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In praise of Mauro Cappelletti

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This article examines the legacy of Mauro Cappelletti, the great Italian legal polymath who was internationally renowned for his vital contributions to numerous diverse legal fields. The author, who was personally acquainted with Cappelletti, first gives an overview of the celebrated jurist's life. He then proceeds to discuss Cappelletti's work, which—permeated as it was with a strongly “outward-looking” perspective, a sense of legal systems as members of a larger and “communicating world”—was all the more groundbreaking in light of the highly dogmatic approach predominant in the study and practice of law in his times, according to which the law was largely “self-contained” in both scientific and national terms. The author then considers Cappelletti's heritage today, detailing his remarkable prescience in preferring a “contextual,” universalistic methodology, emphasizing the law's tendencies toward and aptitude for convergence, registering the rise in constitutionalization, internationalization, socialization, and judicialization, and promoting equality as a crucial element of justice.

1. Mauro Cappelletti as I knew him

Tucked among the pages of one of Mauro Cappelletti's early books, a copy of which I keep on my bookshelves, I found the program of a series of lectures that I organized in 1969 as the Director of the Institute of Legal Studies of the Economics Department of Ancona (then a branch of the University of Urbino). The speakers invited were John Merryman, Arthur von Mehren, Giorgio Ghezzi, Ugo Natoli, and Mauro Cappelletti. For this series, Mauro spoke of “le garanzie del processo civile nel diritto comparato” (the protections within civil proceedings in comparative law).

I had met him in the early 1960s, when we were both young professors. Since then, we exchanged offprints, articles, books, and on several occasions, during seminars and conferences, discussed subjects that were familiar to both. In the 1970s and 1980s, during our Stanford years, we met more frequently in California, also with John Merryman and Lawrence Friedman, and discussed law and development subjects. As we know, he fell ill in the 1980s and passed away in 2004.

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2. Some biographical highlights

Mauro Cappelletti was born in 1927 in Folgaria, a very small town in the province of Trento. He studied first in Rovereto and Trento, and then in Florence, where he met his mentor Piero Calamandrei; here, he also met Gaetano Salvemini, a historian and a polemist, from whom he acquired a strong normative commitment. In the early years after graduation, following the Italian Germanophile tradition of those times, he went to study in Freiburg and Tübingen.

He was a professor of civil procedure for a short while (from 1957 to 1963) in Macerata, and from 1963 in Florence, where he also taught comparative law and was the director of the Comparative Law Institute. He was a regular teacher at Stanford Law School, but also lectured at Harvard, Berkeley, Cambridge, and many other universities. He was an active member and president of many international societies, especially of the International Association of Procedural Law and of the International Association of Comparative Law, and a member of several national academies: the Italian, the British, the French, and the Belgian ones.

Cappelletti was very active as an initiator, promoter and organizer of collective researches, mainly the two big projects on Access to Justice and on Integration through Law. In that role, he had a great virtue: he would associate young scholars to his work.

Cappelletti was an active researcher and prolific scholar for four decades, from the mid-1950s to the mid-1990s, writing on a variety of subjects—procedural law, European law, constitutional review, comparative law. In all these areas, he was considered as one of the leading Italian scholars. He wrote in English and French, and his contributions were translated into these and in other languages. For half a century now, he has been the most widely known Italian scholar in the world.

I shall also mention his strong connection with the European University Institute. Between 1971 and 1973, he wrote several articles in support of the Institute, criticizing the skeptical views of intellectuals of the caliber of Arturo Carlo Jemolo and Franco Antonicelli.¹ He became a professor at the Institute, where he taught from 1976 to 1987, and in 1977 made his ideas very clear speaking at the colloquium on *New Perspectives on a Common Law of Europe*, where he asked: “Will the newly established European University Institute be able to become, albeit on a much smaller scale, the ‘University of Bologna’ of the 20th century?” He dreamed of a transnational center that would be an active participant in the reborn trend toward a *jus commune* of the peoples of Europe.

3. Proceduralism in Europe and Italy during the middle of the century

One cannot appreciate Cappelletti’s role in the world of legal scholarship without placing his work in context: thus, a few words must be said on the conditions of procedural

¹ See the articles collected in MAURO CAPPELLETTI, *L’EDUCAZIONE DEL GIURISTA E LA RIFORMA DELL’UNIVERSITÀ* 203–238 (STUDI—POLEMICHE—RAFFRONTI) (1974), under the general part titled *Una nuova speranza nell’unità del diritto: l’università europea*.

law and comparative law in Europe and in Italy during the middle of the century, when Cappelletti came to the fore.

At that time, procedural law was heavily influenced by German scholarship, and was therefore dogmatic: concepts were more important than cases, the system rather than problems, logic than real life. Procedural law writings were abstract, highly technical, and formalized. Procedural law professors avoided empirical research and disliked linking the study of law with history and with the social sciences: think of the three great masters of the previous generation, Giuseppe Chiovenda, Francesco Carnelutti, and Piero Calamandrei (at least, the early Calamandrei). Proceduralists had forgotten the British motto according to which “freedom grows in the interstices of procedure”; they had forgotten that procedure is not neutral, that even the smallest detail of the regulation of procedure is not value-free. Inquisitorial and adversarial procedures were opposed without taking into account their contexts, their *raison d'être*, their impact. In Italy, myths, the principle of legality, a faith in the certainty of the law, and a veneration for abstract legal thinking, prevailed. Calamandrei, Cappelletti's mentor, began as a prototype of such a jurist, but by the end of his life and of his intellectual journey, he had become more open, less dogmatic, and more inclined to consider law as it operated in action.

Comparative law scholarship, in turn, was limited in two ways. First, it was centered upon only a few national legal systems. The majority of the scholars of comparative law focused on the French, and not on the British, system. When Merryman chose to study the Italian legal system, he was considered a deviant scholar. The title of his series of three now-renowned articles published in the *Stanford Law Review*, “The Italian Style,” was a translation of the well-known Latin expression *mos italicus*, and a sign of his appreciation for his Italian contemporaries, mainly Ascarelli.

Second, legal comparison was conceived as a necessarily dualistic discipline, which would compare the American and the British systems, or the Chinese and the French ones, each of which would be considered as a closed legal system, which did not engage in any communication. Only in later years did comparison come to include families, transplants, and cross-fertilizations: in other words, it began to engage in a global approach that could study two or more legal systems from “above,” as members of a larger and “communicating world” (to use Gino Gorla's expression).

In this respect, Cappelletti was an innovator.

4. The main threads running through Cappelletti's work

Let me now list the main threads running through Cappelletti's intellectual work and the elements of novelty in his approach to the study of the legal systems of the world.

First, Cappelletti's approach to the study of law was anti-dogmatic. He sought to go beyond the study of the law, to penetrate the ideologies and the spirits of the legal systems. He was anti-puristic, favorable to a “law and society” approach (I wish to stress Cappelletti's close collaboration with one of the leading scholars of the field of

“law and society”: Lawrence Friedman). He criticized the lawyers who conceived of the legal system as an autonomous world, and was in favor, rather, of a “contextual” approach.²

Second, his approach was universalistic. He wrote that “the modern comparative school seeks to combine the virtues of both natural law and positivism by adopting the realistic method of positivism in the search for common elements in the legal institutions of various nations and for the common values that they express.”³ He wished to overcome the opposition between natural law and positivism. He engaged in a quest for the converging trends, the similarities and uniformities of different legal systems. He saw convergence as “a fundamental and vital exigency of our epoch.”⁴ He wanted to rediscover the universality of law.

Third, “constitutionalization, internationalization and socialization . . . represent the three facets of a new vision of justice.”⁵ These three facets were, in his opinion, the guiding principles of the modern world: the constitutionalization of the law and constitutional justice; the growth of transnational law and justice; and access to law and justice as a component of the process of socialization.⁶

Fourth, Cappelletti believed that “integration within the scheme of pluralistic, participatory federalism means . . . a radical departure from [the] absolutization of the State.”⁷ Integration through law was opposed to integration through power. Australia, Switzerland, Canada, Germany, the US, and, finally, Europe, provided examples of this trend toward integration and of the role played by the judicial branch in this process.

Fifth, Cappelletti praised the expanding role of judges, judicial creativity, the subordination of statutory law to the constitution, and the related constitutional adjudication. He was well aware of the weaknesses and risks of judicial activism and of the problems concerning the democratic legitimacy of judges. However, he believed that these could be overcome through a “responsive” model, one that balanced independence and accountability, and the inevitable degree of politicization and socialization of the judicial function. A “balanced system of reciprocal checks”⁸ could solve the problem.

The last guiding principle, for Cappelletti, was equal justice. He did not approach this subject in a restrained manner. For him, access to justice did not only consist of

² MAURO CAPPELLETTI, *DIMENSIONI DELLA GIUSTIZIA NELLA SOCIETÀ CONTEMPORANEA* 7–8 (1994).

³ MAURO CAPPELLETTI, *THE JUDICIAL PROCESS IN COMPARATIVE PERSPECTIVE* 119–120 (1988).

⁴ MAURO CAPPELLETTI, *Foreword to the Florence Integration Project Series*, in *INTEGRATION THROUGH LAW*, Vol. 1: METHODS, TOOLS AND INSTITUTIONS, BOOK 1: A POLITICAL, LEGAL AND ECONOMIC OVERVIEW, at viii (Mauro Cappelletti, Monica Seccombe, & Joseph Weiler eds., 1986).

⁵ MAURO CAPPELLETTI, *Fundamental Guarantees of the Parties in Civil Proceedings*, in *FUNDAMENTAL GUARANTEES OF THE PARTIES IN CIVIL LITIGATION* 773 (Mauro Cappelletti & Denis Tallon eds., 1973). See also M. Cappelletti, *supra* note 2, at 8.

⁶ It is interesting to note that in an article written in 1986 on his mentor Piero Calamandrei, Cappelletti summarized his thinking in three points: the constitutional dimension of procedural law and the development of constitutional justice; democratic revolution and emphasis on the access to justice; the transnational dimension of law and justice, and the role of comparison. See Mauro Cappelletti, *La “politica del diritto” di Calamandrei: coerenza e attualità di un magistero*, 41(1) *RIVISTA DI DIRITTO PROCESSUALE* 3 (1986).

⁷ Cappelletti, *supra* note 4, at x.

⁸ CAPPELLETTI, *supra* note 3, at 23.

abolishing barriers to effective justice, providing legal assistance and introducing new judicial remedies, but also of protecting diffuse and collective interests, and of representing public and group interests in civil litigation.⁹

5. What is alive, and what is dead

Twenty years have passed since Cappelletti's last works, and we can now ask what remains alive and what has died of his scientific endeavors.

We now know and accept the idea that the dogmatic approach to law is part of an important intellectual history, but also that it is inexorably dead. That legal scholarship is necessarily comparative. That comparison involves history and requires a global approach. That law is a driving force of integration and that integration produces convergence. That constitutional review has conquered two-thirds of the world's countries. That justice that is not equal is not true justice. Finally, the development of global constitutionalism, that Cappelletti predicted, is now a reality: think of the expansion of human rights and of the increased number of international and supranational courts.

However, after twenty years, we also know that the history of empires can teach European integration more than the history of federalism. Cappelletti began from the assumption that the European Union was to develop towards a federation, and that it had to move in the direction of a single basic European identity. He did not take into account that the history of European empires was more relevant to predicting the Union's future developments, and that it was a mistake to apply, to the Union, Ernest Renan's theory of the nation as one soul and one language: the Union is a multi-ethnic and multilingual body, in which citizens have multiple identities, as in the Habsburg empire, where soldiers belonging to the same army spoke ten different languages, but obeyed orders given in only one common language.

We know that constitutional review is no longer a solitary adventure, because it has become a collective effort, one that includes national and supranational courts. Can we now assume that constitutional courts are final, given that they are now the members of a crowded "club," the family of national courts, plus the Strasbourg and the Luxembourg courts?

We now know that the "mighty problem of judicial review"—its democratic legitimacy and the conflicts between politics and the courts—has been largely overrated. In the long run, constitutional courts have gained full legitimacy, and between legislators and judges, there is more cooperation than conflict.

We know that already fifty years ago, Italian judges were quite different from the type described by Cappelletti as "psychologically incapable" of the value-oriented, quasi-political function involved in judicial review. A great friend of Cappelletti, John

⁹ See MAURO CAPPELLETTI, *GIUSTIZIA E SOCIETÀ* (1972); *ACCESS TO JUSTICE, A WORLD SURVEY* (Mauro Cappelletti & Bryant Garth eds., 1978). A more complete survey of Cappelletti's works is available in the two obituaries by Nicolò Trocker, *Mauro Cappelletti*, 51(1) *RIVISTA TRIMESTRALE DI DIRITTO E PROCEDURA CIVILE* 159 (2005) and by Vincenzo Varano, *In ricordo di Mauro Cappelletti (1927–2004)*, 51(2) *RIVISTA DI DIRITTO CIVILE* 179 (2005).

Merryman, had already attracted scholars' attention to the great divide between the folklore of judges as mere "*bouche de la loi*" and the reality of creative jurisprudence, in his seminal articles on the Italian style.

What Jack Jacob, the leading British proceduralist, wrote in 1988, remains true:

In every generation, a precious few tower over their fellows in the specialist area of their endeavor. They transcend their compeers in being immensely more active and articulate as well as more imaginative, more creative as well as more critical, more innovative as well more inspiring. Their works vastly enrich their subject and greatly enhance their significance and influence. They are readily and rightfully held in pre-eminent regard and esteem. In our age, one of those precious few in the field of comparative civil procedural law and evidence and constitutional law is Professor Mauro Cappelletti.¹⁰

¹⁰ Jack Jacob, *Foreword*, in CAPPELLETTI, *supra* note 3, at v.

getheilt (*sic*) ist, soll die Welt in ebenso viele Staaten zerlegt werden. Jede Nation ein Staat. Jeder Staat ein nationales Wesen» ⁽⁵⁰⁾.

Ecco, dunque, un compito importante e grandioso per la scienza del diritto: ripensare, ri-concettualizzare lo Stato nel contesto delle nuove tendenze e trasformazioni che si sono delineate: i cambiamenti interni, derivanti dal mutare delle frontiere e dalla ridefinizione della base personale dello Stato, costituita dal popolo, e i cambiamenti esterni, derivanti dalla integrazione dello Stato in unità superiori funzionali, dove si esercita una sovranità condivisa.

⁽⁵⁰⁾ J.C. BLUNTSCHLI, *Allgemeine Staatslehre*, Stuttgart, Cotta, V Auflage, 1875, 107. Debbo la segnalazione di questo brano a Olivier Beaud, che ringrazio.