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EDITORS' PREFACE

In our Forum on Comparative Legal Education published last fall (Volume 4 No. 1), Professor Richard Stith argued that one of the central debates in legal education in this country is practice versus theory. While American law schools scramble to put clinical and other "practical" programs on line after years of prodding from members of the practicing bar, in Continental Europe the law school experience is one defined by an attempt to unravel jurisprudence and legal theory.

Doubtless many members of the practicing bar also view the institution of the law review as something largely extraneous and principally a vehicle for the argument of academic (used in both of the two most common denotative senses) concerns. Professor Alan Dershowitz, however, argued in a speech at this law school last year that a good trial lawyer must blend practice and theory, using the latter to accomplish the aims of the former. Still, on the surface, the importance to the practitioner of a symposium on Italian law such as we have attempted might be elusive. It is primarily for the purpose of exposing the fallacy in the previous statement that this symposium has been undertaken.

That we now live in an increasingly internationally integrated world is almost too trite to say. American corporations need only look to the location of their subsidiaries, suppliers, or distributors to prove this. Business lawyers need only compare the situs of their clients' disputes and transactions today with ten years ago to know that economic globalization has occurred. The realization of the European Economic Community and the promulgation of the North American Free Trade Agreement are accelerants in this process. Understanding of the forces of globalization and regionalization, and of the legal and political structures of industrialized and developing nations is now by necessity the stuff of a 101 class, not a graduate curriculum.

This symposium is not intended to be a definitive compilation of scholarly research on the Italian legal system, but a more conversational addition to the discourse on international law in a comparative perspective. On a practical level, the articles and essays are available as educational tools for those who already do or may yet do business in Italy. The Response written by David Russell, an American business lawyer, tells us how Italian and European law has influenced his practice. We hope then that this focus will be helpful in itself to many.

But more than that, we hope that readers view the relationship of the entities involved here, Italy and Indiana, as a paradigm for

further discussion. That is, an American lawyer representing a corporation with manufacturing interests in France is not at liberty to ignore the situation in Italy with the free movement of goods in Europe on the immediate horizon. Alternatively, that Russell writes of his experiences from his Indianapolis, Indiana office—and not from New York or San Francisco—serves to quell any notion that places like the American Midwest are exempt from the duty to keep up on world events. So then, we hope that the model we have chosen for this symposium—a thematic compilation of essays and articles on a particular nation's legal and political structure—is repeated in the future both by this law review and by others.

It should be acknowledged that this particular endeavor could not have been undertaken without the patronage of the Italian Academy for Advanced Studies in America at Columbia University through its principals, Maristella Lorch and Andrea Bartoli. It should also be noted that the contribution of Charlie Ross, our developer and liaison, was indispensable to the existence of this symposium. We also thank the Indiana State Bar Association, International Law Section, not only for its participation in the form of David Russell, but also for the generous interim financial support advanced by its Chairman, D. Robert Webster. Thanks also go to Jacqueline Lee for her secretarial support. Last, but by no means least, we note the time and effort expended by Mike Kelly and Camilyn Kuhns who took on the bulk of the editing challenge at the outset, and whose ideas are indelibly imprinted in this work.

Anthony Scott Chinn
Franklin E. Breckenridge, Jr
Indiana University School of Law
Indianapolis, February 1994

AN ACADEMY FOR THE THIRD MILLENNIUM

I. The Italian Academy: The Charter

In December of 1990, the President of Columbia University, Michael Sovern, and the Consul General of Italy in New York, Minister Francesco Corrias, signed in New York a document of 80 pages that defined in detail the charter of an Italian Academy for Advanced Studies, unique of its kind in America not only for Italy, but for Europe as well. Thus some American and Italian scholars realized their dream legally with an international agreement. They had envisioned and worked on the project since 1986, transforming through the years an institute of Italian studies into a pluridisciplinary academy dedicated to research.

The agreement foresaw on the part of the Italian government the acquisition of a seven-story Florentine palace, situated between the School of Law and the School of International Affairs. The building was called Casa Italiana. According to the agreement, Columbia committed itself to creating, with the sum received from the acquisition, an endowment fund for the Academy. Columbia was assigned the administration of the Academy, having subleased the building from the Italian government. The Italian government, on the other hand, committed itself to the restructuring of the Casa, thereby transforming it from a university building into a palace worthy of decorously receiving 20 fellows, creating a worthy seat for the first research Academy that Italy has abroad.

The charter foresees also the essentials of an administrative structure. The president of the Academy is the president of Columbia University, who is thus responsible for its functioning. The honorary president is the president of the Republic of Italy. The executive director is a professor with tenure at Columbia. Twelve guarantors—six Italian and six American—are responsible for the good functioning of the agreement. Twenty senior fellows—ten Italian and ten American eminent scholars—are the guardians of the quality of the scientific research of the institute. Their names are proposed by the director to the president for approval after having obtained a favorable opinion from the guarantors.

II. Genesis and Mission

In the memorandum which precedes the charter, the ultimate mission of the Academy is defined as, "to offer a privileged view of Europe to America from an Italian prospective." Such a mission is carried out mainly by taking advantage of the resources of the University of which

the Academy constitutes an integral part, while maintaining at the same time a form of autonomy within the university.

In a deeper sense, through the realization of a research program that is carried out mainly by 20 scholars in residence in the restructured Casa, the Academy must offer the occasion for a dialogue between two cultures. It must offer the ideal environment, physically and spiritually, that allows Americans and Europeans to "come close to each other" in a new way. According to those who conceived of the idea, a guarantee that the Academy will realize this philosophy is first and foremost the choice of the two partners: Italy as a country, Columbia as a university.

The idea of the dialogue as *pensare insieme* inspired the periodic reunion of a group of scholars in different disciplines (the author of the present essay being one of them). Americans and Italians gathered between 1986 and 1990 in an apartment of Columbia on Riverside Drive, at the Italian Consulate in New York, and among the woods of Gressonet in the Catskills. These meetings were occasions for an exchange of ideas in reaction to a sequence of events: a world was disappearing without any other world in sight to replace it. These events awoke among the scholars a common enthusiasm and an anguishing apprehension. We thought then that Italy as heir to a most ancient civilization could offer, because of its uninterrupted creativity for millennia, not only an arena for the debate of ideas connected with the problems of a world without borders, searching for new references for its survival, but a word of wisdom as well, to help us face the new millennium. Italy could do so by taking advantage of resources and the international opening of one of the most prestigious American universities.

"Italy," declared in 1988 one of those American scholars, the mathematician E.R. Lorch, "is a country which is and has been for centuries an inexhaustible source of ideas, a laboratory for the invention of hypotheses and for their proofs. The intelligent considers the world around him as his own laboratory. Therefore the Italians and not the French or the Russians or the Germans constitute our ideal partners for that *pensare insieme*, a dialogue at a high level across the Atlantic, which today is more necessary than ever."

Columbia, on the other hand, counts on a long history of dialogue with Italian culture. It was Lorenzo da Ponte, writer and librettist (among others of Mozart and Salieri), teacher, impresario, merchant, historian, an intellectual in the most comprehensive sense of the word, who created the first American bridge with Italian culture with deftness and *con foga*. In 1805, fifty years before Italian unification, da Ponte began working his way into Columbia through a purely casual meeting with Clement Moore, son of the president of the then Columbia College, Nathanial

Moore. One hundred years later in the 1920s a group of Italo-American philanthropists, inspired by a student of Columbia college, Peter Riccio, saw to it that a building should be erected on university ground, and with the support of the university, a seven-story Florentine palace with a Renaissance theater, a library, and a loggia, dedicated to the study of Italian civilization was erected. The Casa Italiana of Columbia University was inaugurated in 1927, as a gift to Columbia University, by Guglielmo Marconi. It was directed for the first ten years by Giuseppe Prezzolini, an intellectual who was a spokesman of Italian culture different from da Ponte but an equally genial interpreter of his time. The Casa continued up to 1990 to fulfill decorously its function as an institute dedicated to Italian studies.

The revolutionary events that mark history between 1986 and 1990 suggested the transformation of an institute of Italian studies into a pluridisciplinary Academy, an arena for the Italo-European and American contribution to the study of problems of the world of tomorrow. On May 7, 1991, hardly two centuries after the arrival of Lorenzo da Ponte to Columbia, the Academy marked its inauguration with two events: an exhibit of material in great part unpublished on da Ponte, "A vision of Italy from Columbia College 1805-38," and a congress co-sponsored with the Center for Ciceronian studies in Rome, "Cicero in American Culture and Political Life." These two events marked the nature of the new Academy. Two years after the inauguration the Academy Research Coordinator, a young Italian sociologist, and an enthusiastic collaborator of the program for about a year, wrote in a letter to the director, "[b]eyond everything what attracts me most to the Academy is the opportunity of working at a project which has its roots in the past and projects itself audaciously into the future—I see already two years from now the first research scholars expressing their reaction to the restructured building—I believe we are doing the right thing by presenting to them and to the world, through this building an ambitious, warm, and stimulating image of a new Italy."

III. THE FIRST STAGES OF THE DIALOGUE (1991-93)

The first stage climaxes with the approval of the international agreement between Italy and Columbia after four years of dialogue by the scholars who envisioned the Academy. The second stage was completed during the two years that followed the inauguration, 1991-93, along a double track. First the director, supported by the president and the provost of Columbia, who chairs the committee of guarantors, worked for two years with the Italian authorities for the clarification and completion of the second part of the agreement that regulates the relation

between Italy and Columbia on the execution of the restructuring of the building. This stage was concluded with success during the summer of 1993. On the other hand, given the forced delay above mentioned of two years in respect to the original plans (the inauguration of the real Academy will take place in 1995 instead of 1993), the director felt obliged to create an interim program fitting to the mission of the Academy.

The dialogue with the architects offered the Academy a splendid and almost unexpected occasion of transposing "ideas" into a physical space. The Italian architect Italo Rota became in July 1991 the winner of a competition that Columbia was asked by Italy to sponsor. He and his American partner, Sam White, grandson of the architect who completed the Casa Italiana in 1927, acquired during these two years of obliged pause in the evolution of the original project (1991-93), a deeper awareness of what the Academy would become. They did so through a constant dialogue with the director of the Academy. In fact, the dialogue between director and architects and more recently between architects, the director, the Columbia administration, and the representative of the Ministry of Public Works enlightened areas of development of the future Academy which could not have been discovered on their own by the scholars who envisioned the institution. The architectural project changed in consequence of this most productive intercourse.

As for the program, the two years of forced pause in the execution of the original plan allowed the Academy to explore the resources of Columbia, not only through the two chairs of International Journalism with the School of Journalism and European Law with the School of Law (both Academy Chairs), but through seminars, congresses, and workshops. These events were designed in general to support research in courses obviously connected with Italy or to research conducted by Italians.

It was precisely in the process of exploring this area of interest between Italy and Columbia that the Academy succeeded in obtaining its first recognition in America and thus a specific identity. The recognition of this identity will allow it to further develop in the future a dialogue at a more coordinated and deepened level with analogous institutes in New York, Rome, Washington, Brussels, Strassbourg, Paris, Los Angeles and Toronto, and also perhaps with the European Community, the Renaissance Society, the American Assembly, the Belles Lettres, the Vatican Archives, the Woodrow Wilson Institute, the Indiana University School of Law at Indianapolis, the American Academy of Political Science, and the American Society of Forensic Psychology.

From the beginning of the work it was realized that the key to success was the stability of an active, vivacious, human, and ambitious

dialogue not exclusively, but especially with Columbia University, of which the Academy is a part. Those who planned the Academy had foreseen what the relation of the Academy to Columbia University should be: "The Academy," said in 1989 one of the Italian founders, the historian Massimo Salvadori, "should entertain with the University that houses it an organic relation as defined in the charter. However, the nature of the specific character of this relation *remains to be defined step by step in the realization of a specific program.* The language of the charter should inspire us, both Italians and Americans, to *pensare insieme* in the right direction, overcoming, in view of the work in common, the difficulties deriving from the different approaches to *pensare*, typical of each of the two cultures. Moreover, it should prompt us to transfer ideas into specific committees taking into account their interrelation and their tasks. We must mostly rely on very particular individuals from both shores of the Atlantic. . . . The autonomy of the Academy depends on its capacity to allow the merging of new frontiers. It depends on its opening to a reciprocal understanding of the two societies in question, the Italian-European and the American. This element *should not constitute a generic presence in the life of the institution but should be articulated in the structure itself of the Academy.*" The Academy's ultimate aim should be to reach a harmony in the *pensare insieme* of the representative of the two cultures.

In this sense, a very laborious stage of the dialogue among guarantors, especially the Italians, which was successfully concluded after two years of debate, was the agreement reached in February 1993 on a list of members of the scientific committee or committee of Senior Fellows. They in turn at their first reunion in New York in April and in Rome in May suggested among other things the creation of a Planning Committee and of a wide and flexible Advisory Board that should support the work of the director.

Inside the Academy, called for by the execution of the program, a skeleton of an internal administration was reinforced. It includes an assistant to the director with an administrative assistant and a public relations officer. A coordinator of research was given the first fellowship of the Academy. The Rotary NW of Rome generously contributes annually, for the duration six months, a young Italian journalist to maintain as a liaison with the Italian press. A group of Columbia students and, when possible, of Italian graduate students in New York supports the administration with enthusiasm. "The experience that I have obtained contributing to the creation of this very new Academy," wrote a non-Italian speaking Korean student after two years of work, "has become for me the essential factor in the education I receive at Columbia College."

In consonance with this philosophy, the planning of the Academy is now characterized by a more clear definition of the cultural directives pursued until now, by the opening of a substantial program of research, and by creating a structure for the realization of the programs (research seminars, Academy Lecture Series, roundtable, workshops, etc.). While we keep open the possibility of individual lectures, we are inclined to favor a deeper commitment, both in content and methods, to a more cohesive and coordinated program. The paradigmatic model for a research seminar will be the one directed in the spring of 1994 by Professor Branca and coordinated by Barolini, Lorch, and Ossola on "Philology and Criticism." This seminar offers the opportunity for experts in a given discipline to relate to each other through the results of their research. All the Italian and American participants will be able to put to use through their contribution their own knowledge of the subject. They will do so by offering examples of different methodologies in the results of their own research. This seminar will profit from the fruitful dynamics of the seminar. Another research seminar throughout the semester will deal with today's Italy in its political, economic, social, scientific humanistic evolution within the European context.

IV. BEYOND 1995

The same opening, flexibility, and variety which has characterized the first years of existence of the Academy will continue to underline its philosophy. In the future, the Italian Academy, the product of a model international agreement between a European government and an American University, will exist from 1995 on, within a new building (the old Casa Italiana restructured as a 'statement' of a new Italy) the mission for which it has been created. A treasure conceived by a group of visionary scholars—including some politicians and diplomats—at the end of the second millennium, the Academy must succeed in diffusing through America as a precious heritage to the third millennium. This image of Italian *pensare*—curious, human, warm, stimulating, ambitious—will be open more than ever before to the *pensare* on this shore of the Atlantic.

Maristella de Panizza Lorch
Director, Italian Academy
Columbia University, New York
February 4, 1994

COLUMBIA UNIVERSITY AND A NEW EUROPEAN LAW CHAIR

As we move toward the end of the century, we become increasingly aware of the importance of enriching the law school's opportunities for study and research in the international and comparative law fields. While we have always taken a geographically broad view of the foreign systems worthy of study and research, and have the most distinguished international and foreign curriculum in the country, we regard European law and legal institutions as of unequaled importance at this stage of the Law School's academic development. The rise of the European Community, of a still larger European economic arena, and of new legal institutions in Central and Eastern Europe are all prominent parts, but only parts, of the whole. Enrichment of our European law program in all its aspects became one of the school's very top priorities. To this purpose, in April 1992, Columbia University School of Law established a permanent Chair in European Law to be held each year by a visiting professor from Europe.

The function of the chair is to bring to Columbia each year an outstanding jurist prepared to teach important aspects of European law and legal tradition, to conduct research, to collaborate in teaching and research with our own regular faculty, and possibly to advise and otherwise work with selected advanced law students. More particularly, the features from which a chairholder's program is drawn include the following:

1) Systematic participation of the Professor of European Law in a small number of courses or seminars regularly offered by members of this faculty. This format would allow the active "comparatizing" of what might otherwise be a purely domestic law inquiry, thus greatly enriching that inquiry while at the same time building close teaching links between the chairholder and individual members of this faculty.

2) Small group or seminar instruction, or research supervision by the chairholder for carefully selected advanced law students where appropriate.

3) Participation by the chairholder in a conference or symposium on a suitable European or comparative law topic to be held at the Law School. We hope to hold such a conference no less often than once every three years. In any case, the subject would be chosen to appeal to the chairholder's special strengths and interests.

4) Delivery by the chairholder of talks, either of an informal variety before the faculty or relevant student groups, or of a more formal variety to which the interested public would be invited.

Although it may not be possible to incorporate every one of these features into the tenure of a single chairholder, this sketch does give an idea of the elements out of which we hope to design the program of each chairholder.

The program reflects a broad and inclusive view of Europe, but at the same time recognizes the special contribution of Italian legal culture both to the civil law tradition and to comparative law generally. The term European was defined expansively to embrace the countries of Western Europe and the European Community enterprise in all its aspects. It also included those countries of Central and Eastern Europe now undergoing profound change likely to bring them still more closely into a European-wide circle of nations. The breadth of Europe is of course among the reasons we believe a rotating chair is so vital.

At the heart of the definition of Europe for present purposes is the continental or civil law tradition which still dominates that continent and provides a lively contrast with the common law tradition represented by the United States, Canada, Great Britain and Ireland, among others. This emphasis also has both a historical dimension (calling upon Roman Law and the reception of Roman Law in Italy in the late Middle Ages and early Renaissance), and a methodological dimension (codification, for example). On the other hand, special prominence was given to Italy in the elaboration of this program because of Italy's historically central role in the development of Western legal culture, its contemporary leading role in the development of European legal institutions, and, of course, its constituting the generous source of support for the chair from the Banca Nazionale del Lavoro.

Accordingly, preference will be given to the appointment of a jurist of Italian nationality, training or activity, when such a person is available and otherwise meets the needs of the program in any given year. Moreover, whatever nationality or national affiliation a chairholder brings, we would expect Italian law, Italian legal institutions and Italian legal materials to figure in the chairholder's activities while at Columbia. We further believe that the orientation of the chairholder's academic activities while at Columbia should emphasize the institutional and cultural dimension of law. The intellectual dividends of the program will be greater if there is a focus on such broader themes as legal structures, legal procedures, and fundamental values rather than on

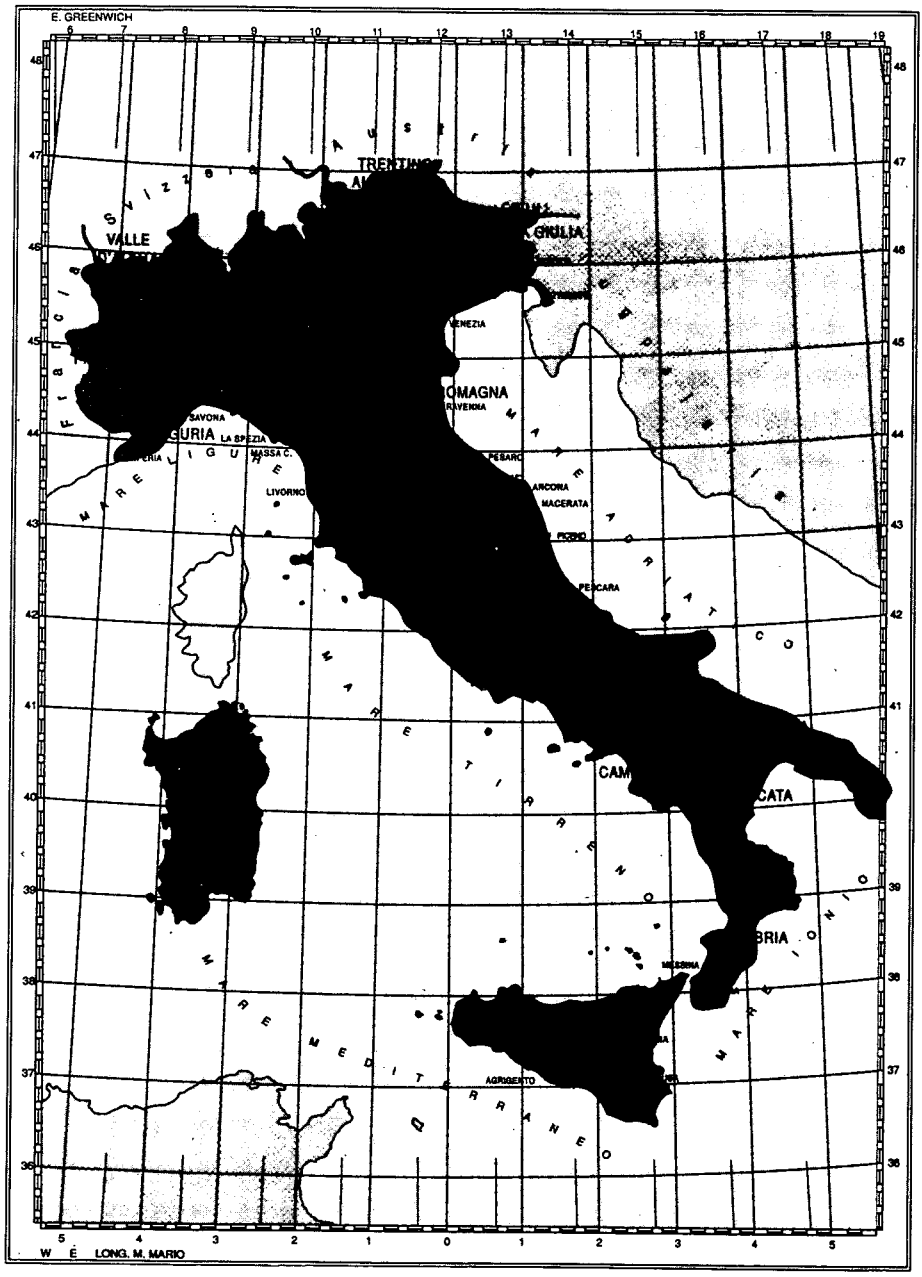
comparisons in narrowly drawn substantive fields of law. This set of preferences may well lead to greater attention to matters that are considered in the Italian legal tradition to be in the nature of public rather than private law.

Columbia Law School has collaborated closely with the Italian Academy for Advanced Studies in America, located adjacent to it in the Casa Italiana at Columbia University, not only with regard to the European Law Chair but also more generally. It seems appropriate, for reasons well beyond architectural proximity, that the chair carry this association. Identifying the European Law Chair with the Italian Academy makes particular sense for all the same reasons mentioned earlier as giving Italy a prominent place in the overall conception of this program.

One year after its inception, Michael Joachim Bonell of the University of Rome was selected as the first BNL Professor of European Law. Professor Bonell taught a course during the Fall 1993 term on International Commercial Contracts which focused on issues such as State Intervention in International Trade Relations, Dispute Resolution, Jurisdiction and Enforcement of Foreign Decisions, International Commercial Arbitration, International Payments, and International Contracts for the Construction of Industrial Works. In addition, under the auspices of the BNL Chair, Professor Antonio LaPergola gave a series of seminars on the complex legal issues currently facing the European Economic Community, and Giuliano Amato gave an insider's perspective on the constitutional and political changes facing Italy today.

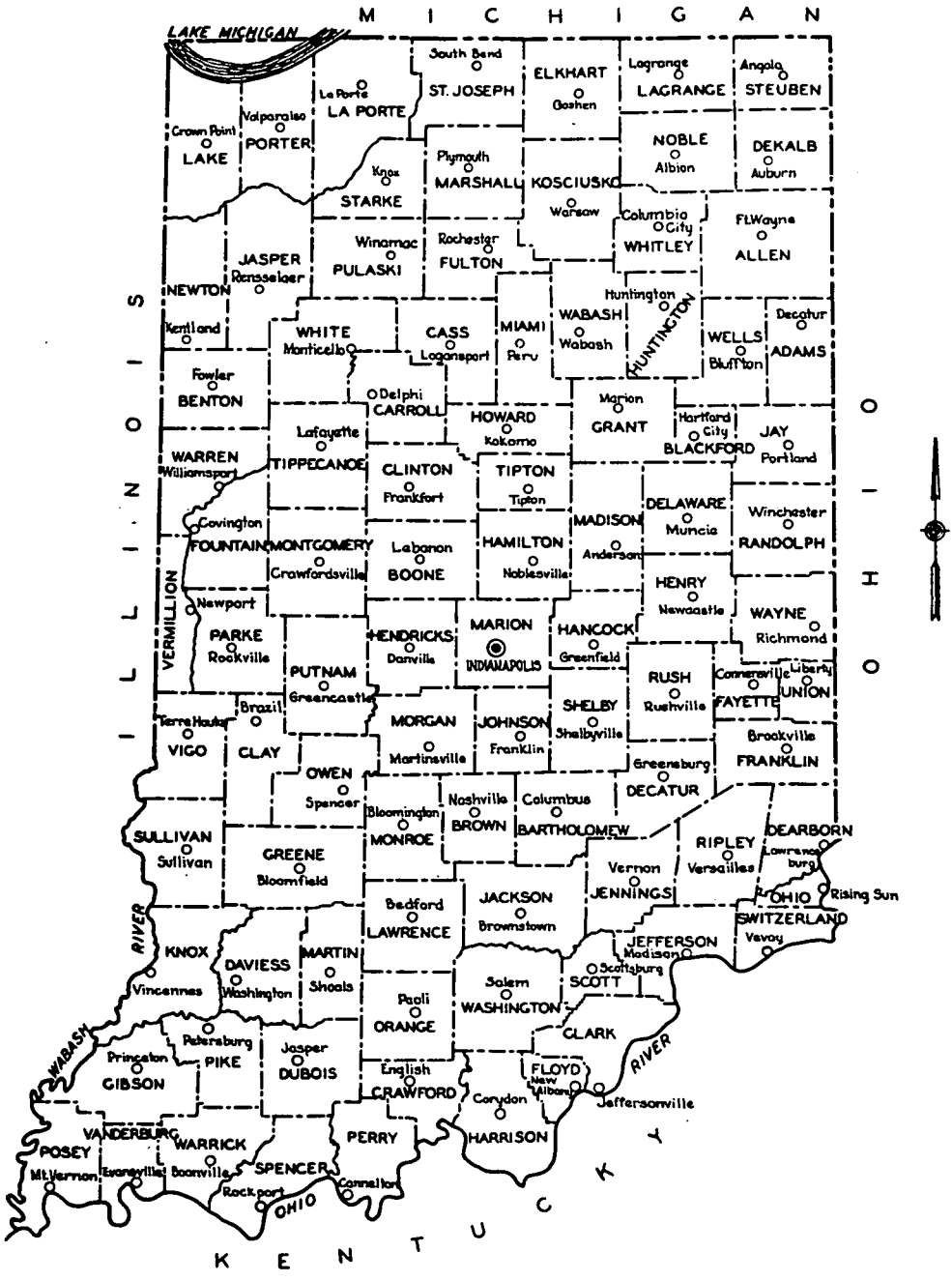
George A. Bermann
Professor of Law
Columbia University
February 1994

The Republic of Italy



Annuario Statistico Italiano (Istituto Nazionale de Statistica 1992)

The State of Indiana



Courtesy of the Indiana Department of Transportation

Symposium Introduction: Italy's Crisis of Justice

*by Charles S. Ross**

In the last few years the Italian Academy has provided a forum for the discussion of issues of Italian law that impact American culture and commerce. With this symposium, the editors of the *Indiana International and Comparative Law Review* assist the Academy in extending that forum from New York into the heart of the country.

I first met Professor Lorch, the director of the Italian Academy, in 1981 in Bloomington, Indiana at a meeting of an organization that was then called the American Association of University Professors of Italian during a panel session on Renaissance literature. We shared a common interest in an Italian poet of the fifteenth century named Matteo Maria Boiardo. Boiardo was the author of a great romantic epic titled *Orlando Innamorato* (Orlando in Love), first published a decade before Columbus discovered America.

Last spring I was invited to New York to read from my translation of Boiardo's poem. There I noticed that the extensive cultural offerings sponsored by the Italian Academy included a series of lectures relating to issues of Italian law. Because I had experience obtaining grants, I had agreed to serve as a symposium development coordinator for the law review. I immediately made a written proposal to Professor Lorch to sponsor a symposium. She accepted on the spot, being keen to extend her audience beyond the confines of Columbia University. It happened that Judge Garavelli was standing in her office at the moment I made the proposal. Maristella introduced us, and I remember the little wave of the hand she used as she explained first my work on Boiardo and then the symposium I was proposing: it was that Italian gesture—bent elbow, hand upraised—where you cup the air to indicate the immensity of things past and then flip your fingers in the opposite direction to say all that is well and good but now it is time to get on with the future. I gave my reading of Boiardo that night, and Judge Garavelli gave me a copy of his book on Italian drug law.[1] We talked briefly

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* Associate Professor of English and Comparative Literature and Director of the Renaissance Consortium, Purdue University; J.D. Candidate, 1994, Indiana University School of Law—Indianapolis.

1. DROGA: IN NOME DELLA LEGGE (Edizioni Gruppo Abele, Turin 1990).

about competing styles of citation. A few days later the Review's chain of command had approved the symposium issue, and we began giving shape to this edition.

Although it falls to a local practioner, David Williams Russell, to comment specifically on the individual pieces in this symposium, I want to raise the issue of special pleading that may be provoked, given the highly charged state of Italian politics, by the pieces by Francesco Cossiga, the former President of the Italian Republic, and Giuliano Amato, a graduate of the Columbia University School of Law who was selected as Prime Minister of Italy in June, 1992. Let me start indirectly, in keeping with the historical theme of this preface. Five hundred ten years ago, in 1482, the year in which Boiardo first published his *Orlando Innamorato*, the Republic of Venice launched an attack against the city of Ferrara, a city ruled by Duke Ercole d'Este, to whom Boiardo dedicated his poem. What strikes one in reading Boiardo's poem and the history of the time is the persistant intractability of regional political problems.

Although I disavow stereotypes, certain aspects of Boiardo's poem have an uncanny timelessness to them. He invents a King of Tartary, named Agricane, who controls vast lands, including Moscow, but his territory constantly fragments, and he cannot keep his armies together. The King of Baghdad, named Trufaldino, is a major villain in the *Innamorato*, who plies his foul ways for years before, having pushed just a little too far, he is suddenly crushed by a knight from the West. Writing five centuries ago, and using sources that go back to the classical period of Rome, Boiardo identifies starvation as a major problem in Northern Africa. My point here is not the possibility, indeed probablility, of a certain "orientalism" that slants our perceptions of these geographic areas, but the way areas no one heard of for years have suddenly impinged in the popular consciousness due to recent world events, such as the break-up of the Soviet Union, Operation Desert Storm, and famine in Somalia. In 1482, Europe trembled during the Turkish onslaught in Bosnia. When Venice attacked Ferrara that year, she employed mercenary armies made up of Albanian, Slavonian, and Croat troops. Even two years ago who had heard these names? Now the history of five hundred years ago seems like today's news.

My point is that cultures implicate everyone. There is a time for blame and a time for understanding. Francesco Cossiga and Giuliano Amato provide valuable surveys of the institutional development of Italy since World War II. In the following section, Judge Garavelli reveals the dual nature of the drug problem as it comes to be considered under the rubric of victimless crime. Guido Bolaffi risks talking about

immigration, which cannot avoid the emotional issue of ethnicity. If there are hidden agendas here, it hardly matters. What goes around comes around, as they like to say in Indiana.

Even Antonio La Pergola's piece on the fine balance between Italian sovereignty and the European Community creates a double set of echoes. I would have thought the best analogy would have been to the Investitute Controversy nine hundred years ago, the struggle between pope and emperor for the power of appointment. La Pergola writes with his audience in mind, however; he compares the situation to the tension in the American system between the federal government and the states. He cites the Supremacy Clause, but misses the exception: federal law rules but Congress cannot interfere in those areas traditionally controlled by the several states, such as health and education (often overlooked are the radical constitutional implications of the Clinton administration's current health care proposals). La Pergola analyzes the question of federalism by using a spatial image, the notion of Italian law withdrawing from certain areas that have been handed over the the European Community.

As Cossiga and Amato point out, Italy's system of government is young. Yet the country faces problems—such as a failure of the notion of public service—that, paradoxically, we in the United States may be only just reaching. For Italy's crisis of justice takes place on a different scale than anything that affects American law. Compared to Italy's situation, American jurisprudence tends to fine tune itself. The impact of new laws, changes in civil procedure, the rise of class actions, occasional treaties, accomodating science and technology, the effect of drug laws on overcrowded courts and prisons, eliminating discrimination—these and other issues play themselves out within boundaries set out by the Constitution two hundred years ago.

By contrast, the problems of Italy tend to be those that have emerged since World War II. The modern democratic state replaced the ruins of fascism—a system of strong central power that Mussolini gave a name to a decade before Hitler rose to power in Germany. As a result, the problems that most worry Italian jurisprudence tend to be closely connected to larger problems of government. The crisis of justice in Italy may be characterized by inefficiency, by unpopular decisions, and by a judiciary seen as conservative if not reactionary. The judicial bureaucracy, often in conflict with itself, also struggles to adapt to the problems of modern society: industrialization, the motor car, urbanization. At a more technical level, the institution of a Constitutional Court has contributed to the continual destablization of the court system. Debate over these problems has been muddled by dif-

ferences of political opinion that characterize not just the country but the courts. Italy is currently in the grip of a massive corruption scandal that promises to realign completely the political parties of this parliamentary democracy in the elections to be held in the spring of 1994.[2]

The result, for a symposium like this one on Italian law, is the presence of a broader political perspective than American lawyers are used to. Italian thinkers, given the urgency of the topics they confront, tend to conceptualize rather than analyze. This tendency may also be due to a greater sense of history in Italian legal thinking. American legal thinkers rarely take a genuine interest in the past; Italian scholars fight it at every turn.

An accurate survey of the politicization of the law in Italy would doubtless need to take into account the history of foreign domination of the peninsula, first that of Spain in the sixteenth century, the age of the Habsburg emperors like Charles V, then of various noble families of Austria, and finally France for an important period following the Revolution, when Napoleon installed his relatives and his civil codes in the old courts of Europe. Napoleon augmented the split between north and south Italy that rends the country to this day and affects the popular imagination. Northern Italy is the home of fashion in Milan, Ferrari automobiles in Maranello, and cuisine in Modena, Bologna, and Parma (home of Parmesan cheese). Southern Italy is the source of much American immigration and the unfortunate folklore of gangster movies. This national context makes the politics of the law seem almost a native tradition.

The papers in this symposium indicate that the issue of judicial activism unites Italy and the United States. Judge-made law crops up most often in this country in gender issues (by omission) and complex litigation. In Italy a judge's politics seem to surface everywhere. The situation seems to be changing, however, along with the drastic changes in electoral politics that are predicted for the next few months.

Some of the opportunities for future research are suggested by, paradoxically, the past. In LAWYERS AND STATECRAFT IN RENAISSANCE FLORENCE,[3] a good introductory book on the history of Italian law as practiced in Italy's most famous city of Florence, Lauro Martines surveys not only the close connection in Italy between politics and the

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2. A key document in disseminating news of this scandal was the Letter from Italy published in The New Yorker edition of September 21, 1992.

3. LAURO MARTINES, LAWYERS AND STATECRAFT IN RENAISSANCE FLORENCE (1968).

practice of law but many details of a lawyer's life that must be of interest to any attorney. Three things struck me as I read this book. The first was the great expense of a legal education, which could require ten years for a degree *in utroque iure*, that is, in both canon and civil law. Lawyers came from wealthy families of merchants who could afford, and needed to, take a son out of the family business to educate in the law. There were no Horatio Alger stories, no Dick Whittingtons leaving poverty to become mayor of London. Although lawyers were highly paid, no one reached the top overnight.

On the issue of compensation it is interesting to learn that the fees of top lawyers compared favorably to business ventures. A top professorial salary of 500 gold florins was almost half of what the entire Medici banking house made per year between 1420 and 1435.[4]

The second striking feature was the power of the legal guild. Lawyers, then as now, took care of their own. In Florence the *Arte dei Giudici e Notai* served what were called judge-lawyers and notaries. Notaries were responsible for public records, whose legacy even when I first studied in Italy in 1971 was the ubiquitous rubber stamp. The notaries did not have to study in a law faculty or pass the exams required of a lawyer. The guild maintained the political prestige of its members, its connection with the town council, and its high ranking in the ordered hierarchy of professions.

The third feature that struck me was the intimate, one wants to say modern correlation between all aspects of legal activity—diplomacy, jurisdictional disputes between Church and state, legal research, civil suits, administrative protocols, and even occasional criminial cases—and taxes. Fraudulent conveyance, for example, was practiced with exceptional skill by property holders who would "deed" their income-producing capital to tax-exempt organizations such as monasteries. The power to tax consumed the energies of ambassadors sent by cities to Rome, where the Pope as likely as not had studied law at the University of Bologna, the oldest law school in Europe. After one session in the late fifteenth century—when Alexander VI (famous for dividing the New World between Spain and Portugal) finally granted Florence a certain license to tax—the diplomats concluded by awarding themselves finders' fees, or kick-backs, of several thousand ducats. If our situation in 1994 requires a more general approach concerning the topic of justice itself, which one hopes will always be the true object of legal study,

4. MARTINES, *supra* note 2 at 77.

future symposium issues may look forward to detailed analyses of international tax law.

Italy: The Rise and Decline of a System of Government

*by Giuliano Amato**

Italy has always received special attention in the studies of comparative government. It had a democracy that seemed weak in that it was continuously shaken by the confrontation between governmental parties and the strongest communist party of the West. Yet Italy also seemed to overcome its difficulties, solve its conflicts and ultimately enjoy the highest level of stability in Europe. My predecessor as Prime Minister, Giulio Andreotti, was already in government in 1946. Not even Andrej Gromiko lasted for so long in the old days of the Soviet Union.

More recently, a sudden and sharp change has occurred and Italy has become the most uncertain and unpredictable democracy of Europe. Its traditional ruling elite has been erased, leaving new and largely unknown rulers on whom no one can safely bet. Is it the outcome of unexpected and unforeseeable events? Is it the final outburst of a longstanding and unremedied malaise that was spreading into the system under the cover of stability?

Of course there is no explosion without triggers. But no explosion would have been so devastating and so effective in leading to radical change, without deep historical underpinnings. If we review them, we realize that Italy is an excellent example of the theory of involution, expounded by Mancur Olson: a vital system that becomes progressively rigid, incapable of correcting its increasing entropies, and unable to keep up with the need of change, is finally destroyed by the impact on its corrupted tissues of newly emerging counter-forces.

Let us go back to the sunrise of the Republic when the Constitution was written by its real founding fathers, the antifascist parties, which, in the stateless Italy of the last years of the World War II, had taken care of the problems of the Italians and had won their convinced support. The Constitution was expected to embody the principles (among others) necessary to eliminate those loopholes of the liberal regime that had allowed fascism to take over in the 1920s. The problem was exactly the same that another Constitutional Assembly, the German one, was

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* President of the Council of Ministers (Prime Minister) of Italy from June, 1992 to April, 1993.

facing exactly at the same time. Why in the end were the two Constitutions so different from each other?

The German Grundgesetz embodies an entire set of new devices aimed at preventing political fragmentation, forbidding extreme parties, and, above all, ensuring government stability. The Grundgesetz provides for an electoral system that denies representation to parties scoring under five percent. It empowers the Constitutional Court to outlaw parties deemed to be—for their activities but also for their values—against the basic principles of the new Constitution. It provides for a constructive vote of confidence to prevent the joining of the opposite wings against the Cabinet. And it gives the President of the Republic the power to keep a minority Cabinet in office when stability seems to him more important than a temporary lack of confidence.

The Italian Assembly considered each of these devices, and proposals similar to the final decisions taken in Germany were made. One knows the constructive vote of confidence as a German invention, but it had been initially proposed in Italy by Egidio Tosato, a professor of constitutional law and a member of the Assembly with remarkable foresight. However, despite Tosato and others who shared his views, none of these proposals was accepted. Why? Because in Germany the system of government had to find the strength it needed in its own branches and in the powers they were given. In Italy the source of that strength was to be found in our powerful and highly legitimized political parties. They were perfectly aware of this and the German-like proposals were rejected upon the motivation that the cohesion of Parliament and the stability of the Cabinet did not need "artificial" guarantees. They necessarily depended on the enduring common will of the parties freely joining in the majority. Strong parties and weak institutions: this was the background upon which the future Republic should find its balance.

An effective and healthy balance was found in the first years, when the dominant and crucial issue was whether the democratic system would receive the necessary support by a national community that was approaching democracy with widespread second thoughts. Not only the communist party and the revolutionary expectations it had raised during the Resistance were a matter of concern. Alcide De Gasperi, too, had his harsh difficulties with many of his followers in the upper and middle classes, whose Catholic allegiance meant allegiance to the "Sillabo," a nineteenth century papal doctrine not yet abandoned, that was not against communism, but against liberalism.

Two heavy wings of the Italian electorate were coming from very far away and from opposite extremes. The challenge facing Italy was

to bridge the political cleavage that divided the extremes. Let us assume that we had adopted a Constitution, similar to the German one, that would have allowed the Constitutional Court to outlaw the extremist oppositions and given the majority the power to run the country unconditionally. Would the outcome have been the German stability or the Greek civil war?

I do not have the answer to this intriguing question. What I do know is that the system it became forced the Cabinet to look for a political consensus that was frequently broader than the majority. The majority and the opposition learned how to coexist with each other through parliamentary procedures that made both groups essential for the ordinary activity of Parliament.

It was an extraordinary lesson in democracy, a demonstration of the substantive potential of democratic procedures. A century ago, Edward Bernstein wrote that his fellow socialists made a tragic mistake in fighting against liberal procedures that were not in the form of capitalist oppression but were an unparalleled framework for the appropriate, balanced solution of any conflict. The Italian case supports the "heresy" of Bernstein. Through liberal, democratic procedures, democratic values were learned, finding their roots in an initially hostile environment. Of course, while the mission of De Gasperi, as far as his conservative Catholic side was concerned, appeared convincingly successful after some time, doubts were repeatedly cast on the communists' real conversion.

Was democracy accepted by them as an unavoidable route to subversion (when and if it became possible) or did it become a final and accepted stage of political evolution? The answer will always be disputable. It is a fact that the Italian Communist party continuously evolved to the point of rejecting the party name and part of the old culture. Many of its followers became ordinary members of their communities, sharing the values, goals and aspirations of all the others. The only subversive action coming for the left in the entire cycle of our Republican life (the Red Brigades) was fiercely opposed by the Communist Party. One might be correct in reading ambiguous motivations underlying some of these events. But these are the facts nonetheless.

To this initial but essential purpose, the system worked successfully. It became, however, a peculiar system, quite distinct from the Westminster model and much closer to a "consociative democracy," the term that Arend Ljiphart uses to refer to societies with deep ethnic or religious differences.

Due to the proportional system of election and to the consequent fragmentation, the majority itself was built up with broad coalitions of four or five parties. Some of them were minor parties and only the Christian Democrats were above 30 percent in representation. The coalitions were necessarily (and therefore easily) formed to stand against the communists, but not easy to convene upon common solutions of concrete issues. Decision-making processes became lengthy and cumbersome within the ranks of the majority coalition even before facing the opposition. Preliminary proposals by the Cabinet stagnated pending meetings and negotiations with the experts of the parties for their approval, which might take weeks before coming. This approval was a prerequisite to the proposal going to the Council of Ministers and then being submitted to Parliament. At that point negotiations began all over again with the Communist opposition (which renewed differences among the majority parties), upon the background of two basic and related conventions. First, there was a "conventio ad excludendum," according to which the communists were excluded from ministerial positions. Second, there was a compensatory "conventio ad includendum," that implied their involvement in the decision-making process in Parliament.

Of course there were various degrees of involvement. The communists could arrive at a final and formal approval, they could abstain, or they could vote "no" but state their opposition in such a way as not to make the approval impossible. What is important is that all of these outcomes were negotiated, sometimes openly, more often covertly. Consider also that negotiation with the communists was a practical necessity in many cases, independent of the convention that required it. Majority members were frequently absent, busy with their districts' problems, while the communists, whose election was guaranteed by the party machine, were always present. Without them you could not even reach the needed "quorum."

What kind of decisions could come out of these tortuous procedures? It was difficult to expect neat policies and clear cut solutions. The foreseeable outcomes were accumulations of conflicting goals, patchworks that smoothed dissents raised by benefits conferred to one group, and by compensating the potential losers with something else which had the effect of increasing confusion of policies and losses for the public budget.

The seemingly eternal dominance of the majority and its increasingly unhealthy relation to the opposition brought about a third negative consequence: the abuse of the privileged access that political parties had to public channels. Political parties considered themselves as the

stockholders of any public entity with the ability to designate public appointees as a matter of right, no matter the appointment. This was true not only of ministers and undersecretaries, but of top officials of public departments and heads and board members of public banks and public companies at the national and the local level. As long as the opposition had its share, a substantial complicity covered this far reaching spoils system.

Public resentment grew out of this morass. Party affiliation was not accepted any longer as the main requisite to hold public positions. Yet largely unknown was the main abuse: corruption.

The explosives were being piled up under the system. Those who realized it initiated a campaign for reform. Strong parties and weak institutions had been a wonderful formula to overcome the difficulties of the first years and to bridge the initial, wide cleavage. Now the time was ripe for change and change meant a new and less proportional electoral system, stronger institutions empowered to pursue their own policies, and political parties coming down from the pedestals of government and restoring their only role as representatives of popular demands.

Some corrections were introduced, mostly in parliamentary procedures, to give the Cabinet higher chances to have its proposals passed without unnecessarily lengthy negotiations. But the crucial problems remained unsolved. Each of the parties had its own solution (the most convenient to each of them) and no willingness to reach a compromise. Agonizingly, mutual vetoes triumphed. The need for reform entered the popular mode of referenda. Referenda were called to change the electoral system and the overwhelming "yes" vote in 1991 was interpreted, and actually was, the first sign of open and widespread hostility against the parties.

Now we are at the final act of the explosive drama, the trigger stage. While popular feelings were intensely changing, a second trigger was entering into action. The 1980s had been years of slow but continuous restrictive policies aimed at reducing the huge and dangerous public deficit. The traditional compensatory public interventions, which Italians were used to, became more and more difficult to provide. The increasing burden of taxation fell upon middle income categories and upon northern regions whether or not benefits were reduced. Progressively, the North (the richest part of the country), felt spoiled and abandoned the traditional parties, mainly the Christian Democrats, who had some of their past bulwarks there. The roots of the newly emerged opposition, the Lombard League, were there. The revolt of still loyal tax payers became a political investment in this new party and the

League scored first in the North at the beginning of the nineties.

At that point corruption was discovered on a wide and unexpected scale. This was the third and final trigger that, together with the others, ensured a wide distribution of the disruptive effects. From the initial case, dealing with a minor episode of bribes in Milan, investigations were broadened thanks to a flood of admissions by entrepreneurs. A net of illegal financial relations came to light. All the traditional parties who had responsibilities either in national or in local government seemed to be involved, but the Christian Democrats and the Socialists more deeply than the others. Their General Secretaries were directly charged and prosecuted. Judicial actions are still on the horizon, but politically the sentence has been pronounced. Recent local elections demonstrate that the Socialists and the minor parties of the previous majority have almost vanished, while the Christian Democrats have fallen under 20 percent. The new major parties, chosen by direct election for the first time, have gone either to the leftist coalitions around the PDS (the former Communist Party), to the Northern League or to the right wing MSI. At the moment Italian electors are revolting against the center and leaning to the extremes. We cannot know as yet whether this is a temporary reaction, whether new personalities and new political parties can restore credibility in the area of the present losers, or whether the extreme parties will become less extreme to catch the moderate electors, who now feel landless. A definite answer might come far beyond the next political elections expected in early spring 1994.

Whatever its outcome, this new political cycle is beyond the horizon of my short review here. My purpose was to investigate, through the Italian case, the interactions between longstanding trends and supervening factors of change, between entropies that prevent self-reform and outbursts of revolt. To this purpose, the relevant cycle goes from the sunrise to what already appears as the sunset of the first Italian Republic.

Institutional Reform and Italian Crisis

*by Francesco Cossiga**

One cannot interpret today's Italian crisis in terms of scandal and morality alone. Rather, it must be considered together as a moral, political and institutional crisis. The connection I make is due not only to a desire to be sincere or current, but also to a deeper connection which exists in Italy today. The need for an institutional reform, a reform of the system of public powers in Italy, dates back to the very moment Italy became constitutionalized. Paradoxically, the need for reform was born when the constitution was approved.

The constituents, in approving the constitution, were fully aware, or in large measure conscious, of the structural weaknesses of the constitution itself. Italy adopted its constitution after having chosen the Republican System, three years after the Second World War. In other words, Italy dealt with the problem of establishing a new system after twenty years of fascist dictatorship, after a lost war, after a hard struggle against Nazism; a civil struggle among Italians that was fought in the name of liberty and democracy, and after the world had divided in war. The constitution took into account all of these factors. The experience of fascist dictatorship led to a concept of checks and balances that greatly weakened the executive power. Various cultural and political currents had to find a place in the constitution: the old Liberal current; the Democratic current; the Catholic current in its various shades, from liberal to social Catholicism; the Socialist current; and the Marxist-Leninist current which the Communist party strongly espoused as it participated in the Resistance against Fascism and the struggle for liberation in Italy.

Italy's new constitution had to be a constitution of compromise, not only to satisfy the many Italian political factions, but also to account for the world that was divided in war during the constituent assembly. Two world powers were created, and also created was the lasting contrast that pitted our political and cultural ideology against the military rule which pervaded international, and in certain cases internal, affairs of countries, especially during the events of 1989-90. The Iron Curtain

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* Senator, Italian Parliament; President of the Republic of Italy from July, 1984 to April, 1992.

divided Europe; most significantly, Germany was split in two. Within Italy, the Iron Curtain fell too, dividing not the territory, however, but social classes, our consciousness, and even families. It created, in Italy, two areas; one ruled by the Communist Party, and the other by the traditional democratic front, centered in the party of Christian Democracy. The Christian Democracy had been transformed by De Gasperi from a party of confessional inspiration into a large democratic convergence party that replaced that backbone of Italian society, the Liberal Party, which had been swept away by the Fascist experience. The constitution was approved in, and affected by, this turbulent climate. The constitution specified the two parts into which the country was to be divided, and it guaranteed their presence to avert a civil war.

I once contended that contrary to the Italian Proverb "the frock doesn't make the monk," in Italy, the frock *does* make the monk. Two or three years later, some great thinkers reiterated these thoughts and from that moment the thoughts became the subject of theoretical speculation. But no one had the courage to criticize when Norberto Bobbio, a great thinker, silenced the scandal I had started by proclaiming the first Republic at an end by writing the dramatic article *The First Republic Died and Died Badly*. From then a new season started, a long path in the Italian life.

The Italian constitution guaranteed forty years of democratic life in our country. It guaranteed democracy by what can be considered the first historical compromise between the Catholic Party, representing the entire democratic tradition, and the Communist Party. This compromise was headed by two great leaders, perhaps the two greatest leaders in post-war Italy: the leader of the Christian Democracy, Alcide De Gasperi, and the great leader of the Italian Communist Party, Palirmo Togliatti. A silent agreement was stipulated, under which the Communist Party understood that it could not aim for participation in the government of international affairs, but was guaranteed a state of freedom which contrasted with the needs of international freedom. The Communist Party was also guaranteed an active part in the internal affairs of Italy, allowing the Italian Communist Party to become the second largest Communist Party in the West after that of the Soviet Union.

Today, criticizing the constitution, as it was created by the founding forefathers of the Republic, does not discredit the positive function that the constitution had in the civil, social and economic growth of Italy according to the principles of liberty and democracy. The life of our country and the life of the constitution developed through different

phases: from a period of hard confrontation, during the period of De Gasperi's hegemony, up to a period of rising political equilibrium when unity overcame the division which the Cold War had introduced in Italy and an attempt to confront the great problems which meanwhile had arrived.

The constitution was the great intuition of one who can be considered the brightest intellectual spirit of Italian political history: Aldo Moro. While acknowledging the existing deep diversity between the Catholic and the Communist parties, Moro recognized the need to bring them closer together in order to gain the national unity necessary to face serious economic crises, like those of the Seventies, or the great crisis of Republican legality which we had to face in the case of terrorism. Aldo Moro reestablished a method of democratic leadership that had its origins in the first democratic compromise between De Gasperi and Togliatti, called "Consociated democracy." Aldo Moro said in his famous speech in Benevento:

> This is a country in which the majority cannot play to the final end the role of the majority, and the opposition cannot play to the final end a role of opposition. But the majority has to make decisions that protect the opposition, and the opposition has to be responsible for the government's decisions, otherwise, this country cannot be governed.

The practical form of Italy's government was created due, almost equally, to the majority and the opposition. The theoreticians said that the political regime, the effective way to keep the constitution alive, was based on two conventions: a *conventio ad escludendum* under which the impossibility of the Communist Party entering the international government was recognized, and a *conventio ad conveniendum* under which an exchange was established for the Communist Party to have the right, from the opposition, to an active role in the domestic government, and a veto right in relations to the most important international decisions.

Certainly there were exceptions when the Communist veto right was not considered. One exception, during my government, was the decision made with Germany to answer the challenge of Brezhnev, who had displayed the SS20 and the Backfire bombers that kept Europe hostage. We answered by accepting the American proposal to display the Cruise and Pershing missiles. Today, we know that was the moment when the Soviet strategic and economic strategy entered a crisis, initiating the decline of the Soviet Union. Gorbachev's declaration affirmed this, although in Italy few remember this or have thanked me for it. To my surprise, however, I was thanked for contributing to the event

when I first visited the capital cities of the formerly socialist countries, which had again espoused democracy.

Together with Ambassador Gardner, I made the decision to display missiles after long confrontations with the leader of the Italian Communist Party, who was, incidentally, my cousin. I had to respect the convention that stipulated that decisions of such importance cannot be made without having first consulted the Communist Party. Their opposition to the missile display was apt, and yet surprisingly soft. In fact, the Communist Party was chastised by the Soviet Union, which sent its minister of foreign affairs, Ponomariov, who spent four hours, being a typical Soviet diplomat, alternating between flatteries and menaces. Throughout the different episodes, the Italian political regime remained one of consociated character, the power of which was exercised not according to the criteria of classical democracy, but exercised with sometimes exhausting and paralyzing mediation and compromise.

Thirty-five years have passed, and the Italian government has spent that past ten years in talks about the reform of the constitution. Italy was a country which had changed, the institutional tools were not appropriate for the demands of a modern country, now heavily industrialized, nor for social, moral and religious growth.

The Second Vatican Council was established during the years following the war with resounding effects. Italy is a country traditionally Christian, so much so that one of Italy's greatest secular philosophers, Benedetto Croce, wrote an essay entitled *Why We Cannot Not Call Ourselves Christians*. The Christian tradition, the Christian culture, strongly affects Italy in that purely ecclesiastical and religious events such as a new Council have real effects on government.

Our country is a frontier country; it is the only country which has attempted to sanction both Catholicism and Communism. In this world in flux, that is yet kept still, perhaps necessarily by a compromise and a consociated formula of running public affairs, the 1989-90 crisis fell as heavily as a mallet. As with Germany, one cannot speak of the crisis as a "fall of Communism," because an ideology which has a seventy year history does not fall in one night. The thinking of Robespierre did not die out; we have traces of it still in Italy. When Robespierre addressed the French Convention in favor of the revolutionary government, he said:

> Tomorrow we will have a constitutional government, but to reach the constitutional government we must pass through the revolutionary government, because we must defeat the enemies of the Republic. Tomorrow we will have a trial according to the guarantees of a constitutional government; to give a just

trial to the enemies of the republic today would mark the end of the Republic.

Today, there is in Italy a saying: "suspicion is the hallmark of truth." Suspicion, not as a hallmark of truth but as a path to justice, was celebrated in the famous Rousseau Jacobin speech to the Convention, when he asked to pass the famous laws on terror, and pronounced the tremendous, but exalted phrases: "Terror without virtue is a crime, but virtue without terror is impotence."

The echo of Rousseau's teaching did not die out in the 1700s, yet there are those today who contend that communism died and disappeared due in large part to a state of equilibrium and to the crisis of economic systems, such as that of the Soviet Union. The "Eclipse of Communism"—I prefer this phrase to the "Fall of Communism"—the fall of so-called socialist systems, and the dissolution of the Soviet Union has been, for the countries of Eastern Europe, a great era of liberty and independence.

The eclipse of communism impacted Germany not during reunification, but in the period that followed, once unity was achieved. What problems has Italy faced? Many reasons for the compromises in the constitution have disappeared. *Conventio ad escludendum* and *Conventio as consociandum* have been made obsolete because the Communist and Christian Democracy parties have become parties like any other, undergoing an identity crisis from which they have not exited. The Communist Party, despite its efforts, has not been able to identify itself with its necessary historical function as a democratic party of the Left, which must assume responsibility for the government of the country. The Christian Democracy is in search of a unity beyond the purpose of being a wall against communism. The extraordinary system of institutional and political compromises which were useful in saving Italy from civil war, and which allowed the building of a modern Italy, are no longer needed, and we find ourselves with a series of old rules which don't apply anymore. Not only that, but due to the ideological crisis of communism, the very future on which the constitution has its foundation has been questioned. This was the culture of anti-fascist unity and of the Resistance.

I want to clarify immediately that I was brought up in a strictly anti-fascist, radical, Republican family. I received a liberal Catholic education and therefore, during the years of Fascism, an anti-fascist education. If I had found myself in the area of the country that was occupied by the Germans, I would have been in favor of the Italian resistance against the Germans. But the analysis made by Bobbio says even more: that the culture of the anti-fascist unity was a myth that

was experienced differently by its interpreters, that a univocal culture of resistance did not exist, and that constitutions cannot live without a culture to support them. The great vitality of the American constitution is that it has behind it a culture. The American culture is not of that continental illuminism, but rather perhaps, British illuminism, the culture of the founding fathers, of the constitution of the colonies of Virginia, Maine, and Massachusetts. It is the culture which we may find in the *Federalist Papers*. With the crisis of communism, it became apparent that the weakness of the formal culture, and thereby the weakness of the constitution, was that it was constituted not by one culture, but by a fractured culture. Those who were supposed to be the founders and keepers of Italy rapidly found themselves on one side or the other of the chasm.

The members of the hegemonic parties, the Christian Democracy and, substantially, the Communist party, found it difficult to accept changes in the rules of conduct, while others, myself included, felt that radical changes were absolutely necessary. Due to the forced "consociated" life, the hegemonic parties had generated the system called "partyocracy," in which the parties occupied the society and the state and substituted themselves for her institutions. This may have been a result of the hegemonic nature of the cultures behind the parties, cultures which refuse the ethics of responsibility, risk and choice.

"The Great Moral Question" arose during the process of creating institutional reform; my fellow citizens gave this question the name *Tangentopoli*, or "Kickback City." The political and institutional crisis and Kickback City are the same thing. It is not that the crisis of the political society, or even of the institution, is a result of the transgressive city, which substituted and took the place of the city of the citizens, but nonetheless, "Kickback City" did affect the political crisis.

If the recent national dilemma, which is the wide spread system of corruption, was an ordinary tale of common thieves, we would not have much to worry about. In all regimes throughout history, monarchies and republics, great private and public stealing has occurred and been accounted for by the economic system. Why then is Italy's problem a great national crisis? Because Kickback City is a syntheses of politics, entrepreneurship and bureaucracy, and has an autocratic and privileged gestation period of its own power that contrasts with economic interests, penal laws and, even more seriously, the fundamental laws of democracy. The laws of responsibility in politics, of impartiality in administration, and the laws of confrontation and competition in the market economy have been ignored by this system.

The "consociated" life and "partyocracy," which are conservative perceptions of society that reject the ideas of risk and of choice, which

is the fundamental ideal of liberty. They have generated a system which recalls the economy of socialism. Does this mean that we are looking for a historical justification of the various conditions under which Kickback City was formed? No, we are not, for two reasons. First, because there is an evident crisis of legality in Italy, and to restore legality we cannot ignore the crime. Secondly, the protest has become, or has the risk of becoming, violent, and the evaluation of a historical explanation could be confused with the justification of it.

The story of common thieves can find a causality in an external forum (within the halls of justice) and an internal forum (within the confessionals). But a bifurcated history in which the country's economy and politics deviated cannot be reconciled if the country's institutional and political crisis are of political origin. This is not to detract from the magistrates' meritorious activity, today those prosecuting, tomorrow the judges; but, it would be extremely dangerous to suppose that there is a judicial path to the solution of a political and institutional crisis. This risks tempting the judicial system not to exercise a law for the sake of justice, but rather for the sake of assuming the power to function as a political entity. Transforming the judicial system into a neutral, political power would be a distortion of the principles of the constitutional and legal state which will only worsen the crisis in which we live.

Reforms of the institutions, political society, and rules of politics go hand-in-hand with solutions to the grave moral question. In Italy, there have been in one year, 1450 arrests and 200 investigations into members of Parliament; we find ourselves facing a crisis which cannot be reduced to a crisis of penal law—we are facing a crisis of a type of politics, an institutional system. The problem remains of what to do. The judicial authority can solve problems on the level of individual cases and of individual responsibilities, but not the problems of a serious crisis of conduct within the political society and the institutions or the problems of undertaking a courageous reform policy both of the institutions and political conduct.

Reform, in my opinion, has to have as a criterion the realization of a *complete* democracy in Italy. Due to the historical and geographical situations that have effected Italy's politics, we have lived for twenty years in an incomplete democracy. A democracy that does not allow for the maximum amount of control and responsibility and the possibility of alternatives is not a democracy. Today, for international, internal and ideological reasons, we can drive the country to a phase of complete democracy. Complete democracy means a personalization of responsibility, direct responsibility of power. The people are alienated from the institutions, which then have a serious problem of de-legitimacy in

the public eye. These institutions find themselves asking to have a more direct rapport with public officials, so that these officials will have a public face and direct responsibility. All this is necessary because, while the political society has been blinded in these years by a conservative vision, which perhaps was necessary to keep democratic institutions and the principles of liberty in a climate of relative civil peace, the country has moved forward. Now a deep gap has formed in our entrepreneurial-based civil society between its cultural, religious and intellectual needs and its political expressions. I believe in order to break the procedure of "partyocracy," "consociated" life, it is absolutely necessary to stress personal responsibility and return power to individuals.

In a transformation of the institutions in Italy, the system has to be privileged with an executive power that will be a direct expression of the people, combined with a strong dose of direct participation by the people in major political decisions. It is a misconception that the common citizens are ready to accept institutions, even the best ones, if they have not directly participated in their creation.

A heavy veil of hypocrisy still covers Italy. There is a belief or pretended belief that our serious moral crisis is just an ordinary story of common thieves. The political subjects and the political class do not want to accept responsibility not only for our institutional and political crisis, but also for the moral crisis of Italy. We must make "the Great Confession" to the Italian people. We must have the courage to inform the people; this cannot be accomplished by attorneys or prosecutors, nor judges at an individual level. It can only be accomplished by a great political inquiry in our country, to discover how it happened that important members of our political and economic lives found themselves able to collaborate for years, for decades, to sustain and finance a political system in which a demand for money transformed political parties into state parties, societal parties.

What historian can imagine a history of the French Revolution written as follows:

> There was a happy time in France where kings wisely ruled, where there were also healers and thaumaturgist kings. And then Marie Antoinette buys for herself an emerald necklace, spending a large sum of money. Then certain meddlers of the royal house skim the public finances. The cause of the French Revolution is not the dissolution of organicistic conception of the monarchy and the eruption of the bourgeoisie into the social life of France. No, the origin of the French

> Revolution is in Marie Antoinette's necklace and the stealing by a few petty-ministers of the King of France.
>
> So, the history of the Italian cannot be written simply:
>
> There was a country that was big and powerful—the seventh, sixth or fifth industrial power in the world—but what happens in the middle of this prosperity? There were these men, Mr. Chiesa, Mr. Mongili, Mr. Prada, who were important examples of what would be the revolutionary conscience. This crisis in Italy was caused by Mr. Chiesa, Mr. Prada and Mr. Mongili. . . .

The history of Italy is as unique as the history of the French Revolution in which Marie Antoinette's necklace both counts and does not count, where the petty stealing in the royal house counts and does not count. In the history of a great country can we accept that 615 million "counts", but that the two billion of Chiesa is immediately given back to him after a relatively mild sentence? This is not possible, and this is why I say that it is necessary for the political class to assume responsibility. Today there are excellent people investigated; tomorrow, there will be excellent people condemned. But in this crisis in Italy there seem to be no excellent innocent people. The Great Confession, the lifting of the veil of national hypocrisy, is the other end of the commitment to reform, to rebuild the state, to reground politics and resurrect the Republic.

Italian society, civil society, has grown and presses us to include the timetables that our country now has in relation to the new European community. We must answer new questions posed by having discovered that Europe is made up not only of Germany, France, Italy, and England, but also includes Poland, Russia, Slovenia, Croatia, and Hungary, countries which at one time seemed abstract entities behind the Iron Curtain. Italian society has grown so much and is so rich in ideas, rich in possibilities. She asks for a new system of politics, a new political morality and new institutions, and if we don't give in to her demands, she protests, and protests loudly.

Is this a pessimistic or optimistic picture? Sin has always lived together with virtue and grace. The choice of the interpretation, based on an optimistic conception or on a pessimistic conception of the society, is a choice that then falls upon our capability to make choices to conform to public interest. In reality, the problem is one of ethics. The ethical life of the country, in regards to politics, economics, family life and personal life, has been replaced by the ethics of the group.

The rights of the party, the faction, the enterprise and the lobby have replaced the rights of the individual.

Being a devout Christian, I refrain from making a prophesy about politics or the future of Italy. I can, however, have a hope—a hope that the traditions of Italy and its dramatic past will give to the present a horizon of light. I believe this light can soon be realized by a strong political and moral reform initiative that will bring back the kind of politics that can be appreciated as an art, as a science. I hope that the common good at the center of life and of society will finally rebuild a new moral and ethical unity in our people.

Justice and Politics: The Italian Case in a Comparative Perspective

*by Carlo Guarnieri**

I. INTRODUCTION

In the field of administration of justice, all democratic regimes have to satisfy two contradictory demands: the democratic accountability of all those exercising political power and the safeguard of judicial impartiality through guarantees of independence.[1] The first flows directly from the basic principle of any democratic government—the people's sovereignty. The second is equally important since judicial impartiality in disputes involving the State—the main example being the criminal process—is one of the basic guarantees of citizens' freedom in a modern constitutional regime.

The growing political significance of judicial actions, a trend more or less evident in all democratic regimes with roots that lie in deep transformations of the relationship between the citizen and the State, has made it difficult to define the judicial role in passive, executory terms, such as depicting the judge as *la bouche de la loi*[2] and the judiciary as *pouvoir nul*.[3] But if judges are exercising political power more openly, the need to make them accountable becomes stronger. Thus, the result has been an increase in the tensions between democratic accountability and judicial independence, although in a constitutional democratic regime neither of these two principles have to be privileged. Since both of them are an intrinsic part of its nature, they have to be balanced one against the other in some way.

Because of the complexity of the factors involved, there is no ultimate solution to the relationships between politics and the judiciary

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* Facolta di Giursprudenza, Universita degli Bologna, Italia (Professor of Law, University of Bologna).

1. Martin Shapiro, *Morality and the Politics of Judging*, 63 TUL. L. REV. 1555, 1589 (1989); MAURO CAPPELLETTI, THE JUDICIAL PROCESS IN COMPARATIVE PERSPECTICE (1989).

2. JOHN BELL, POLICY ARGUMENTS IN JUDICIAL DECISIONS (1983)(citing MONTESQUIEU, 11 DE L'ESPRIT DES LOIS ch. 6 (1748)(translation: "the mouth of the law").

3. *See generally* CAPPELLETTI, *supra* note 1 (translation: "not empowered").

in a constitutional democracy.[4] Actually, different institutional settings are able to satisfy the aforementioned demands, both because there are different ways of settling the balance between these two demands and because the same sort of balance can be satisfied by different settings. In order to assess the Italian case in a truly comparative way, the treatment of this contradiction in other major democratic regimes must be explored.

II. THE JUDICIARY IN DEMOCRATIC REGIMES

Generally speaking, notwithstanding some common characteristics which will become evident, the judiciaries of democratic regimes differ in some significant aspects.[5] Specifically, the organizational setting in which they operate is different: bureaucratic, for the judiciary of civil law systems, and professional, for those of common law. Unlike common law judicial organizations, the judiciary of civil law countries have the following characteristics:[6]

1) the selection of judicial personnel is made through examinations at a youthful age, usually right after completion of university studies, and no consideration is given to the candidate's previous non-judicial experience;

2) the professional training of the judge takes place largely within the judicial body; and

3) organizational roles are ordered according to a hierarchy of ranks. Advancement up the career ladder is competitive and promotions are granted according to formal criteria combining seniority and merit—merit being assessed with great latitude in judgment by a hierarchy of superiors.

4) The approach to work performance and role assignment is of a "generalistic" type. The participants are supposed to be capable of playing all organizational roles formally associated with their rank.

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4. Shapiro, *supra* note 1, at 1557-58; W. Murphy, *Constitutions, Constitutionalism and Democracy*, *in* CONSTITUTIONALISM AND DEMOCRACY (D. Greenberg et al. eds., 2d ed. 1993).

5. CARLO GUARNIERI, MAGISTRATURA E POLITICA IN ITALIA 51-82 (1992).

6. For what follows, see Giuseppe Di Federico, *The Italian Judicial Profession and Its Bureaucratic Setting*, 21 JURID. REV. 40-57 (1976) and GIORGIO FREDDI, TENSIONI E CONFLITTO NELLA MAGISTRATURA (1978). FOR AN ACCOUNT OF JUDICIAL SELECTION IN FRANCE AND GERMANY, SEE BELL, *Principles and Methods of Judicial Selection in France*, 61 S. CAL. L. REV. 1757 (1988) and Clark, *The Selection and Accountability of Judges in West Germany; Implementation of a Rechtsstaat*, 61 S. CAL. L. REV. 1795 (1988).

They are, in other words, to adjust without strain to an extreme variety of diverse tasks, be they to adjudicate a criminal case, a bankruptcy case, a family case, a fiscal case, or to perform as a public prosecutor, and at the same time compete for higher status and positions. The most relevant consequence is that the judge or magistrate is recruited, not for a specific position, but for a wide set of roles. Thus, in the course of a professional career, the judge will tend to change jobs frequently, making the guarantees of independence more problematic because of the influence of the hierarchy of superiors on these changes.

5) In civil law countries, judicial guarantees of independence from the political system generally tend to be weaker. Moreover, due especially to points 3) and 4) above, judges in these countries tend to enjoy a lower degree of *internal* independence, that is, independence vis-a-vis other judges.

In spite of these differences, in both civil and common law judicial organizations there is a need for a check to ensure that the institutional goals are pursued by their members.[7] The problem is obviously dealt with in a different way in Anglo-Saxon judiciaries. Since they tend to employ individuals trained mainly outside the organization, usually with lengthy apprenticeships, they rely less upon internal controls. In Continental Europe, where the personnel is recruited without significant professional experience, young judges are placed at the bottom of the pyramid-like structure where their careers are constantly monitored by an organizational hierarchy.[8]

The organizational setup conditions the reference group, a fact which tends to impact the judges' behavior.[9] In bureaucratic judiciaries the reference group will tend to be inside the organization. Indeed, it is inside the organization that judges tend to be socialized professionally. Moreover, the hierarchical structure entrusts higher ranking judges with strong powers in order to influence the behavior of lower ranking ones, because the higher echelons can control promotions, transfers, and disciplinary proceedings. The case of professional or common law judiciaries is different, since their organizational setting does not lend itself to entertaining notions of a hierarchy, at least in terms similar to Continental Europe.[10] In this case the reference group of judges will

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7. EDWARD GROSS & AMITAI ETZIONI, ORGANIZATIONS IN SOCIETY (1985).

8. FREDDI, *supra* note 6.

9. W. MURPHY & J. TANENHAUS, THE STUDY OF PUBLIC LAW (1972); J.L. Gibson, *From Simplicity to Complexity: The Development of Theory in the Study of Judicial Behavior*, 5 POLITICAL BEHAVIOR 7-49 (1983).

10. P.E. Geller, *Staffing the Judiciary and "Tastes" in Justice: A Commentary on the Papers by Professors Bell and Clark*, 61 S. CAL. L. REV. 1849, 1852-53 (1988).

tend to be external to the judicial organization. This is true even accounting for the difference between the English judiciary, whose reference group primarily constitutes a small professional group (the Bar), and the American judiciary, whose composition seems much more diversified and whose recruitment process allows for different types of professional and political influences.[11]

Generally, similar distinguishing characteristics can be found in the content of judicial role orientations. Civil law judiciaries in particular have traditionally defined the judicial role in executory, non-political terms.[12] Even though this is now changing, it is true that more activist role definitions can be found in a common law country like the United States.[13] In Great Britain the prevalence of less activist orientations can be explained by the social and professional background of the judges together with some characteristics of the political system discussed below.[14]

In contrast to the civil law systems, the judiciaries in democratic regimes are characterized by the following common features:

1) the process through which judges are recruited is almost always directly influenced by the political environment. This influence is exercised in different ways. The most important variation is that in civil law countries the process is normally some kind of public competition run by the Ministry of Justice, and therefore by officers or magistrates who are more or less answerable to the political branches. Conversely, in common law countries the political branches of government are directly involved in the appointment process. This is the case in England where the Lord Chancellor (and to a lesser extent, the Prime Minister) has a prominent role, and certainly in the United States, where, at the federal level, appointments are made by the President with the advice and consent of the Senate. In a number of states, judges are elected by local voters, often for limited terms of office.

2) Judicial guarantees of independence, which are always strong and in some cases very strong, are arranged in such a way as to leave

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11. P.S. Atyiah, *Lawyers and Rules: Some Anglo-American Comparisons*, 37 Sw. L. J. 545 (1983); Gibson, *supra* note 9.

12. JOHN MERRYMAN, THE CIVIL LAW TRADITION 36 (2d ed. 1985).

13. For more details and an attempt at comparing the activism of different judiciaries, see *Judicial Activisim in the United States*, JUDICIAL ACTIVISM IN COMPARATIVE PERSPECTIVE (Kenneth Holland ed., 1991). Holland finds the American judiciary the most active.

14. L. JAFFE, ENGLISH AND AMERICAN JUDGES AS LAWMAKERS (1969); J. BELL, POLICY ARGUMENTS IN JUDICIAL DECISIONS (1983).

some avenue of influence to other political institutions. The avenue of influence is wider and more pervasive in the case of Continental Europe and is reserved to exceptional circumstances in Anglo-Saxon countries.

3) Prosecution is entrusted to magistrates or officers directly or indirectly responsible to some of the political branches, if not to the voters themselves. Existing prosecuting systems range from the classical ministerial structure, either in its centralized (France) or federalized (Germany) version, to a semi-autonomous governmental organization (the Crown Prosecution Service in England), to the peculiar setting of the U.S. federal prosecution, which is more or less under executive control,[15] and finally to the direct election of the chief prosecutor, as is the case in many American states. Only in France do prosecutors and judges belong to the same corps, even though French prosecutors are directly accountable to the Minister of Justice. Elsewhere, judges and prosecutors belong to separate organizations, although they may, under certain conditions, cross over from one branch to the other.[16]

These institutional traits act as checks on judicial power by providing a means by which other branches of government—or, in some cases, the voters themselves—can *indirectly* influence the behavior of judges and the political significance of the judicial system. The influence on the process of recruitment, even when only indirect,[17] helps assure that the values of the individuals who perform judicial functions will not be too inconsistent with those prevailing in the political system. The position of the prosecuting branch is one of the elements that guarantees the passivity of the judicial system and allows the political environment to regulate the demands for action placed upon it.[18]

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15. JAMES EISENSTEIN, COUNSEL FOR THE UNITED STATES: U.S. ATTORNEYS IN THE POLITICAL AND LEGAL SYSTEMS 1 (1978).

16. Only in France and in Italy does the same term—*Magistrature* or *Magistratura*—refer to personnel able to perform both prosecutorial and judicial roles. In Anglo-saxon countries "judiciary" refers only to judges. The same is true for Germany where *Richtertum* refers to judges and *Staatsanwaltschaft* to public prosecutors. Another source of misunderstanding could be that the French or Italian magistrates are far different from the English magistrates, a term actually designating lay judges.

17. In Continental Europe the recruitment of judges is brought about through public competition. In this case political influence cannot be exercised directly, but its strength will be inversely related to the cohesion or the *esprit de corp* of the judicial bureaucracy.

18. According to Alexander Hamilton, "[t]he judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution . . . [It] has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever."

Generally, in democratic regimes the relationships between the judiciary and the political system have been arranged in two ways which roughly correspond to the basic distinction made previously. In civil law countries the political branches—the executive and to a lesser extent the legislative—exercise influence on a judiciary organized along bureaucratic, hierarchical lines through the powers they have over high ranking judges and magistrates. The wider the powers entrusted to the political branches, the stronger this influence will be. Further, the stronger the power of the higher ranking judges and the higher the degree of cohesiveness of the whole judiciary, the stronger this influence will be. The highest influence will be found where the political branches have strong powers over a judiciary organized on a strict hierarchical, pyramid-like line.[19]

In contrast, the influence of the political system in Anglo-Saxon countries is channelled through the recruitment process and, more indirectly, through the reference group of the judiciary. Due to this setting the general values and the role orientations of the judiciary can be, at least in the long run, affected by the political environment. Of course the structure of the political system is also material. A consensual setup that tends to foster a certain fragmentation of political power will support an increase of the political significance of the judiciary.[20] Thus, the more consensual setting of the American political system allows much more political significance to be placed on judicial actions than does the more majoritarian Westminster model in Great Britain which promotes the concentration of power in the executive branch. In the latter case an analysis of British political development shows how the slow but steady consolidation of its majoritarian traits, together with the extension of political participation, has been associated with a decline of the political significance of the judiciary.[21]

In summary, a look at both models shows that a compromise is sought between the two principles of judicial independence and dem-

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THE FEDERALIST No. 78. As underlined by CAPPELLETTI, *supra* note 1, at 30, the passivity of judicial procedure plays an important role in assuring the democratic legitimation of judicial independence.

19. From this point of view, the centralized judicial system of France allows more political influence, at least on the part of the national executive, than the federal one of Germany.

20. For a discussion of the well-known distinction between consensual and majoritarian democratic regimes, see AREND LIJPHART, DEMOCRACIES: PATTERNS OF MAJORITARIAN AND CONSENSUS GOVERNMENT IN TWENTY-ONE COUNTRIES xiii (1984).

21. SHIMON SHETREET, JUDGES ON TRIAL: A STUDY OF THE APPOINTMENT AND ACCOUNTABILITY OF THE ENGLISH JUDICIARY (1976).

ocratic accountability even though the common law model could be considered more in tune with the need to safeguard judicial impartiality without endangering responsiveness. In these countries the check on judicial power is obtained by influencing the values of the judicial corps in a general way, rather than with attempts at directly conditioning judicial behavior.

III. DEMOCRATIC ACCOUNTABILITY AND JUDICIAL INDEPENDENCE IN THE ITALIAN CASE

Traditionally, the Italian judiciary has been structurally very similar to other Continental European judicial organizations; during the Unification (1859-1870), the influence of Napoleonic models of governmental organization was especially strong. Even later, notwithstanding some minor adjustments that perfected its bureaucratic traits, the basic structure did not change much until the end of the Second World War.

As a reaction to past abuses—occurring, but with different intensity, during both the liberal and the fascist regimes—the guarantees of judges and public prosecutors vis-à-vis the executive branch were somewhat reinforced immediately after the war in 1946. However, the hierarchical character of the judiciary was left untouched. The Constitution of 1948 envisaged the institution of a self-governing body of the judiciary, namely the Higher Council of the Judiciary, two-thirds of which was composed of magistrates elected by their colleagues and one-third lawyers and law professors elected by Parliament. All decisions concerning the status of magistrates had to be assigned to the Council. Special guarantees for public prosecutors were also foreseen, while the principle of compulsory prosecution of criminal offenses by the public prosecutor was written into the Constitution.

At first, the constitutional design in the realm of the administration of justice was not implemented. Not until 1959 did things begin to change, leading to a great increase in both internal and external independence of Italian judges.[22] In that year the constitutionally-mandated Higher Council of the Judiciary was instituted which progressively took away the powers of the executive in the administration of judicial personnel— both judges and public prosecutors. The second major modification in the organization of the judiciary concerned the system

22. *See* Di Federico, *supra* note 6; Giuseppe Di Federico and Carlo Guarnieri, *The Courts in Italy*, *in* JEROLD WALTMAN & KENNETH HOLLAND, THE POLITICAL ROLE OF LAW COURTS IN MODERN DEMOCRACIES 153-80 (1988); GUARNIERI, *supra* note 5, at 93-97.

of promotions. Under pressure from the majority of lower ranking magistrates, who were strongly organized in their professional association, Parliament passed a series of laws between 1963 and 1973 which dismantled the traditional system of promotions. The result of this policy is that, today, candidates possessing the seniority to compete for promotion at the different levels of the judicial hierarchy are no longer evaluated, as they were until the 1960s, either on written and oral exams, or on their written judicial works, but instead on a "global" assessment of their judicial performance. In fact, as a result of this global assessment, all candidates who fulfill the seniority requirements are promoted to the highest ranks. This can be explained in part by the way in which the composition of the Higher Council is determined.

As a general result of these processes, a peculiar judicial setting has emerged in Italy, when seen in comparison with other democratic regimes.[23] First, Italian magistrates currently enjoy higher guarantees of both internal and external independence than those found in any other democratic country. The traditional hierarchy has been completely dismantled. In both the process of recruitment and professional socialization and in administering the guarantees of their status, Italian judges and public prosecutors are subject only to limits which are unquestionably less restrictive than those found elsewhere. All decisions relating to them are taken only by the Higher Council of the Judiciary, two-thirds of whose members are magistrates elected by the entire judicial corps. Thus, the Italian judiciary is not subject to the external controls often criticized but still prevalent in France, which remains most faithful to the hierarchical traditions typical of a bureaucratic setting, making its judiciary strongly conditioned by the executive branch. The Italian judiciary is even less restricted than its counterpart in Germany, which is influenced to a certain extent by both the executive and legislative branches. In addition, the recruitment of Italian magistrates, unlike recruitment in common law countries, is completely removed from any institutional intervention on the part of the political environment.

On the other hand, little has changed, except for the aforementioned dismantling of judicial hierarchy, in the bureaucratic setting of the Italian judiciary. The same mode of recruitment, which focuses exclusively on the bottom, with the categorical exclusion of any lateral entry, allows only young graduates with no professional experience into the corps. In addition, the "generalist" approach to work performance and

23. *See* Appendix, Table 1.

role assignment has not changed substantially. Training is still handled internally even though those instruments that once allowed the judicial elite to control and influence this process are no longer working. At present, unlike the process in other civil law countries,[24] after a short and casual apprenticeship of about one year, the young magistrate is entrusted with judicial (or prosecutorial) functions, and her professional competence is not subject to later evaluations. The result is an Italian judiciary that combines *in an original way* features typical of Continental systems with elements found in Anglo-Saxon judiciaries.

The uniqueness of the institutional setting of the Italian judiciary becomes even more clear considering the position of public prosecutors. In most democratic countries institutional ties exist between the prosecuting officers and the political system.[25] Even with some variation from country to country, specific mechanisms are always in place that allow the prosecution to be influenced by the political environment, at least along general lines. Only Italy shows a different setup in that the institutional means at the disposal of the political system are few and are scarcely used. The status of public prosecutors is identical to that of judges. In fact, as previously discussed, prosecuting magistrates and judges are part of the same body that governs itself through the Higher Council of the Judiciary.[26]

Therefore, Italy stands out for the unusual relationships that exist between the judiciary and the other governmental branches, since the latter are almost completely devoid of *institutional* means of influence over the former. There are basically two types of judges within dem-

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24. A training period of at least two years—sometimes even more—is always foreseen. In common law countries the situation is, as we have seen, completely different.

25. This statement applies also to cases other than those considered here. *See, e.g.*, for Canada, BRIAN A. GROSMAN, THE PROSECUTOR: AN INQUIRY INTO THE EXERCISE OF DISCRETION 24 (1969)("Decisions to initiate or not to initiate criminal proceedings are made by the police for individual or policy reasons and are not always subject to judicial supervision or legislative control.") and C. Baar, *The Courts in Canada*, *in* WALTMAN & HOLLAND, *supra* note 22, at 53-82; for the Netherlands, Austria, Switzerland and Norway, HANS-HEINRICH JESCHECK & RUDOLF LEIBINGER, FUNKTION UND TATIGKEIT DER ANKLAGEBEHORDE IM AUSLANDISCHEN RECHT 83-190, 191-328, 329-494, 484-544 (1979)(pinpoint citations ordederd for countries in list respectively); for Spain, F. GRENADOS, EL MINISTERIO FISCAL (DEL PRESENTE AL FUTURO) (1989); for Sweden, J. Board, *The Courts in Sweden*, *in* WALTMAN & HOLLAND, *supra* note 22, at 181-98.

26. At least for a long time and, to a certain extent, even today, the principle of compulsory prosecution has been interpreted in such a way as to imply a "judicialization" of the role of the public prosecutor. *See* CARLO GUARNIERI, PUBBLICO MINISTERO E SISTEMA POLITICO (1984) (chapter one being most relevant).

ocratic regimes. The common law judge is usually an established professional, recruited at a mature age, who is granted extensive guarantees of independence. The civil law judge enters the judiciary through public competitive examinations, usually right after graduating from a university. He will most often spend his entire working life there, going through the stages of a long career while subject to continuous evaluations from higher ranking colleagues and, in certain cases, from the Minister of Justice. In the common law case, the political branches intervene only during the judge's recruitment or in the rare case of a serious breach of conduct. There is not a judicial career as such because the judges are called to fill specific positions and promotions to higher levels are not always foreseen, at least institutionally. However, a civil law judge does remain subject to various forms of control that limit his independence, perhaps because the initial examination is not believed to be sufficiently reliable. Therefore, at least from these points of view, the Italian setting is today radically different from both traditions.

A principal result is that the actions of Italian magistrates can greatly affect the political environment and, more significantly, the other structures of government.[27] Such political significance supported by the strong guarantees of independence is remarkable in the criminal field due to an arrangement that allows prosecuting magistrates to decisively influence the requests addressed to the criminal justice system regardless of the principle of compulsory prosecution.[28] It is difficult to comprehensively assess the extent to which such institutional conditions have been employed for concrete interventions.[29] However, they allow for politically significant interventions due not only to the *de facto*

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27. *See, e.g.*, GIUSEPPE DI FEDERICO, GLI INCARICHI EXTRAGIUDIZIARI DEI MAGISTRATI (1981); Giuseppe Di Federico, *The crisis of the Justice System and the Referendum on the Judiciary, in* 1 ITALIAN POLITICS: A REVIEW 26 (R. Leonardi & P.G. Corbetta, eds. 1989)(noting "the control that the judiciary, represented by an aggressive elite of the professional association, has been able to exert on the legislative process in matters relating to justice"); F. ZANNOTTI, LA MAGISTRATURA, UN GRUPPO DI PRESSIONE ISTITUZIONALE, L'AUTODETERMINAZIONE DELLE RETIBUZIONI (1989).

28. Even though the principle of compulsory prosecution has been written into Article 112 of the Constitution, it is in practice very often misapplied. *See* Giuseppe Di Federico, *The Crisis of the Justice System and the Referendum on the Judiciary, supra* note 27 and Giuseppe Di Federico, *Obligatorietà dell'azione penale, coordinamento delle attività del pubblico ministero e loro rispondeza alle aspettative della comunità, in* ACCUSA E RUOLO DEL P.M. NELL'EVOLUZIONE DEL SISTEMA ITALIANO (1991). For the general problems involved in its implementation see GUARNIERI, *supra* note 26, at 125-52.

29. *See* Di Federico, *The Crisis of the Justice System and the Referendum on the Judiciary, supra* note 27 and Di Federico, *Obligatorietà dell'azione penale, coordinamento delle attività del pubblico ministero e loro rispondeza alle aspettative della comunità, supra* note 28.

discretion enjoyed by public prosecutors but also to the delays in the criminal process. This tends to put the emphasis on the *initiative*—the charging decision—as opposed to the judgment.

However, it must be stressed that political interventions are more likely to occur today than in the past. This is true because of the pressure put on by interested political actors and also because the present-day judicial organization no longer seems capable of upholding the traditional definition of the judicial role. Of course these facts are independent of the general transformation that has occurred in the judicial role in democratic regimes.[30] As in other civil law nations, the traditional concept of the judge is that of a technical, passive relator of academic doctrine.[31] As previously shown, the influence of higher ranking judges has been radically reduced. The influence of academic doctrine has also lessened, not only because it appears today much more diversified than before—many are advocating a more activist posture by the judges—but also because of the organizational mechanism that once supported its importance. That is, the evaluation of judicial rulings (and therefore the judges' conformity to the trends of the doctrine) as a basis for career advancement are no longer working.[32]

Moreover, two other important phenomena seem to be related to such an institutional setting. The first is the development of organized factions (*correnti*) inside the judiciary.[33] This phenomenon can be found in France and Spain, but has acquired higher relevance in Italy because of the role, unheard of in other countries, that the correnti play in crucial decision-making bodies such as the Higher Council of the Judiciary. As has been illustrated, these organized factions were born

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30. CAPPELLETTI, *supra* note 1; P. Pederzoli, *Il giudice nei regimi democratici*, *in* 20 RIVISTA ITALIANA DI SCIENZA POLITICA 293-329 (1990).

31. FREDDI, *supra* note 6 and MERRYMAN, *supra* note 12.

32. *See* Di Federico, *supra* note 6 and Giuseppe Di Federico, *Le qualificazioni professionali del corpo giudiziario: carenze attuali, possibili riforme e difficoltà di attuarle*, *in* 33 RIVISTA TRIMESTRALE DI SCIENZA POEILIZA DELL AMMINISTRAZIONE 21-60 (1985); GIORGIO REBUFFA, LA FUNZIONE GIUDIZIARIA (1986); MIRJAN DAMASKA, THE FACES OF JUSTICE AND STATE AUTHORITY: A COMPARATIVE APPROACH TO THE LEGAL PROCESS 48 (1986). We should not miss the important role played in stimulating a more critical approach to positive law by the introduction, in 1956, of the judicial review of legislation, as well as by the increasing role of the EEC norms and regulations. *See* CAPPELLETTI, *supra* note 1.

33. The professional association of the Italian magistrates (ANM) is officially divided into ideologically differentiated factions, each with a stable, even if small, organizational structure. The main factions are, from left to right: *Magistratura Democratica*, *Unità per la Costituzione*, and *Magistratura Indipendente*.

from conflicts that developed within the judiciary over a specific theme, namely the career. They have become the instrument through which the magistrates effectively articulate their demands to Parliament and to the government even though the strength of the correnti is due mainly to the influence they exert on the Higher Council. The changes in the body's electoral rules, especially the introduction in 1975 of a proportional system with competing lists of candidates, have strengthened the correnti; since 1976, all magistrates elected to the Higher Council have belonged to one or another *corrente*. In fact, the possibility of being represented in the Council has been offered to all the main groups.

Yet the role of the correnti cannot be understood without noting the dismantling of the hierarchical structure of the judiciary. This has occurred by the *de facto* exclusive association of rank with length of service which has deprived the Council of criteria with which to evaluate magistrates. This becomes relevant, for example, in making appointments to higher positions or in deciding on transfers when service applicants compete for the same position.[34] When the Council finds itself in the position to choose among candidates of the same rank, who are all, at least formally, equally qualified, the tie of a candidate to a faction or a party may become highly relevant. In other words, the transfer or "promotion" to a given position occurs, when not on the basis of simple seniority, very likely as a result of a deal among the factions and the parties, which often support one another in reciprocal exchanges.[35] In this way, magistrates—at least a not insignificant number in some degree "interested" in decisions to be made by the Council—cannot fail to take into account the logic of its decision-making, being aware of the complex configuration of factional and party forces that play a role in it.

Given this internal politicization, it is natural that there has emerged a development of connections between the judiciary and the larger political environment. The origin of these connections can be traced to the period when the lower ranking magistrates tried to reform, or more accurately to abolish, the career system. At that time, they successfully influenced the political parties to achieve their goals. But the growing political significance of the Italian judiciary in the last 20

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34. Di Federico, *Le qualificazioni professionali del corpo giudiziario: carenze attuali, possibili riforme e difficolta di attuarle*, *supra* note 32; REBUFFA, *supra* note 32, at 62-68.

35. We have to remember that the Higher Council is presently composed, outside of the 20 magistrates elected by the corps, of ten lawyers or law professors chosen by Parliament, usually along strict party lines.

years has also given a strong incentive to the political class to carefully cultivate the judiciary. Personal ties are difficult to document in full. They often have been reported to be based on the flourishing of extrajudicial duties assigned with remarkable frequency to many magistrates by the political and social environment.[36] Another sign of the development of such connections, and of their ramifications in other institutions, is the growing number of magistrates who have been elected to Parliament and experienced rapidly rising political careers.[37] Personal ties often support more complex relationships among groups, or factions, of magistrates and parties.[38] In the latter case, there are naturally some connections of an ideological nature. The most visible one is that between the Magistratura Democratica and the parties of the left.[39] But there are also different ties that may be called "opportunistic." In any case, such connections, which often cause tension and conflict, principally tend to produce the exchange of reciprocal favors between magistrates and parties.[40] Such exchanges have found a useful institutional seat in the Higher Council, where representatives of the magistrates' factions continuously interact with the representatives of both government and opposing political parties.[41] Yet, it is difficult to conceive of politicians and magistrates as two distinct and opposing groups because of the strong ties that in some way bind them. This phenomenon

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36. The range of extrajudicial duties of Italian magistrates is extremely wide. Among them an important role is played by well-paid appointments as an arbitrator, often in disputes between state-owned companies, or by appointments as a consultant for various governmental departments. For more details see DI FEDERICO, GLI INCARICHI EXTRAGIUDIZIARI DEI MAGISTRATI, *supra* note 27 and F. ZANNOTTI, LE ATTIVITÀ EXTRAGIUDIZIARIE DEI MAGISTRATI ORDINARI (1981)(this is a study based on 16 years of research sponsered by the Instituto Politica Amministrativo of the University of Bologna).

37. In the present Parliament there are 13 magistrates. There have also been some cases of magistrate ministers or deputy ministers. Magistrates elected to parliament or performing governmental functions are on leave from their corps but keep the right to be reinstalled after leaving their political or administrative jobs. However, their career—i.e., their "promotion" by seniority to higher ranks—is not affected by the time spent on leave outside the corps.

38. ZANNOTTI, *supra* note 27 (1989).

39. S. PAPPALARDO, GLI ICONOCLASTI MAGISTRATURA DEMOCRATICA NEL QUADRO DELLA ASSOCIAZIONE NAZIONALE MAGISTRATI (1987).

40. This context could explain, for example, the long and often ineffective—at least until a few months ago—investigations into political corruption as well as parliamentary generosity in setting judicial salaries. For some data on the connections between politicians and magistrates at the local level note the research carried out by DONATELLO DELLA PORTA, LO SCAMBIO OCCULTO: CASI DI CORRUZIONE POLITICA IN ITALIA (1992)(the book looks at corruption in Genoa, Florence, and Catania).

41. Rebuffa, *supra* note 32.

is exemplified by the conflict that erupted, most intensely between 1990 and 1992, between the President of the Republic and the Higher Council. The alignments which emerged inside the Council at that time can be interpreted as evidence that the conflict was not simply between magistrates, on the one hand, and politicians, on the other.[42] Such conflicts have, until recently, acted as a sort of check on the power of the judiciary, because they have affected its actions even though they were not institutionally foreseen.

IV. SOME TENTATIVE CONCLUSIONS ON THE ITALIAN CASE

Not surprisingly, the growth of judicial power in Italy has triggered strong responses from the political environment. The cooptation of magistrates by political forces, even though not always successful, has been made easier by their low institutional identification. Their mode of recruitment makes them bureaucratic but not unburdened by subsequent checks. Another consequence has been the increasing role of the Higher Council. In recent years, the political significance of this body has steadily increased, progressively eroding the traditional position enjoyed by the Court of Cassation as the apex of the judicial system. Even though the Court of Cassation remains the court of last resort, at least in the "ordinary" jurisdiction,[43] the Higher Council exercises a potentially strong influence on the behavior of judges through the role it plays in administering their status. The Italian case can be interpreted as an example of the rather obvious statement that power systems are complex. It is impossible to completely conceal the influence of the political environment on the judiciary. In every democratic regime the judiciary is in some way influenced by politics: "The 'disconnectedness' of the judicial process from the political system . . . is only relative . . . What distinguishes judicial from other kinds of political actors is not that the judges are outside the system but that they are related to it in a different fashion than are other decision makers."[44] If this connection is not achieved, at least primarily, through institutional means, it will be achieved through non-institutional ones—extrajudicial duties—or through an exploitation of the few that are institutional, for example, through the role played by the Higher Council.

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42. It was at this time when President Cossiga was confronted by the Vice-President, a former Christian Democrat politician and lay member of the Council, and by the majority of both magistrates and lay members.

43. In Italy, as in other civil law systems, there is a separate judicial system for administrative matters with the Council of State at its apex.

44. J. Peltason, *Judicial Process*, 8 INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL SCIENCES 283-91 (1968).

In Italy the exchanges between politics and the judiciary do not follow the main models outlined above. The internal hierarchy has been dismantled. Therefore, the power of the higher ranking judges as well as that of the government has been dramatically reduced, especially in comparison with other civil law countries, even though the political system is able to exercise influence through its representatives in the Higher Council. Some magistrates have been able and willing to pursue unorthodox policies even though they are not held in any way democratically accountable for their decisions. On the other hand, the shortcomings of this setting are also clear. There is little guarantee of the professional quality of the judiciary, and as the decision-making inside the Higher Council demonstrates, political considerations have spread through the judicial corps. Thus, Italian judges and magistrates can be said to have become highly politicized, with their behavior conditioned by political considerations both internal and external to the corps.

In this context, the political election of April 1992 marked a new phase in the evolution of the Italian political system. The decline of the electoral fortunes of all main parties, as well as the rise of new parties—a trend that has been reinforced by following the administrative by-election—has shown an emerging new attitude in public opinion, at least in Central and Northern Italy. This attitude has had an immediate impact, for example, on the recent willingness shown by many businessmen to give evidence to prosecutors investigating corruption of public officials. In this new situation, prompted by a spreading popular dissatisfaction with the performance of the political system as well as a growing internal conflict between and inside parties, the judiciary, or at least a part of it, has decided to take its chance. But in the beginning only a few prosecutorial offices decided to follow the example of Milan where the most relevant corruption investigation has been carried out.

The offices in the South have so far shown a remarkable degree of caution. Only recently have the prosecutors in Naples started to investigate many notorious scandals that have plagued that area, and the intent of their initiatives is not always clear. Even placing former Prime Minister Andreotti under investigation on charges of organized crime connections was decided only after a new chief prosecutor, a magistrate from Turin, was appointed to the office in Palermo. Actually, only part of the judiciary, that less connected with the traditional political parties, is resolutely moving to fight corruption. The rest have taken a "wait and see" attitude.

As a general evaluation, based on a comparative analysis of the institutional setting of the judiciary in other democratic countries, it

can be said that the powers in the hands of the Italian judiciary are undoubtedly quite strong. Yet, whether these powers will be effectively used depends primarily on the judiciary's willingness to act, or more specifically on its sensitivity to pressures from the various social and political forces. Therefore, these powers can be employed in order to fulfill different goals, more or less desirable. As an example of the former, in addition to the investigations of political corruption, the recent success in the fight against organized crime should be mentioned. Even though some of the credit for these developments must go to organizational reforms of the police forces and prosecution, as well as to weakening traditional ties between organized crime and some members of the political class, some sectors of the judiciary are displaying a new attitude. On the other hand, one cannot fail to notice that the rights of the citizens in the criminal process are not well safeguarded. Even though the process has assumed, at least since 1988, an "accusatorial," American-style appearance,[45] the broad powers enjoyed by the prosecution as well as the organizational connection between the prosecutor and the judge, who both belong to the same corps, create an imbalance between the two conflicting parties, openly disadvantaging the defendant.

All in all, the strong powers presently enjoyed by the Italian judiciary are the product of its peculiar institutional setting as well as of the present weakness of the national political class.[46] Even though "government by the judiciary" in the Italian version is likely to endure until the political system finds a new equilibrium, Italy will stand out among democratic regimes as a special case of judicial power.

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45. For an enthusiastic account of the 1988 reform passed on October 24, 1988, see E. Amodio & E. Selvaggi, *An Accusatorial System in a Civil Law Country: The 1988 Italian Code of Criminal Procedure*, 63 TEMP. L. REV. 1211-24 (1989).

46. For an attempt at explaining the factors that lie behind this peculiar setting see GUARNIERI, *supra* note 5, at 118-33.

APPENDIX

TABLE 1 — The Judiciary and Politics: The Institutional Setting[47]

	France	Germany	England	United States[48]	Italy
PROSECUTION					
structure	centralized	federal	centralized	federal	centralized
personnel	magistrate[49]	officer	officer	officer	magistrate
responsibility	direct[50]	direct	indirect	direct[51]	independent
JUDGES					
recruitment	public compet./ judicial school	pract. training/ public compet.	appointed by executive	appointed by exec. and legis.	public competition
career	yes	yes	no	no	yes, by seniority
status[52]	Pres. Rep. Min./ Jus. Higher Council	Ministry of Justice/ Legislature[53]	Lord Chancellor	President/Dept. of Justice	Higher Council
removal	Higher Council	Discp. Courts	Legislature	Legislature	Higher Council

47. For more details, see GUARNIERI *supra* note 5, at 51-82 and 93-97.

48. At the federal level.

49. Judges and prosecutors belong to the same corps.

50. To the Minister of Justice.

51. For the practice, see EISENSTEIN, *supra* note 15.

52. Institution(s) in charge of promotions, transfers, etc. In common law countries, as pointed out in the text, promotions take place in a different context than in civil law countries.

53. At the federal level. At the state level, the situation is more complex.

Italy and European Integration: A Lawyer's Perspective

*by Antonio La Pergola**

I. Italy's Stance on a United Europe and Progress Toward European Integration

A. *Historical Background*

Throughout the post-war period, Italy has maintained a steady and unqualified commitment to the goal of European integration. Indeed, in the years immediately following the Second World War, Italy became a staunch advocate of European political union. However, when hopes for a federated Europe failed to materialize, it became evident that the path toward integration was along the road of economic functionalism. Although Italy readily supported this alternative, it never lost faith that integration would eventually grow beyond this economic focus.

Italy's membership in the European Community ("Community") has not been free from adversity or controversy. Adapting the Italian economy to the taxing demands of the Common Market has proven difficult. Italy's delay in implementing Community directives and fulfilling treaty obligations has given rise to doubts among its Community partners as to the firmness of the Italian commitment to European integration. Italian governments have been criticized for paying lip-service to the Community without making the sacrifices necessary for full participation. Nevertheless, there is widespread conviction among the Italian people that a united Europe is in their best interests; consequently, serious efforts have recently been made toward filling the gap between rhetoric and responsible commitment to Community participation.

To better analyze the entrenchment of Italy's dedication to the goal of European unity, we must review the early efforts toward integration. Immediately following World War II, Italy and the world witnessed an unprecedented era of compromise. A new democratic

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* Member, Italian Parliament; Professor of Law, University of Rome; President of the Constitutional Court of Italy, 1986-87.

constitution in Italy and the chartering of the United Nations were two very important accomplishments of this period. However, this spirit of cooperation and democratic negotiation was short lived. As the specter of the communist military threat rose in the East, a different political strategy was required. In the face of a common and imposing enemy, the nations of Western Europe became more closely aligned. Soon the groundwork was laid for the formation of the North Atlantic Treaty Organization (NATO), the West European Union (WEU), and the European Defense Community (EDC).

This brief period of defensive integration in response to the formation of the Eastern alliances left its institutional marks. The ground rules laid down by the Charter of the United Nations and by the Italian Constitution, in order to maintain peace and democracy in their respective spheres, were to a large extent unilateral. These documents condemned and penalized manifestations of the extremes represented by the totalitarian regimes responsible for the war. Such provisos written into international instruments, national constitutions, and the U.N. Charter, reflected the common attitude of rebuking the past.

The crystallization of the bi-polar Cold War was based upon a deep ideological divide that severely affected Italy's domestic situation. The fundamental role of Italy's pro-Soviet Communist Party in the Italian resistance against fascism during the war garnered the Italian Communists much public support and approval, legitimizing their position on the Italian political spectrum. It was only in the spring of 1947 that a deft political maneuver by Prime Minister Alcide De Gasperi, of the Christian Democratic Party, ousted the Communists and their Socialist allies from the government. Thus, Italy's initial involvement in the European integration process was the work of moderate coalitions formed around the Christian Democrats.

This new centrist order in Italy was superimposed upon that era of collaboration in which the crowning achievement was the promulgation of the Italian Constitution by the Constituent Assembly. In addition to the legal guarantees of democracy provided by the new constitution, political guarantees were required. The governments led by De Gasperi viewed Italy's participation in European integration as a kind of insurance policy against the danger of domestic instability created by the Cold War. Italian support for the creation of the EDC was motivated in part by this same concern.

The unratified EDC Treaty remains the only official text in the history of European integration to have envisioned the eventual establishment of political union through federal institutions. A European defense community would have called into being a nascent form of

common government stemming from the merger of national armies. Italy was particularly supportive of Article 12 of the EDC Treaty which provided that in the event of actual or threatened internal turmoil within the territory of a member state, the necessary contingent forces furnished by another state would be placed at the threatened state's disposal by the Community's Commissariat. Consequently, the EDC would have served two fundamental Italian interests: integration and internal security. The French Parliament, however, failed to ratify the EDC Treaty, and the EDC was never realized.

The end of the De Gasperi era in 1954 coincided with the demise of the EDC. Although projects for the creation of a political community in Europe were not scuttled entirely, attention clearly shifted toward the sectorial approach which was exemplified by the Schuman Plan for a European Coal and Steel Community (ECSC). The purpose of the ECSC, which was formally established in 1952, was to eliminate political barriers to the reconstruction and development of the coal and steel industry. In addition, it sought to remove the regulations and discriminatory laws enacted by national governments which broke up a natural economic area. Common control of this strategic sector was also intended as a method to maintain peace among nations traditionally prone to conflict. The means chosen to achieve certain political objectives were primarily economic in nature. This experience with economic functionalism during the early 1950s would prove its importance after the establishment of the European Economic Community (EEC) under the Treaty of Rome in March, 1957.

B. *Economic Functionalism vs. Political Integration*

During the initial negotiations to create the EEC, participant states were intent on creating institutions that would interfere as little as possible with their sovereign rights. The essential choice faced by the Community's architects was between economic functionalism and political confederation. No one championed, then or today, a European federal state capable of devouring national sovereignty. Confederation, a weak and inefficient form of federalism, was known to possess the full potential of statehood. The lesson of the eighteenth and nineteenth centuries was that confederations, which were freely entered into, always evolved into federal states.

The framers of the Treaty of Rome may well have been thinking of these historical precedents when they rejected the confederal mode of integration. Their formal rejection of this process was based upon the criticism of institutional debility; confederation simply lacks the cohesive power of economic functionalism and saps sovereign rights of

member nations. It is paradoxical that confederation was rejected as politically too strong and functionally too weak, since closer examination actually belies this impression.

Economic functionalism leads to the complete integration of the sector to which it is applied. Under the Treaty of Rome, the doctrine of functionalism confers rights and imposes obligations directly upon citizens as well as upon member states. Conversely, political confederation, traditionally exemplified as a league of states, has no direct effect on the individual citizen. Functionalism does not represent the primacy of economies over law, as has been asserted by its critics. Not unlike federalism, functionalism requires implementing the ordering capacity of legal norms. It is Community law, as interpreted by the national courts of member states, that has spun the web of economic interests and values into a binding, normative system.

Thus, integration is a result of what might be called judge-made federalism. Indeed, European integration has been shaped by judges more than by politicians. The supremacy of the Treaty of Rome and Community law over conflicting national legislation has been affirmed by the European Court of Justice in accord with the highest judicial bodies of the member states, including various constitutional courts. The Treaty of Rome has therefore been read to embody a supremacy clause of the kind found in fully federated states.

C. *The European Economic Community and the Single Market*

From the outset, the idea behind the EEC has been to open up a space on the Continent and British Islands for the free movement of people, services, goods, and capital. This has been a difficult and gradual process, the last stage of which was triggered by the Single Act of 1987. A vast common market now exists which the Community Court has defined as an internal market—one which functions like the national markets of the member states. Until the creation of the EEC, common markets had historically only arisen in areas covered by a pre-existing political union and single currency. Thus, economic integration has yielded results which, according to experience, should have only been achieved subsequent to European political federalism. The single market is an unprecedented achievement, and political federalism has yet to come.

D. *The Treaty of Maastricht and European Citizenship*

The Treaty of Maastricht contemplates political as well as economic and monetary union. Political difficulties aside, its provisions do not

offer a satisfactory answer to the problems which must be met if a European union is ever to be established. Political union requires a broader sphere of powers embodied in the Community than currently exists. These powers must embrace new fields such as common foreign policy and defense which relate directly to its political as well as economic responsibilities. Truly democratic methods which have been neglected as long as the Community has remained exclusively economic can no longer be ignored. It is time that the much criticized democratic deficit in Community institutions be remedied.

The current institutions of the Community are the same as those established by the Treaty of Rome: the Parliament, the Commission, the Council of Ministers, and the various auxiliary bodies. This existing layout can hardly be altered, but powers can be redistributed. Parliament should be endowed with all attributes required for the full and effective performance of its role as a popularly elected legislature. It should be coequal with the Council of Ministers in the enactment of European legislation. The Parliament should vote into office and control the Commission according to the principles of parliamentary government. Additionally, the regions of member states should be allowed to enter into compacts, to cooperate among themselves across national borders, and to participate in integrated regional planning.

Although this may require that the national constitutions of the member states be changed accordingly, it would not be the first time that the European integration process has affected the constitutions of member states. The European Community cannot force its members to decentralize, fragment their sovereignty, and create new regions. However, where regions already exist and are recognized by the national constitutions of the states in which they are situated, there is no reason why the Community should not involve them directly in the integration process.

Therefore, the political union provisions of the Maastricht Treaty need to be refined, or even revised, to ensure that decision making is not monopolized by the intergovernmental body of the Community, the Council of Ministers. Currently, the combination of intergovernmental diplomacy and Community bureaucracy tends to dilute democracy. It cannot be assumed that the legislative intent of the framers of the Maastricht Treaty, in speaking of "union," was merely a league of states resembling that created under the Articles of Confederation two hundred years ago in the United States. Evidence to the contrary exists in the provision which recognizes a European citizenship alongside national citizenship. A modern confederation attuned to democratic principles may well be the most appropriate institutional framework

for a European union, so long as it is not only a partnership among sovereign nations, but also a community based upon the idea of common citizenship.

E. *Growing Support for the European Community from the Italian Political Left*

As the internal political situation in Italy evolved and the advantages of European economic integration became recognized, the European Community gained wide acceptance among the country's political forces. The opposition of the Communists with respect to the Community dissipated over time. Although it is difficult to date the turning point, by the mid-1970s the Italian Communist Party had begun to change its attitude toward the Community. There were several reasons for this erosion of opposition to the EEC.

The Communist Party may have seen support for European integration as an important step on the road toward full legitimization as a partner in the national government. Participation in the regional governments set up in the 1970s had allowed the Communists to build on the reputation they already enjoyed for having provided good government at the local level. Active involvement in the Community was probably viewed as a further opportunity for the institutional legitimization of the Community Party. The Italian Communists may have also perceived integration as serving the cause of Euro-communism. Their view of a strong united Europe was one which also envisaged counterweights to Italy's alignment with the United States and its dependence on American benevolence.

After the first direct election of the European Parliament in 1979, Altino Spinelli, who had been elected as an independent candidate on the Communist Party ticket, played a decisive role in launching the appeal for European unity. He produced an innovative draft treaty which attracted wide support from European Federalists and was endorsed by the Italian Communists, although it failed to receive official support from national governments. The Communist Party's philosophy of Europeanism went beyond that of the Socialist Party, which had years before come out decidedly in favor of integration. The core problem for the left-wing parties in Italy, as elsewhere in the Community, was to define what kind of united Europe to which they aspired.

F. *Social Policy in the European Community: The Italian Consensus*

The thrust of the political left's interest in the building of Europe lay in the area of social policy. Both the Socialists and the Communists

recognized that social policy could be used as a lever to promote political union in order to balance the liberalizing effects of a single free market. The left was drawn to advocate the federalist cause by its desire to guarantee social rights, promote economic planning, and establish a democratically legitimized central authority in place of the invisible hand of the free market.

In Italy, support for what is known as "Social Europe" is not limited to the left. A wide political consensus exists over the social rights enshrined in the Italian Constitution. All of the major political parties agree that implementation of these rights should not be jeopardized by any limitation placed on national governments by the European Community. In other countries, advancements in social rights have already been secured. However, Italy still faces serious problems in the area of social services and cannot afford any retrenchment on social rights that in some cases have not yet been given full effect. Although Italy has always championed economic as well as political integration, it has maintained the reservation that establishing freedom of circulation and exchange of goods and services should not undermine the viability of the welfare state, nor infringe upon the constitutionally protected social rights of Italian citizens.

This insistence on social rights reflects the position of a country situated in southern Europe, the main interest of which, regardless of party politics, is to develop cohesion within the market. Since the market should function as a unified area, the road to European unity passes through cohesion. For the market to yield its promised advantages, it must be cohesive and not disparate. The poorer regions should be developed to narrow the gap which divides them from the richer ones. This goal can best be pursued by combining state aid with well-planned regional social policy. Joint efforts at the institutional level are also required if the European Community is to complement the actions of the member states.

Therefore, the problem is to what extent policies promoting cohesion through redistribution of wealth conflict with the principle of fair competition guaranteed by the Treaty of Rome. If there is too much state aid, or if there is none at all, then the balance between cohesion and competition is upset. Assistance should be proportional to the actual needs of the relevant area. Beyond the quantitative aspects of this problem, it is important that the aid foster a spirit of enterprise and lay the groundwork for sustainable development. How these different needs can be met is clearly a Community decision; however, no Community plan can be implemented without the direct involvement of the government of the member state concerned. Thus, integrated

planning is the best possible institutional formula to achieve the objective of cohesion while preserving competition.

G. *The Delors Plan: Integrated Planning as a Blueprint for Cooperative Federalism*

The Delors Plan, launched in 1987 and subsequently updated to bring the Single Act to fruition, hinges on integrated planning which it describes as partnership. A policy of partnership is the method of management for the structural funds which have been earmarked to pursue the central objects of social policy:

1) The struggle against unemployment, especially among youth and women;
2) promotion of traditionally economically depressed regions; and
3) assistance for areas hit hard by industrial crisis.

The hypothesis of the Delors Plan requires an advanced form of federalism not dissimilar from the New Deal policies of the United States during the 1930s.

One of President Roosevelt's achievements in the United States during this period was to turn the old system of dual federalism into one where the federation and its member states cooperated to achieve common goals. In Europe, a long and difficult road of negotiation and compromise must be traveled before the institutional premises are laid down for anything resembling the New Deal. Cooperative federalism requires a strong and democratically legitimized central authority—one that would have all the powers and resources necessary to organize and oversee the combined exercise of power by different levels of government. Thus, a Political Europe is a prerequisite to Social Europe.

II. NORMATIVE INTEGRATION: THE RELATIONSHIP BETWEEN COMMUNITY LAW AND ITALIAN LAW

The focus of this analysis is how Italian judges have posed and resolved the problem of the interrelationship between Community law and Italian law. To make integration workable, the supremacy of Community law over conflicting national law must be established. This has largely been done throughout the EEC. The principle of supremacy was first enunciated by the Community Court. National high courts and constitutional courts have followed suit. The meeting point at which the Community Court and the national courts have arrived requires further elucidation.

A. *The Evolution of the Community Court's Jurisprudence*

When it was first established, the Community Court was challenged by striking the proper balance between the need to avoid excessive encroachment on national sovereignty and the need to facilitate the European integration process in a supranational direction. At the outset, the Court considered Community law as a new legal system within the realm of international law. Over time, the Community Court came to regard and interpret Community law as an autonomous system creating legal rights and duties for individuals independently of any concurrent adaptation of national law to Community law. By the late 1960s, the Court had affirmed the unity of the legal system of which both the Community and the member states formed a part. The supremacy of Community law was spelled out as a corollary of this unitarian view of the system. The Court's position meant that no provision of internal national law, including constitutional law, could prevail over pre-existing Community law.

National decision makers throughout Europe have come to accept the stance of the Court on this point. The prevalence of Community law has been defined by national judicial bodies, including Italian courts, as an essential requirement of normative integration, and one without which the Common Market cannot work. It has been widely recognized that the discipline of integration leads to a more rational public management of the economy. This process essentially either forces market deregulation or conversely introduces new binding rules. Thus, judges have seen that integration secures advantages not only for the member states of the Community, but also for individuals and enterprises.

B. *Application of Community Law in Italy by the Constitutional Court*

Until the mid-1980s, Italy's membership in the European Community was marked by a longstanding dispute between the Italian Constitutional Court and the Community Court over the proper relationship between Community law and domestic law. It was only with *Granital v. Amministrazione Finanziaria* in 1984 that the Constitutional Court adopted a position consistent with the Community Court's view of supremacy.

The Italian Constitutional Court's initial decisions were more influenced by its understanding of international law than by strict Community law. The importance of international law in the Italian legal system can only be appreciated in light of Italy's experience during the Second World War. In the war's aftermath, Italy, like Germany, sought to supplant its previously belligerent approach toward international relations.

Both the Italian and German constitutions contain specific provisions that authorize membership in international organizations and collective security systems. These provisions are found in Article 11 of the Italian Constitution, and Article 24 of the German Basic Law. These two texts envision membership in a range of institutions which are broader in scope and looser in structure than the European Community. Yet, due to the lack of a provision expressly devoted to European integration, these general articles were the only constitutional foundation available for Italy and Germany to sign the Treaty of Rome and join the European Community.

In Italy's case, the "cart came before the horse." Italy adhered to the Treaty of Rome under its ordinary law because the Italian constitution had not been amended before the Treaty was ratified. Consequently, very sensitive constitutional issues were raised relating to the application of Community law in Italy. Article 11 of the Italian constitution does not explicitly provide that ordinary law, rather than constitutional amendment, can transfer any degree of national sovereignty away to an international organization, nor does it clearly articulate the legal consequences of such a transfer of sovereignty.

Thus, the first approach of the Italian Constitutional Court toward defining the relationship between Community law and national law was to place Community law within the Italian constitutional framework governing the application of international law in Italy. Article 10 of the Italian constitution provides that the Italian legal order conform itself to generally recognized rules of international law. Treaties are not included among those rules of international law. Therefore, they rank equally with ordinary domestic law, except for those treaties which, by virtue of an express constitutional prohibition, cannot be changed by a simple majority vote in parliament. Examples of such prohibitionary provisions are found in Article 7, clause 2 and Article 10, clause 2 of the Italian constitution.

The question of determining the rank of Community law within Italy's internal legal system was not merely a theoretical one. The Constitutional Court is competent to adjudicate disputes between ordinary law and higher ranking norms. The question, therefore, became whether Community law should be regarded as supreme over ordinary domestic law.

When the Court first confronted these problems, the postwar constitution provided it with two conceptual approaches. First, the Court could treat Community law as if it were a treaty, which would allow it to be applied by any judge; but this would also allow it to be modified by subsequent internal legislation. Alternatively, it could treat Com-

munity law as if it were customary international law. This treatment would make it applicable only through the centralized constitutional review procedure, and no modification by subsequent internal legislation would be possible.

Neither of these doctrinal options adequately met the goals of European integration. Under the Italian legal system, treating Community law as treaty law would subject it to the whims of the national legislature. Conversely, treating Community law as customary international law would require the additional procedural step of application through centralized constitutional review. Both solutions fell short of what the Community Court, since the 1960s, had defined as the proper relationship between Community law and national law. The Community Court's view of the supremacy of Community law over conflicting national law entailed immediate application by national courts as well.

In the 38 years since the adoption of the Treaty of Rome, a large and growing number of directives, regulations, and decisions have been promulgated by the European Community. No less important nor less extensive is the body of jurisprudence developed by the Community Court through the procedure laid out in Article 177 of the Treaty. This key article mandates that all national judges who face a question requiring an interpretation of Community law be allowed, or bound in the case of courts of last instance, to refer that question to the Community Court. The Community Court has exercised its monopoly on interpretation to determine, pursuant to Article 189 of the Treaty of Rome, that Community law is supreme over conflicting national law.

Notwithstanding this proviso in the Treaty of Rome, the Italian Constitutional Court has never forfeited its function as the supreme interpreter of the Italian constitution. It has viewed the entire problem of how the two legal systems relate to one another from the standpoint of Article 11 of the Italian constitution. This view was crystallized in the *Granital* case, which represents the last in a long line of cases reading Article 11 that began with *Costa v. ENEL* in 1964.

C. *The Constitutional Court's Jurisprudence: A Review of some Important Case Histories*

1. *Costa v. ENEL (1964)*

It was in *Costa* that the Constitutional Court first confronted a challenge to the applicability of Community law in Italy. The issue was whether the domestic law establishing ENEL as the national electric

monopoly conflicted with various provisions of the Treaty of Rome, and if so, which law controlled.

The Court held that Article 11 of the Italian constitution, which authorized Italy's participation in international organizations under general conditions of parity with member states, permitted Italy to join the European Community without a constitutional amendment. The Court's holding essentially allowed Italy to limit its sovereignty through adherence to the Treaty of Rome, but did not permit any exceptions to the principle of legal parity between treaties and domestic Italian law as applied within the Italian legal system.

Thus, a subsequent domestic law would take precedence over the Treaty of Rome as well as over any Community rules flowing from it. For this reason, the Court declined to consider whether the law instituting ENEL conflicted with the Treaty of Rome. According to the Court, any such conflict was moot because the later national law automatically took priority over any existing Community law with which it conflicted. The Community Court, in a contemporaneous and related case, responded by declaring the supremacy of Community law over conflicting domestic law, even if that domestic law was passed subsequent to the Community law.

2. *Frontini v. Ministro delle Finanze (1973)*

The Constitutional Court's decision in *Frontini* provided an intermediate step toward accommodating the Community Court's conflicting position regarding application of Community law in Italy. The Court held that Community law was the law of an autonomous legal order directed toward economic ends. It determined that Italy's delegation of lawmaking power to the Community was consistent with the Article 11 transfer of sovereignty to international organizations.

The Court found that the Treaty of Rome provided sufficient guarantees of due process, and that there was no unconstitutional interference with Italian sovereignty because Italy participates in the formulation of Community acts. The Court also declared that it no longer had jurisdiction to review the compatibility of Community regulations with the Italian constitution, since these regulations were given effect as acts of an external legal system. Henceforth, it could only pass on the constitutionality of Italian domestic law. Moreover, any Italian judge was permitted to apply Community regulations.

Notwithstanding these findings, the Constitutional Court of Italy did reserve an important role for itself. It declared that if Community acts exceeded their economic purpose and conflicted with either the fundamental principles of the Italian constitution or the inalienable

rights of Italian citizens, then it had jurisdiction to determine whether those acts exceeded the scope of the limitation of sovereignty allowed by Article 11. If the Court found those acts to exceed the scope allowed by Article 11, then the Court could declare the domestic law authorizing the implementation of the Treaty of Rome to be unconstitutional insofar as it permitted those acts. However, such a declaration would not cause Italy to withdraw from the European Community; it would merely bar those particular Community acts from being applied in Italy.

3. *Società Industrie Chimiche Italia Centrale IOIO v. Ministero Commercio con L'Estro (1975)*

By the early 1970s, the Constitutional Court had established the superiority of Community law over inconsistent domestic law. However, it had not made clear whether enforcement of the supreme Community law was the exclusive domain of the Constitutional Court. In *Società Industrie Chimiche*, the Court expressly stated that while Italy's membership in the Community enabled all Italian judges to apply Community regulations inconsistent with previous Italian law, it did not confer the power on those judges to abstain from applying subsequent Italian law. Rather, the Court allowed domestic judges to invoke centralized constitutional review in order to obtain a declaration on the constitutionality of the subsequent Italian law.

In the *Simmenthal* case of 1978, the Community Court countered the Italian Court's version of the supremacy of Community law over domestic law. There, the Community Court held that the requirement of centralized constitutional review was not consistent with its view of the supremacy of Community law. According to the Community Court, supremacy and immediate application of Community law go hand in hand. From a practical standpoint, the intervention of the Italian Constitutional Court, and the ensuing procedural bottleneck, would block the effective immediate application of Community principles.

4. *S.P.A. Granital v. Amministrazione Finanziaria (1984)*

In the *Granital* case, the Italian Constitutional Court finally accepted a view of supremacy which an American constitutional lawyer might find similar to that view embodied in the Supremacy Clause of Article VI of the United States Constitution. The Court held that Community law applies immediately, and abrogates any conflicting national legislation regardless of whether that national legislation was promulgated prior or subsequent to the Community law. This holding guaranteed direct and immediate application of Community law in Italy. With this

holding, the issue was exhausted before the Constitutional Court.

The rationale followed by the Court in its construction of Article 11 diverges from that by which customary international law is adopted under Article 10. As interpreted by the Constitutional Court, Article 11 has never incorporated Community law into the Italian legal system, nor does the system conform itself to Community law. In *Frontini,* the Court established that Community law was considered the law of an external legal system which supplanted conflicting national law. Therefore, an Italian judge applying Community law would not be applying national law, but a special kind of non-Italian law. The two systems, which used the same judges, were regarded as separate and independent of each other, but coordinated through the Treaty of Rome.

However, the Court did not take the next step along this line of logic and declare that where Community law was applied, the national law was withdrawn. In practice, where Italian law is supplanted by Community law, Italian judges are called upon to decide cases falling within the purview of Community law to the exclusion of national law. The Court did not sanction this view.

Perhaps, during the 1970s, the Constitutional Court believed that sanctioning such a view would have been taken to mean that Italy had irrevocably surrendered its legislative power to the Community. This reasoning is faulty however, because legislative powers had already been transferred from the state to the Community under the Treaty. Moreover, the nature of this transfer was not irrevocable. Although each member state transfers part of its power to the Community, national sovereignty is not thereby extinguished.

The national law within each system is simply withdrawn to the extent that it allows for the application of Community law. What the Constitutional Court failed to recognize in *Frontini* was that the withdrawal of national law does not amount to a forfeiture of national sovereignty. Thus, the *Granital* decision carries the autonomy language of the earlier cases to a logical conclusion.

Italy's membership in the European Community, through Article 11, makes Community law applicable internally as the law of an autonomous legal order. Domestic courts determine whether Community law covers the subject matter dealt with by subsequent domestic law. If there is overlap, Community law will take precedence. However, the domestic law is not declared unconstitutional or annulled in any way; it is simply ignored.

Consequently, Italian judges, as well as all domestic judges of the other member states, behave as if they are the law-applying organs of the Community. They concern themselves with no other rule than that

provided by the relevant Community law. The hinderance of constitutional review has been removed, and the process by which courts decide whether to apply Community law has become decentralized. If Community law is found to be applicable, then its application is immediate. On this point, the system established by *Granital* resembles the diffused judicial review aspects of the American system.

D. *The Constitutional Court and the Doctrine of Judicial Sentinelship*

This decentralization of Community law application is not unqualified. By allowing domestic judges to apply Community law, the Constitutional Court has not surrendered its role as guardian of constitutional values. The Court still reserves for itself the power to pass on the conformity of Community rules with the basic principles of the Italian constitution and with the inalienable rights of Italian citizens under that constitution. The Court has also reserved the power to pass on the constitutionality of laws which may violate basic principles of either the constitution or the Treaty of Rome. Also included are questions which comprehend the abrogation of the Treaty altogether.

Although these issues rarely arise, once they do, they fall within the purview of the Constitutional Court because they bear on the delicate balance between the powers delegated to the Community and those retained by Italy. The Constitutional Court has never relinquished its exclusive jurisdiction over this area of litigation. The Court's posture flows directly from the view that each member state remains sovereign. Under this doctrine of judicial sentinelship, the Constitutional Court asserts its right to adjudicate broad and fundamental issues. The Court holds that it alone can define the boundary line between the national legal order and that of the European Community. This rationale is rooted in the belief that the Community is not yet a fully developed federal union. Rather, it is thought to be at most a confederation in the making whose members retain both their national identity and complete control over the fundamental values grounded in their respective legal systems.

E. *Monism vs. Dualism: The Conflicting Philosophies of the Community Court and the Constitutional Court*

Although the Community Court and the Constitutional Court now agree on the supremacy and immediate application of Community law, these two bodies arrived at this conclusion by way of different legal theories. The monist view of the Community Court is diametrically opposed to the dualist position of the Italian Constitutional Court. The

underpinning of dualist philosophy is that the Community legal system remains separate and independent from that of the member states. The dualist approach attempts to reconcile the seemingly incompatible notions of the prevalence of Community law with the independence and sovereignty of the member states.

The German Constitutional Tribunal also subscribes to the dualist approach. The logical principle upheld by both the Italian and German constitutional courts is that the relationship of national law to Community law is not that of oneness and subordination, but rather that of separateness and coordination.

The Community Court, following the monist viewpoint, regards Community law and national law as forming one legal system. It conceives national law to be subordinate to that of the Community, as if national law were the law of a member state within a federal union. Despite these philosophical differences, judges have proven capable of reducing the high voltage of this dispute into a serviceable current. The practical results which the Community Court and the constitutional courts have reached assures that integration works on the legal front.

F. *Application of Community Directives in Italy and the La Pergola Act*

Community action is undertaken through the implementation of directives and regulations. Article 189 of the Treaty of Rome defines directives as rules that fix objectives but leave member states free to choose the means to carry them out. Conversely, regulations are complete and immediately applicable—they are self-applying. The distinction between these two classes of rules is drawn by the Treaty, but in fact some directives are so detailed that they can hardly be distinguished from regulations.

The Common Market has been shaped by both instruments, but the bulk of normative integration is still *via* directive. Most of the rules intended to harmonize national provisions are directives. It is therefore essential that directives be implemented by all of the member states and that established deadlines be promptly complied with.

During my tenure as Italy's Minister for European Affairs, the government was suffering from a heavy backlog in the implementation of Community directives. Coping with the implementation of these directives was no less arduous a task than that which I had earlier confronted when, as a constitutional judge, I delivered the opinion of the Court in the *Granital* case. I believed that the only practical remedy to this non-implementation of Community directives was to oblige the government to address the problem by means of an annual omnibus

bill. Such a bill would provide for all of the legislative measures required to bring the directives issued during the preceding period into effect.

Under this procedure, as with the budget law, a yearly debate on the omnibus bill is held in Parliament on the "legge communitaria" before it is to be enacted. This process has come to be known as the La Pergola Act. Each year, the bill establishes an exhaustive system calling for three types of provisions. First, Parliament is asked to repeal rules that it has promulgated or amend laws inconsistent with Treaty obligations. Second, Parliament is asked to entrust a lesser class of measures to the government by delegation in a wide variety of areas covered by Community directives. Finally, a large number of matters covered by law, which in Italy far exceed those addressable under the constitution as formal acts of Parliament, can be brought within the sphere of the executive branch, and thus regulated by decree. The rationale for this last provision is based on the fact that many Community directives concern technical problems which the executive of a member state can handle more effectively than the legislature.

Another bill provision was designed to determine which Community directives would have to be implemented by national law where matters of regional competence are concerned. Due to the divisive nature of this issue, the La Pergola Act provided for a careful balancing of local and central powers. The regions were allowed to implement directives autonomously unless an act of the Italian Parliament provided for uniform implementation. Despite initial difficulties, the system established by the La Pergola Act has been working reasonably well. As a result, Italy's compliance with Community directives has been steadily improving.

As the ultimate instrument of European integration, it is law that has organized the Common Market into a well regulated system of free exchange. And it will be law, again, that will harness the forces of political and economic change under Maastricht and forge, as the Americans say, "a more perfect Union."

Drug Abuse in Italy and Europe in a Comparative Context

*by Mario Garavelli**

I. The Problem of Drugs

The definition of a "drug" put forth by the World Health Organization is any chemical substance, natural or artificial, that modifies the psychology or mental activity of human beings. The equivalent scientific term is "psychoactive substance." Drugs have been used for centuries,[1] and the use to which drugs such as coca, hashish, and opium have been put has been a part of ancient cultures as well as a way of life for many populations. However, it has only been since the last century that this use has become such a serious problem throughout the world for many individuals and for society as a whole. Nowhere is this use more of a problem than in the industrialized nations.

Drug usage has diffused through many strata of the world's population and into anthropological contexts which are unable to regulate the use of drugs. The consequences of this more widespread usage have been (1) a decrease of participation in normal social activities by young people, (2) an outbreak of minor crimes linked to the purchasing of these substances, (3) development of criminal organizations which have realized enormous profits in the drug trade, and (4) more recently, an increase in the spread of AIDS.

The factors which lead to this abnormally high drug consumption throughout the industrialized world are analogous from country to country. The significant factors include more comprehensive welfare programs, improvements in communications and transportation, the slackening of moral values together with an added emphasis on "consuming," and the institutional pressures of family and school.[2]

This Article does not address the medical, sociological, or criminological aspects of drug usage. Rather the focus is upon the main

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* Presidente di Dipartimento di Corte di Appello, Torino, Italy (Judge, Court of Appeals, Turin, Italy).

1. Brian Inglis, The Forbidden Game: A Social History of Drugs (1975).

2. David T. Courtwright, Dark Paradise: Opiate Addiction in America Before 1940 (1982).

characteristics of the various drug control laws in the major European countries, especially Italy. Parallels with the drug abuse problem in the United States are drawn where appropriate.

II. COMMON THEMES IN THE DRUG USE LAWS OF THE WORLD

Due to inherent differences among cultures, legal systems and socio-economic situations of the nations of the world, an analysis of drug control laws reveals constants which are necessarily contrasted against a varied background. One of the most important constants in all drug control laws is prohibitionism. This is a universally accepted principle according to which the non-therapeutic use of narcotic substances is forbidden and sanctioned.

Prohibition is not the only possible answer to the problem of drug abuse in society; it is in part a natural reaction to a socially negative phenomenon. However, prohibitionism also has a definite historical dimension which can be linked to the prevailing ideology in the United States. This ideology has been forced upon other countries due to the weighty American influence on international organizations.[3]

The origins of prohibitionism can be traced back to 1600 in Turkey and Persia where tobacco consumers were put to the pillory. Later, in 1792, a Chinese law condemned opium sellers to strangulation. It was not, however, until the eighteenth and nineteenth centuries that the prevailing Protestant morals gave birth to the temperance movement which resulted in the first anti-alcohol laws in the States of New York (1845) and Maine (1851). The American Prohibitionist Party was created in 1869 and gained its first seat in the U.S. House of Representative in 1890. One of that party's objectives was the prohibition of alcoholic beverages, which was realized with the passage of the Volstead Act of 1920. This Act was repealed in the 1930s during the Roosevelt administration.

Similarly, in 1914, with passage of the Harrison Act, trade in and the use of opiates was forbidden. This same provision was put forth internationally for the first time in 1912 under the Aja Convention.[4] From then on, the role of the United States in this area has been predominant, which in turn explains why prohibitionism has been accepted as an unquestioned postulate in facing the drug problem.

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3. CHARLES R. CARROLL, DRUGS IN MODERN SOCIETY (2d ed. 1989).

4. STANTON PEELE, THE MEANING OF ADDICTION: COMPULSIVE EXPERIENCE AND ITS INTERPRETATION (1985).

This univocal answer to the drug problem did not prevent the birth, in several countries, of anti-prohibitionist movements. The purpose behind the movements was to faciliate discussion of these absolutist ideas. Such movements point out the inability of prohibition to reduce the widespread increase in drug abuse. In addition they ask for replacement of prohibitionary policies with less severe measures. These measures fall into two categories: the first is liberalization which proposes the removal of every prohibition and absolute freedom of trade and consumption; the second is legalization which postulates that distribution should be controlled by governing bodies under particular conditions.[5]

These differing approaches, though still not widely accepted internationally, have already had some effect on legislation and legal practices in several countries. Therefore, it can be said that another constant theme in world drug policy is mitigation of prohibitionism. This mitigation can occur through limiting the types of substances prohibited, such as products derived from cannabis indica, or through consumer health policies, such as regulation of legal administration of methadone or morphine.

A final constant theme pertains to the treatment of drug addicts on an individual basis. The majority of laws with these provisions are aimed at medical and psychological treatment of drug addiction. Very often, the drug addict's illegal activities are not prosecuted if the addict makes a strong personal commitment to rehabilitative treatment.

III. INTERNATIONAL CONVENTIONS

The constants found in various countries of the world mentioned above, derive their principle justification from the long series of international agreements on drug policy. These agreements bind all the major states and set forth the directives and guidelines which the contracting states are bound to follow. The most important of these documents are outlined below.[6]

A. *The Conventions in Brief*

1. *Aja Convention (1912)*

The signing parties, in a limited number, agreed to regulate the production and distribution of raw opium and medical products derived

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5. ANDREW SINCLAIR, ERA OF EXCESS: A SOCIAL HISTORY OF THE PROHIBITION MOVEMENT (1962).

6. W. Wenawski, *Drug Abuse Prevention: Recent International Efforts*, *in* 3 EUROCRIMINOLOGY 13-26 (1990).

therefrom, and to prohibit trade in treated opium used for non-medical purposes.

2. *Geneva Convention (1931 and 1935)*[7]

The representatives of 57 nations decided to control artificially produced drugs and to limit their use only to medical purposes. International cooperation in the prosecution of drug dealers was promoted, as was further specialization of narcotics divisions within enforcement agencies.

3. *Single Convention on Narcotic Drugs, New York (1961)*[8]

Originally adopted by 70 nations, this convention was later ratified by 133, and has become a model for anti-drug policies, having been integrated by a Geneva Protocol in 1972. Its purpose is to replace all previous agreements and to impose a general and absolute prohibition on all known drugs, extending to cannabis cultivations. It also set a deadline to prohibit the use of cannibus cultivations and coca in the countries where it was traditionally used.

This convention regulates in great detail the production and trade linked to prohibited substances. Article 36 provides for an "adequate punishment, particularly with detaining penalties" for serious crimes dealing with every activity linked to drugs. Thus, this convention asserts the universality of prohibitionism and states for all countries, including those who did not sign it, the obligation to fight against production of illicit drugs within their own territories.

This is also the first convention to address treatment for drug addiction. Article 38 obliges the contracting parties to "treat drug addicts and guarantee their rehabilitation."

4. *Convention on Psychotropic Substances, Vienna (1971)*[9]

This convention includes a list of generally forbidden substances such as hallucinogens, amphetamines, THC, and barbiturates. It also provides detailed rules for their use in medical prescriptions and therapy.

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7. League of Nations, Record of the Conference for the Limitation of the Manufacture of Narcotic Drugs, Geneva May 27th to July 13th 1931 (Volume 1: Plenary Meetings, Text of the Debates).

8. Single Convention on Narcotic Drugs, New York, March 1961, 18 U.S.T. 1407, T.I.A.S. No. 6298, 520 U.N.T.S. 204.

9. Convention on Psychotropic Substances, Feb. 21, 1971, 32 U.S.T. 543, T.I.A.S. No. 9725, 1019 U.N.T.S. 175.

5. *Convention Against the Illicit Traffic of Narcotic Drugs, Vienna (1988)*[10]

This is the latest agreement which has inspired the most recent international laws. It was ratified by 50 nations in October 1991. Article 2 states the purpose of the convention as the promotion of cooperation among nations in drug policy. Article 3 provides:

> 1) that the parties deem not only the production and trade of drugs, but also their possession and purchase as penal violations if the latter are done with the intent to deliver the drugs to other people;
> 2) that, the organization and financing of such activities, along with the use or conversion of profits derived therefrom, be deemed penal violations;
> 3) that the possession of drugs for personal use be in and of itself a crime, but that together with punishment therefor, social and rehabilitative treatment measures must be adopted; and
> 4) that similar measures can replace penal sanction when "minor violations" occur.

B. *The Conventions Analyzed*

From a close analysis of these agreements, identification of the most important characteristics of international drug policy is possible. First, there is an ever increasing commitment to cooperation, especially among consumer states, which are most interested in limiting drug usage and which are also the most wealthy and influential of nations. This cooperation is evidenced not only in judicial rules such as the extradition and the mutual legal assistance provisions of Articles 6 and 7 of the Vienna Convention of 1988, but also in the close relationships among different police forces which have made the arrest of major drug dealers possible.

Second, there is a general consensus that the drug addict is an afflicted person in need of treatment and support rather than an antisocial person who must be punished. Consequently, this trend has resulted in increased attempts to provide new approaches to treatment in several different countries.

Third, the increase in international agreements on drug policy creates a greater homogeneity among various national drug policy laws.

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10. Conventions Against the Illicit Traffic of Narcotic Drugs, Vienna, Dec. 19, 1988, U.N. Doc. E/CONF. 821/15 (1988).

This is true both of the content and of the language of national drug policy laws. Therefore, comparative study of the laws themselves becomes easier and cross-national analysis of the effect of similar laws is possible.

Fourth, the increasing commitment to drug control in the international community has resulted in the creation of numerous organizations formed to deal with the drug problem. In addition to specialized institutions such as the U.N.O. agencies,[11] various supranational bodies[12] have come into existence along with private bodies, such as the Drug Policy Foundation in Washington D.C., the Italian *Lega Internazionale Antiproibizionista*, and the French *Observatoire Geopolitique des Drogues*.[13]

IV. EUROPEAN LEGISLATION

The European approach to drug policy presents several substantial uniformities. Most European countries promote a high degree of welfare, are industrialized, and are highly urbanized. These are all conditions which favor excessive consumption of everything, including drugs and alcohol. These common characteristics explain the profound similarities in the various national drug control laws.

Despite these similarities, the nations of Europe have developed separately in the context of their own judicial systems and social conventions; thus, original approaches have developed to face the drug problem in a common field which remains uncertain and difficult to understand.[14] The final analytical portion of this Article is dedicated to a comparative study of different drug control laws of various European nations, together with a view of their particular features, and some applications where appropriate, with an emphasis in Italian drug policy.

A. *Italy*

The Italian drug law of 1975 was advanced for its time and was in line with the current scientific knowledge available.[15] This law pro-

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11. Some organizations are the followings: Commission on Narcotic Drugs; International Narcotic Control Board; World Health Organization; United Nations Fund for Drug Abuse Control; Division on Narcotic Drugs; United Nations International Drug Control Program.

12. Examples are the European Committee to Fight Drugs (CELAD), Interpol, and the World Health Organization.

13. They are called by U.N.O. "Non-Governative Organizations" (ONG). There is a large number of them, about 400 in Bolivia alone, for example.

14. A. DERVAUX, LE PHÉNOMÈNE DES TOXICOMANIES AU TRAVER DU DEVELOPPEMENT DES LEGISLATIONS INTERNATIONALES SPECIFIQUES (1988).

15. G. AMBROSINI, LE SOSTANZE STUPEFACENTI (1989).

vided for impunity of a person who committed crimes connected with drugs who was found in possession of a "moderate amount" of drugs not intended for sale. It also provided for imprisonment of up to 15 years

The law included a series of rules, based on French law, aimed at treating drug addicts who were to be sent to the National Health Service by court order. The ideology underlying this portion of the law was derived in part from viewing drug addicts as afflicted people in need of treatment. Also influential were the the Catholic Church and the political left which were more inclined to sympathize than to repress.

As the drug problem increased, public alarm and a change in the cultural environment occurred, making the faults of this law become more apparent. It was deemed too tolerant, and the social services that it provided were scarcely put into practice. These criticisms generated strong disagreements among the voluntary organizations, especially Catholic ones, which were very active with various juvenile problems in hundreds of communities.

The major principle of the 1990 law[16] that replaced the 1975 law is stated in Article 72: "The personal use of drugs is forbidden." From this prohibition, which had never previously been expressly declared, a series of non-penal measures emanated. These measures were intended to punish only non-serious violations of this provision. A non-serious violation is possession of a moderate amount of an illegal drug, known as the "average daily dose." The rationale for classifying the average daily dose as a non-serious violation is that it is probably only used by the possessor.

The range of punishments available under the law for a non-serious violation include suspension of driver's license, house arrest during the night or periodic check-in at the police station, prohibition from frequenting public places, and the impounding of private vehicles. These punishments are preliminarily ordered by the Prefect, an Italian government official, for the first two violations, and subsequently by the Pretore, the judge, after the filing of a police charge and a meeting with the defendant.

Although this enforcement procedure only punishes drug abusers with light penalties for personal use, the penalties are designed to create problems in their day-to-day lives. However, when the amount of the illegal drug possessed is greater than the average daily dose, its intended

16. *Id.*

sale is presumed and the traditional criminal penalties are applied. This double-standard based on the amount of illicit drug possessed is intended to pressure simple drug addicts to enroll in specialized drug treatment centers for detoxification.

A rehabilitation feature of this new law provides for strengthening public services designed to curb drug abuse by creating treatment centers in every region within the National Health Service system. The goal is to help drug addicts by making available adequate personalized recovery programs which can vary from detoxification to placement in a recovery community to psychological treatment. Immunity from prosecution for those arrested and immunity from sentencing for those found guilty of crimes linked to drug addiction, such as theft or petty solicitation of illegal drugs, is offered for those willing to participate and complete one of the rehabilitation programs.

The law also focuses on both prevention through education and deterrence through punishment. Prevention through education is conducted through informational campaigns in school and during compulsory military service for men in the Italian military. Deterrence through punishment has resulted in a notable increase in punishment for crimes linked to drugs. Article 73 provides for imprisonment of eight to 20 years and heavy fines for possession and sale of large quantities of illegal drugs. Imprisonment of one to six years is mandated for possession and sale of small quantities of illegal drugs.

The innovative approaches of this comprehensive law have produced mixed results. While the number of people assisted by social services has increased, the number of people imprisoned has also increased to the point that the jails have become overcrowded. Over 50,000 prisoners, many of whom are drug addicts, populated the 35,000 available places in the Italian prison system as of the spring of 1993. This crisis led to a referendum of the new law by the people who voted in favor of cancelling that portion of the law that dealt with punishment of drug consumers.

The direct effect of this vote was the removal of both the prohibition expressed in Article 72 and the average daily dose limit that, if exceeded, made those who possess illegal drugs for personal use punishable with jail sentences. Now, simple possession of a moderate but undefined dose of an illicit drug is only punishable by minor sanctions ordered by the prefect, such as suspension of one's driver's license or passport. The most serious sanctions, previously ordered by the judge, have disappeared.

Consequently, the current situation is very uncertain since any drug possession can be punished only if there is concrete evidence of

its destination for trade or if the judge believes that such a purpose is likely based on the amount of the drug involved. Italy awaits legislative intervention or the creation of a uniform jurisprudence which provides the Courts with reference parameters. However, the will of the Italian people, as expressed in the referendum, was certainly in favor of at least the possibility of punishment for drug addicts.

B. *France*

The French law of December 31, 1970, as amended in 1987, provides for penalties of up to one year in jail for possession of illegal drugs and prison sentences ranging from two to ten years for trade in illegal drugs. Under aggravating circumstances, these sentences may be raised to 20 years for illegal drug trade.

For the drug addict arrested for possession, the French judge can order compulsory recovery treatment which stops the penal action if accepted. This forced rehabilitation is found in Article L355 of the French law which provides that "all those who illicitly use substances classified as drugs are placed under the surveillance of the Health authorities."[17]

With a view toward strengthening the fight against AIDS, the sale of sterile syringes was liberalized in 1988. Thus, the network of services offering various intervention models has been strengthened to include welcome centers, specialized hospital units, and therapeutical communities.[18]

C. *United Kingdom*

The Misuse of Drugs Act of 1971, followed by the Misuse of Drugs Regulation of 1973 and the Misuse of Drugs Order of 1977, classifies drugs into three categories: (1) cocaine and opiates; (2) cannabis and hallucinogens, barbiturates, amphetamines; and (3) pharmaceutical.

The penalties against trafficking of drugs are very severe, from life imprisonment in the most serious cases to seven or 14 years respectively for illegally selling drugs from categories one and two above. Penalties for possession are severe also, with possible sentences of up to 14 years for possession of "heavy" drugs. However, as in Ireland,

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17. Translation by the author.

18. C. TRAUTMANN, RAPPORT AU PREMIER MINISTRE SUR LA LUTTE CONTRE LA TOXICOMANIE ET LA TRAFIC DE STUPEFIANTS (1989).

personal use is prohibited only in the case of opium. The use of other drugs is therefore practically permitted.

Therapeutic rehabilitation treatment is enforced under this law. The treatment is administered by regional authorities which make use of special assistance services coordinated by the "District Committees for Counseling about [the] drug problem." The physician who deems that one of his patients is a drug addict is required to inform the health authorities.

D. *Germany*

The drug control law of 1971, as updated on July 28, 1981, punishes the illegal circulation of drugs with imprisonment from three to ten years, which may be raised to 15 years in the case of organized crimes. The judge, however, can omit the penalty "if the guilty person holds drugs for personal use in a minimum amount," and can impose rehabilitation treatment. Even a final sentence of less than two years for crimes connected to drug addiction can be exchanged for therapy.

The network of services pertaining to a single state (*Land*) is expanding to include varied methods of treatment. The distribution of synthetic substances, such as L-Palamidon, is also more widespread in Germany under this law.

E. *Spain*

From the drug control laws of 1976 and 1983, Spain has moved to the law of March 24, 1988, which states that the use and detention for personal use of illegal drugs is not punishable. The penalties vary from two to eight years imprisonment for the production and trafficking of "heavy" drugs and from four months to four years for the production and trafficking of "light" drugs. However, if a criminal organization is involved, these sentences may be increased to 23 years.

The Spanish law also allows for suspension of up to two years of punishment if a therapeutic rehabilitation program is accepted by the defendant. Compulsory treatment and the restriction of freedom of movement in the form of house arrest or driver's license suspension for dangerous drug addicts are other options which the court may order.

F. *Holland*

The Dutch system provides that even if possession of drugs for personal use is formally considered a crime under the May 12, 1928, drug control law, as modified in 1976 and 1985, this use in the case of "light" drugs is not punished because of the ability of the State

Attorney to decline initiation of criminal proceedings. However, drug trafficking is punished with imprisonment of up to twelve years for "heavy" drugs and up to four years for "light" drugs.

The network of assistance services is broad and efficient, even if treatment is voluntary. Sterile syringe distribution, drug addiction control, and streetside mobile units for public assistance have all been employed to combat the expansion of the AIDS virus.

G. *Sweden*

Penalties for crimes connected to drug trafficking in Sweden are very light: imprisonment up to three years for serious crimes and up to six months for non-serious crimes. Under the amended law of June 1968, penalties may be increased to ten years for serious crimes involving large amounts of drugs, organized crime, or "particularly dangerous" criminals.

Personal consumption is practically immune from criminal punishment. Instead, the government uses pecuniary sanctions and drug exchanges; when "the event is not serious," the suspects are free from punishment. Under law 870 of 1988, the Prefecture can request the county court to order the forced treatment of drug addicts. This treatment is offered through special institutions managed by local administrations or local governments. Upon commencement of treatment, the Public Prosecutor may forfeit proceedings against guilty persons for their minor crimes.

H. *Other Countries*

With minor differences in the length of penalties available, the legislation of other European states provides for various forms of punishment for drug trafficking which can be severe; but therapy for drug addicts is also universally offered or mandated. Greece, Malta, Cyprus, and Portugal use long penalties of up to 14 or 20 years imprisonment for drug trafficking, while Austria, Luxembourg, and Switzerland have much shorter drug trafficking penalties of three to five years. Penalties in Norway range from only 14 days to a lengthy 21 years in the case of "heavy" drug trafficking or money laundering.

Most of the laws regulate the treatment of drug addicts explicitly. Generally, the Northern countries, apart from Sweden and Ireland, tend to leave it to the choice of the defendant, while the other countries require compulsory treatment.

V. CONCLUSIONS

This brief, comparative overview of European drug control law enables one to identify the main trends in legislative policies regarding

this topic within Europe. The international community, through conventions, continues to support the prohibition alternative; thus in Europe, drug trafficking and consumption are theoretically punishable. European countries punish major and moderate dealers with several years imprisonment, while the principle of lesser punishment for less serious crimes remains prevalent.

The laws of the Mediterranean countries, together with Ireland, tend to be the sternest ones. Conversely, the drug phenomenon is perceived as less alarming in the Scandinavian countries where alcoholism is believed to be a more serious social problem.

However, a sign that the general public perceives the drug abuse problem as more dangerous than other social problems is the increasing pressure on legislatures to modify their laws with more consideration for the drug addict as a person. This perhaps stands in opposition to popular sentiment regarding various other strict laws punishing criminal acts or asocial conduct such as prostitution, alcoholism, or juvenile crimes.

The illegal use of drugs is formally forbidden in France, Luxembourg, and Italy where it was subsequently cancelled by referendum. Collective use is forbidden in Belgium. In Ireland and the United Kingdom, only the use of opium is officially forbidden. To the contrary, Spain and Holland allow the use of opium, and it is *de facto* tolerated in Belgium, Denmark, Germany, Portugal, the United Kingdom, and now Italy. However, some countries still punish for purchasing opium, or, as in the case of Portugal, possession.

All Western European nations consider drug addicts responsible for their actions except Greece, which frees them from penal proceedings but subjects them to compulsory therapy. However, this provision of the Greek law only applies to those addicts whom the law defines as people accustomed to drugs and incapable of giving them up without therapy, while other addicts are subjected to the penal law.

Even if all of the laws specifically regulated the methods of treatment, they would still be divided between the majority that espouse the efficacy of compulsory treatment under the intervention of judicial authority, as in France, Greece, Ireland, Spain, Sweden, Luxembourg, and Portugal, and the minority of laws which leave it to the drug addict's free will. However, the latter almost always reduce this freedom of choice by offering the addicts the alternative between either penal or administrative punishment and the acceptance of a therapeutic rehabilitation program.

The universal result under both types of law is strengthened public services in drug control everywhere and increased cooperation with

numerous private charitable bodies pursuing the same goals. The Italian law is perhaps the most explicit in this regard since it allows for public bodies to make agreements with private ones for funding these programs.

In Canada, the drug control law of 1970, which strictly punishes drug trafficking, only imposes a fine for personal use and does not provide for alternative therapeutic measures. In the United States, the federal law of 1988 imposes important directives in the context of the "war on drugs" proclaimed by the Omnibus Act of 1986. The introduction of the death penalty for major drug dealers, together with a sanction of up to $10,000 for the personal use of drugs, are some of the most stringent measures. There has been a great effort exerted toward the prevention of drug use, especially in the workplace.[19]

The European situation is characterized not only by the distinct efforts of the different legislatures, but also by a series of attempts to ascertain the difficulty of reducing the problem through suppression of drug usage and the probability of success in the short term. The theory thus derived is that of "harm reduction" which recognizes that the acceptance of drugs in the social context is unavoidable. Thus, it becomes necessary to concentrate on the search for alternative methods of reducing the harmful effects of drug usage.

Attempts in this direction have been varied and diverse. For a long time in Zurich, Switzerland, drug addicts were confined to the town park and allowed to consume drugs there. However, the degeneration of the situation obliged the city to eventually close the park. In Holland, Liverpool, Berne, and Frankfurt,[20] there are currently programs in place to monitor the health of drug addicts, while police simultaneously control them through investigation, distribution of sterile syringes, support from social servants, and mobile stations.

According to reports from the authorities, these methods are providing encouraging results. They obviously do not completely eliminate the drug addiction problem. They do, however, stabilize the situation by reducing both the commission of related crimes and the spread of AIDS. In Holland, for example, 75 percent of habitual drug addicts have made contact with treatment organizations, compared to only 40 percent during the first part of the 1980s. In the Liverpool region of Mersey, the increase in crime for 1991 was only 6.2 percent, compared

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19. Concerning the United States recently, see M. D. Newcomb, *Substance Abuse and Control in the United States: Ethical and Legal Issues*, 35 SOC. SCI. MED. 471-79 (1992).

20. *Drug Policies in Western Europe*, 1989 FREIBURG I. BR. 175 (H.J. Albrecht ed.); ASPECTS DE LA SITUATION ET DE LA POLITIQUE EN MATIERE DE DROGUE EN SUISSE 38, (Office Federal de la Sante Publique 1989).

to the average increase of 18.1 percent throughout the United Kingdom. In Italy, where enforcement of health structures has been the main objective under the 1990 law, deaths due to heroin overdose have decreased by over 50 percent during the first three months of 1993.

To sum up briefly, the significant trends currently developing in Europe are the following:

> (1) a great uncertainty about punishing drug consumers, but a consensus on offering as many chances for treatment of drug addicts as possible and for offering an alternative between punishment and treatment;
> (2) increasingly severe punishment for criminal activities linked to drugs through an increase in penalties and seizure of goods and illegal capital, and a strengthening of international co-operation among magistrates and police forces;
> (3) a prudent openness toward ways of decriminalization or legalization of drug usage, at least in the case of "light" drugs. For example, in addition to the traditional tolerance, Holland, Hamburg and Lower Saxony in Germany, and Switzerland recently considered the adoption of different criminal policies which do not exclude legalization of drugs. And, an item on the agenda of the Italian Chamber of Deputies even proposed "a discussion at the international level concerning the effectiveness of the strategies for containment performed so far and possible alternative hypotheses."

In the European Community, various organizations stress the priority of assistance given to drug addicts at risk.[21] However, the official Community policy remains that expressed by the European Parliament in its Resolution of May 13, 1992, which states that it "does not think that legalization is a feasible solution to the problem of drugs."

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21. For example, the "European Plan for the Fight Against Drugs," promulgated by the Pompidou Group on May 19, 1989 was approved by the European Council in Rome on December 14, 1990, and by the European Community Cabinet on November 13, 1992.

Redesigning Italy: The New Flow of Immigration

*by Guido Bolaffi**

Immigration will prove to be an extremely delicate problem for Italy during the coming years, one that is going to affect the political sphere as well as society and its institutions. The complex nature of entrance and settlement patterns of migrants in Italian cities is a phenomenon about which we still know very little. It will soon be seen that the makeshift measures that have hitherto been taken, in what can only be termed as a sort of political and administrative form of *laissez-faire,* will no longer be adequate. There are two primary reasons for this. First, Italy cannot adopt immigration policies which are not in conformity with those of other European nations. Second, and most important, the very nature of modern immigration represents a serious challenge to a bureaucracy like the one in Italy, which tends to be slow in making decisions and not very flexible when it comes to carrying them out.

Even though the geographical location of Italy—with its very long coastlines—may make it easier for illegal aliens to reach our shores, it is a gross exaggeration to claim, as some have done, that this *per se* constitutes an insurmountable obstacle to the control of immigration. One need only look at Great Britain which, despite the fact that it is an island, has for more than a century stringently regulated the access of foreigners to its national territory. In more blunt terms, the slackness and negligence which over the years have characterized our approach to immigration, as if we secretly hoped the problem would somehow go away by itself, shows just how influential certain sectors of the Italian political milieu continue to be. Specifically, these sectors, in order to avoid making tough or unpopular decisions, invariably choose the path of least resistance, preferring to pay increasingly more in terms of social costs and the dissipation of public resources.

The most recent and perhaps most significant example of this "thoughtlessness" on the part of our decision-makers may be seen in the political deadlock which has arisen between the government and various parliamentary groups over whether or not to grant yet another

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* Capo dell'Ufficio Immigrazione del Ministero degli Affari Sociali, Roma, Italia (Director of the Immigration Department of the Ministry of Social Affairs of Italy, Rome, Italy).

amnesty to illegal aliens already residing on Italian soil. One should consider this important point: the deputies in favor of amnesty do not belong to any one political group, nor do they share a common ideological or cultural bias; they form what is known as a *cross-party party* with members coming from every zone of the political spectrum from the Christian Democrats (the PDS), all the way to the extreme left. These political groups campaign inexplicably in favor of the same measure, each camp motivated by its own set of deep-rooted ideological prejudices. In no other country in the world would those in power have gone so far as to cast doubt on the very credibility of the institutions they represent by considering a measure which, without actually changing the existing legislation itself, would have pardoned those who had effectively broken the law and automatically penalized those who had obeyed it. In my view, this is an act of sheer irresponsibility, even more so if we consider just how controversial is the subject of immigration. When it comes to immigration, we have to be very careful. The recent electoral victories of right wing xenophobic parties in Europe should have made it clear that inter-ethnic conflict is not something which is confined to the economy alone; it has repercussions in the area of politics and culture as well, which could eventually trigger dangerous reactionary backlashes on the part of institutions and bring about a kind of "identity crisis" among groups which have traditionally been thought to be firm supporters of democracy.

If we look at those countries which have already had to deal with immigration in the past, we see immediately that there are no easy ways out, and no miraculous cures. No single piece of legislation, however well-framed, will be able to provide an ultimate solution. More than any other social issue, immigration has shown itself to be far more complex, and liable to change at a faster rate than the measures which have been taken by governments to cope with it. Immigrants themselves have been quick to take advantage of the inevitable loopholes in any law. The flexible nature of the problem poses serious challenges to the Italian bureaucracy which tends to insist that the letter of the law be respected, while often neglecting to enforce the spirit behind it or adapt itself concretely to an ever-changing situation. For example, despite the fact that two immigration bills have already been passed by Parliament, no one has yet been officially charged with the task of actually counting how many immigrants are entering the country. Perhaps even more surprising is that, despite the increasingly tighter policing of our borders, many immigrants continue to be listed as living in Italy long after they have decided to go back to their native countries. We seem to be interested in knowing who is coming in, but not in

who is leaving. The outcome of this is that we cannot really say how many "legal" aliens there are or how many are unemployed because a number of them continue to show up on government employment agency lists when in reality they no longer reside in the country.

That there are "two Italies" holds true for immigration as well. In the industrialized North, foreigners are gradually taking advantage of the official placement agencies and the protection of trade unions. The South, on the other hand, continues to absorb ever-increasing numbers of illegal aliens who, upon arrival, vanish into the secret ranks of the unofficial, "under-the-table" labor market. This state of affairs was highlighted by the recent episodes of inter-ethnic violence which broke out in the regions of Foggia and Caserta. A recent report by the organization *Federmeccanica* on the state of the automobile industry also confirmed that integration of foreigners is taking place at "two speeds." Four and one-half percent of businesses were shown to have immigrants from outside the EEC on their payroll while the total number of immigrants in this sector was around one percent of all those employed. An interesting fact was that only a part of the jobs these immigrants actually performed were listed as menial or unskilled, while a not insignificant number of immigrants were in positions requiring medium or high level of skills. This is why trade unions and employers are currently negotiating agreements over how many immigrants can be hired in the factories. It also shows that the influx of foreign workers is not caused merely by a demand for unskilled labor, but by the existence of areas where professional training courses for Italian citizens have failed to meet the needs of the labor market. Foreigners thus constitute a shadow-labor force which serves as a kind of ballast and emergency reservoir.

Until recently, the phenomenon of immigration in Italy showed characteristics which were quite peculiar and unlike those of other industrialized nations. In other countries, foreign labor tended to gravitate to highly industrialized areas where factories were in need of workers that could no longer be found among the nationals. In Germany, France, and the United States, the governments herded new arrivals into those areas most needed by the economy. In Italy just the opposite occurred. A large number of immigrants found precarious, black-market type jobs in regions of the country which were the least industrialized and had the highest levels of unemployment. This rather paradoxical situation was brought about by the sort of off-hand deregulation with which our government attempted to manage the growing number of arrivals. In addition, despite the current recession, the economy in the North is nearly at full employment. This means that

new vacancies in factories or in the service sector—and not just those positions requiring a low level of skills—are going to be taken by foreigners. Thus, it is hardly surprising that if companies in the North are able to tap this reservoir of foreign workers, there will not be any more incentive for them to set up plants and create jobs in the South where unemployment is high; the nearly two million Southern Italians who are out of work will, as a result of immigration, be simply passed over. We should not underestimate another negative effect that the growing presence of illegal aliens will have on the South's shaky economic development. Recent studies have shown that the presence of "first generation migrants," many of whom are without working papers and who are ready to take any sort of job whatever the salary, has negative economic consequences. Specifically, such a situation tends to have a slow-down effect on the modernization process of traditional types of businesses, encourages the "black-market" economy, and in some cases even encourages businesses to go "under-the-table." The reason for this is that while the presence of foreigners has little effect on official union-backed wage negotiations, the tendency is for foreigners to undercut wages in the non-official sectors of the economy.

Italy, unlike other countries with a strong democratic tradition, has not yet given birth to any nation-wide anti-immigrant movement which is ready to capitalize on the potential animosity out-of-work Italians might feel against foreigners. The simple reason for this is that the most backward and conservative elements of the economy, because they know how important this ethnic reservoir is, have set themselves up as liberal champions of immigrants and oppose any attempts by the government to get a handle on the problem. What is the result of all this? We have a unanimous facade of anti-racism, a complete consensus, where everybody agrees with everybody else and there is no opposition. This is a process of political camouflage which the ruling classes of the South have been known to adopt and which up to now has been successful because of the specific political conditions of our country. Until very recently, Italy has been a country which exported immigrants, a fact which has inspired a sense of "incomprehensible solidarity" among organizations like the confederate trade unions which, unlike unions in other countries, support an open-borders policy and multi-cultural integration. Our decision makers, both from the left and right side of the political spectrum, simply do not know what to make of a situation where Italy, for the first time in history, is actually attracting brains and brawn from abroad. So, except for some vague threats coming from Umberto Bossi's Lombard League, everybody seems to agree that immigration is a good thing. In fact, however, there are growing differences between those in favor of a more disci-

plined approach and those who think that we should simply let everybody in. What is behind all this?

The recent massive waves of immigration have created two main problem areas which Italy must face. One has to do with politics and culture, the other concerns socio-economic questions. Even though these two areas are interrelated, the potential dangers inherent in each are different, with some being more urgent and others less so. It stands to reason, therefore, that any policy aimed at integrating immigrants is going to have to take all of this into account. Millions of people of different races and creeds, with customs vastly different from our own, people who do not even eat the same food as we do, are bound to have an enormous and permanent impact on the way we define ourselves and our national identity. This is not going to be an easy or painless process. It is going to be complex and no one can stop it. Even the future of our democracy is going to be influenced by it. Therefore, people who look at the problems exclusively in terms of economics and statistics are missing the point, as are those who see the problem as a purely cultural one. Neither attitude is going to be particularly effective if we wish to prevent the outbreaks of racial violence that continue to occur in other countries. In the struggle to stamp out racism, should not we err on the side of doing more rather than doing less?

Another potential for conflict comes from the supporters of an open-borders policy, who in the name of the high-sounding ideals of multi-racial and multi-ethnic society say that everybody should be permitted to come. There is something "radically chic" about this position. It is a kind of "ivory-tower" intellectualism which fails to take into account the very unpleasant reality of the hand-to-mouth existence many clandestine immigrants actually lead and the daily humiliation and exploitation they have to endure, which for many women can mean physical or even sexual violence. This is especially true in the South, where the state is not yet in the position of being able to guarantee even the most basic rights, such as jobs or social services, even to Italians themselves. It is better not to unduly inflame the public by using expressions like "free immigration," as if we could simply ignore the necessity for economic integration and the availability of social services. Multi-racial, multi-ethnic societies are only possible where there is a social contract in existence which regulates interchange between members of a society which has rules and in which everyone respects the law. This can only come about if people are committed to building a common future together.

Is Italy going to be able to consolidate its diverse views to create a policy on immigration? This is starting to look less like an ideal goal and more like a dire necessity, given the explosive growth of the

phenomenon. Success is by no means certain. First, the problem is of an entirely different order, the likes of which we have never had to deal with before. There is a kind of "Protean" double nature to it, in that, as it grows quantitatively, it also transforms qualitatively. If immigrants represent a structurally permanent and growing part of the labor market—a fact which the government seems only recently to have discovered—the character of immigrant labor is in a state of continuous flux. The most important reason for alarm, however, is the wide gap existing between the obsolete means the state has at its disposal and the kind of problems that have to be addressed. Until recently, Italy was alone among the industrialized countries to be spared this dubious by-product of prosperity. The waves of foreigners from the Third World or Eastern Europe storming at our gates are a sign that Italy has definitively joined the ranks of the affluent nations of the "North." But unlike them, our institutions are still lagging far behind. The danger is that they will not be up to the task of handling a phenomenon which is having such an enormous impact on our economy and our society. If a country does decide to open up its borders to immigrants, three essential things are necessary.

First, a central authority or body must exist whose job it is to coordinate the implementation of social and economic policy and which is equipped to control migrant flows into and out of the country. Under the new ministry of Social Affairs, an agency like this is already in its early stages and, before long, could be working to full capacity. Second, the nature of immigration and the fact that more family groups will be arriving means that different branches of the public administration will have to become active simultaneously; organizations representing education, labor, social affairs, health and justice will have to work together and not simply ignore each other—or even worse, compete. Third, the passing of the Martelli law means that the age of makeshift measures and last minute improvisation has definitely come to an end and a new, tough era has begun.

Italy will have to decide who it wants to let in and on what criteria such entrance should be based. Above all, Italy will have to come up with some kind of policy for integrating foreigners so that those people who in the next few years do decide to settle down in Italy know just where they stand.

Refractions of Italian Law: An Indiana Perpective

*by David Williams Russell**

I. Introduction

It is indeed a privilege to have been requested on behalf of the International Law Section of the Indiana State Bar Association to submit these remarks to the Italian law symposium edition of the *Indiana International & Comparative Law Review*. It is obvious from even a cursory review of the current legal publications that far more attention has been paid in this country to the comprehensive restructurings of the bar in the United Kingdom and to the bureaucratic machinations in Belgium with respect to the Maastricht Treaty, than to current issues in Italian law. Therefore, a focus upon Italy is very timely. As the reader will observe by reading this Italian law symposium issue, the current legal situation in Italy holds up to us a kind of prismatic mirror through which we may see and be seen—yet in the process both reflect and refract similarities and differences between the American and Italian legal systems.

II. Italian Businesses are Increasingly Prominent in the World Markets

This Italian law symposium is not only timely, but is most relevant because, from the perspective of an Indiana business lawyer, I can attest that Italian businesses are active and proficient traders in international marketplaces, including our own. In our own practice over the years, for example, our firm has had the good fortune to represent a number of American companies distributing medical equipment in Italy and participating in joint ventures to produce in Italy such goods as agricultural and food products and sports equipment for distribution both in Europe and in the United States. In addition, we also have had the opportunity to represent a number of Italian companies man-

* Partner, Johnson Smith Densborn Wright & Heath, Indianapolis, Indiana. J.D., Northwestern University (1976); M.B.A., Amos Tuck School of Business Administration (1969); A.B., Dartmouth College (1967).

ufacturing products as diverse as packaging materials, automotive products, and heating equipment, both in Italy and in the United States, for distribution here. We have assisted Italians in buying manufacturing companies here, in putting together joint ventures in Italy amongst themselves to distribute goods here, and, this past year, were involved in an arduous and intense international arbitration proceeding involving two Italian companies disputing their respective Italian distribution rights. Most recently, to compound the ever-increasing internationalization of our Indiana business practice, we have been assisting an Italian-owned United States joint venture corporation to establish a Mexican distribution network for its Italian-made goods. In the course of such representation, we have developed healthy respect for Italian business people and for American business people having the good sense to trade with Italians—who, after all, opened the North American continent for transcontinental trade.

III. THE ITALIAN LAW SYMPOSIUM ARTICLES REFLECT AND REFRACT UNITED STATES LEGAL PROBLEMS

From this vantage point, it was truly a delight to have the opportunity to review preliminary drafts of certain of the legal articles submitted by the Italian contributors to this symposium. It was not just that these articles were perceptive and penetrating, although they were, and not just that they were exceptional and pertinent—although they were these things as well. No, the major impact of these articles came with the realization that these commentators on another legal system in a country on another continent were dealing with the *very same problems* facing us in Indiana. Not just the same *types* of problems, in many ways the very *same* problems, albeit in a foreign context.

For example, Judge Garavelli presents a fascinating analysis of how the American legal system, the seminal influence upon the international development of systems for legal regulation of psychoactive drugs, has been filtered, interpreted and implemented in a variety of different contexts in Italy and throughout Europe. Guido Bolaffi discusses the need in Italy, as a country with an extensive unprotected coastal perimeter, to integrate Italy's national economic, industrial and employment policies with a comprehensive national immigration policy. Professor Guarnieri comments upon the problems created for defendants' rights as a bureaucratically trained and administered judiciary has become increasingly politicized and aligned with the prosecution and concomitantly distanced from the professional bar. Professor La Pergola presents a particularly fascinating analysis of how in the com-

mercial sphere the law of the European Economic Community ("EEC") has quietly supplanted the Italian Civil Code in most trade-related areas. This has happened, La Pergola points out, not by clear invocation of the supremacy of EEC law by the Italian courts, but by simple supplantation of Italian law by EEC law accompanied by the withdrawal of the Italian judiciary from the practice of invoking the Italian Civil Code in the commercial sphere. This makes Italian courts just another arm of the EEC as to most commercial matters, he observes.

IV. AN INDIANA PERSPECTIVE

In my subsequent remarks, I would like to begin by reflecting a bit about the impact in Italy of the supplantation of its Civil Code by the developing commercial law of the EEC. Then I would like to refract this somewhat by commenting upon a similar infusion of the growing and changing international "law merchant" which is occurring in Indiana and in other states of the United States. From these observations, I would then propose aspects of a couple of areas of law of particular interest to international trade lawyers, namely distribution law and corporation law, which appear to have devolved from different philosophical and theoretical viewpoints in Italy as opposed to the United States. Such areas would appear to present fruitful possibilities for future collaboration, analysis and possible harmonization by legal scholars here and in Italy.

V. SOME COMMENTARY CONCERNING THE POTENTIAL IMPACT OF EEC COMMERCIAL LAW UPON ITALIAN CIVIL CODE LAW

From La Pergola's observation that EEC commercial law has in the main supplanted the Italian commercial law contained in the Italian Civil Code, I would like to add that, from the perspective of common law jurisdictions, such as those in the United States, this process of supplantation would appear to have great likelihood of effecting very substantive changes upon the Italian legal system. This is likely because Italy is what is sometimes termed a "code law" country, as opposed to a "common law" country.

Speaking very generally, in code law countries, legislatures propound and codify laws and regulations in considerable detail. As controversies or disputes arise under these codes, the cases are decided by judges with reference to the code as applied to the facts. Generally, except in cases including questions of constitutional breadth, code country judges are not bound to follow prior decisions on comparable facts and issues, although they may do so. In common law terms, the practical

effect of this tends to be to limit the applicability of each case before a court to its particular facts. Thus, in code law countries, as opposed to common law countries, there is less tendency for the meaning of the code to evolve or "creep" by means of binding judicial interpretations, and a greater tendency for the code to continue to mean what it says—or at least what each separate judge in each separate case thinks it says.

By contrast, in a common law country, such as the United Kingdom or the United States, judges' decisions tend to have more precedential value as *stare decisis, et non quieta movere*, and later judges may be more likely to defer to precedents in subsequent decisions. This can, and often does, lead to the creation of a substantial body of so-called "common law" or judge-made law which may have very little, if any, basis in statute.

As La Pergola has observed, Italian courts have largely withdrawn from the application of Italian code law to most commercial disputes and controversies, and have instead applied EEC commercial law as embodied in the Treaty of Rome and Regulations and Directives promulgated thereunder and under the Maastricht Treaty. Thus, in effect, the Italian courts sit as EEC courts in commercial matters. EEC Regulations, Draft Group Exemptions and Directives tend to be broad and complex, requiring court interpretation and development for full elucidation. Furthermore, decisions regarding EEC issues, such as antitrust policy for example, tend to be reported and to have precedential value as *stare decisis*. Consequently, it appears likely that one result of European unification upon Italian law may well be to move Italy along the spectrum away from being a civil code law country and towards being more like a common law country, at least as regards the "law merchant."

VI. THE INTERNATIONAL "LAW MERCHANT" MODIFIES UNITED STATES LAW AND WILL CONTINUE TO DO SO

As many legal scholars have remarked, whereas much of the law of property in the United States has evolved from principles of English common law, much of the commercial law of the United States has been derived from the "law merchant" as developed in European trade fairs since the middle ages. In this regard, the commercial law of a state of the United States, such as Indiana, does not differ as markedly as one might expect from the commercial law of a European country like Italy. Both bodies of law are essentially branches of a common tree. In Indiana, since the 1960s, we have codified much of our commercial law and "law merchant" in the Uniform Commercial Code,

which both imported foreign commercial law concepts and harmonized various state law developments to a very substantial degree.

Nonetheless, Indiana's commercial law has continued to evolve and develop as Indiana businesses engage in ever more international transactions and has been substantively impacted by the United States' adoption (by treaty) of the 1980 United Nations Convention on Contracts for the International Sales of Goods ("U.N. Convention"). Just as La Pergola noted that EEC law had become the law of Italy as regards the "law merchant," the U.N. Convention—unless contractually excluded—has become the law of Indiana and arbitrarily applies to every transnational contract in goods to which Indiana law applies.

As in the case of Italy, there is every reason to believe, as an international body of decisions construing the U.N. Convention develops, that this body of law, decided by courts outside Indiana, will become part of the international common law of Indiana as regards contracts for the sale of goods, just as EEC decisions now automatically become the law of Italy. Consequently, we in Indiana have much to learn from the European and Italian experience with the harmonization of international laws.

VII. DIFFERENCES IN EUROPEAN AND AMERICAN LEGAL PERSPECTIVES AS TO DISTRIBUTION ARRANGEMENTS: INTRIGUING POSSIBILITIES FOR ANALYSIS AND HARMONIZATION

If one were seeking an area of law with potentially the greatest impact upon international trade, one would be hard pressed to find an area more important than that of distribution arrangements. This is because international distribution arrangements embody so many areas of law within them. Distribution agreements involve sales of goods, and thus the laws of purchase; sale; warranty and limitations of warranty; remedy; and products liability and insurance thereagainst. To the extent that sales are financed, distribution contracts involve international financing and banking law, including such things as letters of credit, documentary drafts, security and pledge arrangements and the like. Distribution contracts are a form of license, so they may involve licensing and intellectual property law, including the laws of trade secrets, trademarks, copyrights and patent rights. Because they are transnational, distribution contracts may involve questions of the choice of law and forum, conflicts of law, dispute resolution mechanisms such as arbitration and mediation, political risk insurance questions, and the like. Locally applicable principles of agency, termination indemnities, employment law questions, tax withholdings from royalty and product payments, the enforceability of non-competition and con-

fidentiality covenants, and foreign exchange controls and the convertibility and repatriability of payments may be involved.

Yet looming above, overarching and dominating, and to a degree integrating all of the aspects of international distribution contracts are international antitrust concerns, and, in particular, questions involving supplier, distributor, customer and territorial restrictions upon both suppliers and distributors party to a distributorship contract. The profound differences between the American and European views of such restraints from an antitrust standpoint can probably best be illustrated by a discussion of the various possible interpretations of the word "exclusive" in an international distributorship antitrust context. As shall be indicated, the word "exclusive" is decidedly ambiguous even in an entirely American, or in an entirely European context. Yet Americans and Europeans tend to interpret the word "exclusive" from an antitrust standpoint in profoundly different ways—with the typical European interpretation being substantively less exclusive than is the typical American interpretation of the word.

A. *In the United States, Suppliers Have Substantial Freedom to Place Customer and Territorial Restraints Upon Both Themselves and Their Distributors*

In this country, where customer, supplier and territorial restrictions in distribution arrangements are horizontal—between two companies on the same level of distribution, for example, two suppliers or two distributors—courts applying antitrust laws tend to look pejoratively at both sides of the bargain. In other words, *both* the first distributor's agreement not to sell in the second distributor's territory *and* the second distributor's agreement not to sell in the first distributor's territory are judged harshly, and in fact deemed *per se illegal*; that is, antitrust injury to competition is *presumed*.

This is not always the outcome in the United States, however, where the restrictive agreement is vertical—entered into between a supplier and a distributor at different levels of distribution. In vertical distribution arrangements, the restrictions a supplier puts on its distributor historically have been viewed harshly. This is true in the case of territorial restrictions pursuant to *United States v. Arnold Schwinn & Co.*[1]

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1. 388 U.S. 365 (1967) (which held that absolute territorial restraints which prevented a dealer from selling outside an exclusive assigned territory were *per se* illegal under the Sherman Antitrust Act, 15 U.S.C. § 1 (1992 Supp. IV).

However, the restrictions the distributor puts on its supplier by agreement, such as the supplier's agreement to sell "exclusively" to its dealers—to sell to no other dealer but the chosen dealer—is essentially viewed as innocuous and permissible. The supplier's right to foreclose itself from dealing with other dealers, the exercise of which would be *per se* illegal in a horizontal arrangement, is usually presumed absolutely legal and unobjectionable in the United States.

Nor did this change when *Schwinn* was overruled in *Continental T.V., Inc. v. GTE Sylvania Inc.*[2] In *Sylvania*, the distributor had been limited to distributing Sylvania brand television sets from a single location, but, in fact had ignored this restriction and had trans-shipped its *Sylvania* sets for sale from another location. After Sylvania enforced this vertical (supplier to dealer) restriction of the distributor contract by terminating the dealer, the dealer sued, claiming that Sylvania's enforcement of the contract's express restrictions was unfair under the antitrust laws.

The *Sylvania* Court noted that such vertical restrictions—and the court viewed all vertical non-price restrictions equivalently—indeed restricted the competitive freedom of one or more distributors of goods identified by one trademark. Nonetheless, the *Sylvania* Court overruled *Schwinn* and held that such restrictions were not to be struck down under the antitrust laws so long as such restrictions tended to benefit the ultimate consumer by enhancing the competition between such trademarked products and similar products bearing different trademarks.

As shall be examined *infra*, the European rule applicable in Italy subjects *both* the supplier's restrictions on its dealers *and* the dealer's restrictions upon the supplier to strict scrutiny. The result is that an "exclusive" dealing agreement in Italy, as a matter of law is far less exclusive than a comparable exclusive dealing arrangement here. The word "exclusive" simply has a different legal meaning in Italy than it does in the United States.

B. *In Italy, Absolute Supplier, Customer and Territorial Restraints Are Not Permissible in Distribution Arrangements*

Just as the United States has antitrust laws, so does Europe. In Italian courts in commercial cases, sitting as EEC tribunals, the applicable regulations are called the "Treaty of Rome." Distribution agreements for an EEC company potentially violate Article 85(1) of the Treaty of Rome, unless they comply with strict guidelines. If they

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2. 433 U.S. 36 (1977).

do not so comply, such agreements may be nullified pursuant to Article 85(2) of the Treaty of Rome.

Article 85(1) of the Treaty of Rome provides as follows:

> The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market and in particular those which:
> (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
> (b) limit or control production, markets, technical development, or investment;
> (c) share markets or sources of supply;
> (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
> (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

This provision is of a scope comparable to that of Section 1 of the Sherman Act,[3] construed as to vertical distribution arrangements in *Schwinn* and *Sylvania*. It potentially forbids almost any limitations upon business conduct agreed to by two or more parties.[4]

Agreements, or because of the "doctrine of severability," at least provisions of agreements, violating Article 85(1), may be found null and void pursuant to Article 85(2) of the Treaty of Rome. Although civil fines under Article 15(5)(a) of Regulation 17/62 of the Treaty of Rome are unlikely to be imposed because of a distribution violation, there is a real potential for a supplier to lose rights to trade secrets and even the rights to be paid for delivered goods, since key provisions, or even the whole distribution agreement, may be held unenforceable.

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3. 15 U.S.C. § 1 (1992 Supp. IV).

4. Bear in mind, however, that arrangements to distribute goods in European Common Market countries such as Italy may be required to comport with certain of the individual laws of such countries as well as with EEC antitrust laws broadly applicable in such countries.

What should an Indiana supplier do before entering into a standard distribution arrangement with an Italian distributor? There are two basic alternatives: (1) to obtain a specific exemption by means of a notification procedure available under the Treaty of Rome, or (2) to make sure the agreement contains no objectionable provisions and/or is exempt pursuant to a group exemption not requiring notification.

1. *Notification*

If the supplier is reasonably certain, based upon antitrust analysis, that the arrangement will violate European antitrust law, the supplier should notify the agreement to the EEC, thereby requesting an exemption from EEC antitrust laws. Pursuant to interpretations of Article 85(3) of the Treaty of Rome, notifying even one of a number of standard distribution agreements to the EEC will stay the possibility of the imposition of any fines during the period when the exemption is being considered by the EEC's "Commission of the European Communities" ("EEC Commission"). This notification period may take up to five years at present. Validation by exemption of but one of such standard agreements has been held by case law to validate all of such agreements.

The exemption by notification procedure in the EEC therefore constitutes a kind of "rule of reason" approach to antitrust law exemption similar to that developed under the Sherman Act as exemplified by *Sylvania*; but it is one which is so institutionalized, bureaucratic and slow as to be of little practical use to fast-moving businessmen. Although there is being developed a quicker procedure to obtain "comfort letters" from the EEC Commission during the lengthy exemption procedures following notification, it makes more economic sense to include in distribution agreements only provisions which have been held unobjectionable under Article 85(1) of the Treaty of Rome and/or those which enable the distribution arrangement to fall within specific group exemptions available under Article 85(1).

2. *Unobjectionable Provisions*

The following general types of clauses have been held acceptable despite Article 85(1). Unless used in combination to achieve a proscribed result, such as price fixing or unpermitted market foreclosure of competitors, agreements containing only such clauses need not be notified to the EEC.

a. *Dealer Competence*

Reasonably necessary requirements for technical competence, professional training or a full-time staff are permissible.

b. *Suitable Premises*

Requirements for suitably equipped and appearing premises to be used exclusively for the subject goods during normal business hours are permissible.

c. *Marketing*

Suppliers may require use of prescribed advertising, display of goods, marketing inventory in good condition, use of the suppliers' trademarks, supply of goods in original packaging and cooperation in marketing efforts.

d. *Adequate Inventory*

Cases have held it reasonable for a supplier to require that a distributor stock a three months supply of inventory of the supplier's goods.

e. *Servicing of Goods*

It has been held reasonable to require dealers to service goods for six months after sale unless the goods are defective, altered or misused.

f. *Exports*

Exports from the EEC may be prohibited unless such restrictions are contrary to treaty.[5]

g. *Sales Information*

Suppliers may demand that dealers provide information regarding customers, pricing and discounts granted, if such demand is not ancillary to a price fixing conspiracy.

h. *Term*

Distribution agreements may be for a fixed term which may be renewed, but which cannot explicitly be made automatically renewable.

i. *General Terms*

Provisions for retention of title until goods are paid for, consignment sales, arbitration and choice of both law and forum are usually acceptable.

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5. However, restrictions by an American supplier against a dealer exporting to the United States could potentially violate the United States antitrust laws.

j. *Intellectual Property*

Requirements for non-exclusive grantbacks of improvement licenses, for sharing of information regarding improvements, for confidentiality of know-how, and for quality control generally are permissible.

3. *Group Exemption Regulation 1983/83*

In addition to the general terms set forth above, distribution arrangements containing certain provisions for exclusivity need not be notified to the EEC Commission, provided such provisions fall within one of the "group exemptions" available under Article 85(1) of the Treaty of Rome. The most useful, Regulation 1983/83, which exempts from notification certain arrangements for the distribution of goods, replaced the former group exemption, Regulation 67/67.[6]

In addition to the unobjectionable provisions outlined above, which are broadly applicable to all EEC distribution arrangements, the *only* additional restrictions permitted under the Regulation 1983/83 group exemption are the following and, as we shall examine *infra*, these are not as far-reaching as their plain language would suggest: (1) the supplier may make an arrangement to supply certain goods to no more than one distributor per territory, which territory may be the whole EEC; (2) the supplier may reserve the right to alter the territory in a non-punitive way; (3) the supplier may agree not to supply anyone but the distributor, including end users, in the territory; (4) the distributor may agree not to manufacture or distribute competing goods and not to buy the subject goods from anyone but the supplier; i.e., not from other distributors; (5) the distributor may agree not to have offices, supply or repair depots for goods outside the territory and not to solicit orders from customers outside the territory; and (6) the distributor may agree to purchase full lines and minimum volumes of the "exclusive" goods.

It is important to note that, despite apparent language to the contrary in Regulation 1983/83, there are very real limits to the types of "exclusivity" permitted under Regulation 1983/83. For example, the supplier may not agree to refuse direct orders from customers in the territory for delivery outside the territory. Neither may the supplier prohibit the distributor from accepting unsolicited orders from customers outside the territory. A supplier may reserve "house accounts" to itself, but only if these accounts are end users and not other distributors.

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6. Regulation 1983/83, 2 Common Mkt. Rep. (CCH) ¶ 2730.

It is these limitations upon the concept of permissible "exclusivity" under the Treaty of Rome, which we shall now explore in greater depth, because the author believes that this analysis demonstrates that what are called "exclusive dealing arrangements" in Italy and the rest of Europe are not understood as such in the United States. Some hints as to this can be found in the language of Regulation 1983/83 itself. For example, Regulation 1983/83 is entitled "On the Application of Article 85(3) of the Treaty to Categories of Exclusive Distribution Agreements."[7] But paragraph (11) of the preambles to Regulation 1983/83 goes on to state as follows:

> (11) Whereas consumers will be assured of a fair share of the benefits resulting from exclusive distribution only if parallel imports remain possible; *whereas agreements relating to goods which the user can obtain only from the exclusive distributor should therefore be excluded from the exemption by category; whereas the parties cannot be allowed to abuse industrial property rights or other rights in order to create absolute territorial protection*; . . . .[8]

Article 3 of Regulation 1983/83, entitled "Restrictive Agreements Prohibited," goes on to *prohibit* exclusive distribution agreements whereunder

> (c) users can obtain the contract goods in the contract territory only from the exclusive distributor and have no alternative source of supply outside the contract territory; . . . .

It is when one explores the actual "exclusive dealing" cases in Europe that it really becomes clear how limited "exclusivity" in distribution arrangements really is in Italy and other EEC countries. There is ample additional and consistent precedent in Europe for the proposition that no one can exercise an absolute product distribution monopoly which will prohibit or prevent a supplier, or persons buying from the supplier, from selling the same goods in competition with the supplier's "exclusive" distributor.

In *Case 22/71, Béguelin Import Co. v. G.L. Import Export S.A.*, for example, the Japanese supplier had "exclusively" licensed a French subsidiary of its Belgian distributor to distribute its unique, trademarked cigarette lighters in France.[9] The same lighters began to be distributed

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7. Regulation 1983/83, 2 Common Mkt. Rep. (CCH) ¶ 2730.

8. Emphasis added.

9. [1971-1973 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8149, 3 [1971-1973] E.E.C. Comp. L. Rep. 757 (November 25, 1971).

in France by another French company. The French distributor sued to enforce its "exclusive" rights against its French rival and its foreign supplier. The French distributor lost, the court holding that the Treaty of Rome's "exclusive" distributorship regulation, Regulation 67/67 (the predecessor of Regulation 1983/83), was inapplicable to exempt "exclusive" distribution agreements which forced *all* French purchasers to buy the unique lighter from only *one* designated French distributor. The tribunal consequently nullified the "exclusive" distributor agreement pursuant to Article 85(2) of the Treaty of Rome.[10]

In *Joined Cases 56 & 58/64, Establishments Consten SARL and Grundig-Berkaufs-GmbH v. Commission*, a French plaintiff had obtained an "exclusive" distributorship for all of France for all "Grundig" brand radio receivers, recorders, dictaphones and television sets.[11] The "exclusive" French distributor then sued another French wholesaler for buying the same "Grundig" brand goods for resale in France, alleging unfair competition and trademark infringement. The French company lost on the grounds that "exclusive" distribution agreements which foreclose all other distributors from the market are illegal in Europe. The French distributor was therefore

> required to refrain from any measure likely to obstruct or impede the acquisition by third parties, in the exercise of their free choice, from wholesalers or retailers established in the European Economic Community, of the products set out in the contract, with a view to their resale in the contract territory.[12]

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10. *Accord* Commission Decision of 21 December 1976 relating to a proceeding under Article 85 of the EEC Treaty (IV/28.812 Theal/Watts), 1977 O.J. (L 39) 19, 3 [1971-1973] E.E.C. Comp. L. Rep. 129 (February 10, 1977); Case 28/77, Tepea BV v. Commission, 1978 E.C.R. 1391, [1977-1978 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8467, 6 [1978-1979] E.E.C. Comp. L. Rep. 831 (June 20, 1978), ("exclusive" Dutch distributor of trademarked record player cleaning products was unsuccessful in preventing other Dutch wholesalers from ordering the "exclusive" products for resale *and* from using the "exclusive" trademarks and actually fined for attempting to enforce its rights in concert with its supplier in such a way as to deny Dutch purchasers other sources of supply for the trademarked products in question).

11. [Transfer Binder 1964-1971] Common Mkt. Rep. (CCH) ¶ 8046, 1 [1964-1971] E.E.C. Comp. L. Rep. 547 (July 13, 1966).

12. *Consten, supra* note 11, at 552; *See also* Case 78/70, Deutsche Grammophon Gesellschaft mbH v. Metro-SB-Grossmärkte GmbH & Co. KG, 1971 E.C.R. 487, [Transfer Binder 1971-1973] Common Mkt. Rpt. (CCH) ¶ 8106 (German holder of "exclusive" rights to the thing itself—copyrighted phonograph records—held not entitled to prevent wildcat distributors from purchasing and reselling the proprietary items in Germany, since enforcement of such rights would tend unlawfully to partition the EEC).

However, when private label goods of the same type are available, it is permissible in Europe to suppress intra-brand competition, as in *Sylvania*, by means of "exclusive dealing" arrangements.[13] In *Case 96/75, EMI Records Ltd. v. CBS Schallplatten GmbH.*, "exclusive" French holders of "Columbia" record distribution and trademark rights, in fact, *were* permitted to prevent the United States supplier from selling these unique copyrighted records to competing French wholesalers for resale in France.[14] The court's reasoning? The United States manufacturer needed only to obliterate the protected trademarks and to privately label these same unique, copyrighted records in order to be allowed to sell these same unique copyrighted records to French wholesalers for resale in France. French purchasers were not therefore denied the right to purchase the things themselves, the unique, copyrighted records, from either the "exclusive" French distributor, or from other French wholesalers sourcing the same unique copyrighted records from the same United States source under private label. In other words, in Europe, even "exclusive" distribution contracts for unique trademarked goods are not permitted to prevent suppliers from making private or alternative label sales of these same unique goods in the "exclusive" European territories under different marks.

Some other European limitations upon "exclusivity" in distribution arrangements are perhaps worth mentioning. Regulation 1983/83 may not be used with respect to distribution arrangements between two competitors or potential competitors if the gross sales of each are very substantial, and, in fact, cross agreements for "exclusive" distribution between competing suppliers of any size are prohibited. As suggested above, the "exclusivity" granted cannot further a monopoly making the supplier the sole source of supply of the "exclusive" goods in the "exclusive" territory. The supplier cannot agree to police, punish or terminate other distributors in other territories for invading the "exclusive" territory.

As previously indicated, suppliers should use caution in enforcing intellectual property rights to promote "exclusivity," although, as suggested by the *EMI Records* cases, suppliers and, possibly, distributors, may be able to use trademark rights to exclude trademarked goods

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13. *See, e.g.*, Case 51/75, EMI Records Ltd. v. CBS U.K. Ltd., 1976 E.C.R. 811, [Transfer Binder 1976] Common Mkt. Rep. (CCH) ¶ 8350 (June 15, 1976); Case 86/75, EMI Records Ltd. v. CBS Grammofon A/S, 1976 E.C.R. 871, [Transfer Binder 1976] Common Mkt. Rep. (CCH) ¶ 8351 (June 15, 1976).

14. 1976 E.C.R. 913 [Transfer Binder 1976], Common Mkt. Rep. (CCH) ¶ 8352 (June 15, 1976).

from outside the EEC. If the supplier owns over 50% of the distributor, the Regulation 1983/83 exemption will be unavailable. However, because there is no "intra-company conspiracy" doctrine in the EEC, "exclusive" distribution through a wholly-owned subsidiary does not violate Article 85(1).

As suggested above, it would appear that significant differences exist between the permissible range of "exclusivity" in European distributorship arrangements as opposed to those in the United States. The study of the possible harmonization of these concepts by legal scholars in the United States and Italy could do much to eliminate some of the legal uncertainties between Europe and the United States of trading through distributors.

VIII. DIFFERENCES IN APPROACH BETWEEN ITALIAN AND UNITED STATES CORPORATION LAWS SUGGEST INTERESTING OPPORTUNITIES FOR ECONOMIC AND LEGAL ANALYSIS

It is beyond the scope of this article to do an in depth analysis and comparison of the legal attributes of limited liability companies in Italy and in the United States. However, it is intriguing that, in Italy, limited liability appears to be a privilege purchased in effect by the enforcement of relatively strict minimum capital guidelines. By contrast, in the United States there has been a "race to the bottom" amongst our various state incorporation statutes with the result that, in most states, a promise to put up $1,000 and minimal adherence to corporate law formalities affords corporate shareholders limited liability beyond their $1,000 pledge, which they need not necessarily even fulfill.

True, in the United States in order to sell stock to the public, corporations must make public disclosures of their finances and, before providing financing, lenders may insist on representations and warranties of corporate soundness, as well as upon shareholder guaranties as a precondition to the extension of credit. But these kinds of safeguards are designed to protect potential lenders or shareholders. They offer no real protections or assurances to the public that the limited liability company is in fact a solid, solvent entity. Furthermore, absent fraud, American corporate directors are liable only for breaches of duties of loyalty (self dealing, theft of corporate opportunity and the like) and care (virtually total stupidity). Furthermore, the new limited liability company statutes would appear to offer the general public no more assurances of the solvency of these new limited liability companies than exists with respect to corporations.

Contrast this system (albeit oversimplified by the writer) in the American corporations with the situation in Italy. In Italy, there are

essentially two types of limited liabilities companies—small and large. There are other types of legal entities under Italian law, but only two with the attribute of limited liability for all owners. The large Italian corporation or *societa per anzioni*, or S.p.A., requires a minimum investment and maintenance capital of at least 200 million lira, or over $100,000. The small Italian corporation, or *società à responsabilità limitata*, or S.r.l., must have and maintain a minimum capitalization of at least 20 million lira, or over $10,000.[15]

What is interesting about Italian limited liability companies is that they must *maintain* their capital. Every year they must file financial reports in a prescribed, precise format[16] with the shareholders and also in an official Italian Business Register, together with a report of the directors. If these annual statutorily-mandated reports reveal that the Italian corporation has lost over one-third of its capital, Article 2446 of the Italian Civil Code mandates that the shareholders meet to consider the situation, and to reduce the capital of the corporation, which cannot be reduced below the statutory minimum. Article 2447 of the Italian Civil Code further provides that if the capital goes below the statutory minimum, the corporation's capital must be increased, or else the corporation must be liquidated, or the limited liability feature of the corporation must be eliminated and the corporation must be reformed as another type of legal entity not having the attribute of limited liability.

It would be most interesting to evaluate the question whether these stringent standards requiring shareholders and directors of Italian limited liability companies to maintain minimum capital have the effect of enhancing trade, since unsecured creditors from these requests have some assurances from these minimum capitalization requirements that they are dealing with a legally solvent company. Conversely, it would be interesting to note whether capital formation in Italy is hampered by the statutory exposure for investors in risky ventures. Probably the concomitant effect of the Italian Bankruptcy Law, Royal Decree of March 16, 1942, Number 267, which can provide penal sanctions from six months to two years imprisonment for "simple bankruptcy" and from three to ten years imprisonment for "fraudulent bankruptcy," also should be evaluated in this regard.

Given the wave of corporate failures and bankruptcies in the United States over the past decade, however, it might well be appropriate for

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15. *See generally* Italian Company Law, Italian Civil Code, Book V, Articles 2325 to 2548.

16. This format now has been modified by the Fourth EEC Directive.

American and Italian legal scholars to investigate the possible effects in this country of more stringent solvency and minimum capital requirements for United States limited liability companies.

IX. CONCLUSION

This Italian law symposium is a timely and salutary addition to our jurisprudence, affording us both a refraction of and a reflection upon our own legal system. Indiana businesses and lawyers are increasingly working with Italian businesses and lawyers in world markets and need better to understand the compatibilities, incompatibilities and cross-fertilizations which are resulting. Furthermore, ambiguities as regards the permissible ranges of restrictions in distribution arrangements and a different, more restrictive Italian approach to requiring the solvency of limited liability corporations afford possible avenues for further study and possible harmonization by Indiana and Italian legal scholars.