CAN AN ITALIAN COURT USE THE AMERICAN APPROACH TO DELAY REDUCTION?*

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Italy may have the largest backlog and the slowest pace of civil and criminal litigation among all western countries. This article represents an effort to outline some of the issues associated with delay in Italian courts and to consider whether solutions to delay from the American experience might be helpful for Italian courts and in countries with similar problems. After a brief examination of the tribunal in Bologna as an example of case processing in Italian general-jurisdiction courts of first instance, the article outlines possible suggestions for improvement that might be offered to this court based on the American experience—such as time standards and limitation of unnecessary continuances. It is not easy to apply such remedies in Italian courts, and the authors describe five factors that would impede any effort to implement suggestions for improvement based on the American experience. They conclude by offering ideas on what might be necessary for an Italian court to provide "a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law," as provided in the European Convention on Human Rights.

The European Convention on Human Rights (ECHR; Council of Europe, 1950) provides that "in the determination of his civil rights and obligations or of any criminal charges against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law" (Art. 6, par. 1). Yet in 1999, the president of the European Group of Public Administration observed that courts in all European countries are faced with problems of management ineffectiveness and inefficiency that have resulted in their being burdened with a backlog of work, with cases protracted beyond reasonable time limits (Snellen, 2000:v).

Courts in European countries are beginning to consider how to cope with judicial delays, and researchers have started to relate the "reasonable time" clause in ECHR paragraph 6 to court management problems regarding the timeliness of civil, criminal, and administrative proceedings (see Fabri and Langbroek, 2003). It has been suggested, however, that Italy may have "the largest backlog and the slowest pace of litigation, both civil and criminal, among all the Western countries. For the excessive duration of trials, Italy has been repeatedly condemned by the European Court of Human Rights" (Fabri, 2000:190; Council of Europe, 2006).

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This article addresses some of the reasons for delay in Italian courts. Following a summary description of the Italian judicial system and an outline of the American approach to caseflow management, the authors briefly examine the way that cases are handled in the tribunal in Bologna as a specific example of case processing in Italian general-jurisdiction courts of first instance. We briefly describe possible improvements from the American experience that might be applied in these courts, and then we address the factors that would have to be considered in any effort to implement any prospective improvements.

ITALIAN COURT ORGANIZATION AND PROCEDURE

Organization. While the constitutional structure of the United States as a federal republic means that there is both a federal court system and a separate set of state court systems, the constitutional structure of the Republic of Italy provides for a single national judicial system (Democratic Republic of Italy, 1948:Arts. 1 and 101-113).

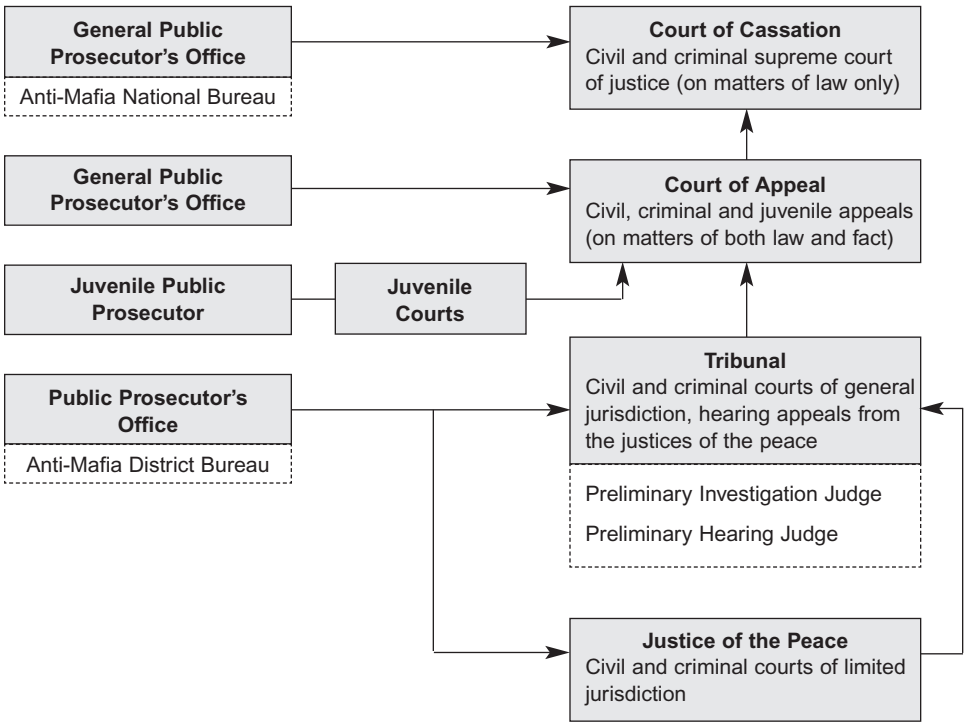
Public prosecutors are part of the judicial branch of government, instead of being in the executive branch as in the United States. In Italy, judges and public prosecutors together are "magistrates," and during their careers magistrates may go back and forth between judicial and prosecutorial assignments, even though recent legislation plans to limit this possibility (see Law No. 150, 25 July 2005, and Law No. 269, 24 October 2006) Public prosecutors have special "Anti-Mafia" bureaus dedicated to activities against organized crime. Tribunals—courts of first instance with general jurisdiction—have a "Preliminary Investigation Judge" who oversees the efforts of public prosecutors in the early stages of criminal prosecutions, while a "Preliminary Hearing Judge" determines if there is "probable cause" to hold a matter for presentation to a trial judge (Fabri et al., 2003:266).

To address its court backlogs, Italy has begun to restructure its courts of first instance (Marini, 2000:65-72). Before 1999, a case might be tried in one of two separate general-jurisdiction courts of first instance. More serious cases would be heard in the "Tribunali" (tribunals) by three-judge panels, while less serious cases would be heard in the "Pretura" (as in the Latin "praetor") by a single judge. In a structural reform, these two courts were merged into a single tribunal, the "Giudice unico di primo grado" ("unified court of first instance"), and the number of trials heard by three judges was reduced, while limited-jurisdiction courts ("Giudici di Pace," or justices of the peace) were established for the simplest civil and criminal cases. (For a simplified view of the Italian judicial system, see Figure 1.)

Procedure. A detailed comparison of civil and criminal procedure in Italian courts with that in American courts is unnecessary for the purposes of this article. Yet it is helpful here to outline some of the broad features of procedure in Italian tribunals.

Unlike the American common-law procedures for civil cases in trial courts, the Italian process follows the civil law and is largely paper based. Court hearings are primarily for presenting documentary evidence, and evidentiary hearings for oral presentation of evidence are rare. Rather than building toward the possibility of in-court

Figure 1
A Simplified View of the Italian Judicial System (source: Fabri et al., 2003:268)



oral testimony in a trial with or without a jury, civil procedure in a civil-law country generally ends with a final hearing, after which a case is held for a written decision by a single judge or a three-judge panel. (For more about civil procedures in civil-law countries like Italy, see Lena and Mattei, 2002; Zuckerman, 1999; and Snijder, 1996.)

Criminal procedure in Italy has in recent years become a more "accusatory" process, initiated by a prosecutor, changing from a more traditional "inquisitorial" approach carried out by an investigating magistrate. As in American criminal procedure, a public prosecutor in Italy is responsible for initiating proceedings against a criminal defendant, although the public prosecutor must prosecute any case where a crime has been alleged, and only a judge may enter a dismissal. Most trials are to a single judge sitting without a jury, except that a three-judge panel hears more serious offenses, and a "court of assize"—consisting of two professional judges and six lay judges—hears trials in the most serious crimes. (On criminal procedure, see Delmas-Marty and Spencer, 2002; Thaman, 2002; and Bradley, 1999.)

AMERICAN APPROACH TO ADDRESSING PROBLEMS OF DELAY

In the United States until the 1970s, efforts to reduce delay focused on the factors now being considered in Italy—court structure, court resources, and rules of proce-

dure, which are the kinds of issues most likely to arise within the cognitive framework of judges, law professors, and lawyers (see Steelman, 1997:148-49). In the past thirty years, however, there has been considerable national-scope research in America on factors associated with the pace of civil and criminal litigation (see Flanders, 1977; Church et al., 1978; Friesen et al., 1979; Sipes et al., 1980; Mahoney et al., 1988; Kakalik et al., 1996; and Ostrom and Hanson, 1999). The conclusion from this research, reinforced by the many individual court studies, has been that case volume, court structure, resources, and rules of procedure may not be the sole or most important factors explaining the pace of litigation in American courts. Rather, the pace of litigation is often more a function of the "local legal culture" (see Church et al., 1978:54)—the shared expectations of judges and lawyers about the progress of cases—than it is of those other factors.

To change such shared expectations, the new "conventional wisdom" in America is that a court must actively control the progress of cases from initiation to conclusion (see Church, 1982, as well as Solomon, 1973; Solomon and Somerlot, 1987; Mahoney et al., 1988; and Steelman, Goerdt, and McMillan, 2004). Applying management techniques specific to caseflow management, such as early court control, differentiated case management, meaningful pretrial events, firm and credible trial dates, and trial management, is, however, only part of what gives a court success with caseflow management.

Underlying the application of such techniques must be a sound court management foundation, including strong leadership, commitment to a shared vision, effective communication, and maintenance of a learning environment, and the willingness to exercise the essential features of active management, such as establishing time standards and other appropriate goals and expectations; using information systems to monitor and measure actual performance; and holding people accountable for bringing actual performance into compliance with standards, goals, and expectations (see Steelman, Goerdt, and McMillan, 2004:60-71, 72-85).

CIVIL AND CRIMINAL CASES IN TRIBUNALS: A BOLOGNA CASE STUDY

If the American experience is relevant to circumstances in Italian tribunals, efforts to restructure the courts and to provide additional resources, while necessary, will not be sufficient to permit those Italian courts to reduce and avoid delay. Instead, more active court management of the progress of cases will be necessary. To date, however, it appears that there have been few studies, in Italy, of the factors associated with the pace of litigation and whether the introduction of caseflow management techniques would be valuable (see Fabri, 2000:195).

It is therefore necessary to look more closely at Italian tribunals to determine if the American experience is relevant and to begin a process of building institutional support for the introduction of more active efforts by courts to manage the pace of litigation. To this end, we have looked briefly at both civil and criminal matters in

the tribunal in the City of Bologna. Subject-matter jurisdiction is as follows (see Ministry of Justice Web site, http://www.giustizia.it/uffici/info/tribunali.htm):

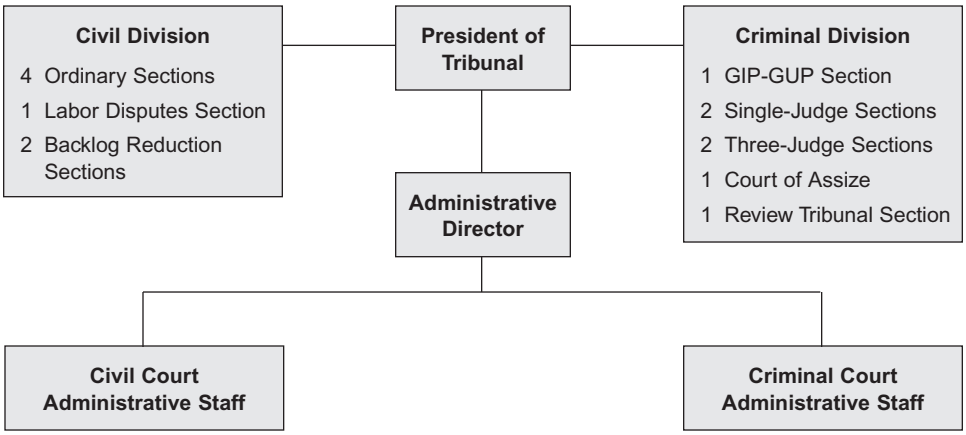
- In civil matters, the judges of a tribunal issue orders in chambers relating to such nonlitigated matters as authorizations, appointments, or revocations. Civil jurisdiction of contested matters includes personal-injury and contract cases, labor disputes, social security, divorce and other nonjuvenile family cases, bankruptcy, and agriculture cases. A judge sitting alone can preside over a case, the enforcement of a judgment, or a de novo appeal from the decision of a justice of the peace. Three-judge panels hear matters of particular importance.
- In criminal matters, a single judge, sitting without a jury, normally has responsibility for the trial of most offenses. Three-judge panels hear more serious cases. Under Article 5 of the Italian Code of Criminal Procedure, the most serious offenses are heard by a "court of assize," which consists of two professional judges and six lay judges whose role can be compared to, but is not identical to, that of jurors in an American criminal-court proceeding.

Within Italy's judicial districts, statistics about civil caseload in the tribunals show that about 35 percent of the total new filings are matters that one might expect to move quickly from initiation to conclusion, such as summary proceedings, non-litigated matters, and appeals from justices of the peace. Another 16 to 17 percent of all "new" filings are proceedings to enforce prior court judgments against the personal property or real property of judgment debtors. Decisions with judgments were more often required in cases involving personal injury, contracts, labor, social security, and families. The inventory of pending cases is overwhelming for most major case categories. For bankruptcy cases, there is a tendency to have more than ten times as many cases pending as are filed in a year, and the inventory of enforcement actions against real property is more than seven times the number of new enforcement actions that are filed in a year.

Bologna Tribunal Organization and Structure. As of 2003, about 35,000 new civil cases and about 20,000 criminal cases, including cases with unidentified suspects, were filed in the tribunal in Bologna. (See Department of Statistics of the Ministry of Justice: http://www.giustizia.it/statistiche/statistiche_dog/2003/civile/bolognat.xls, and http://www.giustizia.it/statistiche/statistiche_dog/2003/penale/bolognat.xls.) It has a main location—the "Palazzo di Giustizia," or Palace of Justice—and a nearby facility that was formerly a school building in the central city, along with two detached offices in Imola and Porretta Terme, where only single-judge hearings are held (see Figure 2).

As of December 2006, the tribunal had twenty-nine professional career judges and twenty-eight appointed associate judges assigned to hear civil matters. There are four sections for ordinary civil litigation, one of which handles all nonlitigated matters

Figure 2
Simplified Organization Chart for Judges and Court Administration in Bologna Tribunal



and another handles all bankruptcies and executions of judgments (see Figure 2). Out of twenty-eight associate judges, fourteen are fully dedicated to the two civil backlog-reduction sections. In the criminal division, there are twenty-seven professional career judges and four associate judges. With eleven professional judges, the "GIP-GUP" section includes the preliminary investigation judges ("Giudici per le indagine preliminare," or "GIP") and the preliminary hearing judges ("Giudici per l'udienza preliminare," or "GUP"). In addition to the court of assize and the sections for single judges and three-judge panels, the criminal division also has a "review tribunal" section, which provides prompt review of decisions on the pretrial detention of criminal defendants (see Fabri, et al., 2003:266). There are twenty-two public prosecutors and two appointed associate prosecutors who appear in criminal cases before the tribunal.

Civil-Case Processing. To file a civil case, an attorney or party presents a complaint at the front counter of the clerk's office, with stamps attached to indicate payment of applicable filing fees. After receipt of the filing, a clerical staff member behind the front counter is assisted by the automated system to assign a case number (Contini and Fabri, 2007), initiate entry of case data in the system, and create a color-coded case file to indicate the general type of case. Subsequent filings are received in similar fashion, and the case file is made available for a judge or judge panel when a hearing is scheduled.

After the publication of a civil decision, the case may be appealed. The court-of-appeal panel reviews the facts as well as the law, and it may overrule the factual determinations made by the tribunal as well as reverse the lower court on issues of law. After the period for any appeal has run, the civil judgment creditor may initiate separate proceedings, before a separate single judge, in execution of judgment against the real or personal property of the judgment debtor.

"Civil Trial Online." The tribunal in Bologna is the first of seven courts to implement a new automated civil-case management information system called "Civil Trial Online," which is much more sophisticated than the automated case management systems now used by sixty-six other tribunals. In each of the seven pilot sites, there are judge-clerk-attorney "laboratories" with software-development personnel and organizational consultants who analyze the steps at each phase of case processing and try to eliminate those involving unnecessary movement of paper. Their effort is not to change the rules of civil procedure, but instead to simplify steps in compliance with the rules of procedure. In April 2004, the information-technology people of the tribunal in Bologna said that the office was technically ready for electronic filing of pleadings and other documents, the creation of an electronic case file, and electronic communications. The Ministry of Justice plan called for Web-site access to case information for attorneys in Bologna by June 2004 change dates, and for electronic filing of documents with electronic signatures to be introduced by September-October 2004; however, by December 2006 this had not yet happened.

Criminal-Case Processing. Italy's criminal procedure is an "accusatory" system driven by the filing of criminal charges by public prosecutors. It is more inquisitorial, however, than the Anglo-American system. Because of the oversight that a preliminary-investigation judge exercises over some of their actions, prosecutors cannot decide on their own not to go forward with prosecution. Under the constitutional principle of "mandatory criminal initiative" (Constitution, Article 112), the prosecutor must seek a judicial dismissal of a case where a prosecution is not possible, as well as in those cases in which the suspect has not been identified. There are over a million cases a year throughout Italy in which the police or prosecutor cannot identify a suspect, and which must as a result be dismissed by a preliminary-investigation judge at the request of the public prosecutor.

Even with an identified suspect, criminal procedure rules require a preliminary-investigation judge to review and validate some public-prosecutor actions, including the decision to arrest and detain a defendant. The prosecutor must apply for the judge's approval of a wiretap or a search warrant. Within forty-eight hours after any arrest, the prosecutor must request court approval of that action, and the court hearing and decision must be completed within forty-eight hours after the request. Decisions by a preliminary-investigation judge approving the jailing of an arrested defendant may be further subject to review by the review tribunal and by the Court of Cassation (Constitution, Article 111). A prosecutor's decision to seek a criminal trial must be approved by a preliminary-hearing judge.

In addition to disposing of cases by dismissal, the judges in the tribunal's GIP-GUP section can also accept plea bargains and hold other "special proceedings" under legislation originally enacted in 1989 but amended several times by the Parliament after decisions by the Constitutional Court. Such special proceedings include "immediate summary trial," "direct summary trial," and "penal decrees," as well as "abbreviated summary trial," in which the preliminary-hearing judge reviews only documentary evi-

dence, as submitted by the prosecutor and the accused, and the accused relinquishes the right to an oral trial in exchange for a one-third sentence reduction if found guilty. (See "alternative summary trial," http://www.giustizia.it/sito_trad _inglese/en_index.htm.)

Plea bargaining is a special form of criminal procedure under which the defendant and prosecutor can ask the preliminary-hearing judge for a reduction of up to one-third of the sentence that could otherwise be imposed. Unlike in the United States, Italian prosecutors cannot bargain on charges. Plea bargaining was initially allowed only for less serious offenses, involving no more than two years imprisonment, but recent legislation (Law no. 134, 12 June 2003) has allowed a penalty of up to five years imprisonment (e.g., for manslaughter). Defendants can also bargain pleas with the judge, even when the prosecutor does not consent (see criminal procedure article 448.). There can be no appeal from a conviction based on plea bargaining (as defined by the Ministry of Justice at http://www.giustizia.it/sito_trad_inglese/en_index.htm).

From initial filing of the charge throughout the preliminary hearing or indictment to the time of the trial, American prosecutors often make successive offers to defendants. Many prosecutors' offices have a policy of making their best, most lenient offer early in the process. If the defendant waits until late in the process, the prosecutor is likely to engage in much tougher bargaining. It makes no sense for a prosecutor to bargain too close to trial, because the prosecutor is ready and all the paper work has been filed. In Italy, plea bargaining is not seen at all as a "hurdles race." Defendants can plea bargain, as well as use some of the other special proceedings, almost until the end of the preliminary hearing, and then also on the day of trial before the judge. Unless a defendant is detained, this gives no incentive to shorten the proceedings.

If a case is not disposed by one of these alternative methods and is bound over for trial, the GUP notifies the assigned trial-division single judge or three-judge panel and receives a trial date. Article 429 of the Code of Criminal Procedure entails that the GUP must assign a trial date no earlier than twenty days after his or her decision to bring the case to trial. Requests for trial are assigned to sections randomly. The date assigned for trial is the next available date for the single judge, three-judge panel, or court of assize.

In trial, evidence is presented by oral testimony of witnesses, who are examined and cross-examined by the public prosecutor and the attorney for the accused. Like the preliminary-hearing judge in an abbreviated summary trial, the judge or judges in a full trial have still the inquisitorial power, even if it is supposed to be used only for exceptional situations (Code of Criminal Procedure, Art. 507), to ask that the police and prosecutor gather and present further evidence, rather than relying solely on the evidence offered by counsel, as a trial judge in the United States would be required to do under American rules of criminal procedure. However, the Italian prosecutor has a broader right to appeal than does an American prosecutor and is authorized to file an appeal from an acquittal in a criminal case.

PROBLEMS AND CONCERNS

Information-gathering visits to the tribunal revealed several problems. While some of these are systemic, others have more to do with the dynamics of a general-jurisdiction court.

Staff Resources. A major resource problem involves the number of part-time staff members working for the court. In recent years, there has been a decrease in the number of full-time-equivalent staff time available to perform day-to-day court operations. The Ministry of Justice decides on the level of staff authorized for each tribunal, and then decides on requests by individual staff members to be allowed to work part time, which is sometimes as little as twelve hours a week. About one-third of all staff in the tribunal in Bologna work part-time, defined as half a week or less. One of the judges in the tribunal observed in an interview that the judges in Bologna could hold more hearings and could have shorter time intervals between hearings, but the number of part-time staff makes it impossible to schedule and process case files for them.

Information Technology, Case Processing, and Change. Through "Civil Trial Online," the Ministry of Justice has promoted efforts to develop a sophisticated case information system in Bologna and six other pilot locations, and the leaders of the Ministry assert that this should permit tribunals to operate more efficiently by processing their cases with fewer people.

Yet case processing in Bologna at present remains largely manual and paper based. While experimental judge-clerk-lawyer teams are preparing for electronic filing and other dimensions of electronic case processing, many attorneys are not yet ready for electronic filing, and court staff members do not yet see what and how things will change. While there is an effort to create a single national system for all the tribunals, case processing is done differently in the Bologna tribunal than it is in Milan, Rome, Naples, or other urban courts. While there may be communication and information sharing among the experimental teams in Bologna and other pilot sites for the new system, some perceive that there is no communication or information sharing among the tribunals about their respective experiences with systems development, and there is said to be no expectation of ongoing efforts to refine the implementation of the new system. Moreover, some studies have shown that there are a number of errors in the civil database, which have required corrections to ensure quality of information. Records in Bologna show a rate of about 600 corrections per month, out of about 10,000 total data-entry events per month—an error rate of about 6 percent.

Times to Disposition. For civil cases, there are backlog reduction units to deal with older pending matters in Bologna and other tribunals, but there appears to be no definition of what constitutes a "backlogged" case, other than that it has been pending for some (undefined) long period of time. If there are no delays in an ordinary contested litigation case, rules of civil procedure provide that it can be completed within twelve to eighteen months. Yet the average disposition time for a civil case is

twenty-four to thirty months, and many civil cases take five to eight *years* to be decided. There are at least two reasons for these extended times. First, while the investigating judge in a civil case is required to ask parties if they wish to have the judge assist an effort to reach an agreed disposition, this is usually no more than a formality, and the parties and their attorneys typically do not take the opportunity to reach an agreed disposition at this phase. As a result, many cases go forward to decision by the tribunal even though they might well have been resolved earlier in the case, through some form of negotiated outcome, at less cost to both parties and the court. A second reason for delay stems most often from the "trattazione" (fact development) phase. Judges too often grant a request for continuance or rescheduling whenever the parties ask for it, thereby yielding control over the pace of litigation to the attorneys. As a consequence, the number of hearings during this phase is multiplied, and the amount of work to be done in a case is artificially inflated.

In a criminal case, a public prosecutor typically has six months to complete preliminary investigation, although that time can be extended with judge approval. The alternative procedures allowing for cases to be disposed by plea bargain or abbreviated summary trial at the GIP-GUP level have caused an increase in early dispositions. Fifty-five percent now come at the GIP-GUP level, while only 45 percent did before the legislation authorizing those measures.

IDEAS FOR POSSIBLE IMPROVEMENTS

An American consultant visiting the tribunal in Bologna might offer several proposals for improvement based on the discussion here about the court's organization, structure, and case processing. They might include the following five suggestions.

1) To enhance chances for its successful deployment of an automated "Civil Trial Online" system under the leadership of the Ministry of Justice, greater attention may be needed to expressions of concern and potential resistance to change from court staff members and attorneys. As a signal that the Italian judiciary considers civil-backlog reduction to be a matter of serious priority, it would be desirable for professional career judges to undertake backlog reduction instead of delegating responsibility for "backlog" cases to appointed nonprofessional judges.

2) If the tribunal in Bologna is to manage its caseflow successfully, the judges and court managers will have to commit to active management of the pace of litigation. As the first element of active management is to have appropriate expectations, the Ministry of Justice might adopt time expectations for the Bologna tribunal as a national pilot site.

3) It would also be desirable to have expectations regarding the size of the pending civil inventory. The goal should be for the judges of the tribunal to dispose of more cases each year than are newly filed, until the number of pending cases is no more than can be disposed within the applicable time standard. After that level is reached, the judges should maintain it by disposing of as many cases as are filed each year.

4) Judges and court managers should then use the court's information system to monitor the age and status of pending cases from the date of case initiation and to look at the age of cases in light of agreed time expectations. To ensure that information provided to judges and court managers is accurate and reliable, it will probably be necessary to undertake a quality-improvement program with the court's data-entry staff.

5) It is necessary for the judges to accept responsibility for the movement of cases and to take active steps to see that they proceed to just outcomes within agreed time expectations. Active steps should include applying a policy discouraging "continuances," introducing "differentiated case management" (DCM), using an early case management order entered by a judge to control case progress, and expanding use of both plea bargains and "abbreviated summary trials" in criminal cases to achieve early dispositions.

FIVE BARRIERS TO CASEFLOW MANAGEMENT IMPROVEMENT IN ITALY

The kinds of suggestions for possible caseflow management improvement offered for the tribunals in Bologna reflect ideas that have been successfully implemented in a number of American trial courts. Yet there are impediments in the Italian courts that would make their implementation difficult and possibly unlikely to succeed without significant attention to other considerations. While some of these considerations are similar to issues that would be present in the courts of the United States or other countries, they may be more pronounced in Italy. They bear significantly on the likelihood that any efforts at improvement might be successful in Italian tribunals.

Education and Socialization of Judges and Lawyers. Apart from legislation, the law in the United States and other common-law countries is "judge-made law" that arises from the cumulative body of court decisions made over time, and in any court decision there is strong reliance on precedents established by prior case law. In the civil-law tradition of Italy and other continental European countries, however, there is much more attention to systemic logic and rational principles, so that the law is said to be conceived more by legal scholars. The education of legal professionals in common-law countries, thus, creates a somewhat different orientation, which Justice Oliver Wendell Holmes called "the logic of experience," than that for legal professionals in civil-law countries, who give more emphasis to theoretical constructs (see Shapiro, 1981; Mestitz and Pederzoli, 1995; Guarnieri and Pederzoli, 2002.).

While judges in the United States and other common-law countries have all come to the bench after a nonjudicial career in the law, most often as either prosecutors or lawyers in private practice, magistrates (judges and public prosecutors) in Italy are career public officials and bureaucrats who have passed a competitive national qualifying examination after the completion of their law studies. Like their counterparts in other civil-law countries, but unlike their Anglo-American colleagues, they consequently do not share a prior professional experience with the advocates who appear before them (see Guarnieri, 1995:247).

The consequences of such differences in education and socialization for the application of delay-reduction approaches in courts are twofold. First, before they will consider the utility of adopting such measures, Italian judges are likely to require a more formal approach, fully consistent with other precepts and principles of law, certainly less pragmatic and extremely careful in the introduction of changes that cannot be found in a specific legal provision. They will be less likely than Americans to allow some degree of experimentation and learning from experience. Members of the Italian judiciary also do not see attorneys as necessary partners in the development and implementation of delay-reduction mechanisms. American judges would see a need for reasonable accommodation of attorneys in efforts to manage the pace of litigation, and they would view members of the bar as their natural partners in the development of delay reduction programs. For judges in Italy and other civil-law countries, however, there is no such easy interaction, despite the fact that attorneys are key stakeholders and institutional participants in the judicial process.

Leadership of Judiciary. One of the most critical elements of successful caseflow management programs in American courts is effective leadership (Mahoney et al., 1998:198; Solomon and Somerlot, 1987:8-9). In American courts, the selection of chief justices as court system leaders at the federal and state levels, whether by election or appointment, is often a matter of political factors involving legislators and the president or a governor, while the selection of a trial-court chief or presiding judge is more likely to be a matter of bureaucratic politics among judges and other considerations internal to a particular judicial system. Strong leadership over time can result in dramatic improvements and sustained success in reducing and avoiding delay. On the other hand, the failure of a court or court system to create or maintain effective caseflow management and delay reduction can often be attributed to the absence of sustained leadership (Steelman, Goerdt, and McMillan, 2004:137-38).

The national leadership of the Italian judiciary is vested by Constitution in the Higher Council of the Magistracy, which has exclusive competence to appoint, assign, move, promote, and discipline members of the judiciary, and the Ministry of Justice, in which responsibility is vested for the organization and operations of the administration of justice (Democratic of Italy, Constitution, 1948:Arts. 105 and 110). The Ministry of Justice, which oversees most of the operational matters that one would associate with court management (Fabri et al., 2003:264-65), has four departments—justice affairs; judicial organization and personnel, the most important because it deals with human resources, purchase and allocation of resources, budgeting, court statistics, and information technology; juvenile justice; and administration of prisons.

While the Higher Council initially was to make promotion of judges and prosecutors based on merit as well as seniority, reforms in the 1960s and 1970s have made career advancements largely based only on seniority. The Higher Council also appoints court leaders, such as the president (chief judge) of a tribunal or a court of appeal, or the chief prosecutor in a public prosecutor's office. Although it would be

desirable for such appointments to be based on leadership skill and managerial aptitude, the common practice is that such appointments are based solely on seniority and on the various factions of the powerful National Association of Magistrates, whose influence in the selection of court and prosecutorial leaders arises from its role in the election of Higher Council leaders (Fabri et al., 2003:262-64). The consequence is that persons with strong leadership and good management skills are seldom chosen for the highest positions in the courts or prosecutor's offices. Likewise, the leaders of the Ministry of Justice in general have little orientation and education in management theory and practice, perhaps because most of its executives are judges or prosecutors. And perhaps because those leaders are magistrates whose civil-law education emphasizes systemic logic and consistent adherence to theoretical principles, the Ministry is viewed as having little tolerance for any pragmatic variation from national directives to meet unique local circumstances, even though the low-visibility, day-to-day operational practices of clerical staff in the Bologna tribunal may in fact be different from those in the tribunals in Rome, Milan, or Naples.

Background and Status of Court Managers. In the United States, the development in the 1970s of current principles of caseflow management to address delay coincided with the emergence of court administrators charged with a broader set of court management responsibilities than those for which clerks of court were traditionally responsible (see Tobin, 1997:12-15), and today their principal organization, the National Association of Court Management (NACM), which holds that "Properly understood, caseflow management is the absolute heart of court management" (NACM, 2003:16), has over 2,500 members. One of most important accomplishments in the field of court administration has been the creation of a set of "core competency curriculum guidelines" for both ongoing educational programs and for self-assessment by court managers of their own knowledge, skills, and abilities (see NACM, 2003:1 ff.).

In Italy, there are civil servants designated as court managers who are appointed by the Ministry of Justice. Although they need not be law-trained, most are, in fact, law graduates rather than persons who may have management education or experience from another setting. Because of the power of the judges who head the tribunals, court managers have limited authority. Because they are appointed by the Ministry, they do not necessarily have a positive working relationship with the judges who serve as the leaders of tribunals. While court managers are held responsible by the Ministry for the accomplishment of organizational goals, they do not always have the authority or judge support necessary for the achievement of those goals (Fabri et al., 2003:277-78).

Judicial Independence. In the American experience, as in that of all common-law and civil-law jurisdictions, it is a fundamental principle of fairness and justice that a judge must be free of any political or other influences that might unduly threaten or impede the judge's capacity to make a sound and independent judgment in any particular case. Yet national court performance standards provide that courts, while they

should not be absorbed by or managed by the executive or legislative branches, must work effectively with the other branches of government and must also maintain reciprocal relations with other government entities, and that each court as a unit of government must be accountable to the citizenry, in that it must responsibly seek, use, and account for its public resources (BJA, 1997:Standards 4.1 and 4.2).

At the level of an individual judge, this means that independence in the rendition of judicial decisions must be balanced with accountability in terms of the internal organizational objectives of the judiciary. Thus, a judge in a court system assigning high priority to timely justice would be expected to make prudent use of an expensive public resource—the judge's time—and to achieve just outcomes without undue delay. That judge's performance would be appraised not only in terms of the quality of judicial decisions rendered, but also by how well the judge managed cases. In such a system, judges showing a combination of both legal and management skills would be recognized by advancement to leadership positions. While there may be considerable variation from one American judge or court to the next in the achievement of this ideal, it has been adopted in general as the most desirable interpretation of "judicial independence" and the functioning of the judiciary.

In Italy, the dynamics of judicial independence appear to have developed in a dramatically different way. While there have been efforts since the end of World War II to transform the institutional setting of the Italian judiciary to make it as independent as possible from the surrounding political environment, events have instead led to a situation in which individual judges are extensively involved in political factions and personally independent of any responsibility to be accountable to the hierarchical leadership and organizational goals of the judicial branch of government (Guarnieri, 1995:245-54; Fabri et al., 2003:274-76, Di Federico, 2005, 2004). Within the National Association of Magistrates, clear political factions ranging from the political left to the political right have developed and have served as vehicles through which judges and public prosecutors have expressed their demands to the national legislative and executive branches of government.

More important, however, these factions have also had substantial influence on the leadership structure and decision making of the Higher Council of the Magistracy, with two critical results. First, the requirements for advancement to higher salaries and positions of leadership have been simplified by the Higher Council to provide for virtually automatic advancement, based solely on seniority. Second, the Higher Council has progressively weakened the organizational authority and power of chief judges and chief prosecutors over their colleagues. As a result, "judicial independence" has come to mean functional autonomy for each judge in terms of everyday working life, so that Italian judicial offices can be viewed as "organized anarchies" (Fabri et al., 2003: 275-76).

One familiar with American courts would recognize that such "organized anarchy" is hardly absent from the judicial landscape in the United States. Yet the consequence of this for American courts are the same as they are in Italian courts: any

effort to define a strategic mission and purpose for the judiciary that includes emphasis on timely justice is met with assertions that "judicial independence" permits any individual judge to ignore such organizational imperatives. In the United States, however, such an "anarchic" interpretation of "judicial independence," rejecting any complementary principle of public accountability, is becoming progressively more untenable (see, for example, BJA, 1997:Standards 4-1 and 4-2; Peters et al., 2005:26; Hewitt, Ostrom, and Schauffler, 2006).

Requirements of Law and Procedure. Any effort to make improvements may face both "hard" and "soft" barriers to change. "Hard" barriers include those having to do with statutes, rules, labor-management agreements, or such physical things as buildings, while "soft" barriers are those that have to do with resistance to change by individual people or groups (Schumacher, 1997). A common observation that is made about the pace of litigation in Italian courts is that delay is built into the structure of the laws and the codes of civil and criminal procedure. Some of this is undeniable. For example, plea bargaining is possible until the opening statements of the trial, and a reduction of one-third of the sentence may be granted by the judge formally using an "abbreviated summary trial" even without the prosecutor's consent. While it would seem that such provisions would be obvious targets for modification in the public interest, there are strong factions in Italian politics that see them as indispensable protections against the arbitrary exercise of government power over individuals.

At the same time, there are expectations in the "local legal culture"—the established informal expectations of judges and lawyers about the pace of the court process (Church et al., 1978:53-54)—that involve the manner in which the Italian rules of procedure are interpreted. In civil matters, for example, many Italian judges reschedule court hearings whenever requested by the attorneys for the parties, especially during the "trattazione" phase of proceedings. This may not be explicitly mandated by the rules, and there may be variations among judges in how they interpret the rules, but it does reflect the understanding among judges about what the rules of procedure require of them and a view that parties have a legal right to proceed in litigation in a manner and at a pace that suits their own needs, without being subject to the imposition of any pressures from the judiciary to move forward to conclusion. Any organizational effort by judicial leaders to counter this approach among individual judges might be viewed as an infringement not only on the rights of the parties, but also as an intrusion on "judicial independence."

STRATEGIES TO OVERCOME BARRIERS TO CASEFLOW MANAGEMENT IMPROVEMENT

The factors discussed above demonstrate that any effort to reduce delay and improve caseflow management in the Italian courts faces substantial barriers. As substantial as such barriers are, however, they are at worst an extreme example of the kinds of barriers to change that must typically be overcome in any effort to introduce substantial changes in the day-to-day operations of any organization.

To overcome the barriers that would impede progress with delay-reduction efforts in Italy, it will be necessary to deal directly with the causes of such barriers. Seven steps warrant particular attention.

National Consensus on Delay. Court leaders should build a broad national consensus, not only among members of the public, but also among key government leaders and political figures, that unnecessary delay in judicial proceedings undermines the purposes of courts and the capacity of government to function, as has been observed with respect to courts in America (Mahoney et al., 1991). While a similar opinion has been expressed by such major public figures in Italy as the president of the republic, who has observed that court delay is a major problem that requires attention, a number of political pressures appear to stand in the way of action. For such political pressures to be removed, it may be necessary for other key actors and factions in the political process to agree that court delay is unacceptable and must be addressed.

Consensus on "Reasonable Time." Court leaders should also build a consensus on what specifically constitutes "a hearing within a reasonable time" so that national time standards can be developed, because to determine what constitutes "improvement" in any effort to combat delay in the courts, it is important to have some measure of what constitutes an acceptable elapsed time for court proceedings. For American courts, a special committee of the National Conference of State Trial Judges adopted time standards for civil, criminal, and divorce cases that were subsequently approved by the American Bar Association House of Delegates (see ABA, 1992:Sec. 2.52), thereby reflecting a consensus among influential members of the national legal community. While those time standards were not uniformly adopted throughout the country, over two-thirds of all the state court systems in the United States now have formal time standards for criminal and civil cases (Dodge and Pankey, 2003).

It is important for Italians to reach agreement on what is "a reasonable time" within which a person is entitled to a hearing before a disinterested tribunal, as provided in the European Convention on Human Rights. What is "reasonable" is not necessarily what is consistent with judges' and lawyers' established current expectations in Italy, and it is not necessarily represented by what Italian courts could comfortably achieve in the context of current resources and current practices. Rather, it should represent a disinterested judgment about what would be reasonable for a citizen to expect of the courts if the judicial branch had adequate resources and were using them reasonably well, and if statutes and rules of procedure were interpreted to require prompt justice for citizens.

Leadership Support. As leadership is part of the basic foundation for successful efforts to reduce and avoid delay (Mahoney, et al., 1988:198; Solomon and Somerlot, 1987:8-9), it will be critical to build leadership support for timely justice in the Higher Council of the Magistracy, the National Association of Magistrates, and the Ministry of Justice. Leadership skills include the ability to develop and articulate a compelling vision, persuasive capacity to show how others will benefit from that

vision, and persistence to see that new initiatives are implemented and carried through to conclusion. It may be critical for delay reduction to become a high priority for the different factions in the National Association of Magistrates, given their influence on the Higher Council of the Magistracy.

Professional Court Managers. Leaders of the judiciary should promote support for the development of a meaningful professional role for court managers. The emergence of a philosophy of caseflow management as a critical way to reduce delay coincided in America with the emergence of a body of court managers, and caseflow management is seen as central to the very function of court management (NACM, 2003). While it is critical for judges and public prosecutors to make a commitment to delay reduction as a matter of priority, much of what must be done outside the courtroom involves activities of court staff members in day-to-day case processing, data entry, and the management of a court's automated case information system. Among the "core competencies" of court managers in Italy should be the ability to participate with judges and the Ministry of Justice in planning for improved caseflow management; providing training for court staff on their role in caseflow management; managing human resources to provide for efficient use of available personnel; budgeting for other resources for caseflow management; allocating and using such resources as computers efficiently; seeing that accurate information is provided to judges about the timeliness of case processing; and communicating with lawyers about the judiciary's caseflow management policies.

Support for Quality. Judicial leaders should promote and encourage innovative efforts by local court leaders and staff members to improve the quality and timeliness of their operations. While some of the essential features found to be common in successful caseflow management programs in American courts have been noted here, it must also be recognized that successful courts have taken different approaches to the achievement of success (Mahoney et al., 1988:198). In Italy, some specific practices in Bologna will necessarily be different from those in Rome, Milan, Naples, or Palermo, and the nature of problems for courts serving smaller areas will necessarily be different from those facing the large urban courts. It is not possible to foresee all potential problems, and a solution that works well for one court may not be suitable for another court. It would be desirable to allow a degree of experimentation among different courts within certain broad parameters, and then to see what are "best practices" for different kinds of settings. From such experimentation, it would be possible after time to develop insights about what kinds of basic principles for managing the pace of litigation are most appropriate for Italian courts, and how those principles might properly be applied in different settings.

Necessary Changes in Law. To support the above steps, it will be important to make changes in law and procedure to promote just outcomes that are also timely and economical. Success in an effort to reduce delay in Italian courts will probably require that competing interests and political factions in the society find a way to accommodate one another for society's greater good.

A separate and easier question is whether existing rules of civil and criminal procedure, as they have been interpreted in practice, actually promote delay. In Egypt, a civil-law society in that general civil and commercial matters are litigated under the Napoleonic Code, judges in general-jurisdiction courts of first instance have traditionally interpreted the rules of civil procedure to require that they not play an active role in causing cases to proceed to prompt justice. Yet in 1998, a justice of the Court of Cassation, with the support of the leaders of the Egyptian Ministry of Justice, argued forcefully that the rules of procedure should be interpreted to call for the judge to play a positive role in civil litigation and manage cases to avoid unnecessary delay (Steelman, 2001). Four years later, the Egyptian Ministry of Justice provided for that justice to lead a committee of judges in the preparation of a draft national plan for civil and commercial delay reduction in the general-jurisdiction courts of first instance (Egypt, 2002).

Italy has a much deeper civil-law tradition than Egypt and a significantly different set of political and economic circumstances. Yet the Egyptian experience suggests that established expectations about the interpretation and application of rules of procedure in a civil-law country like Italy might conceivably be amenable to different interpretations, and that such different interpretations might be more favorable to timely achievement of fair and just outcomes in individual cases.

Change Management. Leaders must accept and plan for the need to overcome resistance to change, both by promoting the value of new initiatives and by giving thoughtful treatment to the concerns of magistrates, court staff members, and attorneys about the impact of new improvement efforts on previously established relationships and practices. The suggestions for improving caseflow management offered here, both for the tribunal in Bologna and as steps to overcome barriers to change throughout Italy, would in effect call for fundamental changes in the character of the Italian legal culture. It would therefore be prudent for advocates of such change to develop a thoughtful approach to change management (see Steelman, 2003:7). From the beginning of their undertaking, leaders of the improvement effort should start to manage expectations and build support for change. During the consideration of alternative ways to address delay problems, they should identify and assess any barriers that would be present for the implementation of each alternative. When a final course of action has been chosen, they should plan specifically to manage the change process as part of the development of the caseflow management improvement plan. Finally, they should deal quickly and thoughtfully with reactions that judges, court staff, and attorneys might have to the change process.

Implementing Strategies for Improvement. The strategies described above will not be self-executing. Experience with efforts to introduce caseflow management improvements in American courts suggests steps that might be necessary for implementation to succeed (see Mahoney et al., 1991:P9-1ff., P10-1ff., and P11-1ff; Steelman, Goerdt, and McMillan, 2004:127-34).

- It will be important to identify specifically what factors might facilitate change, and how those factors might be used effectively to overcome or neutralize barriers to improvement.
- Planning for caseflow management improvement should be realistic and include identification of key persons whose involvement is essential. This will include recognition of the need to involve private lawyers and other regular participants in the court process.
- It will be critical to find small improvements that could be done well, or to experiment with improvement efforts by a small handful of judges with the interest and capacity to do well, to build momentum and support for improvement.
- Support and momentum can be increased further by publicizing successes and ensuring that positive public recognition is given both to judges, non-judge staff, and other court-process participants.
- Flexibility will be essential, and proponents of caseflow management improvement will have to decide what elements of the improvement plan are negotiable.
- Overall, the effort should involve the development and maintenance of an ever-broadening base of support for the caseflow management improvements.

CONCLUSION

A person who is familiar with the judiciary in Italy might be inclined at first to dismiss the suggestions above as being impossible to achieve, given the nature of Italian society. However, such a person might do well to suspend judgment, at least temporarily, in order to think not *whether* these ideas might be put into effect, but instead to consider *how* that might be done. In the end, progress in these areas will be critical, whatever specific steps are taken in the tribunal in Bologna or other Italian jurisdictions to reduce and avoid delay.

While Italy may have "the largest backlog and the slowest pace of litigation, both civil and criminal, among all the Western countries" (Fabri, 2000: 190), Italian courts have taken steps to reduce their backlogs, even though the number of both civil and criminal cases pending in tribunals still remains substantial.

It appears from our brief assessment of the tribunal in Bologna that the lessons learned from the American experience with efforts to reduce delay and manage the pace of litigation would in large part be suitable for application in the Italian courts. More specifically, keys of the American approach to delay reduction—such as time standards, court control of case progress, differentiated case management, and limitation of unnecessary continuances—would probably yield substantial positive results if they could be implemented in Italian courts.

Yet there are substantial barriers to change that would make it difficult to introduce such steps to the Italian courts. Not the least of these barriers are statutes and rules of procedure that seem (at least as they are currently interpreted) to mandate delay; the independence of the judiciary; centralized judicial leadership that discourages local innovation efforts; and a partisan political environment that makes efforts to achieve prompt justice difficult.

Such barriers make it clear that the observation by Arthur Vanderbilt (a leader of twentieth-century court reform efforts in America), "Court reform is not a sport for the short-winded," would be especially applicable to the courts in Italy. To overcome these barriers to caseflow management improvement, it appears that several major strategic steps—such as building consensus, exercising judicial leadership, promoting a court management culture, encouraging innovation, and overcoming resistance to change—would be necessary to achieve the objectives of delay reduction in Italian tribunals. Strategic success in dealing with the major barriers to change in Italy will be a precondition for implementing the kinds of caseflow management improvement suggestions that have been offered here for such general-jurisdiction courts of first instance as those in Bologna. Only then would those courts have a greater opportunity to provide "a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law" (Council of Europe, 1950:Art. 6, paragraph 1) for the litigants that come before them. **jsj**

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