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B.LAB

DISPENSA

ROMAN LAW (MODULO 2)

-CLASSE 20-

A CURA DI

OTTAVIA D'ACUNTO

TEACHING DIVISION

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The most ancient roots: the archaic age

Ius civile (*ius quiritium*)

Rome has just one kind of law in the archaic age: ***ius civile***, composed of ***mores maiorum*** (unwritten laws, orally transmitted, that the ancestors used) and very few ***leges***. It is a small city and a very simplified economy, based mostly on agriculture and farming. Such an economic structure shapes society's structure; the family structure has ***gentes*** (clans), groups of family thinking they have one common ancestor. Families are strongly patriarchal, with the ***patria potestas***. There is some kind of common land, belonging to all the *gentes*.

The legal framework has specific characteristics:

- **Formalism**: character of both legal institutes (e.g. *mancipatio**) and process; in such an economic context, speed in transaction is not a value, as formalities are more important;
- **Ritualism**;
- **Lack of flexibility** (even a small mistake makes the whole ritual void);
- **Exclusivity** (only a citizen can operate in this legal framework, not a foreigner).

Gaius writes about the ancient formalism of civil law (especially in private lawsuits). "4.11 These actions which the ancients employed were so designated, either for the reason that they were provided by the law although at that time the edicts of the Praetor, by means of which many new actions were introduced, had not come into use or, because they followed the words of the law, and therefore, like the law itself, were observed without any alteration. Hence, it was decided that a person who brought an action against another for cutting his vines, and in the pleadings called them "vines," should lose his case, as he ought to have called them "trees," because the Law of the Twelve Tables, under which the action for cutting vines was brought, speaks in general terms of the cutting of trees." → The plaintiff had to use the same words as the formula, otherwise he would lose the case.

- ➔ **Function** – control and monitor the economic activity of citizens
- ➔ **Effect** – slowdown of the economic system

NB *Res mancipi are the most important goods in the ancient ages (land, house, cows, etc.); the method to transfer the ownership is the ***mancipatio***, a very complicated procedure.

How the legal system worked – *ius civile*:

- Mostly unwritten;
- Needs to be collected and transferred (orally);
- Needs to be interpreted (and in some cases to be adapted to new situations) by the pontiffs (***pontifices***).

NB The roman system has been affected by **Etruscans** (in the north) and by the **Greeks** (in the south).

The XII tables

The ***collegium Pontificum*** is made of nobles and aristocracy (**patricians**), who have the monopoly of the law, which gives them power (opposed to **plebeians**). Due to this power, there is a conflict between VI and V century BC, which leads to the publication of the **XII tables** (455 BC). From this moment on the monopoly is broken, as laws are written and can be read by everyone.

Three examples:

- *Si membrum rupsit, ni cum eo pacit, talio esto*. → If there is no agreement on the compensation due to harm caused, the offender will do the same to the offender.
- *Si pater filum ter venum duit, filius a patre liber esto.* → If a father sells his son to someone else three times, the son will be free from his father.
- *Hominem mortuum in urbe ne sepelito neve urito*. → It is not possible to incinerate a corpse inside the city.

Characteristics of the XII tables:

- They are not a code, more of a collection of legal provisions;
- There is a clear influence of **solonian** legislation (Athens, VI century BC);
- The provisions concern not only private, but also public and sacred law;
- A large part of them is devoted to interpersonal conflict and trial.

How to settle a dispute in archaic times?

ILLEGAL/UNJUST ACT → **CONFLICT** (between the offender and the victim if alive, otherwise the relatives) → **SELF-HELP** (ordeal, fight, duel or, in some cases, oath) → **CONFLICT RESOLUTION**.

Is conflict resolution a private or public matter? It is a private matter, but the victim reacting against the offender will happen through a **socially authorized agent**, so there is some kind of social supervision, but it is nothing like tribunals, judges, etc. There is a lot of room for uncertainty.

For this reason, the XII tables are an attempt to reduce uncertainty: they clearly state when a citizen can use self-help and when not and they encourage the ***pactio,*** negotiation between the offender and the victim to end the conflict through compensation instead of violence. Most of all, citizens must ask a *iudex* or *iudices* (or *arbitri*) to settle any litigation.

In the legis actiones trial system, is private force admitted?

According to the XII tables you can use force (kill) against the *fur nocturnus* ("nocturnal thief") or the armed thief, as it is a case if **lawful homicide** (which is different from self-defence in a modern sense). This provision is partially inspired by the Greek (Athenian) law.

Still some traces of private coercion are present in the *legis actiones*. In fact, when someone wanted to call someone else in court, he could bring him by force.

In the laws of Draco (first legislator of ancient Athens), we can find the discipline of the *phonos dikaios*, that is "legitimate homicide". Draco establishes that who kills in determined circumstances does not have to be punished as a murderer. The main cases of *phonos dikaios*, mentioned in Demosthenes' oration Against Aristocrats, concern the involuntary killing of an opponent during the games; the killing, still involuntary, of a comrade; the killing

of a brigand on the street, in case of assault; finally, the killing of the adulterer (*moichos*) caught in the act with one of the women belonging to the family, that is the wife, the mother, the daughter, the sister or the concubine kept to have free children.

The split between public and private sphere

The split between public and private sphere is a long process, as the two dimensions sometimes overlap. When we think about «public» as something different from «private» we are using a somewhat complex concept. As an example, think about the ***delicta*** (one of the sources of obligations) as they were originally conceived: *furtum* (theft), *rapina* (robbery), and so on. *Furtum* is conceived more as an issue between the thief and its victim than an issue between the thief and the society/community. In the Roman world the process up to **imperial age** has distinctly private characteristics: it is not so much an epiphany of public law, but a kind of **regulation of interests**.

- ***Delicta*** are considered a matter of private interest and are issued through a private process which has the aim of establishing the assessment and the exercise of a right.
- ***Crimina*** are considered a matter of public interest and are issued through a public process which ends with a criminal sentence.

The family structure

The ***paterfamilias*** is the chief of the family, and he has **personal** and **disciplinary powers** above his **descendants**, **wife** and **slaves**. Particularly, the *paterfamilias* has the ***ius vitae ac necis***, the right to keep alive or kill anyone under his power. In many cases the exercise of this right by the *paterfamilias* is done in the name of the community (e.g. in case of treason of the fatherland by a son), as the community has no sufficient structure in order to punish. In fact, in the archaic age, the community has few resources in terms of state officers who can provide a structure of law enforcement. The legislation provides citizens with a minimum structure within which the parties are left to settle their differences for themselves.

If we look at Roman history, we can see a clear evolution from private force (so-called: **vengeance**) to the State monopoly of violence. The *ius vitae ac necis* was indeed cancelled in the late imperial age.

CTH.9.13.1 [=BREV.9.10.1] "Emperors Valentinian and Valens Augustus to the Senate. We grant to their older kinsmen the right to correct minors in proportion to the nature of the offense, so that those who are not inspired to practice the virtues of life by examples of merit in the household may at least be compelled to do so by the medicine of correction. It is in Our will that the power to punish faults of character shall not be extended indefinitely, but in accordance with paternal power, the authority of a near kinsman shall have the right to correct the errors of youth and restrain them by private punishment. But if the atrocity of the deed exceeds the jurisdiction of family correction, it is Our pleasure that those guilty of such enormous crime shall be delivered over to trial by a judge." (365) → **correctional power**: if there is a crime, the father shall not punish his son but rather take him to trial.

Legal evolution from the archaic age

Many factors led to a legal evolution:

1. Interpretation by the Pontiffs – they create new legal acts combining old ones (e.g. ***emancipatio***)
2. The ius gentium is absorbed in the ius civile (so not anymore the *ius quiritium* only).

3. From IV-III century BC the ***praetores*** operate to modify and integrate the *ius civile*, creating the ***ius honorarium***: “The *ius pretorium* is the right introduced by the praetors in order to help, add, amend (the civil ius) for the public good; what is also called *honorarium* from the honour of the praetors”. (D.1.1.7.1 Papinianus lib. Sec. Defin.).
4. In the second half of the Republic a very important production of legal studies (***iura***) by experts (***iuris periti***) begins: it is mostly based on **single-case resolution**.
5. The whole complex of the roman legal system is evolving towards a «modern» society, where international trade, finance and complex transactions are normal. But something else is changing in the field of public law.

The classical period: the empire

The emperor has a wide range of powers:

- The so-called ***tribunicia potestas*** - nobody could raise his hand against him
- ***Imperium proconsulare maius et infinitum*** (military powers)
- **Regulatory powers**

The *Constitutiones principis*

Ulpianus (170-228 CE): "*Quod principi placuit legis habet vigorem*" → whatever the emperor likes has the force of law

Before Vespasianus, in order to become emperor, a law is needed that transfers power from the people to the new emperor.

Constitutiones principis issued by the emperor:

- ***Edicta***: laws with varied content and general scope
- ***Mandata***: instructions given to officials on the performance of their duties
- ***Rescripta***; authoritative opinions on legal matters
- ***Decreta***: judgements given by the emperor as a judge

Other aspects of the classical age

- The ***senatusconsulta***, which originally were mere indications given to the magistrates on how to operate, become binding (they have the force of law).
- Jurisprudence flourishes and the emperors often give to renown jurists the «*ius respondendi ex auctoritate principis*», the right to give binding opinions like those given by the emperor.
- Under Hadrian’s rule the jurist Salvius Julian «freezes» the praetorian edict, making it no longer a source of law.

The post-classical age

- The emperor has **absolute power**, and the old political institutions are completely abandoned.

- As a result of the edict of Caracalla (212, *Constitutio Antoniniana*) **local custom** becomes a source of law, unless precluded by general legal principles or opposed to the law.
- Since 284 A.D. the **Tetrarchy** is enacted (rule of four, two ***Augusti*** and two ***Caesari***, one of each in the East and the other in the West).
- Since 395 A.D. the empire is divided into two parts (with two – or more – internal partitions assigned to *Caesari*), one in the east and the other in the west, in order to prevent fights.
- Paganism is progressively replaced by Christianity, which since 382 C.E. (Theodosius I) is State religion.
- The emperor is the only normative source.

Centuries of legal texts need some order:

- The first **compilations** are private ones, made probably by lawyers: *Codex Gregorianus*, *Codex Hermogenianus*.
- The first official compilation is the ***Codex Theodosianus*** (438 d.C.), made by Theodosius II.
- A number of collections of jurisprudence, sometimes apocryphal, are composed (Epitome Gai, Tituli ex corpore Ulpiani, Liber Syro Romanum, etc.).
- Barbarian (Germanic) kingdoms give themselves compilations of Roman-barbaric laws (lex Romana Wisigothorum, Breviarium Alaricianum, etc.) which have force for non-German subjects.

Justinian's period

- In 528 a first commission is established to draw up the first Codex Iustinianus.
- In 530 Triboniano Gallo is in charge of preparing the Digest.
- In 533 it is the turn of the institutions.
- The second codex comes into force in 534.
- Compilers largely use the method of **interpolation** = changing the original text, especially when it refers to archaic *leges*.

The *Corpus Iuris Civilis*

Composed of 3 (+1) parts:

- ***CODEX***: collection of laws of previous emperors, they are shortened by compilers.
- ***DIGESTA***: collection of fragments of legal works sometimes shortened or modified by compilers (interpolations)
- ***INSTITUTIONES***: elementary manual of law.
- Then the ***NOVELLAE***: collection of laws promulgated after the Codex, mostly in Greek.

Important innovations of the imperial period

In Turkey, there is a monument in *Ankara* called the **Monumentum Ancyranum**, which contains the *Res Gestae* — a text that records what Augustus accomplished during his political and military career.

When Augustus gets the power, he proclaims himself ***restitutor reipublicae***. But it is not true: Augustus is indeed the first emperor, but the political system has changed completely. Especially, consider:

1) **bureaucratization**: a more complex judicial system is born. For example, with the ***cognitio extra ordinem***, appeal is introduced (whereas with the trial by ***formulas***, the judgement is final, there is no appeal). In order to have appeal, the structure needs hierarchy.
2) **control**: private freedom is somewhat reduced.

Both these points are very important in shaping the future differences between civil law and common law systems. For example:

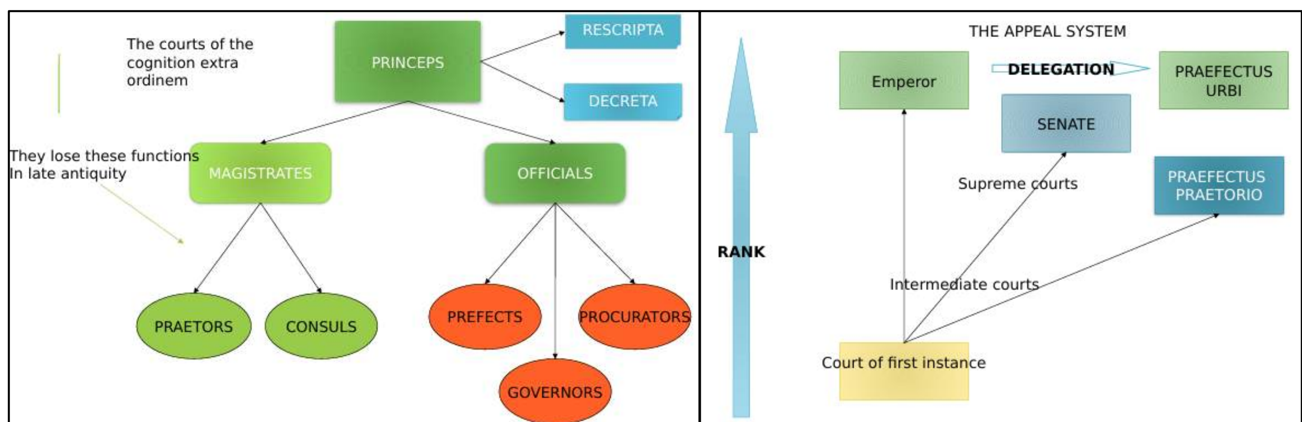
D(igesta). 47.22.1. PR.1 (MARCIAN., INST.) "Provincial governors are directed by the Imperial Instructions not to tolerate associations and that soldiers are not to form collegia in camp. But the lower orders are allowed to pay a monthly fee, as long as they meet only once a month, in order that no unlawful collegium be formed under that pretense. This applies not only at Rome, but also in Italy and the province, stated the deified Severus in a recript. But assembly for religious purposes should not be prohibited, provided that it does not violate the senatorial decree by which illegal collegia are dissolved. It is not possible, however, to participate lawfully in several colleges, as has also been established by the Divi Fratres; and if someone takes part in two, there is a rescript for which he is obliged to choose which one he prefers to be part of, and he will receive from that college that abandons his part of the commons."

In the imperial age there is a **regulation of the right of association**. The government wanted to control people; today it is mostly done with two weapons: police and judicial system.

Who will judge?

- In the provinces: the governors
- In Rome: magistrates (e.g. consuls, praetors); officials designated by the prince (e.g. prefects); magistrates; the prince himself; the Senate.

Criminal trials are decided by **juries**. *Cognitio extra ordinem* is used in both private and criminal suits.



Characters of the *Cognitio extra ordinem*

- The private judge disappears: the judgment takes place before a public body (magistrate or official).

- At most, the magistrate or official can delegate the delivery of the sentence to an auxiliary (***iudex pedaneus***).
- The judge has maximum freedom of appreciation of the merits of the dispute (he is not bound by formulas), and for the conduct of the trial, the choice and admission of the means of proof.
- There are no formalisms.
- The courts have both civil and criminal jurisdiction.
- The summons to court are carried out by the public authority (***libellus conventionis***).
- The defendant/accused who does not appear at the hearing is ***in absentia*** (***contumax***).
- Confession does not stop judgment.
- Pre-trial detention (in criminal matters) is common.

NB How does trial work in the USA? First of all, there is **bail**, meaning someone can stay out of jail if they pay enough money. They ask if you proclaim yourself guilty or not. If you proclaim yourself guilty, the trial ends. The same happened in the Republic.

In the **inquisitorial model**, the confession does not end the trial. Typically, they want to reach an absolute truth, and the confession is not stopping the judgment but will be just a piece of evidence. This model wants to ensure control over citizens.

- The court may order enforcement *manu militari* without recourse to a separate enforcement procedure.
- In criminal matters, the penalties are very severe, especially for crimes against the State and the Emperor.
- The judicial apparatus is imposing, top-down, bureaucratic and relies on the use of public force (see below).
- The *cognitio extra ordinem* is at the origin of modern trial systems (both criminal and civil) in continental Europe.
- The *cognitio extra ordinem* has clear inquisitorial characters.

Cognitio extra ordinem in late antiquity

- The courts have territorial jurisdiction (*praesides* of the provinces, vicars of the dioceses, prefects for the prefectures) at first instance or on appeal.
- The supreme instance is the emperor, with normal delegation to the praetorian prefect.
- For many acts the written form is mandatory.
- The parties are liable to the court costs.
- The problem of prison overcrowding and trial times is becoming chronic (the two things are closely related). That is explained by the fact that prisons are not used as punishment (which is a modern idea), but only for retail or detention.

The police apparatus is very large and complex, and there are problems with abuses made by the officers, especially against common citizens.

CTH. 6.29.1, CIRCA 350: "Those whom the provincials are used to call *curiosi* or *curagendari*, arbitrarily use to throw into prison people who suspect of various crimes. The aforementioned *curiosi* and *stationarii* and all those who perform similar functions, remember to report the crimes to the judges and the need incumbent on them to provide evidence, even with their

own danger, if it should emerge that they have mounted slander against innocents. So, the evil habit of arbitrarily locking people in prison must come to an end."

Categories of police officers:

- ***Curiosi*** – kind of secret police officers
- ***Agentes in rebus*** – kind of secret officers
- ***Irenarchs*** – officers in charge of keeping a place quiet and in peace
- ***Stationarii*** – placed in postage system
- Military corps in general

The ***cursus publicus*** is at the origin of many of the security forces operating in late antiquity. The postage system works for stations, constantly manned. It is a true information network, used also to control enemies inside and outside society.

An example of misconduct – PAP. MICH. 13.660 – Flavius defending Theodoros said: "In the last days of the passed month Mesore of the past seventh indiction the devoted Menas forced my brother Victor who also is a presbyter outside and murdered him having thrown a piece of wood of a machiehis left arm and having (placed) many blows on his stomach from the fifth hour till the evening of the same day and I reserve against him the law me suiting against murderers. And if I shall not prove that he murdered my brother I shall die instead of him. And he did not ask for the blows he received or it must be by the fact that he was ten or eleven days alone". The afore-mentioned Maria defending Theodoros said: "The police of my village Aphrodite together with others who are in its service after having arrested my husband Herakleios put him in the watch-house of my village Aphrodite and after having taken wine to the same watch-house they drunk with him and when the evening had come they beat my same husband Herakleios and killed him with their swords and thereafter they gave his remains to the fire and they did this to him on the eighth of the month Phaophi of the passed sixth indiction at the setting of the sun. Being asked why they murdered my husband they said: 'The most illustrious Sarapammon and Menas wrote us to kill him', and I reserve against them the law me suiting regarding the death of my wretched husband. When Herakleios, my wretched husband, had been killed and his remains had been given to the fire so that they may be burned they poured again water on the same remains and they threw his bones in a basket and buried them I do not know where. I ask, therefore, that they are given to me so that I can bury them. For concerning just this matter I approached already the most illustrious Sarapammon and it was agreed to arrange that they would be given to me but they were not given" (P.Mich. inv. 6901 + P.Palau Ribes inv. 70) "[…] Herakleios having been taken off, and I went to approach... and having recognized one of my husband's murderers."

The order to kill this poor man came from someone from the nobility or upper class. This happens quite often: powerful people used to ask public officers to kill commons.

A still debated issue – (V SEC.) 12.20.4 Imperator Leo: those who have reached the rank of centenary or decenary in the school of *agentes* in rebus should be immune from being called to trial by any authority except the magnificent magister officiorum, which will be responsible for deciding whether or not they should be in court. This is all the truer in the event of criminal cases: it would be absurd for a judge who cannot decide on normal civil matters to be able to express himself on the salvation or fame of an *agens*.

The Roman empire is a difficult time for human rights. The issue of immunity is still actual. For example, in the USA prosecutors have a really strong immunity for their acts and cannot be prosecuted.

Boston review, June 18th, 2020 – Although prosecutors play a powerful role in the mass incarceration of Americans, they have largely escaped attention in the current moment. This is a mistake. People who have been wronged by prosecutors may lose their liberty for decades. They may also lose their lives. Cameron Todd Willingham was executed in Texas for killing his children in a fire prosecutors claim he intentionally set.

Their entire case was built on debunked fire "science" and the words of a witness whom prosecutors failed to disclose had made a favorable deal with the government. The evidence that Willingham was likely innocent was clear long before his execution, but prosecutors stonewalled the appeals process. These prosecutors, with the help of then-Governor Rick Perry, who refused to grant him clemency, and the board of pardons, which refused to consider new evidence, sent Willingham to his death.

Despite years of evidence of an epidemic of prosecutorial misconduct, there is almost no way for victims of such injustice to seek redress. Indeed, when people try to seek justice in civil suits against prosecutors who have violated their rights, legal barriers even more formidable than qualified immunity prevent them from doing so. Prosecutors are absolutely immune from liability, which means that they cannot be sued for their decisions as prosecutors, no matter how outrageous their conduct. The Supreme Court has held that absolute immunity protects prosecutors who knowingly used false testimony and suppressed evidence in a murder trial. Following the high Court's lead, lower courts have granted absolute immunity to prosecutors who have falsified evidence, coerced witnesses, and known but failed to disclose police misconduct.

NB: Immunity extends both to civil and criminal repercussions.

Some examples:

I. **Bernard v. County of Suffolk**, 356 F.3d 495 (2d Cir. 2004): in this case, prosecutors were found to be entitled to absolute immunity for their decision to prosecute town officials regardless of whether the prosecution was initiated solely because of illegitimate political motivations. The court held that, "[c]ertainly, racially invidious or partisan prosecutions, pursued without probable cause, are reprehensible, but such motives do not necessarily remove conduct from the protection of absolute immunity.…[R]egardless of defendants' political motives, absolute immunity shields them from suit pursuant to § 1983." Id. at 504. Kulwicki v. Dawson, 969 F.2d 1454 (3d Cir. 1992), is a similar case; there, the prosecutor brought a case against his former political rival based on personal motives but was protected from suit by absolute immunity.

II. **Cousin v. Small**, 325 F.3d 627 (5th Cir. 2003): in this murder case, the prosecutor intentionally suppressed evidence that the key eyewitness initially told police she couldn't see anything and wasn't wearing her contact lenses the night of the murder and so could only make out patterns and shapes, not faces (completely undermining her later identification of Shareef Cousin). Cousin also maintained that the prosecutor coerced another witness to falsely implicate him. Cousin spent over a year on death row before his conviction was overturned for prosecutorial misconduct. When he tried

to sue the prosecutors for damages, the Court dismissed his case based on absolute immunity: "The need for vigorous and fearless performance of the prosecutor's duty justifies its regrettable but necessary cost, namely, that it may sometimes bar the courthouse door to potentially meritorious claims." Cousin, 325 F.3d. at 636; see also See State v. Cousin, 710 So. 2d 1065 (La. 1998) (vacating Cousin's conviction based on prosecutorial misconduct).

To sum up: Foundations of Rome

→ *Ius* (laws of the city and the citizens)

→ Expansion of the empire and modernization of law

→ Codification of Justinian (VI century)

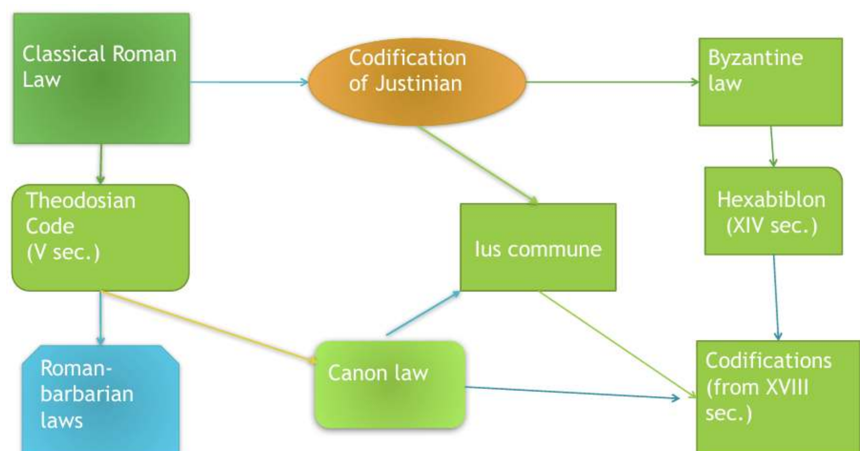
→ Rediscovery of Roman law from the XI century

→ Universal diffusion of Roman law.

Some conclusions: When we think about the Roman law tradition, usually we think about private law. This is a mistake, because there is a strong influence also on procedural law, through the so-called romano-canonic law.

In the history of Europe, we have the traces of Roman and Byzantine law. There is a complicated net between this law and tradition. Classical Roman law was both contained in:

- Codification of Justinian
- Theodosian Code (IV century), which was focused on criminal law. It has a great influence on:
  - Barbarian law
  - Canon law, which had a very strong influence on the ius commune.



Also, in the Theodosian code you have also laws about heretics and so on. And this explain why this code was so interesting for canon law. East of Europe: Byzantine law which ended with the Hexabiblon (XVI century).

A simplified historical outline of procedural law

OFFENSE → REACTION → REVENGE/FEUD → PRIVATE COERCION

In the archaic era, criminal justice is not a public matter, but a private matter. Still now, we have traces of this very ancient mentality, especially in one kind of criminal trial, which is the adversary one. It still has some typical characteristics of private trial.

Things start to change with time and especially with the affirmation of the State on family/clan structures, which are at the beginning the top of the society (although "State" is not the proper term, it would be better public organization). This leads to the birth of civil and criminal procedures.

In the most ancient era, the criminal process is similar to the civil one: the parties manage the trial (not the judge) and many offenses remain the subject of civil trial. **NB** Trial managed by the parties → private trial; trial managed by the judge → public trial.

In the adversarial system, if the parties find an agreement and settle, the trial is over. The aim of the inquisitorial model, instead, is to find the truth. Also, many offenses remain the object of civil trial (es. robbery).

With the affirmation of a bureaucratic state, more models of criminal repression are defined, and the role of the parties is reduced. The policy of criminal repression is born. Such policies change in times and places, but it is possible to identify constituent elements that are constant.

Sovereignty has two basic elements: **control** over the army and power of **punishment** (→criminal justice).

Criminal procedural models – what is the difference between the **adversarial** and the **inquisitorial** system?

Adversarial system	Inquisitorial system
Public fight between two parties. The defendant fights back as in a duel. Plaintiff to defendant: "I accuse you"	The parties are investigated by the judge, which represents the State. Judge to the parties: "I inquire you"

Historical evolution of procedural models

The inquisitorial system:

- It was used for a short period of time as an exceptional tool during the **Roman Republic**.
- In the **Roman Imperial Age**, it was used as the standard system, since it was more repressive, ensuring a stronger control over citizens.
- Since it needed a bureaucracy, it fell out of use with the **fall of the West Roman Empire**.

- It was rediscovered by the **church around the XII-XIII century**, in the same period of the foundation of the university. The church read the **Theodosian Code**, which talked about heresy.
- It was used in the XII-XIII century against the Cathars (a heretical sect in southern France that condemned the Church's corruption) and for the so-called **moralisation** of the Church (reform with the goal of cleaning its image but actually resulting in oppression and control).
- In Italy and France, it was adopted by secular authorities in the **late '200** to build up the power of an absolute monarch over the landlords. In **medieval Europe**, it was a tool to consolidate national monarchy.
- The peak of the inquisitorial model was reached during the **Absolutism** with the **Holy Inquisition**.
- It survived mitigated until the regimes of the **twentieth century**. It reached a point of crisis at the time of **Enlightenment**, just **before the French revolution**.

Enlightenment changes

In Toulouse the **Calas affair**[1] broke out (late '700): a Protestant was punished on the wheel in suspicious circumstances. Voltaire favoured a recourse to the King's Council and absolution was achieved. The Estates General (1789) carried out urgent reforms of the penal process, which had fallen into disrepute. The reforms:

- Limited the secrecy of the criminal trial;
- Ensured a lawyer (if necessary, ex officio);
- Removed the limits on the recusal of witnesses and the presentation of supporting facts in favour of the accused;
- Abolished the courts managed by the nobility;
- Adopted juries;
- Introduced the oral trial (evidence must be presented in an oral form).

➔ The system changed, becoming **mixed**: it started with an inquisitorial preliminary phase, but the rest of the process was carried out in the adversarial form.

After the French revolution

According to the ***Code d'instruction criminelle*** (1808), the trial is composed of two phases:

1. **Instruction**. Investigations are carried out and evidence is acquired. The imputation is secret; there's no obligation of notification to the suspect. Preemptive detention is widely used. → *Characteristics of the inquisitorial model*.
2. **Debate**. A lawyer is appointed, eventually *ex officio*. He can examine the acts and communicate with the defendant. → *Characteristics of the adversarial model.*

The mixed system: from instruction (investigation phase) to debate, "*we pass from darkness to full daylight, there a written and secret labyrinth, all aimed at repressive interests, here everything is oral debates, free defence and full discussion*" (Carnot, 1830). However, the

[1] The Calas Affair was a notorious 18th-century case in France where Jean Calas, a Protestant, was wrongfully accused of murdering his son to prevent his conversion to Catholicism. After being tortured and executed, public outrage—fuelled by Voltaire—led to a retrial that exonerated Calas, highlighting deep religious intolerance and injustice in the French legal system.

investigation minutes have a very strong weight and count more than the accusatory "show". The jury will still have to work mainly on the written material of the preliminary phase.

Elsewhere in Europe, the inquisitorial elements are even more marked, even in the presence of adversarial-style trials. In Lombardy (1807) there is no jury, the acquittal judgments for lack of evidence (*assoluzione per mancanza di prove*) can be repeated until prescription with consequent custody of the accused. There are privileged witnesses and testimony *in absentia* is allowed.

In Italy

In 1865 the Piedmontese codex is extended to the peninsula with some variations: mixed system, with strong inquisitorial elements. The kingdom of Sardegna is indeed not the most progressive one; more liberal kingdoms are *Granducato di Toscana*, which abolished the death penalty, and Kingdom of Naples.

NB The death penalty is actually first abolished by the Byzantine Empire, with the only exception in the case of the king's homicide.

More liberal characters are found in the new code of 1913: a certain role is given to defence in the investigation phase. In 1925, during the fascism, the government obtains the parliament's delegation to reform the code (Minister is Alfredo Rocco). Rocco was the father both of the procedural code and of the substantial one, which is still the one we have. Italy goes back to the inquisitorial model.

Some characters of the **Rocco code**:

- The same judge investigates and judges (***giudice istruttore***).
- The PM has a very broad role, as it is an instrument of the executive.
- Defence is excluded from preliminary phase ("*what is the use of defence where equanimous and omniscient organs work? You cannot have distrust in authority, it is contrary to the fundamental principles of the regime*") → typical inquisitorial
- No terms (legal time limit) for pre-trial detention.
- Modifies the jury in **mixed college**: half jurors (*giudici popolari*) and half magistrate (we still have it in *Corte d'Assise*).
- It makes appeal difficult.
- The fugitive or escapee may not appeal.
- There are **no absolute nullities** (*nullità assoluta*), e.g. the trial can be held on a later date than that indicated on the summons, in the absence of the accused. In procedural law that means that all the trial is destroyed, and you must start all over again. At that time, it is not considered so.

Notes on the history of procedural systems in Italy:

- **United Italy** – mixed system with some inquisitorial characteristics;
- **Twenty years of fascism** – pure inquisitorial model (Rocco code);
- **Today** – tendentially adversarial system.

From the Rocco code to the new code: at the end of WW2 there was no time to make another code. The code is amended both with new **legislative provisions** and **interventions** of the Supreme Court (*Cassazione*) and the Constitutional Court. For example, the **defence is readmitted** in searches, appraisals, etc. (pre-trial fase). Terms of preventive detention shall

be reinserted. It is a sort of "**inquisitorial guaranteeism**" (*garantismo inquisitorio*), meaning the core of the system remains inquisitorial, and this is assured by some guarantees (e.g. allowance for judges to make investigations).

From **1974** onwards an attempt is made to reform the criminal process in an adversarial key. L. 3 April 1974 n. 108, art. 2 c. 1.: "*The Code of Criminal Procedure* [..]*must implement in the criminal process the characteristics of the accusatory system*". The new code has been in force since 24 October **1989**. This resulted in an extremely long process because of political terrorism and mafia. In fact, when dealing with criminal associations, an inquisitorial model is more efficient.

The reform of 1989

- Preliminary investigations: conducted by the PM. Moment clearly distinct from the judicial debate (*dibattimento*).
- Established the **G.I.P**. with non-investigative tasks, but duties of guarantee (personal freedom, communication ...); e.g. a PM cannot arrest someone without asking for the permission of GIP and also, he cannot intercept communication without that authorization.
- Preliminary hearing is introduced (presided by the GUP)
- Introduced alternative rites (bargaining, «*rito abbreviato*», etc.) in order to shorten the procedure. Bargaining cannot be applied as well as in the common law system.

Art. 111 Costituzione*. La giurisdizione si attua mediante il giusto processo regolato dalla legge.*

Ogni processo si svolge nel contraddittorio tra le parti, in condizioni di parità, davanti a giudice terzo e imparziale. La legge ne assicura la ragionevole durata.

Nel processo penale, la legge assicura che la persona accusata di un reato sia, nel più breve tempo possibile, informata riservatamente della natura e dei motivi dell'accusa elevata a suo carico; disponga del tempo e delle condizioni necessari per preparare la sua difesa; abbia la facoltà, davanti al giudice, di interrogare o di far interrogare le persone che rendono dichiarazioni a suo carico, di ottenere la convocazione e l'interrogatorio di persone a sua difesa nelle stesse condizioni dell'accusa e l'acquisizione di ogni altro mezzo di prova a suo favore; sia assistita da un interprete se non comprende o non parla la lingua impiegata nel processo.

Il processo penale è regolato dal principio del contraddittorio nella formazione della prova. La colpevolezza dell'imputato non può essere provata sulla base di dichiarazioni rese da chi, per libera scelta, si è sempre volontariamente sottratto all'interrogatorio da parte dell'imputato o del suo difensore.

La legge regola i casi in cui la formazione della prova non ha luogo in contraddittorio per consenso dell'imputato o per accertata impossibilità di natura oggettiva o per effetto di provata condotta illecita.

Tutti i provvedimenti giurisdizionali devono essere motivati.

Contro le sentenze e contro i provvedimenti sulla libertà personale, pronunciati dagli organi giurisdizionali ordinari o speciali, è sempre ammesso ricorso in Cassazione per violazione di legge. Si può derogare a tale norma soltanto per le sentenze dei tribunali militari in tempo di guerra.

Contro le decisioni del Consiglio di Stato e della Corte dei conti il ricorso in Cassazione è ammesso per i soli motivi inerenti alla giurisdizione.

"**Art. 111 of the Italian Constitution**. Justice shall be administered by means of fair trials regulated by law.

Each trial shall be based upon the equal confrontation between the parties before an independent and impartial judge. The law shall ensure the reasonable length of the proceedings.

In criminal trials, the law shall ensure that the accused are confidentially informed of the nature and reasons of the charges brought against them in the shortest time possible; that they have the time and means to prepare their defence; that they have the right to question those who testify against them before the court, or to have them questioned; to obtain that those who may testify in their favour be summoned and examined under the same conditions granted to the prosecution and to obtain that any evidence in their favour be acknowledged; that they may rely on the help of an interpreter if they do not understand or speak the language of the trial.

Proofs in criminal trials may only be established in accordance to the principle of confrontation between parties. No defendant may not be proven guilty on the basis of witness given by anybody who, by free choice, has always purposely avoided to be cross-examined by the defendants and their defence.

The law shall determine when proofs may be established without confrontation between the parties, either by consent of the defendants or as an effect of proven misdemeanour.

Reasons shall be stated for all judicial decisions.

On points of law, appeals to the Court of Cassation shall always be allowed against sentences and measures concerning personal freedom delivered by the ordinary or special courts. These provisions may be waived only in the case of sentences pronounced by military courts in time of war.

Appeals to the Court of Cassation against decisions of the Council of State and of the Court of Accounts shall only be allowed for reasons of jurisdiction."

Key principle: without cross examination there is no evidence. We have one exception concerning the oral trial for mafia accusations.

Human rights after WWII

There was an enormous issue with human rights. At the end of the war, it was necessary to build a legal infrastructure to prevent similar violations of human rights.

Universal Declaration of Human Rights (1948)

Article 7 "*The Universal Declaration All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination*."

Article 8 "*Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law*."

Article 9 "*No one shall be subjected to arbitrary arrest, detention or exile*."

Article 10 "*Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.*"

<table>
<tr><th>European law</th><th>European Convention of Human Rights</th></tr>
<tr><td>Some common values have been recognised:
• Protection of the person / fundamental freedoms
• Equality in difference
• Right to property (with limits)
• Protection of the worker
• Economic freedom, competition
• Equality between spouses
• Protection of legitimate and non-legitimate children
• Freedom of association
• Principle of responsibility</td><td>History:
• 1946 – Churchill's speech
• 1949 – Treaty of London
➔ Council of Europe
• Nov 4th, 1950, Rome – Signature of the EHRC
➔ Committee of Ministers
➔ Consultative Assembly
• Monitoring compliance with obligations
➔ 1954 – European Commission of Human Rights
➔ 1959 – European Court of Human Rights
➔ Committee of Ministers</td></tr>
</table>

The cornerstone of the Council of Europe remains the European Convention on Human Rights, an international treaty of unprecedented importance, adopted in 1950 and entered into force in 1953. The Convention defines the rights and freedoms that Member States undertake to guarantee to those under their jurisdiction and provides for a mechanism of international strengthening, the European Court of Human Rights, through which individual citizens and States can raise, regardless of their nationality, alleged violations by the signatory States of the rights guaranteed in the Convention. Its competence shall be binding on all Contracting States. It sits permanently, takes care of all the preliminary stages and pronounces the sentences. The Court shall comprise a number of judges equal to that of the Contracting States. It is the governments that initially propose the candidates, but the judges sit individually without representing the State that proposed them. The Committee of Ministers shall monitor alleged breaches of the judgments handed down by the Court.

Article 6 – Right to a fair trial *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 defence*;

(c) *to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require*;

(d) *to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him* → **crossed examination** (*contraddittorio tra le parti*): right to examine and counter examine the witnesses;

(e) *to have the free assistance of an interpreter if he cannot understand or speak the language used in court*.

EHCR outlines an adversarial model; for this reason, all European states have to meet all these requirements in their own trials.

NB The ECHR does not mention the right of appeal introduced with the *Cognitio extra ordinem*; the reason is that it is a characteristic of the inquisitorial model.

European Court of Human Rights

Any Member State (in the case of an inter-State appeal) or an individual who considers himself a victim of a violation of the Convention (in the case of an individual appeal) may submit directly to the Strasbourg Court an appeal alleging a violation by a Contracting State of one of the rights guaranteed by the Convention. A note addressed to the applicants and the appeal form may be obtained at the Registry. The procedure before the new European Court of Human Rights is contradictory and public. Hearings shall be public, unless the Chamber/Grand Chamber decides otherwise by virtue of exceptional circumstances. The pleadings and other documents lodged at the Registry of the Court by the parties shall be accessible to the public. Individual claimants can file appeals themselves, but representation by a lawyer is recommended and in any case is required for hearings or once the appeal has been declared admissible. The Council of Europe has set up a system of mutual legal assistance for claimants whose financial resources are insufficient. The official languages of the Court are French and English, but appeals may be lodged in one of the other official languages of the Contracting States. However, once the appeal has been declared admissible, the use of one of the official languages of the Court shall become compulsory, unless the President of the Chamber/Grand Chamber gives permission to continue to use the language in which the appeal is drawn up.

The Court of Justice of the European Communities has absorbed in its case-law the principles set out in the Council of Europe's European Convention on Human Rights (ECHR), signed in Rome on 4 November 1950.

Back to the ancient world – the succession of trial models in Rome

Adversarial model in Archaic and Republican age → consolidation of State structures → authoritarianism and consolidation of the prince's power → Development of the inquisitorial model → growth and progressive affirmation in late antiquity

The traditional model is a linear representation, which advances along the axis of time: from the "primitive" adversarial model to the complex inquisitorial model, it is an almost continuous process.

NB Primitive → trained judges are not needed, as juries are composed of common people.

Premise: the *Provocatio ad populum*

The ***Provocatio ad populum*** was considered the pillar of the republican constitution and institutions.

Originally magistrates had a bundle of powers called ***imperio***, which contained the power to command the army and a kind of coercive or disciplinary power (they could punish a citizen without any kind of trial).

The *provocatio* was born with the ***Lex Valeria de provocatione*** (509 BC): *ne quis magistratus civem Romanum adversus provocationem necaret neve verberaret* (no magistrate could kill or beat a Roman citizen who had invoked *provocation*). In the case of serious sanctions, citizens had right to "provoke *ad populum*" to obtain a fair trial; it limited the magistrates' power. **NB** It is not a right of appeal.

The ***littori***, ceremonial officers assigned to magistrates, carried the ***fasces lictoriae*** (a bundle of rods with an axe) as a symbol of the magistrate's coercive power, particularly the authority to punish or execute.

In the late Republic, the principle of *provocatio* became a point of political contention. Following Cicero's extrajudicial execution of Catiline's associates, Mark Antony later justified Cicero's own execution by claiming he had violated the *provocatio ad populum*, framing it as a necessary response to an earlier breach of rights.

The *Provocatio ad populum* is considered the historical foundation of the right to a trial:

- Magna Charta, 1215 art. 39: "No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we proceed with force against him, or send others to do so, except by the lawful judgement of his equals or by the law of the land." (*habeas corpus*)
- Origin of two key principles of criminal law:
  - *Nullum crimen, nulla poena sine lege scripta stricta et certa*
  - *Nulla poena sine iudicio*
- Modern right to trial (actively and passively), recognised by the ECHR

The *iudicia populi*

The most ancient tribunals in Roman history were called ***iudicia populi***. They were typical of the Archaic age and some call it **comitial trial**, since the ***comizi*** were the assemblies of the people (though they were only composed of male adult citizens). In this system, the same assembly has both legislative and judicial powers.

- The judgment was promoted *ex officio* by the magistrate, who could order investigation and instruction activities.
- Following this, a notice to appear was issued, with the specification of the charge and penalty (rarely, pre-trial detention).
- For three meetings, in the forum in front of the people, the accuser and the accused explained their reasons and the witnesses were heard.
- After 24 days, the final harangue of the prosecution took place, followed by a popular vote of acquittal or conviction.

The *iudicia populi* had both investigative and judging functions:

- **Investigative function** (***anquisitio***) – entrusted to the magistrate, who carried out investigative and preliminary activities (*quaerere*) and exercised the role of accuser.
- **Judging function** – entrusted to the popular judge (assembly) whose task was to *iudicare vel multam inrogare* (to judge or impose a fine).

Problematic aspects of iudicia populi: the judge coincides with the popular assembly. The people's assembly may be conditioned politically or by other extrajudicial aspects. Although it is an (imperfect) adversarial rite, equity is not always assured. For example:

- **Val. Max. 8.1.abs.2** "Sergius Galba was vehemently accused by the tribune Libo, for having killed – despite his word – many Lusitanians when he was praetor in Spain. The accusation of the tribune was supported by Cato, despite his age. The defendant without defending himself from the accusations began through tears to recommend (to the judges) the fate of his children and his next relative, son of Gallus. In this way, he managed to move the assembly and the one who by general consent would certainly have been sentenced to death, came out acquitted of the trial; a process governed by compassion, not justice. The absolution that could not be given to him because of innocence, he had because of his children."
- **Val. Max. 8.1.abs.8** "Cosconius was charged under the Servilia (corruption) law for numerous and very obvious crimes, and there was no doubt about his guilt. He, rising during the trial, read a poem by his accuser Valerius Valentinus, in which he boasted of having corrupted a young man and a virgin of a noble family. The judges thought it was unfair then to send the accuser as winner, he who deserved to be accused. The acquittal of Cosconius was more than anything else a condemnation for Valerius."

The *Quaestiones Extraordinariae*

The ***Quaestiones Extraordinariae***, which emerged in the 2nd century BC as an inquisitorial form of procedure, were applied in especially serious cases, often following **delation** (accusation by informants). In such instances, the Senate entrusted the investigation and repression of certain crimes to the consuls or to a praetor. This delegation of power is exemplified in the *senatus consultum de Bacchanalibus*[2]. The magistrates then ascertained the facts and pronounced the judgment, acting without the involvement of a jury or popular vote. No possibility was given to challenge the judgment, reflecting the centralized and rigid nature of this extraordinary procedure.

Investigative and judging function in the quaestiones extraordinariae

In cases of exceptional gravity, such as conspiracies, crimes against religion, political offenses, or serial poisoning, the Roman legal system employed extraordinary courts, established by the people or the Senate to handle severe criminal acts that fell outside the jurisdiction of ordinary tribunals. The magistrate combined both investigative and judicial functions.

"I would plead my good cause before the same men, if they were fair judges, both as accusers and judges." Liv. 42.41.1 → the system operated as a kind of ***doppio binario*** (double track).

[2] The ***senatus consultum de Bacchanalibus*** ("senatorial decree concerning the Bacchanalia") is an Old Latin inscription dating to 186 BC. Published by the presiding praetor, it conveys the substance of a decree of the Roman Senate prohibiting the Bacchanalia throughout all Italy, except in certain special cases which must be approved specifically by the Senate.

The *quaestiones perpetuae* (permanent courts)

Established by law and presided over by a magistrate or former magistrate, they are the ordinary organ of criminal repression in the late republic. They are first established to repress the ***repetundae***, the misappropriation by the Roman magistrates in the provinces. *Repetundae* were first established by the ***Lex Calpurnia de repetundis*** (149 BC), according to which:

- Permanent Court was presided over by the ***praetor peregrinus***;
- The jurors are of senatorial rank;
- The goal is recuperatory rather than repressive.

The reforms of Gaius Gracchus

Gaius Gracchus (around 154 BC – 121 BC) brought more rigour into the *quaestiones perpetuae*. Between 123-122 BC, he reformed the system by transferring jury duty from senators to ***equites*** (knights), selecting them from a fixed register of 450 men.

Around 120 BC:

- Extraordinary courts are recognized by public opinion as unfair
- ***Lex Sempronia iudiciaria*** – transfer of the judging function to the knights
- ***Lex Sempronia de capite civis*** – prohibition of establishing extraordinary courts without popular authorization
- Prohibition of establishing courts *ex senatus consulto*
- Birth of the pure adversarial model of the *quaestiones perpetuae*
- Assignment of the judicial function to a panel chosen by the parties

The procedure

The accusation is open to anyone as a representative of the community (***quivis de populo***). The accuser is a party in the trial. The accuser chooses 100 names from the register. Within these 100, the defendant chooses the 50 jurors. The accusation can be brought directly by the injured party; the judgment can also be promoted *alieno nomine*. The jury decides by majority. If more than 1/3 of the jurors declare that they are not able to decide, the hearing is repeated.

- ***Postulatio*** – preliminary application: the legitimacy of the accuser is ascertained
- ***Divinatio*** **–** possible preventive judgment to select the accuser among several postulants
- ***In ius eductio*** – formal presentation of the accusation: the accuser invites the accused to appear in court
- In the presence of the magistrate, the accuser imputes the criminal act (*nominis delatio*) and submits the accused to interrogation (***interrogatio legibus***)
- ***Subscriptio*** – the magistrate draws up a report of the accusation which is signed by the accuser
- ***Nominis receptio*** – the magistrate records the case in his records and sets the dates
- If the accuser does not show up (abandoning), the trial is extinguished

Normally preventive detention does not apply.

- Examination of witnesses: they are questioned first by the party that produces them, then by the adversary

- Harangue of the accuser
- Oration (***oratio***) of the defence
- At the end of the hearing, the members of the college withdraw to deliberate
- The judgment is only of guilt or acquittal, the penalty is established strictly by the law

Role of the parties in quaestiones perpetuae

"The duty of the **accuser** (*accusator*) is to bring charges (presenting and supporting the accusation); the defender's is to refute and repel them (reunite and dismiss the accusations); the witness's is to say what they know or have heard; the judge's is to keep each of them to their proper role (ensure that the parties and the witnesses comply to the procedural rules)." (Rhet. Ad Her. 4.47)

Fair trial

A case: *Cicero Pro Cluentio* (60 BC)

Accuser – Oppianicus Junior; defendant – Aulus Cluentius Abitus; crime – poisoning of Oppianicus Senior (72 BC) and two other people; defender – Cicero; competent court – *Quaestio de veneficiis* (court dealing with poison-related crimes).

In a previous case (74 BC), Cluentius accused Oppianicus Senior of instigating his assassination attempt by poisoning him. Oppianicus was convicted, but his defence (L. Quintius) subsequently managed to have the president of the *quaestio* (Junius) convicted of corruption with some jurors.

NB Aulus Cluentius' mother, Sassia, was Oppianicus Senior's third wife.

The crime ***veneficium*** (poisoning) was defined by the *Lex Cornelia de Sicariis et Veneficiis*, emanated by Silla in 82 BC. This law reformed the discipline of the *crimen homicidii*, introducing the ***interdictio aquae et igni*** ("privation of water and fire"), a penalty for simple murder, poisoning or even attempt that symbolically represented exile.

Cicero: *nihil esse homini tam timendum quam invidiam, nihil innocenti suscepta invidia tam optandum quam aequum iudicium, quod in hoc uno denique falsae infamiae f inis aliquis atque exitus reperiatur* → "Nothing is more fearsome for a man than the envy of others; but once it has arisen, nothing is to be sought – for an innocent person – than a fair judgment, for only in it is found the end of every false accusation."

Fair trial: basic elements

- Absence of prejudices
- Irrelevance of public opinion
- *Condicione aequa disceptari* – equal conditions for both parties
- Only the evidence submitted by the parties is relevant

"We must respect that definition of fair judgment, transmitted to us by the ancestors: Guilt must be punished even where it has not aroused hostile voices, and hostile voices must be ignored when there is no fault."

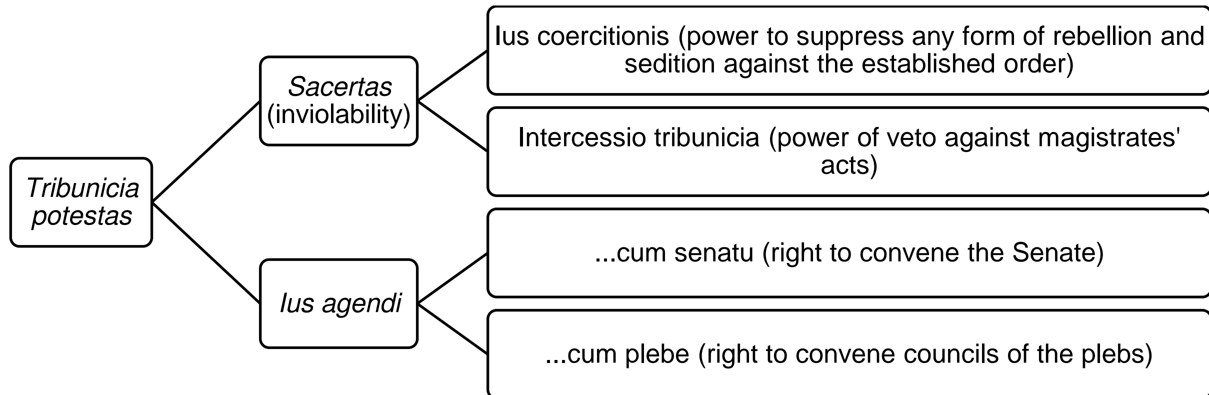
Furthermore:

- The judge (head of the court) must be a third party
- The judge (head of the court) is a moderator

- Prosecution and defence must be on an equal footing

"It happened some time ago, before C. Orchivius, my colleague, that the judges did not give rise to a criminal trial against Faustus Silla, in a case concerning certain residual funds. And this is not because Sulla was immune or because they thought a lawsuit concerning public money was not important, but because they believed that being the accuser a tribune, there could not be a fair trial ... and therefore those judges ruled that the defendant would be in an unfair condition, at the time that the opponent was the holder of such an office."

The powers of a tribune



Pliny's letter 1.23 – C. Plinius Pompejo Falconi – I myself when I was tribune abstained from dealing with causes, because in the f irst place I thought it inconvenient that the one before whom all others must stand and to whom everyone must give way, remained standing when everyone is seated. And that silence could be imposed on the basis of the hourglass on the one who can force everyone to be silent; that the one to whom it would be sacrilegious to interrupt the discourse, should be able to listen even to insults, so as to appear cowardly if he leaves them unpunished or arrogant if he punishes them.

Aspects of the previous trial against Junius
NB Quintus was acting as a lawyer of Oppianicus Senior.

"In that cause there was only envy, error, suspicion, and those daily and seditious assemblies. The tribune (Quintus) charged at the same time before the people and before the tribunal, he left the assembly to come to court, or rather – he took the whole assembly to court. The Aurelian staircases, just built, seemed to have been to act as a theatre for the spectators of the trial, and when the accuser had filled them with exaggerated crowds, you could not exercise the defence, indeed you could not even get up (to talk)"

A general principle
"Our ancestors wanted that even in less important causes, was judge only the one on whose name the parties had agreed." This means that a fair trial implies equality of parties but also the agreement on the choice of jurors.

However, even Cicero is not always respectful of these principles…: *erit tum Hortensius, cum summo imperio et potestate, ego autem aedilis, hoc est paulus amplius quam privatus.* (*In Verrem* 1.13). In the trial against Verres, Hortensius was supporting the defendant, as consul endowed with the highest powers and supreme imperium, I instead supported the accusation as *aedilis*, that is, little more than a private citizen.

The presumption of innocence

- **Procedural fairness** → presumption of innocence & equality between prosecution and defence
- **Procedural unfairness** → weight of public opinion (critical point of the system) → prejudices & accusation supported by a magistrate

So, in order to have procedural fairness:

1. Pre-eminence of the accuser's burden of proving guilt → "In trials we don't have to find if someone is to be acquitted, but if the accusation holds" (Pro Sull. 13)
2. "The accusation must not be a prejudice with respect to the conviction" (Pro Mur. 28)

For this reason, the judges must scrupulously examine evidence and witnesses and not rely on what the accuser says.

"Those judges established a divine and extraordinary principle: that one must not only examine the position of the accused, but also of the accuser and the witness, to understand if the depositions are false, if they derive from chance, from corruption, from fears or vile hopes, from craving or enmity. If a judge in his wisdom, will not consider all this, will not examine everything, if he accepts everything that is said as if it came out of the mouth of an oracle, then to be able to be a judge it will be enough not to be deaf" (Pro Font. 10)

The jury

A jury is in the proper sense a group of people, bound by an oath, in charge of carrying out a certain task. In the best-known sense, a jury means, mostly in the criminal branch, a collegial body with the function of judge, used above all in common law systems, which does not carry out this activity in a professional way.

Different jury models:

Entirely popular juries

- The jurors constitute a panel in their own right and decide with an unmotivated verdict on the questions of fact
- Questions of law are decided by the professional judge with the judgment.
- Used in common law systems

Mixed model

- The lay judges sit together with the professional judges in a single panel, which decides both on questions of fact and on those of law.
- Ex. Germany, Italy, France, Sweden, Portugal, Switzerland and Greece.

Jury in Italy: law n. 287/1951

Popular judges in the Corti di assise must meet the following requirements:

- Italian citizenship and enjoyment of civil and political rights
- Good moral conduct
- Age not less than 30 and not more than 65 years
- Final qualification of secondary school studies of first degree of any kind (*scuola media*).

The judicial panel, in Italy, is composed of two magistrates (a President and a judge on the side) and six popular judges. In each municipality, the mayor provides for the formation of the

lists of citizens in possession of the requirements. The President of the Court verifies the names, approves the register. It forms the general lists of ordinary popular judges and substitutes through a first draw: the drawn are required to serve for two years. For the selection of the six jurors, at the beginning of each session of the Court, the President, with an auxiliary, in the presence of the PM, extracts a number of ordinary judges equal to half of those present at the ballot box. The first six of the draw are the judges of the Court. Jurors may be sanctioned for undue manifestation of conviction before the judgment, or for failure to present without justified reason.

Art. 30 legge 287/1951: *Nell'assumere servizio i giudici popolari effettivi e i giudici popolari aggiunti prestano giuramento secondo la seguente formula: Con la ferma volontà di compiere da persona d'onore tutto il mio dovere, cosciente della suprema importanza morale e civile dell'ufficio che la legge mi affida, giuro di ascoltare con diligenza e di esaminare con serenità prove e ragioni dell'accusa e della difesa, di formare il mio intimo convincimento giudicando con rettitudine e imparzialità, e di tenere lontano dall'animo mio ogni sentimento di avversione e di favore, affinché la sentenza riesca quale la società deve attenderla: affermazione di verità e di giustizia.* → With the firm will to carry out all my duty as a person of honour, conscious of the supreme moral and civil importance of the office that the law entrusts to me, I swear to listen diligently and to examine with serenity evidence and reasons of the accusation and defence, to form my inner conviction by judging with rectitude and impartiality and to keep away from my soul every feeling of aversion and favour, In order for the sentence to be, as the society is awaiting it: an affirmation of truth and justice.

Juries in the USA

- Lists with the names of potential jurors are constructed on the basis of electoral lists, telephone directories or other similar lists, such as that of persons with a driving licence.
- Jurors are summoned by the judge and questioned about their attitude and views e.g. regarding the death penalty.
- The potential juror is questioned, as well as by the judge, also by the parties; therefore, both from the prosecution and from the defence.
- Each of the parties may refuse an unlimited number of jurors "for just cause", mentioning a valid reason

Problems with juries: Patterson Dubois

Problems:

- The jury is a judging body without technical-legal competence
- There is a psychological element in the formation of judgement
- The legal language uses a technical vocabulary such that the juror is prone to comprehension error

Some Observations on the Psychology of Jurors and Juries (Dubois) – on an unconscious level, a myriad of personal convictions operate in jurors, in particular a non-univocal ethics and morality.

- "It is impossible to undo the real or probable complex of past experiences, prejudices, emotions, misunderstandings that affect the minds of jurors."
- "The juror is a puppet of his subconscious."

A case: discrimination against minorities in the USA

Plessy v. Ferguson 1896 – Principle of Color Blindness: institutions are indifferent to the color of the skin and ethnic origin of citizens. However, Blacks and minorities are subjected more than whites to police checks and arrests. Blacks and minorities receive on average longer prison sentences than a white man charged with the same crime. 72% of trials for crimes punishable by the death penalty (between 1995 and 2000) concerned defendants belonging to racial minorities. In fact, it appears that race becomes a determining factor when associated with other variables such as different beliefs, attitudes and cultural heritages. For a fair trial it would be maybe appropriate for the jury to be composed of jurors belonging to other minorities. Research attests that blacks and other ethnic minorities are more lenient than whites, tending to identify with the accused. The absence of technical and legal expertise often causes the inattention of jurors during the exposure of lawyers. The use of forbidding and specific language prevents the juror from consciously following the trial. Jurors appreciate a simple and clear speech with the indication of essential facts and relevant evidence. "When you've lost your attention, you've probably lost the cause" (Theron G. Strong)

The US procedural system

Characteristics:

- Centrality of the hearing → clash of parties
- The role of the judge is in some way merely arbitral
- The decision is up to the jury made up of non-technical and non-specialised individuals
- The jury can easily be influenced by the game of the parties

Amendment I, Bill of Rights: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." → freedom of expression.

Amendment VI, Bill of Rights: "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." → right to a fair trial

The publicity issue

Publicity was a limited problem before the 90s due to the poor development of telecommunications at national/international level (only local networks existed). However, it became an issue of great importance since the 90s, with the creation of the internet and the development of national television.

- Before the trial: the introduction of prejudicial elements by the press can influence the jury and the public opinion.
- During the trial: the problem can be limited thanks to remedies such as the isolation of the jury.

To remedy the effects of prejudicial publicity, initiatives have also been taken with regard to the role of the parties, even before the mass media age:

- 1° Statute of Professional Ethics adopted by the American Bar Association (1908): the parties may not publish in newspapers at the risk of jeopardizing the process
- 2° Statute of Professional Ethics (1969) – Model Code of Professional Responsibility, section DR7-107 about pretrial publicity
- 3° (and current) Statute (1983) – Model Rules of Professional Responsibility, rule 3.4 provides that the parties limit their speech to the court room

Other remedies to publicity:

- Impartial juries
- Change of location not accessible to the press
- Admonition to jurors not to check the various media
- In case if interference, possible "seizure" of the jury
- A **gag order**, which prohibits all witnesses, bailiffs and the parties to make public communications in the event that include prejudicial elements
- Closure of the courts to the press (provided for by the ECHR in Europe)

A case: Sheppard vs Maxwell, 384 US. 333 – 1966

Murder of Marilyn R. Sheppard, July 4, 1954, Ohio. The case arrives in 1964 at the Supreme Court. The court releases him highlighting a "carnival atmosphere" throughout the trial and the refusal by E. Blythin, the judge, to isolate the jury, which was so subjected to the impetus of the press that considered Sam Sheppard already guilty. D.Kilgallen, a columnist, before the trial writes "Well, he's guilty as hell. There's no question about it"

Another case: the Chamberlain Case (Australia)

On August 17, 1980, a ten-week-old girl named Azaria disappeared at the Ayer's Rock campsite in Australia. Her mother, Lindy Chamberlain, claims that the child was kidnapped by dingoes, but later she will be accused of killing her. Shortly after putting Azaria to sleep in the tent with her brother Reagan, the mother returns to the tent recalled by her daughter's crying and realizes her disappearance. All campers mobilize to look for traces of Azaria.

A week later, a torn diaper and a jumpsuit were found near a path. Different investigations are opened:

- 16 December 1980, Coroner Barritt;
- 14 December 1981, Coroner Gerry P. Galvin;
- September 1982, an investigation is conducted in the Northern Territory;
- On October 29, 1982, despite the lack of evidence, the jury found Lindy Chamberlain guilty and her husband complicit of the crime.

Initially the jury is divided: four members were in favor of guilt, four of acquittal and four are undecided. The judge sentences the woman to life imprisonment. Across Australia, the verdict is being met with public approval. On September 15, 1988, the Northern Territory Court of Criminal Appeals, following the discovery of the jacket of the baby, annulled all verdicts of conviction against the Chamberlain spouses.

ACCUSATION-DEFENCE DYNAMICS. Rhetorical evidence was of great importance in the trial. Both sides presented in the testimonies of the "experts" who, through technical

language, tried to impress the jury. There was an imbalance between prosecution and defence, 35 witnesses presented by the prosecution and 24 by the defence. The excessive "zeal" of the prosecution led to the production of evidence that was punctually contradicted by the facts. These dynamics were only possible thanks to the fact that the jury was composed of non-technicians.

INVESTIGATIONS AND TRIAL.

- **1° investigation.** Were the lacerations found on the clothes caused by a dingo or are they human? Ashley Macknay, following the interrogation, fails to prove that Lindy Chamberlain committed the act.
- **2° investigation.** Traces of blood are found in the front seat of the spouses' car. Coroner Gerry P. Galvin reopens the investigation in 1981.
- **Process.** Despite the absence of a motive, no eyewitnesses, the body not found, the Northern Territory, on September 13, 1982, opened the trial against Lindy Chamberlain on charges of murder. Lindy Chamberlain allegedly cut Azaria's throat and hid her body.

THE EVIDENCE.

- **Accusation – Ian Barker.**
  - Analysis of clothes
  - Analysis on the lacerations of clothes
  - The mouth of the dingoes would not have an opening that would allow them to bite the entire head or the throat of the child
  - Finding foetal haemoglobin in the blood of the front seat of the car
  - Various rhetorical evidence and testimonies
- **Defence – John Phillips**
  - Testimony on clothes
  - Les Harris, an engineer, talks about the meat teeth of dingoes.
  - Photographic evidence
  - The blood found on the seat may belong to a female hitchhiker loaded by Chamberlain Further analysis shows that foetal haemoglobin can also be found in the blood of an adult
  - Further testimonials and evidence
- Scientific evidence is not 100% sure
  - The prosecution managed to influence the jury move
  - Much evidence adduced by the defence was ignored and/or rejected

“The Crown says that the dingo story was a fanciful lie, calculated to conceal the truth, which is that the child Azaria died by her mother’s hand […] So, ladies and gentlemen, this is a case of simple alternatives. Either a dingo killed Azaria, or it was homicide, because the child could hardly have inflicted injuries upon herself. If she was killed in the car, one can at once forget the dingo […] Ladies and gentlemen, where does this all lead? A ten-week-old baby girl is last seen alive when she is taken in the direction of her parent’s tent and car by her mother. A week later, her bloodstained clothing is discovered some found kilometers away. It had been buried, with her body in it, dug up, and cut by human hands, using scissors. In the car is found the blood of a baby under the age of six months, and the clearest evidence that an attempt has been to clean the blood up.”

MEDIA AND PUBLIC OPINION. The story aroused from the beginning, for its dynamics, the interest of the press and television. The Chamberlains lent themselves to numerous interviews and appearances on the small screen; the almost cold and detached behavior of the mother provoked a negative reaction or in any case of dubious credibility. By virtue of the above, the press was pushed to further investigate the life of the couple highlighting / exasperating elements of secondary importance, if not rumors, that however were never denied or confirmed, despite the absurdity of some of them. The unclear picture of events from the beginning was further distorted in favor of an archetypal image of Lindy Chamberlain. All this produced a strong polarization of public opinion and contributed to undermining the presumption of innocence of the subject if we consider that the members of the jury were chosen within the "public opinion".

THE JURY. The Australian system provides for a panel of 12 members chosen on the basis of compliance with a number of criteria for criminal cases. In the present case, 9 men and 3 women gave their views. Functional problems: the jurors were not technicians of the law, so they relied on the parties for the reconstruction of the facts (independence of the jury?). Oratory influence of the "experts" → Problem of the impartiality of the jury: the jurors themselves came to the trial each with their own idea about the case and the defendant.

RECONVICTION. In January 1986 an English hiker, David Brett, died as a result of a fall. The area surrounding the place of the discovery of the body was full of dingo burrows; near one of them the police found the famous matinee jacket of Azaria Chamberlain mentioned in the deposition of the mother.

An investigation was opened from which emerged the numerous contradictions presented during the trial; there were many objections on the way the prosecution was conducted and above all concerning the investigative techniques used.

On September 15, 1988, the Criminal Court of Appeal revoked the sentence resulting in the release of Lindy Chamberlain; she was awarded a compensation of 1.300.000 AUD.

"The question may well be asked how it came about that the evidence at the trial differed in such important respects from the evidence before the Commission. I am unable to state with certainty why this was so. However, with the benefit of hindsight it can be seen that some experts who gave evidence at the trial were over-confident of their ability to form reliable opinions on matters that lay on the outer margins of their fields of expertise. Some of their opinions were based on unreliable or inadequate data. It was not until more research work had been done after the trial that some of these opinions were found to be of doubtful validity or wrong. Other evidence was given at the trial by experts who did not have the experience, facilities or resources necessary to enable them to express reliable opinions on some of the novel and complex scientific issues, which arose for consideration. It was necessary for much more research to be done on these matters to determine whether the opinions expressed at the trial were open to doubt. […] In my opinion, upon a consideration of the adopted findings, there is a real possibility that Mrs. Chamberlain did not murder Azaria and, therefore, the convictions of the Chamberlains ought to be quashed and verdicts and judgments of acquittal entered. Not to do so would be unsafe and would allow an unacceptable risk of perpetuating a miscarriage of justice [..] If the accused is not found guilty the presumption of innocence continues. So it is here. Accordingly, I would quash the convictions of Alice Lynne Chamberlain and Michael Leigh Chamberlain and enter verdicts and judgments of acquittal."

IN CONCLUSION, the division of the investigative and judicial functions is not always per se a strong enough element of guarantee. Extrajudicial elements may affect the jury:

- Excessive zeal of the prosecution
- Rhetorical elements
- Emotional-psychological aspects
- Prejudices
- Public opinion and the press

Something we already noticed in the Roman Republic.

Prosecution

The private accuser

Private prosecution existed in classical Athens, Republican Rome, the United Kingdom (excluding Scotland), Canada, and still survives in some modern common law systems. It does not exist in today's U.S., however there are still attempts to revive it.

The accuser:

- Is assumed to take charge of the collective interests or that his interests coincide with those
- Is a party in the trial
- Is not a mere informant

Formalities for the assumption of the role of accuser:

- ***Postulatio***: formal request for assumption of the role and verification of skills
- ***Divinatio***: preventive judgment, where there are more than one *accusatores*
- ***Nominis delatio***: formal presentation of the accusation
- ***Ius iurandum de calumnia***: solemn oath imposed on the plaintiff not to make unfair accusations or defences in case of default of the defendant.
- ***Nominis receptio***: acceptance of the accusation by the head of the court

A **reward clause** is contained in the founding laws of the *quaestiones perpetuae*, and it has the function of encouraging citizens to assume the role of the accuser. The reward can be a pecuniary reward, the acquisition of citizenship (e.g. for latins) or the exemption from *munera*, higher social status concession. Examples in ancient Rome:

- It is a popular *actio*, and the penalty is up to 100 aurei from the condemned. So, half of this sum will go to the citizen who had him condemned, half to the state (D. 29.5.25 pr.).
- It is a good thing to have many *accusatores* in our Republic, to stop arrogance with fear (Cicero, Pro S. Roscio 56).
- An *accusator* should aim not at doing harm to others, but to correct them and their attitude towards the society (Quint., Inst. 12.7.2)

However, private accusation is a highly problematic point: on one hand it is a civil service (*munus*), a type of commitment of the citizen to the defence of the community and it promotes public control of criminal justice; on the other hand, it can degenerate into a source of profit, an instrument of political accusation, and can lead to the presentation of false accusations. Private accusation and the transition towards the empire did indeed lead to **degeneration**:

- "To live the life of an accusatory and take home prizes accusing people is something close to theft" Quint. Inst. 12.7.3
- "People listened to the words of drunkards, jokes of common people, nothing was safe, any occasion was used to harm, and nobody was waiting to see the outcome of the trials as it was always the same" Tac.

In the early imperial age: Presentation of an accusation for *crimen maiestatis* (lèse majesté) → Establishment of the trial by the Senate → Convictions and granting of *praemia* → *Periculum pro exitio habebatur* (Danger is perceived as a certain death – Tac.) → Late empire – progressive transformation of the accuser into *delator* (informer).

Trials before the Senate:

- They only apparently maintain characteristics and formalities of the old adversarial system
- The Senate is chaired by the Princeps
- The Senate decides according to its will
- In reality, these are *cognitiones extra ordinem* that slowly acquire inquisitorial characteristics

A case under Tiberius: Drusus Libo

"Until someone called Junius, urged by Libo to evoke the shadows of the dead, did not denounce the fact to Fulcinius Trio. He was, among the accusers, a man notorious for evilness and thirsty for infamy: he immediately presented an *accusatio* against Libo, addressed the consuls and asked for the establishment of a trial in the Senate. The senators were summoned, not without warning that it was a serious matter and of particular gravity.

29. Libo meanwhile, dressed in mourning and accompanied by women of the first nobility, knocked on various doors, prayed to relatives, asked for a voice in his defense in the face of danger, but everyone shielded themselves with the most disparate pretexts, but with identical panic. On the day of the cause in the Senate, exhausted by fear and depression, or, according to the version of others, pretending to be ill, he was taken on the bed at the entrance of the curia, where, supported by his brother and in the act of stretching, between words of supplication, his hands towards Tiberius, he was welcomed by him with an impenetrable face. A moment later Caesar reads the indictment with the names of the presenters, with an impassive tone of voice, so that it did not seem to diminish or accentuate its gravity.

30. Trio and Cato were joined as accusers by Fonteius Agrippa and Gaius Vibius, and they quarreled among themselves over who had to pronounce the indictment. In the end, since none of them intended to give in and Libo had presented himself without a defender, Vibius declared that he would only present, one by one, the individual accusations, and produced documents so delirious as to claim that Libo had consulted the soothsayers to know if he would have such riches as to cover with coins the entire Appian Way up to Brindisi. There were also other accusations of this kind, senseless and unfounded, or accusations, to want to be good, miserable. However, in a document the accuser showed that Libo had added in his own hand, next to the names of the Caesars and senators, terrible and mysterious annotations. At the denial of the accused, it was decided to interrogate, under torture, the slaves, who knew the handwriting. And since an old decree of the Senate forbade the interrogation of slaves in a capital trial against the master, Tiberius, shrewd interpreter of new

quibbles, ordered the sale of each of the slaves to a tax official, in order to then, of course, have them testify against Libo without violating the decree of the Senate. At this point the accused asked for the postponement of one day, returned home and entrusted to Publius Quirinus, his relative, the extreme supplication to the prince.

31. He was told to ask the Senate. Meanwhile, the house was surrounded by soldiers; they also shouted in the atrium, to be heard and seen, while Libo, finding a new torture in those same food that he had made himself ready to enjoy a last pleasure, prayed that someone would kill him, grabbed the right of the servants, tried to put a sword in their hands. They, in retreating in panic, overturn a lamp placed on the table and he, in that darkness charged with death for him, raised the iron to hit his belly twice. At the groan of the fallen the freedmen rushed, and the soldiers, having ascertained death, went away. The trial was nevertheless taken to its end, with the same seriousness, before the Senate, and Tiberius swore on his intention to intercede for the life of Libo, although guilty, if he had not hastened his death by his own hand.

32. His assets were divided among the accusers, and those of them who belonged to the senate were granted the court in extraordinary assignment"

The case of Titius Sabinus (28 BC)

"69. The people mentioned above consult on how to make more people listen to such confidences. In fact, it was necessary to maintain an appearance of confidentiality at the place of the meetings. If someone had eavesdropped behind the doors, there was a danger of an unexpected glance, a noise or the rise of some random suspicion. Then the three senators, crouched between the roof and the ceiling, in a hiding place no less ignoble than their despicable fraud, approached the ear to holes and cracks. Meanwhile, Latiar manages to find Sabinus on the street and, as if he intended to communicate recently learned information, attracts him into the house and into the room, and here he talks about past and current episodes, a matter of inexhaustible speech, adding new disturbing perspectives. Identical in Sabinus the outburst, but longer, in that what afflicts us, once freed, is more difficult to contain. They promptly fabricate the accusation by sending a letter to Caesar, containing the details of the trap and their own degradation. Never as then was the city anxious, panicked, forced to defend itself even from the most intimate people: meetings, interviews and every ear, both of acquaintances and strangers, were avoided; with suspicion they turned all around their eyes, squaring silent and inanimate objects, roofs and walls." (Tac, Ann 4)

Tiberius' judicial policy

"There was discussion about the abolition of whistleblowers' (*delatores*) prizes, when the accused of lese majesty had taken his own life before the conclusion of the trial. The proposal would have passed, if Caesar, opposing with unusual harshness in explicit defense of the accusers, had not complained that in this way the laws were nullified, sinking the State: better to subvert the right then than to remove its guardians. So the accusers, a race of men invented for public ruin, not sufficiently restrained even by punishments, were now encouraged with the prospect of rewards." (Tac. Ann, 4.30)

The problems posed by the private prosecution in Rome

Lex Iulia de adulteriis coercendis (D. XLVIII.5.4.1): “The possibility of accusing is also given to other persons, in addition to the husband and father.”

CT 9.7.2: “Although the crime of adultery is to be counted among the crimes of public interest, the reporting of which is normally open to all, nevertheless in order to prevent anyone from staining marriages with slanderous charges, it is provided that the accusation is open only to close relatives, the father, the brother, the first cousin, that is, those who are driven to accuse by the pain caused by the fact. We therefore ensure that outsiders are prevented from accusing; in fact, even if accusing forces to assume some legal responsibilities, many do it out of pure wickedness and sour with their calumnies the marriages of others.”

EVOLUTIONS: *ACCUSATIO* → *INQUISITIO*; *ACCUSATOR* → *DELATOR*.

Some equate *accusatores* with modern *collaboratori giudiziari* (judicial collaborators). However, these are usually ***delatores*** (informers) or ***indices*** (“*pentiti*”).

The whistleblower

A *delator* provides ***notitia criminis***, information about a crime which triggers the whole criminal process. He is a private informant, not involved in the trial, who can be solicited by the *inquisitor*. This role was typical in inquisitorial systems, and, in the early imperial age, it also means **accuser by trade**. The role of *delator* differs from that of the *index*, an involved or dissociated informant, typical of both inquisitorial and adversarial systems. Fiscal *delatio* is forbidden and punished by Constantine.

An example of 210 BC

“Then the consul on the authorization of the senate established that those who denounced the authors of the fire would be rewarded with money, if free, with freedom, if slave. Driven by the desire to obtain this award, a man called Manus, a slave of the Calavi Campani family, denounced his masters and five other noble Campani whose parents had been put to death by Q. Fulvius and for this reason had set the fire” (liv 26.27).

Ordinamento penitenziario

Art.58-ter Persone che collaborano con la giustizia *1. I limiti di pena previsti dalle disposizioni del comma primo dell'articolo 21, dei comma quarto dell'articolo 30-ter e del comma secondo dell'articolo 50, concernenti le persone condannate per taluno dei delitti indicati nel comma primo dell'articolo 4-bis, non si applicano a coloro che, anche dopo la condanna, si sono adoperati per evitare che l'attività delittuosa sia portata a conseguenze ulteriori ovvero hanno aiutato concretamente l'autorità di polizia o l'autorità giudiziaria nella raccolta di elementi decisivi per la ricostruzione dei fatti e per l'individuazione o la cattura degli autori dei reati. 2. Le condotte indicate nel comma primo sono accertate dal tribunale di sorveglianza, assunte le necessarie informazioni e sentito il pubblico ministero presso il giudice competente per i reati in ordine ai quali è stata presentata la collaborazione.*

“…those who, even after conviction, have worked to prevent the criminal activity from being brought to further consequences or have concretely helped the police authority or the judicial authority in the collection of decisive elements for the reconstruction of the facts and for the identification or capture of the perpetrators of the crimes.”

Legge n. 82/1991

Art. 6 Attenuante speciale in caso di collaborazione. *Nei casi di cui al comma quarto dell'articolo 289- bis e ai commi quarto e quinto dell'articolo 630 del codice penale, se il contributo fornito dal concorrente del reato dissociatosi dagli altri è di eccezionale rilevanza, anche con riguardo alla durata del sequestro e alla incolumità della persona sequestrata, le pene ivi previste possono essere ulteriormente diminuite in misura non eccedente un terzo.*

"…If the contribution made by the offender dissociated from the others is of exceptional importance, including with regard to the duration of the kidnapping and the safety of the person kidnapped, the penalties provided for therein may be further reduced to an extent not exceeding one third…"

Art. 9 Condizioni di applicabilità delle speciali misure di protezione. *Alle persone che tengono le condotte o che si trovano nelle condizioni previste dai commi 2 e 5 possono essere applicate, secondo le disposizioni del presente Capo, speciali misure di protezione idonee ad assicurarne l'incolumità provvedendo, ove necessario, anche alla loro assistenza.*

Le speciali misure di protezione sono applicate quando risulta la inadeguatezza delle ordinarie misure di tutela adottabili direttamente dalle autorità di pubblica sicurezza o, se si tratta di persone detenute o internate, dal Ministero della giustizia - Dipartimento dell'amministrazione penitenziaria e risulta altresì che le persone nei cui confronti esse sono proposte versano in grave e attuale pericolo per effetto di talune delle condotte di collaborazione aventi le caratteristiche indicate nel comma 3 e tenute relativamente a delitti commessi per finalità di terrorismo o di eversione dell'ordine costituzionale ovvero ricompresi fra quelli di cui all'articolo 51, comma 3-bis, del codice di procedura penale.

Ai fini dell'applicazione delle speciali misure di protezione, assumono rilievo la collaborazione o le dichiarazioni rese nel corso di un procedimento penale. La collaborazione e le dichiarazioni predette devono avere carattere di intrinseca attendibilità. Devono altresì avere carattere di novità o di completezza o per altri elementi devono apparire di notevole importanza per lo sviluppo delle indagini o ai fini del giudizio ovvero per le attività di investigazione sulle connotazioni strutturali, le dotazioni di armi, esplosivi o beni, le articolazioni e i collegamenti interni o internazionali delle organizzazioni criminali di tipo mafioso o terroristico-eversivo o sugli obiettivi, le finalità e le modalità operative di dette organizzazioni.

"Special protection measures may be applied in accordance with the provisions of this chapter to ensure their safety, including, where necessary, their assistance.

The aforementioned collaboration and statements must be of intrinsic reliability. They must also have a novelty or completeness or for other elements must appear of considerable importance for the development of investigations or for the purposes of judgment or for the activities of investigation on the structural connotations, the equipment of weapons, explosives or goods, the articulations and internal or international links of criminal organizations of a mafia or terrorist-subversive type or on the objectives, the aims and operating methods of these organizations."

Italian emergency legislation and reward measures

Based on a calculation of general convenience (*utilitas publica*), Italian legislation attributes, in cases of specific types of crimes (terrorism and subversion, mafia-type crime, drug trafficking and kidnapping), a negotiating aspect to criminal justice.

- **Benefits provided**: protective measures, mitigation, reduction of sentence (for organised crime) and impunity (for terrorism).
- **Rewarded behaviours**: **dissociation**, meaning admission of the activities carried out and help in eliminating or mitigating the consequences of the crime, and **cooperation**, meaning aide for reconstruction of the facts for the identification and capture of those who are responsible of a crime.

Comparison with the Roman world – differences:

- **Roman world** – lack of a specific definition. The legislation also rewards subjects not involved in the crime: in addition to the suspects (***indices***) there are in particular *delatores* (informants) and popular accusers.
- **Today** – there is a unified precise terminology. The legislation rewards those involved in certain criminal offences. **Art. 112 Italian Constitution**: "The prosecutor has the obligation to prosecute" → does not allow the *quivis de populo* prosecution.

Comparison with the Roman world – analogies:

- It is common the idea that the *utilitas publica* requires the use of collaborators of justice to target especially associative and subversive crimes (**NB** It is a use that will grow further with the transition to the inquisitorial system).
- A negotiable interpretation of criminal justice is also accepted by the Romans.: "For the one who has collaborated, whether he is a servant or free, a prize will be established by the judge on the basis of the substances of the accused person; the servant will eventually be granted freedom. What is strange about this, if it derives public utility?" D. 47.10.5.11. (Ulpianus).
- Similar are also the effects of the legislation (impunity, penalty discounts, protection, economic benefits).

Indices: involved informants

Cicero: "If you ask to be recognised as an index, I grant it, if the law allows it"

Indices: Subversion & similar crimes → Dissociation → Promise of impunity

Technical definition – **Ps. Asc.**: "The cases in which impunity is granted to the index are strictly established. In the processes of betrayal, lese majesty and others of the same kind. Therefore, a trial for embezzlement cannot be carried out with the collaboration of indices nor can a person of senatorial rank do so, without violating the law. The index is the one who reveals the secret plots of the crime in which he participates in exchange for the promise of impunity."

So, to summarise:

- The index helps to reveal the plot
- There is a promise of impunity (main reward) and consequent negotiable management of justice
- The request to be index is provided only for certain crimes and for certain people (e.g. the crime has to be associative and capital)
- This figure has its roots in the practice of *quaestiones extraordinariae*

Case 1: poisonings (231 BC)

"A handmaid declared to Fabius Maximus aedilis curulis that she would reveal to him the cause of that public misfortune in exchange for a promise of impunity. Fabius immediately reported the consuls and consuls to the senate and then they promised impunity. Then it became known that the city was at the mercy of a plot of women who prepared poisons and that if they followed her they would catch them in the act. A number of these women then denounced others and in the end one hundred and seventy were convicted." Liv. 8.18

Case 2: poisonings (180 BC)

"The letters of C. Menius arrived, to whom in addition to the province of Sardinia had been assigned the task of investigating the poisons committed outside Rome. He claimed that he had already sentenced three thousand people and that the activity of cognition grew as a result of the calls of indices. So he should either interrupt cognition or leave the province." Liv. The tale shows the main risk resulting from the extensive use of indices.

Case 3: Bacchanals (186 BC) – inquisitorial process

"Since she denied knowing more, the consul specified that if she was disproved by others she would not get forgiveness and indulgence (safety measures: she claimed that being index, they would tear her apart) […] Therefore Sulpicia began to pray to the consul that they send her out of Italy where she could live safely the rest of her life. The consul ordered her to be quiet, that he would take care that she could live safely in Rome." Permanent protection measures: that the consuls and the praetors now in office and those in the future would be committed to ensuring the safety of the woman (Liv.).

Praemia in the case of bacchanals: money, exemption from military service, improved status, impunity; cash rewards for key figures, rewards discretionally granted to other collaborators (impunity), and privileges in favour of the main collaborators.

The case of the Jugurtine conspiracy (circa 110 BC) – adversarial trial

"he convinced the people to deliberate that Cassius, then praetor, be sent by Jugurtha to take him to Rome with public guarantee so that the crimes of Scaurus and the others that he had said had been corrupted with money would be evident." Sall. **NB** Impunity can only be guaranteed following a comitial or Senate ruling.

"The authority of the senate has been sold to a feral enemy, your command has been betrayed, the state has been put up for sale." Sall. **NB** The crime of treason allows the use of indices.

Indices in the quaestiones perpetuaae

Lex Cornelia de Sicariis et Veneficis (D. 48.8.1): "who, being a magistrate and presiding over a public trial, has worked to introduce a false index in order to obtain the indictment and conviction of an innocent…" was subject to the same penalty meant for murderers and poisoners by the same law.

Lex Iulia de maiestate [Papinianus]: "In the processes of lese majesty, women can also be heard. A woman, Fulvia, revealed precisely the conspiracy of Catiline and thanks to her collaboration the consul Marcus Tullius was able to develop the investigation."

The rationalisation of Arcadius and Honorius (397 CE)

"Anyone who has taken part in a wicked association with soldiers, private citizens, barbarians, with the aim of killing the illustrious individuals of our council or senators ... if he, immediately, driven by the desire for authentic praise, denounces the conspiracy, will receive from us prizes and honours. If, on the other hand, the one who took part in the association, even late, still reveals secrets not yet known, he will obtain impunity and forgiveness." 9.14.3

Private accusation evolved into formal collaboration with the justice system. Both ancient Rome and modern systems reward those who assist in prosecuting serious crimes, but the mechanisms and legal safeguards have changed.

Accusatio and inquisitio

Historical evolution of the criminal trial:

- **Archaic age** – very low importance of the public element in criminal repression.
- **Classical age** – increase of the role of the State in criminal repression.
- **Contemporary age** – almost total disappearance of private elements in criminal repression.

Elements of the inquisitorial (*inquisitio*) and the adversarial (*accusatio*) systems:

INQUISITIO	*ACCUSATIO*
• The public interest in the protection of established order prevails • Requires officials specialized in criminal repression • The position of the 'defence' is subordinate to that of the 'prosecutor' & to the judge • Normally the investigative function is attributed (also) to the judge • Whistleblowers and *delatores* are often used extensively • Frequent use of preventive detention • Writing prevails over orality • The judge intervenes in the acquisition of evidence • The trial aims to achieve a full and objective truth • Torture is largely used to obtain evidence • Little to no publicity of the process • Absence of a fight between the parties (*contraddittorio*) • Reduced or no possibility for the accused to know the charges in advance • Reduced or no possibility for the accused to know in advance the evidence against him • Lack of defensive investigations	• Balance (of powers) between the parties • Centrality of the adversarial conflict (*contraddittorio*) • The judge is a «third party» • Strengthening the rights of the accused • Refusal of any kind of prejudice • Possibility of defensive investigations • Maximum publicity • Normal use of juries • Right to reject the judge (in some circumstances) • Prevalence of orality • Absence of any hierarchy of evidence • Right of the accused to know exact accusation and evidence against him
Triangular action: accuser, defence and judge	Binary event: judge-inquisitor (activity) vs defence (passivity)
Compulsion & criminal justice as expression of sovereignty	Conflict settlement

According to Damaska, inquisitorial and adversarial correspond to different models of the State:

- **Reactive State** → adversarial model → equal model
- **Active State** → inquisitorial model → hierarchical model

The inquisitorial judge – Middle Ages and absolutism

- "Without an accuser, there can be no recognition of a crime or imposition of punishment. This fails in special cases." Gandinus, 1287
- The judge is a fighter
- The inquisitorial affair is introspective (Cordero); somatic or phonetic nuances are also verbalised
- By resisting the torments (torture) the accused purges the "clues" against him
- The anthropological picture is pessimistic: man is guilty *ab origine*
- Confession must be reached at all costs in its fullness, even if what is confessed is sufficient for a guilt sentence, the accused it is further tortured so that nothing escapes. (cfr. *vexatio*, term used by Bacon in reference to the experiments made to grasp the "secrets of nature")
- There is an inquisitive bulimia, whereby an inquisitor, if a good narrator, can also be saved
- *Maxime in criminibus enormibus, licet iura transgredi* → Especially in the case of enormous crimes, it is permissible to transgress the laws.
- "If they were allowed to propose justifying facts from the start (of the trial), this concession, fatal to the public good, would be for them a title and a security of impunity." Sèguier, avocat géneral au Parliament, 1786
- "Nobles' tax prosecutors are required to prosecute and prosecute crimes carefully, without waiting for an impulse of some kind, complaint or civil claim" ordonnance royale, May 1579
- The defence aims only with every expedient to impunity. It is only effective for the rich. Better to delete it.
- The defence is essentially left to the accused who answers under a truth oath. If he doesn't answer three times, he won't be able to speak anymore. Mutism is a clue against him.
- There are no deadlines for the inquisition or imprisonment: after a first deadline the judges can absolve or dispose to acquire more information.
- The appeal is difficult, possible only to those who have money and power.
- This system constitutes an "efficient machine" considered "rational" compared to the "primitive" Anglo-Saxon (and republican Roman) style.
- The inquisitorial style fades, but does not disappear at all, in the post-revolution era, when sovereign violence is replaced by the "therapeutic" coercion of the State.(Foucault)

History of *accusatio*

Prejudicial origins of the adversarial model: **OFFENCE → PRIVATE REVENGE → SOCIALLY AUTHORISED AGENT → ORDEALIC DUEL**

The **adversarial model** is a sublimated duel: from physical confrontation to verbal confrontation.

General principles: these procedural models are *ideal types* (Weber), meaning we rarely see them in pure form. Each model reflects the nature of the political system behind it, and each consists of a complex set of interrelated elements.

The adversarial procedure is still affected by its ordealic origins.

Accusatio, the English style

- The SHOW of the inquisitorial system is given by the execution of the sentence. In the adversarial system the show consists of the trial itself.
- The adversarial techniques are intellectually elaborated “Dei iudicia”: from the duel between the parties to the procedural legal duel between prosecution and defense.
- For this reason, in the adversarial system there are more private elements than in the inquisitorial one.
- The judge watches, listens, the president moderates, the parties make tactical choices, make calculated choices.

Procedure:

- The procedure is rigidly formalized
- The president watches over compliance with the rules
- The trial is more similar to the civil one.
- It is normal to contest jurisdiction and competence, as well as the use of instruments that may have delaying effects.
- The parties are in constant activity according to a game of "alternate moves".

The criminal trial in the US common law

VI Amendment US Constitution: “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.” → **cross-examination**: each party may cross-examine any source of evidence adduced by the adversary.

Based on **liberalism** and the principles of *laissez faire*, the State’s task is not to organise the lives of citizens, but only to maintain social balance. The trial is a process that belongs to the parties: Start and conclusion of the dispute are entrusted to the parties → The parties identify the limits and subject matter of the dispute → Rarely can the judge raise objections of its own initiative → The parties offer their legal classification of the facts to which the court must comply.

Example:

- X is on trial for murder.
- The prosecution qualifies the fact as intentional murder.

- The defence makes the tactical choice not to qualify it as manslaughter, despite there are arguments, to put the jury in front of the alternative between innocence and intentional murder, in the hope that it will choose the first possibility.
- The judge complies and does not suggest to the jury to qualify the fact as manslaughter.
- Where is truth?

The principle ***iura novit curia*** ("the court knows the law") does not apply → The judges/presidents of the courts are elective and have no technical-legal competence → Since the process is a way of resolving conflicts, the excessive intervention of the judge/president could be interpreted as incorrect support for one party → It is up to the parties to prove what they claim.

Problematic aspects – a fact that can recall republican Rome: Political consensus building through war on crime / war on terror → Growth of the weight of the public prosecutor (elective). Prosecutors exist at both state and federal levels; at the federal level, they report to the attorney general, while at the local level basically only to the electorate. The exercise of the accusation has become a step in the political career.

- **War on crime** (since the 70s) → strengthening the accusation → judgements and laws that compress claims based on *habeas corpus*
- **War on terror** (2000s) → reduction of warranties → creation of parallel systems of an inquisitorial nature

Developments:

- The role of victims of criminal acts (so-called **closure theory**) is accentuated.
- Judges have lost prestige: often considered too soft on criminals. Moreover, their discretion is severely limited. E.g. three strikes laws, sentencing guidelines.
- About 3% of the U.S. population is somehow brought to the attention of correctional agencies.
- The power of prosecutors, supporters of the utmost criminal severity, prevails over judges and defence.
- Prosecutors reduce the judging function of judge and jury e.g. through mandatory sentencing.
- They play a decisive role in assigning defendants to juvenile justice.
- They use the death penalty as an instrument of pressure.
- Their role has become more executive than judicial (Simon, Governing through Crime, 2007).
- The professional bureaucratic model of the judicial system has been overcome by placing the prosecution as the ideal representative of the public interest (to the detriment of the judge).

Effects: the accuser presents himself as the victim's advocate but plays in the process to win at any cost instead of actually seeking justice. By doing so, fair play disappears (for example, exculpatory evidence is concealed).

The criminal trial in the US follows a **competitive process model**. The prosecutor may not disclose before the hearing all the evidence at his disposal. The parties can avail themselves of the "surprise effect" (withholding evidence until trial).

Other characteristics or the criminal trial in the USA:

- The parties shall dispose of the dispute.
- The defendant can confess by making the conduct of the trial useless. You can refuse legal assistance and renounce the interrogation.
- The prosecutor may not prosecute or revoke the prosecution.
- Plea-bargaining is allowed.

Bargaining

- **Sentence bargaining**: the parties agree on the penalty
- **Charge bargaining**: the parties agree on the derubrication of the crime or on the non-prosecution of other crimes of which the accused is accused

The judge simply checks for the requirements and then ratifies the agreement; he rarely opposes it. The guilty plea, however, can derive from blackmail pressure from the prosecutor.

…Bail → fixed in the first hearing → can be used as a pressure tool → trial by parties → the defendant goes in court as a free man →…

Examples of distortion of plea bargain:

Bordenkircher vs Hayes, sent. Supreme Court 1978. In Bordenkircher the defendant was indicted for uttering a forged instrument [assegni falsi]. Bordenkircher v. Hayes, 434 U.S. at 358-60, 98 S. Ct. at 665-66, 54 L. Ed. 2d at 607-08. During plea discussions a prosecutor offered to recommend a particular sentence in return for the defendant's guilty plea to that charge. Id. However, the prosecutor warned the defendant that if he did not agree to this, the prosecutor would seek an additional indictment under the state habitual offender law [recidiva]. Id. The defendant did not accept the offer, the habitual offender charge was brought, and the defendant was ultimately convicted of both charges at a trial [life imprisonment!]. Id. Defendant argued before the Supreme Court that the prosecutor's conduct in seeking the habitual offender indictment constituted illegal prosecutorial vindictiveness, to discourage him from exercising his constitutional right to a trial. Id. The Supreme Court disagreed.

Brady vs U.S. Petitioner was indicted in 1959 for kidnapping and not liberating the victim unharmed in violation of 18 U.S.C. § 1201(a), which imposed a maximum penalty of death if the jury's verdict so recommended. Upon learning that his co-defendant, who had confessed, would plead guilty and testify against him, petitioner changed his plea from not guilty to guilty. The trial judge accepted the plea after twice questioning petitioner (who was represented throughout by competent counsel) as to the voluntariness of his plea, and imposed sentence. In 1967, petitioner sought post-conviction relief, in part on the ground that § 1201(a) operated to coerce his plea. "Although Brady's plea of guilty may well have been motivated in part by a desire to avoid a possible death penalty, we are convinced that his plea was voluntarily and intelligently made, and we have no reason to doubt that his solemn admission of guilt was truthful".

A rule in the evolution of criminal systems

The introduction of an adversarial model has two main effects:

- Increase in guarantees/rights of the accused party, but also
- Lower repressive "efficiency", especially problems in the acquisition of evidence.

This creates to problems with the repression of organised crime and terrorism. The need to identify remedies leads to an alteration of the adversarial system (**double track** o ***doppio binario***).

Risks in recent emergency legislation

- Creation of new crime figures → opinion crimes + failure to comply with the principle of precision
- Derogation from the adversarial model → reduction of guarantees for the accused

Genesis and effects of emergency legislation

This model can also be applied to antiquity, for example to the *quaestiones extraordinariae*.

Terrorist act → Strong reaction of public opinion → Rapid reaction of the legislator → Creation of new crime figures → Possible alteration of procedural models.

An example: the Military Commissions Act (2006)

- Sec. 948b. Military commissions generally
- (a) Purpose— This chapter establishes procedures governing the use of military commissions to try alien unlawful enemy combatants engaged in hostilities against the United States for violations of the law of war and other offenses triable by military commission.
- (g) Geneva Conventions Not Establishing Source of Rights— *No alien unlawful enemy combatant subject to trial by military commission under this chapter may invoke the Geneva Conventions as a source of rights*.
- (b) NOTICE TO ACCUSED—*Upon the swearing of the charges and specifications in accordance with subsection (a), the accused shall be informed of the charges against him as soon as practicable*.

These commissions were used to trial peculiar subjects: **alien unlawful enemy** (*combattenti stranieri illegali*)

These commissions (tribunals) were not operating according to the standard adversarial model typical of the united states; in this case, the act says (b)

- *A civilian defense attorney may not be used unless the attorney has been determined to be eligible for access to classified information that is classified at the level Secret or higher.* [10 U.S.C. sec. 949c(b)(3)(D)] → there is no civil attorney, maybe a military one
- *A finding of Guilty by a particular commission requires only a <u>two-thirds majority of the members of the commission present at the time</u> the vote is taken* [10 U.S.C. sec. 949m(a)]
- In General— *No person may invoke the Geneva Conventions or any protocols thereto in any habeas corpus or other civil action or proceeding to which the United States, or a current or former officer, employee, member of the Armed Forces, or other agent of the United States is a party as a source of rights in any court of the United States or its States or territories*. [Act sec. 5(a)]
- (e)(1) *No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly*

> *detained as an enemy combatant or is awaiting such determination.*(2) *Except as provided in paragraphs (2) and (3) of section 1005(e) of the Detainee Treatment Act of 2005 (10 U.S.C. 801 note), no court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination*.

At the end, the Supreme Court intervened.

An Italian example: law 155/2005, art. 15 c. 1 ("legge pisana")
Art. 270-sexies. ***Condotte con finalità di terrorismo*** *- 1. Sono considerate con finalità di terrorismo le condotte che, per la loro natura o contesto, possono arrecare grave danno ad un Paese o ad un'organizzazione internazionale e sono compiute allo scopo di intimidire la popolazione o costringere i poteri pubblici o un'organizzazione internazionale a compiere o astenersi dal compiere un qualsiasi atto o destabilizzare o distruggere le strutture politiche fondamentali, costituzionali, economiche e sociali di un Paese o di un'organizzazione internazionale, nonché le altre condotte definite terroristiche o commesse con finalità di terrorismo da convenzioni o altre norme di diritto internazionale vincolanti per l'Italia.*

Any conduct which, by its nature or context, is likely to cause serious damage to a country or an international organisation and is carried out with the aim of intimidating the population or forcing public authorities or an international organisation to perform or refrain from any act or destabilising or destroying the fundamental political, constitutional, economic and social structures of a country or an international organization shall be regarded as terrorist conduct, as well as other conduct defined as terrorist or committed for terrorist purposes by conventions or other rules of international law binding on Italy

In criminal law, the citizen should be clearly informed about what he can and cannot do (*tassatività e precisione*), there should be a clear distinction between, what is legal and what isn't → first issue with this law.

Second issue: "forcing public authorities or an international organisation to perform or refrain from any act" → this formulation is too general, as even a strike would be considered as terrorist.

An English example: the anti-terrorism act of 2006
Critical points: the crime of encouragement of terrorism

- The arrest up to 28 days without raising formal charges (originally up 56 days)
- Encouragement of terrorism (section 1): Prohibits the publishing of "*a statement that is likely to be understood by some or all of the members of the public to whom it is published as a direct or indirect encouragement or other inducement to them to the commission, preparation or instigation of acts of terrorism or Convention offences*." Indirect encouragement statements include every statement which glorifies the commission or preparation (whether in the past, in the future or generally) of such acts or offences; and is a statement from which those members of the public could reasonably be expected to infer that what is being glorified is being glorified as conduct

that should be emulated by them in existing circumstances."[2]. The maximum penalty is seven years' imprisonment.

- Disseminating terrorist publications (Section 2): Prohibits the dissemination of a publication which is either (a) likely to be understood as directly or indirectly encouraging terrorism, or (b) includes information which is likely to be understood as being useful in the commission or preparation of an act of terrorism. The maximum penalty is seven years' imprisonment.

Issues with this law: "is likely to be understood as…" is too vague and relies on the public

The American case: involvement of the Supreme Court (2006)

Hamdan v. Rumsfeld, secretary of defense, et al. Certiorari to the United States Court of Appeals for the district of Columbia circuit. No. 05–184. Argued March 28, 2006—Decided June 29, 2006

Pursuant to Congress' Joint Resolution authorizing the President to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed or aided" the September 11, 2001, al Qaeda terrorist attacks (AUMF), U. S. Armed Forces invaded Afghanistan. During the hostilities, in 2001, militia forces captured petitioner Hamdan, a Yemeni national, and turned him over to the U. S. military, which, in 2002, transported him to prison in Guantanamo Bay, Cuba. Over a year later, the President deemed Hamdan eligible for trial by military commission for then-unspecified crimes. After another year, he was charged with conspiracy "to commit . . . offenses triable by military commission." In habeas and mandamus petitions, Hamdan asserted that the military commission lacks authority to try him because (1)neither congressional Act nor the common law of war supports trial by this commission for conspiracy, an offense that, Hamdan says, is not a violation of the law of war; and (2) the procedures adopted to try him violate basic tenets of military and international law, including the principle that a defendant must be permitted to see and hear the evidence against him.

Boumediene vs Bush Ruling (2008)

The United States Supreme Court ruled that the part of the Military Commissions Act that attempted to block the federal courts from hearing the claims of our clients at Guantánamo was unconstitutional. In an historical decision, the Court unambiguously rejected the political branches' attempts to cut the federal courts out of the process. In Boumediene v. Bush, the Court held that the Center's clients detained at Guantánamo have a constitutional right to file petitions for habeas corpus in U.S. federal court challenging the lawfulness of their detention.

With Justice Kennedy writing for the majority, the opinion begins with a lengthy survey of historical habeas cases in which common law courts considered cases of noncitizens imprisoned without trial. Acknowledging the uniqueness of the Administration's practices at Guantánamo, the Court found that no historical habeas case offered by either side was directly on point and, instead, turned to the fundamental principles underlying the purpose of habeas corpus: to allow the courts to act as a check against the abuse of Executive power. "[F]rom an early date, it was understood that the King, too, was subject to the law."

In considering the extraterritorial application of the Constitution to Guantánamo, the Court adopted a practical approach it has applied in past cases. The Court strongly criticized the President and Congress's attempt to declare that because Guantánamo was outside the

sovereign territory of the United States, the Constitution did not apply. The Court firmly stated that “To hold that the political branches may switch the Constitution on or off at will would lead to a regime in which they, not this Court, say ‘what the law is.’”

“The gravity of the separation-of-powers issues raise by these cases and the fact that these detainees have been denied meaningful access to a judicial forum for a period of years render these cases exceptional.”

“[T]he cost of delay can no longer be borne by those who are held in custody. The detainees in these cases are entitled to a prompt habeas corpus hearing.”

The statements of the British Minister of the Interior. Ideas for some reflections (7.9.2005)

European Union states may have to accept an erosion of some civil liberties if their citizens are to be protected from organised crime and terrorism.

If the judges don't understand that message and don't take decisions which reflect where the people of the continent want to be, then the conclusion will be that politicians ... will be saying we have got to have a change in this regime.

The judges both in my country and in the European Court need to understand that the people of Europe ... will not for a long time accept that action cannot be taken against people who are offering a real threat to our way of life because of human rights considerations

Torture: waterboarding – Wednesday, February 06, 2008 – White House defends CIA use of waterboarding

[JURIST] The White House Wednesday defended the use of waterboarding, saying that the technique is legal. In response to questions as to whether waterboarding constituted torture, White House spokesman Tony Fratto reiterated that the US does not practice torture and "that the programs have been reviewed, and the Department of Justice has determined them to be legal." Fratto further said the president could authorize future uses of the technique in certain situations. The comments come a day after CIA Director Michael Hayden confirmed at a Senate Intelligence Committee hearing that waterboarding had been used on three terror detainees [JURIST report], which prompted Sen. Dick Durbin (D-IL) to call for a criminal investigation [press release; AP report] into the CIA's use of waterboarding. In a Tuesday letter [text] to US Attorney General Michael Mukasey, Durbin criticized Mukasey for not taking a more definite stance on waterboarding:

Some suggested that your confirmation was an opportunity to turn a new page after Attorney General Gonzales's troubled tenure, but your failure to take a position on waterboarding raises questions about whether your leadership will bring significant changes to the Justice Department. Your silence does tremendous damage to America's values and image in the world and places Americans at risk of being subjected to waterboarding by enemy forces. If the United States does not explicitly and publicly condemn waterboarding, it will be more difficult to argue that enemy forces cannot waterboard American prisoners.

Durbin also said that he will object to the nomination of Mark Filip as Deputy Attorney General until Mukasey begins an investigation into the incidents. AP has more.

The controversy over whether waterboarding constitutes illegal torture first loomed large late last year as then-Attorney General nominee Michael Mukasey tried to duck the issue [JURIST report] in his confirmation hearings and former CIA agent John Kiriakou unofficially confirmed the use of waterboarding during interrogations of US terror suspects. Also in December, Hayden sent a memo to CIA employees saying that the agency videotaped the 2002 interrogations of two detainees, but that the tapes were destroyed [JURIST news archive] in 2005 amid concerns that they could be leaked to the public and compromise the identities of the interrogators. Last month, the now Mukasey-led Department of Justice announced that it had opened a criminal investigation into the destruction of the tapes.

Second example: the "Bybee memo"

The Aug. 1, 2002, memo, sent from Assistant Attorney General Jay S. Bybee to Alberto R. Gonzales, counsel to the president, parsed the language of a 1994 statute that ratified the United Nations Convention against Torture and made the commitment of torture a crime. To be torture, the memo concluded, physical pain must be "equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death." And inflicting that severe pain, according to the memo, must have been the "specific intent" of the defendant to amount to a violation of the statute. Human rights groups reacted with horror when the Bybee memo was leaked to the press in June 2004, and it was quietly rescinded by the Justice Department on Dec. 30, 2004, just days before Gonzales was to appear before the Senate Judiciary Committee on his nomination as attorney general of the United States. (Meanwhile, Bybee in 2003 had been nominated and confirmed as a judge on the 9th U.S. Circuit Court of Appeals.)

Case: example of doppio binario in Italy

CONSIGLIO D'EUROPA CORTE EUROPEA DEI DIRITTI DELL'UOMO TERZA SEZIONE c/ ITALIA (N. 2)

(Ricorso n. 10075/02Con sentenza del 23 aprile 1999, la corte d'assise di Palermo ha condannato il ricorrente all'ergastolo.

La decisione è stata presa sulla base delle dichiarazioni di A e B, ritenute precise, attendibili e corroborate da altri elementi, quali le affermazioni di altri testimoni e dei periti.

Il ricorrente ha interposto appello, contestando l'attendibilità dei testimoni e chiedendo la riapertura del dibattimento.

All'udienza del 16 ottobre 2000, il difensore di uno dei coimputati ha eccepito la nullità della sentenza della corte d'assise poiché i giudici della corte d'assise avevano utilizzato delle prove diverse da quelle acquisite durante il dibattimento. (had used evidence other than the evidence obtained during the trial)

Con sentenza del 12 giugno 2001, depositata in cancelleria il 27 luglio 2001, la Corte di cassazione, ritenendo che le giurisdizioni di primo e secondo grado avevano motivato in modo logico e corretto tutti i punti controversi, ha rigettato il ricorso del ricorrente. La Corte di cassazione ha ritenuto che per quanto riguardava la nuova audizione del testimoni e l'acquisizione dei processi verbali delle prove compiute durante il dibattimento prima della sostituzione del giudice, l'articolo 190 bis CPP, che prevede una eccezione al principio generale di acquisizione delle prove nei procedimenti connessi alle attività della mafia, era

applicabile alla situazione controversa, anche se nel procedimento in oggetto non si trattava dell'acquisizione delle prove di un altro procedimento, disciplinato dall'articolo 238 CPP.

(Article 190a CrimPC, which provides for an exception to the general principle of gathering evidence in trials relating to mafia activities, was applicable to the situation at issue)

Peraltro, la Corte ritiene che un elemento importante di un processo equo è anche la possibilità per l'imputato di confrontarsi con il testimone alla presenza del giudice che dovrebbe da ultimo, emettere una decisione; tale regola è una garanzia poiché le osservazioni dei giudici riguardo al comportamento e all'attendibilità di un testimone possono avere delle conseguenze per l'imputato. Pertanto, il cambiamento della composizione di un tribunale dopo l'audizione di un testimone decisivo comporta normalmente una nuova audizione di quest'ultimo (vedere P.K. c. Finlandia (dec.), n. 37442/97, 9 luglio 2002 e mutatis mutandis Pitkänen c. Finlandia n. 30508/96, par. 62-65, 9 marzo 2004 nonché Milan c. Italia (dec.), n. 32219/02, 4 dicembre 2003).

Tuttavia, la Corte ritiene che, nella fattispecie, vi erano delle circostanze particolari che giustificano un'eccezione al principio dell'oralità del dibattimento e al principio dell'immutabilità del giudice del dibattimento. La stessa osserva che le prove controverse sulle quali si è basata la condanna del ricorrente erano le affermazioni di vari testimoni tra i quali un peso decisivo è stato attribuito alle dichiarazioni di due pentiti A e B. La stessa rileva che la sostituzione di uno degli otto giudici componenti la sezione della corte d'assise non ha privato il ricorrente del suo diritto di interrogare i testimoni in questione, poiché gli stessi sono stati sentiti in pubblico dibattimento, alla presenza del ricorrente e del suo avvocato, che hanno avuto modo di porre loro le domande che ritenevano utili per la difesa. Inoltre, come indicato dalla corte d'assise, nelle sue ordinanze del 3 novembre 1998 e 18 marzo 1999, il ricorrente non aveva indicato in che cosa gli interrogatori dei testimoni, da lui richiesti, avrebbero potuto apportare degli elementi nuovi e pertinenti.

(However, the Court considers that, in the present case, there were particular circumstances justifying an exception to the principle of orality of the trial and to the principle of the immutability of the judge of the trial)

Peraltro, anche se uno degli otto giudici è stato sostituito, gli altri sette hanno potuto assistere alla produzione di tutte le prove. In tali circostanze, il fatto che il giudice supplente abbia avuto la possibilità di leggere i processi verbali delle udienze nelle quali i testimoni in questione (A, B ed altri) sono stati interrogati, compensa la sua assenza nelle udienze in cui hanno avuto luogo le audizioni dei testimoni in questione (vedere P.K. c. Finlandia citata). Considerato quanto precede, la Corte conclude che il rigetto delle domande del ricorrente tendenti ad ottenere una nuova audizione dei testimoni o l'utilizzo dei processi verbali di tali dichiarazioni non hanno violato i diritti della difesa e precisamente i paragrafi 1 e 3 d) dell'articolo 6.

Non vi è stata, pertanto, violazione di tali disposizioni. PER QUESTI MOTIVI, LA CORTE, ALL'UNANIMITÀ, Dichiara che non vi è stata violazione dell'articolo 6 paragrafi 1 e 3 d) della Convenzione.

BUT WHAT DISTINGUISHES THE TWO PROCEDURAL MODELS? Is it possible to find a structural feature that differentiates the two models? Locating it is essential to refine our analysis tool. Thus, one can ascribe concrete cases to this or that model without running the

risk of relying on impressionistic or non-central elements. What can this element be? How evidence is formed.

Development of models in the Church

- The theoretical debate on the two models, adversarial and inquisitorial, began in the eighteenth century, also because of the Calas affair.
- The inquisitorial model is "continental". The adversarial model is also called as the “Anglo-Saxon“ one.
- The first is presented as “scientific”. The second as "primitive".

An example of an "inquisitorial manual" The sacred arsenal (Eliseo Masini, XVII sec.)

These inquisitorial manuals for the judge not only to learn something about the law, but something more practical → how to behave in a criminal trial (how to examinate a suspect, etc.)

One of the most famous in this category was written by Eliseo Masini “*Il sacro arsenale*” (XVII sec.) → manual for judges in the holy inquisition; very famous, but at some point after the French revolution even the church thought it was too much.

Development of inquisitorial techniques in the Church: Crusades against heretics XIII sec → First rediscovery of the inquisitorial model → Reform phase (XV-XVI sec.) → Council of Trent → Creation of the *Sant'Uffizio* (now *congregazione per la dottrina della fede*).

Sant'Uffizio

The **Congregation of the Sacred Roman and Universal Inquisition** or **Holy Office** was created in 1542 by Pope Paul III with the bull Licet ab initio. It consisted of a permanent college of cardinals and other prelates directly dependent on the Pope: its explicit task was to maintain and defend the integrity of the faith, to examine and proscribe errors and false doctrines.

Following the reform and the disciplinary and moral measures promulgated by the Council of Trent, the inquisitors were now faced with a large number of duties. Pursuing heretics in their area of expertise remained their leitmotif, but this was accompanied by a long series of other important tasks. The most important of these, which many inquisitors did not like, was the obligation to provide the Supreme Congregation with detailed accounts of each complaint and the state of each trial.

Of the persons against whom the Holy Office will act

- *Contro gli eretici o sospetti di eresia* → Against heretics or suspects of heresy
- *Contro i fautori loro* → Against their accomplices
- *Contro i maghi, streghe, malefici e incantatori* → Against wizards, witches, wizards and spellcasters
- *Contro i bestemmiatori* → Against blasphemers
- *Tutti quelli che si oppongono ad esso santo Uffizio ed ai suoi uffiziali* → All those who oppose the Holy Office and its officials
- *Degli ebrei ed altri infedeli* → Jews and other infidels

Being a jew was not directly enough to be prosecuted, but there were some specific rules (for example jews cold not marry Catholics).

The inquisitorial trial

	Sacro arsenale	Translation	Inquisitorial system
	"Essendo l'inquisitore delegato dalla Santa Sede a conoscere, e terminare le Cause, che riguardano la Fede; e sostenendo egli le veci del Romano Pontefice per combattere l'eresia, o correggere chi contamina la Religione Cattolica, è facile a comprendersi, quanto distinta sia la di lui Autorità, Dignità ed Uffizio."	Being the inquisitor delegated by the Holy See to know, and terminate the trials, which concern the Faith; and by supporting him in the place of the Roman Pontiff to combat heresy, or correct those who contaminate the Catholic religion, it is easy to understand, how distinct is his Authority, Dignity and Office.	• Prevalence of the public interest in the protection of established order • The court is the armed fist od the established order against subversion • Precedents can be found in Book XVI of the Theodosian Code
The ways to start the trial	*"Il primo modo, nel quale si forma il Processo nel Santo Uffizio, si chiama per via di denunzia, […] ed è quando viene alcuna persona a denunziare un'altra, che abbia commesso qualche delitto spettante al Sant'Uffizio".* *"Il secondo modo, nel quale si può formare il processo è per via <u>d'Inquisizione, ed è quando non v'è alcun Accusatore, o Denunziante</u>, che venga a far sapere nel Santo Uffizio il delitto, ma corre fama, e voce pubblica in qualche Città, o Terra, o Luogo, che alcuna persona ha fatto o detto contro la Santa Fede …"*	"The first way, in which the trial is formed in the Holy Office, is called by way of denunciation, [...] and it is when no person comes to denounce another, who has committed some crime due to the Holy Office". "The second way, in which the trial can be formed is by means of the Inquisition, and it is when there is no Accuser, or Denouncer, who comes to make known in the Holy Office the crime, but there is rumour, and public voice in some City, or Land, or Place, that a person has done or said against the Holy Faith ..."	• Trial by complaint/ accusation: extensive use of whistleblowers who serve to maintain capillary control over society. The anthropological picture is pessimistic: man is guilty ab origine. • Trial by inquisition: the trials are started even without accusation, but the presence of scattered rumours is sufficient.
The role of the judge	*"Quando l'inquisitore avrà avviso, […], subito sarà obbligato, per*	"When the inquisitor has notice, [...] he will immediately be obliged,	• The investigative and judging function coincide

	l'Uffizio, che tiene, a farne giuridico Processo. […] *"Dopo che il processo sarà fondato, e cominciato in una delle dette due maniere, le quali comunemente si usano nel Santo Uffizio, dovrà l'Inquisitore senza indugio procedere più avanti, ed esaminare quei Testimoni […]"* *"...Scrupolosità e attento controllo dell'Inquisitore …".* *"L'inquisitore potrà mandare o esaminare le loro case".*	by the Office, which it holds, to make it a juridical trial. [...] "After the process is founded, and begun in one of the two said ways, which are commonly used in the Holy Office, the Inquisitor shall without delay proceed later and examine the Witnesses." "... Scrupulousness and careful control of the Inquisitor ...". "The inquisitor may send to or examine directly their homes."	(investigator-judge binomial) • Criminal investigation is mandatory • The inquisitor is a specialized official: he knows the laws and procedures. • The inquisitor can adopt police techniques and collect evidence directly.
The witnesses	*"L'inquisitore dovrà senza alcun indugio procedere ad esaminare quei Testimoni che o sono nominati dal Denunziante, o per relazioni particolari saprà poter dare informazioni al Santo Uffizio del delitto, e della persona contro di cui è stato denunziato"* *"Si avrà anche non mediocre considerazione se alcun testimone fosse persona di grado, nobiltà o autorità segnalata".* *"Il numero poi de' i testimoni compurgatori consiste nell'arbitrio del Giudice, che può, o molti, o pochi, o Ecclesiastici, o Secolari prefiggere al Reo secondo la qualità delle Persone, la quantità*	"The inquisitor shall without delay proceed to examine those Witnesses who are either appointed by the accuser, or for particular reports will be able to give information to the Holy Office of the crime, and of the person against whom he has been denounced" "There will also be no mediocre consideration if any witness was a person of rank, nobility or reported authority." "The number then of the exculpatory witnesses consists in the arbitrariness of the Judge, who can, or many, or few, or Ecclesiastical, or Secular prefix to the Offender according to the quality of the	• The inquisitor interrogates the witnesses • The Investigative Function will be exercised according to the class to which the witness belongs. There is a sketch here of the hierarchy of evidence. • Maximum discretion and appreciation of the judge, also with regard to the issue of exculpatory witnesses.

	dell'infamia, e la gravità del delitto, e nel tempo, e luogo, che a lui piace".	Persons, the quantity of the infamy, and the gravity of the crime, and in the time, and place, that pleases him".	
Suspicions and presumptions	*"Hanno le leggi Pontificie saggiamente ritrovata, e giovevolmente ordinata una forma di purgare le sospezioni, e presunzioni, la quale chiamano Purgazione Canonica. Questa nel Santo Uffizio si fa quando il Giudice astringe il Reo diffamato, e sospetto a giurare alla presenza di certo numero di Testimoni degni di Fede, ch'egli è innocente. Ed I suddetti Testimoni, che perciò si dicono Compurgatori, similmente giurano, che credono, e stimano il detto Reo sospetto, e diffamato aver giurato il vero".*	"The Pontifical laws wisely discovered, and profitably ordained a way of purging suspicions, and presumptions, which they call Canonical Purgation. This is done in the Holy Office when the Judge constricts the defamed offender and suspect to swear in the presence of a certain number of Witnesses worthy of Faith, that he is innocent. And the said Witnesses, who therefore call themselves Compurgators, likewise swear, that they believe, and esteem the said offender, suspected, and defamed to have sworn the truth."	Purgation: the Offender swears before Witnesses to tell the truth
Recording of the proceedings	*"Di più farà sempre scrivere tutto quello, che domanda al Testimonio, sicché avanti alla risposta preceda in iscritto l'interrogazione, nella quale sia posto tutto quello che si ricerca […]"*	"Moreover, he will always write everything that he asks the Witness, so that before the answer he precedes in writing the question, in which all that is sought is placed [...]"	• The inquisitorial process is a written trial in which extensive use of proceedings is made. • The inquisitorial affair is introspective (Cordero), somatic or phonetic nuances are also verbalized.
Way of examining an Offender	*"Perché sommamente importa al negozio della Santa Fede, che si usi ogni diligenza per*	"For it matters supremely to the affairs of the Holy Faith, that every diligence be used	• The Inquisitor interrogates the Offender and

	scoprire tutti gli errori, ed Eresie celate entro la più segreta parte del cuore d'un Reo indiziato di così fiera, ed orribile pestilenza, abbiamo stimato dover recare non poco piacere e soddisfazione ai Giudici di esaminare un così fatto Reo".	to discover all errors, and Heresies concealed within the most secret part of the heart of an offender suspected of so fierce, and horrible pestilence, we have estimated that it must bring not a little pleasure and satisfaction to the Judges to examine such an offender."	seeks a full and objective truth. • There is inquisitive bulimia, so an accused person, if a good narrator, can also be saved.
Ways of examining witnesses in defence of the defendant	*"Tanta, e così segnalata, è la pietà ed integrità del Santo Tribunale, che al Reo non pienamente convinto, né confesso, non si negano le difese, ov'egli le domandi; ma spontaneamente anche gliè si offeriscono, con assegnare ad esso Constituito un termine conveniente di cinque, o sei, o più, o meno giorni, secondo la qualità della causa, acciochè abbia spazio di poter difendersi, e con decretargli la copia del Processo, e deputargli anco l'Avvocato, o Procuratore".*	"So great, and thus reported, is the piety and integrity of the Holy Tribunal, that the offender, not fully convicted, nor confessed, is not denied defences, where he asks them; but spontaneously these are also offered, with assigning to him a suitable term of five, or six, or more, or less days, according to the quality of the cause, so that it may have room to defend itself, and with decreeing to him the copy of the Trial, and also assigning a lawyer, or Procurator".	• Weak defence left essentially to the inquisitor. • The position of the defence is subordinated. • The lawyer can assume the defence only on the orders of the Inquisition and if he takes the defence of the heretic, he still risks the accusation of aiding and abetting.
Way of examining the offender in torture	*"Avendo il Reo, negato i delitti oppostigli, e non essendo essi pienamente provati: s'egli, nel termine assegnatogli a far le sue difese, non avrà dedotto a sua discolpa cosa alcuna: ovvero, fatte le difese, ad ogni modo non avrà purgato gl'indizi, che contro a lui risultano dal Processo: è necessario, per avere la verità, venire contro*	"Since the Offender has denied the crimes opposed, and since they are not fully proven: if he, in the term assigned to him to make his defences, will not have deduced in his defence anything at all: that is, having made the defences, in any case he will not have purged the clues, which against him are resulting from the Trial: it is necessary,	• The use of psychological and physical torture in inquisitorial processes is, in general, aimed at achieving an absolute truth. • Torture is generally used as an instrument of knowledge and with it the

	di lui a <u>rigoroso esame; essendo stata appunto ritrovata la tortura per supplire al difetto dei Testimoni</u>". *"Conviene, anche talvolta, e per l'atrocità del delitto, e per la gravezza degl'indizi, e per altri rispetti ripetere, o continuare la tortura […].*	to have the truth, to come against him to rigorous examination; torture having been found to make up for the Witnesses' absence." "It is appropriate, sometimes, and for the atrocity of the crime, and for the seriousness of the evidence, and for other respects, to repeat, or continue the torture [...].	accused purges the clues. • Bacon speaks of *vexatio* in reference to the "secrets of nature": for the judge, as a scientist, confession must be reached in its fullness, even if what is confessed is enough for the sentence, it is further tortured so that nothing escapes.
Way to end a trial	*"Qualunque volta il Reo non è per propria confessione, né per evidenza del fatto, né per legittima produzione dé Testimoni convinto, né in altra maniera si rende sospetto, o si ritrova diffamato di Eresia, o di altro delitto al Santo Uffizio appartenente; anzi per legittime e concludenti prove in contrario; e specialmente, se i Testimoni avranno rievocato il lor detto; rimane scolpato affatto; deve spedirsi con final sentenza favorevole".*	"Whenever the offender is not by his own confession, nor by evidence of the fact, nor by legitimate production of the Witnesses convicted, nor in any other way he makes himself suspicious, or finds himself defamed of heresy, or of another crime belonging to the Holy Office; but for legitimate and conclusive evidence to the contrary; and especially, if the Witnesses have recalled their saying; remains acquitted at all and must be sent away with a final favourable ruling".	• Acquittal of the Offender. • The system of evidence is anomalous: it is not the incriminating evidence that has the greatest weight here, but the exculpatory evidence.
Penalties	*"Egli non basta, che il Reo, […], abiuri nel Santo Uffizio; ma deve oltre ciò giustamente esser punito o di pena pecuniaria, o di rilegazione, o di carcere, o di galera,*	"It is not enough that the Offender, [...] abjure in the Holy Office; but it must also justly be punished either by pecuniary penalty, or by confinement, or by imprisonment, or by	Penalties: death, torture subject to evidence, perpetual jails, perpetual ban, torture without reservation of evidence, fixed-term jails, whipping,

	secondo la qualità del delitto; essendo l'Abiurazione non tanto pena, quanto cautela del Santo Tribunale per l'avvenire".	forced labour, according to the quality of the crime; being the Abjuration not so much a punishment, but a caution of the Holy Tribunal for the future".	amend honourable, term ban.
Absentia	*"La contumacia cagiona, che il Reo assente si ha per preferente; onde anco può lecitamente condannarsi: tantoppiù che spesse volte ammonito, non si cura di spurgarsi, e mostra di confessare la colpa, di cui viene imputato".*	"The absentia causes, that the absent offender has to be considered as self-confessed; so that he can be lawfully condemned: especially since he, although often warned, does not care to purge himself, and clearly shows that he confesses the guilt of which he is accused".	The absentia is considered as evidence against the accused.

Truth

Purposes of procedural systems

Res iudicata facit de albo nigrum aequat quadrata rotundis → a final ruling makes white black and transforms squares in circles.

- **Inquisitorial process**: purpose of attaining the absolute truth → external, pre-existing truth is revealed by the trail and by the cognitive activity of the judge.
- **Adversarial trial**: purpose of building the truth into the trial → risk that the obtained procedural truth is completely different from the objective one

The truth or the truths? In procedural contexts, the notion of "truth" becomes complex: truth can be material, argumentative, formal or demonstrative.

And the evidence? There are both positive and negative approaches to the role evidence plays in the construction of truth:

- In a **positive sense**, evidence is central to legal argumentation.
- In a **negative sense**, procedural outcomes may diverge significantly from objective reality, reducing truth to a function of adversarial strategy rather than factual accuracy (**sporting theory of justice**).

Example: the 10 Commandments of the "Good" Cross-Examiner

1) Thou shalt be prepared
2) Thou shalt know thy objective
3) Thou shalt take baby steps
4) Thou shalt lead the witness
5) Thou shalt know thy styles and adapt it to the occasion
6) Thou shalt know when to quit
7) Thou shalt know what to take to the podium

8) Thou shalt know thy audience
9) Thou shalt know the rules of evidence
10) Thou shalt know thy judge

Rhetorical evidence in ancient procedural systems

- Evidence as a strong rhetorical character
- Evidence depends on the very nature of the panel of judges (in Greece and Rome)
- Legal expert and rhetorical expert tend to coincide; Greece even lacks the figure of the legal expert
- There is no regulation of the regime of proof: *extra causam* arguments came into play

This tradition derives from sophistic school; however, the so-called **rhetorical evidence** is still actual, especially in common law systems.

The <u>position of Gorgias (from Plato) as the foundation of the sporting theory of justice</u>: “For me, it is being able to persuade with speeches the judges in court, the counselors in the Council, (10) the members of the Assembly in the Assembly, (11) and the same in any other meeting, whether it is a meeting of citizens. And of course, with this power in your hands, you will have your slave the doctor, and your slave the gymnastics master. This businessman, then, will turn out to accumulate wealth not for himself but for another, that is, for you, who have the power to speak and persuade the masses.”

Aristotelian rhetoric as the art of argumentation – it is composed of three key elements:

1. **Argumentative technique** – aims for the ***verisimile*** (what is probable or plausible) rather than absolute truth, as rhetoric deals with uncertain matters.
2. **Dialectics** – method of debate through question-and-answer to test ideas and produces the **antithesis**, seeking truth through opposition.
3. **Logic** – ensures arguments are structurally sound, even if the conclusions are only *verisimile*.

Procedural law is challenged by the contrast between what is factually accurate and what seems plausible.

The theory of *status causae* (Cicero)

“The first clash between the opponents has as its object a question of indeterminate character, which is resolved in the conjecture (Did Decius take money?), in the definition (Did Norbanus harm the majesty of the Roman people?) in the ascertainment of the juridicity of the fact (Did Opimius kill Gracchus in full right?). These questions, which find their first clash in the attempts to formulate the accusation and defense, have a broad and not precisely determined character. The conflict between the defense and the prosecution's replies leads to the determination of the controversial thing.”

<u>Defence</u> – “Once the status has been identified (which is controversial), one must immediately look for the reason. It determines the cause and contains the defence, which for educational purposes we show in relation to this famous cause: Orestes confesses having killed his mother. If he does not give a reason for the fact, he will have irreparably prejudiced the defence. So, he invokes it, because if he did not do so there would not even be the cause. He says, "She killed my father."”

<u>Accusation</u> – "Once the reason has been found, it is necessary to find the foundation that supports the accusation and that is adduced against the reason of the defence, of which it has been said before. It will be formed as follows: when Orestes has used reason by claiming to have killed her rightly because she had murdered his father, the accuser will make use of the foundation by stating that it was not right for him to execute a sentence without a ruling."

<u>The object of the judgement</u> – "The fundamental question of judgment that we call the object of judgment and the Greeks *krinomenon* arises from the reason for the defence and the foundation of the accusation. It is determined by their synthesis in this way: since Orestes claims to have killed his mother to avenge his father, if it was right that Clytemnestra was killed by her son without any judgment."

General theory of evidence

Prova from *probo*, evaluate

- **Inductive functions**: signs' and clues' value depend on how much we know about the things of the world. If x implies y and x is true, then y is also true → legal evidence (article N prescribes that from x we infer y).
- **Narrative functions**: testimonial evidence is related to the concept of faith; emotional states easily come into play. Despite the problems, it constitutes the main proof in the criminal process (unlike the civil trial).

Problematic nature of narrative functions

Trial is intended as a retrospective machine aimed at establishing if something happened, who caused it and why. The parties shall make assumptions, and the judge accepts the most likely according to given criteria. However, "human history" is gnoseologically safe than natural history.

Narrative contributions have an intrinsic illogical background: narrative assumptions require **faith**. This can lead to **mistake**. The problem posed by the "faith" attributed to narrative functions is articulated differently according to the procedural model (adversarial or inquisitorial).

- **Inquisitorial model**: search for an "external" truth → truth is the product of the judge's critical reasoning
- **Adversarial model**: procedural truth is formed in the debate between parties → the *fides* attributed to the narrative is the result of the contradictory.

The concept of falsificationism

Falsificationism is a theory elaborated by K. Popper, according to which every theory cannot have a validation once and for all, but it is always a risky hypothesis, whose scientific character is given to the fact of containing a basic assertion that can be disproved by experience. When it happens that, in the control of a theory, the observational assertions deduced from it are not in contrast with basic observational assertions accepted by the scientific community, the theory is "**corroborated**". It serves as a criterion of demarcation between scientific assertions and non-scientific assertions: a theory is scientific only if it is falsifiable, that is, if it can be refuted by experience. This characteristic, proper only to scientific theories, means that in scientific knowledge, with the joint use of logic and experience, critical rationality is able to express itself in the most complete way.

From the operational point of view, are there similarities with the adversarial model?

- **Falsificationism**: Formulation of the hypothesis → Submission of the hypothesis to as many objections as possible → If the objections do not undermine the hypothesis, it is considered to correspond to reality. However, the hypothesis in only provisionally true, because every scientific hypothesis must necessarily be falsifiable.
- **Adversarial model**: The examination *ad faciendam fidem* is not conducted by the judge alone → Application for admission of the witness → Examination of the witness by the applicant → Cross-examination by the other party → Possible re-examination that completes the cross-examination procedure → Evidence elaborated in the adversarial contes.

The ***fides*** depends on the ***narratum*** (what is being told), then on the ***loquens*** (who is telling it), and lastly on the ***accipiens*** (who is listening).

Witnesses

Problems	Solutions
• They can lie because interested (knowingly) • They can say the false without will to harm • There may be perceptual disturbances • There may be emotional disturbances • There may be problems related to amnestic flow • There may be language problems	• A screening is needed • The scrutiny may consist of the debate between the parties • A scrutiny may be limited to the critical reason of the judge (inquisitorial model) • The "clash" between the parties serves to assess the reliability of the witness by providing an optimal search of the truth (adversarial model)

Mario Pagano (1784-1799): *"... the comparison is the touchstone of the truth and the most certain arguments of the truth of the witnesses arise from the comparison of their sayings..."*

John Henry Wighmore (1863-1943): "*...cross-examination is the most effective legal instrument that has ever been devised for the ascertainment of the truth..."*

I believe this is the real distinction between the procedural models: the centrality or otherwise of the adversarial procedure between the parties - a principle from which it follows, of course, the need for the parties themselves to be placed in a position of at least tendential equality, in order to compete fairly in the judicial arena before a third judge - and also the so-called "orality" of the process. However, "adversarial and inquisitorial procedural forms are stubbornly intertwined with hierarchical and equal encrustations", but also, and this is perhaps even more significant, it can happen that the old forms undergo, more or less secretly, an adaptation to changing needs (...) the private parties are used as an instrument of the active state (...) the result of these changes is that the process begins to serve objectives of implementing political choices, while outwardly maintaining aspects of the style of confrontation» (Damaska, 1991, p. 132).

Rights of the accused and judicial policy

Torture

Ulpian: "*inquisitio…ad eruendam veritatem per tormenta et corporis dolorem*." → investigation…to obtain truth thanks to torture and physical suffering.

year 320: CTh. 9.3.1 pr = C.I. 9.4.1

Constantine at Rationalis Florentius. In every case, once the accused has been presented, whether there is an accuser or has been brought to trial by the public authority, an investigation must be carried out immediately, so that the guilty party is punished, the innocent acquitted. If the accuser is not present at the appropriate time or if the presence of accomplices seems necessary, it must be obtained immediately. However, the offender must not wear iron handcuffs that are too tight, but chains that are a little released, so that he does not suffer, while remaining firmly in custody. Nor must he suffer imprisoned in deep darkness, but enjoy at least a little light and if the custody is prolonged, he must be able to be brought to light, in the vestibules of the prison and in healthier places, every day at the first sunrise, so that he is not oppressed by the penalties of prison, which is too serious for an innocent person, not severe enough for a guilty person.

Prison

- In the archaic age there are also private prisons (XII tab. → insolvent debtor)
- Banned in the postclassical age → the State assumes the monopoly of violence
- Until the modern age, prison is not a punishment but has a precautionary function.
- Constantine's law tells us how harsh the prison conditions could be.
- In the modern age, the prison becomes a "total institution" with correctional purposes (M. Foucault)

Edictum de Accusationibus section 2 (Constantine y. 319)

If someone accuses of lèse-majesté, a crime for which no one is protected from torture because of his dignity, he must know that he too will be given torment if with manifest clues and arguments he cannot prove his accusations. And the inspirer of such accusations will also be consigned to torment so that all those responsible are punished.

Causa Caeciliani (age of Constantine)

Aelian Proconsul said: Since you pretend not to understand the questions that are addressed to you, I will tell you more clearly. Who sent you from Caecilianus? Ingentius replied: no one sent me. The proconsul Aelian said to his office: prepare him. Once prepared, Aelian proconsul said: let him be suspended. Once suspended, Aelian proconsul said to Cecilian: How did Ingentius come to you? Aelianus proconsul said: Constantine the Great, always Augustus and Licinius Caesars, deign to show so much pity towards Christians, that they do not want their discipline to be corrupt, but rather want to observe and cultivate this religion. So don't think you're sweetening me by telling me that you're a decurion and that you can't be tortured. You will be tortured, so that you do not lie, which is foreign to a good Christian. So, speak clearly if you don't want to be tortured.

Julian in favour of guarantees

Numerius, former governor of Gallia Narbonensis, had been accused of theft and Julian proceeded with unusual severity as a judge to his interrogation after allowing those who wished to attend the trial. Since the defendant defended himself by denying the accusations and it was not possible to prove his guilt, the talented orator Delfidius who attacked him with violence, exasperated by the lack of evidence, said: "very powerful Caesar, who can ever be guilty if to exonerate himself it will be enough to deny?". Julian immediately replied to him: "who will ever be innocent if it is enough to accuse one to make him condemn?"

Also in cases of lese majesty

It is enough to cite just one example of Julian's patience in these affairs, although there would be many others. A man denounced one of his enemies, with whom he quarreled bitterly, of lese majesty. The Emperor pretended nothing, but he insisted, and finally asked him who he was accusing. He said the accused was a rich fellow citizen. At that point, having heard the thing, the prince laughing said: with what clues have you come to this conclusion? And he said: he make a purple dress with a silk pallium. Ordered to leave silent and quiet, since the accusations he made were inconsistent, he insisted. Then Julian exasperated ordered the comes largitionum to deliver to the malevolent annoying guy two purple shoes, which he would give to his opponent, who seems to have had a mantle of the same color. In this way we will know what the benefit of these rags without the great forces is, that must accompany them.

CTh. 9.37.2 a. 369: double track

The emperors Valentinian, Valens and Gratianus Augusti to Probus, PP. The accuser, who binds himself to the snare of the law, knows that he is not allowed to resort to abolitio after the accused has suffered violence because of the accusation, that is, if he has suffered imprisonment, torture, whiplash or chains, unless the one who has suffered this wants to forgive what happened to him and therefore there is equal consent of both the accuser and the accused about the abolitio. But before anyone is freed from the trial, consider that there are crimes for which not even the consent of the parties generates abolitio, such as lese majesty, treason, embezzlement, desertion and all those crimes established by ancient law. In these cases, the judge must push not only the accuser to prove what he reports, but also the accused to exonerate himself from the charges.

«double track»: CTh. 9.35.1 a. 369

No one in any way is subjected to torture without consulting us, deprived of the military status or of the privileges that his status or dignity assures him, except in cases of lese majesty, for which there is equal status for all. Those who are shown to have falsified our documents should also be subjected to torture beyond ordinary limits, a fact for which we do not want even the condition of palatine to be able to act as an immunity

CTh. 9.35.2 a. 376, Emp. Gratian

The emperors Valens, Gratian and Valentian Augustus to Antony PP. of Galliae. We want decurions to be kept immune from torture, even in the case of capital judgments. Nevertheless, the defendants of lese majesty and those who are accused of having spoken nefarious words, even if they belong to the municipal order, are subject to stricter investigation.

CTh. 9.3.6: jail/prison, not a new problem!

The emperors Gratian, Valentinian and Theodosius Augusti at Eutropius PP. Regarding those who are imprisoned, we clearly establish that they must suffer quickly their sentence if convicted or be freed from custody and do not crumble there without end. We establish with strict precept that one must be moderate with the innocent and immediately cease the criminal behavior of the collaborators of the provincial judges who are dedicated to plundering the detainees in the negligence of the provincial judges.

In fact, if the *commentariensis* has not disclosed within thirty days the number of detainees, the charges, their social order and their age, the office will be punished with a penalty of 20 pounds of gold in favor of the tax authorities, and the judge is punished with the sanction of ten pounds of gold, if not worthy of a more severe punishment (exile).

The *commentarienses*

The ***commentarienses*** in the early imperial age are simple secretaries in charge of writing *commentarii* employed by individual city or provincial magistrates, as can be seen above all from numerous inscriptions.

On the other hand, the etymology of their name, as evidenced by a passage from De *magistratibus* by Iohannes Lidus, is certainly linked to the compilation of commentaries, registers or protocols.

Starting from the fourth century and following the Diocletian-Constantinian reform of the bureaucratic administration, the *commentarienses* become civil servants – even if their titling was still, as the pseudo Asconius states, included in the ranks of *legionaria* militia – and acquire, while maintaining the old attributions (the care and drafting of the commentaries), other skills and much more important tasks that can be summarized as follows: **procedural activities in the field of criminal proceedings, care of procedural documents and management of judicial archives, perhaps even small jurisdictional competences and, above all, the management of public prisons.**

Certainly, relevant is their function of support to magistrates, both civil and military, consisting of an investigative activity (**execution of the custody order, verbalization of the formal accusation – the *inscriptio* -, escort of the prisoner in the hearing) and auxiliary (management of torture by personnel under their orders, release of the acquitted detainee and, if convicted, execution of the sentence and even put to death, in the case of capital punishment**).

Imppp. Valentinianus, Valens et Gratianus AAA. ad Probum pp. CTh. 9.3.5 (= C.9.4.4) (a. 371)

The emperors Valentinian, Valens and Gratian Augusti at Probus PP. The *commentariensis* is responsible for the custody and vigilance of the detainees, nor do you try to give to the judges an abject and humble man if any defendant has escaped. In fact, we want him to suffer (the *commentariensis*) the same penalty that would have been the case with the escaped defendant. If, for some reason, the *commentariensis* has found himself far from his office, we order that his deputy supervise with the same care and we order that he will be punished with the same severity of the law.

Pre-trial detention

CTh. 9.2.3, a. 380

The emperors Gratian, Valentinian and Theodosius Augusti at Eutropius PP. No one be imprisoned (? *Or rather be chained*?) before the sentence. If someone is to be transferred from afar, do not give assent to the request of the accuser before, that he has bound himself with the sollemnia to the penalty of the reciprocal and has signed (the accusation papers) with trembling pen.

Non-legal sources

Non-legal sources (especially literary sources) say a lot about prison and the conditions of the defendants. Examples: Libanius, or. De Vinctis, addressed to Theodosius; papyri, ostraca; etc.

From Libanius

"Someone gets angry, immediately goes to the governor and says that he has suffered abuse and violence, if not himself, his wife or if neither of them, their children. They invent insults and beatings, drop a few tears on the clothes and also add this fact to the previous ones. The accused, although he denies, claims to have been slandered, and despite his appeals to the law, he is sent to prison, even when he does not lack the substances for bail. This is what the humblest normally suffer at the hands of the powerful."

A couple of words will suffice and the settlers who refuse to bow to the demands of the landowners and who do not want to be treated like real slaves will be chained by a soldier, arrested and thrown into prison.

"Three times as many people will be arrested, those who drank, ate or slept with them, even if they are completely unaware of the charges, except perhaps to know that the accused are not at all guilty and even if they had no part in the affair"

"They die by the thousands, o Sir, because of the evils that afflict them and in particular because of prison overcrowding."

How does the story end? The detainees die, the *commentariensis* sends his report, the governor orders the funeral. As for the accuser, he fears nothing: he does not even know if the accused is still alive or dead. In Libanius' account, it is not at all difficult to organize someone's imprisonment: a false accusation is enough, but also - significantly - a short discourse (*ῥῆμά τι καὶ μικρὸν*). But it is not only the suspects who are imprisoned: this fate also awaits the witnesses themselves. Thus, they too risk dying before the process has begun. In fact, the governors devote themselves above all to tax matters and are not interested in criminal matters.

Women

While we know remarkably little about the actual treatment of female defendants in late antique criminal judicial procedures, there is some evidence that it may have differed from that of men, both during trial and in terms of penalties. For example, classical Roman writers expressed qualms about holding female defendants in public prisons, and we know that in late antiquity some women were held under house arrest awaiting or during their trial, to be

sure, shielding from the nastiness of the prison was probably mostly aimed at elite women. Indeed, Libanius tells us about a woman who gave birth to a child while being imprisoned.

- The use of violence is widespread.
- Abuses are extremely simple.
- Often the imprisonment is of indefinite duration.
- *Papyri* and *ostrakas* massively attest, from the fourth century onwards, to the death of prisoners in prison, the hunger suffered, the chaining and torture suffered.
- On numerous occasions the detainees complain that they do not even know the reason for their condition and seem to be able to count only on the assistance of relatives, or charitable believers, to try to survive.

"I pray to your father that he may have mercy and send [..] for I am dying in prison, and I do not know why." BKU 144

In Italy – source: Eurispes/Antigone-2022

And then, let's see what these worrying numbers are, clearly focusing them with our own eyes. In the Italian prison system, overcrowding is 113.1%. Alternative measures would help to overcome this problem. Foreigners are falling: in the last year, the Antigone Association has carried out 67 visits to 14 Italian regions; the prisons visited housed a total of 24,418 detainees, almost half (46%) of the Italian prison population. In general, the national overcrowding already mentioned is very worrying. There are 11 prisons with overcrowding of over 150%: the five most critical prisons are located in Brescia (378 prisoners, 200%), Grosseto (27 prisoners, 180%), Brindisi (194, 170.2%), Crotone (148, 168.2%), Bergamo (529, 168%). There are 19,000 detainees who have to serve less than three years. These – with the exception of those convicted of obstructive crimes – would potentially have access to alternative measures: if only half accessed them, the problem of prison overcrowding would be solved. As of June 30, 2021, the percentage of foreign prisoners confined in prisons in Italy was 32.4% (17,019 people). A presence in decline since December 31, 2018.

Shielded cells, cells without showers, some completely devoid of water. In 42% of the Institutes, cells were found with shields on the windows that prevent the passage of air and natural light. In 36% of the prisons there were cells without showers (the penitentiary regulation of 2000 provided that, by September 20, 2005, all the Institutes would install showers in every overnight room). In 31% of the Institutes visited by Antigone there were even cells without hot water. In 3 prisons cells with exposed toilets were found. In the prison of Frosinone, for example, frequent episodes of lack of running water have been reported. Santa Maria Capua Vetere has a structural problem of lack of water connection and the water supplied is not drinkable. The tender to provide for the water connection has been started, but the work has not begun and drinking water is given to each detainee with two two-liter bottles a day.

But how can there be re-education in light of what the complaints of the Committee for the Prevention of Torture (CPT) demonstrate? The result of the prison system can be measured through the level of recidivism and success of the re-educational intent. According to the book Public Vendetta. The prison in Italy of Vigna and Bortolato, the recidivism of those who have committed crimes is very high in Italy, seven out of ten former prisoners return to delinquency, but the percentage collapses from 70% to 1% among those who in recent years as prisoners have had the opportunity to work. Only with a possibility of redemption, it is shown to those

who have made a mistake that they have confidence to use and spend the best in the life that awaits them; otherwise, we only strive to inflict penalties with highly questionable results, both for the former prisoner himself and for society.

Art. 27, It. Const.: *L'imputato non è considerato colpevole sino alla condanna definitiva. Le pene non possono consistere in trattamenti contrari al senso di umanità e devono tendere alla rieducazione del condannato*. «The accused shall not be considered guilty until final conviction. Punishments cannot consist of treatment contrary to the sense of humanity and must tend to the re-education of the condemned»

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TEACHING DIVISION

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NO GENDER KITCHEN

LA PIADINERIA