Fair Trial in the Digital Era. English and Italian standpoint*

Marco Canepa - Douglas Mark Ponton

Abstract

England and Italy have, in principle, the same criminal procedure model, known as the adversarial system. One of its central ideas is that a fair trial requires the complete 'cognitive virginity' of the person passing judgment on facts relating to the crime (jurors in England, professional judges in Italy). The evidence is presented to these decision-makers by counsels for the prosecutor and defence, and the verdict must be based solely on the grounds of evidence properly admitted at trial. Other knowledge could jeopardize the impartiality of jurors/judges, thus vitiating the legal process. In the digital era, new media, social networks and extensive external sources of information pose a fundamental threat to this assumption of cognitive virginity, and 'trial by media' may impinge on what goes on in court.

In the English system, this is a matter of major concern. At the outset of the trial, jurors are warned by the judge that they must not discuss the case with anybody, read newspapers, check issues or points of law on the internet, post on social media, etc. In the Italian system, even though the phenomenon of trial by media is extremely frequent, there are no similar provisions to guarantee impartiality.

This paper compares the two legal systems, and analyses the Criminal Practice Directions (2015) produced by the Royal Courts of Justice. Jurors are told that they must 'disregard any media reports on the case', but in an age where most citizens are exposed to diverse forms of multimedia input, this is easier said than done. As for the Italian context, the judicial authorities have yet to take the first step towards finding a solution, i.e., to recognise that new media do indeed constitute a problem.

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Keywords

Social Media, Trial by media, Fair Trial, Criminal Justice, Criminal Procedure

* Su determinazione della direzione, in conformità al regolamento della Rivista, l'articolo non è stato sottoposto a referaggio.

1. The power of the Net

Before the digital era, there was a popular saying that read: "today's newspaper is tomorrow's fish 'n' chip wrapper"[1]. Nothing more wrong when it comes to the new Media and Social Networks. Once in the Net, a piece of information is there to stay and sometimes can spread virally up to the smartphone of the judge or the jurors. This is the power of the Internet and the new threat to the judicial independence.

2. New challenges to a fair trial

Undoubtedly, the Net and Social Media play a fundamental role in the everyday lives of both individuals and professionals. We are living in a digital world in which new Media are replacing the old newspapers and, as a whole, the way we used to catch up with the news and, as judges and lawyers, the way we used to look up in paper books specific laws and precedent Court decisions.
Nowadays, a good lawyer and a modern professional or technical judge need to be very skilled in the use of legal Apps and search engines when it comes to finding the right rule and precedent decisions suitable to the case.
Yet, the Net and New Media, at the same time, put at stake the common idea of a fair trial and pose legal and ethical challenges to the core principles of the criminal procedure system called "adversarial".

3. The tenets of the adversarial system

Even though the adversarial system derives from common law tradition, both the English and the Italian criminal legal system are, on principle, adversarial. In fact, in 1988 Italy changed its criminal procedure rules and its previous inquisitorial model derived from civil law tradition in favour of an adversarial one. The main feature of the latter is that the person or the panel who is going to make the judgment about the guilt of the defendant and render a verdict of conviction or acquittal (the *jury* in the English and Welsh Crown Court, the *judge* in Italy: thereafter, the *judicial decision-maker*) should base the decision only on judicial evidence. All the evidence, proofs, circumstantial evidence and expert opinions are displayed by the prosecutor and by the defensive counsels before this person or panel, who will pass the judgment only on the ground of these findings. Therefore, every different knowledge of the facts could be prejudicial to the impartiality.
Unlike the inquisitorial model, where the judge plays a role also in the investigation and, as a consequence, they already have, at trial, a deep grasp of evidence and facts regarding the case handled, in the adversarial system investigations are generally carried out by the police and the prosecutor takes over the case at trial so that the judicial decision-maker has no previous opinion or knowledge regarding matter of

[1] *Media as pillory: the power to 'name and shame' in digital times, in The Conversation,* 8 August 2013.

fact related to the case. Furthermore, they must not take into account any different source of information other than the evidence displayed by the defensive and prosecutor counsels during the trial and properly admitted. In this way, the parties (defence and prosecutor) play a key role in bringing evidence into the trial, in examining and cross-examining witnesses, in presenting to the judge or jurors their side of the truth and, at the same time, challenging the other party's version of events. In a nutshell, the adversary model is based on the idea of two opposing sides stating their case to an impartial body which will render a conviction verdict only if the prosecution case is proved according to a certain standard. In England and Italy this standard, that is the measure of the prosecution burden of proof, is *beyond any reasonable doubt*.

Therefore, the formal legal truth comes out from this two-sided struggle, that is from the effort, on the one hand, to state a version of the events (the parties have the burden of production and the burden of persuasion) and, on the other hand, to argue and mystify this statement, in accordance with trial court procedure and rules of evidence. This formal legal truth can diverge from substantive truth but the divergence is merely the price we pay for having a complex multi-purpose system in which actual truth, and what legally follows from it, comprise but one value among a variety of important values competing for legal realization[2].

It is important to point out that, even though the Italian code of criminal procedure embraced an adversarial system and its tenets, these principles were basically undone by the Constitutional Court that placed a very high value on the research for substantive truth at trial[3], the so called "real truth".

In this way, the role of the Judge is more active and quite inquisitorial as they are allowed to ask witnesses questions and to undertake further investigation at the end of the trail. The consequence is that also the role of other judicial actors and the way witnesses' examination is carried out might take on a whole different meaning.

4. A decision shielded from external non-judicial sources at a time of information overload

Everybody agrees that the judicial decision maker should be independent and impartial. But the key question is what the real significance of judicial impartiality looks like in the digital era and whether or not the Internet is a serious breach of their impartiality.

Surely, they must be independent from government, prosecutor, police, and jurors must be independent from the judge itself. Besides, they must not be biased by inappropriate outside pressure. But experience shows that nowadays they are often subjected to different kinds of pressure. In particular, new media, social networks, blogs, and extensive external inputs can be a source of information beyond proper

[2] R.S. Summers, *Two Types of Substantive Reasons: The Core of a Theory of Common-Law Justification*, in *Cornell Law Faculty Publications*, 1978, 1194 ss.

[3] W. T. Pizzi-M. Montagna, *The Battle to Establish an Adversarial Trial System in Italy,* in *Michigan Journal of International Law*, 25, 2004, 429 ss.

judicial findings, can be unconscious pressures, acting like real "opinion-makers", can prejudice or interfere with the judicial process, carrying out a parallel form of trial, the so called trial by media, jeopardizing the due process of law and the right of the defendant to a fair trial, keeping at stake the principle of presumption of innocence until proven guilty beyond any reasonable doubt on the basis of evidence properly admitted at trial.
For example, did the #MeeToo movement play a role in the conviction of Bill Cosby in April 2018 for sexual assault after his first trial, in the spring of 2017, ended in a hung jury[4]? Between these two trials the revelations against Harvey Weinstein came out and the #MeeToo movement gained momentum.

5. The judicial decision maker in England and in Italy

While in the Italian system the activity of passing a judgment is up to the judge (a single one or a three-judges-panel, according to the seriousness of the offence), in the English model (trial before the Crown Court) it is the jury that decides if a defendant is guilty or not guilty and, accordingly, delivers a verdict.
In the Italian system there is no provision similar to the jury. Actually, there is an eight-judges-panel called "*Corte di assise*" that mainly handles murder cases in which six lay judges sit with two professional ones but they are not a jury because they work jointly making decisions (lay and professionals judges) about every point of law and of fact, including the verdict and the penalty. They decide by simple majority (in case of equality the vote of the president prevails).
On the contrary, in a trial-by-jury model as in the English and Welsh Crown Court the twelve jurors attend the trial, listen to the evidence and finally return a verdict. This decision is based, like in every adversarial system, on the evidence displayed. The Judge has no say in their decision.
In the Crown-Court-model the Judge plays a completely different role, mainly makes decisions about the sentence (penalty) that is to be imposed upon the defendant after the conviction or after a guilty plea.
Furthermore, during the trial the judge decides about all the matters of law arisen during the trial. The principle is that the law is for the judge, and the facts are for the jury. The latter is the trier of the fact.

6. English concerns and directions aimed to preserve jurors' impartiality

The English and the Italian system have a completely different approach to the issue of the so- called "cognitive virginity" of the judicial decision-makers.
While in the former this is a matter of major concern, with a set of rules aimed to keep jurors safe from external influence and New Media, oddly enough, in the latter

[4] T. Williams, *Did the #MeToo Movement Sway the Cosby Jury?*, in *The New York Times,* 26 April 2018.

there is no similar concern and there is no provision that prevents the judge from surfing the Net or reading articles regarding the cases handled.
In this way, the English model is much fairer with regard to paying great attention to following the rules of the real adversarial model.
Thus, in England and Wales, the Criminal Procedure Rules (2015) provide detailed guidance on the appropriate directions by Judge to jurors. In particular,
In the phase of empanelling a jury, the judge can excuse a would-be-juror from a particular case where the potential juror has awareness of any publicity that the case has received in the local or national media. For the same reasons, there is the possibility of exercising challenges by either party aimed to stand down a juror.
At the start of the trial, judges should instruct the jury about[5]:
-the prohibition on internet searches for matters related to the trial, issues arising or the parties;
-the importance of not discussing any aspect of the case with anyone outside their own number or allowing anyone to talk to them about it, whether directly, by telephone, through internet facilities such as Facebook or Twitter or in any other way;
-the importance of taking no account of any media reports about the case;
-the jury must try the case only on the evidence and arguments they hear in court.
From this it follows that throughout the trial each juror:
-must disregard any media reports on the case;
-must not discuss the case at all with anyone who is not on the jury, for example with friends or relatives, whether by face to face conversation, telephone, text messages, chat-lines or social networking sites such as Facebook or Twitter;
-must not carry out any private research of their own with a view to finding information which is or might be relevant to the case, for example by referring to books, the internet or search engines such as Google, or by going to look at places referred to in the evidence;
-must not share any information which is or might be relevant to the case and which has not been provided by the court; and must not give anyone the impression that he or she does not intend to try the case on the basis of the evidence presented.
These instructions are given for good reasons:
-they aim to prevent the jury being influenced by opinions expressed by people who have not heard to the evidence;
-in fairness to the jury they should be aware from the beginning that if they do not follow the instructions they may well be guilty of a criminal offence and at risk of a sentence of imprisonment;
-they must never discuss or reveal what took place in the privacy of their jury room, whether by talking or writing about it, for example in a letter, text message or other electronic message such as on Twitter or Facebook.
During the trial, when an issue of law arises, the Judge asks the Jury to leave the Courtroom in order to discuss freely the issue along with the prosecutor and the defence counsels. This is because it is of paramount importance, as mentioned above,

[5] D. Maddison – D. Ormerod – S. Tonking – J. Wait, *The Crown Court Compendium*, Judicial College, May 2016.

to preserve jurors from every knowledge of the facts other than the evidence shown during the trial.
At the end of the trial, jurors are warned by the judge that they must consider only facts emerged during the trial and, if needed, they can draw inferences, using their common sense and their experience, but must not speculate, that is think about facts that are not known. In this activity, they are helped by the closing speeches of the prosecutor and defence counsels and by the so called "summing-up" of the Judge, in which they point out the framework of their decision. In particular, the Judge gives an explanation of the points of laws that have to be weighed and a refreshment of the evidence upon which the decision should be based. Sometimes, they hand jurors a list of questions to follow during the decision process, with their directions.
According to the Criminal Procedure Rules (2015) it is vitally important that such guidance is followed in order to reduce the risk of jurors engaging in behaviour which may jeopardise the fairness of the trial, lead to being discharged and, moreover, charged with the offence of contempt of court and a criminal offence under the Criminal Justice and Courts Act 2015.

7. The balance between freedom on social media and integrity of justice in England

Rightly, media and the freedom of press and expression is regarded as one of the pillars of democracy. Surely, the significance of a public trial, provided in an adversarial system, stems from the assumption that media are a safeguard against judicial abuse.
Yet, when it comes to Social Media there is something more than the old idea of freedom of press. It is the right for everybody to comment on news, to post their own opinion following a media report, to share information and opinions with friends but also, "virally", with thousand or million of people over the Internet. So, the question is how these new media are consistent with the idea that judicial decision-makers must be shielded from every knowledge of the case handled, apart from evidence properly admitted at trial.
This media coverage goes so far that sometimes a real process out of the Court is carried out, so called trial by media. This is surely an undue interference affecting the mind of the judicial decision makers and a prejudice to the right to a fair trial.
Following this idea, in the English system prejudicial publication can be a criminal offence, that is contempt of the Court (contempt by publication).
The Contempt of Court Act 1981 -section 4(2)- sets out what can be published before and during a trial. It is contempt of court to publish anything that creates a «substantial risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced, even if there is no intent to cause such prejudice». The Court itself, where needed to avoid a risk of prejudice to the administration of justice, may order that the publication of any report of the proceeding be postponed. In doing so, the judge should weigh in, on the one hand, the right to the freedom of press, of expression and the right of the public to be properly informed, and, on the other hand,

the risk of interference in the authority of the judiciary.
Having said that, the rule is surely intended for traditional media. But what about new media, social networks, comments posted on Facebook and the like?
In this regard, on September 2017 the English Attorney General, Jeremy Right QC, stated that «our contempt of court laws are designed to prevent trial by media. However, are they able to protect against trials by social media? I am looking for expert evidence on whether the increasing influence and ubiquity of social media is having an impact on criminal trials and, if so, whether the criminal justice system has the tools it needs to manage that risk».
«We have to keep a balance between the principle of freedom of speech and the integrity of the trial process», he explained. «What I want to see is how broad the concerns are, then we can start to think about the issues. I want to see whether judges have the tools required or whether they are crying out for some new powers or changes in the law». For these reason, he set up a public consultation to find out whether reported restrictions needed to be increased during criminal cases and whether the «risks posed by social media to the administration of justice are greater than five years ago».
This statement followed a popular criminal trial, the *Wrightson* case, in which there were legal challenges over what could be published about the trial concerning two young school girls, aged 13 and 14, charged with the crime, and eventually convicted of brutally attacking, beating and murdering Angela Hartlepool in 2014.
These challenges followed the cancellation of the first trial by the judge who ordered a retrial due to the flood of social media comments which might have been prejudicial to a fair trial, including those of a number of media organisations.
Moreover, the judge, Sir Henry Globe QC, asked the media to «remove all links from [their] websites to other websites, including social media sites» and to «refrain from issuing or forwarding tweets relating to the trial».
The BBC appealed against the order on the principle of open justice in British courts. But both the prosecution and defence argued there was now a «real risk that the defendants could no longer have a fair trial». Mr Justice Globe agreed and rejected the appeal.
Similarly, in September 2017 the conviction of a man chasing women and exposing himself was quashed because residents of the little village had shared his images and gossiped about him on Facebook.
According to the defensive counsel, Ms. Genevieve Reed, «this circumvented all of the safeguards of (the Police and Criminal Evidence Act 1984) and fundamentally undermined the identification process». For these reasons, the appellate Judge quashed the conviction.

8. In Italy

On principle, in Italy there is the same adversarial system resting on the idea that the decision-maker (in Italy the judge) will decide only on the ground of evidence brought into trial by parties with equal powers and in equal position and properly admitted.

As mentioned above, the judge has a more active and quite inquisitorial role compared to the English model due to the idea that the final goal of criminal trial is researching substantive truth, the so called "real truth". Yet, also in Italy the judge should base their decision only on judicial findings.
Hence, it should be appropriate for the judge's impartiality to shield the decision-maker from external information because they might be biased in their decision.
Nevertheless, in Italy this is not a matter of major concern and there is no provision whatsoever aimed to keep the judge safe from external influence.
-Moreover, should the judge have even a detailed knowledge of the case, as a consequence of specific procedural occurrence, there are no procedural consequences. For instance, the Supreme Court stated[6] that the judge who has got full knowledge, before the trial, of all the investigative records regarding the case in order to decide whether or not the so called speedy trial proceeding ("*rito abbreviato*") are admissible, if they do not make any decisions about it, they are not incompatible to the trial. Even more noticeably, the judge in charge of the case who makes decisions about the custody of the defendant during the trial is not incompatible regardless of the opinion expressed about the guilty and the knowledge of the case.
-Even at a deontological level, the judge has no duty to refrain from reading media reports, comments on social media, TV programmes debating the case and the like.
As a result, the judge might well have a deep grasp of the case besides judicial findings. Surely, they should not take into any account this further information but it is hard to believe that they are not influenced at all by extensive media coverage which sometimes come along with the judicial trial.
-When it comes to the so called "trial by media", in Italy the focus is on the right of the parties, mainly the defendant, not to be shamed by the pillorying effect of media reports on judicial trials. In this way, politicians involved in investigation claim the presumption of innocence for what is published also before a metaphorical "media conviction" as if there were a real trial carried out by the media and ask for provisions aimed to limit the possibility for the media of "naming and shaming", sometimes using wiretapped conversation or other pieces of trial or pre-trial evidence.
In the same way, not only is pre-trial secrecy aimed to safeguard ongoing investigations, but it is now intended for the purpose of private interest protection.
Thus, In Italy, and in Continental Europe, there is a shift in the fundamental right protection, included presumption of innocence and pre-trial secrecy, from a public level to a private prerogative, requiring the defendant and other parties not to be prosecuted in the public eyes and, in case, enabling to seek compensation for damages[7].
Conversely, protecting judicial impartiality is not perceived as a value requiring limitation in the media reports or even only self-restraining attitude by the judge in approaching external source of information. In continental Europe, only in Austria and in France there is a criminal offence of contempt of the Court by publication, requiring a limitation of the freedom of expression before and during the trial. Yet, this rule

[6] Italian Supreme Court, Criminal Division, IV Chamber, 30 October 2001, no. 39944; Joined Cambers, 27 October 2004, no. 44711.

[7] A. Fusaro, *Tendenze del diritto private in prospettiva comparatistica*, Turin, 2014; G. Resta, *Trial by Media as*

is rarely applied.
Arguably, allowing the judge to get exposed to external information, opinions, pressures, comes down to diminishing the key role of the real actors in an adversarial system, namely the parties. These should be the only source admitted to build, at trial, the foundation of the verdict.
Media can be unconscious pressure but also an intentional threat to an impartial judge. For instance, media campaign pro-defendant or pro-plaintiff but also statements to the media from the parties, criminal reports or wiretapped conversation leaked from officials in charge of the investigation can interfere with the judicial process and result in a denial of a fair trial.
For example, in the famous murder case against Anna Maria Franzoni (charged and in the end convicted of killing her baby), her lawyer Carlo Taormina declared and set up a strategy to use the media "to counter" the widespread impression his client was guilty[8], strategy which included taking part in popular chat shows like the *Maurizio Costanzo show*. Or in the popular murder case against Amanda Knox and Raffaele Sollecito, where the media all around the world took hold of the story before any evidence was even collected. Amanda was named one of the top newsmakers of 2008 by countless Italian news organizations, alongside U.S. President-elect Barack Obama. It was not simply the fact that Amanda was receiving media attention, it was the amount of negative attention she received. The press declared Amanda "a devil with an angel's face". She was called a she-devil, a diabolical person focused on sex, drugs and alcohol. Her MySpace page was dissected. Photos that would be normally found on any twenty-year-old's MySpace account were looked at as sexual. A picture of her laughing while handling a machine-gun in a museum during a vacation with her sister was used to show Amanda as being a violent and unstable woman[9].
In the analysis of these extensive media coverages, the focus was always on the shaming and pillorying effect of the media, never on their pressure on the judge.

9. Coming to terms with different traditions

The lack of any provision to keep decision-maker safe from external knowledge or opinions may be, in Italy, the consequence of a number of reasons.
First, justice is, mostly, up to a professional and/or technical judge who, in theory, should be able to be unbiased also in case of strong media pressure and to distinguish judicial evidence and opinion expressed by defensive and prosecutor counsels from other information and opinion.
Arguably, this is true only to a certain extent because of the strong psychological conditioning deriving from the media.
Therefore, the question is whether or not legal training and experience prevents judges from being biased by outside pressure and inadmissible information or opinions

a Legal Problem. A Comparative Analysis, Rome, 2008.

[8] R. Carroll, *Italy agog at tale of mother and murdered son*, in *The Guardian,* 24 July 2002.

[9] http://www.injusticeinperugia.org/media.html

that should be disregarded.
Some studies have suggested that this is not always the case[10], proving that professional judges are often unable to disregard inadmissible evidence and this information has a negative impact on both judge's and juror's decisions. In these experiments, the instruction to ignore these pieces of information failed to be followed also by professional triers.
Second, as mentioned above, the basic idea behind the Italian trial is to find out the "real truth" (substantive truth). This comes along with more investigative power of the judge at trial and less concern, perhaps a kind of acceptance, about their exposure to external information.
This is how the adversarial system has come to terms with different traditions.
It is surely easier, as it happens in England, to trust the decision-maker and pay great attention to the procedural rules. In a jury-by-trial model there is no possibility of challenging the verdict with regard to the weight of evidence and yet people consider this process fair because it provides them with the fundamental right to be tried by a jury of peers following a model that dates back centuries and is rooted in principles laid down in the Magna Charta and in the re-interpretation of it given in the 17th century.
On the contrary, in Italy ascertainment of the "real" truth requires great effort, detailed reasoning judgment to get the verdict understood, long time, multiple judicial reviews and, at the end of the day, less trust towards the judge and sometimes harsh critics about the decision. This is the consequence of a system that provides a "top-down" decision, from judge to people, not a peer to peer one.

10. In conclusion

So, the key question is: does the Italian system have something to learn from the English one?
Certainly, Italy embraced, on principle, an adversarial procedural system and, as mentioned above, external knowledge and pressures undermine the core principle of the system, the way it is designed for introducing information and building opinions through the parties' activity, with equal opportunities, the key role of these trial actors, the prosecutor's duty regarding the burden of proof, the consequences of the lack of evidence in accordance of a required standard of proof, the impartiality of the judge and the fairness of the trial. The cognitive virginity of the decision-maker is the ground of their impartiality before the real actors of a fair trial, that is the parties. At present, the Italian model has little to do with this.
The Italian system is a compromise in which the judge, in theory, should not have any knowledge but, as a matter of fact, may well have a deep grasp of the case. For instance, in many procedural occurrence, i.e. in case of requests about the custody of the defendant, or even from external sources, press, social media and the like. All of this creates an undue knowledge and an unconscious pressure on the decision makers.

[10] N. Vidmar, *The Psychology of Trial Judging*,in *Current Directions in Psychological Science,* 20, 2011, 58 ss.

Strangely enough, also at a deontological level, the judge is not requested to refrain from reading media reports about the case or researching information on the Net. Arguably, this would be a minimal but important safeguard to the core values of the adversarial system.

Conversely, preventing the media from reporting on the case handled at trial would be a real challenge because freedom of press and expression overtakes, from the Italian standpoint, the value of the judge's cognitive virginity in the criminal procedural system. Having said that, surely there are situations of extreme media coverage, sometimes intentional pressure, in which there should be a limit to report and comment on a case during the trial.

What strikes the most is the lack of awareness about these shortcomings regarding the core values of the adversarial system.

At the end of the day, in Italy law makers pretended to have embraced an adversarial system but, actually, the result was a compromise which has little to do with common law model.