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ABSTRACT

In this review essay, I showcase aspects of Marta Cartabia's and Nicola Lupo's *The Constitution of Italy* that set it apart from standard texts and that make it an excellent resource on Italian government and public law. Then, I focus on two elements of the Italian constitutional order that are discussed in the book and that are unique when seen in comparative context—the non-hierarchical organization of the Italian judiciary and the salience of social rights. I argue that future research on these aspects of the Italian case could make an important contribution to cutting-edge debates in the field of comparative law.

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For scholars of comparative law and European Union ("EU") law, Italy is an important jurisdiction. Together with Germany, it is one of the leading examples of a post-World War II constitution. Relatedly, Italy has been extraordinarily influential in shaping the EU's legal order.[1] Yet the Italian legal system remains relatively inaccessible to foreign scholars because of the lack of writing directed specifically at an outsider audience—writing which translates not only language but also legal concepts and political developments.[2]

Marta Cartabia's and Nicola Lupo's *The Constitution of Italy: A Contextual Analysis* takes an important step towards filling in this gap in the comparative law literature. It is an excellent resource on the government and public law of Italy. The book also explains a number of features that are exceptional to Italy and that hold the promise of offering insights into broader debates in comparative law. In this review essay, I first showcase aspects of *The Constitution of Italy* that set it apart from standard texts on Italian government and public law. Then, I demonstrate the uniqueness of two elements of the Italian constitutional order by placing them in comparative context—the non-hierarchical organization of the Italian judiciary and the salience of social rights. I argue that future research on these aspects of the Italian case could make an important contribution to cutting-edge debates in the field of comparative law.

There is no false advertising the book's title. It truly does put the Italian Constitution in context. The authors give the rich historical background of the various provisions that were contained in the Italian Constitution of 1948. They then take the narrative forward in time, to the present day. They navigate the complex trajectory of how, in the decades since 1948, the Constitution's provisions have been implemented by legislation and have been interpreted by the Constitutional Court. To illustrate with just one piece of Italy's constitutional architecture, consider what the authors call Italy's "Republic of Autonomies."(141) This part of the Constitution is a challenging topic because the main form of sub-national "autonomy," the so-called ordinary regions, received powers only in the 1970s and those powers remained limited until substantial reforms were enacted in 1999 and 2001. Besides the Constitution's temporal evolution, there are many different layers of sub-national government—not only ordinary regions, but special regions, provinces, and local government, which includes municipalities, metropolitan cities, and Roma Capitale. The book does an impressive job of unpacking these many complexities. (139-63)

The book also narrates the constitutional players that have been tremendously important in Italy and that have had a profound impact on how the Constitution operates. These players include not only the formal branches of government but also the political parties on which the Republic was founded and which ruled Italy until the end of the so-called First Republic in 1994. Many authors

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[1] See, e.g., Francesca Bignami, Rethinking the Legal Foundations of the European Constitutional Order, 28 Am. U. Int'l L. Rev. 1311., 1320 (2013) (EU's preliminary reference system patterned on Italy's "incidental" procedure for access to the constitutional court).

[2] It is worth noting that there has been a more general trend in favor of more English-language material. This includes both outlets published entirely or in large proportion in English, for example the Italian Law Journal, as well as group projects that use English as one of the working languages, for example the Max Planck Handbooks in European Law and the Italian contributions therein.

might have been tempted to limit themselves to the Constituent Assembly, government, legislature, and so on, in a book addressed to a global (and Anglo-American) audience unfamiliar with the complex party politics of the Italian system. But of course, such an account would have been fundamentally incomplete and the authors take on the challenge of introducing the reader to the political parties of the Christian Democrats, the Communists, the Socialists, and the Liberals. (8-22, 55-58, 94-95) It is impossible to understand the Constitution's various provisions such as those on federalism, the political executive, and the President of the Republic without knowing something about Italy's very powerful party system—and then the collapse of the party system in 1994, one of the many casualties of the end of the Cold War and the fall of the Soviet Union.

Moving to the exceptional features of the Italian Constitution, let me begin with the judiciary. Italy is a typical civil law jurisdiction in which the system of ordinary justice is separate from the Constitutional Court. The judiciary is established pursuant to one set of constitutional provisions and exercises the "judicial function" (165) while the Constitution Court is established under another set and is designed to be "the living voice of the Italian Constitution." (186) The book provides a succinct and complete account of powers of the ordinary judiciary, as set out in the Constitution and as the practice has evolved over time. (164-85)

From a comparative perspective, the common law versus civil law contrast in procedure and court organization, can account for a number of features of the Italian judiciary.[3] Yet, even within the civil law tradition, there is considerable variation and this is on display in the Italian case. One of the defining elements of civil law jurisdictions is that they, in contrast with common law jurisdictions, do not operate with the doctrine of stare decisis.[4] Even a decision of the supreme court on a point of law is not binding on future lower courts unless relatively exceptional conditions are met. But even so, it is widely acknowledged that supreme courts tend to be followed by lower court judges, at least in part because of the bureaucratic organization of civil law judiciaries—their prospects of promotion, up the judicial hierarchy, depend on their being apprised of and applying the jurisprudence of the supreme court.[5]

It is on the hierarchy element that the Italian judiciary is exceptional. Cartabia and Lupo explain that under Italian constitutional law: "There is no hierarchical relationship between judges: the judiciary is not organised through a hierarchical or a pyramidal structure, but it should instead be regarded as a diffuse power." (174) This diffuse organization manifests itself in a number of ways. Judges are selected based on their performance on an exam, but they do not attend a special course of study. Under constitutional law, they must be allowed to use their own drafting style. With respect to the prior judgments of the supreme court (Court of Cassation), lower court judges cannot "completely and deliberately ignore" them but they "are free to decide differently, although always expressly articulating why they do not agree with the principle previously affirmed or why they think that the principle is inapplicable to the dispute before them." (175)

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[3] See Mirjan Damaška, The Faces of Justice and State Authority (1986).
[4] See, e.g., Konrad Zweigert & Hein Kötz, An Introduction to Comparative Law 259-63 (Tony Weir transl., 3d ed. 1998)
[5] See John Henry Merryman & Rogelio Pérez-Perdomo, The Civil Law Tradition 83 (3d ed. 2007).

Relatedly, public prosecutors are considered part of the judiciary and they are not under the direction of the executive power.[6]

Contrast Italy with France, which offers one of the paradigmatic examples of a hierarchical civil law judiciary. Under French constitutional law, judicial independence and impartiality are foundational, but they are not associated with the notion that the judiciary is a diffuse power.[7] There is a single establishment, the École Nationale de la Magistrature, that educates and selects judges. Once part of the judicial profession, junior judges are trained by the more senior judges on the many courts (Court of Cassation, Courts of Appeal, and the lower courts), including on how to draft a judgment.[8] This accounts for the distinct and uniform style of French judgments. Like Italy, there is a self-governing body of the judiciary, the High Council of the Judiciary, which is responsible for appointments and promotions within the judiciary. Unlike Italy, however, the election of judges to the High Council is not organized around candidates put forward by competing, and loosely political, factions (*correnti*) and therefore the criteria for judicial appointments and promotions to higher courts are potentially less politicized.[9] As for public prosecutors, even though their status is assimilated for certain purposes with that of judges, they are also directed by the executive (the Ministry of Justice) in important respects. The Ministry can influence aspects of their career advancement, issue general guidelines, and order that certain cases be brought.[10]

Especially from a common law perspective, Italy's lack of judicial (and prosecutorial) hierarchy is puzzling. Not only is there no common law stare decisis, but the system lacks the organizational features of a judiciary like the French one that are designed to ensure that junior judges are supervised by more senior ones. How is such a system able to function? How can there be any legal uniformity and certainty in such a system? Because if one sets aside the (admittedly serious) problem of endemic delay in delivering justice (184), the Italian legal system appears grosso modo to operate properly. This question is worthwhile exploring since Italy is not the only civil law judiciary that is lacking in hierarchy—think of Argentina.[11] Indeed, Italy bears a certain resemblance to the EU legal system, where the EU Court of Justice operates in a civil law context that lacks an entrenched principle of stare decisis and that is populated by lower courts that really are not lower courts at all—since organizationally they belong to *Member State* judiciaries. Deepening our understanding of how consistency is achieved in Italian

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[6] See Antoinette Perrodet, The Public Prosecutor in European Criminal Procedures 415, 429-33 (Mireille Delmas Marty & J.R. Spencer eds. 2002).
[7] See, e.g., Decision no. 93-336 DC of 27 January 1994.
[8] See John Bell, Judiciaries within Europe: A Comparative Review 52-58 (2006).
[9] On the Italian High Council, see Francesca Biondi, Sessant'anni ed oltre di governo autonomo della magistratura: un bilancio, 41 Quaderni costituzionali 13 (2021).
[10] See Antoinette Perrodet, "The Public Prosecutor," in European Criminal Procedures 415, 429-33 (Mireille Delmas-Marty & J.R. Spencer eds. 2002).
[11] See generally José Sebastián Elias, Supreme Court of Argentina, in Max Planck Encyclopedia of Comparative Constitutional Law (Raine Grote et al. eds., 2016) (describing provincial organization of Argentinian judiciary and limitations on Supreme Court's jurisdiction and precedential force of its rulings).

law, with only minimal hierarchy, would be a valuable contribution to our knowledge of the dynamics of not only the Italian case but other jurisdictions globally.

The second exceptional feature of the Italian Constitution that is brought to light by the book is social rights. The Italian Constitution is remarkable in how generous it is with social rights. The Italian Constitution contains a long list of enumerated social rights, from financial assistance to families in Article 31 to the right to strike in Article 40. These social rights are not mere paper rights. Immediately after the Constitution's adoption, there was a debate over whether constitutional rights, generally speaking, were something that could be vindicated in court or whether they were simply objectives to be carried out by the legislature and other political branches. This debate, however, was soon settled in favor of litigating rights, including social rights. (13) Today, therefore, Italian laws and regulations are routinely challenged for not adequately guaranteeing social rights such as the right to health or social security or for impermissibly cutting back on such rights. (239-43)

Compare the Italian Constitution with other constitutions of older or similar vintage. It is well-known that neither the text of the US Constitution nor the case law of the US Supreme Court affords any protection for social rights.[12] The German Constitution, which dates to 1949, contains only a vague reference to "the social state." Over the past fifteen years or so the German Constitutional Court has used the right to human dignity in combination with the social state principle to establish a right to minimum income but that is all.[13] The French Constitution goes further than the German one. There are many rights and principles contained in the preamble of the Constitution of 1946 (and recognized by today's Constitutional Council under the 1958 Constitution), including the right to employment and the right to decent housing.[14] But even though there has been some change in recent years, these social rights are difficult to litigate since French courts generally treat them as purposes to be achieved by policymakers rather than as rights that can be used to vindicate certain types of treatment by the state.[15]

Italy's exceptional law on social rights deserves further scholarly investigation, not only to better understand the Italian case, but for purposes of addressing larger debates in the field of comparative law. Since the fall of the Berlin Wall and the adoption of new constitutions throughout the world, social rights have been a favorite topic for comparative inquiry.[16] They have triggered a vibrant debate on the desirability of such rights and whether they do indeed

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[12] See generally Francesca Bignami & Carla Spivack, Social and Economic Rights as Fundamental Rights, 62 Am. J. Comp. L. 561 (Supplement 2014) (describing the US Supreme Court's dismissal of social rights theories in the 1970s).
[13] See Susanne Baer, The Evolution and *Gestalt* of the German Constitution, in 2 The Max Planck Handbooks in European Public Law: Constitutional Foundations 163, 189 (Armin von Bogdandy, Peter M. Huber & Sabrina Ragone eds. 2023).
[14] See, e.g., Decision no. 97-393 of 18 December 1997; Decision no. 2009-578 of 18 March 2009.
[15] See Olivier Dutheillet de Lamothe, Les principes de la jurisprudence du Conseil constitutionnel en matière sociale, 45 Les Nouveau Cahiers du Conseil constitutionnnel 5 (2014).
[16] See, e.g., The Future of Economic and Social Rights (Katharine G. Young ed. 2019).

contribute to solidarity and to more equitable distribution of resources or rather have unintended, and sometimes, perverse, consequences. In general, American constitutional law scholarship has been quite skeptical of social rights. The idea is that big resource allocation decisions involving large-scale redistribution are not the proper place for courts—they do not have the political legitimacy or regulatory tools that are necessary for the task. Cass Sunstein, for instance, has taken this position.[17] On the other hand, Mark Tushnet has argued in favor of social rights when they are paired with so-called weak-form constitutional review, which involves dialogue with the political branches.[18]

In this scholarly debate on the desirability of social rights, the constitutions that are analyzed are generally relatively new and operate in the context of extreme income inequality and low levels of economic prosperity. Think of South Africa. The Italian Constitution, by contrast, has a much longer track record. Italy also is considered, at least since the 1970s, an advanced economy with a relatively low wealth gap. It is therefore a country case that offers better historical data on the impact of social rights on redistribution and policy design and that can shed light on how social rights can be expected to operate in advanced economies. In other words, deepening our knowledge of the Italian experience with litigating social rights, whether good or bad, can make an important contribution to contemporary debates on how to achieve equality and social justice. We are fortunate to have Cartabia and Lupo's excellent volume as a springboard for pursuing these and undoubtedly many other legal and theoretical inquiries in the discipline of comparative law.

[17] The Second Bill of Rights (2004).
[18] Weak Courts, Strong Rights (2008).