Prof. Dennis Campbell (ed.)

Transnational Legal Practice

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Edited by

Prof. Dennis Campbell

Director, Center for International Legal Studies,
Salzburg, Austria, and Director of European Programs,
University of the Pacific, McGeorge School of Law

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Inquiries concerning the activities of the Center should be directed to the Center for International Legal Studies, Box 59, A5033 Salzburg, Austria.

THE AUTHORS

Obed Y. Asamoah: Bruce-Lyle, Bannerman and Asamoah, Accra, Ghana.

Adolfo S. Azcuna: Bengzon, Zarraga, Narciso, Cudala, Pecson, Azcuna and Bengson, Manila, Philippines.

Paul D.B. Baker: Madden, Butler, Elder & Graham, Melbourne, Australia.

Wahé Balekjian: Head, Department of European Law, University of Glasgow, Glasgow, Scotland.

Stephane Bertouille: Puelinckx, de Scheemaecker and Dillemans, Brussels, Belgium.

Dennis Campbell: Director, Center for International Legal Studies; Director, European Programs, University of the Pacific, McGeorge School of Law, Salzburg, Austria.

Kenneth G. Chrystie: McClure, Naismith, Brodie and Company, Glasgow, Scotland.

Jack J. Coe Jr.: Assistant to the Director, European Programs, University of the Pacific, McGeorge School of Law, Salzburg, Austria.

Anthony Collins: Eugene F. Collins and Son, Dublin, Ireland.

T.J.B. Costello: Boodle and King, London, England.

Denis Debost: Debost, Falque, Carpentier and Barbé, Paris, France.

Rudolf du Mesnil de Rochemont: Loschelder, Heuking, Kühn and Partner, Düsseldorf, Germany.

Rafael Echegoyen: J. and A. Garrigues, Madrid, Spain.

Michael Fox: Herzog, Fox and Company, Tel Aviv, Israel.

Ramon R. Franco V.: Franco and Franco, Panama, Panama.

Teodoro F. Franco: Franco and Franco, Panama, Panama.

Tsuyoshi Fukuda: Fukuda and Tsuchiya, Tokyo, Japan.

Mario Paolo Ginelli: Studio Legale Bianchi ed Associati, Milan, Italy.

Antony B. Hadjioannou: K.S. and C.K. Kyriakides, Athens, Greece.

Anis F. Kassim: Al-Saleh and Graham and James, Safat, Kuwait.

Ihor Konyk: Puelinckx, De Scheemaecker and Dillemans, Brussels, Belgium.

J. Korsø Jensen: Kønig, Homann, Homann, Korsø Jensen and Steen Hansen, Copenhagen, Denmark.

Costas K. Kyriakides: K.S. and C.K. Kyriakides, Athens, Greece.

Jean-Flavien Lalive: Lalive and Budin, Geneva, Switzerland.

William T. McKay: Madden, Butler, Elder and Graham, Melbourne, Australia.

Carsten Mellbye: Krefting, Løchen, Ødegard and Sandven, Oslo, Norway.

Antonio Mendes: Pinheiro Neto, Sao Paulo, Brazil.

Margareta Nilsson: Research Assistant, Faculty of Law, University of Lund, Lund, Sweden.

Michał Płachta: Faculty of Law, Jagiellónski University, Kraków, Poland.

Robert Salkin: General Counsel, W.H.B. Chan and Company, Los Angeles, California.

Eugen Salpius: Law Offices of Fritz Janetschek, Salzburg, Austria.

J.A. Schiltkamp: Law Offices of J.A. Schiltkamp, Curacao, Netherlands Antilles.

J.S.H. Skrine: Skrine and Company, Kuala Lumpur, Malaysia.

György Szilàgyi: Lawyers Working Community Number 52, Budapest, Hungary.

S.M.C. Thomson: Kaplan and Stratton, Nairobi, Kenya.

J.J. van Wessem: Loeff and van der Ploeg, Rotterdam, The Netherlands.

Jan Waselius: Roschier, Holmberg and Waselius, Helsinki, Finland.

PREFACE

That law and legal systems are well embarked on a process of transnationalization is a development recognized by numerous writers. The process has gained momentum with the growing need for cross-boundary approaches to protection of the environment, regulation of multinational enterprise, and the meeting of issues raised by the mobility of labor, the accrual and portability of welfare rights, and the existence of commodity cartels. In its most direct impact on the world's legal profession, the process has accelerated due to the simple fact that more firms are 'doing business abroad' and thus implicating their domestic attorneys in the intricacies of a foreign legal system.

Perhaps an accurate measure of the extent of the legal transnationalization process is the fact that there has been movement to better regulate the ability of the foreign lawyer to function, at least in some carefully-structured capacity, in various legal systems. A recent report of the American Bar Association concerned the function and regulation of foreign lawyers in nine jurisdictions of the United States (California, Connecticut, District of Columbia, Florida, Illinois, Massachusettes, New York, Pennsylvania, and Texas) and the function and regulation of American attorneys in nine countries (Belgium, Brazil, Canada, England, France, Germany, Italy, Japan, and Mexico). A recent directive of the Council of Ministers of the European Communities, adopted to 'facilitate the effective exercise by lawyers of freedom to provide services', relates only directly to members of the bars of the ten Member States, but the domestic legislation it may provoke could have a positive impact on the practice situation of other foreign lawyers, as well. Finally, the American Bar Association's Section on International Law has proposed the formation of a committee to work with bar organizations in other countries, the International Bar Association, the Inter-American Bar Association, and the *Union Internationale des Avocats* in matters concerning practice by lawyers in or involving the laws of more than one country.

Indeed, this amounts to recognition of an emerging reality: the transnational lawyer. What follows here is further recognition of this increasingly important dimension of legal practice. The introductory chapter seeks to portray the development, nature, and tone of transnational practice – and to document its significance. Thereafter, each practitioner-author examines those issues which would confront the foreign lawyer who seeks to enter that jurisdiction, either to practice on a regular basis or merely for the purpose of executing an isolated transaction.

Where relevant to the particular country, each author has sought to address the following issues: (1) the general requirements for the practice of law; (2) restrictions, if any, on non-citizens who wish to practice; (3) registration or other formalities imposed on lawyers licensed in other jurisdictions who wish to establish or conduct business in the respective country; (4) the current extent of activity by foreign practitioners in the respective country; (5) the nature of

activities permitted to foreign practitioners; (6) the extent and nature of co-operation and collaboration between foreign practitioners and local counsel; (7) the most effective means by which foreign practitioners can identify and contact appropriate local counsel, and (8) future developments, if any, which may affect the situation of the foreign practitioner.

In short, each chapter attempts to provide an introduction and set of guidelines for the foreign lawyer who may have transactions to undertake, either directly or through local counsel, in the respective country.

Each chapter has been prepared under the terms of laws, regulations, and practice as they prevailed in February 1981.

Dennis Campbell
Salzburg, Austria

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MARIO PAOLO GINELLI

Introduction

The legal profession in Italy is an autonomous one of an 'intellectual' nature as contemplated by Sections 2229 and following of the Italian Civil Code. Those sections are part of the provisions which, under Title III of Book V of the Civil Code, deal with autonomous work, including that of artisans, artists and similar independent workers, that is, one who '... binds himself to perform a piece of work or render a service for compensation, primarily by his own effort and without a relation of subordination with respect to the principal ...' (Section 2222, Civil Code).

Section 2229, paragraph 1, Civil Code, deals with the intellectual profession and states that 'the law specifies the intellectual professions for whose exercise registration in special rosters or lists is required'.

According to Section 2231, paragraph 1, Civil Code, 'When the exercise of a professional activity is conditioned upon registration in a roster or list, the services rendered by a person who is not registered do not entitle him to an action for payment of compensation'. In such a case, the duty to pay compensation can be construed only as a 'moral' obligation in the meaning of Section 2034, paragraph 1, Civil Code, whereby 'recovery of that which was spontaneously given in performance of moral or social duties is not permissable, unless the performance was made by a person lacking capacity'.

The above rosters or lists are compiled by public agencies or organizations which, on one side, protect the autonomy and freedom of those exercising intellectual professions (in our case, attorneys-at-law) and, on the other side, constitute a guarantee for the public. The latter is achieved through compliance with laws and regulations governing registration on those rosters or lists, granting to those public agencies or organizations disciplinary powers aimed at ensuring compliance with professional ethics. This is particularly important in the legal profession insofar as the practicing attorney collaborates in the administering of justice, one of the fundamental functions of a state.[1]

Governing Laws – Distinction between Avvocato and Procuratore

The legal profession in Italy is governed by Law Number 36 of 22 January 1934, to which numerous amendments have been made, especially by Law Number 91 of 17 February 1971. These amendments, however, have not changed the substantial features of the original Law 36/34 (hereinafter referred to as the 'Professional Law').

Prior to the enactment of the Professional Law, a distinction was made between the profession of *avvocato* and that of *procuratore*. The *avvocato* was the attorney who defended the party and also pleaded on his behalf, while the *procuratore* only represented the party in court by signing writs of summons', briefs, other deeds, making appearance and performing other procedural activities. Such distinction somehow corresponds to *avocat* and *avoué* in France, and to 'barrister' and 'solicitor' in England. The Professional Law, while maintaining the two categories of *avvocato* and *procuratore*, has substantially unified these professions with some differences which are mostly of a technical nature.

The *avvocato* can exercise his profession before all Courts of Appeal, *Tribunali* and *Preture*[2] in Italy (Article 4 of the Professional Law), while the procuratore can exercise his profession only before the Court of Appeal, *Tribunali* and *Preture* within the District of the Court of Appeal covering the *Tribunale* in which roster he is registered (Article 5 of the Professional Law).[3]

A difference also can be found in Articles 83 and 87 of the Code of Civil Procedure. Article 83 states that, when a party is represented in court by a *procuratore*, the latter must have written power of attorney issued by the party. Article 87 states that the party can be defended by one or more *avvocati* without mentioning the need for a written power of attorney. A further distinction is made as regards fees which, as we shall see herebelow, are established by ministerial decree and are lower for procuratori than for avvocati.

The distinction between *avvocato* and *procuratore*, however, is rather meaningless nowadays inasmuch as parties usually are represented by attorneys who act as *avvocato* and *procuratore* at the same time. This is confirmed also by the fact that all legislative proposals for reforming the exercise of the legal profession which were presented in the last thirty years contemplate the abolition of the distinction between *avvocato* and *procuratore*. Therefore, for the sake of simplicity, hereinafter we shall use the term attorneys-at-law when referring to both *avvocati* and *procuratori*, unless otherwise expressly stated.

Restrictions

Article 1 of the Professional Law expressly states that an attorney-at-law must be registered in a roster. This shall be discussed more in detail below. It is a controversial issue as to whether this requirement refers only to representation and defense of the party in court, or also to out-of-court assistance.

Thus far, precedents have held that the above requirement refers only to representation and defense in court, since the Italian legal system accepts the principle of free enterprise (Article 41 of the Constitution). This could be held to be the prevailing trend of interpretation as confirmed by some decisions of the Court of *Cassazione* (the Supreme Court).[4]

However, a more recent decision of the Court of *Cassazione*[5] has taken a restrictive view, inasmuch as it has held that the registration of an attorney-at-law in a roster is not necessary only if the attorney performs consultancy services on a non-continuous basis.

The requirement of compulsory registration has been challenged in some

cases as being unconstitutional insofar as it conflicts with Article 4 of the Constitution which guarantees the right to work. Nevertheless, this conflict with the Constitution has been held by the Court of *Cassazione* to be manifestly without grounds, since the right to work and the freedom of choice as to the type of work lawfully may be restricted in order to protect the interests of the community.[6] In this connection, it is worth noting that Article 33, paragraph 5, of the Constitution contemplates a qualifying state examination in order to exercise an intellectual profession in Italy, such as that of attorney-at-law, doctor of medicine, architect or engineer.

The right to defend oneself also should be taken into consideration. This right seems to be excluded by Article 6 of the Professional Law, but Article 82, paragraph 1, of the Code of Civil Procedure expressly permits a party to defend himself without benefit of counsel before *Giudici Conciliatori* (a kind of justice of the peace), who handle civil cases of little value.[7] This also is permitted by Article 82, paragraph 2, of the Code of Civil Procedure in civil cases handled by *Pretori*, when the *Pretore* authorizes the party to do so in consideration of the nature and size of the suit. In addition, Article 86 of the Code of Civil Procedure states that the attorney-at-law, who is registered in the pertinent roster for a given court, can defend himself in civil suits before that court.

The situation differs as regards criminal matters. According to Article 125 of the Code of Criminal Procedure, the accused party must be defended by an attorney-at-law, upon penalty of nullity of the procedure, except for those cases involving crimes that are punishable by a fine not exceeding 24.000 Lire or one month's imprisonment. It has been held by some courts that Article 125 of the Code of Criminal Procedure might conflict with Articles 2 and 24, paragraph 2, of the Constitution. Article 2 recognizes and guarantees the inviolability of human rights, while Article 24, paragraph 2, states that the defense of each citizen is an inviolable right. The Constitutional Court has ruled against this assumption in judgment Number 125 of 10 October 1979.[8]

It also has been contended that Article 125 of the Code of Criminal Procedure is in conflict with Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which was stipulated in Rome on 4 November 1950 and includes the right to defend oneself. This, however, has been overruled by the Court of *Cassazione* in its judgment of 18 November 1972.[9]

Rosters for the Exercise of the Legal Profession

As noted above, law practice in Italy is conditioned upon registration in rosters of *avvocati* and *procuratori.* Each *tribunale* has its own rosters which list all *avvocati* and *procuratori* residing in the territory over which the *tribunale* has jurisdiction. According to Article 27 of the Professional Law, and with the exceptions set forth below, registration in the roster of *avvocati* presupposes a period of registration in the roster of *procuratori.* The requisites for registration in the roster of *procuratori* are listed in Article 17 of the Professional Law and

are: (a) Italian citizenship; (b) capacity to exercise civil rights; (c) upright and honest conduct; (d) a doctor of laws degree from an Italian university; (e) at least one year's successful practice in a law firm; (f) passing the pertinent state examination; (g) residency in the main town of the circuit of the tribunale in which registration is requested.

The above requisites are those resulting from amendments to the Professional Law by Law Decree Number 215 of 7 April 1944 and Law Decree Number 374 of 5 May 1947, which made access to law practice easier than it was in the past. The two-year practice period was reduced to one year and, most important, there is no longer a closed number of candidates admitted to the roster, as was the case prior to the amendments of 1944.

Following are some observations on the requisites for registration in the roster of *procuratori* as set forth above:

a. Today, Italian citizenship does not have the importance that it had in the past. Foreigners can be registered in an Italian roster, provided they are citizens of European Communities (EEC) Member States. This is the result of a ruling of the Court of Justice of the European Communities of 21 June 1974 in case 2/74, *Reyners v. Belgium.*[10] The judgment is based on the holding that Article 52 of the EEC Treaty is a directly binding provision notwithstanding failure to adopt directives contemplated by Articles 54, Number 2 and 57, Number 1 of the Treaty. The ruling specifies that the activities of an attorney-at-law, either those of consultant and counsel or those of representation and defense of parties in court, cannot be deemed to fall within the exceptions set forth in Article 55, paragraph 1, of the Treaty since those activities 'do not fall within the category of the exercising of public powers'. It should be added that, following the above mentioned judgment, there were no further amendments to the Professional Law as regards citizenship.[11] Some local bar associations, which have the task of verifying the existence of the conditions for admission to the roster (Article 16 of the Professional Law) have upheld the interpretation of the above-quoted sentence, considering Article 52 of the EEC Treaty to be directly effective. Such orientation has been followed, for example, by the Milan Bar Association, but there are no decisions on the subject by the National Board of Bar Associations which, as we shall see, reviews appeals of decisions of various local bar associations.

b. Concerning capacity to exercise civil rights, the Criminal Code contemplates a series of accessory punishments in addition to imprisonment. They are listed in Articles 28-38 and include debarment from public offices and prohibit the practice of certain professions. The satisfaction of this requisite is provided by the lack of a criminal record of the person requesting registration in the roster of *procuratori.*

c. Regarding upright and honest conduct it is useful to note the most recent remarks made by some commentators on the Professional Law

which explain how broad the investigations made by the Bar Association on the ethical conduct of the candidate could be: 'That reference to upright and honest conduct cannot be considered to be restricted to the professional activity, is inferred in the general wording of the Professional Law and finds confirmation in the remark that a professional person who, in his private life fails to observe the rules of generally accepted moral conduct, cannot be considered to have upright and honest conduct in his profession.' [12]

d. As to the requisite of law degree, it would be sufficient to observe that an EEC Directive is being studied on the recognition of the law degree for the purpose of admission to the legal profession in Member States. This, in the future, should permit registration in the roster of *procuratori* of those who are Member State citizens with a law degree from a university in their country or from a university in another Member State.

e. Regarding the practice period which, as above said, is now reduced to one year, this is generally deemed to be insufficient by all interested parties, including lawyers and judges, as it is too short and, above all, no control is exercised by the bar association on the actual work done during this period. Legislative proposals for reform contemplate modifications in this respect.

f. The examination for admission to the roster of *procuratori* is held annually at each Court of Appeal. The subject matter of the examination is contemplated in Article 20 of the Professional Law and consists of two written tests on civil law or administrative law, civil procedural law or criminal procedural law, and six oral examinations on civil law, criminal law, administrative law, tax law, civil procedural law and criminal procedural law. It should be added that Article 21 of the Professional Law foresees that the Ministry of Justice can decide to conduct such examinations in Rome.

g. The requisite for residency in the chief town of the circuit in which registration is requested is no longer justified since improvements in the transportation system have greatly expanded urban centers. As a result, many people have moved their residence to satellite communities of the major city. In practice, it appears that such requisite has little importance also because Article 10 of the Professional Law states that the President of the *Tribunale*, having heard the opinion of the bar association, can authorize the *procuratore* to reside outside of the major city, provided that in the major city he has an office, even in care of another *procuratore.* Article 26 of the Professional Law contemplates the possibility for registration in the roster of *procuratori* of special categories of persons, such as, certain civil servants and university professors, provided that the requisites set forth under the letters (a), (b), (c), and (d) above have been met.

For registration in the roster of *avvocati* the requisites set forth under the letters (a), (b), (c), and (d) above are necessary, as well as to have successfully

practiced as a *procuratore* for at least six years or to have passed a state examination, which is held annually at a national level Articles 27 and 28 of the Professional Law). *Procuratori* who have practiced for at least two years are admitted to this examination as well as those who have served as judges or attorneys-at-law for the state for at least four years.

This examination, as contemplated by Article 29 of the Professional Law, consists of four written tests on civil and procedural law, commercial law, criminal and procedural law, administrative law and of nine oral tests on Roman law, civil, commercial, criminal, constitutional, administrative, ecclesiastic law, civil and criminal procedural law. As a matter of fact, few *procuratori* take these tests in order to be admitted to the roster of *avvocati.* The majority prefer to practice as *procuratori* for six years and to then be automatically registered in the roster of *avvocati.*

Also for registration in the roster of *avvocati*, Article 30 of the Professional Law contemplates certain facilitations for specific categories of civil servants such as university professors, provided that the requisites set forth under the letters (a), (b), (c), and (d) above mentioned are met.

In order to practice in the superior courts (Court of *Cassazione*, Constitutional Court, *Consiglio di Stato*), one also must be registered in a special roster, which is kept by the National Board of Bar Associations, pursuant to Article 33 of the Professional Law.

Attorneys who have practiced law for at least eight years can be registered in that roster, while remaining registered in the roster of a *tribunale.* However, after twenty years of registration in both rosters, the attorney has the option to be registered only in this special roster and continue to practice only in the superior courts.

Also for the special roster, the law facilitates registration for those belonging to special categories who have carried on considerable activities in the legal and academic fields Article 34 of the Professional Law).

Two more provisions of the Professional Law should be taken into account.

Article 3 contemplates that the exercise of the profession of attorney-at-law is incompatible with carrying out any other profession or public or private employment or several other working activities, except for that of university professor or a member of Parliament. Nevertheless, attorneys working in law departments of public agencies can practice as regards law suits and matters of the agencies for which they are engaged. Such attorneys are registered on special lists annexed to rosters.

Many bar associations have given broad interpretation to the above provision. For example, the Milan Bar Association has held that the practice of an attorney is incompatible with the holding of office as president of a joint stock company or a limited liability company.[13] Various reform proposals drawn up in the past years contemplate incompatibility between the exercise of the profession of attorney-at-law and holding office as a member of a company's board of directors.

Article 11 of the Professional Law sets forth that the *procuratore*, without just cause, cannot refuse to represent a party in court proceedings. Such provi-

sion does not apply to the *avvocato* and this is one of the distinctive features between an *avvocato* and a *procuratore.*

Article 129 of the Code of Criminal Procedure states that the defending attorney cannot abandon his office or fail to appear at hearings, so that the accused party is left without assistance. In the event of abandonment, the judge must make a report to the Bar Association for disciplinary measures.

European Community Directive Number 249 of 22 March 1977

Article 1 of Directive Number 249 refers to the working activity of those persons who exercise the legal profession under denominations which are specific for each country. Article 4 exempts activities relative to representation and defense in court proceedings from all conditions of residency and registration in local professional rosters. According to Article 5, however, each Member State can require that the non-resident attorney, before being admitted to practice, be introduced to the president of the local court and join a local attorney who would assume responsibility with the local authorities for the non-resident in case of necessity.

For the enforcement of this directive in Italy, a proposal was approved by the Cabinet on 6 November 1979 and was presented to Parliament on 23 May 1980. Article 6 of this bill upholds the restrictions set forth in Article 5 of the directive. Article 2, paragraph 1, of the bill allows the non-resident attorney of a Member State to exercise his profession 'in court and out-of-court'. This reference to consulting activities may be held to be superfluous insofar as, as has been seen above, such activity is not exclusive for *avvocati* and *procuratori* registered in Italian rosters. On the other hand, Article 2, paragraph 2 of the Bill prohibits 'the establishment of an office or of headquarters or of a branch of a foreign law firm' in the territory of the Italian Republic.

Miscellaneous

The Bar Association (*Ordine degli Avvocati e Procuratori*) is governed by a board (*Consiglio*) and is composed of attorneys who are registered with it. The board is elected every two years from among the registered attorneys, including both *avvocati* and *procuratori.* The number of the members of the board varies from a minimum of five to a maximum of fifteen, according to the number of persons registered in a given roster (see Article 19 of Law Decree Number 382 of 23 November 1944 above cited).

The functions and duties of the board are listed in Article 14 of the Professional Law. They mainly consist of ascertaining the requisites for registration in the rosters of *procuratori* and *avvocati*, in the adoption of disciplinary measures and in the settlement of disputed attorneys' fees, as shall be mentioned below.

The National Board of Bar Associations, (*Consiglio Nazionale Forense*) con-