there will be a cost in terms of the accuracy of trial verdict. Thus, for example, stationhouse confessions are not admissible unless the police have given the required *Miranda* warnings<sup>69</sup> and crucial physical evidence of a crime must be ruled inadmissible if the officers obtaining the evidence violated the defendant's fourth amendment rights.<sup>70</sup>

But in Italy, the Parliament has been trying to strengthen the individual rights of defendants, while the Constitutional Court has been weakening those rights through decisions that place a strong emphasis on the primacy of the search for truth at trial.

In 1992, there was a series of three decisions from the Constitutional Court that appeared to mark the end of Italy's attempt to introduce an adversarial trial system. Section III will show that it was not the end of the adversary system in Italy and that Parliament responded to these court decisions by taking steps to protect better adversary protections from constitutional attack. But in the 1990s, it appeared to many that Italy's experiment with an adversary system had ended as a result of the three decisions in 1992.<sup>71</sup>

The first decision is referred to as Constitutional Court, judgment n. 24/1992.<sup>72</sup> The Constitutional Court is not an appellate court sitting at the top of the judicial system in Italy the way the United States Supreme Court is in the United States. Rather than hearing appeals of particular cases involving particular parties, the Constitutional Court is best viewed as sitting aside from the normal court structure. It decides constitutional questions referred to the Court by others in the legal system, often trial or appellate judges who think that a certain statutory provision is constitutionally suspect.<sup>73</sup> Thus, it decides constitutional questions that are independent of the individual cases that may have caused the question to be raised to the court.

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69. *Miranda v. Arizona*, 384 U.S. 436 (1966).

70. *Mapp v. Ohio*, 367 U.S. 643 (1961).

71. *See, e.g.*, Grande, *supra* note 4, at 256.

72. The fact that the title of the judgment of the Court is simply the number of the judgment in a given year reflects differences in the way constitutional questions are decided in Italy compared to the United States. Corte cost., 31 jan. 1992, n. 24, Gazz. Uff. 1<sup>a</sup> serie speciale, 5 feb. 1992, n. 6, Foro It. 1992, I, 1052.

73. This raises another difference between the Italian legal system (and most other civil law systems) and the U.S. legal system: judges, other than those on the Constitutional Court, do not have the authority to declare a statute to be unconstitutional. Because the Constitutional Court is deciding a particular Constitutional legal question, perhaps put to it by several judges in different parts of the country, decisions of the Constitutional Court tend to be more abstract and less specifically fact-based.



In judgment n. 24/1992, the issue raised to the Court was whether the limitation in Article 195, section 4 of the Code was constitutional.<sup>74</sup> Article 195 of the 1988 Code provided that whenever a witness in court referred to facts about the case that the witness had heard from someone else, it was necessary to produce the source of those earlier statements in court. In essence, this is a hearsay rule that bars admission of an out-of-court statement as a substitute for calling the maker of that statement as a witness. (Also like the U.S. hearsay rule, 1988 Code, Article 195 provided some exceptions in which the “hearsay” would be admitted.)

More particularly, the Court’s concern was section 4 of Article 195 which barred a police officer from testifying about out-of-court statements that the officer gathered during the investigation of the crime. The rationale of the section of the rule being challenged was to avoid the introduction of out-of-court statements of important witnesses with information about the crime through the testimony of an investigating officer.<sup>75</sup>

But the Constitutional Court held that 1988 Code Article 195, section 4 was unconstitutional because it lacked a reasonable justification. The Court also felt that the rule did not place enough value on the truth-seeking function of a trial. To make sure that trial judges and other fact-finders find the truth, the Court determined that fact-finders must be able to consider out-of-court statements about what took place at the time of the crime. The Court noted that Article 195 made an exception that allowed private citizens to put into evidence out-of-court statements of witnesses in limited situations, such as when the maker of the statement has died or is infirm. The Court stated that there was no justification for not extending an exception to police officers. The Court reasoned that the members of the judicial police have the same *capacity* to testify as other citizens and that they cannot per se be considered less reliable than other witnesses. The Court held that the right to confront those making the statements is fully preserved if the police officers are allowed to testify about such statements because the officers can be cross-examined about their testimony.

The decision by the Constitutional Court will seem jarring to those accustomed to the strong protection given to defendants in the United

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74. In judgment n. 24/1992, the Court decided an issue that had been presented to the Court by seven trial judges concerned about the limitations in 1988 C.p.p. art. 195, n. 4. Corte cost., 31 jan. 1992, n. 24, Gazz. Uff. 1<sup>a</sup> serie speciale, 5 feb. 1992, n. 6, Foro It. 1992, I, 1052.

75. 1988 Code Section 195 was bolstered by 1988 C.p.p. Article 500, which stated that out-of-court statements contained in the dossier cannot be introduced at trial unless the statements were given during a search or at the time and place of the commission of the crime. This exception for statements at the crime scene seemed intended to allow spontaneous on-the-scene statements to be introduced roughly on the analogy of the hearsay exception for “excited utterances” under hearsay rules in the United States.

States, because it allowed police to relate the contents of statements from witnesses which will often be powerfully incriminating, while providing very little that a defense lawyer can do to attack those statements. Certainly, the cross-examination of the testifying officers would be no substitute for being able to cross-examine those who made the statements. The officer testifying may be an honest, reliable individual, but the person making the statement may be biased or incompetent as to the information related, but cross-examining the officer usually cannot show this.

With judgment n. 24/1992, the attempt of the drafters of the Code to separate the pretrial investigatory phase of the procedure from the trial phase began to collapse. Much of the information in the dossier could flow into the trial through the testimony of investigating officers. Calling the makers of those out-of-court statements to testify at trial was no longer necessary, only optional.<sup>76</sup>

## 2. Judgment n. 254/1992

Judgment n. 254/1992<sup>77</sup> is the second of the three 1992 decisions of the Constitutional Court that knocked down the main supporting structures of the 1988 Code's adversarial system. This decision had to do with Article 513, section 2, which prohibited the introduction at trial of an accomplice's out-of-court statements when the accomplice was called as a witness at trial but exercised his or her right to remain silent. This provision arose, for example, when an alleged accomplice of a defendant has given a statement to the police during the investigation but when called to testify at trial, the accomplice invokes the right to remain silent. In this situation, section 2 of Article 513 forbade the public prosecutor from introducing the out-of-court statements of the accomplice against the defendant.

This hearsay issue has come before the United States Supreme Court in several variations. The typical way it arises in the United States is the situation where the defendant and the accomplice/co-defendant are being tried together and the prosecution wishes to introduce the accomplice's statement, which also incriminates the defendant, against the accomplice. In a line of cases, starting with *Bruton v. United States*<sup>78</sup>

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76. Interestingly, the only limitation on the testimony of police officers as to out-of-court statements of witnesses that remained after judgment n.24/1992 was the limitation in Article 62 having to do with statements made by the defendant—a police officer cannot testify at trial as to the defendant's prior statements.

77. Corte cost., 3 june 1992, n. 254, Gazz. Uff. 1<sup>a</sup> serie speciale, 4 jun 1992, n. 24, Giur. It. 1993, I, 533.

78. 391 U.S. 123 (1968).

in 1968 and stretching up to *Gray v. Maryland*<sup>79</sup> in 1998, the Supreme Court has severely limited the use of statements of a defendant in situations where the statement incriminates by reference, directly or even indirectly, the co-defendant because of the fact that co-defendant does not have the opportunity to cross-examine the maker of the statement as required by the Sixth Amendment.<sup>80</sup>

But there is a Supreme Court case which closely resembles the situation being discussed in judgment n. 254/1992, *Lilly v. Virginia*.<sup>81</sup> In *Lilly*, an accomplice of the defendant had given statements to the police admitting his involvement in a robbery/murder but claiming that the defendant was the person who had shot the victim. At trial, the accomplice was called as a witness and invoked his right to remain silent. At this point, the prosecution was allowed to put into evidence the accomplice's incriminating statements on the theory that the statements were against the declarant's penal interest and the declarant was unavailable to testify.

The Supreme Court had no difficulty finding the admission of the confession that was strongly incriminating as to Lilly to be a direct violation of the confrontation clause. (Indeed, in his concurring opinion, Justice Scalia referred to what had happened at trial as "a paradigmatic Confrontation Clause violation.")<sup>82</sup>

79. 523 U.S. 185 (1998).

80. Recently, the Court ruled that the Confrontation Clause bars the admission of a hearsay statement against a defendant, even where the trial judge has determined that the hearsay statement exhibits indicia of reliability. In *Crawford v. Washington*, No. 02-9410, 2004 WL 413301 (U.S. Mar. 8, 2004), the trial court had admitted a recorded statement of the defendant's wife into evidence against the defendant in a case in which the defendant's wife did not testify due to the marital privilege. Despite the hearsay problem the statement presented, the trial judge had admitted the statement because he determined that the statement was sufficiently trustworthy to be allowed into evidence because the statement was nearly identical to the statement the defendant had given the police.

But the Court reversed the conviction, reasoning that when a hearsay statement is *testimonial* in nature (as opposed to a business record or a government document), such a statement cannot be admitted against a defendant who has not had a prior opportunity to cross-examine the maker. This is true, said the Court, even if the statement appears to the trial judge to be reliable and trustworthy. When testimonial statements, such as statements to the police during the investigation, are concerned, "the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." *Crawford*, 2004 WL 413301, at \*19.

After *Crawford*, statements obtained by the police during an investigation, even if they might be admissible under a traditional hearsay exception or might otherwise seem reliable, will not be admissible against a defendant at trial unless the defendant has previously had a chance to cross-examine the maker.

81. 527 U.S. 116 (1999).

82. *Id.* at 143.

The issue facing the Constitutional Court in judgment n. 254/1992<sup>83</sup> was directly analogous to the situation in *Lilly*: if the defendant's accomplice is called as a witness, but he or she asserts the right to remain silent, should the out-of-court statements of the accomplice be admissible against the defendant despite Article 513(2)? The Constitutional Court reached the opposite result from the Supreme Court's decision in *Lilly*. The Court ruled that in order to discover the truth, trial judges, as triers of the facts, need to be able to examine as much information about the crime as they can learn at trial.<sup>84</sup>

Obviously, one factor that must have been in the minds of members of the Constitutional Court in judgment n. 254/1992 was the threat of organized crime in Italy at that time and the risks of even prosecuting such cases. Judgment n. 254/1992 is not specific to organized crime cases and might apply to any case with multiple defendants. But the pressure on the Court and the whole Italian criminal justice system from organized crime needs to be understood as a background factor in the decision of the Court. Section III will discuss two particularly brazen assassinations of judges by organized crime that occurred in 1992 in Italy.<sup>85</sup>

At a time when the Mafia seemed more powerful than the police, it was much harder to get accomplices to testify against others. In a multiple defendant case involving a serious crime, the prosecution in the United States would likely push to trial the strongest case and hope to convict that defendant. At that point, the convicted defendant would very likely be willing to testify against the other defendants in exchange for a possible sentence reduction. Or perhaps the prosecutor might offer one defendant an excellent plea bargain, maybe even immunity, if the defendant agrees to testify against the other defendants.

But in Italy in an organized crime case, these routes were either unavailable or not so easily traversed. The convicted accomplice might not be willing to testify against other defendants because it would be hard to secure his personal safety. As for the possibility of exchanging immunity or an attractive plea bargain for testimony, as discussed above, plea bargaining is far more limited<sup>86</sup> and a public prosecutor cannot give immunity to a defendant in exchange for testimony. In short, some of the

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83. One of the situations involved in judgment n. 254/1992 was the situation where a co-accused had given statements during the investigation of the case incriminating the defendant. But when called to testify at the defendant's trial, the co-accused had exercised his right to remain silent. The issue was whether the public prosecutor could introduce into evidence the co-accused's prior statements incriminating the defendant. The defense had objected relying on 1988 C.p.p. Article 513, subsection 2. Corte cost., 18 may 1992, n. 254, Gazz. Uff. 1<sup>a</sup> serie speciale, 4 jun 1992, n. 24, Giur. It. 1993, I, 533.

84. *Id.*

85. *See infra* p. 457.

86. *See infra* p. 437.

tools available to U.S. prosecutors are not available in the Italian criminal justice system. This is not to say that the decision in judgment n. 254/1992 was correct, but that it must be understood given the difficult period in Italy.

When judgment n. 254/1992 was added to judgment n. 24/1992, the result was to widen the range of materials from the dossier that could be used against defendants at trial and reassert the dominance of the information in the dossier at criminal trials. While the Code had tried to limit the influence of the investigatory phase on the trial, the Constitutional Court seemed intent on bringing down the main pillars of the adversarial trial system.

### 3. Judgment n. 255/1992

The third of the decisions of the Constitutional Court in 1992 is judgment n. 255/1992.<sup>87</sup> This decision concerns an issue over which the U.S. legal system has struggled at times in the past: what weight should be given to impeaching statements at trial and should they be limited in their substantive use as evidence of the crime under consideration? The issue before the Constitutional Court was the constitutionality of Article 500, section 3 which dealt with the use of prior out-of-court statements by a witness to impeach that witness' testimony at trial. The situation which the Constitutional Court dealt with was one in which a witness gave a statement during the investigation, but at trial, testifies inconsistently in whole or in part with the prior statement. Article 500, section 3 provided that out-of-court statements used to cross-examine the witness could not be considered as substantive evidence about the crime but only as evidence going to the credibility of the witness. There were two limited exceptions to this rule: where the prior statement was obtained during a search from the witness or at the place of the crime during the initial investigation. (Presumably, these statements were to be viewed as inherently reliable because they were made immediately during the initial investigation, somewhat analogously to statements treated as "present sense impressions" or "excited utterances" in the Federal Rules of Evidence (FRE).<sup>88</sup>)

The issue of whether to allow substantive use of prior inconsistent statements is an issue on which states and evidence authorities in the United States have been split for many years. FRE 801(d)(1)(A) provides that statements inconsistent with a witness's testimony at trial and

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87. Corte cost., 3 june 1992, n. 255, Gazz. Uff. 1<sup>a</sup> serie speciale, 4 june 1992, n. 24, Foro It. 1992, I, 2012.

88. See, e.g., FED. R. EVID. 803(1) (present sense impressions); FED. R. EVID. 803(2) (excited utterances).

on which the witness has been subject to cross-examination are not hearsay (and can be used substantively) if the prior statement was given under oath subject to the penalty of perjury at a hearing, trial, deposition of other similar proceeding. This is a fairly narrow exception that does not permit juries to consider statements given to police and other authorities during an investigation to be used substantively where the witness is cross-examined on the basis of these prior statements at trial. In such cases, the jury would be instructed that the statements may only be used to determine credibility.

But the position taken by Congress in enacting FRE 801(d)(1)(A) was a compromise position. The Advisory Committee Notes to FRE 801(d)(1)(A) noted that many scholars and other authorities had argued for a broader rule on admissibility.<sup>89</sup> They would allow prior statements to be used substantively as long as the maker of those statements has been cross-examined on those statements at trial.<sup>90</sup> The Advisory Committee Notes<sup>91</sup> refer to the reasoning on this point of Judge Learned Hand in *Di Carlo v. United States*,<sup>92</sup> that when a jury decides that the truth is not what the witness says now, but what the witness said earlier, the jurors are still deciding based on what they have seen and heard in court. But, in the end, Congress narrowly limited the range of prior inconsistent statements that would be used substantively.

What is interesting in Italy is not that there would be debate over the use to be made of prior inconsistent statements on which a witness has been cross-examined at trial, but that the limitations in the 1988 version of Article 500, section 3 should be viewed by the Constitutional Court as having a constitutional dimension. But the Court held that the limitations on the use of prior inconsistent statements were basically without justification and were unconstitutional because they irrationally impeded the search for truth.<sup>93</sup>

The decision of the Court in judgment n.255/1992 was quite controversial in Italy. On the one hand, there were scholars who thought that the opinion was sensible and pragmatic, just as some would argue in the United States that whatever the limitations on the use of prior inconsistent statements in the rule of evidence, juries will use the statements substantively in any event if they find the defendant to be lying on the stand.<sup>94</sup> But, on the other hand, there were critics of the constitutional

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89. See FED. R. EVID. 801(d), advisory committee's note.

90. *Id.*

91. *Id.*

92. 6 F.2d 364 (2d Cir. 1925).

93. See MIRJAN R. DAMASKA, EVIDENCE LAW ADRIFT 23 n.35 (1997).

94. See Angelo Giarda, *Ci sono principi e principi: parola della Corte costituzionale* [*There Are Principles and Principles: Word of the Constitutional Court*], 9 CORRIERE

dimension of the Court's decision because values such as searching for truth at trial were not based on specific provisions in the Constitution.<sup>95</sup> The decision seemed to be simply the Court's estimation of the proper balance between the search for truth and the need for a fair procedure for defendants, not the Constitution's. Like the two earlier decisions, the decision seems to view the procedural protections in the Code as unfair hindrances in the state's battle against crime.<sup>96</sup>

### III. A UNITED PARLIAMENT STRIKES BACK IN DEFENSE OF ADVERSARY PRINCIPLES

#### A. *Changes to the Code in the Aftermath of the Constitutional Court's 1992 Decisions*

In fairness to the Constitutional Court, a few things need to be explained in order to understand better the context in which the Court handed down its decisions in 1992. These decisions occurred in the middle of a period in which the Mafia seemed to rival the government for power over Italy. Specifically, in May and July of 1992, two prominent public prosecutors, Giovanni Falcone and Paolo Borsellino, who had each aggressively prosecuted leaders of the Mafia in Sicily, were assassinated despite the fact that each lived his life heavily guarded by police officers. On May 20, 1992, a massive explosion blew up Falcone's car on a highway in Sicily, killing him, his wife, and three police bodyguards.<sup>97</sup> Two months later, on July 18, Borsellino was killed when a car laden with explosives was detonated outside his apartment building as he was

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GIURIDICO 979, 984 (1992); Paolo Tonini, *Cade la concezione massimalistica del principio di immediatezza* [*It Has Fallen: The Maximalistic Idea of the Principle of Immediacy*], 35 RIVISTA ITALIANA DI DIRITTO E PROCEDURA PENALE 1137 (1992).

95. See generally Paolo Ferrua, *La sentenza costituzionale n. 255 del 1992: declino del processo accusatorio* [*Judgment n. 255 of 1992: Decline of the Adversarial System*], 35 RIVISTA ITALIANA DI DIRITTO E PROCEDURA PENALE 1455 (1992); Giovanni Fiandaca, *Modelli di processo e scopi della giustizia penale*, [*Models of Process and Aims of the Criminal Justice*], Foro It. 1992, I, 2023; Glauco Giostra, *Un atto di indagine non utilizzabile come prova: le "sommarie informazioni" di polizia giudiziaria nelle ipotesi dell'art. 513 c. 1 c.p.p.* [*An act of investigation not utilizable as evidence: the statements given to the police in the case provided by art. 513, n. 1, c.p.p.*], 38 GIUR. COST. 515 (1993); Giulio Illuminati, *Principio di oralità e ideologie della Corte costituzionale nella motivazione della sentenza n. 255 del 1992* [*Principle of orality and ideologies of the Constitutional Court in the judgment n. 255 of 1992*], 37 GIUR. COST. 1973 (1992).

96. It appears that the background to judgment n. 255/1992 was a murder case in which some witnesses had given statements to the police incriminating the defendants, but when called to testify at trial, they had recanted their prior testimony and now claimed not to remember anything about the crime.

97. See David Lane, *Palermo Polishes Its Image*, FIN. TIMES (London), Mar. 2-3, 2002, The Front Line, at 2.

about the enter the building. Along with Borsellino, five police officers who had been guarding him were killed in the blast.<sup>98</sup>

In response to the assassination of Falcone, the Government passed emergency legislation on June 8, 1992 strengthening the laws against the Mafia.<sup>99</sup> This emergency legislation was eventually made permanent when Parliament passed Public Law n. 356 of August 7, 1992.<sup>100</sup> The law strengthened the investigative power of the police in the battle against organized crime and it severely increased the sentences for those found to be involved in organized crime.<sup>101</sup>

While many in the legal establishment were concerned about the way the Constitutional Court had undercut the adversary protections in the 1988 Code, Italy's political system had other more pressing priorities at that time. In judgment n. 24/1992, the Court had struck down the limitation in Article 195, section 4 which barred police officers from testifying about out-of-court statements gathered during the investigation of the crime. This section of the Code was not amended so the Court's ruling remained in force.

Nor did Parliament at that time do anything about the Court's decision in judgment n. 254/1992 which struck down Article 513, section 2 which barred the introduction at trial of incriminating statements of a co-defendant against the defendant on trial where the co-defendant exercised his right to remain silent and refused to testify.

The only legislative change that took place in the immediate aftermath of the Court's three decisions in 1992 was an amendment to Article 500 that attempted to soften the impact of the Court's decision.<sup>102</sup> The Court's judgment had declared that section 3's limitation on the substantive use of prior inconsistent statements was unconstitutional because it irrationally impeded the search for truth. The amended version of Article 500 stated that prior out-of-court statements of a witness could be used substantively if there was evidence that tended to confirm or corroborate the out-of-court statement or if there were circumstances suggesting that the witness had been threatened, bribed, or otherwise improperly influenced not to testify truthfully in court.

The result of the amendments to Article 500 was to permit substantive use of prior inconsistent statements in cases where witnesses had

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98. *Italian Cleric Suggests Sainthood for Slain Anti-Mafia Judge*, BBC MONITORING, July 18, 2002, at 2002 WL 24356038.

99. Law n. 306 of June 8, 1992, Racc. Uff. 1992, IX, 3264, Lex. 1992, I, 2445. Technically, this refers to a *decreto-legge* which differs from a law as it is issued by the Executive Power and not approved by the legislature.

100. Law n. 356 of Aug. 7, 1992, Racc. Uff. 1992, X, 4060, Lex. 1992, I, 3002.

101. *Id.*

102. Law n. 306 of June 8, 1992, Racc. Uff. 1992, IX, 3264, Lex. 1992, I, 2445, Art. 7; Law n. 356 of Aug. 7, 1992, Racc. Uff. 1992, X, 4060, Lex. 1992, I, 3002.



been intimidated or otherwise improperly influenced to alter their testimony at trial, but the amendment did not allow substantive use of prior inconsistent statements in all situations.

*B. The Change to Article 513 in 1997 and the Fate of that Provision in the Constitutional Court*

In 1997, Parliament passed an amendment to Article 513 of the 1988 Code, which had dealt with the admissibility of the out-of-court statements of an accomplice who has exercised his right to remain silent.<sup>103</sup> This provision had originally protected defendants against such hearsay statements but it had been held unconstitutional in 1992 on the ground that in order to discover the truth, the judge must be able to examine as much information about the crime as possible.<sup>104</sup>

What Parliament tried to do in 1997 in its revision of Article 513 was to preserve a defendant's right of confrontation with respect to such statements. Revised Article 513 stated that the out-of-court statements of an accomplice who now exercises his right to remain silent at trial could only be used against a defendant at trial if the defendant consented to the use of such statements at trial.

Because it was unlikely that many defendants would be willing to allow the admission of an accomplice's incriminating out-of-court statements to police, revised Article 513 was an attempt to undo the Constitutional Court's actions in 1992. Not surprisingly, the constitutionality of the revised Article 513 quickly came before the Constitutional Court.

In judgment n. 361/1998,<sup>105</sup> the Court declared the revised Article 513 unconstitutional because it too severely limited the admissibility at trial of hearsay statements by an accomplice. The Court ruled that even if a defendant has not consented to the admission of such statements at trial, such statements must be admissible as long as there is other evidence tending to corroborate the out-of-court statement.

Judgment n.361/1988 was the last straw as far as the Parliament was concerned. It had tried to preserve the values of confrontation and cross-examination which are at the heart of adversary trial procedures, but the Constitutional Court had failed to give those values the priority and the weight that Parliament felt they deserved. Parliament had only one other option that it could take: amend the Constitution.

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103. Law n. 267 of Aug. 7, 1997, Racc. Uff. 1997, XIII, 5330, Lex. 1997, I, 2549, art. 1.

104. See *infra* p. 452.

105. Corte cost., 2 nov. 1998, n. 361, Gazz. Uff. 1<sup>a</sup> serie speciale, 4 nov. 1998, n. 44, Foro It. 1998, I, 3441.

### C. Amending the Constitution to Include Adversarial Values

Unable to protect the adversary values in the Code from the Court's constitutional analysis, Parliament decided to change the Constitution. The effort to reform the Constitution came to be called the "due process reform" (la riforma del giusto processo).<sup>106</sup> In order to amend the Constitution, Article 138 requires that an amendment be approved twice in a period of not less than three months by a supermajority in each chamber of the Parliament.<sup>107</sup> Italy has been rather notorious in the period since World War II for a series of governments that have not been able to maintain a majority coalition in Parliament so as to stay in power. But what is amazing is that the due process reform, which required two approvals by an absolute majority in each chamber of the Parliament, was approved relatively quickly. That parties of both the left and the right in a multi-party system were able to come to agreement on the issue of the need to better protect defendants shows the hunger in Italy for change in the trial system.

The due process reform was achieved through an amendment to Article 111 of the Italian Constitution.<sup>108</sup> The sections added to Article 111 make it a very long article compared to other articles of the Italian Constitution. The amendment added five sections that read as follows:

1. Every judicial matter should be carried out under the principle of due process of law.
2. Every trial should guarantee each party equal standing to offer evidence or contrary evidence in front of an impartial judge. The law also guarantees that trials should be of a reasonable length.
3. In the criminal trial the law guarantees that a person accused of a crime should be privately informed as soon as possible of the nature and the reasons for the charges against him; that the accused should be assured enough time and suitable conditions

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106. Cost. Law n. 2 of Nov. 23, 1999, Gazz. Uff. serie generale, 23 Dec. 1999, n. 300, Lex. 1999, I, 4447.

107. Article 138 reads:

Laws amending the Constitution . . . must be adopted by each Chamber of Parliament in two consecutive deliberations at intervals of not less than three 3 months, and must be approved by an absolute majority of the members of each Chamber on the second vote.

COST. art. 138, § 1.

108. Sections 1-5 are the "new" parts of the Italian Constitution Article 111. But Article 111 has three other sections regarding the compulsory presence of the reasons for every jurisdictional judgment and the possibility to appeal in Cassation every judgment, as well as measures restricting the freedom of a person in certain situations. COST. art. 111.

to prepare his defense; that the accused should be allowed the opportunity, before the judge, to examine or to have examined any witnesses against him; that the accused have the right to subpoena favorable witnesses at trial on an equal basis with the prosecution, as well the right to produce other evidence in his favor; and that the accused be assisted by a translator at trial if he does not understand or speak the language used in the trial.

4. The criminal trial is based on the principle that evidence should be heard in front of the parties and each party should be able to offer contrary evidence and to challenge opposing evidence. The accused cannot be proven guilty upon declarations of anyone who willingly avoided being examined by the accused or by his lawyer.

5. The law regulates cases in which evidence is not presented in a manner such that the accused may challenge the evidence at trial by consent of the accused, due to verified objective impossibility or as a result of proven illicit conduct.<sup>109</sup>

These five sections of Article 111 reproduce some of the principles guaranteed in Article 6 of the European Convention of Human Rights.<sup>110</sup> In essence, what Article 111 guarantees a defendant is the right to offer contradictory evidence, the right to an impartial judge, the right to a trial of a reasonable length, the right to confront and cross-examine witnesses, and the right to due process of law.

More specifically given the earlier decisions of the Constitutional Court, Article 111 provides that a defendant cannot be proven guilty

109. *Id.* §§ 1–5 (as amended 1999).

110. Amended Article 111 of Italian Constitution reproduces some of the principles provided by Article 6 of European Convention of Human Rights dealing the with right to a fair trial which states:

(1) . . . [E]veryone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. . . .(2) Everyone charged with a criminal offence shall be presumed innocent until proven guilty according to law. (3) Everyone charged with a criminal offence has the following minimum rights: (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him; (b) to have adequate time and facilities for the preparation of his defence;(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given free assistance when the interests of justice so require; (d) to examine or have examined witnesses against him and to obtain the attendance and the examination of witnesses on his behalf under the same conditions as witnesses against him; (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

European Convention, *supra* note 28, art. 6, 213 U.N.T.S. at 228, Europ. T.S. No. 5, at 10.

based on out-of-court declarations by any accuser who has not been subject to cross-examination by the defendant (or the defendant's lawyer).<sup>111</sup> The only exceptions are situations where the accused has consented to the use of such statements, where there is the objective impossibility of getting the witness to repeat the statement (such as the case where the witness has died), or a situation where unlawful conduct has made it impossible to have the witness testify at trial. The Constitution provides that in these situations the law shall determine the scope of these exceptions.

#### *D. Amending the Code to Conform to the Principle in Article 111*

With Article 111 of the Constitution in place, there remained the job of redrafting provisions of the Code of Criminal Procedure to conform to the new constitutional principles and to give life to the new rights in the Constitution.<sup>112</sup> This is a difficult task and it continues today. But Public Law n. 63, passed by Parliament on March 1, 2001, modified many articles of the Code, especially those regarding the way in which evidence at trial was to be acquired so as to conform to what is now in Italy a defendant's constitutional right to confront and cross-examine his accusers and to challenge in court the evidence against him.<sup>113</sup>

Among the many articles changed were those that the Constitutional Court had found unconstitutional in 1992. Article 195 of the 1988 Code, which the Court had found deficient because it failed to allow police officers at trial to relate the substance of out-of-court statements of witnesses interviewed during the investigatory stage, was changed to be more consistent with the original design of that provision before the

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111. One case that arose prior to the adoption of Article 111 violated this principle and the European Court of Human Rights held that Italy violated the European Convention of Human Rights. The Court stressed that a person charged with a criminal offence cannot be proven guilty on the basis only of out-of-court statements given during the investigation by accomplices who have exercised the right to silence at trial. *See* Lucà v. Italy, 2001-II, Eur. Ct. H.R. 169.

112. To handle cases that were approaching trial in the interim period between the passage of Article 111 and the passage by Parliament of amendments to the Code to conform to Article 111, the Government issued Legislative Decree n. 2 of January 7, 2000 which was later passed by Parliament as Law n. 35 of February 25, 2000. Law n. 35 of Feb. 25, 2000, Racc. Uff. 2000, I, 411, Lex. 2000, I, 815. This law was meant to cover cases coming to trial in the interim period.

113. *See* Paolo Ferrua, *L'attuazione del giusto processo con la legge sulla formazione e valutazione della prova* [The Carrying Out of Due Process of Law about the Formation and the Evaluation of the Evidence], 7 DIRITTO PENALE E PROCESSO 585 (2001); *see generally* GIUSTO PROCESSO, NUOVE NORME SULLA FORMAZIONE E VALUTAZIONE DELLA PROVA [DUE PROCESS, NEW RULES ABOUT THE FORMATION AND THE EVALUATION OF THE EVIDENCE] (Paolo Tonini ed., 2001).

Constitutional Court's judgment n. 24/1992. Article 195, section 4, as now modified, states that the members of the police cannot testify about the content of the out-of-court statements of witnesses where those statements were gathered during the preliminary investigations.<sup>114</sup>

Article 500, section 3 of the 1988 Code, which the Constitutional Court had found unconstitutional because it failed to allow prior inconsistent statements of witnesses to be used substantively, was changed back to a version close to the original provision. The new version of Article 500 states that an out-of-court statement used to impeach a witness at trial can be used only to assess the credibility of the witness and not as substantive evidence of the crime.<sup>115</sup> The exception to this bar on substantive use is the situation where there is evidence at trial suggesting that the witness has been subjected to violence, threats, or a promise of money to alter the witness's testimony at trial.<sup>116</sup> In those situations, the prior statements can be used as substantive evidence.<sup>117</sup> Other than the situation where a witness has been improperly influenced to alter his or her testimony at trial, Article 500 limits the use of prior inconsistent statements to very narrow situations.<sup>118</sup>

The reform of Article 513, which had originally protected defendants from being convicted on the basis of out-of-court statements of an accomplice where the accomplice exercised his right to remain silent at trial and refused to testify is more complicated to describe because it involved rewriting many articles of the Code and also adding a new provision.<sup>119</sup> Changes designed to assure every defendant the right to

114. C.P.P. art. 195, § 4. The change to Article 195 was contained in Public Law n. 63 Article 4 of March 1, 2001. Law n.63 of Mar. 1, 2001, Racc. Uff. 2001, II, 651, Lex. 2001, I, 1405.

115. C.P.P. art. 500, § 2.

116. *Id.* § 4.

117. Article 500, section 5 states that where a party has alleged that a trial witness has been intimidated or influenced in his or her testimony under section 4, the judge should determine that issue. *Id.* § 5.

118. Two of those exceptions are when the prior inconsistent statement was obtained at a preliminary hearing and when the parties agree to the substantive use of the impeaching statements. *Id.* §§ 6-7.

119. Among the articles of the Code changed to protect the right of defendants to confront their accusers were Articles 12, 64, 197, 197 bis, 210, 500, 503 and 513. For a full exposition of these Code changes, see Ennio Amodio, *Giusto processo, diritto al silenzio e obblighi di verità dell'imputato sul fatto altrui* [*Due Process, the right to silence and the obligation to tell the truth of the co-accused about the liability of others co-defendants*], 41 CASSAZIONE PENALE 3587 (2001); Paolo Tonini, *Riforma del sistema probatorio: un'attuazione parziale del "giusto processo"* [*The Reform of the Probative System: a Partial Carrying Out of "Due Process"*], 7 DIRITTO PENALE E PROCESSO 269 (2001); Daniela Vigoni, *Ius tacendi e diritto al confronto dopo la l. n. 63 del 2001: ipotesi ricostruttive e spunti critici* [*Ius tacendi and right of confrontation after the law n. 63 of 2001: systematic hypotheses and critical ideas*], 8 DIRITTO PENALE E PROCESSO 98 (2002).

confront their accusers were made to approximately ten different Code provisions.<sup>120</sup>

The main objective of this broad reform effort was to assure the right of confrontation in the cases in which the statement is given by a co-accused. Article 500, section 3, which was just described as to the use of prior inconsistent statements against witnesses, also deals with the problem of the use of statements of an accomplice against a defendant. That section states if a co-accused during trial refuses to answer questions and exercises his or her right to remain silent, prior out-of-court statements of the alleged accomplice cannot be used as substantive evidence against the defendant (unless the defendant consents to such use).<sup>121</sup>

Another provision adopted to help protect the defendant's right of confrontation was Article 526, section 1 *bis* which repeats the language of Article 111, section 4 of the Constitution stating that "the guilt of a defendant cannot be based on the out-of-court statements of any person who willingly avoided examination by the accused or his attorney."<sup>122</sup>

The change in Italy's Constitution as well as the major overhaul of the Code of Criminal Procedure has left many jurisprudential issues still to be resolved. But even in the early stages of the reforms that will be needed to protect the guarantees enumerated in Article 111 of the Constitution, it is clear that the legal landscape has been changed in such a way that the chances of Italy's adversarial experiment surviving are much improved.

For one thing, there are strong indications that the Constitutional Court views the Code differently as the result of the addition of Article 111 to the Constitution and that some of its former decisions would today be resolved differently if brought before the Court. Even prior to the 2001 passage of the reforms to the Code, in a decision where the Constitutional Court discussed an issue relating to former Article 513 dealing with the admissibility of statements of a co-accused, the Court was careful to note that the new constitutional clauses in Article 111 are now the standard against which the constitutionality of Code provisions must be evaluated.<sup>123</sup> More specifically, the Court noted that there is now a new right of confrontation in the Constitution and, as a result, the Court observed, "The normative picture . . . is radically changed."<sup>124</sup>

In another decision handed down the same day, the Court stressed that the right of confrontation provided by the new constitutional provi-

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120. *See id.*

121. C.P.P. art. 500, § 3.

122. C.P.P. art. 526, § 1-bis.

123. Corte cost., 25 oct. 2000, n. 439, Gazz. Uff. 1<sup>a</sup> serie speciale, 2 nov. 2000, n. 45., Foro It. 2001, I, 40.

124. *Id.*

sions meant that the Court's previous interpretation of Article 512 was no longer correct because that interpretation was no longer compatible with the new constitutional rules.<sup>125</sup>

More recently, in February of 2002, the Constitutional Court was asked about the constitutional legitimacy of Article 500, which had been changed by Public Law n. 63 of 2001.<sup>126</sup> The Court stated in its opinion, "Article 111 has elevated to a constitutional level the right of a defendant to challenge evidence against him at trial."<sup>127</sup> The Court went on to state that this means that the trial is, in Italian, *impermeabile*, meaning by this term that out-of-court statements cannot be permitted to enter the trial as evidence against the accused where the defendant had no opportunity to confront and challenge the maker of those statements.<sup>128</sup> Evidence against a defendant must be developed at trial so that the defendant has an opportunity to test that evidence and offer evidence that contradicts that evidence.

## CONCLUSION

Italy remains one of the most important countries for comparative study at the present time. How one blends a civil law heritage with strong adversarial rights of confrontation and cross-examination is a difficult and fascinating problem. It is also a problem that will be faced more and more in the future as judges from different legal traditions come together in new legal institutions, such as the new International Criminal Court and other criminal tribunals, and need to work out procedures that must reach compromises with individual legal traditions.

As this Article has made clear, Italy had no choice but to try to blend two great legal traditions: the civil law tradition and the common law tradition. Italy wants to protect adversarial values and diminish the importance of the dossier on the issue of guilt, but at the same time it wants to retain features of its civil law heritage, such as the judicial role of the public prosecutor and the right of crime victims to participate in criminal trials.

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125. Corte cost., 25 oct. 2000, n. 440, Gazz. Uff. 1<sup>a</sup> serie speciale, 2 nov. 2000, n. 45, Foro It. 2001, I, 40.

126. See Public Law n. 63, *supra* note 114.

127. Corte cost., 26 feb. 2002, n. 36, Gazz. Uff. 1<sup>a</sup> serie speciale, 6 Mar. 2002, n. 10, 47 Giur. Cost. 320 (2002).

128. See also Corte cost., 26 feb. 2002, n. 32, Gazz. Uff. 1<sup>a</sup> serie speciale, 6 Mar. 2002, n. 10, 47 Giur. Cost. 280 (2002); Paolo Ferrua, *La regola d'oro del processo accusatorio: l'irrelevanza probatoria delle contestazioni*, [The golden rule of the adversarial system: the evidential insignificance of the out-of-court statements], in *IL GIUSTO PROCESSO TRA CONTRADDITTORIO E DIRITTO AL SILENZIO* [THE DUE PROCESS BETWEEN CROSS-EXAMINATION AND RIGHT TO SILENCE] 22-24 (Roberto E. Kostoris ed., 2002).

The story this Article has told is an amazing one of a Code of Criminal Procedure that embraced certain changes in values but which was basically undone by a Constitutional Court that placed a very high value on the search for truth at trial. That Court was reluctant, understandably perhaps given Italy's civil law heritage, to see trial judges deprived of important evidence at trial. But the Italians overcame this problem by putting the adversarial protections on a much more secure footing by placing those protections in the Constitution itself.

What will happen in the years ahead with Italy's adversarial trial system as various of the provisions of the Code that were revised in 2001 come before the Constitutional Court, no one can predict with complete certainty. But it is certainly the case that the adversarial protections in the Code are today far better protected than they were in 1988. As the Constitutional Court itself observed in the aftermath of the passage of the new rights of criminal defendants in Article 111, "The normative picture . . . is radically changed."<sup>129</sup>

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129. Corte cost., 25 oct. 2000, n.439, Gazz. Uff. 1<sup>a</sup> serie speciale, 2 nov. 2000, n. 45, Foro It. 2001, I, 40.