
Theme: Reform, Change Management

Criminal Procedure And Public Prosecution Reform In Italy: A Flash Back

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ABSTRACT

This paper addresses the struggle of the Italian justice system during the transition to implement the 1989 Code of Criminal Procedure. The Code was intended to solve some of the major problems of the Italian Courts, such as backlog and length of trials, by adopting special procedures and an adversarial model. Justice system officials assumed that the oral process would accelerate the pace of litigation and, thereby, increase the efficiency and the effectiveness of the administration of justice. In retrospect, the assumption was simply wrong. On the contrary, the Italian experience demonstrates how a significant reform in the criminal process and procedure involves not only amending the rules; in addition, it must consider the institutional and organizational contexts, the actors' capacity to absorb change, and the risk that change may worsen the functioning of the criminal process. The paper also shows how the legal formalism that pervades the Italian justice system saddled the reform with rules that failed in practice to work.

INTRODUCTION

This paper focuses on select aspects of the Italian Code of Criminal Procedure *in action* following its implementation on 24 October 1989. I will use a judicial administration approach by reviewing the *law in practice* rather than the *law in books*,¹ attending more to caseload management and organizational issues than to legal aspects.

In particular, I focus on select issues linked with the initial impact of the criminal process reform: the changing role of judges, prosecutors, and defense attorneys; the difficulties entailed in learning how to present oral argument and the related record; and the effort to introduce so-called *special proceedings*. I end the paper with conclusions based on the facts described.

The data and the information presented in this paper reflect extensive field research initially completed by the Research Institute on Judicial Systems of the Italian National Research Council and the Research Center of Judicial Studies at the University of Bologna when the Code entered into effect² and subsequently updated with the analysis of quantitative data and legislation.

As a prelude to analyzing the reforms of the Code of Criminal Procedure, I describe briefly the organization of the Italian judiciary to provide for the reader the correct institutional framework.³

THE ITALIAN CRIMINAL JUDICIARY: A BRIEF OVERVIEW

COMPOSITION OF THE JUDICIAL POWER: A major feature of the Italian justice system is that public prosecutors are part of the Judicial rather than the Executive power.⁴ Both judges and prosecutors are part of *magistratura*; as members of the

¹ R. Pound R., "Law in Books and Law in Action", in *American Law Review*, 1910, 44, p. 12. See also R. Summers R. (1982), *Instrumentalism and American Legal Theory*, Ithaca-London, Cornell University Press, p. 21.

² The research has been carried on for several months in courts and prosecutors' offices in Southern and Northern Italy. The research has been conducted by participant observation, interviews, and analysis of quantitative data by myself along with Davide Carnevali and Francesco Contini, researchers at the Research Institute on Judicial Systems.

³ References are made only to books and articles written in English. For an introduction to the Italian Courts, even if it is not really up to date, see: G. Di Federico and C. Guarnieri (1988), *The Courts in Italy*, in J.L. Waltman and M. Holland (eds.), *The Political Role of Law Courts in Modern Democracies*, London, Macmillan Press. For a reference to civil law systems, H. Merryman (1985), *The Civil Law Tradition*, Stanford, CA., Stanford University Press. For articles in English which deal with the Italian code of criminal procedure, see, W. Pizzi and L. Marafioti, "The new Italian Code of Criminal Procedure: The Difficulties of Building an Adversarial Trial System on a Civil Law Foundation", *The Yale Journal of International Law*, vol. 17, n. 1, winter 1992, pp. 1-40; J. L. Fassler, "The Italian Penal Procedure Code: An Adversarial System of Criminal Procedure in Continental Europe", *Columbia Journal of Transnational Law*, vol. 29, 1991, pp. 245-278; J.J. Miller, "Plea Bargaining and its Analogues Under the New Italian Criminal Procedure Code and in the United States: Towards a New Understanding of Comparative Criminal Procedure", *New York Journal of International Law and Politics*, vol. 22, 1990, pp. 215-251; E. Amodio Ennio and E. Selvaggi, "An Accusatorial System in a Civil Law Country: The 1988 Italian Code of Criminal Procedure", *Temple Law Review*, vol. 62, n. 4, winter 1989, pp. 1211-1224; M. Fabri, "Theory versus practice of Italian criminal justice reform", in *Judicature*, vol. 77, n. 4, 1994.

same body, they are called magistrates (*magistrati*). Both have the status of public official and are considered part of the traditional state bureaucracy. During their careers, they can switch between prosecutorial and judicial positions as many as four times,⁵ subject to the consent of the Judicial Council⁶. Judges and prosecutors begin their career in the judiciary when they are about twenty-seven years old. A law degree is required. They also have to be successful in a public competition which stresses their knowledge of formal and abstract law.⁷ Salaries increase and advancement up the “career ladder” are substantially based on seniority.⁸ Even though a recent law reform⁹ claims to have introduced effective change in the evaluation process and, therefore, in the career advancement, empirical research needs to be undertaken to evaluate the actual impact of this reform.

THE MINISTRY OF JUSTICE: The other justice system organization that completes the institutional setting of the Italian judiciary is the Ministry of Justice; it is in charge of the organization and functioning of the judicial offices (procurement, technology, administrative personnel, budgeting etc.).¹⁰ It is a peculiarity of the Italian Ministry of Justice that almost all the executive positions are held by magistrates.¹¹

COURT AND PROSECUTORIAL SYSTEM STRUCTURE: The structure of the Italian judicial offices is organized as follows.

⁴ Prior to World War II, prosecutors were hierarchically subordinate to the Minister of Justice. The Italian Constitution enacted after the Fascist regime placed the public prosecutors within the judiciary.

⁵ This limit was recently introduced by the controversial Law n. 111, enacted by the Parliament on July 31st, 2007 (in particular art. 2 point 4 changes art. 13 of the Legislative Decree n. 160, 5 April 2006 enacted by the previous Government). This law has reformed several aspects of the organization of the judiciary (i.e. magistrates’ selection, transfer, evaluation, promotions, disciplinary, training).

⁶ The Judicial Council is the institution in charge of recruitment, promotion, transfers from judicial positions and has a disciplinary system for judges and prosecutors (art.105 Italian Constitution). The Council is considered the *self-government* body of the Judiciary, including both judges and prosecutors. It is the key player in all the policies that deal with members of the Judiciary. In particular, the Council decides about their transfers, appoints the head of the offices, subject to the formal consent of the Ministry of Justice, approves the internal *organizational schemas (tabelle)* which are a quite detailed description of the organization of the office and of the criteria used to assign cases within the courts and, partially, also within the Prosecutor’s Offices. Although the Council was mentioned in the 1948 Constitution, it was established only in 1959. It is composed of twenty-seven members: sixteen judges and prosecutors elected by their colleagues, eight law professors or lawyers with at least fifteen years of experience in the law profession elected by the Parliament, and three *ex-officio* members (ex officio members are: the President of the Republic, the President of the Supreme Court and the Chief of the Public Prosecutor’s Office attached to the Supreme Court). Every Council remains in office for four years, and members cannot be immediately re-appointed (art. 104 Italian Constitution). The composition and the electoral system of the Judicial Council were changed by statute no. 44 of 28 March 2002. Currently, the sixteen elected members of the judiciary must be as follows: 10 judges, 4 public prosecutors and 2 judges or public prosecutors working in the Supreme Court or in the Public Prosecutor’s Office attached to the Supreme Court. Members elected by the Parliament are elected at a joint session of the Parliament with a qualified majority of three fifths of all the members (about 950 people), or a majority of three fifths of the voters after the second ballot. The President of the Judicial Council is the President of the Republic, but for the day-to-day operations of the Council, the Constitution (art. 104) provides for the election of a vice-president from among the members elected by the Parliament. The Council has nine commissions which deal with the specific matters entrusted to the Council such as training, court organization, appointment of the head of the courts or Prosecutor’s Office etc., however, all the decisions must be taken by the plenary session of the Council. Such decisions can be appealed before the Administrative Court of Rome. The Judicial Council at the national level (*Consiglio Superiore della Magistratura*) must not be confused with the Local Judicial Boards (*Consigli Giudiziari*). In Italy, each judicial district has a Local Judicial Board, the members of which are three judges or prosecutors of the judicial district, elected by their peers every two years, as well as two members *ex officio*: the head of the Court of Appeal and the Chief Prosecutor attached to the Court of Appeal. Local Judicial Boards have a limited consultative function for the Judicial Council. They give opinions – almost always highly positive – for judges’ or prosecutors’ career advancements when they reach a certain seniority in the Judiciary. They also give opinions on the organization of the courts’ and prosecutors’ offices within the judicial district and on request, on the extra-judicial activities by the judges and prosecutors of the district as well as on the temporary allocation of a judge to a different office. They are also in charge of organizing the on-the-job training of the apprentice judges and prosecutors within the district.

⁷ G. Di Federico (2005), *Recruitment, Professional Evaluation and Career of Judges and Prosecutors in Italy*, in G. Di Federico (ed.), *Recruitment, Professional Evaluation and Career of Judges and Prosecutors in Europe: Austria, France, Germany, Italy, The Netherlands and Spain*, Bologna: Lo Scarabeo, pp. 127-158; C. Guarnieri (2007), *Professional Qualifications of the Judiciary in Italy, France and Germany*, in *Global Corruption Report 2007. Corruption in Judicial Systems*, Cambridge, Cambridge University Press, pp. 56-61.

⁸ After 28 years, every career judge or prosecutor reaches the highest salary level without any real evaluation. The automatism in the career ladder also implies that quite often judges or prosecutors do not change their position, even if they move up to the next rung in the career and salary ladder. In other words, they do the same job but with a higher status and salary. See G. Di Federico (2005).

⁹ Law n. 111, 31 July 2007, see footnote 5.

¹⁰ Cost. art. 110.

¹¹ See G. Di Federico G. and C. Guarnieri (1988), p.177.

A. LIMITED JURISDICTION FIRST-INSTANCE COURTS: The first single-judge court of limited competence is held by the Justices of the Peace (*Giudici di pace*).¹² There are 849 Justices of the Peace offices nationwide which have limited jurisdiction in civil and criminal matters. Justices of the Peace do not receive a monthly salary but are paid on the basis of their actual work (i.e. they receive a certain amount of money for each decision, written judgment and hearing).

B. GENERAL JURISDICTION FIRST-INSTANCE COURTS: The courts of first instance with general competence are called Tribunals (*Tribunali*). There are 165 of these all over the country,¹³ as well as 222 detached offices¹⁴. These courts sit either as a single-judge or a three-judge panel depending on the type of case. Within these courts, there are specialized units such as the Judge for Preliminary Investigations (*Giudice per le indagini preliminari*) and the Judge for Preliminary Hearings (*Giudice per l'udienza preliminare*). The Judge for Preliminary Investigations checks the work of the public prosecutors in many ways. For example, the judge must authorize tapping a suspect's telephone, pre-trial detention, and suspension of the investigation upon the prosecutor's request. The Judge of the Preliminary Hearing is in charge of the formal indictment of the suspect as well as application of special proceedings introduced by the 1989 Code of Criminal Procedure. Of the 165 courts of first instance, there are 93 units called Assize Courts (*Corte di Assise*) which have criminal competence in serious crimes such as murder and kidnapping that can entail a sentence ranging from 24 years to life imprisonment.¹⁵ Their composition includes two career judges and six citizen jurors. Of the 165 first-level courts of general competence, 26 are units called Revision Units (*Tribunale della libertà o del riesame*), which are in charge of revising court orders dealing with personal restraints within a judicial district.¹⁶ In addition, a reform¹⁷ has established a new special unit in only 12 of 165 courts of first instance and in 12 Courts of Appeal to deal with patents and intellectual property litigation.

The current court structure came into effect in July 1999. Previously, there was another court of first instance: the *Pretura*, a single-judge court with limited jurisdiction in civil and criminal matters. In 1999 the *Preture* were merged with the *Tribunali* (courts of first instance), creating just a single court of first instance of general competence.

C. GENERAL JURISDICTION FIRST-INSTANCE PROSECUTION OFFICES: Attached to each of the 165 courts of general competence are 165 Public Prosecutor Offices.

D. "SPECIAL JURISDICTION" PROSECUTION BUREAUS FOR ORGANIZED CRIME: In 26 of those Prosecutor Offices, there is a special antimafia team called the Antimafia District Bureau (*Direzione distrettuale antimafia*). Established in 1992, these bureaus oversee all mafia cases within a specific judicial district -- the geographical area of each of the 26 Courts of Appeal. The work of these 26 special teams is coordinated by a central office in Rome called the Antimafia National Bureau (*Direzione nazionale antimafia*), formally attached to the General Prosecutor's Office of the Supreme Court. This National Bureau is directed by an Antimafia National Prosecutor and, among other responsibilities, it promotes mafia investigations through intelligence work. To preserve the independence and autonomy of each Public Prosecutor, the Antimafia National Prosecutor has only a single deputy and exercises no hierarchical authority over the regional offices. For the same reasons, within each Public Prosecutor Office, the Chief Prosecutor has very limited, if any, hierarchical authority over the deputies.

F. "SPECIAL JURISDICTION" PRISONER SURVEILLANCE COURTS: A specialized competence over detainees and prisons has been granted to the so-called Surveillance Courts (*Tribunale di Sorveglianza*). They number 58 and are organizationally separate from the courts of first instance where judges (*Magistrato di Sorveglianza*) deal with all matters related to the treatment of detainees. The decisions of these courts are rendered by a single judge and may be appealed to a panel of four whose members include two career judges and two experts.

G. "SPECIAL JURISDICTION" JUVENILE COURTS: Civil and criminal cases with defendants between the ages of fourteen and eighteen years are handled by 29 Juvenile Courts (*Tribunale dei minorenni*), to which specialized Prosecutor Offices are

¹² The Justices of the Peace were introduced in the Italian justice system by statute n. 374, 21 November 1991, which came into effect in May 1995. The Justices of the Peace are temporary judges. They have to be qualified for the Bar to be appointed.

¹³ The Legislative Decree n. 491 of 3 December 1999 established two new courts of first instance with general competence (Tivoli and Giugliano). They were created nearby the courts of Rome and Naples, in order to decrease the huge caseload of these two courts. To date one of the two, the Giugliano court close to Naples, has never been in operation since it was established by statute in 1999. Therefore, theoretically, the courts of first instance with general competence are 166, but *de facto* they are 165 plus a "shadow court".

¹⁴ Only the hearings that require a single-judge court can be held in the detached offices of the "Tribunals".

¹⁵ There is also some exclusive competence for certain crimes which entail a prison sentence of at least ten years.

¹⁶ The "Revision Units" are not really separate organizational units within the courts; they are specific panels of three judges which decide on court orders dealing with personal restraints within a judicial district.

¹⁷ Legislative Decree no. 168 of 26 June 2003.

attached. Decisions are issued by panels of four whose members include two career judges and two *experts*, one male and one female, with professional expertise in social assistance, psychology, and related disciplines. Appeals from these courts are heard by a special unit of the Courts of Appeal.

H. FIRST-INSTANCE COURTS WITH “SPECIAL” SECOND-INSTANCE JURISDICTION: The courts of first instance, sitting as a single-judge benches, also function as second-instance or appeal courts for the decisions made by the Justices of the Peace.

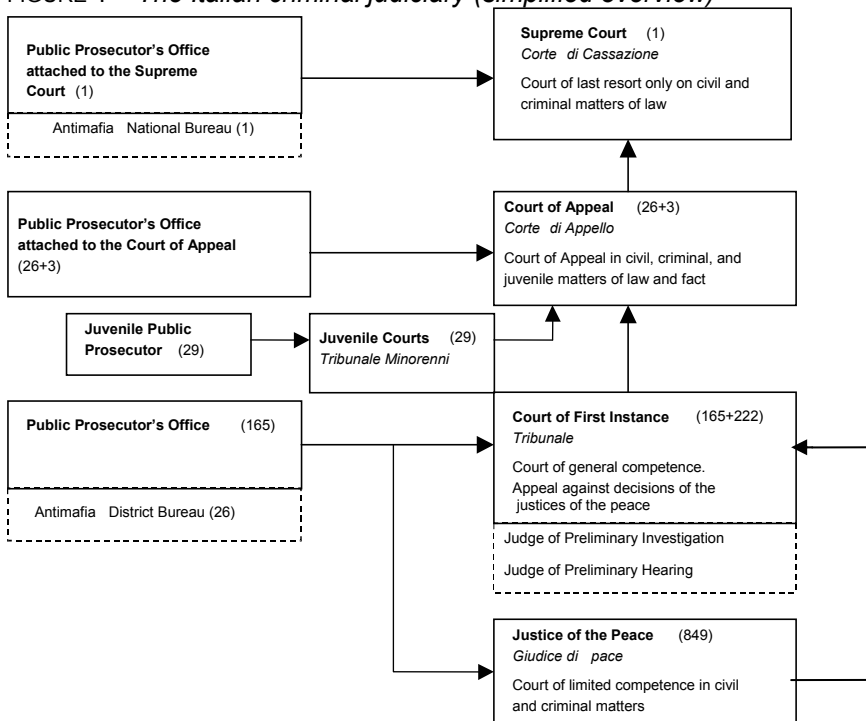
I. GENERAL JURISDICTION SECOND-INSTANCE OR INTERMEDIATE APPEALS COURTS: The 26 Courts of Appeal (*Corte di appello*) – and three detached divisions – function as appeal courts for decisions rendered by the courts of first instance (*Tribunali*). Within these Courts of Appeal, there are several specialized units, including the Appeal Courts of Assize (*Corti di assise d’appello*) which handle appeals from the Court of Assize of first instance, and the specialized juvenile units, which hear appeals from the Juvenile Courts. These various units of the Courts of Appeal sit in panels of three judges, with the exception of the *Corte di assise d’appello* which sit in panels of two career judges and six citizens who serve as jurors.

The appeal process considers both factual or evidentiary matters and legal issues. In effect, new evidence can be submitted during the appeals process, a practice that has the potential to significantly protract the length of the criminal process on the appellate level.

J. GENERAL JURISDICTION SECOND-INSTANCE OR APPEALS LEVEL PROSECUTION OFFICES: Attached to each Court of Appeal there is a Public Prosecutor Office which prosecutes cases on the appellate level.

K. GENERAL JURISDICTION SUPREME COURT OR COURT OF LAST INSTANCE: Italy’s highest court is the Supreme Court (*Corte di cassazione*), located in Rome. It deals with questions of law and conducts final appellate reviews of all provisional orders relating to personal restraints (art. 111 Cost.). The Supreme Court’s jurisdiction extends to ensuring the uniformity of how the law of the state is interpreted and applied.¹⁸ The Court is obligated to review all the pleadings that are appealed to it; it does not have a *writ of certiorari* discretion. This requirement generates a substantial caseload which, in turn, requires a disproportionately large court of final appeal. The Supreme Court currently has in excess of 300 judges, which is exceedingly high when compared with the terminal courts of appeals of other European judiciaries.

FIGURE 1 – *The Italian criminal judiciary (simplified overview)*



¹⁸ Notwithstanding Italy’s status as a country in the civil law tradition in which the *stare decisis* doctrine does not apply, precedents have always played a major role in passing judgments. In particular, the judgments by the Supreme Court have always affected the decision-making process of the trial courts.

CRIMINAL JUSTICE PROCEDURAL REFORM

A NEW CRIMINAL PROCEDURE CODE: In 1988, the Italian Parliament enacted a Code of Criminal Procedure with an effective date of October 24, 1989. This new Code superseded the 1930 Code that originally was drafted under the Fascist *regime* and amended several times after the Second World War to make it compatible with the post-war Constitution.

A. THE OLD CODE – LACK OF PROCEDURAL DUE PROCESS PROTECTIONS: The structure of the first Code (known as *codice Rocco*, from the Minister of Justice who played a major role in its preparation) was based on a non-adversarial or inquisitorial model and hierarchical officialdom.¹⁹ During a closed pretrial inquisitorial phase, evidence was gathered to determine whether a crime had been committed and, if so, by whom. Formally, a judge controlled the pretrial examination, performing the role of both judge and investigator. The defendant had no right to participate or even to be notified of the investigation. Without the presence of the defendant or defense counsel during the examination proceeding, interrogators could exert considerable pressure on witnesses who appeared before them. Following the examination phase, a trial proceeding was conducted for presentation of the evidence and structuring of a case on the basis of which the defendant could be convicted. The principles of orality and immediacy were abandoned; records and materials collected during the investigative phase became the basis for the verdict and sentence. The trial process merely confirmed what had taken place during the pretrial examination phase.²⁰

A series of Constitutional Court decisions issued between 1965 and 1972 increased the participation of the defense in the pretrial phase. “But while these decisions guaranteed greater protections for the defendant in the pretrial phase, they did nothing to temper the system’s exclusive focus on the pretrial phase”.²¹

B. ENACTING THE NEW CODE: Enacting the new 1989 Code was a complex and very lengthy process.²² Parliament began consideration of criminal procedure reforms in 1965, but did not formally authorize an effort to draft a new Code until 1974. The government completed a preliminary draft in 1978 that coincided with the beginning of a period of intense terrorist activity in Italy. After several delays, the final statutory deadline for completion and passage of the code expired. Nearly ten years later, in 1987, Parliament issued a new delegation of authority, and the following year, effective October 24, 1989, it approved the new Code of Criminal Procedure.²³

C. ANTICIPATED CONSEQUENCES OF IMPLEMENTING THE NEW CODE: The new Code reflected an effort to transition from an inquisitorial to an adversarial model of criminal procedure,²⁴ one that has its distinctive origins in liberal ideology and is considered a more functional and transparent litigation model for liberal democratic states.²⁵ The reform effort also was motivated by the enormous backlog of pending cases and the archaic and time-consuming procedural requirements of the old code. The enormous investment of time and effort required by various court procedural rules, and its harmful impact on due process rights and the ability of the court system to deliver timely justice – an impact for which Italy has been repeatedly condemned by the European Court of Human Rights – have contributed to multiple disastrous consequences which violate citizens’ legitimate expectations of their justice system.²⁶

¹⁹ M. Damaska (1986), *The Faces of Justice and State Authority*, New Haven, Yale University Press, p.17.

²⁰ W. Pizzi and L. Marafioti (1992). p. 3.

²¹ W. Pizzi and L. Marafioti (1992). p. 5.

²² M. Volcansek, “Decision-Making Italian Style: The New Code of Criminal Procedure”, *West European Politics*, vol.13, n.4, 1990, p. 33-45.

²³ W. Pizzi and L. Marafioti (1992), p. 5

²⁴ “The adversarial mode of proceeding takes its shape from a contest or a dispute. It unfolds as an engagement of two adversaries before a relatively passive decision maker whose principal duty is to reach a verdict. The non adversarial mode is structured as an official inquiry. Under the first system, the two adversaries take charge of most procedural action; under the second, officials perform most activities”. M. Damaska (1986), p. 3. See also, T. Weigend (1983), *Criminal Procedure: Comparative Aspects*, in, *Encyclopedia of Crime and Justice*, New York, Free Press, vol. II, p. 537-546. J. Merryman (1985), *The Civil Law Tradition*, 2nd. edition, Stanford, CA., Stanford University Press.

²⁵ J Miller, “Plea Bargaining and its Analogues Under the New Italian Criminal Procedure Code and in the United States: Towards a New Understanding of Comparative Criminal Procedure”, *New York Journal of International Law and Politics*, vol. 22, 1990, p. 218. M. Damaska (1983), *Adversary System*, in, *Encyclopedia of Crime and Justice*, New York, Free Press, vol. I, p. 25.

²⁶ G. Di Federico (1989), *The Crisis of the Justice System and the Referendum on the Judiciary*, in R. Leonardi and G. Giorgio (eds.), *Italian Politics: A Review*, Bologna, Il Mulino, p.26. See also, T. Weigend, *Prosecution: Prosecutorial Discretion*, in, *Encyclopedia of Crime and Justice*, New York, Free Press, vol. III, pp. 1272-1304.

D. ASSUMPTIONS: The decision to move from the old inquisitorial model to an adversarial one was based on two major assumptions: First, that the adversarial procedure is more compatible with democrat government; and second, that there was a pressing need to restore effectiveness and efficiency to the administration of criminal justice.

E. PRIMARY OBJECTIVES: The two primary objectives of the reform were (i) to terminate eighty to eighty-five percent of new criminal cases prior to trial by employing primarily Italian plea-bargaining (*applicazione della pena su richiesta della parti*), and (ii) to accelerate the trial process through the use of other special procedures created by the new Code such as direct trial (*giudizio direttissimo*); abbreviated or summary trial (*giudizio abbreviato*); immediate trial (*giudizio immediato*); and penal decree (*decreto penale*).

F. ANALYSIS: It is not clear how these legal reforms by themselves can make the judicial system more efficient and effective. Procedural law is just one of several factors that must be coordinated to effect a substantial change in the quality of justice; it may not be the most important one.

Changing from an inquisitorial to an accusatorial system, and from a written to an oral process, is complicated and difficult. These two models are substantially different. Table 1 summarizes some of the differences.

TABLE 1 – *Inquisitorial versus accusatorial process: some features of two ideal models*

<i>Inquisitorial</i>	<i>Accusatorial</i>
Offense against the State	Offense against the individual
Truth emerges from a long, segmented trial process organized in different installments	Truth emerges from an adversary process consolidated into a single continuous trial
Parties are different, the investigating judge seeks the truth	Parties are equal under the law
Judges dominate the process	Judges manage the process
Evidence is collected and reviewed by the judge before the trial	Evidence for its case is collected by each side prior to and presented during the trial
Primarily a written process	Primarily an oral process
Secret dossier	Public trial
Jury trials are exceptional	Jury trials are more frequent
Written judgment and sentence	Oral verdict or written judgment and sentence
Appeal on facts and law; new evidence allowed	Appeal on law; new evidence not allowed

Perhaps the most important and difficult element in the reform process is the initial implementation which can result in its success or failure. At this important juncture, Italy faced some enormous problems that, in hindsight, could have been foreseen.

THE INITIAL IMPACT

A. THE DIFFICULT RELATIONSHIP BETWEEN PROSECUTORS' OFFICES AND THE POLICE: One problem with the former Code was the discretion it allowed the police with regard to how much time they could take to file criminal complaints. It was considered a source of possible abuse and a violation of the constitutional provision of "mandatory penal action." According to the Italian Constitution,²⁷ the prosecutor must file a criminal complaint if there are reasons to suppose that a crime has been committed.

²⁷ Cost. art. 112.

This principle of *mandatory penal action* or *compelling initiative of criminal proceeding* by prosecutors was a reaction to the Fascist period, during which prosecutors were under the control of the executive power and many abuses occurred.²⁸ This principle should have guaranteed the equal treatment of citizens.²⁹ “In fact, however, penal actions in Italy are largely discretionary. The magistrates to whom this task is assigned institute proceedings not only on request from outside (reports and accusations from the police, private citizens or public authorities) but also on their own initiative. In other words, it is quite legitimate for them to carry out, with the greatest independence, investigations of any kind, of any citizen, using the various police forces to verify whether the offenses they (more or less justifiably) assume to exist have actually been committed.”³⁰

To reinforce the monopoly over initiating criminal proceedings, the 1989 Code of Criminal Procedure mandates that a complaint (or notice) that a crime was committed must be filed in the prosecutor’s office by the police within forty-eight hours.³¹

The major objectives of this rule were: (i) to eliminate the discretion of police agencies which are arms of the executive power, in determining the pace of the investigations; and (ii) to involve the prosecutor in the investigations as soon as possible in order to improve the administration of justice by advancing the process.

In practice, however, the rule did not fulfill the expectations. In the first two days after the Code went into effect, police agencies, in their efforts to comply with the new forty-eight hour rule, overwhelmed the prosecutors’ offices – particularly those in the courts of limited jurisdiction which handle about 85% of the entire caseload – with crime reports that they had collected throughout the year. As a consequence, prosecutor offices were flooded with thousands of documents that, under the law, were supposed to be recorded “immediately”³² by hand in an archaic docket registry book.³³ In effect, although crime reports were effectively filed in the prosecutors’ offices by the police within the required forty-eight hours, most languished without action for six months or longer while the prosecutors struggled to deal with the backlog.

Moreover, even if the prosecutor’s office could immediately record all the crime reports, it is hard to believe that they would be able to manage the huge caseload effectively. (In some cities, each prosecutor already has a caseload of more than 5,000 cases.)

This was not the only problem inadvertently created with implementation of this new rule. Because the prosecutor is legally in charge of managing the investigations, the police determined it was unnecessary to conduct any investigation or assemble evidence prior to receiving the prosecutor’s instructions. As a consequence, the police were losing or misplacing important pieces of information that should have been collected and secured immediately following the crime. In addition, conflicts between police officers and prosecutors had been increasing. Many police officers had little confidence in the ability and competence of prosecutors to lead criminal investigations, in part because the only training many of them received was on the job.

After three years of trouble, the government finally amended the forty-eight hour rule.³⁴ Now the police must transmit a crime report to the prosecutor’s office “without any delay.” This amendment helped to adjust the flow of reports, but it failed to address the fundamental challenge of how to respond effectively to the mandatory criminal action requirement which compels courts and prosecutors’ offices to deal with an enormous paperwork burden to the detriment of the substantive investigation process.³⁵ The best intentions of the Italian Parliament notwithstanding to promote the principle that all crimes have to be prosecuted in a timely manner, the Italian Judiciary has tightened itself in a vicious loop.

²⁸ See G. Di Federico and C. Guarnieri (1988), p. 171.

²⁹ M. Damaska, “The Reality of Prosecutorial Discretion”, *The American Journal of Comparative Law*, vol.29, 1981, p. 119-138. See also, T. Weigend (1983), p. 1285

³⁰ See G. Di Federico (1989), p. 28; and also C. Guarnieri and P. Pederzoli, *Judicial Activism in Italy: Some Illustrative Cases*, paper presented at the European Consortium for Political Research, Rimini, Italy, 5-10 April 1988.

³¹ See the Code of penal procedure (C.p.p.) art. 347.

³² See the Code of penal procedure (C.p.p.) art. 335.

³³ From 1989 the Ministry of Justice has undertaken a massive investment in information technology with very limited tangible result. D. Carnevali, F. Contini e M. Fabri (2006) (a cura di), *Tecnologie per la giustizia. I successi e le false promesse dell’e-justice*, Milano, Giuffrè; M. Fabri e F. Contini, “Tecnologie e organizzazione giudiziaria in Italia e in Europa”, in *Sociologia del Diritto*, n. 2, 2006, pp. 129-168. M. Fabri (2004), *Information and Communication Technology for Justice: the Italian Experience*, in A. Oskamp, A.R. Lodder and M. Apistola (eds.), *IT Support of the Judiciary*, The Hague, Asser/Cambridge University Press.

³⁴ Law n. 356, 7 August 1992.

³⁵ Although reliable data are not available, it seems that about 95% of crime reports with unknown perpetrator submitted to the prosecutors’ offices are dismissed by the judge without any real investigation.

B. FORECASTING CASELOAD AND ANTICIPATING JUDICIAL NEEDS: Many prosecutors' offices were unable to manage the unanticipated increase in filings because their offices were insufficiently organized, staffed, and equipped. No legislative impact studies had been undertaken to assess what resources would be required to process the additional caseload. The Ministry of Justice does not have a functional system to determine judicial needs and to forecast judicial caseloads. Organizationally, the Italian Judiciary suffers from an inadequate strategic planning function, resulting in the failure to adequately orchestrate resources to deal successfully with the practical requirements of implementing the new Code. Indeed, a major judicial administration concern is the lack of reliable data on extent to which implementation of the new criminal code has been successful and its overall impact on the performance of the judicial system. Installation of automated caseload management systems in recent years has led to modest increases in the reliability and availability of data. The primary cause of the modest increases appears to be not so much the unavailability of technology to handle data, but the judges and court officials have not yet come to recognize how important the recording of accurate and complete case information data can be in helping to manage institutional operations and in anticipating future requirements. In short, in many courts, accurate data collection and preservation appear to be viewed as a waste of time rather than an investment.

Pursuant to the Constitution, the Ministry of Justice is responsible for the organization and the functioning of the judicial and prosecutorial system. However, the Ministry lacks a qualified technostructure³⁶ that can be useful to analyze, design, plan, and implement progressive change in an organization. Almost all the executive positions in the Ministry of Justice (e.g. Director of the Prison Department, Director of Information Technology, Director of Statistics etc.) are held by magistrates who, with some exceptions, have neither sufficient training nor experience essential to their positions. Rather, they bring to them an archaic and formalistic approach which impedes their success and the adoption of flexible and progressive management principles and practices in the Ministry. This lack of organizational sensitivity and management competence give rise to problems in key areas of administration such as strategic planning, information technology, performance appraisal, finance and budget, and human resources management. The resulting dysfunctions, which undermine initiatives for dynamic reform, linked with the inadequate performance of the criminal justice system, were foreseeable had the legislators, legal scholars, and judicial officials who wrote the 1989 Code and who were in charge of the implementation process, adopted a more pragmatic, proactive, and goal-oriented approach.

Italian policy makers and criminal justice system executives continue to maintain that the function of criminal procedure rules is to yield a deductive and abstract intellectual effort rather than viewing them as a set of important organizational tools that facilitate the efficient administration of criminal justice. Therefore, very little attention has historically been paid to substantive application of the rules and to their organizational aspects.

THE ROLE OF DEFENSE ATTORNEYS, PROSECUTORS AND JUDGES

A. DEFENSE ATTORNEYS

Another major problem that emerged with adoption of the new Code was the balance between the prosecutor and the defense attorneys, a problem that was exacerbated by the changing role of judges. In the adversarial model, criminal defense attorneys play a very active role. They conduct investigations to gather exculpatory evidence, and they must be prepared to mount a vigorous defense that includes examining their own and cross-examining prosecution witnesses. To collect exculpatory evidence, they have to acquire investigative skills and recruit professional private investigators to assist and support them in seeking evidence.³⁷ In Italy, prior to adoption of the new criminal code there were few such professional investigators because the existing inquisitorial model did not need them. As a consequence, defense attorneys had difficulty finding qualified investigators. That shortage has largely been eliminated, but for a number of years following implementation of the code, there were inadequate investigative resources available for the defense. Italy does not have a public defender system. Where an indigent person is charged with serious criminal behavior, private-sector defense attorneys are appointed by the court from a list prepared by the local bar association.

B. PUBLIC PROSECUTORS

Public prosecutors in Italy enjoy a privileged status among their Western European colleagues. Their status as judges provides them with status and benefits that include career protections, professional independence, immunity from liability, etc. In addition, the Constitutional principle of mandatory penal action authorizes them to exercise broad discretion in setting priorities and committing criminal justice system resources (e.g. wiretapping, number of police officers to involve in an investigation etc.) to the process of conducting a criminal investigation. Implementation of the new Code enhanced and strengthened their roles. For example, a prosecutor's decision to dismiss a case, to incarcerate a defendant for pretrial detention, or to authorize a wiretap on a telephone, must be reviewed by the preliminary investigation judge

³⁶ H. Mintzberg (1979), *The Structure of Organizations*, Englewood Cliffs, NJ., Prentice Hall.

³⁷ A new law was enacted by the Parliament (n. 397, 7 December 2000) to better regulate the investigations carried out by the defense lawyer.

(*giudice per le indagini preliminari*). This judicial position – a creation of the 1989 Code that eliminated the traditional *investigating judge* of the inquisitorial tradition – is authorized to indict a defendant when the prosecutor has collected enough evidence to go to trial. These checks by a judge are considered necessary, because, as pointed out before, the prosecutor is compelled to initiate a criminal proceeding under the Italian Constitution; therefore, prosecutors cannot dismiss a case without judicial control. In practice, however, these judicial checks are often little more than legal formalities which are easy to overcome. Indeed, judicial controls are now exercised routinely and primarily only on the amount of evidence that the prosecutor intends to introduce.

The role of prosecutors has also been strengthened by what it has been called a *countereform*. This *countereform*, which reverted some of the oral innovations of the new Code back to written processes, was determined mainly by Constitutional Court decisions³⁸ and by a government law in the aftermath of the assassination of the General Manager of Criminal Affairs of the Ministry of Justice, Giovanni Falcone, and his colleague, Paolo Borsellino, who for many years led the investigations into mafia crimes in Palermo.³⁹

It is impossible to analyze in this brief overview all of the details attending the significant changes that occurred as a consequence of this tragedy. One of the most important provides that in organized crime trials, certain categories of evidence collected for other trials or during the preliminary investigations can be introduced in written form, primarily for the protection of potentially targeted witnesses who otherwise would have to appear in court and offer oral testimony. This was a substantial retreat to certain provisions of the inquisitorial model, and it is perceived as weakening the role of defense attorneys and strengthening that of prosecutors. Here it is important to point out how the full accusatorial and inquisitorial models are two ideal opposites on a *continuum* within which every criminal judicial system eventually locates the position which best suits its criminal justice system.

It also bears brief mention that an amendment to the Constitution (n. 2, 23 November 1999) modified article 111 of the Constitution by introducing a provision for the *fair trial*, similar to article 6 of the European Convention of Human Rights, to balance the impact of the inquisitorial *countereform*.⁴⁰

C. JUDGES

In the inquisitorial model, the public hearing is much less important than in the adversarial model. In the former, the judge already knows and understands the case prior to the trial. Documents and transcriptions of depositions taken before the investigating judge are part of the file. The public hearing is the end of a long process that transpires in successive stages. Essentially, the trial in the inquisitorial procedure is something quite different from the public accusatorial model trial. “The file of a case [was] the nerve center of the whole process, integrating various levels of decision making [...] The trial was not concentrated, but organized in installments. After a matter has been considered at one session, new points can emerge to be the subject of another session, and so on, until that issue seems thoroughly clear”.⁴¹

In the adversarial model the trial, rather than the case file, is the focal point of the litigation process. “Attorneys on both sides must have good oral skills. The drama of a case is concentrated on few hearings and “requires that decisions be based largely on fresh impressions, including surprise, shock, the spell of superficial rhetoric, and, perhaps, even theatrics”.⁴² In sum, the litigators’ performances have to be remarkable to allow the decision maker, the judge, to be informed of the details of the case through the parties’ process of evidentiary presentation and argument.

The difference between these two opposing models is substantial. To trained observers who watch videotaped trials and various interviews, trial attorney performance in general and public prosecutor performance in particular requires several years of professional trial experience to build up to a level that is acceptable and appropriately competitive. Making the transition from a file-based process to an oral-based one is time consuming and requires commitment and effort. In the United States, only a minority of practicing lawyers learn or are trained to function as active trial-level litigators. Trial-level prosecutors are provided fairly significant training in how to present the case to court, to examine their own witnesses, to cross-examine defense witnesses, and to address a jury.⁴³

³⁸ The Constitutional Court has played a major role in the modification of the Code of criminal procedure. Between 1989 and 1994 the Constitutional Court has touched more than 40 provisions of the Code. For an analysis of the main Constitutional Court decisions and the impact on the Parliament see. P. Pederzoli (2006), *Corte Costituzionale e Parlamento*, in C. Guarnieri e F. Zannotti (a cura di), *Giusto processo?*, Padova, Cedam, pp. 115-138.

³⁹ Law n. 356, 7 August 1992 that was inspired by the law decree n. 306, 8 June 1992.

⁴⁰ See C. Guarnieri e F. Zannotti (2006) (a cura di), *Giusto processo?*, Padova, Cedam.

⁴¹ M. Damaska (1986), p. 56.

⁴² M. Damaska (1986), p. 51.

⁴³ For example, the training offered by The National College of District Attorneys at Houston, Texas.

The poor performance of Italian prosecutors in this transition to the adversarial model, linked with the civil law tradition where judges play a far more proactive role during the trial (they are responsible for developing the evidence, calling and questioning witnesses, etc.), generated another problem. Judges are supposed to remain neutral in an adversarial model, but in Italy, given the inertia of the old system, they frequently question witnesses directly, reverting back to the traditional inquisitorial model.⁴⁴ Here again, the criminal law reform required adaptation to and acquisition of new skills and patterns of actions⁴⁵ which cannot not be learned and integrated overnight.

THE CALENDAR AND THE TRIAL RECORD

Making the transition to the oral process from the written process anticipates a much greater need for adequate preparation and extemporaneous performance skills. To adequately organize and prepare, it is very important to design and implement an effective calendaring system as well as a verbatim trial recording system that is reliable, accurate, and complete.

A. CALENDAR MANAGEMENT

In several Italian courts, managing the calendar in a manner consistent with the new oral process remains an elusive objective for prosecutors, judges, police officers, counsel, and even witnesses. Effectively scheduling events for the investigation, pretrial hearing, and trial calendars is critical to effective management of the pace of litigation. It permits the prosecutor who led the investigation to easily track the case all the way to court.

In Italy, the case is initiated by the prosecutor's office. If not carefully managed, it may generate calendar definition problems. A review of the various stages of case processing clarifies what these problems are.

The prosecutor who has a major role in the investigation typically determines when to file the case in court.⁴⁶ The case is randomly assigned to a preliminary hearing judge who determines whether to indict the defendant or dismiss the case. If the judge decides to indict the defendant, the case will be assigned to a trial division for public hearing. Because the preliminary investigating judge, the trial division, and the prosecutor do not share an integrated calendaring and scheduling system and because there is no specialization by criminal case type or jurisdiction, coordinate their respective activities and scheduled is a difficult and time-consuming proposition, thus delaying prompt case processing. For example, five different cases assigned to the same prosecutor could be assigned to five different preliminary hearing judges, as well as to five different trial divisions, and all of them have independent calendars. As a consequence, it is not unusual for the same prosecutor to have two or more scheduled hearings in different courts at the same time or at overlapping times. Because he or she cannot simultaneously be present at the same time in different courtrooms, there incidence of adjournments is very high; moreover, where a substitute prosecutor is designated who has insufficient time to become familiar with the particulars of the case, his or her performance frequently is inadequate.

B. THE TRIAL RECORD

Also very important for the trial process in an adversarial system is the manner in which the oral record is taken and preserved. In the courts of the United States on both the state and federal levels, a variety of recording systems are deployed, ranging from the traditional stenotyping to the most advanced CAT (Computer-Aided Transcription) and CIC (Computer-Integrated Courtroom) systems to digital audio and videotape court reporting. The oral trial needs a recording system that is reliable, complete, accurate, and easy to use,⁴⁷ among other reasons for purposes of presenting a clear and complete record of the trial if the decision in the case is appealed.

Unlike the adversarial model, the inquisitorial procedure, which relies heavily on content of the file, can utilize short summaries of the oral discussion and witness testimony rendered in a hearing because most of the documentation is the dossier.⁴⁸ In most court systems that continue to rely on the inquisitorial model, the presiding judge will dictate short summaries of the proceeding to a court clerk who records them either in handwriting, on a typewriter, or on a PC. The

⁴⁴ See C.p.p. art. 506.

⁴⁵ C. Argyris and D. Schon (1978), *Organizational Learning: A Theory of Action Perspective*. Reading, MA., Addison-Wesley.

⁴⁶ For minor cases the public prosecutor can decide to overcome the filter of the preliminary hearing judge and ask for a trial date directly to the judge.

⁴⁷ See W. Hewitt (1990), *Videotaped Trial Record*, Williamsburg, Virginia, National Center for State Courts; J. Maher (1990), *Do Video Transcript Affect the Scope of Appellate Review? An Evaluation in the Kentucky Court of Appeal*, Williamsburg, VA., National Center for State Courts; M. Greenwood, J. Horney et al. (1983), *A Comparative Evaluation of Stenographic and Audiotape Methods for United States District Court Reporting*, Washington, D.C., The Federal Judicial Center; K. Stuart and L. Olson (1983), "Audio and Video Technologies in the Court: Will Their Time Ever Come?", in *The Justice System Journal*, 8, p. 287-307. M. Fabri, Applicazioni di tecnologie audiovisive negli uffici giudiziari, in *Working Papers IRSIG-CNR*, Bologna, Lo Scarabeo, n. 3, 1994, pp. 1-20.

⁴⁸ M. Damaska (1986), p. 33: "In the great majority of Continental countries [...] The integrity of a powerful central authority was thought to require strict governance by rules [...] As a bureaucratic maxim of the period asserted: *What is not in the file does not exist*".

risk, of course, is that the judge's summarized description may contain biases or comprise an incomplete record of key witness testimony. For that reason, some inquisitorial-based systems are adopting verbatim recording systems to ensure the accuracy of the record.

The new oral trial model has forced the Italian courts to address the recording problem. The legislators, in part due to lack of useful information about state-of-the-art recording technology, selected stenotype as the standard and, for particular events, audio or video recording with a summary account of the interrogations.⁴⁹ The Ministry of Justice then recognized that there was an insufficient number of skilled stenotypists to staff the nation's courtrooms. The Ministry then rushed to procure and test audio-recording systems for the courts and to train courtroom staff in their use. Some courts took the initiative to locate and enter into contracts with free-lance reporters. A few months later, the Ministry sponsored pilot testing of videotaping systems in six courts. Following relatively successful results of the pilot test at the end of calendar year 1992, the Ministry of Justice purchased eighty of these video systems to deploy in the trial courts.

Judicial assessments of these different systems are as varied among judges in Italy as they are among judges in the United States. Generally speaking, most Italian judges who understand the role and function of the adversarial model prefer the videotaped record. They find it helpful in complex cases and particularly useful in organized crime or mafia trials where visual communication is extremely important. However, it is necessary to revise the law to make the videotape record really useful both at the trial and at appeal levels. The primary problem is the transcript which is still considered necessary even where video or audio recording is made. Judges, prosecutors, and attorneys have relied on paper for so long that transferring to an electronic recording involves too much change too quickly. Over time, each court appears to have migrated to a hybrid that responds to the needs of its judges, leaving justice system officials with a heterogeneous mix of systems that is costly to operate, administer, and maintain.

THE ITALIAN SPECIAL PROCEEDINGS

A major purpose of the new Code was to create new proceedings that would serve to help reduce enormous pending criminal case backlogs and to accelerate processing of the caseload. The Code introduced alternative proceedings to the trial referred to as "special proceedings."⁵⁰ Their goal is to reduce the number of criminal cases that go to trial by using a variety of abbreviated procedures designed to encourage agreement among the parties. Table 2 summarizes the different special proceedings available and their main features. This paper cannot describe or analyze all of them; it focuses on the Italian version of plea-bargaining.⁵¹

PLEA BARGAINING: Italian plea-bargaining is very different from the version of plea-bargaining generally utilized in the United States. Although the goal is supposed to be the same – settling cases before trial – the rules that govern the two systems and their respective effects are quite different. Italian plea-bargaining allows the defendant to opt for, at the most, a one-third reduction in the sentence he otherwise would receive based on the charges in the indictment. The reduced punishment cannot exceed five years; otherwise, the plea-bargaining is not applicable.⁵² Unlike plea-bargaining in the United States, Italian prosecutors cannot bargain by reducing the number or kind of charges. In addition, the Italian model permits defendants to bargain pleas with the judge, even when the prosecutor does not consent.⁵³

⁴⁹ See C.p.p. art. 134.

⁵⁰ For a summary explanation of the special proceedings see W. Pizzi and L. Marafioti (1992), p.18-26.

⁵¹ See also, J. Miller., "Plea Bargaining and its Analogues Under the New Italian Criminal Procedure Code and in the United States: Towards a New understanding of Comparative Criminal Procedure", *Journal of International Law and Politics*, vol.22, 1990, p.215-251.

⁵² See C.p.p. art.444. This article of the 1989 Code has been amended with the Law n. 134, 12 June 2003. Up to 2003 the plea bargaining could apply to crimes that, after the one third reduction, entail a punishment up to two years imprisonment, the law n. 134 has enlarged the use of plea bargaining to crimes that entail punishments up to five years imprisonment.

⁵³ See C.p.p. art. 448.

TABLE 2 - Italian special proceedings: main features

<i>Proceeding</i>	<i>Usage</i>	<i>Trial</i>	<i>Sentence</i>	<i>Appeal</i>
<i>Decreto Penale – Penal Decree</i>	Cases where a fine is due	No trial	Fine (50% reduction in what should be paid)	No appeal allowed
<i>Applicazione della pena su richiesta delle parti – Plea Bargaining</i>	Cases where the sentence, after 1/3 reduction, does not exceed five years in prison	No trial, but plea bargain is possible just before the opening statements	No sentence, but the judge can review the plea bargain	No appeal allowed under parties' agreement
<i>Giudizio Abbreviato – Abbreviated Trial</i>	All cases except those punishable by a life sentence	No trial; the judge uses only the dossier	Verdict and written judgment, sentence reduced by 1/3	Appeal is allowed with some restrictions
<i>Giudizio Direttissimo – Direct Trial</i>	Defendants either are caught in act or confess	Adversary trial	Verdict and written judgment	Appeal is always allowed
<i>Giudizio Immediato – Immediate Trial</i>	Cases with overwhelming evidence	Adversary trial	Verdict and written judgment	Appeal is always allowed

A very important aspect of plea bargaining has not been adequately considered in Italy. To effectively utilize plea-bargaining to decrease the backlog of pending cases that are tried, it must be considered from the *hurdles race* perspective. In the United States, from initial filing of the charge through the preliminary hearing or indictment to the time of the trial, prosecutors may repeatedly approach the defendant with variations of a plea-bargain. Many prosecution offices as a matter of policy, make their best, most lenient offer early in this sequence. The longer the defendant waits, the greater the likelihood that the generosity of the original plea-bargain offered will be diminished. There is an inverse relationship between the amount of work the prosecutor invests in the case and how generous the offer is likely to be. There is little utility in bargaining when the trial is imminent – the prosecutor is prepared and all the paper work has been completed and filed with the court.

In Italy, plea-bargaining is not conducted in the context of a *hurdles race*. Defendants can plea-bargain or consent to the other special proceedings without penalty as late as the day of trial before the judge and either with or without the prosecutor's consent.⁵⁴ To that extent, no incentives exist to motivate defendants to opt for alternatives to trial, especially if they are not being held in pretrial confinement. Defense attorneys, unless they are court-appointed counsel, have no incentive to settle cases because they can earn more if the case is brought to trial. The only strong incentive to plea bargain is triggered when a defendant is caught *red-handed* in committing a crime because a plea bargain will result in reducing the punishment by one-third where the likelihood of being convicted is very high.

Plea bargaining, as well as the other special proceedings, have only slightly diminished the number of cases that went to trial in the first years of the implementation of the Code.⁵⁵ Things have changed during the years, particularly after the 2003 reform that enlarged the possibly to plea bargaining, with an average of about 35% of criminal cases brought before

⁵⁴ See C.p.p. art. 446.

⁵⁵ Although reliable data on the use of plea bargaining in all types and phases of proceedings were, and still are, scarce, from October 1989 to December 1993, the average nationwide percentage of plea-bargainings, on the total of the prosecutors' office filings to the courts of limited jurisdiction (*preture*) was less than 1.5% and less than 4% for the courts of general jurisdiction (*tribunali*). The other special proceedings also were not very successful. From October 1989 to December 1993, in the courts of limited jurisdiction there were 0.3% *giudizi abbreviati*, 1.9% *direttissime*, 25.1% *decreti penali*. In the courts of general jurisdiction, there were 1.5% *giudizi abbreviati*, 3% *direttissime*, 4.6% *decreti penali*, 2.6% *giudizi immediati* (Ministry of Justice, Monitoring Office, Criminal Division, 1994).

the judge that are disposed by special proceedings.⁵⁶ However, this percentage is still too low to give some relief to the overwhelmed criminal caseload, which still suffer of an outstanding number of pending cases, an extremely slow length of the procedure and a consequent huge percentage of criminal case that end because they go over the statute of limitation.⁵⁷ The integrity of the justice system is strongly diminished under these circumstances.

CONCLUSION

This paper has addressed important issues that have confronted and continue to confront Italian prosecutorial offices and courts since implementation of the 1989 Italian Code of Criminal Procedure. The Code was designed to address major problems with which the Italian Courts were wrestling, including enormous pending case backlogs and unnecessarily lengthy proceedings, by adopting special procedures and an adversarial model.

The Italian experience illustrates that assuming that the substitution of the oral for the paper process for purposes of accelerating the pace of litigation and improving the administration of justice was both wrong and naive. On the contrary, if criminal justice reform efforts are not adequately researched, planned, organized, and managed, the overall consequences can increase rather than diminish the difficulties with which the criminal justice system must deal. Substituting the oral process is just one of many important steps that may have to be taken to effect sustainable improvements in the administration of justice. A prime lesson learned in Italy is that it makes no sense to change the criminal procedures rules without simultaneously reforming the institutional roles of prosecutors, judges, and defense counsel.

The legal formalism that pervades the Italian justice system saddled the 1989 Code with rules changes that have been shown to not work in practice. The Constitutional principle of mandatory penal action requirement imposed on prosecutors generates enormous paperwork to the detriment of substantive action by law enforcement. Implementation of this Code provision has demonstrated that this ideal principle is impractical and does not work in practice. Conflicts between prosecutors and police agencies have been emerged as a result of the prosecutors' expanded role in managing investigations. Italian plea-bargaining and other delay reduction measures under the rubric of "special proceedings" have not fulfilled their initial expectations of reducing the number of cases that proceed to trial. The Italian experience also has show that cultural traditions and practices are often difficult impediments for lawyers and magistrates to overcome when attempting to integrate into an old system fundamentally new practices and procedures that may be perceived as counter-intuitive and questionable. Judges have complained about prosecutors' poor performances during the oral trial process. Their substandard performance detracts from the quality of the public hearing and may impact the judges' ability to reach the correct decision. On the judges' side, they also had several difficult transitions to make in adapting to their new adversarial role.

"By definition, a reform is intended to cause change, and, in contrast with normal behavior, change conveys elements of risk and uncertainty that, themselves, tend to inhibit action [...] one must plan a reform with specific attention to normal behavior within the system to which the reform is to be applied".⁵⁸ In the Italian case the negative impact of these drawbacks might have been minimized had more attention been focused in developing the Code, planning for its implementation, and preparing and training the key players.



⁵⁶ It is a rough calculation based on the gross data supplied by the the Statistical Office of the Ministry of Justice at: www.giustizia.it/statistiche/statistiche_dog/2006/agpenale/nazionalepen.xls

⁵⁷ According to a forecast made by some chiefs of public prosecutors' offices before the Judicial Council, in few years 75% of criminal cases will be dismissed because they exceed the statute of limitation.

⁵⁸ R. Nimmer (1978), *The Nature of System Change. Reform Impact in the Criminal Courts*, Chicago, American Bar Foundation, p. 180.

Theme: Reform, Change Management

Judicial System Restructuring and Modernization in Abu Dhabi

By Lawrence Groo, Abu Dhabi Government Restructuring Committee, Program Management Office¹

Abstract

The purpose of this article is to provide a practical overview of the recently initiated modernization of Abu Dhabi's judicial system. Beginning in 2007, Abu Dhabi's Government launched a comprehensive effort to transform the Emirate's judicial system. While the implementation of these reforms is ongoing, with the adoption of the law in May 2007 establishing the new judicial architecture the initial phase of the modernization program is already complete. The restructuring process encompasses court management and administration reform, a new judicial training regime, a redesigned organizational structure for the Emirate's Judicial Department and courts, and the establishment of a system-wide strategic planning and budgeting process. Many of these initiatives are supported by applying advanced IT-based applications. Given the early achievements and ambitious broader aims of the restructuring process, Abu Dhabi's example is relevant not only to the other Emirates within the Federal UAE system, but also within the context of the wider Middle East region.

I. Introduction

In 2007 the Government of Abu Dhabi launched a comprehensive restructuring and modernization program with the objective of transforming the Emirate's judicial system. This program envisions the improvement of court operations and administration, judicial training, performance management and strategic planning, as well as overall judiciary organization and staffing. Advanced information technology applications were identified as integral tools to support improvements in all of these areas. Collectively, the program was designed to achieve a more effective judicial system and enhanced rule of law.

While the implementation of the associated reforms is ongoing, with the adoption of the law in May 2007 establishing the new judicial architecture the initial phase of the modernization program is already complete.² The purpose of this article is thus to (1) outline the aims of this restructuring and modernization effort (Section III); (2) to describe the achievements of the program to date (Section IV); and (3) to note reasons for the program's initial success, ongoing challenges, and to place Abu Dhabi's example within the wider context of the Middle East (Section V).

II. Overview of Abu Dhabi's Judicial System

The Emirate of Abu Dhabi is the largest of the seven Emirates within the United Arab Emirates, and Abu Dhabi city is the capital of the UAE. Until the mid-20th century, the Emirate's population was largely dependent on date farming, camel herding and fishing and pearl diving in the Arabian Sea. In this earlier era, laws were primarily tribal-based and enforced in tribal courts. The economic development of the Emirate shifted dramatically following the discovery of oil in 1958. Today the Emirate has nearly nine percent of total known global oil reserves, and features one of the highest per capita incomes in the world. Bolstered by strong oil prices and significant domestic investment in infrastructure, urban development and cultural and educational sectors, Abu Dhabi has one of the world's fastest growing economies. As of late 2007 there is more than \$200 billion in planned urban developments (accounting for close to 30% of development in the wider region), including a new cultural district in the city of Abu Dhabi that will feature the world's largest Guggenheim museum, a branch of the Louvre museum, and several other world-class cultural destinations. The Emirate is also developing a number of strategic sectors, launching important initiatives with leading partners in the fields of alternative energy (Massachusetts Institute for Technology), medicine (Cleveland Clinic), education (Sorbonne University), and aerospace technology (Boeing). Notwithstanding this phenomenal growth and economic transformation, the local population maintains a strong connection with traditional local Arab culture and Islam. There are approximately 1.8 million inhabitants, a majority of which are expatriates; there are 400,000 citizens.

Within this remarkable economic and demographic context, Abu Dhabi's modern legal and judicial framework is predicated on the UAE's Federal Constitution, adopted in 1971. In common with other legal systems in the Middle East, the judiciary is largely based on the continental European civil law model. The system is divided between civil, criminal

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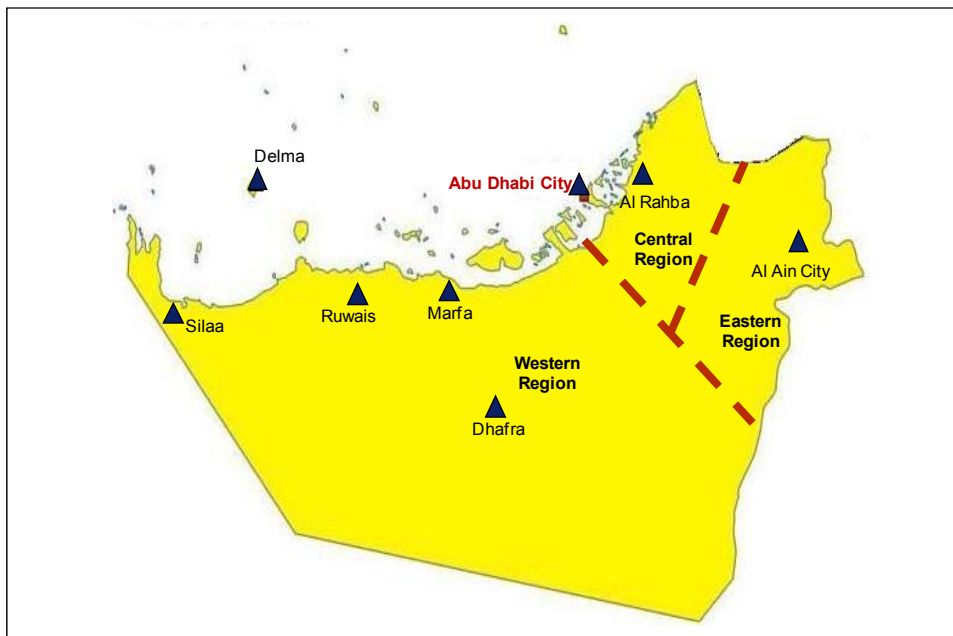
² Law No. 23, April 29, 2007.

and sharia jurisdiction, with the latter focused primarily on family, inheritance and personal status matters. As in other Federal states such as Canada and Malaysia, under the Constitution there are both Federal and local courts, although the former exist only in four of the seven Emirates. The Emirates of Dubai, Ras Al Khaima and, most recently, Abu Dhabi, have opted to maintain local court systems under the Federal Constitution, whereas the other four Emirates (Sharjah, Umm Al Qaiwain, Fujairah, and Ajman) feature Federal courts. The UAE's Federal Supreme Court tries cases pertaining to Constitutional issues that arise in any of the Emirates.

Under Abu Dhabi's recently enacted law on the judicial system, the Emirate maintains a three-tiered system of courts: First Instance Courts, Appeals Courts, and a Court of Cassation. Courts are located in eight different cities of the Emirate, with approximately 115 judges and over 500 support staff.³ As with other government departments in the UAE and the Gulf region, a majority of staff are expatriates, with less than 15% of judges maintaining UAE citizenship. Most expatriate judges and staff are from other regional countries, including Egypt, Sudan and Morocco.

While employing expatriate judges may strike some foreign observers as highly unusual, the shared legal heritage of regional Arab countries – procedural and substantive laws in most Arab countries were heavily influenced by Egyptian models, and in most systems sharia plays an important role – make this practice more understandable, if still exceptional. The workload of Abu Dhabi's court system is increasing at approximately 2% annually, with 25,239 cases (whether criminal, civil or sharia) registered before the First Instance Courts in 2006. Of this total, over 60% of the cases were criminal in nature. The dynamic and record growth enjoyed by the Emirate over the last five years, averaging over 15% per annum, suggests that court dockets are likely to grow significantly in coming years, and is likely to include an increasingly higher percentage of complex commercial cases. With respect to dispute resolution, by law family related cases must first enter family advisory bodies before entering court, and all civil cases are required to first endeavor to solve any disputes via government sanctioned Settlement Committees.

Emirate of Abu Dhabi Map & Court Distribution



Unlike the judicial models adopted in Dubai, Qatar and Bahrain, Abu Dhabi has not established independent judicial mechanisms affiliated with economic “free-zones” that are outside of the authority of the existing national judicial framework. Instead, Abu Dhabi has maintained legal unity within the Emirate, while adopting more streamlined and advanced commercial law procedures to bolster the confidence of international companies and foreign investors.

³ The Courts are located in Abu Dhabi, Al Ain, Delma, Dhafra, Marfa, Rahba, Ruwais and Sila. Other courts are expected to be established as the Emirate continues to grow.

III. Modernization Program

In 2005 the Government of Abu Dhabi established the Abu Dhabi Government Restructuring Committee (ADGRC), whose purpose is to help the Emirate attain more effective and efficient government organization and services. The ADGRC operates under the aegis of HH Crown Prince General Sheik Mohamed Bin Zayed Al Nahyan. In coordination with the leadership of the Judicial Department, led by HH Chairman Sheik Mansour Bin Zayed Al Nahyan, the Emirate's leadership committed to modernizing the judicial system. The primary impetus for doing so was to ensure higher standards of professionalism and service, and to improve legal certainty and law enforcement. An overhaul of the justice system was also cited as one of the critical elements in supporting the Emirate's continued economic growth and integration into the global economy.

The first step in the justice restructuring program was the establishment of a Steering Committee in late 2006. Comprised of representatives from the Federal Ministry of Presidential Affairs, the Abu Dhabi Judicial Department, the Executive Council's General Secretariat and the Executive Affairs Authority, the Steering Committee reports directly to the Chairman of the Judicial Department and is empowered to take action on any issues pertaining to the judicial system's modernization and restructuring.

The Steering Committee in turn authorized the creation of an implementation team comprised of local and international experts to lead the modernization program, with a detailed program scope, timeline and budget. Working in close conjunction with representatives of the Judicial Department, the implementation team was initially tasked with working across four thematic areas: (1) strategic planning, budgeting and performance management; (2) court management and administration; (3) information technology; and (4) communications. Initial preparatory work in these four areas has led to a detailed implementation plan involving 10 separate workstreams.

Working under the supervision of the Steering Committee via regular meetings and briefings, the implementation team launched a multi-phased program intended to achieve a more effective, independent and cost-effective system of justice that incorporates practices and processes utilized by the most advanced judiciaries in the world.

IV. Progress and Expected Results

The most critical development to date in the modernization program was the adoption of the new law establishing Abu Dhabi's judicial system in May 2007. There are four particularly important aspects of this law. First, the law establishes an independent Judicial Council, composed of a majority of judges, which is responsible for governing judicial affairs. Specifically, the Council oversees the appointment and promotion of judges, reviews the quality of judicial decision-making via the Judicial Inspection Division, and approves and oversees court procedures and policies. In establishing the Council, the Emirate has adopted a model of judicial governance that is one of the most independent and self-regulating in the wider Middle East region.

The second particularly noteworthy component of this law is the strengthening of court management and authority under Court Presidents. For example, the law establishes the position of Head Clerk within each court, centralizing court management under a senior court administrator who reports directly to the Court President. More generally, Court Presidents are now directly responsible for all staff within their courts.

The third key attribute of this new system is a consequence of the centralization of court staff under Court Presidents – that is, those staff within the judicial system that do not work directly within courts. Specifically, support staff will be organized across five main offices: IT, Public Affairs, Administration, Performance Management and Judicial Support Services. Increasingly, the important support functions and services undertaken by staff in these offices (supervised by the Undersecretary, or lead executive officer of the Department) will operate under transparent and clear performance guidelines, focusing on higher-level policy development and management practices rather than lower-level administrative tasks (which can be outsourced or left to court clerks, as appropriate).

The fourth significant area impacted by the new law is training. By establishing a local independent legal and judicial system, the new law paves the way for a new judicial training regimen which will be guided and administered by a soon to be established Judicial Academy. This Academy is expected, in time, to not only train future judges and senior court staff from Abu Dhabi, but to act as a resource and training facility for other Emirates (and in time, other countries).

Following the adoption of the new law, the implementation effort has to date achieved a number of important milestones. Within 90 days, a comprehensive analysis of the system's operating and structural strengths and weaknesses was completed. This effort was immediately followed by the comprehensive detailed design of the judiciary's entire organization, including courts and supporting entities. In addition, an implementation plan was prepared that provides a detailed sequencing of reform initiatives planned for the next six months and beyond.

An intensive three-month training program was also initiated to benefit assistant judges and newly appointed judges. A team of leading scholars and academics from across the region was gathered to prepare and deliver a course of instruction on civil, criminal, commercial and procedural laws. This course focused on both key principles of UAE law and higher court rulings and the comparative experience of Lebanon, Jordan, Egypt, Syria, Qatar and the UAE, and highlighted the notable legal unity across most Arab countries. As noted above, given that much of the UAE's civil and criminal legislation derives from Egyptian laws and procedural codes that have also been adopted in various regional systems, understanding the comparative case-law of other countries is of particular relevance for Abu Dhabi's judicial personnel.

During the initial six month implementation period a number of important IT-based initiatives were also initiated and completed, including (1) equipping all judges with lap-top computers and associated training; (2) installing local area networks in remote courts; (3) ensuring appropriate network security measures to protect sensitive data; (4) developing a digital catalog of all national laws and higher court cases; and (5) designing and developing a judiciary website. A comprehensive electronic archiving effort, recording some 500,000 cases, was also launched, and is expected to be completed within a five month period.

Less tangible, though of considerable importance, are three more general achievements. First, as a result of granting judges and associated staff a salary schedule that is independent from the national civil service system, the government has made a strong statement regarding the unique and valuable role of judges and personnel within Abu Dhabi's society.

Secondly, not unlike other GCC countries, Abu Dhabi's deficit of local judges has been targeted as a key area for improvement. The Judicial Council, for example, is comprised of 50% nationals, considerably higher than the ranks of the bench as a whole, and is expected to be almost entirely nationalized within five years. Similarly, the bench of the first instance courts, which constitutes approximately 75% of judges within the Emirate, is expected to be 75% local by 2012, up from less than 15% today. This goal will be achieved through the means of an intensified training regime for local assistant judges, in addition to the considerably higher judicial salaries and associated benefits.

Finally, it remains to note that the recent law enables women to assume the bench for the first time. Currently there are three female assistant judges and two prosecutors within the judiciary's ranks. This development substantially widens the potential pool of judicial applicants; the more so since a large percentage of local law graduates are women.

The next implementation phase, expected to be completed over the coming 12-18 months, includes the following:

- Realignment of the judiciary's staff to comply with the new detailed design of the judiciary;
- Establishment of a new system for training, selecting and promoting judges and developing judicial specializations;
- Design and adoption of new financial management and human resources management processes and procedures;
- Development and adoption of a comprehensive strategic and operational plan to guide the judiciary's continued development over the 2008-2010 period;
- Design and implementation of a modern public complaint monitoring system;
- Design and development of a comprehensive IT-based case management system;
- Design and development of a system-wide IT-based performance management system;
- Design and development of an internal portal resource for all staff as well as court users;
- Renovation and refurbishment of court facilities to improve access and level of service;
- Amendment of procedural laws enabling more streamlined and transparent trials; and
- Establishment of a Judicial Training Academy, with a state-of-the-art curriculum for new judge and select court staff.

Other initiatives and performance-based improvements are also planned. The primary results of these efforts are expected to be improved quality of judicial decision-making, reduced trial times, improved level of service for court users

and the public at large, more transparent laws and court decisions, clarified career and training opportunities for court staff, and, overall, higher levels of public confidence in the courts and a greater degree of professionalism and capability by judges and court staff.

V. Conclusion

Having described the framework, achievements and continuing efforts to modernize Abu Dhabi's judicial system, three additional issues are worthy of mention: (1) notable aspects of the restructuring process that have contributed to the program's success to date; (2) future challenges and complexities that the modernization effort is likely to face; and (3) the implications of Abu Dhabi's experience for the wider region.

There are at least four primary factors that have ensured the program's success to date:

Unequivocal political support: From the beginning of the modernization program, the senior political leadership of the Emirate, across the Judicial Department, the ADGRC, and the Ministry of Presidential Affairs, has shown unwavering and strong support for the reform effort. This has enabled a full mobilization of internal resources (including the adoption of a special budget supporting the modernization effort), and removing various internal bureaucratic hurdles that would accrue from less senior and undivided political support (for example, ensuring the Judicial Department was not bound by the traditional civil service requirements in recruiting and hiring new staff).

Effective program oversight: Whether on the part of the Steering Committee or the ADGRC, the primary government officials entrusted with oversight authority for the implementation have been closely involved at every stage of the modernization effort to date. For example, Steering Committee members receive weekly (and in some cases daily) updates on implementation issues, identifying any issues that need higher-level political support. This close involvement and supervision has also ensured a high degree of cohesion between the approach being implemented and the unique political, social and cultural aspects intrinsic to Abu Dhabi's government and society. The individuals involved were handpicked by the Emirate's senior political leadership, and are among the most able and impressive individuals within the Emirate's government (or, in my experience, any government).

Dedicated and experienced implementation team: The assembled implementation team was fully dedicated to the restructuring effort (whether internal or external team members), and has regularly worked six day weeks throughout the initial implementation phase. The overall implementation effort includes staff from the ADGRC PMO and a variety of external consultants – particularly key roles have been assumed by the management consultancy Booz Allen Hamilton, as well as the Amman-based Centre for Arbitration and Law (in addition to other consultants and organizations). The combined team includes a number of experts with previous experience with the Emirate's judicial system (at both the Federal and local levels), as well as with other advanced and developing judicial systems. This not only eliminated the usual "acclimatization" period for key staff, it also enabled the team to more effectively gauge priority implementation issues and establish closer connections with counterparts across the government.

Clear timeline and program scope: The modernization program has also benefited from the setting, and adhering to of a detailed time and project scope approved for six-month intervals. The timeline and scope are defined with a high degree of detail (specifying what the result will be of each initiative and who is in charge of ensuring successful implementation, etc). This timeline and scope are distributed to all relevant parties across the Judicial Department and related government entities.

None of these factors are revelatory given experience with government reform programs elsewhere in the Middle East, Europe, Asia and Latin America. However, the combination of these factors, together with the fact that the reform program has been entirely started, managed and supported by the local government, has led to an especially focused restructuring program that has, in the words of an expert from the United States Federal Judicial Center, led to completing "at least two year's worth of work in only a few months."

On the other hand, there are a number of challenges facing the implementation program. In my opinion the primary challenges are fourfold:

Scale: Government modernization programs typically focus on one or two discrete aspects of an institution (customer service, performance management, etc.). In traditional court reform programs, for example, the focus is often only one tier or section of the wider system. In contrast Abu Dhabi's leadership has committed to restructuring and modernizing the entire judicial system, at one time. While it is true that the Emirate's judicial system is of a comparatively small scale (total workload at the First instance level is equivalent to the workload of one large urban

court in a country like Egypt), the significance of this ambitious scale is a particular challenge given the need to ensure the successful integration and sequencing of reforms in different parts of the judicial system. For example, that various IT-based applications such as the case management system, performance management system and electronic archiving, should be compatible, even though their development complexity, timeline for deployment and end-users are distinct.

Meeting expectations: The political leadership of the Emirate has repeatedly indicated the importance of completing the necessary reforms as quickly and comprehensively as possible. This is especially true in the justice sector – at the Federal level, for example, the UAE’s Prime Minister recently issued a rare public rebuke of a government organization, expressing his “utmost dissatisfaction” at the level of service of the Ministry of Justice and in the courts, and pledged that “[w]e will not allow this to continue”.⁴ This commitment to judicial reform, mirrored at the Emirate level in Abu Dhabi, has been backed by allocating significant internal resources for the restructuring program. However one may push reforms from on high, engendering fundamental behavioral and organizational change requires years of steadfast work and a host of related reforms sequenced over a period of months and years. The complexity of a judicial system, whether measured as a function of associated human interactions or procedural components, is exceptional. Moreover, since – like most governments in the Gulf – there is comparatively limited institutional familiarity with internal reform programs residing within Abu Dhabi’s courts, key officials have difficulty accepting that attaining a fundamentally enhanced level of organizational performance is rarely, if ever, managed in less than a matter of several years.

Creating a stronger judicial culture: While “culture” is a much abused catch-all for the lack of organizational and behavioral capabilities, what is nevertheless undeniable is that in a country as new as the UAE (founded in 1971), the judicial profession can benefit by further developing a supporting culture of professionalism and respect common in states with older judicial institutions. While in Western Europe and North America the vocation of a judge is esteemed and respected across society, in Abu Dhabi – as elsewhere in the Middle East – the judicial profession has not been as well recognized or professionalized; a circumstance which requires significant investment in training, recruiting, and broader public education throughout society.

Pairing reforms with actual organizational capabilities: One of the most common mistakes of government reform programs is importing a group of external experts to design new systems, performance standards and internal processes without ensuring sufficient internal capability to actually achieve sustainable performance improvements across the wider organization. This risk exists in Abu Dhabi as well; while a number of additional and better qualified staff are being hired to help lead the new judicial system, and counterparts from the Judicial Department have been committed to working alongside the implementation team, the successful integration of the myriad procedural, staffing and technology-based reforms within the judiciary remains a delicate work in progress.

None of these challenges are unique given experience in other countries, as well as existing literature and research on organizational change and institutional development.⁵ Nor is this article the venue for describing in detail the unique responses necessary to overcome each of these challenges. The central point is that given the existing positive factors above, achieving continued implementation success is likely, though not assured.

While this article does not address wider concepts of state and administrative development, Abu Dhabi’s example suggests a broader observation about the evolution of government in the wider Middle East. Whether one studies the achievements to date or the government’s ultimate stated goals, it is likely that within several years Abu Dhabi will have a judicial branch of government that is, in certain respects, as capable and technologically sophisticated as some of the most advanced and developed states in the world. Given that Abu Dhabi’s local and Federal government is only 35 years old, and that the older generation of UAE citizens today was raised in starkly under-developed surroundings amidst Arabia’s dauntingly arid geography, this achievement is highly significant.

Moreover, it is notable that Abu Dhabi’s leadership has initiated these far-reaching reforms highlighted not as a response to external pressure or donor demands, but rather to achieve ambitious internal public service reform goals. In contrast, many of the extant government modernization programs (and judicial reform programs in particular) in the Middle East and elsewhere are taking place as a result of external incentives or supra-national regulatory compliance issues. To the extent that a significant percentage of these externally-induced reform programs prove incapable of fundamental

⁴ *Gulf News*, April 18, 2007.

⁵ For a general survey of judicial reform experience see, for example, Juan Carlos Botero et al, “Judicial Reform,” *18 World Bank Research Observer* 1 (2003).

organizational and service improvements,⁶ the Emirate's experience of launching an entirely homegrown self-financed and internally managed judicial modernization program of ambitious scope represents an instructive and hopeful model for implementing lasting government reform in other countries.

Bearing these points closely in mind, it is fair to draw a final and important conclusion about the nature of government and judicial reform in the Middle East. Specifically, Abu Dhabi's example not only demonstrates the commitment of the Emirate's political leadership to attaining a high standard of public service -- it also suggests that the commonly held notion in certain quarters that the cultures and political systems in the Middle East are somehow inherently unsuited to, or incapable of attaining, internationally recognized standards of the rule of law and effective government should be fundamentally reconsidered.



⁶ See, for example, *U.S. Rule of Law Assistance has had Limited Impact*, U.S. Government Accounting Office (GAO-01-740T), Statement of Jesse T. Stone, Director of International Affairs and Trade before the House Committee on Government Reform, Subcommittee on National Security, Veterans Affairs, and International Relations (May 17, 2001).

Theme: Reform, Change Management

Judicial Productivity in India

By Barry Walsh¹

Unlike some British imperial legacies, such as English literature and the sport of cricket, judicial and court administration in India bears important dissimilarities to its British progenitor. These differences are substantial. Some of them are subtle and seem to gain scant recognition, even to many who practice as judges, advocates or commentators within the Indian court system. The direction for improving the Indian court system is to be found by recognizing those differences and the lessons they may offer.

The essential thesis of this paper is that the practices and associated expectations of participants in the Indian court system are significantly different from most other countries that have inherited their legal systems from the British. An examination of those differences can help to identify strategies that may be pursued in overcoming a significant case backlog and delay problem in Indian courts. International comparisons with courts in other jurisdictions are not only useful and appropriate, but offer new opportunities for reforming the Indian court system that may hitherto have been overlooked. If the reader agrees with the author's arguments and conclusions, then this paper offers a novel range of areas in which reforms may be advanced. If, on the other hand, the effect of this paper is to provoke a contradictory response from Indian commentators by reference to practices in other countries, then it will have achieved its purpose in seeking to gain recognition of the value of international comparisons as a means of identifying court system reform strategies in India and, hopefully, elsewhere.

Differences in practices and expectations

The constitutional and legislative features of the Indian court system suggest that it is very much modeled on the English adversarial common law system. With notable qualifications, such as the abolition of the jury system in 1956, Indian trial and appellate courts follow the English model. The application of that system in India, however, has resulted in practices which are significantly divergent from those of England and other English speaking former British dominions that adopted English law; such as the USA, Canada, Australia and New Zealand. Unlike India, these other court systems have been generally successful over the last 20 years or so, in overcoming endemically large backlogs and delays in case disposals. Through trial and error, and bitter experience in some cases, those other systems have identified the causes of backlog and delay and successfully applied usually similar methods to overcome them.

Judicial Productivity

A view widely shared among judges and commentators on the Indian judicial system is that there are not enough judges for the workload they have to bear. Three arguments are commonly offered in support of this. The first is that high rates of case pendencies² across India show that there are not enough judges to dispose of the cases before them. A second argument is that there is a logical and proper numerical relationship between a society's population and the number of judges needed to service that population – and that the proportion of judges relative to population in India is very low by World standards. A third argument, related to the second, is that in those societies which are particularly litigious, possibly India, the proportion of judges relative to population should be even higher, compared with less litigious systems. The evidence that might support each of these arguments is readily at hand. Pendency figures and population statistics are quite accessible. However, one necessary assumption which seems to be implicit in each argument is that Indian judges are efficient in disposing of their caseloads. If, for example, there were good reasons why Indian judges can be expected to be less productive than judges in other countries, then presumably there would be an argument for having more of them, relative to population. Similarly, if for no good reasons, Indian judges are less productive than other systems, then there might be an argument for not increasing their numbers until their productivity is improved by other means. But evidence about the productivity of Indian judges, as distinct from their workloads, is seldom, if ever, raised as a factor in support of the case for increasing judicial numbers. More commonly, it seems to be assumed that judges are sufficiently productive, perhaps as productive as they will ever be.

¹ This article is based on a conference paper prepared in October 2005 and first published in an anthology, *Judicial Reforms in India: Issues and Aspects*, Editors: Arnab Kumar Hazra and Bibek Debroy, Academic Foundation with Rajiv Gandhi Institute for Contemporary Studies, New Delhi: 2007. The author is an Australian justice sector development consultant who lived and worked in Delhi during 2004 and 2005, leading studies of the workings of its court system under projects sponsored by the Asian Development Bank.

² Pendencies mean the number of pending cases. The terms "pending caseload" and "backlog" are also used to describe such cases.

It is difficult to rationally evaluate judicial productivity without identifying an objective benchmark to indicate just how productive a judge *could* be. If judges across India share common managerial problems, such as low numbers and poor resources, as many believe to be the case, then it is unlikely that an objective benchmark of judicial productivity can be found within India. International comparisons are more likely to be illuminating. The problem in looking to other systems, however, is in finding a system that is sufficiently similar so as to permit reasonable comparison. This is difficult. Civil law systems, for example, are especially unlikely to offer useful comparisons because a large proportion of civil law trial court benches often comprise at least three judges, whereas most trial court benches in common law systems, such as India, are of judges sitting alone. Common law systems, on the other hand, can also offer unhelpful dissimilarities by reason of geographic spread, size of populations and economic and cultural differences. These differences can be compensated for, when data relevant to productivity is available. Often systems which might bear comparison with Indian experience do not necessarily offer accessible data that would permit useful comparison. Data that has been readily accessible to the author by reason of personal experience, however, has been data about court practices in Australia and in the courts of Delhi, in India.³ As it turns out, comparing the court system of the National Capital Territory of Delhi with all of the courts of Australia can offer some useful insights into the question of judicial productivity in India. Delhi, for instance, has 13.8 million people, whereas Australia's population is not much greater at 20 million. Both are common law systems that rank their courts into generally three levels. Both operate under codified constitutional federal systems and each have jurisdictional ranges that are generally comparable for criminal, civil and appellate jurisdictions. Here are some figures about each system that can be related to judicial productivity.

Judge to population ratios. Allowing for High Court judges in Delhi (the superior court of the national capital region), but excluding Supreme Court judges (the national superior court), there are 30.8 judges in Delhi per million of population⁴. The comparable Australian figure is 44 judges per million of population⁵. This indicates that Australia has half as many judges again than Delhi when compared proportionately to population. This comparison strongly supports the argument for increasing judge numbers in Delhi to match the ratios achieved in Australia – assuming, of course, that the ratios in Australia represent an appropriate benchmark for India⁶.

Disposals per judge. A useful indicator of judicial productivity is the ratio of judges to disposals per year. It is better to consider disposals, rather than pendencies, because disposals represent actual productivity, whereas pendencies represent productivity that is yet to happen. Looking at disposals is useful because it gives an insight into judicial productivity in terms of what they do, rather than in terms of the population they serve. It also offers an indicator that can be related individually to each judge. In Delhi courts this ratio was 701 disposals per judge per year.⁷ The comparable figure for Australian courts was 1,511 disposals per judge or around double the level of Delhi disposals⁸. This suggests that Delhi judges might have to work twice as hard to dispose of as many cases as Australian judges.

Judges per lakh⁹ of disposals. Another indicator of judicial productivity is to measure the number of judges needed to dispose of 100,000 cases in a year. This is useful for the purpose of justifying additional judge appointments in tandem with, or as a consequence of, increases in caseloads. In Delhi district courts 153 judges are needed to dispose of 100,000 cases. The comparable figure for Australian courts, however, is 66 judges; which verifies the point already made that Australian judges have double the disposal capacity of Delhi judges.

³ Very little statistical information about Indian courts is published. Most of the data used in this article was derived directly from the courts themselves from their routine internal reports, few of which are published in their entirety. Some authoritative data on Delhi courts is available via the websites of the Delhi High Court (<http://www.delhihighcourt.nic.in/>) and the Delhi District Courts (<http://www.delhidistrictcourts.nic.in/>). Statistics on courts in other countries referred to in this article are derived from published reports, as cited.

⁴ Sanctioned rather than working numbers of judges are used to ensure comparability with Australia. The working number of judges in Delhi is closer to 21.5 judges per million of population. The sanctioned numbers used are 33 High Court and 392 district courts judges in Delhi as against a population of 13,782,976 as determined in the 2001 census.

⁵ Australian judge numbers were 881 as at January 2005 – Source: website of the Australian Institute of Judicial Administration <http://www.aija.org.au/JudgesMagistrates.htm>. Australian court disposal figures in 2003/04 were 587,900 civil cases and 742,900 criminal cases. Source: Productivity Commission of Australia, Report on Government Services 2005, Chapter 6.

⁶ For example, Australia's judges are distributed over a landmass 2.5 times the size of India, whereas Delhi is effectively a city state, a factor which implies that Australia might need more judges than Delhi to cover a more widely dispersed population.

⁷ Based on disposals of 79,297 civil & 95,898 criminal in district courts and 32,346 disposals in the High Court in 2004. Judge to disposal ratios are based on working, rather than sanctioned numbers of judges which is taken to be 296 in Delhi in early 2005.

⁸ Source: Productivity Commission of Australia, Report on Government Services 2005, Chapter 6.

⁹ In India a *lakh* means 100,000 and is more commonly used as a numerical measure than *thousands* or *millions*.

Disposals per lakh of population. A further variation is to look at the number of case disposals per year per lakh of population. In Delhi the number of cases disposed per 100,000 of population is 1,506. The comparable Australian figure, however, is 6,651 or almost four and a half times greater. This suggests that the population of Delhi is, at most, one quarter as litigious as the Australian population. It would seem that the level of litigation is not necessarily a factor affecting the ability of Delhi judges to dispose of cases.

These different ways of examining judicial productivity in India reveal an extraordinary but logical conclusion: If litigation rates in Delhi rose to levels equivalent to Australia, then the average productive capacity of the Delhi courts would need to increase at least eight fold to cater for the additional work. If the working number of judges in Delhi were to be doubled, so as to match the ratio of judges to population in Australia, it would only account for around half of the required increase in productive capacity. Thus it could be said that no practical increase in judicial numbers would overcome the reality that Delhi judges are only half as productive as Australian judges in terms of case disposal capacity. One might question the precision of these figures, being based on the latest available yearly figures, rather than figures compiled over time. However, the degree of difference between judicial productivity of Delhi and Australia is so great that numerical errors are unlikely to affect the basic conclusions.

Why are judges in Delhi, and presumably across India, so much less productive than Australian judges? The answer is that, despite the similarities of each system, Indian courts administer cases in ways that are significantly different from the ways of Australian courts. It is unlikely that Australian judges work harder than Indian judges; nor are they necessarily more learned or experienced. What is different is that they generally use case management and court management methods and practices which Indian courts generally do not use, or are less effective in using. These methods and practices are referred to in this paper as “best practice”. Many courts in England, USA, Canada, Australia and New Zealand use best practice methods; but not all of them. And those that do use best practice methods are not without their problems from time to time. But the judicial leadership of each would vouch for the fact that when those practices are consistently used, they work. So how is it that Indian practices differ from best practice?

Low civil settlement rates

A key reason why Australian judges dispose of more cases per judge than Indian judges is because they conduct fewer trials. Overwhelmingly, the dominant means by which cases are disposed of in Australia is by voluntary settlement by the parties, rather than by a judge-adjudicated verdict. In best practice systems, 70% or more of civil disposals can be expected to settle before a trial begins¹⁰. In Indian trial courts, the settlement of a case by voluntary agreement between the parties is a rarity. In civil matters the typical proportion of cases that settle is around 5% and most of those settlements reportedly occur after a trial begins¹¹. The causes of these low rates in India are not well researched. The main cause may be that the incentives for parties to settle disputes in best practice jurisdictions are either absent in India or are rendered less compelling by other factors.

In systems that apply best practice, and probably in all common law systems, there are two types of cases which are prone to settle. The first kind, which we may call *early settlement* cases, are either cases where all parties are in an ongoing relationship of some kind and want to resolve their dispute quickly; or cases where the cost of settling for both parties is not high and where settlement would allow them to pursue other, more worthy things. In early settlement cases there is a prospect that the parties will settle early in litigation, often without the direct involvement of a judge, by using methods like private arbitration, mediation, court-supervised settlement conferences or old fashioned advocate-to-advocate bargaining.

The second kind of case that is prone to settle, which we can call *late settlement* cases, are cases in which the parties are in sharp dispute but who reach a point in time where one of them starts to believe three things, i.e. that (i) unless they settle, they will lose the case at significant cost to themselves; (ii) the time of loss is imminent or is not far off; and (iii) when they lose, they will quickly be forced to pay a higher price than if they decided to settle. In Australia a high proportion of settlements are both early settlement and late settlement cases. In well managed courts that encourage case settlement, early settlement cases are filtered out of court lists relatively early, sometimes even before the case is listed before a judge. But late settlement cases usually remain in court lists until case preparation is completed and a date for

¹⁰ The proportion of instituted cases that went to trial in the trial courts in the Canadian province of Ontario was consistently below 10% in the period 1978 to 2000. This, of course, is a practical settlement rate of 90%. Source: Ontario Courts Annual Report 2002-2003.

¹¹ This figure is based on the results of a listing survey conducted in early 2005 which, among other things, measured the means by which cases were disposed in 21 trial courts over a three week period – of all the disposals recorded in that period only 5% were by way of settlement - Source: Listing Survey Report, May 2004, ADB /GOI India Administration of Justice Technical Assistance Project TA4437-IND

trial is set. When a trial date is set in most Australian courts, the psychological pressures on parties to consider compromise begin to coalesce, with the common result that settlements occur, as is often said, “at the door of the court - meaning that a high proportion of cases settle on the morning of the first day of a trial. The psychology of late settlement cases is so reliably predictable that many civil courts in Australia, and in other systems, confidently schedule more trials than there are available judges, in the expectation that a proportion of them will settle before their trial begins.

Undoubtedly there are early settlement and late settlement cases in Indian trial courts. But few of them appear to settle. Why would this be so? In answer, two reasons can be offered. One reason is that voluntary settlement is not the custom in India, the English adversarial system being well ingrained since the British era. It might also be said that concern about corruption in the legal profession and the judiciary make Indian litigants wary of settlement processes. But in answer to this argument, it may be said that customary inhibitions, even concerns about transparency of settlement processes, can be overcome by managerial initiatives in courts, such as the development of formalized court annexed mediation schemes or similar ADR initiatives that assure transparency of settlement negotiations under judicial supervision.¹²

The second reason for low settlement rates, which is considerably more compelling, is that Indian courts do not offer the essential preconditions of late settlement as suggested above, - i.e. they ordinarily do not offer a party in a case the opportunity to reach a point of realization that they will lose the case; that they will lose soon; and that they will soon have to pay for it. Why would those preconditions be absent from Indian courts when they are evidently present in Australian courts and in other systems? The answer to this question is much simpler. It is because most Indian trial courts cannot offer litigants what may be called *outcome date certainty* – i.e. they cannot indicate or direct with reasonable certainty when a particular trial will be completed and when a readily enforceable and final verdict will be given in favor of one party. The absence of outcome date certainty in Indian courts is the quintessential difference between most Indian courts and most courts in Australia and other systems which apply best practice methods. Before elaborating on the reasons for the absence of outcome date certainty, however, it is useful to point out an important difference that affects settlement in *criminal* cases in India.

Low criminal plea rates

Plea rates are the proportion of criminal cases in which the accused person pleads guilty and thereby avoids a trial. Sentencing a person who pleads guilty requires fewer resources for a court and the prosecution; and avoids the uncertainty of putting the accused to trial. It also enables the decision on sentencing to take into account factors that may mitigate a sentence, such as contrition of the accused. Accused persons are motivated to plead guilty when they believe that a finding of guilt by trial is likely; and when they believe they will get a lighter sentence by pleading guilty. Best practice criminal justice systems endeavor to give accused persons ample incentive and opportunity to plead guilty. They do this by usually offering efficient prosecutions that have a high probability of a finding of guilt, they provide outcome date certainty and they assure consistency in sentencing. In Australian magistrates courts, over three quarters of criminal cases are disposed by plea or by comparable processes that do not involve a defended hearing¹³. In contrast, rates of guilty pleas are not measured or reported by Delhi sessions courts or magistrates courts. Presumably the same applies to most other Indian criminal courts. However, anecdotal feedback from Indian judges and advocates suggest that pleas are uncommon, if not rare, except possibly in non-custodial matters. The sad reason for this is likely to be that there is no incentive to plead guilty when there is a high probability in Indian criminal courts that the accused will be acquitted, either at trial or on appeal. Conviction rates indeed appear to be low. The 2004 annual report of the Delhi district courts, for example, reported that only 35% of criminal sessions cases and 49% of magistrates cases resulted in a conviction¹⁴. To date, little information is available on plea rates, let alone research on the causes. What is clear is that in most Australian and other criminal court systems that apply best practice methods, the rates of guilty pleas account for sizable proportions of criminal lists, allowing judges of criminal courts much higher disposal rates than are achieved in Indian criminal courts.

A predominance of contested hearings

Rates of civil case settlement and criminal pleas in any court system are influenced purely by subjective assessments of self interest. If a defendant sees advantage in settling a civil case, rather than wait for a judge to enter a verdict, the defendant will settle. Similarly, if an accused person believes that he or she will be convicted and may suffer a worse

¹² Few Indian courts offer court annexed mediation. In most Indian trial courts, however, there is a court annexed alternative dispute resolution process known as a *lok adalat*. Lok adalats are tribunals, normally presided over by a judge, to which, usually, small civil claims are referred for conciliation and negotiated settlement. The features of lok adalats which distinguish them from court annexed mediation, is that they are held in open court and usually in large volumes on a single day.

¹³ Magistrates Courts in the Australian state of New South Wales disposed of 133,105 criminal cases in 2003. 86% of those cases were disposed of other than by defended hearing. Source: website of the NSW Bureau of Crime Statistics and Research at http://www.lawlink.nsw.gov.au/lawlink/bocsar/l_bocsar.nsf/pages/bocsar_lc_stats9903.

¹⁴ District Court of Delhi website at <http://delhidistrictcourts.nic.in/Annual%20Reports.htm>

penalty on a plea of not guilty, then the accused will consider a plea of guilty. These are truisms of human behaviour that apply irrespective of culture or jurisprudential traditions. Settlement and plea rates in India are usually low because there is uncertainty about the likely outcome; about when that outcome will occur; and because defendants thereby perceive advantage in delay or indecision. To reverse this trend, it is necessary to offer more certainty of outcome and to deny advantage to litigants who procrastinate. For courts this means being able to ensure that trials are finished within a certain period that is known to the parties and that the prosecution in a criminal case is well prepared to secure a conviction. Furthermore, civil defendants who go to trial without settling and who then lose, should expect to pay more than they would have been required to pay, had they settled. Similarly, accused persons who plead not guilty and are then found guilty, should expect that their penalty will be worse. Courts have little direct control over the quality of the prosecution. However, they can have control over the timing of a criminal trial, as they do in civil cases. This concept is described as *trial date certainty*¹⁵ in Australia and other systems that endeavor to apply best practice. In India, however, the idea that trials can be given near certain completion dates is peculiar and quite rare.

A propensity to adjourn

Outcome or trial date certainty is difficult to achieve in India courts because most cases are adjourned multiple times and in unpredictable ways, even after a trial begins. In Australian courts the reduction of the average number of case adjournments has been a major managerial priority in backlog and delay reduction for at least the last 20 years. Criminal case attendance rates¹⁶ for most courts in Australian states range from 0.3 to 6.3 adjournments per disposed case¹⁷. Civil case adjournment rates are in the range of 1 to 5. In India attendance rates appear not to be counted by any court. Estimates offered by individual Indian judges and advocates, however, put the rate of adjournments in Indian trial courts as typically between 20 and 40 times over the life of a case. Some cases are adjourned many more times. An ADB study revealed that on a single randomly selected day in March 2004 the High Court of Delhi had listed before it an average of 100 cases per judge, of which 80% were adjourned to another day¹⁸. Another ADB study conducted in Delhi *district courts* over a three week period in early 2005 showed that 80% of a much larger sampling of listed cases were adjourned. These figures suggest that while Australian courts devote a lot of effort to minimize case adjournments, Delhi courts depend upon high rates of adjournment to get through their daily cause lists. With almost no exceptions, every Delhi judge's cause list contains at least a dozen cases daily (often several dozen). And each case will typically be called and given some attention, if only for a few minutes, before being adjourned again. It appears that the trends in Delhi are reasonably typical of most Indian courts.

Absence of continuous trials

The propensity of Indian courts to adjourn cases compared to Australian courts can be explained by a fundamental difference of view about how cases should be managed by courts. Australian courts share with many of the intuitional courts in England, the USA, Canada and New Zealand, a convention that a trial should, as far as possible, be conducted continuously. A continuous trial means that ordinarily a judge should conduct a trial in a particular case, and normally no other, from start to closing submissions with minimal interruptions. This convention probably stems from the jury system which demands that evidence be presented to jurors as quickly as possible so that they can deliberate on their verdict and then be discharged. Even in those jurisdictions in which juries are no longer used, the commitment to pursuing continuous trials still remains because of the recognized efficiencies they provide. For reasons unclear, however, continuous trials in India have become largely extinct. While Indian jurists and advocates would agree that continuous trials are desirable, it almost never happens¹⁹.

The tendency of cases to be adjourned in India appear to have two distinct causes. The first is what appears to be a well established practice that there be a separate scheduled hearing for each of the main stages of a prosecution or a civil action. It is an undisputed practice, for example, that once the plaintiff's evidence in a civil case has been given and cross examination is complete, then the case should normally be adjourned to another day for the purpose of hearing the defendant's evidence. Australia does not have this convention – there is normally an expectation that evidence for all

¹⁵ While the expression “trial date certainty” applies in Australia and elsewhere, this paper uses the term “outcome date certainty” in recognition of the fact that setting a date for the commencement of a trial in India does not really indicate when that trial is likely to finish.

¹⁶ The term “attendance” is used in Australia in lieu of “adjournment” when counting the total number of courtroom events - thereby ensuring the first court event is counted. The American term “appearance” has not been adopted in this paper as it can mean something else in other jurisdictions. For example, in Australia and India “appearance” can refer to whether or not a particular party or legal representative actually attended a scheduled hearing.

¹⁷ Average attendance rates can be less than 1 because many cases are disposed before being listed before a judge.

¹⁸ Final Report of the ADB/GOI Administration of Justice Technical Assistance Project – TA4153 IND 26 May 2004, page 44.

¹⁹ The practice exists under legislative authority that a higher court in India can exceptionally direct a lower court to try a particular case “from day to day”. But even in these circumstances such a direction is taken to mean no more than a requirement to hear one case at least for part of the day, each consecutive day, while other cases are also heard.

sides and submissions will occur within a continuous, mostly unbroken, trial. Indian courts, on the other hand, work on the assumption that a trial ought to occur in no less than five stages, each separated by an adjournment, i.e.

- Issues and charges
- Plaintiff's or petitioner's evidence
- Defendant's or respondent's evidence
- Final argument
- Order and judgment.

A second evident cause of high rates of case adjournments in India is the effect of rising backlogs and case delays. Given that courts already routinely fragment trials into separate formal stages, the response to rising caseloads has been to subdivide them even further. Generally, as cause lists have grown, individual cases have been scheduled for hearing no less frequently; but less time is available for them at each hearing by reason of there being more cases in each cause list. There is a commonly held view among judges and advocates alike, for example, that it is better to take the evidence of one available witness and then adjourn, rather than risk that witness not being available on the next occasion. Australian courts, however, would resist this practice. Instead, Australian courts would seek to deal with rising caseloads by maintaining a commitment to continuous trials and by applying other measures to deal with rising caseloads²⁰.

So why is it better to preserve continuous trials rather than to fragment trials into shorter but regular hearings? The answer is that continuous trials offer outcome date certainty while fragmented trials do not. Once a trial starts under a continuous trial system, the date of the outcome becomes readily predictable and permits the parties to consider settling their case. But when trials are fragmented into multiple adjournments, there is no predictability about the time of a final outcome, thereby reinforcing the reluctance of parties to settle. So it would seem that if Indian courts aimed at more continuous trials, then they could induce more case settlements with consequential reduction in their trial volumes and pendencies.

Fragmented hearings

The advantages of continuous hearings are not limited to encouraging more case settlements. They also reduce the duration of trials overall. Not all Australian court trials are continuous. Many non-jury trials are adjourned "part heard" for various practical reasons. Part heard adjournments, however, are resisted by Australian judges because they are inconvenient and costly. The need to adjourn a trial before evidence is closed usually represents an unscheduled disturbance in a system that assumes all essential evidence will be available at the scheduled time. Thus if an adjournment is sought, then an Australian court will usually consider penalizing the party who seeks it, if that is a practical option. And the prospect of a penalty being imposed is usually an effective deterrent against such things as failing to prepare for a hearing. Regrettably there appears to be little research available on the efficiency of trials in India. So it is not possible to offer certain conclusions about it. However, one might confidently infer that a system which usually fragments the taking of evidence into numerous installments will be less efficient and more time consuming than a system which seeks to assure an unbroken presentation of evidence and submissions by contesting parties.

Deterring misbehaviour

There is a widespread view among Indian judges and advocates that the Indian justice system offers ample opportunity for a litigant to evade court decisions, or to intimidate opposing parties by appealing or by lodging an interlocutory application. A high proportion of pendencies comprise such applications, with the result that delays in disposing of them afford ready opportunities for litigants to evade court decisions. Similarly, it is said that there is a remarkable degree of court tolerance of incompetence in the legal profession and of litigants in general. The ADB survey of court adjournments conducted in early 2005, for example, indicated that 43% of cases listed were adjourned due to the fact that either a litigant or legal representative failed to attend or was not sufficiently prepared for the hearing. High levels of case adjournments also offer opportunities to evade court decisions, often for many years, and also defeat the incentive of either party to settle. While Australian courts also need to deal with unmeritorious appeals, incompetent advocates and ruthless litigants, they are generally effective in discouraging them. The primary way they achieve this is by ensuring that adjournments are minimized and by offering early decisions on interlocutory applications and appeals. But what underlies the success of these methods is the presence of an effective means of punishing those who misuse court processes. Courts achieve this by enforcing cost penalties against misbehaving litigants and by using an effective disciplinary system against misbehaving advocates. India has both a system of party/party cost sanctions and a system for disciplining

²⁰ In an environment of large trial backlogs, Australian courts will ordinarily list a case for trial whenever there was available time for a continuous trial – effectively resulting in longer waiting lists for a trial date.

misbehaving advocates. However, it seems to be common knowledge that neither system is consistently effective in offering a deterrent to misbehavior. The reasons for this and the likely remedies are necessarily speculative, as little formal research into these problems appears to have been done. Whatever the reasons, it may be said that it is recognized in Australia that effectively deterring behavior which defies or seeks to evade judicial policy and court orders, is a key to assuring judicial productivity. Arguably this connection is yet to be recognized in India.

Slow evidence

Oral evidence in most Indian courts is generally typed in real time by the presiding judge's stenographer using a word processor. In some cases manual typewriters are also used and sometimes the judges themselves record evidence by longhand. In most cases the words typed by a stenographer are dictated by the judge after the judge hears the questions asked by advocates and the answers given by witnesses. Much court time is often spent supervising the typing of testimony in this way, including dealing with arguments from advocates about the accuracy of the words dictated. Oral evidence in Indian courts consequently tends to be taken slowly and incompletely. This is often made more onerous if the language of the witness is not English, in which case the judge must also act as interpreter when dictating in English. No court in Australia uses this method. Instead they use shorthand writers, stenotype machine operators or electronic sound recording with associated verbatim transcript production. Human shorthand or stenotype writers are used sparingly in Australia because of the high cost and the difficulty in finding skilled writers. Voice recognition technology is still unreliable in a court environment. Consequently, the preferred technology in most courts that apply best practices is sound recording of court proceedings and full or partial text transcription from the recordings by typists (transcribers) working outside the courtroom. The introduction of sound recording to Indian courts, however, would not be a simple matter of installing new courtroom hardware. It would presage enormous change in the dynamics of courtroom usage. It would require, for example, that courtrooms become relatively noiseless; something that most Indian judges and advocates are not used to and would probably have trouble adapting to. It is unlikely that any studies have examined the efficiency of present Indian methods of court recording. However, one can speculate fairly confidently that unlike current Indian methods, which necessarily impede the pace at which oral evidence can be taken, sound recorded courts would enable evidence to be taken much faster, possibly at twice the speed. Until that happens, of course, Indian courts will remain less efficient at taking evidence than courts which successfully use sound recording, such as in Australia.

Conclusions

Some key points of comparison explained above are now summarized.

Judicial productivity. If the Australian court system is used as a hypothetical benchmark, (i) there are almost half as many more judges in Australia as a proportion of population than there are in Delhi; (ii) the average case disposal capacity of a Delhi judge is only half that of an Australian judge; and (iii) per lakh of population, the number of cases disposed by Australian judges is eight times greater than Delhi judges.

Settlement rates. Delhi judges, and probably most Indian judges, appear to be less productive because they administer more trials as a proportion of overall disposals than Australian judges. Over 70% of Australian disposals are settled voluntarily without a court verdict, whereas the comparable rate in India is probably around 5%. Around three quarters of Australian criminal cases in magistrates courts are disposed without a defended hearing, usually involving a plea of guilty; whereas most Indian criminal cases are defended. Only around half of criminal cases in India result in a conviction, whereas much higher rates of conviction are typically achieved in Australian courts.

Adjournment rates. Typically a case in an Australian court will be adjourned up to half a dozen times. In India cases are typically adjourned 20 to 40 times before being disposed. The fragmentation of the taking of evidence by frequent adjournments results in reduced efficiency in trial management. This inefficiency is compounded by the method of court recording by dictation, which probably doubles the time taken to record oral evidence, compared with sound recording methods used in Australian courts.

Continuous trials. Most trials in Australia are run continuously, i.e. a judge conducts the trial in one case, and normally no other case, from start to closing submissions, with minimal interruptions. Continuous trials almost never happen in Indian courts, with most trials being adjourned at the conclusions of each of up to five stages of trial. Adherence to continuous trials and minimization of adjournments are key reasons why Australian courts have high settlement rates for civil matters and high rates of undefended hearings in criminal cases with consequent benefits for judicial productivity. Continuous trials and low adjournments are achieved by having effective means of deterring misbehavior by litigants or advocates.

Courts that apply best practices tend to be preoccupied with increasing judicial productivity, minimizing adjournments and increasing certainty of trial scheduling and verdicts. The intended by-product of each of these strategies is to increase overall case settlements rates and to increase the proportion of case settlements that occur early. Discussions about case delay and backlog problems in India, however, seldom invoke these kinds of issues. Not only is the Indian court system

different from other common law systems, but arguably contemporary public debate about the problems that beset Indian courts has not yet recognized those differences. Indian courts need to acknowledge those differences and to act upon them. If this were to happen then the following major changes in judicial policy might be contemplated:

- Shifting the debate about judicial numbers to a debate about judicial productivity.
- Adopting case settlement, rather than case adjudication, as their primary strategic goal of Indian courts.
- Substantially reducing case adjournment rates in India to levels achieved in other systems.
- Implementing continuous trials as the preferred trial method for cases that do not settle.

Each of these options, if applied with any vigor, would be regarded as radical in India. All of them, however, have already been successfully applied in other systems. The challenge for those that influence the policies and practices of Indian courts is to accept that the key to successfully reforming the Indian court system is to apply methods used in other systems that have been shown to be effective. Indian practice should emulate best court management practice and improve upon it; just as Indians have done so well with English literature and the sport of cricket.

