Michigan Journal of International Law

Winter 2004

THE BATTLE TO ESTABLISH AN ADVERSARIAL TRIAL SYSTEM IN ITALY

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Introduction

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Transplants of judicial systems across legal cultures, like the transplant of plants across climates, are difficult matters. A few such transplants make take hold and even thrive, but many may become weak and eventually die out. Some viewed the decisions of the Constitutional Court striking down key provisions of the Code of Criminal Procedure as the death knell for the legal transplant that was to have been an accusatorial and adversarial system. But recent developments have shown that the battle over the future direction of Italian criminal procedure is not over. Unable to trump the Constitutional Court's decisions because they were based on the Italian Constitution, the Italian Parliament went to the source in 1999 and changed the Italian Constitution to mandate an adversarial trial system by strengthening the rights of defendants, especially the rights that guarantee defendants the right to confront and cross-examine witnesses against them. Once that constitutional change was in place, Parliament in 2001 changed the Code of Criminal Procedure to reflect the new constitutional rights of defendants.

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I. Italy's Adversarial System

A. Transferring Power from the Trial Judges to the Adversaries

It is not always easy to categorize trial systems as "adversarial" as opposed to "inquisitorial" because there is no litmus test that can be applied to the features of a trial system to provide a definitive answer as to whether a trial system is adversarial or inquisitorial. Indeed, as this Article will emphasize throughout, the trial system in Italy has a mixture of features, some associated almost exclusively with inquisitorial trial systems and some that are found only in adversarial trial systems. For example, in trials on the continent, victims are often permitted to play an active role at trial even to the point of being represented by their own attorney who participates on a level not much different from the public prosecutor or the defense attorney. Under the 1988 Code, Italy continues to allow those injured by a crime to participate at trial through counsel and to seek civil damages from the defendant for their injuries. While almost all jurisdictions in the United States now allow victims to participate at sentencing hearings, active participation by victims through counsel at the trial stage is not a part of the trial tradition in the United States. Nor is the participation of the victim allowed at trial in England.

Another feature that is almost universal in continental trial systems is that the trial determines not just the defendant's guilt but also the sentence to be imposed if the defendant is found guilty. This contrasts sharply with the United States and England where trials are limited to the determination of guilt with sentencing to take place at a separate proceeding with quite different evidentiary rules. In Italy, under the Code, trials continue to be concerned not only with guilt but also with imposing the appropriate sentence if the defendant is found guilty. The dual nature of the inquiry at continental trials has important strategic consequences for the defense because any evidence that might serve to mitigate the defendant's sentence will need to be presented at trial as there will be no later opportunity.

Another difference between trials under the Code in Italy and trials in the United States and England is the fact that the Code never intended to introduce a central feature of common law systems, namely, juries, to Italy. Lay people are involved in trials in Italy only for very serious crimes, such as cases of treason, murder, or kidnapping. Even in those cases, the lay people (six) sit together with professional judges (two) to decide the issues on the model of so-called "mixed" panels of lay people and professional judges that one finds in France, Germany, and other continental countries. But the vast majority of criminal trials in Italy take place before professional judges only with no lay participation

1. Limiting the Admissibility of the Materials in the Dossier at Trial

But even though there are many aspects of the Italian trial system that remain true to Italy's civil law heritage, there were three interrelated reforms in the Code evincing Italy's attempt to introduce an adversary trial system. The first reform had to do with limiting the influence of the materials gathered during the pretrial investigation on the trial. In continental trial systems, all the materials gathered by the police and the parties during the investigation of the crime are put into an official file or "dossier" that plays a very important role at trial. Typically, the dossier will contain all the police reports, witness statements, documents relating to the crime, physical evidence, experts' reports, and other materials gathered during the investigation.

The dossier has great importance at the trial and, in some continental countries, such as the Netherlands, the trial usually consists of a discussion of the materials in the dossier in an attempt to determine the issue of guilt and the appropriate punishment. But even in countries where the power of the dossier is more limited at trial, for example in Germany, where witnesses have to be called even though there are statements of those witnesses in the dossier, the presiding judge will have studied the dossier and will be very familiar with its contents. One reason for the extensive use of the dossier relates to another feature of the civil law tradition, namely, that the presiding judge at trial has the responsibility for calling witnesses at trial and for the initial examination of those witnesses at trial. For this reason, the presiding judge, not unlike a prosecutor in the United States, has to be thoroughly familiar with the materials gathered during the pretrial investigation.

The Italian Code attempted to limit the influence of the dossier at trial by creating a trial system that demanded the production anew of all the relevant evidence against the defendant. Prior to the Code of 1988, the trial had been conceived of more as a ratification of what had been done and what evidence had been assembled during the pretrial investigation. But, after 1988, the trial became the heart of the system and the two contending parties were to produce the evidence and test the evidence at trial. To make that change, the trial judges were denied access to most of the materials gathered during the pretrial

investigatory phase. This limitation on the trial judge's access to the dossier leads to the second part of the reform in the 1988 Code, namely the shift in responsibility for the production of evidence away from the trial judges to the parties.

2. Shifting Responsibility for the Production of Evidence to the Parties at Trial

In continental trial systems, the responsibility for controlling the conduct of the trial is placed on the trial judge who plays a very active role at trial. The trial judge or the presiding judge (when there is more than one professional judge, which is often the case) decides what witnesses should be called at trial and undertakes the initial questioning of each witness. The public prosecutor, the defense attorney, and the victim's attorney (if the jurisdiction permits victims to participate) play a supplemental role in the conduct of the trial. They may suggest or request that the judge call additional witnesses and they may ask questions of witnesses after the judge or judges have finished questioning the witnesses. But in an inquisitorial system, the trial judge is really the person in control of the trial.

Italy wanted to change its system to ensure that the trial judge would come to the trial without extensive exposure to the dossier. This was accomplished by restricting the information that is routinely to be made available to the trial judge. Instead of simply making the entire dossier available to the trial judge, the Code sharply limited the material in the dossier that is given to the trial judge automatically. If a party wishes some additional evidence to be made available to the trial judge before trial, the Code provides for a hearing at which the issue will be argued before the preliminary hearing judge who will decide whether to give the requested information to the trial judge.

But, obviously, even if the trial judge is no longer allowed to examine all the information gathered during the investigation, it is still possible that the judge might have learned a great deal about the case if the judge heard many pretrial motions during the investigatory stage of the case or if the judge presided at a preliminary hearing in the case. This, of course, is often the case in the United States where a judge will usually handle the pretrial motions in a case as well as the trial.

Italy solves the problem of the trial judge with previous knowledge about the case by requiring that the judge who presides at the criminal trial be a different judge from the judge who has supervised the investigatory stage of the case or the judge who has heard the preliminary hearing in the case.

The fact that the Code intends that the trial judge be shielded from the great bulk of the information in the dossier makes it necessary that the burden of calling witnesses be shifted to the parties at trial, who will be familiar with all of the evidence, as intended by the Code. The Italian Code states that, first, the public prosecutor presents the evidence against the defendant and then the other parties (this would include the victim if there is a civil claim against the defendant) have the opportunity to put on any evidence they wish to present. As is common in adversary trial systems, it is the party calling the witness who conducts the initial questioning of that witness--not the presiding judge--with the other party or parties entitled to cross-examine the witness after the direct testimony has been completed. Judges may ask questions, just as a trial judge in the United States may ask questions at trial, but the major responsibility for presenting and testing the evidence was clearly intended to be that of the public prosecutor and the defense attorney.

One of the main objectives of the 1988 Code was to ensure that a defendant had a chance to hear the evidence against him or her and to ensure that the defendant had a chance to confront that evidence and, if appropriate, present evidence that challenged the initial evidence offered by the public prosecutor. Put another way, the intent of the Code was to make clear that the only evidence against a defendant that can be considered is evidence that has been presented and tested at trial, not evidence that may have been assembled during the investigatory stage. For a country with a civil law heritage, where it was long felt that defendants had trouble testing the evidence against them and offering their own, the Code presented a very different way of conceptualizing the nature of a criminal trial.

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C. The Difficulty of Building an Adversarial Trial System on a Civil Law Foundation

It needs to be emphasized that the task Italy set for itself was daunting in that it was attempting to make radical changes in its trial system while building on a foundation that was heavily civil law. We have already mentioned two features often found in the civil law tradition that were not changed in the 1988 Code: 1) the trial determined both guilt and sentence, and 2) victims are allowed to continue to play a role at trial independent of the public prosecutor. But there are other aspects of the prior procedures that one almost always finds in continental trial system and rarely in adversarial trial system. These aspects were carried over from the former trial system and may seem strange to those who have been trained only in the U.S. system.

The first concerns the figure of the public prosecutor. The Italian term for the person who presents the prosecution's case in Italy is pubblico ministero which roughly translates as minister for the public. For shorthand in this Article, we use the term "public prosecutor" to indicate the prosecutorial authority. But Italian has no specific word for "prosecutor" and that is because the pubblico ministero is conceptually different from a U.S. prosecutor. In continental systems, the public prosecutor is a judicial figure and part of the same judicial system that includes trial judges and appellate judges.

This is quite different from the United States. U.S. prosecutors are members of the executive branch of government and usually elected. In European systems, like the Italian system, any member of the judiciary may apply for the position of public prosecutor if there is a vacancy. This means that there is movement from the position of judge to the position of public prosecutor and vice versa, as vacancies occur in different positions in different cities.

In Italy, members of the judiciary are selected based on their prior training and marks on a national qualifying examination. The judiciary includes prosecutors, judges who supervise the investigatory stage of criminal cases, trial judges, and appellate judges. They all belong to the same professional association, the magistratura, and move within the judicial system from position to position with few restrictions and the same economic remuneration.

That the public prosecutor may be seen as having a judicial function is not as different from the United

States as might appear at first glance. The U.S. system places ethical restrictions that demand that prosecutors place a high value on the public interest in making their decisions to the extent that the prosecutor should strive to achieve justice rather than simply convict. For example, the Comment to Rule 3.8 of the Model Rules of Professional Conduct states that a prosecutor "has the responsibility of a minister of justice and not simply that of an advocate." Although prosecutors are usually elected public officials, they are directed by the ABA Standards for the Prosecution Function to "give no weight to the . . . political advantages or disadvantages which might be involved" when making the decision to charge someone with a crime. Also the U.S. system places ethical and constitutional obligations on prosecutors that are different from those that are placed on other advocates. For example, a prosecutor must, as an ethical matter, disclose possibly exculpatory material to the defense even if such material has not been requested by the defense.

But because the public prosecutor in Italy is actually a member of the judiciary, this presents problems due to the close professional relationship that exists between public prosecutors and judges because they are members of the same professional organization.

The United States attempts to avoid this close relationship by putting the prosecutor in a different branch of government from the judiciary and through election of the prosecutors. But it would be difficult to convince continental countries, including Italy, that there are advantages to placing the public prosecutor under the sorts of political pressures that exist on prosecutors in the United States. It is part of the civil law tradition that those who occupy a position roughly analogous to a U.S. prosecutor are judicial figures with the obligation to see that the results of a prosecution are fair and just.

II. The Fate of the 1988 Code in the Constitutional Court in the 1990s

A. The Clash of Values in the 1990s

It was not surprising that the Code ran into difficulties in the 1990s when the adversarial aspects of the Code clashed with Italy's civil law tradition. An introduction to the problems can be nicely highlighted by looking at a provision in the Italian Code that is very similar to a provision in the rules of evidence in the United States. The Italian provision of the Code is Article 507 and it permits the trial judge to call witnesses at trial. It is substantially similar to Rule 614 of the Federal Rules of Evidence according to which a judge at a trial may sua sponte call witnesses and may also question witnesses at trial. Rule 614 is not problematic in the United States because judges sparingly use the power to call a witness and because appellate courts have always strongly cautioned trial judges about asking too many questions at trial lest they appear to the jury to have abandoned their neutral role and to have endorsed one side of the case.

But in Italy this provision became problematic in the years immediately following the adoption of the Code. In 1992, the Corte di cassazione, an appellate court that reviews legal issues, ruled that the fact that the Code places the power of calling witnesses primarily in the hands of the parties does not preclude the trial judge from introducing other evidence that the judge believes is necessary for a just decision in the case. The following year, the Constitutional Court handed down a decision that reached the same conclusion. Both decisions emphasized that while the power of the parties to introduce evidence at trial is important, this power cannot preclude a judge from seeking additional evidence that the judge believes is necessary for a proper decision of the case.

These are controversial decisions in Italy because the active seeking of the truth by the trial judge that these decisions permit seems inconsistent with an adversarial model where the judge plays a relatively passive role with the burden on the parties to produce evidence. But there are reasons why the Constitutional Court might have felt pressure to vest in the trial judge a broader power to call witnesses than would courts in the United States. First, there is the civil law tradition whereby the trial judge has always felt responsible for the accuracy of the trial verdict. With a strong civil law heritage, it is harder for judges in Italy to accept a more limited trial role. Secondly, the Code marked a rather abrupt break with the past, demanding a shift from a trial controlled almost completely by the judge to one controlled by the parties, and it was not always easy for each person in the system to make that adjustment. For example, if the public prosecutor negligently failed to call a witness who was perceived by the trial judge to be necessary to establish an element of the crime, the trial judge would feel compelled to call that witness rather than allow the case to collapse due to the prosecutor's negligence. A trial judge in the United States would probably be more likely to allow the prosecutor's case to collapse under such circumstances.

Thirdly, the pressure on the judge to call witnesses is especially strong when the judge believes that evidence that might support a defense has not been presented by the defense. This is a problem in any trial system that is concerned with justice. In the United States, for example, one often reads of death penalty cases in which the appointed defense attorney was very inexperienced or in which the defense attorney received so little funding that fully investigating the case and mounting a credible defense became nearly impossible. Italy does not have a death penalty, but a trial judge in Italy has always been viewed as having a paternalistic obligation to protect the defendant. Thus, a judge may feel compelled, if the defense lawyer is not skilled, to call a witness who should have been called by the defense lawyer or to assist in the examination of a witness. Indeed there is a long line of cases in Italy, even under the 1988 Code, stressing the need for the trial judge to intervene if necessary to assure that the defendant's trial is fair and that any verdict at trial is accurate.

The difficulties that arose in Italy over the appropriateness of a judge calling witnesses is symptomatic of the difficulties in building an adversarial trial system on institutions that are civil law by tradition.