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WILLIAM T. PIZZI

LESSONS FROM REFORMING
INQUISITORIAL SYSTEMS

William T. Pizzi*

1. Italy's New Criminal Code

In 1989, Italy adopted a new code of criminal procedure aimed at transforming an inquisitorial trial system into a system that would include a number of adversary protections.¹ Everyone agreed that the Italian system badly needed major reform. The old system had degenerated to the point that Italy's trial system incorporated almost all of the negative aspects one associates with inquisitorial systems—the secret assembly of an investigative file, the dominant importance of this investigative file at the trial, and a near total concentration of power in the judiciary.

But although the reforms embodied in the new code were eagerly anticipated, they have not worked well in practice. For example, the attempt to transfer primary responsibility for the presentation of evidence from the judges to the parties has run into problems because it has been difficult for judges to let themselves be bound by the decisions of the parties. A similar problem has thwarted the code's attempt to introduce a limited form of plea bargaining. Although it permits plea bargaining in minor criminal cases with a fixed sentencing discount in exchange for the bargain, plea bargaining is not used often because judges have a difficult time accepting bargains that mean that a defendant will receive a sentence that is less than he or she deserves for the crime in question.

The intellectual difficulty that Italian judges have had making the transition to an adversarial system may seem puzzling to readers unfamiliar with civil law systems and comfortable in a system where plea bargaining is the norm. But if one grows up in the legal culture where judges have a responsibility to see that the trial arrives at the truth and to see that the sentence imposed is fair and just, it is not easy to turn primary responsibility for the development of evidence over to the parties or to accept procedures that require a judge to pronounce a sentence that is less than the sentence the judge would give the same offender without plea bargaining. Whatever happens in Italy in the years ahead, its recent experience is evidence that changing legal traditions and institutions is not an easy matter.

2. Parallels in the New Federal Sentencing Guidelines

But what does Italy's experience have to do with sentencing guidelines in federal courts? The answer is that the parallels between the two systems are strong.

Sentencing at the time Marvin Frankel wrote his influential book calling for reform² was a highly inquisitorial procedure with tremendous sentencing discretion vested in a single judge and, as a practical matter, no checks on that discretion. It was not uncommon, even for non-violent offenses, for an offender to be facing a sentencing range of from zero to twenty years in prison. The judge would enter the courtroom armed with the equivalent of a civil law file—a presentence report the contents of which had usually not been revealed to the prosecution or the defense. After listening to a one-sided presentation from the defense lawyer (the tradition being that the prosecutor "stood mute" at sentencing) and a few mumbled words from the defendant, the judge announced a sentence within the broad sentencing range that the judge considered appropriate for the offender and the offense. Sentencing philosophies varied considerably from judge to judge, even in the same district.

That this system had serious structural flaws and needed reform was pretty obvious. But what the drafters of sentencing guidelines may have failed to appreciate was just how difficult it would be for those involved in sentencing to adjust to a system that operates on radically different premises. Sentencing under a tight guideline system clashes sharply not only with what federal judges had traditionally been doing at sentencing, but with how federal judges (and others) see their role in the system. Prior to the guideline era, the federal judiciary served as a safety valve or a backstop. If a judge believed that the law to be applied was too harsh and punitive for what the defendant had actually done, or if the judge (and perhaps the prosecutor, too) believed that the defendant truly "deserved a second chance," the old sentencing system permitted a judge to sentence consistent with those beliefs. On the other hand, whatever the plea may have been, the judge was usually fully aware of the scope of the defendant's criminal activities and the broad sentencing range made it easy to impose sentences that were proportionate to the offender's actual wrongdoing.

Much of the power that judges had "to make things come out right" has been eliminated by the guidelines and it is at times frustrating for judges to work within the guideline system. The guidelines are asking judges to accept a redefinition of what it means to be a federal judge in the criminal justice system. That is not easy for them to accept, especially when difficult cases come along that require them to impose sentences that they would not have imposed in the pre-guidelines era.

3. Lessons for the Sentencing Commission

There continues to be a high level of hostility toward the guidelines on the part of federal judges and this hostility concerns me and ought to concern

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— WILLIAM T. PIZZI —

the Sentencing Commission. While I take many of the accusations and criticisms leveled against the guidelines by federal judges with a grain of salt (and think the Commission should do the same), the reality is that a strong sentencing system needs the support of the judiciary. To hear reports of districts where the judges permit or even encourage defense attorneys and prosecutors to work around the guidelines is disturbing. While some commissioners may feel angry at such judges for subverting the guideline process, the Commission needs to understand that the guidelines are asking an awful lot of federal judges in terms of the way judges are being asked to see themselves within the system.

Now that the guidelines have been in place for a while and most judges understand that they are a reality, a major priority of the Commission should be to try to dissipate some of the judicial hostility to the guidelines. At a minimum, are there not ways to give judges a larger role in reforming the guidelines so that they feel more committed to the sentencing system under which they are working? Are there not also ways to give judges somewhat more flexibility without undercutting the premises of the guideline system? Would it not make sense to try to simplify the guidelines so that they seem less mechanistic and

permit judges to feel that it is they who are in control of sentencing?

I don't pretend to have easy answers to offer the Commission. But I think a Commission that understands the difficulties for federal judges as the nature of their judicial power is redefined is far more likely to improve the situation than a Commission that views the problem as simply a battle of wills in which any concession is a sign of weakness.

As Italy threatens to demonstrate, history is full of attempted reforms of legal institutions that never achieve their goals because they are eventually overwhelmed by the legal cultures into which they are introduced. It would be wise for the Commission to keep that lesson in mind.

FOOTNOTES

¹ See generally William T. Pizzi & Luca Marafioti, *The New Italian Code of Criminal Procedure: The Difficulties of Building an Adversarial Trial System on a Civil Law Foundation*, 17 *Yale J. Int. L.* 1 (1992).

² Marvin E. Frankel, *Criminal Sentences: Law Without Order* (1972).