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An Historic Convergence of Civil and Common Law Systems-Italy's New "Adversarial" Criminal Procedure System

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An Historic Convergence of Civil and Common Law Systems—Italy’s New “Adversarial” Criminal Procedure System

Louis F. Del Duca*

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I. Introduction

A new Criminal Procedure Code became effective in Italy on October 24, 1989.¹ It makes many significant changes in Italian criminal procedure by incorporating some basic features of the “adversarial” system on which the United States and other common law criminal justice systems are based. To explain the impact of these changes, Part II of this article describes the pre-October 24, 1989 Italian criminal procedure² which was similar to “inquisitorial” systems that continue to be used in most European civil law countries.³ Part III then analyzes the basic changes made by the new Code. Special issues raised by the adoption of the new system are thereafter addressed.

Under the traditional “adversary” system, evidence collected by police and prosecutors generally does not become part of the official court record of a criminal proceeding until it is presented in a public trial and subjected to confrontation, examination, and cross examination procedures.

Under the traditional “inquisitorial” system, police, prosecutors, and (in cases other than summary or simple misdemeanor type offenses) *giudice istruttore* (i.e., investigating judges) collect evidence

1. Presidential Decree Law September 22, 1988, n.447, *Approvazione del Codice di Procedura Penale*, 1 Suppl. Ord. Gaz. Uff. 24.10.88 n.250.

Pursuant to authority granted by Article 76 of the Italian Constitution, the “Government” (i.e. the Prime Minister and his cabinet) was delegated the task of drafting the details of the new code by the Parliament’s *Legge delega* February 16, 1987, 1 Suppl. Ord. Gaz. Uff., March 16, 1987, n.62 [hereinafter *Legge delega*]. Under the Italian constitutional system the new code as drafted by the “Government” became law without further vote by the Parliament.

2. The pre-October 24 Criminal Procedure Code was enacted by Royal Decree October 19, 1930, n. 1939. Decisions of the Italian Constitutional Court (which was created in 1957 as provided for by the post-war Italian Constitution) substantially modified the content of this 1930 Code. See A. PIZZORUSSO, *L’ORGANIZZAZIONE DELLA GIUSTIZIA IN ITALIA* (TORINO, EINAUDI 2d ed. 1985). For an overview of that system, see CERTOMA, *THE ITALIAN LEGAL SYSTEM* 220 (1985) [hereinafter CERTOMA].

3. See *Strafprozessordnung* (STPO) (BFB1. NR 631/1975) (Code of Criminal Procedure in Austria); *Code De Procedure Penale* (1959) (Code of Criminal Procedure in France); *Strafprozessordnung* (STPO) (BGB1.1 S.1074, ber. S.1319) (7 April 1987) (Code of Criminal Procedure in the Federal Republic of Germany); Mueller, *Lessons of Comparative Criminal Procedure*, 15 AM. U.L. REV. 341 (1966); Pakter, *Exclusionary Rules in France, Germany and Italy*, Hastings Int. and Comp. L. Rev. 1 (1985); Schlesinger, *Comparative Criminal Procedure: A Plea for Utilizing Foreign Experience*, 26 BUFFALO L. REV. 361, 362 (1977).

of crimes.⁴ This evidence is placed in a dossier and turned over to a panel of hearing judges which excludes the investigating judge. The dossier automatically becomes part of the official court record to be used by hearing judges in conducting a *dibattimento* (i.e., an open trial) and making ultimate determinations of fact necessary for rendition of their final decisions. The open trial offers the prosecution and the defense the opportunity to present testimony of witnesses and documentary evidence to reinforce or dispute the contents of the dossier. The hearing judges then make ultimate findings of fact based on the materials contained in the dossier and in the evidence presented in open court.

Italy is the first civil law country to have moved decisively and dramatically in the direction of the common law adversarial system. As such, this unique experiment will be closely observed in civil and common law countries.

II. Overview of Pre-October 24, 1989 Italian Criminal Procedure

A. *Initiation of Criminal Proceeding—Investigation by Police and the Public Prosecutor*

Italian criminal proceedings are initiated with a formal charge brought by the prosecutor (an official of the Public Ministry)⁵ after either police have gathered information or private individuals have provided information concerning the crime. The Public Ministry, with offices located to serve each *tribunale* (i.e., trial court), acts through the public prosecutor who has exclusive responsibility for initiating all criminal actions.⁶ Prosecutions may not be initiated through private individuals but must officially go through the public prosecutor in the Public Ministry.⁷

4. As discussed later in this article, the investigating judge is eliminated under the new Italian criminal procedure system and replaced by a "preliminary hearing" judge who does not have any investigative function but hears evidence presented in open court to determine whether the case should proceed to trial or be dismissed.

5. The prosecutor acts under the *vigilanza* (oversight) of the Minister of Grace and Justice, but he (or she) enjoys the same guarantees of independence constitutionally provided for judges. Under the Italian system judges and prosecutors are both part of the corps of magistrates (*La Magistratura*) and at various stages of their careers individuals may be assigned from prosecutor to judge positions or vice versa.

6. See the Italian Constitution [COST] art. 112 and the former CRIMINAL PROCEDURE CODE (*Codice di Procedura Penale*) [C.P.P.] art. 74d. The Public Ministry also maintains offices located to serve the intermediate Courts of Appeals (*Corte D'Appello*) and the Supreme Court (*Corte de Cassazione*).

7. In most of the cases involving *de minimis* crimes, the Public Ministry may not initiate the criminal process without an express complaint by the injured private party (*querela*). See C.P.P. arts. 9-14 and the ITALIAN SUBSTANTIVE CRIMINAL CODE (*Codice Penale*) [C.P.] arts. 120-126.

In addition, initiation of the criminal process is also left to the judgment of the injured person in crimes "which although of a certain gravity may, through the publicity inherent in the criminal process, cause the injured person greater damage than already inflicted by the commission of the crime." CERTOMA, *supra* note 2, at 222. An example would be the crime of

The police have power to initiate investigations.⁸ They can gather evidence from witnesses as well as physical evidence, and then present it to the public prosecutor.⁹ After getting information from the police, the prosecutor will begin an investigation, which may follow the same lines as that of the police.¹⁰ However, the investigation may also involve a more detailed examination of the facts that are relevant to the crime and a generally broader base of investigation. When the police turn over their findings to the public prosecutor, the function of the police with reference to that case is finished. The public prosecutor is then in charge of developing further evidence. However, throughout his handling of the case, prior to turning over a dossier to the investigating judge, the prosecutor has the discretion to use or to discontinue use of police assistance.

The *procuratore generale* (i.e., chief prosecutor) reviews the investigations of the police and the prosecutor assigned to the case and suggests to the court whether there is enough evidence for a *prima facie* crime; if enough evidence exists no further investigation is conducted.¹¹ In non-controversial simple cases the work done by the investigating police coupled with investigative work done by the public prosecutor might be sufficient to have the case go to trial without having the usual additional independent investigation by the investigating judge. In such cases, the public prosecutor would interrogate witnesses and include the results in the dossier, turning the dossier over to the hearing court and requesting that the case be scheduled for trial. Hearing judges would then interrogate witnesses utilizing all of the statements and evidence that went in the dossier and retaining the right to base findings either on the contents of the dossier, the testimony, and evidence presented in open court or some combination of these two sources.

B. Use of "Investigative" Judges—Lack of Prosecutorial Discretion to Dismiss Cases

In the many cases involving more difficult issues, a third investigatory phase, conducted by an investigating judge,¹² followed the police and public prosecutor investigations. For example, where the victim of a crime died while in the operating room, a difficult factual

rape. See C.P. art. 519.

8. See new C.P.P. art. 330. (*notitia criminis*); art. 347-357 (Police Preliminary Investigations).

9. C.P.P. art. 219. The police can also decide measures restrictive of personal liberty, for instance the arrest of persons apprehended during the commission of a crime (C.P.P. art. 222). In these cases, the police measures must be reported to the judicial authorities within 48 hours for their approval. See also COST art. 13, par. 3.

10. See C.P.P. art. 232.

11. C.P.P. art. 246. See CERTOMA, *supra* note 2, at 231.

12. So called "formal instruction." C.P.P. arts. 295-388.

issue might arise as to whether the inflicted wound or the negligence of the surgeon, a nurse or some other process in the hospital caused the death. This type of complicated factual issue would have required use of the third investigating phase.

The investigating judge was independent of the public prosecutor.¹³ Although such judges conducted their investigation independently of the public prosecutor and the Public Ministry, nevertheless, they had to keep the Ministry informed of all findings as they developed. It was deemed necessary to have a judge in charge of this third stage of investigation because only the investigating judge and not the prosecutor had the power to decide whether a *prima facie* case existed after completing an investigation (thereby requiring that it be referred to the Tribunale for trial).¹⁴

The work of an investigating judge who had decided that there was a *prima facie* case was completed by writing a *sentenza di rinvio a giudizio*¹⁵ (i.e., an interim order) to refer the case for further proceedings to the full court.¹⁶ However, an investigating judge who had decided the case should be dismissed because of the absence of a *prima facie* case would enter a final order (*archiviazione*) to terminate the proceeding.¹⁷

A continuing important difference under the old and new Italian systems as compared to the United States system is that United States public prosecutors have great discretion to decide whether to prosecute.¹⁸ No such discretion exists in the hands of the public prosecutor in civil law countries generally and in Italy particularly. The public prosecutor could only request the investigating judge to enter an order of *archiviazione* (i.e., an order to dismiss) or to proceed to a full hearing before the court. Only the investigating judge (who as noted later, is eliminated by the new Code) had the power to dismiss.¹⁹

13. Consequently, his (or her) decision whether to report the case to the Tribunale for formal trial is not formally bound by the prosecutor's request. See *infra* note 14.

14. See C.P.P. arts. 274 and 378.

15. The judge's decision to refer the case to the Tribunale for formal trial can be appealed by the defense only in regards to the measures restrictive of personal liberty. See CORTE CASS. Sez. V, 10.14.1981 *Grappone*, GIUST. PEN. III 1816 (1982).

16. The decision is void if it does not include in the statement of the facts the specific crimes charged, mitigating and aggravating circumstances, and all the circumstances that can lead to the application of precautionary measures. (Article 374).

17. According to judicial interpretation of C.P.P. art. 370, the prosecutor also has the power to request further investigation, but the investigating judge is not bound by that request.

The Tribunale (Tribunale) is the first instance court of general jurisdiction in Italy. For an overview of the structure of the Italian court system see Del Duca, *The Expanding Role of International And Comparative Law Studies — An Overview of the Italian Legal System*, 88 DICK. L. REV. 221 (1984). See also PIZZORUSSO, LEZIONI DI DIRITTO COSTITUZIONALE 391 (1984).

18. See W. LAFAVE & J. ISRAEL, CRIMINAL PROCEDURE 561 (1985).

19. See *supra* notes 14 and 15.

C. *Separation of "Investigative" and Trial Judge*

As a matter of due process, the investigating judge was under no circumstances permitted to be a member of the hearing court (a three-judge panel used for trials of ordinary criminal proceedings)²⁰ or the larger panel comprised of two career judges plus six popular judges (i.e., lay judges) used for trial of more serious felony cases.²¹ The underlying theory was that since the investigating judge had already prepared the dossier and concluded that it contained enough evidence to hold the defendant for trial, it would be unfair to have the same judge involved in making the final decision of the defendant's guilt or innocence. A United States common law lawyer might be tempted to conclude that since the investigative judge at this point would only have decided that the case should go to trial and not that the defendant was guilty, the process was similar to a probable cause hearing in the United States where the judge conducts both the probable cause hearing, and subsequently can also conduct the trial to determine the defendant's guilt or innocence. However, the procedures are not analogous because the evidence before the judge in the United States probable cause hearing and in trial is not based on a dossier prepared by the judge.

If the investigating judge had referred the matter to the full court for trial, an appeal could not be taken from that order, and the case would go to trial.²² On the other hand, if the investigating judge issued a verdict of not guilty against the accused on grounds of insufficiency of evidence, the public prosecutor at this point had a right to appeal to the Court of Appeals from the Tribunale.²³ This right was an important procedural step in the process, particularly in light of the prosecutor's lack of discretion under the Italian system to decide not to prosecute particular cases.

D. *Conduct of the Trial*

Once the case went to trial, the trial itself served as a safety mechanism over all of the investigation that had occurred prior to that point. One of the main purposes of the actual trial was to guarantee that the dossier presented to the court contained findings which were not violative of the defendant's rights.²⁴ An important difference between the United States common law system and civil law countries generally is that hearing courts in civil law countries

20. *The Tribunale*; See CERTOMA, *supra* note 2, at 226.

21. *The Corte di Assise*. See Article 12(2) Law April 10, 1951, n.287, *Riordinamento dei giudizi di Assise*, 102 Gaz. Uff. 5.7.1951.

22. See C.P.P. arts. 295-388.

23. Article 387 C.P.P. (*Sentenza di proscoglimento istruttorio*).

24. LEONE, *MANUALE DI DIRITTO PROCESSUALE PENALE*, 526 (1985)

make findings of fact and conclusions of law not only on the basis of evidence adduced at trial but also based on the dossier resulting from the investigatory phases that precede the actual trial.²⁵ They can justify their findings of fact on the bases of the findings included in the dossier by the police, public prosecutor or the investigating judge. Alternatively, based on evidence presented at the actual trial, the hearing court can disagree with any of those findings.²⁶ In the United States, only testimony and other evidence presented at trial that would be usable for fact-finding and law application purposes generally can be considered.²⁷ However, even in common law systems such as the United States, testimony by investigatory officers is often key evidence at trial. Certainly, prior inconsistent statements made at a probable cause hearing can be introduced at trial subject to cross examination. In addition, for purposes of sentencing, the probation officer's investigation report can be the primary source of information for the sentencing court.

Since a civil law court can only base its findings on legally acquired evidence, if the evidence was acquired in an illegal manner contrary to the rules of law, the evidence cannot be used.²⁸ However, in the civil law system, the judge may generally look to the totality of the record, evidence in the dossier and evidence presented at trial. Findings are made and based on the *libero convincimento del giudice* (i.e., the judge's reasonable, but freely developed conviction and interpretation of the evidence).²⁹ In addition, nuances of proving beyond a reasonable doubt, as distinguished from proving by a preponderance of the evidence, do not exist in civil law countries. Whatever the judge reasonably thinks is sufficient evidence after having carefully considered the totality of the evidence will be a sufficient basis for supporting the court's decision. It is, therefore, difficult to overrule a civil law judge on a finding of fact on appeal.³⁰

E. "Motivated" Decision

We come now to the *sentenza motivata* (i.e., motivated decision). This term refers to a decision containing the reasons for the

25. This feature of the former Italian criminal procedure emphasized the interaction between the accusatorial and inquisitorial systems. See MERRYMAN, *THE CIVIL LAW TRADITION* 134 (1969).

26. See *infra* note 29.

27. See generally McCORMICK ON EVIDENCE, 122 (III ed. 1984).

28. CORTE CASS. Sez. III, 11.19.1955, *Di Nigris*, GIUST. PEN. III 400 (1956).

29. See CERTOMA, *supra* note 2, at 221, 234.

30. Nevertheless, if on appeal the findings of fact differ from those that supported the first instance decision, the appellate judge has to declare the first judgment void, and return the dossier to the prosecutor for a new preliminary inquiry. See CORTE CASS. Sez. I, 3.4. (1980); Pagano, GIUST. PEN. III 226 (1980).

action taken.³¹ "Motivated" decisions in Italy are sometimes long in part because of complications resulting from liberal joinder procedures. In addition, these decisions serve as a safety valve on the very broad power that the judges have to make decisions based on the entire record which included the dossier plus the trial evidence. Even though under the new Code, the dossier is no longer part of the record, the judge still retains power to render decisions based on his or her freely developed conviction and interpretation of the evidence. This is why the "motivated" decision is explicitly required.³² For example, the motivated decision in the famous organized crime case in Palermo, in which several hundred defendants were brought to trial, and about 350 of them were recently convicted, was 13,725 pages in length.³³ It took one year and four months to write the decision.

F. Appeals

Any party has the right to appeal from the decision of the *tribunale* (i.e., trial court) to the intermediate Court of Appeals. The Italian courts of appeal, unlike our courts of appeal can take new evidence as well as review issues of law.³⁴ In the final appeal to the Court of Cassation (the Italian Supreme Court for civil and criminal matters but not for constitutional and administrative matters), the defendant no longer has a right to dispute facts.³⁵ This appeal is based only on questions of law.³⁶

G. Absence of Plea Bargaining

There was no plea bargaining under the pre-October 24, 1989 Italian system, except for the Law of November 24, 1981, N. 669, which specified that for minor crimes falling under the jurisdiction of the *pretore* (i.e., magistrate), the accused with the consent of the prosecutor could ask for non-jail sanctions in place of sentences of up to six months. However, at the preliminary hearing (provided for by the new Criminal Procedure Code), based on what little evidence is introduced, the prosecution and the defense may possibly work out a lesser sanction than that which would normally be imposed. The preliminary hearing court may approve such agreement under the October 24 reforms. A July 2, 1990 decision of the Italian Constitution

31. See C.P.P. art. 474, n.4.

32. COST art. 111. According to C.P.P. art. 475, a decision is void if it does not include reasoning or if it is contradictory in the reasoning.

33. The largest mafia trial in history ended in Palermo, Sicily in December 1987. 338 of 452 defendants were convicted of running a vast criminal empire financed by heroin traffic. N.Y. Times, Dec. 17, 1987, at 1, col. 4.

34. See C.P.P. art. 520.

35. C.P.P. art. 524.

36. The errors of law subject to review by the Court of Cassation may be either substantive or procedural. See CERTOMA, *supra* note 2, at 249 (1985).

Court has held this provision of the law invalid to the extent that it would have permitted the prosecution and the defense by themselves to enter into such an agreement. The agreement between the prosecution and the defense for imposition of a lesser sanction is invalid if the judge concludes that the action is not in accord with the mitigation standards of the law.³⁷ While this procedure is not the blatant kind of plea bargaining that is known in the United States criminal law system, something similar to plea bargaining is beginning to find its way into the Italian system.

H. Burden of Proof

The "beyond a reasonable doubt" requirement, which is the basis on which a conviction must be based under the United States criminal law system³⁸ is inapplicable in Italy. What is applicable is the *libero convincimento del giudice* (i.e., the judge's reasonable, but freely developed conviction and interpretation of the evidence) previously discussed.³⁹ This obligation of the judge to look to the totality of the evidence, even though the evidence is not going to be based on the investigatory phases but rather on the evidence presented at the trial, will still give Italian judges a broader basis than United States judges have for making findings of fact. Nevertheless, Italian judges will continue to be required to set forth reasons for their ruling by filing a "motivated" decision setting forth in detail reasons for each finding.

III. Changes in Italian Criminal Procedure—Attempt to Achieve Greater Justice and Efficiency

The pre-October 24, 1989 Italian criminal proceedings were greatly influenced by an inquisitorial pattern which governed the defendant's rights and liberty before and during the oral trial proceedings. However, the Italian system had been slowly moving from the inquisitorial pattern to an adversarial pattern with similarities to the United States system. Parenthetically, the United States system itself has some inquisitorial features⁴⁰ and is not in its entirety a pure adversarial system. The changes in the Italian system eliminate negative characteristics of the inquisitorial system and adopt some of

37. Article 444 to 448 of the new Code state these revolutionary plea bargaining type provisions of the new Italian criminal procedure system. See *infra* notes 65-67. The validity of the second paragraph of Article 444 was in issue before the Constitutional Court. CORTE CASS. 7.2. 90 note 313 in 113 *Foro it.*, I. 2385 (1990).

38. *In re Winship*, 397 U.S. 358 (1970).

39. See CERTOMA, *supra* note 2, at 221, 234.

40. For example, when the police or the public prosecutor request the judge to issue arrest, eavesdropping and search warrants under *ex parte* proceedings. See Goldstein, *Reflections on Two Models: Inquisitorial Themes in American Criminal Procedure*, 26 *STAN. L. REV.* 1009 (1974).

the more democratic aspects of the accusatorial system based on the principles of orality,⁴¹ publicity,⁴² and confrontation at trial.⁴³

A. Preliminary Investigation—Elimination of Investigative Judges

As previously stated, the investigation by the police, by the public prosecutor, and by the investigating judge are generally the three investigation phases in existing inquisitorial civil law criminal justice systems and the pre-reform Italian system. All three of these investigators inserted their findings into the dossier that became a part of the evidentiary base which could be used by the trial court itself (along with the testimony as presented in open court) to make findings of fact.

In discussing the main features of the new Code, one should first note that the investigation or "instruction" phase of the old procedure no longer exists. The investigative judge has been eliminated under the procedural reform, which went into effect on October 24, 1989.⁴⁴ Investigations will continue to be the job of the police and the prosecutors. The police and the prosecutors will gather facts regarding the event, but will present that evidence at a preliminary hearing rather than include it in a dossier that becomes part of the record.⁴⁵

Preliminary investigations are to be conducted only by judiciary police (a special police force specifically attached to the court) and by prosecutors.⁴⁶ They normally will not collect evidence, but only seek to establish elements of the crime in order to file charges against defendants. However, in some cases, such as body and domiciliary searches and sequestrations, in which the acts themselves are destined to be used as evidence at the trial and the acts cannot be again recorded, evidence may be collected.⁴⁷ In addition, the object of the instruction phase is no longer stated as "to ascertain the truth" (i.e., the ultimate guilt or innocence of defendants), but rather only to determine if sufficient elements of a crime to bring the

41. Article 2, § 1 directive 2 of *Legge delega*.

42. Article 2, § 1 directives 38, 58 of *Legge delega*.

43. Article 2, § 1 directive 3 of *Legge delega*.

44. Even the word "instruction" (*istruzione*) has been eliminated. The new rules concerning the pre-trial stage (now called "preliminary investigations") are included in Articles 326 to 415 of the new Code.

45. See Article 416 to 433 of the new Code.

46. Preliminary investigations by the judiciary police are regulated under book V, Title IV, "Activities and Actions of the Judiciary Police, Articles 347 to 357 of the new Code. Title V, "Activities of the Public Prosecutor," Articles 358 to 378, regulates instead the prosecutor's investigations.

47. "Acts of surprise" are regulated under Book III, Title III "Research methods for evidence, chapter I "Body searches," chapter II "Domiciliary searches," chapter III "Sequestrations" of the new Code. Specifically Articles 244 to 265.

defendant to trial are present.⁴⁸

There was concern that in some instances it would be necessary to collect evidence prior to the trial. For example, the new Code gives the parties the power to ask a neutral judge to obtain a deposition of a witness who could be intimidated or who is dying, or more generally, evidence that there is reason to believe certain information will be impossible to gather at trial.⁴⁹ This type of collection of out-of-court evidence is referred to as *incidente probatorio*.⁵⁰ (It is similar yet broader than the United States' Federal Rule of Criminal Procedure).⁵¹ Both prosecutors and defense lawyers are entitled to be present and to question such witnesses in direct and cross-examination.

B. Preliminary Hearing

At the end of the preliminary investigation (normally within six months from the moment in which the prosecutor received the *notitia criminis*⁵² and the suspect's name has been entered in a special register),⁵³ a preliminary hearing is held before one judge of the *tribunale* (i.e., first instance trial court).⁵⁴ At the preliminary hearing stage, the decision is made either to discharge the accused because of insufficiency of evidence or to go ahead with the trial.⁵⁵

48. Article 2, § 1 directives 37,50 of *Legge delega*. These preliminary investigations precede the initiation of the criminal process.

49. Articles 2, § 1 directive 40 of *Legge delega*. Article 392 of the new Code provides additional situations where the *incidente probatorio* (out-of-court evidence) is applicable. For a comparison with the former CRIMINAL PROCEDURE CODE see C.P.P. art. 418.

50. *Incidente probatorio* is regulated under Book V, Title VII Articles 392 to 404 of the new Code.

51. Federal Rule 15 of Criminal Procedure entitled "Depositions" provides in part:

(a) Whenever due to exceptional circumstances of the case it is in the interest of justice that the testimony of a prospective witness or a party be taken and preserved for use at trial, the court may upon motion of such party and notice to the parties order that testimony of such witness be taken by deposition

(b) The party at whose instance a deposition is to be taken shall give to every party reasonable written notice of the time and place for taking the deposition

(c) At the trial or upon any hearing, a part of a deposition, so far as otherwise admissible under the rules of evidence, may be used as substantive evidence if the witness is unavailable

18 U.S.C. Rule 15 (1986).

52. Article 405 par. 2 of the new Code caption "Commencing A Criminal Action." Compare with C.P.P. art. 396. *Notitia criminis* is the filing of a complaint regarding a criminal offense with the public prosecutor or the judiciary police by public officers, private parties or physicians.

53. Article 335, caption *Notitia criminis* Register of the new Code. See also Article 2 § 1 directive 35 of *Legge delega*.

54. Under the new Code preliminary hearings are not before the *Pretore*. Proceedings before the *Pretore* are governed by Book VIII of the new Code. The *Pretore* also has jurisdiction over criminal cases involving maximum sentences of up to four years imprisonment and for certain other specified crimes. (See C.P.P. art. 7.)

55. The different decisions that the *Tribunale* can take at this stage are listed in Article 424 of the new Code.

At this hearing, the judge will conduct the examination of witnesses. The prosecution asks for a trial of the defendant. The defense lawyer also presents arguments, motions, and asks for dismissal. The defendant may agree to answer questions from the judge. The findings of fact are based exclusively on what is presented at the trial rather than what is contained in the dossier.⁵⁶ At the request of the prosecution and the defense, the preliminary hearing can be changed to a *giudizio abbreviato* (i.e., accelerated judgment) summary trial to which the preliminary hearing process is extended to permit the single judge to decide the case. However, the evidence presented at the preliminary hearing will not otherwise become a part of the official transcript to be used by the full court in hearing the case and making its findings of fact, unless the offense is of a minor summary nature which can be disposed of at the preliminary hearing.⁵⁷ The prosecutor and the defense lawyer can also ask the judge to hear witnesses or experts. At the end of the preliminary hearing, the judge either dismisses the defendant or issues an order to proceed to trial.

The prosecutor and the investigatory judge cannot bring the accused to trial, as was the case under the pre-October 24, 1989 procedure. The new procedure requires a confrontation between the prosecutor and the defense lawyer at the preliminary hearing before a neutral judge, who decides if sufficient evidence is present to put the accused on trial.⁵⁸

The same policy of assuring a hearing before a neutral body supports the new rules on preventive detention⁵⁹ and on means of collecting proof.⁶⁰ The prosecutor no longer has the power to issue a

56. The new rules concerning evidence are included in book III of the new Code, (Articles 187 to 271).

57. So called *Procedimenti sommari* ("Summary proceedings"). See *infra* notes 65-67.

58. The new procedure is regulated under Book V, Title IX, "Preliminary Hearing," Articles 416 to 433 of the new Code.

59. "Preventive detention" is regulated under Book IV; Title I, Chapter 1, Articles 272 to 279 of the new Code. Compare C.P.P. arts. 269-276. See also Article 2 § 1 directives 59 to 65 of *Legge delega*; Article 13 CONST. and Article 5, par. 1c European Convention of Human Rights. Preventive detention is applied whenever preponderant indications of guilt are present and the judge concludes there is a danger of tainting or destruction of evidence; danger of escape; or specific danger that the indicted person will commit serious criminal offenses such as robbery, rape, coup d'état, organized or recidivist crime, etc.

60. Cross-examination is provided for by the Italian system in Article 498, "Witness cross-examination," Article 499, "Rules for cross-examination," Article 500, "Contradictions in cross-examination" of the new Code. See Preamble and Article 2, Directives 2, 3, 73, and 76 of *Legge delega*.

The hearsay rule of evidence has been enacted in Article 195, "Indirect testimony." The only exception is provided in the same Article par. 3, when cross-examination is impossible because of "death, infirmity or disappearance." The Italian system distinguishes "means of proof" Book III, Title IV, from "means of obtaining proof" Title III of the new Code. "Means of proof" are examination and cross-examination. "Means of obtaining proof" are illustrated by search and seizure. The Italian Constitution regulates search and seizure under Article 1, par. 2 and Article 14, par. 2, which requires issuance of a "motivated decree" by the judge to

warrant for detention or to engage in wiretapping.⁶¹ Instead, the prosecutor must petition the preliminary investigations judge for authority to use such measures.⁶² These proceedings, therefore, come under the control of a neutral body.

It is consistent with the new system of preliminary investigations and with the elimination of the investigative judge that the trial judge does not have access to the written reports of the evidence collected out of court and that the prosecutor does not write a statement into a dossier to be given to hearing judges of the reason why the accused was brought to trial. An adversarial system prohibits use of a judge whose opinions are in some way compromised by what happened before the trial or by what an investigative judge wrote before the trial. Under the new Italian system, the trial judge will have only the indictment and consequently can form an opinion based only on the evidence presented at the trial.

C. Examination — Cross-Examination — Summary Trials

Trials will be handled through examination and cross-examination of defendants and witnesses,⁶³ similar to the procedure used in American criminal proceedings. Consequently, the trial obviously will become longer since cross-examination takes more time than reading dossiers prepared beforehand. Because of the Italian mandatory prosecution requirements that prohibit prosecutors from avoiding trial through dismissals or plea bargaining, these lengthy proceedings could overwhelm the resources of the criminal courts. The new Code, therefore, uses some tools similar to those used in United States proceedings, where the so-called "funnel effect" brings to trial no more than 5% of the cases.⁶⁴ For example, it provides for summary trials called *giudizio abbreviato*⁶⁵ (i.e., accelerated judgment), *applicazione della pena su richiesta delle parti*⁶⁶ (i.e., sen-

confirm the existence of probable cause.

61. The former Criminal Procedure Code distinguished *ordine* issued by the prosecutor from *mandato* issued by the judge. The old discipline regulated the prosecutor's power to issue a warrant for detention and a subpoena in C.P.P. arts. 243 and 393.

The prosecutor could also issue a decree in order to authorize telephonic interceptions. This power was regulated under Articles 266(3) and (6) enacted in the C.P.P. by Article 5 of the Law, April 8, 1974, n.98 *Tutela della riservatezza e della liberta e segretezza delle comunicazioni*, Gaz. Uff. 12.4.75, 97, and Article 9 of the law of May 18, 1978, 191 *Norme speciali e processuali per la prevenzione e la repressione di gravi reati*, Gaz. Uff. 22.3.78, 80.

62. The new discipline concerning the warrant for detention is regulated by Articles 291, 292 of the new Code. See also Article 2, § 1 directives 59, 62, 64 and 65 of *Legge delega*.

The new procedure of telephonic interceptions is regulated by the Article 267 of the new Code. See also Article 2 § 1 directives 37, 41, 47 of *Legge delega*.

63. See *supra* note 60.

64. See W. LAFAVE AND J. ISRAEL, CRIMINAL PROCEDURE 766-72 (1985).

65. The new Code regulates *giudizio abbreviato* under Book VI, "Summary Trials" Title I, Articles 438-443, 449, 453, 457. See also Articles 2, § 1 directives 1, 53 of *Legge delega*.

66. This "Summary trial" is regulated under Book VI, Title II, Articles 444 to 448. See also Article 2, § 1 directives 1, 22, 23, 24, and 45 of *Legge delega*. Compare with the Law of

tencing on request of parties) and *procedimento per decreto*⁶⁷ (i.e., proceeding by decree).

The goal of summary trial is to avoid the ordinary trial. In order to encourage use of such trials, the defendant who agrees to a summary trial is given the opportunity to qualify for a less serious sentence (i.e., normal sentence reduced to one third). Summary trials are handled with inquisitorial procedural patterns with the investigative dossier made available to the court as is the case in the United States when defendants enter guilty pleas.

Only the major characteristics of the new Italian Criminal Procedure Code have been discussed since it would be impossible to summarize in this analysis the content of the more than seven hundred articles of the new Code. What should be made clear is that, generally speaking, the new model moves from the old system in which the guarantees of the defendant's rights rested on the presence of the defense lawyer from the very beginning of preliminary investigations to a system in which the defendant's rights will also be guaranteed by the fact that the trial judge cannot use the reports of preliminary investigations, and the evidence must be collected orally by proper submission of documents and through examination and cross-examination at trial.

IV. Case Management Concerns

A. Dealing with Organized Crime—Interface Between "Mandatory Prosecution" and the Crime of "Mafiosa Association"

The manner in which the United States and Italian criminal proceedings cope with organized crime is of great importance. In this regard, a substantial difference exists between the two systems. This difference is apparent if one looks at the Italian proceedings in one trial against hundreds of members and associates of organized crime⁶⁸ and at the United States proceedings in one trial usually against no more than ten defendants.⁶⁹ The Pizza Connection trial,

November 24, 1981, n.689 *Modifiche al sistema penale* 1 Suppl. Ord. Gaz. Uff. 30.11.81 329.

67. *Procedimento per decreto* is provided for by Book VI, Title V, Articles 459 to 464 of the new Code. It involves a request by the public ministry to the court to impose pecuniary sanctions rather than incarceration where the law permits. If the defendant disagrees with the pecuniary sanction imposed, he or she may appeal to the same court for a full hearing in open court. See also Article 2, § 1 directives 1, 46 of *Legge delega*. Compare the summary trial *Giudizio per decreto* provided in C.P.P. arts. 506-510.

68. See *supra* note 33. See also various statutes enacted in order to fight the Mafia phenomenon and generally organized crime. Law May 31, 1965, n.575 *Disposizione contro la mafia*, Gazz. Uff. 5.6.65 u. 138; Law September 13, 1982 646 *Disposizioni in materia di misure prevenzioni di carattere patrimoniale* (introducing the Italian Parliament's commission coordinating the fight against the Mafia), Gaz. Uff. 14.9.82, 253; Law October 12, 1982 726 *Misure urgenti per il coordinamento della lotta contro la delinquenza mafiosa*, Gaz. Uff. 12.10.82, 281.

69. For an overview of trials against organized crime in the United States, see J. ALBA-

against twenty-three defendants, was quite unusual. American professionals expressed the opinion that it was possible to conduct it only because of fortuitous circumstances.⁷⁰

Under the Italian law, it is not only mandatory prosecution that compels prosecution of hundreds of organized crime members in a single proceeding. The Italian Criminal Code also provides for the crime of *Mafiosa Association*⁷¹ through which all the members and associates of organized groups, both terrorists and organized crime members, may be prosecuted. In dealing with the latter, a special law of 1982 (issued ten days after the assassination of Palermo's *Prefetto*, General Carlo Alberto Della Chiesa) created the specific crime of *mafiosa association*⁷² which is defined as follows:

An association is *mafiosa* if members and associates use the force of intimidation by the association itself and the rules of *omerta* and *duress* in order to commit crimes, to acquire directly or indirectly management or control of economic activities, special administrative concessions, licenses, public contracts and services, or in order to gain unfair profits or advantages in favor of themselves or other parties.⁷³

Furthermore, this law is aimed at the seemingly legitimate economic activities of organized crime. Therefore, it provides many effective tools to seize the proceeds of the economic activities run by organized crime families irrespective of whether such proceeds are obtained illegally or under the facade of legal activities. The law can be applied not only to seize the assets of convicted organized crime members, but also assets of those who act as fronts, such as spouses, children, corporations, etc.

In the last several years, law enforcement against organized crime has improved substantially because of the new 1982 law and because some members of organized crime decided to cooperate with judicial police, *carabinieri*, prosecutors, and investigative judges. Among them, the most famous is without doubt Tommaso Buscetta, who became a cooperating witness in the United States and a cooperating accomplice in Italy.⁷⁴ Others, frightened by the bloody fight

NESE, ORGANIZED CRIME IN AMERICA (2nd ed., 1989); H. ABADINSKY, ORGANIZED CRIME (2nd ed. 1986).

70. For a detailed study of the Pizza Connection Trial, see S. ALEXANDER, THE PIZZA CONNECTION: LAWYERS, MONEY, DRUGS, MAFIA (1989).

71. See Article 416 bis c.p. caption *Associazione per delinquere*; a special provision against association to cope with Terrorism was enacted by the Law of February 6, 1980, n.15, Gaz. Uff. 7.2.80, n.37, in the new Article 270 bis c.p.

72. See *id.* at Article 416 bis c.p. caption *Associazione di Tipo mafioso* enacted by Article 1, Law September 13, 1982, u.646.

73. The definition of *mafiosa* association is provided by par. 3 of Article 416. Par. 8 extends the Article to other forms of organized crime, structured like the Mafia, such as *Camorra* and *'Ndrangheta*.

74. Tommaso Buscetta (a member of organized crime who turned in state evidence and

among organized crime families, looked for protection and safety by making deals with law enforcement personnel. In Sicily alone, about one thousand organized crime members are now on trial. At the end of 1987 the biggest trial — that of Palermo involving 454 defendants — ended with more than 300 convictions.⁷⁵

Nevertheless, serious difficulties are created by the requirement of mandatory prosecution coupled with the broad coverage of the crime of *Mafiosa Association*, which together compel joint prosecution of hundreds of defendants. The real problem in case management in Italy is not how to handle preliminary investigations, but rather how to be able to bring to trial simultaneously and successfully hundreds of defendants, which under the broadly defined crime of *Mafiosa Association* includes all the known members and associates of organized crime families against whom judiciary police and prosecutors have collected evidence.

At the trial stage, one sees the negative consequences of the combined effect of the mandatory prosecution requirement and the crime of *Mafiosa Association*. Mass trials are difficult to manage. The risk of mass acquittals must be faced.

It is possible to investigate the whole range of activities of organized crime including its structure and its web of activities developed over a number of years because of the tools provided by the inquisitorial system. These tools included: (a) mandatory prosecution; (b) trial by career judges rather than by jurors; and (c) evidence gathered by prosecutors and investigative judges rather than by presentation to jurors through examination and cross-examination. This inquisitorial system is able to achieve goals not allowable in the United States. However, the risk of not being able to bring a trial to a successful conclusion, or of acquitting many defendants because of the forced prosecution of cases not fully developed for trial, also weakens the capacity of government to deal with organized crime.

Under the new system, preliminary investigations⁷⁶ are still very broad and comprehensive in the sense that judiciary police and prosecutors have to inquire into the whole range of the criminal activities. However, since they do not have to collect evidence to be used at trial, they will become more effective. The defense lawyer normally will not have the right to be present during investigations because the results are not yet evidence. However, as the prosecutor

became a cooperating witness) became the key-witness in the trial against *Cosa Nostra* which ended in December 1987. Moreover, because of his cooperation it was possible to start the operation against the so-called "Pizza Connection."

75. See *supra* note 33.

76. The pre-trial preliminary investigation stage is regulated under Book V, Titles I to VII Articles 326 to 415 of the new Code.

concludes that investigations conducted so warrant, some defendants and some charges may be brought to trial. The prosecutor is required to ask the judge to hold the preliminary hearing only for these defendants and charges. In so doing, it will be possible to sever into separate trials the results of the judiciary police and the prosecutors' investigations. This process appears to be the only way to combine mandatory prosecution with the features of an adversary system in dealing with organized crime and to avoid mass trials where it is not possible to develop evidence against all the defendants.

As a practical matter, the same witness can be cross-examined no more than three or four times since the witness thereafter tends to get confused and the lawyers can take advantage of the contradictions with the previous answers. From this point of view, problems are present in dealing with cooperating witnesses who have to testify against hundreds of members and associates of organized crime. Perhaps, the solution can be found in a new approach to the crime of association. It would be possible to provide that only the principals shall be punished for the crime of association, while mere associates would be indicted only for the crime they actually committed in the course of the criminal association.

Before the Italian Court of Assize, it is possible to manage trials with more defendants, than is the case in trials before jurors. However, this process would take too much time since the cross-examination system without doubt requires much more time than the pre-October 24, 1989 Italian system of handling trials. As noted earlier, one must take into account, for instance, that the Pizza Connection trial in the United States, in which twenty-three defendants were involved at the beginning, lasted seventeen months, while the Palermo trial of 454 members of organized crime lasted twenty months. It was accordingly concluded that it would be impossible to create a workable adversarial system for cases involving more than thirty to forty defendants. In cases involving more serious crimes, career and law judges sit together⁷⁷ and the fact finding function, therefore, becomes more complicated.

Because of these practical trial management problems, the

77. The *Corte di Assise* is regulated by the Law of April 10, 1951, 287. *Riordinamento dei giudizi di Assise*, Gaz. Uff. 5.7.151 102. This "specialized court" was enacted by Cosr art. 102. The subject matter jurisdiction of the *Corte di Assise* is included in Article 5 of the new Code.

See also Article 2, § 1 directive 12 of *Legge delega*. The *Corte di Assise* is comprised of six lay judges plus two career judges and, in contrast with the American criminal procedure where the jury is only a fact finder, in the Italian system the *giudice popolare*, (i.e. popular judges) who are private citizens selected from the population at large on an ad hoc basis for each case involving enumerated serious "felony" type crimes, also participate in applying the law.

American adversary system of handling trials against organized crime is of great interest. Nevertheless, the effect of combining mandatory prosecution and the crime of association with the accusatorial features of the new Criminal Procedure Code is a matter of concern. Very critical problems will be faced in handling organized crime trials under the new adversarial system without having the possibility to use the tools provided against organized crime such as the United States criminal law prosecutorial discretion and the *Racketeer Influenced and Corrupt Organizations (RICO) Statute*.⁷⁸

Prosecutorial discretion in the United States plays a very important role from the very beginning of the proceedings. In fact, it gives law enforcement agencies the possibility of handling long and secret investigations without being compelled to discover all the evidence and to indict all the criminals subject to investigations. The same thing happens before the investigative grand jury which handles long and secret investigations without the participation of the prospective defendant or the cooperating witness.

Prosecutorial discretion provides significant advantages such as: (1) the power, at the end of preliminary investigations, to select only a few defendants to be brought to trial to avoid mass trials; (2) the power to enter into formal or informal agreements with prospective defendants (without prosecuting them) in order to use them as government witnesses against the accomplices; (3) the choice of a few charges against defendants in order to bring to trial only those crimes for which the prosecutor has strong evidence and for which the social expectation of punishment is greater; and (4) finally, prosecutorial discretion is the only way by which the adversarial system can work since it would be impossible to apply the lengthy trial examination and the cross-examination procedure of gathering evidence at trial before the jurors if one had to try hundreds of defendants together at the same trial.

This selective adversarial type of process helps give the public reason to believe that the justice system is really combatting organized crime. However, for civil law lawyers, the knowledge that hundreds of members and associates of the organized crime families are

78. The Racketeer Influenced and Corrupt Organizations (RICO) statute was enacted in order to provide an effective defense against organized crime in the United States. The Federal Congress passed the bill in 1970. Publ. L. 91-452, Title IX § 901(e), Oct. 15, 1970, 84 Stat. 94, now 18 U.S.C. §§ 1961-1968. For an overview of RICO, see D. Naranjo & E. Pina, *Civil RICO: Overview on the Eve of the 200th Anniversary of the Federal Judiciary*, 21 ST. MARY'S L.J. 23 (1989); *Guide to RICO*, Bureau of National Affairs Corporate Practice Series (Ed. J. Fricano 1986); *Civil RICO 1986*, Practising Law Institute Litigation and Administrative Practice Series (1986); Blakey & Gettings, *Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts — Criminal and Civil Remedies*, 53 TEMP. L.Q. 1009 (1980); C. Bradley, *Racketeers, Congress and the Courts: An Analysis of RICO*, 65 IOWA L. REV. 837 (1980); B. Tarlow, *RICO: The New Darling of the Prosecutor's Nursery*, 49 FORDHAM L. REV. 165 (1980).

not tried and are free to go on with their illicit and criminal affairs is very disturbing. In addition, the knowledge that while some bosses and lieutenants are convicted, cooperating and immunized witnesses receive very short prison terms or are relocated under witness security programs without being prosecuted and perhaps are willing to start again their criminal activities, is also disturbing. These cultural and political value judgments are important and relevant in fashioning and managing any legal system, including a criminal procedure code.

One of the major challenges of successfully implementing the new Italian Criminal Procedure Code is to put together mandatory prosecution, crimes of association, and cultural and political values in such a manner that it will be possible to go after all the known members of organized crime families and their illicit affairs within a new adversarial system. It is, in part, a matter of converging parts of the existing inquisitorial system with parts of an adversarial system. The resulting combination is neither totally adversarial or totally inquisitorial but a combination of both.

The new system will be carefully monitored to determine whether dealing with organized crime without giving up mandatory prosecution is workable or whether some inquisitorial features for combatting organized crime may have to be reinstated.

V. New Responsibilities of Legal Education and the Bar — The Challenge of Implementing Legal Transplants and Harmonized Legislation

In his introduction to *New Perspectives For A Common Law of Europe*,⁷⁹ summarizing the papers published for the historic First Academic Year Colloquium held at the European University Institute in 1977, Mauro Cappelletti notes that a realistic program for transplanting legal systems and achieving uniformity requires much more than the mere adoption of similar texts of laws:

Law, of course, is not merely rules or legislation, but also, and above all, legal culture or tradition, structures, actors, and processes. This realistic approach might well make the task of lawyers, and especially comparative lawyers, and more generally of all those concerned with law and legal reform an extremely difficult one; it is, however, the only way to deal with realities, rather than merely playing with words.⁸⁰

79. M. CAPPELLETTI, *NEW PERSPECTIVES FOR A COMMON LAW OF EUROPE* (M. Cappelletti ed. 1978); MERRYMAN, *ON THE CONVERGENCE (AND DIVERGENCE) OF THE CIVIL LAW AND THE COMMON LAW*; and *NEW PERSPECTIVES FOR A COMMON LAW OF EUROPE 195* (M. Cappelletti ed. 1978).

80. M. CAPPELLETTI, *supra* note 79, at 1, 11.

Substantial parts of the United States' common law adversary criminal justice procedure system have been transplanted into the new Italian Criminal Procedure Code, which now is a mixture of adversarial and inquisitorial components. With justification, legal realists caution us that to assure the success of such transplants, the legal infrastructure of the receiving state must provide the actors and structures to operate and apply the transplanted law. The mere enactment of written rules will not by itself assure successful transplant of legal systems.

Within the United States itself, during the post-World War II period, leaders of the legal community such as former Chief Justice Warren Burger lamented the fact that the United States adversarial system was not working properly primarily because of the enormous lack of attorneys skilled in trial and appellate practice. This concern, coupled with a desire to expand the availability of legal services for all sectors of the population, produced dramatic changes in post-war legal education and practice of law in the United States. Extensive trial practice and appellate advocacy programs coupled with criminal and civil legal aid clinics have become standard and substantial components of the legal education in law schools as well as continuing legal education programs throughout the United States.⁸¹

The trial advocacy skills of gathering and presenting evidence, examining and cross-examining witnesses, and exercising initiative in the development of trial and appellate strategies are primarily responsibilities of attorneys in an adversarial system, rather than responsibilities of judges as is the case in an inquisitorial system. To make the adversary system work effectively in Italy or anywhere else, the supporting legal infrastructure must provide advocates with such skills as well as other physical and personnel requirements.⁸²

It is not enough to focus solely on the normative aspect of the law. Admittedly, legislation can fix rules of conduct such as defining the roles of lawyers, prosecutors and judges in the criminal justice system. However, successful implementation of such changes requires the additional step of providing the physical facilities and trained personnel to activate the system.

81. Amsterdam, *Clinical Legal Education — A 21st Century Perspective*, 34 J. LEGAL EDUC. 612-701 (1984); Cevelette, *Clinical Education in Law School and Beyond*, 67 A.B.A. J. 576 (1981); Tushnet, *Scenes from the Metropolitan Underground: A Critical Perspective on the Status of Clinical Education*, 52 GEO. WASH. L. REV. 272-9 (1984); McCauliff, *Trial Advocacy: Improving the Quality of Legal Services Through Continuing Education Courses*, 30 J. LEGAL EDUC. 536 (1980); Wald, *Teaching the Trade: An Appellate Judge's View of Practice-Oriented Legal Education*, 36 J. LEGAL EDUC. 35-44 (1986).

82. For example, anticipating these requirements Article 1 Law February 3, 1989, n.32 provides for an increase of 329 judges for 1989, 105 for 1990 and 29 in 1991. As the continuing need for new judges became apparent, Decree Law June 15, 1989, n.32 (converted to Law July 25, 1989, n.261) created an additional 550 judicial positions.