Presumption of Innocence: procedural rights in criminal proceedings

Social Fieldwork Research (FRANET)

Country: ITALY

Contractor's name: Fondazione 'Giacomo Brodolini'

Authors: Marta Capesciotti

Reviewer: Silvia Sansonetti

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PART A. EXECUTIVE SUMMARY

For the country report on Italy on 'Presumption of Innocence: Procedural Rights in Criminal Proceedings', the Fondazione 'Giacomo Brodolini' interviewed 12 professionals between February and September 2020. The main findings were grouped in analysis under six headings:

- The right to be presumed innocent in general
- Public references to guilt
- The presentation of suspects and accused persons
- Burden of proof
- The right to remain silent and not to incriminate oneself
- The right to be present at the trial and to have a new trial

The Directive 2016/343/EU has not been formally transposed in the Italian legal system. However, the principle of the presumption of innocence is enshrined in the Italian Constitution (Article 27) and most of the procedural rights guaranteed by the Directive are envisaged and adequately implemented in the Italian criminal judicial system.

The right to be presumed innocent in general

All participants described the presumption of innocence as a milestone of the Italian judicial system. As per the practical implementation of this principle, judicial authorities – including judges and prosecutors – and police officers reported that the most effective way to implement it is being impartial and deliver evidence-based accusations and decisions. Criminal lawyers reported never questioning their clients' innocence and trying to carry on the best legal defence they can, presenting witnesses and evidence in favour of the defendants. The participants mentioned several elements compromising in practice the presumption of innocence of the defendant: previous convictions and ethnic origins/nationality were the elements that participants commented on the most. The presumption of innocence of the defendant can also be compromised by the personal biases and prejudices of judicial authorities deciding the case. According to some of the participants, judges are compelled to be impartial, but they still are human beings with their own personal ideas and prejudices. One of the greatest challenges for the effective implementation of the presumption of innocence therefore is for judicial authorities to be aware of the risk entailed by personal prejudices and try, as much as possible, to decide the case on grounds of the available evidence and witnesses.

Public references to guilt

The public prosecutor is the authority legally in charge of selecting the information concerning investigations and judicial cases that need to be provided to the media. The aim of disclosing information to the media is to provide correct and selected information on judicial cases of public interest, as in the case of investigations involving public figures or concerning severe criminal offences. According to police officers, providing information to the media can also be useful to convey a feeling of security to the population and to find an accused person that is untraceable. Despite the existence of a formal procedure governing the interaction between media and public authorities, many participants – especially criminal lawyers – reported that media often obtain and disclose information retrieved from unofficial sources, even including the prosecutors' office: these leaks can have a detrimental effect on the presumption of innocence of the defendants and on the judicial system in general.

Media were recognised by the participants as having a crucial role as watchdogs of the freedom of expression and of the good functioning of the judicial system, which are two pivotal elements of any democratic system. However, the impact of media coverage on the presumption of innocence of suspects/defendants were described by all participants as negative. Moreover, defendants belonging to an ethnic minority or having a foreign nationality was mentioned by the participants as the element that most influenced the way the media treat judicial cases, especially when the information is reported by right-wing newspapers and media.

The presentation of suspects and accused persons

According to the Italian legislation, defendants have the right to take part in a trial with no physical restraints. Defendants who are deprived of their personal freedom – because they in pre-trial detention – are always escorted from the detention facility to the courtroom by penitentiary police officers, often using specific pathways that avoid their contact with the media. Once in the courtroom, they generally are set free from handcuffs and allowed to sit next to their lawyers, even if always watched over by police officers. Handcuffs are left on if deemed absolutely necessary for safety reasons; this is a discretional decision of the penitentiary police: defence lawyers can protest this treatment and the judge can intervene to eliminate all physical restrictions. Defendants can also be forced to take part in the trial from a separated area of the courtroom, separated by bars – the so-called 'cage' – especially when more defendants are involved in the same proceeding: some participants reported that the 'cage' is sometimes used even when there are no safety concerns. Participating in the hearing from behind bars can definitely have an impact on the defendants' presumption of innocence.

No prison clothes exist in Italy and the defendants are free to choose their outfit for the hearings. However, some of the participants reported that the outfit can have an impact on the Court and on the public image of the defendants. Some of the participants mentioned the specific case of fast-track proceedings where defendants are brought before the Court with the same clothes they had at the moment of the arrest: their outfit is often easily recognisable since they are often deprived of shoelaces and belts for safety reasons (in order to avoid self-harm in the prison's cell).

Burden of proof

The burden of proof rests with the prosecution and this was mentioned by all participants as one of the basic principles of the Italian criminal judicial system. The legislation does not foresee formal exceptions to this principle even if practical examples of inversion were mentioned by some of the participants. The defendants can confess their guilt and they must be informed about this right at the very first contact with the authorities. However, this confession is never sufficient to conclude the proceeding. The confession must be sustained by reliable evidence and witnesses. Some of the participants stressed that the defendant's confession can allow for a faster conclusion of the proceeding and can result in a milder sentence.

The right to remain silent and not to incriminate oneself

The right to remain silent is a crucial procedural right that is implemented – according to the participants' experiences – providing clear and adequate information to the accused persons/defendants since the very first contact with public authorities. This information must be provided in a language the person can properly understand, with the support of a cultural mediator/interpreter when needed. Accused persons/defendants can never be forced to incriminate themselves, providing information or evidence without their consent. However, this evidence – such as the content of personal computers and mobile phones, documents, etc. – can be obtained by police authorities even without consent, if authorised by judicial authorities. The defendant's silence does

not have a formal and automatic impact on the proceeding. However, it can be interpreted by judicial authority as a reluctance to cooperate in the case, providing an alternative version of the facts. This reluctance can prevent the defendant from obtaining some procedural benefits, as well as any reduction of the sentence if considered guilty by the Court.

The right to be present at the trial and to have a new trial

Participating in a trial is a right and not an obligation of the defendant. If the defendant decides not to show up at the trial, there are no legal consequences. A strict notification system is in place to make sure that the defendants are informed about the existence of the charges and legal proceedings against them. Some of the criminal lawyers participating in the research reported that this notification system does not always adequately protect disadvantaged defendants – as is the case of irregular migrants – who might not always be aware of the proceedings and lose contact with their lawyers, who often are public defendants. If it is impossible to locate the defendant to let them know about the existence of judicial proceedings, the proceedings are suspended: police authorities must periodically try to locate the defendant and inform them. Each professional category described its own definition of effective participation: provision of clear and complete information, effective understanding of judicial procedures and the presence of a lawyer were the elements mentioned by all the participants. Criminal lawyers mentioned the videoconference system as one of the elements most severely affecting effective participation. As per defendants with specific vulnerabilities, the general approach in place is that the specific situation of each defendant is individually assessed and can be reported to the Court by the lawyer. In case the defendants have severe intellectual impairments, it is an obligation of the Court to assess whether the defendants are able to take part and participate in the proceeding; otherwise the proceeding itself is cancelled. Defendants who do not understand Italian have the right to be assisted by interpreters/cultural mediators during the hearings and have all the documents translated into a language they can understand.

PART B. INTRODUCTION

The Fondazione 'Giacomo Brodolini' was commissioned under contract to provide background information on Italy for a comparative research project of the European Union Agency for Fundamental Rights (FRA) concerning the presumption of innocence and other procedural rights in criminal proceedings.

In total, **10 eligible interviews** were carried out in the timeframe of February 2020 to July 2020. The research team conducted the **two remaining interviews** in September 2020, thus concluding the research fieldwork.

Two police officers were interviewed belonging to two different Italian institutions: the Italian State Police, reporting to the Ministry of the Interior, and the Italian Carabinieri, reporting to the Ministry of Defence. Despite the differences in the history, functioning and ministerial pertinence between Carabinieri and the Italian State Police, both security institutions are involved in judiciary police activities, which is the support to public prosecutors in conducting criminal investigations. Officers involved in judiciary police activities – which include inspections, interrogations, wiretapping and other evidence-gathering activities – must undergo a specific training on judiciary investigation procedures and must always be delegated by the prosecutor in charge of the case. These activities are governed by Articles 55 to 59 of the Italian Criminal Procedure Code. Despite being professionally based in the Netherlands at the moment of the fieldwork, they both had experience as judiciary police officers and were directly involved in investigation activities.

Six criminal lawyers from Rome, Turin and Florence were interviewed.

Four members of the Italian judicial authorities were eventually included in the sample. Two of them work as judges (Italian Ordinary Courts) and two as public prosecutors in Rome and Florence.

As per the interviews' setting, the two pilot interviews were conducted in person: the first in the office of a criminal lawyer and the second at the judge's office at the Ordinary Court.

The outbreak of the COVID-19 pandemic subsequently compromised the fieldwork as it soon became impossible for the interviewer to travel and interview the participants in person. For that reason, the remaining eight interviews were conducted via electronic means of communication. The only exception was an interview conducted in September with a criminal lawyer. In this case, the interviewee accepted to participate in person, while all the necessary safety safeguards were ensured.

The research team was not able to comply with one of FRA's selection criteria, namely the requirement to select participants from one or two Italian urban areas, as the Italian Covid-19 response measures, which besides a general lockdown included inter alia the suspension of most judicial proceedings and the closing of Italian Courts, made it extremely difficult to contact lawyers, judges, prosecutors and police officers. Responding to this situation, the research team expanded its selection area and included participants from more than 2 Italian locations (Rome, Florence and Turin) in order to make the sample.

B.1 PREPARATION OF FIELDWORK

All interviews were conducted by the same interviewer, the legal expert of the FRANET Italian research team at Fondazione 'Giacomo Brodolini' (FGB). The interviewer took part in the inception meeting of

the research project and personally translated into Italian all the research materials, including the privacy notice, the consent forms and the interview templates for all categories. The interviewer was also in charge – together with the project manager – to communicate with FRA and submit all the deliverables, which were always reviewed by the senior expert before being delivered.

B.2 IDENTIFICATION AND RECRUITMENT OF PARTICIPANTS

The interviewees were identified and recruited using a snowball recruitment method. Each member of the research team contacted their professional contacts – from previous research and projects – explaining the purpose of the research and asking to suggest potential interviewees to contact. The research team decided to avoid directly involving acquainted professionals in order to preserve the quality and impartiality of the information.

Once the first interviews were conducted, the snowball process actively involved the interviewees who were asked to point out colleagues or other professionals the research team could contact for the research. Using this method, lawyers and judges/prosecutors (L- and J-category) were easy to reach and provided interesting and informative interviews.

The police (P-category) deserves a separate mention since it was the most difficult professional group to reach. The research team tried different methods to recruit participants: the snowball approach (described above), on grounds of personal acquaintances of the researchers or of the interviewees; and a more formal approach, contacting the Ministry of the Interior and some police Headquarters via certified mail. The research team failed in being authorised by the Ministry of the Interior to conduct the four interviews required to complete the sample. Thanks to the mediation and support of the Italian National Liaison Officer (NLO), the two police officers mentioned above could eventually be recruited. However, due to the difficulties in getting in contact with this sample subgroup, the research team negotiated with FRA the possibility of replacing the two remaining interviewees of the Police category with two additional criminal lawyers.

B.3 SAMPLE AND DESCRIPTION OF FIELDWORK

Police officers:
Requested: 4; Completed: 2

Judges/prosecutors:
Requested: 4; Completed: 4

Defence lawyers:
Requested: 4; Completed: 6

Table 1: Sample professionals

Group	Operational expertise on criminal investigations and trials	Experience with media	Gender
Police officer	Deputy Commissioner of the Italian Police with direct experience of criminal investigations	Yes	Male
Police officer	Lieutenant of the Italian Carabinieri with direct experience of criminal investigations	Yes	Male
Lawyer	Criminal defence lawyer with long-standing experience of criminal proceedings.	Yes	Male
Lawyer	Criminal lawyer with a long-standing experience in dealing with proceedings involving criminal organisations.	Yes	Male
Lawyer	Criminal lawyer with long-standing experience of criminal proceedings.	Yes	Female
Lawyer	Criminal defence lawyer and representative of a Bar Association who cooperates with the University, teaching criminal procedure and prison law.	Yes	Male
Lawyer	Criminal defence lawyer with experience of criminal proceedings.	No	Female
Lawyer	Criminal lawyer with more than 20 years of professional experience.	Yes	Male
Judge	Criminal court judge (Ordinary Court).	Yes	Female
Judge	Criminal court judge working both, in the civil and the criminal branches.	Yes	Female
Prosecutor	Public prosecutor with long-standing experience in conducting criminal investigations and participating in criminal trials as a public prosecutor.	Yes	Male
Prosecutor	Public prosecutor with long-standing experience in conducting criminal investigations and participating in criminal trials as a public prosecutor.	Yes	Female

Two interviews were conducted in person and eight using electronic means of communication. They all lasted more than the expected 60 minutes, apart from one of the judges' interviews.

Most of the interviews were extremely informative, also due to the solid professional experience of the participants and their availability to participate. Lawyers were the professional category most keen to provide critical inputs and direct experiences of the cases they worked on.

The level of trust was generally high, and the participants felt free to communicate and report their opinions on the issues covered. The use of electronic means of communication did not seem to compromise the quality of the provided information and the level of fluency and trust.

B.4 DATA ANALYSIS

The amount of information and data emerging from the interviews is remarkable. The decision to use the same interviewer for all the interviews allowed identifying during the process the most frequently recurring themes and issues that were reported by the interviewees within the same category and across categories.

In order to complete the final report of the research, all interview reporting templates were analysed separately, highlighting the most relevant information emerging for each section. A comparative analysis was then conducted for each thematic section, reporting the opinions emerging from each interview and grouping them according to the interview's categories, in order to point out potential differences among categories.

B.5 LEGAL FRAMEWORK

The principle of presumption of innocence is explicitly mentioned in Article 27.2 of the Italian Constitution which establishes that 'the defendant cannot be considered guilty until the court's final decision'. This is the legislative disposition ruling the principle of presumption of innocence in the Italian judicial system and it is located in the supreme legislative source, the Italian Constitution. This supreme principle also entails the burden for the public prosecution to demonstrate the defendant's guilt; moreover, the defendant can only be found guilty by judicial authorities if their guilt is assessed 'beyond any reasonable doubt' (Article 533.1 of the Italian Criminal Procedure Code). The principle of the burden of proof resting with the prosecution is at the core of the Italian criminal system. Given the supreme principle of the presumption of innocence and the right to remain silent and to not physically participate in the proceedings, the defendant is not requested to provide evidence of their innocence. The defendant has the right to provide evidence (Article 190 of the Italian Criminal Procedure Code). The public prosecution is compelled to start an investigation if it is informed about a crime (Article 112 of the Italian Constitution).

As per the relationship between the judicial system and the media, it is worth mentioning Articles 114 and 329 of the Italian Criminal Procedure Code. Article 114 forbids the publication of the documents and acts covered by judicial confidentiality (*segreto investigativo*). Acts and documents that are no longer covered by judicial confidentiality cannot be disclosed and published until the official end of the investigation or until the preliminary hearing. Article 329 forbids the publication of the investigation acts carried out by the public prosecution and by the judicial police, as well as the public prosecutors' requests for investigation: these acts are covered by judicial confidentiality until the defendant is informed about the investigation and in any case no longer than the official end of the investigation. If these dispositions are violated and these acts are published, the perpetrators can be sentenced to a 30-day detention period or to a financial sanction of EUR 51 to 258 (Article 684 of the Italian Criminal Code).

As per the implementation of the Directive 2016/343, the Italian Parliament passed the Law No. 163 of 25 October 2017 – the so-called European Delegation Law 2016–2017 – delegating the Government to introduce a Legislative Decree aimed at implementing the Directive (among other EU legislative acts). However, the Government has not exerted this delegation power so far: the Directive is therefore not officially implemented in the Italian judicial system.

This issue of public reference to the defendant's guilt is not governed by the legislation in force. However, it is possible to mention other documents dealing with public references to guilt.

First, this is the list of documents that are relevant in this respect: i. Self-regulation Code concerning the representation of judicial proceedings in TV shows and radio broadcasting, issued on 21 May 2009 (hereinafter Self-regulation Code); ii. Consolidated Text on the Duties of Italian Journalists, adopted by the National Council of the Association of Journalists on 27 January 2016 (hereinafter Consolidated Text); iii. Guidelines on the Organisation of Judicial Offices to promote a correct institutional communication, issued by the Supreme Judicial Council on 11 July 2018 (hereinafter Guidelines); and

iv. Ethical Standards on personal data treatment in the journalistic activity, issued by the Italian Data Protection Authority on 29 November 2018 (hereinafter Ethical Standards).

As per public references to guilt, the Self-Regulation Code (Article 1) recalls the need to ensure impartial, complete and unbiased information. If judicial proceedings are concerned, media are requested to protect the dignity of all the people involved and to respect the principle of presumption of innocence of the defendant and to clearly distinguish between the defendant and the condemned person. The violation of the Code's principles must be assessed by a specific Committee – set up in December 2009 – which is also in charge of the adoption of corrective measures. A similar provision is included in Article 8 of the Consolidated Text: according to this disposition, Italian journalists are requested to always respect the principle of presumption of innocence, to update the information if incorrect and to clearly distinguish between defendants and condemned people. The violation of the dispositions of the Consolidated Text are sanctioned according to the discipline enshrined in Title III of the Law No. 69 of 3 February 1963, governing the journalistic profession. Article 51 of the Law establishes that the Council of the Order of Journalists is entitled to assess these violations and impose different measures to punish them. These include the warning, the censorship, the suspension of the journalist (for a period of 2 to 12 months) and the expulsion from the journalists' register. The Guidelines recommend judicial authorities and offices who decide to release information on ongoing judicial proceedings to always respect the presumption of innocence and the rights and dignity of defendants: more specifically, the difference between the role of public prosecutors and judicial authorities; the difference between defendants and condemned people; the right of the defendants to directly receive information about the case and to not be informed about their judicial situation from the media. Page 8 of the Guidelines explicitly states: 'the respect of the presumption of innocence must be ensured. It is therefore necessary to avoid – especially when the case is particularly complex, and the investigation is still at the beginning – any reconstruction of the investigation that might cause in the public opinion the assumption of the defendant's guilt'.

The issue of the presentation of suspects and accused persons is not explicitly governed by the legislation in force. Defendants who are not deprived of their personal freedom can go to the courtroom autonomously and are not subject to any form of restraint. More concerns arise when dealing with suspects who are deprived of their personal freedom – for instance defendants in pre-trial detention – who need to be transferred to the courtroom by the penitentiary police. The penitentiary police is the authority in charge of assessing the level of danger the defendants' transfers entail. Article 8 of the 2013 internal regulation of the penitentiary police concerning transfers and stakeouts procedures, rules the way defendants must be escorted to the courtrooms (or generally transferred, for instance to another detention facility) and clearly establishes that – in case of collective transfers – detainees must be handcuffed; in case of individual transfers, the use of handcuffs is compulsory when the context or the requested operations make the transfer dangerous or in case the subject is deemed dangerous or at risk of fleeing. The decision on how to transfer the detainees/defendants is a discretional power of the penitentiary police. At any stage of the proceeding, the defendant has the right to report the mistreatment to the Ministry of Justice, to the director of the detention facility or to the judicial authority in charge of their case. The reporting of such episodes can give raise to additional judicial proceedings concerning the abuse of power perpetrated by law enforcement authorities. In general terms, all the above-mentioned documents generically refer to the importance of respecting and protecting the dignity of the defendants while reporting – through any kind of media – information about judicial proceedings. However, Article 8 of the Ethical Standards states that: '[…] 2. Unless it is relevant for public-interest purposes or for referenced purposes of justice and law enforcement, journalists must never film, issue images and

photos of detained people without their consent; 3. People cannot be presented with handcuffs, unless it is necessary to report abuses'.

The right of the defendants to remain silent and to not incriminate themselves are recognised by the Directive as crucial procedural rights. Article 24.2 of the Italian Constitution establishes the right to defence as an inviolable right of each person. The defence is therefore a right and not an obligation. Moreover, Article 64 of the Italian Criminal Procedure Code clearly establishes that those who are subject to investigations – even those who are in pre-trial custody or in detention – can freely participate in the interrogation. Before the interrogation, the defendant has the right to be informed that their declarations might be used against them; that they have the right to refuse to reply to any question and that the proceeding will continue without their reply. If the defendant is not adequately informed or these provisions are violated, the information obtained during the interrogation cannot be used in the proceeding. Moreover, Article 188 of the Italian Criminal Procedure Code establishes that it is forbidden to use the methods and techniques aimed at influencing the self-determination or at altering the ability to recall and assess facts, even with the consent of the concerned person. As per the public discussion going on in Italy on this issue, a critical aspect emerges concerning the right of defendants who are definitely discharged to obtain financial compensation for unfair detention (Article 314 of the Italian Criminal Procedure Code). According to some experts, the defendant's decision to remain silent can be considered as a negative element against them, because if they had participated in the proceeding, providing evidence for their innocence, they might have avoided detention. In this kind of proceedings, silence is often considered a negative element and might be used by public authorities to avoid compensating the complainants for the unfair detention they suffered before being discharged. The Italian Court of Cassation – with the decision No. 42014 of 14 September 2017 – actually confirmed the possibility of excluding a complainant from the right to compensation because of the silent conduct adopted during the judicial proceeding or providing a fake alibi. According to unofficial data dating back to 3 July 2019, the amount of this kind of compensation is constantly decreasing – from EUR 56 million in 2004 to EUR 47 million in 2011; EUR 37 million in 2015 and EUR 33.4 million in the first 9 months of 2018. However, an estimated 90,000 to 150,000 defendants are recognised as innocent every year.

Another procedural right enshrined in the Directive is the right of the defendants to be present at trial and to have a new trial. In this respect, the Italian criminal system was relevantly reformed in 2014: from that moment, *in absentia* proceedings can no longer exist. If the defendant is untraceable, the criminal proceedings cannot start and are suspended (Article 420 of the Italian Criminal Procedure Code).

A notification procedure is in place, that is the legal procedure through which the suspect is informed by police authorities that an investigation was conducted and concluded and that a judicial proceeding will start, as well as the criminal charges the defendant must respond to. The notification also includes some specific information on the rights of the defendant, such as the right to appoint an entrusted lawyer or to benefit from a public defender in case the defendant does not have a lawyer. The Court must assess that the notification procedure was adequately carried out: if it is the case and the defendant is not present at the hearing, the proceedings can continue, and the defendant must be represented by their lawyer. The defendant therefore has the right to be present: they are not compelled to participate in the hearings, though, and they must always be represented by their lawyer. They have the right to be informed about the end of the investigation, the start of the proceeding, the criminal offences they are charged with (Articles 148 to 162 of the Italian Criminal Procedure Code). The defendant is not directly informed – as soon as a lawyer is appointed and this is a mandatory procedure – they are communicated all the notifications by the competent judicial

authorities. Article 474 of the Italian Criminal Procedure Code states that the defendant has the right to take part in the hearing; that they cannot be imposed any constraint – even if they are in detention – unless it is deemed necessary for safety purposes. This disposition clearly established the right of the defendant to participate in the hearings.

A final remark is needed to allow better comprehension of the report's contents. Some of the interviewees mentioned the specific case of fast-track judicial proceedings (*giudizio direttissimo*), governed by Articles 449 to 452 and 558 of the Italian Criminal Procedure Code. This kind of proceeding can be requested by the prosecutors if the defendant is caught in flagrancy or decides to confess. The defendant caught in flagrancy of perpetrating the crime is arrested and brought before the Court within 48 hours: this hearing is aimed at both validating the arrest and deciding the case, after the police officers responsible for the arrest are formally interrogated. Differently from ordinary proceedings, fast-track proceedings do not envisage the preliminary hearing when the Preliminary Hearing Judge (*Giudice dell'Udienza Preliminare* – GUP) decides if the prosecutor's accusation is solid enough to give raise to a criminal judicial proceeding.

PART C. RIGHTS IN PRACTICE – ANALYSIS OF THE INTERVIEWS

C.1 The right to be presumed innocent in general

The principle of the presumption of innocence is enshrined in the Italian Constitution: Article 27.2 establishes that 'the defendant cannot be considered guilty until the court's final decision'. Article 533.1 of the Italian Criminal Procedure Code implements this principle in judicial practice, establishing that defendants can be sentenced by judicial authorities only if their guilt is assessed 'beyond any reasonable doubt'. Moreover, Article 530.2 of the Italian Criminal Procedure Code states that a defendant must be discharged if the evidence against them is not enough to prove their guilt beyond any reasonable doubt.

One of the interviewees – a criminal judge – stressed that the Italian Constitution does not actually envisage the principle of the presumption of innocence, but rather the principle of the defendants not being guilty. According to the interviewee, these two concepts are not completely equivalent and the conceptual consequence of this difference is that judicial authorities are requested to consider the defendant as not guilty until the final grade of the proceeding, rather than as innocent. In compliance with this supreme principle, judicial authorities consider defendants as not guilty and not as innocent. This issue was also considered by a criminal lawyer who believes that the two wordings are *de facto* equivalent.

a. How are the different professions implementing the presumption of innocence?

Judicial authorities (judges and prosecutors) and police officers – as public authorities involved in judicial investigations and in shaping the accusation against the defendants – expressed similar views concerning the practical implementation of the presumption of innocence.

The two judges that were interviewed reported that implementing the principle of presumption of innocence in the judicial profession means assessing and deciding a case considering all the available evidence and documents and being aware of any personal bias and prejudice that can influence their perception of the facts and of the people involved in the case. **Sticking to the facts and the acts** is the only way for judicial authorities to overcome potential prejudices and biases when deciding a case.

The two prosecutors confirmed this approach, also adding another relevant element: Italian public prosecutors have an obligation to collect evidence on a case that is both in favour and against the defendant and this principle is de facto an implementation of the principle of presumption of innocence. As stressed by both prosecutors, a peculiar feature of the Italian judicial system is that public prosecutors are members of the judicial power, just like judges, and their mandate is therefore a judicial one: as such, they are requested to be impartial before the defendant and try to assess the case in all its elements, including those that disprove their accusation.

> *'È una peculiarità del pubblico ministero italiano che è inserito organicamente nell'ordine giudiziario, che è quella di svolgere un'attività, un lavoro che ha peculiarità giurisdizionali, anche se fa il pubblico ministero. La peculiarità giurisdizionale vuol dire fare una valutazione dei pro e dei contro [dell'accusa].' (Public prosecutor)*

'It is a peculiar feature of the Italian public prosecutors who are members of the judicial order, that is the obligation to carry out a professional activity which has a judicial nature, even if they are public prosecutors. An activity with a judicial nature means assessing the case, considering the pros and cons [of the accusation].' (Public prosecutor)

However, the criminal lawyer reported that this happens extremely rarely and when evidence in favour of the defendant emerges, this often happens by accident and not because the prosecutors actively look for this kind of evidence.

As stressed by a public prosecutor, the presumption of innocence guides the public prosecutors since the very early stages of the investigations – namely preliminary investigations – both when the accused person is known by judicial authorities, and when the investigations are carried out without knowing the possible perpetrator(s) of the criminal conduct.

'La rilevanza, nella mia esperienza, del principio di non colpevolezza è far sì che, anche quando si ha già un soggetto indagato, di indirizzare, e proiettare e approfondire tutti gli elementi indiziari a disposizione e utilizzare tutti gli strumenti investigativi, senza avere l'idea che quel soggetto indagato è già presunto colpevole, ma ragionando in termini di presunzione di innocenza e costruendo le indagini in modo da avere solo all'esito delle indagini un'idea che poi dovrà essere sempre un'idea di soggetto indagato, quindi non di soggetto indagato uguale colpevole ma soggetto indagato nel senso che si ritiene che gli elementi acquisiti sono sufficienti per dire che può essere imputato di un determinato reato […] che verrà poi rimesso alla fase processuale.'

'The importance, in my experience, of the presumption of innocence is to make sure that, even when there is an accused person, all the available evidence and investigation instruments are directed and used without considering this person as guilty; but rather assessing them in terms of presumption of innocence and carrying out the investigation in order to have, in the end, an idea on the accused person, who is not accused equals guilty, but accused meaning that there are sufficient elements to charge them for a criminal conduct […] and this must later be assessed during the judicial proceeding.'

The two police officers expressed similar points of view on this issue. The principle of presumption of innocence is implemented in their professional activity trying, as much as possible, to **avoid interpreting the facts** and being influenced by previous experiences and personal opinions and adopting an **objective approach to the case**. Moreover, the facts must be assessed and analysed through formal acts that are adopted respecting the legal procedures in force.

'Si tratta semplicemente di essere più professionali possibile, nel senso di valutare i fatti per quello che sono e non per come eventualmente un'opinione personale o un'esperienza pregressa possano incidere nella valutazione dei fatti stessi. Essere più oggettivi possibile.' (Deputy Commissioner of the Italian Police)

'It is about being as professional as possible, that is trying to assess the case for what is and not on grounds of personal opinions or previous experiences, since these elements might influence the evaluation of the facts. Being as objective as possible.' (Deputy Commissioner of the Italian Police)

Criminal lawyers reported that the presumption of innocence is a core principle of their professional activity: the defendants they assist must be considered innocent until proven otherwise by judicial

authorities. One of the interviewees reported that the principle of the presumption of innocence is a sacred one for each criminal lawyer: this entails that – when accepting a case – **lawyers never ask themselves if the defendant is guilty or innocent**, they rather focus on the available evidence and documents in order to figure out if they can be used in the proceeding.

A criminal lawyer reported that the principle of the presumption of innocence is more effectively implemented in the later stages of the judicial proceedings: the preliminary investigations are the phase of the proceeding when the principle of the presumption of innocence is more severely compromised. This might be due to the fact that – during preliminary investigations – prosecutors must convince the Preliminary Hearing Judge that the accusation is solid enough to start a formal proceeding.

> *'Più vanno avanti le fasi del processo, più si ha l'impressione di una effettiva implementazione di questo principio. Ad esempio, la fase delle indagini preliminari credo sia l'area del procedimento che più offende il principio di innocenza perché i pubblici ministeri […] dovrebbero cercare le prove a carico degli imputati ma anche cercare le prove a discarico degli imputati. Cosa che in [...] anni di esperienza professionale ho visto accadere in rari casi.'*

> *'The more the judicial proceeding advances, the more you have the impression of an effective implementation of this principle. For example, the phase of preliminary investigations is the area of the proceeding that most compromises the principle of the presumption of innocence because public prosecutors […] are supposed to look for evidence charging the defendant but also discharging them. This is something that – in […] years of professional experience – I have seen very rarely.'*

b. <u>Potential factors that have an effect on guaranteeing the presumption of innocence</u>

All interviewees confirmed that some factors might influence the presumption of innocence of the defendants.

> *'in qualsiasi contesto, sociale, culturale, economico e istituzionale, l'appartenenza a un ambito che è da sempre oggettivamente e soggettivamente connotato da pregiudizi e stereotipi […] che sono il risultato di un portato culturale millenario per mantenere fermo un rapporto di potere gerarchico e quindi coloro che ne sono colpiti appartengono, eccetto le donne che sono la metà del genere umano […] a delle minoranze […] in questo caso, se il giudice è culturalmente attrezzato a prevenire il pregiudizio che attraversa il contesto socio-culturale allora il problema non si pone. Se invece quel giudice non è consapevole del contesto in cui quel pregiudizio ha sempre operato, rischia di esserne vittima.' (Judge)*

> *'in every social, cultural, economic and institutional context, belonging to a group that has always been objectively and subjectively exposed to prejudices and stereotypes […] that are the result of a millenarian culture aimed at maintaining hierarchies and power imbalances and those who are more exposed generally belong to minorities, with the exception of women who constitute half of mankind […] in these cases, if the judge is culturally equipped to prevent this prejudice that shapes the social and cultural context, then there is no problem. If, on the contrary, the judge is not aware of the context where the prejudice is active, they risk being victim of the prejudice themselves.' (Judge)*

Previous convictions are an element that most of the interviewees pointed out as negatively compromising the presumption of innocence, even if this issue is partially governed by the legislation in force. Previous convictions might be an element affecting this principle because they provide a picture of the defendant as a person inclined to perpetrate crimes.

> *'Qui veramente c'è il trionfo della negazione del principio di innocenza […] se nella tua vita hai avuto 1, 2, 5, 10 reati, vedrai che sei colpevole. A me una volta è capito un caso particolarissimo di una persona che aveva un casellario giudiziario che andava rilegato! […] riuscire a fare un processo con questa persona che aveva [...] fogli di casellario giudiziale, era una guerra! Perché come mi disse il giudice: «Avvocato, un uomo che spazia con così tanta disinvoltura fra gli articoli del Codice penale, non può che essere colpevole». E questa è esattamente la negazione di questo principio.' (Criminal lawyer)*

> *'This really is the triumph of the violation of the principle of the presumption of innocence […] if a person in their life has committed 1, 2, 5, 10 criminal offences, they cannot but be guilty. I dealt with a very peculiar case once of a defendant with such a huge criminal record that it had to be book-bound! […] being able to carry on a proceeding involving a defendant with such a criminal record was a real war! Because as the judge told me, "Lawyer, a man that is able to range so easily among the criminal code's dispositions, cannot but be guilty". Well, this is exactly the denial of this principle.' (Criminal lawyer)*

The Italian judicial system explicitly envisages that previous convictions can be an element to consider when assessing the level of social danger entailed by the defendant and the necessity to opt for pre-trial custody. This element was reported by one of the police officers who explained that previous convictions are a factor that police officers must take into account in some specific procedures, such as in the case of optional arrest of a suspect (see quotation). The optional arrest is governed by Article 381 of the Italian Criminal Procedure Code and concerns the possibility of police officers arresting any person caught in flagrancy of perpetrating specific crimes: the decision to arrest must be based on the severity of the offence and on the danger entailed by the subject.

> *'Mi viene in mente l'arresto facoltativo, sancito dall'Art. 381 del Codice di Procedura Penale. Nell'arresto facoltativo viene valutata [da parte dell'operatore di polizia] la personalità del soggetto […] la personalità del soggetto non è intesa in base a una percezione personale dell'operatore di polizia ma in base alla pregressa condotta di vita nell'ambito criminale. Quindi se la persona ha dei precedenti, questo può incidere nella valutazione della facoltatività dell'arresto.' (Deputy Commissioner of the Italian Police)*

> *'I am thinking of the optional arrest, ruled by Article 381 of the Italian Criminal Procedure Code. In the optional arrest, [police officers] must evaluate the personality of the suspect […] the suspect's personality is not assessed on grounds of the personal opinions of the police officers, but rather on grounds of their previous criminal conducts. If this person has previous convictions, this can influence the optional arrest evaluation.' (Deputy Commissioner of the Italian Police)*

Previous convictions are an element that judicial authorities also consider when deciding the sentence. The Italian legal system envisages recidivism as an aggravating circumstance in connection with the sentencing phase: this means that if a defendant that is considered guilty by judicial authority was already condemned for the same crime, they can be condemned with a higher sentence (and detention period) compared to a defendant perpetrating the same crime for the first time.

'I precedenti penali sono fondamentali. E qui devo dire che anche l'ordinamento ti permette una valutazione sui precedenti penali, tant'è vero che noi abbiamo istituti come la recidiva, per esempio, che si basano proprio su un aumento della pena in caso di presenza di precedenti penali […] devo dire che in concreto io so che se c'è un imputato che ha un certificato penale ben nutrito, l'occhio dell'operatore è condizionato. Però questo è umano insomma!' (Criminal lawyer)

'Previous convictions are crucial. It is worth stressing that the legal system allows considering previous convictions and in fact we have dispositions governing recidivism, for instance, envisaging an increase of the sentence if there are previous convictions […] I must also report that in practice if the case concerns a defendant with several previous convictions, the point of view of the judicial authority is influenced. But this is human!' (Criminal lawyer)

The **economic and social background** of the defendants was mentioned as an element potentially compromising the general outcome of the proceeding. One of the interviewees – a public prosecutor – reported that the main reason for this is the existence in Italy of two main types of proceedings. On the one hand, there are the fast-track judicial proceedings for the defendants who are caught in flagrancy of perpetrating a crime: in these cases, the proceeding is much shorter and there is no time for the presumption of innocence to actually be implemented. In fact, as explained above, if a defendant is arrested in flagrancy, they are brought before the Court within 48 hours and during this hearing the Court must both validate the arrest and decide the case. In just one hearing, the subject often shifts from being a defendant – benefiting from the presumption of innocence – to being condemned for a crime and rapid judicial procedure does not allow for a thorough and careful implementation of the principle of the presumption of innocence. On the other hand, the ordinary proceedings – which concern most of the judicial cases – are much longer and the parties that are involved often have the perception that the proceedings will come to no conclusion due to the extreme length of judicial proceedings in Italy. This length also entails extremely high judicial costs and fees which affect disadvantaged defendants dramatically.

'C'è una differenza nella possibilità materiale di reggere processi particolarmente complessi, nel senso che il facoltoso, il ricco si può permettere collegi difensivi particolarmente di alto livello e quindi regge processi di tanti anni senza avere degli effetti sulla propria persona e sul proprio reddito particolarmente significativi. La persona media, effettivamente, un processo lungo lo subisce come un grosso danno economico. Che però è un problema diverso dalla presunzione di innocenza; è un problema di danno effettivo soprattutto laddove alla fine dell'iter processuale viene riconosciuta l'innocenza [dell'imputato]. E non ci sono discipline risarcitorie.' (Public prosecutor)

'There is a difference concerning the material possibility of sustaining complex judicial proceedings: Wealthy defendants can afford to pay the best lawyers and to deal with proceedings lasting many years with no significant backlash on their lives and income. For the average defendant, a long proceeding can actually represent a serious economic damage. But this issue does not concern the presumption of innocence, but rather the actual damage on the defendant, especially if – at the end of the proceeding – their innocence is confirmed. There is not a compensation possibility for this damage.' (Public prosecutor)

Fast-track proceedings were also mentioned by one of the criminal lawyers who often works as a public defender with defendants of disadvantaged economic and social backgrounds. In this kind of proceedings and with this kind of defendants, the implementation of the presumption of innocence is particularly weak: all the authorities and subjects involved in the proceeding – including the judge –

have instead a presumption of guilt towards the defendant. According to the participant, the principle of the presumption of innocence in these cases is actually reversed.

> *'In questi casi specifici, in cui abbiamo reati semplici, che soggetti tendenzialmente marginali che quindi per sopravvivere tendono a essere costretti a delinquere e a commettere reati che hanno un disvalore molto basso, la presunzione di innocenza è praticamente pari a zero. In generale, più il reato diventa complesso, più la persona è inserita [socialmente], più ha la possibilità che il giudice si approcci al caso con un dubbio […] A me sembra che negli altri casi ci sia una presunzione di colpevolezza, da parte di tutti, anche purtroppo del giudice.' (Criminal lawyer)*

> *'In these specific cases, when petty crimes are concerned and the defendants are marginalised subjects that often perpetrate crimes to survive and these crimes have a low social value, the presumption of innocence barely exists. In general, the more the case is complex and the person is [socially] integrated, the more are the chances that the judge approaches the case with a doubt […] in the aforementioned cases, I believe that there is a presumption of guilt, in all the people involved, including the judge unfortunately.' (Criminal lawyer)*

The **ethnic group/nationality** of the defendants was mentioned by criminal lawyers as an element potentially compromising the presumption of innocence. One of the lawyers reported that specific ethnic groups are more at risk depending on the historical period. The interviewee mentioned the case of the general perception Italians used to have in the 90s of immigrants from Albania who often were victims of racist prejudices: according to him, in that period, the Albanian nationality could be an element affecting the presumption of innocence of the defendant.

> *'La delinquenza ha un suo flusso. C'è stato il periodo degli albanesi … è chiaro che essere albanese il quel momento non era un granché. Così come magari essere arabo con lo zainetto sulle spalle ora non è un granché. Ma non è un granché per chi? Per la società! […] Si chiede al giudice una cosa impossibile secondo me, di estrapolarsi quasi dalla società, il che è impossibile.' (Criminal lawyer)*

> *'Delinquency has its own trends. We had the Albanians period … it is clear that being Albanian in that period was not good. The same happens today with being Arab with a backpack on the shoulders… it is not good. But it is not good, for whom? For the society! […] And so, judges are asked something that is impossible in my opinion, to be detached from society – it is impossible.' (Criminal lawyer)*

One of the prosecutors confirmed the role played by the nationality of the defendant on their presumption of innocence:

> *'Tante volte ci sono degli approcci investigativi che presumono, ma in buona fede, che lo straniero extra-comunitario sia in un certo modo un soggetto che tiene certi comportamenti e quindi, nell'alternativa delle piste investigative, se vediamo che c'è quello che viene dal Paese mediorientale lo indaghiamo a prescindere, no? Però, lì deve essere il ruolo del pubblico ministero quello di fare delle verifiche fattuali, cioè verificare sulla realtà che cosa è effettivamente affidabile e attendibile e che cosa è, invece, una suggestione.' (Public prosecutor)*

> *'Investigation approaches often presume, in good faith, that the third-country citizen is somehow a subject that is inclined to some kinds of behaviours and so, if more than one investigation line is possible, if there is a suspect coming from a country of the Middle East, we*

[as prosecutors] decide to investigate on them anyway, right? However, the role of the public prosecutor is to cross-check this investigation line with evidence, to assess which elements are reliable and solid and which are, on the contrary, mere impressions.' (Public prosecutor)

One of the judges reported a very interesting and unexpected point of view concerning the impact of the ethnic origin/nationality of the defendants on the presumption of innocence. In the interviewee's opinion, this is not a factor that generally influences Italian judges. She mentioned, for instance, Roma defendants, saying that they might be considered a group at risk of being discriminated for their ethnic origin but – according to her – previous convictions represent a much more important element judicial authorities consider when deciding a case. On the other hand, she stressed that women who are victims of gender-based violence – despite being victims – are always affected by prejudices and exposed to secondary victimisation both outside the court room, in their social context, and during the proceedings. Roma defendants were mentioned also by one of the criminal lawyers who disagreed, reporting that they are more easily considered guilty than other defendants who belong to more socially accepted groups.

One of the criminal lawyers also mentioned the **gender** of the defendant as an element influencing the presumption of innocence. More specifically, female defendants are generally treated more mildly by prosecutors and judges; in the case a man and a woman are involved in the same proceeding, the female defendant is generally assigned weaker responsibility in the case, compared to the man, even if the conduct is the same. This is especially true when petty crimes are concerned, such as drug dealing and robberies. On the other hand, s/he mentioned that when female defendants are involved in more serious cases (as in the case of women charged of being members of political subversive groups), they are generally treated very harshly by prosecutors because they completely disrupt the gender role and expectations assigned to women in the Italian society.

'In un processo che stiamo seguendo, la donna che viene considerata addirittura una figura apicale di un'organizzazione è una figura completamente estranea a quello che è il ruolo prestabilito, chiaramente c'è un accanimento. A me vengono in mente almeno un paio di casi, quando la donna poi fa il capo – o il presunto capo ovviamente secondo l'impostazione dell'accusa – allora lì sì sono più cattivi che con l'uomo.' (Criminal lawyer)

'In a judicial case we are working on, the female defendant is even considered having a role at the apex of the organisation and therefore she is seen as a complete outsider of the gender pre-established role, and therefore [the prosecution] is relentless. At least a couple of cases of this kind come to my mind, when a woman is considered the leader – the presumed leader of an organisation, according to the prosecution's accusation – then she is treated much harsher than a man.' (Criminal lawyer)

Finally, the **type of crime** was mentioned by criminal lawyers as another element potentially compromising the presumption of innocence. One of the lawyers stressed that the principle of the presumption of innocence is at risk when the most severe criminal offences are concerned, especially those perpetrated or connected to mafia organisations. Defendants involved in this kind of proceedings are easily considered guilty and the principle of the presumption of innocence in this case is considerably weakened. Moreover, prosecutors conducting the investigations on these cases cannot often accept that – after all the hard work they have done – the case is concluded without a proceeding because the accusation is not strong enough.

'Per le categorie più fragili, perché c'è un preconcetto. Invece, per i reati più grossi, perché sia pubblici ministeri che giudici, si innamorano dei processi. Cioè ci sono indagini che magari durano un anno, un anno e mezzo, con centinaia di migliaia di intercettazioni telefoniche e i

cui fascicoli sono librerie all'interno di stanze, per cui a un certo punto fatta quella ricostruzione, non si è più in grado di guardare quella stessa indagine con un occhio esterno […] Io ho visto tanti processi nei quali la pubblica accusa ha proseguito perché non era possibile che finisse male.' (Criminal lawyer)

'As far as vulnerable categories of defendants are concerned, the reason is prejudice. As for severe offences, the reason is that public prosecutors and judges fall in love with the proceedings. I mean, there are preliminary investigations lasting one year, one year and a half, with hundreds of thousands of interceptions and whose files fill entire bookcases, so that once this huge activity is carried out, it is impossible for them to look at the case impartially […] I've seen many proceedings that have been continued by the public prosecutors because it was impossible to end them there.' (Criminal lawyer)

Another lawyer mentioned that, for instance, being charged with theft often results in fast-track proceedings where the evidence and witnesses are not adequately and carefully assessed. This is because this type of crime – such as theft and other damages to property – is often perpetrated by the most poor and marginalised social groups. The interviewee also mentioned that the functioning of the Italian judicial system allows this kind of discrimination since Italian judicial authorities are evaluated depending on how many cases they decide every year and so they find it more convenient to deal with many minor proceedings for petty crimes, rather than spend most of their time dealing with complicated and difficult proceedings.

'Il Sistema [giudiziario] per com'è strutturato oggi in Italia agevola questo criterio perché l'introduzione della statistica e degli indici di produttività favorisce, anche se non deliberatamente, la definizione e la trattazione di casi semplici. Se io vengo come magistrato valutato per quante sentenze faccio, mi conviene fare cento sentenze per furto di una mela, piuttosto che una per una vicenda complicata di corruzione.' (Criminal lawyer)

'The current functioning of the [judicial] system in Italy fosters this approach because the introduction of statistics and productivity indexes encourages, even if not deliberately, easier cases. If judges are evaluated depending on the number of decisions, they prefer to deal with 100 cases of theft of an apple, rather than with a single complex case of corruption.' (Criminal lawyer)

Finally, one of the lawyers reported that the recent Law No. 69 of 19 July 2019 – reforming the Italian Criminal Code and the Italian Criminal Procedure Code to counter gender-based violence, also known as the 'Red Code' reform – is threatening, in his/her opinion, the correct implementation of the presumption of innocence of the defendants. The reform is also aimed at accelerating the start and the conclusion of criminal proceedings concerning this type of offences (such as stalking, domestic violence, etc.), in order to ensure the victim with a prompt implementation of the right to justice. However, according to the interviewee, this is resulting in some public prosecutors' offices not conducting thorough and comprehensive investigations on the cases: this might be detrimental to the presumption of innocence of the defendants.

c. The role of prejudices and stigma

Many interviewees confirmed that judicial authorities can be influenced by their **personal opinion and beliefs**. Personal biases are considered as natural and obvious: one of the most crucial challenge for the presumption of innocence is the awareness judicial authorities deciding the case have of these biases and the attempts they make to reduce the impact of these prejudices on their impartiality. The judge's decision must be **rational and evidence-based** and it must be solid enough to be confirmed

before the Court of Appeals and the Court of Cassation: this is a way to limit the influence of judicial authorities' personal opinions on the outcome of judicial proceedings and on the presumption of innocence.

> *'è ovvio che il giudice ha le sue idee. Io non penso che il giudice sia una macchina: ha delle idee, ha dei preconcetti. Come tutte le persone, ragioniamo per esperienza e la nostra esperienza fa molto nel modo in cui amministriamo la giustizia. E quindi è evidente che ci può essere anche un pregiudizio del magistrato. La grande scommessa è che noi nel processo superiamo il nostro pregiudizio!' (Judge)*
>
> *'It is clear that the judge has their own ideas. I don't believe that judges are robots: they have their ideas and prejudices. As with all other people, we are influenced by our own experiences and these have an impact in the way we carry out our job. It is therefore evident that judicial authorities might have prejudices. The great deal for us is that during the proceeding, we are able to overcome our prejudices!' (Judge)*
>
> *'La giurisprudenza che cos'è? Dal mio punto di vista, è il diritto calato nella società, nelle relazioni concrete. E questo è influenzato inevitabilmente anche da un giudizio morale, no? Non dovrebbe essere così: il processo non è una chiesa, non si giudica la moralità se non personalmente, ma non processualmente. Eppure, questo si riflette. Lei ritiene che gli zingari abbiano la stessa presunzione di innocenza […] rispetto a un altro soggetto più accettato socialmente? C'è da chiederselo!' (Criminal lawyer)*
>
> *'What is the jurisprudence? From my point of view, it is the application of the law to the society, to tangible relationships. And it is therefore influenced by a moral judgement, isn't it? It should not be so: the proceeding is not a church, morality should not be considered. It can be considered at the personal level, but not at the judicial level. And still, it counts. Do you believe that Roma people benefit from the same presumption of innocence […] as of another subject that is more socially accepted? It is worth considering this!' (Criminal lawyer)*

The judge admitted that it happened to her – once the proceeding was concluded – to personally believe that the defendant was guilty; however, the defendant was discharged because the evidence collected by the prosecutor was not enough to condemn them and/or because the evidence collected by the judge and the discussion during the proceeding did not contribute in clarifying the case.

Criminal judges might be influenced by **previous convictions** of the defendants. The judge provided an example in this respect concerning the case of drug dealing that is often concentrated or more frequent in some areas of the city and law enforcement agencies find it difficult to operate in such areas. If a person is arrested for this criminal offence in one of those areas of the city, the judicial authority in charge of the case will be definitely more inclined in considering the defendant as guilty, especially if they have previous convictions for the same offence.

Finally, the judge stressed that increasing the **diversity** of identities and experiences among criminal judges might reduce the impact of personal bias and prejudices on the presumption of innocence of the defendants. According to the interviewee, the judiciary is today more gender-balanced: however, traditionally judges were mostly men and they were probably more inclined in identifying with the male defendant. The case of gender-based violence and domestic violence was mentioned: according to the interviewee, this is something that always happened; however, these cases did not end in a judicial proceeding and, when they did, the defendants were generally deemed innocent. This is the case also of ethnic minorities: the interviewee stressed that there are no black judges in Italy; judges

are all white men. This may definitely have an impact on the presumption of innocence of a black defendant.

d. Discussion of findings

- The principle of the presumption of innocence is a milestone of the Italian judicial system, entailing the obligation for judicial and police authorities to be impartial and deliver evidence-based accusations and decisions.
- Several elements can *de facto* compromise the presumption of innocence, previous convictions being the most mentioned one. Ethnic origins/nationality and type of crimes are also elements that were mentioned by most of the interviewees, especially criminal lawyers.
- Judicial authorities can be influenced by their personal opinions and prejudices: one of the greatest challenges for the effective implementation of presumption of innocence is for judicial authorities to be aware of this risk and try as much as possible to be impartial and carefully consider all the available evidence and documents.

C.2 Public references to guilt

a. How do the different professions liaise with the media?

Prosecutors are the public authority in charge of providing the media with information concerning judicial investigations and proceedings. More specifically, the **State's senior prosecutor** (*procuratore capo*) – or the prosecutor who conducted the investigation if delegated by the chief prosecutor – is the only public authority legally entitled to disclose information about an ongoing investigation if this investigation has a public interest. In these cases, the prosecutor organises a **public press conference** where the details of interest about the case and the investigation are communicated to the journalists. For this reason, the only public authorities participating in official press conferences are the chief prosecutor, the delegated prosecutor and the law enforcement officers who arrested the defendant(s).

The **identity of the defendant** can be mentioned in the press conference only if it is already public and the investigation and the case are not covered by confidentiality of the investigation (*segreto istruttorio*). However, judges and public prosecutors are not allowed to disclose information on investigations that are still ongoing and subject to judicial confidentiality: if they do so, they are subject to a disciplinary sanction. One of the prosecutors stressed that the decision to disclose the defendant's identity also depends on the public popularity of the subject: if the defendant is a public figure, it is impossible for the prosecutors not to disclose the identity to the media because there is also the right of the public opinion to be informed that must be protected and fulfilled.

> *'Il problema è il ruolo pubblico che eventualmente la persona coinvolta nelle indagini ha. Perché se viene coinvolto nelle indagini un sindaco o un esponente della pubblica amministrazione, non si può non riferire il dato dell'informazione perché ci sono tutta una serie di altri interessi all'informazione che in qualche modo devono essere soddisfatti.' (Public prosecutor)*

'The point is the public role played by the person that is involved in the investigations. If a mayor or a member of the public administration is involved in judicial investigations, it is impossible not to disclose the name since there is also a relevant public interest in this information that must be fulfilled.' (Public prosecutor)

If the defendant is not a public or institutional figure, there is no need to disclose their identity and image. The only exception concerns the necessity to disclose the defendants' identity for investigation purposes: for instance, when criminal organisations or fugitives are concerned.

As for the way the defendant's image is presented to the media, lawyers always try to reinforce the presumption of innocence of the defendants. But public prosecutors and judiciary police officers organising press conferences often do this to praise their investigation activities: in these cases, the defendant is often presented as guilty, as if the judicial proceeding was already concluded. According to a criminal lawyer, the reason for this kind of behaviour lies in the way police officers are trained: they are not raised in the absolute respect of the truth of the acts, documents and statements they make. Police officers in Italy are not trained to consider impartiality, objectivity and the respect of truth as crucial values for their profession. On the contrary, in his/her opinion, judicial authorities tend to be more immune to this kind of behaviour since they must pass a public examination to practise their professional activity: their stronger cultural and technical background allows them to better comply with the principles governing the judicial system.

One of the participants – a criminal lawyer– mentioned a recent case in this respect dating back to December 2019 and concerning a huge investigation of the public prosecutors of Catanzaro targeting mafia organisations: many press conferences have been organised and the information was presented as to almost convince the public opinion that the mafia in Calabria had been definitely defeated. According to the interviewee, this was certainly a crucial police operation and many accused persons are currently involved: however, s/he stressed that the judicial proceeding has not started, yet. The defendants' guilt will only be assessed at the end of the last phase of the proceedings.

A criminal judge reported never communicating with the media, since this activity belongs to the mandate of the public prosecutor's office. A public prosecutor reported having direct experience of interaction with the media, since s/he had the opportunity to support his/her chief prosecutor in preparing **press releases** to be disseminated to the media, concerning investigations of public interest. The purpose of these press releases is to provide correct information concerning cases that would be treated by the media in any case.

Both police officers participating in the research, confirmed they had to liaise with the media when conducting investigations. The Decree of the President of the Italian Republic No. 15 of 15 January 2018 governs how police officers must deal with personal data of suspects/defendants in order to comply with the Directive (EU) 2016/680. The Decree also governs the reasons allowing police officers to disclose information on the investigations and on judicial cases: the interviewee mentioned that in some cases, such information is disclosed with the aim of preventing and countering criminal activities (for instance, if the perpetrator is a fugitive). The Deputy Commissioner of the Italian Police reported that, in order to adequately protect the right to information (Article 21 of the Italian Constitution), it is crucial to provide information about the investigations or judicial cases at the same time to all media subjects, without preferential treatment. The Lieutenant of the Italian Carabinieri defined interaction with the media as 'tricky', since police authorities must always carefully select the information to communicate and the words to use in order to avoid that the information is reported by the media in an incorrect way, without properly considering the context of the case, thus wrongly influencing the public opinion and creating misunderstanding and miscommunication. As per the procedures in place

governing interaction with the media, Italian Police and Carabinieri have their own press office which deals with the media – in cooperation with the police officers coordinating the investigations – in the most relevant cases which have a strong impact on the public opinion.

Criminal lawyers generally reported avoiding any communication with the media, and when they did, it was to protect the public image of the defendant. This is the case of one of the participants – a criminal lawyer– who reported that, on some occasions, s/he was interviewed because s/he was legally assisting the defendant. In those cases, the interviewee's aim was to publicly announce that the presumption of innocence of his/her client was not respected or that the proceedings were not being carried out properly. A criminal lawyer explained that criminal lawyers can be divided into two groups: those who deem it important to establish contacts with the media and foster the media coverage of the judicial proceedings they are involved in; and those who avoid the media and adopt a more reserved approach to the cases. The interviewee reported belonging to the second group. Even when s/he deals with cases of public interest, s/he considers the mediatisation as dangerous for the balanced development of the proceedings. S/He also stressed that when such mediatisation is impossible to prevent, s/he generally avoids releasing statements or information and s/he also asks his/her clients to do the same.

Some of the interviewees reported that **this official procedure is not always respected**, and it might happen that information is disclosed to the media through other channels. A criminal judge reported that sometimes police officers disclose information about cases on TV without the presence of a judicial authority. Another example that was mentioned by the participant concerns the interviews lawyers and police officers often deliver on the cases they have been working on. This kind of interview can also involve witnesses of the cases or other people that might be acquainted with the victim or the defendant (such as neighbours) who consent to be interviewed. In these cases, these people refer to the defendants as innocent or guilty, depending on their role in the case/proceeding: for instance, the lawyer defending the accused person will be interested in describing the defendant as innocent.

A public prosecutor also reported the case of information that is disclosed by journalists who succeed in having access to the documents lodged by the prosecutors at the court's chancellery, sometimes through the cooperation and mediation of the lawyers of the defendants. The prosecutors are obliged to lodge these documents and do not have the possibility of controlling who has access to these documents and how these are used. This is the case, also, for the content of wiretapping used by the prosecutors in their investigations.

> *'Tante volte ci sono delle polemiche sul fatto che si accusa la pubblica accusa di propalare informazioni. In realtà, è il sistema che è fatto in maniera tale che il giornalista particolarmente esperto è in grado di accedere alle informazioni senza tra l'atro neanche violare il segreto istruttorio. Cioè, ci sono dei momenti processuali in cui, pur rimanendo l'indagine ancora nello stadio della segretezza, cioè non siamo ancora davanti al giudice in un processo, però il pubblico ministero deve fare* discovery*, cioè deve depositare alcuni atti della sua indagine, ad esempio una perquisizione […] quegli atti vengono depositati nella cancelleria di un giudice, finiscono nelle mani dell'avvocato di un imputato e probabilmente da lì comincia un trasferimento dei dati e delle informazioni che spesso è fuori dal controllo del pubblico ministero.' (Public prosecutor)*
>
> *'There often are criticisms about the decision of the public prosecutors to disclose information. However, the functioning of the judicial system allows expert journalists to have access to the information without even violating the investigation secrecy. I mean, there are some phases of the judicial proceedings when, even if the investigation is still formally secret, meaning that*

the case has not arrived before a court yet, the public prosecutors are requested the discovery, that is the obligation to lodge some documents concerning the investigation, such as the search's report […] these documents are lodged at the court's chancellery and they can end up in the hands of the defendants' lawyers. From that moment on, the information and the data are transferred in a way that cannot be controlled by the public prosecutors.' (Public prosecutor)

Another example of unofficial information sources is confidential information unlawfully provided to the media during the investigations, the so-called leaks (*fuga di notizie*) that can happen for many different reasons, such as to provide information to suspects who are still not aware of the investigations against them or because of 'unfaithful' behaviour of judicial authorities. Finally, the participant stressed that the main problem concerns the fact that prosecutors sometimes decide to disclose information to the media and to participate in TV shows commenting on judicial cases they are directly or indirectly aware about, and this is – according to the interviewee's opinion – a violation of the deontological code.

The Deputy Commissioner of the Italian Police mentioned the case of defendants' arrest in flagrancy. In this case, public authorities do not have the time to conduct ordinary investigation and to organise a press conference to inform the media. Journalists often happen to be in the courthouses and they might come to know about the arrest because they see the defendant escorted before the Court for the fast-track trial (especially if the courthouse does not have a separate entry for the defendants deprived of their personal freedom). If they ask questions to the defendant's lawyer, they might provide information and comment on the arrest. This would be unofficial information provision, and this also could give rise to an incorrect presentation of the case.

One of the criminal lawyers reported that it happens quite often that the newspapers publish photos of the pre-trial detention orders (that is the requests of pre-trial detention filed by the prosecutors and approved by the competent judicial authorities), reporting the defendants' personal data (i.e. name, surname and date of birth). Such orders are – in his/her opinion – provided to the media by the prosecutors in charge of the case.

'immagino che ci siano dei protocolli interni a ciascuna procura rispetto a come vengono date le notizie e chi ha l'obbligo. Però poi la verità è che, al di là dei protocolli, secondo me quello che crea più un vulnus alla presunzione di innocenza è la fuoriuscita di documenti. Perché quando io pubblico su un giornale l'ordinanza di custodia cautelare fotografata con in nomi o la faccio scorrere in televisione, è difficile all'occhio del cittadino immaginare che questo pezzo di carta che addirittura dispone la carcerazione immediata di una persona, sia sottoposto comunque a un vaglio di presunzione di innocenza. Immediatamente il soggetto diventa un delinquente!' (Criminal lawyer)

'I guess there are internal protocols in each public prosecutor's office concerning how to disclose the information and who is entitled to do it. But the truth in my opinion is that, besides these protocols, the greatest challenge to the presumption of innocence is the disclosing of documents. Because, when a pre-trial detention order is made public in a newspaper or on TV, reporting the names [of the defendants], it is difficult for the common citizen to remember that this document – that decides the immediate detention of a person – is subject to the presumption of innocence. The defendant immediately becomes a criminal!' (Criminal lawyer)

Another criminal lawyer confirmed that the media often have access to judicial information – such as investigations' reports, transcriptions of interrogations or wiretapping – even before the defendants

CASE STUDY

PERUGIA MURDER (DELITTO DI PERUGIA)

The victim was a British student participating in a student exchange in Perugia who was murdered at age 21. She was found dead in her bedroom in November 2007. Based on the identification of the bloodstained fingerprints at the crime scene, a man born in Côte d'Ivoire was charged with the victim's murder. The victim's flatmate – a US citizen – and her Italian boyfriend were charged with the murder, as well. The prosecution of the two received intense international publicity. In this case, many subjects organised press conferences on the case: in addition to the public prosecutors who are legally entitled to release information on the cases, the defendants with their lawyers and the police officers investigating the case. For instance, on 6 November 2007 the police officers of Perugia declared – during a press conference – that the case had been solved.

and their lawyers are informed. And this happens very often in Italy, even if judicial investigations are confidential.

'Capita purtroppo spessissimo in Italia che i giornali sappiano le cose molto prima degli imputati e degli avvocati. Per cui, se è vero che le indagini sono segrete, è vero anche che si leggono parti di trascrizioni di verbali, di interrogatori o di intercettazioni telefoniche che io, come difensore, non ho mai visto e vedrò magari tra sei mesi quando le indagini saranno concluse […] cioè, a volte si fa prima ad aprire il giornale e vedere cosa dice che ad andare in Procura della Repubblica perché tanto non ti dicono niente.' (Criminal lawyer)

'It happens unfortunately too often in Italy that newspapers obtain information far before the defendants and the lawyers. Even if investigations are confidential, it is possible to read parts of investigations' reports, interrogations or wiretapping interceptions that I, as a lawyer, have never seen before and will probably have the chance to analyse in six months when the investigations will be officially concluded […] many times it is better to open the newspaper and read the information than resorting to public prosecutors' offices because they won't tell you anything.' (Criminal lawyer)

Another criminal lawyer confirmed this issue:

'Per esempio, c'è un'operazione di polizia, vengono arrestate delle persone alle 6 di mattina, alle 9 uno trova su vari giornali nomi e cognomi di tutte le persone arrestate […] e spesso non c'è nessuna formula dubitativa: non viene detto forse ha commesso questo reato e non si usa il condizionale. Alcuni giornali vengono proprio accusati di riprendere la velina della questura e riportare esattamente quello che c'è scritto. Quindi credo ci sia un rapporto prioritario tra polizia, procura della repubblica e giornalisti.'

'For instance, there is a police operation, some people are arrested at 6 in the morning, at 9 a.m. you can find in several newspapers the names and surnames of the arrested people […] and often the newspapers do not use a dubitative formula, they do not use the conditional tense. Some newspapers are even accused to directly use the police statement and report this information. So, I believe that a priority relationship exists between police authorities, public prosecutors and journalists.'

A telling example of information provision from unofficial sources was provided by one of the criminal lawyers who mentioned a very relevant recent case of conflict between the former Italian Ministry of the Interior and the public prosecutor of Turin. The Ministry used his/her personal Twitter account to congratulate Italian police officers on the arrest of some members of a Nigerian criminal organisation; the public prosecutor severely criticised this behaviour since the arrests had not been concluded yet, and the Ministry's announcement risked compromising the whole operation. A public dispute occurred between the two authorities: the Ministry replied that s/he had been informed by the Chief of Police in charge of the arrests and that the public prosecutor should retire.

Finally, one of the participants – a criminal judge – stressed that **media coverage relevantly changes depending on the stage of the proceeding**. According to the participant, this way of dealing with judicial information and cases has a severe impact on the presumption of innocence of the defendants.

'intanto la stampa dice sempre «presunto colpevole»: già dire presunto colpevole è diverso da dire innocente, perché l'imputato è innocente fino a prova contraria. Già usare la parola colpevole da parte dei media è sbagliato e a tratti pericoloso. E poi, soprattutto, che in genere si ha una grande eco mediatica della fase prima, e poi molto spesso viene data – se viene data – la notizia dell'assoluzione in sordina. Oppure magari c'è una condanna molto minore di quello che è stato chiesto. E quindi secondo me i media hanno una grandissima responsabilità sulla presunzione di innocenza.' (Judge)

'First, the media always refers to the defendant as "allegedly guilty". Saying so is different from referring to them as innocent, since the defendant is innocent until proved otherwise. Usie of the word "guilty" by the media is wrong and somehow dangerous. Secondly, huge attention is paid by the media to the investigation phase, and information of an acquittal – if reported – is reported quietly. Or in some cases the sentence is lighter compared to what the prosecutor asked. And so, in my opinion, the media have a huge responsibility on the presumption of innocence.' (Judge)

This perspective was also confirmed by one of the prosecutors:

'Rispetto a quanto è ampia un'attività procedimentale, dall'inizio dell'indagine alla sentenza definitiva, di fatto la percentuale di notizie che riguardano la fase delle indagini è numericamente enorme rispetto poi a un report delle fasi processuali […] e quindi questo investe in modo particolare le procure e chi svolge l'attività di pubblico ministero.' (Public prosecutor)

'If we consider the complexity of the proceedings, from the beginning of the investigation to the final decision, the percentage of media information covering the investigations is disproportionately higher compared to the reporting of the following stages of the proceeding […] this is the reason why public prosecutors' offices and prosecutors are specifically concerned by this issue.' (Public prosecutor)

The same opinion was confirmed also by a criminal lawyer who stressed that media coverage mostly focuses on the investigation and prosecution phase; if a defendant is finally discharged by judicial authorities at the end of the proceeding, the conclusion of the case is rarely reported by the media, including the same media that covered the case in its initial phases. This is because depicting someone as guilty is more interesting to the public and earns the media greater revenue.

b. Effects the media have on presumption of innocence

I. Positive effects

None of the interviewees mentioned that media coverage can have a positive effect on the presumption of innocence of the defendants. However, media coverage can have other positive outcomes. A public prosecutor stressed the crucial role of the media in any **democratic system**. Their role is crucial in terms of the public control of the judicial power, to avoid abuses and cover-ups. Despite the risk of bad media coverage of judicial cases, the interviewee is not in favour of the adoption of legislative dispositions that excessively limit the freedom of speech and of information, because of the severe risk that exists of compromising the functioning of the democratic system. The Deputy Commissioner of the Italian Police reported that providing information to the media can have **crime prevention** purposes.

> *'Ero estremamente attento alla divulgazione delle informazioni personali legate al soggetto attenzionato, indagato o arrestato. Perché ho sempre ritenuto che non sia la persona – un nome e un cognome – che deve far clamore, assolutamente mai. Deve emergere la notizia, il disvalore sociale del fatto e quello che può essere trasmesso di positivo per la collettività, nel senso di percezione di sicurezza ma anche per eventuali criminali […] sapere che la polizia in un determinato territorio è vigile, presente e attiva.' (Deputy Commissioner of the Italian Police)*

> *'I was extremely careful when disclosing personal information concerning the suspect, the defendant or the arrested person – because I have always believed that the person – a name and a surname – should not be the core of the information. Never. The case must be reported, the social demerit of the conduct and a positive message to the community, in the sense of an increased perception of security and to potential criminals […] the awareness that the police, in a specific territory, is vigilant, present and active.' (Deputy Commissioner of the Italian Police)*

II. Negative effects

Participants in the research generally described the impact of media coverage in negative terms, *devastating* being one of the strongest adjectives used in this respect. A public prosecutor confirmed that the risk exists that parallel proceedings are carried out by the media and this is detrimental to the judicial system, to the parties involved in the proceeding and to citizens in general. And this is also detrimental to the principle of presumption of innocence.

One of the criminal lawyers reported that – in his/her opinion – information is provided or leaked to the newspapers and the media for **economic purposes and to advance careers**: reporting news about pending proceedings and investigations allows newspapers to sell more copies and increase their profits and they will be therefore more interested in disclosing information on these issues. This is according to the interviewee a sort of vicious circle that dramatically exposes the judicial system to the media spotlight. A similar point of view was expressed by another criminal lawyer who stressed that – since *Tangentopoli* – a connection was established between journalists and public prosecutors' offices based on an intense information exchange. *Tangentopoli* (which is a wordplay which could be translated as 'Bribesville') was a huge nationwide judicial case concerning a system of corruption involving the Italian political system. This case resulted in a complete transformation of the Italian public and political system and the disappearance of many political parties. During the investigations, about 5,000 public figures were monitored by Italian prosecutors; half of the members of the Parliament were under indictment; and many city councils were dissolved for corruption. The bribery system was perpetrated by Italian and foreign companies with the aim of obtaining contracts for public works. The volume of affairs of this corruption system amounted in the 1980s to ITL 6.5 trillion (about USD 4 billion). The exchange of information the interviewee referred to is aimed at fostering

the careers of both journalists and prosecutors and caused the proceedings to be more and more held in the media.

One of the criminal judges reported that media coverage is overall irrelevant for the activity of judicial authorities.

> *'Io ho fatto dei processi mediatici ma non mi è mai passato per l'anticamera del cervello di farmi influenzare. E neanche i miei colleghi si fanno influenzare da cosa si aspettano i media. Magari c'è un generale convincimento di colpevolezza ma se poi tu nel processo sei convinto che la persona sia innocente, la assolvi assolutamente.' (Criminal judge)*
>
> *'I had to deal with media proceedings, but I was never influenced. And it is the case also of my colleagues, they are not influenced by the media's expectations. I mean, there might be a general conviction of the guilt [of the defendant] but if you [the judge] during the proceeding consider that the defendant is innocent, then you will for sure discharge them.' (Criminal judge)*

An opposite perspective is provided by one of the criminal lawyers who reported that – in his/her experience – the public scrutiny of the criminal justice system performed by the media is not at all beneficial since judicial authorities are influenced by the way the proceedings are treated by the media. For instance, if a case becomes of public interest and the media are interested in it, the prosecutor and the judge might feel under pressure to behave in a specific way or to adopt a specific decision, such as, for instance, a pre-trial detention order.

One of the participants – a criminal judge– also considered the impact of media coverage on all the other persons involved in the judicial proceeding and how it can influence the judicial proceeding as a whole. More specifically, information disclosed by the media, can expose the victims who reported the crime to police officers but also police officers and prosecutors who carried out the investigation. On the other hand, the way the media reports and describes a case or a pending investigation can mould the public discourse on the case. This public discourse generally has an influence on the proceeding too: even if the judge is not influenced and can deconstruct such discourse, the witnesses and the parties can be influenced or benefit from such a public narration of the case.

c. Differences in media coverage concerning certain groups

I. Men and women

Some of the interviewees confirmed that the gender of the defendant is an element that can have an impact on the presumption of innocence. A criminal judge, reported that gender stereotypes are generally reinforced: if the case concerns an offence perpetrated by criminal organisations, female defendants are generally considered as manipulated by or operating on behalf of male members of their family or of the organisation since they are not deemed able to perpetrate severe and cruel criminal offences. If the case concerns gender-based violence episodes, male defendants are generally defended because of the patriarchal culture prevailing in Italy, a bias that might influence not only judicial authorities in charge of the proceedings, but also the media's narration of the case and the public opinion. According to the patriarchal perspective on gender roles and gender-based violence, male perpetrators of gender-based violence crimes are generally justified, and their actions described as acts of jealousy or the reaction to the victims' actions or attitudes. Gender was mentioned also by the other criminal judge who reported that there is a general higher sympathy towards female defendants. This might be due – in his/her opinion – to the fact that criminal offences are statistically

perpetrated more by men than by women. Men are more frequent both among defendants and among prisoners.

II. Children and adults

None of the participants mentioned this issue.

CASE STUDY

OMICIDIO DI YARA GAMBIRASIO (THE YARA GAMBIRASIO MURDER)

The Yara Gambirasio murder is a well-known criminal case that happened in Italy in November 2010. A young girl – aged 13 – disappeared from her small town near Bergamo (Lombardy) after a training session in a local gym. The case immediately raised the public and media attention due to the young age of the victim and the cruelty of the crime. The judicial proceeding – which started four years after the corpse was found since it was difficult for the prosecutors to point out a suspect – was concluded in 2018. Italian media intensely covered the case and the identity of the defendant was immediately disclosed. The public needed a perpetrator to be identified mostly because the victim was very young, and this caused the information about the case to be often extremely emotional. Most of the information conveyed by newspapers and TV seemed to support the guilt of the defendant.

III. Nationals and non-nationals (including ethnic minorities, e.g. Roma)

One of the criminal judges mentioned the ethnic group/nationality of the defendants as an element influencing the way media report information on judicial cases. Media focus a lot on the nationality of the defendant, even if this element has – in the participant's experience – no impact on the outcome of the judicial proceeding.

> *'Se lei vede quando a commettere un reato è qualcuno che non è italiano, l'articolo [di giornale] comincia sempre così: «un albanese è entrato in un'abitazione», «un marocchino ha stuprato una ragazza». E invece se è un italiano, dicono: «un uomo è entrato in un'abitazione», «un uomo ha stuprato una ragazza». Come se la caratteristica dell'umanità non appartenesse a chi non è italiano. Cioè, il primo dato che viene comunicato quando qualcuno commette un reato, è il dato etnico.' (Judge)*

> *'If you pay attention, when a foreigner commits a crime, the article [in the newspapers] always begins in this way: "An Albanian broke into an apartment", "A Moroccan raped a girl". If the perpetrator is an Italian person, they say, "A man broke into an apartment", "A man raped a girl", as if humanity does not belong to people who are not Italians. In other words, the first element that is conveyed when someone commits a crime is the ethnic group.' (Judge)*

One of the criminal lawyers explained that the way the ethnic origin of the defendants is treated by the media depends on the political orientation of the media itself. For instance, left-wing newspapers will treat the defendants' ethnic origin respectfully; on the contrary, right-wing newspapers will stress the nationality of the defendant to demonstrate third-country citizens are more inclined to perpetrate crimes.

IV. Persons with disabilities

Disability was mentioned by a minority of the interviewees as an element influencing the presumption of innocence of the defendants. A criminal judge reported that disability might diminish the perception of the severity of the offence.

V. Other groups

A public prosecutor reported that an element influencing the way media treat judicial cases concerns the **type of crime** the defendant is charged with; environmental crimes, financial crimes or crimes against the public administration can be treated and presented in different ways, depending on the political orientation of the newspaper or of the media. One of the lawyers also mentioned the case of defendants who are members of or support specific political groups or organisations that are looked down upon by a part of the Italian media. In this case, the defendants are always presented negatively and bear a strong public stigma.

d. Discussion of findings

- According to the law, the public prosecutor's office is the authority in charge of selecting the information concerning investigations and judicial cases that need to be provided to the media. However, many participants – especially criminal lawyers – reported that media often obtain and disclose information from unofficial channels, and this can be highly detrimental for the presumption of innocence of the defendants and for the judicial system in general.
- The impact of media coverage on the presumption of innocence is generally described by the participants as absolutely negative, even if most of them recognise the crucial role of media for any democratic system as watchdogs of the freedom of expression and of the good functioning of the judicial power.
- The ethnic minority/nationality of the defendants is mentioned as the element that most influences the way media treat judicial cases, especially when the information is reported by right-wing newspapers and media.

C.3 The presentation of suspects and accused persons

a. Measures used to present the accused and its impact on their presumption of innocence

As a preliminary remark, all the participants stressed that this issue mostly concerns defendants who are **deprived of their personal freedom** – those who are in pre-trial custody – who must be escorted to the courtroom by penitentiary police officers. The penitentiary police is another branch of the Italian Police depending on the Department of Penitentiary Administration (*Dipartimento dell'Amministrazione Penitenziaria* – DAP) of the Ministry of Justice: its prevalent task is the custody and management of people who are detained or deprived of their personal freedom. The procedures governing these transfers are ruled by the internal regulation of the penitentiary police. Defendants

who are not in detention are free to go autonomously to the courthouse and are not escorted by the police. Police officers and Carabinieri might be involved in the transfers in case the defendants are arrested in flagrancy and undergo a fast-track proceeding: they are held in a holding cell (*camera di sicurezza)* at the police headquarters and brought before the Court the day after the arrest (or as soon as possible if the arrest occurs during the weekend). The Lieutenant of the Italian Carabinieri reported that unless the defendant represents a threat to themself or for police officers, they are transferred to the courtroom without handcuffs. He also reported that police cars are now provided with a shatterproof glass partition, separating the officers from the people sitting in the back: this safety measure allows police officers to avoid using handcuffs. With this glass, defendants cannot attack the officers and are handcuffed only if they try to do harm to themselves.

The general principle in the Italian judicial system is that defendants have the right to participate in the hearing with no physical constraint, such as handcuffs. Moreover, Article 114 of the Italian Criminal Procedure Code explicitly forbids the publication of images of the defendants in situations of physical restraint (for instance, when they are handcuffed).

> *'In aula noi [i giudici] pretendiamo sempre, sempre che loro [gli imputati] siano liberi. Sempre. Le manette vengono levate prima e se non vengono levate, noi le facciamo togliere. Tutti i giudici italiani. Tutti.' (Judge)*

> *'In the courtroom, we [the judges] claim always, always that they [the defendants] are not restrained. Always. The handcuffs must be taken off before entering the room and if they are not, we order to take them off. All the Italian judges. All of us.' (Judge)*

Constraint measures are adopted only in case these are necessary for security reasons. This is the case, for instance, of handcuffs that are used only when deemed necessary for safety reasons. Another example concerns the separated areas (called '**cages**') existing in some courtrooms: these are areas within the courtroom where defendants in pre-trial detention can assist in the hearing from behind bars. Another example of safety measures was mentioned by one of the criminal lawyers who referred to the so-called '**bunker courtrooms**', courtrooms provided with individual cells on both sides with a protective barrier where defendants are held during the hearing. This kind of courtroom is generally used in criminal proceedings involving several defendants charged with severe criminal offences, such as mafia or criminal organisations. Bunker courtrooms can have a strong emotional impact on the public, especially because the kind of proceedings held in these courtrooms are subject to intense media coverage.

Defendants who are in pre-trial detention are generally transferred to the courtroom from the prison on the day of the trial and held in cells located in the basement until the beginning of the hearing. They are escorted by penitentiary police officers to the courtroom and during this transfer they are generally handcuffed: handcuffs are taken off when judicial authorities enter the room.

One of the lawyers expressed a positive perspective on the implementation of this procedure:

> *'Nella mia esperienza, ormai pluriventennale, mi è capitato di rado di assistere a un abuso dell'utilizzo dei cosiddetti "schiavettoni", delle manette in aula. Personalmente io ricordo, ero studente, i casi di "Mani Pulite", la presentazione in ceppi dell'imputato davanti al giudice, l'umiliazione pubblica e anche i suicidi, perché insomma quella stagione è stata determinata anche da lutti. Oggi su questo mi sento di spendere parole positive: quasi mai io ho visto un utilizzo indebito [delle manette].' (Criminal lawyer)*

> *'In my 20-year-long professional experience, I rarely witnessed an abuse of the use of the handcuffs in the courtroom. I personally remember, as a student, the "Mani Pulite" judicial*

cases, the presentation of the defendant with the handcuffs before the judge, the public humiliation and the suicides, because I mean that period was also characterised by losses. Today, I feel positive about this issue: I have almost never seen an unlawful use of handcuffs.' (Criminal lawyer)

The transfer from the basement to the courtroom might be filmed or photographed by the media, thus showing the defendants while they are physically restrained. This can have an impact on the public imagination and, consequently, on the presumption of innocence.

Judicial authorities reported that the defendants always take part in the hearings with no physical restraints, sitting next to their lawyers. One of the judges mentioned the case of defendants who are accused of being members of **mafia criminal organisations**: in those cases, defendants are rarely transferred to the courtroom and they generally participate in the proceeding by videoconference.

One of the criminal lawyers reported, however, that even if the defendant has the right to take part in the hearing with no physical restraint and sitting next to their lawyer, this right is implemented in practice in most cases forcing the defendants to participate in the hearing from the 'cage'. They are not handcuffed but forced to participate in the hearing from behind bars. According to the interviewee, this measure – which must be based on security reasons – is often adopted even if it is not necessary. Forcing the defendants to take part in the proceeding from behind bars should be a measure adopted in marginal cases, namely when the defendant represents a threat to the security (because they are aggressive or dangerous), when there is a flight risk or when there is a lack of security staff – penitentiary police officers – escorting the defendant during the hearing. Lawyers can insist before the judicial authorities to have the defendants sitting next to them without physical restraints: however – according to his/her experience – judicial authorities often find it more convenient – especially when more defendants are involved in the same proceeding and disorder in the courtroom is more likely – to have the defendants behind bars. This information was confirmed by a judge who reported that in the Courthouse of Turin the defendants – once in the courtroom – can be held in 'the cage' for safety reasons; however, in his/her opinion, they are perfectly able to follow the hearing and hear what people say.

'Il fatto che uno stia dentro a quell'area [la gabbia], tendenzialmente deve essere fatto solo se la persona è pericolosa: certo che nella stampa può ingenerare una certa convinzione di che cosa sia quel soggetto, cioè se è colpevole o non colpevole perché viene tenuto lì. Alcune volte viene fatto perché c'è una pericolosità; alcune volte viene fatto anche se questa pericolosità non c'è.' (Judge)

'The fact that a defendant is held in that area [the cage], in general, a defendant can be held there only if they are dangerous: this can engender in the press the conviction of the guilt or innocence of the defendant is they are held there. Sometimes this choice is based on danger; other times the defendant is held there even if there is no danger.' (Judge)

One of the criminal lawyers reported that when the defendant is shown to the media while transferred in handcuffs to the courtroom, this will certainly be the only image the public opinion will remember about the case, whatever the eventual outcome of the proceeding.

CASE STUDY

OMICIDIO DI YARA GAMBIRASIO (THE YARA GAMBIRASIO MURDER)

Italian media intensely covered the case and the identity of the defendant was immediately disclosed. The defendant participated in some of the hearings from behind bars. There are also TV images as well of the defendant escorted by police officers to the courthouse.

Another element emerging from the interviews is that the courthouse's premises can be different depending on the location and entail different treatment for the defendants who are under detention and need to be escorted to the courtroom. Separate pathways are generally used for these transfers: the defendants are consequently not exposed to the attention of the media and the risk to present them as guilty in this respect is limited. However, in those courtrooms that do not have separate pathways, it cannot be excluded that the defendants are escorted by penitentiary police officers through the crowd with the handcuffs on. In these cases, the defendants are not allowed to cover their faces.

This is how one participant described, for instance, the situation of the Rome Courthouse:

> *'gli imputati vengono portati in aula dalle gabbie, cioè al piano di sotto del tribunale, nel seminterrato ci sono delle celle. Vengono portati la mattina dal carcere dentro queste celle e poi vengono fatti salire per dei corridoi interni quando ci sono o a volte per le scale pubbliche fino all'aula. E questo tragitto viene fatto con le manette, con strumenti di contenzione. Arrivati in aula, quando l'aula lo consente, le manette in linea di massima vengono levate.' (Criminal lawyer)*

> *'[D]efendants are brought to the courtroom from the cages, that is in the courthouse's basement there are some cells. They are brought there from the prison in the morning and then they are accompanied through internal hallways – when available – or through the ordinary stairs to the courtroom. During this path, the defendant is handcuffed, and physical restraints are used. Once in the courtroom, if the courtroom allows it, the handcuffs are generally removed.' (Criminal lawyer)*

A similar situation was reported in Turin by one of the judges: defendants are transferred from the detention facility to the courtroom with a police van and the van arrives directly inside the Turin Courthouse's basement. When the hearing is about to begin, the defendants are escorted by penitentiary police officers to the courtroom through a dedicated pathway: no journalists are allowed, so she excluded that they could be able to take photos or film the transfer.

One of the lawyers reported that, despite attending the hearing without handcuffs, defendants who are detained are constantly watched over by at least two police officers. If the courtroom does not physically allow police officers to adequately control the defendants – for instance, because it is too small and overcrowded – they can remain handcuffed until the judge arrives. The interviewee reported that the judges generally ask penitentiary police officers to remove the handcuffs if they do not do it on their own.

Defendants are never allowed to **cover their faces** during the hearings since, in order to have access to the courthouse, it is necessary for everyone to be fully identifiable. Defendants can ask through their lawyers to have the proceeding behind closed doors: this possibility must be sustained with objective and solid reasons of vulnerability and protection of the parties involved in the proceeding

Specific remarks were provided concerning the **arrest** of the suspects: during the arrest, the defendants often try to cover their faces with their hands or with a newspaper. The Lieutenant of the

Italian Carabinieri mentioned the case of mafia bosses who, during the arrest, often decide not to cover their faces as a gesture of defiance against the State. Moreover, according to his experience, police authorities can decide to adopt further safeguards for the defendants, such as avoid letting out the defendants in the police car in front of the police station, but rather to let them out in the station's parking area to avoid exposing them to the attention of the media and of passers-by.

The possibility of covering the face during the arrest should always be ensured during the arrest of the defendant: however, the actual implementation of this right often depends on the sensitivity of police officers and on the social status of the defendant. Police officers' attention towards the privacy of the defendants is much higher when dealing with defendants with a high social status (opinion expressed by a criminal lawyer).

One of the criminal lawyers stressed the importance of allowing the accused person/defendant to cover their face during the arrest:

> *'Sempre per tornare al tema della mediatizzazione, molto spesso le immagini degli arresti vengono esibite come un trofeo di caccia. E sono assolutamente trofei di caccia che fanno più danno dell'articolo di giornale. Perché una cosa è l'articolo di giornale con le iniziale, altra cosa è il volto.' (Criminal lawyer)*
>
> *'Going back to the mediatisation, it happens very often that the images of the arrests are exhibited as hunting trophies. And they actually are hunting trophies that can do more harm than the newspaper article – since having an article reporting the initials (of a name) is extremely different from showing a person's face.' (Criminal lawyer)*

b. Clothing

All participants confirmed that no prison clothes exist in Italy and defendants are **free to choose their outfit** for the trial. However, some of them reported their personal opinions and experiences concerning the impact of the defendants' outfit on their presumption of innocence and on the Court.

According to one of the criminal lawyers an outfit suggesting poverty or social marginality of the defendant might elicit some empathy from the court or audience, suggesting the defendant might have committed the crime, acting from necessity.

Another criminal lawyer reported that the outfit definitely contributes to shaping the public image of the defendant before the public opinion and judicial authorities. This is the reason why – in his/her experience – disadvantaged or vulnerable defendants are encouraged to choose clothes that are generally considered as decent and acceptable.

A specific issue in this respect concerns defendants who have just been arrested and are brought before the court in the preliminary hearing (the so-called **fast-track proceedings**) with the same clothes they were wearing when arrested and without being given the possibility of having a shower. These defendants are easy to recognise because of their outfit since they are often deprived of shoelaces and belts for safety reasons (in order to avoid self-harm in the prison's cell)

> *'[l'abbigliamento] racconta qualcosa dell'imputato. Questo è il motivo per cui io a determinati tipi di imputati ho sempre detto, mi raccomando vieni vestito normalmente. Cioè, vestiti in un modo che sia ritenuto accettabile e decoroso. Così come, al contrario, mi è capitato soprattutto nei processi che vengono fatti per direttissima […] e lì sicuramente ha un impatto veramente forte […] perché vieni arrestato e processato immediatamente. Il che vuol dire che passi due giorni in camera di sicurezza e ti ritrovi di fronte al giudice con i vestiti che avevi due giorni*

prima. Questo è sicuramente un aspetto che ha un impatto sui giudici perché ti fotografa al momento di quella che è la commissione del reato. Così come mi è capitato […] di imputato che sono arrivati coi vestiti strappati in aula che poi è emerso che derivavano da atti illeciti commessi sulla persona dalle forze dell'ordine.' (Criminal lawyer)

'[The outfit] tells us something about the defendant. This is the reason why I often suggest to some categories of defendants to wear ordinary clothes. I mean, dress in a way that is considered acceptable and decent. On the contrary, in fast-track trials […] in these cases the outfit has a great impact […] because you are arrested and immediately prosecuted. This means that you spend two days in a security cell and then you are brought before the judge with the same clothes you had on two days before. This is something that might have a strong impact on the judge because your outfit captures your image in the moment you have allegedly committed a crime. It also happened to me that […] a defendant entered the courtroom with torn clothes and it later on emerged that the clothes were torn because of the abuses perpetrated by police officers on that person.' (Criminal lawyer)

c. Presentation of vulnerable groups

Most of the respondents could not point out any specific safeguards in place to protect vulnerable defendants.

One of the criminal lawyers reported that third-country citizens involved in criminal proceedings as defendants are not protected with specific safeguards; on the contrary:

'I migranti sono massacrati. Parlo della stampa, della presunzione di colpevolezza o d'innocenza che dir si voglia. Quelli sono massacrati.' (Criminal lawyer)

'Migrants are massacred. I am referring to the press/the media, to the presumption of guilt or of innocence as we prefer. They are massacred.' (Criminal lawyer)

Some participants stressed that the vulnerability of the defendant must be assessed on an individual basis: the lawyer can point it out to the court which has the obligation to assess it and adopt specific safeguards. The legislation in force does not envisage categories of defendants that are considered vulnerable *a priori*; however, if specific needs emerge during the proceeding – such as the case of a defendant with disabilities – judicial authorities have the obligation to address them to ensure that the proceeding is correctly carried out. For instance, the lawyer or the prosecutor can ask to conduct the trial behind closed doors if the exposure to media attention can harm the defendant or the parties involved in the proceeding. However, there is no standard procedure: each situation is considered individually (opinion expressed by a public prosecutor).

One of the two judges mentioned the use of videoconference as a safeguard for vulnerable defendants: according to the participant, this instrument – which is currently limited to severe criminal offences or to defendants who are deemed to be socially dangerous – allows defendants to be less exposed to public attention during the hearing and during the transfer to the courtroom.

One of the police officers mentioned the necessity of balancing the protection of the defendants and the operability of the police:

'Sicuramente vanno prese delle cautele extra, specialmente nei casi che ha appena menzionato. Questo però non deve inficiare l'attività della polizia, perché sicuramente se pensiamo a un migrante che è accusato di rapina a un anziano, se questa vicenda […] è mediaticamente attenzionata vanno prese delle cautele extra […] se però non ci sono

alternative, io non ho il mantello di Harry Potter e posso farlo scomparire e ricomparire in aula.' (Lieutenant of the Italian Carabinieri)

'Some specific safeguards are clearly needed, especially in the cases you just mentioned. And still, these safeguards cannot affect police activities, because if we consider an example, the case of a migrant robbing an elder – if this case […] is covered by the media, some specific safeguards are needed […] but if we do not have alternatives, I do not have Harry Potter's cloak to make him or her [the defendant] disappear and reappear in the courtroom.' (Lieutenant of the Italian Carabinieri)

The Deputy Commissioner of the Italian Police reported that – in his opinion – introducing categories of particularly vulnerable defendants is not useful because this poses the risk of providing weaker protection to 'ordinary' defendants.

d. Reactions to presenting the accused as being guilty

The way the defendant is presented and transferred to the courtroom is a discretional decision of the penitentiary police that must assess the level of danger of the defendant. At any stage of the proceeding, the defendant has the right to report the mistreatment to the Ministry of Justice, to the director of the detention facility or to the judicial authority in charge of their case.

'Ad esempio, in assenza del giudice in aula – perché magari si è ritirato in camera di consiglio – è il pubblico ministero che deve gestire la disciplina e l'ordine nell'aula. Se in questa fase il pubblico ministero se ne va e magari succedono delle situazioni di violenza o di costrizione, potenzialmente c'è una violazione disciplinare in qualche modo rimproverabile a lui [al pubblico ministero] ed eventualmente poi alla polizia penitenziaria o a chi ha commesso queste azioni.' (Public prosecutor)

'For instance, if the judge leaves the courtroom – because they are in the council chamber to decide – the public prosecutor is the authority in charge of maintaining discipline and order. If in this phase, the public prosecutor leaves and cases of violence or illegitimate constraint occur, there is a potential disciplinary infringement that can be rebuked to the prosecutor or to the penitentiary police or to the subject perpetrating these actions.' (Public prosecutor)

Judicial authorities have a crucial role in this respect because they always control what happens in the courtroom and can immediately take action in case a violation occurs.

'Il giudice in genere ha un controllo sulle procedure e le modalità di accesso dell'imputato in udienza: se l'imputato viene portato in aula con le catene ai piedi, viene fuori una scenata, una situazione di grossa criticità. E sicuramente subiranno delle conseguenze disciplinari quelli della scorta che hanno fatto questa cosa.' (Public prosecutor)

'The judge is generally in control of the procedures to accommodate the defendant in the courtroom: if the defendant is escorted with chains at their feet, the judge will make a scene, it would be a critical situation. And the penitentiary police officers who did this would for sure face disciplinary consequences.' (Public prosecutor)

The defendant can thus start a parallel judicial proceeding to claim mistreatment: however, according to one of the judges this does not have an impact on the outcome of the principal proceeding.

Defendants might also request and obtain compensation for the damage to their public image.

'[l'imputato può chiedere] dei danni di risarcimento all'immagine […] però sono stupidaggini rispetto al danno che uno subisce. Ripeto, lei quando pensa a un processo, vedrà che le viene sempre in testa la manetta. *È così!' (Criminal lawyer)*

'[The defendant can ask] compensation for the damages to their public image […] however, this is irrelevant if compared to the damage they might have suffered. Again, if you think of a judicial case, the first image that will come to your mind is the handcuff. This is how it works!' (Criminal lawyer)

e. Discussion of findings

- Defendants have the right to participate in the trial with no physical restraints. Those who are deprived of their personal freedom – pre-trial detention – are escorted by the penitentiary police from the detention facility to the courthouse and set free from the handcuffs once they enter the courtroom. Handcuffs are left on if deemed absolutely necessary for safety reasons. This is a discretional decision of the penitentiary police: defence lawyers can protest this treatment and the judge can intervene to eliminate all physical restrictions.
- There are no prison clothes in Italy and defendants are free to choose their outfit. For some of the participants, the defendants' clothes can have an impact on their public image and on the Court. Some of the participants mentioned the specific case of fast-track proceedings where defendants are brought before the Court with the same clothes they had at the moment of the arrest: their outfit is often easily recognisable since they are often deprived of shoelaces and belts for safety reasons (in order to avoid self-harm in the prison's cell).
- No specific safeguards were mentioned governing the public exposure of vulnerable defendants.

C.4 Burden of proof

The principle of the burden of proof resting with the prosecution is described by all interviewees as one of the cornerstones of the Italian criminal judicial system. The defendant must be considered innocent unless the public prosecutor can prove their guilt. It is not up to the defendant to prove their innocence. As a consequence, the defendant must be discharged if the evidence against them is not enough to prove their guilt beyond any reasonable doubt (Article 530.2 of the Italian Criminal Procedure Code).

'Si sente spesso parlare nei film dei famosi alibi. L'imputato non deve avere nessun alibi perché è il pubblico ministero, al contrario, che deve provare che è esattamente quella persona che ha compiuto quell'azione che è contestata nel processo e che l'ha compiuta volontariamente.' (Judge)

'In the movies, there is often a reference to the alibi. The defendant does not need an alibi because it is up to the prosecutor, on the contrary, to prove that the specific person – the defendant – did commit the action considered in the proceeding and that they voluntarily committed it.' (Judge)

One of the criminal lawyers explained the principle of burden of proof, stressing that it rests with the prosecution because of the higher judicial value awarded to the evidence and witnesses filed by the prosecutors. Even if the defendants (and their lawyers) actively contribute to the case, providing evidence and witnesses in discharge, these elements are given far less reliability than those provided by the prosecutors. And this is especially true when the prosecutors' witnesses are police officers or

other public authorities: in these cases, the judges nearly always consider them more reliable than the defence's witnesses. In general terms, prosecutors – being judicial authorities – benefit from an image of impartiality and they are considered as reliable by the Court. Yet specifically, the evidence provided by the prosecutors might not be sufficient to prove the defendant's guilt; however, it is always considered reliable and true.

a. Exceptions to the burden of proof

No exceptions are formally envisaged by the legislation in force. However, some participants mentioned specific examples of ***de facto*** **inversion** of the burden of proof.

One of the criminal lawyers reported that – according to his/her experience – the problem in practice is that investigations are currently based mostly on wiretapping and the defendants are often asked to justify and explain excerpts of conversations they had with other people sometimes many years before the proceeding. It might be very difficult for them to explain the meaning of their words and this approach – in the interviewee's perspective – can be seen as a *de facto* inversion of the burden of proof principle.

> *'quando la fonte di prova del pubblico ministero è riversare migliaia e migliaia di conversazioni che sono soggette a interpretazione per il loro contenuto, qui per esempio il problema del fornire l'onere della prova risulta invertito. Perché nel momento in cui io propongo un'interpretazione […] l'accusa propone una lettura e poi è compito dell'imputato spiegare.' (Criminal lawyer)*

> *'When the source of proof of the public prosecutor is represented by thousands of conversations whose content is subject to interpretation, the problem of burden of proof is reversed. Because if I support an interpretation, […] if the prosecution supports an interpretation then it is up to the defendant to explain [why the prosecutor's interpretation of their words is mistaken].' (Criminal lawyer)*

Another criminal lawyer mentioned the case of defendants who are accused of being **members of mafia criminal organisations**. In these cases, the suspect/defendant is automatically considered as socially dangerous and held in pre-trial custody. It is generally up to the suspect/defendant and their lawyer to demonstrate that the connection with the criminal organisation was rescinded.

> *'Le dicevo che io faccio anche processi per mafia […] lì ci sono delle presunzioni legali che presumono che chi è imputato o indagato, presuntivamente è pericoloso. La legge lo stabilisce. Sì d'accordo ma influisce sul concetto di colpevolezza o presunta innocenza? Sì, certo che influisce! Perché nei processi per mafia se uno è in carcere perché si presume che abbia questo vincolo associativo che in quanto tale è imperituro nel tempo e presente in ogni angolo della stanza ecc. ecc. è impossibile dimostrare la rottura di questo rapporto e comunque la deve dimostrare l'imputato o l'indagato.' (Criminal lawyer)*

> *'I was mentioning before that I also deal with mafia proceedings. […] In this field, there are some legal presumptions that consider the suspect or defendant as automatically dangerous. It is established by the law. Okay, but does it influence the presumption of guilt or the presumption of innocence? Yes, it does! Because if a person is detained in the context of a mafia judicial proceeding, they are presumed to maintain the connection to the criminal organisation and this connection is presumed to be everlasting and to be present in every corner of the room, etc. etc. it is impossible to demonstrate that this connection has been rescinded and, in any case, it is up to the suspect/defendant to prove it.' (Criminal lawyer)*

The **type of crime** was mentioned as another element potentially reversing the burden of proof in practice, even if it still rests on the prosecution formally: for specific types of criminal offences, perpetrators are automatically perceived as unreliable and so they find it harder to prove their innocence. This is the case of a drug addict compared to a professional, who will be treated differently by judicial authorities even if charged for or perpetrating the same criminal offence.

> *'Ci sono delle fattispecie di reato, seppur minori, nel nostro sistema, che sono soggette spesse a una valutazione anche dell'apparenza [dell'imputato]. L'esempio più classico è il porto ingiustificato di oggetti atti ad offendere. Nessuno di noi può andare in giro con un coltello a serramanico in tasca senza un plausibile motivo. Sistematicamente nel nostro sistema, ad esempio, tutti i tossicodipendenti, che usano il coltellino per frazionarsi lo stupefacente o per scaldarlo e non certo per infilarlo in pancia ad altri, vengono comunque condannati anche per questa contravvenzione penale […] semplicemente in quanto sono tossicodipendenti e non credibili per partito preso. Se io, che faccio l'avvocato, giro con un coltello serramanico in tasca e ho la prontezza di dare una giustificazione, più o meno plausibile, è estremamente difficile che possano prima contestarmi e poi condannarmi. Basta una giacca e una cravatta tante volte!' (Criminal lawyer)*
>
> *'There are some criminal offences, including petty ones, that are sanctioned by our system that are often subject to an evaluation that can also encompass the defendant's physical appearance. One example in this respect concerns the unjustified carrying of objects that can cause harm. Nobody can carry a switchblade in the pocket without a plausible reason. Systematically in our system, drug addicts – who generally use these knives to split or heat the drug, and for sure not to injure other people – are charged also for this criminal offence […] simply because they are drug addicts and consequently a priori not trustworthy. If I, as a lawyer, am caught with a switchblade and I have the readiness to provide a (plausible or non-plausible) reason for that, it is extremely difficult that they will report and charge me for this. Sometimes, suit and tie are enough!' (Criminal lawyer)*

The same exception was mentioned by a public prosecutor:

> *'Ci sono tutta una serie di tipologie di reato particolarmente difficili ma strumentali a combattere le organizzazioni criminali mafiose, come ad esempio l'intestazione fittizia di beni o il trasferimento fittizio di beni. Qui la prova è sicuramente una prova positiva cioè io [pubblico ministero] devo dimostrare che un certo soggetto ha subito una serie di condanne, ha un reddito di una certa quantità sproporzionata rispetto ai beni che detiene. Dopo di che però sulla base di questi elementi si presume che l'intestazione fatta a un terzo di bene che sono a lui riconducibili sia illecita. E qui c'è un'inversione dell'onere della prova effettivamente perché deve essere l'imputato a dimostrare che quei beni li ha acquistati o se li è procurati lecitamente.' (Public prosecutor)*
>
> *'There are some types of crimes that are particularly complex to prove but useful to counter mafia criminal organisations, such as the fictitious registration of property or the fictitious transfer of property. The burden of proof in this case is positive, that is I [as public prosecutor] must prove that a subject already has previous convictions, has an income that is disproportionate if compared with their property. On grounds of these elements, I can presume that the registration in favour of a third subject concerning property that can be attributed to the suspect is illicit. This is an inversion of the burden of proof because it is up to the defendant to demonstrate that they have purchased or obtained this property lawfully.' (Public prosecutor)*

Another element considered by the participants is the case of the defendant caught in possession of **illegal goods** (such as drugs or weapons). One of the lawyers stressed that the defendant is expected to explain the possession; however, the mere possession is not automatically considered as sufficient to condemn them. For one of the prosecutors, the case of a defendant caught *in flagrante delicto* cannot be considered an exception either since – according to the interviewee – the burden of proof still rests with the prosecution: it might be an easier proof for the prosecutor, but the system is still the same. One of the judges further explained that if the defendant is caught in possession of illegal goods, the proceeding will be based on the witness of the police officers who caught the defendant. The defendant is always allowed to explain their actions and, in this specific case, the possession of the goods. Depending on these elements, the defendant can be discharged if there are the judicial conditions for this decision.

One of the judges mentioned the specific case of **gender-based violence** as an exception to the principle of the burden of proof. According to the participant, in this kind of proceedings the burden of proof formally rests with the prosecution but *de facto* it rests with the victim, that is the woman who is victim of gender-based violence. This actual reversal of the burden of proof is due to the sexism that is well-rooted in the Italian society: women reporting an episode of gender-based violence and abuse are often mistrusted and the defendants' defensive strategy is generally based on demonstrating that the victim was consenting. During the trials, victims are generally scrutinized in their lifestyle, outfit and behaviours, as if these were elements explaining the abuse they suffered. The interviewee – who has long-standing professional experience in this field – wanted to express that in this kind of controversy, the victims often undergo intrusion in their personal lives perpetrated by the defendants and their lawyers, trying to demonstrate the unreliability of the victims' words.

Finally, one of the lawyers mentioned the **insufficient support** public prosecutors provide to criminal lawyers who have investigation powers that are far more limited than those at the disposal of public prosecutors' offices. There is a clear imbalance between the defence and the prosecutors even during the proceeding's development: if a witness that is crucial for the defence does not show up at the hearing, the lawyer and the defendant lose their right to interrogate the witness; the same does not happen for the prosecutors' witnesses and the hearings are postponed until the witness is found or the prosecutors renounce to the witness. These are – in the interviewee's opinion – clear violations of the judicial procedures envisaged by the law and substantial inversions of the burden of proof: it is possible to file a complaint during the appeals phase; however, judicial authorities often consider these potential violations as petty and minor issues.

> *'In fase di processo, anche se è contro le norme processuali ma avviene quotidianamente nelle aule di tribunale, se manca all'udienza un teste della difesa, l'avvocato e l'imputato decadono dalla possibilità di sentirlo; se manca un teste dell'accusa, l'udienza verrà rinviata di udienza in udienza, di anno in anno, fino a che o la Procura non lo trova, oppure la Procura della Repubblica non decide di rinunciare a quel teste. Queste sono violazioni processuali […] le eccepisci in appello e però vengono considerate dalle autorità giudicanti come questioni bagatellari.' (Criminal lawyer)*

> *'During the proceeding – even if this practice is a violation of judicial procedures but it still occurs often in the courtroom – if a witness of the defence does not show up at the hearing, the lawyer and the defendant lose their possibility to interrogate them; if a prosecutor's witness does not show up, the hearing is postponed until the prosecutors can find this person or give up on the possibility of having that witness in the proceeding. These are violations of judicial procedures […] you can file a complaint in the appeal phase, but these are considered by judicial authorities as petty issues.' (Criminal lawyer)*

b. <u>Confession</u>

All participants confirmed that the defendant's confession is **not sufficient** to conclude the judicial proceeding. Confessions must be cross-checked and sustained with further evidence and documents. However, the defendant's confession might result in a faster conclusion of the proceeding.

> *'Se non c'è nessun altro elemento e c'è una confessione, io comunque mi pongo dei dubbi. A me non è mai capitato, però è possibile che un padre confessi qualcosa per non far finire in carcere il figlio, il marito con la moglie, la moglie col marito. Quindi io in assenza di altri elementi, solo con la confessione, non mi è mai successo ma ci rifletterei lungamente.' (Judge)*

> *'If the confession is not supported by other evidence, I would doubt it. It never happened to me, but it is possible that – for instance – a father confesses a crime to avoid his son ending up in prison, or the husband for the wife, or the wife for the husband. For this reason, if no other elements emerge besides the confession – it never happened to me – but I would strongly reflect on the case.' (Judge)*

According to one of the lawyers, the confession severely compromises the presumption of innocence of the defendant:

> *'[In caso di confessione] possiamo dire che la presunzione di innocenza viene meno. Quasi sempre a questo tipo di situazioni […] la scelta processuale che si impone è quella del patteggiamento. Quindi possiamo dire che alla presunzione di innocenza vi ha rinunciato l'imputato stesso.' (Criminal lawyer)*

> *'[In case of confession], we can say that the presumption of innocence fails. Almost always in this kind of situation […] the judicial path to choose is to plea bargain. So, we can say that the defendant themselves waive the presumption of innocence.' (Criminal lawyer)*

One of the lawyers reported that the defendant's confession can have a strong impact on the judicial proceeding. If a defendant decides to confess, they contribute to the proceeding with a strong evidence in favour of the prosecution. The impact of this decision is therefore crucial on the proceeding's outcome. It would be possible to prove that the confession is not true and to investigate the reasons behind this choice: however, this is something only the defendant's lawyer can decide to do; the prosecutors and the judges have no interest in it.

One of the lawyers suggested that the defendant's confession might convince judicial authorities to adopt a **milder sentence**. Moreover, the defendant is considered to be aware of their mistakes and to have started a redemption process: this is the reason why they deserve a milder treatment. This mechanism is described by the interviewee as hypocritical. Another lawyer stressed that lawyers never suggest that the defendants confess unless the prosecutors' accusation is so solid that it would be impossible to be discharged.

Some **safeguards** are in place to ensure defendants are well-aware of their right to confess, which is the counterpoint of their right to remain silent (see section C.5). Judiciary police officers are compelled by the legislation in force to inform the accused person/defendant about their rights, including the right to remain silent and to confess. This information must be provided before the beginning of the police/prosecutor's interrogation. If this information is not provided, the defendant's confession cannot be used in the proceeding. This information notice must be delivered to the subject in a written form and – if the person does not understand Italian – it must be translated into a language they can understand. The defendant is also informed by the judge – before the cross-examination starts during the hearings – about their right to give spontaneous declarations during the proceeding. A defendant cannot be heard and interrogated without their lawyer.

'Intanto bisogna vedere come lo confessi e quando lo confessi. Perché se la confessione è fatta senza l'avvocato, in un contesto nel quale non c'è magari neanche stata una verbalizzazione e non è una confessione ma un riferire da parte di terzi il contenuto di quello che è stato sentito, il suo valore è pari a zero […] da noi non c'è nessuna possibilità che queste dichiarazioni abbiano un'utilità.' (Public prosecutor)

'First of all, it must be considered how and when the confession occurs. If the confession is made without the lawyer, or it is provided by a third subject who overheard the content of a conversation, it has no value […] In Italy, there is no way that this kind of declaration can be used.' (Public prosecutor)

CASE STUDY

OMICIDIO DI YARA GAMBIRASIO (THE YARA GAMBIRASIO MURDER)

In October 2019 – when the case had already been officially closed by the Court of Cassation – the defendant sent a letter to the director of a well-known right-wing Italian newspaper, sustaining he had been pressured to confess his guilt by the public prosecutor and the prison's administration. Moreover, he claimed that the behaviour of the Ministry of the Interior violated his rights to a fair judicial proceeding.

If the confession is provided to the penitentiary police and the lawyer is present, this confession can be used by the prosecutor during the interrogation of the defendant, but it cannot be used directly before the court.

According to one of the prosecutors the confession that is provided during the public prosecutor's interrogation is the most protected one: the defendant must be assisted by the lawyer, they must be formally communicated the charges and they must be provided in advance with information concerning their rights as a person involved in a criminal proceeding, such as the right to remain silent. These safeguards are ensured to all defendants. Moreover, in case of defendants with a migrant background, the penitentiary police must assess that they can adequately understand Italian, otherwise a translator/mediator is needed and all the documents concerning the proceeding must be translated. Judicial authorities can also carry out this assessment of the level of understanding of Italian.

In some cases, self-accusatory declarations are allowed even outside the formal procedures established by the law: these declarations can be at any time withdrawn but their impact on the public opinion's perception of the case and therefore on the presumption of innocence can be disruptive (opinion expressed by a criminal lawyer).

One of the judges stressed that confessions are quite ordinary in the cases of arrest in **flagrancy** of the defendant. If the evidence against them is solid, the defendant might decide to confess in order to have access to alternative judicial proceedings – such as the fast-track proceeding – and have the sentence reduced by one third.

One of the judges reported that the decision to confess is often part of the **defence strategy** and it is negotiated with the lawyers:

'E poi questa è una strategia difensiva. A parte quello che dice il giudice sugli avvisi, sul fatto che sia una scelta consapevole e libera, in realtà la scelta di parlare o non parlare, di confessare o non confessare, è una scelta difensiva. Una strategia che decide l'imputato col suo difensore.

Nel nostro sistema funziona così. Ovviamente chi ammette la propria responsabilità ha forti benefici dal punto di vista della pena.' (Judge)

'This is a defensive strategy. Besides what the judge says about the notices, about the necessity to ensure that the confession is a free and informed choice of the defendant, the choice to intervene, or to confess, is a defensive choice. A strategy that is decided by the defendant and their lawyer. This is how our system works. Those who admit their responsibilities will of course obtain significant benefits when it comes to the sanction.' (Judge)

c. Discussion of findings

- The burden of proof resting with the prosecution is described by all participants as a cornerstone of the Italian judicial system. No formal exceptions are mentioned. However, some of them reported some *de facto* examples of inversion of the burden of proof.
- The confession is a right of the defendant who is informed about it – together with the other procedural rights – from public authorities since the very first contact with them.
- All of the participants agreed that the defendant's confession is never sufficient for concluding the judicial proceeding: evidence and witnesses are still needed to prove the confession's reliability.

C.5 The right to remain silent and not to incriminate oneself

a. The right to remain silent in practice

All participants reported that the most effective way to implement the defendant's right to remain silent is to promptly and adequately inform them about this possibility, as well as about all the other procedural rights they can benefit from. This information must be provided clearly, in a language the defendant can understand and from the very first contact with public authorities. Each professional category reported a specific way to provide this crucial information to the accused person/defendant.

Judges described the right to remain silent as one of the core principles of the Italian judicial system. This is implemented in practice by **informing the defendant** – at the beginning of the hearing – about their procedural rights, including the right to remain silent. The defendant can choose whether to participate in the hearing – once they are adequately informed about the proceeding itself – if they participate, they are immediately informed by the judge about the right to make statements in any moment and degree of the proceeding; the defendant is also asked if they want to undergo the prosecution's interrogation. If the defendant declines all these possibilities, the proceedings go on anyway.

Prosecutors implement the right to remain silent carefully respecting the procedures envisaged by the legislation in force. The defendant can be interrogated by the prosecutor during the trial only upon request of the defendant. The interrogation is an obligation only if pre-trial custody measures are adopted or at the end of the investigation phase. If the defendant formally asks to be interrogated, the prosecutor is obliged to fulfil this request as their institutional mandate is to collect evidence both against and discharging the defendant. Moreover, the interrogation is always conducted respecting some **specific safeguards**, such as the presence of the lawyer and the communication to the defendant about the right to remain silent.

'Rendere effettivo questo diritto significa non condizionare, soprattutto in una fase di indagine, l'indagato a parlare. Anche quando la scelta è quella e però c'è un interesse a capire alcune cose, è chiaro che si potrebbe rischiare in qualche modo di condizionarlo [l'indagato]. Però il

modo migliore per rendere effettivo è costruire le indagini il più possibile a prescindere dalla parola dell'indagato.' (Public prosecutor)

'Making this right effective means avoiding influencing, especially during the investigation phase, the accused person to provide information. Even if they decide to remain silent and the prosecutor needs to better understand some things, it is clear that there is the risk of influencing [the accused person]. But the better way to make this right effective is to carry out the investigations independently from the accused person's words.' (Public prosecutor)

Lawyers explained that the right to remain silent is envisaged by the Italian judicial system and the decision of the defendant to remain silent can be a strategy negotiated with the lawyer. Judicial authorities cannot by any means infer the guilt from the defendant's silence. The right to remain silent also includes the defendant's right to lie before the court. In fact, the Italian Constitution enshrines – in its Article 24 – the defendant's right to defence in every stage of the judicial proceeding. This right has both an active and a passive meaning. In an active sense, it entails the possibility for the defendant to actively take part in the proceeding providing information, evidence and their version of the facts, though without being subject to the obligation to tell the truth (Article 503 of the Italian Criminal Procedure Code); in its passive sense, it entails the right of the defendant to not cooperate with judicial authorities and consequently to decide to remain silent.

'L'imputato in Italia può dire quello che vuole per la difesa, no? […] qui c'è un diritto di difesa garantito, anche di dire le stupidaggini. Il cittadino non lo capisce, non lo può capire probabilmente però il diritto a dire le stupidaggini è una conseguenza del più ampio diritto al silenzio, oppure del diritto a dire quello che uno ritiene di dover dire difendendosi. Senza doverne dar conto a nessuno, salvo il reato di cui deve rispondere chiaramente.' (Criminal lawyer)

'The defendant in Italy is free to say whatever they want for the defence, right? […] we have in Italy a right to defence that is guaranteed, including the right to lie. Citizens do not understand it, they cannot understand it probably but the right to lie is a consequence of the wider right to remain silent, or to say anything a person wants to say for self-defence. Without being accountable for it before anyone, except the obligation to respond for the crimes they are charged for.' (Criminal lawyer)

Similarly:

'In Italia, non solo è garantito il diritto al silenzio ma è garantito anche il diritto alla menzogna. Mentre in altri ordinamenti, se si accetta di rispondere, poi si avrebbe anche il dovere di dire la verità, in Italia no. Per cui bisogna accettare anche che il soggetto, nel momento in cui risponde, possa tirare fuori una propria argomentazione falsa.' (Public prosecutor)

'In Italy, not only the right to remain silent is granted but also the right to lie. In other legal systems, if the defendant accepts to reply to the questions, they would be obliged to tell the truth. This is not the case in Italy. We must therefore accept that the defendant, during the interrogation, can provide information that is untrue.' (Public prosecutor)

One of the lawyers stressed that defendants generally remain silent during the hearings and they are often suggested to do so by their lawyers. Lawyers often recommend their clients to remain silent because – in the interviewee's experience – they are often unable to comprehensively understand the impact of their statements on the proceeding's outcome. According to the interviewee, the defendant's decision to make a statement is highly risky. However, the decision to remain silent or to

make statements is an independent and individual choice of the defendant and the lawyers must respect it.

Police officers reported that the right to remain silent is implemented providing the accused person/defendant adequate and clear information about their procedural rights. This information notice is provided before the interrogation; moreover, an accused person is informed about the end of the investigations and the beginning of the procedure and also about the possibility of participating in an interrogation with the prosecutor in charge of the case. This information notice is provided to the accused person from the very first contact with the police authority: when the person is declared under arrest, they are immediately informed about their rights. This is also because there are some procedural rights – such as the right to inform a lawyer, to contact family members, and to remain silent – that must be at the disposal of the person under arrest since the very beginning of the arrest procedure: the person cannot be informed late about the possibilities at their disposal. The Deputy Commissioner of the Italian Police further explained that the information notice must be translated if the accused person/defendant cannot adequately understand Italian. Moreover, in the case of specific individual needs of the accused person/defendant, judiciary police officers can resort to the judicial authorities in charge of the case and tailor specific solutions to make sure the person correctly understands the information they are provided. Judiciary police have the option to appoint and recruit professionals with specific technical skills when they are needed to support the investigations and any other judicial activity (Article 348.4 of the Italian Criminal Procedure Code): this might be the case, for instance, of using communication assistants for defendants with sensorial disabilities. If a professional is asked to cooperate with the judiciary police, they cannot refuse.

> *'È chiaro che uno che mi parla la lingua dei segni non è che lo trovo aprendo la porta del commissariato. Anche perché ogni volta che richiediamo l'abilità tecnica di qualcuno, chiediamo sempre come quella persona è abilitata a fare quelle cose: iscrizione all'albo, un master, un dottorato. È chiaro che non è che ci si affida al primo che passa.' (Deputy Commissioner of the Italian Police)*

> *'It is clear that I can't find a person knowing sign language just opening the police station's door. [...] anytime we resort to a person's technical skills, we always ask this person to demonstrate such skills: registration in a professional register, a master's degree, a Ph.D. We obviously do not rely on the first person we find.' (Deputy Commissioner of the Italian Police)*

Finally, the Lieutenant of the Italian Carabinieri explained that promptly informing the accused person about their rights is crucial when dealing with people of foreign origins that come from countries where the police and the legal system do not provide adequate protection and guarantees to the people under arrest: these people might be spontaneously scared of their interaction with police officers, and the officers must be aware of this possibility.

b. <u>How is information on the right to remain silent and not to incriminate oneself shared with the accused?</u>

Suspects and defendants are informed about the right to remain silent during their first contact with public authorities, such as for instance during the interrogation phase, through a pre-printed form. Public authorities must use a standard formula to inform the suspects/defendants. This form – together with the report of the interrogation – must be signed by the accused person/defendant as a way to prove that they were aware of what was going on during the interrogation procedure. Moreover, the interrogation of the defendants who are deprived of their personal freedom must always be audio-recorded. If the suspects/defendants are not informed, the information and declarations thus obtained cannot be used in the proceedings. If during the preliminary investigations a person is heard by the prosecutor as a person informed about the case (and not as an accused

person) – and therefore without the presence of a lawyer – and during this conversation information emerges that incriminates this person, the information provided by the accused person to the prosecutor cannot be used against them.

As for the practical implementation of this procedure, one of the lawyers reported that the information notice is often read quickly to the accused person without making sure they really understand the meaning of the wording. For instance, s/he reported that this notice includes a list of legislative dispositions (the number of the articles of the Criminal Code) that cannot be understood by those accused subjects who do not have the legal and technical knowledge to do so.

One of the lawyers mentioned a case that might represent a violation of this procedure. The defendant that is arrested and/or charged with a criminal offence, has the right to make spontaneous statements (*dichiarazioni spontanee*). In this case, public authorities are not compelled to provide the defendant with the information notice about their rights (including the right to remain silent and to not incriminate themself) and these statements are transcribed and put on the record by the competent authorities (the prosecutor or police authorities). The defendant who decides to make spontaneous statements is asked to sign them. These declarations can be used in the proceeding, even if the defendant was not informed about some of their crucial procedural rights. However, the interviewee also stressed that it is extremely difficult to prove that the defendant was not adequately informed about the consequences of their declarations.

c. Self-incrimination

Defendants cannot be obliged to provide their password, phone's personal identification number (PIN) and email password, unless this information is formally requested by the prosecutors and authorised by the judge. Forensic police can gather this type of evidence even without the defendant's consent. However, this activity must be authorised by judicial authorities. The defendant always has the right to refuse cooperating in this evidence-collection activity.

> *'La regola è che laddove si debba acquisire una fonte di prova che va a incidere sulla sfera dell'individuo, ci deve essere sempre una riserva assoluta di legge. E quindi se è previsto dalla legge e quindi c'è stata una valutazione da parte del legislatore del bilanciamento di interessi tra le esigenze di ricerca della verità e la tutela della riservatezza individuale, si può fare. Laddove invece questo non è consentito e non è previsto, non è che si può torturare uno per farsi dire la password! Ci saranno degli strumenti tecnici che semmai consentiranno di arrivare a questa password se è possibile.' (Public prosecutor)*

> *'The general rule is that if prosecutors need to obtain a specific piece of evidence that compromises the defendant's personal integrity and freedom, this procedure must be strictly governed by the law. If the law envisages this possibility, it means that the legislator carried out the balance between investigation purposes and the protection of the subject's privacy: in this case, it is possible to collect this evidence. If this possibility is not envisaged by the legislation, a person cannot be tortured to obtain a password! There might be other technical instruments to obtain this password otherwise.' (Public prosecutor)*

A public prosecutor might try to obtain information or evidence from the defendant that might incriminate them; however, the defendant has the right to always be assisted by a lawyer. The presence of a lawyer is a guarantee against potential abuses of public authorities in charge of the investigation.

One of the lawyers reported that accused persons can also be induced to accept unauthorised police searches: the interviewee mentioned the case of police officers convincing the accused person to

allow this kind of treatment, telling them that a public prosecutor would authorise it anyway so there is no reason to postpone the procedure. The accused person is therefore induced to formally authorise a police search that would have otherwise needed a formal authorisation of the public prosecutor in charge of the case. A similar perspective was reported by another lawyer who reported that, thanks to technological innovations the professionals, police officers and prosecutors can use, they are able to obtain any information they need for their investigations: for this reason, his/her perception of this issue is that defendants and accused persons often choose to cooperate because this information can be obtained in any case – even without the subject's cooperation – and in case of refusal to cooperate, the defendant/accused person's position towards the authority might worsen.

Most of the participants mentioned the DNA test for identification purposes as evidence that judiciary police officers can obtain even without the accused person/defendant's consent, if the procedure is authorised by competent judicial authorities.

d. Right to remain silent

The decision to remain silent is a crucial procedural right of the defendants and it cannot be by any means considered as an evidence of guilt. The respondents provided relevant insights on how this right is implemented in practice in judicial proceedings.

One criminal lawyer reported that the defendant's decision to remain silent can be considered by the judge as one of the elements and evidences to decide the case. Moreover, the silence of the defendant can have many meanings depending on their situation and the offence of which they are accused. For instance, in the case of criminal organisations, the decision of the defendants to remain silent can be explained as their fear to betray the organisation and pay the consequences of this choice.

Another lawyer explained that in practice the effect of silence depends on the judicial case: for example, if judicial authorities are dealing with a serious criminal case where victims have lost their lives, the defendant's silence is considered negatively and might penalise the defendant; on the contrary, the decision of the defendant to cooperate with judicial authorities is generally rewarded when deciding the verdict. A similar perspective was expressed by another lawyer who reported:

> *'Mi capita spesso di leggere, a fronte della contestazione della solidità delle prove raccolte contro il mio assistito, che in motivazione della sentenza, il giudice scriva […] che la ricostruzione dei fatti è convincente […] perché dall'altra non è stata fornita una versione alternativa e l'imputato si è sempre avvalso del silenzio. Quindi, le cose sono andate così non solo perché è verosimile che siano andate così, ma quel pezzo che manca […] me l'hai fornito sostanzialmente tu non proponendo un'alternativa ricostruttiva all'evento.' (Criminal lawyer)*

> *'It happened often to me that, when complaining about the robustness of the evidence collected against my clients, that the judge, in the decision's reasoning, states that [….] the findings of facts are persuasive […] also because no alternative version was offered and the defendant decided to remain silent. And so, these are the facts not only because the prosecutor's version is plausible, but also because the missing pieces […] are substantially offered by the defendant who decided not to provide an alternative version.' (Criminal lawyer)*

A more negative perspective on how the defendant's silence is interpreted by judicial authorities was expressed by another criminal lawyer:

> *'Cioè da che è un diritto quello di rimanere in silenzio, anche da questo punto di vista si ha sempre meno garanzie. Il silenzio può essere sempre usato contro di te [imputato]. E non lo usa solo il pubblico ministero ma si trovano sentenze, anche per cose veramente banali, in cui*

l'imputato viene accusato di non aver dato una versione alternativa, di non aver parlato, di essersi avvalso della facoltà di non rispondere.' (Criminal lawyer)

'Even if the right to remain silent is a right, the safeguards are increasingly weaker. Silence can always be used against you [the defendant]. Not just by the prosecutors, there are many judicial decisions, concerning even petty crimes, where the defendant is accused of refusing to provide an alternative version of the case, of refusing to bear witness, of exerting the right to remain silent.' (Criminal lawyer)

Judges reported that the silence of the defendant has two main effects. On the one hand, the defendant gives up the possibility of giving the court their own version of the case and the judge can only rely on the version provided by the prosecution. On the other hand, the defendant – if deemed guilty – cannot benefit from a reduction of the sentence since they refused to provide to the court any element that could explain or partially justify their actions.

'Non avendomi fornito elementi positivi, ad esempio ho commesso una rapina perché mio figlio sta al reparto di neuropsichiatria e devo pagare un'assistente etc. io come faccio? Cioè per me hai commesso una rapina! Quindi se tu ti avvali della facoltà di non rispondere non mi dai nessun tipo di argomento: qual è la tua vita, qual è il tuo contesto, cosa ti ha mosso a commettere quel reato, io non lo so! Quindi incide sulla pena, indirettamente.' (Judge)

'The defendant does not provide me any positive element, for instance, I committed a robbery because my son is hospitalised in the neuropsychiatry department and I need to pay an assistant, etc. What can I do? I mean, I only know you committed a robbery! So, if the defendant decides to remain silent, they are not giving me any element: what their life and context are like, what are the reasons of the crime, I would not know! So, this choice has an indirect impact on the sentence.' (Judge)

Similarly:

'Rendere la propria versione è comunque utile per l'imputato. Nel senso che, se io [in quanto giudice] posso interpretare un fatto in modo alternativo, è possibile che a me non venga in mente quella spiegazione alternativa e che però esista. È ovvio che nel momento in cui l'imputato non me la fornisce, non mi fornisce neanche la possibilità di vedere una spiegazione alternativa a meno che non me la figuri io stessa.' (Judge)

'The decision of providing their version of the events can be useful for the defendant. As a judge, I might not be able to interpret the case in a different way, but an alternative explanation might exist. It is clear that if the defendant does not provide me with an alternative interpretation, they do not even allow me to interpret the facts differently unless I come to a different explanation by myself.' (Judge)

Silence can also have an impact in the case of the proceedings where the defendant is discharged, and they decide to start the procedure to obtain financial compensation for the unfair detention they were subject to. In those cases, their decision to remain silent can be considered as a negative element against them, because if they had participated in the proceeding, providing elements proving their innocence, they might have avoided detention. According to one of the lawyers who works in Rome, silence is too often considered a negative element in this kind of proceedings and is used as a way for the State to avoid compensating the complainants for the unfair detention they suffered. This information was also confirmed by another criminal lawyer.

e. <u>Discussion of findings</u>

- Participants of all professional categories reported implementing in practice the right to remain silent. In most cases, this right is implemented providing clear and adequate information to the accused person/defendant about their procedural rights, since the very first contact with public authorities.

- Accused persons/defendants can never be forced to incriminate themselves, providing information or evidence without their consent. They might, however, feel pressured to consent, considering that police authorities would obtain the information they need anyway.

- The defendant's silence does not have a formal and automatic impact on the outcome of the proceeding. However, it can be interpreted as a sign of the defendant's reluctance to cooperate with judicial authorities, to not provide an alternative version of the facts. This might result in the impossibility of benefiting from any reduction of the sentence.

C.6 The right to be present at the trial and to have a new trial

a. Consequences of non-appearance

The defendant has the right and not the obligation to be present at the trial. The notification system in place is highly protective of the defendants' rights. All the proceedings' acts and documents must be notified to the defendant or to their appointed lawyer. Defendants are therefore informed about all the steps of the proceeding. Then, it is up to the defendant to decide whether to personally participate in the hearings or not. If the defendant is informed and they decide not to participate, the proceeding can continue, and the defendant is not informed about the postponement dates. The decision not to show up in Court has **no legal consequences**, as it was stressed by all participants.

> *'Le notifiche che si devono fare all'imputato sono almeno tre. Gli devo notificare l'avviso di concluse indagini, come pubblico ministero gli devo consegnare l'atto di incolpazione con la comunicazione che tutti gli atti sono depositati. Poi, il giudice dell'udienza preliminare gli deve notificare la mia richiesta di rinvio a giudizio con il decreto che fissa il giudizio. Se supero l'udienza preliminare, il giudice delle indagini preliminari gli deve notificare il decreto che dispone il giudizio, con l'imputazione, con la data dell'inizio del processo. Quindi da questo punto di vista il sistema è molto garantista.' (Public prosecutor)*

> *'The defendant must be given at least three different notices. The public prosecutor must communicate the end of the investigation and deliver the accusation act, as well as the information notice about the fact that all the documents are lodged by the court's chancellery. Then, the preliminary hearing judge must inform them about the prosecutor's request of indictment and the date of the preliminary hearing. After the preliminary hearing, the preliminary investigation judge must inform them of the beginning of the proceeding, the charges against them and the date of the first hearing. So, from this point of view, the safeguards in place are very strong.' (Public prosecutor)*

Many participants also stressed that the Italian Criminal Code was recently reformed as to abolish ***in absentia*** **proceedings**: if the defendants cannot be located and informed about the existence of a judicial proceeding against them, the proceeding is suspended until this information is provided by police officers. If the defendant is untraceable, the proceeding is suspended for one year. After one year, law enforcement officers try to retrace the defendant again: if they are untraceable, the proceeding is suspended again for one year. According to one of the lawyers who works in Rome, this system worsens the Italian judicial backlog. During the one-year suspension, law enforcement officers

carry out insufficient investigation to find the defendant: this is defined by the interviewee as a 'non-solution' to this issue; it is just a way to postpone the problem

> *'Il nostro codice ha avuto una modifica abbastanza recente, da qualche anno, per cui non esiste più il processo contumaciale […] e questo anche grazie ad alcune direttive europee sull'assenza, sulla contumacia, sulla condanna in contumacia. Per cui mentre una volta il soggetto che non veniva trovato, veniva processato nonostante non fosse a conoscenza del proprio procedimento come contumace […] oggi il processo si fa solo nei confronti del soggetto che è stato avvisato.' (Criminal lawyer)*

> *'Our Criminal Code was recently reformed, some years ago, so that the proceeding in absentia does not exist anymore […] This reform was possible also thanks to some EU Directives on absence, on the in absentia procedure, on the in absentia judgement. Before the reform, the defendant who was not traceable was nonetheless prosecuted even if they were not aware of the proceeding […] Now the proceeding can start only if the subject is informed.' (Criminal lawyer)*

According to one of the lawyers police authorities are not really interested in ascertaining that the defendant is adequately informed about the proceeding; they only need to know that the defendant has chosen a legal address where they can send the proceeding's notices.

No specific safeguards and procedures are in place for vulnerable defendants. One of the judges mentioned the case of defendants with disabilities who have a supporting administrator/guardian: in this case, the notifications concerning the proceedings are communicated both to the defendant and to these subjects.

b. <u>What has been understood as 'effective participation'?</u>

All participants mentioned availability of information, the effective understanding of judicial procedures and the legal defence as pivotal elements for the effective participation of the defendant to the proceeding.

Lawyers described effective participation as the voluntary presence of the defendant in the courtroom, sitting next to and supported by their lawyer. The defendant must be ensured the possibility of presenting to the court all the elements and the evidence in their favour and to actively contribute to proving their own innocence.

Judges described effective participation as the full awareness of the defendant about the facts they are accused of, about the roles of each person participating in the proceeding and about the different types of existing proceedings and the different rights they can benefit from during the hearing as a defendant.

Prosecutors reported that the defendant's participation in a trial is effective when they are assisted by their lawyer who is fully aware of all acts and documents and can therefore guide and orient the defendant through the judicial proceeding. Moreover, each stage of the proceeding offers different instruments to the defendants to shape their defence strategy (such as, for instance, the possibility to file documents, evidence and witnesses) and the defendants must be aware of these possibilities.

The **videoconference** system was mentioned by all criminal lawyers as a system which compromises the defendant's right to effective participation in the trial, since the relationship and communication between the defendant and their lawyer are made more difficult and less immediate. Moreover,

during videoconference hearings, the face of the defendant is extremely visible and projected on a big screen in front of all the people present in the courtroom.

> *'Uno degli elementi che oggi sta mettendo un po' in crisi il diritto a presenziare all'udienza è quello dei processi che sono seguiti telematicamente. Perché noi avvocati riteniamo che avere l'imputato in un altro luogo e dover parlare attraverso un microfono […] è molto più difficile e più complesso e meno immediato che il rapporto con l'imputato seduto accanto al difensore.' (Criminal lawyer)*
>
> *'One of the elements that is currently compromising the right to be present at the trial is the videoconference. Because, we – as lawyers – believe that having the defendant in another place and being forced to communicate with them with a microphone […] it is much more difficult and complex and less immediate than having the defendant sitting next to the lawyer.' (Criminal lawyer)*
>
> *'La video-conferenza è una battaglia di noi avvocati. Io lo so che quando ho accanto l'imputato e lui mi fa segno col gomito e mi dice: «guarda che questa è una stupidaggine. Guarda che non è così. Quello che sta dicendo il teste è per questo motivo, ecco qui il documento», ecc. Questo è un discorso. Un altro discorso è averlo collegato da [citta] dove deve chiamare il cancelliere, il cancelliere chiama [in aula], ti passa il telefono [all'avvocato] […] è ovvio, è una battaglia persa che noi avvocati abbiamo fatto perché riteniamo che il diritto di difesa viene molto, molto appesantito da una cosa di questo genere.' (Criminal lawyer)*
>
> *'Videoconference is a battle the lawyers have fought. I am aware that if I have the defendant sitting next to me and they can catch my attention and tell me, "This is false. This is not true. The witness is saying this for this reason, here is the document," etc., it is one thing. A completely different situation is having the defendant connected from [an Italian city where a detention facility is located] where they have to ask the chancellor, the chancellor makes a phone call [to the courtroom], the call is transmitted [to the lawyer] […] It's obvious. It is a losing battle the lawyers decided to fight because we believe that the right to defence is extremely overloaded by this kind of technical tool.' (Criminal lawyer)*
>
> *'è una violazione del diritto di difesa il fatto che di default, soprattutto in questo periodo ma purtroppo la tendenza è quella […] la remotizzazione dell'imputato è un modo di allontanarlo dal processo che lo riguarda e di rendere meno efficace la sua percezione del processo, la percezione della fisicità del giudice, il contatto con il suo difensore. Per quanto le garanzie formali siano rispettate.' (Criminal lawyer)*
>
> *'It represents a violation of the right to defence the fact that automatically, in this period in particular but this is a general trend: […] the defendant is remote: this is a way to remove them from the proceeding and to make less effective their perception of the proceeding, their perception of the physical presence of the court, their contact with the lawyer – even if the formal guarantees are respected.' (Criminal lawyer)*

One of the lawyers stressed another critical feature of the videoconference system concerning the communication between the defendant and their lawyer. Privacy is still ensured; however, communication between the lawyer and the defendant becomes evident to the court and it might provide inputs about the relevance of some passages and pieces of evidence that are presented during the proceeding.

'Se pure è vero che l'udienza in videoconferenza si svolge con un telefono privato, separato tra avvocato e detenuto, oppure quando sono in aula e voglio parlare con un mio detenuto vado vicino alla sbarra e quindi parlo con lui, ho riservatezza in tutti e due i casi. Ho la stessa riservatezza se ce l'avessi di fianco e potessimo parlare. Però è chiaro che do molto più nell'occhio! È meno immediato perché io magari devo chiedere riscontro di una cosa […] e perdo un pezzo di udienza. Ma soprattutto […] qualcosa racconta al giudicante. Se io devo stare al telefono un quarto d'ora con il mio assistito perché il teste X ha detto una cosa, è chiaro […] che quello è un elemento sensibile.' (Criminal lawyer)

'Even if the hearings held in videoconference provide a private phone, separated at the disposal of the lawyer and the detainee, or when I am in the courtroom and I need to talk to my client I can go to the bars and communicate with him or her, I have my privacy in both cases. I have the same privacy I would have if the defendant was sitting next to me. But the communication is more evident! It is less immediate because I might need to ask something to the defendant […] and I would lose part of the hearing. But most of all […] it tells something to the court. If I must spend 15 minutes talking on the phone with my client because the witness X said something, it is evident […] that that evidence might be sensitive.' (Criminal lawyer)

Finally, one of the lawyers reported that the COVID-19 emergency further worsened this situation:

'Durante il Covid, c'è stata un'accelerazione sul processo in remoto. Poi questa cosa è decaduta perché c'è stata un'opposizione ferrea degli avvocati e dell'ordine degli avvocati. E, ovviamente, la figura che poteva stare a casa era l'avvocato. Magari in aula c'era il giudice e il pubblico ministero, l'imputato in videoconferenza e l'avvocato da casa […] l'idea era che ormai l'imputato è sparito con la videoconferenza, e così spariva anche il difensore. Quindi alla fine rimangono il giudice e il pubblico e la tendenza è sempre più questa.' (Criminal lawyer)

'During the COVID-19 emergency, there was an acceleration of the use of remote proceedings. This approach fast ended because of the strong opposition of the lawyers and of the association representing them. However, the only figure that had to stay home was the lawyer. I mean, the judge and the prosecutor were in the courtroom, the defendant participated via videoconference and the lawyer stayed at home […] the idea was that the defendant already disappeared with the videoconference, and this approach also allowed the lawyer to disappear. So, in the end, only the judge and the prosecutor remain. This is the trend in my opinion.' (Criminal lawyer)

On the contrary, another lawyer stressed a positive effect of the increased use of videoconference techniques in the judicial system, referring as well to the COVID-19 period. More specifically, s/he reported that during the COVID-19 emergency, defendants who were deprived of their personal freedom could communicate with their lawyers via video calls. According to the participant, if privacy is ensured, this could represent an important improvement because it would relevantly reduce the defence costs (such as involved with the necessity of the lawyer to frequently travel to the prison where the defendant is detained). This is particularly important for defendants with a disadvantaged economic and social background.

Lawyers also mentioned the case of defendants belonging to marginalised social groups who often do not have an entrusted lawyer and are given a **court-appointed lawyer** (since in the Italian judicial system, the defence of a lawyer is compulsory). This is the case of defendants stopped and checked by police officers during street control operations and reported for a crime: they are given a short explanation of the situation and asked to appoint a lawyer. Since they rarely have an entrusted lawyer,

a public defender is chosen from a list at the disposal of police and judicial authorities. The defendant is asked to sign a form to formally appoint the lawyer; moreover, they are communicated orally or in written form the name and address of the lawyer. If the public defender is able to contact these defendants, they can be informed about the date of the hearings; unfortunately, most of the times it is impossible for the lawyers to find their clients – since they might not be registered in the official civil registries – and they are therefore prosecuted without even knowing about the existence of the trial. Moreover, one of the participants – a criminal lawyer – stressed that lawyers cannot perform an effective defence without knowing the defendants: the right to defence in these cases is merely formal. This gap might represent not only a violation of the defendant's right to be present at the trial, but also of the right to defence.

One of the lawyers explained this critical issue in detail:

> *'Quindi qual era il problema? Notificare una prima volta, fare un'elezione di domicilio. Che succedeva soprattutto per gli stranieri? Beccavano gli stranieri qui a [citta], ne prendevano uno perché magari era successo qualcosa […] gli dicevano qual era il difensore d'ufficio. Gente che probabilmente sa parlare in italiano a stento. Anche questo bisognerebbe che fosse assolutamente precisato, attenzionato e molto spesso passano sopra. Facevano eleggere a questi disgraziati senza fissa dimora domicilio presso il difensore d'ufficio […] poi magari questo tizio lo lasciavano libero, si perdeva nel mondo come l'ossigeno nell'atmosfera e nel frattempo l'avvocato d'ufficio si trovava una domiciliazione quindi sulle spalle un processo senza mai aver visto l'ipotetico cliente e quindi processi fatti … ora non è più possibile perché adesso ci vuole il consenso del difensore.' (Criminal lawyer)*

> *'Which was the problem? The first notification and the designation of a lawyer. What was the general procedure especially with immigrants? Police officers used to stop them here in [a city], they would arrest one of them because, who knows, something happened […] they would tell them the name of the public defender. And these people could barely speak Italian. This is another topic that should be carefully dealt with by police officers and they often do not. They used to make the defendant appoint the public defender […] and then they set the defendant free, this person was consequently untraceable as the oxygen in the atmosphere. In the meanwhile, the public defender received a designation and had to deal with a proceeding even if they had never met the defendant and so we used to have these proceedings … now this is not possible anymore because the consent of the defender is needed in order to have a lawful designation.' (Criminal lawyer)*

The extreme **complexity of judicial proceedings** was mentioned by one of the judges as an element potentially affecting the effective participation of the defendant. Defendants might not have the legal knowledge that is necessary to understand all the technicalities of the proceedings: this is the reason why they must be assisted by professional lawyers whose mandate is to legally represent the interests of their clients.

> *'Comunque, il processo è una cosa complicata. Io personalmente mi sforzo sempre di far capire a chi è lì però non è che gli imputati normalmente hanno una laurea in giurisprudenza, anzi quasi mai. E quindi io mi rendo conto della difficoltà che può avere un imputato a capire cosa succede. Io per esempio quando faccio le direttissime con gli arrestati, la prima cosa che faccio è chiedere se l'imputato ha capito perché è lì, che cosa è successo, che è stato arrestato. Questo è uno sforzo che io cerco sempre di fare […] questo è il motivo per cui hanno una difesa tecnica. Il ruolo dell'avvocato è rappresentare tecnicamente le ragioni del proprio assistito.' (Judge)*

'The proceeding is complex. I personally try to explain the situation to the defendants, but they do not always have a degree in law; on the contrary, they almost never do. And so, I am aware of the difficulties a defendant might have in understanding what is going on. For instance, when I deal with fast-track proceedings with defendants in detention, the first thing I ask the defendants is whether they are aware of the reasons of the hearing, what happened and that they are under arrest. This is my personal effort […] but this is also the reason why the defendants can benefit from a technical defence. The role of the lawyers is precisely to technically represent the reasons of their clients.' (Judge)

c. Vulnerable groups

In general terms, the specific situation of each defendant can be reported to the Court by the lawyer. It is up to the Court to assess the situation and the requests and to adopt specific safeguards, such as the appointment of a communication assistant for defendants with **sensorial disabilities**.

As for **foreign defendants** who do not understand Italian, they have the right to an interpreter and to have all the proceeding's documents and notices translated into a language they can understand, even if the proceeding must be conducted in Italian. Moreover, if the translation or interpretation are not actually guaranteed, the proceeding is considered not valid. According to one of the lawyers– this system is not always efficient and adequate: for instance, defendants who are under arrest have the right to have the arrest notice and all other notices translated by the penitentiary police, who are not always able to ensure the quality of the translation and do not have the skills of a professional interpreter. This information was confirmed by one of the judges, who reported that foreign defendants are always provided with an interpreter: the problem is that they are not always professional interpreters – especially when local languages or dialects are concerned – and the judge cannot check the quality of the translation and be sure that the defendant is correctly understanding what people are saying during the hearing. According to the interviewee, this is a severe problem that might compromise the right to effective access to justice for third-country citizens.

Defendants with disabilities were often spontaneously mentioned by the participants when commenting on vulnerable groups. Judicial proceedings are suspended in case the defendants have disabilities or impairments that do not allow them to understand and consciously participate in the proceedings against them. These disabilities are assessed by experts appointed by the Court. More specifically, if the disability emerges during the proceeding, the initial notification procedure is the same as the one for defendants without intellectual impairment. If the disability is legally certified after the investigation phase, the proceeding might be suspended because the defendant would be declared as intellectually unable to take part in the proceeding (*incapace di intendere e di volere*). In case of sensorial disabilities, an interpreter or a professional assistant is generally appointed.

A more general remark concerning the protection of vulnerable defendants was reported by one of the lawyers who suggested that additional persons should be envisaged in the Italian judicial proceedings providing cultural mediation between these defendants and the judicial system. This could also be useful for Italian defendants with a very low education level. In fact, many third-country citizens come from countries where the judicial system works in a completely different manner compared to the Italian one: cultural mediators are need to make sure they understand the procedure and the language that is used during the trial. The interpreters are not enough in this respect, especially because very often only the interpreters for the most common languages are available (English and French mostly). Moreover, interpreters are available only when the defendants deal with the authorities: the lawyers are not provided with interpreters when privately communicating with their clients and they must pay for their own interpreters and this could be extremely expensive.

'L'interprete è previsto solo in aula. Io ho assistito questi ragazzi eritrei, per reati anche molto gravi e che sono stati in carcere per molto tempo. Nonostante avessero detto che non parlavano italiano, il Tribunale gli ha dato tutte le carte per cui venivano arrestati in italiano. Gliele hanno tradotte quando erano scaduti tutti i termini per fare tutto […] solo grazie al sostegno della comunità eritrea che credeva fortemente nell'innocenza di queste persone, abbiamo trovato degli interpreti che hanno lavorato gratis e che venivano in carcere e a ogni colloquio, che spiegavano le cose, che hanno tradotto le intercettazioni […] e comunque erano persone che semplicemente venivano dall'Eritrea e che stavano in Italia da più tempo. Non sono mediatori professionisti e sicuramente non sanno nulla di diritto.' (Criminal lawyer)

'The interpreter is provided in the courtroom only. I have assisted some Eritrean guys, charged with severe offences and who spent a long time in jail because of this. Despite having declared they could not speak Italian, they were provided all the documents concerning their arrest in Italian. These were translated when all the deadlines to file a complaint had expired […] Thanks to the support of the Eritrean community that strongly believed in their innocence, we have been able to find interpreters who worked for free, assisting me in jail and in the communication with the defendants and who also translated all the wiretapping transcriptions […] and in any case they were just Eritrean people who had spent a longer time in Italy, they were not professional cultural mediators and they were not experts in law.' (Criminal lawyer)

d. Discussion of findings

- The defendant has the right and not the obligation to show up at trial. The decision to not participate has no legal consequences. However, a strict notification system is in place to make sure the defendant is informed about the charges and the existence of a judicial proceeding against them.
- Each professional category reported its own definition of effective participation: provision of clear and complete information, effective understanding of judicial procedures and the presence of a lawyer were the elements mentioned by all the participants. Criminal lawyers mentioned the videoconference system as one of the elements most severely affecting effective participation.
- As per vulnerable defendants, the specific situation of each defendant is individually assessed and can be reported to the Court by the lawyer. Defendants who do not understand Italian have the right to be assisted by interpreters/cultural mediators during the hearings and have all the documents translated into a language they can understand.

C.7 Challenges and improvements

a. Challenges

All participants were aware of the crucial role played by the media in any democratic system, contributing to the implementation of the freedom of expression and of the functioning of the judicial system. However, one of the challenges mentioned by the interviewees is the necessity to adequately **balance** freedom of expression and the existence of a free press and media system, with the presumption of innocence and privacy of accused persons and defendants.

Personal prejudices and opinions of judicial authorities are mentioned as another element potentially compromising the presumption of innocence of the defendants. The participants reported that it would be important to figure out which biases could compromise the presumption of innocence of

each defendant, depending on their personal features. This is because judicial authorities are expected to be impartial, but they might still be exposed to prejudices and stereotypes.

> *'L'imparzialità è un percorso, non appartiene agli esseri umani. È un percorso difficile che richiede consapevolezza, scavo e coscienza dei propri limiti e fragilità umane di carattere conoscitivo. Poiché i pregiudizi e gli stereotipi sono uno strumento di conoscenza veloce e poiché noi abbiamo […] una quantità di procedimenti in relazione ai quali abbiamo bisogno di trovare delle tecniche cognitive veloci. Di fronte alla complessità, poiché io devo prendere una decisione, devo semplificare necessariamente […] quando ci sono imputati che potrebbero essere vittime di pregiudizio o stereotipo e ci sono, e quindi parliamo dei tossicodipendenti, parliamo degli immigrati, parliamo dei Rom, parliamo di tutti quei contesti di marginalità sociale. E in positivo, parliamo del professionista, parliamo del bianco, del dirigente d'azienda […] quindi l'unico strumento vero per mantenere fermo e saldo il principio di non colpevolezza che è un valore fondamentale, sia quello di formare la magistratura a riconoscere gli eventuali bias che possono colpire una categoria di imputati.' (Judge)*

> *'Impartiality is a path, not a natural feature of human beings. It is a tough path that requires awareness and knowledge of our personal limits and cognitive human fragilities. Because prejudices and stereotypes are a fast knowledge tool and since we have […] so many pending proceedings, we need to decide, we need fast cognitive techniques. Before such complexity, since I am requested to decide, I need to simplify […] when there are defendants who might be victims of a prejudice or a stereotype – and there are many – and I am thinking of drug addicts, immigrants, Roma, all social marginalities. But also in a positive sense and I am thinking of professionals, CEOs, white people […] I believe that the only way to ensure the principle of presumption of non-guilt that is a fundamental value, is to properly train judicial authorities in order to make them fully aware of potential bias that might compromise a category of defendants.' (Judge)*

The **role of media** was also mentioned as a crucial element, together with the fact that sometimes information about the investigations or judicial cases is provided to the media through **unofficial sources** and not directly by the judiciary police or the prosecutors in charge of the case. This is the reason why it is crucial that judicial information is disclosed to the media by public authorities in charge of the investigations and the case and who are aware of the facts, the evidence and the official documents collected up to that moment.

The extreme **complexity and length of judicial proceedings** in Italy might be a crucial challenge for the presumption of innocence of the defendants.

> *'I tempi dei processi! Perché poi essere un presunto innocente per troppo tempo in qualche modo condiziona e svilisce la presunzione di innocenza […] la vera sfida è riuscire il sistema giustizia di strumenti e mezzi che consentano di chiudere celermente i processi.' (Public prosecutor)*

> *'The length of the proceedings! Because being presumed innocent for a long time somehow influences and demeans the presumption of innocence […] The biggest challenge would be to provide the judicial system with instruments and means that would allow a fast conclusion of the proceedings.' (Public prosecutor)*

Some participants mentioned specific **technical aspects of the judicial procedure**. This is the case of one of the lawyers who reported that the system of evaluation of evidences in Italian judicial proceedings currently leaves room for a high level of arbitrariness: the evaluation of evidences is the

core of the judicial activity, entailing that the Court that is in charge of the case, assesses and analyses all the pieces of evidence and documents presented by the parties and comes to a conclusion for the case. This activity leaves room to the discretional power of the judge. The participant stressed that this legitimate power cannot entail arbitrariness though, and that more precise and strict criteria for this evaluation activity would be needed. S/He mentioned, as an example, the use of **the 'mafia' category** by prosecutors and judges: the legislation in force enshrines specific legislative dispositions concerning mafia organisations and how to counter this criminal conduct. If the label of 'mafia organisations' is applied to any kind of criminal group or organisation, the category itself loses its meaning. Moreover, public prosecutors have specific additional powers when dealing with mafia organisations, but these are legitimate only when dealing with this type of case. Finally, defendants involved in mafia organisations can be more easily considered as socially dangerous and undergo specific pre-detention and surveillance measures: these measures limit personal freedom and they must be used cautiously. The 'mafia' category cannot be applied to any criminal conduct or criminal organisation, thus weakening the category itself.

Another example mentioned by one of the judges is the **responsibility of law enforcement agencies** arresting the defendants and consequently acting as witnesses in the proceeding: they are qualified witnesses and their version of the case is very relevant for the judicial authorities deciding the case. They should therefore be aware of their responsibility and contrast potential abuses that, besides damaging the defendants, also compromise the credibility of their profession before public opinion.

> *'La seconda [questione] è la profonda responsabilità che hanno le forze di pubblica sicurezza. E devono essere ben consapevoli di questo. Cioè, quando uno scrive qualcosa in un verbale di arresto, ha un significato molto importante. Ed è per questo che sono gravi i casi come il caso Cucchi e tutti quei casi lì, sono gravi perché nella quotidianità noi molto spesso condanniamo sulla parola di quello che hanno visto i carabinieri o di quello che hanno visto i poliziotti. Io non è che lo prendo come oro colato, la prendo come la versione di un testimone. Ma certamente è un testimone qualificato che tutti i giorni di quegli aspetti lì. Quella penso davvero che sia una sfida ma più che per il magistrato per le forze dell'ordine, cioè di isolare i casi in cui quei verbali vengono falsificati. Perché il problema di quei casi lì non è solamente il danno enorme che hanno fatto alla singola persona ma anche il danno di credibilità che hanno fatto a loro stessi.' (Judge)*

> *'The second [issue] concerns the relevant responsibility of law enforcement agencies. They should be deeply aware of that. I mean, when they redact an arrest record, this document is very relevant. This is the reason why cases such as the Cucchi case or other cases of this kind are extremely serious. They are serious because we [judicial authorities] often condemn the defendants on the grounds of what has been reported by the Carabinieri or the police officers. I do not take that for true. It is the version of a witness. However, they are qualified witnesses who deal with this kind of issues every day. So, I believe this is a great challenge not just for judicial authorities but even more for law enforcement agencies, I mean the importance of isolating the cases of counterfeiting of the records. Because the problem with these cases is the damage not only to the defendant but also their credibility.' (Judge)*

Some participants also stressed the recent upsurge of **populism** which is closely connected to the public opinion's interest and the need to have someone to blame and consider guilty, in order to feel safer (this approach is defined in Italian as *giustizialismo*). This general trend also allows for a more intense use of investigation instruments that are extremely intrusive of the personal freedom and privacy of the suspects and defendants.

'Ma dove sta andando il mondo? […] il populismo … ma non è una cosa locale, è una cosa generale. Il popolo vuole sangue! Sono tutti giustizialisti, tutti. […] il popolo italiano, il popolo in generale … […] e quindi i Trojan perché c'è il terrorismo, tutti mafiosi perché c'è il pericolo […]' (Criminal lawyer)

'How is the world changing? […] Populism … but it is not something local, it is a general change. People want blood! They are all justicialists, all of the people […] Italian people, people in general … […] and so we have the Trojan horse because there is the terrorism, all defendants become mafia gangsters because we are in danger […]' (Criminal lawyer)

b. Improvements

The Directive has not yet been implemented in Italy. However, some of the participants provided their personal opinions about the most relevant trends of recent years in the field of justice and defendants' rights.

Some of the participants reported that in recent years, the procedural rights of the defendants have become stronger: One of the judges mentioned the recent jurisprudence of the Supreme Court of Cassation which established that the notification of the proceeding and the appointment of the lawyer if not translated into a language the defendant can adequately understand cannot be considered as valid.

c. Suggestions

Many interviewees reported that – despite the lack of formal legislative implementation of the Directive – the procedural rights it enshrined are already adequately ensured by the Italian legislation and judicial system.

'Leggendo questa Direttiva, penso che ci riguarda fino a un certo a noi italiani questa Direttiva perché ritengo […] che sono dei principi che noi già garantiamo tutti […] sicuramente interessa altri Stati […] il nostro diritto è un diritto di grande spessore e grandi garanzie.' (Criminal lawyer)

'Reading the Directive, I believe that its principles do not really concern the Italian system […] I believe that we already ensure all these principles […] It may concern other States […] the Italian legal system is extremely dense and safeguards relevant guarantees.' (Criminal lawyer)

A public prosecutor suggested that further safeguards should be introduced to limit and avoid that the **documents and the acts of the investigations** are disclosed to the media before a formal accusation is presented to the defendant.

One of the judges suggested to reform the **selection process** in place for the recruitment of Italian judges. The selection procedure of judicial authorities can have a severe impact on the way justice is administrated. The selection procedure is public, and this allows people from different social and economic background to become members of the judicial power. However, the selection procedure also became a second-level public selection and this means that participating is expensive: this might result in a negative outcome, since only wealthy candidates will participate in the selection, that is

only those candidates who can afford to study for such a demanding competition without wasting time in working to sustain themselves.

PART D. GENERAL ASSESSMENT

Even if the Directive were not formally incorporated in the Italian legal system, most of the procedural rights it enshrines are strongly protected by the Italian constitution and legislation. The most crucial challenges to the effective implementation of the presumption of innocence do not therefore concern the Italian legislative and judicial system in themselves, but rather the practical implementation of this principle in judicial proceedings and in the media.

As per the media and the way they cover investigations and proceedings, more efforts should be put in avoiding that information is disclosed by unofficial sources and through informal channels. The only authority in charge of disclosing information is supposed to be the prosecutor's office in charge of the case, since this approach allows selecting the information to disclose based on its relevance for the interests of the public opinion and for the fundamental right to information. Comments on the case can be made by other actors involved in the proceeding – such as the lawyers or the victims – while they still respect the defendant's privacy, public image and procedural rights. Moreover, another crucial challenge to the presumption of innocence concerns the disproportionate attention paid by the media to the investigation phase and to the initial phase of the proceeding when the prosecutors need to demonstrate the solidity of the accusation and sustain the defendant's implication in the case. Much scarcer attention is paid by the media to the development and conclusion of the proceeding: the defendants who are often presented as guilty by the media during the investigation phase, do not have the opportunity to clean up their reputation if damaged since no media attention is paid to the outcome of the proceeding.

Another challenge emerging from the interviews concerns vulnerable defendants who do not seem to benefit from specific safeguards. As a general approach, the specific situation of each defendant is individually assessed and can be reported to the Court by the lawyer. The Court is compelled to take each case in to account and adopt, if seen as necessary, the needed precautions. This is the case – for instance – of defendants who do not understand Italian: where it is seen as impossible for the defendant to understand what is going on during the hearing, it should be highlighted by the lawyer, so that the Court can appoint an interpreter/cultural mediator and make sure that all the documents concerning the case are translated into a language the person can understand. As per disabilities, severe intellectual impairments – where certified by independent professionals appointed by the Court – can result in the cancellation of the proceeding because it is deemed impossible for the defendant to understand their actions and the proceeding itself. As per sensorial disabilities, they must be pointed out by the lawyers in order for the defendant to obtain the assistance of communication professionals.

PART E. CONCLUSIONS

The principle of the presumption of innocence is a milestone of the Italian judicial system and it is highly protected from both the Italian Constitution (Article 27) and from the Italian ordinary legislation, namely the Italian Criminal Code and Criminal Procedure Code. This principle entails the obligation for judicial authorities – including judges and public prosecutors – and for police authorities cooperating with them to be impartial and deliver evidence-based accusations and decisions.

When implemented in practice during investigations and judicial proceedings, the principle of the presumption of innocence can be compromised by many elements, including the defendants' personal features. In this respect, previous convictions are the element that most affect the principle of the presumption of innocence since it might influence the opinion judicial authorities have of the defendants. Moreover, the legislation in force allows the consideration of previous convictions as a criterion to assess the social danger the defendant might cause – which is a relevant element when deciding precautionary judicial measures, such as pre-trial detention – or to decide the sentence if the defendant is deemed guilty by judicial authorities. Another element potentially compromising the correct implementation of the presumption of innocence concerns the judges' personal biases and prejudices: for this reason, some of the participants reported that one of the greatest challenges for the effective implementation of this principle is for judicial authorities to be aware of the impact of their personal beliefs and to try, as much as possible, to be impartial and carefully consider all the elements and evidence that are at their disposal.

In regard to interaction with the media and press, the public prosecutor's office is the authority legally in charge of disclosing information on investigations and judicial proceedings. This interaction is aimed at ensuring the right of information – which is a constitutional principle – especially when investigations and proceedings concern public figures or events of public relevance and concern. Despite the existence of a formal procedure governing the interaction between prosecutors and police authorities and the media, many participants in the research – especially criminal lawyers – stressed that the media often obtain judicial information from unofficial sources. This can represent a severe issue since these leaks might concern documents and pieces of evidence which are covered by investigation secrecy – such as the content of wiretapping and interceptions and the arrest warrant of the suspect – and disclosing this information can be highly detrimental to the defendants and their presumption of innocence and public image.

If the general impact of media coverage on the presumption of innocence is considered, most of the participants described its effects as negative. Despite this widespread opinion among interviewees, they also recognised that the role of the media deserves protection since it is pivotal for any democratic system, as guarantee of the freedom of expression and the good functioning of the judicial power. There was not a general agreement among participants concerning the elements that might influence the way media covers judicial cases: the ethnic minority/foreign nationality of the defendants was the only element mentioned by participants as negatively influencing the image of the defendants conveyed by the media, especially when the information is reported by right-wing newspapers.

The right to take part in a trial is a procedural right of any defendant. According to the Italian Criminal Code, defendants have the right to participate in the hearing with no physical restraints. The major issue in this respect concerns the situation of defendants in pre-trial custody who are, therefore, deprived of their personal freedom. These defendants must be escorted to the courtroom by penitentiary police officers and watched over during the hearing: some courthouses have separate pathways for these defendants so they can be escorted avoiding contact with the public and the media. Once in the courtroom, they are set free and allowed to sit next to the lawyer. If for a solid security reason – such as the defendant is dangerous or aggressive, there is a flight risk or many

defendants are involved – the defendants can be left handcuffs on or they might be forced to participate in the hearing from a separate area of the courtroom supplied with bars. This area is informally known as 'the cage' and it exists in some Italian courthouses. Assisting the trial from behind bars can have an impact on the public image of the defendants and consequently on their presumption of innocence.

The presentation of the defendants during the trial is not affected by prison clothes since they do not exist in Italy: however, some interviewees reported that the outfit of the defendant can have an impact on their public imagine and on the perception of the Court. Some of the participants mentioned the specific case of fast-track proceedings where defendants are brought before the Court with the same clothes they had at the moment of the arrest: their outfit is often easily recognisable since they are often deprived of shoelaces and belts for safety reasons (in order to avoid self-harm in the prison's cell).

The burden of proof was another crucial issue covered by the research. The core principle of the Italian criminal judicial system is that the burden of proof always rests with the prosecution and no formal exceptions to this exist in the legislation. However, some interviewees reported practical inversions of this principle which are not explicitly envisaged by the legislation.

As per the other procedural rights enshrined in the Directive, the right to confess and to remain silent are both procedural rights guaranteed to all defendants in Italy at all stages of the investigation and of the judicial proceedings. Defendants must be promptly informed about these rights – as well as about all procedural rights – since the very first contact with public authorities: this information is generally provided listing the procedural rights in a language the defendant can understand. Both police officers and judicial authorities can resort to cultural mediators and interpreters if the defendant cannot understand Italian. Some criminal lawyers suggested that this information notice is provided to the accused persons/defendants in a language that is too technical to allow a thorough and effective comprehension. Moreover, the quality of the translation is not always adequately assessed by judicial and police authorities, especially when local languages and dialects are concerned, and non-professional mediators are the only available people to count on. All participants agreed on the fact that the defendant's silence and confession do not have an automatic impact on the proceeding. The confession in particular is not sufficient to conclude the proceeding and must still be sustained by further reliable evidence and witnesses. Such evidence can never be collected by forcing the defendant to provide it and to incriminate themself: however, police authorities can obtain evidence – such as personal computer passwords and mobile phone personal identification numbers – even without the person's consent if they are authorised to do so by judicial authorities.

As mentioned above, the defendant has the right to participate in the trial; this is not an obligation though. The decision to not participate has no legal consequences. However, a strict notification system is in place to make sure the defendant is informed about the charges and the existence of a judicial proceeding against them. If judicial authorities – with the support of the Italian police – do not succeed in locating the defendant, the proceeding is suspended since the Italian legislator recently abolished *in absentia* proceedings.

Physical participation in a trial is not sufficient to define effective participation in the proceeding. According to all professional categories involved in this research, the participation is effective when the defendant is provided with clear and complete information about the case, they correctly understand the procedure and the charges against them and can be assisted – at all stages of the investigations and the proceeding – by a professional criminal lawyer. Criminal lawyers severely criticised the increasing use of the videoconference system in Italian proceedings, since this technique affects the right to defence, as it undermines communication between defendants and lawyers and prevents the defendants from correctly understanding what is going on and is said in the courtroom.

Annex – Case studies

Member State case study: Media coverage #1		
1	Reference details/Name/Title (please indicate here how the case has been publicly referred to)	Perugia murder (Delitto di Perugia)
2	Brief description of the case	The victim was a British student participating in a student exchange in Perugia who was murdered at age 21. She was found dead in her bedroom in November 2007. Based on the identification of the bloodstained fingerprints at the crime scene, a man born in Côte d'Ivoire was charged with the victim's murder (hereinafter named A). The victim's flatmate – a US citizen (hereinafter named B) – and her Italian boyfriend (hereinafter named C) were charged with the murder, as well. The prosecution of the two received intense international publicity.
3	Timeline of events (briefly outline major events in order to capture the nature of the case)	November 2007: The victim was found dead in her flat in Perugia 6 November 2007: B was charged with murder. She reported being interviewed several times by Italian police officers without being given access to a lawyer. During the proceeding, she reported to the Court that she was subject to pressure tactics perpetrated by investigating authorities aimed at making her incriminate herself for the murder. 20 November 2007: A was arrested in Germany and charged with murder. December 2007: The funeral of the victim was held in the United Kingdom where she is buried. October 2008: A was found guilty during a fast-track judicial proceeding. He was sentenced to 30 years imprisonment for murder and sexual assault. During the appeal proceeding, the sentence was cut from 30 to 24 years due to the automatic one-third reduction given for the fast-track judicial procedure, resulting in a final sentence of 16 years. 16 January 2009: B and C started their trial. In the meanwhile, they had been held in prison in pre-custody regime. They were accused of murdering the victim in conspiracy with A. They both declared their innocence. At the end of the first-level judicial proceeding, B and C were found guilty of murder and sentenced to 26 years of imprisonment. November 2010: The appeal proceeding for B and C started. The DNA evidence presented by the prosecution was contested by a court-ordered technical review. 3 October 2011: B and C were acquitted of the charge of murder. The Court's verdict confirmed that the declarations of B at the beginning of the case were the effect of a 'great psychological pressure' caused by the interrogation technique. Moreover, the Court also stated that the police interviews on B featured an 'obsessive duration'. 26 March 2013: Following a successful prosecution request and the introduction of additional evidence (a previously unexamined sample of C's blood on a kitchen knife that was allegedly the crime weapon), the Court of

		Cassation decided to nullify the acquittal decision and to send the case back to the Court of Appeals 27 March 2015: The Court of Cassation ruled the innocence of B and C, thus ending the case. At the time, B had already moved back to the USA (since 2011). In September of the same year, the Court made public the reasons for the absolution decision: first, none of the presented evidence demonstrated the presence of B and C at the crime scene; second, no biological traces could be attributed to B and C at the crime scene, whereas several traces could be attributed to A. June 2016: A benefited from his first 36-hour release from prison after 9 years of continuative detention. January 2019: The European Court of Human Rights (ECHR) condemned Italy for the treatment B received during the pre-trial investigation and interrogation. According to the Court, B was not immediately ensured the possibility of speaking to a lawyer and the quality of the translation was not checked, thus causing the impossibility for B to adequately understand what the police officers were saying. The mistreatment perpetrated by Italian police officers might have compromised – according to the Court – the impartiality of the proceeding. The Court condemned Italy to compensate B with EUR 10 800 of moral damages and EUR 8 000 of judicial expenses.
4	Media coverage (how did the media refer to the suspects? How were the suspects presented, e.g. handcuffed, in prison clothes? Did law enforcement authorities or other actors inform about the case, e.g. in a press conference? Please include references, including links where possible)	The case immediately caught the public and media's attention. A book was released even before the beginning of the trial. B decided to start a legal action against the author since – according to B's lawyers – it 'reported in a prurient manner, aimed solely at arousing morbid imagination of readers'. For this reason, B obtained in 2010 a EUR 40 000 compensation for the damages to her privacy. Moreover, during the pre-trial investigation, B involved a fourth person – a black man – in the case. He was immediately acquitted: this, however, caused a damage to his image as owner of a private club. Moreover, this fourth person's surname recalls the name of an African political figure, thus fostering confusion and doubts in the public opinion about a (non-existing) connection between these two subjects. The involvement of this fourth person caused B a proceeding for slander and she was sentenced to 3 years and 11 days of imprisonment (the conviction was upheld by the Court of Cassation in 2015); the fourth person also received EUR 8 000 for 14 days of unfair detention. The facial images of A, B and C were immediately made public in the Italian media and they are among the most well-known defendants in Italian criminal history. B became a popular personality in the United States as well, where a public campaign started supporting B and attacking Italian investigators. B's story was the subject of two cinematic movies released in 2011 and 2014 and of a documentary released in 2016. Many organised press conferences on the case: besides the public prosecutors who are legally entitled to release information on the cases, also the defendants with their lawyers and the police officers investigating the case. For instance, on 6 November 2007, the police officers of Perugia declared – during a press conference held after the interrogation of B – that the case had been solved. There is much online information on this case, including two Wikipedia pages reporting links to the Italian and foreign media sources that covered the proceeding.

5	Key issues (e.g. major allegations of guilt in the media; where the presumption of innocence was concerned, reactions of persons involved and the media)	The case has often been described as a 'media circus' because of how Italian and foreign media reported information about the people involved and about the different steps of a judicial proceeding that lasted about eight years. There was a polarisation of the public debate of those convinced of the innocence and those convinced of the guilt of B and C. The guilt of A was never doubted. An example of this intense public interest in the case can be retraced in the moment of the first absolution of B and C in 2011: when the Court read the decision, the defendants started crying in relief; on the contrary, the public participating in the hearing started shouting and insulting the judges and the defendants' lawyers. The same happened outside the courthouse. B and C themselves always used the media to affirm their innocence, even organising their own press conferences, publishing books and participating in TV shows and documentaries. The family of the victim also participated in the debate with several interviews and press conferences. Official statements and press releases were also allowed on behalf of US and UK authorities, thus making the case an international affair.
6	Key consequences or implications of the case with regard to the presumption of innocence (with a focus on public reaction to publications in the media which might lead to a public debate)	The public debate – in the newspapers and on TV shows and radio broadcasting – was extremely intense. B and C are now well-known public personalities and new information about them continue being occasionally reported in the newspapers (this is the case of the recent crowdfunding organised by B to finance her wedding in the US). Their innocence – that was eventually established by Italian judicial authorities in 2015 – was never actually presumed: the intense public conviction about their guilt was in this case fuelled by a clumsy and fallacious investigation process, as it was stressed by the Court of Cassation in 2015. The evidence gathered against them was probably not sufficiently strong to sustain the high level of attention the case received in the media and it is still considered one of the worst pages of the history of the Italian criminal system.
In case the case brought before a court or a non-judicial mechanism – the following questions would also need to be answered		
7	What was the decision of the case (summarize briefly and indicate reference details of the case)? How did media report on the decision?	The murderer was tried separately through a fast-track procedure (rito abbreviato) and found guilty of sexual assault and murder by the Court in October 2008. He is currently serving a 16-year sentence. The flatmate and her boyfriend underwent all grades of the Italian criminal judicial system. Their conviction was eventually annulled by the Supreme Court of Cassation on 27 May 2015. The Court ordered that no further trial should be held, which resulted in their acquittal and end of case. Media mostly reported the information because the peak of media attention on the case focused on the investigation phase and on the years between 2007 and 2015.

Member State case study: Media coverage #2		
1	Reference details/Name/Title (please indicate here how the case has been publicly referred to)	Omicidio di Yara Gambirasio (The Yara Gambirasio murder)
2	Brief description of the case	The Yara Gambirasio murder is a well-known criminal case that happened in Italy in November 2010. A young girl – aged 13 – disappeared from her small town near Bergamo (Lombardy) after a training session in a local gym. The case immediately raised the public and media attention due to the young age of the victim and the cruelty of the crime. The judicial proceeding – which started four years after the corpse was found, since it was difficult for the prosecutors to find a suspect – was concluded in 2018.
3	Timeline of events (briefly outline major events in order to capture the nature of the case)	- 26 November 2010: The 13-year-old girl (hereinafter A) went to an ordinary gym training nearby her home. After the training session, A disappeared. Her family reported the case to the police. A's mobile phone was registered for the last time during the afternoon and then the signal disappeared. The gym's security cameras were not functioning, and they could not be used to monitor A's actions after the training session. - 5 December 2010: A Moroccan worker (hereinafter B) – an employee at a construction site located in the town where A used to live – was arrested on a vessel sailing to Tangier. B was investigated for A's disappearance due to a phone wiretapping in B's language: B was later discharged since he had nothing to do with A; the translation of the wiretap resulted to be incorrect. - 26 February 2011: The corpse of A was finally found in a field 10 kilometres away from the town. The autopsy revealed several wounds inflicted with a bar, other wounds and a head trauma. No signs of sexual violence were registered. - 28 May 2011: A funeral was held in the sporting centre where she used to train. - 16 June 2014: A 44-year-old local bricklayer (hereinafter C) was arrested: his DNA was compatible with the DNA traces found on the corpse. The arrest was announced by the Ministry of the Interior: this information disclosure was harshly criticised by the public prosecutor's office of Bergamo in charge of the investigations. - 26 February 2015: Investigations are officially closed. C always declared his innocence. C's lawyers requested the fast-track judicial procedure since they were convinced about the impossibility of

		demonstrating the compatibility of the DNA traces found on the corpse and the DNA of the defendant. - 27 April 2015: The preliminary hearing is held in Bergamo. C is charged with voluntary murder; - 1 July 2016: The Assize Court of Bergamo condemned C to life sentence for murder. C was also deprived of the parental rights towards his three children. - 30 June 2017: The second-grade proceeding started before the Court of Appeals of Brescia. The Court confirmed the first-grade decision. - 12 October 2018: The Court of Cassation confirmed the life sentence and the case was officially closed; - 29 November 2019: During this period, the innocence of C was claimed by some journalists and legal experts on TV and newspapers. The Assize Court of Bergamo allowed C's lawyers to re-examine the DNA traces in order to obtain the possibility of reviewing the proceeding concerning the defendant.
4	Media coverage (how did the media refer to the suspects? How were the suspects presented, e.g. handcuffed, in prison clothes? Did law enforcement authorities or other actors inform about the case, e.g. in a press conference? Please include references, including links where possible)	Italian media intensely covered the case and the identity of C was immediately disclosed. All the family members of C were interviewed on TV and a relevant part of the investigations focused on the family history of the defendant since he found out during the proceeding the real identity of his father. The defendant participated in some of the hearings from behind bars. There were TV images as well of the defendant escorted by police officers to the courthouse. The media also reported the dispute between the Public Prosecutor of Bergamo – in charge of the investigation – and the Ministry of the Interior who decided to organise a press conference to announce the identity of the defendant before the investigation was officially closed and the charges against C formalised. According to the Ministry, the citizens had the right to know; according to the Public Prosecutor, the Ministry's decision did not adequately protect the rights of the defendant. In October 2019 – when the case had already been officially closed by the Court of Cassation – the defendant sent a letter to the director of a well-known right-wing Italian newspaper, sustaining that he had been pressured to confess his guilt by the public prosecutor and the prison's administration. Moreover, he claimed that the behaviour of the Ministry of the Interior violated his rights to a fair judicial proceeding. Many TV shows focused on the case and five books were published both during and after the conclusion of the judicial proceeding.
5	Key issues (e.g. major allegations of guilt in the media; where the presumption of innocence was concerned, reactions of	The public needed a perpetrator to be identified, mostly because the victim was very young, and this caused the information about the case to be often extremely emotional. Most of the information conveyed by newspapers and TV seemed to support the guilt of the defendant. However, some newspapers harshly criticised the media circus around the case and also the conduct of the Ministry of the Interior; they supported the role of the Public Prosecutor of Bergamo in the dispute.

	persons involved and the media)	
6	Key consequences or implications of the case with regard to the presumption of innocence (with a focus on public reaction to publications in the media which might lead to a public debate)	The media attention on the case caused public opinion to be firmly convinced of the guilt of the defendant. His image and the story of his family are widely known, and he also tried to make the most of this public attention to continuously claim his innocence.
In case the case brought before a court or a non-judicial mechanism – the following questions would also need to be answered		
7	What was the decision of the case (summarize briefly and indicate reference details of the case)? How did media report on the decision?	On 12 October 2018, the murderer was eventually condemned to life sentence since he has been considered the only perpetrator of the crime. All the newspapers reported this information; some of them also described the reaction of the defendant and of the people attending the final hearing. The defendant himself – who always proclaimed his innocence – asked for the proceeding to be public and recorded by media cameras.