

INTRODUCTION TO ITALIAN LAW

EDITED BY
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KLUWER

Introduction to Italian Law

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INTRODUCTION TO ITALIAN LAW

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To Adele N. D'Alessandro

— JSL

To FGS

— JSL, UM

Preface

We are pleased to offer to our readers the *Introduction to Italian Law*, a volume in our series of Introduction books to the laws of different countries.

Italy has a particular place among contemporary Civil Law countries. She is a member of the European Union, which has its inception in the Rome Treaty of 1958. But the significance of Italy goes back much further, being the home of Roman Law and the root of the unification of law centuries ago. The spirit of modern Civil Law comes from those days and became the inspiration of our age. World renowned scholars such as Cappelletti during the last decades, as well as a brilliant new generation of lawyers are putting strong emphasis on comparative law and unification of law. Italy is the host country to various international institutions such as UNIDROIT as well as other institutes of law. She is currently engaged in intensive efforts to modernize her legal structure. Nevertheless, there have not been many books in the market in English covering the whole legal system, and those which do are now outdated.

We are grateful to Professor Mattei, Mr. Lena, and to the authors who contributed their respective chapters, for preparing this Introduction to Italian Law.

In this book on Italian law, readers will find not only descriptions of different institutions of present Italian law, prepared by experts on the topics, but they will get something not present in other volumes in our series – trends in the development of the contemporary Italian law, enriched with many references to court decisions and scholarly publications. We, as general editors share the view of Professor Mattei and Mr. Lena that such a book on Italian law will be appreciated by our readers, and we hope that the book will serve the needs of both beginners and practitioners and scholars, who do not have direct access to the Italian law in the original Italian.

Prof. Tuğrul Ansay

Prof. Don Wallace, Jr.

Introduction

What is the value of an English language introduction to Italian law?

In the increasingly global environment of legal practice, there is a basic need to know something about the legal systems of different countries. International practice requires an essential understanding of the legal minds of colleagues operating outside of one's own legal system. We are still far from achieving a common taxonomy and a common conceptual framework for comparative work of this nature. It is possible that we will never achieve it, but because English has become the lingua franca of Western international legal culture, it follows that such basic knowledge should at least be disseminated in English.

There is surprisingly little written in English on Italian law. The classic work of Cappelletti, Merryman, and Perillo published in 1967 is more than thirty years old, and is unfortunately out of print. And though other work has been produced in the interim, there remains a gap to be filled. This book aims to fill that gap.

Although one could argue that the "Italian Style," as captured in John Henry Merryman's groundbreaking work,¹ cannot be changed by the stroke of the legislator's pen, changes in Italian law have been substantial indeed since Professor Merryman first wrote. Italy has an entirely new code of criminal procedure. Civil procedure has been fundamentally transformed. A new body of family law is in place. The encroachment of European legislation has redrawn the map of the sources of law. Private international law is new. Administrative law has undergone recent reform. The changes are such that even an Italian lawyer who attended school twenty years ago and who has not kept abreast of recent developments would find it hard to recognize the system – let alone someone whose knowledge is based on the presently available English-language literature.

¹ J.H. Merryman, "The Italian Style: Doctrine," *18 Stanford Law Review* 39 (1965); The "Italian Style II: Law," *18 Stanford Law Review* 396 (1966); "The Italian Style III: Interpretation," *18 Stanford Law Review* 583 (1966).

Some English-language materials reflecting the evolution of Italian law have been published, and have attracted unprecedented international interest. The Italian Association of Comparative Law has attempted publication of a yearbook in English patterned after the *Scandinavian Studies in Law*. Specific yearbooks are also available for Civil Procedure and International Law. These initial efforts notwithstanding, much more needs to be done. The work on legal transplants in the area of Criminal Procedure has not led to further examination of the law-in-action in its new legal-cultural context. The *Italian Studies in Law* have been discontinued. The *Civil Procedure Yearbook* reflects the highly technical and formalistic jargon of Italian proceduralists and is therefore unusable by non-Italians. Finally, studies of international law are not the place to look for changes in national legal culture.

It therefore seemed useful to offer scholars and practitioners an updated introduction for those who do not have the time or ability to search specialized libraries or consult Italian language texts, but who still need to know something about current Italian law. The motivation behind this project, however, was not merely practical. Introductions to foreign legal systems written in English have an impact that extends beyond international legal practice to reach the structure of legal taxonomies – a task that lies at the very core of the comparative legal profession. Such introductions, indeed, are usually major reference sources for comparative law work. They are the new materials from which comparative generalizations can be developed and new taxonomic structures are theorized.

As in every collaborative work, one of the most important tasks is careful selection of the contributors. We determined early on that we wanted comparativists to undertake the work because they are accustomed by training and habit of mind to step outside of the internal legal frame and think broadly about fundamental operative principles. We felt this was essential to produce accounts of Italian law helpful to foreign jurists engaged in trying to understand a legal system different from their own.

Fortunately, following the lead of scholars such as Sacco, Gorla, Cappelletti, Denti, and Verrucoli, an exceptionally strong comparative law community has developed in Italy (despite the many hurdles that the ministry of Higher Education, and other conservative academic establishments have placed in its path). These scholars have developed the seeds of a useful critical approach to comparative law as an instrument for challenging deeply embedded assumptions of local legal cultures often still dominated by legal positivism. As a result, today's Italian legal culture now includes an emerging vanguard of scholars whose work is worthy of world-wide discussion. We searched for our contributors among this group,

often enjoying the luxury of selecting from among several strongly qualified colleagues.

It is also important to note that in the balance between scholarly quality and practical interest, we thought to privilege the former, with the understanding that an introduction offering only the most recent black-letter enactment or the most recent court decision would be less useful to both scholars and practitioners. Consequently, the contributing authors were invited to discuss major trends in their areas primarily to illustrate legal principles and how an Italian lawyer might think about them. At times, this tradeoff has resulted in contributions that are more interesting and topical than they are elementary. Still, after reading this book, the non-Italian lawyer should be able to engage in fruitful conversation with an Italian colleague and have a sense of what he or she is talking about. The reader should also be able to use this book as a point of departure for further exploration of either a scholarly or practical sort in most areas of Italian law.

A word about structure and coverage: our grouping of contributors attempts to capture the law in a dynamic context. We avoided the use of locally loaded taxonomies such as “public law vs. private law” or “civil law vs. commercial law.” We also avoided the use of a formal theory of sources of law as a structural point of departure since many aspects of legal systems function as sources of law without being recognized as such. In sum, we tried to make our material accessible to anyone who comes to it with an open mind, without requiring him or her to grapple with the technicalities of a particular legal system.

Of course, the coverage is not complete. There are areas of commercial law that are very important in practice – bankruptcy, insurance, intellectual property – which are not covered. There is no section on tax law, and the American reader might wonder about the absence of systematic treatment of the law of evidence. Also, we have not provided, with some regret, chapters on substantive criminal law, or a systematic view of the legal profession. Beyond the standard space constraints imposed by the publisher, we had good reason to omit certain areas. Taxation law in Italy, for example, is a disparate array of contingent enactments. Intellectual property is mostly covered by European Union law, and the law of evidence does not exist as a unitary body common to civil and criminal processes. These lacunae notwithstanding, we offer the present work as a sound introduction to the Italian legal system and trust that it will help the reader build a bridge between the Italian legal system and his or her own.

INTRODUCTION

Finally, the editors wish to thank Ted Jang and Stephen Lothrop of Hastings College of the Law; Christine Robben, Elize Plink, and Steve Lambley of Kluwer; Tuğrul Ansay and Don Wallace, our general series editors; and Jen Scappettone of the University of California, Berkeley. Each improved the volume or facilitated its production, or both.

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31 October 2001

Presentation

This interesting and authoritative new book on the Italian legal system is an important contribution to the English language literature of comparative law. I know of only three earlier works that attempt to deal comprehensively with the Italian legal system. The first, by Cappelletti, Merryman and Perillo, was published in 1967 and is now out of print.¹ The second, by Certoma, appeared in 1985,² and the third, by Watkin, in 1997.³ This new collective work, written by a number of distinguished Italian academics and jointly edited by Professor Ugo Mattei and American Attorney Jeffrey Lena, will at once displace its predecessors and dominate the field.

It is a small, thinly populated field, at least on this side of the Atlantic. When I started to become a comparative lawyer in the early 1960's, Joseph M. Perillo of Fordham and I were the only American academics who appeared to display any interest in Italian law. The situation has since improved, partly due to transatlantic commuting by a number of Italians, notably including Mauro Cappelletti (of Firenze and Stanford) and one of the Editors of this volume, Ugo Mattei (of Torino and Hastings). Interest in Italian law has of course also been fostered by an increase in transatlantic commercial activity requiring a familiarity with foreign legal systems. Still, the attention paid to Italy by comparative lawyers in the English-speaking world continues to be modest.

Someone has said that all Western lawyers are Roman lawyers. I take this to mean that all of us are beneficiaries of the record of legal experience and scholarship that, beginning in ancient Rome, was preserved in Justinian's compilation and the early Canon law of the Church of Rome, was revived and nourished in the Italian universities in the early Renaissance and spread throughout what came to be called the "civilized world" in succeeding centuries. The suggestion, as I understand it, is

¹ M. Cappelletti, J.H. Merryman and J.M. Perillo, *The Italian Legal System: an Introduction*, Stanford, The Stanford University Press, 1968.

² G. Leroy Certoma, *The Italian Legal System*, London, Butterworths, 1985.

³ T.G. Watkin, *The Italian Legal Tradition*, Aldershot/Brookfield USA/Singapore/Sydney, Ashgate Dartmouth, 1997.

that the deep structure of our modern law – Common Law as well as Civil Law – is a distillate of that historical experience.

Argument about such a proposition, while endlessly fascinating to some, is bound to be inconclusive, although Civil lawyers may be expected to find it more congenial than Common lawyers. Some will relate it to a different but comparably attractive idea: the thesis that the medieval *jus comune*, fractured by the rise of the nation-state, was in some profound empirical sense socially and culturally *valid*. It was a natural legal state of affairs to which the West now finds itself returning by way of the European Union and other international institutions.⁴

Consciousness of such a Romanic presence in modern law is nowhere more immediately felt than in Italy. Nowhere does one find a more vital and productive community of legal scholars actively engaged in comparative scholarship. The volume, variety and quality of Italian legal publications – journals, monographs, treatises, encyclopedias – astonishes those who first encounter them.

Young comparative lawyers, I encourage you to look to Italy, the source of the Civil Law tradition. This important new book provides an excellent place to begin such a voyage. Other readers, who may have only an occasional need to deal with specific questions of Italian law, will find this book a convenient and reliable place to begin to learn how such questions are phrased and addressed by thoughtful Italian lawyers.

My compliments and congratulations to the Editors and Authors of this important work.

John Henry Merryman

Stanford, 19 November 2001

⁴ Compare the interesting discussion by Professor Monateri in chapter 2 of this book. I address a variation of this thesis in *The French Deviation*, originally published in *Studi in memoria di Gino Gorla*, vol. I, p. 619 (Milano, Giuffrè, 1994), republished in 44 *American Journal of Comparative Law* 109 (1996) and in my essay collection *The Loneliness of the Comparative Lawyer*, p. 160 (The Hague/London Boston, Kluwer Law International, 1999).

Table of Abbreviations

Codes

ABGB — Codice Austriaco del 1811

C. Nap. — Codice Napoleone

BGB — Codice Civile Tedesco del 1900

CC — Codice Civile

CPC — Code di procedura Civile

CCrPr — Code di Procedura Penale

Courts

Cass. — Corte di Cassazione

Cass. S.U. — Cassazione Sezioni Unite

Corte Cost. — Corte Costituzionale

T.A.R. — Tribunale Amministrativo Regionale

Encyclopedias

Dig. IV Disc. Priv. Sez. Civ. — Digesto IV Discipline Privatistiche Sezione Civile

Enc. Dir. — Enciclopedia del Diritto

Enc. Giur. Del Lavoro — Enciclopedia Giuridica del Lavoro

Noviss. Dig. It. — Novissimo Digesto Italiano

Law Reviews

Am J Comp L — American Journal of Comparative Law

Arch. Civ. — Archivio Civile

BBTC — Banca Borsa e Titoli di Credito

Cass. Pen. — Cassazione Penale

Colum L Rev — Columbia Law Review

Contr. Impresa — Contratto e Impresa

Corriere Giur. — Corriere Giuridico

Dir. Eccl. — Diritto Ecclesiastico

Dir. Fam. — Diritto di Famiglia

DL — Diritto del Lavoro

ECJ Report — European Court of Justice Report

Fam. E Dir. — Famiglia e Diritto

Foro Amm. — Foro Amministrativo

Foro It. (or *FI*) — Foro Italiano

Gazzetta Giur. — Gazzetta Giuridica

Giur. Comm. — Giurisprudenza Commerciale

Giur. Cost. — Giurisprudenza Costituzionale

Giur. It. (or *GI*) — Giurisprudenza Italiana

Giur. Pugliese — Giurisprudenza Pugliese

Giust. Civ. — Giustizia Civile

Guida al Dir. — Guida al Diritto

Harv. Env. L Rev. — Harvard Environment Law Review

Hastings LJ — Hastings Law Journal

J Leg. Studies — Journal of Legal Studies

Mass. Foro It. — Massimario del Foro Italiano

Michigan L Rev. — Michigan Law Review

- MLR* (or *Mod L Rev.*)— Modern Law Review
- NGCC* — Nuova Giurisprudenza Civile Commentata
- Notre Dame L Rev.* — Notre Dame Law Review
- Nuova Giur. Civ.* — Nuova Giurisprudenza Civile
- Pol. Dir.* — Politica e Diritto
- Quadr.* — Quadrimestre
- Rass. Giur. Umbra* — Rassegna di Giurisprudenza Umbra
- Rass. Locaz. e Condominio* — Rassegna Locazioni e Condominio
- RDCo* (or *Riv. Dir. Comm.*)— Rivista di Diritto Commerciale
- RDI* — Rivista Diritto Industriale (or Internazionale)
- Rep. Foro It.* — Repertorio Foro Italiano
- Resp. Civ. e Prev.* — Responsabilità Civile e Previdenza
- Riv. Crit. Dir. Priv.* — Rivista Critica del Diritto Privato
- Riv. Dir. Agr.* — Rivista di Diritto Agrario
- Riv. Dir. Civ.* — Rivista di Diritto Civile
- Riv. Dir. Eur.* — Rivista di Diritto Europeo
- Riv. Giur. Amb.* — Rivista giuridica dell'Ambiente
- Riv. Società* — Rivista delle Società
- Riv. Trim. Dir. e Proc. Civ.* — Rivista Trimestrale di Diritto e Procedura Civile
- Riv. It. Dir. pubbl.* — Rivista Italiana di diritto pubblico
- Società e Dir.* — Società e Diritto
- Stan L Rev* — Stanford Law Review
- U Chi L Rev* — University of Chicago Law Review
- Vita Not.* — Vita Notarile
- Yale J Int'l Law* — Yale Journal of International Law
- Yale LJ* — Yale Law Journal

Treatises

Giur. Sist. Civ. e Comm. diretta da W. Bigiavi — Giurisprudenza Sistemática
Civile e Commerciale diretta da W. Bigiavi

Trattato di Dir. Civ. Cicu – Messineo — Trattato di Diritto Civile diretto da
Cicu e Messineo

Trattato di Dir. Priv. Rescigno — Trattato di Diritto Privato diretto da
Rescigno

Trattato di Dir. Civ. Vassalli — Trattato di Diritto Civile diretto da Vassalli

Miscellaneous

C.S.M. — Consiglio Superiore della Magistratura

CGIL — Confederazione Generale Italiana lavoratori

CISL — Confederazione Italiana Sindacati dei Lavoratori

CONSOB — Commissione Nazionale per le Società e la Borsa

DM — Decreto Ministeriale

DPR — Decreto del Presidente della Repubblica

EC — European Community

ECSC — European Coal and Steel Community

EU — European Union

EURATOM — European Atomic Energy Community

GU — Gazzetta Ufficiale

ILO — International Labor Organization

L. (or l.) — Legge

R.D. — Regio Decreto

UIL — Unione Italiana Lavoratori

WS — Workers' Statute