

**THE THREE MOST IMPORTANT FEATURES OF ITALY'S LEGAL SYSTEM THAT OTHERS SHOULD (MAY BE) UNDERSTAND**

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The Italian legal system, officially speaking, is not that different from any other legal system of continental Europe. Balance of powers, sovereignty of the Parliament in making laws, 'notarial' role of the President of the Republic, all basic and internationally recognized rights granted by the Constitution and conceived of as a limit to parliamentary sovereignty, political and administrative power exerted by the Government under parliamentary control, a Constitutional Court judging about conflicts between public agencies and about the constitutional legitimacy of ordinary laws, judicial review granted, three instances of jurisdiction (first degree, courts of appeal, Corte di cassazione, the last one only dealing with the alleged incorrect application of a legal rule), a separate system of jurisdiction for 'administrative' disputes, independence of both judges and public prosecutors (belonging to the same professional group) from both Parliament and Government, separation between State and Church(es), a reasonable degree of administrative and legislative autonomy recognized to regions (some of them enjoying larger autonomy by special reasons, e.g. ethnical), basically written law based on codes following the Napoleonic model at least in principle, increasing dependence of the legal system as a whole and of laws in particular on rules and decisions coming from the European Community (which is a major limit to independence of member states). And so on and so forth. What matters, however, is not really theory, but how all this works, and it works less and less, alas.

My readers will understand me if I chose to describe three major problems which *affect* the Italian legal system, rather than praising its qualities – there are some, or at least some have survived. Indeed, science is there to solve problems, not to indulge in apologies, and scientists should not be afraid of putting to the attention of their scholarly community, which is transnational by definition, any kind of problem, including the ones which somebody might consider as politically incorrect to make known universally.

1. *Law as a dummy variable*

It is a commonly held idea that a major virtue of the Italians is creativity. Creativity actually implies a high degree of freedom, and freedom, in its place, implies both a capacity and a concrete possibility to move beyond common boundaries, denying commonplaces and defying public opinion. If this idea is true – may be it is – one field in which it can be tested empirically is certainly that of law.

Law, especially Western statutory law of the 'rational' type, is usually conceived by theorists as both a limit to, and a project of, social action. Like a motorway, it should address people to a destination while delimiting, laterally, the space within within which they can move freely. They are not allowed to trespass such limits even if this would allow them to go faster and hit the mark more easily.

This conception of law is precisely what Italians, especially of the last generations, do not accept in principle. I should not intend to suggest that law is not taken into account in my country. It is, in fact, but provided it is convenient to a social actor's interests. If it is not, s(he) is very likely to act beyond the law. One could imagine this as a betrayal of social expectations. In fact, once again, it is not or, at least, it is so under certain limits only and certainly less and less. While acting, any prudent person knows that her/his counterpart might behave in an unexpected way with respect to law. Law infringement, or misuse of law, is therefore part of an actor's social expectation. Quite simply, the attitude of Italians to move along alternative footpaths shifts social expectations from the field of law to other fields, specifically that of interests. If you take this field as an independent variable, you are more likely to guess how your counterpart will behave.

Needless to say, this portrait is extreme and just addressed to help foreign people understand how many things go on in the beautiful peninsula. Actually, there are differences to be taken into account. For example, we might distinguish between the private and public sphere, in that legal behaviour is may be more diffused in the former than in the latter. If one knows that you will continue interacting with a specific counterpart, her/his behaviour is more likely to be legal. The great majority of face-to-face and daily economic transactions go on smoothly, indeed, especially if their monetary value is low – it is not convenient to cheat for a few euros. As long as values increase, one's field of expectations becomes far more complex. The most impressive example is the instrumental use of indebtedment and even bankruptcy procedures by large scale companies, as the recent cases of Cirio or Parmalat has shown significantly. Indeed, had the country failed to enter the euro zone in 1997-1998, the consequences of just those two cases would have not been less dramatic, in terms of inflation rates, than the formidable crisis of the mid-Seventies, when the lira lost three-fifths of its value in a few months, compared to the other European currencies.

However, the public sphere is much more intriguing. Here, the attitude of the average Italian to take an illegal or a borderline behaviour is, for a paradox, quite a firm point in the field of social expectations, if law is not convenient, obviously. The most telling example is tax evasion, whose rate is said to be, by far, the most impressive in the so-called First World, amounting perhaps to more than 50% in both direct and indirect taxation. The consequences of this are twofold. On the one side, the Italian public debt is immense, 1,409.997 billion euros in September, 2007. On the other side, if one takes into account both direct and indirect taxes, the taxation rate is said to be the world's highest, to the detriment of only those revenues which cannot be concealed. All this does not imply that prices in Italy be low. Quite the contrary, the immense flux of money that comes from tax evasion (and from economic illegal activities, quite obviously, but this is a universal problem) makes average prices, especially in the real estate field, be among the world's most expensive, indeed far beyond the reach of people who, since they pay taxes, they do so twice, i.e. for themselves and for those who do not pay at all, or at least not sufficiently.

It would be quite naïve to imagine that the public and government officials perceive this as a social illness. Quite the contrary, again. Even many people who cannot escape taxes happen to justify tax evasion as a kind of social protest. As far as

the government is concerned, although the attitudes may change from one to another cabinet, suffice to say that the former prime minister, a media tycoon, publicly justified tax evasion as a kind of healthy social reaction in a country choked by taxes, ignoring that if all people were to pay, the average taxation rate might be drastically reduced.

Many other examples could be offered, running against the purposes of this paper. A conclusion on this point might be the following. Law is usually considered, sociologically, as either an independent or a dependent variable – Jeremy Bentham and Friedrich Carl von Savigny being the epitomes of the two visions respectively. As far as Italy is concerned, neither vision seems to fit in. Law is neither an independent, nor even a dependent variable. In statistical terms, it may perhaps be defined as a *dummy variable*, i.e. an element that must be introduced in the scheme because, whereas it cannot be forecast, it might occur, such as a war or large scale strike. I mean that people may even behave legally, amongst others. One never knows, it cannot be excluded.

## *2. Contingent law*

Law is a dummy variable not only because it can be often infringed, but because it is hard to know what it is, i.e. which is the existing law.

That law certainty is a myth does not need be explained. Even Hans Kelsen, who is frequently portrayed as a formalist theorist (whereas he built up a ‘formal’, not a ‘formalist’ legal theory), admitted it openly, by referring to the partially ‘undetermined’ character of any legal provision and by describing the judicial activity, correspondingly, as at least partially free. As well, it is quite well known that law certainty is at stake also (and perhaps especially) in the civil countries, though their legal systems are based on written statutory law. On the one side, law sources have become extremely complex. Local law, international law and transnational law compete with state law to frame all legal systems, whose boundaries have become less and less perceivable. On the other side, state law-givers are extremely fertile. Law, which had been considered as a stable and far-reaching social product – let us think of modern codes – has become increasingly contingent. It is done and undone, recurrently and somewhat randomly, according to the needs of unexpected occurrences, economic turmoil, social reactions to sudden events, and, first of all, conflicts in the political arena which, in its turn, is increasingly dominated by the need of protagonists to appear on the media and build up their own image conveniently. All this produces an increasing amount of legal provisions, in many cases unenforceable or even devoid of real content. No surprise with this landscape, which is visible in all countries, both democratic and undemocratic.

It is no surprise, either, that Italy can be taken as an extreme example, nay a metaphor, of such phenomena. It is an Italian civilist, Natalino Irti, who insists on the idea that contemporary law has become ‘nihilist’, i.e. apt to be filled up with any content and highly volatile. Irti is a liberal in his mind, not indeed a nostalgic of pre-modern law. Still he denounces a situation in which it seems that law seems to have gone mad.

This problem is not only of quantity, but also of quality, of the legislation. Quantitatively speaking, there is a sort of driving rain of laws, regulations, by-laws etc., which come out from public institutions daily, especially so in some fields, such as, again, that of fiscal regulation, in which changes are so frequent that it is virtually impossible to ascertain what are, by this specific day, the rules in force. Moreover, almost every day, information is given by the media about changes in the legislation in a way that not only distorts the content of existing rules, but even confuses existing laws with bills in Parliament, law drafts or mere intentions of the power elites to put forward or advocate a new bill. Qualitatively speaking, laws come out from complex procedures, quite often hurriedly carried out with no attention whatever to contradictions, clarity of expression or even grammar and syntax, opening the way to multiple interpretations – not to forget that vagueness or obscurity are in many cases a strategy aimed at concealing unsolved conflicts or shifting to civil servants and to judges the weight and responsibility of the interpretation.

The question of interpretation, in itself, is a very delicate one. It is not so much the fact that Italy, as a civil law country, does not recognise the *stare decisis* principle. In fact, the precedents of the *Corte di Cassazione* are highly influential when they are confirmed repeatedly. The fact is that this is not so often the case. All judges, including the Supreme Court, are overwhelmed by cases. To this, one more factor must be added, which is usually ignored or underscored, i.e. the role of doctrinal writing. The Italian legal science has been for centuries, and still is, extremely creative. No young lawyer can hope to become an academic if s(he) does not produce an ‘original’ portrait of a piece of legislation, i.e. an interpretation which has not been proposed before. Fights between opposite lawyers in courts also turn out, quite often, into new interpretations of existing laws. All this contributes exceedingly to make the legal system complex, or to raise the level of its entropy, to say so. With due exceptions, one never knows whether a rule will be interpreted in the same way in which it has been usually interpreted, may be for decades. Even procedural law, which should be the most immune to creativity, is in fact at stake from this viewpoint.

### *3. The duration of judicial proceedings*

What has been said so far has obvious consequences on a third problematic feature of the Italian legal system, which is, alas, very well known at least on a European scale, i.e. the duration of the legal proceedings in all sectors of law (civil, penal, administrative etc.), which is often described as a cancer that paralyses the system itself – in fact Italy has been the target of the overwhelming majority of censures of the European Court of Human Rights for violation of the principle of reasonable delay.

The more complex and entropic the system, the more numerous the ‘legal messages’ which circulate within society and, we can even say, paradoxically, the richer a country’s legal culture, the higher the chance that legal suits last long. If law, as a point of reference, is perennially in question, if the parties and judges may doubt, not only on facts and evidence – something which in itself is a very hard and time-consuming exercise, especially if a long time has lapsed between an occurrence and its discussion in court – but also on whether a rule exists or what does it mean ‘really’, it comes as no surprise if procedures do not come to a quick end.

Yet, the causes of this phenomenon, which reaches unbelievable extremes in some cases in terms of even some decades before a case is definitely settled, are to a large extent mysterious. The number of judges and public prosecutors (belonging to the same corporation) who actually work in the country's various ordinary courts, is very high, amounting to 8,868 professional figures (75% judges and 25% public prosecutors) and 11,759 lay magistrates who either support the activity of professional judges and public attorneys or act on their own, such as the case of the *giudici di pace* (justices of the peace), whose jurisdiction is both civil (small claims) and criminal (petty crimes). To these, one should add some hundred magistrates acting in the administrative tribunals. It is, in short terms, an army.

The fluxes in civil litigation have indeed increased in the last decades, following a general pattern around the world, but not, however, reaching that 'explosion', which was so often denounced by scholars and legal operatives in various world's countries twenty years ago already. Quite surely, the sphere of criminal repression is particularly overwhelmed and has traditionally being so for decades, to the point that the overload was tackled for decades through recurrent amnesties for less serious offenses, a device which has become virtually impossible since a reform passed in 1989 raised exceedingly the parliamentary majority needed for an amnesty to be approved. From that period onwards, another cancer has attacked the system, i.e. the ever increasing number of criminal procedures running against the statute of limitations – a privilege which wealthy defendants can easily enjoy and that a reform passed by the former parliamentary majority has rendered even easier to achieve, by reducing the limitation period drastically.

Even the evident crisis in the penal sector, however, cannot give account of the high rates of duration fully. No empirical research has provided a reasonable explanation for that. As suggested in an in-depth study of civil litigation, published in 1997, endogenous factors, especially occurring in the organization of courts and the distribution (and lack) of resources, etc., seems to affect the system more than any exogenous factor: even wars or natural catastrophes seem to have a more limited impact on the duration of proceedings. The present writer has chaired a team of researchers who has worked for three years on both general data and specific cases to describing the state of the judicial system. The results of this enquiry are going out and help adding a number of tesserae to mosaic. Still, they seem to raise as many doubts as those they seem to dissolve.