Ralph Henham[1] and Grazia Mannozzi[2]

Victim Participation and Sentencing in England and Italy: A Legal and Policy Analysis

1. INTRODUCTION

The internationalization of criminal justice has focused attention on the need to understand how the essentials of criminal trial processes and practices in specific jurisdictions (both national and international) are constructed, negotiated and relate to one another. This necessitates debates regarding the synthesis and differences of paradigms of criminal trial process (i.e. civil/inquisitorial and common law/adversarial), the analysis of hybrid jurisdictions and the socio-historical and cultural reasons for their development.

Within this comparative dimension this paper's focus on victim participation in sentencing is timely in that it addresses fundamental questions relating to access to justice both within and across jurisdictions that are of immediate concern to the development of internationalized paradigms of criminal justice process. More particularly, it endeavours to connect legitimate victim concerns for penalty with the developing place of victims within restorative justice. To date, most relevant research and policy analysis has treated these aspects as parallel streams, and thereby failed to realize the potential for victim integration in sentencing to produce a rounded and more inclusive framework for punishment and resolution options. We argue that this is a crucial policy purpose for the realization of more balanced notions of justice, which feature victim access and interests beyond measures of individual harm and just deserts.

The English[3] and Italian jurisdictions have been deliberately chosen to reflect different and innovative approaches to integrated sentencing. In particular, they demonstrate recent initiatives in victim involvement, and peculiarities in judicial dis-

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1. Ralph Henham is Professor of Criminal Justice at the Nottingham Trent University, UK.
2. Grazia Mannozzi is Professor of Criminal Law at the University of Insubria, Como, Italy.
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3. What follows is equally applicable to Wales.

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cretion and intervention in the sentencing process in the context of various procedural traditions, for example:

(a) Verdict deliberations in the Italian process are judicial, collegiate and secret, with the result subsequently announced by the court. This is in marked contrast to the often protracted nature of English jury trial.
(b) The sentencing phase of the English trial process (in contrast to Italy) is separate from that which determines guilt or innocence. Its form is determined by conventions, principles, relationships and interactions which differ from the main body of the trial.
(c) There are considerable differences of approach between the English and Italian systems in establishing the criteria necessary to determine the seriousness of the offence for the purposes of sentencing.
(d) The overriding failure of the Italian system to rationalize the purposes of sentencing means that judicial discretion operates in an ideological vacuum which appears incapable of promoting principles for the rational variation of cases. In England, judicial ideology and instrumental rationality are grounded in a substantial body of sentencing principle.
(e) The more proactive and confrontational aspects of judicial behaviour typified by the adversarial paradigm are present in the English sentencing phase.

The instrumentality of judicial discretion is significant in that it provides the means for directing our attention to the way in which the tensions between the ideologies of crime and social control are resolved within the structures for criminal process provided for individual jurisdictions. An important aspect of this resolution concerns the balance between the symbolism and reality of victim participation, and how this is realized as an ongoing routine judicial activity within jurisdictions which (as with England and Italy) have developed from different doctrinal roots, but have undergone varying degrees of substantive and procedural transformation to the criminal trial process.

This paper examines victim participation against the theme of integration in the sentencing process by looking at the ways in which victim-related information is evaluated during the course of the trial and how this impacts on sentence decision-making. The notion of integrated decision-making as it relates to sentencing is invoked here to reflect the prevailing view that victims should participate fully and have a significant input into the sentencing process. Conceptually, it recognizes that the sentencing decision should be conceived as an amalgam of process decisions rather than simply representing the processual climax of those decisions, and acknowledges the fact that integration should also encompass both lay and professional interests in trial decisions. This analysis of integrated sentencing is therefore particularly concerned with evaluating different modalities of judicial discretion and intervention as regards the perception, evaluation and use of information about victims for sentencing purposes.

More generally, the underlying theme of integration allows us to investigate the connections made between penal justifications, policy and decision-making. This is particularly important in seeking to develop restorative justice strategies which depend not only on clear links being established between the justifications for sentence,

sentence outcomes and their effective implementation, but especially on open access and rights protection for victims. In effect, through exploring communitarian notions of justice, restorative justice themes force us to reconceptualize the relationship between the justifications for punishment, the policies and legislation formulated for its execution and the contexts of its implementation.

Clear conceptual and practical distinctions exist between the English and Italian jurisdictions as regards the nature of the formal process for trial and verdict, the sentencing phase, and wider substantive and procedural distinctions drawn between ordinary (adult), negotiated and juvenile justice. As we discuss below, these fundamental differences in the conceptualization and significance of the trial process have important repercussions for understanding what is meant by victim participation in each jurisdiction and the prospects for future integration.

2. ORDINARY JUSTICE

2.1. England

2.1.1. Trial and Verdict

Within the context of the English criminal trial the position of the victim as a provider of factual information relating to the circumstances of the crime is no different from that of any other witness. In essence, the victim's contribution is limited to testimony that assists in establishing the facts against which the guilt or innocence of the accused can be judged according to the onus of proof which the prosecution must discharge in a criminal case; namely, beyond all reasonable doubt. Although certain types of witnesses (for example, children and rape victims) are protected by special measures, adult victim witnesses are subject to the normal rules of examination and cross-examination applicable to an English adversarial trial,[4] and to the rules of evidence. Furthermore, witnesses may receive protection from being questioned in an intimidatory and humiliating manner,[5] and the limits of witness examination may be tested against the right to a fair trial under Article 6.1. of the European Convention on Human Rights (ECHR),[6] or the ethical codes of legal participants in the trial.

The victim has no civil *locus* in the English criminal trial, unlike his Italian counterpart, which might jeopardize his perceived neutrality in the eyes of the judge. In circumstances where the victim is a *potential* civil claimant the normal practice is to await the outcome of the criminal process before proceeding with the civil claim. There are two main reasons for adopting this course:

4. For a useful summary *see*, J. Sprack, *Emmins on Criminal Procedure* (Oxford 2002).
5. *See Brown (Milton Anthony)* [1998] 2 Cr App R 364 at 391 *per* Lord Bingham.
6. *See* further A. Ashworth, 'Victims' Rights, Defendants' Rights and Criminal Procedure', in A. Crawford and J. Goodey (eds.), *Integrating a Victim Perspective within Criminal Justice* (Aldershot 2000) Ch. 9.

(1) Clearly, a finding of guilt in the criminal trial strengthens any civil claim a victim might wish to make.
(2) The burden of proof in the English civil process is discharged by establishing the elements of the claim on the balance of probabilities. It, therefore, makes practical sense, particularly in jury trials, to separate criminal and civil process requirements. Accordingly, the procedural and evidential requirements differ considerably.

Although compensation can be awarded as an additional outcome to a criminal trial this is by no means equivalent or meant to substitute the civil process.

A further significant reason which impacts on the quality and extent of witness testimony generally in an English criminal trial relates to the relationship between substantive criminal law and sentencing principles. Broadly, there is no necessary symmetry between the elements required to be proved to establish the commission of a substantive offence and the factual basis for sentence. For example, as regards aggravating circumstances; whilst these may be germane to establishing the objective quality of the substantive offence, their relevance to sentence is determined by different considerations related to penalty. These divisions between substantive and sentencing law are re-enforced and sustained by the two distinct trial/verdict and sentencing phases of the criminal process and the existence of jury trial.

2.1.2. Sentencing

The narrow doctrinal arguments regarding the distinction between procedural and service rights for victims in English sentencing[7] have been largely eclipsed by the policy dynamics which characterized the debate over sentencing policy during the 1990s. With its roots in the 1990 Victim's Charter[8] and the 1991 Citizen's Charter,[9] the 1996 Victim's Charter[10] appeared to go further in advocating the right for victims to present victim statements,[11] suggesting that:

> The police, Crown Prosecutor, magistrates and judge will take this information into account when making their decisions … you should be given the chance,

7. For an excellent overview *see*, I. Edwards, 'Victim Participation in Sentencing: The Problem of Incoherence', 40 *Howard Journal of Criminal Justice* (2001) 39. *See also* I. Edwards 'The Place of Victims Preferences in the Sentencing of "Their" Offenders' [2002] *Crim L.R.* 689.
8. Home Office Public Relations Branch JO10368 RP 2/93.
9. *The Citizen's Charter: Raising the Standard* (London 1991) 25. For critical assessment, *see* H. Fenwick 'Rights of Victims in the Criminal Justice Process: Rhetoric or Reality?' [1995] *Crim L.R.* 843.
10. Home Office *The Victim's Charter: A Statement of Service Standards for Victims of Crime* (London 1996).
11. Sanders *et al.* suggest that the use of the term 'victim statement' instead of 'victim impact statement' reflects the policy confusion in the Victim's Charter over whether the scheme was supposed to affect sentencing decisions. *See*, Sanders *et al.*, 'Victim Impact Statements: Don't Work, Can't Work' [2001] *Crim L.R.* 447, 449, n. 10.

> if you wish, to explain more generally how the crime has affected you. Projects[12] to test how this might be done are being put in place. Depending on the outcome of this evaluation, the aim is to implement the system nationwide.[13] (footnotes added)

In the event, the evaluations of both the One Stop Shop and Victim Statement pilot projects produced controversial results. In particular, Hoyle *et al.* surmised[14] that both initiatives had raised victims' expectations unrealistically, resulting in lower satisfaction levels than might otherwise have been expected. As far as the Victim Statement was concerned, although only one third of the sample opted to provide such a statement, 60% had done so for 'expressive'[15] reasons, whilst 55% were 'instrumental', in that victims wished to influence the outcome of the case. However, some 90% of victims apparently had no idea what had happened to their Victim Statement. The authors concluded that:

> Objectives were unclear and need to be identified. If they are mainly expressive, victims should not be led to expect that VSs will have any concrete effects. If primarily instrumental, there should be guidelines for taking them into account consistently and victims should be informed of the uses to which their VSs have been put.[16]

Not surprisingly, Hoyle *et al.* made the somewhat negative assessment that Victim Statements rarely, if ever, have any tangible influence on sentencing decisions, and suggested a switch of emphasis; the making of a Victim Statement should depend on the court's desire to learn more about the offence and its impact, rather than the victim's wish for the court to learn more about the circumstances of the offence.

The debate concerning the desirability and effect of victim impact statements has persisted. More recently, Ashworth[17] repeated his reservations, also suggesting that

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12. These introduced experimental victim impact statement schemes and so-called 'One Stop Shop' schemes (OSS) in which the police provided information to victims regarding the progress of their cases. For evaluation, *see* C. Hoyle *et al.*, *Evaluation of the 'One Stop Shop' and Victim Statement Pilot Projects*, Home Office Research, Development and Statistics Directorate Report (London 1998) and R. Morgan and A. Sanders 1999, *The uses to which Victim Statements are put*, Home Office Research, Development and Statistics Directorate Report (London 1999). For a summary of both reports *see*, C. Hoyle *et al.*, *The Victim's Charter – An Evaluation of Pilot Projects*, Home Office Research, Development and Statistics Directorate Research Findings No. 107 (London 1999).
13. Home Office, *The Victim's Charter: A Statement of Service Standards for Victims of Crime* (London 1996) 3. Fenwick suggested that this wording implied the prospect of a broadening of the right to explain victim impact and that full victim statements might be allowed to affect sentencing decisions directly: Fenwick H., 'Procedural "Rights" of Victims of Crime: Public or Private Ordering of the Criminal Justice Process', 60 *MLR* (1997) 317, 329.
14. *Op. cit.*, n. 10, Hoyle *et al.*, 1999, 4.
15. For example, 'to get it off my chest'.
16. *Op. cit.*, n. 12.
17. A. Ashworth, 'Victims' Rights, Defendants' Rights and Criminal Procedure', in Crawford and Goodey, *op. cit.*, n. 4, ch. 9; *see also*, A. Ashworth, 'Responsibilities, Rights and Restorative Justice', 42 *British Journal of Criminology* (2002) 578.

the use of victim impact statements in the context of adversarial criminal justice processes tends to increase sentencing severity; that they are a cynical political ploy used to appease victims' concerns whilst, in reality, such statements tend to corrupt substantive and procedural justice goals. Erez,[18] on the other hand, has consistently championed the use of victim impact statements, stressing particularly their cathartic and therapeutic aspects, and suggesting that they empower victims, helping them cope with victimization and the criminal justice experience.[19] Erez also suggests that the incorporation of victim statements tends to enhance proportionality rather than increase penal severity, as Ashworth maintains.

In a recent paper, Sanders *et al.*[20] take issue with Ashworth's assertion that substantive (i.e. service) rights are as effective as procedural rights in satisfying victims, but without the disadvantages of procedural rights. They assert that victim information schemes are ineffective in promoting victim satisfaction with the criminal justice process without interaction and discussion with victims. Sanders *et al.* continue by outlining what they regard as more effective means for advancing victim satisfaction than Erez's suggested improvements in court procedure and training.[21] More particularly, they maintain that, 'were victims helped to understand the process of VIS-appraisal and decision-making in general, and if these processes were fair, it is likely that dissatisfaction regarding unpalatable outcomes would be greatly reduced.'[22] Ultimately, Sanders *et al.* regard a reconceptualization of victim participation as essential, especially a recognition that such participation serves entirely different purposes for victims and the court process. In particular, they view participation along continental or restorative justice lines as inappropriate mechanisms for assisting the English courts, and suggest further specific procedural reforms are vital to ensure that victims have a 'genuinely participative system'.[23]

Notwithstanding, the then Home Secretary, Jack Straw, announced that the 'Victim

18. *See* particularly, E. Erez and P. Tontodonato, 'The Effect of Victim Participation in Sentencing on Sentence Outcome', 28 *Criminology* (1990) 451; E. Erez, 'Victim Participation in Sentencing: And the Debate Goes on', 3 *International Review of Victimology* (1994) 17; E. Erez *et al.*, *Victim Impact Statements in South Australia: An Evaluation* (Adelaide 1994); E. Erez and L. Roger, 'Crime Impact v. Victim Impact: Victim Impact Statements in South Australia', 6 *Criminology Australia* (1995) 3; L. Rogers and E. Erez, 'The Contextuality of Objectivity among Legal Professionals in South Australia' 27 *International Journal of the Sociology of Law* (1999) 267; E. Erez and L. Rogers, 'The Effects of Victim Impact Statements on Criminal Justice Outcomes and Processes: The Perspectives of Legal Professionals', 39 *British Journal of Criminology* (1999) 216; E. Erez, 'Who's Afraid of the Big Bad Victim? Victim Impact Statements as Victim Empowerment and Enhancement of Justice' [1999] *Crim L.R.* 545.
19. *Ibid.* [1999] *Crim L.R.*, 551. Erez concludes, 'Comparitivists encourage us to increase appropriate legal transplants and decrease inappropriate ones. There is sufficient evidence at this point to suggest that VIS (among other victim-oriented reforms) is an appropriate transplant', at 555.
20. *Op. cit.*, n. 11. *See also* A. Sanders, 'Victim Participation in an Exclusionary Criminal Justice System', in C. Hoyle and R. Young (eds.), *New Visions of Crime Control* (Oxford 2002).
21. *Ibid.*, 455.
22. *Ibid.*, 456. Sanders *et al.* consider briefly a number of alternative approaches which involve victims in a more meaningful way than do conventional OSS and VIS schemes; namely the prosecutor or *partie civile* approach adopted in some civil law systems, and participation in terms of restorative justice.
23. *Ibid.*, 458, and *infra.*

Personal Statement' scheme would be extended nationwide in 2001,[24] and that the right to make such a statement would be available to 'any individual victim of crime, and others including relatives and partners in homicide cases, parents of children who are victims and small businesses.' This was confirmed in the Government's major policy document, 'Criminal Justice: *The Way Ahead*',[25] which provided general guidelines for the operation of victim personal statements, including the following:

> From October 2001 we will be introducing victim personal statements. Victims (including bereaved relatives in homicide cases)[26] will be able to give a statement in their own words to the police saying how the crime has effected their lives. These statements then may be used throughout the criminal justice process. For example, … to register whether the victim wants to be kept informed of case progress (footnote added).[27]

It was also suggested that victim personal statements might be used to rebut false claims made by the defence in mitigation, or used by the prosecutor at the point of sentence to draw the court's attention to its compensatory powers.[28] Nevertheless, it is significant that neither the Auld Criminal Courts Review,[29] nor the fundamental review of the sentencing framework proposed in the Halliday Report,[30] made detailed recommendations on the issue of victim participation in the sentencing process. Auld acknowledged that improvements in service rights for victims were desirable, and that there should be a role for victims in the monitoring and enforcement of diversion schemes,[31] whilst the Halliday Review referred to the fact that 'victim statements, once available, would be considered as part of the judgement of seriousness';[32] exactly how this proposal would be operationalized was left to the imagination.

It was, therefore, against this background of controversy and confusion regarding the proper purpose and effectiveness of victim impact statements that the Victim Personal Statement Scheme was introduced on the 1 October 2001. The scheme

24. Home Office, 'Home Secretary announces National Victims Statements' (Home Office Press Release 147/2000).
25. Home Office, Criminal Justice: *The Way Ahead*, CM 5074 (London 2001).
26. As Brennan points out, the 2001 draft Victims' Charter specifically excludes large companies, businesses and corporations and witnesses of serious offences; *see*, C. Brennan, 'The Victim Personal Statement: Who is the Victim?' [2001], 4 Web JCLI 3.
27. *Op. cit.*, n. 25, para. 3.114.
28. *Ibid.,* para. 3.115.
29. *Review of the Criminal Courts of England and Wales by the Right Honourable Lord Justice Auld* (2001) available at http://www.criminal-courts-review.org.uk/.
30. Home Office, *Making Punishments Work: Report of a Review of the Sentencing Framework for England and Wales* (London 2001), para. 254. For commentary *see*, E. Baker and C.M.V. Clarkson, 'Making Punishments Work? An Evaluation of the Halliday Report on Sentencing in England and Wales', [2002] *Crim L.R.* 81.
31. *Op. cit.*, n. 29, ch. 10.
32. *Op. cit.*, n. 30, para. 2.33. The recent government White Paper contained no proposals to increase the participation of victims *directly* in the sentencing process; White Paper, *Justice for All*, (London: TSO, Cm 5563, 2002) ch. 2. Proposals to extend the range of restorative justice initiatives were contained in ch. 7, paras 7.31–7.37.

essentially enables victims to provide such a statement when making their initial witness statement, but it may be provided or updated at any time prior to sentence. Although the police are charged with the function of informing victims of the scheme, and facilitating the statement's completion, the decision whether or not to make a Victim Personal Statement is entirely one for the victim. Once presented with a Victim Personal Statement the court is expected to take it, and any evidence presented in support, into consideration prior to passing sentence.[33]

The Home Office Circular[34] addressed to those agencies charged with administering the scheme is also instructive for two main reasons:

(1) As if to compound its ambiguous status in sentence decision-making, paragraph 4 states that, 'it is important to remember that the scheme is *not* primarily a sentencing tool' (emphasis added). It goes on to emphasize that, whilst not a victim *impact* statement in the conventional sense, where a victim *personal* statement had been made, it *could* prove helpful to sentencers.
(2) Again, although stressing the policy objective of greater involvement for victims in the criminal justice process,[35] paragraph 12 cautions that the police should provide victims with a realistic appraisal of the potential for victim personal statements to affect sentencing decisions; more specifically, that judges and magistrates are unlikely to take victims' views on the appropriate punishment into account, although they will have regard to the effect the crime has had on the victim.

The correct approach for the court is elaborated in a Practice Direction issued by the Lord Chief Justice on the 16 October 2001 to coincide with the introduction of the scheme. Particularly significant are the following points:

1. The evidential injunction contained in paragraph 3(b). This provides: Except where inferences can properly be drawn from the nature of or circumstances surrounding the offence, a sentencer must not make assumptions unsupported by evidence about the effects of an offence on the victim.

2. The limitations placed upon victim participation in the determination of sentence contained in paragraph 3(c): The court must pass what it judges to be the appropriate sentence having regard to the circumstances of the offence and of the offender taking into account, *so far as the court considers it appropriate*, the consequences to the victim. The opinions of the victim or the victim's close relatives *as to what the sentence should be* are therefore not relevant, unlike the consequences of the offence on them. Victims should be advised of this. If despite the advice, opinions as to sentence are included in a statement, *the court should pay no attention to them*. (emphasis added).

3. The issue of transparency referred to in paragraph 3(d): The court should consider

33. Thus, the scheme is not primarily court driven as envisaged by the Home Office Special Conference in September 1999. For criticism, *see* Sanders *et al.*, *op. cit.*, n. 11, 457.
34. Home Office Circular 35/2001, *Victim Personal Statements*, 14 August 2001.
35. *Ibid.*, paras 7 and 8.

whether it is desirable in its sentencing remarks to refer to the evidence provided on behalf of the victim.

Certainly, as Sanders *et al.* commented on the earlier Home Office proposal for a dual approach,[36] the present scheme is no more participative than other victim statement schemes, and fails to deal with the problems of false expectations and victim dissatisfaction[37] previously identified, resulting in the continued 'marginalization' of the victim. The absence of any coherent rationale and strategic guidance is evidenced by the fact that the procedure remains essentially expressive, with limited instrumental or procedural impact for victims. In these circumstances, Ashworth's conclusions surely remain pertinent:

> In the context of a sentencing system whose primary aim is not restorative … there must be grave doubts about allowing a victim to voice an opinion as to sentence. It is unfair and wrong that an offender's sentence should depend on whether the victim is vindictive or forgiving: in principle, the sentence should be determined according to the normal effects of a given type of crime, without regard to the disposition of the particular victim. *If it is then said that allowing the victim to make a statement on sentence is not the same thing as allowing the victim to determine the sentence, one wonders about the point of the exercise.* Victims' expectations might be unfairly raised and then dashed if a court declines to follow the suggestions made, and the whole process might appear to victims as a cruel pretence. (emphasis added).

Arguably, the current English scheme represents the worst of both worlds; neither providing for *actual* participation in the sentencing outcome, nor guaranteeing that victim impact will have some measured and principled effect on sentence, in circumstances where full information and transparency are not mandatory requirements.

The preceding discussion demonstrates the predominantly limited focus of the contemporary legal and policy debate regarding victim participation in English sentencing. It is limited further in that it appears to ignore the influence and constructive import of restorative justice paradigms which, in addition to victim participation, concentrate (*inter alia*) on the humanitarian treatment of trial participants; elements of compensation, restitution, reparation and reintegration; and, diversionary and

36. *Op. cit.*, n. 11, 458.

37. A major contributory factor here is likely to be the lack of transparency. Victims may not know what effect, if any, their statement has had in the sentence decision-making process. This was highlighted as a major flaw in the evaluation of the Pilot Project; *op. cit.*, n. 12. Although new provisions imposing greater obligations on the courts to explain sentences and to give reasons are included in the Criminal Justice Bill (2002) they make no specific reference to the needs of victims.

mediatory processes.[38] However, as Edwards points out,[39] in reality the debate about victim participation in the English sentencing system appears trapped between advocates of proportionality and those promoting principles of restorative or reparative principles. This dichotomy is fundamental in that proportionalists generally regard victims as marginal because they threaten commensurability and the achievement of 'just deserts', whilst restorative advocates see victims as the central focus for sentencing, and instrumental in achieving wider reintegrative purposes.

As suggested earlier, the emphasis in this paper is to argue for a more radical conceptualization of participation under the aegis of integration, one which gives the victim a significant role in shaping the decision-making processes occuring throughout the trial (and pre-trial phases) that impact upon the eventual sentencing outcome. This is consistent with our view that it is necessary to address victim participation and its relationship to sentencing outcome as a phenomenon throughout the process of the trial; hence our focus on the victim as witness, prosecutor and informant, conceptions which, as we now illustrate, have much greater poignancy for the Italian than the English trial process.

3. ITALY

3.1. Trial and Verdict

In Italy, the structure of the criminal trial has the primary function of ascertaining the facts, not that of gaining 'knowledge' about the individual. In the minor trials that make up routine judicial events the cognitive basis for the judgement concerning the 'capacity to commit a crime' is generally based on two unique sources: the criminal

38. *See* further, J. Braithwaite, *Crime, Shame and Reintegration* (Cambridge 1989); J. Braithwaite and P. Petit, *Not Just Deserts: A Republican Theory of Criminal Justice* (Oxford 1990); H. Zehr, *Changing Lenses: A New Focus for Criminal Justice* (Pennsylvania 1990); L. Zedner, 'Reparation and Retribution: are they Reconcilable?', 57 *Modern Law Review* (1994) 228; J. Dignan and M. Cavadino, 'Towards a Framework for Conceptualising and Evaluating Models of Criminal Justice from a Victim's Perspective', 4 *International Review of Victimology* (1996) 153; J. Braithwaite, *Restorative Justice and Responsive Regulation* (Oxford 2002); Special Issue: Practice, Performance and Prospects for Restorative Justice, 42 *British Journal of Criminology* (2002).

Dignan suggests that the philosophy upon which restorative justice is based can best be summarized in terms of three principles:

1. Responsibility – to engage with offenders to try to bring home the consequences of their actions and an appreciation of the impact they have had on the victim(s) of their offences.
2. Restoration – to encourage and facilitate the provision of appropriate forms of reparation by offenders towards either their direct victims (provided they are agreeable) or the wider community.
3. Reintegration – to seek reconciliation between victim and offender where this can be achieved, and, even in cases where this is not possible, to strive to reintegrate both victims and offenders within the community as a whole following the commission of an offence.

See, J. Dignan, 'The Crime and Disorder Act and the Prospects for Restorative Justice', [1999] *Crim L.R.* 48. The influence of the restorative justice paradigm on victim participation and the development of victims' rights is considered in section 3 of this paper.

39. Edwards (2001), *op. cit.*, n. 7, 43.

record and the social and domestic conditions of the offender. In short, the judgement gives disproportionate weight to these *facts*, since it is feared that too much knowledge of the accused in a unitary sentencing model carries the risk of more severity in the punishment or different evaluation of the same circumstances.[40]

In general, the victim in the Italian penal system plays a very modest role.[41] This role is truly minimal regarding the phase that deals with decision-making on the length of punishment. The victim is not called upon, or urged, to offer information that could aid the judge in evaluating the effective consequences of the offence, and thus in deciding on the appropriate punishment. Conversely, as explained below, the victim does not have a real interest in spontaneously supplying such information.

The victim is often present at the criminal trial in the role of 'subject damaged by the offence' (in other words, having suffered from an offence in a way that can be dealt with through monetary compensation). In this role the victim participates in the criminal trial as the 'plaintiff',[42] and possesses a limited capacity to protect his interest regarding damages.[43] The plaintiff does not have an independent right to contest the accused's acquittal, and is most definitely excluded from the sentence bargaining procedure (and has no right to be heard regarding its admissibility).

Furthermore, the act of compensation through damages within the penal process arising from the offence is viewed as a possible source of 'falsification' of the procedural rite; a rite which is almost totally dominated by the *public* interest of punishing the guilty party and restoring social peace, not the *private* interest of compensating an individual for economic damages. Nevertheless, such compensation is provided for in the Italian legal system essentially for reasons of 'pragmatism', or 'procedural streamlining'; to avoid as much as possible the initiation of other civil trials for compensation after the criminal trial has concluded with a guilty verdict.

The victim (expressly referred to as the 'person injured by the offence' by Article 90 of the Code of Criminal Procedure (CCP)),[44] nevertheless possesses independent rights[45] within the trial procedure, even though these are rather limited. According to a strict interpretation of existing law, the rights of the person injured by an offence (as set out in Article 90 CCP) are basically threefold:

40. On the difficulties and risks in gaining knowledge of the personal history and social environment of the offender during the trial and the sentencing phase *see*, L. Monaco, *Prospettive dell'idea dello 'scopo' nella teoria della pena* (Napoli 1984).
41. *See*, G. Ponti (ed.), *Tutela della vittima e mediazione penale* (Milano 1995) 53 ff; for a general description of the topic, *see also*, M.M. Correra and D. Riponti, *La vittima nel sistema italiano della giustizia penale* (Padova 1990).
42. *See* Art. 74-82 CC. For a clear analysis of the role of the plaintiff *see* P. Gualtieri, 'Soggetto persona offesa e danneggiato dal reato: profili differenziali', [1995] *Riv. it. dir. proc. pen.* 107 ff.
43. On the French origins of the institution of the plaintiff ('parce qu'il ne peut demander que des interetes civils') *see*, F. Cordero, *Procedura penale* (Milano 2001) 265.
44. Pennisi A. Commentary on Art. 90 in A. Giarda and G. Spangher, *Codice di procedura penale commentato* (Milano 2001).
45. In the event of the victim's death, his rights are exercised by "close relatives" – that is, by the closest relatives or the spouse. Moreover, when this involves the interests of a group of individuals, the rights of the injured person can be upheld by organizations that represent collective interests.

(i) the right to request a judge to commit the defendant for trial (in the case of crimes susceptible to 'private prosecution') and associated rights (principally the right to be advised in the event of a request for dismissal by the public prosecutor; the right to oppose a specific settlement of the proceedings by payment of a fine);
(ii) the right to present defence briefs to the public prosecutor and judge;
(iii) the right to present elements of evidence.

It should be noted that the law does not in any way circumscribe the nature and aims of participation in the trial by the injured party; the latter can take part personally in the preliminary hearing and discussion, and is not required to appoint a defence attorney to exercise his legal rights (Article 101 CCP).

During the trial the victim provides his account almost exclusively through his testimony. The injured party is considered a witness, and as such is examined during the hearing.[46] Moreover, it is particularly important to point out that we are dealing here with a witness who is *substantially* different from other possible witnesses. The injured party is 'involved' in the criminal act – often dramatically so. Usually it is the victim who makes the accusation, or initiates the private prosecution.[47] Furthermore, it is often the victim who seeks compensation for damages through his attorney who, in his name, becomes the 'plaintiff'.

This type of witness is viewed with 'suspicion' by the judge; a suspicion which can be considered institutionalized since it derives from well-entrenched judicial practice in Italy. According to the jurisprudence of both the Supreme Court of Cassation and the lower Courts, the version of events provided by the witness/injured party must be *carefully* and *prudently* evaluated. The law asks that consideration be given to the fact that injured parties are never 'neutral' witnesses, since so far as the accused is concerned, they have a direct interest in compensation for damages or, in any event, a desire for revenge against an individual they consider to be an 'antagonist'. Thus, according to Italian law, the accounts of injured persons must above all else contain certain 'intrinsic' elements (completeness, coherence, congruity, sobriety) and, in addition be accompanied (if possible) by some form of 'independent verification' supporting their reliability. In the absence of elements that 'confirm' the reliability of the injured party, Italian judges are unlikely to reach a guilty verdict in respect of the accused.

Thus, the victims of an offence must exercise their (potential) role in the trial with absolute 'sobriety'. Too high a profile in the trial and the presentation of too much evidence may easily be perceived as a sign of 'animosity' or 'vindictiveness', and consequently act to the disadvantage of the victim. The victim normally recounts the events and begins the proceedings with an information, (possibly) provides further details or additional facts upon request by the public prosecutor during the hearing, and

46. Before being examined by the judge, he or she swears to tell the truth and must answer all the questions and not hold back any information.
47. On the importance of the victim with respect to the detection of crimes, *see* G. Forti, *L'immane concretezza* (Milano 2000) 261.

confirms them before the judge during the cross-examination, thereby running the intrinsic risk of being cross-examined by the defence attorney.

In the Italian criminal process, except where offences involve *collective* or *numerous* victims, it is rare to find instances where individual victims offer evidence and present defence briefs, especially for sentencing purposes. The injured party plays an active role only when undertaking litigation after suffering quantifiable injuries, which can therefore be compensated for by damages.[48] The injured party, through a defence attorney, presents the facts and circumstances regarding the events in question, in addition to describing the personality of the accused and presenting supporting evidence which can be explicitly evaluated by the judge during sentencing.

From the point of view of the substantive criminal law there are no particular difficulties in allowing a more active role for the victim, even during the sentencing phase. This is based on the fact that the victim possesses (potentially at least) knowledge that is appropriate for a better understanding of the personality of the offender, his/her reasons for committing the offence, and the extent of the negative consequences of the offence.[49] In fact, the intervention of the victim could allow for a widening of the basis for sentencing under Article 133 CC, which (as discussed below) indicates among its key parameters the 'seriousness of the harm, the reasons for committing the offence, and the offender's capacity to commit an offence'.

Nevertheless, procedural practice continues to discourage greater participation by victims for a series of reasons connected partly to the complexity of the judicial machinery, and partly to a culture tied to the exclusively public aspect of the offence.

As regards judicial reasons related to the complexity of the judicial machinery, it should be noted that, normally, partly because of their extremely heavy workload, judges rarely manage to carry out an inquiry aimed at gaining a deeper knowledge of the personality of the accused, and at reconstructing the real nature of the damage from the behaviour in question. It is perhaps this awareness that leads those injured by an offence to make limited use of the powers granted them under the law; namely, to direct their defence briefs to the judge and present evidence. It cannot be emphasized too strongly, that to take too active a role in the trial is a well-known risk for the victim, since it leads judges to suspect their 'hostility' and thus accord their testimony limited reliability. That is why injured parties adopt rigorous self-restraint in exercising their procedural rights. However, this is only an apparent paradox. To be more 'credible' when accusing the offender, victims must avoid being 'overexposed' during the trial by exercising their rights strategically in presenting accounts of the events and evidence. Italian procedural practice and forensic custom require that the victim limits himself to reporting the facts and providing the details the public prosecutor asks for; after that,

48. For a useful overview, *see* E. Strina and S. Bernasconi, *Persona offesa, parte civile* (Milano 2001) 228 ff.
49. Forti, *op. cit.*, n. 47, 252 ff (in part 260 f).

it is the latter who undertakes the search for evidence, looking unfavourably at too insistent a role on the part of the victim in this regard.[50]

3.2. Sentencing

In essence, the Italian Criminal Code's system of sanctions for ordinary justice is based on a neo-classical paradigm geared towards the 'legality' of the punishment. This produces a sentencing model with binding discretionary power (Article 133 CC)[51] and the obligation to justify the sentence (Article 132 CC).[52] This so-called unitary or 'mono-phase' sentencing model is distinguished by the fact that the judge giving the verdict also sets the punishment. It is also characterized by the notion of 'guided discretion', since it is based on a regulation that indicates 'narrative' guidelines for sentencing.[53] In particular, Article 132 CC, which establishes the discretionary power of the judge, must be exercised within the legal sentence ranges and requires justification of the sentence as regards the reconstruction of the facts and the quality and quantity of the sanction. In a nutshell, the Italian Criminal Code has adopted a partially flexible system.

Article 133 CC, on the other hand, provides the two macro-criteria (of a factual type) that must guide the judge in the exercise of his discretionary power. These are:

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50. Only when the offence is exceptional in nature and/or involves a large number of victims do we witness more or less 'structured' forms of aggregation among victims. In such cases victims maintain a stronger position and are able to raise the level of their 'demands for justice'. With regard to exceptionally serious events, such as airplane disasters, or those deriving from large-scale water or air pollution, victims have in fact organized themselves and appointed common defence teams, and have received the support of a large segment of public opinion. In these (and only these) situations victims, by presenting a common front, have drawn up complex defence strategies, indicating specific aspects for investigation and offering evidence; more particularly, clear factors which define the damaging consequences of the offence in order to arrive at appropriate sanctions and compensate injured parties.

    In some cases organized groups of victims have been responsible for important changes in the law. Recently, in an important case of air pollution by a chemical company, the Supreme Court of Cassation accepted the demand by the numerous victims for compensation and determined compensation for the stress caused to the inhabitants of a vast polluted area; particularly stress arising from the worry caused to the inhabitants by the need to monitor their health closely in the years following the event. In other cases, thanks to a general consensus among public opinion, victim groups have even obtained ad hoc legislative changes (such as ope legis extensions of the time limits for inquiries which were soon to expire). *See* M. Tantalo and A. Colafiglio, 'La "nuova" vittima collettiva. Riflessioni su di un paradosso risarcitorio', in Ponti, *op. cit.*, n. 41, 217.
51. On the discretionary power of the judge the 'classical' reference to F. Bricola, *La discrezionalità nel diritto penale* (Milano 1965) cannot be omitted.
52. The general features of this model, before the period of reform ushered in by Law 335/1975, are the following: a mandatory minimum and maximum punishment sentence range; a narrow range of punishments; no possibility to negotiate the sentence; limited recourse to benefits in the executionary phase of punishment. *See* M. Romano and G. Grasso, *Commentario sistematico del codice penale* (Milano 1990) (*sub* Art. 133).
53. The sentence can be appealed on its merits and with regard to punishment before an appeals judge, with subsequent recourse to the Court of Cassation, for reasons concerning the allegedly incorrect application of the criminal laws or rules of procedure.

(1) the *seriousness of the offence* (which, in turn, is determined by a series of objective and subjective factors), and
(2) the *offender's capacity to commit a crime* (which is determined by a series of sub-factors that imply the formulation of a prognostic judgement regarding the future behaviour of the convicted person).

A basic problem with Italian sentencing is the Italian code's silence on the aims of punishment.[54] However, Dolcini believes that a 'clear definition of the criteria for the aims of punishment is not sufficient, … , to guarantee rationality with regard to sentencing; however, it is true that once the aims of the punishment are clearly defined we can determine what facts are relevant for determining the punishment in a particular case, and how they may be evaluated.'[55]

Article 133 CC does not seem to have satisfactorily resolved the problem of the proportionality of the punishment. The requirement for 'factual criteria', which is too analytical, has not been supplemented by any indications regarding the *aims* for the criminal sanction. This lack of indicators set by the legislator regarding the aims of sentencing has meant that the discretionary power of the judge is without direction.[56]

In practice the Criminal Code's silence regarding the aim of punishment, and the fact that judges do not provide adequate justifications for sentence as far as proportionality is concerned, have led to a considerable lack of control over the exercise of discretionary power and more or less indiscernible forms of disparity of treatment. In theory, the victim's contribution to the proceedings can and should be twofold; providing information of the facts surrounding the offence, and providing elements for evaluation for the purpose of imposing sanctions. Among the latter (those elements which the judge must take into consideration under Article 133 CC in order to determine the punishment) are those which the victim is either exclusively or better placed to point out:

- *seriousness of the harm or the danger caused by the offence* (this parameter relates to the 'seriousness of the offence' clause under Article 133, section 1, CC);
- *reasons for committing a crime and the character of the offender* (this parameter belongs to the 'capacity of the accused to commit a crime' clause under Article 133, section 2, CC).

Nevertheless, common practice is for the victim to remain in the background of judicial events. At least as regards ordinary justice for adults, it is difficult to give 'visibility' to the victim, as the sentencing process forms part of a unitary trial, characterized (in particular) by the processual and juridical cultural irrelevance of such mecha-

54. But *see*, *infra*, n. 107, in general *see*, E. Dolcini, *La commisurazione della pena* (Padova 1979) 34. Dolcini remarks that 'for any legal institution structured along discretionary lines the main criterion for managing the relative powers connected to it is the function assigned to the institute by the regulations. With regard to sentencing, this means that this criterion must be drawn from the aim of the punishment'.
55. *Ibid.*, 34.
56. Indications on the sentencing goals come from the jurisprudence of the Court of Cassation. *See* G. Mannozzi, *Razionalità e 'giustizia' nella commisurazione della pena* (Padova 1996) 3 ff.

nisms as the VIS, or, the preparation of pre-sentence reports by the social services.[57] In short, the structure of the Italian penal process and the sentencing phase (both characterized by considerable safeguards for the accused against discriminatory criminal practices on the part of the state), together with a well-entrenched 'suspicion', or in any event 'distrust', towards the victim by those involved in the legal process, tends to marginalize the victim during the trial.

4. NEGOTIATED JUSTICE

4.1. England

In England, a clear distinction is drawn between charge, fact and plea bargaining, although all three are generally described as forms of 'plea bargaining'. Charge bargains occur where the prosecution agrees to drop a more serious charge in return for a guilty plea to a lesser included offence, or in circumstances where the defendant faces two or more charges and intends pleading not guilty to all of them, the prosecution agrees to drop one or two charges provided the defendant pleads guilty to one of the charges. In fact, a bargain occurs where the prosecution agrees to present a particular (usually less serious) version of the facts in return for a guilty plea. Technically, a plea bargain occurs only where there is a change of plea from not-guilty to guilty but no charge or fact bargain is involved. In such circumstances the 'bargain' relates to the defendant exchanging the right to trial and possible acquittal for the certainty of a lower sentence than he would have otherwise received upon conviction (i.e. a sentence discount). There is no 'bargain' in the sense of negotiation and agreement on sentence with the judge.

The concept of the sentence discount in return for a guilty plea has long provoked controversy between due process and crime control advocates alike. One fundamental due process objection to sentence discounts is that they undermine the presumption of innocence and the necessity for the prosecution to prove its case. A further objection lies in what may be termed the so-called 'trial penalty', or the perception that an unjustifiable difference in sentence severity exists between the sentence which follows a guilty plea and that which would be imposed if the offender were to plead not guilty and be convicted following a trial. The legal position appears unequivocal in that it has been stated on several occasions by the Court of Appeal (Criminal Division) that, whilst a guilty plea may be treated as a mitigating factor indicating remorse justifying a sentence below the level appropriate to the offence, a person exercising his right to plead not guilty should not be penalized by the imposition of a sentence above the ceiling fixed by the gravity of the offence.[58]

A formalized system of plea-bargaining or sentencing 'canvass' proposed by the 1993 Royal Commission on Criminal Justice met with widespread judicial hostility,[59]

57. The latter are used during the enforcement phase of the punishment, supervised by a judge – the so-called 'Supervisory Judge' – who is different from the sentencing judge.
58. *See* further, D.A. Thomas, *Principles of Sentencing* (London 1979) 50.
59. *See* A. Ashworth, *The Criminal Process: An Evaluative Study* (Oxford 1994) ch. 9.

principally on the basis that it would have effectively reversed the guidance delivered by Lord Parker C.J. in *Turner*[60] to the effect that a judge should (with one limited exception) never indicate the sentence which he is minded to impose. Further, the Royal Commission also developed a proposal for a three-point graduated sentence discount to reflect that by pleading guilty the defendant had thereby avoided a full trial of the issue.

It came as no particular surprise, therefore, when in February 1994 the government proposed a statutory system of sentencing discounts for guilty pleas based on the general principle that the earlier a defendant pleads guilty the greater the reduction in the sentence.[61] The new sentence discount procedure was roundly condemned by Thomas[62] who described it as 'a clumsy and partial attempt to turn (the general principles governing discounts for pleas) into statute' and unnecessarily increasing the criteria by which a sentence must be justified. Notwithstanding, the probable implementation of the Auld Report's recommendation to provide a form of encouragement to guilty pleas by advance indication of sentence[63] is likely to prove controversial. The introduction of a statutory system will inevitably require a publicly well-defined and consistently applied scale of minimum discounts according to the stage in the proceedings when the plea is offered.

Although the Code for Crown Prosecutors contains standards for the control of charge bargains the possibility continues to exist for defendants to receive a double discount by pleading guilty to a lesser offence resulting in a lower sentence, and receiving a further discount for pleading guilty. As Ashworth points out,[64] this places enormous pressure on defendants to plead guilty to a lesser charge particularly where

60. [1970] 2 QB 321.
61. The resultant S. 48 of the Criminal Justice and Public Order Act 1994 came into force on 3 February 1995 and provided:
    (1) In determining what sentence to pass on an offender who has pleaded guilty to an offence in proceedings before that or another court a court shall take into account:
        (a) the stage in the proceedings for the offence at which the offender indicated his intention to plead guilty, and
        (b) the circumstances in which this indication was given
    If, as a result of taking into account any matter referred to in subsection (1) above, the court imposes a punishment on the offender which is less severe than the punishment it would otherwise have imposed, it shall state in open court that it has done so.
    This provision was consolidated as S. 152 of the Powers of Criminal Courts (Sentencing) Act (2000). It is repealed and replaced by Clauses 137(1) and 167(2)(d) of the Criminal Justice Act Bill 2002.
62. D.A. Thomas, 'Viewpoint', 2 *Sentencing News* (1994) 12.
63. Auld Report, *Review of the Criminal Courts* (London: Lord Chancellor's Department, September 2001) ch. 10, paras 91–114. Such a step was proposed in the White Paper, *op. cit.*, n. 32, paras 4.42 and 4.43. where there was a commitment to introduce a clearer tariff of sentence discount backed up by arrangements whereby defendants could seek advance indication of the sentence they would get if they pleaded guilty, although (contrary to Auld's recommendation) not what the sentence might be were a contested trial to result in a guilty verdict. This significant omission would have contravened the principles of transparency and, arguably, increased the pressure on defendants to plead guilty given greater awareness of the available discounts that would result. Alternatively, it may be argued that the judge should not be forced to commit him/herself on what will be the sentence following the outcome of a full hearing on a plea of not guilty. Regrettably, these proposals failed to materialize except in modified form before the Magistrates' Court; *see* Schedule 3, Criminal Justice Bill 2002.
64. A. Ashworth, *The Criminal Process: An Evaluative Study*, (Oxford 1998) 275.

defence counsel advise the likelihood of a non-custodial sentence rather than the custodial sentence that might result from a trial and conviction. In such circumstances there is an argument for going far beyond any proposed reforms and entrusting the judiciary with the task of reviewing all types of plea agreement (including cases where guilty pleas are entered without any kind of negotiation) thus effectively abandoning the *Turner* principle. Since, as McConville argues,[65] administrative and actuarial considerations, rather than remorse, now form the basis for the discount; the legitimacy of the argument that plea bargaining undermines adversarial principles is ultimately irrelevant since the question has now simply become one of deciding where the control mechanism should be located.

4.2. Italy

In Italy, the sentencing model for ordinary justice, based on the complex and detailed system of aggravating and mitigating circumstances contained in Articles 132 and 133 CC, has two 'internal' variants:

(1) The first derives from the application of different procedural rites: summary trial (Article 442 CCP)[66] and sentence bargaining (Article 444 CCP).[67]
(2) The second derives from the complex system governing the enforcement of prison sentences, which cannot be suspended or replaced by non-custodial measures whether or not detention is ordered as a result of adversary trial, sentence negotiation or summary trial.

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65. M. McConville, 'Plea Bargaining: Ethics and Politics', 25 *Journal of Law and Society* (1998) 562, 576.
66. Summary trial is general in nature, and can be applied to all types of offences. If the accused, usually during the preliminary hearing, seeks to avail himself of summary trial, and the judge feels in a position to decide based on the state of events, the punishment imposed in the event of a conviction is reduced by *exactly* one-third (for example, a punishment of six years imprisonment is reduced to four years as a reward for choosing the abbreviated proceeding. *See* F. Cordero, *op. cit.*, n. 43, 1017 ff. For a synethesis of judicial pronouncements on summary trial, *see* G. Conso and V. Grevi, *Commentario al nuovo codice di procedura penale*, (Padova 1977) sub Art. 444.
67. Contrary to summary trial, sentence bargaining is not general in nature. We must remember in this regard that, as the Italian system is characterized by the principle of mandatory prosecution, bargaining is possible only as regards the degree of punishment (so-called *sentence bargaining*) and not the charge (*charge bargaining*). Secondly, the parties involved can agree on the extent of the punishment only if the latter, after having taking into consideration all the circumstances and the reduction provided for by this alternative rite, is only up to five years imprisonment. We must also consider that the reduction in the punishment permitted under bargaining is not one-third exactly but *up to* one-third (as the summary trial). *See* Cordero, *op. cit.*, n. 43, 1004; Conso and Grevi, *ibid.*, *sub* Art. 444. *See also* generally on this topic, D. Vigoni, *L'applicazione della pena su richiesta delle parti* (Milano 2002); R. Peroni, *La sentenza di patteggiamento* (Padova 1999). The term of five years was introduced by a recent Criminal Justice Act (12 June 1993, n. 134 – "Modifiche al codice di procedura penale in materia di applicazione della pena su richiesta delle parti"). Before Act No. 1993/134, Art. 444 CCP established a term up to *two* years. Henceforth sentence bargaining is possible for almost every crime (even the most serious ones). For an overview of the Act No. 1993/134 *see* F. Peroni (eds.), *Patteggiamento 'allargato' e giustizia penale* (Torino forthcoming).

As regards the first variant, the fact that the main aims of punishment are concerned with procedural streamlining and the organizational functioning of justice provision (shortening trials and simplifying the gathering of evidence), rather than prevention or retribution, introduces elements in opposition to the main principles of sentencing as regulated by the CC. Firstly, the sentencing choice is based on the abstract concept of an offence (which also contributes to the problem of false sentence discounts). Moreover, the decision of the judge, which is based on 'the state of the facts', does not permit complete information to be obtained regarding the objective and subjective characteristics of the harm suffered by the victim. Secondly, the punishment refers to the past without any evaluation of the criminal prognosis for the convicted person. The subjective characteristics of the offender, which normally only emerge to a limited extent even during the adversarial trial process, are in this case completely neglected. Finally, the victim has no say in the matter of sentencing.

As far as the second variant is concerned, the enforcement of punishment in Italy is characterized by the possibility of making significant changes to the *quantity* and *quality* of the sanction.[68] During this phase (which is always jurisdictional, since it is presided over by a specialized Supervisory Judge), victims play no significant role. The recent emergence of restorative justice has, nevertheless, allowed for a reinterpretation of certain elements of the justice system in such a way (in particular, through the possibility of taking reparative behaviour into consideration, or entering into mediation) that the victim's voice can be heard by the court that decides on modifications to the punishment during the enforcement phase.[69]

5. JUVENILE JUSTICE

5.1. England

In England, the ambivalence in sentencing rationales has been compounded by managerialist and consumerist criminal justice policies and legislative initiatives.[70] Nevertheless, the recent application of restorative justice paradigms in the sphere of

68. For a complete analysis of the 'enforcement phase' of punishment, *see* G. Canepa and S. Merlo, *Manuale di diritto penitenziario* (Milano 2002).

69. On the possibilities of victim participation in the enforcement phase of punishment *see* the survey carried out by L. Monteverde, 'Mediazione e riparazione dopo il giudizio: l'esperienza della magistratura di sorveglianza', [1999] *Minori e Giustizia* 86 ff. (which includes an overview of the praxis of the Italian Courts for the enforcement of punishment).

70. *See* further, N. Lacey, 'Government as Manager, Citizen and Consumer: the case of the Criminal Justice Act 1991', 57 *MLR* (1994) 534; R. Henham, 'Anglo-American Approaches to Cumulative Sentencing and the Implications for UK Sentencing Policy', 36 *Howard Journal of Criminal Justice* (1997) 261. It is noteworthy that Clause 139(2) of the Criminal Justice Bill 2002 contains another example of Government 're-packaging' in the guise of a 'new' 'youth community order' that may refer to a curfew order, exclusion order, attendance centre order, supervision order or action plan order. Despite the fact that reparation is included as one of the statutory purposes of sentencing (Clause 135(1)(e)) the suitability of the proposed sentence for the offender must still be balanced against the restrictions on liberty that are commensurate with principles of just deserts and proportionality (Clause 140).

youth justice is evident through the introduction of reparation orders for young offenders in the Crime and Disorder Act 1998, and the establishment of youth offender panels in the Youth Justice and Criminal Evidence Act 1999.[71] The Government White Paper *No More Excuses*[72] suggested that reparation would be a 'valuable way of making young people face the consequences of their actions and see the harm they have caused.'[73] The reparation order[74] itself must be considered in all cases before the Youth Court, and reasons must be given if the court does not make such an order. Reparation is defined as referring to something other than the payment of compensation,[75] which may be required in respect of a named individual(s), or to the community at large. Such an order is not available where the court proposes to pass a custodial sentence on the offender, or to make a community service order (now community punishment order), combination order (now community punishment and rehabilitation order), supervision order, action plan order or a referral order.[76] A reparation order cannot be made unless the court has first obtained and considered a written report by a probation officer, social worker or youth offending team member indicating the type of work that might be suitable for the offender, the victim(s) attitude to what the order proposes, and that arrangements for implementing the order exist in the area proposed.[77]

Unfortunately, the reparation order provisions suffer from a major conceptual flaw in that S74(2) states that the requirements specified in such an order 'shall be such as in the opinion of the court are commensurate with the seriousness of the offence and one or more offences associated with it.' As Wasik opines,[78] this government's desire to fit the reparation order within the proportionality rationale of the 1991 Criminal Justice Act's just deserts sentencing framework forces it to comply with desert constraints. Consequently, the emphasis is on proportionality between offender and offender, and not between offender and victim. Wasik also contends that allowing victims to influence the form that reparation should take may lead to inconsistency and injustice.[79] Ashworth also cautions that the overall orientation of the government's reforms to the new youth justice system introduced in the 1998 Crime and Disorder Act appear inconsistent with a general crime reduction strategy whose focus is on the prevention of offending by the offender,[80] as well as being incompatible

71. *See*, Dignan, *op. cit.*, n. 38; M. Wasik, 'Reparation: sentencing and the victim', [1999] *Crim L.R.* 470; C. Pollard, 'Victims and the Criminal Justice System: A New Vision', [2000] *Crim L.R.* 5; A. Morris and L. Gelsthorpe, 'Something Old, Something Borrowed, Something Blue, but Something New? A comment on the prospects for restorative justice under the Crime and Disorder Act 1998', [2000] *Crim L.R.* 18, and generally, A. Ashworth, *Sentencing and Criminal Justice* (London 2000) 325.
72. Home Office, *No More Excuses – A New Approach to Tackling Youth Crime in England and Wales* (London: HMSO, Cm 3809, 1997).
73. *Ibid.*, para. 4.14.
74. Introduced by SS67 and 68 Crime and Disorder Act 1998 (now S73 PCCSA).
75. S73(3) PCCSA.
76. S73(4) PCCSA.
77. SS73(5) and (6) PCCSA.
78. *Op. cit.*, n. 71, 478.
79. *Ibid.*, 479.
80. *Op. cit.*, n. 71, 326.

with other previously stated government rationales[81] that refer to general prevention, deterrence and punishment as aims of the youth justice system.

The referral order introduced by S1 of the Youth Justice and Criminal Evidence Act 1999[82] may be made for a period of between three and twelve months, and requires the local youth offending team to establish a youth offender panel for the offender. The youth offender panel is then mandated to try and 'seek to reach agreement with the offender on a programme of behaviour the aim (or principal aim) of which is the prevention of re-offending by the offender.'[83] The programme may include the payment of financial compensation to the victim, attendance at mediation sessions, the performance of unpaid work or service in the community, and participation in various specified activities.[84] Once a written record of the agreed programme has been signed it becomes known as a 'youth offender contract'.[85] Failure to agree results in the case being referred back to the appropriate court by the panel[86] for disposal in the normal way. Again, advocates of proportionality such as Ashworth[87] have criticized the coercive aspects of these provisions based (as they are) on expert diagnosis and discretion, their failure to display any commitment to the overall proportionality rationale of the sentencing framework, and the apparent difficulty in challenging the terms of a youth offender contract before a court.

Finally, the same criticisms have been levied at the action plan order, the most recent youth justice measure providing for the possibility of including victim-oriented conditions, introduced by SS69 to 70 of the 1998 Crime and Disorder Act.[88] This order involves supervision for three months during which time the offender may be required to engage in one or more of the sorts of activities or actions specified for other orders, including making reparation to an individual(s) or the community at large.[89] Although the court must be satisfied that the making of the order is desirable 'in the interests of securing the rehabilitation of the offender, or preventing the commission by him of further offences', it is difficult to situate the rationale for this provision in terms of proportionality (cardinal or ordinal).

The limited introduction of reparative and restorative justice principles into the youth justice system has been largely cosmetic due to the failure to rationalize the conflicting objectives claimed for the relevant provisions, and the potential human rights challenges emanating from the excessive discretionary and coercive aspects of their operation pose additional concerns.[90] The failure to engage all the key participants will, therefore, ensure the continued marginalization of victims in the sentencing process for

81. *See* further, J. Fionda, 'New Labour, Old Hat: Youth Justice and the Crime and Disorder Act 1998', [1999] *Crim L.R.* 36.
82. Now S16 PCCSA.
83. S23(1) PCCSA.
84. S23(2) PCCSA.
85. S23(6) PCCSA.
86. S25(2)(b) PCCSA.
87. *See also* C. Ball, 'The Youth Justice and Criminal Evidence Act 1999 Part I: A significant move towards restorative justice, or a recipe for unintended consequences', [2000] *Crim L.R.* 211, 213.
88. *See* now, SS69-72 PCCSA.
89. S70 PCCSA.
90. Ashworth, *op. cit.*, n. 71, 332.

young offenders.[91] Furthermore, the prospects for developing a new sentencing framework for both adult and young offenders which invests more in measures involving reparation and restorative justice appear to depend more on their evaluation in terms of crime prevention than with increased public and victim satisfaction.[92] These issues are addressed in a later section of this paper.

5.2. Italy

In criminal proceedings involving minors (regulated by a law in force since 1989; Act No. 488/1988)[93] the diminished role of the victim described above is even more evident. In fact, the Italian process represents an extreme in this regard, since this type of trial does not even allow a civil action aimed at compensation for damages (Article 10, Act No. 488/1988).[94] Article 1, Act. No. 488/1988 provides that, in principle, the general rules of criminal procedure for adults are to be applied to minors.[95] Nevertheless, the rules for adult trials must be applied in a way that is appropriate to the 'educational needs' of the minor, save for a series of exceptions. The prohibition on civil action in criminal proceedings is one of these exceptions.

It is easy to understand why the victim has no interest in actively participating in a trial where he/she is totally excluded from seeking compensation for damages. The justification for this set of norms is undoubtedly related to what are perceived as the primary educational needs of the minor; that is, to the inappropriateness of involving minors in any way in civil disputes arising from the offence.

As closer examination reveals, the justification for this norm confirms what was described above concerning the cultural context of the criminal justice system for adults. It has already been emphasized that part of the Italian juridical tradition views the active participation of the victim in criminal proceedings quite disfavourably, since the victim is often seen as 'hostile' or moved by a 'vindictive spirit'. This, it is feared, can hinder an impassioned ascertainment of the facts and, in consequence, the decision regarding the guilt or innocence of the accused or the amount of punishment. Thus, the drastic choice to exclude a party (judged *a priori* to be *factious*) from juvenile criminal proceedings could negatively condition the course of a trial which, although aimed primarily at punishing the juvenile who is guilty of an offence, may also, more importantly, affect the tendency to re-educate him.

91. Morris and Gelsthorpe, *op. cit.*, n. 71, 29. For a more optimistic assessment, *see* Dignan, *op. cit.*, n. 38.
92. *Op. cit.*, n. 30, para. 1.70 and Appendix 6.
93. *See* S. Larizza, *Criminalità minorile e ruolo residuale del diritto penale* (Pavia 1992).
94. *See* generally, A.C. Moro, *Manuale di diritto penale minorile* (Bologna 2000).
95. A. Ceretti, *Come pensa il Tribunale per i minorenni* (Milano 1996).

6. DISTINCTIVE ITALIAN PARADIGMS

6.1. The Role of the Justice of the Peace

On 28 August 2000, Law No. 274 introduced the penal jurisdiction of the Justice of the Peace, which covers several minor offences under the CC or special penal laws.[96] However, the Justice of the Peace's jurisdiction only became operative on 2 January 2002. The institution of the Justice of the Peace creates a new sanctioning 'microcosm' (new sanctions and alternative mechanisms for resolving conflicts) that functions independently of the ordinary criminal justice system.[97] Structurally, it is a mixed model that combines *retributive* and *reparative* aspects. The basic objectives of this reform are lightening the workload of the system of ordinary justice, minimizing recourse to criminal sanctions, and favouring reparative conduct and reconciliation between the parties to a dispute.[98] When an attempt at reconciliation fails, the Justice of the Peace can apply the following sanctions: fines, home detention, community service, and weekend detention.

As regards sentencing, this appears to be left to the complete discretion of the judge, since the law, by referring to Article 133, section 2, CC, mentions exclusively the general need to apply interdictory sanctions (for example, forbidding the offender from frequenting certain places).[99] The sentencing phase of the Justice of the Peace process does not recognize the victim as having any right to intervene. On the other hand, the victim plays a very important role in the alternative definition of the proceedings: 'acquittal due to insubstantiation of the facts' (Article 34, Act No. 274/2000), and the 'extinction of the offence as a consequence of reparatory conduct' (Article 35 Act No. 274/2000).[100]

In such cases the victim must be heard and can exercise an autonomous power of veto. Based on his statements, the judge can decide not to extinguish the offence (because it is predominantly unsubstantiated, or due to reparative conduct by the offender) and proceed along the lines of the specific criminal procedure. Thus the victim, even though he may not be able to influence the severity of the sanction, can

96. The main references on this topic are; E. Aprile, *La competenza penale del giudice di pace* (Milano 2001); P. Bronzo (ed.), *La competenza penale del giudice di pace: D. Lgs. 28 agosto 2000, n. 274* (Milano 2001); V. Zagrebelsky and V. Pacileo, *Il diritto penale per i giudici di pace* (Milano 2001). On the procedural aspects of the penal jurisdiction of the justice of the peace, *see* in particular G. Giostra and G. Illuminati, *Il giudice di pace nella giurisdizione penale* (Torino 2001); A. Nappi, *La procedura penale per il giudice di pace* (Milano 2001).

97. *See* D. Brunelli, 'Il congedo dalla pena detentiva nel microsistema integrato del diritto penale "mite"', in A. Scalfati (ed.), *Il giudice di pace. Un nuovo modello di giustizia penale* (Padova 2001) 401 ff.

98. *See* Art. 2, Act n. 274/2000.

99. Even the justification for the sentence is required in an abbreviated form, because the sanctions applicable entail a limited amount of suffering.

100. *See* A. Presutti, 'Attori e strumenti della giurisdizione conciliativa: il ruolo del giudice e della persona offesa', in L. Picotti and G. Spangher, *Verso una giustizia penale 'conciliativa'* (Milano 2002) 181 ff.

nevertheless initiate legal proceedings[101] that lead to the imposition of one of the sanctions at the disposal of the Justice of the Peace.

6.2. Responsibility and Sanctions for Corporations[102]

More recently, Italian law (Act No. 231/2001) introduced sanctions relating to the administrative responsibility of corporations. This reform, in addition to a specific model of responsibility, also provides for an autonomous system of pecuniary and inderdictory[103] sanctions. In practice, in the event of an offence committed by the administrators, both the offenders and the corporations that have benefited from the offence are punished.[104]

On the basis of Article 11, Act No. 231/2001 the fine is determined by the judge according to a day-fine system, taking into account the following parameters:

(1) the seriousness of the offence;
(2) the corporation's degree of responsibility;
(3) the actions already undertaken to eliminate or attenuate the consequences of the offence and prevent the commission of other illegal actions.

This sentencing paradigm adopts a strictly proportional parameter linked to the objective gravity of the actions and the degree of responsibility of the offender, and a parameter aimed at prevention: the evaluation of the conduct subsequent to the corporation's offence. On the basis of Article 12, Act No. 231/2001 the fine can be reduced when the damage to the victim's assets due to the offence is 'especially tenuous', or unsubstantiated.

Also significant is Article 17, which emphasizes in particular the reparative conduct of the corporation's representatives. Given the pecuniary sanction, the judge does not apply the (additional) 'interdictory' sanctions (for example, revocation of administrative concessions, or the limiting of the capacity to conclude contracts) if, before the start of the public trial, the corporation completely compensates the victim for the damage, or has set in motion the compensation process. In this specific case the reparative conduct following the offence not only influences the amount of the sanction but its applicability as well. Thus, in addition to the traditional sentencing parameters the relevant law now adds a new sentencing parameter linked to an evaluation of the reparative behaviour on the part of the corporation's representatives.

Surprisingly, there is no mention in this legal context of the victims of the offence, who, especially as regards corporate crime, are often 'widespread' and at times unaware

101. On the procedure for initiating legal proceedings by the victim, *see* A. Presutti, *ibid.*, n. 100, 188–202.
102. For English language analysis *see*, J. Gobert and E. Mugnai, 'Coping with Corporate Criminality – Some Lessons from Italy', [2002] *Crim L.R.* 619.
103. C. Piergallini, 'Sistema sanzionatorio e reati previsti dal codice penale', [2001] *Diritto penale e processo* 1353 f.
104. This reform marks a fundamental change in the repression of corporate crime, since previously the Italian legal system was inspired by the ancient principle that '*societas delinquere non potest*'.

or scarcely aware of their own victimization. As noted, these victims have limited room for action with respect to the general model of criminal proceedings (ordinary justice). In fact, the procedure for ascertaining the administrative responsibility of corporations is included in ordinary criminal proceedings; the criminal judge who passes a judgement on the offences attributed to the corporation's representatives also evaluates the administrative responsibility of the corporation. Thus, the same judge imposes both the criminal sanctions on the offender and the administrative sanctions on the corporation.

The marginal role reserved for victims can also be criticized in this sub-system of criminal justice. The victim's contribution by means of a VIS during the sentencing phase could turn out to be highly useful, since it would help to define the basis for the sentencing judgement with regard to two fundamental parameters; namely, the gravity of the damage and the congruousness of the reparative behaviour. Thus, with regard to offences committed by corporations, there is no reason why the victims (groups of individuals, consumer associations, creditors of companies or banks) should not be granted a more active role in determining the extent of the sanctions.

7. COMPARATIVE ANALYSIS

Having described the nature and extent of victim participation as it relates to sentencing in English and Italian criminal trial process in jurisdictional context, we now propose to reflect on areas of synthesis and difference and consider the implications for policy and the prospects for integrated sentencing and restorative justice.

7.1. Sentencing Models and Structures

The rationality for the neo-classical model of sentencing mentioned earlier is not one derived from a conceptualization of law as a construct isolated from its social environment. On the contrary, it is a theoretical model based on the liberal theory of criminal law which espouses a fundamental link between retributivism as a rational sentencing philosophy and its intrinsic moral legitimacy.[105] In its purest form, this model limits (*inter alia*) the severity of punishment through the principle of proportionality, demands equality of treatment and advocates clarity and certainty in the administration of justice so that there is no place for judicial interpretation and judicial discretion.[106]

It is significant that this vision of rationality continues to inform significant areas of Italian sentencing procedure and practice, in particular the Criminal Code of 1930 (CC) upon which Italy's current sentencing model for adults is still based. However, this structural implementation of liberal theory has been achieved through the adoption

105. *See* further, M. Moore, 'Justifying Retributivism', 27 [1993] *Israel Law Review* 15.
106. *See* further, L. Radzinowicz, *Ideology and Crime* (London 1966) ch. 1.

of a *partially flexible* rather than a *rigid system*. Elsewhere, Mannozzi[107] explains the reasons why, within this apparently flexible system, the exercise of judicial discretion in Italian sentencing remains illusory and opaque in reality:

> … the transparent exercise of judicial discretion has been made arduous by the fact that the Italian Criminal Code sets very severe grades of mandatory punishment … In more recent times judges have generally applied the minimum sentence, thus foregoing, in practice, their discretionary power. This widespread lowering of sentencing rates to their minimum by judges (made feasible by the adroit use of mitigating circumstances), has ended up by making the provision for the justification for the sentence superfluous. This is because each time the sentence is close to the mandatory minimum, the judge avoids enunciating the reasons that led him to apply the punishment in the first place.

From these comments it is evident that, despite the explicit nature of the Constitutional provision[108] providing that rehabilitation should be the main aim of punishment, and the Constitutional Court's continued emphasis on the so-called 'polyfunctional theory of punishment', there remains general obfuscation and irrationality in the articulation and implementation of the purposes for punishment.

Superficially, the English retributive-based sentencing model has similar roots in the liberalism of the Enlightenment,[109] but the nature and development of constitutional convention[110] and the absence of any Constitutional Court (or other effective regulatory mechanisms) have all contributed towards a continual re-enforcement of the centrality of the judicial role and judicial discretion in trial proceedings as the key variable in the development of sentencing jurisprudence. Whilst structural considerations are also crucially involved (as discussed later), it is apparent that an appreciation of the critical role of judicial discretion in sentencing provides the basis for understanding why contemporary English and Italian sentencing models differ, both in their conception and implementation. For example, as Garland suggests when discussing the development of nineteenth-century English penality,[111] the centrality of the judiciary as makers and interpreters of criminal and penal law was instrumental in effecting the view that, contrary to Beccaria, justice and a respect for individual rights did not preclude reformation as an appropriate purpose, and that the promotion of deterrence along with retribution was equally part of the framework for justice implied by the social contract.

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107. G. Mannozzi, 'Are Guided Sentencing and Sentence Bargaining Incompatible? Perspectives of Reform in the Italian Legal System', in C. Tata and N. Hutton (eds.), *Sentencing and Society: International Perspectives* (Aldershot 2002) ch. 4, 111.
108. Art. 27, para. 3.
109. *Op. cit.*, n. 106, 14–28. *See also*, L. Radzinowicz and R. Hood, 'Judicial Discretion and Sentencing Standards: Victorian Attempts to Solve a Perrenial Problem', 127 [1979] *University of Pennsylvania Law Review* 1288.
110. As Ashworth suggests: 'It is thus fair to say that in England the legislature has de facto deligated a large part of its policy-making function on sentencing to the judiciary'; A. Ashworth, *Sentencing and Penal Policy* (London 1983) 62.
111. D. Garland, *Punishment and Welfare: A History of Penal Strategies* (Aldershot 1985) 16–17.

Furthermore, as we have described, instead of instituting a single rational system of punishment, the Italian sentencing system has more recently embarked on a series of structural reforms, which, to a greater or lesser degree, adopt, subvert or modify the neo-liberal model established in the CC of 1930.[112] In consequence, the sentencing of adults, juveniles, corporations,[113] and the new-created Justice of the Peace system are modelled differently, yet there is still no coherent statement of how each of these variants are supposed to relate to the 1930 CC paradigm, or, to one another, either procedurally, or in terms of the philosophical justifications for punishment. In addition, procedural reforms based on adversarial forms of criminal trial instituted by the 1989 Code of Criminal Procedure (CCP), have failed to impact on the development of the existing model for retributive sentencing.

The implications of these developments for victims are profound. As Dignan and Cavadino suggest,[114] the English position, as exemplified by Ashworth's[115] narrow distinction between procedural and service rights for victims, tends to approximate a pure retributivist model, where the victim is marginalized and there is little acknowledgement of victims' needs beyond their status as witnesses, or limited recognition of their potential as participants in the sentencing process apart from some restricted form of victim impact statement. Whilst this restricted view of the victim's role is echoed in the Italian model for adult sentencing based on the 1930 CC, various forms of institutional structure now exist based upon restorative justice modelling. The English approach has been to endeavour to rationalize and accommodate alternative sentencing justifications within the overarching philosophy of limited retributivism and the proportionality demanded by just deserts, as creatively interpreted by judicial discretionary sentence decision-making.[116] The Italian retributive model, by contrast, has fragmented in the sense that the rationality of the 1930 reforms does not necessarily sustain any conceptual affinity with more recently introduced models. This may be a reflection of the debate[117] between those who argue that restorative justice does require a paradigmatic shift away from retributive concerns, and others who envisage the possibility of conceptual links between retribution and restorative concerns, particularly through linking notions of communitarianism to retributive punishment through questioning its moral legitimacy.[118]

Notwithstanding these controversies, we would argue that, in the context of sentence modelling, it is the instrumentality of judicial discretion which distinguishes the English and Italian paradigms. In Italy, the neo-classical form of retributivism embodied in the framework for decision-making advocated for Articles 132 and 133 has been judicially interpreted within a civil law, non-adversarial paradigm and jurisprudential

112. Mannozzi suggests an alternative conceptualization based on the work of Roxin; *op. cit.*, n. 107, 121.
113. *See*, *op. cit.*, n. 102.
114. *Op. cit.*, n. 38, 157.
115. A. Ashworth, 'Victim Impact Statements and Sentencing', [1993] *Crim L.R.* 498.
116. This has spawned an extensive resource of sentencing jurisprudence; *see*, D.A. Thomas, *Current Sentencing Practice* (London 1982 updated loose-leaf).
117. As to which *see* Zedner, *op. cit.*, n. 38.
118. *See* further arguments by Cotterrell in D. Durkheim, *Emile Durkheim: Law in a Moral Domain* (Edinburgh 1999).

tradition that regards the creativity and interpretative function of the judiciary with circumspection, whereas, the opposite has been the case in England since the outset of the enlightenment project in criminal law and justice.

Hence, the significance of the comparative accounts relating to the role of judicial discretionary decision-making in sentencing relates to its instrumentality in the reproduction of particularized justifications for sentencing. In England, this instrumentality has been integral to maintaining the pre-eminence of the judiciary as law-makers and *de facto* determiners of sentencing policy (or executive attempts to direct it). In Italy, discretion has not been instrumental in determining process since, historically, this has not been a crucial determinant in the development of the judicial role. The emphasis on procedural form and the failure of legislative or juridical attempts to rationalize contemporary punishment justifications has been countered defensively by the Italian judiciary. This phenomenon appears to have been exacerbated by the more recent adversarialization of the Italian trial process. Our conclusion that the concept of judicial discretion is a fundamental determinant of how fact and value are presented in sentencing is not surprising. What is significant is that our understanding of why this might be the case provides a critical perspective for evaluating the position of the victim in the criminal trial process.

If, as we suppose, the context in which judicial discretion is exercised is the key independent variable in our contextual evaluation of sentence modelling, it becomes important to evaluate its operation and the implications for victims in the substantive and procedural practice of sentencing. A preliminary hypothesis would suggest that it could play a pivotal role in determining the impact of adversarial forms within a hybrid jurisdiction such as Italy.

7.2. Nature of Sentencing Law and Policy

As suggested earlier, the so-called mono-phase or unitary sentencing model for adult sentencing in Italian criminal procedure is especially significant as a determinant of the boundaries of judicial discretion since there is effectively no distinction in processual terms made between the delivery of the verdict and the sentence. The judges reach their verdict immediately following the close of the trial[119] following collegial deliberations *in camera* directed by the President of the court.[120] The obligation on the court is then to announce its judgement (*sentenza*) and give reasons for its decisions (generally within 30–90 days). Where a conviction results, the court is obliged to consider relevant aggravating and mitigating circumstances as specified in Article 132 CC before dealing with the sanctions to be imposed.[121] Unlike the English adversarial form of jury trial, there is no independent procedural structure provided for sentencing, and therefore, no conceptual distinction made between the procedural contexts for receiving information relevant to sentence which might serve to differentiate the qualitative nature of the evidence for the purposes of either verdict or

119. Art. 525 CCP.
120. *Ibid.*, Art. 527.
121. Arts. 533–537 CCP.

sentence.[122] The sentencing phase of the Italian trial is characterized by form,[123] with any allusions to sentence justification being merely declaratory of the court's considered view without further justification.

These apparent differences in structure and form between Italian and English sentencing are paradoxical for victims in the sense that Italian law imposes no substantive limits on the possible extent of victim participation in sentencing, whilst English sentencing law envisages no substantive rights at all, and has only recently succumbed to the notion of victim personal statements which aim to satisfy purely procedural or 'service' rights.

But it is the legal culture and the broader contextualization of process that has determined the response of the Italian courts to the victim concept. These are the factors which condition the circumspection with which victim evidence is received and treated by the Italian judiciary. As pointed out earlier, there are in fact no substantive legal reasons for excluding or restricting victim participation in decisions which inform the basis for sentencing under Article 133 CC. The position is further complicated where a civil claim is also being simultaneously pursued by the injured party. Not only might this reinforce the potentially prejudicial nature of victim witness testimony for the judiciary, it also sets *State* and *individual* interests at odds.

In legal/structural terms, therefore, the Italian sentencing process appears typified by legal formalism and the restrictive judicial interpretation of particular procedural constraints as regards the appropriation of information that might be deemed relevant to victim participation in sentencing decisions. This narrow ideology consequently delimits the appropriate terrain for victim participation in sentencing in terms of due process and the potential for restorative justice themes to be developed beyond any communitarian function that might be attributed to denunciation as an aspect of retribution.

By contrast, in English sentencing, the principle of judicial independence has by convention placed the judiciary in the vanguard of determining the ambit of substantive and procedural sentencing law and the parameters of policy. Furthermore, the context in which this judicial discretion has been exercised has been one which supports and sustains the concept of individualization of sentences. Within this conceptual framework retributive considerations are balanced against utilitarian concerns such as deterrence, rehabilitation and reparation. Therein would seem to reside the potential for developing a jurisprudence devoted to restorative themes. However, this scenario has failed to deliver any material benefits in terms of compelling the judiciary to take account of victims in sentencing. The main reason for this is that, particularly since the 1991 reforms, judicial discretion has been constrained by the proportionality requirements of an overriding just deserts justification for sentencing which effectively sought to reduce unfettered discretion, and failed to address the conceptual problem of determining how conflicting rationales for sentencing should be reconciled, and, in consequence, the possible parameters for sentence individualization.

122. Note the significance of 'Newton' hearings in English sentencing law; *see*, Ashworth, *op. cit.*, n. 71, 307.

123. Arts. 533 and 535 CCP.

English judicial discretion in sentencing (both at first instance and on Appeal) has therefore been directed towards sustaining the primacy of judicial independence in matters of law and policy. Victim participation has been marginalized as a procedural issue, and, as with many policy initiatives driven by political rhetoric and populism, there is a palpable sense in which the judicial reaction to further reform has been (and remains) one of scepticism. In effect, it appears as if the provision of some degree of transparency in the sentence decision-making process is perceived by the higher judiciary as a sufficient concession to the executive in its efforts to assuage public demands for greater victim participation.

Therefore, in both Italy and England we note that, for what appear to be entirely different reasons, the legal and political contexts of judicial discretion have produced a narrow and partisan conceptualization of the victim, and restricted the extent to which victim participation in sentencing should be promoted. Pursuing the analysis further we might postulate the dichotomies in Figure 1 as characterizing the contexts of judicial discretionary behaviour across the two jurisdictions.

The distinction made between individualization and proportionality and legality in the general approach to sentencing in Figure 1 is a function of distinct legal and political judicial cultures. In England, these are the contexts which sustain the principle of judicial independence, whilst, in Italy, the judiciary do not (and need not) exercise the same juridical and political power over the policy and development of sentencing. Similarly, the dichotomy of process styles and the sentencing models for sentence are reflective of movements of significant socio-historical and political importance. In essence, the certainty, restraint and control of discretion demanded of neo-classicism continues to inform the culture in which Italian judicial discretion is exercised, whilst the norms governing English judicial discretionary behaviour remain rooted in the values of Victorian pragmatism.

Whilst Figure 1 deals only with the legal/structural variables involved in this comparative analysis, we can speculate on their policy implications in terms of syn-

Figure 1: Instrumental factors in judicial discretionary behaviour

England	Italy
Individualization	Proportionality and legality
Independence	Marginalization
Adversarial process	Hybrid process
Binary model	Unitary model
Pragmatism	Social contract theory

Note: This figure does not attempt to draw divisions between legal and political contexts. We regard the production of such taxonomies as counterproductive on the grounds that an understanding of the interrelationship of contexts operating at different levels within the criminal process is necessary.

thesis and difference. From what we have described it is plausible to suggest that the imposition of forms of adversarial procedure and the adoption of penal pluralism in Italy has failed to impact substantially on the pre-existing discretionary model of retributive sentencing. The form of verdict and sentence delivery and the requirements of the reasoning and justificatory process remain firmly wedded to their neo-classical roots, so that the primary duty of the judiciary is as defenders of the principles established for the administration of justice embodied in the criminal code. This reflects the boundaries of the notional social contract between citizens and State; namely, the extent to which State structures and the agents of the State are permitted to interfere with the individual liberty of its citizens. In modified form, this reality sustains the synergy between legality and proportionality in sentencing.

However, the autonomy of the judiciary in sentencing and the realization of an integrated sentencing process for victims in adult sentencing has, as Mannozzi notes,[124] been further threatened by the fragmentation of the unitary model of sentencing through the impact of summary proceedings and sentence bargaining. Although Mannozzi makes details proposals for reform, such as clarification of the justifications for punishment and their linkage to sentencing outcomes, our analysis also indicates a further need for similar re-statement and clarification of the role of judicial discretion within this re-modelling of Italian sentencing according to clearly established boundaries. As she suggests:[125]

> It is thus vital that procedural rules regarding 'non-adversary proceeding' should be made consistent with 'substantive' rules on sentencing laid down by the criminal code.

In this injunction the parallels with English sentencing are clear in their implications for victim participation; that restorative justice paradigms necessitate evaluative judicial responses that sit uneasily with proportionality requirements, legislative sentencing guidelines, or narrative criteria. If we are to draw lessons from analyses of the use of judicial discretion in sentencing, it must surely be that the relationship between the philosophical justifications for punishment and sentencing outcomes is complex, and, more particularly, that the conception and representation of legalistic criteria has more symbolic than real significance for the choice of sentencing options. If this is true, then the coordination of philosophical justifications and procedural imperatives must be clarified for restorative justice. As Ashworth maintains,[126] this should involve a reconceptualization of the State's role in the administration of justice, and with it, the concomitant responsibility to provide a framework that ensures consistency in the application of punishments and safeguards for victims.

However, the constraints of proportionality are difficult to reconcile with the different forms and demands suggested by restorative justice processes. The implications are that the role of judicial discretion should be re-defined within philosophical para-

124. *Op. cit.*, n. 107, 122.
125. *Ibid.*, 123.
126. A. Ashworth, 'Responsibilities, Rights and Restorative Justice', 42 *British Journal of Criminology* (2002) 578, 579–582.

meters set for sentencing which should reflect the State's obligations to pursue communitarian goals and set principled limits for their implementation within and beyond the conventional structures of penality. Without doubt both England and Italian sentencing law and policy currently fall well short of such a commitment to integrated sentencing.

7.3. Significance of Process and Procedure

In this section we are concerned with describing the role of structural constraints on sentencing, and the extent to which they can be said to contribute to sentencing as a reproducible local practice – in other words, instrumental factors implicated in the recursivity of process. As Henham has previously described,[127] for sentencing, this implies an examination of the sources, inputs and channelling of information relevant to sentencing (i.e. communication structures) and the ways in which these impact on the operation and function of legal norms and the everyday reality of discretionary decision-making.

We have already alluded to the distinction between the collective nature of Italian trial decision-making as contrasted with the role of the single judge in the English adversarial form of jury trial. In the English process the judge draws upon discrete information sources (such as pre-sentence reports, medical reports) together with defence mitigation to construct the legal justifications of seriousness and individualization of the sentence. In Italy, not only are the collective deliberations of the judges relating to verdict and sentence held *in camera* and the pronouncement of the sentence and its justifications strictly formalized, evidence relevant to sentencing is inextricably linked to prior trial testimony and its judicial interpretation during the course of the trial phase. This is clearly not the case in England, since the factual basis for sentence is established independently from the trial proper and is governed by detailed procedural rules and case law principles. Nevertheless, the English sentencing criteria based on *just deserts* will necessarily cause the same factual information to be reformulated and repositioned according to structure; the English approach tends to obfuscate the relationship between the relative seriousness of behaviour and the relative seriousness of sentence.

In terms of process integration and the potential for victims to participate in the trial, we have also observed that, for different reasons, both the Italian and the English systems have failed to develop rational justifications for sentencing which address reparative or restorative justice concerns other than through reaching some accommodation with the predominant philosophy of limited retributivism and the framework of proportionality it imposes. The position of victims has therefore been weakened through the introduction of particular procedural reforms (some designed to further restorative concerns) within a penal context focused primarily on blame allocation, censure and proportionate punishment.

127. R. Henham, 'Theory and Contextual Analysis in Sentencing', 29 *International Journal of the Sociology of Law* (2001) 253.

In Italy, such reforms are exemplified in the introduction of summary trial and sentence bargaining described earlier.[128] The primary rationale for the special proceedings introduced by the 1989 CPP[129] appears to have been bureaucratic and managerial efficiency, since it was envisaged that the movement towards a more adversarial form of trial would make greater demands on already scarce resources. The more radical innovation of sentence bargaining under Article 444 CCP envisaged a considerable role for judicial discretion in that the defendant and the prosecutor must present their negotiated sentence to the preliminary investigations judge who must verify that the parties' determination of the applicable charge and penalty is correct. In an important decision of the Constitutional Court[130] it was held that the CCP's plea bargaining provisions were unconstitutional as a violation of the constitutional presumption of innocence, to the extent that no provision exists for judicial review of the bargain to ensure proper balance between the crime and the bargained sentence. This decision effectively increased the judicial role in reviewing negotiated sentences in the special proceedings and, as Cockayne suggests,[131] indicated an unwillingness to see sentencing discretion pass from the judge, as under the traditional inquisitorial system, to the parties themselves, under the new system.

Significantly, under the Italian process of sentence bargaining there is no requirement of an *express* acceptance of guilt; the defendant *implicitly* accepts guilt by requesting a negotiated sentence. Comparisons with the English practice of 'plea bargaining' reveal other significant differences; for example, the fact that the procedure is limited to offences which carry a maximum penalty of five years[132] imprisonment and dissimilarities in the nature of prosecutorial discretion.

However, the similarities are of greater comparative interest. For instance, in common with the English sentence discount procedure described earlier, the Italian judicial decision to accept the plea in return for a reduced sentence is made without the benefit of a full trial whereby evidence is subjected to rigorous appraisal and evaluation. Certainly, in neither jurisdiction does the victim have a right to participate in the decision-making process. Hence, as Fenwick points out,[133] the victim's likely desire that the trial should proceed without the offer of a sentence discount may be ignored. Such a result may prove detrimental since victims (actual or potential) clearly have an interest in seeing a true offender convicted. Further, some victims may prefer

128. The Italian possibility of reflecting reparative concerns during the enforcement phase of the sentence has no comparable process in England, where sentence enforcement is strictly an administrative function under executive control. For the Italian legal system *see* Mannozzi, *La giustizia senza spada* (Milano, forthcoming).

129. For English language discussion *see*, J.E. Miller, 'Plea Bargaining and its analogues under the Italian Criminal Procedure Code and in the United States: Towards a new understanding of comparative criminal procedure', (1990) 22 *New York University Journal of International Law and Practice* 215, and generally, S.P. Freccero, 'An Introduction to the New Italian Criminal Procedure', (1994) 21 *American Journal of Criminal Law* 345; J. Cockayne, 'A Survey of Recent Criminal Procedural Reform in Italy, France and Spain: Evidence of Internationalisation' (2002), (unpublished working paper).

130. Judgment No. 313, 3 July 1990, Corte cost. 35 *Giurisprudenza constituzionale* 1981 (1990).

131. *Op. cit.*, n. 129, 38.

132. *Op. cit.*, n. 67.

133. *Op. cit.*, n. 13.

the ordeal of a court appearance to seeing the defendant receive a light sentence as a result of a sentence discount. Past support for plea discounts and the ideology of crime control, with its emphasis on financial expediency, speed and finality of conviction,[134] has been on the basis that it is broadly in the interests of victims because it spares victims the ordeal of giving evidence whilst recognizing that some due process rights may be infringed and some innocent defendants may be induced to plead guilty. Fenwick's conclusion[135] is surely apposite for both Italian and English sentencing; that the perceptions of victims towards these processes is extremely complex and, that there is a substantive case for establishing rights of consultation and participation in these decisions, at least for victims of serious offences.

Finally, an important structural judicial influence on the sentencing process in Italian trials relates to the judicial supervision and enforcement of sentences mentioned above. As Mannozzi discusses,[136] an offender who receives a sentence of imprisonment from the sentencing judge may have this modified either qualitatively or quantitatively, even by a different judge. The sentence can be changed *qualitatively* either by the sentencing judge through the use of substitutive sanctions consisting of non-custodial or semi-custodial penalties for short periods of imprisonment of up to one year, or, by the supervisory judge, who may substitute various alternative measures (such as house arrest or semi-custodial measures like the Probation order provided by Article 47 Act No. 354/1975). Further, *quantitative* changes to the prison term and its application may be ordered by the enforcement judge, who is the judge that had previously issued the sentence. Mannozzi illustrates how the availability of these procedures to avoid incaceration have contributed to the so-called crisis in the monophase (or unitary) model of sentencing, in effect, helping to perpetuate a sentencing paradigm with endosystematic aims (i.e. internal to the system).

The significance of these observations for the present discussion turn not on the systemic weaknesses of the Italian sentencing process, but, rather on the concept of the supervisory or enforcement judge itself. Such a concept is entirely alien to English sentencing since, historically, the doctrine of the separation of powers has meant that sentence supervision and enforcement have been the preserve of executive agencies, albeit subject to judicial review, and, more recently, the jurisprudence of the European Convention on Human Rights. English judges are only called upon to vary or modify community sentences where there has been some legally specified breach of the original terms – the evidential requirements being satisfied by the supervisory executive agency. Naturally, there may be conflicting aims and rationales that operate where the criminal process is fragmented in this way. These are likely to be system rather than process interests, in that the particular interests of offenders and victims may well be subsumed to the 'endosystematic aims' of particular agencies or functionaries.

The Italian experience shows us that the reasons for increasing penal obfuscation, and the 'labyrinthine' effect produced by the alternative effects of the supervisory

134. It should be noted that the Italian C.C.P. states that the application of the penalty is 'comparable' to a judgment of guilty, but is clearly not equivalent to a conviction which follows a guilty plea in English law.
135. *Op. cit.*, n. 13, 330.
136. *Op. cit.*, n. 107, 113.

and enforcement judges is intimately related to the problems inherent in the rationale and operation of the main sentencing provisions included in Articles 132 and 133 CC. In other words, these procedures exacerbated an already increasingly unworkable system lacking in rationality, coherence and transparency. Despite this, we would suggest that, where a sentencing system *is* capable of being rationalized and structured in such a way as to promote the notion of sentence integration, actual integration should normally include decision processes that occur *after* the formal pronouncement of sentence, and, that, subject to appellate review, all phases of the criminal process where such discretion is exercised should be judicially supervised. The English and Italian experiences merely illustrate what can go wrong when structure and process are not directed by any overarching vision of which aims should determine their existence and function within an integrated criminal trial process.

7.4. Relationship between Process and Outcome

The purpose of this section is to draw attention to the social reality of discretionary decision-making within the courtroom as it affects victim participation. More particularly, it explores ways in which trial participants (lay and professional) are involved in the application of rules and resources through interaction and decision-making as a processual activity.

We begin with some observations regarding judicial style and the conduct of proceedings which have an important bearing on how victims are perceived and their evidence received. Earlier it was described how the victim in an Italian criminal trial, despite having certain basic rights accorded by Article 90 CCP, is by convention treated with some circumspection and suspicion by the judge because of his apparently incongruous position as 'neutral' witness, seeking to serve the interests of justice and the State, when contrasted with that of the injured party 'involved' in the criminal act, and often pursuing compensation through a simultaneous civil action. It is arguable that the more adversarial paradigm and the special proceedings introduced under the 1989 CCP reforms have exacerbated this tendency for victims on the basis that, at the interactive level, judicial style is still typified by an authoritarian approach reflective of the President's hierarchical status, solemnity, formality and adherence to ritual; the embodiment of the traditional inquisitorial style.[137]

The move towards a more adversarial trial procedure in Italy has had serious implications for trial process, and judicial culture in particular. For example, the principle of orality and the nature and order of permissible testimony resemble common law trials. Yet, significantly, inquisitorial elements remain; judges may direct the further exploration of issues on their own initiative,[138] intervene with their own questions during the examination of witnesses,[139] subpoena experts,[140] and require the acquisition of

137. *See* M. Findlay and R. Henham, 'Methodology and the Comparative Contextual Analysis of Trial Process: A Preliminary Study' (unpublished working paper).
138. Art. 506(1) CCP.
139. Art. 506(2) CCP.
140. Art. 508 CCP.

further evidence where absolutely necessary.[141] The principle of immediacy also means that the judge who collects the evidence is also the one who decides on the merits of the case, further pressure coming from the fact that the trial must be held within a reasonable time to permit clear recollection of the evidence at the time of its evaluation.[142] For these reasons, there may be even greater restraint on the part of victims to exercise their procedural rights under Article 90, or expose themselves unduly to the rigours of adversarial evidential procedure and possible further questioning at the discretion of the judge.

A comparison with the English judiciary is instructive at this level. Again, for reasons relating to the judicial culture of independence and its relationship to sentencing policy referred to, the English judge appears more detached and free from processural constraint than his Italian counterpart.[143] Consequently, judicial style is more idiosyncratic with judicial authority and control over the sentencing phase of the trial also possibly serving wider ideological or pragmatic judicial concerns. Trial interaction is more judicially proactive and confrontational, and through the sentencing homily, the judge may address specific victims concerns, or express wider communitarian justifications for sentence.

Hence, an unfettered adversarial paradigm *per se* is not the issue that distinguishes Italian and English judicial practice in the exercise of any discretion relating to the extent of victim participation in ordinary criminal trials. Generically, the crucial determinant is the context which informs the instrumentality of judicial discretion; in other words, the legal, social and political culture of the judiciary.

It is notoriously difficult to speculate on the nature and effects of collective discretionary decision-making, whether it be Italian judges or English and Canadian Magistrates,[144] but, it is perhaps worth recalling the observations of Smith and Blumberg[145] in this respect. In their 1967 investigation into what they considered to be the most significant variables involved in judicial decision-making, they particularly stressed the importance of group decisions in alleviating bureaucratic pressures for efficiency and production in the administration of criminal justice. By 'group decisions' they were referring specifically to cases where single judges appeared to lean heavily on psychiatric and probation report recommendations. Not only did this practice enable the judges to mitigate the bureaucratic pressures for efficiency, it also enabled them to satisfy public opinion in cases where the sentencing criteria to be applied were unclear. However, the 'group decision' seemed to fulfil other functions:

141. Art. 507 CCP.
142. *See* P. Corso, 'Italy', in C. van den Wyngaert (ed.), *Criminal Procedure Systems in the European Community* (London 1993) 239.
143. *Op. cit.*, n. 137.
144. *See*, for example, J. Hogarth, *Sentencing as a Human Process* (Toronto 1971); R. Hood, *Sentencing the Motoring Offender* (London 1972).
145. A.B. Smith and A.S. Blumberg, 'The Problem of Objectivity in Judicial Decision-making', 46 *Social Forces* (1967) 96.

> The group decision … can also be pointed to as evidence of profound efforts to individualize, and at the same time make the administration of justice more uniform and equitable.[146]

Certainly, one may suppose that victim integration in Italy would be advanced by the provision of some mechanism whereby victims' opinions might be considered as relevant to the assessment of factors under Article 133 CC, and the introduction of a procedure making the collegial deliberations of the Italian judiciary in ordinary criminal proceedings public after the close of the trial (or at least making them a matter of public record). Without attaching undue weight to victim impact in decision-making, transparency alone will not significantly advance the cause of victim participation where the primary aim of the sentencing system is not restorative, as has been the case in England.

8. CONCLUSIONS

As indicated at the outset, the purpose of this contextual analysis is to produce meaningful comparative evaluations relating to the legal and policy contexts of victim participation in Italian and English sentencing at the legal, organizational and interactive levels. This exercise has been conducted within the wider aspirational context of speculating upon the potential for the exercise of judicial discretion within an integrated sentencing process. By this we envisage a conceptualization of sentencing which acknowledges the relationship between the justifications for sentence, sentencing policy and judicial discretionary decision-making. In order to further victim participation in sentencing we, therefore, recognize the need for victim *integration* throughout the criminal trial process.

In this respect, our comparative study tends to confirm the view that the prospects for victim integration and the development of restorative justice strategies are not advanced within the constraints imposed by proportionality and deserts-based ideology. Further, the fragmentation of process through the introduction of discrete structures for dealing with particular forms of offender or offending behaviour understandably does little to advance the cause of integration, either in theory or practice. As the Italian experience suggests, changes in structure and form without a corresponding re-evaluation in the overall purposes of prosecution, trial and sentence beyond a basic need to remedy procedural deficiency produces penal structures whose philosophical justifications are impossible to reconcile within the existing stated aims of punishment and the legislative model which embodies them.

Hence, the simplified trial process introduced for the adjudication of crimes before the Justice of the Peace clearly represents a radical departure from the Italian tradition of penal prosecution as governed by the principle of legality. Instead, it not only challenges the notion of 'crime' and criminality for the penal process, but also culturally accepted notions of 'trial'. It does so by transferring the discretionary process of deciding how the violation of criminal norms should be resolved from the State

146. *Ibid.*, 100.

to the parties directly involved. Such cultural shifts in penality and individual empowerment have taken place against the background of the 1989 reforms that challenged the conventionally accepted notion of inquisitorial 'trial' process for ordinary criminal proceedings under the 1930 CC by introducing adversarial reforms which re-focused attention on the trial rather than the pre-trial process as the mechanism for testing and verifying the evidence.

As regards the role of judicial discretion and the prospects for process and victim integration, the 2000 reforms have in a sense democratized the Italian criminal process by restoring aspects of penal resolution to citizens, yet, this weakening of judicial and State authority has been reversed by the pivotal role accorded to judicial discretion in ordinary criminal proceedings following the 1989 reforms. These reforms have gone far beyond those experienced in England, or in fact in the notion of victim participation evident in the norms and practices of international criminal tribunals, such as the International Criminal Court (ICC).[147] The overall effect of the Italian reforms is, of course, to reduce the overall significance of the new adversarial model through the introduction of alternative models which provide significant derogations from the accusatorial approach.

In England, a similar objective has pre-occupied policymakers since the early 1980s, but its rationale has been driven more by the administrative problems of prison overcrowding than the perceived failings of the criminal trial system as in Italy. This perception has now changed, so that criticisms of unfettered judicial discretion and policy initiatives for diversion or mediation and the generalized re-packaging of custodial alternatives as punitive disposals are presented as part of a comprehensive package to reposition the judiciary, their discretion and the role of the criminal trial in the public mind.

It is arguable that such reforms in English sentencing will do little to further the cause of victim integration in sentencing simply on the grounds; firstly, that they do not increase victims' procedural rights in any substantive sense, and, secondly, that they fail to address one of the main structural obstacles to the notion of integration i.e. the strict separation of the trial/verdict and sentencing phases of the criminal process characteristic of adversarial trial forms. The reasons for arguing against the latter are not weakened by our observations of the Italian experience. In Italy we have suggested that attempts to adversarialize process and the way in which the judiciary use their discretion in ordinary proceedings following the 1989 CCP reforms have been hampered by the slowness of an inquisitorial judicial culture to adapt to change and exploit the potential for addressing victims concerns within the existing philosophical framework imposed by the 1930 CC. Consequently, the advantages for victim integration in sentencing that might be derived from a process structure which combined the verdict and sentencing phases of the trial have not been fulfilled. In summary, these would include the ability to conceptualize the criminal process culminating in sentencing as an amalgam of process decisions informed by a unified rationale and

147. *See*, R. Henham, 'Some Issues for Sentencing in the International Criminal Court', 52 *International and Comparative Law Quarterly* (2003) 81.

coordinated policy aspirations.[148] In England, not only has the sentencing phase of the trial traditionally been where the principle of judicial independence has found its fullest expression, it has also developed its own philosophical rationales, procedural rules, sentencing principles and policy. Further, notions of lay/professional participation in the process are grounded in these contexts rather than any overall integrated conception of the criminal trial.

One of the most significant practical implications for victim integration of the separation of verdict and sentence concerns the need for evidence to be reconstructed to serve the purposes of the sentencing phase.[149] However, this phenomenon also takes place within any integrated model. In Italy, for example, specific criteria establish the boundaries for the exercise of discretionary power relevant to sentence, but it is witness testimony elicited during the trial phase that is evaluated against these legal constraints.[150] Similarly, the rights accorded to victims under Artilce 90 CCP are directed towards the trial (verdict and sentence) rather than to sentence. Such a model should also be integrated in the sense that the rationale, policy and procedure governing the exercise of judicial discretion for the purposes of verdict and sentence should reflect and relate to one another. For reasons we have explained, this has not occurred with Italian sentencing. In a sense, what has occurred in Italy reflects the fundamental tensions which occur in purely adversarial systems; that, ultimately, the ideology of traditional criminal law theory – certainty, predictability and consistency are problematic for rationalizations of penality which envisage consequentialist justifications as primary rationales for the penal system. The failure of adversarial systems to integrate trial philosophy and practice has meant that questions of procedural fairness and rights protection have assumed particular significance.

Indeed, it is arguable that the jurisprudence of international human rights norms will assume a disproportionate significance in the broader context of the internationalization of sentencing.[151] Furthermore, it remains to be seen how conflicting interpretations of legal norms are resolved at the local level, and on what moral basis such instruments derive their legitimacy in these contexts.[152] Although it may be suggested that human rights (and other) norms have impacted on the re-modelling of criminal trial processes in European States, our analysis of the legal and policy contexts of English and Italian

148. For an excellent analysis of the theoretical and practical implications of such a suggestion *see*, N. Lacey, 'Discretion and Due Process at the Post-Conviction Stage', in I.H. Dennis (ed.), *Criminal Law and Justice* (London 1987) 221.

149. In England, the difficulties caused by the need to establish the factual basis for sentencing are a direct result of the division of the trial into two distinct phases. In particular, evidence relevant to sentence (such as provocation) may not be sufficiently explored, even during a full trial. Where the offender pleads guilty these difficulties are exacerbated, since the prosecution and defence accounts of the facts may differ considerably.

150. Judicial deliberations follow immediately after the close of the trial and, after considering any unresolved preliminary matter and/or procedural issues, judges must consider each issue of fact or law, *as well as the proper sentence.* Needless to say, abbreviated proceedings and procedures that facilitate bargaining for sentence distort the extent to which the facts upon which sentence is based actually correspond with those that occurred.

151. These issues are explored in a subsequent paper.

152. *See* further, R. Henham, 'Sentencing Theory, Proportionality and Pragmatism', 28 *International Journal of the Sociology of Law* (2000) 239.

sentencing far indicates that our understanding of the complex interrelationship of process variables operating at many different levels renders any such generalized conclusions overly simplistic, and of little practical utility for policymakers. For example, we have noted how similar process results are achieved through different penal strategies in different jurisdictional settings because of the operational effects of legal culture. Similarly, notions of lateral and upward internationalization need to examine what appear as re-alignments, convergence or dissimilarities in sentencing against an awareness of their wider socio-political significance.

We conclude by cautioning that the main obstacle to real victim integration in post-modern penal strategies has more to do with political pragmatism than ideology. As Garland suggests,[153] State/citizen relationships are continuously reconfigured or re-modelled in order to shift penal accountability. The centralization of penal authority in the State, the institutionalization of penality and restrictions on individual autonomy and participation have a symbolic rather than moral legitimacy.[154] Within this context, the manipulation and redistribution of judicial discretion within process models and the apparent empowerment of lay actors is merely a functional response rather than indicative of any meaningful increased democratization. This analysis is also consistent with the general willingness on the part of both civil and common law systems to institutionalize criminal processes which are unconstitutional or otherwise in breach of human rights norms on the grounds of managerial or bureaucratic efficiency. Such manifestations have little to do with notions of integration as models for penological change.

We have argued that comparative contextual analysis provides a valid methodology for understanding and evaluating the mechanisms which directly sustain the rationales for sentencing that actually operate, both within and across the English and Italian jurisdictions. In particular, we have exposed and analyzed the legal and policy contexts that determine the instrumentality of judicial discretionary behaviour in sentencing and its significance for the transformation of current legal and policy imperatives. Such understanding is vital if either jurisdiction is to make substantial progress towards the introduction of integrated models of sentencing process where the substantive interests of victims are consistently represented and enforced.

153. D. Garland, 'The Limits of the Sovereign State: Strategies of Crime Control in Contemporary Society', 36 *British Journal of Criminology* (1996) 445.

154. Beyond any that may be attributed to retributivism.