Understanding Italian Politics: Sommeliers and Judges

Stanton H. Burnett (November 25, 2007)

What we expect from wine stewards and judges is discrimination --- the ability to make fine distinctions...

... Without a good sommelier, most of us would stab blindly at the wine list and wind up with some thin picnic liquid to accompany our hearty venison. The danger posed by judges and magistrates who fail to make proper distinctions, and this goes for the scholars and journalists who follow the

legal action, is almost as serious as a bad meal.

These reflections are forced on us by some recent Italian failures in this regard by people who should do better. And they are significant enough to lure us, once again, away from Gothic's intended path to a structured understanding of the Italian political culture. Back on track next week, we promise.

The context is a felicitous one. Several distinguished editorialists have recently expressed regret, or at least some doubts, about their unqualified support for the Milan pool of magistrates when, in the early 1990s, it was sweeping through selected parts (there's the rub) of Italian politics and industry, leaving only scorched earth and forty suicides in its wake. In none of these cases, you can be sure, did the re-thinking stem from a new-found fondness for Silvio Berlusconi, but from sober reflection on what was lost or damaged, and the misconceptions that allowed the massacre to happen (the word guillotine is slipping more and more into these accounts).

Last month it was Eugenio Scalfari. This month it's Giampaolo Pansa and Piero Ostellino. If anyone doubts the importance of any of these gents, please stay tuned: we'll devote some future columns to the political press in Italy. The line that stands out in Dott. Pansa's column in the November 1 L'espresso --- "And more and more often I ask myself whether I did the right thing to defend [Antonio Di Pietro] at the time of Mani Pulite." [my translation. S.B.] --- is so stark that one tends not to notice what is going on in these essays, by omission in Pansa's case, by explicit commission in that of Ostellino. Pansa's comment is an obiter dictum in the course of his warning that De Pietro and Mastella are currently showing why the Partito democratico, although a new vessel, is already leaky. So we do not know precisely what part of Mani pulite now bothers Pansa.

For Ostellino it's that current hot question: how should magistrates disport themselves in public? It may be the television appearances of Forleo and De Magistris that attracted his attention, but he well recognizes that it is not a new issue: he goes back to the campaign waged by the Milan pool in July 1994 against the Biondi decree which would have interfered, a little, with the use the Mani pulite magistrates were making of preventive detention to pry information, or at least some kind of statement, out of suspects and witnesses, a use that is not one of the three allowable justifications listed in Italian law. The magistrates stood on the steps of Milan Palace of Justice, addressed an assembled media throng and, according to Ostellino, nobody on the Center-Left or in the media raised questions about the propriety of this political act (Anzi, tutti si erano schierati a fianco del pool. --Ostellino, in the October 30 Corriere.)

Many media commentators are now saying that the public acts of Forleo and De Magistris are not what magistrates should do, that judges should judge, politicians should debate and vote, and sommeliers should not comment on the dessert. Ostellino has the courage to go back in recent history and ask for consistency in such views. His choice of the Biondi decree example struck a nerve here. The cover of my book (The Italian Guillotine) on the politics of Mani pulite carries a photo of exactly that incident: the Milan pool, Di Pietro in the foreground, haranguing the crowd from the steps of the Palace of Justice.

But crucial distinctions are being lost in all this. What was wrong, I believe, with the pool's politicking in that hot summer of '94 was (1) the substance of their position against moving Italy even a small step toward the norms that limit preventive detention in other Western countries and (2) the fact that it showed the glaring hypocrisy of their claim to non-involvement in Italian politics. But no argument was made for a gag rule.

In fact, it is precisely the protective silence of the magistrates which constitutes a danger. The key distinction should be between public comments about current cases, comments that would compromise the possibility of those involved in the cases to find justice… and comments on general issues of law, including past history, institutional functioning, etc. To block magistrates from engaging in debate on the larger issues is, besides robbing them of rights enjoyed by everybody else, a loss to the nation by depriving it of the wisdom of those who have the most practical knowledge about many of these issues.

Worse yet, much worse yet, it allows the magistrates to hide behind such a ban, to make use of the patent absurdity of the claim that since the law requires them to open a case on any sliver that slips through the door of the Palace of Justice in order to say, as the Milan pool consistently did, that they could not have operated with political bias because the law does not permit them the luxury of discretion. It was on just that absurdity that the then-Minister Flick weighed in after Stefano Vaccara had lured two stars of the pool into an interview for America Oggi. Flick attacked the claims the magistrates had made about having no discretion (a welcome attack) but also, most regrettably, brought disciplinary action against them for speaking out publicly.

The point about which we should all be concerned is this: if, in addition to the magistrates' vaunted independence, an independence more extreme than elsewhere in the West, we add a shield of silence around their actions and policies, we have the very definition, not of independence, but of irresponsibility.

So distinctions must be made about the subjects of their public statements. Some lie clearly on one side or the other of the line suggested above, and are easy calls. But there will always be, of course, questions closer to the line, requiring a finer discrimination. But that's what judges and magistrates do. In the Anglo-Saxon system, with its emphasis on precedent, the distinctions in case law, the question of the similarity to, or difference from, preceding cases, is the whole game. But even in continental systems, based more on a close reading of the written law, the definitions must be fine, and there must be, here too, a consistency with past findings. Otherwise the legal system is unpredictable. And unpredictability has long been recognized as a fundamental element of state terrorism.

Participation in the public debate on political issues should be a possibility for an Italian magistrate, although hemmed in by the fine distinctions that prevent the corruption of current cases. But distinctions are supposed to be special talent of magistrates, judges, and sommeliers.

Links
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