

## 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.<sup>1</sup> We talked briefly

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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 Investiture 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 to 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, accommodating 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 destabilization 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.<sup>2</sup>

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*,<sup>3</sup> 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.<sup>4</sup>

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 criminal 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,

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

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