

# Legal Professions

## Legal Fields and Elites

According to Pierre Bourdieu's well-known definition (Bourdieu and Wacquant, 1992: 105–6), the legal field is a national space whose characteristics are determined by the hierarchies and conflicts that arise among the actors operating within it, and from the relationships between it and society at large. As producers, interpreters, administrators and mediators of the law, European legal practitioners contributed to the nineteenth-century formation of the national states by guaranteeing legality and governability in their countries (Trubek et al., 1994: 411). The eloquence of lawyers helped construct the discourse on the nation (Beneduce, 1996). And trials, no longer conducted behind closed doors, became arenas in which public opinion was shaped. In their turn, the national states transformed the legal fields during the 1800s. The great Napoleonic legal reforms and those in Britain, the Italian codification of 1865, Germany's of 1878 and the 1864 Russian code restructured the national legal fields and imprinted the legal professions with enduring features.

The legal professions performed a national role such that they long dominated the European political scene. This was especially the case for the Latin countries. The French Third Republic was re-baptized 'the Republic of Lawyers', which was a not inaccurate definition if one considers that in 1881 some 41 per cent of French parliamentarians were jurists. The decline of the political lawyer began with the *affaire Dreyfus*, during which there arose a new social bloc headed by intellectuals (Charle, 1994a). In 1910, French jurists accounted for 37 per cent of all members of parliament, but by 1919 their proportion had diminished to 28.5 per cent. Yet despite this decrease, between 1898 and 1940 legal professionals still represented 26 per cent of French deputies (Dogan, 1967: 476). Also, Italy was a country of lawyers: 34.11 per cent of parliamentary deputies in 1880 were legal practitioners, and in 1919, when the proportional electoral system was introduced, the share increased to 43.31 per cent. Even during fascism, which created a new ruling class, political representation by lawyers still stood at around 24 per cent in

1934. From the 1930s to 1958, lawyers accounted for 25 per cent of the Italian parliamentary deputies (Cammarano and Piretti, 1996). In Great Britain, from the end of the 1700s to 1832, the representation of the legal professions in the House of Commons amounted to 14 per cent, while between 1906 and 1960 it was fully 20 per cent (Guttsman, 1974: 28–9).

The legal professions formed the ‘backbone’ of governments. During the Third French Republic, the presence of lawyers in the executive was far greater than in the Chamber of Deputies, and it remained high even when the proportion in parliament diminished. In 1865, 40 per cent of British ministers were barristers, and thereafter the proportions were in 50 per cent in 1894, and 33 per cent in 1908 (Duman, 1983: 185). In Germany during the Wilhelmine Empire, the legal professions formed the second largest group within the executive after the high civil servants, and they represented 40 per cent of ministers. Their number diminished during the Weimar Republic (31.1 per cent), and then fell sharply during Nazism (15.2 per cent) (Knight, 1952: 41). In Italy, between 1860 and 1922 lawyers represented 44 per cent of ministers and under-secretaries; as in Germany, their presence in the executive dwindled under fascism to around 26 per cent.

After the Second World War, the legal fields progressively lost their importance as the formative arenas of the national ruling classes. Their marginalization was determined by the interweaving of various factors. First, the process of formation of the political class changed. The advent of mass political parties overwhelmed the old notability system and relegated jurists to below other social groups (Cotta et al., 2000: 232, 251). At the same time, new higher institutes and schools, such as the French ENA, supplanted the faculties of law as the education agencies for future ruling classes. The figures on France – the erstwhile ‘Republic of Lawyers’ – are striking. In 1986, 5.2 per cent of the deputies in the *Assemblée Nationale* were lawyers; in 2002 the proportion rose, but only to 5.9 per cent (Le Béguec, 2003: 197, 218–19).

Italy is a variant on the European pattern, but not one sufficient to gainsay a trend by now consolidated. In that country, the presence of the legal professions in politics has decreased less than elsewhere: in 1994 lawyers accounted for 12 per cent of deputies and in 2001, after the introduction of the majoritarian electoral system and the advent of the centre-right governments, it rose to 15.8 per cent. Even more significant is the permanence of lawyers in the governments of republican Italy, who between 1946 and 1996 represented 50 per cent of all ministers and under-secretaries (Cammarano and Piretti, 2009).

The dominance of the economic order and globalization are the other factors responsible for the changes in legal fields. In the age of industrialization, the legal sector forged enduring relations with the economic sphere. In some countries, this interchange fostered the advent of lawyers

operating in the business sector and formed a professional elite whose careers were often crowned with prestigious political offices. The English lawyers worked in finance, in the mining industry and with the railway companies (Sugarman, 1993: 264–79). After 1895, when the commercial courts were created, the brightest lawyers that acted as counsel before them rose to the apexes of the legal elites: they became high-court judges more easily than other lawyers, they entered the House of Lords and frequently became Lord Chancellors (Jacob, 1997: 94–7). In Italy, too, there formed in the early 1900s a club of business lawyers working with the largest banks and companies and who made important contributions to governance of the country's economy. Their embeddedness in the national economy was reinforced by their membership of the boards of banks and companies, of which they were the legal representatives while also owning shares. Their activity in many cases led to election as deputies and senators (Cantagalli, 2010).

Yet it was only when the expansion of business led to a boom in the legal-consultancy market that legal elites endowed with characteristics different from the past arose in the legal fields of all countries. These elites were formed of business lawyers who had left the public sphere, severing their ties with the community to identify with the client firm, to the point that they joined boards of directors and participated in the firm's profits (Kronman, 1993). According to Yves Dezalay (1992), the model of the 'merchant of law' has disrupted the traditional pattern of the elites operating in the legal field as composed of 'pure jurists', these being legal theoreticians, law professors specialized in legal doctrine and judges who developed and applied the law independently from the world of business.

Another effect of globalization has been the expansion of the private sphere of justice, which economic actors today prefer to resolve their transnational business disputes. In the past, arbitration used to be conducted by members of the European legal elite, 'grand old men' with high professional and academic credentials, and who formed a narrow group that helped give recognizability and legitimacy to arbitration. Opposed to this model were the large Anglo-American law firms which forcefully entered the European arbitration clubs and imposed their own techniques (Dezalay and Garth, 1996: Chapters 1, 3).

Finally, the liberalization of legal activities introduced in 1993 by the European Union has provoked far-reaching changes in legal fields and within national legal elites. The advent in Europe of the first American law firms, such as Baker and Kenzie (Bauman, 2002), began in the early 1960s. It first affected capitals and cities with large business volumes, like Zurich, Frankfurt and Milan, to be followed in subsequent decades by large-scale penetration. The competition instigated by these firms in the

European space accelerated unification of the legal professions and spread a model of the law firm which changed the traditional organization of legal work based on individual chambers. The presence of the Anglo-American law firms in the European countries altered the assets of the legal elites. Elites, for example in France exert much greater weight within the national bar than their actual number would suggest, because they hire French lawyers (Boigeol and Willemez, 2005: 59). The introduction of the law-firm model has also changed the mechanisms whereby legal elites are formed. In Germany, the large company law firms recruit the most outstanding young graduates with stringent selection criteria: applicants must possess a doctorate in law and preferably also a masters obtained in the United States (Rogowski, 1995: 116).

The penetration of the Anglo-American legal model into Europe has come about through mechanisms of adaptation to national contexts. For example, in the early phase of their penetration in Italy, the Anglo-American law firms recruited the most prestigious members of the Italian bar. But these *principi del foro* found the rules of the law firms irksome and continued to act in accordance with their traditional individualistic mentality. Numerous partnerships were dissolved and the Italians preferred to create large, national associated firms. Today the Anglo-American ones tend to recruit Italian lawyers trained in the English-speaking countries, while they enter into more flexible arrangements with the Italian legal elites so as to facilitate cooperation between the two different cultures (Malatesta, forthcoming).

## Judges

In the contemporary age, the power of the judiciary has been radically curtailed with respect to the *Ancien Régime*, when judicial and political powers coincided. During the nineteenth century, the division of the state's powers was followed by the shift of the constitutional axis to the executive. On the continent, the judiciary maintained great influence and prestige where – as in Germany – the public administration wielded great power and occupied the apex of the social hierarchy. Great Britain represents the opposite case: in that country, the judiciary preserved its symbolic power and the unconditional trust of citizens because, in the common law system, the judge is a producer of law and not just its executor.

The British judiciary attained its independence from political power with the Glorious Revolution of 1688. From the late 1600s onwards, this position, which placed the judiciary above the other powers of the state, formed Britain's constitutional basis. And it remained such even when the

reforms of the late nineteenth century modified judicial organization and procedure (Díez-Picazo, 1997: 25). The British judicial system is separated into two branches, higher and lower. Contrary to the instability distinctive of the lower judiciary, high-court judges have since the modern age been characterized by their irremovability, and this, combined with their autonomy, has strengthened their power and prestige.

The model of the judiciary that arose on the continent with the French Revolution was profoundly influenced by the necessity to shed the experience of the *Ancien Régime*, where the sovereign also embodied judicial power. For this reason, judges were made subject to the supremacy of encoded law (Van Caenegem, 1991). The judge–civil servant sprang from the separation of powers which formed the basis of the rule of law on the continent after the French Revolution. But despite this division of the state’s powers, judges were not exempt from interference by the executive, and from the risks of dangerous contamination by the political sphere.

In France, judges pursued a single career, and they might move from investigative to the adjudicatory functions. The *parquet*, or the public prosecutor’s office, once depended directly on the court, and the prosecutors were appointed on fixed-term contracts. The *parquet* provided the easiest access to the bench (*siège*), which was composed of irremovable judges. This system bred contamination between the judiciary and the political power, because the careers of the prosecutors depended on the Minister of Justice (Charle, 1997). The problem was solved after the Second World War when the new constitution of 1946 created the Conseil Supérieur de la Magistrature, to which were attributed the powers of discipline, appointment and promotion previously exercised by the Cour de Cassation.

Also in unified Italy there arose a model of the judiciary founded on the single career, although the bond tying it to the executive was slackened by the introduction of a new recruitment system. Yet public prosecutors were still susceptible to conditioning by the political power because they depended on the Minister of Justice. Self-government of the Italian judiciary came in the early 1900s. The Consiglio Superiore della Magistratura was created in 1908; and a year later the judiciary’s first trade union was set up, the Associazione Generale fra i Magistrati Italiani (Venturini, 1987). The judicial order also remained unchanged under fascism and preserved its liberal structure: only the trade unions of the judges were suppressed. Although a law reforming the judiciary was enacted in 1941, it did not produce significant changes, except for an intensification of the executive’s control over the public prosecutors and judges. Like Nazism and the Pétain regime, fascism also flanked the lower judiciary with a special tribunal for defence of the state, composed of military judges, which tried 5619 defendants and inflicted 29 death sentences, of which 24

were carried out. The existence of this special jurisdiction enabled the Italian judges to avoid direct involvement in the injustices perpetrated by fascism on political dissidents, but it did not shelter them from connivance with the regime (Neppi Modona, 1973: 142–55). The Italian judiciary acquired total autonomy with the advent of the republic. The 1946 law made public prosecutors entirely independent from the Minister of the Justice and obliged them to begin criminal prosecutions on their own initiative. Finally, the 1948 Constitution reinforced the prerogatives of the Consiglio Superiore della Magistratura and drastically reduced the Minister of Justice's powers over that body. Today, the Consiglio exercises disciplinary power and has exclusive competence for the assignments, transfers and promotions of judges.

In Germany, the figure of the judge–civil servant was brought into being within the government judiciary by reforms promoted by Frederick II and a system of recruitment based on a public examination introduced in the eighteenth century. The separate careers system was adopted because it was regarded as guaranteeing the independence of judges. In the period prior to unification of Germany, the judiciary opposed the political power on several occasions. Over the years, this critical stance changed into defence of the strong powers that emerged during the Weimar period. After the Nazis took power, the judges lent support to the regime, towards which they expressed strong consensus. Hitler considered them as comrades engaged on the 'law front' and the judges became executors of a people's justice which attributed them absolute power (Müller, 1991). Between 1942 and 1945, the German people's courts condemned 4951 individuals to death. If to these sentences are added those passed in the USSR, in Poland and by the military courts, the figure reaches 30,000. Nazism acted as a powerful factor in re-establishing a balance between the bench and the bar. In 1933, there were 19,276 lawyers and 9,943 judges in Germany. In 1943, the judges had grown in number to 16,000 and the lawyers had diminished to 12,000 (Reifner, 1986: 100–4). The purging of the lawyers thus had the effect of strengthening the judiciary; but upon conclusion of the war there was no equivalent purging of the German judges. This continuity with Nazism meant that in the German Federal Republic the judiciary continued to act as an authoritarian body. Its rightist propensities became evident during the 1970s when the *Berufsverbot* law, theoretically intended for both extreme-left terrorists and former Nazis, was never applied to the latter (Krause, 1996: 236).

The bureaucratic career and the irremovability of judges have been the instruments used on the continent to protect judges against contamination by political powers. The bureaucratic model was introduced in Prussia during the Enlightenment, and thereafter no change was made to the principle

of state-controlled meritocratic selection for entry into the public administration. The bureaucratization of the German legal professions came about under the dominance of the bench over the bar. In 1878, the law on the legal professions harmonized the training of judges and lawyers throughout the country. Aspirants had first to pass a state examination at the end of their university courses, followed by a *Referendariat* or internship, which at that time lasted three years and was undertaken for two years at a law court, and then for one year at a law firm. On conclusion of the *Referendariat*, the candidate took a second state examination, and if successful received the title of judge and could opt for the career of either a judge or a lawyer (Ledford, 1996: 75–7). This system has remained in force in federal Germany.

In France and Italy, the legal field has been historically characterized by a separation between the legal professions. A French law of 1810 established that admission to the judiciary required a degree in law, a two-year internship as a lawyer, and a minimum age of between 25 and 30. The judiciary was conceived by Napoleon as a body of notables fulfilling honorary functions, given that their salaries were derisory. This system had harmful effects on the impartiality of judges, who were often accused of colluding with financial powers and of persecuting indigent defendants (Chavaud, 1996: 41). Judges were recruited by co-option, a method which enabled the political power to maintain control over judges and to use them for clientelist purposes. For this reason, any attempt to introduce admission rules based on meritocracy were fiercely resisted. In 1908, an entrance examination was introduced, but the Minister of Justice retained the power to nominate judges. The co-option system was abolished in the 1930s, and during the Fourth Republic the judiciary's autonomy was reinforced by creation of the Centre National d'Études Judiciaires, the training school for magistrates created in 1958 and then converted into the École Nationale de la Magistrature in 1970.

In the pre-unification Italian states, the careers of lawyer and judge remained fungible until the seventeenth century (Tedoldi, 1999). The two professions were separated in the eighteenth century, but it was not until the 1800s that the judiciary acquired its complete independence. Its professionalization came about within the space of a century, and its referents were both foreign models and the judicial orders of the pre-unification states. The French model prevailed in the first decades of the new unitary state. The bureaucratic route was still secondary and consisted of a two- or three-year internship at a law court: instead, more than half of the judges appointed between 1865 and 1890 (Guarnieri, 1997: 244) were co-opted by the Minister of Justice from among lawyers, prosecutors and notaries. In 1890, the Minister of Justice, Giuseppe Zanardelli – responsible for the

new penal code of unified Italy and the judicial reforms of the 1880s – emulated Prussia by introducing a selection process based on a rigorous entrance examination. Thereafter, the judiciary became a career entirely separate from the bar; it was entered by young graduates in law who had completed internships at the courts.

The British judiciary has represented the highest grade of the profession of barrister and the reason for its great distinction. Barristers became judges in the higher courts, where they held monopoly over defence. Such elevation resulted, not from success in an examination, but from selection by the Lord Chancellor among the Queen's councillors, the high-level barristers. This was a *cursus honorum* that began at the Inns of Court and might end with appointment as a judge or even Lord Chancellor. Political activity thus crowned the career and facilitated it at the same time. Most of the barristers who entered the House of Commons were Queen's Counsellors; vice versa, judges were often selected on political criteria from among lawyers with seats in parliament (Duman, 1983: 176–8). Thus created was a judicial hierarchy headed by a gerontocratic caste composed of judges. Unlike on the Continent, where the judicial career begins at a young age, in Great Britain today the majority of judges are appointed between the ages of 45 and 55, after at least 20 years of forensic practice. The barrister/judge merger was for centuries the demarcation line against solicitors. This historical division was eliminated in 1993 when the Law Society successfully applied for solicitors to have the right of audience in high courts (Sugarman, 1995: 19).

## Notaries

Of Roman origin, the notariat emerged in the Middle Ages as a legal profession and spread through Europe's two principal jurisdictions: common law and continental law. The combination of the profession's two main components, the state notary and the free professional (Olgiate, 2002: 1215–17), produced the Latin notary and the Anglo-Saxon counterpart. The profile of the former was defined in France by the law of 16 March 1803, which stipulated the notary's nature as a public functionary and incompatibility between the notarial profession and that of lawyership. The law of 28 April 1816 equated notaries to public officials and authorized them to cede their offices, including deeds, to other notaries. The profession of the French notary consisted in authenticating deeds to which legal value traditionally attached, such as matrimonial contracts, wills, donations, affidavits and, with the advent of industrial society, deeds regarding the constitution of joint-stock companies and partnerships, commercial transactions, and so on.



The model of the French notary was also adopted in Italy. The law on notarial practice enacted in 1875 to unify the profession throughout the country was also inspired by the French legislation, though differing from it in some respects, one of them being the stipulation that deeds were not the notary's property and were to be deposited in a public archive (Ancarani, 1983: 349ff.). The Latin notary operated in a regime of quasi monopoly which did not exclude competition with other professions. The Italian notaries contended for civil deeds with the municipal registrars (Romanelli, 1988); the French ones with the *avoués* for judicial sales of real estate and administration of probate.

A mixed model of the notariat instead arose in nineteenth-century Germany. The French model was imported into the territories which had been occupied by the Napoleonic army, while the model of the Germanic notary persisted in the rest of the country. As a consequence, incompatibility between the professions of lawyer and notary was introduced in Rheinland, Westphalia, Hamburg and Bavaria, while still in force in North Germany was the dual profession of lawyer–notary that had spread at the time of the eighteenth-century Frederickian reforms. The French and Germanic traditions took root in the various regions and persisted after the formation of the national state. Nazism compelled their unification by creating the state notary and the Reich's chamber of notaries, but even under the totalitarian state the local notarial statutes were preserved. The Federal Republic of Germany has resolved the matter with a pluralist arrangement whereby the diffusion of both models is encouraged in each *Land*. The *Nurnotare* are pure notaries and perform the usual notarial functions. The *Anwaltsnotare* are instead public functionaries appointed by the *Land's* Minister of Justice. German lawyers become eligible for appointment as *Anwaltsnotare* after having practised the forensic profession for ten years.

The notary occupied a subsidiary position to judges and lawyers in the European legal field. In Italy and France, practice as a notary used to be possible without a degree in law; it sufficed to have taken some law examinations and served an internship concluding with a final examination. In Italy, compulsory possession of a law degree was introduced in 1913 as a result of lobbying by the notaries, who wanted their credentials to be made equivalent to those of lawyers. The status project of the Italian notaries was accomplished under fascism, when a 1926 law introduced a state examination with the same characteristics as that for judges: the posts distributed across the national territory were allocated according to the classification list (Santoro, 2006). In France, compulsory possession of a degree in law was introduced in 1973, since when the profession's attractiveness and prestige have considerably increased (Halpérin, 1996: 187–8).

Notaries are residual figure's in the English-speaking countries (where they amount to a total of 1300). They do not carry out any public certification and survive only in the jurisdictions where Roman law is still used: for instance the ecclesiastical courts. A large part of the functions performed by the Latin notaries, such as certification of property conveyances and wills, passed to solicitors in 1760, when the English notaries lost control over deeds in the City of London. Only a small group of 25 individuals, the scrivener, continued to exercise this monopoly. But they lost it in 1999 following a complaint lodged with the European Commission in 1996 by the notary and solicitor Mark Kober-Smith against the monopoly enjoyed by the European notarial profession, its restrictions on access and nationality requirements. Kober-Smith's grounds were that these restrictions were contrary to the principles enshrined in the Treaty of Rome (Shaw, 2000). In effect, given its official authority, the notarial profession had been treated as being exempt from the norm on the free circulation of the intellectual professions and their denationalization. Kober-Smith's protest had an immediate effect in Great Britain, although the other European countries reacted in different ways. Spain, Italy and Portugal eventually expressed their willingness to remove the nationality requirement, but Germany disputed the European Union's definition of the notarial profession (Shaw, 2003c).

### **The Forensic Kaleidoscope**

In early modern Europe, the bar was divided between two professions distinct by function, training and rank: the attorney, who represented clients at trial and dealt with procedure; and the lawyer, who assembled the legal material necessary for the accused's defence. In the nineteenth century, the forensic professions changed their institutional structure and internal organization, assuming specific and diversified national features. There consequently arose two tendencies: in Great Britain and France, and partly in Belgium, the bar divided between two or more professional figures; in Germany, Austria, Switzerland, Spain, Russia and Italy, it was substantially unified.

The modern legal profession in France began with an act of suppression. Two of the cardinal principles of the French Revolution were that the law must be accessible to all, and that citizens must be able to plead their own defence at trial. The democratization of defence was accompanied, on 2 September 1790, by suppression of the corps of advocates and the order which represented them. This act of self-destruction (advocates made up more than one-sixth of the Constituent Assembly) has been explained in various ways by historians, but – as Michael Burrage has

pointed out (2006: 104–13) – it must be framed within the broader endeavour to suppress the guilds and erase the old regime. To obviate the risk that liberalization of the law might hinder the workings of justice, in 1791 the Constituent Assembly restored the function of legal representation and created the *avoué* (Halpérin, 1996: 43), who acted as counsel for defence. During the Jacobin period, the *avoué* was replaced with the *fondé de pouvoir*, who could be any citizen. According to Fitzsimmons (1987), the deprofessionalization of the French bar during the revolution brought the justice system to total collapse. However, more recent studies on a local scale (Bellagamba, 2001; Fillon, 2003) have shown that in revolutionary France the justice system continued to function because the court-appointed defenders were selected from among advocates and attorneys who had practised the profession during the *Ancien Régime*.

The law profession in France owed its restoration to Napoleon Bonaparte. A law of 18 March 1800 changed the judicial system of the revolutionary period and reintroduced the figure of the attorney, to whom it assigned legal representation before courts and defence. This reunification was short-lived, however, for in 1804 the two functions were once again separated. Legislation enacted in 1816 and 1822 to liberalize the bar by freeing it from the restraints imposed on it by Napoleone Bonaparte established distinct prerogatives for the two professions. The *avoué* was a public functionary similar to a notary who could transfer his office in exchange for a sum established by the market. The *avoués* worked in civil procedure and had monopoly of defence in judicial auctions of real estate. The *avocats* could act as defence counsel at all judicial levels and in all the state's courts without limits of territoriality; and they monopolized defence in the courts of first instance and appeal.

But other law practitioners operated in the French system, most notably the *agrées*, who were attorneys in the commercial courts, and the *conseils juridiques*, law and tax advisers who set up their own associations at the end of the 1800s. Regulated for the first time in 1971, the profession of *conseil juridique* was merged with that of *avocat* in 1990. The French 'kaleidoscope' – as J.L. Halpérin has termed it (1996: 42–53) – reflected a division of labour within the legal sector whereby *avocats* did not handle business cases but left them for the other legal professions to deal with. This pluralist model broke down in the 1960s as legal work expanded in the economic and financial sectors. The 1971 law marked the first stage in reunification of the legal field. The figure of the *agrée* working in the commercial courts was abolished; and the *avoué* was no longer permitted to represent clients in courts of first instance. Representation by *avocats* was extended to all jurisdictions, except for the commercial courts, and

special jurisdictions where the parties could be represented by other practitioners.

The complete reunification of the French law professions was induced by the competitive pressure raised by large Anglo-American law firms which opened branches in France during the 1970s. The cause of contention in this second stage were the *conseils juridiques*, whom the lawyers wanted to absorb in order to counter competition by the *experts-comptables* in the consultancy market (Boigeol and Dezalay, 1997). Although the lawyers were successful, the second professional law of 1990 only partly satisfied their demands. The *avocats* did not obtain monopoly over the law as they had hoped, but they had to share it with other professionals – the *experts-comptables* – authorized to act as legal consultants (Boigeol and Willemez, 2005).

The law on the bar enacted in Italy in 1874 did not establish a precise boundary between the *avvocato* (lawyer) and the *procuratore* (attorney). The *procuratore* was the most important of the two figures and after 1874 formed the core of the law profession, whilst the *avvocato* had monopoly of defence in the higher courts. The prosecutor's function of representation was obligatory, whilst the attorney did not enjoy true monopoly over defence: indeed, prosecutors who had been practising for six years could also defend in the courts of assize. The two professions were linked by propaedeuticity, and the 1933 professional law enacted during the fascist period definitively established that qualification as an *avvocato* came after six years of exercising the profession of *procuratore*, or on passing a state examination after two years of practice (Tacchi, 2002: 474ff.).

The 1933 professional law remained in force until 1997, when the two Italian legal professions were merged. Since then, qualification as an *avvocato* has required completion of a two-year postgraduate internship and success in a state examination. The unification of the two professions has removed the territorial constraints which impeded attorneys from exercising the profession outside the appeal court at which they were enrolled. Today, an *avvocato* can represent the parties at trial in all courts.

The model of the legal profession that arose in Germany during the 1800s anticipated the simplified system which, at the end of the twentieth century, became recognized throughout Europe as most efficient. The distinction between the *Advokatur* and the *Prokuratur* had never been clear since the *Ancien Régime*. During the 1700s, the Prussian monarchs turned their attention to the legal professions and brought them under the state's control. In 1780–81, Frederick II suppressed defence at trial, and the attorney was replaced with a government functionary, the *Assistentenrat* (Halpérin, 1996: 96). In 1793, the profession of lawyer was reinstated, but it was subjected to rigid regulation by the state, which determined the

number of lawyers, decided where they could exercise the profession, and placed them under the control of the judiciary.

The Prussian lawyer was a civil servant with a status inferior to that of a judge. He was not paid a salary, and his task of legal representation and defence of the client sat uneasily with his role as a public functionary (Siegrist, 1990a). These contradictions were resolved after 1848, when many states granted the requests advanced by the lawyers during the revolutionary period. Among them was the introduction of the oral procedure in trials, after which the lawyer could defend clients before the courts, thereby acquiring unprecedented visibility and prestige (Padoa Schioppa, 1987).

Following Germany's unification, the judicial system was standardized throughout the country. The 1878 law extended the single figure of the *Rechtsanwalt* nation-wide, granting him almost total monopoly over representation and defence (except in the industrial and commercial courts, as well as the labour tribunals introduced in 1926). In 1879, created in each *Land* were three types of court – district and regional and appeal courts – to which there corresponded three categories of lawyers. A *Rechtsanwalt* was admitted to only one court and remained tied to it by a territorial restraint which could only be avoided by acquiring 'simultaneous admission' – that is, an authorization (rarely granted) to defend in all courts. The territorial constraint operated top-downwards, in the sense that lawyers enrolled at the higher courts could plead cases in lower ones, but not vice versa.

Such localization provoked fierce competition, which exploded in the early 1900s, and especially at the district courts, where the largest number of German lawyers were enrolled. From that moment onwards, gaining simultaneous admission became the goal of the district lawyers. The latter formed a significant component of the German bar in numerical and political terms, and in 1907 they set up their own association. But until 1914 they failed to obtain the results that they wanted because of resistance raised by a lawyerly elite determined to defend its protected market.

The war between the district lawyers and those of the higher courts resumed in the first years of the Weimar Republic, when the association of the district lawyers was opposed by that of the higher-court lawyers created in 1921. The former were more aggressive, and after having outmanoeuvred the other law associations, in March 1927 they managed to obtain from the Reichstag a law which abolished the localization system and authorized attorneys to plead cases in all courts (Ledford, 1996: Chapter 7). On conclusion of the Second World War, each *Land* created its own rules, until, in 1958, a new law was enacted which re-introduced a single regime throughout the country. The principle of territorial limitation was reprised, but only in regard to civil suits. It was abolished in 2000 owing to the intensification of Europeanization and globalization.

Contrary to developments on the continent, the English bar is still today characterized by a dual structure. Barrister and solicitor are professions which sprang from a process of rationalizing and absorbing other practitioners which lasted for approximately three centuries and concluded in the 1800s. The barristers achieved their ascent through a twofold differentiation: they detached themselves from the upper layer of the profession consisting of the serjeants-at-law, whose pupils they had been, while they simultaneously distinguished themselves from the lower layer (Prest, 1991) formed by the attorneys. In the mid-seventeenth century, when a burgeoning caseload forced the profession to augment its ranks, the barristers took over the monopoly over defence in the courts previously held by the serjeants-at-law; they forbade their members from providing legal representation; and they chased the attorneys out of the Inns of Court.

The privileges won by the barristers consisted in the monopoly of defence, absolute control over their profession, the right to complete freedom of speech in advocacy, entitlement to elevation as a judge and an immunity whereby they could be arrested only in the case of homicide. Finally, they were authorized to use the title 'esquire'. Over a century and a half, their monopoly of defence was subject to a constant erosion which culminated in 1990 with the abolition of their monopoly in the higher courts.

The history of the solicitors began with an act of exclusion. On being forced out of the Inns of Court, the attorneys assembled at the Inns of Chancery, where there formed a group of 'solicitors' – originally clerks employed to 'solicit' the services of the chancery. Over time, the term 'solicitor' prevailed over 'attorney', and the two professions, previously separate, merged during the 1800s. That 'original trauma' (Sugarman, 1996: 85) bred the profession of solicitor and the dualism of the British legal profession. The solicitor maintained contacts with the client and prepared the defence brief for the barrister. The barrister had no contacts with the client, not even when the fee was paid: it was delivered to him by the solicitor, who in the 1800s began to assist him in court.

The British solicitors have no counterparts in the other European countries because – as said – they also perform functions undertaken by the continental notaries. Their principal activity was for long the certification of property conveyances, on which in 1903 they acquired a monopoly which lasted for around 90 years. The division between barrister and solicitor induced both professions to make repeated attempts to erode some privilege pertaining to the other. The barristers, for instance, sought in 1949 to encroach on the solicitors' monopoly of conveyancing; while the solicitors, for their part, obtained an increasing role in defence practice. However, with the passage of time, the distinction between

barrister and solicitor became blurred. Proposals for merger between the two professions were made in the late 1800s; and in 1881 the solicitors obtained a fast track for qualification as barrister. Merging the professions was again proposed during the 1960s by a minority of barristers, who regarded it as necessary to modernize the legal profession. But resistance raised by both branches once again thwarted the project (Abel-Smith and Stevens, 1970: 439–54).

### **Bar Autonomy and State Regulation**

Autonomy is a fundamental stage in the construction of a modern profession. Upon its achievement, the profession can constitute its own identity, differentiate itself from other professional groups and establish its own representative institutions. Autonomy and self-management can never be exercised without external agents, such as the political or economic powers, which alone are able to create the conditions in which professions can develop and regulate their activities (Freidson, 1999: 51). All the Western professions have need of the state and of recognition from the public powers, just as the state needs professionals and their skills to mediate its relationship with civil society and to ensure that the public administration works efficiently (Torstendahl, 1990).

Autonomy and state regulation are not mutually exclusive. The strong presence of the state does not necessarily entail less autonomy for the legal professions – as demonstrated by the French and Italian bars (Siegrist, 1989). These are two historically determined concepts which have acquired specific meanings according to the national context and the historical period. On Burrage's perspective (2006), the revolutions and political changes which have occurred over the centuries in the European societies have likewise been factors of change in the legal professions, impacting both on their internal organization and on their relations with the public powers.

#### *Great Britain*

The British bar has consolidated its autonomy over the centuries by virtue of its control over training and access to the profession, and its exercise of disciplinary powers. This process has coincided with the history of the Inns of Court, and it has been inextricably bound up with the function of sociability performed by the Inns, and which has been one of the factors constitutive of the British legal profession. Lincoln's Inn, Gray's Inn, the Middle Temple and the Inner Temple have formed the centre of forensic sociability and the core of the barristers' identity.

The Inns of Court arose in the Middle Ages as guilds to which judges granted the exclusive right to authorize entry into the profession. Unlike the other professions, the British bar's prerogatives have never been confirmed by a royal charter. State recognition of its autonomy and its self-legitimation have derived from the constitutional role that the British bar has historically shared with the judiciary. Jealous of their identity, the barristers strenuously resisted all attempts, whether by Parliament or the judiciary, to modify their structure (Abel-Smith and Stevens, 1970: 63). During the 1800s, a fierce conflict ranged the Inns against Parliament, internally to which had formed a current critical of their hierarchical structure, the autonomy which they enjoyed and shortcomings in the training of barristers (Cocks, 1983: 22).

At the beginning of the nineteenth century, there was no institution in England at which law could be studied in systematic fashion. In 1758 and 1800, Oxford and Cambridge had introduced legal subjects on to their curricula, but without this being followed by the creation of a faculty of law. Whilst on the continent the law faculties were the centres of training for jurists, in England the Inns were considered 'the third university', where the teaching of law was conducted not in an academic manner but through its actual practice. During the 1830s, concerns were raised by public opinion about legal training. Projects for reform were devised which centred on three essential measures: creation of a law faculty, revision of the pupillage system and control over entry to the profession. Two years after its foundation, the University of London tried to introduce a systematic programme for legal training, drawing on the German model for the purpose. A chair of jurisprudence was created in 1828 and then one of English law in 1829. However, student intake was very disappointing: apprentice barristers preferred to train at the Inns because this guaranteed them entry into the profession (Brooks and Lobban, 1999).

The need to modify the legal training system and give it the theoretical depth neglected in favour of wholly practical instruction was also felt by groups of English and Irish barristers. In 1846 and 1854, Parliament appointed two royal commissions to examine the state of legal education in Ireland and England. On conclusion of their inquiries, both commissions deplored the fact that future professionals were entirely bereft of instruction in jurisprudence – unlike their continental counterparts – and they recommended creation of a law faculty and the introduction of a system of compulsory examinations. Several bills on the matter were put before Parliament in the years that followed, but the Inns had no intention of accepting a training programme common to both branches of the profession, nor of cooperating with the universities. Although they organized some courses in law and reinforced the pupillage system, their only



important concession was the introduction of an entrance examination in 1879.

The conflict over legal education provided the Inns with an occasion to raise intransigent defence of their autonomy against the powers of the state. But it also represented a cultural confrontation between the continental and British models. Oxford and Cambridge, and subsequently the University of London, created chairs in legal disciplines and began to award degrees in law; but these had cultural rather than vocational purposes. Until the second half of the 1900s, the Inns maintained full control over training and access to the legal profession, doing no more than certify some of the subjects studied at university as vocational qualifications (Burrage, 2006: 467–8). But it was only in the 1970s that the British training system drew closer to the continental one, and the university route into the profession began to predominate over the vocational one. There were 1500 law graduates in 1938–39; by 1980–81 the number had risen to around 16,000 (Abel, 2003: 98). For their part, the Inns opened a school in 1964 requiring compulsory attendance before sitting the examination for the professional qualification.

During the 1800s, Parliament sought on several occasions to reform the corporative organization of the Inns as well. In this regard, too, royal commissions were appointed and bills were presented by reformist lawyers in Parliament intent on curtailing the power of the benchers and responsabilizing barristers towards their clients by obliging them to collect fees directly (Duman, 1983: 56–61). But the Inns were able to obstruct every proposal for change, doing so with the support of a large part of the political class. This explains why they were not affected by the reforms which in those same years changed the statutes of the army, the medical profession, the Anglican clergy and the civil service. The only changes made were those decided by the legal profession itself. The most notable of them was creation of the Bar Council in 1895. This was a professional association which assembled barristers of every level, from juniors to the attorney-general, and its purpose was to handle relations with the government, Parliament, judges and the press on behalf of the category as a whole. The Bar Council shared tasks and areas of influence with the Inns and specialized in defending the interests of juniors and in consulting on rules of professional conduct (Abel-Smith and Stevens, 1970: 219).

The solicitors used every means at their disposal to acquire a legitimacy equal to that of the other legal professions. They started from a position of disadvantage, however. They did not enjoy an autonomy comparable with that of the barristers because in 1729 Parliament had placed them under the control of the judges, and they had inferior social status. In their pursuit of autonomy and status, they endowed themselves with a powerful

association, resorted to legislation and collaborated with the government. The solicitors acquired by legislative means what the barristers had enjoyed for centuries by constitutional right. The point of departure was different, but the results were the same. Yet a fundamental difference still persists: the Inns of Courts are not comparable with the other professional associations. Practising the profession of barrister is conditional upon membership of an Inn, whilst membership of the other associations, and therefore also of the Law Society, is voluntary (Millerson, 1964: 15).

The Law Society came into being in 1739 as the Society of Gentlemen Practisers and became the most authoritative of the legal clubs which met in the taverns and coffee houses around Chancery Lane. In the golden period of the formation of British public opinion, these clubs fostered the growth of a legal public sphere and then its spread from London to the provinces. The Law Society was officially founded in 1823 and acquired premises in Chancery Lane. Its original constitution as a private club was modified by a royal charter of 1845 which recognized its nature as an independent professional body with public responsibilities (Sugarman, 1996: 92). The Law Society acquired complete self-government in the space of around one hundred years: it obtained administration of the professional register in 1843, and subsequently control over training and access. But it took longer to remove the judges' power of discipline over its members. The first conquest was the Solicitor Act of 1888, which authorized the Law Society to investigate its own members, though not to punish them, a power still reserved to the High Court. In 1919, the entire disciplinary procedure was transferred to the Law Society, with right of appeal to the courts. The 1930s saw completion of the Law Society's conquest of self-government when it was empowered to draw up a code of professional conduct. The autonomy achieved in disciplinary matters eventually became equal to that of the barristers, and greater than that of the other British professions, for which disciplinary power and control over training were divided between members of the profession and external members (Abel-Smith and Stevens, 1970: 192).

Training was a crucial juncture in the status project of the solicitors, who did not adopt the co-option system used by the barristers, but sought to control the entire training process and to adopt merit criteria. The Law Society was the second professional association, after the College of Surgeons, to set written examinations. In 1860, it introduced an entrance examination, and in 1877 it contrived to obtain a provision that the examination boards should consist only of solicitors.

The collaborative relations that the Law Society was able to establish with the executive further strengthened the status of the solicitors. In the Victorian Age, the British state had a 'minimalist' structure and it relied on

the expertise of independent bodies for the formulation of policy. In this regard, the Law Society made an important contribution to the preparation and revision of legislation. Moreover, in 1923 it was assigned responsibility for the provision of legal aid to the poor, and in 1949 the Labour government of Attlee entrusted it with administration and distribution of the public funds allocated to legal aid schemes (Sugarman, 1995: 14–15).

The birth of the welfare state forged new bonds between the British legal professions and the state. Over the years, legal aid became one of the main sources of income for lawyers, and it compensated them for the increased number of practitioners consequent upon the expansion of academic legal education. It was especially the barristers who benefited: from the 1970s onwards. In fact, around half of their incomes derived from the state (Abel, 2003: 240–1), and bargaining between the Bar Council and the state on the tariffs for legal aid became decisive for their future. Neither the growth of the state market of the legal professions, nor the universitization of the legal profession in the post-war period, diminished the autonomy of the legal professions; nor, for that matter, did the large-scale modernization of British society. It was Margaret Thatcher who disputed the relationship between the state and civil society which had enabled the legal professions to preserve their prerogatives intact for centuries. Her project to reform the legal professions represented – according to Michael Burrage (1997: 148–54) – a challenge to British constitutional principles.

The reform of the legal professions was part of a neo-liberal and neo-bureaucratic project to dismantle their traditional monopolies and bring them under the state's control. In 1985, the solicitor's monopoly on conveyancing was abolished, and the sector was opened up to competition from an array of authorized practitioners. In the same year, in order to reduce costs, the administration of legal aid was removed from the Law Society and transferred to the state. A Green Paper presented to Parliament in 1989 set out the guidelines for the Thatcherist reform of the legal professions, which would be treated 'like any other industry' and adjusted to the principles of free competition and free circulation of human capital propounded by the European Community. Thus announced was the end of monopoly over defence in courts, the birth of the new profession of 'licensed advocates' and liberalization of the activity of barristers. The reform would be implemented under the state's control at the cost of the historical autonomy of the two legal professions.

The first effect of Thatcher's policy was to set barristers against solicitors. The latter, having lost on the issue of conveyancing, became the proponents of equalization between the two professions, and they challenged the bar's monopoly of audience in the High Court and Crown

Courts, their purpose being to compensate for their losses and remove the barrier excluding them from the judiciary. The two legal professions engaged in a very public wrangle on their respective jurisdictions known as the 'Bar Wars'. However, many points contained in the Green Paper were eliminated when the law was drafted, and the 1990 Courts and Legal Service Act was a compromise which protected the interests of both professions. The idea of 'licensed advocates' lapsed; for the solicitors, conveyancing returned to a regime of moderate competition; and for the barristers, access to the high court was granted only to the solicitors of proven experience.

The second, and much more important, effect was cultural in nature. On the one hand, the 1989 Green Paper showed that the long-standing pact between the state and the British legal professions was no longer operative, and that the latter could be subject to the state's regulation and intervention as on the continent. On the other hand, the Conservatives' policies induced a change in the language of the legal professions, forcing them, like the doctors, to speak in terms of market and to deprecate the effects of Americanization (Abel, 2003: 473). This cultural change was carried forward by New Labour, which did not cancel Thatcher's reforms upon assuming office but continued them with respect to legal services.

### France

The history of the French bar well exemplifies the interweaving between conditioning by the public powers and the strength of the professional body's tradition. It was nourished by the 'political myth' of its origins (Karpik, 1995: 149). The 'classic bar' – as Lucien Karpik termed it – was born in the sixteenth century, when the bar first began to differentiate itself from the powers of the state, with which it has hitherto been confused. Emancipated from the control of parliament, the lawyers' *ordre* gradually conquered its autonomy. The *batonnier* (the head of the order) was selected from year to year on a criterion which combined eligibility, seniority and co-option. Until 1781, he nominated the members of the council of the order, who thereafter were elected by the general assembly of lawyers.

Also, the acquisition of disciplinary power was a slow process. Only in the eighteenth century did parliament (which at that time had jurisdictional functions) delegate, albeit non-formally, all disciplinary power to the *ordre*, which could thus suspend or expel its members. The *ordre* finally formulated its code of conduct. From the early 1700s onwards, the *ordres* sought to conjugate the improvement of legal culture with observance of the ethical code. Fusion between the cognitive and normative

universes (Karpik, 1995: 80) thus became the distinguishing feature of the French legal profession and of its anthropology. The Revolution put an end to this ideal equilibrium, however. The *ordre* was swept away by the destruction of the corporative system and by the Jacobin determination to found the legal system on natural law.

The reconstitution of the legal order came in 1810 with a derogation from the Le Chapelier Law that had abolished all guilds in 1791. The purpose was twofold: on the one hand, it disciplined a profession whose 'factiousness' Napoleon deemed dangerous; on the other, it was tribute paid to the profession's tradition which enabled the *avocats* to 're-invent' the French bar (Leuwers, 2006: 265ff.). With the law of 1810, the state delegated governance of the profession to the *ordre*, although this was a self-governance restricted by the control exerted by the judiciary and by the Minister of Justice. The July Monarchy marked the beginning of the golden age of the French bar when the legal orders acquired true self-governance. An ordinance of 27 August 1830 established that the disciplinary council of the order and the *batônnier* were to be elected by all the lawyers enrolled at the court of appeal to which the order belonged. Revoked during the Second Empire and reinstated in 1870, the direct election of the governing council was again re-established by a law of 27 July 1944 which regulated all the professions after abrogation of the Vichy legislation.

The French legal orders were given three prerogatives: administration of the professional register, control over vocational training, and normative and disciplinary power. The order was *maître de son tableau* – master of the register – in that it was empowered to decide whether to accept or reject the enrolment of a lawyer on moral or political grounds, or because of rules laid down by the order's council (Halpérin, 1996: 76). With the passage of time, the courts of appeal prevented the orders from fixing rules of access which went beyond those established by law until a decree of 20 June 1920 abolished their control over the register and their entitlement to decide the criteria for admission (Ozanam, 1994: 53). The decree contained other provisions designed to bring the orders under public discipline; but it was also a decisive stage in the professionalization of the French lawyers. It protected the title of *avocat* by reserving it for law graduates enrolled with the order, whereas previously it could be used by all law graduates who had sworn the oath.

In the nineteenth century, the French orders exercised a normative power based on local usages relative to the lawyer's rights and duties. This normative tradition gave rise to formulation of the codes of conduct. The professional orders of today have lost this prerogative, as well, since its appropriation by the state. The third prerogative enjoyed by the orders

used to be management of the *stage*, or internship, which lasted for three years and was undertaken internally to the order. The main commitment required of interns was attendance at the weekly sessions of the *Conférence du stage*. This was a ‘workshop’ in legal forensic rhetoric where the interns debated issues of law and performed exercises in eloquence. But the *Conférence* was above all a training ground for the members of the profession’s élite, some of whom went on to pursue political careers. Every year, 12 trainees were selected to act as secretaries of the *Conférence*. Between 1870 and 1914, fully 28 of them became government ministers (Charle, 1994b). The order thus performed a central role in the selection of the French ruling class.

The decline of the orders began in the 1930s, when new associations arose in defence of the legal profession. In 1921, the *Association Nationale des Avocats* (ANA) was born on the initiative of Jean Appleton, a lawyer and professor in Lyon. The ANA (which in 1938–39 had 2340 members) campaigned to ensure that *avocats* maintained monopoly over defence, and for the *stage* to be given a more vocational structure. Whilst the ANA’s first demand was not met immediately, the second was granted in 1930, when it became compulsory to spend one year of the *stage* in the chambers of a lawyer or notary, or at a court.

In those years of economic crisis and unemployment, the ANA campaigned for a cap to be set on the number of law practitioners, and it became the mouthpiece for the xenophobic tendencies harboured by the French bar during the 1930s. Also through intervention by the ANA, a law was enacted in 1934 to protect the legal professions against the wave of refugees from Eastern Europe. The law stipulated that a foreigner could practise a legal profession ten years after being ‘naturalized’ (Israël, 2005: 58–62). The Vichy regime completed the work of thinning out the legal market by introducing in 1940 retroactive rules which stipulated that enrolment on the professional register required being born of a French father, and that the access of Jews to the courts was restricted to 2 per cent of the lawyers enrolled on the register or the *stage* (Halpérin, 1991: 145–52).

The reorganization of the legal profession under the Vichy regime was not so much an authoritarian fiat imposed from above as a response to demands long advanced by the lawyers – as in Germany and Italy. The monopoly of the title of *avocat* was confirmed for law graduates enrolled on the register or the *stage* and who practised the profession; exclusive entitlement to furnish legal representation and defence was given to *avocats* and *avoués* in some jurisdictions of peace; lastly, the ANA’s demand for limits on entry to the profession was granted. Finally, the law of 26 June 1941 introduced the CAPA (Certificate of Aptitude for Exercise of the Legal Profession), which was obtained after attendance on a year-long

course at a university faculty. Designed to exclude naturalized French citizens with insufficient language skills, the CAPA is still in force today, but has changed in substance because it is now a professional examination, rather than the university examination which it used to be.

The French bar welcomed these new dispositions and overlooked the judiciary's increased control over the orders. The anti-Jewish laws were also substantially approved and applied without too many scruples by the councils of the orders. The latter represented that section of the profession which had developed a virulent anti-Semitism in the 1930s (Badinter, 1997: Chapter 1). In this first phase, only a tiny minority of lawyers dared oppose the Pétain regime: this being the case of the lawyers of the *Musée de l'Homme* group, who formed the first resistance network in Paris. Things changed in 1941, when the regime increased the special jurisdictions where the right to defence was almost entirely non-existent: in the special sections created at the military courts, the lawyer had only 15 minutes to defend the accused, whilst in the martial courts there was no defence at all. According to Liora Israël (2005), this scenario opened the eyes of numerous lawyers, who engaged in actions that ranged from opposition to the regime, often mixed with corporative defence of professional prerogatives to defence of the regime's political opponents, to outright resistance. In her opinion, one may speak of the existence of authentic judicial Resistance during the Vichy regime.

In the first half of the twentieth century, the French legal order was subject to rigorous regulation by the state and thus resembled the bureaucratic model of the Italian orders. But unlike in Italy, where the Consiglio Nazionale Forense was created in 1944, the French orders did not have a national body of representation and coordination until 1990, when the Conseil National des Barreaux was founded. This was a public-interest body which represented the bar in dealings with the government and supervised the profession's rules and practices, but unlike the Consiglio Nazionale Forense it did not have disciplinary power. One wonders why the French legal profession was so belated in endowing itself with a national representative body. In this regard, it should be borne in mind that the order in Paris had since the 1800s performed the role of representing French advocacy in its entirety; and secondly that the lawyers' trade unions continued the ANA's social protection of the profession after the Second World War (Sialelli, 1987: 50), weakening the power of the orders and abating the need for a central representative body.

### *Italy*

The construction of the modern profession of lawyer came about in Italy within the space of about 60 years and on the basis of a statist and

centralized model. It moved through two main legislative stages: the first was the 1874 law on the profession of *procuratore* (attorney) and *avvocato* (lawyer) enacted in the post-unification period, and the second was the law of 1933 during the fascist regime. The 1874 law was one of the reforms undertaken to achieve national juridical unification. The new civil code came into effect in 1865, but it was not until nine years later that the traditions in force in the pre-unification states were amalgamated into a single professional law, and the resistances of some regional professional groups were overcome (Tacchi, 2002: 89–94). But even thereafter the Italian bar was characterized by marked regional cleavages, which were among the costs paid for the profession's belated and widely resisted unification. The 1874 law resulted from identification between the post-unification political class and the bar, and not, as happened in Germany, from interaction between the law associations and the state. Nevertheless, it had high historical and symbolic significance. It was the first law of the Kingdom of Italy to lay down the conditions for exercise of a free profession and for its representation, and it became the model emulated by the other professions awaiting regulation by the state.

Practice at the Italian bar after 1874 required possession of a degree in law, success in a theoretical–practical qualifying examination, and enrolment on the professional register. However, until 1933, enrolment only had the value of certification and could not prevent frequent abuses of the title of *avvocato*. The Italian legal order differed from the French one in important respects. It was a public corporation to which the state delegated governance of the bar. For this reason, it was not *maître de son tableau*, but merely verified fulfilment of the legal requirements for enrolment on the register. It was uninvolved in vocational training and pupillage, which functions were delegated to the universities and private chambers; but it was entirely autonomous in exercising disciplinary power over its members.

The legal profession's autonomy was progressively eroded during the 20 years of fascism. The totalitarian regime increased the state's control over the professions by bringing them within the corporative regime. The first law of 1926 founded the Consiglio Superiore Forense as the Italian attorneys and lawyers had long requested, but endowed it with only very limited self-government. The law also introduced the obligation of the oath and a clause stipulating 'special and blameless' conduct as a condition for enrolment on the professional register. This clause made it possible to block the enrolment of lawyers disagreeable to the regime or to expel them from the profession. In 1928, the legal orders were placed under the control of the fascist trade unions and the government, and they were abolished in 1933. The fascist trade unions were assigned the functions previously performed by the order's councils,



such as maintenance of the registers and the exercise of disciplinary power (Meniconi, 2006: Chapter 3).

However, fascism did not undertake solely repressive action in regard to the professions, and particularly to the bar. Its behaviour exhibited the duality inherent in the authoritarian modernization that characterized its policies and whereby control from above and repression were interwoven with attempts to rationalize the social and institutional system. The law of 27 November 1933 was also a response to demands for some time advanced by the lawyers. Enrolment on the professional register became compulsory for practice of the profession and to be able to use the title of *avvocato*; professional credentials were raised with the introduction of a more selective qualifying examination (Santoro, 1996: 127); and the *numerus clausus* was introduced for attorneys to defend the law market against the crisis of the 1930s.

The Italian lawyers only gradually aligned themselves with fascism. Between 1919 and 1922, the period prior to Mussolini's ascent to power, they had scant sympathy for fascism. In those early years, the fascists sought to 'normalize' the bar by resorting to violent means, such as attacks on legal chambers and the intimidation of socialist and anti-fascist lawyers. In 1926, the law reforming the legal professions provoked vociferous protest on the grounds that it greatly curtailed the autonomy of the lawyers. The protests were quashed by the public authorities and failed to prevent enactment of the law. Thereafter, space to defend professional autonomy dwindled away (Tacchi, 2002: 439–43).

The establishment of the totalitarian state accelerated the rush among lawyers to enrol with the Fascist Party and trade unions, albeit to a slightly lesser extent than among the doctors and engineers. More substantial was their presence in the executive bodies of the Fascist Party and within the Grand Council, which confirms that the bar continued to predominate within the fascist ruling class. Added to the positions of power held by the legal elites were the professional benefits enjoyed by the rank-and-file enrolled with the trade unions and the Fascist Party. Smaller and greater rewards induced them to close their eyes against the loss of freedoms and fundamental rights that the regime brought with it. Defence was effectively abolished at the Special Tribunal for Defence of the State, where the political opponents of the regime were tried (Tranfaglia, 1995: 535); subsequently, defence counsels consisted of soldiers and officers in the fascist militia.

Historians agree that Italian lawyers furnished fascism with strong consensus, either out of conviction or self-interest. However, recent studies have emphasized their dissenting positions and solidarity with Jewish colleagues struck off the registers in 1938 after enactment of the racial

laws. According to Casali and Preti (2009), a total of 3771 (2.5 per cent) 'subversive' professionals were placed on file by the police between 1890 and 1945; and around 45 per cent of them were lawyers. The greatest concentration of dissident lawyers under fascism has been recorded in Sicily. The numbers change if one analyses the proportions of the various categories of professionals which participated in the struggle for national liberation (1943–45). Partly for demographic reasons (the partisans were very young), professionals were involved in the resistance to only a minor extent, and even less so were the lawyers. There were 332 medical partisans, compared with 99 lawyers, in the region of Emilia-Romagna. However, several lawyers, perhaps most notably Duccio Galimberti, died as resistance heroes.

The transition of the Italian bar from being fascist to republican came about through restoration of the autonomy that it had enjoyed during the liberal period, and elimination from fascist legislation of authoritarian provisions without altering the reforms introduced. The Lieutenantcy Decrees of 1944 abolished the corporative regime, eliminated the fascist trade unions, and restored the professional orders. Finally, the Consiglio Nazionale Forense was created, which today represents the bar at national level and enjoys complete self-government: it has jurisdictional power in disciplinary matters, and its rulings can only be challenged before the Court of Cassation. Free trade unions were also reinstated in 1944, and, as regards the regulated professions, a semi-official division of labour was established whereby the trade unions defended the profession's interests while the orders attended to its public aspects.

However, the Italian centre-right governments of the 1950s sought to shift monopoly on representation of the professions to the orders alone, the purpose being to stifle the pluralism of representation, as at the time of fascism. It was in fact only after the advent of the centre-left governments that the legal trade unions reorganized themselves on a national scale. Founded in 1964 was the Federazione dei Sindacati degli Avvocati d'Italia (FISAPI), which succeeded in extending the social security entitlements of lawyers to include health insurance. It worked to construct the image of the 'new lawyer', which during the 'long 68' assumed a progressive political stance. In the following years, two factors undermined unitary legal trade unionism. The first was the growth of new sectoral associations corresponding to the new specializations and professional identities which arose within the legal field and fragmented representation. But the most severe challenge was raised in the 1990s by the Consiglio Nazionale Forense, which since then has acted as the Italian bar's main political representative (Berti Arnoaldi Veli and Berti Arnoaldi Veli, 1997: 87–151).

*Germany*

In early nineteenth-century Prussia, the profession of lawyer was characterized by a high degree of bureaucratization, and as such it has been classified by historians (Siegrist, 1990a: 63) as a variant of the continental statist model. This anomaly with respect to the other European law professions had marked political overtones. Instituting a 'free bar' in Germany, too, became one of the goals of German liberalism, and it had a significance which extended well beyond the mere issue of professionalism. One of the protagonists of this battle was legal associationism. Having arisen in the Germany of the *Vormärztz* period (Ledford, 1996: Chapter 4), associations of jurists performed a leading role in the organization of the legal profession. After 1878, in fact, representation of the German bar assumed a binary public/private structure which was much more evident than in France and Italy. The weight of voluntary associationism in all the German professions was such that it is today argued that the concept of professionalization from above is inadequate to understand their history (Cocks and Jarausch, 1990: 14–17).

Legal trade unionism developed during the *Vormärztz* period at local and regional level; but there soon arose a project to create a national association in preparation for German legal reunification. However, the project was thwarted in the 1850s by the repression exercised by the various German states (John, 1991: 170–3). Nevertheless, the legal associations of the time made decisive contributions to the modernization of the German legal profession. In the absence of institutions recognized by the state, they enforced professional ethics and disseminated a culture of self-government which induced some of the German states to create *Anwaltskammern*, or orders of lawyers. The first *Anwaltskammer* was instituted in the Kingdom of Hanover in 1850. In Prussia, instead, *Ehrenräte* ('courts of honour') were created: these were formed of lawyers and public functionaries who exercised discipline over practitioners, although their decisions could be annulled by judges.

In the 1860s, the main objective of legal unionism and the reformist wing of the German legal profession was to achieve a 'free bar'. This concept denoted an open profession, regulated by the market, and free from the control of the executive and discipline by the judiciary; but it was also a political concept expressing the demand for change advanced by the German reformist middle class. Its manifesto was the book *Freie Advokatur*, published by the jurist and theorist of liberalism Rudolph von Gneist in 1867. Despite the doubts and fears expressed by the rank-and-file lawyers, above all the Prussian ones, concerning free entry to the profession, in the end they all accepted the proposal to eliminate the *numerus clausus*.

The law on the legal profession, the *Rechtsanwaltsordnung* (RAO), enacted eight years after German unification, was a compromise between more advanced liberal tendencies and resistance within the government and among lawyers. The principle of free entry to the profession recognized by the law was the consequence of harmonization between the training programmes for judges and *Rechtsanwälte*. On passing the second state examination, the *Referendar* could choose between becoming a judge or applying for admission to the bar. The self-government of the legal profession was also recognized. Created in all the courts of appeal were *Anwaltskammern*, public bodies similar to the Italian orders and which had compulsory enrolment; they enjoyed wide margins of discretion on the admission of candidates, but they had less autonomy than the French and Italian orders because they shared disciplinary power with judges. The *Anwaltskammern* flanked the voluntary bar associations. The Deutsche Anwaltverein (DAV), which arose in 1871 from merger between the Prussian and Bavarian bar associations, became the powerful representative of the interests of German lawyers, three-quarters of whom were members of the DAV on the eve of the First World War (McClelland, 1991: 158).

During the Wilhelmine Empire, public and private representation of the legal profession were balanced in that both were governed by the professional elite formed of the attorneys who practised as counsel in the higher courts. However, the balance was disrupted during the Weimar Republic. Under the impact of the economic crisis, the principles of the 1878 law were contested, and with them the binary *Anwaltskammern*/DAV system of representation. The first blow was struck by a law of 1927 on simultaneous admission, as discussed above. This marked the failure of the unitary model of representation personified in the DAV, which was unable to mediate among the conflicting interests of the various categories of lawyers.

Demand for re-introduction of the *numerus clausus* was the second blow inflicted on the liberal bar. Expanding enrolments at law faculties at the end of the 1800s had first provoked discontent among lawyers, but the problem exploded in the 1920s, when the rise in university enrolments occurred in a context of profound crisis of the middle classes. In keeping with a well-known pattern of behaviour, the elite of the profession had no qualms about a free market because it possessed the resources to deal with it (Ledford, 1996: 271–2); it was instead the lower classes which feared liberalization and demanded protective measures. As the economic situation deteriorated, even a liberal association like the DAV was forced to reverse its policy, and between 1931 and 1932 it joined the *Anwaltskammern* in lobbying the government for temporary closure of entry to the profession. Overwhelmed by the demands of all the professions, the Weimar government decided to restrict enrolments at university.

On achieving power, Nazism adopted a strategy already invoked by lawyers during the last years of the Weimar Republic: thinning the ranks of the profession by eliminating its weakest members. Added to this was racial selection: a law of 25 April 1933 established that university matriculations by Jewish students must not exceed 5 per cent of enrolments at all faculties, and female matriculations should be no more than 10 per cent of male ones, while mediocre students were discouraged from continuing their studies and deprived of financial support. Between 1933 and the 1935, other provisions excluded Jewish lawyers, those suspected of communism, and women, from exercise of the profession. In 1935, some 4394 lawyers, equal to one-quarter of the profession, were expelled from it; the 1753 Jewish lawyers who still remained in 1937 were expelled in November 1938 (Reifner, 1986: 119).

Nazism favoured the traditional components of the legal profession over its new practitioners, and it completed – as did fascism – the lawyers' professionalization within a hierarchical and authoritarian context. The lawyers obtained professional monopoly, and judges, retired functionaries and legal advisers were excluded from advocacy before the courts. The lawyers were also authorized to practise in the labour courts, from which they had been excluded during the Weimar Republic. Moreover, the new category of company lawyers was prohibited from representing clients in civil cases and in arbitration. Finally, in 1935, Nazism distinguished legal internships from those undertaken by judges, thus satisfying a demand forcefully expressed by the lawyers. The bar was brought under the control of the public administration and the judges; the *Anwaltskammern* were purged, deprived of legal personality and self-government, and subjected to the control of the Lawyer Imperial Chamber (*Reichsrechtsanwaltskammer*). The latter was the higher representative body for which the German lawyers had unsuccessfully campaigned since the early 1900s, and which Nazism founded, attributing it control over all lawyers. Created in 1928 was the Bund Nationalsozialistischer Deutscher Juristen (BSNDJ), the league of Nazi jurists which contributed to the nazification of lawyers after 1933. The Bund absorbed the DAV and the other legal associations, and because it selected the members of the executive bodies of the *Anwaltskammern* and the Imperial Chamber, it gained control over the entire representation of the legal profession.

Elliott Freidson (2002) has explained the ways in which the totalitarian states provoked processes of deprofessionalization which consisted in the retreat of the professions from their fundamental functions. The case of the legal profession under fascism, Nazism and the Vichy regime is a complex variant on this model. On the one hand, these regimes fuelled the professionalization of the bar; on the other, they triggered a deprofessionalizing

process which involved the collaboration of lawyers with the totalitarian regime. In the case of the German lawyers, deprofessionalization was manifest in total subordination to the judge-*Führer*, before whom they even requested the death penalty for their clients, instead of acquittal or commutation of the sentence.

The nazification of the German lawyers bore many similarities with the process in Italy. Also in Germany, few lawyers belonged to the Nazi movement before 1933. It was only when Hitler took power that the membership of the Bund National Sozialistischer Deutscher Juristen rose from 1500 to 80,000. However, Jarausch (1990: 101) maintains that in its early years the regime did not command consensus among lawyers, whose nazification was less widespread than it was among judges. Moreover, the numerous court cases allocated to Jewish lawyers before 1933 show – according to Reifner (1986: 115) – that anti-Semitism was not generalized in the German courts. This explains why the DAV sought to protect its non-Aryan members before it was dissolved. According to Charles McClelland (1991: 223), the nazification of the German bar proceeded slowly. There was no lack of resistance raised in defence of professional prerogatives, such as that by the lawyer Harry Litten. Finally, some jurists also participated in the resistance, for which they paid with their lives (Hoffmann, 1994: 87–90).

After the birth of the German Federal Republic, the system of representation consisting of the *Anwaltskammern* and the DAV was restored (Rueschemeyer, 1973: 20), and the *Bundesrechtsanwaltskammer* (German Federal Bar) was added to it in 1959. Formed by the presidents of the *Anwaltskammern*, the *Bundesrechtsanwaltskammer* compiles the professional code of conduct, but unlike the Italian Consiglio Nazionale Forense it has neither disciplinary nor jurisdictional powers. The new federal system has increased the self-government of the bar because disciplinary power has been restored to the courts of honour composed of three lawyers. Nevertheless – as Halpérin points out (1996: 106) – the exercise of discipline by lawyers decreases as the hierarchy of disciplinary organs expands, given that the presence of judges increases in the higher levels of the justice system.