

BOOK REVIEWS

CIVIL PROCEDURE IN ITALY. BY MAURO CAPPELLETTI & JOSEPH M. PERILLO. The Hague: Martinus Nijhoff, 1965. Pp. xxxii, 451. Gld. 54.

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Until recently, except for the contributions of the late Robert Wyness Millar,¹ English language studies of legal procedure in civil law countries were lacking.² A serious weakness in comparative law work was the result, and the risk existed that, because of ignorance of relevant procedural features, American lawyers would reach wrong conclusions notwithstanding their knowledge of the foreign substantive law. In addition, foreign procedure merited attention in its own right. Though "technical," and the product of local conditions, procedure should be governed by sound general policies. Comparative study of procedure thus would yield the advantages of all comparative law work.

Matters have begun to improve since the end of the last war. The teaching tools used in this country for comparative law work have emphasized the need for knowledge about procedure; the *American Journal of Comparative Law* has published articles on procedure;³ a comparative study of German civil procedure has appeared in one of our law reviews.⁴ But this is not all the improvement to be noted. Prior to the last war, the American Bar had complained about difficulties in obtaining judicial assistance abroad in such matters as service of process and taking of testimony.⁵ The United States was the only major country without treaties on the subject. Responding at last to pressures, Congress, in 1958, established the Commission on International Rules of Judicial Procedure to look into the situation.⁶ No

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¹ See McMahon, *In Memoriam Robert Wyness Millar*, 9 AM. J. COMP. L. 174 (1960).

² The situation abroad has not been any better. Writings in civil law countries on American procedure are almost non-existent. But see, Sereni, *Aspetti del processo civile negli Stati Uniti*, in *STUDI DI DIRITTO COMPARATO* 348 (1956).

³ See, e.g., Sereni, *Basic Features of Civil Procedure in Italy*, 1 AM. J. COMP. L. 373 (1952).

⁴ Kaplan, von Mehren, & Schaefer, *Phases of German Civil Procedure*, 71 HARV. L. REV. 1193 (1958).

⁵ See Jones, *International Judicial Assistance: Procedural Chaos and a Program for Reform*, 62 YALE L.J. 515 (1953).

⁶ See Jones, *Commission on International Rules of Judicial Procedure*, 8 AM. J. COMP. L. 341 (1959).

funds, however, were appropriated for the needed research. The Carnegie Corporation of New York then stepped in and made a substantial grant to the Columbia University School of Law Project on International Procedure. It was generally agreed that the international aspects of judicial assistance could not be handled properly without better knowledge of foreign procedure in general.⁷ A comprehensive study of civil procedure in three countries, Sweden, Italy, and France, was, therefore, decided upon. The volume under review is the end product of one of these various endeavors of the Columbia Project.⁸

Italian law may have been chosen for study for any of a number of reasons. The Italian Code is of relatively recent date (in effect only since 1942), although it is not rated as a leading one. On the other hand, after a Germano-Austrian start, modern civil law literature on procedure has been dominated by the contributions of Italian scholars, some of world-wide reputation. Chiovenda, Calamandrei, Carnelutti and Redenti are perhaps the best known, but the list does not end with them. Furthermore, an Italian scholar, Mauro Cappelletti,⁹ is the leading civil law expert on English and American procedure;¹⁰ he is also at home in comparative constitutional law¹¹ and is one of the few foreign scholars conscious of the constitutional requirements of civil procedure in the United States. If Mauro Cappelletti would do the volume on Italian procedure in conjunction with an American lawyer, production of an outstanding work could be anticipated.

The volume under review, a joint effort of Professors Cappelletti and Perillo,¹² is just that—outstanding in every respect. Presentation in a readable way of a technical subject like procedure is not easy. Making the subject understandable to the reader, considering the great difference between Italian and American procedure, is an accomplishment. The authors' success may be traced to their familiarity with the two systems and to what was apparently a happy collaboration.

The volume covers more than might be expected of a book entitled *Civil Procedure in Italy*.¹³ Preceding the main part of the book, which contains the description of the procedure proper, is a short

⁷ See Smit, *International Aspects of Federal Procedure*, 61 COLUM. L. REV. 1031 (1961). The Commission's work is described in its *Fourth Report*, reproduced in H.R. Doc. No. 88, 88th Cong., 1st Sess. (1963).

⁸ Another study already available is GINSBURG & BRUZELIUS, *CIVIL PROCEDURE IN SWEDEN* (1965).

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¹⁰ His principal work is a two volume comparative study of the question of allowing parties to a law suit to testify as witnesses. CAPPELLETTI, *LA TESTIMONIANZA DELLA PARTE NEL SISTEMA DELL' ORALITÀ* (1962).

¹¹ See Cappelletti & Adams, *Judicial Review of Legislation: European Antecedents and Adaptations*, 79 HARV. L. REV. 1207 (1966).

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¹³ The same can be said of all the volumes produced under the direction of Professor Hans Smit as part of the Columbia Project Series.

chapter on the political history of Italy, followed by a chapter on the history of Italian civil procedure starting with Roman law. Chapters of general interest on the legal profession and the organization of the courts come next. In the main part of the book, all stages of procedure are described for all levels of the judicial system. A chapter on enforcement of judgments is also included. The book closes with a chapter on judicial assistance¹⁴ and a number of sample documents appear in the appendix. The "international" features, jurisdiction, recognition of foreign judgments, and judicial assistance, are presented with special care.

The volume is more than simply a good summary statement of the Code rules with references to the Commentaries, other literature and case law. The approach is critical throughout, and the authors have much to say about deficiencies in the present law.¹⁵ The emphasis is on practical consequences, and the authors avoid mere doctrinal argumentation, which is often found to excess in Italian writings.¹⁶ As is the case with a great many codes of procedure, the Italian Code of 1942 has not yet been brought entirely into line with modern thinking. The courts have no rule-making power and law reform is slow. Italian procedure appears to be more complicated and less to the point than procedure in the United States federal courts, without securing better results. Of course, what may serve litigation well in the United States, may be unsuitable for foreign litigation shaped by differing environment and tradition.

The American lawyer who is following litigation in the Italian courts will find the volume most valuable. Similarly, the lawyer facing conflicts problems of a jurisdictional nature will get much help from the chapters on assumption of jurisdiction (Pp. 85-94),¹⁷ recognition of foreign and ecclesiastical judgments (Pp. 367-95),¹⁸ and judicial assistance (Pp. 396-423).

¹⁴ The authors of the instant work have also authored the chapter on Italy in *INTERNATIONAL CO-OPERATION IN LITIGATION: EUROPE* 247 (Smit ed. 1965).

¹⁵ According to the authors, the principal weaknesses are an excess of abstractly fixed peremptory stages; lack of machinery to implement the principle of orality; lack of adequate discovery powers; hearing of evidence by one judge, rather than the full panel; and improper interference with the principle of free evaluation of evidence (see pp. 44-45). Amendments passed in 1950 have done little to remove these deficiencies (see p. 46). Appeal of judgments is encouraged by the rule that, in general, judgments of the first instance cannot be enforced before the appeal has been decided or the time for appeal has lapsed (see pp. 256-57).

¹⁶ The authors note that the abstract reporting of decisions has encouraged excessive concern with abstract legal arguments with too little attention being given to the facts of cases (see p. 272 n.115). On weaknesses in reporting, see generally Gorla, *Lo studio interno e comparativo della giurisprudenza e suoi presupposti: le tecniche per la interpretazione delle sentenze*, [1964] *FORO ITALIANO* V. 73; also in GORLA, *RACCOLTA DI SAGGI SULL' INTERPRETAZIONE E SUL VALORE DEL PRECEDENTE GIUDIZIALE IN ITALIA* (1966).

¹⁷ Discussing *CODICE DI PROCEDURA CIVILE* art. 4 (1942).

¹⁸ Discussing *CODICE DI PROCEDURA CIVILE* arts. 796-801 (1942).

Italian law is considered among the more liberal, as far as international cooperation is concerned, and this certainly applies to technical judicial assistance. In other areas, the picture is not as favorable.

With respect to the assumption of jurisdiction over aliens, none of the improper fora of the French and German varieties (jurisdiction based on plaintiff's nationality and judgment in personam on the basis of mere presence of assets)¹⁹ are used in Italy. Service of process on an alien temporarily in Italy is sanctioned only on a retaliation basis (P. 89).²⁰ But jurisdiction can be obtained for the impleading of guarantors without any of the limitations set by due process (P. 88).²¹

For resident Italians, the Code has rules restricting forum selection agreements²² which go beyond the standards agreed upon in international conventions.²³ Similarly, the Code interferes with normal commercial arbitration by establishing a nationality requirement for arbitrators (Pp. 91, 362).²⁴ Conclusion of treaties is necessary to overrule the requirement.²⁵

Recognition of foreign judgments seemingly is regulated in a liberal way, but this is not the full picture, as is duly pointed out in the book. Out of concern over the effects in Italy (a non-divorce country) of divorces granted abroad to Italians, the Code requires formal recognition proceedings for *all* foreign judgments without distinguishing between judgments in status matters and other judgments (Pp. 367-69).²⁶ This is an unnecessary complication when no enforcement is involved. The rules on grant of conclusive effect are open-minded but they can be evaded easily. One way is to start proceedings in the Italian courts before the foreign judgment becomes "final" in the Italian sense; that is, before the time for an appeal has run out.²⁷ Another method of evasion is non-appearance on the part of the defendant in the foreign court, in which case reexamination on the merits is allowed (P. 382).²⁸ Recognition and enforcement of foreign judg-

¹⁹ See Nadelmann, *Jurisdictionally Improper Fora*, in XXTH CENTURY COMPARATIVE AND CONFLICTS LAW 321 (Nadelmann, von Mehren, & Hazard, eds., 1961).

²⁰ Discussing CODICE DI PROCEDURA CIVILE art. 4(4) (1942).

²¹ Discussing CODICE DI PROCEDURA CIVILE art. 4(3) (1942).

²² Under the CODICE DI PROCEDURA CIVILE art. 2 (1942), such an agreement by an Italian selecting a forum abroad is not valid unless the Italian is without domicile or residence in Italy and the agreement is with an alien (p. 374).

²³ See the Hague Convention of Nov. 25, 1965 on the Choice of Court, *Hague Conference on Private International Law, Tenth Session*, 13 AM. J. COMP. L. 615, 629 (1964): article 2 allows a reservation but limited to where both parties to the forum agreement are nationals and residents of the state using the reservation.

²⁴ CODICE DI PROCEDURA CIVILE art. 812 (1942).

²⁵ For arbitration agreements between Italian and United States citizens the requirement is removed by the Agreement of Sept. 26, 1951, Supplementing the Treaty of Friendship, Commerce, and Navigation of Feb. 2, 1948, 12 U.S.T. 131, T.I.A.S. No. 4685 (p. 389 n.117). Cross-references should have been made at pp. 91 and 362.

²⁶ The prevailing view was challenged recently. See Cappelletti, *Il valore delle sentenze straniere in Italia*, 20 RIVISTA DI DIRITTO PROCESSUALE 192 (1965).

²⁷ This "routine" is discussed at p. 378.

²⁸ CODICE DI PROCEDURA CIVILE art. 798(1).

ments enforceable where rendered is hindered by the requirement that the foreign judgment must no longer be subject to the ordinary means of review (including appeal) (P. 382).²⁹ These rules are in contrast with the more suitable rules in the treaties on enforcement of foreign judgments which have been concluded by Italy with foreign countries.³⁰

Generally speaking, a lack of flexibility in the codified rules is noticeable. One is reminded of the conflicts rule in the Italian Civil Code generally ruling out *renvoi*.³¹ Might this be a characteristic of Italian conflicts law?

The book's final chapter, "International Co-Operation in Litigation," discusses as the last item "Proof of Foreign Law (in the Italian Courts)" (P. 421).³² Clearly, this important item should have been included in the chapter on evidence, "The Proof-Taking State" (P. 173). Not even a cross-reference is provided, and the rather poor subject matter index does not remedy the omission. Otherwise, the organization of the work is excellent, and this includes the technical side.³³

Professors Capelletti and Perillo have made an outstanding contribution to the American literature on foreign procedure and conflicts law. A correspondingly valuable contribution to Italian legal knowledge by production of a parallel volume on American procedure is hopefully suggested. A dialogue between specialists in the two countries would thus be made possible to their mutual advantage.

²⁹ CODICE DI PROCEDURA CIVILE art. 797(4).

³⁰ References to the treaty law are to be found in notes 144-47, at pp. 393-94. The Treaty between Belgium and Italy, of April 6, 1962, 47 RIVISTA DI DIRITTO INTERNAZIONALE 137 (1964), should be added.

³¹ CODICE CIVILE Preliminary Provisions art. 30 (1942). For an example of difficulties created, see De Nova, *Conflict of Laws and Functionally Restricted Substantive Rules*, 54 CALIF. L. REV. 1569 (1966).

³² For fuller treatment, see Capelletti, *Il trattamento del diritto straniero nel processo italiano*, 49 RIVISTA DI DIRITTO INTERNAZIONALE 299 (1966).

³³ We spotted an error in note 152, at pp. 38-39: "M. Rauter" should read "J. F. Rauter."

CHIEF JUSTICE: THE JUDICIAL WORLD OF CHARLES DOE. BY JOHN PHILLIP REID. Cambridge: Harvard University Press, 1967. Pp. xii, 489. \$12.50.

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Charles Doe, admitted to the bar in 1854, was appointed an Associate Justice of the Supreme Judicial Court of New Hampshire in 1859. The duties of the office included both trial and appellate work; the judges took turns presiding at trials in each of the state's counties. Doe earned his appointment by campaigning briefly, but vigorously, for the new Republican party, after renouncing his former allegiance to the Democrats, because they had become spokesmen for southern interests. The Democrats recaptured the state in 1874, and, on the pretext of reorganizing the judicial system into separate trial and appellate functions, they legislated Doe out of his job. The Republicans took the state again in 1876. Speaking for an independent bench, Doe was one of the few among the victors to advocate leaving the Democratic court undisturbed. But the Republicans restored the former court organization, and Doe acceded to strong pressure to accept appointment as Chief Justice, a position in which he served from 1876 until his death in 1896.

Until the appearance of this full dress biography by Professor John Reid of New York University School of Law, Charles Doe owed his place in our legal history almost wholly to the praises of Roscoe Pound. Pound described Doe as the one state court judge who stood out as a law maker in the years from the Civil War to the early 20th century,¹ and he placed Doe in his pantheon of the ten greatest judges in our history.² John Reid, by a careful search of sources and by looking imaginatively at his subject from a variety of perspectives, has now provided material from which we can estimate for ourselves Doe's title to the honor Pound paid him. The result, however, is substantially to disprove that title. Mediocrity and dullness abound more in this world than do the excitement of creative will and individual flare, and thus we properly hold in high esteem a man who brings bold style to his work. But while Doe had style—indeed, to a degree bordering on idiosyncrasy—Reid's comprehensive inventory shows a want of substance in Doe's life work. Style is not enough for a great appellate judge. We ask from him also analytical insight, sturdy generalization,

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¹ Pound, *The Place of Judge Story in the Making of American Law*, 1 MASS. L.Q. 121, 134 (1916).

² POUND, *THE FORMATIVE ERA OF AMERICAN LAW* 4, 30-31 & n.2.

and the resolving of fuzzy or question-begging propositions into concepts that command reasoned respect. What John Reid's dispassionate account of Doe shows to me is more naiveté than insight, generalizations which fragment rather than tie together the operations of law, and concepts which only replace other men's fuzziness and begged questions with Doe's own.

This is a biography of a man of ideas. Suffering the frustration of many legal biographers, Reid has been unable to find any substantial material to illuminate Doe's few years in practice; what he has found is routine. Before he went on the bench, Doe was active in New Hampshire party affairs, and with suitable decorum he paid some attention to politics while he was a judge. But politics was not a major element in Doe's career, although Reid's book will add perspective for those who have enjoyed the American Winston Churchill's novels of political maneuvering in New Hampshire in the late Jacksonian period and in the turn-of-the-century years of the railroad lobbies. Nor did trial work bulk large in his total service, though New Hampshire's judicial organization required that Doe sit as a *nisi prius* judge in addition to his appellate duties. Tired and bored with trial service, Doe threatened to resign soon after he became Chief Justice in order to escape the burden. His colleagues were able to persuade him to remain only by undertaking themselves to do his trial stint.

The area of Doe's greatest contribution was the judicial reform of procedure; his key principle was that no right be left without a remedy, and that—within the frame of constitutionally guaranteed rights—procedure serve substantive policy. He insisted that the forms of action not be treated as defining the whole content of the law. Thus he persuaded his colleagues to approve the amendment of a declaration to change the form of action, and he would permit any declaration at law to be amended to stand as a bill in equity, or vice versa, when the development of a case showed the change to be appropriate (Pp. 98, 100). With such flexibility, the New Hampshire court under Doe showed that a state could accomplish broad reform of judicial procedure without the need of legislation.

Confident that he and his colleagues had the knowledge and wisdom to see where community good lay, Doe also led his court to assert broad discretion in law-making apart from reform of judicial procedure. He paid tribute to the importance of the separation of powers, but no one was readier to see judges legislate, not just interstitially, but in broad sweep. He would not even confine judicial law makers by their own traditions; he preferred growth to any close regard for precedent. A notable example of his law-making was his court's rejection of the confines of the M'Naghten rules, and its determination that the defense of insanity in a criminal proceeding might be established by proper proof of any kind of mental disease producing the offending conduct, without freezing into law any one medical theory (Pp. 117-18).

However, Reid's treatment shows that there were basic inconsistencies in Doe as a judicial law-maker. Doe held no reforming principle more fundamental than his insistence that there existed too many straitjacketing rules of law, and too little cognizance that many questions which courts must answer were questions of fact and not of law. Perhaps Doe was groping towards the emphasis on the functional aspects of law which a later philosophy of legal realism would develop. We sense this when he criticizes the proliferation of presumptions in evidence and the multiplication of dogmatic rules for construing documents. What Doe did not see—or at least did not acknowledge—was that in treating insanity or negligence as questions of "fact," he was implicitly lumping together the determination of value-neutral propositions about existence and the making of value choices about socially acceptable or useful behavior. Doe's "fact" approach, in effect, abdicated a legitimate and necessary responsibility of law makers. It is the law's business to generalize from like situations and to define and rank in a rational hierarchy the value choices which must be made if a society is to have the structure it needs to function as a society. At odds with his "fact" emphasis, moreover, was Doe's declared view that the courts were guided by common law principles or "American principles" which he left without definition or functional justification. Further, despite his emphasis on constitutional limits, Doe seems not to have seen that generalized standards and rules help restrict public officers to responsible uses of power.

John Reid plainly likes the unpretentious, stubbornly individualistic Yankee judge whom he has studied so long and closely. But he has also kept a scholar's detachment. Reid concludes that, despite his bold willingness to innovate, Doe had little influence on the development of the law outside New Hampshire. Perhaps the one area in which he exerted a general influence was in helping develop a more pragmatic, flexible attitude towards court procedure. His technique of reform through judicial decision, however, was not widely copied, for procedural reform elsewhere was carried out primarily by legislatures and committees. Reid finds the Chief Justice guilty of philosophical naiveté in his failure to define the concepts of "justice" and "reason" which he invoked, or the concept of "fact" which was so central to his reforms. Reid sprinkles these critical judgments throughout his book, and his material supports them at point after point. I wish that he had better integrated his critical comments in his summation, for the book also praises Doe with a vigor which seems at odds with the criticisms. Nonetheless, Professor Reid has put the reader in possession of material from which he can make his own over-all judgment. Most will conclude that Doe belongs in New Hampshire's hall of fame, but not in the national shrine in which Dean Pound placed him.