Review

PAOLO BORGNA,
DIFESA DEGLI AVVOCATI SCRITTA DA UN PUBBLICO ACCUSATORE
(A Defense of Lawyers Written by a Public Prosecutor),
Roma-Bari, Laterza, 2008

"Judges, prosecutors, and attorneys are not the expression of the opposition between public and private interest, rather they are different stances of a sole function, *i.e.* the adjudication" (p. 39).

This essay addresses courageously the readers by taking a clear position in the current debate on judicial independence and on the role played by the bar in democratic societies. In this respect it touches upon crucial issues that reverberate on socio-legal scholarship and policy discourses. It drives to the extreme consequence the centrality of the triad in the justice administration: two parts before a judge that should be deemed impartial because of her/his independence from both parts. With regard to this last point, the articulation of the thesis put forth by the author is path-breaking. The point is not – according to Borgna – the guarantee of a triadic structure by means of formal institutional constraints. Ties and obligations that insulate the judge from all other legal professions are rather fatal to the proper exercise of the judicial function. The point made in the volume is the following: judges, prosecutors and lawyers are altogether the lymph of a trial, whose fairness is the outcome of the dialogic dynamic which engages all parts into a common game. The game is of a positive sum, even for the part that will lose in the final adjudication.

The volume combines an historical analysis of a period of Italian contemporary history (in which the legitimacy of the trial as a prototypical democratic ritual was contended) to a sociological and anthropological account of the trial as social game. The author takes then the opportunity to deal separately with three issues: the discretional power of the prosecutors – between execution of law and interpretation of the prosecutorial role; the link between the lawyers and the civil society; the dialogic nature of the trial as a ritual.

- *Drawing lessons from political contingency*. In 1976 the legal representative of the leftist terrorists, charged for "armed group", is Fulvio Croce, president of the Turin forensic council. His destiny is one of the last episodes of an escalation

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in which the charged took a radical stance against the very institution of legal representation, one of the pivotal rights of any demo-constitutional political system. Leftist terrorists undertook a generalized fight aiming at destructing all instantiations of the State, included the courts. Several murders have been committed meanwhile. Fulvio Croce was dramatically killed before the trial entered in the hearing stage. The paralysis of all public institutions, apparently held at stake and de-legitimized by the terrorists threaten, was made possible by the heroic decisions of the lawyers that accepted to unfold all steps of the trial till the final ruling would have been given, despite all risks.

- *The functionalist argument*. Lawyers embody the spirit of the private interest by means of a deontological attitude that encompasses public norms and goods. Exactly because of that they are functionally necessary to the correct, legitimate structure of the trial. In particular, this holds for criminal matters. Prosecutorial decisions entail, as the author argues in the third chapter, an unavoidable ineludible discretional power. This power needs to be counter-balanced. The function of checking and balancing such a power is performed by the lawyer, the dissenting player, the critical eyes casted on each document, each interpretation, and each prosecutorial decision.
- *Dialogic function*. Lawyers, considered both as individuals and association (the bar), undertake a regular and vital relationship with the civil society. Since they are exposed to the demands of justice coming from companies, citizens, etc., they are better placed than anybody else to unveil dormant problems, knowledge, or latent criticalities economic and social activities. They represent a repository of know how that would be rarely and uneasily accessible to judicial (public) actors.
- *Roots in the civil society*. Because of the function they perform and because of the position they hold into a civil society, lawyers and forensic institutions may inject into the trial the refreshing hints of the social morality and of the civicness. Of course, in order to make this possible, proper legal and judicial education turns out to be crucial for the matter. In those cases in which lawyers are not capable enough or adequately trained and socialized to perform this function, the trial as a whole loses legitimacy and is more exposed to the risk of unfairness. In other terms, even though one can not argue that a democratic society necessarily produces a skillful and ethically correct bar, it is definitely true that in order to have a democratic society, a skillful and ethically correct bar is absolutely needed.

In the book these arguments are put forth by means of different types of evidence, some of them functionalist, some drawing from the lessons of history (in Italy but also in other countries, pp. 41-42). In doing so the author paves the way to a more comprehensive set of considerations directly touching upon the legitimacy of adjudication. Public institutions, even strong and effective, do not ensure *ipso*

facto the due process of law. In arguing so, the author converges on the main results reached by recently research, which unveiled the crucial role played by lawyers in enforcing liberal constitutionalism in a number of different cultural and institutional settings (Halliday, Karpik and Feeley, 2008). Functionalist arguments should by any mean carefully considered in nascent or nearly consolidated democracies. In many post authoritarian or authoritarian regimes, policies of democracy and rule of law promotion have devoted intensive efforts to enhance the capacity of the judiciary and to strengthen the guarantees of judicial independence. History however has harsh lessons to offer: without a properly empowered "demand-side"(legal representation), the administration of justice proves shortcoming in fulfilling the expectations of a fair trial. A weak bar hampers the effective implementation of the constitutional principle. A de-legitimated bar is equally problematic in this respect. The book of Paolo Borgna, by drawing with a passionate style from a case study, casts an echo on a more large and broad spectrum of cases, which goes far beyond the experience of Italy. It represents a challenging reading for all actors who are anyhow involved into the judicial and legal field. As scholar, one can only wish that further research is carried on in Europe in order to depict, in a more realistic portrait, how and under which conditions social and political institutions contribute altogether – as the *ying* and the *yang* of the whole system of adjudication – to the practice of the due process of law.

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