

In Italy, the system of evidence is very complex, as the result of a series of legislative choices aimed at respecting constitutional rights.

The system of personal guarantees is held to prevail over the right of protection of the victims of the crime, on the principle of presumption of innocence, until the definitiveness of the sentence.

However, the respect of these principles contrasts with the duration of the criminal trials, which see the conclusion after many years, despite the constitutional reform on the "due process", which introduced the principle of necessary speed of resolution of criminal and civil judgments, in interest also of the suspect.

Many times, it seems ridiculous that after many years judges are still trying cases, when it is clear that if State is not "structured" to do so, there is no interest to do so.

It is a no sense to have trials (as it is happening in the case of a strand of the Parmalat trial) against defendants fifteen years after the fact, and in the first instance of judgment!

The severity imposed by our legal system, therefore, as regards compliance with constitutional principles, clashes with a reality of the facts and the need for legal protection that probably does not find similar treatment in the less developed countries of the world.

But it is like this.

Scarce results, in the face of scarce resources, with further damage for those who suffered the damage effects caused from the unlawful fact.

The system of guarantees, which, as told, are presupposed in the presumption of innocence until the definitive ascertainment of responsibility, also places limits on the trial of the damaged person.

It is evident by facts that the unlawful fact, administrative or criminal, involves the intervention of the Administrative or Penal Authorities, which have survey instruments certainly not usable by the common citizen.

It is also true that defensive investigations have been introduced at the penal level, but it is also true that for the injured, the regulation sets limits deriving from the need to avoid obstructions to the proceeding Authority.

In Italian legal system, and dealing with unlawful fact relating to the sphere of investment, investigations are carried out both by the Supervisory Authorities and by the Public Prosecutor: while the latter concern facts that have criminal relevance, as regards the intervention of Supervisory Authority the theme becomes complicated.

In fact, the Bank of Italy and Consob can intervene either on its own impulse, for specific administrative violations, or by

performing delegated investigations, in the typical Judicial Police function.

The administrative investigation is based on accesses, reports, acquisitions, and, above all, specific requests for information and clarifications.

On the basis of these elements, the Authority can issue sanctions, but the documents remain confidential, as well as the sanction or the provision for dismissal of the proceeding.

The case of an obstacle to the Supervisory Authority is also settled in the event that the party opposes the completion of the investigative activities.

Who subjects to the sanction can move appeal to the Regional Administrative Court of Lazio, in the appeal of the administrative act, and then to the Council of State.

It is clear that the secrecy of the acts, and the prohibition of their publication, entail an undoubted limitation to the system, due to the impossibility of the damaged person to use the probative material collected during the preliminary investigation.

The only viable solution would be to ask the judge, in the course of a civil or criminal trial, to issue a production order, if it is possible to demonstrate the non-exploratory nature of such an instance.

If the fact detected in administrative matters is of criminal relevance, the Supervisory Board, in its position of "public

official", will have the obligation to report to the Public Prosecutor.

In criminal cases, the system is even more complex.

First of all it is necessary to distinguish according to the phases.

During the preliminary investigations, the damaged person (as well as the suspect) has no right to obtain copies of documents, due to the confidentiality of the content of the investigations, which even goes so far as to penalize those who disclose the acquired evidence.

Even if the injured party were to be heard as a person informed about the facts, he would not be entitled to obtain the relative report of his statements.

There are possible phases in which there is limited access to acts, which are the probationary incident and the completion of non-repeatable investigative measures.

These also allow the damaged person to acquire, but not to use, these documents.

With the closure of the investigations, that is formally notified only to the defendant (and his lawyer), who can perform requests for the execution of further investigations and request to be submitted to the interrogation, the prosecution takes place.

The discovery is then made, and in this moment the parts of the trial can obtain a complete copy of the investigation acts.

It must also be considered that the deadline for preliminary investigations, also due to specific extensions granted by the Judge for Preliminary Investigations, does not stop the prosecutor from carrying out further investigations, which may therefore in fact continue.

The introduction of the evidence in the proceedings takes place at the trial.

In the acts of the trial, which will constitute the entire probative compendium that the judge can use for the decision, the evidence is acquired only in the contradictory of all the parts of the trial, with the sole exception of unrepeatable acts, the acts that have become unrepeatable, and the evidence of the probative incident.

The testimonies are taken with the examination and the cross-examination.

### **How can this evidence be used by the damage person?**

Our legal system provides for the possibility that the restitution and compensation claims are enforced in the criminal trial, through the establishment of a civil party.

So, parties of judgment are: the Judge, the Prosecutor, the defendant, the civil party and the civil responsible.

This allows obtaining, with the conviction of the accused for the offense, the conviction of the same to compensate the

damages that are an immediate and necessary consequence of the fact, or restitution.

The sentence for civil effects is not immediately enforceable, unless the judge finds justified reasons, or when the sentence is "generic" and the Judge has therefore determined a provisional damage award, which is immediately enforceable by law.

In this last case, and at the effects of the evidence, the one concerning the fact will have already been assumed by the Judge, but that relating to the extent of the damage will have to be examined by another Judge, in civil proceedings.

This happens only when the Judge of criminal trial doesn't liquidate the damage.

The irrevocable criminal sentence of conviction pronounced following a trial has the force of judgment, as to the ascertainment of the existence of the fact, of its criminal illegality and to the statement that the defendant committed it, in the civil or administrative judgment for the refunds and compensation for the damage brought against the convicted person and the civil liable who has been sued or has intervened in the criminal trial (Article 651 of the Code of Criminal Procedure).

With regard to the accused, the civil party and the civilly liable party who has been or has intervened in the criminal trial, the irrevocable criminal sentence of conviction or acquittal

pronounced following a trial has the force of judgment in civil or administrative proceedings, when in this case, it conflicts with a legitimate right or interest whose recognition depends on the verification of the same material facts that were the subject of criminal proceedings, provided that the established facts were deemed relevant for the purposes of the criminal decision and provided that the civil law does not have limitations to the evidence of the subjective position in question (Article 654 of the Code of Criminal Procedure).

**In the event that the party has not joined the case as a civil party, what happens?**

The trial must be proven again in civil proceedings, being able to be used all the investigative acts that the victim has legitimately acquired, in his capacity as a person offended by the crime.

The judgments of first and second degree can not have any relevance, except to demonstrate the historical fact of a judgment, but not for the verification or not of the fact.