

For  
H. Steffan  
K. Kusella  
with regards  
6/5/95  
prop

---

## Book Reviews

---

CAPPELLETTI, M.—MERRYMAN, J. H.—PERILLO, J. M. *The Italian Legal System—An Introduction*. Stanford: Stanford University Press, 1967. Pp. xiv, 462.

This sophisticated work is the best I know of any introductory book in English on a foreign legal system. Professors Cappelletti and Perillo, the Italian and American proceduralists and comparativists who in 1965 gave us *Civil Procedure in Italy*, combined their efforts with Professor Merryman, who only in recent years has turned his concentrated attention to civil law in general, and to the Italian legal system in particular, to produce a most readable, lucid and highly instructive whole. It is a book written for English language readers, not a translation of a work written for Italians, and its co-authors have overcome remarkably well the difficulty of describing one legal system to persons of another.

Each chapter has its special merit. The first, attributed to Professor Cappelletti with acknowledgments of assistance from Dr. Lamberto Pansolli, is an extremely rich and sensitive account of the history of continental law in general and of the Italian law in particular, one which is filled with evidence of just pride in the role which Italian jurists have had in both. Of all the chapters it is the most literary in style, and perhaps it reflects more than any other the traditional erudition and perspective of the Italian legal scholar. Deserving of special note are the chapter's expositions of the nature and position of the *jus commune*, the distinction between the *mos italicus* and the *mos gallicus*, the development of canon law and its influence on the civil law, and the reception of the civil law in Spain. I do not know of any short treatment of the general subject which expounds these aspects of it with as much depth of understanding. Equally good are the chapter's sections on the multiple influences on the development of Italian law since the Napoleonic era.

Professor Perillo's contribution consists of the second and third chapters, on the structure of the Italian state and on the Italian law professionals. These are written very clearly and, it appears to me, with a definite understanding of the problems the average Anglo-American would have in coming to know Italian institutions and methods. These chapters are distinguished by their efforts to communicate both official structures and actualities in government, legal education and practice. Supplementing them is an appendix containing an English translation of the Italian constitution.

The fourth chapter on civil procedure and evidence is Professor Cappelletti's. Again great pains have been taken to make the subject comprehensible to Anglo-American oriented readers and to describe the law in practice as well as in the books. The author is very critical of Italian pro-

cedure in both theory and practice, particularly its rule of toleration of excessive delays, and its failure in fact to require parties in the conduct of trials. Professor Cappelletti shows what impatient with Italian procedural doctrine because of its emphasis on systematic construction and dogmatics" and that "it is divorced from the social, economic, and ideological context" and points hopefully to signs and forces of reform. The last chapter is an appendix containing in translation significant portions of the record of a simple civil suit to recover indemnification and property damage. Its one hundred and twenty-four pages of testimony to why it is that many Italian suits are so long and so expensive compelled to wonder whether the particular suit was typical or indicative of the kinds of abuses which may be found in Italian suits in Italy.

The fifth, sixth and seventh chapters on Italian doctrine and interpretation are in my mind the most important of the book. Professor Merryman, who authored all three, has shown remarkable care within each he has been meticulous in the attempt to describe doctrine and practice in its Italian context and to avoid characterizing it in American legal terms. His exposition is careful and somewhat pedantic and includes Italian appraisals of their own legal system as well as his own observations. The documentation is ample, but more than cumulative. Reading these chapters is a pleasant surprise as an informative one. On the whole I do not hesitate to commend Professor Merryman's success as brilliant.

There are, nevertheless, some critical observations which I wish to make. First, the organization of the book as a whole would be better if the dominant and official Italian legal theory on procedure and evidence had been placed last, after those on doctrine and interpretation. The theoretical basis of Italian law is legal positivism, procedure may not be considered more than a means of maintaining and enforcing the substantive law presumably created by legislation. Thus to treat the subject matters in logical order procedure should have been considered last.

Secondly, and for the same reason for which the chapters on procedure should have followed those on the substantive law, the chapters on doctrine (that is, legislation) should have preceded that on doctrine founded on legislative positivism, doctrine (literally, doctrine) performs a number of functions, but none of them is to provide a background of unlegislated law against which the law is to be envisaged, and this no matter how much the practice is to the contrary. Before the nineteenth century, when the *ius cogens* was the basis of Italian law, doctrine was indeed its best evidence of its pervading notions. One writing on the Italian system would have been correct in considering doctrine first. Since legal positivism became the official basis of the Italian legal system, doctrine of logical necessity became the servant of the law rather than the institution through which the law was to receive

tion. Doctrine from that time forward could expound the law, point the way to its extension, criticize it and suggest the mode of its reform, but it could not legitimately provide a teaching on the existing legal order which did not have its foundation in the expression of legislative will. Thus, in my opinion, to give the reader the correct impression of the structure of the Italian legal system through the book's organization as well as through the contents of its chapters, the chapter on law should have preceded that on doctrine. There is another reason, too, why this arrangement would have been better. Under the chapter on interpretation, which then would have followed that on doctrine, Professor Merryman quite correctly discusses both interpretation by doctrine and interpretation by the judiciary. The chapter on interpretation, therefore, would have been a logical sequel to that on doctrine. As the book stands, the chapter on law breaks the continuity of thought which otherwise would have existed.

Professor Merryman's arrangement of the chapters in question, and to some extent their contents, suggest to me that in spite of his most diligent efforts to be absolutely objective in presenting the subject, his predilection for American realism has manifested itself and indirectly colored his exposition. On first reading the chapters on doctrine, law and interpretation it occurred to me that Professor Merryman might have been delighted to find it possible to label them "policy science," "the materials of the law" and "the judicial process." He writes approvingly of an emerging doctrine in opposition to the traditional theory of legislative positivism (which he characterizes, I think inaccurately, as "folklore" and "cultural agnosticism") and criticizes the judiciary for not exercising a primary role in interpretation. In a sense I share his observations on and his concern for the present state of Italian interpretation. The enactment of a new Civil Code in 1942 and of a new Code of Civil Procedure in 1940 understandably resulted in doctrine being directed principally to the work of expounding the content of the new statements of the law and neglecting for the time being that of interpretation in the sense of the adjustment and application of the rules and principles of the legislation to evolving postwar conditions. Probably it is true also that legal education on the whole has not paid sufficient attention to the attunement of law students to the art of interpretation. I agree, too, that Italian judges should participate more in interpretation than Professor Merryman says they do, though I would insist they draw their inspiration from good doctrine if it exists. In my opinion, however, Italians would lose more than they could gain if they failed to adhere to the traditional approach and veered toward a "policy science." Italian thought today is acutely pluralistic and most often skeptic. In this environment legislative positivism provides an authoritative pseudoconsensus, if not a real one, through which interpretation must be given and by means of which its limits will be somewhat confined. Unless this interpretation remains primarily in the hands of the legal scientists rather than the judges, Italian law will soon become as varied and uncertain as opinion on American common law. Judicial interpretation eventually would result in a judicial gloss, much like that in Louisiana, which probably would be devoid of the expertise, the consistency and the order which

reasonably might be found in doctrinal writings. By the  
their work judges cannot be expected to see the law as a  
with particular situations in trial environment. The doc  
have more opportunity to do so.

In spite of these defects, however, the book may become  
a classic, and justly so.

ROI

---

\* Professor of Law, Louisiana State University.