The Legal Profession, Politics and Public Opinion: Some Reflections on the Independence of Lawyers and the Rule of Law in Modern Italy

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1. *The independence of lawyers and the rule of law*

Judicial independence – understood both as the institutional independence of courts and tribunals and as the individual impartiality of judges – is at the core of the rule of law and constitutes litigants' main guarantee for a fair trial[1]. Systems based on the rule of law require the judiciary not only to be independent but also to appear to be independent, in order to maintain the public's trust[2].

While judicial independence and its role in fostering the rule of law has been discussed at length by jurists in Europe over the past two centuries, the independence of lawyers (i.e., persons with legal training defending and counselling litigants: attorneys-at-law, barristers, Rechtsanwälte, avocats, avvocati, etc.) has been debated mainly amongst lawyers themselves. However, the professional independence of lawyers is an essential prerequisite for the right to a fair trial and for the impartiality of judges – and therefore for the enforcement of the rule of law in free societies.

To begin with, the independence of lawyers is the main guarantee to ensure the effectiveness of the right to counsel. For lawyers to effectively perform their tasks (within the limits of the relevant procedural rules), they must be independent – that is, free from the influence of interests or pressure of any kind[3]. When their freedom is put under pressure, lawyers are unable to provide people with the legal assistance they are entitled to.

Indeed, independence is more than a duty for lawyers: it is their right. It is probably the main principle concerning lawyers both as individuals and as a group, and it has been the subject of reflection throughout the history of legal ethics[4].

The independence of lawyers presupposes the independence of the legal profession, which in turn presupposes free access to the legal profession and the self-government of bar associations. Independence

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means that lawyers can freely choose what clients they will represent and what tactics they will follow in pursuit of their clients' interests; similarly, clients must be able to choose freely what lawyers will represent them.

In this context, it should be pointed out that most legal systems conceive of lawyering as a liberal profession, practised by private professionals chosen by the parties. Such a conception of the legal profession in itself constitutes a guarantee for the independence of lawyers (although the state can exercise varying degrees of control over the practice of law even where this is seen as a liberal profession).

However, in the past, some legal systems conceived of lawyering as a public service. The legal profession was then practised by public officials who were chosen and paid by the state and were thus assigned to the parties. For example, in 1781, Frederick II of Prussia introduced a reform under which courts were to choose a legal advisor for each party from among their members and entrust that advisor with the task of arguing that party's case in court. This reform was ultimately abolished in 1793, after which parties were allowed to choose their own lawyers[5].

The independence of lawyers requires lawyers to be independent not only of the state but also of their clients. The client-lawyer relationship has been debated since the Middle Ages. For example, in the first half of the 16th century a treatise on the legal profession stated that lawyers should avoid being influenced by family or friendship connections with their clients, as this could lead to aiding and abetting. By contrast, he argued that lawyers should choose their defence strategies freely, without necessarily pleasing or indulging their clients, let alone bowing to their demands[6].

Given that lawyers are, by definition, partial to one side in legal proceedings, their independence might seem a paradoxical issue to address. How can lawyers be independent when their role in trials is to protect their clients? Indeed, the client-lawyer relationship is founded on loyalty, to the point that violation of the duty of loyalty constitutes a crime[7].

In fact, lawyers must navigate conflicting values and interests, which are sometimes even openly at odds: on the one hand, they defend their clients' interests; on the other, they participate in the fair administration of justice. This is the background to the oxymoronic concept of "impartial partiality", which refers to the need to strike a balance between the partiality of defence, which is a lawyer's institutional task, and the impartiality of judgment in a court of law, to which the lawyer contributes by defending his or her client[8]. On a similar note, reference is made in the Italian legal system to "dual loyalty": loyalty to the client on the one hand and to the judicial system on the other[9].

In this paper, I would like to make a few remarks about the independence of lawyers, with a focus on the legal profession in Italy from unification in the second half of the 19th century onwards. This issue offers a particular vantage point from which to reflect on the dynamics underlying the relationship between the legal profession, politics and society as well as on the effects that lawyer independence exerts on the enforcement of the rule of law.

The history of Italian lawyers can be seen as the history of their struggle for independence. Currently, Article 1 of the Law

on the Italian Bar, enacted in 2012[10], guarantees the independence and autonomy of lawyers as an indispensable condition for the effectiveness of defence and the protection of rights. And Article 9 of the Code of Conduct for Italian Lawyers, approved by the Italian National Bar Council in 2014, establishes the duty of independence as one of the fundamental duties of lawyers (along with the duties of honesty, integrity, probity, dignity, decorum, diligence and competence). Hence the duties that lawyers must fulfil require them to be independent, and the independence of lawyers is guaranteed by their respect for ethical rules.

The principle of independence is closely linked to that of avoidance of conflicts of interest (whether between the client and the lawyer or between two clients). In fact, Article 24 of the Code of Conduct – which concerns conflicts of interest – establishes that «[a] lawyer, in the practice of his or her professional activity, shall maintain his or her independence and defend his or her freedom from pressures or influences of every kind, including in relation to interests regarding his or her personal sphere».

At the constitutional level, it is interesting to note that the Italian Constitution of 1948 guarantees the independence of judges but does not mention the independence of lawyers. In recent years, the Italian National Bar Council has urged that Article 111 of the Italian Constitution – which concerns due process – should be amended to strengthen the role of defence lawyers in the administration of justice and to enhance the enforcement of the independence of lawyers. In its proposal, the Bar Council, after acknowledging the public role played by lawyers and the liberal nature of the legal profession, stresses the need for assistance from a lawyer during trial (except in extraordinary cases) and specifies that lawyers are to practise their profession with freedom and independence and in compliance with ethical rules – something that, it is pointed out, will also help to guarantee judicial independence[11].

At a supranational level, the independence of lawyers has been proclaimed in many declarations and charters over time. For example, the International Bar Association's International Code of Ethics of 1956 makes the following affirmation: «Lawyers shall preserve independence in the discharge of their professional duty. Lawyers practising on their own account or in partnership where permissible, shall not engage in any other business or occupation if by doing so they may cease to be independent» (Rule 3). Further, in 1987, the Union Internationale des Avocats adopted the International Charter of Legal Defence Rights, in which it stated that «[t]he independence of judges cannot be separated from that of lawyers» and that «[i]n carrying out his tasks, the lawyer shall at all times act with complete freedom, diligently and courageously, according to the law, respecting his client's wishes and the ethics of his profession, without concerning himself with the restrictions or pressures to which he might be subjected by authorities or the public» (Art. 13).

Subsequently, a duty of independence was declared in the Code of Conduct for European Lawyers, enacted by the Council of Bars and Law Societies of Europe in 1988 in order to regulate cross-border activities. That Code of Conduct recognised the role of lawyers «[i]n a society founded on respect for the rule of law» (Art. 1.1) and acknowledged the independence of lawyers

as one of the general principles of the legal profession, affirming that «[t]he many duties to which a lawyer is subject require the lawyer's absolute independence, free from all other influence, especially such as may arise from his or her personal interests or external pressure» and specifying that «such independence is as necessary to trust in the process of justice as the impartiality of the judge» (Art. 2.1).

Furthermore, the Charter of Core Principles of the European Legal Profession – adopted in 2006 in order to gather the fundamental values common to all national and international rules governing the conduct of European lawyers – provides for «the independence of the lawyer, and the freedom of the lawyer to pursue the client's case» (principle (a)). As is pointed out in the commentary on the Charter, «[a] lawyer needs to be free – politically, economically and intellectually – in pursuing his or her activities of advising and representing the client».

2. *The legal profession and politics*

Lawyers' independence from political power has been debated since the Middle Ages. For example, in the mid-14th century, Alberico da Rosciate, a famous Italian jurist from Bergamo, stated that the legal profession was then very difficult to practise in Italian cities because of political conflicts and tyrannical regimes («tale officium exercere debite est multum difficile secundum tempora moderna propter partialitates et tyrannica regimina»)[12].

To be independent from political power, lawyers obviously need to be independent from the government and thus free from political control, pressure or influence, but it is also essential that they should be independent from judges. Historically, the legal profession has often been subordinate to the judiciary, meaning that the lawyer-judge relationship affected the independence of lawyers. Starting in the Middle Ages, sovereigns in various countries sought to subject lawyers to the control of judges. Examples include the Kingdom of Sicily, with Frederick II's *Liber constitutionum* (also known as the Constitutions of Melfi), which, although not always complied with, remained in force until the end of the 18th century[13], and the Kingdom of Spain, with Philip II's *Nueva Recopilación* (which, as regards the part on rules for the legal profession, was based on the *Ordenanças a los abogados y procuradores* of the sovereigns Ferdinand and Isabella)[14], under which admission to the legal profession required the approval of royal judges. Moreover, the introduction of an inquisitorial criminal procedure in the Middle Ages reduced defence lawyers to being mere collaborators of judges.

In more recent times, the legal profession was subject to tight government control in the 19th century in the Kingdom of Lombardy-Venetia (in what is today Italy), which had come to be under Austrian legislation. The government exercised this control through the judiciary, which was responsible not only for verifying admission to the legal profession but also for exercising disciplinary power over lawyers[15]. The adoption of an inquisitorial model based on the Austrian code of 1803 further restricted defence in criminal proceedings and contributed to diminishing the role of the legal profession[16].

Government control over lawyers manifests itself both in the organisation of professional associations and in the work of individual professionals. As regards the latter, an independent lawyer is a lawyer who is given the freedom to take on and carry out any defence assignment. Further, defendants must be free to ask the lawyer of their choice to represent their interests. That lawyer must be allowed to freely represent and assist the client, to communicate freely with him or her, guaranteeing the protection of professional secrecy, to plead on his or her behalf without restrictions, and to have unlimited access to the case files. What is more, no lawyer is to be persecuted or threatened for having advised or represented a client or defended his or her case. In particular, the Basic Principles on the Role of Lawyers adopted by the United Nations in 1990 state that «[g]overnments shall ensure that […] lawyers are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference» and «shall not suffer, or be threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics» (principle 16).

Independence also requires bar associations to be free to regulate their own practice. The independence of the legal profession is safeguarded mainly by bar associations having statutory power to establish professional rules as well as having jurisdiction over their members' disciplinary liability. Indeed, the Charter of Core Principles of the European Legal Profession acknowledges the importance of «the self-regulation of the legal profession» (principle j). The commentary on the Charter emphasises that «bar associations must play an important role in helping to guarantee lawyers' independence» and sees self-regulation as «vital in buttressing the independence of the individual lawyer». As a matter of fact, it is pointed out that, although most European countries «display a combination of state regulation and self-regulation», «only a strong element of self-regulation can guarantee lawyers' professional independence vis-à-vis the state, and without a guarantee of independence it is impossible for lawyers to fulfil their professional and legal role».

At present, authoritarian governments in many countries are endangering the free exercise of the legal profession: lawyers are often subjected to threats and violence – not to mention unjustly prosecuted and sentenced – just for doing their job. In this connection, the commentary on the Charter notes that «[i]t is one of the hallmarks of unfree societies that the state, either overtly or covertly, controls the legal profession and the activities of lawyers» (principle j) and that «in unfree societies lawyers are prevented from pursuing their clients' cases, and may suffer imprisonment or death for attempting to do so» (principle a). Even in many democratic countries, the denial of guarantees for the freedom of defence lawyers means that the independence of lawyers is called into question. However, the situation is obviously worse in non-democratic societies.

Just think of Nasrin Sotoudeh, an Iranian human-rights lawyer jailed in 2018 after defending several women arrested for demonstrating against compulsory veiling[17]; or Ebru Timtik, a Turkish human-rights lawyer who was sentenced to over 13 years in prison in 2019 for terror-

ism-related offences. Timtik died in 2020 after going on a hunger strike to demand a fair trial – after the rejection of all her defence lawyers' requests for her release, and despite the appeals of various international organisations[18]. After her death, many Turkish lawyers were arrested (and thus joined the hundreds of other lawyers sentenced to long prison terms) on charges of terrorism for having defended members of terrorist organisations; they were denied the right to choose their defenders, with the prosecutor's office instead appointing them[19]. Furthermore, a reform to the election process for Turkey's bar associations was proposed in 2020, with the goal of weakening the profession[20]; undermining the independence of bar associations is a preferred course of action among authoritarian governments.

And then there is Latifa Sharifi, an Afghan lawyer specialised in defending women's rights – and, in particular, in assisting female victims of domestic violence in divorce proceedings – who has been subjected to numerous threats and acts of intimidation. She is currently hiding[21].

In Europe, the backsliding of the rule of law in some EU Member States is undermining the independence of the legal profession. For instance, the Dutch foundation Lawyers for Lawyers has denounced the treatment of Roman Giertych – a Polish lawyer who has represented various prominent opposition figures – after he was detained and his home and office were searched in violation of lawyer-client privilege[22].

Numerous initiatives have been launched at an international level to uphold a free and independent legal profession and to enforce the right to counsel, in accordance with the Basic Principles on the Role of Lawyers. On 24 January of each year since 2009, the Association of European Democratic Lawyers organises the Day of the Endangered Lawyer to draw the attention of civil society and public authorities to the situation of lawyers in a given country[23]. And in 2015, an International Observatory for Lawyers was established, the aim of which is to uphold the right to practise law freely and completely independently as well as to denounce situations where the right to counsel is at risk[24].

3. *The legal profession and public opinion*

As argued above, independence requires lawyers to be free from any external control, pressure or influence – but it is important to note that «external» here goes beyond government. The issue of the relationship between lawyers and public opinion has already been dealt with as part of the broader debate over the relationship between the administration of justice and society[25].

Lawyers can clearly be exposed to pressure from public opinion, which itself can be influenced by political forces. Such pressure – which falls within the complex relationship between the administration of justice and the mass media[26] – risks undermining the independence of lawyers and the right to counsel.

Lawyers who take on the cases of defendants charged with heinous crimes are often publicly insulted or threatened, including on social media, which ends up compromising the right to counsel. In the opinion of many people, such defendants do not deserve a defence lawyer, meaning

that lawyers should not take on their case. Laypeople often ask, how could a lawyer possibly defend a person charged with such shocking offences? Recently, an Italian lawyer was insulted for assisting a defendant accused of sexual assault – and the fact that the lawyer was a woman was seen as an aggravating circumstance. Unfortunately, the very fact that many lawyers refuse to defend unpopular clients (and disapprove of colleagues who agree to defend them) only strengthens this tendency[27].

This is a result of the confusion surrounding the relationship between a lawyer and his or her client, specifically of the widespread belief that the lawyer necessarily sympathises or agrees with his or her client's behaviour. However, as the International Charter of Legal Defence Rights states, «neither the authorities nor the public should associate the lawyer with his client or with his client's case, however popular or unpopular it may be» (Art. 13).

Moreover, traditional prejudice against lawyers cannot be ignored. This includes the common view that lawyers prevent swift, frictionless trials by exploiting legal loopholes. There are numerous examples of hostility towards lawyers who are considered responsible for problems that, in reality, do not depend (exclusively) on them – first and foremost, the excessive length of trials[28]. This view, which is widespread in society and often shared by institutions, helps foment the public's distrust in the administration of justice.

In Italy and in many other democratic countries today, the role of trials and the function of the judiciary are being called into question by criminal-law policies that increase the severity of punishments in an attempt to obtain a popular consensus and political legitimacy[29]. In this climate – where, to reassure the public, public safety tends to prevail over the protection of individual guarantees – the right to counsel is increasingly subject to attacks by those who see lawyers, if not as outright supporters of the crime committed, then at least as an unnecessary barrier to the conviction of the defendant.

Defence lawyers have reacted strongly to such public hostility, emphasising that a fair trial must be ensured for everyone[30]. In a democratic system, a person accused of a crime, however heinous it might be, has the right to be represented by counsel. A lawyer does not defend the crime, but rather the person – and when a lawyer acts in accordance with legal ethics, he or she only ensures that the adversarial system and the rule of law are upheld.

However, lawyers often do refuse to take on cases that might expose them to public hostility, because defending an unpopular client could be professionally difficult or even personally dangerous. Lawyers who accept controversial clients are typically subjected to disapproving reactions from the public and media. The topic of the unpopular client has been widely discussed[31]. In this context, it should be borne in mind that no lawyer is obliged to represent any client (except where appointments are made by a court or a bar association). A lawyer is free to accept or refuse any client or case for any reason. Even so, however, one of the functions of lawyers is to uphold constitutional guarantees and, in particular, to implement the right to counsel. Thus, a lawyer should accept any defendant – no matter how unpopular or disgusting he or she may be – and should refuse a client only for professional reasons (which are in the

client's interest), not for personal reasons or interests[32]. This idea is well expressed by the cab-rank rule of English law, according to which a lawyer should accept any client, irrespective of who he or she is or what he or she is accused of doing[33].

4. *The independence of lawyers in Italy in the 19th and 20th centuries*

4.1. *The liberal period (1860s to 1920s)*

Italian governments have made several attempts to regulate and control lawyering, including within legal frameworks that conceive of lawyering as a liberal profession.

In Italy, the independence of the legal profession was debated soon after political unification, within the broader debate over the relationship between the legal profession and the judiciary during the liberal period[34]. Bar associations were established in Italy by Law No. 1938 of 8 June 1874; they were based on the French model[35] and served as a model for other professions[36].

Under that law, admission to the bar was required for anyone who wanted to practise as an *avvocato* (a lawyer counselling and assisting clients in legal matters) or as a *procuratore legale* (a lawyer representing clients in court) – two roles that, following much debate, had been kept distinct. Bar associations were set up at each court of first instance or court of appeal, and bar-council members were freely elected by all members of the local bar. Leading jurists differed in their views on this arrangement: Giuseppe Zanardelli, a bar-council president who later held various ministerial positions during his career, welcomed the establishment of independent bar associations that were supported by the very people practising the profession, as he felt it safeguarded the rights and duties of lawyers[37]; Professor Francesco Carrara, by contrast, believed that in the absence of a national bar association, the local nature of bar associations weakened the legal profession's standing in the eyes of the government[38].

The 1874 law ensured that bar associations would have independence – in particular, by assigning them disciplinary power over lawyers. However, despite this autonomous disciplinary power, which was meant to protect lawyers against pressure and control exerted by public authorities, the Italian state demonstrated a tendency to interfere in the legal profession through the judiciary, as Giuseppe Zanardelli pointed out[39].

Firstly, under the 1874 law, judges and prosecutors were permitted to intervene in disciplinary proceedings. Bar-council decisions could be contested (by the accused or by the competent prosecutor) before the competent court of appeal, and the ruling of the court of appeal could then be appealed before the Court of Cassation.

Secondly, the Code of Criminal Procedure of 1865 – which provided for the power of judges to punish the misconduct of lawyers during hearings (Art. 635) – was not abolished after the 1874 law came into force. Interestingly, while the French law of 20 November 1822, which recognised the independence of bar associations, expressly maintained judges' disciplinary power during hearings (Art. 16), the Italian law of 1874 did not expressly provide for this case. Nonetheless, the corresponding view prevailed in Italy – and indeed, judges in practice increasingly expanded their disciplinary power over lawyers. As an example,

it may be mentioned that, under the 1865 code, judges could discipline lawyers for neglect in defence. Case-law broadened the applicability of this provision, which was already wide-ranging, by equating neglect in defence with abandonment of defence – a rather frequent occurrence, given that lawyers used to leave the courtroom in protest against violations of the right to counsel. As a result, bar associations had only residual disciplinary power over lawyers[40].

The issue of the independence of bar associations fuelled the debate over the codification of legal ethics. Lawyers tended to consider their ethical rules (or at least most of them) to be customary law and thus refused to codify them, so as to prevent the state from controlling the legal profession and endangering the (very limited) independence of their bar associations[41].

As regards the right to counsel, the Code of Criminal Procedure of 1865 excluded defence lawyers from the pre-trial phase of criminal proceedings, confirming the inquisitorial nature of that phase in accordance with the Napoleonic model. Lawyers were henceforth allowed to participate only in the trial phase[42].

In 1913, the new Code of Criminal Procedure took a step in the opposite direction by allowing lawyers to intervene in some parts of the pre-trial phase together with the prosecutor. The 1913 code also regulated the disciplinary power of judges and bar associations (which had been left to case-law under the previous code), establishing that abandonment of defence was to be punished by judges (Art. 78) whereas other violations would fall under the disciplinary power of the competent bar association (Art. 82).

4.2. *The Fascist regime (1922-1943)*

During the Fascist dictatorship, the independence of lawyers – both as individuals and as a group – was again limited, and even further so[43]. It was no surprise that the legal profession, which in the liberal tradition stood for the protection of individual rights and freedoms, was subjected to strict control during Fascism. Lawyers were seen as subservient to the state, and the interests of the state took precedence over those of individuals[44].

Between 1926 and 1933, the Fascist regime progressively reformed the legal profession as part of its corporatist system, finally suppressing bar associations by Law No. 1578 of 27 November 1933.

From that time, bar councils were no longer elective but controlled by the Minister of Justice, and a National Bar Council was established as a second-instance court in disciplinary matters whose members were appointed by the government. Bar membership was prohibited for those who acted against the nation's interests (in other words, opponents of the Fascist regime).

Moreover, to emphasise their subordination to the state, lawyers were required to take an oath upon admission to the legal profession. This oath highlighted the regime's intended role for lawyers, namely that of collaborators to judges in the administration of justice: future lawyers swore to practise the legal profession with loyalty, honour and diligence «for the superior purposes of justice and the superior interests of the nation». Interestingly, under the 1874 law, only *procuratori legali* had had to take an oath. In fact, only they were considered public officials. By contrast, it

was considered that having *avvocati* take an oath would have endangered their independence[45]. Fascism required both categories of lawyers to do so. Hence even as individuals, lawyers were subject to strict conditions in their practice, in accordance with Fascist values, which considered lawyers to be officers of the court.

As a result of the situation described above, lawyers were actually prohibited from taking cases concerning political crimes against the state. Nonetheless, many lawyers – showing great courage in the performance of their jobs – took on the defence of "subversives", often suffering Fascist violence as a consequence. Lawyers frequently saw their offices searched (or perhaps ransacked would be a more accurate term) in an attempt to suppress the right to counsel[46].

Lawyers also saw their role in court proceedings reduced. The Fascist Code of Criminal Procedure of 1930 returned to the system of the 1865 code, thus completely excluding lawyers from the pre-trial phase. Lawyers were even hampered in their oral arguments during trials, as judges were given the power to limit closing defence arguments (Arts. 468 and 470)[47].

Under the 1930 code, a court could discipline a lawyer who abandoned his or her client's defence (Art. 130) and appoint a lawyer itself, even choosing from among members of the judiciary (Art. 131). These provisions were strongly opposed by lawyers, who considered them prejudicial not only to the defendant's rights but also to the legal profession's independence and prestige.

4.3. *The transition from Fascist state to Republic (1943-1948)*

After the fall of Fascism in 1943, bar associations regained – and the National Bar Council gained – their independence from the state. Law No. 382 of 23 November 1944 re-established bar associations and set out the rules for free and fair election of their councils. Nonetheless, during Italy's transition from Fascist state to Republic, the independence of the legal profession was undermined by both political influence and social pressure. In practice, many defendants found it very difficult or even impossible to retain counsel to defend their cases because of the community's reaction.

In this context it should be mentioned that after the Fascist regime collapsed, special courts of assizes were established by Law No. 142 of 22 April 1945 to punish crimes of collaborationism committed during Germany's military occupation of northern Italy[48]. These very savage crimes had had a strong impact on the people of northern Italy, who wanted justice (or perhaps revenge) to be served, especially in the months immediately following the end of the war. The legal system responded to society's demands by punishing these crimes very severely, though the severity of punishment soon lessened (with amnesty ultimately granted to Fascist and Nazi collaborators in June 1946).

Defendants before the special courts of assizes had the right to have a lawyer under the Code of Criminal Procedure of 1930. Hence trials in these special courts partly adhered to due process and the adversarial system of proceedings, even though their composition and procedure were typical of

those used in the administration of political justice[49].

However, it must be pointed out that, in the eyes of the public, lawyers who took on the cases of Fascist and Nazi collaborators were seen to be supportive of their clients. For this reason, the public openly disapproved of these lawyers, including by insulting and threatening them. Hence few lawyers were prepared to take on such cases; those who did not also cited ethical and political grounds.

At hearings, lawyers were often interrupted by members of the public who were in attendance. Some defendants claimed that this amounted to a violation of the adversarial principle, but the Court of Cassation generally rejected such claims, stating that reactions of protest or dissent from the public did not make a sentence invalid as long as they had not prevented lawyers from calling witnesses for the defence or from giving their closing arguments[50]. Some lawyers stepped down from cases in protest, but even the impossibility of conducting a defence was considered remedied if no record of the protest had been made in the transcript of oral arguments[51]. Only when the public's misbehaviour had been such that it had impeded the defence and the lawyer had immediately protested could a sentence be declared invalid[52].

Eventually, however, the newly re-established bar associations championed the principle that everyone had the right to be defended, irrespective of political tendencies. This contributed to enhancing the role of the legal profession in securing the respect of individual guarantees and, thus, in affirming the principle of the independence of lawyers[53]. Interestingly, Fascist collaborators were often defended by lawyers who had actively opposed Fascism (and who were now elected members of bar councils). This demonstrates that lawyers defend the person, not the crime, and it highlights that lawyers must be free from pressure and influence. One example of this is Cesare Degli Occhi, an anti-Fascist lawyer[54] who, during the first post-war election to the Milan Bar Council, advocated for the independence of the legal profession by affirming that those accused of collaborationism had the right to a defence and by reminding those present that he himself had defended some of the Fascist regime's most vehement supporters[55].

4.4 *The terrorism emergency of the 1970s and 1980s*

Law No. 1578 of 27 November 1933 remained in force even after the fall of Fascism (though of course with amendments to the parts referring to the corporatist system). Calls for reform of this law began to be heard immediately after the war. The advocates of reform wished both to modernise the legal profession in light of the new social and economic context and to give the profession greater independence. The debate on this reform was intertwined with that on the codification of legal ethics, which itself revolved first and foremost around the issue of the independence of lawyers. The first code of conduct for Italian lawyers – which stemmed from case-law in disciplinary matters – was eventually established in 1997 by the National Bar Council, whose aim was to ensure that those practising the legal profession would be aware of

legal ethics and respect their professional duties[56].

In parallel, the right to counsel was progressively expanded through adaptation of the Fascist Code of Criminal Procedure (which would remain in force until 1988) to the democratic principles of the 1948 Italian Constitution. This was made possible by interventions of the legislature and by rulings of the Constitutional Court[57].

A number of limited measures were adopted immediately after the fall of Fascism – pending a comprehensive overhaul of the Fascist code – in order to extend individual guarantees by repealing or amending those Fascist provisions that conflicted the most with liberal principles.

Law No. 517 of 18 June 1955 broadened the scope of action granted to defence lawyers in the pre-trial phase, effectively restoring the situation envisaged under the 1913 Code of Criminal Procedure. Then the Constitutional Court – following a bitter clash with the Court of Cassation – extended the provisions of the 1955 law concerning the pre-trial phase of formal proceedings to include the pre-trial phase of summary proceedings[58], and later on it ruled that defence lawyers could be in attendance during defendant questioning[59].

The 1955 law also amended the provisions of the code that gave judges disciplinary powers in the case of abandonment of defence: it maintained the power of judges to suspend lawyers from practising (Art. 131), but it also provided that judges were to immediately report the matter to the competent bar council so as to enable it to take the appropriate disciplinary measures (Art. 130).

However, in the 1970s and 1980s, there was a wave of political terrorism in Italy, including bombings, assassinations and kidnappings, which stunned citizens and made them call for an effective (and reassuring) response from their government. A number of exceptional laws were enacted, causing a drastic weakening of individual guarantees for reasons of public order and safety, and thus also endangering the independence of the legal profession.

This emergency legislation exploited criminal trials for the purposes of social control, with an overall decrease in the protection of defendant rights[60]. In practice, the reduction in defence guarantees at the legislative level resulted in open hostility between lawyers and judges. Some judges resorted to preventive measures against defence lawyers (such as preventive detention, wiretapping and searches of their offices in violation of lawyer-client privilege) that frustrated lawyering and seriously jeopardised the independence of lawyers[61].

One of the most dramatic – and at the same time most important – moments for the independence of the legal profession in this context is the trial against the leaders of the Red Brigades, one of the most violent left-wing extremist organisations ever seen in Italy. That trial, which gave rise to a wide-ranging debate on self-representation[62], took place between 1976 and 1978 before the Court of Assizes of Turin.

The defendants declared that they refused to accept the appointment of public defenders – setting in motion what the French lawyer and political activist Jacques Vergès called a «rupture strategy»[63]. To understand this, two provisions of the Code of Criminal Procedure should be borne in mind: Article 125, which provided that a defendant was to be assisted by a lawyer on penalty of nullity of the proceedings, and

Article 128, which provided that when a defendant did not have a lawyer, the court would appoint a public defender, who had a duty to provide legal assistance.

Public defenders were duly appointed for the lawyerless defendants, but the appointees refused their appointment in the face of threats from the defendants. Therefore, in accordance with Article 130(2) – which provided that if a public defender or defence lawyer did not take on the defence, the chairperson of the competent bar council would be appointed to do so – the president of the Court of Assizes of Turin appointed the chairperson of the Turin Bar Council, Fulvio Croce, to take on the defence along with other council members.

Given that the defendants continued to refuse to be defended, threatening and insulting their defenders in the process, Croce and the other new defenders called into question the constitutionality of Articles 125 and 128. Specifically, they pointed out that the right to counsel enshrined in Article 24 of the Italian Constitution includes the right to refuse defence, and they invoked Article 6 of the European Convention on Human Rights, which lays down that anyone charged with a criminal offence has the right «to defend himself in person or through legal assistance of his own choosing». However, the Court of Assizes of Turin held that the constitutionality issue was manifestly unfounded.

In the meantime, Croce insisted that the National Bar Council should call for a law introducing the principle of self-representation into Italian criminal procedure, as that would allow the trial to continue, but the Council favoured the principle of professional defence.

On 28 April 1977, Croce was assassinated by the Red Brigades[64]. After his death, the defence was entrusted to the new chairperson of the Turin Bar Council, Gian Vittorio Gabri, and other public defenders. The new defenders – still faced with the defendants' persistent refusal to be defended – reiterated the previous defenders' objection on the grounds of the unconstitutionality of Articles 125 and 128 of the Code of Criminal Procedure. The objection was again rejected; the Constitutional Court would rule on the matter only in 1979, also finding the objection unfounded[65].

At this point, the defenders – faced with the dilemma of how to perform their function while respecting the interests of their clients (who refused to accept their assistance), on the one hand, and adhering to the principles of the legal system (which required such assistance), on the other – found a solution that would help reaffirm the role of independent lawyering in trials: they assisted the defendants for the entire duration of the trial but solely to monitor compliance with procedural rules and constitutional principles, abstaining from taking part in the final discussion in order to respect the will of their clients[66].

5. *Concluding remarks*

The current debate on the evolution of the democratic principles of the rule of law in Europe concerns, first and foremost, the independence of the judiciary from both government power and media influence.

However, the legal profession – as an active participant in the judicial system and as a key partner of the judiciary – plays

an essential role in ensuring the fair and effective administration of justice. An independent legal profession is an essential prerequisite for an independent judiciary. Simply put, the independence of lawyers serves as the basis for a society governed by the rule of law.

In Italy, the developments that the national legal profession has undergone from unification onwards have demonstrated that the delicate balance between the legal profession, politics and society affects how the rule of law is upheld, meaning that it also affects citizens' trust in the administration of justice.

Independence is, first and foremost, a *right* for lawyers. That right is often threatened – not only in illiberal societies but also in democratic ones. The rule-of-law crises in some EU Member States have often led to a weakening of individual guarantees and, in particular, of the right to counsel, which can compromise the independence of lawyers. Hence endangering the independence of the legal profession in turn undermines the right to counsel.

From a professional-ethics perspective, however, independence is also a *duty* for lawyers. Lawyers must be independent to be able to fulfil their professional role. For this reason, it gives cause for concern that we continue to witness widespread misconduct in lawyering, mainly due to economic pressure on lawyers and restricted access to the legal profession.

Lawyers promote and defend their clients' interests, but at the same time they contribute, through their defence, to the administration of justice by helping the judge reach the correct ruling. Lawyers do not just serve their clients; they also serve the public interest. Only by adhering to the principle of independence in their dealings with both judges and clients – and only by upholding professional ethical rules – can lawyers perform their function of ensuring access to justice, protecting fundamental rights and, consequently, enforcing the rule of law. Indeed, as Professor Robert W. Gordon has pointed out, the «independence of lawyers has a social and political value going well beyond the value of effective client service»[67].

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