

Italian Studies in Law

Volume 2

Edited by

Alessandro Pizzorusso

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ITALIAN STUDIES IN LAW is published annually in a volume consisting of five or six essays and one or two reviews on Italian legal subjects. The aim of the series is to provide information on and insights into the Italian legal system for an international audience.

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GENERAL EDITOR: ALESSANDRO PIZZORUSSO

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This volume is dedicated to the memory of Gino Gorla, who died in Rome on July 6, 1992. The editors of Italian Studies in Law, who had the privilege of publishing one of his fundamental studies in the first volume of this Series, hail in him one of the greatest masters of all comparative law scholars.

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Preface

Italian Studies in Law – Strengths and Weaknesses of an Idea

In the first volume of this Yearbook Mauro Cappelletti explained the reasons that induced the Italian Association of Comparative Law to be its promoter and the general objectives it proposes to achieve by it; on the occasion of the publication of this second volume I should like, besides presenting the essays contained in it, to try to show readers the direction followed by the editors in their choice and preparation of material to be included in the volumes that make up the series.

With this aim it is necessary firstly to clarify that this Yearbook is not an international journal of comparative law, like some very important ones outside Italy, but exclusively contains essays by Italian authors and is devoted to topics of Italian law. Nevertheless, it cannot even be assimilated with Italian legal journals, which are mainly aimed at Italian readers: indeed the writings collected here are principally aimed at foreign readers and for this reason are not only written in (or translated into) English but are even written (or at least adapted) in relation to the needs and requirements of a foreign reader.

It could certainly be observed that the needs of a reader with a training in common law are not the same as those of a scholar trained in France or Spain or Germany and even less so those of someone who has grown up in countries outside Europe; but it is clear that, wanting to satisfy the needs of readers up to this point, not only would the objective pursued become unreachable, but readers would be excessively helped (against their own interest). A publication of this type, indeed, to be able to be usefully read by foreign legal scholars, must of course be distinguished from a normal national legal journal, and must however also be distinguished from a foreign journal which as a hypothesis decides to deal with Italy. Compared to the Italian journals, it must be distinguished for the fact of selecting, at least to some extent, Italian legal literature to the advantage of foreigners, whereas, compared to foreign journals that deal with Italy, it must be distinguished for the fact of presenting products of Italian legal culture moving from a

for the fact of presenting products of Italian legal culture moving from a situation of familiarity with it which a foreign observer can have only with difficulty. And besides, if it is true that this is not a journal of comparative law, it is however a Yearbook aimed particularly at comparative law scholars, *i.e.* at scholars who know at least the differences that separate the main legal systems and who know the most important characteristics of their principles (and, in particular, those of the Italian system).

It is also to be noted that this Yearbook, unlike other similar publications, is not specifically dedicated to the study of a certain discipline or a certain sector of the law; on the contrary it proposes to make known the tendencies of Italian legal literature and case-law considered as a whole. Consequently, the pages that make up each volume are ideally divided into six sections, the first aimed at general theory of law, the second at a series of profiles of Italian legal scholars, the third at topics of private law, the fourth at topics of public law, the fifth at topics of civil and criminal procedure and the sixth at topics not included in the preceding sections. The section comprising the essays will be preceded by an introduction, presenting each single volume and followed by one or more reviews of legal literature or case-law. Naturally circumstances may occur where the distribution of articles among the six sections cannot be exactly followed and it might thus happen that one section is represented by more than one essay and another is neglected (as has already happened in the first volume, which contains two essays belonging to the third section – those of Gorla and Sacco – and none on civil and criminal procedure, nor the disciplines contained in the sixth section; whereas the present volume contains three belonging to the latter and again two belonging to the private law section. So, occasionally, this volume is published without the review).

The approach to the work that results from what has so far been said is however easier to describe than to realise and the difficulties regard both the finding of the essays and their translation or adaptation for their presentation to the foreign reader. Indeed although the objective of this Yearbook is to make Italian law known, it is obvious there are aspects which are more interesting than others for the foreign readers, and the large part of what is written in one country is of almost no interest to someone living elsewhere. It is therefore logical to have to begin at least by presenting the foreign reader with aspects of Italian law that can interest him the most, either because they deal with problems in common or concern different situations, but are however more easily comparable with those of other countries. Consequently, it is not a question of presenting the “best” of Italian legal literature but that part of it that presents such particular characteristics.

Other problems to be pointed out regard the translation of the texts selected for inclusion in *Italian Studies in Law*, some of which have already been pub-

lished in the mother tongue of the authors. The translation of a technical text, in fact, cannot be limited to substituting for Italian sentences corresponding English ones through the correct use of vocabulary, grammar and syntax of each of the languages, but involves a comparison between the legal concepts used by scholars of Italian and Anglo-American law, so as to establish a correspondence not only terminological but also logical and systematic. This means that the translations must as a rule be done through collaboration of a translator whose mother tongue is English and scholars with experience of comparative law (besides which, if possible, the authors of each text).

Because of the complexity of the work required for the preparation of each volume, it has not been possible, at least up to now, to closely respect the annual time-scale that had been foreseen. The first volume, conceived with reference to 1990, was only printed in 1992 and the current one, expected for 1992, will come out in 1994. We are however sure that we can respect an essential time-scale in the sense that each Steering Committee elected at the time of its four year renewal will produce four volumes, at times more or less exactly corresponding to the years of its stay in office.

For the section on the general theory of law this second volume contains an essay by Paolo Grossi which also deals with that topic of law-making, to a particular aspect of which Riccardo Guastini's essay, included in the same section of the first volume, was devoted. While however Guastini's essays dealt with a theoretical aspect of the problem of sources, the prevalently legal history setting of Paolo Grossi's contribution brings it to a certain degree closer to Gino Gorla's essay also included in the first volume.

Moving from analysis of the effects of codification at the time of the Enlightenment, the eminent historian and legal scholar from the University of Florence emphasises how was reduced the role of the legal scholar from that of an interpreter to that of an exegetist and how later in many countries (against this type of Legal Absolutism) an important reaction developed which made significant appearances also in Italy from the second half of the 19th century onwards.

In the section devoted to biography, after the one on Vittorio Emanuele Orlando made by Maurizio Fioravanti in the first volume, follows an analysis in this one of the figure of Costantino Mortati traced by one of the greatest contemporary Italian constitutional law scholars, Gustavo Zagrebelsky. In succeeding volumes we plan to insert essays showing the importance of Lodovico Mortara and Piero Calamandrei.

In the section on private law, there were Gino Gorla's essay on natural law as a limitation to the powers of the *princeps* (which in fact might have been more appropriately placed in the first section) and Rodolfo Sacco's on European codification that appeared in the first volume. The second volume

includes a work by Francesco Busnelli, President of the *Scuola Superiore S. Anna* in Pisa, on the role of law in determining new frontiers of human life deriving from the technological development of biology, and another by Professor Antonio Gambaro, Vice-President of the Italian Association of Comparative Law, on "Codes and Constitutions in Civil Law".

The essay by Francesco Busnelli develops the thesis according to which the problem of the "new" frontiers as it is now formulated, contrary to what would appear at first sight, cannot have negative solutions. The frontiers of human life are linked, today as ever, to the essence of human life, and in this sense they can be considered "natural"; scientific and technical progress may be able to provide new instruments for the defence or for the destruction of these frontiers. Once again law has to make fundamental choices.

The work by Antonio Gambaro discusses the widespread opinion according to which codes and constitutions would have played a similar institutional role, and in particular the opinion, followed especially in France, according to which the *Code Napoléon* would have formed the true French constitution in the course of the 19th century. In fact, there are big differences between the legal language of a code and the language, usable by the legal scholars but also meant to be used in the political process, which is characteristic of a constitution.

To private law topics has also been dedicated the review published in the first volume concerning the law of property, edited by Albina Candian, Antonio Gambaro and Ugo Mattei. A second review devoted to the law of the family, edited by Mario Cattaneo with the contributions of Maria Dossetti, Maria Donata Panforti, Claudio Stellini and Elena Urso, was not able to be prepared in time for this volume and will therefore appear in the following one.

For the section on public law the first volume presented an enquiry by the administrative law scholar from the University of Florence Domenico Sorace, on compensation for expropriation, followed in this volume by an essay by another scholar of administrative law, Professor Gregorio Arena from the University of Trento, devoted to the recent Italian law on the transparency of administrative procedures. In this essay are emphasised the great innovations introduced by this law which unites a project aimed at enforcing the control of the citizen's freedom of information with regard to administrative action and a project originally conceived separately aimed at controlling in an organic way administrative procedure, whose systematic analysis had up to then depended on legal scholarship and case-law.

For the section on criminal procedure not represented in the first volume we present here a close analysis by Vittorio Grevi devoted to the new code on criminal procedure that came into force in Italy on October 24, 1989,

which has made great changes in earlier discipline taking inspiration to a considerable degree from American model. Grevi's analysis was written in the period immediately after the coming into force of the code when practical experience of the new norms was still missing. While these lines are being written – almost three years later – we are instead able to register the first impressions produced from the experiences made, which on the whole cannot be said to be very positive. In these first three years modifications to the code have been numerous both as a result of legislative interventions and Constitutional Court judgments. Given the exceptional importance of the subject we are planning to come back to it in one of the following volumes.

For the section devoted to other legal disciplines we must note the analysis of the Italian Constitutional Court judgment no. 364 of 1988 – limiting the importance of the principle *ignorantia iuris non excusat* – by the eminent criminal law scholar from the University of Florence Francesco Palazzo, the essay on the launch of objects into space by the Constitutional Court judge and Professor of shipping law Gabriele Pescatore, and the essay on the Italian and the American tax systems by the Professor of tax law Carlo Garbarino. all three included in the current volume.

The above-mentioned judgment of the Constitutional Court has made a very important change in Italian law in that it has made control on the psychic causes of legal information possible; consequently it has modified certain essential presuppositions of some law concepts which reflect not only on criminal law disciplines but also interest general theory of law.

The problems of shipping law have now been widened to include the law on space and the essay we present here analyses some innovations that this new dimension brings about compared to the traditional fixing of liability for the movement of vehicles on the earth, and of craft on the sea and in the air.

Finally, the comparative analysis of the provisions concerning taxation in the Constitutions of the United States and Italy offers us some essential indications for understanding analogies and differences between the two legal systems with reference to a sector of the law of great practical importance.

Alessandro Pizzorusso