Revista Eletrônica de Direito Processual
Rio de Janeiro – Brasil
e-ISSN 1982-7636

THE ABUSE OF PROCESS DOCTRINE IN THE ANGLO-SAXON SYSTEM: A RECONSTRUCTION AT THE ANTIPODES OF THE EUROPEAN SYSTEM.[379][380]

O ABUSO DA DOUTRINA DO PROCESSO NO SISTEMA ANGLO-SAXÃO: UMA RECONSTRUÇÃO NOS ANTÍPODAS DO SISTEMA EUROPEU.

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ABSTRACT: The present survey is based on the analysis of the abuse process in the common law system, in particular in the system of the United States. Looking at the Anglo-Saxon system, the overall theoretical abuse of process is based on the principle of fairness: if a fair trial cannot take place, or it would be unfair to continue a criminal trial against anyone, the basic concept is that we are facing a "false" process. The accused is no longer in a position to exercise his faculties and rights fully. To continue would be an outrage against the moral integrity of the system and, at the same time, unjustly trying to at least provide a "hard" and essential guarantee core, to protect the overall fairness of the proceeding which, therefore, would represent the final horizon towards which every (procedural) means is projected.

KEY WORDS: abuse of right, abuse of process, criminal action, double jeopardy, abuse of right in Anglo-Saxon system, autrefois acquit, autrefois convict.

RESUMO: A presente pesquisa baseia-se na análise do processo de abuso no sistema common law, em particular no sistema dos Estados Unidos. Olhando para o sistema anglo-saxão, o abuso teórico geral do processo é baseado no princípio da justiça: se um julgamento justo não pode ocorrer, ou seria injusto continuar um julgamento criminal contra qualquer pessoa, o conceito básico é que estamos diante de um processo “falso”. O acusado não está mais em condições de exercer plenamente suas faculdades e direitos. Continuar seria um ultraje contra a integridade moral do sistema e, ao mesmo tempo, tentar injustamente fornecer pelo menos um núcleo de

[379] Artigo recebido em 17/04/2020 e aprovado em 12/09/2023.
[380] The present work is updated until April 2020.

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garantia "duro"; e essencial, para proteger a equidade geral do processo que, portanto, representaria o horizonte final para o qual todos os meios (processuais) são projetados. Palavras-chave: abuso de direito, abuso de processo, ação penal, dupla incriminação, abuso de direito no sistema anglo-saxão, absolvição autrefois, autrefois condenado.

INTRODUCTION

The so-called functional profile of the abuse of process381, as reconstructed in the Anglo-Saxon process system, can perfectly be grasped in the following consideration: "the topic must be taken seriously in order to preserve the welfare of the system"[382].

To be honest, the reflection just mentioned has in this regard the civil trial. In fact, even in the Anglo-Saxon legal system, as in the Italian one, the institute in question originates on the civil procedural ground, as a form of remedy-the distorted use of action or of certain procedural instruments[383]. And, as equally brought to light, even in the Anglo-Saxon system, like what is found in the domestic system, we are faced with a notion of origin, matrix? jurisprudence, therefore, outside the positive legal grids

The words mentioned above, however, are exactly translatable to the criminal trial[384], because of the identity

[381]Part of the present work is referred to the first edition of my monograph: D. LIAKOPOULOS, The different form of abuse of law and process in the European Union, Vandeplas Publishing, Florida, 2019.

[382]N. ANDREWS, Abuse of process in english civil litigation, in A.A.V.V., (ed.), Abuse of procedural rights: Comparative standards of procedural fairness, Kluwer Law International, The Hague, 1999, pp. 98 and in the same spirit see also: R. BRAY, Beckford and beyond. Some developments in the doctrine of abuse of process, in Denning Law Journal, 19, 2007, pp. 69ss.

[383]R v Forbes, ex p Bevan, [1972], 127 CLR 1, 7, per Menzies J; Taylor v Taylor, [1979], 143 CLR 1, 6, per Gibbs J.; Castro v Murray, [1875], LR 10, Ex 213; Asmore v British Coal Corporation, [1990], 2 QB 338, 348; Bhamjee v Forsdick Practice Note, [2003], EWCA Civ 1113, [2004], 1 WLR 88, 33; Laing v Taylor Walton, [2007], EWCA Civ 1146, [2008], PNLR 11, 303; Jameson v Central Electricity Generating Board, [1998], QB 323, 344. For more details see: I.H. JACOB, The inherent jurisdiction of the Court, in Current Legal Problems, 43, 1990, pp. 43ss. R.G. FOX, Criminal delay as abuse of process, Monash University Law Review, 64, 1990, pp. 74ss. J.A. JOLOWICZ, Abuse of the process of the Court: Handle with care, in Current Legal Problems, 43, 1990, pp. 78ss. K. MASON, The inherent jurisdiction of the Court, in Australian Law Journal, 57, 1983, pp. 449ss. P.H. WINFIELD, The history of conspiracy and abuse of legal procedure, Cambridge University Press, Cambridge, 1921. S. SINE, A practice approach to civil procedure, Oxford University Press, Oxford, 2016. S. BLAKE, J. BROWNE, S. SIME, A practical approach to alternative dispute resolution, Oxford University Press, Oxford, 2012. A. KEANE, P. MCKEOWN, The modern law of evidence, Oxford University Press, Oxford, 2014. P. ROBERTS, Excluding evidence as protecting constitutional rights, in L. ZEDNER ROBERTS JV (eds.), Principles and values in criminal law and criminal justice. Essays in honour of Andrew Ashworts, Oxford University Press, Oxford, 2012, pp. 172ss.

[384]A. CHOO, Abuse of process and judicial stays of criminal proceedings, Oxford University Press, Oxford, 2008, pp. 2.

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e-ISSN 1982-7636

of essence and ratio of the category in both the trial seats.

As will be seen, the essence of the abuse of process (it is given by the discretion, indeed, had specific regard to what is the paradigmatic model of the reaction to the distorted practices put in place by the prosecutor (consistent prosecutor), consistent in the arrest of criminal proceedings by order of the judge, the doctrine in word would also borrow the name: abuse of process discretion (or doctrine). With extreme synthesis, we could say that the lemma discretion assumes a double value on the side of process abuse by operating in two directions.

One can look at it from the perspective of prosecution (prosecutorial discretion): the theoretical object of the analysis that will follow, in fact, originates directly from the need to prevent prosecutor's discretion in the exercise of prosecution can be solved in an intolerable prejudice charged to the accused (up to compromising, as we shall see, the overall fairness of the procedure). But it can be watched from a further angle. The foundation of the power-duty of the judge's intervention, faced with the abuses of the public part, is given by what appears to be an intrinsic element of the jurisdiction: judicial discretion, we can for now define it as (the hyperbole is allowed) the quintessence of the common law: the power to "individualize" justice.

Apparently, we are faced with distinct concepts; one would say: a discourse is the discretionality of the accusation in the exercise of one's functions, another is that which directs the work of jurisprudence. In reality, the overall theoretical abuse of process shows its mutual specularity, so much could be affirmed-that there would be no reason to conceive a judicial discretion in the matter in question, where the prosecutorial discretion was not postulated upstream. Which, in simpler terms, would be like saying: there would be no reason for the jurisprudence to invent a remedy of a discretionary nature, if there was no need to reject an abuse of discretion by the prosecution.

More in detail: in what sense the arrest of the procedure by order of the judge, due to an abuse of the process, is the exercise of a "discretionary" power? “The power to stay is said to be discretionary. In this context, the word “discretionary" indicates that, although there are some clear categories, the circumstances in which proceedings will constitute an abuse of process cannot be exhaustively defined and, in some cases, minds may differ as to whether they do constitute an abuse. It does not indicate that there is a discretion to refuse a stay if proceedings are an abuse of process or to grant one if they are not”[385].

[385]R v Carroll, [2002], HCA 55, par Gaudron and Gummow JJ. For more details see: A. ASHWORTH, M. REDMAYNE, The criminal process, Oxford University Press, Oxford, 2010, chapter 1-3. A. SANDERS, R. YOUNG, M. BURTON, Criminal justice, Oxford University Press, Oxford, 2010. M.D. DUBBER, T.H. ÖRNLE (eds), The oxford handbook of criminal law, Oxford University Press, Oxford, 2014. P. ROBERTS, J. HUNTER, Criminal evidence and human rights. Reimagining common law procedural traditions, Hart Publishing, Oxford &

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We immediately find a fundamental indication, both of a dogmatic (a concept of discretion with regard to the abuse of process), and of a methodological nature. The selection of behaviors that integrate an abuse constitutes a discretionary operation: being inseparable to form a closed number, they will be evaluated case by case (fact-finding approach). Rather, it is the reaction to the established abuse that, if this has irremediably compromised some fundamental interests of the criminal system, it establishes a real duty on the part of the judge[386].

With this, pay attention, it is not to say that the methodological approach just mentioned translates into the impossibility of tracing real paradigmatic cases of abuse of process. Indeed, the guidelines emerged in practice seem to indicate the opposite, showing a progressive effort by the Anglo-Saxon jurisprudence to settle application and interpretation modules characterized by the setting of standards rules and, at the same time, not to rectify the symptoms of abuse cases within a closed number. On the other hand, we are dealing with a highly malleable and magmatic material. This aspect is reflected in the evolutions of a discipline which, on closer inspection, presents itself as an open "container": some prosecution practices, which are at a specific moment in history without specific sanctions, could subsequently - by changing the address jurisprudential - fall within the specter of the abuse of process doctrine.

To summarize, in terms of the abuse of process doctrine, discretion is a qualifying element in a double sense: both in the perspective of the accusation and in that of the jurisdiction.

To be sure, if one looks at the side of jurisdiction, one would be tempted to place the remedy in question in the subjective situation of duty[387]: where the existence of certain premises is verified, the judicial obligation to provide (one could observe) is triggered. In fact, however, the operating procedures that characterize this dogmatic category, in addition to the exceptional nature of the related sanction, which will therefore intervene if another legal instrument is not invokable and only following a balancing of interests in conflict (intrinsically unpredictable evaluation, strictly dependent on the circumstances of the specific factual context[388]), they illuminate the above reported

Oregon, Portland, 2012, pp. 164ss. C. TAPPER, Cross & Tapper on evidence, Oxford University Press, Oxford, 2010.

[386]Hunter v Chief Constable of West Midlands Police, [1982], AC 529, par Diplock J. For further details see: K. PITCHER, Judicial responses to pre-trial procedural violations in international criminal proceedings, ed. Springer, Berlin, 2017, pp. 260ss. I.H. DENNIS, The law of evidence, Sweet & Maxwell, London, 2014.

[387]A. CHOO, Abuse of process and judicial stays of criminal proceedings, op. cit., pp. 2ss. R v Horseferry Road Magistrates' Court, ex p Bennett, [1994], 1 AC 42, 74, per Lord Lowry. For more analysis see: R. TER HAAR, A. LANEY, M. LEVINE, Construction insurance and UK construction contracts, ed. Routledge, London & New York, 2016.

[388]R v Martin, [1998], AC 917, 926; R v Burns, [2002], EWCA Crim 1324, [27].Jones v Kernott' [2012] Conveyancer & Property Lawyer 159; J Mee 'Jones v Kernott: Inferring and imputing in Essex' [2012] Conveyancer & Property Lawyer 167. Chaudhary v Chaudhary [2013] EWCA Civ

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fundamental trait: essentially, discretionary power.

The natural (if we may say so) course of the procedure provides for the duty of the judge to ascertain the merits of the punitive pretension: "the normal course should be that any criminal charge should proceed to full trial, and it is only in the most exceptional circumstances (...) that the court should exercise its undoubted discretion to prevent such a course on the basis that the proceedings amount to an abuse"[389]. Which is to say: the accusation has the (discretionary) power to conduct the accused before the court for an examination on the merits of imputation (the latter, which corresponds to an obligation, in principle); in the same way, it is a fundamental public interest to repress crimes and punish the guilty. Nonetheless, the misuse of the prosecution's prosecution (abuse) cannot be tolerated in any way: with the consequence that, in exceptional situations, the interests referred to are "sacrificed" in the face of the moral prejudice that the system of justice would suffer or what the defendant would suffer if the procedure continued (danger of condemnation of an innocent).

1.GENESIS OF THE REMEDY.

Where does the recognition in the head of the judge of the power-duty to block the progression of the trial process come from when an abuse of the public prosecutor takes place?

As already anticipated at the beginning of the work, the perspective of framing the Anglo-Saxon doctrine is diametrically antithetical to the European one. Again with reference to the criminal system, in the European legal system the abuse arises essentially as an instrument of reaction to the obstructionist conduct put in place by the defendant or his defender, when (to repeat a known and representative slogan) the last end of the first becomes the defense "from the" process and not "in" the process. If we want, then, the abuse of the process is conceived in a repressive key: it is necessary to protect the efficiency of the judicial machine, as well as the interest in the celebration of the process in reasonable time, even if this involves the denial of an abstractly legitimate faculty.

On the contrary, as already mentioned in the previous paragraph, the notion of abuse of process is a guarantee: in the Anglo-Saxon justice system, the prosecution is in principle an option of the public prosecutor, to whom the selection is of what is "concretely" worthy of persecution; the need to contain the possible diversions, therefore, could be said to be physiological to a system so conceived: if you want, the doctrine in word arises from an awareness, that is between discretion (in the exercise of criminal action) and arbitrariness passes a very

758, [2013] Family Law 1257. For further details see: B. SLOAN, Keeping up with the Jones case: Establishing constructive trusts in "sole legal owner" scenarios, in Legal Studies, 35 (2), 2015, pp. 228ss.

[389]In this sense: v CPS v Tweddel, [2001], EWHC Admin 188, [2002], 1 FCR 438, [6].

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thin border that, if not well subjected to scrutiny, risks resolving itself into an intolerable detriment to the accused and consequently of the system as a whole.

Hence the first caution to be considered in terms of comparative analysis: we are not dealing with a safeguard clause for objective or systemic needs, such as the efficiency of the procedural machine or the rationality of its functioning (interests that, if anything, they can find protection through the Anglo-Saxon doctrine of abuse in an indirect way, by reflex). Shifts-so we could say-the context of values: the parameters of reference are others. The foundation of the power-duty to punish, here, revolves around two poles that, inevitably, must be in balance: on the one hand, we have the claim to the persecution of the crime-facts; on the other hand, that of ensuring fairness of the process (which, we will deepen it, does not mean other than guaranteeing the starting conditions of the process such that the probabilities of condemnation are equivalent to those of not guilty).

In any case, we continue with the tracing of the basis of power-duty to stop the proceeding.

The leading cases would be many. However, the following can be taken as an example. The R v Connelly, [1964], AC 1254, 1296 case posed the problem-we will see it in more detail later, when we will proceed to the analysis of the symptomatic cases of abuse of process-of the limits and the operational boundaries of the double jeopardy rule. In other words, the prohibition of double judgment (an expression within which the spectrum of contents and discipline of the aforementioned doctrine can be contained) does not provide the defendant with a comprehensive protection: there are situations, in fact, in which the establishment of a according to the judgment, against the same person for the same fact (or for facts strictly connected to those for which a judgment has taken place), it emerges from the "coverage" area of the rule referred to; nevertheless, that which is not expressly forbidden would not become legitimate for this reason: under certain conditions, the second judgment would be unfair or, in any case, materialize in an injury to the morality of the justice system.

In this specific case, even, the power-duty of the court to react to the wrong behavior by the prosecution would not only stop the progress of the procedure, but also extend to the possibility that the process begins (in short, cutting it on the to be born). Which, beyond any technical consideration inherent in the contents of this power-duty, sounds like a caveat to the public part: jurisdiction has "inherent (physiological) power", capable not only of questioning the mode of proceed with the accusation, but also and above all the self. In fact, the judge recognizes a basic prerogative:“to prevent a trial from taking place [in the exercise of its] residual discretion (...) are the courts to rely on the Executive to protect their process from the abuse? Have they not themselves an inescapable duty to secure fair treatment for those who come or are brought before them? To questions of this sort there is only one possible answer. The court cannot contemplate for a moment the

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transference to the Executive of the responsibility for seeing that the process of law is not abused (...)"[390].

This with regard to the legitimacy of this jurisdictional attribution. It should be opportunely highlighted, however, that this is a residual clause, intended to operate in very exceptional circumstances (extraordinary power). And it is on this point that, in reality, the greatest difficulties in application are concentrated. It would therefore be a question of identifying the conditions under which recourse to this power is inevitable.

It has been said that when the accusation is promoted, the court must proceed to verify its validity; in short, there arises the duty to dissolve an alternative: guilty or not guilty. This is true in principle, since there are four fundamental exceptions. In particular, the obligation in question is canceled if: -the criminal action is impracticable; -falls in the area of direct operation of the double jeopardy rule (autrefois acquit or autrefois convict); -there is an order not to prosecute the attorney-general (nolle prosequi); -there is a lack of jurisdiction of the court in question[391].

Now the anti-abuse clause constitutes the fifth exception, adding to the precedents listed above, which are traditionally accepted by the Anglo-Saxon jurisprudence as true limits to the exercise of the ius dicere.[392]. In any case, the essence of the doctrine in analysis (better: the final sanction in which it is substantiated), also looked at from this visual angle, remains unchanged: it is a remedy for a genetic defect or arising from the action exerted by the public, the jurisdiction is based on a discretionary determination of the prosecutor, who is responsible for choosing to start or not the actual trial, but the impropriety of action can affect the "opportunity" of the action or, more accurately, the fairness of the process. In these cases, it cannot be continued.

At this point it is necessary to confront a further question: from a technical point of view, what is the arrest of the criminal procedure (stay)?

This is a notion that cannot easily be managed by the Italian jurist (more in general, perhaps, than that of civil law). In fact, in our legal system there is no residual clause by which the judge can order the non-prosecution of the trial (or action): it has a dry alternative, condemnation or acquittal and, it is worth noting, among the causes of acquittal in detail indicated by the law, nothing is found that comes close to the remedy in question.

On the material level, it is not difficult to understand what the arrest of the procedure consists of: the trial ends by express order of the judge. We will not

[390]R. PATTENDEN, Pre-verdict judicial fact-finding in criminal trials with justice, in Oxford Journal of Legal Studies, 29 (1), 2009, pp. 6ss.

[391]B. SLOAN, Keeping up with the Jones case: Establishing constructive trusts in "sole legal owner" scenarios, op. cit.

[392]R v Chairman, County of London Quarter Sessions, ex p Downes, [1954], 1 QB, 1. R. PATTENDEN, Abuse of process in criminal litigation, in Journal of Criminal Law, 53, 1989, pp. 34ss. R. PATTENDEN, The power of the Courts to stay a criminal prosecution, in Criminal Law Review, 1985, pp. 175ss. A. OWUSU-BEMPAH, Silence in suspicious circumstances, in Criminal Law Review, 2014, pp. 128ss.

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go further (save, clearly, the possibility for the accusation of proposing an appeal). On the other hand, from a technical point of view, it is inevitable to combine with absolution; because, in substance, the effect (better: the benefit) that the defendant draws from both the pronouncements is the same. However, this does not detract from the fact that the stay of the proceeding and acquittal are distinct objects; the first must also be distinguished from another type of judicial decision, with which it would share even more evident affinity margins (verdict of not guilty): "where a defendant arraigned on an indictment or inquisition pleads not guilty and the prosecutor proposes to offer no evidence against him, the court before which the defendant is arraigned may order that a verdict of not guilty shall be recorded without any further steps being taken in the proceedings, and the verdict shall have the same effect as if the defendant had been tried and acquitted on the verdict of a jury or a court (...)"[393]. To simplify, we can say that acquittal and verdict of not guilty are assimilated by the law in terms of the effects resulting from their pronunciation: ne bis in idem. With the second, the arrest of the procedure evidently shares a (if we may say so) methodological aspect: in both cases, in fact, there is no real assessment on the merits of the sub-judicial affair that instead distinguishes the absolution (the defendant is found not guilty following the preliminary investigation and assessment of the fact by the jury).

If so, the real discrete line between the order of non prosecution due to the abuse of trial and the two other rulings can only be constituted by that of the consequential effects: only acquittal or verdict of not guilty follows the prohibition of double judgment (operating for the same, therefore, the aforementioned double jeopardy rule).

Not for the first one: there is something similar, but not the same. Unless there is authorization from the court, the establishment of a second judgment against the same person for the same fact, already arrested for having abused the trial, will also constitute an abuse of the process, with identity of consequences.

However, in this scenario it is not possible to exclude an alternative outcome: that the prosecution does not add any evidence against the defendant, with the result: no case to answer. In this case, the accused can benefit from a verdict of not guilty, with full operation of the ne bis in idem[394].

2.JURISDICTION AND EXECUTIVE: THE DOCTRINE OF ABUSE AT THE "TEST BED" OF INTERFERENCE BETWEEN POWERS.

[393]Criminal Justice Act 1967, Section 17. See in argument for more details and analysis: A. OWUSU-BEMPAH, Judging the desirability of a defendant's evidence: An unfortunate approach to s.35(1)(b) of the criminal justice and public order act 1994, in Criminal Law Review, 2011, pp. 692ss. A. GILLESPIE, S. WEARE, The english legal system, Oxford University Press, Oxford, 2017.

[394]R v Thompson, [2006], EWCA Crim 2849, [2007], 1 WLR 1123. R. PATTENDEN, Abuse of process in criminal litigation, op. cit., p. 353ss. A. CHOO, Abuse of process and judicial stays of criminal proceedings, op. cit., p. 9.

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It is inevitable: the theory of abuse of process involves the problem of the relationship between jurisdiction and the judiciary magistrature. To better say: in the aforesaid terms, the problem could be faced with the "lens" of Italian law; in the Anglo-Saxon system, we should more correctly speak of: relations between jurisdiction and executive power[395].

Here, of course, the interference that is recreated as a result of the application of the discipline of the abuse takes on significantly greater dimensions and pregnancies: not unjustly, in fact, it has been highlighted that this doctrine resolves into questioning the same discretion inherent in exercise of executive power[396]. In some ways, it was said before: the use of process discretion is the necessary response to the distortions of prosecutorial discretion. The link or, in other words, the interference between the same is a congenital aspect of the overall reconstruction.

In practice, the paralysis of a criminal proceeding on the assumption of the unfair (or, in any case, grossly negligent) conduct of the prosecutor, is substantiated (the expression is allowed) in an invasion of the field: indeed, if the choice inherent to the exercise of the action belongs to the executive (Crown Prosecution Service), the order to block the progression is ingested directly in the same opportunity of the act of impulse (i.e. judgment of inopportunity of continuation).

In order to carry out a reflection of greater theoretical rigor, in the Anglo-Welsh system, the approach of the abuse of process would be at first reading an obvious dystonia with the adversary trial: it is an acquired principle that, following the exercise of criminal action, the relationship between the judge and the prosecution is confined to what happens inside the classroom[397]; so, it would lose relevance, always on the general level, as materially occurring before or outside (among which, obviously, also those events that would in fact create the conditions of an abuse of the process and, therefore, of the application of the relative sanction). The underlying logic is crystalline, especially for the jurist accustomed to confront the principle of phase separation: the trial is impermeable terrain to what happened extra moenia, coming into play the state of mental neutrality of the judge (of the jury).

In this way, the improper conduct of the prosecutor (prosecutorial misconducts) should be distinguished according to the procedural moment in which they are placed: where they are put in place in court, the judge has full power of intervention (in general, the discipline in question is derived from the police and criminal evidences act of 1984)[398], reporting the dialectic in the

[395]A. CHOO, Abuse of Process,and judicial stays of criminal proceedings, op. cit., p. 9.
[396]See the observations of Viscount Dilhorne, in DPP v Humphrys, [1977], AC 1.
[397]Collier v Hicks, [1831], 2 B & Ad 663, 668, 670, 672. see, G. DURSTON, Evidence. Text and materials, Oxford University press, Oxford, 2011.
[398]A. GILLESPIE, S. WEARE, The english legal system, op. cit.

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correctness path[399]; different discourse would apply to what was done in the phases prior to the trial: from the point of view of the system axioms, it should not even be known by the judge of merit, on pain of an entry of the judge in the field of investigations[400].

Similarly, the speech in question can be done with reference to the police. The traditional Anglo-Welsh setting provided for the responsibility of the said organ both in relation to investigations and to the exercise of the action; the Prosecution of Offenses Act of 1985[401] has significantly changed the scenario: the Crown Prosecution Service was established, a body of state officials responsible for conducting criminal proceedings following the decision of the police to start (in essence, the latter residual the initial choice to institute criminal proceedings against anyone, being differently attributed to the official of the state the power is to conduct the subsequent investigations, which exercise the prosecution). On closer inspection, if there is no doubt that the legislation referred to has visibly changed the relationship between police and prosecutor, we cannot even say that, due to the "new" set-ups introduced, the actions of the police are subtracted from the court's of abuse, sensing the risk that the choice relating to the establishment of a criminal proceeding is dictated by reasons that exceed the aims of justice or, to be clear, extremely vexatious. We agree, we foresee instruments aimed at putting an embankment to abuse of this type: the director of public prosecutions, in fact, can order at any time of the preliminary stage the interruption of criminal proceedings[402], if you find reasons for inappropriateness of the continuation of the process; however, it does not seem that this mechanism is able to eliminate at the root any potential liability profile for the police in the event of an abuse of process[403].

Returning to the central core of the reflection, we can ask ourselves an essential question: if-as it seems to understand-the assessment of an abuse of the trial by the judge cannot disregard the knowledge of what happened before the trial or, anyway, at the external, are we facing a doctrine in contrast with one of the fundamental axioms of the accusatory process? Beyond any possible conjecture or attempt to compose the potential conflict of powers, the most appropriate response would seem positive. But on the other hand: can the judge rely

[399]R v Kalia, [1974], 60 Cr App R 200, 211; R v Maynard, [1979],

[400]Cr App R 309, 317-8; R v Olivia, [1965], 49 Cr App R 298; R v Tregear, [1967], 2 QB 574; R v Roberts, [1985], 80 Cr App R 89. For more analysis see: A. CHOO, Evidence, op. cit. R. GLOVER, Murphy on evidence, Oxford University Press, Oxford, 2015, pp. 690ss.

[401]A. GILLESPIE, S. WEARE, The english legal system, op. cit.

[402]Prosecution of Offences Act (1985), Section 23. For more analysis see: A. GILLESPIE, S. WEARE, The english legal system, op. cit.

[403]See in matter the Prosecution of Offences Act (1985). For more details: F. BENNION, The new prosecutorial arrangements: (1) The Crown Prosecution Service, in Criminal Law Review, 1986, pp. 4ss. K.W. LIDSTONE, The reform prosecution process in England: A radical reform?, in Criminal Law Journal, 21,1987, pp. 296ss.A. GILLESPIE, S. WEARE, The english legal system, op. cit.

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entirely on the executive, excluding for this reason that the trial is never subject to abuse by the former?

However, there is a different key to reading. The obligation enshrined in constitutional law principally concerns the exercise of the action: the sanctioned reserve, therefore, takes the form of the exclusive attribution to the public prosecutor of the ownership of the act of impulsion which, once it has been put in place, irreversibly rooted the control of the jurisdiction; so - it does not seem entirely irrational to observe - an eventual collocation (assuming: de iure condendo) on the judge of power to stop the criminal trial begun, on the basis of an abuse that makes (so to say) unfair the procedure, it would not really conflict with the obligatory nature of the prosecution, since, in any case, it has already been exercised. A different matter would be in the hypothesis of preventive syndication: a possible mechanism of ex ante control regarding the opportunity of the exercise act would undoubtedly conflict, meeting a pre-announced fate (declaration of illegitimacy). Indeed, probably, the very existence of the obligation enshrined therein if, on the one hand, excludes any invasion "from the outside" in relation to the act of impulse, on the other, would make ex-post judicial control necessary.

3.THE CONCEPT OF JUDICIAL DISCRETION.

It will be opportune some clarification in point of judicial discretionality (judicial discretion) that, as already pointed out, constitutes a key element both for the purpose of the understanding as well as in a perspective of framing the essence of the Anglo-Saxon doctrine of the trial abuse. Indeed, one (so to call it) actio finium regundorum of the discretion of the judge in the Anglo-Welsh system should serve to recreate a compromise between the instances of reasonableness (or, as we shall see shortly, of "individualization" of the abstract rule) and those containing the authoritative power.

Reduced the question to the minimum terms, it is a matter of differentiating the discretion from what is its conceptual antipode: the rule of law.

In general, if this last expression identifies a rule-written or not-from the rigid prescriptive content (where the material of the case would follow an exactly predetermined effect), the first lemma would postpone otherwise to the possibility for the judge to orient himself in the individual case in the choice of the concrete solution, through a margin of maneuver (more or less broad) dictated upstream by the law.

This cannot be the place to discuss the philosophical reasons underlying the adoption of operating modules marked by discretion, or the extension that it would be appropriate to recognize within the jurisdictional function[404]. But of course it is a point: that a minimum coefficient of discretion is necessary in judicial activity; if,

[404]A.M. GLEESON, Individualised justice-The holy grail, in Australian Law Journal, 20, 1995, pp. 422ss. C.E. SCHNEIDER, Discretion and rules: A lawyer's view, in K. HAWKINS (ed.), The uses of

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indeed, the rigidity of the abstract rule (rule of law) would guarantee the best of legal certainty, not providing (ideally) any margin in the adoption of viable solutions in the individual case, or the predictability of the effects expected from materializing of a behavior described by the case, on the other: "rules without discretion cannot fully take into account the need for tailoring results to unique facts and circumstances of particular cases. The justification for discretion is the need for individualized justice (...)"[405].

Therefore putting aside the main function of judicial discretion, we must dwell on the way to identify its essence.

In other words: what is meant by judicial discretion? The settings substantially matured on the point are two. Like the first, judicial discretion would be a decision-making power totally free from the law (unfettered power). Otherwise speaking: if the law, in a given situation, imposed the behavior A, the judge could deviate from the legal prescription not only not following the legal command, but even independently elaborating a different solution (B)[406]. The setting in question would sound suggestive, but it does not convince: it greatly enhances the moment (so to speak) creative of the rule by the judge; nevertheless, it is badly suited to the theory of the abuse of the process. As will be better seen in the following paragraphs, the overall construction of the same is based on rigid values, which tend to be incompressible (in terms of the principle of legitimacy and fairness) and, therefore, insane as regards derogation or balancing with interests of an adverse sign. Wanting to exemplify, the adoption of such an approach could entail an eventual fact: there is abuse when the process is unfair; however, if the upstream rule configured by the abuse of process doctrine would impose the arrest of the proceeding in this case, the judge could also deliberately depart from it.

Therefore, the second is better: discretion is the ability attributed to the judge to move within an operating margin or appreciation, prepared by law (open-texturedness) in order to "individualize" the abstract content of a rule in the individual case (but without, as it would be in the context of the first approach, that this entails freedom for the judge to choose whether or not to apply the basic precepts).

To clarify: "a discretion necessarily involves a latitude of individual choice according to the particular circumstances, and differs from a case where the decision follows ex debito iustitiae once facts are ascertained (...)"[407].

discretion, Oxford University Press, Oxford, 1992. C.R. SUNSTEIN, Problems with rules, in California Law Review, 83, 1995, pp. 953ss. L. GELSTHORPE, N. PADFIELD, Exercising discretion, ed. Routledge, London & New York, 2012, pp. 217ss.

[405]K.C. DAVIS, Discretionary justice: A preliminary inquiry, op. cit., pp. 17ss.

[406]A. CHOO, Abuse of process and judicial stays of criminal proceedings, op. cit., pp. 156ss.

[407]Evans v Bartlam, [1937], AC 473, 489 per Lord Wright. For more details see: R. PATTENDEN, The judge, discretion, and the criminal trial, op. cit., pp. 4ss. Y.M. MORISSETTE, The exclusion of evidence under the Canadian Charter of Rights

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Arguments then (perhaps, but so it would seem) sufficient to anticipate a consideration that will certainly be useful in the continuation, when we will go into the analysis of the doctrine in question: if, as already anticipated, the judicial discretion constitutes a physiological aspect to the theory of abuse, the latter must logically be conceived in the dual dimension of power-duty of the judiciary. With greater clarity: the judge has ample room for maneuver in the reconstruction of situations that legitimize the adoption of remedies established by the doctrine in comment; the diagnosis of such "symptomatic" situations, however, if it gives positive results, results in an obligation: the application of the sanction (arrest of the procedure).

4.THE QUALIFYING ELEMENTS OF THE DOCTRINE.

It is now a matter of summarizing the hypotheses of application of the doctrine of procedural abuse; better to say: the operational "poles" of the theory. In essence: in which cases can one generally say that an abuse of the process has occurred? Which, on balance, would be tantamount to establishing the qualifying element for the purposes of judicial diagnosis. The Anglo-Saxon jurisprudence has settled on a double characterization of abusive conduct: "(...) the jurisdiction to stay can be exercised in many different circumstances. Nevertheless two main strands can be detected in the authorities: -Cases where the court concludes that the defendant cannot receive a fair trial; -Cases where the court concludes that it would unfair for the defendant to be tried. In some cases of course the two categories may overlap (...)[408].

The reference parameters are therefore two. In the first hypothesis, the process is "falsified" ab origin: contrary to fairness, therefore the defendant is not in a position to exercise full and adequate defense (we will discuss in the next paragraph of the concept of fairness). In the second, although the fairness of the process is not in question and, therefore, the capacity of the accused to elaborate an effective line of action, it would be unfair to prolong the exercise of the punitive pretension, contrary to the moral integrity of the system (moral integrity of justice).

The doctrine in question constitutes the crossroads of two parameters of different nature. Around the first operative pole, the idea of the risk of an unjust conviction rotates: we are therefore faced with a direct intrinsic policy of the system (intrinsic policy), aimed at protecting more than the correct functioning of the judicial machine, that of avoid the condemnation of an innocent; on the second, otherwise, the image of the ethical integrity of the system of justice (extrinsic policy) is thickened: even if there is no risk of reaching the conviction of an innocent subject, the interest in punishing the perpetrators degrades to this a point that can be said to be non-

and Freedoms: What to do and what not to do, in McGill Law Journal, 30 (4), 1984, pp. 554ss.

[408] R v Beckford, [1996], 1 Cr App R 94, 100-1.

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existent (related) to the continuation of the procedural process.

Certainly, the second area of operation is the one most difficult to handle by the Italian jurist: it involves for the judge, when assessing an abusive conduct on the part of the prosecutor, the adoption of metagiuridic reference parameters. We could try to summarize it:"(...) in these cases the question is not so much whether the defendant can be fairly tried, but rather whether for some reason connected with the prosecutors' conduct it would be unfair to him if the court were to permit them to proceed at all. The court's inquiry is directed more to the prosecutors' behaviour than to the fairness of any eventual trial (...) if it is satisfied that it would not be fair to allow the proceedings to continue, the court does not then concern itself with the possibility that any ensuing trial might still be a fair one, because it will have formed the prior view that it would not be fair to the defendant if it were to take place at all (...)[409]. In essence, rather than focusing on an evaluation of an objective nature (if a fair trial is possible), the judicial assessment would be based on the subjective coefficient of guilt (or bad faith) of the accusation. As it is argued, in this last case the needs of safeguarding the procedural guarantees and those of "moralizing" the system interpenetrate. Comparing categories: principle of legitimacy and fairness. The fairness is polysemy: between system requirements, morality and subjective guarantees. We anticipated the question that will merge the subject of this paragraph: what should be understood by fairness of the criminal trial?

A simple semantic transposition would already highlight the problematic nature of the notion: a purely literal meaning would provide us with the term

[409]R (Ebrahim) v Feltham Magistrates' Court, [2001], EWHC Admin 130, [2001], 1 WLR 1293, 20. For more analysis and details see: S. FAIRCLOUGH, It doesn't happen...and I've never thought it was necessary for it to happen: Barriers to vulnerable defendants giving evidence by live link in Crown Court trials, in International Journal of Evidence & Proof, 21 (3), 2017, pp. 212ss. S. FAIRCLOUGH, Speaking up for Injustice: Reconsidering the provision of special measures through the lens of equality, in Criminal Law Review, 2018, 7ss. E. HENDERSON, Taking control of cross-examination: Judges, advocates and intermediaries discuss judicial management of the cross-examination of vulnerable people, in Criminal Law Review, 2016, pp. 184ss. J. JACKSON, S. SUMMERS, The internationalisation of criminal evidence: Beyond the common law and civil law traditions, Cambridge University Press, Cambridge, 2012. A. KIRBY, Effectively engaging victims, witnesses and defendants in the Criminal Courts: A question of "court culture"?, in Criminal Law Review, 2017, pp. 950ss. A. LOUGHNAN, Between fairness and "dangerousness": Reforming the law on unfitness to plead, in Criminal Law Review, 2016, pp. 452ss. R.D. MACKAY, Unfitness to plead-Data on formal findings from 2002 to 2014. London: Law Commission, 2016. J. MCEWAN, Vulnerable defendants and the fairness of trials, in Criminal Law Review, 2013, pp. 103ss. L. MULCAHY, Putting the defendant in their place: Why do we still use the dock in criminal proceedings?, in British Journal of Criminology, 53 (6), 2013, pp. 1140ss. A. OWUSU-BEMPAH, Judging the desirability of a defendant's evidence: An unfortunate approach to s.35(1)(b) of the Criminal Justice and Public Order Act 1994, in Criminal Law Review, 2016, pp. 694ss. A. OWUSU-BEMPAH, Defendant participation in the criminal process, Routledge, London, 2017. R. DENYER, Case management in criminal trials, Hart Publishing, Oxford & Oregon, Portland, 2012.

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"correctness, loyalty"; but it is not the only one: from a technical-legal point of view, it would correspond to "fairness". Which, in any case, would mean a lot: if the first meaning, in fact, evokes a dialectical scenario centered on the obligation of loyalty of the parties, the second aims straight not only to the need to respect the "rules of the game", but also to that of safeguarding the fundamental guarantees of the accused in the criminal proceedings. In essence, the polysemy of the lemma makes it clear of the ethical matrix of a principle that is subsequently placed within a technical framework.

We can also understand another fact: the concept of fairness poses the domestic jurist facing the same difficulties that in general would appear before the common law abuse doctrine: in addition to the deficiency of upstream legality, we are witnessing the merging of instances "moralizing" of the justice system and of the defense of the right of defense, with the inevitable consequences in terms of problematic classification. In any case, to attempt to clarify the content of the concept under analysis, one can move from the call of another fundamental principle in the context of the anti-abuse theory.

In the Anglo-Saxon system, the principle of legitimacy is the first foundation of both the ius dicere and the criminal justice system itself; at the base, there is the idea that jurisdiction derives legitimacy from the duty to protect two essential interests: the protection of the innocent from unjust sentences and the safeguarding of the moral integrity of the system[410]. Wanting to simplify to the maximum, with the first of the interests mentioned, we refer to the need to put the accused in starting conditions in which the probabilities of arriving at a non-guilty pronouncement are equivalent to those of a conviction. In short, a general idea of equality of arms is instilled in the system: it is impossible for it to take place if the criminal trial starts with a clear phase-shift between the accusation and the defendant, where the latter is not in fact able to prepare adequate defense. The nature of this first articulation of the principle of legitimacy is clearly transpired: it has a deliberately broad content, materializing more in an operational direction than in an exactly predetermined technical command: it expresses the need, both from a normative and strictly practical point of view, to guarantee the probable outcome of the equivalent process at the outset, so that always on a plan of principle, any conduct of a part aimed at undermining this ideal equilibrium must be censured.

The second content is different: it reconnects the foundation of the public power (in this case: jurisdiction and repression of crimes) to the collective custody that is placed on justice itself (public confidence). In other words, the idea of a justice system totally dissolved by an "ethical" control of the community cannot be in any way confirmed: repressing crimes is certainly of apical

[410] A.A.S. ZUCKERMAN, Illegally-obtained-evidence-discretion as a guardian of legitimacy, in Current Legal Problems, 40, 1987, pp. 59ss.

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interest; however, it is not possible to disregard the need for procedural fair play: this in turn implies that the accusation follows the good faith (to recall the duty of loyalty and probity of the parties), constituting this a real counter, limit to the exercise of punitive power: if exceeded, you would inevitably throw discredit on jurisdiction and justice.

The corollary of what has just been illustrated is summarized as follows.

Between the principle in question and the doctrine of abuse, with specific regard to the two outlined "poles" of operation (unfair trial/unfair to try), there is a close link, which would be summarized in the identity of the base of operations. In the wake of the first articulation of the principle of legitimacy, we find a content that is obviously corresponding to that of fairness: reduced the question to the minimum terms, guarantee initial conditions of the procedure such that the probabilities of condemnation correspond to those of absolution other does not mean if not avert the danger of an unjust conviction, id est: condemnation of an innocent. At the same time, if the process is unfair, there is a lack of legitimacy of the ius dicere; if this is connected to a conduct carried out by the public part, it cannot continue; similarly, a fair trial could also be possible, the conduct of the magistrate could be contrary to the root of correctness: the protraction of the punitive pretension is morally unjustifiable. At a practical level, all this translates into a specific technical operation, to which the English judge is called if he considers the opportunity to paralyze the course of the proceedings due to an abuse of process. In particular, he will have to verify the existence of precise conditions: a) the protection of the not guilty by unjust sentences; when the first evaluation gives a positive outcome, b) that the interest in the repression of the guilty continues and, specularly, that c) such interests do not conflict with the moral integrity of the system.

Summing up: the application of the abuse of process doctrine will be possible if and because, alternatively, there is a real danger when an innocent defendant will be condemned or when the protraction of the procedure constitutes an outrage to the ethical image of justice (more concretely, to the collective trust-public confidence-towards the same)[411].

Based on the considerations made, we would then arrive at a conclusion.

Intercurring an intimate link between the principle of legitimacy and the theoretical abuse of the process (constituting, indeed, the latter a sort of "emanation" of the first practice), we can

[411]R v Griffin, [2001], 3 NZLR 577, (2001) 19 CRNZ 47 (CA), per Richardson P, Blanchard and Tipping JJ at para 40; R v Forbes, [2001], 1 AC 473, [2001] 2 WLR 1 (HL); Brown v Stott, [2003], 1 AC 681 [2001] 2 WLR 817 (PC); Randall v R, [2002], 1 WLR 2237 (PC) [2002] UKPC 19 at para 28; Montgomery v HM Advocate, [2003], 1 AC 641, [2001] 2 WLR 779(PC). For more details see: M. SPENCER, Concentrate questions and answers evidence, Oxford University Press, oxford, 2016. B. EMMERSON, A. ASHWORTH, A. MACDONALD, Human rights and criminal justice, Sweet & Maxwell, 2012.

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arrive at the delineation of the content of the process fairness: at the end of the reckoning, it would represent the place of mediation between a teleological projection of criminal process (given in the Anglo-Saxon system, as seen, by the repression of crimes), and that of respect for the defensive guarantees which, in the end, is embodied in the protection of the innocents from unjust sentences.

Consistently with these premises, the innate absoluteness of the rule in comment has been affirmed. It is rigid, unsuitable to found a balancing judgment with opposing values: "trial fairness is an absolute right in that nothing less than fairness to the accused is acceptable"[412].

It would be worth, further, to remove it from any form of balancing test: it would escape compressions of sorts due to possible "counterweights" value[413]. It would be an operation both illogical and juridically unsustainable in such a system: denying fairness is tantamount to denying the fundamentals of criminal jurisdiction.

5.BETWEEN THE ARREST OF PROCEDURE AND "INTERMEDIATE" SOLUTIONS: CRITERIA FOR CHOOSING AN EXTREME REMEDY.

As stated above, the arrest of the proceedings due to a procedural abuse constitutes the remedy of last resort. It is not appropriate to dwell on the reasons for the exceptionality: needs linked to the effectiveness of criminal jurisdiction and the repression of crimes lead immediately to this conclusion. The real question is another: what are the "intermediate" solutions and, therefore, when it can be said that the same do not provide adequate protection, making appropriate the use of the "extreme" sanction?

The "case-by-case" approach (often highlighted) to the subject matter also precludes the elaboration of a general rule. In the same way in which it is not possible to give an exact definition of the abuse, letting the practice concretize its contents and operating procedures[414] from time to time, so it is not conceivable an abstractization of situations in which the remedy of last resort is imposed[415]. On the other hand, reasoning is not exclusively linked to the physiological pragmatism of the abuse of process, but also to strictly technical considerations related to the changing nature of the concept of fairness over time: concretizing in an (implicit) reference to the operational rules that govern the development of the process, it is clear that the operative modulation (and the correlated eventual prejudice) of the same is affected by the normative or hermeneutical events that directly or indirectly affect it.

[412]D. MATHIAS, The duty to prevent an abuse of process by staying criminal proceedings, ed. Robertson, 2004, pp. 6ss.

[413]R v Narayan, Glazebrook J, HC Auckland T 2902: "(...) the balancing of probative value and prejudicial effect (...) is at the heart of the discretion to admit or exclude evidence (...)".

[414]Watson v Clarke, [1990], 1 NZLR 715, (1988) 3 CRNZ 67, par Robertson J.

[415]A. PACIOCCO, The stay of proceedings as a remedy in criminal cases: Abusing the abuse of process concept, in Criminal Law Journal, 15, 2001, pp. 315ss.

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Nevertheless, a rough reconstruction can be attempted for which the need to use the arrest of the proceeding was considered in previous case law cases. After all, even in a subject strongly dominated by interpretative and pragmatic oscillations like the one in question, a guideline is present: the prejudice deriving from the accused by the abuse. At the end of the day, this is at the same time the symptomatic element (of the incorrect procedural conduct) and the guiding criterion towards the opportunity of the "therapeutic" intervention of the jurisdiction[416].

A further common thread is found: alternative solutions to the arrest of criminal trial are resolved by judicial interventions on the admission or exclusion of the trial. In essence, if-as placed above in light-the interest most heavily guarded by the doctrine in question is constituted by fairness (in its dual articulation of technical operating rule and at the same time "ethics"), it is immediately apparent that the terrain most sensitive to abusive behavior of part, able to compromise (if we want to say) the genuineness of the dialectical process and, therefore, the substantial correctness and equality of weapons in the trial, is that of evidence. Without going too far into a complex area, we can still say that even in the Anglo-Saxon system the judicial "treatment" of the trial follows a diversification of rules for the admission (and acquisition) of the trial and the final evaluation. The consequence is soon said. The alternative remedies to the penalty of maximum rigor are: the possible exclusion of the "contaminated" test (exclusion of tainted evidence); an invitation to caution formulated by the judge to the jury (judicial warning), in the sense of carefully weighing the weight to be attributed to a particular test or the specific meaning to be assigned to the same[417].

In which cases can we say that the exclusion of a trial is a more appropriate solution than the arrest of the procedure (or vice versa)?

As is known, consistently with the core principles of the adversarial trial of the Anglo-Welsh order, the supporting rule regarding the powers of intervention of the judge on the evidence (requests and/or produced by the parties) is summarized in the general prohibition for the judge of investigation on the method and on the operative modalities adopted by the parts for the obtainment or the finding of the trial during the investigations (lawfully evidence obtained)[418], except in exceptional circumstances, the seriousness of the

[416]A. PACIOCCO, The stay of proceedings as a remedy in criminal cases: Abusing the abuse of process concept, op. cit.

[417]D. MATHIAS, The duty to prevent an abuse of process by staying criminal proceedings, op. cit., pp. 2ss. See also the next cases: R v Grace, [1989], 1 NZLR 197; R v Sutton, [1988], 4 CRNZ 98 (CA); Mohammed v The State, [1999], 2 AC 111, 123 (PC); R v Buhay, [2003], 225 DLR (4th) 624, 2003 SCC 30.

[418]R v Shaheed, [2002], 2 NZLR 377, 2002 19 CRNZ 165 (CA); R v Grayson and Taylor, [1997], 1 NZLR 399; R v Taylor, [1996], 14 CRNZ 426 (CA). J. JACKSON, S. SUMMERS, The internationalisation of criminal evidence: Beyond the common law and civil law traditions, op. cit.

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conduct carried out by the public part, aimed at obtaining the proof, imposes its exclusion from the trial field[419].

Now it is clear that here we are facing a solution of high rigor; it is difficult to say which cases are justified in recourse to one rather than the other solution, showing the hermeneutical declinations that emerged in the courtrooms a wide oscillation between the choice to continue with a process vitiated by an improper conduct of the accusation and to recover the "orthodoxy" through the exclusion of the vitiated evidence, or on the contrary to definitively end its course[420].

As you can see, the question revolves around the object of aggression. With greater clarity, we can say that if the overall fairness of the process is at stake, no balancing judgment will be possible: it was said before, enucleating the essential features of fairness, on the absoluteness and inelasticity of the same (for that same insuscettibile to bend in front of antithetical interests). Otherwise, if the opposed interest is different, we will have to tend towards the solution of less rigor. The residual doubt, however, always invokes the terms and the degree of reliability of the judicial prognosis: in other words, with what degree of reasonableness one can say that the mere exclusion of proof will preserve the accused from the risk of an unjust conviction and that, for this reason, the impartiality of the jury is sufficiently protected?

Even here, there is no definite answer. Too many allies and factors that can come into play: to illustrate, the demonstrative "weight" of the evidence that would be excluded from the final decision could play a decisive role; moreover, the gravity of the offense for which it proceeds and, consequently, the impact (in a broad sense) of emotion that it may have on the soul of the jurors could have little relevance.

The approach to the second problem is different. How to discern cases in which the arrest of the trial is justified by those in which a judicial warning is sufficient. It is opportunely repeated, the invitation made by the judge to the jury can be in a twofold alternative sense: in bringing an appropriate demonstrative "weight" to a test (or, on the contrary, in the invitation not to overemphasize its relevance); in assigning the correct "meaning" or representative content to the test. These are situations, however, more problematic: in cases of this type, in fact, a test has already been admitted and acquired (in the first case, however, the judge could also block the entry of the trial, denying admission). A proof, in short, here is already present in the process: acquired, has already entered the sphere of knowledge of the jury.

It would not be questioned here, at least in appearance, the legality of the proof itself, but the mere evaluative

[419]R v Dally, [1990], 2 NZLR 184, 1990 5 CRNZ 687. For mode analysis see: D. MATHIAS, Discretionary exclusion of evidence, in New Zealand Law Journal, 20, 1990, pp. 25ss. J. JACKSON, S. SUMMERS, The internationalisation of criminal evidence: Beyond the common law and civil law traditions,

[420]R v Looseley, [2001], UKHL 53 (25 October 2001), 2001 4 All ER 897 (HL).

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moment of the same. Basically, it is rational to believe that a simple caveat to the jury provides adequate coverage of the process? On the other hand, even the exclusion at the root of the "poisoned fruit" would not elude doubts about the impartiality of the judge of the fact: denying the use of a given evidence for the decision does not mean to erase it from the memory of who learned the contents. In the end, it is a matter of practical sense: what - it seems - we must always have as a point of reference the danger of condemning an innocent person; if, therefore, even the exclusion of the proof (and not the simple invitation made by the judge to the jury) should not avert the risk in question, the arrest of the procedure would be an obligatory solution.

6.THE "CLINICAL" CASES OF THE ANGLO-SAXON SYSTEM.

A brief illustration of the "symptomatic" cases of abuse of the process in the Anglo-Welsh system is imposed to such an extent, albeit in a totally summarized manner. The caveat in the premise is the usual: these are practical examples (as well as conceptual), since it cannot be ruled out that the practice will increase the number of cases in the future, as well as a (so to speak) "trial" procedure, usually brought back to the phenomenology of the abuse, in the concrete case then do not configure it (or vice versa, that empirical manifestations traditionally not brought back to the abusive practice subsequently become). In short, the anchoring of the judicial review to parameters of substantial sign, such as the concrete possibility for the accused to benefit from a fair trial or that in the specific case the continuation of the trial results in an outrage to the ethical integrity of justice, in one with the physiological oscillation of the (already reported) fact-finding approach, involves in itself the purely illustrative relevance of the analysis of leading cases in the matter. At the most, this observation serves as a methodological indication for the continuation: we will try not only to shed light on the "specializing" features of symptomatic cases, but also on the type of concrete assessment that the judge is called to play, also trying to clarify with which particular declinations the above mentioned substantialistic parameters are placed within the typical situation.

7.DELAY IN THE EXERCISE OF CRIMINAL ACTION.

It is well known: in any modern criminal justice system, the excessive length of procedures is an aspect that is in some ways endemic and unavoidable[421]. This can certainly not be the place to dwell on the reasons behind this systemic inefficiency: if only because the reasons in question are of heterogeneous nature, moving from

[421]In this terms see. D. YOUNG, M. SUMMERS QC, D. CORKER, Abuse of process in criminal proceedings, ed. Bloomsbury, New York, 2014, pp. 2ss. D. BIRCH, C. TAYLOR, "People like us?": Responding to allegations of past abuse in care, in Criminal Law Review, 2003, pp. 824ss. P. LEWIS, Too late to try?, in New Law Journal, 2006, pp. 1458ss. A. CHOO, Abuse of process and judicial stays of criminal proceedings, cit., pp. 71 e ss.

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"physiological" or structural problems of the process itself (from the point of view of the apparatus upstream legislation), to arrive at profiles related to the workload that afflicts the judicial machinery. A consideration, on the other hand, must be immediately carried out: the classification (to use an expression more in keeping with domestic legal terminology) within the Anglo-Saxon order of the reasonable length of the criminal trial within the framework of the fairness of the process. It is a key analysis, in fact, that must be immediately brought to light: in substance, within the Anglo-Welsh criminal process, the defendant's claim to containment within reasonable time of the celebration of the rite answers, first of all, that absolute and incompressible interest that we have seen to be fairness. We will soon have the opportunity to see it in more detail, but it is immediately perceived that the delay in the celebration of the process can be resolved in the risk of an unjust conviction: the course of time alters the capacity reminiscent of the facts of the case, therefore a (so to call it) key-witness to the defense could, as a result of the lapse of time, not be able to clearly re-emerge details that would be essential for the purposes of defensive strategy, alongside for an acquittal. In any case, it must be said that the problem of dilation of the procedural time is able to manifest itself in a double direction: delay in the exercise of the criminal action (having regard to the interval of time between the beginning of the procedure and the act of impulse of the process); delay in carrying out the merit judgment (concerning the excessive length of the trial itself). In the common law system, it detects only-for the purposes of the application of the anti-abuse doctrine-the first form: for the logical reason that, in that case, it is procedural length due to the prosecutor (or, what is the same, to the police in the execution of investigations).

In general, the answer to the problem of the excessive length of the procedures takes place in modern systems on two fronts: on the one hand, through the imposition of predetermined duration limits of the procedural stages; on the other, as a function of closing the system and at the same time to mitigate the rigidity of the phase terms, the jurisprudential processing of discretionary rules on the reasonableness of the duration of the proceedings. One cannot clearly say in a priori way which of the two settings is more efficient: if, in fact, the introduction of rigid terms makes it possible to identify (at least in principle) with confidence the threshold beyond which the duration of the process must be defined excessive. It is also true that the length of the procedure is (as we said) an endemic problem to justice, so that we cannot even logically rule out that the celebration of a trial, within the maximum times established by the law, does not in any case have an excessive duration or, better to say, implying overall iniquity. It is axiomatic that some delay is inevitable. The question is, at what point does the delay become unreasonable?[422].

[422]R v Smith, [1992], 2 SCR 1120, par Sopinka J.

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In the Anglo-Saxon order, an overview of the terrain of the abuse jurisdiction allows us to deduce the clear favor shown for the second solution.

The story clearly shows how the doctrine in question is "daughter" of jurisprudential elaborations, occurred outside the legal grids and the judicial discretion that underlies it intimately permeates the settings that have emerged on this specific side. If we want to put it in other words, it is a question of cultural heritage: the discretion of the judge constitutes an empirical instrument, intrinsically oscillating; but it is also a critical "tool" which, in the common law's cultural genetic code, protects the rights of the individual, thus ensuring an effective synthesis of individual guarantees and collective interests.

If this is so, it will then be clear why in the system in question the parliament has never introduced a positive discipline in the matter of temporal scans of the phases of the criminal trial: in concrete terms, there is not properly a subjective right of the accused, of legislative matrix, the containment of the times within which the prosecutor can exercise the criminal action[423].

To this, the "sectoral" provisions given by the Magistrates' Courts Act 1980 are strictly excluded. These are special provisions concerning the summary offences (facts-crime of attenuated gravity, in general): "except as otherwise expressly provided by enactment and subject to subsection (2) below, a magistrates' court shall not try an information or hear a complaint unless the information was laid, or the complaint made, within six months from the time when the offence was committed, or the matter of compliant arose" (Section 127). For the rest, the regulatory framework on this matter is realized, as well as in judicial rulings aimed at establishing precise references in terms of procedural lengths, in what we could define as codes of conduct for practical operators.

Specific reference is made, in the first place, to the Code for Crown Prosecutors, issued by the director of public prosecutions (on the basis of the provisions of the Prosecution of Offenses Act 1985, s.10): in providing a code of guidelines and practices in the prosecution, it is established that a trial will not start if there is a considerable amount of time between the date of commission of the offense and that of the trial, unless: a) the fact- crime is serious; b) the delay has been caused, albeit partially, by the defendant; c) the news of a crime has only recently been learned by the authority; d) there have

[423]D. YOUNG, M. SUMMERS QC, D. CORKER, Abuse of process in criminal proceedings, op. cit., pp. 10ss. A. CHOO, Abuse of process and judicial stays of criminal proceedings, op. cit., pp. 71ss. A clear example of this ideological-cultural guideline can be found in the introduction of the War Crimes Act 1991, aimed at the persecution of war crimes committed in the years 1939-1945 (see, R v Sawoniuk, [2000], 2 Cr App R 220, CA). For more details see: C. SINGH, M. RAMJOHN, Unlocking evidence, ed. Routledge, London & New York, 2016. J. DOAK, M. MCGOURLAY, M. THOMAS, Evidence in context, ed. Routledge, London & New York, 2015. P. ROBERTS, A. ZUCKERMAN, Criminal evidence, Oxford University Press, Oxford, 2010.

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been lengthy investigations due to the complexity of the matter.

Secondly, the well-known attorney-general's reference no 1 of 1990[424] should be mentioned. An authentic cornerstone in terms of delay, it is necessary to find the relevance of this "precedent" in having canonized the essential parameters delimiting the threshold beyond which the delay in carrying out the procedure results in an intolerable prejudice against the accused.

Synthetically, the fact is recalled: a police officer was involved in an accident in August 1987; the trial of merit established against him began only in March 1989. The judge (of the Crown Court) accepted the request of the defense to block the continuation of the procedure on the basis of the delay in the exercise of criminal proceedings, included always in a defensive thesis, shared by the judge, an abuse of the trial.

Thus, a problem arose: according to the attorney general's perspective, an interpretation of this guise, which based the opportunity of the exceptional remedy of the arrest of the proceedings solely on the basis of the objective delay that occurred in the exercise of the action, would have been excessively rigid, since it would not have taken into account both the element of "responsibility" for the redundant length of the procedure, as the fact that (as said at the beginning) the delay is physiological problem to the judicial machine and therefore, to a certain extent, it constitutes an "acceptable systemic risk".

Hence the questions posed by the attorney general: - if the arrest of the criminal trial could be ordered by the judge only on the basis of the objective delay in the exercise of the prosecution and, therefore, regardless of the circumstance that the same could be a consequence of a guilty conduct of the prosecutor; -in the affirmative answer, what is the level of seriousness of the prejudice against the accused in order to justify the appeal of the arrest of the proceeding. In fact, neither the defense in the application for the arrest of the procedure, nor the judge who had ordered it took into consideration two relevant elements: the responsibility for the delay in the exercise of the criminal proceedings occurred; the extent of the prejudice suffered by the accused in consequence of the length of the same and which, in the event of protraction of the court proceedings, would continue to suffer.

The answer to the first question was affirmative. The arrest of the trial is indeed a remedy of an exceptional nature, but the fact that the delay in the exercise of the action does not depend on a behavior guilty of the accusation does not sterilize the resulting injury. Rather, a limit should be imposed (so to say) negative to the operability of the remedy in question: it will not be available where it is established that the delay occurred solely as a consequence of the complexity of the sub-judicial

[424]A. GILLESPIE, S. WEARE, The english legal system, op. cit. P. ROBERTS, A. ZUCKERMAN, Criminal evidence, op. cit. J. SPRACK, A practical approach to criminal procedure, Oxford University Press, Oxford, 2011.

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case or, alternatively, if it is chargeable to the defense.

With regard to the second, the determining value of the prejudice that the defense would suffer due to the excessive length of the procedure was affirmed. Basically, in order to operate the doctrine of the abuse of the trial, it is necessary that it derives a concrete compromise of the rights of the accused; the extent of the injury is the usual, settling on the well-known binomial of the theoretical: unfair trial/unfair to try. The burden of proof on this point lies with the defendant: whether it is due to the high probability of not being able to benefit from a fair trial due to the delay (or, alternatively, the ethical reprehension of the protracted trial); both with regard to the seriousness of the damage that would result from the continuation of the process. In this sense, always in consideration of the intrinsic exceptional nature of the remedy in question, the judge will always have to evaluate the alternative viability of intermediate solutions: the non admission of a proof, possibly "spoiled" because of the delay; the indication of guidelines to the jury for the purpose of evaluating the evidential conglomeration.

The following key parameters are then set for the abuse of the process due to delay: a) minimum acceptable injury coefficient. The prejudice that threatens to suffer the defense must be serious. With greater clarity, there must be the risk of an unfair trial (unjust conviction): the course of time significantly alters the demonstrative value of the evidence, making it more concrete the danger of a conviction (we would say) "not beyond reasonable doubt". But even if a fair trial were possible, there could still be a need to end it: time inevitably soothes the "scuffing" recreated by the crime, leading even to the oblivion of the same in the collective consciousness, thus not justifying itself anymore, in this case, the persecution. Outside this extreme region, the delay must be tolerated as necessary "evil".

Impracticability of intermediate solutions. It was said above. The definitive arrest of the criminal trial passes through a preliminary assessment or, better, a prognosis about the unprofitable experience of intermediate solutions (not admitting a trial, caveat indications to the jury in the decision on the fact).

The "guilt" of the prosecutor. Guideline already highlighted: the charge of the delay to the accusation is not a conditio sine qua non for the arrest of the trial. Rather, it requires special caution when no etiologically relevant conduct of the prosecutor emerges from the available elements. Therefore, the element (so to speak) subjective given by the fault (if not the malice) of the accusation affects a different aspect with reference to the ascertainment of the occurrence of an abuse: the judgment of reproover that the first can be moved into terms of causation of delay and of the procedural inequality that derives from it. Causes of delay of the procedure that do not integrate abuse. Some hypotheses of "physiological" procedural length are not included in the paradigm of the doctrine in analysis. The objective complexity of the case treated is the most intuitive: similar to it, therefore, are the difficulty

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encountered in investigating by the prosecutor in finding the sources of evidence (imagine the sector of economic crime, notoriously involving very complex and long investigations). In the same way, the delay due to a defense behavior cannot be configured for abuse.

Documentary proof and oral exam. It should be opportunely drawn a line of discrimine between processes mainly based on documentary evidence (the case of crimes in economic matters is referred again) and those based on oral examination (think of sexual crimes). As is well understood, the traditional hermeneutical approach tends to reconnect the opportunity to proceed with the arrest of the procedure due to abuse of the second group of hypotheses (waiting for the "non-usurability" due to the time of a documental contribution)[425].

To summarize: “where delay jeopardises the fairness of a forthcoming trial or where, for any compelling reason, it is not fair to try an accused at all (...) the proceedings must be brought to an end (...)”[426].

The above guidelines have had a large influence on judicial practice to follow, hesitating in setting certain operating points which, on closer inspection, would constitute a "projection" and at the same time a confirmation of the upstream criteria expressed in the leading case analyzed above. It was therefore established that: -even if the length of the procedural time is excessive and does not find plausible justification in other reasons (such as the objective complexity of the case), the paralysis of the procedure must however be confined to exceptional cases; -the sanction of maximum rigor will not take place, unless it is proven that the accused cannot benefit from a fair trial or, alternatively, that the protraction of the punitive pretension results in an attack on the moral integrity of justice; -if the existence of a prejudice against the defendant is proven, the judge must first assess whether the procedural fairness cannot be guaranteed through more attenuated remedies (by extending a trial from the trial or, otherwise instructing the jury on the most suitable criteria for his final evaluation); -only when the conditions listed above occur jointly, the criminal trial must be arrested.

At this point it is worthwhile to make some final considerations regarding the delay in the exercise of the action: in particular, with reference to the concrete relationship between the procedural flaw in question and the two operational "poles" of the abuse doctrine (unfair trial/not fair to try). With regard to the first, it is necessary to move from the premise that, in the Anglo-Welsh system, it constitutes ius receptum the rule by which the exercise of the penal action must necessarily be accompanied by the granting of the concrete possibility of carrying out an adequate defense. This principle makes the assessment of the injury intimately connected to the delay in the process. As lucidly summarized in multiple

[425]R v Buzalek and Schiffer, [1991], Crim LR 115, CA; R v Central Criminal Court, ex p Randle and Pottle, [1992], 1 All ER 370, CA.

[426]Spiers v Ruddy, [2007], UKPC D2, (2008) E WLR 608, par Lord Bingham of Cornhill.

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pronunciations, with the passage of time, memories will tend to vanish; better: a re-enactment of the facts will inevitably replace a reconstruction of the same that, as a result of rational workmanship, will still be devoid of that clarity and that genuineness of a memory that resurfaces through the words of a witness[427].

Clearly, the margins of uncertainty in terms of procedural unfairness are not only radically unavoidable; to clarify: the prognosis in point of injury from unjust condemnation is not possible except in probabilistic terms. In short, it would require the judge a perspective look at the reconstruction of the fact that will be made by the jury at the end of the acquisition of evidence. For this reason, instead of the actual impossibility of a fair trial (as for reasons of simplification of soles say), it would be more correct to speak of "substantial risk that the defendant does not benefit from an adequate possibility of defending himself"[428].

Said risk is understandably higher in the processes in which the accusatory construct is based (exclusively or in a determining manner) on the declarative tests[429]. And this is generally recognized also in the application area[430]: if, in fact, the pre-established test, once formed, remains insensitive to the course of time, on the contrary this will produce a physiological alteration of the memories present in the psyche of the witness.

However, the antithetical hypothesis cannot be excluded. The situations could be the most varied, but can be exemplified as follows: expected that the course of time also affects the physical reality (imagine the inevitable changes suffered by the state of the places where, for example, the crime occurred), an unjustifiable delay-either due to operational inefficiency of the requisite office or for any other reason-could lead to a technical assessment, subsequently reversed on a documentary evidence, inevitably characterized by a precarious reliability.

Instead, a different reasoning must be made with reference to the second operative "pole" of the doctrine on the abuse of the process. Because of the time course, the equity of the process may not be in question; nevertheless, the length of the procedural times would make the protraction of the punitive pretension "morally deplorable". In this specific sense, there is no longer a problem in terms of assessing the probability of unjust conviction. As has been correctly pointed out, the question here is based not on the "technical" prejudice that the defendant would derive (impossibility of an adequate defense), but on the

[427]R v S, [2006], EWCA Crim 756, (2006), 2 Cr App R 23, p. 341. For more analysis see: J. R. SPENCER, Evidence of bad character, Bloomsburry, 2016.

[428]Cooke v Purcell, [1988], 14 NSWLR 51, 87; Gill v Walton, [1991], 25 NSWLR 190; Herron v McGregor, [1986], 6 NSWLR 246, 254.

[429]A. CHOO, Abuse of process and judicial stays of criminal proceedings, op. cit., pp. 92ss. In jurisprudence, see: Doyle v Leroux, [1981], RTR 438.

[430]A.L. SCHNEIDER, The right to a speedy trial, in Stanford Law Review, 20, 1968, pp. 499ss.

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ethical, sociological or psychological one[431].

Basically, it is a bias operating in two directions: from the public image of prejudice, the (inevitable) negative irradiations of the strepitus fori are well known; from a strictly personal point of view, the state of psychological prostration that is ingenious in the defendant, when not even the radical modification of his living conditions (change of residence, loss of work, change of affective relations) is evident. The most problematic aspect, however, of this interpretative operation lies in the identification of the specific conditions under which the interest in the repression of crimes must yield to that of the individual. The general guideline criterion that can be used is the following: if the objective of criminal justice is not exclusively to repress crimes (or to punish the guilty) but, if the person responsible for the fact is repressed, it is also to put the guilty in the condition to become aware of the error committed, in a perspective directly functional to its amendment, it can be said that the time course justifies the arrest of the procedure if the eventual condemnation would not lead to any "maieutic" or socially therapeutic result towards the prevented (in short, it would constitute a further stigma as an end in itself)[432].

8.PROHIBITION OF DOUBLE JUDGMENT (DOUBLE JEOPARDY).

The rule in question constitutes another paradigmatic hypothesis of application of the anti-abuse doctrine. However, before going into the analysis of the operational declinations of this rule within the matter of the abuse of process, it will be possible to make some preliminary mention of the nature and the connotations of the prohibition of double judgment. In general terms, even in the Anglo-Saxon system it can be summarized in the general prohibition of prosecuting someone twice for the same fact[433].

This, so to speak, would be the general brought about by the principle; nothing new, one could say, compared to what can be substantially found elsewhere. The rule in comment, however, presents a more multifaceted articulation in the common law; more concretely, it expresses the need to avoid that someone, already condemned or acquitted for a fact, suffers the risk of a second conviction for a story that is substantially the same from a historical point of view (subject to shortly illustrating what should meaning this last expression).

According to a moralizing view of criminal justice, the instrument is designed to stem the repressive zeal of authority in the face of crude criminal manifestations that, by hypothesis, have

[431]R v Telford JJ, [1991], 2 WLR 866, 876-7; R v Buzalek and Schiffer, [1991]; R v Norwich Crown Court, ex p Belsham, [1992], 95 Cr App R 9, 16-17. For more analysis see: J. HERRING, Criminal law: Text, cases and materials, Oxford University press, Oxford, 2018.

[432]R v Mill, [1986], 52 CR (3d) 1, 91-2.

[433]J. JACKSON, J. JOHNSTONE, The reasonable time requirement: An independent and meaningful right?, in Criminal Law Review, 2005, pp. 23ss.

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already gone to an acquittal (in this sense, as will be seen, the rule in. The object also operates with reference to the situation in which a criminal trial began with regard to a fact that acts as a "trailblazer" for a second proceeding concerning a more serious affair closely related to the first).
In any case, the essence of the prohibition could be summarized as follows:"(...) to put a person in double jeopardy may increase the chances of his or her being convicted even though innocent, and will also undermine the moral integrity of the criminal process. The accused may, as a result of having revealed his complete defence at the first trial, be at a greater disadvantage at the second trial and thus less able to defend him or herself effectively. Irrispective of this, it is in any event morally objectionable to subject someone to the embarassment, expense and anxiety of a second prosecution, with the possibility that a verdict might be returned which is ought to be borne in mind when considering stays of proceedings in the double jeopardy context (...)"[434].

As we argue, the intimate logic of the principle is linked to the conceptual core of fairness: there is also a need, strictly practical, to avoid a (second) judgment in which the effectiveness of the defensive strategy is significantly reduced compared to that of antecedent. Which, in any case, would like to say what we have generally observed previously: the concrete danger of an unjust conviction, due to a radical "disparity" between weapons of accusation and defense. On the other hand, the rationale of the rule is not found only in a guideline of guarantee; if it is true, as mentioned above, that the upstream need is to avert the "double ordeal" of the proceedings for the same fact, there is also that (certainly no less important) to ensure the rationality and the economic efficiency of the justice system.

> *"(...) the underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense (...)"*[435].

Apart from that, a further point is significant. Economics of the judicial machine regardless, the logical "founding" of the principle in question are exactly corresponding to the above illustrated principle of legitimacy. In the same way that it is necessary to protect the individual from an unjust conviction in a second judgment for the same fact, in the same way it is morally deplorable to subject the "already judged" to a second proceeding for the same affair: in other words, he can ethically justify himself a persecutory obstinacy against someone who has already been subjected to a trial for the same fact?

[434]A. CHOO, Halting criminal prosecutions, in Criminal Law Review, 1995, pp. 866ss.
[435]M. L. FRIEDLAND, Double Jeopardy, Oxford, 1969, p. 4. In jurisprudence see Green v US, [1957], 355 US 184, 187-8. For analysis see: M. S. MOORE, Act and crime: The philosophy of action and its implications for criminal law, Oxford University press, Oxford, 2010, pp. 313ss.

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Which, incidentally, places the double jeopardy rule in perfect conceptual linearity even with the dual operational articulation of the process abuse (unfair trial/unfair to try).

In order to complete the reasoning, recalling an approach illustrated at the beginning of this chapter, we could say, that in the first group of hypotheses, we are faced with the opportunity to place the single (potentially innocent) safe from a judgment that, because of a lack of resources (economic, for example), or because of the concrete inactivity to the predisposition of a further defensive strategy, determines a situation of unequivocally starting "unequivocal weapons" (intrinsic policy); a risk that, then, would be extremely aggravated in the hypothesis of a second judgment instituted against someone who has been acquitted.

Within the second, however, it can be said that it is in the public interest not to subject the individual to the psychological prostration of a second judgment for the same fact (extrinsic policy). To provide a concrete dimension to the reasoning carried out: an overview of the casuistry on the subject shows how, more often than not, in the midst of the second judgment, the accused suffers a limitation of personal freedom[436]. More effectively:"(...) a defendant is (...) when invoking the pleas in bar (...) reminding the state-as the community's representative, the community in whose name the business of criminal justice is done-of the limits of its power. The defendant speaks as a member of the political community and her claim is something like this: "Having once submitted to the process of justice in relation to this offence, and having been duly acquitted (or convicted and punished, as the case may be), your (political, moral) jurisdiction to subject my conduct to examination in criminal proceedings is exhausted. My citizen's duty is done, and I am beyond your reach" (...) this is the special value of finality in criminal proceedings, and the principal rationale underpinning double jeopardy protection (...)"[437].

The illustrated rule receives in Anglo-Welsh practice protection expressed through the institute of autrefois acquit or autrefois convict (plea in bar): respectively, with the first, it protects from the risk of a second judgment for the same fact who is previously been fulfilled; with the second, specularly, the one who was previously convicted.

Nonetheless (as will be seen shortly), the protection that can be linked to the institute just mentioned is not comprehensive. It is precisely because of this practical emergency that the English jurisprudence has elaborated a form of subsidiary

[436]M.L. FRIEDLAND, Double jeopardy, op. cit., pp. 162ss. A. CHOO, Abuse of process and judicial stays of criminal proceedings, op. cit., pp. 23ss.
[437]P. ROBERTS, Acquitted misconduct evidence and double jeopardy principles from Sambasivans to Z, in Criminal Law Review, 2000, pp. 954ss. D. BROWN, The judicial role in criminal charging and plea bargaining, in Hofstra Law Review, 46 (1), 2018, pp. 67ss. A. BRUCE, A. GREEN, S.J. LEVINE, Disciplinary regulation of prosecutors as a remedy for abuses of prosecutorial discretion: A descriptive and normative analysis, in Ohio State Journal of Criminal Law, 14, 2016, pp. 144s.

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protection: the doctrine on the abuse of the process is a perfect instrument in this regard.
Which, in any case, does not mean the identity of institutions or protection: as rightly pointed out, in fact, if the first (plea in bar) becomes a real and absolute right for the accused, this does not apply to the second, i.e. the "specific" protection of the ne bis in idem can be invoked in every state and degree of the procedure; in addition, it cannot be renounced or disputed by the party concerned (an admission of responsibility by the defendant does not remove the power of the judge to proceed according to the rule in question)[438]. The problem therefore arises of delimiting the objective area of (in) applicability of the latter: in essence, which hypotheses come out of its scope of operation?

First of all, it is necessary to illuminate the elements that identify its defining aspects. Attention runs to the meaning of the same offense term.

The interpretative effort of the jurisprudence focused on clarifying the scope of this last phrase.
It was not so much questioned-at least, it did not constitute the most relevant aspect of the question-the concept of fact: it is immanent principle even in the Anglo-Saxon legal system that the factual nucleus of the sub-novitiate affair must be substantially the same.
The interpretative difficulties originate, in fact, from the wider semantic extension of same offense.

The terms of the problem discussed here have been summarized in a well-known leading case on the subject. Connelly refers to DPP[439]: defendant Connelly took part in an armed robbery at a dairy, together with other individuals (all part of a criminal consortium), from which he followed the death of a company employee; initially tried for murder, he was sentenced in first instance. The sentence was later annulled by the court of appeal for significant procedural violations committed by the judge of the previous grade of proceedings (procedural misdirections). As a result of the failure in the first trial, the prosecution promoted a second trial against the defendant himself, but this time for armed robbery. In this process, both the total factual situation and the evidence support were unchanged compared to those present in the previous procedure: in essence, there was a criminal violation of different species (or nature), matured in the same historical-factual context (the episode of death occurred in the context of a robbery being logically inseparable). The defense, as one guesses, had pleaded the ne bis in idem, on the basis of articulated reasoning: if, as it seems, one cannot doubt that robbery and murder are conceptually distinct and mentally separable episodes, it is also true that for the identity of material context in which they were perpetrated and being both known to the prosecution since the beginning of the criminal proceedings for homicide, it was the obligation of the prosecutor to

[438]Connelly v DPP, [1964], AC 1254, 1305, per Lord Devlin.

[439]Cooper v New Forest District Council, The Times, 19 March 1992.

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proceed within the first proceeding jointly for the charges of the same; differently by opting-always according to the defense-, one would allow (as in the present case) the accusation of prolonging at will the state of subjection of the prejudice to criminal trial, unduly exacerbating the state of anxiety and moral and psychological prostration already suffering due to previous judgment.

Hence the origin of the (double) hermeneutic question, submitted to the judge by the defense: first, what should be understood by same offense and, therefore, when this requirement should be considered integrated, necessary for the application of the double jeopardy doctrine; secondly, whether the protection of the prohibition in question could in this case be applied and, in the event of a negative answer, what remedy was open to action.

In relation to the first question, the preliminarily judge clarified one point: in relation to the concept of same offense, it is not enough that the probative material brought by the accusation, in one as in the other process, is the same: even though a useful element for recognizing the violation of the prohibition of dual judgment does not constitute a decisive element. Trial and fact to prove are distinct entities, being clear that (we can hypothesize) the same eyewitness can fully report as much in order to a robbery as to a homicide[440]. To answer the first question, further, it would not have been sufficient to focus the attention on the element of the identity of the fact (strictly understood) because, otherwise, the question would have had no reason to be: although intimately connected from a chronological point of view and material, the offenses subject to separate assessment originated in any case from separate conduct[441]. Evidently, the scope of the expression "same offense" is more extensive; in particular, the question came to be amended in the following terms: if it were possible to start a criminal trial for a fact in relation to which in a previous criminal proceeding the same defendant could have been legitimately convicted (to be understood: if the accusation had opportunely raised the charge together with the one that had already founded an assessment). In other words: it can be said that, if in the previous criminal proceedings there was no conviction for a fact that, if properly contested, would probably have led to a statement of responsibility, there is a sort of implicit renunciation of the exercise of the action for that affair?

A quicker answer, it was underlined, could be given about the charge that, as an alternative, had been formulated by the prosecutor during the first trial: in fact, Connelly had been

[440][1964], AC 1254, 1305, par Lord Devlin.

[441]DPP v Humphrys, [1977], AC 1, where the accused, judged and acquitted by the crime of driving without a valid license of a motor vehicle, was subjected to a second judgment for false testimony (perjury) and there condemned, although the defense had submitted a request based on the double jeopardy rule (autrefois acquitted), supporting it on the basis of the consideration that the "decisive" proof in both procedures was the same (testimony of the police officer who would have detected the infraction of the prejudice).

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primarily accused of murder and, alternatively, of culpable homicide (manslaughter). The fact that the jury had pronounced (with a conviction) on the first accusatory hypothesis inevitably founded an acquittal (so to speak) tacit on the second (which certainly would have founded a plea in bar for autrefois acquitted)[442]. As mentioned, however, the defense wanted to go further: the prohibition of new judgment should also be considered operating in the situation in which the prosecution, perfectly aware of a further fact (robbery), which could be debited already at the time of the first trial, deliberately postponed the persecution.

In order to answer this question, a general criterion was proposed: provided that the offense, challenged in a second judgment, must be the same or substantially the same as that which was the object of a previous assessment, the judge must check whether the evidence, alleged in the context of the second proceeding, could have founded a conviction already within the first. Although not exactly technical, the reasoning evokes the pattern of assessments placed in a relationship of prejudiciality; in short, it means that: we are faced with a substantial identity of factual story (and, therefore, to a violation of the rule of ne bis in idem) when the acquittal for the "first" imputation can only lead to the acquittal in sequential way for the "second"[443].

That said, the profile concerning the exceptions to the double jeopardy rule was addressed. The first is in the hypothesis of crime (so we would say, using the domestic legal lexicon) against the administration of justice: in particular, a sentence of acquittal in reference to a crime can be canceled, if it is established that it is achieved at a unlawful pressure against a member of the jury or a witness (for which fact, there has been a criminal proceeding to the same sentence and sentence against the author of the subornation), except that the reopening of the criminal proceedings for the first offense, in reason for the course of a considerable period of time, is not contrary to the interests of justice[444].

The second concerns peculiar criminal categories, characterized by a significant social alarm (intentional or negligent homicide, genocide, kidnapping, sexual violence, to cite a few examples): in this case, where new evidence against a person survives or is discovered acquitted for one or more of the crimes mentioned, the prosecutor, with the written authorization of the director of public prosecutions, if this is not contrary to the interests of criminal justice, may request the revocation of the previous acquittal and the

[442]N.J. KING, R.F. WRIGHT, The invisible revolution in plea bargaining: Managerial judging and judicial participation in negotiations, in Texas Law Review, 95, 2016, pp. 325, 339ss. D. LIAKOPOULOS, Plea bargaining in international criminal law, in International and European Union Legal Matters, 2013

[443]Connelly v DPP, [1964], par Lord Hodson.

[444]Criminal Procedure and Investigations Act 1996, Section 54. For more details and analysis see: C. MCALHONE, Core statutes on evidence, Macmillan, London, 2013, pp. 182ss.

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subsequent reopening of the criminal trial against the acquitted.

What, however, arouses the most attention is the fact that the case in analysis had to definitively establish (with an approach that would not be subsequently disavowed) the applicability of the doctrine of the abuse of the trial to the violation of the ne bis in idem (better, as you are about to say, to situations placed in a "border" zone with this prohibition).
The answer to the question passed for the enunciation of a general rule, pointing out an opportune fact in the introduction: the top rule of the prohibition of double judgment, as explained above and declined in court, was not applicable to the present case; are heterogeneous situations: exceptions to the separate principle (evidently not conferring with the story in question), a previous ruling of merit (conviction or acquittal) for a fact, object of new persecution, is not equivalent to the cancellation of procedural defects of a sentence (of condemnation, in this case) for one fact, connected with another for which a second judgment was promoted. The doctrine of the abuse of the trial, therefore, was invoked by the defense against the refusal opposed by the judge at the time of application of the ne bis in idem, as a remedy of extrema ratio to compensate for the protection voids left by the latter.

In any case, it was established that, in principle, the prosecution has the obligation to promote a single criminal trial for all the crimes of which he is aware and has the intent to pursue (for obvious reasons such as procedural economy and the undue protraction of the punitive "ordeal" against the same person); nevertheless, if such modus procedendi were contrary to the collective interest of the repression of crimes, it would be exceptionally allowed to the magistrate to opt for the separation of the proceedings. In the present case, the conclusion was a negative sign: the ne bis in idem had not been violated, nor could it speak of an abuse of the trial, given that the second trial did not recompense the risk of unjust condemnation against the defendant, nor it constituted an attack on the morality of the system (in that case it was involved in criminal trials involving very serious delinquent forms).

Regardless of the final response, we have a point: the theoretical abuse of the process constitutes a useful tool in limit situations with the prohibition of second judgment, more properly configured as a sort of "completion" or extension of the range of protection projected by the second.

Sseems, therefore, to be able to see a further principle "in filigree": the arrest of the procedure (remedy specifically requested by the defense in the case in question) would be abstractly feasible solution, although in progress (reaffirmed by the judge on that occasion) quite exceptional; secondly, it seems to be able to evoke-perhaps for the first time in a ruling, a configuration of the abuse of the process as an institution, beyond the specific legal-factual context (double jeopardy rule), generally valid in terms of subsidiary doctrine: in other words (if we want), usable as a true instrument of judicial orthopedics able to fill the gaps left by an express rule.

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9.ENTRAPMENT.

Given the premise for any discussion on the subject of entrapment is that in the Anglo-Welsh legal tradition it is not the subject of specific discipline and protection[445]. The institute, therefore, or rather, the protection from such distorting practice is exclusively the result of recent jurisprudential elaborations.

The term, in itself, is charged with a negative connotation: it evokes the idea of entrapment, of the trap, providing immediately the image (clearly more exemplary than many other "clinical" manifestations) of the abuse of authority towards the individual.

If you want to give a general definition (albeit subject to subsequent clarification), you can recall that provided in a known court case: "(...) entrapment occurs when an agent of the state-usually a law enforcement officer or a controlled informer-.causes someone to commit an offense in order that should be prosecuted (...)"[446].

Otherwise it is: "the use of deceptive techniques to test if a person is willing to commit an offense". The pragmatic origin of the institute mentioned above, however, immediately highlights a further characterizing aspect (which, therefore, places it in perfect continuity with the overall theoretical abuse of the process): this is the approach eminently practical to the topic; this implies that the judicial investigation, aimed at reconstructing an eventual or abusive conduct, will be determined by the individual circumstances of the specific case. For this reason, it could be justified to say that, on the one hand, we are dealing with a figure (if we want it) malleable, where the discretion of the judge has (more than ample) ample room for maneuver, on the other, we have significant difficulty in reconstructing the general outlines of a rule that physiologically escapes conceptual generalizations; or to put it more effectively: "each case turns on its own facts"[447].

On the other hand, it is an issue - as has been rightly stressed[448]-which has received increasing attention in recent years, because of the "all-out" war not only in the area of drug trafficking, but also in that of terrorism which has as we know, involved the whole Western world. In essence, the number of court cases where the problem of the entrapment has been specifically dealt with has increased significantly over the last fifteen years, bringing to the center of attention (both the doctrine and the jurisprudence) the profile concerning the delimitation of

[445]R v Looseley, [2001], 1 WLR 2060, HL, par Lord Hoffman. A. CHOO, Evidence, op. cit.
[446]A. ASHWORTH, Re-drawing the boundaries of entrapment, in Criminal Law Review, 2002, pp. 161ss. A.P. SIMESTER, J.R. SPENCER, G.R. SULLIVAN, Simester and Sullivan's criminal law: Theory and doctrine, Hart Publishing, Oxford & Oregon, Portland, 2014.
[447]D. CORKER-M. SUMMERS QB, D. YOUNG, Abuse of process in criminal proceedings, op. cit., p. 204.
[448]D. CORKER-M. SUMMERS QB, D. YOUNG, Abuse of process in criminal proceedings, op. cit., p. 204.

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boundaries of operation of the theoretical matured on the point.

But let's start with some upstream observations. It was said that entrapment is not supported by any legal provision expressed or, in any case, by any discipline (not even of jurisprudential origin) that establishes elements and protection; this would be enough (to want to offer some terms of comparison with another common law system), to differentiate the treatment regime concerning the matter that is in the Anglo-Saxon system with respect to the United States (where, on the contrary, the criminal law specifically provides for the institution)[449].

In any case, the evolution of the jurisprudential analyzes on the subject, found in the field of the Anglo-Welsh practice, shows a clear progression with regard to the desire to recognize protection for the accused from the serious conduct of authority. The oppositional limitations that were found in responding to the (broadly speaking) demands of justice of defense were of a twofold order: from the point of view of the fight against crime, the explicit and radical stigmatization of this practice (by hypothesis: to be sanctioned with the paralysis of the criminal proceeding concerning a fact followed by an incitement by the police during investigations) would have resulted in a substantial decrease in the effectiveness of the fight against very serious delinquent forms (see, for example, drug dealing, where- as known, extensive use is made of covert transactions); on the side of judicial practice, then, one understands the difficulty in conceiving a form of protection which, if brought to the radical consequence (abuse of the process, ergo arrest of the procedure), would have actually involved the (so to say) lapsed of practically all the judgments where the charge raised by the accusation materialized in an action or omission "caused" by an undercover agent (for the obvious reason that the determining, if not exclusive, proof of the offense was constituted by the following statements of the witness-agent)[450].

To make the above mentioned problems appear to be hand held, the call of a well-known court case is sufficient.

In R v Sang[451], finding in the introduction the vacuum of specific protection in terms of entrapment, as

[449]T. ELLIS, S. SAVAGE (eds), Debates in criminal justice: Key themes and issues, ed. Routledge, London & New York, 2012.

[450]See in particular: Sherman v US, [1958], 356 US 369; Matthew v US, [1988], 108 S Ct 883; Jacobson v US, [1992], 112 S Ct 1535. In argument see the considerations of: R.J. ALLEN, M. LUTTRELL, A. KREEGER, Clarifying entrapment, in International Commentary of Evidence, 1998. A. CARLON, Entrapment, punishment and the sadistic State, in Virginia Law Review, 93, 2007, pp. 1081ss. K.A. SMITH, Psychology factfinding and entrapment, in Michigan Law Review, 103, 2005, pp. 760ss. P. MARCUS, the entrapment defense, LexisNexis, 2018. H. LAI HO, State entrapment, in Legal Studies, 31 (1), 2011, pp. 74ss.

[451]For the investigation methodology see: M. MAGUIRE, T. JOHN, Covert and deceptive policing in England and Wales: Issues in regulation and practice, in European Journal of Crime, Criminal Law and Criminal Justice, 1996, pp. 316ss. A. CHOO-M. MELLORS, Undercover plice operations and what the suspect said (or didn't say), in Web Journal of Current Legal Issues Yearbook 1995, 1996. P. GILL, Rounding

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well as of more than three decades of consequent inability to react jurisprudential to the problem (which, of course, was anything but infrequent), were different options taken considerations: far removed even from the hypothesis of the extreme remedy of the arrest of the procedure, the use of the evidence obtained through the undercover operation of the police officer or, alternatively, the mitigation of the rigor of the penalty eventually imposed. The first solution was discarded: not only (as mentioned above)[452] because the exclusion from the probationary material of the exclusive (or even conclusive) proof of the prosecutor would inevitably have led to the collapse of the accusatory castle, but also because this would have building-for the first time-a substantial defense from the factual entrapment, as we said, lacking in the Anglo-Saxon system (both in positive law and in previous jurisprudential elaborations). It was a reasoning, to think well, somewhat labile, if only because it would not leave alternatives: the viable solution that remained was the mitigation of the sentence applied with the sentence; which, clearly, exposes the argumentative construct to strong perplexities: it would soon be countered, in fact, that the mitigation of the quantum poenae does not constitute a remedy, capable ex if to cancel or to put in nothing the conduct of the police officer; it is evident, in fact, that without the interference of the latter in the criminal dynamics, the fact object of subsequent charge would not have been committed by the accused (at least, it is highly probable that the prejudice would not have committed it, lacking a free and wise volitional self-determination): this makes the process, in a certain sense, "sought" or "constructed" by the authority, with the undoubted consequence that-at least in the case in which the proof obtained by the entrapment is exclusive or determining for the condemnation-defense and accusation do not play from the beginning on equal terms.

In any case, if the Anglo-Saxon judicial practice witnessed a stasis, a real propulsive propulsive to the juridical recognition of a specific protection from the distortive practice in question came with a ruling by the European Court of Human Rights (ECtHR)[453].

up the usual suspects? Developments in contemporary law enforcement intelligence, Ashgate Publishing, London, 2000. A. CHOO, Evidence, op. cit., H. QUIRK, The rise and fall of the right of silence. Principle, politics and policy, Taylor & Francis, New York, 2016. A. ASWORTH, M. REDMAYNE, The criminal process, Oxford University Press, Oxford, 2010, pp. 86ss.

[452][1980], AC 402. and in the same spirit see also: R v Tonnessen, [1998], 2 Cr App R, 328; R v Springer, [1999], 1 Cr App R, 217; R v Shannon, [2001], 1 WLR 51, 73. For more details see: J. HERRING, Criminal law: Text, cases and materials, op. cit.

[453]ECtHR, Texeira de Castro v Portugal of 9 June 1998. For more details see: B. RAINEY, W. WICKS, C. OVEY, Jacbos, White and Ovey: The European Convention on Human Rights, Oxford University Press, Oxford, 2017. J.P. COSTA, La Cour europèenne des droits de l'homme. Des juges pour la libertè, ed. Dalloz, Paris. 2017. F. TIMMERMANS, Fundamental rights protection in Europe before and after accession of the European Union to the European Convention on Human Rights, in Liber amicorum Pieter Van Dijk,

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In short, two agents "in plain clothes" make contact with a narco-trafficker, that VS, who would have acted as intermediary in the story in question, for the purchase of a given amount of heroin; the latter accepts the proposal, making contact with another subject (FO), which takes care to directly conduct the first, together with the two police officers (in the guise of buyers), from the future applicant to the European Court: Texeira de Castro. He, in turn, accepts the purchase proposal from the agents (twenty grams of heroin), accompanying them from that would be the material supplier of the narcotic (this JPO) who, having procured the substance, provides for payment to give it to Texeira , therefore, he definitively gave it to the two police officers; hence his arrest "(...) the use of undercover agents must be restricted and safeguards put in place even in cases concerning the fight against drug-trafficking (...) the right to a fair administration of justice holds such a prominent place that it cannot be sacrificed for the sake of expedience (...) the public interest (see: persecution of offences) cannot justify the use of evidence obtained as a result of police incitement (...)"[454].

On closer inspection, this is a decisive premise: the established essentiality and, at the same time, the indispensability of the principle of procedural fairness would immediately highlight a line of continuity between the European Convention on Human Rights and the Anglo-Welsh order where, as as we have seen, fairness constitutes a rigid, insurmountable balancing or temperament value due to opposing interests. At the end of the reckoning (but the theme will be dealt with in greater detail in the following chapter), it would not seem wrong to say that we are faced with different nomenclatures but, at the same time, with the same conceptual substance: putting moral integrity aside of the system, if fairness (in the conceptual declination offered in the Anglo-Welsh system) becomes concrete in the need to ensure a process played on equal terms (or, otherwise, where there is no risk of an unjust condemnation due to obvious imbalance in terms of initial probabilities of conviction), it is equally true that art. 6 ECHR by enclosing an indispensable core of guarantees that must be recognized to the accused, to be applied as a minimum standard in national justice systems, would prefigure the basic conditions of a criminal proceeding where the defendant has the real possibility of carrying out an adequate defense. In short, regardless of the declination of the parameters of equity in the specific (which, in the case of the European Convention, are given by a summary of the legal traditions of member states), the conceptual symmetry is palpable.

Given this, the focus shifts to the conduct of police officers. The starting

M. Van Roosmalen and others (eds.), Intersentia, Antwerp, Oxford, 2013, pp. 225ss. D. HARRIS, M. O'BOYLE, C. WARBRICK, Law of the European Convention on Human rights, Oxford University Press, Oxford, 2014, pp. 372ss.

[454]ECtHR, Texeira de Castro v Portugal of 9 June 1998.

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point for establishing the legitimacy of the undercover operation is identified in the "upstream" control by a magistrate (prosecutor or adjudicator): key figure, clearly, not only in terms of impartiality, but also to ensure that the investigations are directed towards someone burdened by clues.

However, the requirement in question lacked in the present case: neither the supervision of a magistrate nor an indicative compendium against the applicant was apparent in the present case before the intervention of the officials in the anti-drug operation (the applicant was subject uncensored, unknown to the officers themselves, who came into contact with the same only through the work of intermediation carried out by third party traffickers). The interference by police officers, therefore, would have already been for this reason illegitimate.

But it is not this or, better, this is not only the aspect that was relevant in this case, in order to be able to state that the conduct kept by police officers constituted undue determination to the crime, such as to encroach on a prohibited practice as disrupting the overall fairness of the criminal trial (article 6 ECHR).

In the specific sense of the entrapment, the reasoning of the court is affixed to the causal element: in other words, the judges of Strasbourg had to assess whether Texseira was concretely recognizable as an autonomous volition in relation to the crime or if, rather, it were the result of an induction of the applicant to the commission of the same, surreptitiously realized by the agents-instigators, whose intromission, therefore, would have constituted in this case, with respect to the cession of narcotic, condicio sine qua non. The answer is precisely in this last sense: no element in the proceedings led to the opposite reconstructive hypothesis, playing in opposite directions or contrary elements, such as the finding of drugs by a third person (not directly by the applicant), the a circumstance that no substances were found in possession of the biased besides those explicitly requested by the agents. In short: the work of the undercover officers was not limited, as it would have been necessary, to the conduct of investigations, but exorbitated from these boundaries, to arrive at a real incitement[455].

The ruling, in addition to the content value of the reconstructed prohibition on the subject of entrapment, signaled the fundamental

[455]ECtHR, Vanyan v Russia od 15 December 2005; Khudobin v Russia of 26 October 2006; Ramanuskas v Latvia of 5 February 2008.for more details see: O. JOHAN SETTEM, Applications of the fair hearing norm in ECHR art. 6 (1) to civil proceedings, ed. Springer, Berlin, 2016, pp. 486ss. A. SEIBERT-FOHR, M.E. VILLIGER, Judgments of the European Convention of Human Rights. Effects and implementation, ed. Nomos, Baden-Baden, 2017. C. GRABENWARTER. European Convention on human rights: ECHR, C.H. Beck, München, 2014. K.S. ZIEGLER, E. WIKS, L. HODSON, The UK and european human rights. A strained relationship, Hart Publishing, Oxford & Oregon, Portland, 2015. K. PITCHER, Judicial responses to pre-trial procedural violations in international criminal proceedings, ed. Springer, Berlin, 2018, pp. 46ss.

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need to contain the operations under cover within certain limits.

The "response" of the Anglo-Saxon order did not wait: the approval of the regulation of Investigatory Powers Act (2000)[456] introduced a composite body of forecasts aimed at circumscribing the conditions of legitimacy of undercover police interventions[457].

But not only. The influence of the supra-national "precedent" was manifested in the fundamental change in the jurisprudential direction matured up to that moment within the English classrooms (see R v Sang approach).

If we want to retrace, albeit briefly, the interpretative itinerary that would have led to the today's scenario on the subject, we should mention the first "step" constituted by the opportunity to create a real exclusionary rule regarding entrapment: we started to put in to highlight the necessity, in order to guarantee fair trial, to exclude evidence obtained in the context of undercover operations (although it was possible, it must be said, also due to the launching of the Police and Criminal Evidences Act of 1984, the average tempore; where it was expressly acknowledged-Section 78-the power of the judge to oust the evidence obtained illegally from the trial court)[458]. Clearly, it was an intermediate solution to the arrest of the procedure and that only potentially would have been able to lead to the total fall of the accusatory claim (where, by hypothesis, the evidence of the excluded accusatory sign had been the only one or the determining one, in fact it would have reached the acquittal).

But the real turning point came with R v Latif and R v Shahzad[459]. The pronunciation represents, in fact, the decisive step for the application of the doctrine of the abuse of the process to the entrapment, also coinciding chronologically with a period in which the doctrine in question lived a consistent expansion. For the first time, the power to block the continuation of the procedural procedure was sanctioned, if the work carried out during the police investigation had compromised the overall fairness of the trial or, alternatively, created the premises of a judgment contrary to the morality of the justice.

The details of the factual story at the basis of the dictum can be omitted; we will go straight to the problematic "nucleus" from which the final affirmation moves: we allude to the already-in some way previously

[456]A. SANDERS, R. YOUNG, M. BURTON, Criminal justice, Oxford University Press, Oxford, 2010.

[457]S. MCKAY, The definition of the covert human intelligence source, in Archbold News, 2004, pp. 5. Briefly, an undercover operation may be authorized if it is deemed to be well founded that: a) the adoption of such investigative means is proportionate to the outcome of the expected investigation; b) it is necessary for the interests of national security, or c) it is necessary for the prevention or repression of the crime or to prevent unrest; d) it is necessary for the protection of the interests of the national economy, or e) for the protection of public health or for the repression of tax evasion or, lastly, f) when recourse to such means is requested by order Secretary of State.

[458]R v Smurthwaite, [1994], 1 All ER 898.

[459][1996], 1 WLR 104. A. ASHWORTH, Should the police be allowed to use deceptive practices?, in Law Quarterly Review, 114, 1998, pp. 120ss.

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emerged-balancing of two opposing instances.

If, in fact, the prospect of a (so to speak) automatism such that the criminal trial, founded exclusively (or in a determining way) from the evidence provided by the agent-instigator, should be arrested, would intolerably compromise the protection of the community from alarming forms of crime (in this case: drug trafficking), on the other hand, the exclusion at the root of this possibility would have supported the view of the public conscience that justice tolerated bad practices and police abuse. For this reason, neither one nor the other would have been concretely practicable. The solution was found in mediam rem: we already know it, that of judicial discretion. The process is unfair, so it goes to the end. Or, as had been hypothesized by the defense in the present case (but with a negative final response from the judge), the trial constitutes an attack on the ethical "status" of the judicial machinery. In the latter case: "(...) it is for the judge in the exercise of his discretion to decide whether there has been an abuse of process, which amounts to an affront to the public conscience and requires the criminal proceedings to be stayed (...) in a case such as the present, the judge must weigh in the balance the public interest in ensuring that those that are charged with grave crimes should be tried and the competing public interest in not conveying the impression that the court will adopt the approach that the end justified any means (...)"[460].

The theoretical subject receives final consecration with R v Looseley; A-G's Reference (no 3 of 2000)[461] which, further, would represent the fulfillment of that interpretative evolution, registered in the Anglo-Saxon courtrooms, aimed at the implementation of the principles established by the European Court in the subject matter (Texeira de Castro v Portugal)[462]. In particular, the key factors analyzed were identified for the applicability of the doctrine on abuse to entrapment: a) the nature of the crime and the complexity of the investigation; b) the reasons for the undercover operation; c) the nature and the concrete causal contribution made by the police

[460]A. ASHWORTH, Should the police be allowed to use deceptive practices? op. cit. A. SANDERS, R. YOUNG, M. BURTON, Criminal justice, op. cit. S. PICERING, J. MCCULLOCH, Borders and crime. Pre-crime, mobility and serious harm in an age of globalization, ed. Springer, Berlin, 2012.

[461][2001], UKHL 53, 1 WLR 2060.

[462]A. ASHWORTH, Entrapment and criminal justice (R v Looseley and Attorney General's Reference (No 3 of 2000)), in Oxford University Commonwealth Law Journal, 18, 2002, pp. 125ss. B. LEWIN, Test purchasing-The impact and the regulation of investigatory powers act 2000, in Justice of the Peace, 2001, pp. 956ss. S. MCKAY, Entrapment: Competing views on the effect of the Human Rights Act on english criminal law, in European Human Rights Law Review, 9 (4), 2002, pp. 764ss. S. O'DOHERTY, Entrapment: From mitigation to abuse, in Justice of the Peace, 2002, pp. 984ss. R.R. JERRARD, Entrapment: Abuse of legal process for police to incite crime, in Police Journal, 2002, pp. 245ss. A. CHOO, ecidence, op. cit., M. AMOS, Human rights law, hart publishing, oxford & Oregon, Portland, 2014, pp. 365ss. C. HARFIELD, K. HARFIELD, Covert investigation, Oxford University Press, Oxford, 2012, pp. 145ss. D. OMEROD, J. CYRIL SMITH, B. HOGAN, Smith and Hogan's criminal law, Oxford University Press, Oxford, 2011, pp. 400ss.

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in carrying out the crime; d) the criminal record of the accused. Substantially unaltered, starting from this pronunciation, the hermeneutical scenario related to the theme remained.

10.(FOLLOWS) DISPERSION OF EVIDENCE (LOST OR DESTROYED EVIDENCE) IS ANOTHER "HOT" TERRAIN OF THE DISPERSION OF EVIDENCE.

Its strict bond with the theory of abuse of process is of immediate intuition: regardless of who the part to which the loss is chargeable, a test-to discharge-is able alone to determine the fate of a process or, if we want to comply with the methodology adopted in this matter by the English courts, to significantly compromise fairness. As correctly observed, the issue is a perfect summary of the principle of equality of arms between prosecution and defense[463]: more specifically, it translates into the opportunity to balance the (be allowed) omnipotence of the police in the investigative phase with (although ex post) protection of defensive strategies during actual judgment. It is argued that the stakes are high: here, too, is a problem intimately connected with the principle of legitimacy that, if on the one hand imposes the repression of crimes and the persecution of the guilty, on the other stigmatizes to the highest degree the "evil" (ethical and juridical) given by the risk of condemnation of an innocent person. Clearly, the claim is not that of a radical elimination of risk (only theoretical), but that of minimization: in essence, the natural tension towards it (so to call it) "optimal" Pareto is implemented through a dual instrument: law and judicial discretion which, as already mentioned, finds the maximum expression in the theory of the abuse of the process; the law devises mechanisms informed by this principle, to which-in hypothesis of inadequacy in the individual case the jurisprudence would be added, which would intervene in order to bring within the confines of the equity a situation resulting from an abuse of authority.
In any case, the fundamental "precedent" on the subject, which established the essential parameters of the discipline, is R (Ebrahim) v Feltham Magistrates' Court[464].

Logically, it was said at the beginning, the dispersion of a trial to discharge is able to question the overall fairness of the proceedings, leading directly to the danger of an unjust sentence. The arrest of the proceeding on account of iniquity, even in this case, will be a strictly exceptional remedy, given the natural "self-sterilization" capacity of the criminal trial (emblematic, in this sense, is the

[463]D. CORKER-M. SUMMERS QB-D. YOUNG, Abuse of process in criminal proceedings, op. cit., p. 73.
[464][2001], EWHC Admin 130, 1 WLR 1293. M. DODDS, Arguing abuse of process in relation to loss or destruction of CCTV evidence, in Justice of the Peace, 2001, pp. 316ss. S. MARTIN, Lost and destroyed evidence: The search for a principled approach to abuse of process, in International Journal of Evidence and Proof, 9, 2005, pp. 158ss. v SMITH, Lost, altered or destroyed evidence, in Justice of the Peace, 2007, pp. 556ss.

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prediction of the Police and Criminal Evidence Act 1984, Section 78, which regulates the judicial power of admitting evidence in court, as well as their eventual ouster, conceived as a mechanism of equitative orthopedics). Basically, if it is true that in some cases it is necessary to adopt the penalty of maximum rigor, it will be up to the judge to assess in advance whether the procedural fairness can be sufficiently preserved through the median solution, constituted by the exclusion of a proof of indictment of a sign directly contrary to the one that was lost.

Less direct, perhaps, is the logical link with the second pole of operation abuse (unfair to try). The qualifying element in this direction is given by the prosecutor's bad faith: it requires the accusation of sticking to the general duty of loyalty. We are outside, as we know, procedural rules in the strict sense; furthermore, the high probability of an unjust conviction is not even questioned: it is the improper conduct of the magistrate who, because of its seriousness, is intolerable, thus not only diminishing the interest in the persecution, but also making it compliant with the public interest in the cessation of criminal persecution. In this case, therefore, unlike the first hypothesis (unfair trial), where there is the objective lack of evidence that jeopardizes (we would say) "beyond reasonable doubt", there is an assessment based on a coefficient of subjective nature: bad faith or the serious fault of the prosecutor or the police in the loss of the evidentiary contribution.

This is the paradigm of the application of the anti-abuse doctrine to the matter in comment. Generally, the case law solutions have been for the rejection of the defense's request to stop the trial due to unfairness of the process: the reasoning, in short, would have based on the fact that the loss of a probative contribution did not undermine the overall fairness of the procedure which, therefore, it had to be considered safeguarded by the presence of further probative data for which the jury would have taken into account[465].

11.THE "MEDIA" PROCESS: ADVERSE PUBLICITY.

Adverse publicity is a problematic dating: the strepitus fori, especially in the face of incidents of alarming cruelty, can constitute a potential double prejudice for the accused. On the one hand, as can be guessed, we risk submitting the same to the media "pillory", almost as though we are hyperbole apart-the actual criminal trial is flanked by a further procedure (that of the mass media, precisely). We are here, it is inferred, to an "irradiation" of the effects (nefarious for the accused) of the criminal proceedings in public opinion. On the other hand, one can also come across the phenomenon of the opposite

[465]R v Beckford, [1996], 1 Cr App R 94, 103; R v Taylor, [2001], EWCA Crim 1106; R v Elliott, [2002], EWCA Crim 1199. for more details see: H. WELCH, Criminal proceure and sentencing, ed. Routledge, London & New York, 2014. R. HUXLEY-BINN, Criminal law concentrate, Oxford University Press, Oxford, 2014.

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direction: the public opinion that, due to the widespread dissemination of the news related to the trial, comes to "pollute" the impartiality of the judge. And it is this last aspect to be noted for the purposes of this part of the discussion.

The relationship between the criminal trial and the media world is too complex and delicate to be analyzed here in great detail; here, an observation is sufficient: that - as common sense induces us to believe - in certain situations, the influence in the courtrooms exercised by the debate promoted by the mass media is such as to seriously question the state of mental neutrality that he should keep the criminal judge. In other words: under certain conditions, the "polluting" influence of the media debate can go so far as to endanger the fairness of the procedure itself. Inaccurated guilties, a risk of unfair conviction: in substance, a process would take place where the image of a defendant replaces ab initio that of the guilty party. The premises and the rationale of the anti-abuse doctrine do not allow it: hence its application to abstractly evoked scenarios.

Also in this case, it is impossible to say in an a priori manner what exactly are the conditions that justify the recourse to the extreme remedy of the arrest of the proceeding. To this end, it is not enough to put in mind the (already well known) "casuistic" approach that characterizes the subject of the abuse of the process. In reality, the problem concerning the identification of cases in which the media influence has reached intolerable levels, so as to jeopardize the process fairness, is intertwined with a further profile: this type of assessment would be concretized, for all purposes, in a psychological investigation by the judge against the members of the jury. In other words: stating that the criminal trial is hopelessly "distorted", for having come to create the premises of a real (using a terminology more congenial to us) iudex suspectus, it means to make a negative opinion on the third party and impartiality of the judges (an aspect which, it is repeated, inevitably involves the psychic coefficient). What may be the factors object of weighting for this purpose, then, it is difficult to establish, since they will be intertwined so much indices of an objective nature (think of the capillarity and the diffusion of the news related to the case, or the territorial location of the each other and the place where the media debate has predominantly centered), as much as of a subjective nature (constituted, in a broad sense, by the complex of information pertaining to the person of the jurors).

The "precedents" known in this context make these known difficulties[466]. Clearly, the (repeated) exceptionality of the remedy typical of the anti-abuse doctrine also imposes in this case the unavoidability of recourse to the same, with the known prior negative judgment

[466]R v Mc Cann, [1991], 92 Cr App R 239, 253; R v Taylor, [1994], 98 Cr App R 361, 368; R v Abu Hamza, [2006], EWCA Crim 2918, [2007], QB 659. See also: J. GRIFFITHS, P. MCKEOWN, Evidence, Oxford University Press, Oxford, 2012. N. MONAGHAN, Criminal law, Oxford University Press, Oxford, 2018, pp. 91ss. T. STOREY, A. LIDBURY, Criminal law, ed. Routledge, London & New York, 2012.

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e-ISSN 1982-7636

on the inadequacy of possible intermediate solutions (such as, for example, the appropriate caveats or indications that the judge can provide to the jury). Intermediate remedies that, however, to reflect well, would not be able to have the desired effect (avoid the arrest of the procedure), configuring the opposite - one would say - a vicious circle: if the judge invites the jury (hypothesize) not to take into account any public opinion, manifested in relation to the fact-offense being judged, other effect does not (does not seem wrong to believe) other than to confirm or even sharpen the conditioning explained by the first on impartiality of the jurors. A problem that, although latent, already exists, would thus be virulently brought to the surface.

There was a danger of unjust condemnation. In this case, therefore, the application of the theory of abuse would be limited to the operational pole of the risk of unfair trial. This, on the other hand, is what emerges from the analysis of the cases found on this specific area. It cannot be ruled out, however, that even the second of the operational articulations of the abuse of the process can be applied here, as it does not seem logical to assume that the media hype, provoked by a criminal affair, from which a profound state of frustration and anxiety for the accused, may constitute an attack on the moral integrity of justice, to the extent that the media "ordeal" is translated into subjecting the person concerned to a real extra-judicial penalty.

12.BREACH OF PROMISE.

This is probably the least frequent symptomatic case (in quantitative terms), but certainly the most paradigmatic with regard to the "ethical" foundation underlying the doctrine under examination.

Someone, subjected to criminal proceedings (we assume to be in the investigation phase), makes an agreement with the authority (with the prosecutor or with the police): the latter promises not to promote the prosecution; the "counter-claims" could be different (generally, it is that of the commitment to collaborate with justice). But if the authority does not comply with the pacts, promoting a criminal trial against the beneficiary of the promise? There is no need to dwell on the prejudice that the beneficiary of the promise of non-persecution would derive.

The violation of the commitment not to prosecute constitutes a distortion-it would seem to be physiologically inherent in the structure of the Anglo-Welsh criminal system: as already mentioned, the prosecution is in principle subject to the discretionary evaluation of the Crown Prosecution Service; without the need to dwell on the reasons that support this systemic option (which would certainly exceed the scope of this analysis), suffice it to note that no other misconduct of authority perhaps, like the present, materializes an abuse (in the literal sense of the term) of the criminal trial, being crystal clear evidence that the breach of the agreement, by unilateral choice made by the authority, simultaneously affects the fundamental interests underlying the two operational

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articulations of the anti-abuse doctrine. It is of immediate intuition that the one who receives a commitment (assumed) of the prosecutor, independently of the promised "counterpart", renounces to cultivate any defensive strategy for a future trial; the establishment of a trial, therefore, against it, would see these in a physiologically worse position than that of the accusation, inevitably voted towards the risk of an iniquitous sentence. Or again: the authority could renounce the origin of itineris to cultivate the punitive pretension, thus neglecting the collection in investigation of all possible evidence: the subsequent sentence would therefore undoubtedly be undermined by doubt (wrongful conviction). "(...) it is not likely to constitute an abuse of process to proceed with a prosecution unless: a) there has been an unequivocal representation by those with the conduct of the investigation or prosecution of a case that the defendant will not be prosecuted and b) (...) the defendant has acted on the representation to his detriment. Even then, if facts come to light which were not known when the representation was made, these may justify proceeding with the prosecution despite the representation (...)"[467].

13.THEORETICAL PARADIGM.

But is bad faith necessary? Furthermore: it has been said that the prosecution is attributed to prosecutor, as can a promise of non persecution coming from the police, where breached (with consequent prosecution of the trial by the prosecution) constitute an abuse of the trial (being, it would be said, of ultra vires act)?

With reference to the first question, we answer immediately negatively. The objective datum is more specific: that, on the basis of the promise received, the prejudice has adopted determinations such as to abandon any self-defense perspective in relation to a setting up of a trial (whence the prejudice)[468], it being understood that the any relief of bad faith at the head of the authority can only exacerbate the judgment of disapproval by the judge, with particular regard to the profile of the injured moral integrity of justice (evidently, a process started with such premises deviates from its institutional goals, also entailing the loss of that fundamental collective interest in the persecution of the guilty).

On the basis of the indices offered by the case studies, it seems therefore that the central element for the detection of a procedural abuse is that of the prejudice suffered by the interested party (detriment). But what exactly does it mean?

The applicative declinations have shown different manifestations: the authority refuses to pursue in exchange for the collaboration of the prevented as potential witness (prosecution witness)[469], or the indication to the same of possible competitors in the crime. In

[467]R v Abu Hamza, [2006], EWCA Crim 524.
[468]R v Croydon JJ, ex p Dean, [1993], QB 769; A-G of Trinidad and Tobago v Phillip, [1995], 1 AC 396.
[469]R v Croydon JJ, ex p Dean, [1993], QB 769.

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any case, there would be an (implicit or not) renunciation of the interested party to any further self-defense active in the criminal trial. This can be translated into the terms of a causal prognosis: the commitment of the authority must have led to the conviction, not guilty, of the definitive closure of the criminal affair; moreover, it will have to occur if the lack of a promise in this sense would have led to totally different determinations of the prejudice (eg: no collaboration with the authority would have been established by the same).

Between rational opening of system and future scenarios.

The stage of the question to which we can probably assume that we have reached the end of the work revolves around the following question: is it plausible that a criminal system, such as the Italian one, adopts an organic discipline on the subject of the prohibition of abuse?

We will leave the lemma "discipline" intentionally unspecified (without, therefore, re-entering the opportunity to conceive its implementation by legislative or interpretive means).

The need to acquire greater awareness of the dogmatic category under analysis and the actual terms of the problem in which it manifests itself would be, rationally, incontrovertible data. Of this, on closer inspection, one would have demonstrated in a singular circumstance: tendentially (it is almost constant to say, if one does not run the risk of unbalancing), every attempt to discuss the issue ends up in a look at the unreasonable duration of the criminal trials in Italy, on the urgency of a reform of the statute of limitations and on the need to stigmatize the indecorousness offered by the defense in the court proceedings.

The aforementioned problems are not ineffective with the abuse of the process; nevertheless, they represent one (if it is allowed) tiny exemplifying portion that, if not appropriately "embedded" in the larger mosaic of which it is part, would not only be excessively limited (in terms of correct understanding of the phenomenon), but also misleading and source of strabismus (hermeneutics and perspective). The option to solve the problem by means of a "delegation" to the disciplinary jurisdiction is equivalent, all in all, to a resignation in the face of the inability of the system, as designed, to offer a real and effective response to the phenomenon in question. The limits of a procedural legality[470] have been highlighted, albeit in a synthetic way, which, if we continue to understand it in the traditional declination of a rigid principle, would not allow the way out of the impasse. Probably, this is the real underlying error:

[470]M. MCCONVILLE, L. MARSH, Adversarialism goes west: Case management in criminal courts, in International Journal of Evidence and Proof, 19 (1), 2015, pp. 172ss. J. MCEWAN, From adversarialism to managerialism: Criminal justice in transition, in Legal Studies, 31 (4), 2011, pp. 519ss. A EDWARDS, The other Leveson report-The review of efficiency in criminal proceedings, in Criminal Law Review, 2015, pp. 400ss. L. MARSH, Leveson's narrow pursuit of justice: Efficiency and outcomes in the criminal process, in Common Law World Review, 46, 2015, pp. 51ss.

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pretending to face the issue of abuse with the "lens" of strict legality would be solved in practice in the use of an unsuitable instrument. So, if the same should be invoked (a function that certainly can not be challenged at the same) as a barrier to arbitrary or authoritarian drifts, a downturn in the name of those guarantees that would want to preside would certainly not result in an eversion.

And, if we do not go too far, the arrogance of those conservative settings of a "strong" legality, in an irreducibly legis centric vision, would perhaps show more a fundamental illusion than a genuine will to safeguard the pillars of the system. It is true: the idea of a practice that produces acts that conform perfectly to the ideal abstract-archetypal model of legality-is powerful in its political implications.

It generates the reassuring image of automatic legal operations, where everything is predetermined by a device (the law) that-so looked at-would seem omnipotent. But, it is useful to repeat: the practice (or, if you want, the daily experience) surpasses the theory. The product of a "reached" legality shows how it is the precipitate of something that never corresponds (entirely) to the legal type. Of course, this does not mean to come to disavow the role of an axiom such as the one in comment, so as to supplant its natural instrument of expression (legislative activity) with another (the interpretative one).

What would, at most, be to adjust its rigidity to an ever-changing legal, social and cultural context, even admitting-where necessary-an issue.

In short, if what has been said is true, that is to say the difficulties that loyalty to the paradigm are known, linked to the physiological lack of information on all the constitutive elements (of the case), and that the postulate of necessity must not be contested either. of a tendential conformity of the practical result to the basic norm, the practice, on the other hand, often shows the contrary need for a temperament of the starting dogma, in order to offer to the system those self-protection instruments that could not be placed in the written law.

It is reiterated: the abuse of the process, conceived in the proposed key of reflection, should not be a weapon capable of disintegrating the law and the principle of respect for forms; on the contrary, it would be (if we want to define it) a silent (unwritten) garrison, directed at opposing those procedural distortions of the genuine logic of the first, as well as the individual guarantees that the same would protect. We agree. The proposed operational and interpretative paradigm is likely to be influenced by (excessive) audacity: the juridical-cultural path in which the internal legal system is inserted (civil law) would not, in principle, show openings in the illustrated direction.

But the point, on closer inspection, would perhaps be right here: if it is worthwhile to insist with a line that - as it seems - has already abundantly shown the profiles of inefficiency towards certain dysfunctions highlighted by the practice and, at the same time, the material limits of a legislative activity that, although technically unexceptionable or sensitive to concrete

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experience, can not but constitute an approximation, therefore destined to leave gaps that end up sharpening the basic problems of the system; or else, always with the prudence imposed by an interpretative and operative model that, if hypothesis were introduced, would require a substantial amount of time to settle and become (so to say) ius receptum, take note of the current historical and cultural contingencies, to be ready not to a clumsy as unpopulated tabula rasa of the "old" to enter the "new", but to let everything change, because (the whole itself) remains as it is[471]. Within this perspective dimension, the role of a careful doctrine-one believes it can sustain-would be to contribute to a rational and wise control of this change.

CONCLUDING REMARKS.

The paragraph will end with some general consideration on the Anglo-Welsh doctrine of the trial abuse. As we have tried to point out immediately, the origin and the cause of the institution's elaboration has an undoubted common feature with the reconstruction matured in the Italian system: the gaps in the system (in our: from the law) are filled through a jurisprudential substitute work.

Clearly, the Anglo-Saxon is certainly a more fertile ground for the cultivation of the theoretical subject: to the connotations of an order where a written law is structurally lacking, there is the discretionary nature of the prosecution, which would imply-at least theoretically-a greater thus) degree of "abusability" of the procedural instruments in general, if not properly of the process itself.

Attempting to simplify the terms of the discussion as much as possible, one can rationally say that the central element of all the jurisprudential reconstruction so far analyzed is the discretion: as we have seen, recourse to the anti-abuse doctrine is subject to discretionary evaluation by of the judge who, within a broad disciplinary dosimetric spectrum, has more options, reaching the adoption of the extreme solution when the principle of legitimacy is irreparably compromised. At the same time, what we have called "abusability" of the trial (or of the trial institutes) depends directly on the margins of maneuver that the procedural parties have in the conduct of the dispute: in the criminal trial, being the accusation part actress, is at the same time the one that is most able to pollute the overall fairness of the procedure (intuitively, then, if the exercise of the voluntas persecutionis is even remitted to it, one understands the imbalance that is recreated among the necessary parts of the process with regard to the ability to abuse it).

It has also been seen that the arrest of trial constitutes an entirely exceptional remedy: for the most understandable reasons that, on the one hand, the paralyzing of the punitive

[471] J. JACKSON, S. SUMMERS, The internationalisation of criminal evidence, Cambridge University Press, Cambridge, 2012.

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pretension places a sensitive barrier on the collective interest in the repression of crimes; on the other, we are witnessing a cultural scenario in which we generally trust in the "thaumaturgical" capacities of the criminal trial: it is a machine that already has enough tools to guarantee the overall fairness, possibly (if so we want to say) cars - making up during the course. In short: there is generalized trust in a procedural system which, ideally, would represent a correct compendium of needs for the discovery of the truth (repression of crimes) and the protection of guarantees.

On the other hand, the whole theory of abuse of process seems to stand on the dialectic just reported, leading to the adoption of a fundamental system caution: the degree of heuristic penetrance of the process must be modulated . Truth always has a price and, in certain cases, it can become unbearable. In conclusion, it would not seem risky to state that the doctrine of abuse of process can only be citizenship within an accusatory system.

There will be no judgments about the limits or correctness of the reconstruction made in the Anglo-Saxon order (it does not even fall within the scope of the present comparative research). In fact, it interests something else: if the instruments offered there are likely, in some way, to import into the internal procedural system. In short, all the meaning of the analysis carried out here should be turned into a final question: if and what in concrete can be borrowed from the Anglo-Saxon system regarding the abuse of process.

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