Cross-Examination in Italian Criminal Procedure: The Bumpy Road to Due Process

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Abstract

During the last three decades, Italian criminal procedure has been steadily going through substantial changes. The most notable transformation has been brought forth with the introduction of a new Code of Criminal Procedure (1988) that among other things, changed criminal procedure from an inquisitorial system into a so-called predominantly adversarial system. Adding to this, the incorporation of other fundamental substantive rights as well as procedural protections to the Code of Criminal Procedure has been essential to this evolution; such as the presumption of innocence (2021), the standard of proof that a person can only be found guilty beyond any reasonable doubt (2006), due process of law (1999), and the right to cross-examination (1999).

Specifically, cross-examination is a procedural guarantee, incorporated in the body of the Italian Constitution that is often applied in the Code of Criminal Procedure as a requirement for evidence and testimonies admitted in a trial hearing to comply with due process of law. Notwithstanding the rules about how to conduct the cross-examination are not fully specified in detail within the law. Furthermore, there is scarce jurisprudence and different points of view within the legal doctrine on its application during a trial hearing, thus making it an interesting issue for a critical legal analysis. Unquestionably cross-examination has great importance in criminal procedure; therefore, any legal issues and challenges that emerge in a trial are susceptible to a certain degree of interpretation from the judge in the application of this constitutional right.

The judge wrote on and then he folded the ledger shut and laid it to onside and pressed his hands together and passed them down over his nose and mouth and placed them palm down on his knees.

Whatever in creation exists without my knowledge exists without my consent.[1]

In loving memory of my mother,
Ana Enriqueta Biamón González.

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[1] C. McCarthy, *Blood Meridian or the Evening Redness in the West* (New York: Vintage International, 1992), 198.

I. Historical and Constitutional Context of Cross-examination: The Big Change in Criminal Procedure

During the fascist period in Italy, criminal procedure was different than nowadays; trials were ruled with the 1930 Criminal Procedure Code, *Codice Rocco*, that granted ample prerogatives to judges during the trial in the gathering of evidence and sentencing decisions. The inquisitorial system, as it is known, was characterized by an accumulation of functions by the judge, also known as inquisitorial judge, with several procedural functions, such as: investigating, evaluating the evidence, and exercising the so-called criminal action (*azione penale*). Thus, the judge had the power to form all the evidence during the trial and also give a judgment. Moreover, the judge operated in secret and the defendant had no presumption of innocence, consequently not having space for a dialectic process during the trial.[2] Judges for example could ask a witness to freely describe an incident without a subsequent cross-examination.[3] A practice nowadays prohibited by Art 499, para 1, of the Code of Penal Procedure (CPP), approved in 1988: 'Witness examination is carried out through questions on specific fact'.

As far as witness examinations were concerned during that period, they were made directly by the judge and the prosecution, having the defendant's defense attorney only allowed to formulate questions to the judge and not to the witness. Furthermore, when judges examined witnesses, they had the criminal investigation file (*istruttòrio)* at their disposal, evidence that nowadays is not allowed for the judge to evaluate during the trial hearing. In other words, during a criminal trial the defense had to plead for the admission of the questions that would be used during their witness examination; that if admitted, would be reformulated by the judge and usually changed in context. A situation that the defense was constrained to accept.[4] Accordingly, under the *Codice Rocco* (1930) a judge's sentence was constructed in a way to accept the results of the criminal investigation without any critical and/or autonomous consideration.

It is noteworthy that the 1988 Code of Penal Procedure reforms regarding witness examination were not an improvisation from the legislature of that period. Instead, two historical precedents that influenced guarantying the pertinence of the trial process and the respect toward the parties during the criminal procedure.[5] The first was from prominent law professor, Francesco Carnelutti's 1962 treatise on reforming criminal procedure.[6] Then, the law that enacted the creation of a new code of criminal procedure, legge 3 April 1974 n. 108, that laid the groundwork,

[2] 'Dialectics is a term used to describe a method of philosophical argument that involves some sort of contradictory process between opposing sides'. On 'Hegel's Dialectics' *Stanford Encyclopedia of Philosophy*, available at https://tinyurl.com/2jk6xr63 (last visited 30 September 2024).

[3] E. Stefani, *L'accertamento della verità in dibattimento* (Milano: Giuffrè, 1995), 87.

[4] G. Bianchi, *L'ammissione della prova nel dibattimento penale* (Milano: Giuffrè, 2001), 12-13.

[5] M. Pisani, *'Italian Style': Figure e forme del nuovo processo penale* (Padova: CEDAM, 1998), 86.

[6] F. Carnelutti, *Verso la riforma del processo penale* (Napoli: Morano, 1963).

as established in Art 2:

> 'The Code of Penal Procedure must implement the principles of the Constitution and adapt the rules of international conventions ratified by Italy, relating to the rights of the persons and criminal trials. It must also implement in a criminal trial the characteristics of the accusatory system'.

Subsequently, a new criminal procedural code was implemented, the so-called *Codice Vassalli* (1988), currently in use, that reformed the inquisitorial system to a more adversarial procedure. Incontrovertibly, at the center of the reforms is the right to a public criminal trial, guaranteed in the Constitution by way of popular sovereignty, which the administration of justice has to comply with, as established in Art 1, para 2, of the Constitution, approved in 1947: 'Sovereignty belongs to the people and is exercised by the people in the forms and within the limits of the Constitution'.[7] Furthermore, Art 101, para 1, of the Constitution, states that: 'Justice is administered in the name of the people'. Hence, Art 1 of CPP states that: 'Criminal jurisdiction is exercised by the judges provided for by the judicial system laws according to the provisions of this code'. Implicitly referring to what is established in Art 102 of the Constitution:

> 'Judicial proceedings are exercised by ordinary magistrates empowered and regulated by the provisions concerning the Judiciary.
>
> Extraordinary or special judges may not be established. Only specialized sections for specific matters within the ordinary judicial bodies may be established, and these sections may include the participation of qualified citizens who are not members of the Judiciary.
>
> The law regulates the cases and forms of the direct participation of the people in the administration of justice'.

Forasmuch as the innovations of the CPP regarding the admission of evidence and witness examinations in criminal trials introduced a new so-called predominantly adversarial system, done by the Italian legislator to change the inquisitorial system,[8] also warranted by the Constitution itself. Evidence is henceforth admitted at the request of the parties, brought forth by the defendant's defense or by the public prosecutor. Consequently, this evidence becomes essential for the judge in knowing the facts of the case and giving a valuable juridical qualification. Very different than with the inquisitorial system before, where evidence was formed and evaluated in secret by the judge, as explained before.

Accordingly, the CPP has two (2) cardinal points that strive towards the adversarial principle (*principio del contraddittorio*). First, the new code establishes

[7] C. Morselli, *Esame controesame, riesame: prova penale: dal predibattimento al dibattimento* (Pisa: IUS Pisa University Press, 2021), 16.

[8] G. Bianchi, n 4 above.

that evidence is formed not in secret but in the presence of all parties, as established in Art 190, para 1, of the CPP:

> 'Evidence shall be admitted upon request of a party. The court shall decide without delay by issuing an order, excluding any evidence that is not allowed by law or manifestly superfluous or irrelevant'.[9]

A right warranted by the constitutional amendment of due process of law in Art 111 of the Constitution, approved in 1999.[10] Specifically, it is established in Art 111, para 3, of the Constitution that: 'In criminal law proceedings, the formation of evidence is based on the principle of adversary hearings (…)'. Therefore, the procedural truth comes forth after a dialectic process with subjects that have antagonist interests. Second, criminal procedure is based on orality, immediacy, and the impartiality of the judge, which is assured by the fact that the judge of the trial hearing (*dibattimento*) cannot base his decision on evidence or on the outcome of the previous phases of the criminal investigation and/or pre-hearing phases (*predibattimentale*), as established in Art 526, para 1, of the CPP that reads: 'For the purposes of deliberation, the judge shall not use evidence other than that lawfully gathered during the trial hearing (*dibattimento*)'.[11] Even though, oral testimony (*prova dichiarativa*) is understood by the legal doctrine as both natural and essential to the criminal procedure, regardless of an inquisitorial or adverbial legal system.[12] In contrast, under the Code of Penal Procedure of 1930 (*Codice Rocco*) criminal trials were mostly based on the reading of statements and judicial acts prepared during the criminal investigation during the earlier stages of the procedure, conducted by the public prosecutor and not during the *dibattimento*. Nowadays the impartiality of the judge is based on his ignorance of almost all the statements and sources of evidence from the public prosecutors' file.[13] Furthermore,

[9] In Corte di Cassazione-Sezioni unite 21 April 2010 no 15208, *Rivista Penale,* 7-8 (2011), note by G. Domenico, the court established that the right to present evidence is subject to verification from the judge: 'The right of evidence recognized to the parties implies the corresponding attribution of the power to exclude manifestly superfluous and irrelevant evidence, according to a verification under the exclusive competence of the judge of merit which escapes the review of legitimacy where it has been the subject of specific reasoning free from logical and legal'.

[10] Legge costituzionale 23 November 1999 no 2 and legge 1 March 2001 no 63.

[11] In Corte di Cassazione-Sezione penale I 1 February 1995 no 1079, the court established that witness statements during the investigation phase could be admissible in the trial file if acquired in a lawful manner: 'In accordance with the Art. 526 CPP, all the evidence acquired during the dibattimento can be used for the purposes of the decision, including the evidence not admitted during the trial, but acquired in the trial file. The legitimate acquisition in the trial file of testimonies made during the preliminary investigation phase therefore entails their use for evidentiary purposes'. For example, if a previous witness statement from the investigation phase is found in the trial file and the defendant's defense fails to notice it and raise the timely objection, it could be lawfully used by the judge in his motivations for the sentence.

[12] R. Casiraghi, *La prova dichiarativa* (Milano: Giuffrè, 2011), 2.

[13] L. Liguori, 'Istruzione dibattimentale', in F.G. Catullo ed, *Il dibattimento* (Milano: Wolters Kluwer Italia, 2006), 125.

the Constitution requires that the judge maintain an impartial position during the *dibattimento*, as established in Art 111, para 2:

> 'All court trials are conducted with adversary proceedings and the parties are entitled to equal conditions before an impartial judge in third party position'.

Impartiality is also established in the form of prohibiting outside interference from the judge's decisions, particularly in Art 101, para 2, of the Constitution the prohibition of interference from any other State power: 'Judges are subject only to the law'. In this sense, the *Corte Costituzionale* has defined an impartial trial as having '*the preventive force*' (*forza della prevenzione*), being free from the natural tendency of maintaining a judgment based on a previously resolved issue on another phase of the criminal procedure.[14] Furthermore, in this Sentence, the *Corte Costituzionale* defined the so-called doctrine of the unprejudiced judge (*impregiudicatezza*) as: 'absence of a pre-judgement concerning the object of the proceeding'. In synthesis, the so-called predominantly adversarial system is safeguarded in the Constitution by the right of the defendant to examine during a public and oral trial the evidence against him, subject to direct and cross-examination; and also, to have the evidence admitted and adjudicated before an impartial judge.

1. The Outset of Cross-examination

An important change in Italian criminal procedure came with legge costituzionale 23 November 1999 no 2, the so-called due process reform and the creation of the right of cross-examination in Art 111, para, 3 of the Constitution:

> 'In criminal law trials, the law provides that the alleged offender shall be promptly informed confidentially of the nature and reasons for the charges that are brought and shall have adequate time and conditions to prepare a defense. The defendant shall have the right to cross-examine or have to cross-examine before a judge the persons making accusations and to summon and examine persons for the defense in the same conditions as the prosecution, as well as the right to produce all other evidence in favor of the defense. The defendant is entitled to the assistance of an interpreter in the case that he or she does not speak or understand the language in which the court proceedings are conducted'.

In this regard, cross-examination became secured as a constitutional right with Art 111 of the Constitution, even though it was previously incorporated as a procedural right one year earlier in Art 498, para 2, of the CPP: 'Subsequently, further questions may be asked by the parties who have not requested the

[14] Corte Costituzionale 15 September 1995 no 432, *Foro italiano*, 3068 (1995).

examination, following the order specified in Article 496'. Meaning that after the direct examination, the other party has the right to cross-examine the witness previously examined, if he decides to do so because it is not required. Thus, as a result of legge delega 16 February 1987, no 81 the legislator conceived and based the CPP with the adversarial principle (*principio del contraddittorio*), where the judge could reach a decision based on the evidence admitted during the *dibattimento*, brought forth and equally cross-examined by all the parties, as established in Art 498, para 1, of the CPP: 'Questions shall be asked directly by the public prosecutor or the defense lawyer who required the examination of the witness'. Therefore, for the first time in Italy, the public prosecutor and the defense attorney became in a position of parity during a criminal trial; another defendant's right secured by the Constitution in Art 111, para 2, referred to as parity of arms (*parità delle armi),* cited earlier.

Undoubtedly, the introduction of cross-examination has brought influences from common-law criminal procedures.[15] Also, it recalls the VI Amendments of the United States Constitution,[16] regarding the position of the defendant during the *dibattimento*.[17] Other influences from movies, TV shows, and books have also worked themselves in the legal culture. Nevertheless, the statute that proposed the current CPP, legge 16 February 1987 no 81 on Art 1, specifically states that:

> 'The code of criminal procedure must implement the principles of the Constitution and adapt to the rules of the international conventions ratified by Italy and relating to personal rights and criminal proceedings. Furthermore, it must implement the characteristics of the accusatory system in the criminal trial'.

Therefore, it should be clear that even though the right to cross-examination resembles somewhat that of the criminal procedures in the United States, the Italian legislator is not repeating or copying the United States Constitution, statutes, rules, or codes. But in fact, is applying Art 6, para 3, of the European Convention on Human Rights (ECHR), ratified by Italy in 1955, which reads that the defendant shall have the right:

> 'to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same

[15] C. Morselli, n 7 above, 120.

[16] United States Constitution, VI Amendment: 'In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence'.

[17] R. Bin and G. Pitruzzella, *Diritto costituzionale* (Torino: Giappichelli, 2021), 318.

conditions as witnesses against him'.

The ECHR represents a non-exhaustive catalog of due process of law that is regarded as minimum rights and a bridge between the continental criminal procedure and common law.[18] Another important difference with common law criminal procedures is that witnesses that undergo a cross-examination are under the protection of the judge that: '(…) guarantee that the witness examination is conducted without harming the person's dignity', as established in Art 499, para 4, CPP. Therefore, demolishing the witness from the other party during cross-examination to make him look not credible to the eyes of the jury, like it's done in common law criminal procedures is not allowed. In this sense, Italian criminal procedure is ruled by the right of human dignity, which is assured to the witness and cannot be compromised even when searching for the truth during the trial.[19]

Subsequently, after years of criticism and resistance from several sectors of the Italian legal community, including the magistrate, the CPP was implemented and accepted based on the adversarial principle (*principio del contraddittorio*).[20] This model, through a reconstructive metamorphosis, marks a fundamental change in Italian criminal procedure; and also, a victory for Italian defense attorneys. After the reform, criminal trials became free from the monolithic inherence of the judge, having a different way of seeing and approaching witness declarations under the scrutiny of due process of law and a cross-examination that emphasizes its value on evidence. The force that caused these constitutional reforms was the due process of law principles from the European Community now the European Union that gave it political validity. In this sense, Art 6 of the European Convention on Human Rights, cited earlier, gave the blueprint for Italian constitutional reform.[21] Even

[18] P. Raucci, *La valenza autonoma della formula "Giusto Processo" in Costituzione* (Milano: Wolters Kluwer, 2023), 35-36.

[19] See R. Casiraghi, n 12 above, 449.

[20] A. Gaito and E. La Rocca, 'Vent'anni di "giusto processo" e trent'anni di "Codice Vassalli" quel (poco) che rimane' *Archivio Penale*, 1-14 (2019).

[21] Art 6, Council of Europe. 'Convention for the Protection of Human Rights and Fundamental Freedoms' *Council of Europe Treaty Series 005*, 1950.

'1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3. Everyone charged with a criminal offence has the following minimum rights: (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him; (b) to have adequate time and facilities for the preparation of his defense; (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require; (d) to examine or have examined witnesses against him and to obtain the attendance and

though the new criminal procedure is tendentially accusatory it does not have the force to grant equality between all parties, being called by some critics as an *Italian-style* adversarial system.[22] An example of this is how the public prosecutor's office and the judicial police (*polizia giudiziaria)* have at their disposal much more time than the defense to investigate a case, with numerous means at their disposal, provided the state to gather sources of evidence; including interception of communications and preliminary seizures (*misure cautelari*), to name a few, before the *dibattimento*. Adding to this there is no option for the defense to interview a prosecution witness, before taking the witness stand.[23] Therefore the defense cannot know in advance the content of the certain testimony or prepare for possible surprises from the prosecution's witness testimonies, as established in Art 430 *bis*. CPP:

> 'The public prosecutor, the judicial police, and the defense are prohibited from obtaining information from the person admitted under Art. 507 or indicated in the request for probative evidentiary hearing (*incidente probatorio*) (…)'.

Contrarily, even though the defense has the right and ethical duty to investigate on behalf of the defendant, it cannot compare with the unlimited resources of the state. Furthermore, there is fierce resistance against private investigations done by the defense, seen by many as invasive and polluting to the witness's sincerity.[24] Nevertheless, from the defense's strategy having a deposition from their witness before the *dibattimento* can be useful if the witness later changes the facts during his testimony, this could later be to be used to challenge the veracity of his testimony in a *contestazioni* during the cross-examination, explained in detail in part II of the Art.

As far as the admission of evidence during the trial, the due process reforms to the Constitution regarding criminal procedure have also democratized the Italian legal system. Some academics[25]argue that it is evident that these reforms were influenced by the V and XIV Amendments of the United States Constitution.[26]

examination of witnesses on his behalf under the same conditions as witnesses against him; (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.'

[22] C. Schittar, *Dal colloquio informativo al controesame: la prova orale dalle indagini al dibattimento* (Milano: Giuffrè, 2010), 6.

[23] E. Amodio, 'L'arte del controesame e le anomalie dell'Italian style' *Sociologia del diritto*, 155-168 (2008).

[24] E. Randazzo, *L'esame incrociato* (Milano: Giuffrè, 2011), 9.

[25] C. Morselli, n 7 above, 112.

[26] United States Constitution, V Amendment: 'No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be

Thus, bringing a cardinal principle from common law in the form of the impartial judge deprived of a progressive knowledge of the facts and object of his decision. Nevertheless, there are notable differences in comparison with the United States criminal procedure. Whereas, the Italian judge for the *dibattimento* begins the trial with the creation of the trial file, as established in Art 431, para 1, of the CPP: 'Immediately after the decree for committal to trial has been issued, the Judge shall proceed with the production of the trial file after hearing the parties (…)'. Henceforth gathers the evidence at the request of a party during the *dibattimento* as established in Art 190, para 1, of the CPP, cited earlier. In synthesis, with the principle of orality and immediacy, evidence that comes before a judge for the final verdict has to be gathered during the *dibattimento*, for that reason any declarations not subject to cross-examination cannot be admitted in the trial file, a right secured by the due process procedural guarantees in Art 111 of the Constitution. However, it should be emphasized a substantial difference between the United States criminal procedures whereas there is no trial by jury in Italy, and the procedure where the witness makes its statements, thus forming the evidence, is presided over by a judge who in the past had a monopoly over the trial hearing under the inquisitorial system and in practice still tends to gravitate there. Another difference is that during a criminal trial, a jury may have a natural sympathy for the defendant, whereas the Italian judge is distrustful of the defendant when testifying because there is no penalty for false testimony by the defendant. Art 497, para 2, of the CPP requires the judge to warn the witness to tell the truth before giving a testimony, under penalty of law; nonetheless, the defendant, when testifying in the capacity of a defendant, and not as a witness is exempt from this obligation of telling the truth: 'Before the examination begins, the president warns the witness of the obligation to tell the truth (…)'. This specific right of the defendant during the criminal procedure is often referred to by the legal community as the right to lie (*il diritto di mentire*).[27]

taken for public use, without just compensation (added emphasis)'.

United States Constitution, XIV Amendment, Section 1: 'All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws (added emphasis)'.

[27] In Corte di Cassazione-Sezione penale V 5 February 2014 no 15654, *Repertorio Foro Italiano*, Falsità personale, no 10 (2014), the court clarified that even though the defendant has the right to lie when testifying, this right does not extend to false testimony regarding his personal details: '(…) the conduct of the suspect who, subject to an international arrest warrant, provides false personal details to the judicial police who proceed with his identification in affirming the indicated principle, the court specified that the suspect cannot invoke the justification of the exercise of a legitimate faculty because, despite having the right to silence and the faculty to lie, it has the obligation to provide its personal details according to the truth (added emphasis)'.

In Corte di Cassazione-Sezione penale V 7 February 2021 no 4264, the court further explained that: 'the right to silence and the right not to make statements by the accused, the suspect, or

2. The Introduction of Beyond any Reasonable Doubt and the Presumption of Innocence

More recently in 2006, the Italian legislature approved legge 20 February 2006 no 46, introducing the standard of proof beyond any reasonable doubt (BARD) in criminal procedures for establishing a judgment of conviction. Notably a right not included in the European Convention of Human Rights, but adopted in Italy. Consequently, Art 533 of the CPP was amended to read:

> 'The court shall deliver a judgment of conviction if the accused is proven to be guilty of the alleged offense beyond a reasonable doubt. Using the judgment, the court shall apply the penalty and any security measures'.

It has to be noted that the way that the BARD norm is canalized in the criminal procedure is with a final balance of not having enough evidence for a conviction, as established in Art 125 and Art 425 of the CPP. Based on Art 125, para 1, the public prosecutor can present to the judge a request to file the case and not proceed with the criminal charges, because of unfounded evidence and elements that cannot sustain a criminal indictment during a trial beyond any reasonable doubt: 'The cases in which the court issues either a judgment, an order or a decree are established by law'.[28] Also, based on Art 425 of the CPP, during the preliminary hearing the judge can emit a ruling of no grounds to proceed (*sentenza di non luogo a procedere*) when there are insufficient and contradictory elements to prove the crime to sustain a conviction in a trial beyond any reasonable doubt:

> 'Should there be a cause which extinguishes the offense or which should have prevented commencement or continuation of the criminal prosecution, or the act is not deemed an offense by law, or the act did not occur or the accused did not commit it, or the act does not constitute an offense or the person is not punishable for any reason whatsoever, the judge shall deliver a ruling of no grounds to proceed, indicating the cause in the operative part of the judgment'.

On all considerations, the BARD rule has added an important element for the judge in the evaluation of evidence admitted during the *dibattimento*. Therefore, it may be regarded that the public prosecutor has fulfilled this burden of proof

anyone who must be considered as such already when evidence of criminality emerges against him, does not include the possibility of not reporting or of reporting falsely when declining his personal details to the investigator or public official who requests them'.

On a recent Sentence, the Corte di Cassazione-Sezione penale II 5 December 2023 no 48444, established that the obligation to provide true information of one's personal details, excludes information regarding the owner of the SIM card of a seized mobile phone: '(…) it must be however excluded that this obligation also includes that of indicating oneself as the user of a telephone card in the name of others, since this is data which is completely unrelated to the person's personal details'.

[28] See C. Schittar, *Dal colloquio* n 22 above, 5-6.

when any different explanation of the alleged fact, based on the evidence, appears unreasonable; vice versa the public prosecutor has not fulfilled its burden when the procedural findings are not capable of excluding a reasonable reconstruction proposed as an alternative by the defense based on admitted evidence.[29]

Another important and recent change to the CPP is the adoption of the presumption of innocence in criminal trials, incorporated from the European Union Parliament directive 9 March 2016 no 343 and passed into law by the decreto legislativo 8 November 2021 no 188 that created Art 115 *bis*, para 1, of the CPP:

> 'Except as provided for in paragraph 2, in measures other than those aimed at deciding on the criminal responsibility of the accused, the person subjected to investigation or the accused cannot be indicated as guilty until guilt has been established by sentence or irrevocable criminal decree of conviction. This provision does not apply to acts of the public prosecutor aimed at proving the guilt of the person under investigation or the accused'.

Concisely, both the BARD rule and the presumption of innocence are defendant's rights that are protected by the CPP but are not regarded by the doctrine as constitutional rights, whereas cross-examination and due process are rights secured by the Constitution. In this sense, it should be clear, that the presumption of innocence, from Art 115 *bis* CPP, cited earlier is not the same as the so-called presumption of not guilt in Art 27, para 2, of the Constitution: 'A defendant shall be considered not guilty until a final sentence has been passed'. As legal scholar Paolo Tonini explains, in 1947, the Constitutional Assembly wanted to affirm the presumption of innocence but instead chose a formula that satisfied the politicians of the period, not resolving the ambiguity that created the phrase presumption of not guilt in the Constitution, that carried a negative connotation towards the defendant.[30] Previously, before Art 115 *bis* CPP, the presumption of innocence was best interpreted by the legal doctrine under Art 6, para 2 of the European Convention on Human Rights: 'Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law'.

II. Cross-examination *all'Italiana*: Theory and Practical Issues

As far as cross-examination in criminal procedure it is guaranteed as a defendant's right in Art 24, para 2, of the Constitution: 'The defense is an inviolable right at every stage and instance of legal proceedings', and also in Art 111, para 3, of the Constitution, cited earlier.[31] It should be mentioned that cross-examination

[29] P. Tonini, *Manuale di procedura penale* (Milano: Giuffrè, 2018), 258.

[30] Id, *Lineamenti di diritto processuale penale* (Milano: Giuffrè, 2019), 142.

[31] Even though Art 111, para 2, of the Constitution, could give the impression that the accused can personally execute a cross-examination during the dibattimento, legal doctrine has clarified that in the judicial process the defense's attorney is the only person that conducts the examination of

is unique to criminal procedure because it is not guaranteed during a civil case. The foundation for this constitutional norm lies in the fact that criminal procedure forms evidence in the adversarial system. Thus, the accused person cannot be found guilty based on statements by witnesses of their own free choice who have voluntarily refused to undergo a cross-examination by the defense.[32] Also, the norm is based on the principle of parity between the parties involved in a criminal procedure before an impartial judge, Art 111, para 2, also cited earlier.

With this in mind, during the *dibattimento*, cross-examination is done by the party that has an opposite interest to the other party that called the witness to the examination. Its main purpose is to cast doubt on the version of the facts testified during the direct examination.[33] The cross-examination can be on facts, on the credibility of the witness, or both. When it is about credibility it tends to make the witness declare facts that demonstrate the non-credibility of him. When the cross-examination has to do with facts it tends to make the witness declare a different fact or a contradiction to the testimony given during the direct examination or to obtain an admittance of a contradiction. On the other hand, the party that has not asked for the witness cannot ask questions on different issues than those testified during the direct examination. The Corte di Cassazione has clarified that the party that has not asked for the witness, during the cross-examination cannot ask questions on circumstances different from those specified in the direct examination; if this was allowed, said the court, it would: 'frustrate terms or procedures with the limit of admissibility established by the code for admitting evidence'.[34] Nevertheless, the legal doctrine is divided with this issue, with the more accepted interpretation that questions that allow the clarification of dark or obscure facts should be admissible during the cross-examination, even if the object of the questions was not mentioned during the direct examination.[35] In practice, if the question is pertinent and clarifies an important issue, the judge tends to allow such questions.

In this context, cross-examination should not be seen only as a way to discredit a witness; it can also be used as a way of obtaining more support for the defense theory that may not be obtained through a direct examination. Thus, the introduction of cross-examination was the crucial passage towards an adversarial criminal

witness, based on his professionality that is a guarantee of tutelage for his client. That is why the term technical defense is used (*difesa tecnica*).The reasons why the accused should not do the cross-examination are: '1- Does not have the judicial know how, 2-There is difference between the lawyer and the accused in the sense that the lawyer is registered to the bar and has an obligation to comply with a code of ethics, 3- It is against common sense that the accused be able to cross-examine the victim of a crime (persona offesa), and 4- There are no rules establishing how a defendant could execute a witness examination, in which case it should be elaborated on a case basis by the judge'. See L. Liguori, n 13 above, 288-289.

[32] G. Illuminati, 'Ammissione e acquisizione della prova nell'istruzione dibattimentale', in P. Ferrua ed, *La prova nel dibattimento penale* (Torino: Giappichelli, 2010), 115.

[33] P. Ferrua, *La prova nel processo penale* (Torino: Giappichelli, 2017), 140-141.

[34] Corte di Cassazione-Sezione penale I 5 November 1996 no 2037, *Repertorio Foro Italiano - Dibattimento penale* no 124 (1998).

[35] See P. Tonini, *Manuale* n 29 above, 727.

procedure.[36] Nonetheless, there is a fallacy around cross-examination that it is the golden key that opens the triumphant door during the trial, when in reality only a small number of testimonies amount to a resolution of the central issue based on the cross-examination.[37] Also, in some instances, it is said that the best cross-examination is the one that is not done by the defense.[38]

Even though cross-examination is a right guaranteed by the Constitution, there are three (3) exceptions when it is not required during the criminal procedure. First, when evidence is formed outside the *dibattimento* with the consent of all the parties and the defendant, like for example during the so-called brief trial (*giudizio abbreviato*), where the public prosecution can agree with the defense to a reduction of the penalty in exchange for renouncing the *dibattimento*. This is generally done when the defense's strategy chooses an alternative procedure that omits the *dibattimento* to get the benefit of a reduced sentence. Second, a written testimony can be admitted due to the impossibility of having the witness testify. For example, a statement testimony can be admitted from a deceased person. Third by establishing that the witness's testimony is the result of a previously proven illegal activity; for example, when a witness is bribed to testify. Furthermore, a judge can limit a cross-examination with an ordinance if it is used as a dilatory tactic, as established in Art 499, para 6, of CPP:

> 'During the examination, the president of the bench shall intervene, also of his own motion, to guarantee the appropriateness of the questions, the truthfulness of the answers, the loyalty in the examination and the correctness of the objections and shall order, if necessary, that the parties show him the part of the record including the statements that have been used for challenging the oral evidence'.

Another important exception is the so-called special evidentiary hearing (*incidente probatorio*). During this procedure cross-examination is done by the judge, with the questions submitted by the defense or the public minister. A particular characteristic of the *incidente probatorio* is that it is held before the *dibattimento* by another judge. It stands as an exemption because the general rule for sentences during a criminal trial is ruled by the principle of immediacy (*principio di immediatezza*), establishing that sentences have to be passed by the same judge that presided during the dibattimento. Hence, Art 525, para 2, of the CPP establishes:

> 'Under penalty of absolute nullity, the same judges who participated in

[36] S. Ramajoli, *Il dibattimento nel nuovo rito penale* (Padova: CEDAM, 1994), 90-91.

[37] M. Stone and E. Amodio, *La cross-examination: strategie e tecniche* (Milano: Giuffrè, 1990), XIV.

[38] E. Randazzo, *Insidie e strategie dell'esame incrociato: con le linee guida e il vademecum del laboratorio permanente esame e controesame* (Milano: Giuffrè, 2012), 115.

> the trial shall be concur at the deliberation. Judges that cannot concur must be temporarily substituted by other judges and the decisions which have already been issued shall maintain their effectiveness, unless they are expressly revoked'.

Furthermore, criminal procedure sentences are ruled by the adversarial principle (*principio del contraddittorio*), as established in Art 111 of the Constitution, explained earlier. Accordingly, Art 526, para 1, CPP states: 'For the purposes of deliberation, the court shall not use evidence other than that lawfully gathered during the trial'. Nevertheless, it is not always the case when the acquisition of evidence is not possible during the *dibattimento*. For that the reason the *incidente probatorio* was established to gather evidence in a previous hearing.

Therefore, cases that are considered justified are cases with vulnerable witness, outside those with threats or great impediments which are also allowed. Accordingly, Art 392, para 1 bis, CPP establishes:

> 'In the proceedings for the crimes referred to in Articles 572, 600, 600-bis, 600-ter and 600-quater, also concerning the pornographic material referred to in Articles 600-quater. 1, 600-quinquies, 601, 602, 609-bis, 609-quater, 609-quinquies, 609-octies, 609-undecies and 612-bis of the Penal Code, either the public prosecutor, also upon request of the victim, or the defendant may request the testimony of either any underage person or the victim that is of age by means of a special evidentiary hearing, also in cases other than those provided for in paragraph 1. The victim's testimony by means of a special evidentiary hearing may be requested by the public prosecutor, also upon request of the victim, or by the suspect whenever the victim needs specific protection'.

Once the request is accepted by the judge, a court order is sent to the parties involved instructing that before the date for the *incidente probatorio* they must get the copy of the declaration made by the witness who will testify.[39] Previous knowledge of the declarations is fundamental to efficiently conduct the *incidente probatorio* and to conduct the cross-examination and also to ascertain the credibility of the witness.[40] The incidente probatorio is held without public access in the council chamber (*camera di consiglio*), with the participation of the defense and the public minister. Evidence is recorded and one-way mirrors are used with minors or an adult with mental disabilities. It is important to note that the judge asks the questions to the witness not the parties' attorneys using the form established

[39] In Corte di Cassazione-Sezione penale III 18 October 2021 no 37605, *Repertorio Foro Italiano - Incidente Probatorio* no 12 (2021), the court clarified that the *incidente probatorio* can provide to safeguard the physical and psychological integrity of the victim, but it does not provide for the evidence be admitted just based on its mere request.

[40] P. Tonini, *Lineamenti* n 30 above, 344.

in the *dibattimento*; when witnesses are called to testify using the direct and cross-examination. Wherefore the defense's role is fundamental, submitting the questions to the judge to ask; and also, in order to latter use the evidence gathered during the *incidente probatorio* during the *dibattimento*, that can only be admitted as evidence against the defendant if the defendant's attorney is present. In practice if the defendant does not have a defense attorney, the court names one before the proceedings. It is essential that during the examination of a minor the evidence admitted is absolutely necessary; justified with concrete and specific evidence, in order to avoid unnecessary repletion during the *dibattimento*. Hence, it's production during the *dibattimento* should be justified with concrete and specific evidential needs that make it indispensable.[41] The *incidente probatorio* has the function of anticipating the evidence, while guarantying the right of the defendant against evidence that could later be read during the *dibattimento*, Art 511 CPP: 'The judge, ex officio orders that the documents contained in the trial file be read, in whole or in part'. It is well established within the legal doctrine that the *incidente probatorio* is admissible and compatible with due process of law.

1. Witness Examinations During the Trial Hearing (*Dibattimento*)

The search for the truth is a center point during the *dibattimento*, a notably subjective concept, like in the samurai film Rashomon (1950), where a man's murder and the rape of his wife are told by four persons, each one with a different version of the facts of the crime. Adding to this, the general assumption that evidence is exclusively formed during the *dibattimento* is greatly watered down by the current Italian legal culture.[42] Nonetheless, under Art 1, para 1, of the Constitution cited earlier, the administration of justice is a power of the people. Therefore the judicial truth (*verità giudiziale)* is characterized by being both contextual and functional, commanding a factual reconstruction that underlines a just decision that confirms a truth that will be respected throughout the entire criminal procedure and also guarantees the *people's* consent.[43] Wherefore facts elucidated in the Italian criminal process, specifically during the *dibattimento* have to pass through the impartiality of the judge, with a methodology of neutrality that balances the findings of the first judge who viewed the case in an earlier phase, while approaching the facts in a new way.[44] It is important to note that the judge who will finally decide the verdict cannot take into consideration previous criminal investigations, and should also have limited initiatives regarding evidence, in comparison with the parties in the procedure that are entrusted with requesting the admittance of the evidence, as established in Art 190, para 1, CPP:

[41] E. Randazzo, *L'esame* n 24 above, 101.

[42] G. Carofiglio, *Il controesame: della prassi operative al modello teorico* (Milano: Giuffrè, 1997), IX.

[43] G. Ubertis, *La prova penale: profili giuridici ed epistemologici* (Torino: UTET, 1995), 7.

[44] See G. Bianchi, n 4 above, 36, 40.

> 'Evidence shall be admitted upon request of a party. The court shall decide without delay by issuing an order, excluding any evidence that is not allowed by law or manifestly superfluous or irrelevant'.

Parties through their discussions will indicate the evidence and arguments to the judge (*argumentum*), which gives the parameters of a cognitive nature for evidence to be admitted into the trial file, finding them suitable in demonstrating the innocence or guilt of the defendant. Moreover, during the *dibattimento* the hypothesis of the criminal indictment cannot be accepted with automatism; instead, it has to be carefully examined and it is also susceptible to opposition from the defendant. For example, demonstrating the falsity and/or absurdity of the public prosecutor's theory, opposing lies with the truth, in a method of syllogism, typical of deductive reasoning.[45] This dialectic is regarded by the Italian legal system as a fundamental passage in the criminal process based on orality, and it is well established as the right of orality (*principio di oralità*).

Therefore, it is logical to assume that the most important evidence during the *dibattimento* is witness testimonies. In this context, the CPP includes testimonies as a source of evidence, but the legislator did not explain specifically how they should be carried out, limiting it only to the technical aspects.[46] For instance, during cross-examination suggestive questions are allowed with the object of verifying the reliability of the testimony, they can also be used as a method of weakening the testimony. Nevertheless, suggestive questions are not allowed during the direct examination, Art 499, para 3, of the CPP establishes:

> 'In the examination by the party who requested the subpoena of the witness and the party who has a common interest, questions that tend to suggest answers are prohibited'.

Accordingly, during the cross-examination, suggestive questions are needed when it is necessary to prove a lie or an error in the evidence.[47] Even so, there is no specific ban established in the CPP on so-called *suggestive objections* by the parties. A practice that is widely diffused and harmful is a leading question during the direct examination.[48] It also harmful an objection to a question that contains useful information the opposite party is looking to have confirmed, for example: - *The witness has already said that* or – *The question is not admissible because it tends to confuse the witness by challenging what he did not report*. Thus, it is a true inadmissible question masked as an objection that even though is an incorrect behavior from the attorney, since it is not regulated by the CPP could provoke in the worst-case scenario a reprimand from the presiding judge.

[45] See C. Morselli, n 7 above, 96-97.
[46] L. Grilli, *Il dibattimento penale* (Padova: CEDAM, 2007), 257.
[47] See G. Illuminati, n 32 above, 119.
[48] See E. Randazzo, *L'esame* n 24 above, 13.

On the other hand, so-called *insincere questions* are not allowed during the cross-examination, as established in Art 499, para 2, of CPP: 'During the examination, questions which may compromise the sincerity of the answers are not allowed'. So, it leaves, ample space for judicial interpretation, because it is widely accepted that remembering a fact by itself does not produce a reconstruction of an event. Furthermore, what people remember is a mental mixture of a production and a reconstruction. Thus, reconstructive memory is characterized by the fusion of different elements. An example of an *insincere question* that is ambiguous could be the following: - *Did you become aware of the (xyz) fact during the police interrogation?* This wording could motivate the witness to spontaneously remember the *xyz* of fact during the examination; or instead, the same *xyz* fact could have been suggested by the police officer to the witness earlier during the investigation, which in any case would result in neither a positive nor negative answer, thus would leave unresolved the dilemma of what happened in reality.[49]

Consequently, the *dibattimento* is a place of confusion, proving the falsehood of the investigation, when the defendant is exonerated. On the other hand, it is also the place where the criminal accusation hypothesis is demonstrated publicly. Therefore, during the *dibattimento* evidence is organized in different so-called stadiums. The first stadium is when the evidence is announced for the first time, during the *discovery* with the deposit of the witness list. It is organized and introduced during the pre-trial stage (*predibattimentale*). The second stadium comes when the evidence is admitted and acquired in the trial file (*fascicolo per il dibattimento*), thus elaborated and formed. The third stadium is when the evidence is screened, reorganized, and synthesized to a definitive procedural position, (*reductio ad unum*), that justifies and confers the foundation for the conclusions (*discussione finale*). Hence, the third stage is the climax for the evidence on which the hypothesis was based; normally no new evidence is admitted and it is oral, except for the victim's party (*parte civile*) that submits its conclusion in written form. To that effect Art 523, para 1, of the CPP states:

> 'After gathering evidence, the public prosecutor and, thereafter, the lawyers of the civil party, of the person with civil liability for damages, of the person with civil liability for financial penalties, and the defendant, shall make and describe their respective conclusions, also concerning the cases provided for in Article 533, paragraph 3-bis'.

Based on this enumeration of different so-called stadiums with their corresponding concepts establish a progression of judicial acts (*sequenza probatoria*) for the acquisition of evidence with its vertex given to the cross-examination.[50] Therefore the validity of the hypothesis in the accusation is not a

[49] See P. Ferrua, n 33 above, 143-144.
[50] C. Morselli, n 7 above, 92-93.

guarantee of truth by itself, but instead, it is truth that can only exist with its verification. Witness examination is composed of three phases: direct examination, cross-examination, and redirect examination. Only the direct-examination should be authorized by a ruling from the judge and the cross-examination is not conditioned by a previous request. In that sense, in a recent sentence from the *Corte di Cassazione*, it is reaffirmed that the right of the defense to cross-examine witnesses is a fundamental competence of the accused party.[51]

Because of this, the legislator inspired by the adversarial system provided witness examination (*istruzione dibattimentale*) as the central phase of the *dibattimento*, like a filter for the truth. During this phase, the parties through their witness or the examinations of the defendant establish facts and circumstances in a dynamic sequence to reconstruct in the most possible precise way what happened in reality. Thus, the public prosecutor and the defense use questions during their witnesses' examinations that are a fundamental part of the total acquisition of information for the *dibattimento*. It is the moment when the evidence is admitted into the trial hearing file, under Art 187 CPP:

> '1. Facts concerning accusations, criminal liabilities and the determination of either the sentence or the security measure are facts in issue.
> 2. Facts on which the application of procedural rules depend are also facts in issue.
> 3. Facts concerning the civil liability resulting from an offense are also facts in issue if a civil party joins the criminal proceedings'.

It has been well established that there is no existing procedural instrument compared to the cross-examination capable of distinguishing truth from false. In this sense, American law professor, Irving Younger's new commandments of cross-examination have been diffused into legal culture:[52]

> 'Be brief as you can under the circumstances; ask only short questions using plain words, except when making a speech; use the most profitable methods of cross-examination available given the specific situation; do not ask a question if you don't know the answer unless the situation dictates otherwise; listen to and watch the answer and then follow up on what you hear and see; argue with the witness whenever the jury would deem it to be appropriate; do not rehash damaging direct testimony without a good reason; if you know what a witness's explanation will be, or that a different explanation will expose the witness to impeachment, you can further your personal advocacy objectives without sacrificing the quality of the cross-examination; learn the facts of the case well enough to develop a plausible theory of the defense so that you never ask one question too many; get only what you

[51] Corte di Cassazione-Sezione penale IV 22 September 2023 no 35684.
[52] L. Liguori, n 13 above, 269.

need, and then stop and sit down'.[53]

That being so, when cross-examination is practiced correctly it offers control and verification of the different hypotheses of the truth in the procedural dispute, making adjustments to them if necessary.[54] Cross-examination also has an important duality in the sense that is the only way to arrive at the judicial fact (*fatto storico*) while at the same time being a means of protection (*mezzo di tutela*).[55] The *Unione Camere Penali Italiane*, the foremost criminal defense organization in Italy, has defined this duality in its 2019 *Manifesto* as:

> 'The cross-examination for evidence is at the same time an individual right and, in its epistemic force, a condition of the regularity of the trial. It is a general rule that an accusation cannot be validated by evidence formed unilaterally by the same person who raised it'.[56]

Another Italian organization that has dedicated a great deal of effort to education regarding cross-examination is the *Laboratio Permanente Esame e Controesame* (LAPEC), which published its eight guidelines for witness examination, where it is possible to gleam into some of the predominant legal controversies surrounding cross-examination:

> '1. The witness list must contain a specific indication of the circumstances covered by the examination.
>
> 2. The question that is prohibited and inadmissible cannot be re-proposed by the party who formulated it, even if correctly reformulated.
>
> 3. If prohibited questions are repeatedly formulated, although expressly censured, or objected to because they suggest the answer to the person examined, the judge warns the party by recording this in the trial file.
>
> 4. The expert witness and technical consultants are not asked to make a declaration of commitment telling the truth regarding their assessments within their competence, if not limited to the facts directly learned during their activity.
>
> 5. The expert witness and technical consultants may participate in every hearing of the trial, both before and after their examination.
>
> 6. The judge cannot intervene during the examination conducted by the parties, except in the cases expressly provided for by law.
>
> 7. The judge cannot ask questions that tend to suggest the answer to the person being examined.
>
> 8. Before proceeding with the direct examination of witnesses, expert

[53] H.W. Asbill, 'Ten Commandments of Cross-Examination Revisited' *Criminal Justice*, 1-6, 51-54 (Winter 1994).

[54] See G. Carofiglio, n 42 above, 4.

[55] See C. Morselli, n 7 above, 34-35.

[56] Unione Camere Penali Italiane, 'Manifesto del diritto penale liberale e del giusto processo', 10 May 2019, 39.

> witnesses and, technical consultants, the judge must indicate to all parties the topics of evidence that he deems relevant and useful for a complete examination and for the initiatives that they may deem appropriate to adopt. (added emphasis)'.[57]

Notwithstanding, some critics have argued that in Italy there is no cross-examination in the proper sense because the possibility of a witness examination is not given only to the opposite party or antagonist, it is also given to the victim (*parte civile*) during the *dibattimento*.[58] Regarding the *parte civile* there is a prohibition against suggestive questions by the victim's attorney specified in Art 499, para 3, of the CPP, cited earlier.[59] Nevertheless, some attorneys for the *parte civile* tend to ask suggestive questions to the witness brought by the public prosecutor, therefore defense attorneys should be vigilant to this type of witness examination and raise objections when needed. Even though Art 499 prohibits suggestive questions in certain witness examinations, the only procedure sanction for this norm is found in Art 191, para 2, CPP: 'Evidence gathered in violation of the prohibitions set by law shall not be used'. So, in practice, after the objection almost systematically the judge consents the part to reformulate the question. Because of that, the defense attorney also has the possibility of after objecting verbally a question during *dibattimento*, having his arguments put in written form with the so-called defense's memoir (*memoria difensiva*), as established in Art 121, para 1, of the CPP: 'At any stage and instance of the proceeding the parties and the lawyers may submit briefs or written requests to the court by filing them with the Court Registry'. Regardless, the CPP is not explicit on all the types of questions that are allowed during a witness examination, Guglielmo Gulotta's recommendations on the admissibility of different types of questions during examinations have ingrained themselves in the legal culture:[60]

[57] LAPEC, 'Linee guida per l'esame incrociato nel giusto processo', 5 March 2010, available at https://tinyurl.com/znrmk2y2 (last visited 30 September 2024).

[58] See G. Illuminati, n 32 above, 114.

[59] See P. Ferrua, n 33 above, 147-148.

[60] G. Gulotta, *La investigazione e la cross-examination* (Milano: Giuffrè, 2003), 125.

Type of Question	Direct examination and redirect	Cross-examination	Example
Recall: tends to bring out memories	*Admitted*	*Admitted*	*Was it dark when you left the house?*
Elaboration: tends to produce judgments	*Admitted only if dissociable from the facts*	*Admitted only if dissociable from the facts*	*Did he seem like a good person to you?*
Closed: limits the range of possible responses	*Admitted*	*Admitted*	*Have you ever moved?*
Open: allows for a wide range of responses	*Admitted*	*Admitted*	*Why did you change your citizenship?*
Connecting: it is linked to the previous answer	*Admitted*	*Admitted*	*And then what happened?*
Guided: leads the topic of the answers, not the content	*Admitted*	*Admitted*	*Now that you have described the place, can you tell me how you were dressed?*
Luring: contains assumptions that are made up or known to be false	*Admitted*	*Not Admitted*	*What did the dog do when you heard the shot? (we know there was no dog)*
Leading: when it presupposes undisputed facts	*Admitted*	*Admitted*	*How many times did you shoot? (Witness previously confessed)*
Leading: that presupposes disputed facts (suggestive)	*Not Admitted*	*Admitted*	*Why do you beat your wife?*
Leading: that presupposes non-essential facts	*Admitted*	*Admitted*	*Where did you go to school?*
Argumentative: that presupposes essential facts	*Not Admitted*	*Admitted*	*Have you ever returned to the scene of the crime?*
Speculative: deductive type	*Admitted*	*Admitted*	*You said that you only saw men in the bar: so the accused wasn't there?*
Speculative: conjecture type	*Not Admitted*	*Admitted*	*You said that you only saw men in the bar: so, it wasn't frequented by women?*

2. Confrontation with Previous Statements (*contestazioni*) During Cross-examination

An important part of cross-examination is the confrontation of the witness with his previous statements. If the witness gives a testimony that is incompatible with a previous statement, the attorney conducting the cross-examination can use these statements to refresh the witness's memory.[61] These contradictions raised during the cross-examination are known by the name *contestazioni* and originate from a previous statement during the direct examination or a document from the public prosecutor's file, that the defense can investigate before the trial hearing. The *contestazioni* can only be used when there is a previous statement from the same person testifying and cannot be brought forth if the witness has not declared first. In this sense, a judicial decision based on evidence from a previous statement where there was an absence of the written record of the circumstances when the declaration took place or that omits parts of the previous statement would be unconstitutional since it admitted evidence that was formed outside the trial without being subject to cross-examination.[62] So when a *contestazioni* is being elucidated, the judge can interfere through its discretionary power asking for the previous declaration from the public prosecutor's file as established in Art 499, para 6, of the CPP, cited earlier. In this case, the previous declaration is admitted, but the only part of the statement that will be used is that regarding the contradiction and the entirety of the statement will not be determinant in the sentence, as established in Art 500, para 2, of the CPP: 'The statements that are read for challenging purposes may be used to ascertain the witness's credibility'. Moreover, the *Corte Costituzionale* has established that it is unconstitutional for a judge to attach in the trial file only the summary of the statements that will be used in the *contestazioni*, done by the public prosecutor and/or the judicial police (*polizia giudiziaria*), leaving out the previous statements made by the witness contained in the public prosecution file.[63]

It is well established that the complaint (*querela*), accusation (*denuncia*), or written statements from the public prosecutor's file can be used by the judge to the end of establishing witness credibility, as established in Art 500, para 2, of the CPP, cited earlier. Evidence can be disputed by the witness because of Art 194 para 2, CPP, establishes that the examination can be extended to the circumstances whose verification is necessary to assess credibility: 'The existence of a fact cannot be inferred from circumstantial evidence unless such evidence is serious, precise and consistent'. Hereinafter, the dispute of statements or documents different from the precedent declarations, imposes to the witness the pressure of admitting to have committed an error, thus by following Art 192, para 1, of the CPP the judge

[61] D. Schittar, *Esame diretto e controesame nel processo accusatorio* (Padova: CEDAM, 1989), 110.

[62] See P. Ferrua, n 33 above, 156.

[63] Corte Costituzionale 3 June 1992 no 255, *Il Foro italiano*.

should always include in their motivations the reason that he considers the evidence to the contrary and unreliable: 'The court shall evaluate evidence specifying the results reached and the criteria adopted in the grounds of the judgment'.

Furthermore, the *contestazioni* has a double purpose, first to attack the credibility of the witness that makes the contradictory testimony; and also, to allow a recalibration or clarification of his testimony during the *dibattimento*. Hence, a previous declaration from a third party is inadmissible. It must also relate to the facts and circumstances of the testimony that the witness is testifying. The way for the attorney examining to raise the *contestazioni* during the *dibattimento* is to read the previous declaration, so the witness can rectify his declaration. Another possibility is that the witness remains firm on his testimony during the *dibattimento* or that refuses to answer the attorney's questions. In the case that the previous declarations cannot be used because they are inadmissible evidence, the judge has to consider them only for the credibility of the witness and the previous declaration cannot constitute a proven fact. There are some exceptions when a previous declaration can constitute a fact, the first is when a witness is subject to threats or bribes to testify a lie (Art 500, para 4, CPP). In this case, when there is evidence of threats and money offers in the public prosecutor's file it is reasonable to assume that the declaration done by the witness during the *dibattimento* is not genuine.[64]

In this regard, previous statements made by the witness to the *polizia giudiziaria* are only attached to the trial file if they were done with all the legal warranties; they must have a delegation from the public prosecutor to proceed with the interrogation, and also, the person during the moment of the statement was free and not detained.[65] Only if those two requirements are met, they can be considered as a spontaneous declaration, as established in Art 503, para 4, CPP:

> 'Without prejudice to the prohibition to read and produce statements, the public prosecutor and the lawyers may challenge, in whole or in part, the content of the testimony by using the out-of-court statements previously made by the witness and contained in the investigative dossier. Such right may be exercised only if the party has already testified on the facts and circumstances to be challenged'.

In any case, the *contestazioni* should be accepted or denied by the judge, as established in Art 504 CPP:

> 'Unless otherwise provided by law, the President of the bench shall decide immediately and without any formality on the oppositions submitted during the examination of witnesses, experts, technical consultants, and private parties'.

[64] See P. Tonini, *Manuale* n 29 above, 743.
[65] L. Liguori, n 13 above, 321.

Likewise, it cannot conclude by itself that the witness' testimony during the *dibattimento* is false, whereas it can only consider the testimony as insufficient evidence. The reason is that the previous statement does not disqualify the testimony during the *dibattimento*; instead, it makes it uncertain, inconsistent, and elusive thus discrediting the credibility of the witness.[66]

3. The Judge's Cross-examination

After the conclusion of the cross-examination, the parties can have a redirect examination of the witness and then the judge is allowed on his initiative (*d'ufficio*)to examine the witness and ask new questions, in what can be considered a tangling of both the inquisitorial and adversarial systems.[67] It could be categorized as a *sui generis* cross-examination, that is not specifically regulated by the CPP, and where jurisprudence and the legal doctrine are divided on the role of the judge. The CPP does establish that the judge can ask direct questions to the witness and the parties, after the direct and cross-examination from the defense and public prosecutor, but it does not specify the type of questions allowed, Art 506, para 2, CPP states:

> 'The President of the bench, also upon request of a different member of the bench, may ask questions to the witnesses, experts, technical consultants, as well as to the persons referred to in Art 210 and to the parties who have already been examined, only after the examination and cross-examination have been carried out. The right of the parties to conclude the examination following the order referred to in Arts 498, paras 1 and 2, and 503, para 2, remains in force (added emphasis)'.

Whereas, some judges, often interrupt the examinations by asking questions to the witness before the examination and cross-examination have been concluded, a situation that is reminiscent of the inquisitorial system and that puts the defense in an awkward and delicate predicament of potentially questioning the actions of the judge during the *dibattimento*. It is quite clear that judges can ask about new things, not addressed during the direct and cross-examination, a prerogative not given to the parties, as established in Art 506, para 1 CPP: '(…) the President of the bench may indicate to the parties new or broader topics of evidence, useful to carry out an exhaustive examination'. Nevertheless, the legal doctrine is unquestioned that this can only be done after the conclusion of the direct and cross-examination of the parties during the *dibattimento*.[68] Therefore an objection in these circumstances serves to make the rules of the procedure respected; and also, stops the witness from saying something contrary to the version of the facts of the party that brought

[66] See P. Ferrua, n 33 above, 160.

[67] See C. Morselli, n 7 above, 115-116.

[68] F.R. Dinacci, 'Cultura dell'esame incrociato e resistenze operative', in D. Negri and R. Orlandi eds, *Le erosioni silenziose del contraddittorio* (Torino: Giappichelli, 2017), 97.

that witness. Likewise, it helps the witness in a difficult moment, giving him time to relax. Objections based on this are legitimate and could be in the form of: - *I oppose the question because it is not clear; or because it confuses the witness; or because it forces the witness to give a hypothesis*'.[69]

Despite that, the CPP does not specify if the judge can ask suggestive questions.[70] In this sense, Art 499, para 3, of the CPP, cited earlier does not allow leading/ suggestive questions from the party that requested the witness, and also to the party having a common interest, like the victim (*parte civile*), as I explained earlier. Accordingly, the CPP has a *vacatio legis* on the issue of whether the judge can or not propose suggestive/leading questions to a witness. Not surprisingly, in a system that is influenced by the inquisitorial system, most judges tend to examine witnesses with suggestive questions. In this respect, legal scholar, Paolo Tonini describes this as a temperate accusatory prerogative; with a balance of functions and the power of the judge's initiative (*d'ufficio*).[71] These initiatives from the judge should be done after the culmination of the direct examination and cross-examination not before. Also, the judge's initiative should be limited to assuming evidence that is only necessary for the clarification of facts regarding the elements of the crime and also the innocence. Therefore, the judge cannot invert the order of the examination and cross-examination. During the cross-examination, the judge should refrain from cumbersome interventions that stray from the evidential objective that the parties propose. Furthermore, a direct examination from a judge's initiative (*da ufficio*) without allowing a cross-examination should be considered unusable.[72]

Some recent jurisprudence from the *Corte di Cassazione* tends to favor the power of judges making suggestive questions:

> '(…) the premise that the prohibition on suggestive questions given the clear literal tenor which refers the prohibition itself to the examination conducted by the party who requested the summons of the witness and by the party who has a common interest does not operate in concerns the judge, who can ask the witness all the questions he deems useful for clarifying the fact (added emphasis)'.[73]

Another recent sentence clarifies that there is no prohibition for suggestive questions by the part of the judge:

> 'Nonetheless, the exception relating to the prohibition on asking suggestive questions is manifestly unfounded. The prevailing teaching of this Court is, contrary to what the appellant demonstrates to believe, in the sense that this

[69] See G. Gulotta, n 60 above, 125.
[70] See E. Stefani, n 3 above, 111.
[71] See P. Tonini, *Manuale* n 29 above, 757, 759.
[72] See G. Illuminati, n 32 above, 123.
[73] Corte di Cassazione-Sezione penale IV 2 August 2023 no 33917.

> prohibition on asking suggestive questions is not addressed to the judge, who, in the exercise of the powers attributed to him by Art. 506 CPP, (…) there is indeed an isolated ruling to the contrary, but on closer inspection it concerns the particular hypothesis in which the judge himself proceeds with the direct examination in cases where this is provided for by procedural law and which does not occur in the case of species.'[74]

Despite that, the *Corte di Cassazione* in 2020 decided a leading case where Art 111 of the Constitution was brought as an argument against the monopoly of the judge regarding witness examination, determining that:

> 'During the witness examination, the prohibition on asking harmful or suggestive questions to the witness applies not only to the party and to the subjects who requested the examination, under Art. 499, paragraph 2 of the Code of Criminal Procedure, but also to the judge, who must instead ensure the authenticity of the answers within the proceedings.'[75]

In this case, the court applied the prohibition of asking suggestive/leading questions, in Art 499 of the CPP, cited earlier, not only to the party that had brought the witness to testify in the direct examination but also to the judge during his witness examination. Commenting on this decision from the *Corte di Cassazione*, legal scholar Carlo Morselli is also of the opinion that the prohibition to formulate suggestive or harmful questions by the judge could damage the sincerity of the responses to the questions, which is an inherent competence of the judge.[76] In this case, the judge examined the victim (*parte civile*) of a sexual crime a 14-year-old female with certain suggestive force, ending up manipulating the witness testimony and obtaining slavish answers that were in contrast with the authenticity of the facts, hence distorting them.

Even though the legal doctrine is divided on whether a judge is allowed to make suggestive questions to the witness, some exceptions are undisputed (*pacifica*) by the legal doctrine as in the case of minors and sexual crimes. Therefore, the *Corte di Cassazione* understands that in certain cases, while examining a minor. the judge is allowed to ask suggestive questions but not harmful questions, establishing an important distinction in cases that deal with sexual crimes:

> 'The prohibition on asking suggestive questions in the witness examination does not apply to the judge, who, acting from a perspective of impartiality, can ask the witness all the questions deemed useful to contribute to ascertaining the truth, except for harmful ones specifically in the field of sexual crimes, in which the court ruled out that the question posed by the judge to the

[74] Corte di Cassazione-Sezione penale V 20 July 2023 no 26761.
[75] Corte di Cassazione-Sezione penale IV 19 May 2020 no 15331, *Anpp 4/2020* (2020).
[76] See C. Morselli, n 7 above, 191.

offended person had a suggestive nature, having to be understood as a mere request for clarification on the modalities of the crime.'[77]

Furthermore, in the case of a hostile witness, it has also been established by the *Corte di Cassazione* that because the judge is required to search for the substantial truth, therefore suggestive questions were allowed,[78] however barring any harmful questions.[79] In another scenario, in a case with a minor, the judge was allowed to make suggestive questions because there were difficulties in finding the substantial truth of the case.[80] In this regard, the highest court tends to favor the judge in making suggestive questions.

In conclusion, given the ambiguity of judges' cross-examination of witnesses, the main criteria for the judge not to allow judicial errors or a misjudgment in the evidence with the standard of proof beyond any reasonable doubt is paramount. Therefore, if suggestive questions are asked by the judge, they should be influential in his final verdict of guilt or absolution and not on the hypothesis or counterhypothesis of the parties in the trial hearing.

[77] Corte di Cassazione-Sezione penale III 15 April 2015 no 21627, *Repertorio Foro Italiano* (2015).

[78] Corte di Cassazione-Sezione penale III 8 March 2010 no 9715.

[79] L. Fedalti, *La testimonianza penale* (Milano: Giuffrè, 2012), 231.

[80] Corte di Cassazione-Sezione penale III 28 October 2009 no 9157, *Repertorio Foro Italiano 2010, Dibattimento penale*, 68 (2010).