



Adversary System Experiment in Continental Europe: Several Lessons from the Italian Experience

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Abstract

In order to promote efficiency and realize democracy ideal, Italy transplanted adversary system in 1988. Because of rampancy of organized crimes and compulsory prosecution system and material truth ideal, reformer's effort was nibbled away by constitutional court of Italy. In 1999, the legislature of Italy amended Article 111 in Constitution which formed the constitutional basis of adversary system. Until now the reformers win. The Italian experience tells us: transplant of adversarial system is not only trial structure reform but reform of whole criminal procedure; in the course of internalizing the new system, a difficult repeated testing is the only way.

Keywords: Adversary System, Italy, Lessons

The new Italian Criminal Procedure Code of 1988 represented a revolutionary transition of continental inquisitorial procedure, because it was inspired by the Anglo-American adversarial system. The new Code had been experienced a series of changes since it came into force. The difficult history of criminal procedure reform in Italy can give a few lessons for continental law tradition countries which are going to transplant adversarial procedure system. The ambitious attempt to shift from a centuries-old non-adversarial procedure to an adversarial mode modeled upon practices in the United States has made the Italian experiment of great interest from the perspective of law reform: perhaps for the first time in the modern period, the Italian legal system is the subject of an international academic debate. (Elisabetta Grande, 2000) Italy, by adopting a largely adversarial criminal process within an inquisitorial tradition, stands poised to lead the development of a third way of delivering criminal justice. (David M. Siegel, 2006)

1. Transplant of Adversarial System in 1988

The Code of 1930, drafted in the fascist era, criminal proceedings were divided into two phases, the investigative stage ("*istruzione*") and the trial stage ("*dibattimento*"), with the investigative stage holding more influence over the proceedings. The Code provided for an investigating judge ("*giudice istruttore*") with extensive powers. On recommendation of the public prosecutor, the investigating judge would direct the investigation in order to "ascertain the truth." He would hear witnesses and experts, perform searches, seizures and experiments. The investigating judge could also summon and question the accused. All the evidence obtained in the course of the investigation would be recorded in the investigative dossier, upon which the trial judge based his decision. Originally the defense was forbidden to participate in the investigative phase. Later reforms and a series of decisions of the Constitutional Court in the 1970s allowed the defense opportunities to challenge or contradict information that was gathered. However, confrontational and adversarial initiatives were permitted in the trial phase, which took place only if the investigation had collected sufficient evidence. In most cases the trial phase did not add to what had been done in the investigative phase or disavow the conclusion reached during the investigation. The trial simply functioned as a control on what had been previously decided. (Illuminati Giulio, 2005)

Italy has what is probably the biggest backlog and slowest pace of litigation, both criminal and civil, among all Western countries. As estimated, there are about 1.5 million civil suits and more than 2.5 million criminal actions before the

Italian courts, and proceedings often last 15 years or more. (Macro Fabri, 1994) “The excessive duration of trials--for which Italy has been repeatedly condemned by the European Courts of Human Rights--has itself contributed to a multiplicity of disastrous consequences which violate citizens’ legitimate expectations from their system of justice.” (Di Federico, 1989)

Given the prestige enjoyed by the American legal system in general and by American criminal procedural in particular, it is not surprising that the Italian legislator, seeking a way to "open up" its criminal justice system to reflect its status as a modern democratic society, looked at the United States for its inspiration. “The new Italian Code appears as the most outstanding event in the 20th Century.”(Ennio Amodio and Eugenio Selvaggi, 1989)

1.1 *Abolishing the Investigating Judge and Establishing the Principle of Adversariality*

The 1930 Code was based on the premise that all evidence should be available to a judge, regardless of how it was collected; no limit should be placed on the search for the truth. The drafters of the 1988 Code, however, were driven by an opposite belief. They believed that no investigation could be completely impartial; all investigators are affected by their personal points of view and backgrounds. (Glaucio Giostra, 2001) Furthermore, they believed that the act of investigating a crime itself creates bias on the part of the investigator. Because of this potential for partiality, the drafters of the new Code created a clear separation between criminal investigations and trials. (Michele Panzavolta, 2005) Under the Code, the individual parties conduct investigations, effectively abolishing the investigating judge and establishing *giudice per le indagini preliminary* (GIP). The GIP does not conduct any investigation before trial any more, whose function is to guarantee the legality of investigatory phase and protect the legitimate rights of suspects from government invasion. Any restraints of personal freedom requested by the prosecutor and any activities such as wire taps or other interceptions that impinge upon an individual's right of privacy, require GIP's authorization following a hearing.

Under the new Code, investigations are conducted by the prosecutor. The new code configures the prosecutor as a party to the proceeding and deprives him of the judicial powers he previously enjoyed at the preliminary inquiry. The prosecutor is no longer required to pursue the search of the truth in his investigation. Moreover, in presenting the evidence in court he is expected to be partisan (article 190 c.p.p.). According to the most authoritative Italian scholarship, that means that the Italian prosecutor is now no longer in charge of collecting evidence on behalf of the person under investigation.

Article 358 of the code of criminal procedure states that “the prosecutor completes every activity necessary under article 326 c.p.p. and also assesses the facts and circumstances favoring the person under investigation.” as read together with article 326 c.p.p., article 358 c.p.p. has been interpreted as asking the prosecutor to collect the evidence in favor of the suspect only for the very limited purpose of deciding whether to prosecute or not. In other words, in deciding if the evidence collected is sufficient to obtain a conviction at trial, the prosecutor shall not disregard the evidence favoring the person under investigation, because, as Cordero says, “if the prosecutor disregards (evidence favorable to the suspect), looking just in one direction, he risks a failure at trial or even before at the preliminary hearing; that the prosecutor must also consider the suspect's side is a matter of elementary caution, it is not a matter of inquisitorial opportunity.” (F. Cordero, 1998).

In order to balance the unequal position between the public prosecutor and the defense the new Code establishes the principle of adversariality in which the assistance of a lawyer is required when the public prosecutor or the police carry out investigation. There is a distinction between investigation that require the presence of the defense counsel, who must be notified in advance (such as the police or the public prosecutor interrogation of the suspect), and those that the defense counsel have the right to attend if they can be found and are immediately available, but which do not need to be announced in advance (such as searches and seizures). (Mireille Delmas-Marty & J. R. Spencer, 2002)

1.2 *Cutting off the stream-line relations through the “Double-Dossier” System*

Inspired by American adversary system and strictly separate the trial phase from the investigative one, the new Code invented a new system—“Double-Dossier” System. The system was so named in opposition to the single investigative dossier that characterized the old system. In the 1930 Code, any record of evidence collected by the investigating judge was placed into the dossier. This dossier was then brought to trial and had other records of the evidence formed at trial added to it. The drafters of the new Code wanted to prohibit any use of the prior record at trial. They also wanted to shield the trial judge from the investigative file so that he would not be biased by the records contained therein. The idea was to not prejudice the judge's mind at the commencement of trial, thereby guaranteeing only the evidence produced during the trial would influence the judge. (Michele Panzavolta, 2005)

The result is a dual principle in use of the contents of the files. Only information in the trial dossier, which contains the formal steps for starting the prosecution and constituting a *parte civile*, the written accounts of investigative steps which cannot be repeated as well as any evidence taken ahead of trial at *incidente probatorio* and defendant's criminal record and other information that could be useful in assessing the character of the accused, may be used directly as evidence; but information contained in the public prosecutor's dossier may only be used negatively, in rebuttal. (Mireille

Delmas-Marty & J. R. Spencer, 2002)

1.3 Laying Down Strict Exclusionary Rules to Guarantee Trial-Centeredness System

The aforementioned description of the severance of the dossiers should guarantee that investigative evidence does not affect the judge's decision at trial. Nevertheless, the Code, when drafted, contained two additional rules to further ensure that the judge will be shielded from the investigative record. First, the parties, particularly the prosecutor, could not take the initiative to read any prior statements or other investigative records at trial, except for those few exceptions specifically provided by law. The second rule prohibited police officers from testifying at trial as to witnesses' statements collected during the investigation. These two rules guarantee what has been called the "accusatorial golden rule": out-of-court statements may be used only to verify a witness' veracity; they cannot be used for the truth of the matter asserted. Thirdly, the severed co-defendant's prior statement to the prosecutor could be used for substantive purposes only if he failed to show up at the trial, but not if he attended and exercised his privilege against self-incrimination.

Despite these measures, the drafters of the Code feared that a system that excludes all investigative evidence could be too rigid and cause inefficiencies. For this reason, they provided some exceptions to the rule. One exception allows the parties to read a relevant portion of the investigative record when it has become absolutely impossible to otherwise present the evidence due to serious and unforeseen reasons (e.g., the witness' sudden death). The second exception allows the parties can make substantive use of prior statements of the accused that were rendered to the prosecutor, not the police, once the statements are used at trial to discredit the accused. The third exception is about hearsay rule: if the statements were collected at the crime scene immediately after the action occurred, they can be used at trial for substantive purposes only after they have been used to discredit a witness.

1.4 Shifting Responsibility for the Production of Evidence to the Parties at Trial

In order to transfer the powers of court investigation to parties the new Code changes the traditional powers separation in court. Unlike the former criminal procedure model, in which the entire proof-taking process was officially conducted and the fact-finding process was officially controlled (since the evidence was assembled by judges and other impartial officials and produced in court by the trial judge), the new code, in principle, took the opposite approach, envisaging a system of adjudication in which the evidence is essentially presented by the parties.

Accordingly, in sharp contrast with a system where the presiding judge used to first interrogate the defendant and the other private parties, and then, *ex officio*, examine witnesses by exclusively questioning them, introduce documents, examine expert witnesses and finally admit and examine the evidence presented by the parties, the Italian criminal procedure code now provides that "evidence is received upon party's request" (article 190 c.p.p.). Thus, each party presents his own case, calls his witnesses and examines them.

The trial begins with the discussion of any preliminary matters, such as venue or claims of procedural error. Then the prosecutor, like his American counterpart, makes his opening statement. This is followed by the opening statements of the "private parties," i.e., plaintiffs asking for damages and parties "civilly accountable for the fines." The injured party of a crime can indeed intervene in the criminal action and become a co-plaintiff together with the public prosecutor.ⁿ⁴² Subsequently, it is the accused's turn to make his opening statement. Each side indicates the facts to be proven and the evidence they intend to introduce. The prosecutor presents evidence first, then it is other parties' turn to produce evidence. As there is no a *prima facie* case to be proven by the prosecution (due to the absence of a bifurcated trial where the jury is the ultimate trier of facts), this order of evidence production may be subject to derogation upon agreement by the parties.

Unlike under the previous code, the defendant can decide not to take the stand. Unlike the common law system, moreover, the defendant is given the opportunity to issue spontaneous statements whenever he deems it necessary to do so. Questions are posed to witnesses, technical consultants and private parties by the parties through direct, cross and re-direct examination. Answers to leading questions are not admissible during direct examination, but they are admissible during cross-examination. (Elisabetta Grande, 2000)

1.5 Speed up the Trial Hearing through Various Special Procedures

In order to speed up the trial hearing, procedural alternatives have to the usual forms of ordinary proceedings have been planned, which include abbreviated judgment (*Giudizio Abbreviato*) and application of penalty by request of the parties (*Procedimento per Decreto Penale*) and criminal order (*Procedimento per Decreto Penale*) and direct judgment (*Giudizio Direttissimo*) and immediate judgment (*Giudizio Immediato*). The last two procedures are trials without preliminary hearings and the judge could make his decision based on the investigatory dossier. The other three procedures are simplified procedures without trial. Abbreviated judgment and application of penalty by request of the parties, which has embodies the party-dominated "negotiated justice", have some similarities with American plea bargain system. The Italian drafters wanted to use these two procedures to reduce trials by 70-80%. (Stefano Maffei, 2004)

In the original version of the abbreviated trial, the defendant and the prosecutor agreed to a judgment on the investigative file. In other words, both defense and prosecution waived their rights to trial but not to a judgment. The abbreviated trial serves the interests of both parties. The prosecution obtains a quicker resolution of the case, while the defendant, on the other hand, receives a reduction in penalty. If the defendant is found guilty, he is sentenced to a penalty reduced by one-third of the regular sentence. (Freccero, 1994) Application of penalty by request of the parties has some resemblance to the plea-bargaining conducted in the United States. In this deal, the defendant's attorney and the prosecutor agree on a penalty for the defendant. The defendant is then accorded a reduction of up to one third of this penalty. Under the original Code provision, the reduced penalty bargained for could not be longer than two years imprisonment. By reaching an agreement on the penalty, the accused waives his right to trial and to a full judgment. (Michele Panzavolta, 2005)

2. The Limitation of the Reform

2.1 Contamination of Judges by the Trial Dossier

In Anglo-American criminal trial, the jury as truth-finder has no legal path to seize any information about the case before trial. In order to guarantee the disinterestedness of the jury, when indicting the public prosecutor should not transfer any evidence to the trial chamber. The new Code of Italy also adopted some measures to protect the judges being effected by the one-side information of public prosecutor, which requires only trial dossier can be transferred to judges before trial. A few exceptions had been laid down, some exceptions may have practical reasonableness, because such measures that cannot be repeated in trial must be conducted before trial are not practicable, but evidence such as previous conviction and other character evidence, which are usually excluded in America, can openly and legally come into trial judges sight, so the new Code cannot protect the trial judges contamination from the dossier.

2.2 Not Passive Enough Judges

The Italian trial is not entirely party-controlled. There are four departures from a purely adversarial approach to fact-finding. First, if parties consent to the admission of hearsay, the trial judge may require original proof (i.e., non-hearsay evidence), according to article 195 c.p.p., n.3. Second, the presiding judge, is allowed not only to question witnesses at the conclusion of the examination (as in the U.S. system), but also to indicate to the parties new issues that need to be addressed during the examination. Third, expert witnesses, always officially appointed, unlike in the U.S. system, may be examined ex officio in court (article 224 c.p.p., n.1, but also arts. 468 c.p.p., n.5 and 501 c.p.p., n.2). Moreover - and this has proven to be a very influential provision in a legal system rooted in the continental tradition - article 507 c.p.p. provides that, after all the evidence has been produced in court, whenever absolutely necessary, the trial judge is subsidiarily authorized to examine proof sua sponte. The presiding judge will then examine the witnesses he himself has produced and decide afterwards who among the parties will pose questions first (usually it is the party that appears to be favored by the witness's statements). (Elisabetta Grande, 2000)

2.3 Limited Application of Special Procedure

Although the procedure known as *giudizio abbreviato* is available for all crimes, the request of the defendant is not the only condition for applying such procedure. Only the request are permitted by public prosecutor first and the judges then can the abbreviated judgment apply.

With regard to Italian plea bargain, there are at least three differences between Italian plea bargain and American one: first, in Italy defendants can plea bargain during the preliminary hearing and even during the trial, when all the investigations and the paperwork have been concluded; second, plea negotiations are limited to offenses involving only pecuniary fines or where the sentence, as a consequence of mitigating circumstances, negotiations, and the statutory sentence reduction of up to one third, does not exceed 2 years imprisonment; third, in the Italian system the prosecutor and the defendant do not bargain over the nature of the crime for which the defendant pleads guilty. (Nicola Boari, 1997)

2.4 Limited Defense Power to Investigate the Case

The new Code has authorized the defense lawyer such broad rights as to be there while interrogation of the suspect and free communication with the his client and dossier reading, and also established the principle of adversariality according to which the defense lawyer can monitor almost all activities of the investigative organ, which may be envisaged by his American counterpart. The Code also conferred powers of investigation on defense counsel; however, "Those rights were rather limited and theoretical, in particular because there was no possibility of authenticating statements received by the defense counsel." Because the public prosecutor had been one partisan and not judicial officer any more, the defense counsel possibility of getting some helpful evidence from the public prosecutor was thin, such inequality between the public prosecutor and the defense can eventually affect the integrity of the trial. (Mireille Delmas-Marty and J. R. Spencer, 2002)

3. Return to Inquisitorial System

3.1 Conservative Behavior of Italian Constitutional Court

The 1988 new Code transformed the structure of Italian criminal procedure from judicial officer dominated inquisitorial

system to party dominated adversary system. But “the law in book” doesn’t mean “law in action”, the most important condition for implementation does not rely on the Code’s perfect words, but on the law-executors. The written laws require a certain amount of acceptance from the governed; otherwise, they will encounter resistance in their application and other forms of rejections. Such a system which ideal is so contradicted with continental traditional ideal was doomed to meet its difficulties in implementation. The bellwether that defeated the new Code was the Italian constitutional court. In Italy, any provision of law can be submitted to the Constitutional Court for review to determine whether this law is consistent with or in violation of the Constitution. These submissions can be made in the course of a judicial hearing only when there is doubt about a provision's validity. The constitutionality issue can be raised by either the presiding judge or by parties provided that the complaint is not considered groundless by the judge. (Michele Panzavolta,2005)Prosecutors and judges submitted a large number of provisions of the new Code to the Constitutional Court. In particular, the allegations were directed against those rules that supported the sharp distinction between investigations and trials.

3.1.1 Invalidating the Prohibition against Police Officers Testifying about Statements Collected in the Investigations

The Constitutional Court agreed with these complaints and delivered a first blow to the Code in Decision n. 24/1992. Here the Court invalidated the prohibition against police officers testifying about statements collected in the investigations. In the view of the Court, the provision violated the principle of equality because it prohibited police officers' hearsay testimony while a similar ban did not apply to ordinary witnesses. Unfortunately, the Court failed to see the essential role this provision played in separating the phases of the criminal process.

3.1.2 Treating the Out Court Witness Statements as Evidence of the Facts at Issue

Pursuant to Art.500 of the Criminal Procedure Code impeachment of witnesses for statements made at trial, inconsistent with out-of-court statements, had been reduced to a mere credibility test. The Constitutional Court endorsed the Italian judiciary's criticisms by its Decision No 255/1992, in which it declared paragraph 2 of Art.500 of the Criminal Procedure Code unlawful, since the principle styled as "non-dissipation of evidence", was to be deemed also applicable to the system of criminal procedure newly introduced. Following this decision, any statements made by witnesses to the prosecutor came, through impeachments of witnesses due to inconsistency or silence at trial, to be treated as evidence of the facts at issue. (Ennio Amodio,2004)

3.1.3 The Severed Co-defendant Who Attended Trial but Exercised His Privilege against Self-incrimination could Have His Prior Statements Read

Decision n. 254 in 1992 declared Article 513/2 unconstitutional, thus permitting the admission of out-of-court statements of a severed co-defendant called to testify in the other defendant's trial, regardless of whether the severed defendant chose to exercise his right to remain silent. The Court justified its decision on the ground that it was unreasonable to treat a severed co-defendant and a joint co-defendant differently. If a joint co-defendant who attended trial but exercised his privilege against self-incrimination could have his prior statements read, a severed co-defendant should be treated in the same way.

3.1.4 The Judge’s Veto Power to Plea-Negotiation on the Basis of the Rehabilitation of the Convicted Person

In the Italian Constitutional Court's 313/1990 decision, issued the year after the new Italian Code introduced the *patteggiamento*. In this decision, after repeatedly stating that the judge's power of control over the agreement was not just a formality, the Constitutional Court held that art. 444.2 of the Italian Criminal Procedure Code, which regulated the *patteggiamento*, was unconstitutional because it did not expressly give the judge the power to control the congruence between the sentence agreed upon by the parties and the seriousness of the offense, and thus deprived the judge of the power to enforce art. 27.3 of the Italian Constitution, which establishes that the goal of punishment is the rehabilitation of the convicted person. Therefore, this decision attempted to reaffirm and increase the powers of the judge against the parties regarding the *patteggiamento*.(Maximo Langer, 2004)

3.1.5 Wide Interpretation of the Court’s Authority to Order Extra Evidence

Among the Constitutional Court's many decisions that have altered the original accusatorial approach, a new interpretation has been provided as to the rule by which the trial judge's power to call witnesses in the interest of justice had been restricted to exceptional cases. By Decision No 111/1993 n16, it was held that, if the prosecutor fails to offer any evidence at trial, out of negligence or lack of initiative, then the judge may deal with any such failure by ordering that useful items of evidence be gathered to establish the truth. The Constitutional Court, referring to the pursuit of truth, has stated that the parties do not have a completely free hand with the evidence. (Mireille Delmas-Marty and J. R. Spencer, 2002)

3.2 Factors Contributing to the Adversarial System's Failure

3.2.1 Reality: Rampant Organized Crime

Mafia-type organizations are so deeply interwoven into the fabric of Italian society that they have become part of the

darker side of Italian culture. (Ottavio Campanella, 1995) At the end of 1987 the biggest trial--that of Palermo involving 454 defendants--lasted 20 months and ended with more 300 convictions. Organized crime became one of the most important factors that caused the trial delay, Italy used the method to severed trial of organized crime defendants to solve such problem. But such method brought another problem: how to judge the admissibility of the confession of the severed defendants. As the Part One said, Italy adopted a very strict exclusionary rule to protect the defendant's right of confrontation. (Louis F. Del Duca, 1991)

In 1992, two valorous prosecutors were brutally assassinated by the mafia. All the institutions of the Italian State had to display their firm determination in fighting the mafia. This justified the need for emergency legislation aimed at strengthening the evidentiary powers available to law enforcement officials. Parliament passed a bill in August of 1992 that implemented the Court decisions and increased the exceptions to the rule that the only evidence admissible was that collected at trial. For example, the parties were allowed to introduce records of other proceedings and decisions taken in collateral cases. Also, out-of-court statements of witnesses not present at trial could be used more extensively. This legislation was enacted by the State in response to attacks by organized crime. (Illuminati Giulio, 2005)

3.2.2 System: Lacking Separation between Adjudicating and Prosecuting Members of the Judiciary and Compulsory Prosecution Principle

The Italian prosecutor is a career bureaucrat who has a lifetime position with almost complete autonomy. A mechanism for automatic wage increases keeps the salaries of the judges and prosecutors at the top of the pay scale for public employees. (William T. Pizzi & Luca Marafioti, 1992) The lack of separation between adjudicating and prosecuting members of the judiciary - consistent with the previous officially-controlled system in which all officials were in charge of discovering the truth and, consequently, of collecting and introducing evidence both for and against the accused - denies defendants a fair trial under the new system for collecting and presenting evidence.

The notion of compulsory prosecution has found its way into the 1948 Italian Constitution. Its rationale has been the same fostering of prosecutorial impartiality that has justified its introduction in the German system. According to this theory, the lack of discretion on the side of the prosecutor would avoid future unfair treatment of crimes perpetrated by the political regime. (Elisabetta Grande, 2000) The compulsory principle can explain on the one side that why the public prosecutor only have limited power to plea bargain with the defendant, on the other side, the Constitution Court had used the principle to uphold the judge's power to find material truth. By Decision No 111/1993 n16, it was held that, if the prosecutor fails to offer any evidence at trial, then the judge may deal with any such failure by ordering that useful items of evidence be gathered to establish the truth. The Constitutional Court believed that, in the Italian judicial system - one governed by the "compulsory prosecution" principle - it cannot possibly be conceived that the prosecutor's lack of initiative may prevent the trial judge from establishing that an offense was or was not committed. (Ennio Amodio, 2004)

3.2.3 Culture: Search for "Material Truth"

Under the Continental tradition the evidentiary field rests within the scope of the decision maker's domain, whose inquiry is understood as a tool to be handled with a view to protecting the public interest. As a consequence, the comparatively passive role vested in the trial judge in proof taking by the 1989 Code, patterned after the adversarial model, has been perceived by the Italian judiciary as a barrier to elicit the truth.

As one of the continental countries, Italian traditional criminal procedure model was premised on the assumption that an impartial, capable researcher could best ascertain the facts of a case. By contrast, the new Code is rooted in the premise that there is not an objective way to ascertain facts or conclusions, but that truth is best found through confrontation of differing points of view. The traditional view of the fact-finding process is still prevalent today in Italy, both among the judiciary, and among the public. In order to restore the power the trial judge's power to elicit material truth, the Constitutional Court had declared many Articles of the new Code unconstitutional, just as what Milan University professor Amodio said in evaluating the "non-dissipation of evidence" principle: such principle was "a novel disguised version of the material truth principle at the root of Continental criminal justice." (Ennio Amodio, 2004)

4. The Re-Establishment of the Adversary Principles

In 1997, Parliament decided to re-establish the original accusatorial choice. Law 267/1997 abolished some of the many exceptions to the principles of orality and immediacy in order to place the trial stage at the center of criminal proceedings again. In particular, the reform stated previous statements of an accomplice, are separately inadmissible for determining the defendant's guilt as long as the accomplice remained silent at trial. The reform moved toward a restoration of the accusatorial process, preserving the defendant's right of confrontation. However, the Constitutional Court reviewed the revised provisions and concluded that they were an unconstitutional violation of the equality clause. The provision forbid the use of an accomplice's previous statements where the accomplice was silent at his trial, but did not forbid the previous statement of a witness. The reasons stated for the decision display the ideology of the Constitutional Court. The Court again recalled the principle that no judicial activities should be wasted and no evidence should be lost. Parliament and the judiciary were now in open conflict and the judiciary was prevailing. (Illuminati

Giulio,2005) The Constitutional Court's systematic misinterpretation of the Constitution made it clear that Parliament would have to amend the Constitution to explicitly state the intended procedural system. Constitutional law 2/1999 reformed Article 111 of the Constitution by introducing five new sections.

The sections added to Article 111 make it a very long article compared to other articles of the Italian Constitution. The amendment added five sections that read as follows:

- (1) Every judicial matter should be carried out under the principle of due process of law.
- (2) Every trial should guarantee each party equal standing to offer evidence or contrary evidence in front of an impartial judge. The law also guarantees that trials should be of a reasonable length.
- (3) In the criminal trial the law guarantees that a person accused of a crime should be privately informed as soon as possible of the nature and the reasons for the charges against him; that the accused should be assured enough time and suitable conditions to prepare his defense; that the accused should be allowed the opportunity, before the judge, to examine or to have examined any witnesses against him; that the accused have the right to subpoena favorable witnesses at trial on an equal basis with the prosecution, as well the right to produce other evidence in his favor; and that the accused be assisted by a translator at trial if he does not understand or speak the language used in the trial.
- (4) The criminal trial is based on the principle that evidence should be heard in front of the parties and each party should be able to offer contrary evidence and to challenge opposing evidence. The accused cannot be proven guilty upon declarations of anyone who willingly avoided being examined by the accused or by his lawyer.
- (5) The law regulates cases in which evidence is not presented in a manner such that the accused may challenge the evidence at trial by consent of the accused, due to verified objective impossibility or as a result of proven illicit conduct.

As the Constitution Amendment passed, the Italian legislature also enacted new provisions to guarantee the Amendment's implementation. Act No. 63/2001 primarily drew inspiration from the principle of "completion of the proceedings", pursuant to which a co-defendant whose position has irrevocably been defined by conviction or acquittal is treated as a witness and remains under an obligation to testify, but is entitled to be assisted by counsel. As a departure from this principle, a co-defendant not prosecuted on the same offense may only be heard as a witness if he was warned, when interrogated in the pretrial stage, that, should he give evidence against accomplices, he would be treated as a witness at the trial. Except for this, any co-defendant shall have the right of silence and may, accordingly, escape cross-examination, thus making any statements previously made by him to the prosecutor inadmissible.

Except to re-establish the strict evidence rule, the Italian legislature also adopted some other measures to strength the adversarial system.

Firstly, after abolishing the investigative judges, the task for pretrial judicial control and preliminary hearing was carried on by the GIP, who did not investigate the case any more. But because the GIP took these two tasks together, his decision made during the preliminary hearing may be affected by the information which he had got before hearing. In 1998, the legislature of Italy decided to set up a special organ - *the giudice dell'udienza preliminare* (GUP)-to conduct the preliminary hearing, thus the GIP's function remained to pretrial judicial control.

Secondly, defense lawyer's powers of investigation were bettered. The law of 7 December 2000, no.397, entitled "rules about defense investigations", extended the powers of defense to allow them to conduct their own investigations: he can interview people who may be able to provide information, he can be authorized by a judge to enter private places or places where the public is not allowed and he can examine seized evidence. Furthermore, he can engage substitutes, private authorized agents and technical consultants to carry out all these activities. All evidence found by the defense counsel is then collected in a specific dossier, called the "defense counsel's dossier". (Mireille Delmas-Marty & J. R. Spencer, 2002)

Thirdly, the enormous caseload of the Italian system itself adds to this cycle of inefficiency. Various reforms have recently been adopted to cope with this backlog. One reform issued in 1998 provided that minor crimes be judged by a single judge rather than by the traditional panel of three magistrates. In 2001, the legislature also introduced justices of the peace to deal with petty offenses, thereby relieving the tribunals from deciding some cases.

Despite these reforms, there is still tremendous pressure on the system to be more efficient. Law no.479 of 1999 removes the need for the prosecutor's agreement while the defendant initiates a request for abbreviated judgment. Another important change introduced in 1999 is that the defendant may now ask the judge to carry out further investigation-therby removing the power of the judge to reject the request to proceed by abbreviated judgment because he did not have enough evidence before him to reach a decision in the case. The reform of Italian plea bargain goes the same route with abbreviated judgment: extending its application. The limitation of up to five years of imprisonment was introduced by statute in June by Law 134/2003.

5. Conclusion

The historic mixture of adversarial and non-adversarial characteristics implemented by the 1989 Italian Code of Criminal Procedure are reflective of that country's concern with the imposition of checks on abuses of power by dividing the functions of the players and the phases of the disposition of a criminal case. (Rachel A. Van Cleave, 1997) Italian transplant of adversarial system is not only trial structure reform but reform of whole criminal procedure. From the perspective of furthering the proceeding, the trial phase is just one phase of the criminal procedure. Therefore, if we put all our effort on the trial procedure reform and neglect other corresponding procedure reforms, the result may be out of our expect and the different part of procedures may be counteract each other. Adversary criminal trial implements strict trial-centeredness principle: the investigative phase and trial phase are rigorously divided into two procedures, only the evidence that the accusing party has obtained are confronted in open court by the defense party and goes through the barrier of evidence rules be used as the basis of the decision. Accordingly, transplantation of adversary trial must involve reform of investigative procedure and evidence rule. Or the transplant will be fruitless. Furthermore, in adversary criminal trial, the judges are passive and the public prosecutor becomes "public interest party" of the proceeding, in order to repair the ingrained inequality between the parties and realize the goal of fair trial, extending the defendant's defense power is one of the necessary measures. Adversary criminal trial is also one high-price activity, if we cannot design corresponding low-price procedure to shield out such unnecessary cases, the remained cases which really need be taken seriously cannot come into real battle field.

As we all have seen, the adversarial reform of Italian criminal trial has adhered to such whole reform view. Division between the trial phase and investigative phase, establishment strict exclusionary evidence rules, extension of the accused defense power and creation of various efficient procedures all are the concrete embodiment of such view. No others continental system countries, including Japan, can compare with the Italian's reform with respect of depth and strength of the reform.

Whether the transplanted system can reach the expected result of the legislature in judicial practice are conditional, one of the most important factors is whether the ideal of the new system can be internalized by the law executors. In the course of internalization, a difficult repeated testing is the only way. In a comparative analysis of political cultures, Seymour Martin Lipset (1996:21) writes that due to its long-standing emphasis on individualism and mistrust of government, "American began and continues as the most antistatist, legalistic, and rights-oriented nation." American government, including the judiciary, accordingly, is designed to fragment and limit power.

Because of such deep mistrust of government power, the American criminal trial emphasized the self-protection of the parties, not judges or other officers. But the continental countries always emphasize the judge's obligation to find the material truth *ex parte*, which is another power trust culture. Accordingly, the Constitutional Court of Italy felt incompatible with the new Code. The new Code not only weakened the power the judges but also does not satisfy the above ideal of continental Europe tradition which requires to finding object truth. A series of constitutional decisions of the Italian Constitutional Court are inevitable product of these two cultures contradiction. With respect to the present materials, the Italian legislature has won the fight with the judicial system, but the prospect of re-reform remains to be observed.

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