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THE LEGAL PROFESSIONS OF ITALY †

JOSEPH M. PERILLO*

INTRODUCTION

THERE are several legal professions in Italy.¹ While attorneys, notaries, state's attorneys and judges share a common law school education and are all known as jurists (*giuristi*), they are members of distinct professions between which only minimal interchanges of personnel occur. Since the content of law school instruction significantly affects the manner in which all jurists approach law, discussion of these professions requires an understanding of Italian legal education.

I

LEGAL EDUCATION

Twenty-four of the twenty-six schools of law (*facoltà di giurisprudenza*)² are units of the state university system, while two are sponsored by private agencies.³ The Ministry of Education promulgates a curriculum that must be followed by all law schools and permits only slight local option in courses offered.⁴ In other academic matters, considerable

† This paper in slightly modified form will appear as a chapter of a book to be published by Stanford University Press in 1966, entitled *An Introduction to the Italian Legal System*. The writer of this paper gratefully acknowledges the valuable ideas, criticisms, corrections and advice provided by Professors Mauro Cappelletti of the University of Florence and John H. Merryman of Stanford University, coauthors with him of the forthcoming book. Full responsibility for this article is, however, his own.

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¹ The Italian bench and bar is the subject of chapters 2 and 3 of MAURO CAPPELLETTI & JOSEPH M. PERILLO, *CIVIL PROCEDURE IN ITALY* (1965). Those chapters place greater emphasis on technical details of the rules governing these professions.

² On Italian legal education, see Franchino, *A New Look at an Old System*, 11 J. LEGAL ED. 367 (1959). For a comparative analysis of the Italian and German systems of legal education and post graduate apprenticeship, see MAURO CAPPELLETTI, *STUDIO DEL DIRITTO E TIROCINIO PROFESSIONALE IN ITALIA E IN GERMANIA* (1957); *ESTUDIO DEL DERECHO Y TIROCINIO PROFESIONAL EN ITALIA Y EN ALEMANIA* (Span. transl. 1959).

³ On the university system, see Simonini, *The Universities of Italy*, 40 A.A.U.P. BULL. 563 (1955).

⁴ The suggested curriculum at the University of Florence is: *First Year*: Institutions of Roman Law, Institutions of Private Law, History of Roman Law, Political Economy, Constitutional Law, Philosophy of Law, and History of Italian Law I; *Second Year*: History of Italian Law II, Administrative Law I, Civil Procedure, Taxation and Governmental Finance, Criminal Law I, Roman Law I, Civil Law I, Commercial Law, Labor Law and one elective; *Third Year*: International Law, Roman Law II, Civil Law II, Criminal Law II, Administrative Law II and one elective; *Fourth Year*: Ecclesiastical Law, Criminal Procedure and one elective.

autonomy is conferred upon the universities and their constituent schools.⁵ For example, the president of the university and the dean of the school are elected by their respective faculties.

The quality of an Italian law school is generally gauged by the caliber of its faculty. An academic career in law is the most intensely competitive and the most difficult to attain of juristic careers. Acquisition of the title "professor" is a coveted and prestigious accomplishment. It is not accidental that Italy's recent president and the two most recent prime ministers were law professors.⁶ Among the most famed and successful practicing lawyers, professors predominate.

A law graduate who aspires to a professorial post begins as an assistant to a sponsoring professor. A small but increasing number of assistantships in each law school carry a salary. Many other assistants serve without pay.⁷ An assistant performs research and sometimes teaching duties assigned to him by his sponsoring professor. His progress depends upon a series of national competitions (*concorsi*) in which the quality and quantity of his publications are the primary measures. A major steppingstone to an academic career is the acquisition in competition of the title of *libero docente*, which, when attained, qualifies the holder to conduct classes but does not necessarily result in an academic position. A minimum of five years and often a decade or more of effort are expended to acquire the *libera docenza*. Most assistants never attain this status, and most *liberi docenti* continue as assistants for a number of years before attaining a professorial position.⁸ Since an Italian law professor is not appointed merely as a professor of law, but as professor of criminal law, administrative law, civil procedure, or of some other specialty, the period of time required to obtain a professorship is partially dependent on fortuitous circumstances, such as the death and retirement rate of professors in the aspirant's field.

When a professorial vacancy occurs, a competition is announced by the Ministry of Education but conducted and judged by the faculty of the law school. The *libero docente* does not usually apply directly for the vacancy. If, for example, the vacancy is in the University of Rome—a

The curriculum at the University of Padua Law School is described in Franchino, *supra* note 2, at 369-71.

⁵ Laws and decrees governing the universities are compiled in *LEGISLAZIONE UNIVERSITARIA* (Jorio ed. 1963).

⁶ Antonio Segni was president until 1964. Aldo Moro is prime minister and Giovanni Leone was his predecessor.

⁷ Assistants, like professors, are free to, and frequently do, engage in legal practice.

⁸ Although it is not a required prerequisite to a professorship, only in extraordinary circumstances is such a position obtained without prior acquisition of a *libera docenza*.

desirable post because of its prestige and its proximity to the highest courts and to major clients—professors in other universities will normally apply for the position. When appointed to the vacancy in Rome, the successful applicant vacates the position he formerly held. In turn, other professors may apply for the vacancy he has left. Vacancies thus occur in turn from the most down to the least desirable universities. After incumbent professors step up the ladder to better positions, the remaining vacancy is awarded to one of the competing *liberi docenti*, who takes the title of *professore straordinario*.⁹ After three years of satisfactory service, determined by a national committee of professors in his field, he is appointed full professor (*professore ordinario*), a post from which he may not be removed, except for cause, until the mandatory retirement age of 75 is reached.¹⁰

To enter law school, an applicant must have completed thirteen years of primary and secondary education.¹¹ The last five of these years must have been in the *ginnasio e liceo classico*, where intense instruction in the classics is stressed. No preliminary university studies are required for admission to law school. However, the *ginnasio-liceo* course is considered to be about equivalent to an American junior college education.¹²

Primary and secondary education is, in many respects, similar to that in the United States: attendance is recorded; homework is assigned; Socratic methods of classroom discussion are employed and promotion is dependent upon successful results in periodic examinations. Law School

⁹ One cut below the rank of *professore straordinario* are a certain number of professors, known as *professori incaricati*, who are retained on year-to-year contracts. Usually they are *liberi docenti* who have not yet successfully completed a competition for a regular professorial vacancy.

¹⁰ At the age of 70 professors retire from teaching; at the age of 75, complete retirement occurs.

¹¹ Article 34, paragraph 2, of the Constitution provides that eight years of tuition-free education are compulsory. This article has been implemented by the Law of December 31, 1962, no. 1859, which provides penalties for non-attendance. As yet, enforcement of this law is incomplete.

¹² See, e. g., Franchino, *supra* note 2, at 369. Since the curriculum in Italian secondary schools is considerably different from that in American schools, and the calibers of different *licei* and high schools vary within the two countries, it is difficult to evaluate the relative weights of a *liceo* diploma and a high school diploma. Despite the difficulties in making the evaluation, Italian and American university registrars frequently must decide what standing to give a diploma from the other country. Italian universities ordinarily require two years of American college work as a prerequisite to admission. See EUNICE CHAPMAN, *ITALY: A SURVEY OF ITALIAN EDUCATION AND GUIDE TO THE ACADEMIC PLACEMENT OF ITALIAN STUDENTS IN THE U.S.A.* 51-52 (1962). Conversely, according to a random sampling of American university registrars, Italian graduates of *licei* usually have been given two years' college credit upon admission to American universities. However, the recent trend has been to adopt a case by case approach, frequently resulting in less rather than more than two years' credit. Such an approach is recommended by Miss Chapman, who recommends that approximately one year's credit be given in the usual case. *Id.* at 65.

education is radically different. Instruction is by lecture and attendance by a small fraction of the class is the rule.¹³

Examinations are based on assigned textbooks. Often mimeographed or printed lecture notes are published by the professors. The texts and lectures are concerned largely with the explanation and classification of definitions and concepts. It is frequently averred that the case method is not utilized because the basic law is codified.¹⁴ A more fundamental explanation is that legal education is concerned not with techniques of problem-solving but with the inculcation of fundamental concepts and principles. Not analysis of factual situations but analysis of the components of the law is the desired content of legal education. Law school is not considered a professional training school but a cultural institution for training in law as a science.¹⁵ The flavor of an Italian legal textbook is approximated in English by Hohfeld's *Fundamental Legal Conceptions as Applied in Judicial Reasoning*.¹⁶

Examinations are oral, frequently conducted in a classroom in the presence of other students. The lack of interest in problem-solving as a pedagogical tool is carried over into the examinations. The student may be asked, for example, in a criminal law examination to discuss the concept of causation. As he proceeds with the discussion, he will be asked further more specific questions, such as "Which authors espouse the *sine qua non* theory of causation and what theory does the Penal Code adopt?" The examination consists of a discussion of perhaps three such topics. The student is not expected to know detailed rules of law: these may be looked up in the codes or learned in a law office.

Although legal education is designed for completion in four years, the student is not required to take any examination at the end of any school year. He may refrain from participating in an examination until he considers himself prepared. Examination sessions are held three times a year. Failed examinations may be retaken indefinitely. No student

¹³ Attendance, by law, is compulsory: a student may not take a course examination unless the professor certifies in writing that the student has been in regular attendance. So ingrained is the custom of non-attendance, however, that it would be startling if a law professor refused to issue a certificate of attendance. Indeed, if all law students chose to attend class, the physical plant of the law schools would be grossly insufficient to contain them.

¹⁴ See, e. g., Franchino, *supra* note 2, at 372 n. 25. The fallacy of confusing a system of case law with the case method of instruction is exposed in CHARLES EISENMANN, *THE UNIVERSITY TEACHING OF SOCIAL SCIENCES: LAW* 116 (UNESCO 1954).

¹⁵ The scientific approach to law as understood in Italy is discussed in detail in the forthcoming book, cited in the introductory footnote. Here it suffices to state that this approach is based primarily upon analytic jurisprudence.

¹⁶ Part I: 23 *YALE L.J.* 16 (1913); Part II: 26 *YALE L.J.* 710 (1917). Both parts are reprinted with other essays in WESLEY N. HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING* (1923).

18 *Journal of Legal Ed.* No. 3—3

can be dismissed for failure. He may continue enrolled so long as he pays his tuition.¹⁷

The final hurdle to the law degree (*laurea*) is the thesis examination. The candidate must write a thesis under the close supervision of a professor or professorial assistant. Upon successful completion of an oral examination, conducted by a panel of professors, upon the subject matter of his thesis, he is awarded the degree of *Dottore in giurisprudenza*. Italian universities grant no master's or bachelor's degree, only the degree of *dottore*.¹⁸

Many of the merits and demerits of the system of legal education are readily apparent. On the positive side, the student must exercise considerable self-reliance, since there is little student-teacher contact. From oral examinations he acquires considerable verbal fluency in discussing difficult concepts and principles. On the negative side, the learning process is passive, with much memorization and with little encouragement to individual thinking.¹⁹ Nor, with the exception of the thesis requirement, is significant training given in legal research.²⁰ Certainly, the student is not trained to handle a concrete case. Above all (and whether this be positive or negative is debatable), legal education gives him a strong orientation towards scholarly doctrine as opposed to judicial precedent and towards the orthodox dogmatic approach of the academic establishment.²¹

II

THE LAW GRADUATE

More than half of the graduates end their legal careers upon graduation.²² They have acquired the title of *dottore* and will be addressed by that title in social intercourse, much as American M.D.'s are addressed as "Doctor." The degree grants access to jobs that are stepping stones to

¹⁷ Tuition is set at about sixty-five dollars per year for the four-year course. After four years of enrollment, a lesser sum is payable.

¹⁸ The unitary degree, as well as many other aspects of the Italian university system, have been the subject of much debate, study and criticism. A thoroughgoing modification of the system of higher education seems reasonably likely to occur in the near future.

¹⁹ On passive and active techniques in the study of law, see EISENMANN, *op. cit. supra* note 14, at 109-14; CAPELLETTI, *op. cit. supra* note 2, chs. IV, V.

²⁰ A very small number of professors impose writing assignments on the students, and moot court experiments have occasionally been conducted. A number of seminars are offered, but only a small number of students are enrolled. No student-edited law reviews are published.

²¹ See note 29 *infra*.

²² Some statistics on this point are published and considered in Amirante, *Dubbi e riflessioni sul progetto di riordinamento didattico della Facoltà di giurisprudenza*, 13 IUSTITIA 239 (1960).

executive positions in industry and in the higher reaches of the civil service. In short, it serves much the same purpose as the Bachelor of Arts degree in the United States.

The minority of graduates who intend to pursue careers as jurists usually elect soon after graduation whether to set out for the bar, the notariat, the bench, or a position as state's attorney. A number of obstacles inhibit a subsequent change from one to another of these careers.²³ Most decide to seek entrance to the practicing bar.

III

THE BAR

Attorneys who represent clients in the courts are theoretically divided into the two distinct professions of *procuratore* and *avvocato*. In reality, the two are merely categories based on seniority within the same profession. Theoretically, there is also a division of functions between the *procuratore* and *avvocato*. The *procuratore*, in theory, is the party's agent and procedural technician who, pursuant to a written power of attorney, prepares and signs procedural documents for the party.²⁴ The *avvocato* is considered the successor to the Roman *juris consultus*, the legal artist-scientist who prepares and prosecutes the party's substantive claims and defenses.²⁵ Much doctrinal literature has been written on the distinction.²⁶ As we shall see, the realities are quite different.

After an apprenticeship of one year in the office of a practicing *procuratore* (usually without pay), a law school graduate is qualified to take a state examination for admission to practice as a *procuratore*.²⁷ As such, he is qualified to practice only within the territorial district of the court of appeal in which he resides. Six years of practice as a *procuratore* is the sole requirement for admission to the rolls of *avvocati*. An *avvocato* may practice, except in the highest courts, anywhere in the country. Eight years of practice as an *avvocato* is the sole prerequisite for

²³ See Conclusion, *infra*.

²⁴ CODICE DI PROCEDURA CIVILE art. 82 requires, with minor exceptions, that a *procuratore* be retained in all civil cases. Unlike an *avvocato*, he may not act unless he has been given a written power of attorney.

²⁵ A party may retain an *avvocato* in any case. CODICE DI PROCEDURA CIVILE art. 87. He is required to retain an *avvocato* in cases before the *Corte di cassazione*. CODICE DI PROCEDURA CIVILE art. 82, para. 3.

²⁶ *E. g.*, "By the difference between procedural technique and the science, or better, the art of law, one can explain the difference between the *procuratore*, who is a procedural technician, and the *avvocato*, who is a jurisconsult." Carnelutti, *Avvocato e procuratore* (Premessa), in 4 ENCICLOPEDIA DEL DIRITTO 644, 645 (1959).

²⁷ Designated advanced study is a permissible, but infrequently utilized, alternative to apprenticeship. Examinations are waived for law professors who have two years of tenure, former judges and state's attorneys who have five years of service, and other specified persons.

admission to practice before the highest courts. Practically all *avvocati* retain their qualifications as *procuratori* and may perform a dual role in the same proceeding. *Procuratori* are not forbidden to perform, and do perform, the functions of *avvocati* in litigation. Since there is no bar to anyone, whether or not a jurist, to give and receive payment for legal advice, both *procuratori* and *avvocati* give counsel.²⁸

Although the Code of Civil Procedure was drafted pursuant to standards considered to be scientific and analytic rather than historical,²⁹ it utilizes the historical distinction between the two professions as the basis of a few vestigial rules that are conceptually valid but meaningless in reality. For example, (1) each party must be represented by a *procuratore*, but need not be represented by an *avvocato*; (2) a *procuratore* may not act without a power of attorney, but an *avvocato* may.

Membership by *procuratori* and *avvocati* in the Attorney's Guild (*ordine forense*) is compulsory.³⁰ The guild is a semi-autonomous quasi-governmental agency that has the functions of maintaining the rolls of attorneys and of disciplining violators of professional ethics. Its local and national officers are elected by its members.

The legal status of attorneys, although similar in many respects to that in the United States, has several points of difference. Attorneys may not accept full or part-time employment, either in a professional or non-professional capacity, and may not engage in business. Violation of these

²⁸ The giving of legal advice for a fee is not deemed to constitute the practice of law. See Carnelutti, *supra* note 26, at 644; Soc. ital. di costruzione e lavori pubblici v. Menzarelli, *Corte di cassazione*, sez. II, July 14, 1955, no. 2233, 108 GIURISPRUDENZA ITALIANA (1956) part I, sec. 1, col. 47 (non-lawyer plaintiff may recover fee for advising defendant on legal methods of obtaining reduction of workman's compensation premium). Consequently, foreign lawyers may receive payment for legal advice given in Italy. See Renato, *Agenzie di affari*, I ENCICLOPEDIA DEL DIRITTO (tome 2) 884, esp. 893 n. 13 (1958); Lanza, *Tutela del segreto professionale dell'avvocato staniero in Italia*, 38 TEMI 437 (1962). Contrast *In re Roel*, 3 N.Y.2d 224, 165 N.Y.S.2d 31 (1957); see Comment, *Interstate and International Practice of Law*, 31 So. CALIF. L. REV. 416 (1958).

²⁹ This idea is pursued in depth by John H. Merryman in his contribution to the work cited in the introductory footnote. Certainly, many Italian jurists recognize the impact of tradition on classifications generally regarded as scientific. See, e. g., Rotondi, *The Movable Character of Shares and Interests in Companies in the Romanesque Codes—Some Reflections on the Teleological Character of Legislative Qualifications and the Effects of Legal Conceptualism*, in XXTH CENTURY COMPARATIVE AND CONFLICTS LAW—LEGAL ESSAYS IN HONOR OF HESSEL E. YNTEMA 232 (1961).

³⁰ The basic law governing the bar is Royal Decree Law of Nov. 27, 1933, no. 1578, which, with amendments, was converted into Law of Jan. 22, 1934, no. 36, and which has, in turn, been amended on numerous occasions. A compilation of laws and decrees governing the profession is CODICE DELLE PROFESSIONI FORENSI (A. Vigorita & G. Jorio eds. 1961).

rules results in removal from the rolls. Partnerships for the practice of law are forbidden.³¹

These rules, designed to maintain rigorously the individual responsibility of attorneys, are giving way in substance, if not in form, under the pressures engendered by the evolution of modern industrial and commercial enterprises into large organizations. Some ingenious solutions have been utilized. Although a corporation may not *employ* house counsel, it may *retain* attorneys for a yearly retainer fee and provide space in the corporation's offices. Although lawyers may not form partnerships, they may jointly hire office space and clerical help and divide some of the work if not the responsibility.

The Italian economy is still dominated in many areas by agriculture and owner-managed small enterprise. In these areas, attorneys do conform to the legislative ideal of individual practice. The independent practitioner is idealized because attorneys are deemed to be independent participants in the administration of law. “. . . [T]he lawyer is the lord not the serf. Professional freedom of the lawyer in relation to his client means this: that he is free to accept or refuse, in accordance with the dictates of his conscience, the clients who solicit his services and the cases offered him; and when he has accepted a case, the only volition that matters on the manner [in which] it is to be conducted is his own.”³² In the light of this thinking, it is apparent that the attorney's freedom of association is limited to prevent his subordination to clients, partners, or employers.

The attorney-client relationship is governed, along with such professions as journalism, medicine and engineering, by articles 2229-2238 of the Civil Code, which are entitled “The intellectual professions.”³³ The attorney is given broad discretion in carrying out his client's mandate. Imposed upon him is the concomitant duty to safeguard and to attend, with a minimum of delegation, to his client's interests. The client may discharge his attorney without cause, paying for services rendered on a *quantum meruit* basis. The attorney, however, may withdraw only for good cause and on condition that his client's interests are not prejudiced by his withdrawal: he retains his right to payment for services rendered. The lawyer is enjoined from divulging any information that came to his

³¹An argument to permit the formation of law partnerships is made in Lanza, *Società di avvocati*, 7 RIVISTA DI DIRITTO CIVILE 363 (1961). Despite the general rule against employment, practicing attorneys may be employed as university professors and may hold elected public office.

³²*Gli avvocati dello Stato e Vinamovibilità*, in 5 PIERO CALAMANDREI, STUDI SUL PROCESSO CIVILE 277, 280 (1947).

³³These articles are analyzed in CARLO LEGA, LA LIBERA PROFESSIONE 205-324 (2d ed. 1952).

knowledge by virtue of his professional activity—a rule of professional secrecy that goes far beyond its American counterpart.³⁴

The attorney incurs no liability to his client by mere negligence. Usually liability attaches only to the immediate and demonstrable consequences of professional errors caused by gross negligence or gross ignorance.³⁵

Contingent fee agreements are forbidden. After approval by the Minister of Justice, a schedule of legal fees is published from time to time by the National Council of the Attorneys' Guild.³⁶ *Procuratori* are not permitted to deviate from this schedule. For *avvocati*, the schedule sets merely minimum and maximum fees. By special agreement with his client, an *avvocato* may charge more than the maximum scheduled fee, but it is a violation of professional ethics to charge less. Attorneys may be retained to provide a client with all required legal services for a period of time. Retainers of this kind need not comply with the Guild schedule of fees.³⁷

Upon decision of a case, the judgment must order that the unsuccessful litigant reimburse the victor for his counsel fees.³⁸ Legal fees, relative to American standards, are quite high for extra-judicial matters but quite low for litigation.³⁹ This seeming paradox is perhaps explained by two factors. First, Italian courtroom procedure does not suffer from rigidity of form and, except to a limited extent in criminal cases, the expertise required of an American trial specialist has no counterpart in Italy. Second, the drafting of typical contracts and other legal instruments does not ordinarily require the services of an attorney. These are prepared by notaries. Consequently, only complex legal instruments involving affluent clients are ordinarily prepared with the aid of attorneys.

³⁴ Violation may result in a disciplinary proceeding as well as up to one year of imprisonment. CODICE PENALE art. 622. Secrecy is further protected by a privilege not to give evidence upon the matters protected. CODICE DI PROCEDURA PENALE art. 351; CODICE DI PROCEDURA CIVILE arts. 249, 118.

³⁵ CODICE CIVILE art. 2236; GIOVANNI CATTANEO, LA RESPONSABILITÀ DEL PROFESSIONISTA 175-196 (1958); *Limiti di responsabilità del legale negligente*, in 3 PIERO CALAMANDREI, STUDI SUL PROCESSO CIVILE 121 (1934); Carnelutti, *Rimedi contro la negligenza del difensore*, 10 RIVISTA DI DIRITTO PROCESSUALE CIVILE (part II) 57 (1932).

³⁶ See CESARE RUPERTO & ANDREA TORRENTE, GLI ONORARI DI AVVOCATO E DI PROCURATORE PER PRESTAZIONE PROFESSIONALE IN MATERIA CIVILE, PENALE E STRAGIUDIZIALE (3d ed. 1961).

³⁷ The legality of such arrangements had been in doubt. They were upheld in *Lo Porto v. I. N. P. S., Corte di cassazione (sez. II)*, July 8, 1960, no. 1827, 107 GIURISPRUDENZA ITALIANA (Part I, § 1) 1092 (1960) (note C.Lega), 10 GIUSTIZIA CIVILE (part I) 1964 (1960) (note E. Ciaccio).

³⁸ Exceptions to this rule are discussed in CAPPELLETTI & PERILLO, *op. cit. supra* note 1, ch. 9.

³⁹ See, e. g., Sereni, *The Legal Profession in Italy*, 63 HARV.L.REV. 1000, 1005 (1950).

The system of legal aid—although criticized as less than adequate by many Italians—is markedly superior to that prevailing in much of the United States.⁴⁰ As early as 1786 the Criminal Laws of Tuscany provided that, “In all criminal trials, in places where there is no lawyer appointed as the defender of accused persons when poor, an advocate shall be named *ex-officio*, for the poor and unfortunate who are accused, and who have no advocate of their own.”⁴¹ This in essence continues to be the law. In all except specified minor cases, a party to a civil or a defendant in a criminal case must be represented by an attorney.⁴² The Constitution guarantees free legal aid to indigent parties in civil, criminal, and special courts.⁴³ No public defender system is in effect. Rather the burden of defending the poor is placed, at least theoretically, upon the whole profession. An applicant for legal aid petitions to a committee of judges and lawyers attached to each court. The committee assigns an attorney to serve the applicant. Unfortunately, in practice the whole profession does not share the burden. Volunteers usually are assigned, and inexperienced and unsuccessful practitioners predominate among the volunteers.⁴⁴

⁴⁰ American criticism of legal aid in the United States requires no citation. For an Italian's criticism, see ELENA ROBERG DE LAURENTIIS, *LA DIFESA DEL POVERO IN AMERICA* (1957). However, marked improvements have occurred in the United States since the decision in *Gideon v. Wainwright*, 372 U.S. 335 (1963). See Kaufman, *The Criminal Justice Act and the Indigent Defendant: A Milestone on the Path to Even-handed Justice*, 152 N.Y.L.J. no. 52, p. 1 (Sept. 15, 1964).

⁴¹ See article 50 of the EDICT OF THE GRAND DUKE OF TUSCANY FOR THE REFORM OF CRIMINAL LAW IN HIS DOMINIONS: TRANSLATED FROM THE ITALIAN: TOGETHER WITH THE ORIGINAL (Warrington, Byrnes 1789). The Edict was issued under the influence of Cesare Beccaria's famous book, *OF CRIMES AND PUNISHMENTS* (available in various English translations), the impact of which revolutionized European criminal law, especially in the abolition of legalized torture and capital punishment.

⁴² CODICE DI PROCEDURA CIVILE art. 82; CODICE DI PROCEDURA PENALE art. 125.

⁴³ Constitution art. 24, para. 3. On legal aid, see generally Luzzatti, *Gratuito patrocinio*, 3 ENCICLOPEDIA FORENSE 1033, 1038 (1958). The basic law governing legal aid is the Royal Decree of Dec. 20, 1923, no. 3282.

⁴⁴ Various private organizations also exist for the defense of indigent defendants in criminal and compensation proceedings. These are sponsored mostly by trade unions and political parties. See INTERNATIONAL COMMISSION OF JURISTS, *THE RULE OF LAW IN ITALY* 43-44 (1958).

Many Italian jurists are dissatisfied with the operation of legal aid. In Germany “legal aid is granted in perhaps twenty per cent of all civil litigation . . . in the regular courts.” Kaplan, Von Mehren & Schaefer, *Phases of German Civil Procedure*, 71 HARV.L.REV. 1193, 1469 (1958). In Italy, on the other hand, in 1960 legal aid was granted only in 5,000 out of 495,000 ordinary civil cases of first instance and 40,000 cases on appeal and in the *Corte di cassazione*. This indicates that in only about 1% of civil cases was legal aid granted as compared to 20% in Germany.

Legal aid in civil cases is undoubtedly required more frequently in Germany and Italy than in the United States, since contingent fees are prohibited in these as well as some other countries. CODICE CIVILE art. 2233, para. 3 [Italy]; RUDOLPH B. SCHLESINGER, *COMPARATIVE LAW: CASES—TEXT—MATERIALS* 344-51 (2d ed. 1959) [Germany]; *id.* at 207 [France]; SAMUEL WILLISTON, *CONTRACTS* § 1712 (Williston & Thompson rev. ed. 1938) [England and several of the United States]. However, in

Sometimes a case arises that so outrages public opinion that attorneys, fearing financial repercussions or social ostracism, are reluctant to accept it. When substantial numbers of attorneys refuse to involve themselves with unpopular causes, the rule of law is vitiated.⁴⁵ In Italy such occurrences are rare. If such a situation arises, however, the tradition is that the president of the local council of the Attorneys' Guild gratuitously undertakes to represent the unpopular cause.⁴⁶

The *modus operandi* of attorneys in the administration of law is best examined in connection with discussion of Italian procedure.⁴⁷ It suffices to say here that the lawyers who stand out are those having the best grasp of legal dogmatics and the greatest facility in writing briefs in the prevailing doctrinal style. This in part explains the preeminence of law professors among the practicing bar.

In the public mind an ambivalent attitude prevails towards lawyers. They are regarded as pillars of society and are generally elected to public office in preference to others. On the other hand, they are suspected of being hair-splitting quibblers and of practicing brinkmanship on the edge of law and ethics. This ambivalent reputation seems universally to have afflicted the profession from ancient Greece to the modern world. A famed Italian scholar and practitioner seems best to have explained the lawyer's dilemma. Law suits and crimes, he observes, are forms of societal disorder. The lawyer's function is to assist real and alleged creators of disorder by practicing the art of advocacy. The essence of this art is skill in contradicting opposing counsel to enable the court to arrive at truth. To the dismayed public, disturbed by contradiction, its essence is pettifoggery. Moreover, every litigant and criminal defendant is regarded by his adversary or by the community as an enemy. More than technical assistance the troubled client needs moral support from his lawyer who has the professional duty to lend it. But this association with his client is "the root of the difficulty, the danger, the unpopularity and the nobility of the bar."⁴⁸

Italy an attorney may accept a case from an impecunious client in the hope of obtaining his fee from the adversary in the event of victory.

In Spain the granting of legal aid to the indigent is the duty of the entire profession. Members of the bar are appointed in alphabetical order to represent the indigent. See Murray, *A Survey of Civil Procedure in Spain and some Comparisons With Civil Procedure in the United States*, 37 TULANE L.REV. 399, 404 (1963).

⁴⁵ See, e. g., Pollitt, *Timid Lawyers and Neglected Clients*, 229 HARPER'S 81 (August 1964).

⁴⁶ See INTERNATIONAL COMMISSION OF JURISTS, *op. cit. supra* note 44, at 40-41.

⁴⁷ See CAPPELLETTI & PERILLO, *op. cit. supra* note 1, at 6.01, 8.04.a.

⁴⁸ Carnelutti, *supra* note 26, at 645.

IV

STATE'S ATTORNEYS

One agency (*Avvocatura dello Stato*) represents and provides legal advice to the state and most state organs, including governmental corporations such as I.R.I.⁴⁹ It has no role in criminal prosecutions, and it does not intervene to represent the public interest in proceedings to which neither the state nor a state agency is a party.⁵⁰ The centralization of government lawyers into one organ is the product of a long historical process during which various specialized bureaus, such as the attorneys' office of the state railways, were consolidated into a semi-autonomous agency, responsible only to the prime minister.⁵¹ Agency personnel act as attorneys only; they have no power to compromise claims or otherwise to dispose of the substantive rights in issue. This power belongs to the governmental organ that holds the substantive rights.⁵²

A district office of the agency is established in each of the twenty-three court of appeals districts. The office in Rome is headed by the *Avvocato Generale dello Stato*, who also exercises supervisory functions over the entire agency and determines its overall policy. The staff of the *Avvocatura dello Stato* is selected by competitive civil service examinations, which are partly oral and partly written. The examinations are open to apprentice judges (*uditori giudiziari*), military judges who have served for one year, *procuratori*, and to law school graduates who are eligible for examination for admission as *procuratori*. Upon successful completion of the examination, the applicant is appointed as *procuratore dello Stato*, which is a position in the lower echelon of professional service in a state's attorneys' office. Three years of service as *procuratore dello Stato* is the usual prerequisite to examination for the position of *Avvocato dello Stato*.⁵³ Ordinary judges and military judges who have

⁴⁹ See generally Menestrina, *L'avvocatura dello Stato in Italia e all'Estero*, RIVISTA DI DIRITTO PROCESSUALE CIVILE (part I) 201 (1931); Belli, *Avvocatura dello Stato*, 4 ENCICLOPEDIA DEL DIRITTO 670 (1959); Azzariti, *Avvocatura dello Stato*, I ENCICLOPEDIA FORENSE 646 (1958).

The basic laws governing the agency are Royal Decree (*testo unico*) of Oct. 30, 1933, no. 1611, as amended by Royal Decree of Sept. 17, 1936, no. 1854; Royal Decree (*rego-lamento*) of Oct. 30, 1933, no. 1612; Royal Decree of June 8, 1940, no. 779; Law of June 20, 1955 no. 519.

⁵⁰ These functions are carried out by the public prosecutor, a judicial officer.

⁵¹ Under specified conditions the state has the privilege, which it has never exercised, or retaining private counsel. See Belli, *supra* note 49, at 675.

⁵² *Id.* at 674.

⁵³ *Id.* at 679. The law permits the appointment, without examination, of a limited number of judges and law teachers to the position of *avvocato dello Stato*. Recourse to such appointments is unusual. *Ibid.*

three years of service are also eligible for the examination. Promotions within the *Avvocatura dello Stato* to the position of office chief and other responsible posts are made, upon the recommendation of a committee consisting of high officers within the agency, by the Prime Minister.

A career in the *Avvocatura dello Stato* carries tenurial rights. These are not as firm, however, as those held by university professors and judges. The highest level of the agency's officials may be retired by the Cabinet upon a finding that they have failed in diligence or lack ability. Personnel on the next lower level, if passed over for an increase in salary for three consecutive times, are dismissed.⁵⁴

The agency has developed a considerable amount of autonomy. Although the Prime Minister and the Cabinet have potential power to control its functioning through their powers to dismiss and appoint key personnel, those powers are not generally utilized for this purpose and it is common to find statements that state's attorneys are accorded independence similar to that granted judges.⁵⁵ In general, agency personnel are not affected by changes in political fortunes. These career civil servants, insulated from the spoils system, help preserve the principle that governments should be founded in law and not in men.⁵⁶ The somewhat divergent goals that the agency is designed to achieve are that the state be effectively represented and that the rights of individuals be protected from arbitrary state action. That the system effectively achieves these goals seems borne out by the respect with which practicing lawyers regard it.

V

NOTARIES

The American notary public's functions are but atrophied versions of those of the Italian *notaio*, who drafts and authenticates important legal instruments, including wills, corporate charters, conveyances and contracts.⁵⁷ Any instrument which on its face purports to have been drafted by and executed under the supervision of a notary is known as a "public act" and is conclusive evidence of three things: (1) that it was in fact

⁵⁴ See 3 GUIDO ZANOBINI, CORSO DI DIRITTO AMMINISTRATIVO 69 (6th ed. 1958).

⁵⁵ *Ibid.*

⁵⁶ A strong defense of the tenurial rights of states' attorneys was published, while the fascist regime was in power, in Calamandrei, *Gli avvocati dello Stato e l'invocabilità*, 68 FORO ITALIANO (part III) 33 (1943), reprinted in 5 PIERO CALAMANDREI, STUDI SUL PROCESSO CIVILE 277 (Padova, Cedam 1947).

⁵⁷ On Italian notaries, see generally GINO BARTOLINI, MANUALE DEL NOTAIO (6th ed. 1957); N. FERRANDO, IL NOTAIO (1961); Del Russo, *The Notary Public in the Civil Law of Italy*, 20 GEO. WASH. L. REV. 524 (1952).

so drafted and executed; (2) that the recitals and agreements expressed in the instrument are accurate reports of the parties' statements and agreements; and (3) that any fact that the instrument recites to have occurred in the presence of the notary did occur and any act the instrument recites to have been performed by the notary was in fact performed.⁵⁸ The conclusive nature of a public act can be upset only in a special proceeding, with criminal overtones, known as a *querela di falso*.⁵⁹ The faith and credit granted a notarial instrument has been termed a potent force for civilization and order.⁶⁰

Although only rarely is it required that an instrument be prepared by a notary,⁶¹ recourse to notarial services is taken in many transactions because of the evidentiary value of a material instrument and because notaries are trained and experienced draftsmen.⁶² Notaries are also authorized to draft and present in court certain petitions in noncontentious matters.⁶³ Frequently they are appointed by court order to take inventories, to draw up partition plans, to take custody of sequestered property and to perform other duties in connection with litigation.

Successful completion of a difficult national examination is a requirement for admission to the notariat. Prior to the examination the candidate must have completed law school and have served an apprenticeship for two years in the office of a notary. When a vacancy occurs in one of the approximately 4,000 notarial positions, preference for the opening is given to notaries already in service. In the ensuing national competition for the position such factors as seniority, publications and public service are evaluated. Vacancies that are not applied for by any incumbent notary are filled by the successful examination candidates.

Before assuming his post the notary must post security. This fund guarantees redress to the public in the event of his malpractice⁶⁴ and

⁵⁸ CODICE CIVILE art. 2700.

⁵⁹ CODICE DI PROCEDURA CIVILE arts. 221-227. See CAPPELLETTI & PERILLO, *op. cit. supra* note 1, at 8.10.

⁶⁰ BARTOLINI, *op. cit. supra* note 57, at 5.

⁶¹ See CODICE CIVILE art. 782 (donations); arts. 14, 2328, 2464, 2475 (corporate and partnership charters); arts. 162-163 (marital agreements); arts. 2504, 2538 (corporate mergers); CODICE DELLA NAVAGAZIONE art. 328 (contract of enlistment in the maritime service).

⁶² In addition, a public act calling for the payment of a sum certain may be brought directly to a marshal (*ufficiale giudiziario*) for execution, without the necessity of a court action on the merits. See CAPPELLETTI & PERILLO, *op. cit. supra* note 1, at 12.02.b.

⁶³ See BARTOLINI, *op. cit. supra* note 57, at 639-43. An example of such a non-contentious matter is an application by relatives requesting permission to take possession of goods belonging to a person who has disappeared.

⁶⁴ On the liability of notaries, see D'Orazi Flavoni, *La responsabilità e le responsabilità del notaio*, 7 RIVISTA DI DIRITTO CIVILE 332 (1961).

also serves to ensure payment of certain taxes and fees owed to public bodies. Soon after his appointment, the notary is obliged to open an office in the district to which he is appointed and to be present during office hours fixed by the president of the court of appeal. Unlike a lawyer, he must serve any person who requests his services; but like a lawyer, he may not advertise his services or compete for clients. To prevent competition, he is forbidden to perform any official function outside the district to which he is appointed.

The keeping, filing, and indexing of notarial records are minutely governed by law. Ordinarily a notary must retain the original of any instrument he prepares or that is filed with him.⁶⁵ Upon demand he is required to prepare and deliver a copy of any instrument—except a will—that is in his official custody.⁶⁶ A notarial copy usually has the same evidentiary value as an original.⁶⁷

Although a notary is a public official he receives no salary, but is remunerated by his clients.⁶⁸ The fees charged are rigidly fixed by law and fixed high. The transfer of a parcel of land for \$25,000 involves a notarial fee of about \$300. In non-standardized transactions parties frequently retain lawyers as well as a notary, thereby increasing the financial burden of legal services.

Notaries elect, from among their number, a national council of fifteen members whose principal function is to study and recommend proposals for the improvement of laws that affect the notariat and notarial duties. The council also exercises limited disciplinary powers. It may warn privately or censure publicly any notary whose professional or private conduct adversely affects the dignity or prestige of the profession. Charging fees less than what the law requires is also ground for censure. More serious penalties are within the competence of the civil tribunals, which, in a proceeding instituted by the National Council of the Notariat or the public prosecutor, may impose a fine or suspend or remove an offender from office. The notariat is subject to the national supervision of the Ministry of Justice and the local supervision of the public prosecutor. Supervision is exercised by periodic and special inspections of the records of each notary.

The profession offers its members generous financial rewards and performs a highly useful function. Implicit trust is granted notaries

⁶⁵ See BARTOLINI, *op. cit. supra* note 57, at 100.

⁶⁶ *Id.* at 110-11.

⁶⁷ CODICE CIVILE art. 2714; CODICE DI PROCEDURA CIVILE art. 212.

⁶⁸ A notary has been characterized as a non-salaried public official. See BARTOLINI, *op. cit. supra* note 57, at 3. See also, on the legal status of notaries, Carnelutti, *La figura giuridica del notaio*, 4 RIVISTA TRIMESTRALE DI DIRITTO E PROCEDURA CIVILE 921 (1950).

and it is rarely abused.⁶⁹ Lawyers criticize it as a dull, plodding vocation but may envy its secure earning power and the universal respect it is accorded.⁷⁰

VI

JUDGES AND PROSECUTORS

The Italian judiciary (*magistratura*) is organized along lines radically dissimilar to those followed in common law systems. The principle of separation of powers is pushed towards its logical conclusion: the judiciary is not only a separate, but it is also an autonomous branch of government. Judges are appointed, promoted and supervised by judges. Moreover, the judicial function is deemed to be fundamentally distinct from advocacy; consequently, a judgeship is not the culmination of an advocate's career but a position to be earned by apprenticeship within the judiciary. Another divergence is that the prosecutorial function is deemed to require a judge's impartiality, rather than an advocate's ardor; consequently, judges fill the role of prosecutor.

The governing body of the judiciary is the Superior Council of Magistrature (*Consiglio Superiore della Magistratura*), which bears this name because a judge (*giudice*) and a public prosecutor (*pubblico ministero*) are both considered magistrates.⁷¹ Fourteen of the twenty-four members of the Council are elected by magistrates from their own ranks. The electoral provisions assure that six will be magistrates of the *Corte di cassazione*, four of the courts of appeal, and four of the tribunals. Weighting of the Council in favor of higher court judges has been attacked—especially by lower court judges—as violating the spirit and perhaps the letter of the Constitution, which provides that “judges are to be distinguished among themselves only by reason of diversity of function.”⁷² The intent of this provision, it is argued, is to proscribe

⁶⁹ See Intersimone, *La morale notarile*, 11 *IUSTITIA* 278 (1958).

⁷⁰ The notary is compared to the judge in the impartiality he must exercise and the faith accorded his acts. See Satta, *Poesia e verità nella vita del notaio*, 10 *RIVISTA DI DIRITTO PROCESSUALE* (Part I) 264 (1955).

⁷¹ Before 1958, a council with this name existed but its functions were primarily consultative. The fundamental powers of the council derive from articles 104–110 of the Constitution. The basic law governing the council is the Law of March 24, 1958, no. 195. The Council is discussed in FERNANDO SANTOSUOSSO, *IL CONSIGLIO SUPERIORE DELLA MAGISTRATURA* (1958). On the judiciary generally, see G. GHIROTTI, *IL MAGISTRATO* (1959); L. ROSA, *INDIPENDENZA DEI MAGISTRATI E LIBERTÀ DELLA GIUSTIZIA* (1959).

The Council governs, and this article discusses, only the judiciary of the ordinary civil and criminal courts.

⁷² CONSTITUTION art. 107, para. 3.

any hierarchical control of lower court judges and to insure that the judiciary be self-governed along democratic (one man-one vote) principles.⁷³ However, the Constitutional Court has upheld the validity of the electoral provisions of the law instituting the Council.⁷⁴

The Constitution also assigns membership on the Council to the President of the Republic, who acts as chairman,⁷⁵ and to the First President of, and public prosecutor attached to, the *Corte di cassazione*.⁷⁶ In addition, parliament appoints seven members to the Council. Eligible for appointment are *avvocati* who have practiced for fifteen years and law professors.⁷⁷

The Council is empowered to admit applicants into and to promote and discipline magistrates within the judiciary. Candidates for the judiciary must be law school graduates who are Italian citizens between the ages of 21 and 30 years and must be members of families of unquestionable moral reputation.⁷⁸ Entrance, as is the rule with civil service posts, is attained by competitive examinations. Since 1963 women, as well as men, have been eligible.⁷⁹ Qualified applicants are examined by a commission consisting of judges and law professors, appointed by the Superior Council of Magistrature. The examinations, usually held yearly, are difficult.

A successful applicant is appointed to the post of judicial auditor (*uditore giudiziario*) and is assigned to a court of first instance or to a prosecutor's office to commence an apprenticeship, which has a theoretical minimum duration of two years. Vacancies in the courts are not, however, filled with sufficient swiftness, and a shortage of judges is the result. To fill this shortage auditors usually are assigned to sit on the bench as judges after one year of apprenticeship, although they have not attained judicial status.⁸⁰

Eighteen months after his appointment as judicial auditor the candidate may apply for the examination for the status of judicial adjunct. The

⁷³ See Viesti, *La sezione disciplinare del Consiglio Superiore della Magistratura*, 37 *TEMI* 237 (1961).

⁷⁴ *Corte Costituzionale*, Dec. 23, 1963, no. 168, 89 *FORO ITALIANO* (part I) Col. 3 (1964).

⁷⁵ CONSTITUTION art. 104, para. 2. The chairmanship of the President of the Republic is a check on the autonomy of the judiciary. See Picozzi, *Ordinamento giudiziario*, 5 *ENCICLOPEDIA FORENSE* 363, 378-79 (1959-60).

⁷⁶ CONSTITUTION art. 104, para. 3.

⁷⁷ CONSTITUTION art. 104, para. 4.

⁷⁸ The basic law, known as the *Ordinamento giudiziario*, governing the appointment and apprenticeship of judges and the organization of courts is Royal Decree of Jan. 30, 1941, no. 12, as amended.

⁷⁹ Law of Feb. 9, 1963, no. 66.

⁸⁰ In May 1965, a law was enacted permitting judicial auditors to sit on the bench after six months of apprenticeship.

examination takes a fairly practical form. The candidate must write three judicial opinions on problems presented and orally answer questions on the practical application of rules of law. Successful completion of the examination entitles him to be appointed to perform the functions of tribunal magistrate. (In fact, he may have been performing these functions prior to the examination.) After three years of service in this status, the district council of judges⁸¹ determines whether he has demonstrated the necessary aptitude to acquire the title of tribunal magistrate. If the judgment is adverse, the candidate is removed from service. If the title of tribunal magistrate is conferred, the candidate acquires tenurial rights and cannot be transferred without his consent or removed from office except for legal cause duly proved.

The title of tribunal magistrate is somewhat misleading. A person bearing that title may be appointed to serve as a *pretore*, a judge in a tribunal, or as a public prosecutor attached to a tribunal.

The criteria which should be utilized as the basis of promotion beyond this level have been heatedly debated. Generally, the lower court judges urge that promotion be based solely on seniority. Higher court judges contend that the ability of aspirants to higher positions should also be evaluated. The law governing promotion, amended in 1963, basically continues the system previously in effect and favored by the higher court judges.⁸² The controversy continues to rage. By its own terms the 1963 law is intended to be a temporary expedient, a stop-gap measure to last until a new basic law governing judicial organization and administration is drafted and approved.

There are presently three roads to promotion. The first of these is based almost entirely on a competitive examination. This provides an avenue to promotion for the brightest and most ambitious judges. Only ten per cent of vacancies in the higher courts may be filled in this manner. The other two avenues of promotion are based on a complex evaluation of ability and seniority: they diverge merely on the degree of emphasis on seniority as opposed to ability, as calculated by complex formulas, and will not be here distinguished. In both cases the candidate's ability is weighed by a commission of judges appointed by the Superior Council of Magistrature. The local judicial council, on the basis of a report made by

⁸¹ Attached to each court of appeal, a district council of judges is elected by judges of the district and presided over by the president of the court of appeal. The councils pass upon the aptitude of apprentices and also may veto any application for promotion by any judge within the district. See Picozzi, *supra* note 75, at 384.

⁸² Law of Jan. 4, 1963, no. 1. According to article 106 of the Constitution, outstanding *avvocati* who have practiced for fifteen years and professors of law may be appointed to the *Corte di cassazione*. No appointments have been made pursuant to this provision.

the chief judge of the candidate's court, reports to the commission on his "culture, diligence and reputation." The candidate submits a specified number of his written judicial decisions. In the past he was permitted wide latitude in selecting these decisions. Serious distortions arose since a candidate selected decisions which were written with an eye towards submission to the competition for promotion and which were not necessarily representative of his day-to-day work. Since 1963 a candidate must submit decisions that he has written during specified trimesters, arbitrarily selected by the Superior Council from among the five years preceding the competition. A candidate may also submit publications or any other materials that are relevant to his qualifications. All of the materials submitted are considered in relation to his years in service.⁸³

In addition to 350 judicial auditors, the law allows for 4,173 tribunal, 1,780 court of appeal and 579 *Corte di cassazione* magistrates. The titles of these positions, as has been indicated, tend to be misleading. For example, the position of president of a tribunal section is occupied by a court of appeal magistrate. Prosecutors are also included in these categories, and a number of magistrates (one hundred seventeen in the Ministry of Justice) are assigned to administrative posts in various ministries but nonetheless bear the titles of magistrates of specified courts.

Not only is the judiciary largely independent of the other branches of government, but each magistrate possesses a large measure of independence. The Constitution provides that "Judges are subject only to the law." This is an elliptical way of stating that judges need not heed unlawful orders from other governmental authorities. Magistrates may not be removed from office—until the mandatory retirement age of 70—except for cause established at a proceeding conducted by the Supreme Council of Magistrature. A judge against whom charges are brought must be apprised of the charges made and given an opportunity to be heard and to read the transcript of the evidence against him. Disciplinary sanctions include warnings, censure, loss of seniority, removal from office without loss of pension rights, and dismissal from office with loss of pension rights. These measures may be applied on grounds as varied as physical incapacity to perform judicial duties and conviction of a crime. Indeed, any public or private conduct that reflects adversely on the judiciary may be penalized. Disciplinary proceedings are infrequent and corruption is believed to be almost inexistent. One research study discovered no case of dismissal and three cases of removal in the ten year

⁸³ The competitions described in the text apply only to judges. Magistrates who have assigned to prosecutorial or other non-judicial duties are evaluated by other standards.

period ending in 1958.⁸⁴ Judges are subject not only to criminal prosecution and disciplinary sanctions for unjudicial behavior but also to civil liability for wilful acts of fraud or corruption.⁸⁵

Judicial independence is further protected by the rule that no magistrate may be transferred without his consent. The rule is intended to prevent the influencing of judicial conduct by threats of exile to a desolate community. This rule is, however, subject to some interesting exceptions. A magistrate of a court other than the *Corte di cassazione* must be transferred if a relative, within specified degrees of consanguinity to himself or his spouse, practices law within the community. Moreover, if two magistrates of the same court are related, one may be transferred.

The status of public prosecutors as members of the judiciary is the result of a long historical development. Previously they had been a *sui generis* category of civil servants loosely dependent on the Ministry of Justice. Since the 1948 Constitution and implementing legislation were enacted the position of prosecutors in the judiciary has been firmly established. The rationale for the grant of judicial status to prosecutors is that they, like judges, must be impartial and free from political and governmental pressures.

Although judges and prosecutors may exchange roles, this occurs infrequently. When commencing his apprenticeship, a judicial candidate begins either in a prosecutor's or in a judge's office. Generally he will continue in the role in which he began.

Italian courts have suffered from congestion. Delay in the criminal courts is especially long. In 1963, to speed the administration of justice, 1,179 new judgeships were created. Many judges opposed this increase on the grounds that a rapid influx of so many new judges would dilute the quality and the reputation of the judiciary. They argued that rather than more judges, courts needed more clerical help. For lack of such help

⁸⁴ INTERNATIONAL COMMISSION OF JURISTS, *op. cit. supra* note 44, at 37. An application may be made to revoke a civil judgment tainted with judicial fraud. CODICE DI PROCEDURA CIVILE art. 395(6). It is indicative that applications of this kind have been extremely rare. See 2 FRANCESCO CARNELUTTI, ISTITUZIONI DEL PROCESSO CIVILE ITALIANO 206 (5th ed. 1956); 2 ENRICO REDENTI, DIRITTO PROCESSUALE CIVILE 495 (2d ed. reprint, 1957).

⁸⁵ CODICE DI PROCEDURA CIVILE art. 55, para. 1. According to article 56, no civil action may be commenced against a judge without the prior authorization of the Minister of Justice. This precondition probably violates article 24, paragraph 1 of the Constitution which provides that "Everyone may proceed at law for the protection of his rights and legitimate interests." See 1 VIRGILIO ANDRIOLI, LEZIONI DI DIRITTO PROCESSUALE CIVILE 151 (2d ed. 1961); 1 GIAN ANTONIO MICHELI, CORSO DI DIRITTO PROCESSUALE CIVILE 1963 (1959); Denti, *Il Diritto di azione e la Costituzione*, 14 RIVISTA DI DIRITTO PROCESSUALE 116, 120-21 (1964). Contrast the complete immunity of judges in the United States for judicial acts "even when their conduct is corrupt, or malicious and intended to do injury." WILLIAM L. PROSSER, TORTS 1014 (3d ed. 1964).

many, if not most, judges, even on the appellate level, must type their own judgments. Judicial law clerks are inexistent.

The number of judges assigned to particular courts is determined by Presidential Decree based upon proposals made by the Minister of Justice after consultation with the Supreme Council of Magistrature. This power has not been used with great flexibility. Statistics of the number, kind, and disposition of proceedings are meticulously kept and published but are not utilized to develop flexible responses to problems identified in the published data.⁸⁶ However, they formed the basis for the 1963 increment in the number of magistrates and have given impetus to projected procedural reform, especially of the Code of Criminal Procedure. Indeed, delays in civil cases are not, for the most part, attributable to calendar congestion, but to the opportunities presented to litigants by the Code of Civil Procedure to stall and hamper the rapid disposition of cases.

Although Italian judges are respected, they are not, like their common law counterparts, regarded as occupying the pinnacle of the legal profession. Rather, they are considered important bureaucrats. At least in the high standard of living areas of Northern Italy their earnings fall considerably short of the incomes of moderately successful lawyers.

Much may be said in favor of the Italian judicial system. Impartiality is its aim. It is achieved by segregating judicial candidates from the stresses, strains, and pressures of private practice and politics. A basic test to evaluate a legal system is: to what extent are decisions of judges and prosecutors uninfluenced by venal and political considerations? From all visible indications, the Italian legal system rates high in this respect.

CONCLUSION

A major characteristic of the legal professions in Italy is the rarity of lateral movement of personnel. Career decisions must be made early; for example, applicants for the judiciary must be no more than thirty years of age. Promotion of judges, prosecutors and state's attorneys is largely dependent on seniority, which tends to discourage most individuals from leaving one legal career to start another at the bottom of the ladder. Similarly, a notarial or academic position must be preceded by an apprenticeship. Some movement from these public and quasi-public offices to the private practice of law occurs; movement in the opposite direction is highly unusual. Interestingly, such flow as there is proceeds in a direction opposite to what is usual in common law countries.

⁸⁶ Lack of flexibility is, in part, the result of a lack of judicial rule-making power.

Lack of lateral mobility creates a degree of insularity. A conversation with an Italian judge about problems of court congestion almost invariably results in his attributing any malfunctioning of the courts to the dilatory tactics of lawyers.⁸⁷ Lawyers tend to resent "bureaucratic" interference by judges in the conduct of their cases. Lawyers and judges fail to think of themselves as members of a common profession and, except for occasional conferences, do not join together in professional associations to discuss and solve mutual problems of judicial administration.

Emphasis on seniority tends to discourage the more able law school graduates from entering the judiciary and the state's attorneys' office. These careers, it is frequently said, offer a life "without fear and without hope:" from the acquisition of tenure until retirement, the career follows a pre-determined route. This is not (yet) entirely true; ability is given some recognition in the award of promotions. However, it is not unlikely that greater emphasis will in the future be placed on seniority to the exclusion of ability. An association representing the majority of judges favors such an exclusion.

Compartmentalization of the legal professions has, despite its drawbacks, numerous and important advantages. Specialization and emphasis on apprenticeship and seniority, despite narrowing tendencies, usually result in depth of experience and competence, even if in a limited area. The insulation of judges, prosecutors and state's attorneys from politics inhibits some of the more unsavory aspects of judicial administration that can result from the spoils system. The elevation of notaries to impartial, almost judicial, draftsmen of legal instruments results in community reliance on a great number of legal instruments and certainty in legal relations and inhibits overreaching in many transactions.

Although the Italian bench and bar are organized pursuant to conceptions that are foreign to those developed in common law systems, differences in approach do not lead necessarily to different destinations. The very existence of an independent bench and an independent bar in both systems is rooted in the shared belief that fundamental human rights must be protected from arbitrary action and demonstrates the fundamental unity of purpose pervading the Italian and Anglo-American legal systems.

⁸⁷ Bad relations between the Italian bench and bar are discussed in PIERO CALAMANDREI, *EULOGY OF JUDGES* (1942).

