

FEDERICA CENTORAME\*

## TOWARDS A TWO-PHASE SYSTEM IN THE ITALIAN CRIMINAL PROCEDURE?

ABSTRACT. *Despite the traditional unitary decision-making system of Italian criminal procedure, the most recent case-law seems to give increasing importance to the Italian Enforcement Judge in amending the original sanction imposed at the end of the trial phase. From this perspective, the present paper will be focused on verifying if such brand-new tendency to bifurcate the decision between guilt and sentencing in the Italian criminal process represents another legal transplant from the Common-law model or, rather, a peculiar effect of its inner inquisitorial soul.*

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### **1. Introduction**

It is the claim of many legal scholars<sup>1</sup> that, during the last few years, Italian criminal proceedings – where the finding of guilt and sentencing take traditionally place at one single session – seem to have converged towards a sort of “segmentalization”<sup>2</sup> of these triable issues, just as in the Anglo-American bifurcated criminal process, whereby

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\* Research Fellow in Criminal Procedure Law, Faculty of Law, Roma Tre University.

1 On this opinion, among the Italian scholars, see A. GAITO, *Poteri di integrare il merito post rem iudicatam*, in *Diritto penale e processo*, 1995, p. 1322; S. LORUSSO, *Giudice, pubblico ministero e difesa nella fase esecutiva*, Milano, 2002, p. 91; L. MARAFIOTI, *Funzioni della pena e processo penale*, in G. DE FRANCESCO-E. MARZADURI, *Il reato lungo gli impervi sentieri del processo*, Torino, 2016, p. 209; G. UBERTIS, *Sul progetto preliminare del Codice di procedura penale*, in *Rivista italiana di diritto e procedura penale*, 1988, p. 1309.

2 See G. O. W. MUELLER-D. J. BASHAROV, *Bifurcation: the Two Phase System of Criminal Procedure in the United States*, in *Waine Law Review*, 1968, p. 616.

there are two phases of the trial, one concerned with *guilt fact finding* and the other with *sentencing*.

In particular, what has emerged as a central feature of this phenomenon of change is the increasing power 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.

Based on these premises, it is argued that the penalty is actually established within the Enforcement phase of the proceeding due to the fact that the severity of the original sanction applied might well be reviewed by the Enforcement Judge. It follows that the trial phase is conversely intended to determine only whether the defendant is guilty or innocent of the crime he/she is charged with.<sup>3</sup> And this would appear to be another attempt to incorporate typical Common-law institutions into the Italian criminal justice system, following on its long-standing shift from an inquisitorial model to an accusatorial one.<sup>4</sup>

Moving from such theoretical assumptions, this paper aims to assess the true extent of this legal transplant<sup>5</sup> of the Common-law concept of bifurcation into the Italian criminal process in order to answer the question whether it is a further fruit of the accusatorial ambitions of the Italian justice system, or, by way of contrast, it represents a reshaped projection of its inquisitorial legacy.

## ***2. The Italian Sentence Supervision Judiciary and its power-duty to amend the sanction***

For the Italian reader – as well as for those coming from other civil-law systems – the bifurcation of the criminal process, which stands out as one of the most striking hallmarks of the Anglo-American justice system, is extremely common. In essence, it

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3 D. THOMAS QC, *The Sentencing Process*, in M. McCONVILLE-G. WILSON, *The Handbook of the Criminal Justice Process*, Oxford, 2002, p. 478.

4 For a recent overview of this process of transition, see J. T. OGG, *Adversary and Adversity: Converging Adversarial and Inquisitorial Systems of Justice - A Case Study of the Italian Criminal Trial Reforms*, in *International Journal of Comparative and Applied Criminal Justice*, 37, 2013, p. 31; L. LUPÁRIA-M. GIALUZ, *Italian Criminal Procedure: Thirty Years After the Great Reform*, in *Roma Tre Law Review*, 1, 2019, p. 24.

5 In the words of A. WATSON, *Legal Transplants: An Approach to Comparative Law*, Edinburgh, 1974.

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consists in separating “the issue of criminal liability from that of an appropriate sentence,”<sup>6</sup> which is the ultimate expression of the Common-law jury system where a defendant who contests his/her guilt is tried by the jurors and the judgement falls entirely within the authority of the judge. Nevertheless, such a binary decision-making system does not change even in cases heard by a judge sitting alone.<sup>7</sup> Here again, although the sentence is determined by the same magistrates who had decided whether the defendant is guilty or innocent, the Anglo-American process falls then into two distinct stages.<sup>8</sup> And to be fair, this latter aspect could be used as an argument in favour of the above-mentioned doctrinal approach whereby also the Italian criminal process is moving forward a bifurcated style system of judgement. That is because, in the light of the Common-law experience, the bifurcation between conviction and sentencing does not seem to be strictly linked to the existence of a bifurcated adjudicating body as well: namely, the jury on the one hand, and the professional judge, on the other. It follows that it might well be transplanted even within the Italian justice system where notoriously there is no jury and the adjudicating body has thereby a unitary structure.

In this perspective, it is thus worth highlighting 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 the Sentence Supervision Tribunal, whose task is to assess the adequacy of the penitentiary treatment compared to the rehabilitation of the condemned person.<sup>9</sup> Both of them have an expanding role within the Italian criminal trial since they are empowered to change the sentence imposed at the end of the former stage of the proceeding, either in part or completely. On the argument presented in this

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6 Literally, G. O. W. MUELLER-D. J. BASHAROV, *Bifurcation: The Two Phase System of Criminal Procedure in the United States*, 1968, p. 613.

7 See J. JACKSON, *The Adversary Trial and Trial by Judge Alone*, in M. McCONVILLE-G. WILSON, *The Handbook of the Criminal Justice Process*, 2002, p. 335.

8 D. THOMAS QC, *The Sentencing Process*, 2002, p. 478.

9 See M. GIALUZ, *The Italian Code of Criminal Procedure: a Reading Guide*, in M. GIALUZ-L. LUPÁRIA-F. SCARPA, *The Italian Code of Criminal Procedure: Critical Essays and English Translation*, Padova, 2017, p. 54.

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paper, however, the key point is to understand the rationale behind such increasing duties to amend the penalty so as to compare it with the one underlying the pure Anglo-American bifurcated model.

To this end, let us examine first the cases where the Sentence Supervision Judge and the Sentence Supervision Tribunal are entitled to amend the original sentence. To some extent, the fact of undertaking certain active sentencing responsibilities is implicit in the own function of these professional judges. In fact, to ensure the coherence of the penitentiary treatment with respect to both the personality of the subjects and the progress made by them in terms of rehabilitation, the sanction itself has to be modified so that the Sentence Supervision Tribunal can apply one of the alternative measures to detention provided by law, instead of maintaining the penalty initially imposed with the enforcing judgement.

A good example of this deviation from the original sanction imposed at the end of the trial is the brand-new proactive role that the recent Legislative Decree no. 123 of 2 October 2018 amending the Italian penitentiary system has given to the Sentence Supervision Judge. In cases of lower sanctions – prison sentence of up to eighteen months – and after the suspension of the enforcement has been ordered by the Public Prosecutor in accordance to Art. 656, par. 5 CCP, the Sentence Supervision Judge has thus been empowered to provisionally grant the convicted person one of the alternative measures referred to in Articles 47, 47-*ter* and 50, par. 1, of Law no. 354 of 26 July 1975, also on the basis of the results of the scientific observation of the personality carried out by the External Criminal Enforcement Office. In practice, this means that the Sentence Supervision Judge himself is able 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 without the obligation to wait until the case is tried before the Sentence Supervision Tribunal. In fact, if no objection is raised by the condemned person against the reassessment of the sanction, the provisional order imposing the “new” sentence becomes enforceable. It is easy to see that 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 proceedings, because it basically achieves a bifurcated decision-making process with a bifurcated “adjudicating body”: the trial judge, on the one hand; the Sentence Super-

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vision judge, on the other. Therefore, it can be reasonable stated that from the perspective of the Sentence Supervision Judge's power of restructuring the sanction, the two models in comparison seem to have converged even on their rationale side. The Common-law bifurcation as such is based on the pivotal assumption that "the punishment should fit the offender as well as the crime,"<sup>10</sup> likewise the Italian Supervision Sentence jurisdictional body is entrusted with the task of ensuring the re-education of the accused person, set forth in Article 27, par. 3 of the Italian Constitution.

### ***3. The new role of the Italian Enforcement Judge: comparative impressions and traditional goals***

The other aspect to be considered to ascertain the true nature of the Italian reception of the Common-law style bifurcated system is the increasing importance given to the role of the Enforcement Court in managing the sentence resulting from the final decision whose enforcement the Court is responsible for.

In this regard, it may be convenient to take a brief look at the relevant case-law. One need only mention the power of the Court to amend the sanction in case of convictions which turned out to be illegal following a decision of the Constitutional Court declaring the constitutional illegitimacy of specific provisions concerning the penalty<sup>11</sup> (e.g., those providing for mitigating or aggravating circumstances), or as a result of a final judgement of the European Court of Human Rights (ECHR) establishing a violation of a fundamental right safeguarded by the European Convention (e.g., the right to no punishment without law laid down in Article 7 ECHR).<sup>12</sup> Again, it is worth mentioning the Enforcement Judge's competence to amend the sentence resulting from a

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10 E. ZENOFF, *Sentencing Alternatives*, in R. J. JANOSIK, *Encyclopedia of American Judicial System. Studies of the Principal Institutions and Processes of Law*, New York, 1987, p. 917.

11 *Corte di Cassazione, Sezioni Unite*, 29 May 2014, *Gatto*, in *Rivista italiana di diritto e procedura penale*, 2015, p. 1006, which follows *Corte Costituzionale*, 15 november 2012, no. 251, in *Giurisprudenza costituzionale*, 2012, p. 4043.

12 *Corte di Cassazione, Sezioni Unite*, 24 October 2013, *Ercolano*, in *Giurisprudenza italiana*, 2014, p. 1752, to be read in connection with ECHR, 17 September 2009, *Scoppola v. Italy*; *Corte di Cassazione*, 6 July 2017, in *Rivista penale*, 2018, 4, p. 379, linked to ECHR, 14 April 2015, *Contrada v. Italy*.

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mistake of law in the application of the relevant rules at the adjudication phase.<sup>13</sup>

It is easy to see that, in terms of practical results, these decisions achieve something similar to what is reached in the Anglo-American bifurcated judgement system, since the issue of the enforceable sentence ends up being actually postponed from that of the guilt fact-finding. On the other hand, however, the two types of bifurcation are remarkably different in their intimate essence.

As mentioned before, within the “original” Common-law bifurcated trial, the sentencing phase of the procedure is intended to achieve the individualization of the sanction to be imposed to the defendant.<sup>14</sup>

To this extent, the Anglo-American model envisages a strict distinction between the factual basis on which to pass, respectively, the verdict and the sentence.<sup>15</sup> It follows that, although the sentencer must base the sanction on a version of the facts which is consistent with the verdict,<sup>16</sup> 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<sup>17</sup> are assembled by the probation officer in the pre-sentence reports, and restricted to that portion of the proceeding in which the sentence is determined.

The same can be said about the use of psychiatric evaluations of the defendant’s history and his personal characteristics at the dispositional stage of the action. With a

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13 *Corte di Cassazione, Sezioni Unite*, 27 November 2014, *Basile*, in *Cassazione penale*, 2015, p. 2578, according to which the Enforcement Judge has the power 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; *Corte di Cassazione, Sezioni Unite*, 29 October 2015, *Mraidi*, in *Cassazione penale*, 2016, p. 4009, whereby the Enforcement Judge is legitimated 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.

14 D. A. THOMAS, *Principles of Sentencing*, London, 1979, p. 8.

15 See A. ASHWORTH, *Sentencing and Criminal Justice*, Cambridge, 2015, p. 424; J. SHAPLAND, *Between Conviction and Sentence. The Process of Mitigation*, London-Boston and Henley, 1981, p. 1.

16 D. A. THOMAS, *Principles of Sentencing*, 1979, p. 368.

17 Regarding the English system, however, pursuant to 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.

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view to determining the most suitable and proper sanction for the condemned person, a psychiatric study of the case can thus help the sentencing judge to answer any questions that 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,<sup>18</sup> that are all assessments serving the goal of the sentencing stage.<sup>19</sup> By way of contrast, none of the above evidence can be adduced to the jury (or to the trial judge) at the earlier stage of the Anglo-American proceeding for the purpose of deciding on the guilt or innocence of the accused.<sup>20</sup> The result of such bifurcated approach, it is argued, is that “the verdict itself may not imply any determination on a matter which is relevant to sentence.”<sup>21</sup> This explains why, according to the English case-law,<sup>22</sup> 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 a sentence. In sum, this means that the sentencing 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.<sup>23</sup>

Nevertheless, there is none of that within the bifurcated sentence decision-making process *à l'italienne*. Unlike the Common-law model, it thus draws no distinction at all between the evidentiary basis upon which the Enforcement Judge amends the sen-

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18 See R. B. CAMPBELL JR, *Sentencing: The Use of Psychiatric Information and Presentence Reports*, in *Kentucky Law Journal*, 60, 1972, p. 293.

19 A. R. FELTHOUS, *The Use of Psychiatric Evaluations in the Determination of Sentencing*, in R. ROSNER-R. HARMON, *Criminal Court Consultations*, New York, 1989, p. 190; A. DERSHOWITZ, *The role of Psychiatry in the Sentencing Process*, in *International Journal of Law and Psychiatry*, 1978, p. 63-77.

20 See R. MCPHAKE, *Criminal Litigation and Sentencing*, Oxford, 2015, p. 225; W. T. PIZZI, *Sentencing in the US: An Inquisitorial Soul in an Adversarial Body?*, in J. JACKSON-M. LANGER-P. TILLERS, *Crime, Procedure and Evidence in a Comparative and International Context. Essays in Honour of Professor Mirjan Damaška*, Oxford and Portland, 2008, p. 70; M. WASIK, *Rules of Evidence in the Sentencing Process*, in *The Sentencing Process*, Dartmouth, 1997, p. 187.

21 D. A. THOMAS, *Establishing a Factual Basis for Sentencing*, in *Criminal Law Review*, 1970, p. 81.

22 *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.

23 See again D. A. THOMAS, *Establishing a Factual Basis for Sentencing*, 1970, p. 84.

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tence and that underlying the former two-fold decision on the issues of guilt and sentencing delivered by the trial judge. One need only think that, pursuant to the 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. Thus, it becomes clear that there cannot be any effective separation 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 the one hand, and the reassessment of the sentence carried out during the Enforcement stage of the proceeding, on the other. This is due also to the fact that, contrary to what happens in the Common-law system once the legal proceedings are closed, the Italian court shall always justify its decision in an opinion that evaluates the evidence gathered and explains in detail all the grounds for the deliberation.<sup>24</sup> Hence, the Enforcement court amending the sentence cannot but refer to all the same items and issues that the reasoning behind the decision dealt with. Accordingly, Italian case law<sup>25</sup> has ruled that the entire file of the trial process must be at the disposal of the Enforcement Judge himself, who may have unrestricted access to it.

It follows that the Italian Enforcement Judge's power to amend the sanction consists of nothing but a substantial review of the previous judgement and its cognitive framework.<sup>26</sup> Yet, this makes a sharp severance between the Italian phenomenon which has given increasing importance to the Enforcement phase in amending the sentence and its Anglo-American reference model of bifurcated trial.

Rather than being seen as another attempt to spread the Common-law institutions into the Italian legal traditions, the transfer of such Italian-style bifurcation of the proceedings has resulted instead in its opposite, that is the fortification of both the basic

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24 On this point, L. MARAFIOTI, *Italian Criminal Procedure: A System Caught between Two Traditions*, in J. JACKSON-M. LANGER-P. TILLERS, *Crime, Procedure and Evidence in a Comparative and International Context. Essays in Honour of Professor Mirjan Damaška*, 2008, p. 87.

25 *Corte di Cassazione, Sezione I*, 30 November 2005, Fiorella, in *CED Cassazione*, no. 233102. Similarly, *Corte di Cassazione, Sezioni Unite*, 29 May 2014, Gatto.

26 On this point, please refer to F. CENTORAME, *La cognizione penale in fase esecutiva*, Torino, 2018, p. 73.

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continental tenets of the Italian criminal justice system and its peculiar attachment towards seeking as closely as possible the objective truth in adjudicating criminal liability.<sup>27</sup> A significant corollary to this is that “continental justice implies the need for direct reconsideration of the trial adjudication by a higher court.”<sup>28</sup> In this perspective, where there have been mistakes of fact or of law undermining the reliability of the final sentencing decision delivered at the end of the trial,<sup>29</sup> even the Italian Enforcement Judge is required to reassess the decision, and, as a result of this reconsideration, accordingly amend the imposed sentence. The point is, however, that since it is the fruit of a reassessment of the former decision, such an amendment of the sentence must be seen as a further appellate remedy within the Italian “vertical” and “unitary” criminal justice system,<sup>30</sup> not as a clear-cut bifurcated procedural phase in which sentencing is actually determined.

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27 On this opinion, E. GRANDE, *Legal Transplants and the Inoculation Effect. How American Criminal Procedure Has Affected Continental Europe*, in *The American Journal of Comparative Law*, 64, 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 pure adversary models.

28 Literally E. GRANDE, *Dances of Justice: Tango and Rumba in Comparative Criminal Procedure*, in *Global Jurist*, 9, 2009, p. 16.

29 A recent overview of the concept of juridical truth is provided by G. UBERTIS, *Profiles of Judicial Epistemology*, Turin, 2018.

30 See L. LUPÁRIA-M. GIALUZ, *Italian Criminal Procedure: Thirty Years After the Great Reform*, 2019, pp. 66-67.

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