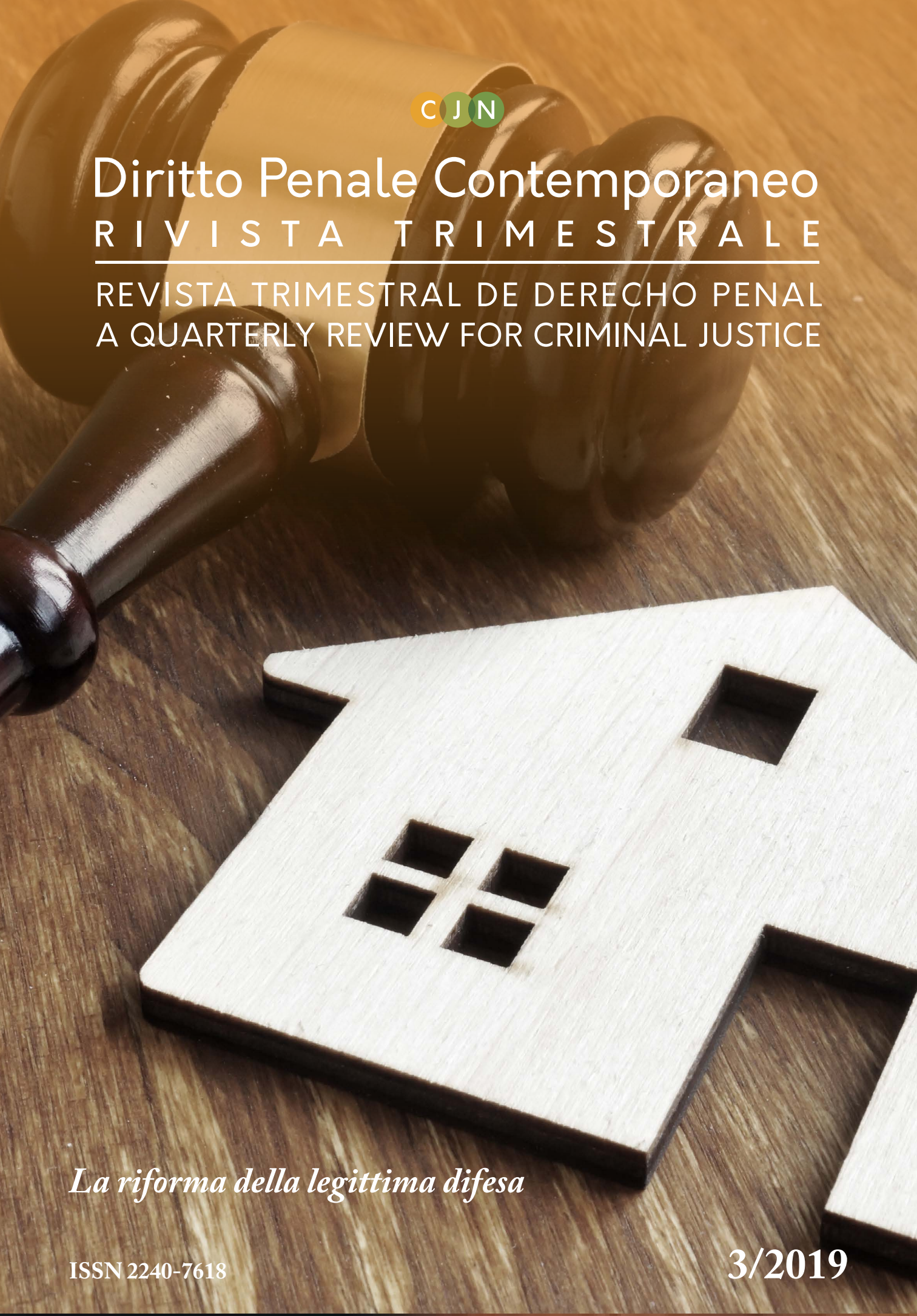

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Verdadero y falso en la transición del proceso penal italiano al sistema bifásico

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Fundamental Procedural Rights, Execution of Criminal Sanctions | Diritti processuali fondamentali, Esecuzione della pena | Derechos procesales fundamentales, Ejecución de la pena

Abstracts

Italian case-law of recent times seems increasingly geared to empower the Enforcement Judge to amend and manage the sanction imposed with the final conviction. This phenomenon evokes comparative suggestions with the Anglo-American bifurcated trial, whereby the issue of the enforceable sentence is actually postponed from that of the guilt fact-finding. In this perspective, the present Article aims to assess if such brand-new trend towards bifurcation is a further attempt of the Italian criminal justice system to inoculate typical institution of the Common Law accusatorial model or instead it represents a peculiar effect of its irrepressible inquisitorial roots.

La casistica giurisprudenziale italiana degli ultimi tempi appare sempre più orientata a riconoscere alla giurisdizione esecutiva ampie possibilità di intervento correttivo e manipolativo della pena inflitta con il giudicato di condanna. Il che, realizzando un effetto di sostanziale "sdoppiamento" tra il giudizio di accertamento della responsabilità e quello di applicazione della sanzione, evoca forti suggestioni comparatistiche con il sistema processuale bifasico di derivazione anglo-americana. In questa prospettiva, il presente articolo mira a verificare se il suddetto fenomeno evolutivo rappresenti un ulteriore e nuovo tentativo, da parte del processo penale italiano, di avvicinarsi al modello accusatorio di Common Law o costituisca, piuttosto, il riflesso della sua stessa, insopprimibile natura inquisitoria.

La jurisprudencia italiana de los últimos años parece cada vez más orientada a reconocer a la jurisdicción ejecutiva amplias posibilidades de intervención correctiva y manipuladora de la pena infligida con la sentencia de condena. Esto, creando un efecto de "división" sustancial entre el juicio de comprobación de la responsabilidad y el de aplicación de la sanción, evoca fuertes sugerencias comparativas con el sistema procesal bifásico de la derivación angloamericana. En esta perspectiva, el presente trabajo se propone verificar si el mencionado fenómeno evolutivo representa un nuevo intento, por parte del proceso penal italiano, de acercarse al modelo acusatorio del Common Law o si constituye, más bien, el reflejo de su propio e irreprimible carácter inquisitivo.

* My gratitude goes to Professor John Jackson from the University of Nottingham for his precious comments and suggestions.

Sommario

1. Introduction

It is not surprising that, in the closing stages of the criminal process, Italian criminal proceedings have been experiencing a phenomenon of change that would seem to bring them close to the Anglo-American system of bifurcation whereby there are two phases of the trial, one concerned with *guilt fact finding* and the other with *sentencing*. This general trend towards bifurcation appears to be specifically the result of the evolution of Italian proceedings from an inquisitorial model to an accusatorial one[1].

There have been at least three aspects to this trend towards bifurcation. First of all, in the bifurcation that has taken place between the investigative stage and the trial stage; secondly, in the double-dossier system, which means material separation between the investigative file and the trial dossier; thirdly, in the clear distinction between the functions of the prosecution and those of the judge. At first sight, therefore, the above-mentioned phenomenon of separation between conviction and sentence in the Italian criminal trial may look like just another aspect of its natural tendency towards bifurcation. And consequently, it may sound as another attempt to incorporate common law institutions into the Italian criminal justice system.

Nevertheless, the present Article aims to show that, in common with the transfer of other Anglo-American features in the context of the Italian criminal procedure, the tendency to incorporate bifurcation between the guilt and penalty phase into our system is not exactly what it seems to be. In particular, each attempt to borrow from the common law model is severely undermined by the different institutional background and traditional mentality of the civil law system with the result that the imported features become merely reinterpreted in the style of the original system[2]. It is not accident, in fact, that pursuant to Article 2 of the Enabling Act no 81 of 16 February 1987, the Italian Code of criminal procedure shall implement the accusatorial project, in accordance with a list of peculiar principles and criteria provided for by the legislature himself. That says a lot about the uniqueness of the product conceived by the Reformers, which, by legal definition, cannot be depicted as a pure adversarial style model nor as the result of the imitation of a single juridical experience[3]. It rather looks like a system «caught between two traditions»[4], where the inquisitorial roots of the criminal procedure keep on affecting profoundly the operation of legal institutions, even those underlying a strong adversarial soul. And the extent of this influence is such that, on the whole, the question arises whether the current features of Italian criminal proceeding – bifurcation included –are the true fruit of its accusatorial ambitions or, conversely, represent a reshaped projection of the inquisitorial legacy of Italian justice system.

From this perspective, the Article will examine some of the most significant instances of the *bifurcation* process of the Italian criminal proceedings in order to figure out how much they still reflect its continental traditional model. To be more precise, the second section will briefly deal with the attempt of the 1988 Italian Code of Criminal Procedure to shift from a centuries-old inquisitorial procedure to an adversarial model, which provided for a solid barrier between investigation and trial and their respective bodies. The analysis will then proceed to ask whether this bifurcation was actually genuine and how successfully it has been accomplished. Particular attention will be given to both the practical implementation of the new rules through everyday judge made-law and the changes that have been made to the process of Italian criminal procedure up to the latest organic reform of the Code, the so-called "Orlando Reform", which came into force on 3rd August 2017. Section third will focus on the

[1] For a recent overview of this process of transition, see Ogg (2013), p. 31. On the same issue, see also, Illuminati (2005), p. 567; Pizzi and Montagna (2004), p. 429.

[2] On the issue of the resistance of the traditional institutional background of civil law procedure on the new model imported from Common law system, see Damaška (1997), p. 839: "even textually identical rules acquire a different meaning and produce different consequences in the changed institutional setting". See also, Grande (2016), p. 584; Ead. (2000), p. 227; Jackson (1997), p. 51.

[3] See Lupária (2017), p. 8.

[4] In the words of Marafioti (2008), p. 81.

latest bifurcating trend in Italian criminal proceedings which has given ever more importance to the Enforcement phase of the sentence. This is fast becoming the effective stage of the trial where the penalty is established, just as what happens in the Common law systems after the adjudication phase. Special attention, however, will be given to the question whether this brand-new phenomenon is truly a bifurcation.

2. A Brief Overview on Some Atypical Attempts of "Bifurcation" in the Italian Criminal Procedure

According to the undisputed opinion of many scholars[5], one of the key differences between inquisitorial and accusatorial systems resides in the conception of the relationship between the different phases of criminal proceedings. On the one hand, the inquisitorial model favours the substantial continuity of the investigative phase throughout the trial stage, so that the trial ends up becoming a mere confirmation of what has taken place during the investigation[6]. In short, this means that, instead of being just a secret and unilateral activity in preparation of the prosecution and trial, the investigative stage itself becomes the real seat of criminal fact-finding. On the other hand, the accusatorial system requires a clear-cut demarcation between the investigative phase and the adjudication phase[7]. Only the latter phase is conceived as the procedural stage where evidence is adduced in accordance with the fundamental principles of orality and cross-examination which act as structural pillars of the adversarial model[8]. In this view, therefore, the accusatorial "bifurcation" between procedural phases prevents materials collected during the investigation becoming the grounds of the final decision.

Based on these initial premises, it is easy to see how the separation between pretrial and trial proceedings[9] in the Code of Criminal Procedure of 1988[10] was a turning point in moving the Italian system away from the inquisitorial tradition toward an accusatorial approach. Such a revolutionary rule, in particular, is rooted in the ideological premise that the probative value of evidence is conditioned on the manner in which it is gathered[11]: either secretly and unilaterally by the Public Prosecutor or by means of a process of cross-examination, involving the defendant. As a practical consequence of this ideological and methodological assumption, the 1988 Italian Code establishes a "double-dossier system"[12], that is, a peculiar "bifurcation" between the investigative dossier and the trial one. The first contains all the documents referring to action carried out secretly during the preliminary phase. It remains available to the parties, but it cannot be submitted to the trial judge. The second one, by contrast, includes the documents the Court may have knowledge of[13].

Against this backdrop, it is possible to explain the unprecedented introduction, into the Italian criminal procedure, of the notion of *unlawfully gathered evidence* which seems to follow the model of the Anglo-American *exclusionary rules*[14]. This is necessary in order to give internal coherence to the system and avoid both investigation files being given as much value as the evidence collected orally at trial[15] - in line with the goal of the common law rules of "*intrinsic policy*" which are meant to enhance the accuracy of fact finding[16], precisely by requiring first hand witness declaration instead of out-of-court statement or hearsay -and evidence gathered in violation of legal prohibitions being used by the judge in deciding the case (Article

[5] Above all, see Damaška (1973), p. 506.
[6] See Grande (2000), p. 229; Marafioti (2008), p. 82.
[7] According to Jackson (1988), p. 557 this sharp distinction the investigative pre-trial stage of inquiry and the proof stage of the trial reflects also an important feature of the classic scientific method of proof which makes a clear distinction between discovery and justification.
[8] See Illuminati (2010), p. 311; Panzavolta (2005), p. 611.
[9] Amodio (2004), p. 489.
[10] Among the first comments on the adoption of the 1988 Italian Code, the following articles may be consulted: Amodio and Selvaggi (1989), p. 1211; Del Duca (1991), p. 75; Pizzi and Marafioti (1992), p. 1. For a recent overview of the cultural changes introduced by the Code of 1998, see Lupária and Gialuz (2019), p. 24.
[11] Illuminati and Caianiello (2007), p. 129.
[12] Above all, see Gialuz (2017), p. 37.
[13] According to Article 431 c.p.p. they are: charging files, materials which are objectively impossible to reproduce in court, the *corpus delicti* and, of course, all the evidence collected orally during the trial, in the presence of the accused.
[14] See Amodio (2004), p. 490. On the same issue, Panzavolta (2016), p. 617.
[15] Illuminati (2010), p. 311.
[16] Damaska (1997), p. 12.

191 c.p.p.)- in tune with the Anglo-American rules of "*extrinsic policy*"[17] that reject probative information for the sake of values unrelated to the pursuit of truth[18].

As previously mentioned, however, it would be too easy to believe that these features in themselves could achieve a full transformation of Italian criminal proceedings into a pure accusatorial "bifurcated" trial. If one looks behind the basic evidence rule whereby *the court shall not use evidence other than that lawfully gathered during trial*, it is possible to assess how much of a change was in fact achieved.

First and foremost, it is worth taking into account the peculiar significance of the "imported" exclusionary rules within the Italian criminal procedure. Unlike genuine adversarial models, where the inadmissible evidence is materially excluded from the adjudicator's cognizance, in the Italian criminal procedure context – as well as in other Continental systems – evidence unlawfully gathered is simply eliminated from the argumentative basis of the judge's written reasoning[19]. This means, in other words, that the operation of exclusionary rules does not prevent the Italian judge from considering the unlawfully obtained information in the process of coming to his or her intimate conviction but it «just makes it more difficult for the court to *justify* a decision which may well have been influenced by the "excluded" evidence»[20]. Given this, it can be argued that the goal of achieving an accusatorial system through bifurcation between the investigation and the trial stage become subverted in everyday courtroom practice. If the judge is not actually prevented from accessing the unlawfully gathered item of evidence, the consequence is to enable him to make psychological and substantive use at trial of the out-of-court statements and the written material collected during party-investigations, with no real demarcation between procedural phases.

But to what may we ascribe this side-effect of the Italian regulation of evidence inadmissibility? Actually, the main reason resides in the fact that, contrary to Common law systems, Italian one has not a bifurcated court as well and «there can be little room for notions of admissibility if there is no separation between the judging and the fact-finding roles»[21]. It is known, indeed, that the effectiveness of the Anglo-American rules excluding the untested evidence gathered during the investigation is strictly linked to the existence of a bifurcated judge[22]: namely, the jury on one side and the trial judge on the other. In such a binary context, decisions concerning the admissibility of evidence are made by the professional judge. To this end, in fact, the judge holds a sort of "trial within a trial" in the absence of the jury[23]. It thus follows that jurors remain truly unaware of inadmissible evidence that might taint their decision-making. By contrast, this is not actually possible in Italy due to the unitary structure of its judicial organization. Where judge presides alone, there is no real distinction between the admission of evidence phase and the evaluation of the admitted evidence because the same person is responsible both for the decision on the evidentiary issues and the final assessment of the case[24]. This results in a two-fold effect: the inadmissible proof leaves unavoidable traces in the mind of the judge who has to decide on the facts; there is more pressure on the judge himself to exclude an inadmissible – but relevant – evidence because then he knows that he cannot make use of it for the outcome of the trial. And the overall consequence is to undermine the effectiveness of the exclusionary rules, intended as one of the hallmarks of the accusatorial bifurcated criminal proceeding. Furthermore, this is confirmed also by the weakening of the Anglo-American rules of evidence themselves, in cases of trial by judge sitting alone[25]. In situations such as these, even in the Common law systems, the absence of the jury necessarily results in an adversarial *deficit* just because of the unitary structure of the decision-making process[26]: the professional judge loses his role to umpiring solely the contest and ensuring the fairness of the trial and becomes responsible both for the evidential issues and the final verdict.

[17] On the distinction between "intrinsic" and "extrinsic policy" exclusionary rules, see Wigmore (1940), p. 296.
[18] Walton (2002), p. 17.
[19] Damaŝka (1997), p. 52; Grande (2016), p. 607.
[20] Literally, Weigend (2007), p. 254. On the point, see also Jackson and Summers (2012), p. 73. According to them, in fact, «it is legitimate to question whether judges can really be expected to ignore evidence which they have already seen».
[21] Jackson and Summers (2012), p. 73.
[22] Damaska (2003), p. 123; Id. (1997), p. 72.
[23] Doran (2002), p. 393.
[24] Wistrich *et al.* (2005), p. 1260.
[25] Damaska (1997), p. 76. The same can said about the rules governing the evidence admission phase in front of the International Criminal Court where there is no jury as well: see Caianiello (2008), p. 202.
[26] Jackson (2002), p. 348; Jackson and Doran (1995).

In practice, this leads to an increased evidentiary use of unchallenged statements[27] – that is, evidence gathered against the hearsay rule and in breach of a pure bifurcation between the investigation and the trial stage – on the (questionable) assumption that the lack of the jury renders it unnecessary to exclude written testimony collected out of the court because of the professional judge ability to evaluate the reliability of an unchallenged testimonial statement[28]. But that is not all.

Such considerations on the ineffectiveness of the rules restricting the use of evidence at trial take us to another distinctive respect in which Italian bifurcation between the investigative stage and the trial stage can be subverted, that is in degree of mutual autonomy that is granted to the two phases. An example of this is the provision introduced last year, by Law n. 103 of 2017, with particular regard to the use of evidence unlawfully gathered for the "summary trial"[29] which allows for a special proceeding where the case is decided in advance at the preliminary hearing and is based solely upon the investigative files if the accused person consents resulting in a reduction of sentence by one third should he be found guilty. With respect to the operation of the exclusionary rules within the summary trial, it is now expressly provided in Article 438, par. 6-*bis*, c.p.p. that «the request for summary trial submitted during the preliminary hearing shall redress any nullity other than absolute nullities and prevent any form of exclusion of evidence from being raised, unless they derive from the violation of a ban on evidence gathering». The result of this is that when the accused opts for this special proceeding giving up on his right to a full adversarial trial, almost "everything" can be used as a ground for the decision in the case[30], regardless of how it was collected. So, here it goes another remarkable sign of the inquisitorial soul that is still alive in the adversarial body of Italian criminal procedure. Unlike the adversary common law system, where even in case of summary trial, the Magistrate has to deal with objections to the admissibility of evidence[31], on the premise that «the fairness of a trial may be compromised by unfairness early in the proceedings, including impropriety in the way in which evidence was obtained»[32], Italian old goal of safeguarding official fact-finding outcome ends up making irrelevant in the summary trial any evidentiary rule imposing specific modalities of evidence gathering[33]. This means, in practice, that the defendant could not seek to exclude items obtained by illegal methods during the preliminary investigation but only those means of evidence strictly prohibited by the Code at any stage of the proceeding. This normative innovation has a significant impact in the field of technological evidence – for instance, wiretapping and digital information – where there are important provisions guaranteeing the defence rights of the accused person in terms of legitimacy of the manner in which such evidence shall be gathered: no matter if they were obtained improperly (*i.e.* interception of communications carried out in breach of Article 268, par. 1 and 3, concerning the modalities of execution of wiretapping), they are nevertheless admissible at summary trial because of the absence of a probative ban[34]. Hence, at the systematic level, the result of the above new regulation is an unrestricted growth in the use of pre-trial exhibits as determinative basis of the guilt fact-finding at the expense of the evidence gathered adversarially. And on the argument presented in this paper, the overall consequence is to progressively reduce the fundamental separation between the functions of investigation and adjudication and revert to a system more in tune with an inquisitorial mode of criminal justice.

An overview on the various dynamics showing Italian criminal procedure trend towards bifurcation would not however be complete without any reference to the need to maintain a sharp division of function between the judge and the prosecution as a very relevant factor in implementing the accusatorial choice made by the Italian Code of 1988. Consistent with a sharp division of tasks, the Public Prosecutor must have sole responsibility for the preliminary

[27] See, again, Jackson (2002), p. 348. The Author remarks that «where judges preside alone (…) they have often read the statements of the witness before trial and they do not come nearly so cold to the trial».
[28] In this sense, notwithstanding from the peculiar point of view of the operation of rules of evidence with cases tried before the ICC, see Caianello (2011), p. 304.
[29] On the issue, see Pizzi and Marafioti (1992), p. 23.
[30] See Daniele (2017), p. 482.
[31] As notes Spack (2011), p.180, the problem here is, one more time, that in determining any objection to evidence the judge presiding the summary trial will inevitably discover what the evidence is.
[32] In these terms, Dennis (2017), p.150.
[33] On this opinion, see Caraceni (2018), p. 12; Marzaduri (2018), p. 539; Maffeo (2017), p. 154.
[34] See Ferrua (2017), p. 1267.

investigation, aimed at deciding whether or not to prosecute the offence[35], whereas the judge is the impartial fact-finder who has to go fresh to trial, without any previous involvement in the case to be decided. Theoretically, this differentiation of the different roles played by public officials in the Italian criminal process denotes a marked sense of loyalty to the accusatorial choice made, and in particular, towards the proper implementation of its main imported feature: the principle of parties' confrontation[36]. Yet, moving from theory to practice, few comments can be made in terms of the effectiveness of this "subjective" bifurcation between the key roles of the Italian criminal justice system.

Regardless of the structure of the Italian Judiciary, where judges and prosecutors belong to the bench and come from a common background[37] which risks confusing their institutional roles with both triers of fact and accusers able to go from one position to another[38], it is worth taking into account the trial judge's evidentiary power that still persists nowadays within Italian criminal proceedings. Once again, the lack of a bifurcated adjudicating body similar to that in the Common law judge-jury ends up being of crucial importance. That is because, feeling his sense of personal responsibility for guilt determination, the Italian single judge cannot but be induced to become involved in proof-taking activity more than he does in jury trials[39]. Otherwise, it would not explain the extensive interpretation that it has been given in courtroom practice to Article 507 C.p.p. whereby «upon completion of evidence gathering, the Court may order, also of its own motion, the admission of new means of evidence, if absolutely necessary». This provision is, in fact, often overused to such an extent that the trial judge can also introduce evidence on his own initiative when the parties have not filed any probative motion at all[40]. And such judicial activism in producing evidence which deflates the accusatorial impulse towards a pure bifurcation between the judge and the prosecutor is paradoxically confirmed by the justification that the Constitutional Court itself provided for the aforesaid judge's *ex officio* powers. In the Court's view, the trial judge's evidentiary power aims at preventing a violation of the constitutionally mandated compulsory prosecution principle (Article 112 of Italian Constitution)[41]. So, here is the point: the assumption that any official adducing of evidence will serve the implementation of the compulsory prosecution principle, by which the Italian Prosecutor is bound[42], amounts ultimately to saying that the adjudicator himself is, somehow, subject to the same principle. And the consequence is thus to make the roles of the judge and that of the prosecutor look less "bifurcated" and therefore less adversarial.

3. Between Conviction and Sentence: The Pure Bifurcated Approach from the Italian Point of View

In the light of the previous remarks about the ups and downs of the Italian transition to an adversarial-style bifurcated approach towards criminal proceedings, readers will not be surprised to learn that this tendency reached its highest point in the context of the Enforcement phase of judgements which coincides with the procedural step following the conviction.

As it is known, indeed, within the Anglo-American criminal justice system, the term of bifurcation as such «stands for the separation of the issue of criminal liability from that of an appropriate sentence»[43]. This is probably at its strongest when applied to the Common law jury system where a defendant who contests his guilt is tried by the jurors and the sentence is wholly within the authority of the judge, but such a binary decision making does not change a lot even in cases of trial by judge alone because, again, although the sentence is determined by the same magistrates who had decided whether the defendant is guilty or innocent, the

[35] On the role of the Public Prosecutor, under the Italian Code of 1988, see Caianiello (2011), p. 250; Illuminati (2004), p. 303; Perrodet (2005), p. 361; Ruggeri (2015), p. 59.
[36] Illuminati (2010), p. 311.
[37] Lupária (2017), p. 12; Panzavolta (2005), p. 606.
[38] See Grande (2000), p. 236; Langer and Sklansky (2017); Marafioti (2008), p. 95.
[39] Damaska (1997), p. 135.
[40] See Court of Cassation, 17th October 2006; Id., 6th November 1993. Such broad application of the Article 507 C.p.p. was endorsed even by the Constitutional Court with the judgement 26th February 2010, n. 73.
[41] See Constitutional Court, judgement 26th March 1993, no. 111.
[42] In this respect, see Ruggeri (2015), p. 59.
[43] Literally, Mueller and Basharov (1968), p. 613.

process falls then into two distinct stages[44].

During the last few years, the Italian criminal process as well – whose traditional system of judgement, conversely, provides for a two-fold and concomitant decision on the issues of both guilt and sentence – seems to have converged towards a sort of "*segmentalization*"[45] of these triable issues. Such a perception, arisen particularly on the doctrinal level[46], is related to the increasing powers that Italian jurisprudence has entrusted to the Enforcement court to restructure the sentence imposed by the trial judge at the end of the fact-finding process.

The argument goes as follows. Given the fact that the severity of the original sanction applied might well be reviewed during the enforcement phase, it is within this latter stage of the proceedings that the penalty is in reality established. By way of contrast, it is argued, the trial phase is basically intended to determine only whether the defendant is guilty or innocent of the crime with which he is charged, just as in the Anglo-American bifurcated criminal process[47].

Before attempting to assess the true extent of this further legal transplant[48] of the Common-Law concept of bifurcation into the Italian justice system, a quick reconnaissance is in order to map out some of the main cases where the Italian enforcement judge has been entitled to change the sentence, either in part or completely.

To begin with, it is worth stressing that the Italian process of implementing the judgment of conviction is under the jurisdiction of two different courts. On the one hand, the Enforcement Judge as such, who is entrusted with the control over the legitimate implementation of the enforceable decision; on the other hand, the Sentence Supervision Judge and Sentence Supervision Tribunal, whose task is to assess the adequacy of the penitentiary treatment compared to the rehabilitation of the condemned person[49].

It is easy to see how the latter court's power to amend the sentence is implicit in its own function. For in order to ensure the coherence of the penitentiary treatment with respect to both the personality of the subject and the progress made by him in terms of rehabilitation, the sanction itself has to be modified so that Sentence Supervision Tribunal can apply one of the alternative measures to detention provided for by law, instead of maintaining the penalty initially imposed with the enforcing judgement.

In this perspective, the recent legislative decree No 123 of 2 October 2018 amending the Italian penitentiary system has gone even further. In cases of lower sanctions – maximum of eighteen months prison sentence – it was thus envisaged that, after the suspension of the enforcement has been ordered by the Public Prosecutor in accordance to art. 656, par. 5 c.p.p., the Sentence Supervision Judge shall grant provisionally the convicted person one of the alternative measures referred to in Articles 47, 47-*ter* and 50, paragraph 1, of Law No 354 of 26 July 1975, also on the basis of results of the scientific observation of the personality carried out by the External Criminal Enforcement Office[50].

In such situations, more exactly, the Sentence Supervision Judge is empowered to commute the original sanction imposed by the trial judge into an alternative measure (i.e. probation) without the need to hold a hearing nor to wait until the case is tried before the Sentence Supervision Tribunal. Indeed, if no objection is raised by the condemned person against the reassessment of the sanction, the provisional order itself becomes enforceable almost seamlessly from the original sanction imposed by the trial judge at the end of the former stage of the criminal proceeding. This is reflected in a considerable simplification of the procedure for amending the sanction imposed at the end of the trial phase which seems to follow very closely the pure Anglo-American two-phase system of criminal proceeding, because it basically achieves a bifurcated decision-making process with a bifurcated "adjudication body": the trial judge, on one side; the Sentence Supervision judge, on the other side.

From a different perspective, however, it is not so easy to see why the Enforcement judge should be empowered to amend the sentence resulting from the final decision whose enforcement he is responsible for. Unlike his colleagues on the Supervision Sentence juri-

[44] Thomas QC (2002), p. 478.
[45] See Mueller and Basharov (1968), p. 616.
[46] On this opinion, among the Italian scholars, see Felicioni (2017), p. 166; Gaito (1995), p. 1322; Lorusso (2002), p. 91; Marafioti (2016), p. 209.
[47] Thomas QC (2002), p. 478.
[48] In the words of Watson (1974).
[49] See Gialuz (2017), p. 54.
[50] On this last amendment, see Ruaro (2018).

sdictional body, the Italian Enforcement judge is not entrusted with the task of ensuring the re-education of the accused person, set forth in Article 27, par. 3 of the Italian Constitution. The reasons behind the increasing importance given to the role of the Enforcement Court in managing the sentence are thus to be found elsewhere, as shown by the relevant case-law. One need only mention the power of the Court to amend the sanction in the case of a conviction was rendered illegal as a result of decision by the Constitutional Court declaring specific provisions concerning the penalty[51] to be constitutionally illegitimate (e.g. those providing for mitigating or aggravating circumstances), and as a result of a final judgement of the European Court of Human Rights establishing a violation of a fundamental right safeguarded by the European Convention (*e.g.* the right to no punishment without law provided for in Article 7 ECHR)[52]. But it is also worth noting that the Enforcement judge was given competence to amend the sentence resulting from a mistake of law in the application of the relevant rules at the adjudication phase[53].

In terms of practical results, it can be reasonably stated that these decisions resulted in something like the Anglo-American bifurcated judgement system being created, since the issue of the sentence ends up being actually postponed from that of the guilt fact-finding.

Nevertheless, it is on their rationale side that the two types of bifurcation sharply diverge.

On the one hand, in the "original" Common-law bifurcated trial, the sentencing phase of the procedure aims at providing the most suitable sanction for the condemned person[54], on the pivotal assumption that "*the punishment should fit the offender as well as the crime*"[55].

From this perspective, the Anglo-American model envisages a strict distinction between the factual basis on which to pass, respectively, the verdict and the sentence[56]. This means that, although the sentencer must base the sanction on a version of the facts which is consistent with the verdict[57], any issues related to both mitigating and aggravating circumstances, as well as the evidence concerning the accused person's character and his own background and criminal records[58] are assembled by the probation officer in the pre-sentence reports, and restricted to that portion of the proceeding in which sentence is determined.

In this regard, it is also important to mention that for the purpose of the sentencing hearing, the judge can even order a psychiatric evaluation of the defendant's history and personal characteristics to be included in the pre-sentence investigation reports. A psychiatric study of the case can thus help the sentencing judge to answer any questions which require a more definitive inquiry into the offender's personality – his motives, his inner conflicts, his capacity for self-control, or his latent character assets – and also the question of his need for psychiatric treatment[59], that are all assessments serving the aim of determining a suitable and proper sanction for the accused, at the sentencing stage[60].

Conversely, none of the items above can be submitted to the jury at the earlier stage of the proceeding for the purpose of deciding on the guilt or innocence of the accused[61]. As a result, jurors come "cold" to the evidence in each case and exercise a "fresh" judgement on the facts only[62]. And the extent of this bifurcated approach is such that, according to some scholars in the field, «the verdict itself may not imply any determination on a matter which is relevant to

[51] See Court of Cassation, 29th May 2014, no. 42858, linked to the Constitutional Court judgement no. 251/2012.

[52] See Court of Cassation, 24th October 2013, no. 18821, to be read in connection with European Court of Human Rights, 17th September 2009, *Scoppola* v. *Italy*; Court of Cassation, 6th July 2017, no. 43112, linked to European Court of Human Rights, 14th April 2015, *Contrada* v. *Italy*.

[53] See Court of Cassation, 27th November 2014, no. 6240, according to which the Enforcement Judge is entitled to amend the sanction if the trial judge imposed an additional sentence due to a mistake in perception of the law applicable in the case in point; Id., 29th October 2015, no. 26259, whereby the Enforcement Judge has the power to revoke the final conviction – and consequently the relative sanction – if the relevant rules applied were already been repealed before the conviction, but the proceeding judge did not declare it due to a mistake of perception.

[54] According to Thomas (1979), p. 8, the sentencer makes a balance between a sentence intended to reflect the offender's culpability and the objective to influence his future behaviour by means of an individualized measure referring to the offender's personal characteristics.

[55] Zenoff (1987), p. 917.

[56] See Ashworth (2015), p. 424; Shapland (1981), p. 1.

[57] Thomas (1979), p. 368.

[58] It is worth high-lightning that, as far as the English System, with the enactment of the *Criminal Justice Act 2003*, evidence of the defendant's bad character is now admissible at trial under the sole conditions provided for by the law, such as if all parties to the proceedings agree to the evidence being admissible or when the evidence is adduced by the defendant himself or is given in answer to a question asked by him in cross-examination and intended to elicit it. On this issue, see Spencer (2016).

[59] See Campbell Jr (1972), p. 293.

[60] Felthous (2017), p. 290; Id. (1989), p. 190; Dershowitz (1978).

[61] See McPeake (2015), p. 225; Pizzi (2008), p 70; Wasik (1997), p. 187.

[62] Doran (2002), p. 381.

sentence»[63].

From this perspective, for instance, it is significant that English jurisprudence[64] pays particular attention to ensuring that if any issue relevant to sentence (i.e. where the defence contends provocation) is left unclear as a result of the jury verdict, the judge should hold a so-called "*Newton hearing*" before passing sentence. In particular, this means that, in order to provide a proper factual basis to the sentence, the sentencer himself ought to hear the particular evidence relating to any mitigating factor which was not been addressed during the trial process. So, in other words, the judge is required to come to his own view of the factual issues having potentially significant impact on the level of sentence by means of a proof stage other than that of the trial[65].

On the other hand, the bifurcated sentence decision making *à l'italienne* draws no distinction at all between the evidentiary basis upon which the Enforcement judge amends the sentence and that underlying the former two-fold decision on the issues of guilt and sentencing delivered by the trial judge.

Suffice to say that within Italian justice system any information about the defendant's antecedents, his "bad" character, criminal records or even current charges are heard by the trial judge together with all the evidence relevant to fact-finding. It therefore goes without saying that there cannot be any effective differentiation between the evidentiary material that is used in the Italian two-phases system of criminal procedure: the finding of guilt and sentencing which take place at one single session at the end of the trial stage, on one side, and the re-assessment of sentence carried out during the Enforcement stage of the proceeding, on the other side.

To be more exact, there is one actual diversion between the evidence underlying such "Italian style" double decision-making process. It resides in the use of the expertise on the defendant's personality which is allowed only in the Enforcement phase, whereas it is absolutely banned from the trial stage, pursuant to Article 220, par. 2 of the Italian Code of Criminal Procedure, whose rationale is to avoid that any negative aspects of the accused's character resulting from the criminological expertise influence the decision on the issue of guilt, by making the court more likely to convict the defendant[66]. What results, however, is a system which gives rise to some inconsistencies. On the one hand, it does strictly prohibit the evidentiary use at trial of any psychological evaluations despite their undisputed value with a view to achieving the individualization of the sanction to be imposed to the defendant[67]. Indeed, it is no coincidence that, for its part, the Italian Criminal Code (Article 133, par. 2, no. 1) provides for the judge to determine the sanction also considering the offender's motives and his character. And this appears to call the judge himself to a properly psychological scrutiny that would certainly be more successful on the base of the opinion of an expert rather than having regard to other probative results[68].

On the other hand, Italian system largely allows the accused's "*track record*"[69] – including judgements yet to become final and even simple alleged offences – to be taken into account in deciding whether he has committed the crime of which he is currently charged or is likely to misconduct himself in future[70], with the further (undesirable) effect of making it easier to issue a precautionary detention[71] order against the accused which ends up being a sort of punishment imposed upon him in advance of the fact-finding and – of course – without any referral to his individualised rehabilitation purpose. That is, the exact opposite of the pure Anglo-American sentencing phase rationale.

Furthermore, another clue to understanding the true nature of the Italian reception of the

[63] Thomas (1970), p. 81.
[64] *R v Newton* (1982) 4 Cr App R (S) 388; *R v Costley* (1989) 11 Cr App R (S) 357; *R v Broderick* (1993) 15 Cr App R (S) 476.
[65] See again Thomas (1970), p. 84.
[66] In this regard, among the Italian scholars, see Giannini (2003), p. 87 *et seq.*; Martucci (2004), p. 746; Moscarini (2006), p. 929; Rivello (2013), p. 422.
[67] See Chiavario (1990), p. 38. A proof of this incoherence is, indeed, given by the fact that, before the enactment of the Code of 1988, it was proposed to introduce the use of criminological expertise just after the criminal ascertainment, by reopening the trial in order to evaluate the author's personality. Above all, see Pisapia (1980), p. 1029.
[68] On this opinion, Moscarini (2006), p. 930.
[69] The term is used by Spencer (2016), p. 1.23.
[70] See, again, Spencer (2016), *ibidem*.
[71] According to Italian case law, indeed, criminal charges can be taken into account in order to assess the defendant dangerousness with a view to the application of a precautionary measure, pursuant to Article 274, lett. c), of the Code of criminal procedure. In this sense, for instance, see Court of Cassation, 15th july 2008, no. 33873.

accusatorial bifurcation between trial stage and sentencing stage is related to the fact that, unlike the Common law system, the decision set out by the Italian court at the end of the trial phase is always reasoned. The presiding judge has thereby to explain the verdict in an opinion that evaluates the evidence gathered and explains in detail all the grounds for the deliberation[72]. So, it is quite impossible for the Enforcement court amending the sentence not to base its decision on all the same items and issues that the reasoning behind the decision dealt with. Indeed, according to the recent case-law[73], during the enforcement phase, the entire file of the trial process must always be at the disposal of the Enforcement judge, who may access to it constantly. This means, however, that the Italian Enforcement judge's power to amend the sanction becomes nothing but a substantial review of the previous judgement and its cognitive framework[74].

4. Some concluding remarks

What conclusions can be drawn from such a divergence between the rationale behind the Anglo-American bifurcated trial and the Italian phenomenon which has given increasing importance to the Enforcement phase in amending sentence?

Keeping these contrasting rationales in mind, rather than being seen as an attempt to imitate the adversary criminal procedure model, the tendency towards Italian-style bifurcation of the proceedings is better explained on the basis of a strong resistance towards such a model within the basic continental tenets of Italian criminal justice system and on its peculiar attachment towards the search for truth.

Indeed, given the pursuit of seeking as closely as possible the objective truth in adjudicating criminal liability[75], «continental justice implies the need for direct reconsideration of the trial adjudication by a higher court»[76]. Consistent with this general paradigm of truth-finding, where there have been mistakes of fact or law undermining the reliability of the final sentencing decision delivered at the end of the trial [77], the Italian Enforcement judge himself is required to reassess the decision, and, as a result of this reconsideration, amend the imposed sentence accordingly. But precisely because it is the fruit of a reassessment of the former decision, such an amendment of the sentence is regarded as a further appellate remedy within the Italian "vertical" and "unitary" criminal justice system[78], rather than as a clear-cut bifurcated procedural phase in which sentencing is actually determined.

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[72] See Marafioti (2008), p. 87.
[73] See Court of Cassation, 30th November 2005, no. 1396. Similarly, see Court of Cassation, 29th May 2014, no. 42858.
[74] On this point, please refer to Centorame (2018), p., 73.
[75] See Grande (2016), p. 589, who underlines the dichotomy between the *objective* truth as conceived by the Continental systems and the *interpretive* truth as the goal of justice in the of the pure adversary models.
[76] Literally Grande (2009), p. 16.
[77] A recent overview of the concept of juridical truth is provided by Ubertis (2018).
[78] See Gialuz (2017), p. 51.

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