

THE
JUDICIAL SYSTEM
OF
FASCIST ITALY



Dih Wang.

June, 1939.

100-111
100-111

**ORIGINAL COPY IS
TIGHTLY BOUND AND
TEXT IS CLOSE TO THE
EDGE OF THE PAGE**

| | |
|---|------------------|
| CHAPTER III. THE MINISTRY OF JUSTICE ----- | page (82) |
| Functionaries ----- | " (82) |
| Functions ----- | " (84) |
| Conclusion ----- | " (88) |
| CHAPTER IV. COURTS | |
| Historical ----- | " (91) |
| General Features ----- | " (91) |
| The Scheme of Courts ----- | " (100) |
| The Local Conciliation Court- | " (103) |
| The Praetorian Court ----- | " (111) |
| The Tribunal ----- | " (117) |
| The Court of Appeal ----- | " (125) |
| The Court of Assize ----- | " (132) |
| The Court of Cassation ----- | " (139) |
| CHAPTER V. THE JUDICIAL PERSONNEL ----- | " (150) |
| The Conciliators and Assessors -- | " (152) |
| The Magistrates ----- | " (154) |
| Praetors of the Praetorian Courts ----- | " (154) |
| The Magistrates Bench ----- | " (160) |
| The Judicial Councils and the Supreme Judicial Council of Magistrates ----- | " (176) |
| Rules and Conditions ----- | " (178) |
| Discipline and Disciplinary Charge of Magistrates --- | " (186) |
| The Chancellors and Secretaries - | " (194) |

| | |
|---|------------------|
| CHAPTER VI. PROCEDURES ----- | page(198) |
| The Civil Procedure ----- | " (200) |
| a) Procedures in the Civil Tribunals ----- | " (205) |
| b) Procedure in the Conciliation and Praetorian Courts --- | " (211) |
| c) "Impugment" ----- | " (213) |
| Criminal Procedure | |
| a) Preliminary Proceedings --- | " (219) |
| b) Trial ----- | " (222) |
| c) Appeal ----- | " (226) |
| CHAPTER VII. SPECIAL JUSTICE | |
| The Special Tribunal for the Defence of the State ----- | " (230) |
| The Labour Court ----- | " (235) |
| CHAPTER VIII. CONCLUSION ----- | " (246) |

THE JUDICIAL SYSTEM OF FASCIST ITALY

ABSTRACT

The thesis gives an account of the main features of the judicial system of Fascist Italy. In the first chapter, Fascist "Law and Justice" as an admixture of "new" and "old" conceptions, are generally discussed. The "Jurisdictions" of the law courts are described and a detailed account is given of "The Ministry of Justice" which is one of the thirteen State departments responsible for the administration of the law as well as legislation in the field of legal administration. There follows an analysis of the "Courts" in which both the general scheme and the central features of all the Italian judicial courts, including a number of special courts are described. The account of the courts is completed by a detailed description of their personnel and procedure. The term "judicial personnel" covers not only the judges but also the conciliators, assessors, clerks and prosecutors of all ranks, whose status, functions and qualifications are fully discussed. Procedure is described in two parts, civil and criminal procedures. The former rests now on the new Code of Civil Procedure of April 1, 1939 and the latter on the Code of Penal Procedure of 1930, both of which represent new aspects of Fascist judicial justice. The section on so-called "Special Justice" which

covers mainly the "Special Tribunal for the Defence of State" for judging political offences, and the "Labour Courts" in which collective and individual labour disputes are solved, deals with the organization and procedure of these two courts. Criticism of their soundness is dealt with partly in the section on "Law and Justice" and partly in those on "Jurisdictions" and "Courts". The brief "Conclusion" summarizes the main features of the Fascist judiciary, its dissimilarities as compared with the judiciaries of Democracies and its validity as a system of "ordinary justice".

In the view of the writer, the following parts constitute an original contribution to the knowledge of the subject. The classification of all the Fascist laws in the first section. The analysis of the relations between Fascist political, economical and social doctrines and the law in the fourth section. The analysis of the basic principles of the judiciary in the Statute Fondamentale in the first section. The detailed account of the jurisdiction of the courts, of the Ministry of Justice, of courts, personnel and procedure.

CHAPTER 1

LAW AND JUSTICE

.....

THE FASCIST LAW AND JUSTICE.

Mussolini, the "Creator of New Law "

In the Spring of 1938, while wandering round the lofty corridors of the Palazzo di Giustizia in Rome, I found myself face to face with a Statue of Mussolini. The Statue was not unusual; the prominent position which it occupied is a commonplace feature of Italy to-day — but the inscription caught my attention. I gazed at it and then produced my notebook with the intention of copying it. Two gendarmes strode up, gesticulating. "No, no " they remonstrated — evidently I was not allowed to copy the inscription, and upon enquiry I found that this prohibition was based upon no rules nor reasons. I slipped my notebook into my pocket — but I continued gazing at the words before me until they were imprinted on my memory. This done, I hurried off, and having passed out of sight, wrote down the following:-

"Il Creatore di Nuovo Diritto

Al Duce

Il Sindacato Nazionale Fascista degli

Avvocati, Procuratori

per ricordare

Il Congresso Giudizio Italiano".

"The creator of New Law" in Italy is now the Duce, Mussolini. This simple inscription gives, however, the exact interpretation of the legislative process in contemporary Italy. It is quite true that prior to the Fascist regime, the legislative power of the State used to be centered in Parliament, and the regular legislative channels were nearly similar to those of a parliamentary government, but, since the proclamation of the Law of January 31, 1926, the old method has been practically put out of use, in spite of the fact that the parliamentary form of the Italian Government has not been abolished in name. In practice, the substantive power of legislation has been transferred to the executive authority and the Chamber of Deputies now ranks as an institution foreign to Fascist sentiment and mentality. In the Duce's address to the National Corporative Council on the 14th of November, 1933, he declared that the Chamber of Deputies has never been to his taste. For "it presupposes the plurality of political parties" that the Fascists have abolished, and moreover, "a world that they have demolished". As the Chamber has now lost all its essential reasons for existence, the machinery itself will have to be dissolved in time.

1. See "Fascism, Doctrine and Institution" by Benito Mussolini, pp. 57-58.

The transference of the legislative function, from the legislative to the executive, has been a universal tendency of modern governments. In nearly all the totalitarian states, the substantive powers of the legislature have been concentrated, with no exceptions, in the executive. Moreover, it is recognised generally that such transference is fully consistent with their political doctrines, or may even be taken as a logical consequence of the totalitarian form of government. Therefore, in many dictatorial regimes, as in Italy, the transference has been made lawful, nay constitutional, by provisions of the Fundamental Laws, and the validity of these laws is as powerful as that of the written Constitution of the United States.¹ But in democratic states, though the same tendency of transferring the legislative function to the administrative organs is now in full swing, both the guiding principle and the actual methods of transference are nevertheless different from the former. For the democratic states have only admitted the advantage of the regulation of highly technical rules or laws by experts or special commissioners who are closely related to the administrative departments. This recognition of a greater advantage in perfecting the law has been the main reason for Democracies employing this method. The

1. See page(4).

ultimate step of making or repealing law, which is the essence of legislative power, still rests with the Parliament or the Congress itself. And those administrative subordinates who have drafted the law are not in a position to interfere. The transference in Democracies is but a matter of technical importance and it never has been nor will be a factor that affects adversely the substantive powers of the legislative of the state. This is however the real difference between the totalitarian states and the Democracies in respect of the legislative function.

As has been noted, the transference of the legislative function in Italy was formally acknowledged by the Law of January 31, 1926, on the "Royal Decrees and Executive Power". One more Fundamental Law, on the "Powers of the Head of Government", issued the year before, gave however to the process a "special flavour" and distinguishes it even more sharply from those of the other totalitarian states. For the Law of January 31, 1926 only authorized the executive as a whole to issue Royal Decrees when necessary, whereas the earlier Law granted the Duce a free hand in the legislation of all laws. This Law is not a promulgation of the supreme Fascist organ (the Grand Council of Fascism), so it may have a force equal to that of a constitutional Statute. It is in name, however, a mere "Law" legislated by the Parliament and its validity may not exceed that of any other

legislation.¹ But, in fact, its tenth Article says that "All provisions conflicting with the present law are repealed". As a result of this provision, the Law has become the first law of the Kingdom; its validity is then absolute and its nature is even beyond the designation "constitutional".

This immense power possessed by the Duce may be better expressed by stating separately the important role played by it in each of the three legislative channels, in respect of the three main kinds of Fascist legislation.

"The Fundamental Laws having a Constitutional Nature" (Promulgazioni aventi carattere costituzionale) are the first type of Fascist laws that may be considered as supreme and basic among all forms of Italian legislation. According to the law of December 14, 1929, these laws would only bear upon the most fundamental problems such as the "succession to the Crown", "attribution and prerogative of the Crown", and "composition and functions of the Senate and the Chamber of Deputies", and the "syndical and corporative organisation" etc., although in practice the Labour Charter, promulgated on April 21, 1927, has so far been the only instance. Nevertheless, it may also be expected that the future legislation on the abolition

1. See page (8).

of the much detested Chamber of Deputies will most probably be promulgated in this legislative form.

All the laws of this type should be "legislated" or "promulgated" only by the Grand Council of Fascism, and to such promulgations the Parliamentary vote and the imperial sanction are required only as a formality. Debate on such proposed legislation will most probably be held in the Council only. However, the Duce was the creator of this supreme organ and is now by right the first man sitting in the chair. His will is therefore the most essential factor in the legislative work of this Grand Council.

Secondly, the Royal Decrees (Decreti Reali) and the so-called Decree-Laws (Leggi Decreti) may be considered as another type of the Fascist Laws. In terms of quantity, these Decrees take up nearly seventy or eighty per cent of the total quantity of Fascist legislation. The substance of these rules deals usually with the most important measures of the Government such as the provisions that bear upon the "organisation and working of the State administration", "of Local Government" and "of the administrative functionaries" which were all at one time part of normal parliamentary legislation. Further legislation of this type regulates "the execution of Laws" and "the use of powers belonging to the executive". But rules regarding the magistracy, the jurisdiction of the courts and the

guarantees of magistrates and other functionaries who cannot be removed, must still be enacted by the Parliament.

All the Royal Decrees are first prepared by the administration, are then submitted to the "deliberation" of the Council of Ministers, and subsequently to the "hearing" of the Council of State. Throughout the process, these decrees remain unaffected by what survives of the Parliamentary machine. The Duce is here again the centre of gravity, since the Law of December 24, 1925 endows him with the absolute power to propose such legislation and moreover to preside over the session of the two Councils.

The Decree-Laws are prepared, heard and deliberated in the same way, but due to the "urgency" or "absolute necessity" of the legislation, the laws may be presented by permission of the Duce to either the Senate or the Chamber of Deputies for ratification. The most famous instance of this process is the Decree-Law of September 2, 1928, on "The Electoral Law".

The third kind of Fascist law includes mainly the ordinary Civil and Penal Codes (Codici) in which little political importance is normally involved. The codification of these laws is supposed to be the main function of the Chamber of Deputies, though the drafts are in general prepared by legal experts of a "Commission for the Reform of Codes" subordinate

-8-

to the Ministry of Justice.¹ But here, too, the Duce exercises no less power than in the legislation of other laws. The justification of this immense power is again laid down in the Law of 1925 as its sixth article — "No bill or motion may be introduced to either of the houses of Parliament without the consent of the Head of the Government." The Duce has always proved diligent in reading over those legislative drafts word by word and in giving advice before they were introduced into Parliament for the registration of nominal approval.

One more type of legislation that belongs here is the so-called "Law" (Legge) which is different even in name from the "Charter", "Royal Decree", "Decree-Law" or "Code". The "Law" is now the only Fascist legislation that necessitates a Parliamentary approval, as, of course, a mere matter of formality, in order to camouflage the irregularities of Italian legislation before the gazing eyes of the international public. Clear illustrations of this point may be seen in the forms of legislation of those exceedingly weighty laws. In connection with the political interest, for instance, the three most important measures on the "Powers of the Head of the Government" and on "The Grand Council of Fascism" are all legislated in

1. See Chapter III, page (87).

the form of "Laws". Since these Laws have all been passed in the reformed Parliament by a majority of votes, the "Creator" can claim, as he is now claiming in the case of the Italian demands on French Tunis and Corsica, that they are the wish and will of the representatives of the people. With regard to the syndical and corporative system, we will see again that the fundamental measures also take the form of "Laws". They are: the Law on "Syndicates and Collective Relations of Labour" of April 3, 1926; the Law on "The National Council of Corporations" of March 20, 1930; the Law on "The Provincial Councils of Corporative Economy" of June 18, 1931; and the Law on "The Formation and Function of Corporations" of February 5, 1934. In the economic sphere there is the Law on the "Governmental Approval for the Opening or Extension of Industrial Plants" of January 12, 1933. Finally, in respect of social and educational provisions there is the Law concerning the "Organisation of Maternity and Child Welfare" of December 10, 1925, as also the Law concerning the "Balilla Organisation for the Physical and Moral Training of the Young". However, in all these measures the Head of the Government has, more than ever, played his important role as the "Creator". To him must be attributed the revolutionary reforms in the fields of politics and economics which make up the substance of these "Legge". Both in his speeches and addresses, one can see easily that these well-planned projects and schemes had long been proposed and

-10-

discussed by himself. Again, since the Law of December 24, 1925, as has already been noted, the power of the Duce, particularly over Parliamentary legislation, has become immense. He not only gives his consent to whatever measures are submitted to the Chamber but he is also empowered to request a rejected bill to be voted upon after a lapse of three months. And, in such a case, the bill will be voted again by ballot, without a debate. So the Law suggests that the legislative machinery of contemporary Italy has been domesticated in the household of one man and, at the same time, as Professor M. A. Steiner states in his recent valuable book on the "Government in Fascist Italy" (1938), the matter of submission, amendment, discussion on, or revocation of a Parliamentary bill, as a whole, implies, in fact, a "simple wave of the Duce's hand", in which even the executive Ministry or minister, who happens to be in charge of that bill, has no part.

The Conception of Law

It is a long admitted fact that a Fascist State, in spite of its feverish activities in politics, adheres none the less to the regulation of laws or a set of fixed rules in the matter of administration, at times even stricter than a democratic state. Such a situation is perfectly true in Italy where not even the administration of justice is an exception to this rule. The laws that regulate the administration of justice are the "Codes" and a number of "appendices",

-11-

added as supplementary legislation or in the form of amendments to certain provisions; these provisions, however, as a whole, are different in nature from all the other Fascist laws. For these laws are the laws of a community and concern themselves mainly with the everyday life of its citizens.¹

The question which now engages us is the nature of these laws; a clear grasp of that nature is necessary to an understanding of the whole field. Do these laws of a Fascist State differ in substance from those of a Democracy? Do they form a distinctive theory by themselves? Are they altogether a matter of "entirely different import"? If so, what are the causes? — In answer to these questions, Mr. E.B. Ashton maintains that "the individualist law" of Democracies "is a sum of restrictions which the people impose upon their freedom". Secondly, "these restrictions are themselves restricted and supplemented by certain rights of the individuals, whether constitutionally guaranteed or implied from the essence of the democratic system". "The Fascist laws" on the other hand "are also restrictions, but those which the community imposes upon itself through the mouth of its leader and which in turn are always restricted and supplemented by the Fascist 'high law'".²

There is truth, of course, in these statements of Ashton, but

1. For the detail of the Codes, see pp (35-37).

2. See Mr. E.B. Ashton's "The Fascist, His State and His Mind", pp. 125- .

-12-

it must be added that the Fascist law is not a restriction which is self-imposed by the community, but a set of rules imposed upon individuals by the State for the good of the community. For in the legislation of these laws, the people, as individuals or citizens, are not in a position to express their ideas, nor is the community allowed to declare its public opinion. It is only the State which decides what will be "the good order" for the community and the individuals must later abide by the decision. And the order decided upon by the State alone is in complete accord with the political, social, economic and spiritual aspects of Fascism.

But between the laws of a Democracy and of a Fascist State, there should not in substance, apart from a few instances, be much difference. For what is different in the legal conception of these two types of states does not necessarily lead to an equal difference in the substance of their laws. The conception of the Fascist law in Italy, as has been noted above, has only been formed since the Fascist revolution in 1922, but in the substance of the present Italian Codes, nearly 50% has been legislated some fifty years before the Fascist regime, when the Government of Italy was still a Constitutional Monarchy. If, however, we should insist that there is a difference in the substance, in spite of the fact just stated, such difference is then not caused

-13-

by the differences in their nature as law but by the differences of system e.g. case law v. written code.

In the second place, even in the other 50% of the Italian Codes that has been legislated lately under the Fascist auspices, which includes mainly the new Penal Code and the Code of Penal Procedure, there is not much difference of substance which can be directly attributed to the Fascist conception of law. Even the most notorious provision in the new Penal Code, that on the "Crimes against the Personalities of the State", could find its (1) parallel in the old Italian Penal Code of 1913, i.e. the "Crimes against the Security of the State", and also (2) some slight resemblance such as "Crimes against the State", in Codes of many other countries. Yet this provision in the new Fascist Code is considered to be an exception, because its jurisdiction is not allotted to the ordinary high Criminal Court of Assize, as it was under the old Penal Procedure, but to the Court of Special Justice, i.e. the "Court for the Defence of the State". Secondly, Mr. Ashton alleges that the criminal law in democratic countries always bases its provisions on the maxim of "nulla poena sine lege", but in the Fascist State the basic maxim becomes "nullum crimen sine poena". Such an assertion really contradicts both theory and practice, for when we open the new Italian Penal Code, we see in the first article a provision stating that:

"No one may be punished for an act which is not expressly deemed to be an offence by the law, or with punishments which are not prescribed by the same,"

This is exactly the maxim of "no punishment without previously enacted law to cover the crime". Again, practice has shown that in Italy there is no criminal sentence given by a judicial court, which is not in accordance with the enacted Code or Code of Procedures. If, however, there is such a case, that case must not have been adjudged by the regular judicial court, nor is it in accord with the regular judicial Codes, as usually it belongs to the jurisdiction of the so-called "Special Justice". Thirdly, Italian justice is also attacked on the grounds of the lack of a jury system in the Italian penal procedure; this is deemed to be ^{one} more consequence of her unusual conception of law. But this point does not justify one in asserting that the substance of the Fascist law is not equivalent to that of the Democracies'. For the jury system has not only originated from the Anglo-American judicial system, but has also been a main feature of that system. It must not be supposed, in the first place, that all the Continental judicatures, which are of an absolutely different origin, should copy the same system; though the tradition has shown that a number of them, even including the Italian judiciary, did copy it, although with tremendous

modifications. In the second place, the system copied by the Italian court was very similar to the present jury system of the French and German courts, but since the Fascist regime it was acknowledged as a symbol of democracy, and therefore was abolished as such. Instead, the "Assessor system" has been adopted, after the German model of "Schoffen". Actually, in the latter system, the power of Assessors (who are chosen in the same way as the jurors are) is much wider than that of jurors. For they have not only to decide the facts of a case, but theoretically have to assist the judge in handling the whole process. So, logically speaking, if there is any special value in trial by jury, there will certainly be more in trial by Assessors, though whether or not there is any value in a jury system at all is a disputable question.¹

So to conclude, it is safer to assert that the conception of law in a Fascist State such as Italy is utterly different from that in Democracies, and that the difference is mainly attributable to their differences in political doctrines. But the differences in the substance of the laws, or in the judicial routine of courts arise mainly from the differences in their conceptions of law: in actuality, there is not any great difference in the substance of their laws.

1. See "Justice in England" by "A Barrister", chapter 11, and "English Justice" by "Solicitor", chapter VIII.

The Position of the Judiciary

Montesquieu's doctrine of separation of powers has in recent times undergone considerable criticism. To confine the three governmental powers to three distinct organs, so as to safeguard the absolute independence and security of each power is impossible in practice. The division of powers or functions, as now maintained by modern governments is "simply a division of labour and nothing more"¹. Only, in Democracies, this division is still accepted in its ancient philosophical essence, for it is a household doctrine in their democratic view of the State, and from their standpoint of individual freedom. But in the totalitarian states, the State alone, theoretically speaking, has monopolized all the governmental powers and activities. Liberalism, the premise to the philosophical meaning of the separation of powers, is definitely and absolutely denied by Fascist political doctrine.² For the Fascists, therefore, Montesquieu's doctrine, which was primarily a reaction against too powerful an executive, is naturally contradictory to their fundamental policy, and thus meaningless. And the division of labour, that they have made use of on an equally extensive scale, is only a technical measure to improve

-
1. See "The Separation of Powers under Democracy and Fascism" by Mr. C. H. Wilson, *Political Science Quarterly*, Vol. LII, No. 4, Dec. 1937.
 2. See "Political and Social Doctrine of Fascism", Mussolini.

the efficiency of State administration. Moreover, such division of labour in a totalitarian state, if it were undertaken between the three departments, the legislative, the executive and the judiciary, would be the same as if undertaken in one department, which is the State. For in a Fascist State such as Italy, none of these powers is now in its normal shape. The legislative, as has been indicated, is transferred to the Head of Government. The judiciary instead of being neutral or independent as a governmental power in the democratic states, has now been made an administrative department. And the executive authority, as the representative of the State, has been immeasurably expanded by absorbing what has been curtailed from the two other powers.

It is clear then that, in a Fascist State, there is only one supreme power in existence, i.e. the executive. In the course of its expansion, the legislature has lost importance, until it now reaches a position equivalent to that of a body of governmental committees.¹ And the judiciary, though existing as usual, has never been acknowledged by the Fascist regime as a governmental power. It is only a power or function subordinated to the State, and under no circumstance can it be interpreted as an equivalent to the independent judiciary of Democracies. The new criterion of this converted judiciary will be seen clearly in the following words of the Duce:

1. See the new Law of January 19, 1939 on the "Instituzione della Camera dei Fasci e delle Corporazioni".

"The Fascist State organises the nation, but it leaves the individual adequate elbow room. It has curtailed useless or harmful liberties, while preserving those which are essential. In such matters the individual cannot be the judge, but the State only."

An organisation of the State to exercise the judicial function over individuals, while leaving them "adequate elbow room", is the present position of the judiciary in Italy. The main features of the judicial function are: (1) the ordinary law courts and judges provided by the State to solve the civil and penal disputes and litigations involving only individuals; (2) The ordinary Civil and Penal Codes and Codes of Procedures, with the exception of "Crimes against the Personalities of the State" in the new Penal Code (Arts. 241-313), which is not allotted to the jurisdiction or judiciary, but to the Special Justice supervised directly by the State and which adjudicates offences that, though committed by individuals, are obviously beyond their "adequate elbow room"; (3) The ordinary judicial personnel, including Conciliators, Praetors, Judges, Councillors and Prosecutors, etc., who are styled the "Judicial Officials" and are still guaranteed their "independence" if they behave properly.

Judicial Reforms

The reforms undertaken by the Fascists for the purpose of converting the judiciary into what they think a judiciary ought to be, which has been discussed above, are drastic and numerous.

-19-

First of all, in response to the denial of the tenet that the judiciary is an independent governmental power, the Fascist Government combined the "Fifth Session" of the Council of State with the "Fourth" as early as in 1925. For that famous "Fifth Session" had hitherto exercised the supreme power of judicial supervision over the administration of the Government, and thus the Council of State, in its capacity as the highest administrative tribunal, had been deprived of much of its competence.

Secondly, in order to confine the judiciary or the "ordinary justice" to the "adequate elbow room" granted to individuals, the State invented the "Special Justice" to take its place in respect of cases which might be said to fall outside the individual's "elbow room". The administration of this "Special Justice" is coloured by the political purposes or social and economic concepts of the Fascist State, though the laws that it administers are not necessarily "non-judicial" as many expert writers on the Fascist Government have stated.

'Special Justice' in Italy is, however, different from the "special courts", for it administers a kind of justice that is new and particularly characteristic of the Fascist regime. But the special courts, such as the Military Tribunal, the Admiralty Court, the Administrative Court, the Police Court and the Juvenile Court etc., which are the courts other than the ordinary law courts, may always find equivalents in other Countries, despite differences in the form of government.

-20-

The Special Justice in Italy is mainly divided into two bodies. One is the "Supreme Court for the Defence of the State" which judges only the political offences against the State. In this Court, apart from its jurisdictions which are codified in the new Penal Code, there is practically nothing in common with the ordinary law courts. For the judges of this Court are often military and Party figures, who may not have had the slightest training in law and procedure. Its procedure is governed by a special decree. Above all, the decision of this Court is final, and no appeal is granted, not even before a supreme organ of the executive. It cannot be denied that in this Court of "Special Justice", in whatever sense it may be taken, little justice could be accomplished owing to its non-judicial process and in view of its incompetent personnel.

The "Labour Court" publicized and regulated by the Royal Decree of July 1, 1926, composes the other half of the "Special Justice". This Court, though equally novel and characteristic of the Fascist regime, forms, nevertheless a contrast to the "Supreme Court for the Defence of the State". For, in the first place, it is not absolutely disconnected with the system of ordinary justice but is rather tightly incorporated with it. Not only have the Courts of Labour Disputes sheltered themselves under the same roof as those of the ordinary law courts, but also their main personnel is borrowed from the category of "Judicial Officials".

-21-

In the second place, interference of the State here takes only the place of a third party, in the capacity of an intermediary arbitrator, whose "personality" or "security" is not directly involved nor threatened. So there is no reason that the State should not be neutral and also impartial. In the third place, labour disputes, particularly "collective" ones, need expert knowledge in judicial procedure. Viewed from this angle, there is a justification in separating labour disputes from the procedure of ordinary justice.

Thirdly, apart from the scheme of separating the "Special Justice" from ordinary justice, one more reform, which is equally drastic and far reaching, has been carried out in the body of laws guiding the administration of justice. The object of this reform is to infuse Fascist theories into the judiciary, and into its administration. The work is carried out mainly in two parts; the one is to develop a set of new laws and the other is to revise the old. However, the truth is that nearly all the political and economic theories of Fascism have found expression in the various forms of Fascist legislation. In the first place, the highly important theory on the "exaltation of the strong state", for instance, links directly with the provision on "Crimes against the international and internal personalities of the State" in the new Penal Code. In accord with this provision one who has been accused of these crimes (usually named political

crimes or offences) must submit to the jurisdiction of "Special Justice" in Italy and can be punished with the most severe penalties, irrespective of whether the accused is a national or a foreigner, and whether the place in which the crime is committed is or is not the State territory (Art. 7, Penal Code). In the second place, the nationalist aspect of Fascism in the "Exaltation of the Italian Nation" is again clearly discernable in the codification of the same law, that is, those rules on the "Crimes against the Integrity and Health of the Race" (Arts. 545-555) and on the "Crimes against the Respect due to the Dead" (Arts. 407-413). In the former, "abortion" may be punished with a maximum penalty of 12 years, and "application of" or "incitement to birth control" with a maximum servitude of 2 years and a fine up to 10,000 Lire. The latter provision on the "Crimes against the Respect due to the Dead" is also a Fascist invention, and its object emerges from the assertion that to emphasize the greatness of the Italian people, must first kindle one must first keep alight the ancient glory and prestige of their ancestors. The third important theory of Fascism is the well-known doctrine of the "Corporative State" in which the Fascist State seeks a firmer organization on the basis of economic groups, so as to enable itself to control widely the nation's industrial production, and to appease the class-war between the workers and capitalists. The whole notion of this theory is fully expressed in a number of legislations which include the Labour Charter, the Law on Syndicates and Collective

relations and the Royal Decree on "Functions of the Syndicates and Collective Relations" etc. Jurisdiction over labour disputes, as has been explained, is allotted to the Labour Courts, which are partly incorporated in the system of ordinary justice. Apart from these, expression is also found in the new Penal Code, i.e. the provision on punishing the "strike and lockout" (Arts. 502-506). Finally, one more important aspect of Fascism is the "Spiritual conception of the State", which asserts that the Fascist State has above all a spiritual influence, which may affect or guide the morale and spirit of the Italian race. Perhaps realising, however, that their own shortcomings in point of this conception are considerable, the Fascists have embraced a closer cooperation with the Catholic Church, a cooperation which may reinforce their spiritual appeal by acting upon the traditional Catholic sentiment of the Italian people. Thus, in addition to the peace with the Pope, signed in 1929, the Catholic Church is given a prominent place in both the Civil and Penal Codes, and in the Fundamental Statute, denoting that the faith of the Catholic Church is not only acknowledged and protected by the State, but is guaranteed the power to interfere in the people's civil relations — a power long enjoyed by the Church in Italy.¹ This civil interference

1. Statuto Fondamentale, Art.1, & Penal Code, Arts.402-406.

-24-

involves mainly the legal prohibition of divorce and also the criminal charge on "application of birth control".

The fourth reform undertaken by the Fascist regime is the promulgation of the Royal Decree of April 19, 1934 by the Head of the Government, in which, it is made incumbent that all the "Judicial Officials" or judges must be members of the National Fascist Party before or upon their appointment to a judicial post. In later years, this regulation has even been made a condition for entry to the public competition for recruiting judges. The object of this promulgation is, however, to avoid any further anti-Fascist campaign such as that which took place among judges in 1925 and which led to the famous purge of so many judges, regardless of their traditional guarantee of irremovability. But since that incident and this subsequent promulgation, the judicial personnel of Italian courts is both "one-coloured" and "untouched". "One-coloured", because hitherto neither the State nor the Party has done any serious harm to the independence of judges conferred by the old "Statuto Fondamentale" and later acknowledged by the Fascist Government.

Judicial reforms of the Fascist regime in both the spheres of legal administration and law are not limited, however, to those undertaken in the political interest. Many of them are purely judicial, carried out either for the purpose of improving the system of courts and judges or in response to the judicial concept of Fascism. To speak the truth, some of these reforms are

very admirable and useful. (1) As in the administration of courts, the most notable reform that had been carried out as early as in 1923 was to unify the five supreme Courts of Cassation into the one now existing in Rome. (2) In criminal justice, apart from the scheme to separate the "Special Justice" from the ordinary jurisdiction, the Fascist regime has considerably increased nearly all the penalties which include capital punishment, penal servitude, and the pecuniary fine, and (3) has attached to the high Criminal Court of Assize a new system of "assessors", which the Italians have often named the "jury system". (4) In civil justice, there is one more reform which has only been carried out in recent months, that is, to simplify the old inefficient civil procedures. The scheme includes, for the most part, the introduction into the higher civil courts of both the personal appearance of litigants and the verbal process, both of which were non-existent under the old system of civil litigation. (5) Another reform which is mainly located in the civil jurisdiction is the establishment of a larger number of special courts which are closely incorporated into the ordinary civil courts. These special courts, as has been noted, do not include the "Special Court for the Defence of the State" and the "Labour Court" but only those courts which administer technical or other jurisdictions, which are different to a certain extent from the ordinary jurisdictions defined in the Civil and Penal

Codes. In one of the later chapters, these special courts are more fully discussed as a corollary to the system of ordinary courts but not as a subsidiary part of the "Special Justice".

The Italian Judiciary as merely the System of "Ordinary Justice"

The Italian judiciary, as has been indicated in the previous pages, is mainly limited (1) to the community of individuals (2) to the jurisdictions exercised only by these ordinary judicial courts and judges, and (3) to those criminal charges which would affect only the security and social order of the individual community. Outside this criterion we have, then, the sphere of "Special Justice" which concerns mainly the "political offences" and partly the "labour disputes". But proportionally speaking, the latter jurisdiction occupies only 1.78 per cent¹ of the total jurisdiction; therefore, in no circumstances could it represent a complete view of the Italian judiciary in spite of the fact that the "novelty" of this system has already preoccupied so much of the world's criticism. And, on the other hand, the system of

-
1. This percentage is calculated from the total criminal sentences pronounced per annum by the ordinary judicial courts and that by the Special Tribunal for the Defence of the State. The former records are obtained from the "Annuario Statistico Italiano" 1938, and the latter records from William Elwin's "Fascism at Work" pp. 18-19.

ordinary justice which bears the greatest quantitative importance in the life of the Italian masses has been unconsciously minimized in contrast with the new but less important system of "Special Justice". A consequence of such a tendency is the common assertion of the democratic public that "there is absolutely no justice in the Fascist State".

It is quite true that in Fascist Italy the legislative function is transferred to the executive, that the conception of law is practically different from that of Democracies, that the judiciary as a whole is merely an administrative branch and that the "extraordinary tribunal" has been established on an illegal and unprecedented ground. Nevertheless, it is still true that in the legal routine, as has been shown by the facts, there is little change.¹ This legal routine means of course the administration and jurisdiction of courts, the status and functions of judges, and the procedures of both the civil and criminal cases, an outline more or less common to all the world's judiciaries. It is asserted, however, that, in this outline, the main features of a judiciary and the soundness or unsoundness of its system can both find their natural expressions.

In Italy to-day, the outline of the judiciary remains nearly the same as three quarters of a century ago. Many of its main features, organisation, practices, functions, fundamental rules,

1. See "The Fascist, His State and His Mind" p.138, by Ashton. "Making the Fascist State" p.59, by Schneider; "Government in Fascist Italy" pp.84-86, by Steiner.

and even those basic principles as provided in the old Statuto Fondamentale are unaltered in spite of the drastic change in the Nation's politics, and in the form of Government, in the last twenty years. As in the old days, i.e. prior to the Fascist regime, the Statuto Fondamentale took the place of a written constitution; in it, all the basic principles of the Italian judiciary were provided. Since the Fascist revolution, this Statuto Fondamentale has been retained in force and these constitutional provisions on the "Ordine Giudiziario" (Arts. 68-73), with a few striking exceptions, remain generally in complete accord with the present judicial system which is patronized by the Fascist State. Therefore, by undertaking a careful study of these old constitutional provisions in the Statuto Fondamentale one can obtain a more genuine and objective vision of the present Fascist judicial system.

The Basic Principles of the Judiciary in the Statuto Fondamentale

The basic principles of the Italian judiciary, as provided in the old Statuto Fondamentale, are designed to safeguard the whole system of courts and judges. The bulwark is not, of course, in any sense set up for defence against the menace of other governmental powers, though a small number of academic figures in Italy still hold that these constitutional safeguards of the judiciary were set up to stem "political interference in the direction of judicial security", and thus they still name

-29-

them as "political guarantees for the judicial institutions". Such claims, however, are nonsense, even when made in the best sounding and most highly polished terms. In truth, it is not much more than a mythical interpretation and is obviously unable to patch up the incompatibility between the doctrine of the separation of powers and that of the saliency of the executive. Any thought of the complete independence of the courts or of the judicial supervision of governmental activities which are peculiar to the theoretical treatment of the Anglo-American system of law and justice would naturally and rationally be out of place in a State in which the judiciary as a whole has already been made subservient to an officially predominating executive authority. Thus it is an inscrutable jest when the Fascist jurists so voluntarily and misleadingly interpret their remodelled judiciary in the typical terms of Democracies, terms which are so incompatible with the interests of their own political doctrines. But, on the other hand, it would also be a jest for Americans, for instance, to interpret and criticize the Fascist judicial system with reference to typical American practices such as the judicial supervision of governmental activities; or likewise, for the English people to distort the present Italian judicial system on the grounds of a theory which is peculiar to their own ideology such as that ^{of} "the conformity of Government with Law".

-30-

These basic principles set out in the Statuto Fondamentale are therefore confined to the safeguarding of the permanence of the organisation of the courts, the inflexibility of judgeship and the highest efficiency and convenience of the work of the judiciary within the sphere assigned to it by the Codes and conferred by the State. For the judiciary of a Fascist State, as has been repeatedly mentioned, is no longer a State power which may be equivalent to the other State powers; it is only an organization, an administrative department or a machinery governed by the State and the extent of its function is confined to promoting social welfare within the community of subjects, (i.e. "the elbow room of individuals"), and dispensing "justice" in disputes involving only the private parties. And in the meantime, a line of demarcation has also been drawn to ascertain the extent of the court's jurisdictions, which, as a rule, should not go beyond such subject-matter as that involving purely civil relations or those criminal charges not incorporated in the so-called "political offences".

The first basic principle is a definition of the court of judicial justice as defined in the Statuto Fondamentale. It states that the judicial court is "one of the King's institution constituted for the purpose of applying and administering the law issued in the name of the King and through it, the justice emanating from the Throne is expected to be distributed among

His subjects".

Theoretically, however, no striking innovation can be found in this definition of the Italian courts. On the contrary, it appears that this definition, despite the wide contrast in the form of the two Governments, is much the same as that of the English court of justice which says that "All judicial courts are derived, mediately or immediately, from the power of the Crown & the power of judges who represent the King is only an emanation from his royal prerogative".¹

But the essential problem is not however the theoretical equivalence; what should be considered is rather the practical result of the theory. Thus, the point we shall study is how far this theory of the court has been carried out in practice or, in other words, whether the existing system of the Italian judicial courts coincides with what is claimed by the theoretical definition.

One part of the theory which endows the judicial court as a King's institution has, so far as the writer's private observations and inquiries have elicited, been unanimously and elaborately carried out in the formation of all the judicial courts by means of symbolic display. Such symbolism mainly consists of the erection of the King's statue and the visible presentation of a legal maxim "All Men are Equal before the Law". Such ornaments

1. See Stephen's "Commentaries on the English Laws", Vol.1, 20th Edition, pp. .

are seen in all courts, save in a few Local Conciliation Courts where the space is too limited to allow for objects of no practical use. In the meantime, the modern Fascist monuments usually consisting of an immense photograph of the Duce and a symbol of the Fascio, so often exhibited in public offices, shops or private houses, are not seen in the judicial courts. The judges, clerks and lawyers are not in black shirts but in their old-fashioned capes and robes. Furthermore, in the courts higher than the Tribunals, the presiding judges are mostly elderly men who were in the profession long before the Party came into power. They have, as has been noted, since the enforcement of the Decree of April 19, 1934, urging all the judges to be party members, entered unanimously and resolutely into the subscription to the Party panels, yet in their mode of functioning, in the oath they take upon investiture, and in their ways of private life, one can hardly see any notable change. They, nevertheless, distinguish themselves as a refined, cool-headed and reserved class, which is rare among the modern Italian population. In them one cannot yet see the highly appraised "spirit" and "temperament", which are now in full bloom among the typical Fascists. Also the purely "realistic conception" of the Fascists does not seem fully agreeable to their minds, and their faith in the "ideological or mystical sublimation" which is how the Fascists distorted the democratic ideal, has not completely vanished. We may

therefore conclude that inasmuch as the formation of the Italian judicial courts, and their routine within the sphere of purely judicial functions, are concerned, the influence of the Party over the judiciary has not yet attained its full measure.

On the other hand, the judicial court, in the general conception of the lay people, is certainly not convincing in its theoretical form. The precise idea that "the court is the King's institution" has probably never been considered. For such an ideology, in spite of its popularity in the world of the judiciary, is nevertheless out of keeping with the people's general education. For in Italy there is only a body of developed common-sense and of wide but indifferent interests; their average power of reasoning is comparatively low. Therefore they generally understand the court, in the same way as they understand many other official structures, in terms of "what it is" or "what it is for". And, the question of "how it is" or "how it should be" is seldom entertained. Again, they know in general, that the court is a high official organ instituted in the long run to administer laws and orders which are of great concern to their daily life and, in particular, they know where the people can obtain redresses of debts and of grievances, or where a criminal can be sentenced and punished. By such common-sense impressions of the lay-people, the courts are considerably esteemed for their contributions towards the social good. The popularity

of the courts in Italy is attributable also to the localization of court jurisdiction, of which an account is to be given in the following Chapter on "Jurisdiction". In Italy, the people usually know the locality of the courts in their home towns, in addition to vague ideas held about the general proceedings at those inferior, as the Praetorian Courts and Tribunals. It is however the nearness of the courts that enables them to frequent them not only for the purpose of lawsuits but in order to pass time by listening to the court proceedings. The Praetorian Court is usually the most crowded; but the high criminal Court of Assize during the session may sometimes be as crowded as an opera house on the evening of a first night. One more reason that accounts for the popularity of the Italian judiciary is the fairness of costs. This is, however, quite a general feature of most Continental judicial systems and it will be more fully discussed in a later Chapter on the "Procedures".

Moreover, in the eyes of the lay people in Italy, the law court and the Fascist Party are still considered as organs different in nature. The former, as they know, is an institution with a long history which has created confidence and familiarity; but the latter, in spite of its powerful reign of sixteen years, is still an ill-digested power to them. They are certain of the service that the court may render to them while towards the Party for the most part, they remain doubtful of its objects and of its

enormous powers. It is therefore a denial of facts to say that the ordinary judicial courts in Italy "instead of giving a sense of security and well-being to the citizen, only add to the fear of those who gaze within the threatening portals where they are sitting."¹ Such a situation may be applicable to the special "Supreme Court for the Defence of the State", but to the ordinary judicial courts, so far as the facts show, the old social and psychological reactions of the lay people are generally retained, because they see that there are no drastic changes since before the Fascist regime in the legal routine of the Courts.

With reference to the laws applied and administered by the ordinary courts, a comprehensive explanation has already been given in the previous pages. But a further comment on the general nature and contents of these laws still seems necessary. For the laws defining the jurisdiction of ordinary courts, and also governing their administration, are mainly the Codes, which by themselves have formed a specific line of Fascist legislation and which are also marks of the criterion of ordinary justice. These Codes are five altogether and include, of course, a number of appendices on either the "Rules of Execution" or the "amendments of Contents". In Italy, these Codes are popularly known as

1. See "Justice of the Courts" by Hon. J. W. de B. Farris, K.C., the Canadian Bar Review, Sept., 1938.

the "Cinque Codici". (1) The Civil Code as a whole was first adopted in 1865 and had, until recently been retained in function ever since the beginning of the Fascist Regime. Recently, its First Book on "Persons" has been replaced by a new enactment with the same title, which was enforced on April the 1st of this year. The rest of the Code still prevails as it did seventy four years ago. (2) The Code of Civil Procedure is now entirely new and the new Code was enforced on the same date as the First Book of the Civil Code. By the enactment of this new Code, valuable reforms have been made in a number of the old inefficient procedures, and the civil process as a whole has been greatly simplified. (3) The Commercial Code was adopted in 1882 and has not received much amendment throughout its continuous enforcement of nearly sixty years. (4) The Penal Code, which has been considered as the most colourful representation of the Fascist laws, was enforced in 1934. Apart from the many provisions linking up with political theories and the general increase of penalties for a variety of crimes, the rest of its contents does not differ much from the old Penal Code of 1913. (5) The new Code of Penal Procedure was also enforced in 1934. In response to the drastic revisions that were made in the new Penal Code, reforms were also made here for the penal procedures, such as the enlargement of the bench of Assize Court by the participation of lay "Assessors", and the removal of the jurisdiction over the "Crimes against the security

of the State" (Arts. 104-116, old Penal Code) from the Assize Court to the "Supreme Court for the Defence of the State".

The second basic principle appearing in the Statuto Fondamentale consists of (1) a rule that is common to many other judiciaries, and (2) a reference to the "infinite conception of justice" which the court should achieve at its best. Firstly, "Justice", as it accordingly proclaims, "is a mere emanation from the grace of the Crown". While its administration is entrusted to the judges, they must, nevertheless, carry it out in the name of the Giver". Secondly, "if such justice is rendered in due process, it will be called the "Natural Justice", which can not be hindered nor denied by anybody in the Kingdom, in absence of a proper reason". "Nor is there the possibility of creating extraordinary tribunals or commissions, apart from those judicial courts which are the institutions of the King".

But since the development of the "Special Justice" by the Decree of Nov. 25, 1926, the last part of this constitutional guaranty is of course deliberately violated and that violation has long been exposed to bitter criticism and abusive calumny by the Democracies. In defence of the situation, Dott. M. Battista, an eminent judge in the Court of Cassation, has endeavoured, however, to give a new and modified interpretation of this comment on "Natural Justice", in his book called "Nozioni di Ordinamento Giudiziario". He contends that the "Natural Justice" guaranteed

in the Statuto Fondamentale only refers to "a consequence that may possibly be obtained from the lawful jurisdiction of certain judges in certain courts and over certain matters". Thus the principle will only be violated, for instance, by nullification of judgment, by modification of assigned circuits, or by transmission of jurisdiction from one court to the other. But in establishing a special court, or creating special justice, the event itself does not constitute a move in the opposite direction to this fundamental judicial principle. Because, whenever there is a special justice or special court, there must be simultaneously a special matter, an eventuality which immediately implies again the rule of the "lawful jurisdiction of a certain court over a certain matter", etc. Therefore as long as these terms of "certain court", "certain judge" and "certain matter" are applicable to both the ordinary and special system of justice, the subsequent result of "Natural Justice" will be achieved to a like extent, even when the case at issue is deemed to be special. On the other hand, if an ordinary court ventures to assert its power beyond its ordinary subject-matter, that will be equally condemned as a violation of this fundamental principle. So, to institute the "Special Justice" is not only done for the essential purpose of accommodating special matters within the framework of adequate jurisdictions and courts but also for another important object, namely, that the development of "Special Justice" may help to prevent the ordinary judicial courts from interfering in special

subject-matter. From this logical but unsound contention, the able judge Battista concludes that the establishment of "Special Justice" is not a violation of the basic principle as provided in the Statuto Fondamentale because its establishment can be fully justified in point of Logic, of reason and of law.

Another far-fetched argument reinforcing the distortion is an historical pretext for the establishment of the special "Supreme Court for the Defence of the State". It states that Italy, like most continental states, has long had a variety of special courts existing simultaneously with the ordinary judicial courts. She had, for instance, the Administrative Court (Magistratura della Giustizia Amministrativa) constituted in 1865, and the Tribunal of Public Water (Tribunale dell'Acqua Publica) established in 1919. While it is true that the "Special Supreme Court for the State Defence" has come into existence since the Fascist Reign, it is equally true that other special courts, besides the one at issue, have been added. For instance, the "Commissari degli Usi Civili", the "Commissioni delle Imposte Dirette", the "Giustizia Militare", the "Magistratura del Lavoro", and the "Tribunale per i Minorenni" have all been established since the accession of the new regime in that memorable year 1922. Many of them are constituted upon sound principles and have proved to be quite useful machineries, yet, in spite of all these, none of them have ever been appraised or approved by outsiders nor have they been so bitterly criticised as the "Special Supreme Court for the Defence of the State". Why should only

the latter, as the Italian's retort, be so repulsive to the outside world, since it is fully justified, even in the light of judicial history, just as much as all other special courts?

To conclude the foregoing arguments and criticisms, it is still true to say that the rule of "Natural Justice", codified in the Statuto Fondamentale, cannot be taken in any other sense than that of a safeguard of the status of the ordinary judicial courts, and the later establishment of an "extraordinary tribunal" or "Special Justice" irrespective of the integrity of the judiciary, is, nevertheless, a deliberate violation of this constitutional principle. When the Statuto Fondamentale was being adopted by the Fascist regime, the Special Justice under discussion had not taken root, even in the plan of the Fascist State. It was not until 1926, following the three attempted assassinations of the Duce that this non-judicial body came into existence. In keeping with the circumstantial requirement, the Court was established on Nov. 25 of the same year and was given a temporary establishment of five years. But in 1931, the term was prolonged for another five years and then in 1936 it was made permanent. This organisation is altogether a non-judicial body and is quite different from the institutions of all these other special courts.¹ Apart from its jurisdiction as laid down in the new Penal Code, there is nothing in common between this Special Court and the ordinary courts, nor can it

1. See pages (19-21) .

find any parallel in Democratic judiciaries. But these other special courts which are mostly incorporated in the special sections connected with the ordinary Tribunals or Courts of Appeal, do as a rule adopt the ordinary judicial procedures. And jurisdiction there is also exercised by the ordinary judges with or without the assistance of technical experts. These courts are open to the public and appeal to a higher court is always permitted. Between such special courts and the ordinary judiciary, as far as their inner working is concerned, there is nothing too dissimilar, and therefore their existence in the circle of the judiciary can be justified, or at least they cannot be said to violate the constitutional safeguard of "Natural Justice".

The third basic principle is an old and universal rule which is widely applied in the judiciaries of all well governed States. It prescribes that "justice must be administered in public with 'an open door', exceptions to which are confined to strict conformity with the special provisions of law". The exceptions indicated arise from a variety of causes as, for instance when the subject-matter of the case might affect social order or, vice versa, where the effect of publicity would destroy the subject-matter or morally injure the prisoners or the parties to a civil suit. Again, the presence of the public might hinder the administration of justice and so on. These exceptions are termed in Italian "hearings with closed door", and are utterly different from the process of "deliberation in camera". The latter course

-42-

must be employed in every judicial process and in every court before a judgment is reached, since it is considered to be the most adequate way for the judges or assessors to discuss their individual opinions on a certain subject-matter. Thus, to employ such a method is only to promote the efficiency and practicality of judicial administration, and to fulfil the paramount duty of securing that "justice is done".

These exceptions of "hearing with closed door" are more widely prevalent in Italy than in other countries, and more usual for criminal trials than for civil procedures. For instance, trials of "Crimes against Public Morality and Decency" (Penal Code Art. 519-), or of a minor offender whose age is under eighteen years, (Penal Procedure Art. 425) are all held with closed doors. An additional case is the trial of "Crimes against the Personality of the State" (Penal Code, Arts. 424-) though the closed door hearing is an habitual practice with the "Special Supreme Court for the Defence of the State".

In the sphere of ordinary judicial courts, this rule of administering justice in an open court and its possible exceptions, so far as the legal routine permits, are well and properly kept. The public is admitted to nearly every room in each section of the ordinary judicial courts whenever and wherever a trial is in process. At the Praetorian Courts, and the Penal Sections of Tribunals, or the Courts of Appeal, the audiences are always large.

-43-

It is only at the various sections of the Court of Cassation in Rome, where trials are open to the public, just as in the other courts, that scarcely any audience is present. The reason is probably due to the fact that the debate and process of these trials are too advanced in legal terms and technical aspects to attract the interest of a common audience who are only capable of appreciating a trial for the novelty of its subject-matter, or for the variety of the particulars of these comparatively preliminary procedures.

However, in a Country like Italy, it is a particular advantage to have an open court in the judicial system, for wherever the masses are less educated, they tend to be more enthusiastic. In this particular sense, then, it can be an important factor in the promotion of the popularity of justice, in the creation of wider interest and deeper concern in the status of law courts, and above all, in the building up of greater confidence in the validity of the judicial process. Besides, it helps to forward the legal education of students. It is interesting, however, to see that students of law, or of other subjects, are always the most distinguished audience in any judicial court. They are as a rule permitted to sit by the side of the lawyers or may comfortably settle themselves in special reserved seats as in the high criminal Court of Assize. Furthermore, they may also venture, if opportunity arises, to put questions to the judge or

-44-

other staff when the trial is over, about the particulars of procedures or the ambiguity of the laws concerned in the subject-matter. Such questions are usually answered with the utmost willingness.

The fourth basic principle of the judiciary is concerned with the status of judges. "Magistrates" as it proclaims, "of all the ranks, save the one of Mandamento¹ are irremovable from posts after a three years service". But, the latter condition had been supplemented since 1930 by the Law No.421, which provides that only a magistrate who has attained the rank of "Practor" may not be removed after his third year of post. The codification of this rule is apparently aimed at providing that the judges should be independent in their sphere of activities and not influenced by other governmental powers; a provision which has, again, been universally adopted in the judicatures of many other States. In keeping with this, the Art. 68 of the Statuto Fondamentale ratifies that the judges are "delegates of the Crown" and "their jurisdiction is the power of the sovereign, derived from the Royal prerogative of the Crown".

The irremovability of the Italian judges can be seen in two aspects. One is general in nature and consists in the defence of themselves and their powers against the encroachment of other state powers against the contemporary influence of the political party or the dominance of the Dictator or any

1. The magistrates assigned to the Local Conciliation Courts, see Chapter VII, pp (152) .

-45-

surviving prestige of the Catholic Church and so on, either in name or in fact. The other provision is to regulate individual status within the profession, admittance to the profession, formation of the hierarchy of various judicial ranks, distribution of judicial functions, promotion and finally, the enforcement of judicial discipline. The supplementary act of the Statuto Fondamentale, with reference to this Art., provides that the judges cannot be deprived of their respective ranks, in cognizance of their statutory right of irremovability, or suspended from posts without their consent. Nor can they be put on an unattached list or temporarily discharged from appointed duties without pension grant. Even if they retire for proper reasons or in accord with the ordinary course of regulations, the grant of pension must likewise be duly given. The details of these and of other points, regarding the status of judges of various ranks, we shall discuss later in connection with the "Judicial Personnel" in Chapter 4.

In the meantime, one corollary that should not be missed here, is a cursory survey of the limitations hindering the way to the absoluteness of the judges' rights of irremovability, both in view of statutory provisions and political pressure. Despite what has been provided in the supplementary Act just noted, recent practice has witnessed that the abatement of judicial personnel, suspension from office, exemption from

-46-

duties on account of illness or mental deficiency, and involuntary entrance into the unattached list, are not unusual events. Besides, judges are subject to certain restrictions, even when they are on duty, such as "recusation" and "abstention" which will be described in the following chapter on "Jurisdiction" of the Italian Courts. Again, Art. 783 of the Code of Civil Procedure and Art. 189 of the new Code of Penal Procedure all prescribe that, with regard to any unnecessary grievance of litigants, fraud and extortion, caused or prompted by the judges, public ministers and other inferior judicial personnel within their sphere of jurisdiction, they will be imputable, and must reply to disciplinary charges or civil actions of damage taken by litigants. to the external influence of the Fascist Party, since the Law of 28, December, 1924, No. 2271, (modified in 1934 by the Law of No. 698) has been in force, they have surrendered by becoming subscribed as members of the National Fascist Party in order to preserve their posts and to adapt themselves to the new circumstances. Thus, in Italy to-day, all the judicial personnel of courts like the other State officials, have become subscribed members of the Fascist Party; and the difference between the two is only that the former are chiefly recent subscribers who are yet far from being typical specimens of Italian Fascists.

The fifth basic principle lays it down that "the Italian judicial courts have no power to interpret provisions of law nor to review any legislation, for the power as such is entrusted exclusively to the legislative body". Therefore, any recorded judicial decision rendered by the ordinary law court is only good for settling the dispute at issue, and it is not regarded as an "expression of law", binding upon subsequent judgments. Only in the absence of adequate provisions of law may a case be decided in accordance with rules drawn from precedents.

This principle is very important as it is one of the most characteristic features of the Italian judiciary, which has much in common with Continental systems. From this, all the judiciaries of the Anglo-American type are differentiated. The one type is governed by a written code and the other is built up from case-law.

The last of the basic principles is a brief but comprehensive treatment of the whole category of judicial magistrates and courts of all ranks which declares that-

"They are all conservative organs and personnel.

It is only by the enforcement of an extraordinary law that alteration or modification may be made. Otherwise there is no possibility, which should derogate them from their respective status, and organisations as provided by the written codes".

-48-

Italy, like most of the Continental States, possesses a judicature thoroughly governed in every detail by written Codes and supplementary rules. The administration of courts, the recruitment of magistrates, the extent of jurisdictions, and the regulation of proceedings are all made permanent and unchangeable in principle. The whole judicature and its routine seem to resemble an immense machine. The lay people may not know its internal movements but they may well be able to comprehend how it moves and what is its result. Thus, no matter how bulky the volumes of codes and how technical and complicated their contents, they are clear and defined and it is within the ability of lay people, even if they cannot master them, to gain a definite idea of their content. Where, as in the Anglo-American judicature, the substantive laws, the procedures and the constitution of the courts have to be derived from thousands of statutes and reported cases, the task of securing a cursory knowledge of them is certainly too difficult to be undertaken by the lay people. The condition is particularly bad in England, where the courts of justice are constituted by piecemeal reforms based upon no logical reasoning. Moreover, the "costs" are unusually high. With the delay and arrears of the courts in their functions, and the lack of judges to ensure adequate supply for circuit, the majority of the English people are deprived of their access to the law courts.

To conclude, after a general survey of the theoretical definition and practice of the judicial courts and of the various

basic principles provided in the Statuto Fondamentale, Italian Justice, notwithstanding the existence of the notorious Special Court for the Defence of the State etc., must on the whole be admitted to be quite admirable. A great number of points deserve public admiration, such as the fairness or reasonableness of the fixed costs, the promptness in the transaction of legal affairs, the even distribution of law courts, the sufficiency of judges and public ministers to ensure adequate supply for circuit, and above all, the popularity of judicial justice among the majority of people. These considerations are all significant and valuable assets of a judicial system and will all be fully discussed in later chapters. Therefore, if we cannot anticipate that the Italian court will achieve absolute justice, we shall see that the community of judicial courts in Italy achieve justice among the community of citizens. Again, if we do not prejudice ourselves by believing in the none too plausible contention of the complete destruction of the Italian judiciary through political usurpation, we shall then see clearly that there is still a well-governed system of law and justice under the Fascist regime.

CHAPTER

II

THE

JURISDICTION OF THE DIFFERENT

COURTS

...

INTRODUCTION

...

The Jurisdiction of all the Italian judicial courts is defined in the provisions of the Codes. Regulations on the exercise of them are also prescribed in detail. So far as the main process of litigation is concerned, no alteration or modification in the realm of jurisdiction is permitted. There is, however, the principle, whereby jurisdiction relating to accessory process, such as that of taking evidence, or inspecting matters with the assistance of experts, may be delegated to other courts for convenience sake. Again, there are certain exceptions in the sphere of criminal justice, in which, the jurisdiction of one court may be remitted to the other. However, these topics of delegation and remission of jurisdiction will be treated at a later stage.

~~While the court by these provisions is bound to judge all the cases brought before it, yet it must not meddle with matters which lie beyond its jurisdiction. The exercise of a jurisdiction is an obligation imposed upon the court by the provisions of the law.~~

CIVIL AND COMMERCIAL JURISDICTIONS

.....

The civil and commercial jurisdictions, as distributed among various courts, are defined with reference to three as-

(Supplement)

Jurisdiction in general is defined as the competence of a court to try and to decide upon cases, or to reverse and quash sentences upon appeal, within a sphere which is limited in respect of area, class of case (e.g. whether civil or criminal), subject matter, disposition of litigants, as well as in respect of the penalty to be imposed and the total money value at issue. While the court by these provisions is bound to judge all the cases brought before it, yet it must not meddle with matters which lie beyond its jurisdiction. The exercise of a jurisdiction is an obligation imposed upon the court by the provisions of the law.

pects, outlined in the following paragraphs.

Firstly, that of matter and value:

The word MATTER, "materia", in this particular sphere indicates both the type of proceeding and the object concerned, while the word VALUE, "valore" implies the total amount of a claim at issue. The provisions regarding the distribution of jurisdiction are set out as follows:

A Local Conciliation Court exercises jurisdiction over civil, personal, and commercial actions relating to a dispute over personal property or over benefits derived from immovables, claims not to exceed a value of Lire 400 (24.3.4.).

The Praetorian Court has the jurisdiction over actions on similar matters, but in respect of claims of higher value, ranging from Lire 400 to Lire 5,000 (252. 1.8.).

This court has also jurisdiction concerning alimony which does not exceed an annual payment of Lire 500 (25.4.2.).

Furthermore, the Praetorian Court acts as a court of appeal in certain cases which are judged in the first instance at the Local Conciliation Court.

For a Tribunal the civil and commercial jurisdictions are divided into two organizations. Civil jurisdiction goes to the Civil Tribunal and commercial jurisdiction to the Commercial Tribunal.

The Civil Tribunal has jurisdiction over all civil actions, the claims of which exceed Lire 5,000. Its jurisdiction also extends to appeals in civil cases from the Praetorian Courts.

The Commercial Tribunal has jurisdiction in the first instance over all cases of commercial interest, the claims of which do not exceed Lire 1,500 (£15.12.6). Besides, it exercises jurisdiction over commercial cases on appeal from the Praetorian Court.

In the Court of Appeal civil and commercial jurisdiction are combined again in the same organization, though exercised in different Sections, and by different judges. But jurisdiction in this Court is then limited to cases of appeal. No litigation is, in the first instance, admitted. As a rule, all the civil and commercial actions on appeal, come from the Civil and Commercial Tribunals.

When a case is on appeal in the abovementioned Court, it still has to be heard and decided on its merits. The proceeding adopted in the court

of first instance may be re-adopted in this court. Though the process itself is unavoidably different, the content of the jurisdiction is similar

The Court of Cassation can only reverse or annul the sentences pronounced by the inferior courts in the course of appeal. The ground supporting the Cassation is limited to errors in point of law. That is to say, a case in the above-mentioned Court never has to be judged on its merits.

When the application of law, which backs the decision on Cassation, is not deemed to be fit, the decision will then be declared annulled and the case will be sent back to the original Court of Appeal for re-consideration. Otherwise, the Court may confirm the sentence on cassation after the trial. However, this Court is not authorised to render a new decision for a case of impugment. ^{1 & 2.}

1. The jurisdiction of the Court of Cassation warrants a more detailed study, therefore its technical explanation will be put forward in a later chapter on Courts. (2) The value of a claim is determined in strict accord with the amount made in petitions. The amount of interest due, the judicial costs or damages as incurred during the court proceedings, would, each and all, amount to the capital sum of the claim. When a suit includes a number of claims, its jurisdiction will be determined by the total value of these claims. If a claim is made on an undivided sum, which is being shared by many creditors who are all plaintiffs at the moment, the claim is not affected, with respect to the determination of the jurisdiction, by the latter fact. To calculate the value of immovables which are unidentified, we need only multiply the annual tax to the State by a number of

Note continued from page 4.

300 (The value of unidentified immovables = 300 x Annual tax. For instance, if the annual land tax is Lire 100, the value of the land is Lire 30,000; or, in the latter case, the value of the benefits will be Lire 15,000. If any other object in dispute, besides the immovables, is of indeterminable value, it may be roughly and universally treated as exceeding a worth of Lire 1,500, in accordance with the provision of the Code. In many cases, the court expenses charged is in proportion to a certain percentage of the amount of the claims. In consequence of the general interest of the amount of increase in the cost of living, the "values" prescribed in the Civil Code have been raised many times in the last half century. For instance, at the Local Conciliation Court, the fixed value of jurisdiction is Lire 30 in 1865 and is increased to Lire 100 in 1892; the present rate of Lire 400 has remained since 1922. When the new draft of the Civil Procedure takes effect, the rate will be raised once again to Lire 1,000.

Secondly, that of the territory;

a) The personal and real actions relating to disputes over personal property may be brought before the court of the district where the defendant has his residence or domicile. If the dispute concerns a contract, the plea for jurisdiction can also be proposed at the court of the place where the parties have contracted or where the obligation of the party or parties to the contract has to be fulfilled. In such cases, if the defendant happens to be a company or other juristic person, the case should go to the court of the district where the office or branch office is.

b) When the actions concerning immovables or benefits of immovables, they must be brought before the court of the district where the immovables are located. If, however, the location of property extends over two districts, action should then be taken in the court of that district in which the major portion of the direct tax to the State is collected. In case the revenues collected from the two sections of the property are equal, then the action should be commenced in the court of that district where the defendant resides.

c) In the matter of succession, the rules drawn to determine jurisdictions are numerous. In general, all of

them regulate that actions relating to succession should be commenced in the court of the district where the succession took place.¹

1. In detail, such cases, which are subject to the above-mentioned jurisdiction, may be depicted as follows:

1. The plea for inheritance or division of inheritance or the dispute over succession between joint heirs;
2. The recession of wrongful division;
3. The action against the testamentary executor of a will;
4. The action to be taken against or by a legatee or creditor of the inheritance (in such case, the litigation does not affect the real rights over the property).

If the succession is occasioned abroad, actions over it may be brought before the court of the district where the immovables involved are located; otherwise, the rule that "the plaintiff must follow the defendant" which has been noted with reference to jurisdiction over personal property is also applicable. Though, in Italy, this rule is not completely followed, the plaintiff, in order to obtain redress, can only plead for jurisdiction at the court of that district where he has his residence or domicile. It is not like that of many other countries where the court of the place in which the defendant carries on his business may have jurisdiction over him.

Thirdly, that of the disposition of causes:

"The disposition of causes" in its relation to jurisdiction may be assumed as a part of the provisions of judicial procedure. To expound it is bound to be a bit technical. In the new draft of the Civil Procedure and also the present Code of Penal Procedure, this part is not treated as one of the aspects which determines the jurisdiction of a court but as a regulation to explain the dispositions of procedure.

First, it is prescribed generally that, if the court in an action directed against a number of defendants, has jurisdiction over one of them, it has jurisdiction over all of them. Secondly, when a court has jurisdiction in the main process of a suit, it has also jurisdiction in accessory processes.

When an action is confronted with the preliminary problem of the determination of jurisdiction, each of the three aspects, which have been noted in the preceding pages, must be viewed with equal importance. The application of the one does not preclude the compliance of the other. A case concerning personal property, for instance, under a value of Lire 400 must commence at the Local Conciliator of the district where the defendant takes his residence, not at the court of the place where the plaintiff resides.

The Effects of Distribution of Jurisdiction:

a) On the Hierarchy of the Courts

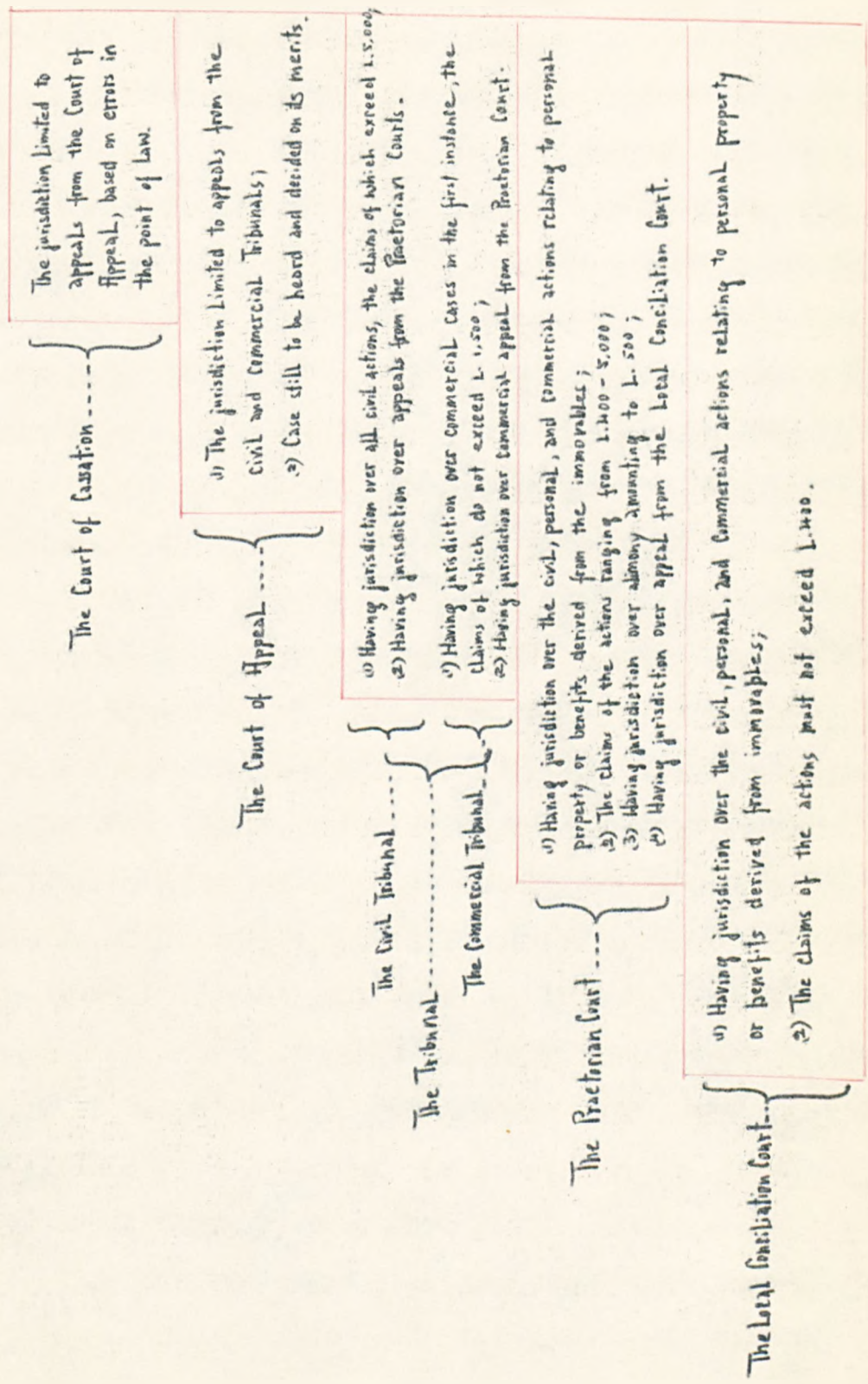
The distribution of jurisdiction, in view of these three aspects, bears upon the formation of the hierarchy of the judicial courts. Although, at a later stage, we shall see that the hierarchy of the Italian judicial courts is also formed on a planned scheme, with reference to the divisions of administrative areas of the whole Kingdom, defining the circuit of each judicial authority, nevertheless, the distribution of jurisdiction is a factor equally important in mapping out the hierarchy and in defining the extent of the functions and powers of each court.

On the side of criminal justice, inspite of the different criteria adopted for the determination of jurisdiction, the process of distribution involves similar consequences on the formation of the judicial hierarchy. Two diagrams illustrating the hierarchy of courts in connection with both the civil and criminal jurisdictions are shown on page 9 and

b) On the Accuracy of Jurisdiction

Some account has been given of the jurisdiction granted to each court, which is determined and limited inasmuch as it is defined by the prescriptions of the law. Such prescriptions are not, however, susceptible to the confusion arising from the exercise of jurisdiction. As a rule, the

A. The Judicial Hierarchy of the Civil and Commercial Court



-10-

exercise of jurisdiction should be accurate, for such is compulsory on the courts up to the limit of their power. The results of an orderly and planned enforcement should not admit of correction. In order to comply with such assumption, no means of control, corresponding to the function of the prerogative writs which fulfil a part so essential for the regulation of jurisdiction in the courts of England exist in the Italian legal system. The only errors that might be occasioned in the application of jurisdiction are conflict over determination of jurisdiction and Incompetence of jurisdiction.

Whenever a litigant is dissatisfied and complains of a wrongful decision, rendered by the court within its realm of jurisdiction, the remedy that he should look for is an ordinary process of appeal or of revision at a superior court. If it is the judge who has done injury to him by a decision which cannot be justified as a proper exercise of jurisdiction, the judge will be liable, on his own behalf, to action for damage. But these remedial measures are part of the ordinary procedure, which are not regarded as administrative measures for the regulation of jurisdiction.

Conflict of Jurisdictions

Conflict of jurisdictions occurs when a judicial action has been brought before two courts, or two related

-11-

judicial actions have not been taken at the same court; for instance, if there is a dispute over contract, the action of which can either be taken at the court of the district where the parties have entered into that contract, or at the court of the district where the obligations to the contract should be fulfilled, if proceedings in such a case have been taken in both courts, the law then defines it as a conflict of jurisdictions. Again, when two claims of a debt have been brought up by two plaintiffs against the same defendant but at different courts, it is another case of conflict of jurisdictions since the law provides that such actions should be taken at the same court, that which has jurisdiction over the defendant.

The solution of a conflict over jurisdiction is procured by resort to a common superior court, i.e., the court holding administrative authority over the two conflicting courts. Should a conflict occur between two Tribunals, it would be the task of a Court of Appeal to solve the difficulty. Appeal on a decision rendered on conflict over jurisdiction is permitted once more before another superior court. Meanwhile, the regular process of the case at the lower court will be suspended.

Incompetence of Jurisdiction:

Incompetence of jurisdiction means violation of the rules set forward, particularly with regard to "matter and value", in connection with the extent of jurisdiction for courts. When the

judicial authority is guilty of incompetence, the case at issue is immediately suspended or taken to a court which may have jurisdiction over it. But an assertion of incompetence can also be raised by the interested parties, at any stage of litigation and the same court is in a position to render a final decision.

Delegation of Jurisdiction:

In principle, no law court can delegate its jurisdiction over a suit to other judicial authorities. Nor can the litigants in a lawsuit propose a transference of jurisdiction in the course of the suit unless they have elected to reside in a new residential district. But for the sake of convenience, the law grants a few exceptions in the sphere of accessory procedures. They are, namely:

Firstly, when any evidence of a case is located at a long distance from the court, the investigation or examination of which may be entrusted to a Praetorian Court.

Secondly, when a party or expert is summoned for an interrogation or a declaration of oath at the court, but, due to long distance or illness, he is unable to be present in time, the court may delegate the jurisdiction to a court of equivalent jurisdiction or a Praetorian Court of the district in which the party or expert lives. For testimony of witnesses this exception is also applicable.

The Civil Jurisdiction of the Public Minister:

The public minister resembles the public prosecutor in the judicature of other countries. Therefore he is the person who exercises criminal jurisdiction. But, according to the many unusual provisions of the Italian code, he may also have a place in the civil courts and exercise a considerable measure of civil jurisdiction. Considering that a public prosecutor represents the State in the exercise of coercive power, this provision for the grant of civil jurisdiction to a public minister may be viewed by outsiders, as an apparent evidence of the Fascist idea — the strong State. But in accordance with the explanations made by Italian jurists, the reason for this provision, as it was originated as early as in the law of 1865, long before the Fascist regime came into power, is purely religious in nature. For the Catholic church in Italy long justified itself in the possession of enormous powers over the State, and its interference has been particularly far-reaching in the family. For instance, according to the church regulations, divorce is entirely prohibited, lack of heir is a valid reason for separation, birth control an inexcusable sin etc.. Many of these rules have been codified in the Civil Code of 1865, and the State must look to their enforcement through the public ministers. Therefore we may believe that the statement of Italian

-14-

jurists is, in a certain sense, based on truth. Yet there is equal truth in the fact that since the regime of the Fascist Party, the idea of the Strong State is emphasized and the national scheme for increasing population is in full operation. Special provisions for these policies are codified in the new criminal code of 1934 in which typical changes are made by turning over great powers to the agents of the authority and making drastic rules for the building up of a healthy and abundant population. But in the old code of the civil law and procedure, a number of provisions are found which were once based on religious ideas, but incidentally serve a purpose similar to the aim of the Fascist law. Thus, in spite of the complete separation of the Church from the Fascist State, the Civil Code of 1865 has still proved worthy of retention.

According to the provisions of Civil Procedure, the jurisdiction that a public minister may exercise in the civil courts is of two kinds: that of criminal actions which have been evoked around a civil suit; and that of civil actions which are distinguished by the particular provisions requiring the interference of a public minister. One example of the first kind of jurisdiction is the discovery of a false document among the evidence in a civil suit. But this jurisdiction itself is not civil; therefore its being assigned to the public minister does not constitute an exception to the civil procedure. The chief example of

-15-

the latter kind is actions relating to matrimony or separation of husband and wife; others are those which have been regulated by particular provisions of the Code.

While, at a civil trial, the public minister may interfere, his part which will take the form of a verbal statement of his conclusive opinion on the case, will usually occur after the "discussion of the procurators" (a form of debate between lawyers). The procurators may submit brief notes to the judge for the purpose of defending their parties from whatever opposition may be made by the public minister. In the absence of such notes, the President of the court may summon the procurator of the party to be present at the "council of councillors" (a council held by the President and judges in camera), to re- defend the party if deemed necessary in the opinion of the court.

Restrictions on the Judges:

When litigants or procurators to an action are discovered to be near relations, great friends or enemies of the judge (or of his wife) who exercises jurisdiction over the litigation in accord with the law, the latter must immediately relinquish jurisdiction. If, on the other hand, the judge has been an adviser, a guardian, a creditor or a debtor to a litigant, he will again relinquish jurisdiction. Moreover, the judge must have no personal interest in the suit nor have ~~anti-~~

participated in the trial of first instance.

In many cases, the public minister has power to interfere in civil jurisdiction; he is then under the same restrictions as are imposed on the judges. These restrictions are also applicable to all praetors even where they are to act as (councillor) of the family, although the conciliators who occupy the most inferior position among the judicial personnel are not exempted from the administration of this rule.

The provision of such restrictions is to be interpreted in two contrary senses, i.e., recusation and abstention. The act of recusation is understood to be an interposition of an objection or an appeal directed against the judge by one of the parties on the ground of his relationship to the opposite party or of his personal interest in the suit itself. The party may take this precautionary measure whenever any of these situations are disclosed, with a view to defending his interest against any harmful manipulation or expected partiality. Therefore recusation is viewed as an exclusive right of the parties to a dispute. But abstention is taken on the initiative of the judges. It is an act of self-restraint, taken as a measure of self-protection. On the other hand, the provision of abstention can be viewed as a disciplinary measure to which a judge must conform.

The processes adopted for the acts of recusation and abstention are generally different. Recusation is requested

by one of the parties by referring the situation to the cognizance of the First President of the court, in which the main suit finds its appropriate jurisdiction. Three days before the commencement of a trial, or the discussion of the procurators, all evidence bearing upon the judge's relationship to the litigant or other cogent facts must be submitted.¹ Then the judge concerned will be given notice of the event and is obliged to make an explanation in two days either denying or acknowledging the allegation. With the full evidence before him, the First President proceeds to a decision with the assistance of a "relatore" (a judge appointed for the occasion) in the "camera", and a number of judges may participate in the process. Meanwhile, if the main suit is urgent, it may be continued under an acting judge. Appeal is only permitted in the event of a decision relating to the recusation of the judge but not of the praetor or the conciliator. If the whole process of recusation fails, the party which has proposed it will, as a consequence, be liable to a fine of "multa" of Lire 150.

Some account has been given of the act of abstention, which is initiated by a judge or a public minister. The proper step for him to take is comparatively simple. As soon as the situation is known to him, he declares it to the First President from whom he will obtain permission to abstain from the

1. According to the new code of Civil Procedure of 1939, such objection may be raised at the "first hearing" of the actor see Chapter 6, page(200) .

jurisdiction of the suit.

Dispositions relating to Foreigners:

Sovereigns and diplomatic officials of foreign States are immune from the jurisdiction of Italian courts, even when they are residing in the Country. The immunity enjoyed by diplomatic officials is not limited to the ambassadors alone but extends universally to their staffs. This is a rule almost unanimously adopted in all civilized countries; so we find similar provision in the judicature of Italy.

Privates of foreign nations are not so favoured. They can be sued in many cases, although they may have no residence in the country. For example, they can be brought to trial for a suit relating to their real or personal property within the Country, for a claim based on a contract that has been concluded and will be executed in the Country, or in all other cases where the defendant is obliged to respond with mutual action (reciprocita).

The last provision is ambiguous and is supplemented with no explanation. To interpret it literally, it means that a foreigner who is not an Italian resident is under the obligation to submit himself to the jurisdiction of Italian courts in all civil cases, except such as relate to a foreign land or to a contract not concluded in the Country. For such matters, the court of the district where the plaintiff has his residence, may claim

the cognizance of jurisdiction over his foreign opponent.

When a foreigner has acquired residence in Italy, jurisdiction over him is all the more assured. In so far as a suit does not relate to immovables in foreign lands, he can sue or be sued in just the same way as a national.

CRIMINAL JURISDICTION:

The Extent of Criminal Jurisdiction:

The extent of the criminal jurisdiction of the judicial courts is determined with reference to two aspects: the territory in which a crime is committed; and the penalty which shall be inflicted. By virtue of the first aspect, the jurisdiction extends primarily to offences committed within the territory of the State which the Code defines for the enforcement of the penal law as the whole Kingdom, the Colonies, Italian shipping and aircraft. The principle is that whoever violates the penal law which is in full force within the State territory, shall submit to the jurisdiction of Italian courts. Moreover, within this territorial limit, the jurisdiction of criminal courts extends to all persons, whether Italian or foreign. Again, regarding the same aspect, a crime is considered to be committed in the State territory when the action or omission constituting the crime occurred wholly or in part therein, or when the consequence of an action which constitutes the crime is effected

therein. The same holds true of an attempted crime,¹ when the latest act of it took place therein; and similarly, in a continued offence² when the final act ends in the territory of the State. Finally, whenever an indictable offence is found to have been committed within the State territory, it is not assumed that all Italian courts have jurisdiction over it. Only the court of that district, where the offence is located, is authorized to conduct the trial. Otherwise, the criminal court of the district where the offender resides or is arrested will exercise jurisdiction if the exact place in which the crime is committed remains ambiguous.

Furthermore, the Italian courts may have criminal jurisdiction over offences committed abroad. The same is applicable even when the indicted offenders are not Italians. This is not however accepted as an expedient with the object of meeting difficulties or particular situations which often occur when the law of one nation is in conflict with that of another. The provision is nevertheless constituted as a rule parallel to the one set out in the preceding passage regarding the territorial limitation of jurisdiction. Parallel these two rules may be in

-
1. Attempted crime: whoever commits acts which are appropriate for, and directed in an equivocal manner to the committing of a crime is responsible for attempted crime if the action is not completed or the event has not actually taken place (Art. 56, Criminal Code).
 2. Continued offence: more than one breach of one or various provisions of law by one or more acts (Art. 81, C.C.).

so far as codification is concerned, but in principle they are entirely contradictory to each other. By setting a territorial limitation over criminal jurisdiction, which jurisdiction is at the same time extended to offences committed in the territory of a foreign state or by subjects of the same, is indeed an intricate judicial paradox. However, this is one of the unusual features of the new criminal code and did not exist in the old code of 1865 prior to the Reign of the Fascists.

The extent of criminal jurisdiction over offences committed abroad is determined with reference to the nationality of the offender, the gravity of the offence and the kind of penalty to be inflicted. The provisions are generally outlined as follows:

In the case of any ordinary offence committed abroad by a national for which the Italian law prescribes the death penalty, life servitude or a servitude over three years, the judicial courts in Italy can claim jurisdiction over the matter whenever the accused enters the territory of the State.

In the case of notable offences such as those directed against the "personality" of the State or aimed at an attempt to abuse the State powers and to counterfeit the seal, legal currency or stamps etc. of the State _____ which are committed abroad, either by a national or a foreigner, the Italian courts can also claim jurisdiction over the matter even before the prisoner's arrival in the Country.

Other crimes aimed at infringement of the political interest of the State or the political right of a national (limited to a Fascist, of course) are considered to be political crimes, and, whether they are committed by a national or a foreigner in the territory of a foreign State, the Italian court is again empowered to try them, if it is demanded by the Minister of Justice.

The other aspect determining the extent of criminal jurisdiction at large is the kind of penalty to be imposed for a committed crime. The penalty in question, is however, not the one ultimately imposed on the accused by the formal judgment but merely an implication based on the dictum of the public prosecutors. When the jurisdiction over a certain matter has been accordingly determined, its effect is irrevocable, even when the judge later decides upon a penalty far from consistent with the one presumed in the prosecutor's indictment.

The penalties described in the new criminal code are numerous; before we embark on an explanation of their application with reference to the extent of criminal jurisdiction, it is necessary for us to obtain a general conception of what these penalties are.

According to the new criminal code, the principal penalties are prescribed for both crimes and contraventions. There are four different kinds of them, under the category of crimes,

among which death is the major punishment. In the old Penal Code of 1865, which was later condemned by the Fascists as wholly inspired by liberal principles, capital punishment was replaced by servitude for life. But since the Fascist regime, notably in the new criminal code of 1931, the penalty of death has been re-introduced on an extensive scale. Its execution, which is not made public, is carried out by shooting within the walls of a penitential establishment or in any other place designated by the Minister of Justice. Most of the crimes against the so-called "international personality of the State" are punished by death as also, for instance, attempts against the life, security or personal liberty of the Head of the Government, Mussolini. But, in 1926, we faced the ugly fact that, in the case of Zamboni, a boy of fifteen, who had made an attempt on the life of Mussolini, the penalty awarded was far more severe than mere death. The boy was lynched before the trial and his body was dragged through the city of Bologna and left unburied for eleven days. Furthermore, his father and aunt were each sentenced to thirty years' servitude, while his brother was deported to Lipari Island for five years of hard labour. Nevertheless, according to the new Penal Code, the words sound more moderate and there should be no such accessory penalties for the prisoner's family, associated with the infliction of a capital penalty.

The second principal penalty for crimes is "Ergastolo" which means life servitude with compulsory labour and it is

usually carried out on the island of Lipari. The crimes to be punished with "ergastolo" are mostly committed against the personalities of the State. Comparatively speaking, there are far fewer "ergastolo" sentences than death sentences as prescribed in the Code. However, according to the stories told about Lipari, the lives of prisoners there are hard and particularly hard is the fate of political exiles.

The third principal penalty for crimes is "reclusione" which means penal servitude of a period varying from fifteen days to twenty four years. This penalty is served in a penitential establishment with compulsory labour. But, "reclusione" is seldom imposed for its maximum length of 24 years, unless in the case of political crimes or other crimes against the State. Even, in the matter of homicide the maximum term of "reclusione" is 21 years. Nevertheless, within the term of "reclusione" many interesting features as provided in the Code may be brought out. For example, the Code provides that whoever makes an attempt against the liberty of the Head of the Government, Mussolini, shall be punished with penal servitude from four to twelve years; whoever commits an offence against his honour or prestige shall be punished with penal servitude from one to five years; whoever commits acts, directed to render a person impotent to procreate, shall be punished with penal servitude from six months to two years and with fines; or whoever publicly incites to practices contrary to procreation or carries on propaganda in favour thereof, shall be punished

with a year's servitude etc.. These are only a few instances among the many provisions in the Penal Code that fairly represent the innovations of Fascist justice.

The last of the principal penalties prescribed for crimes is "multa" which is the penalty of a fine consisting in the payment to the State of a sum from 50 to 50,000 Lire. For crimes inspired by motives of gain, the judge may impose a fine ranging from 50 to 20,000 Lire, not as an accessory punishment but in addition to the principal penalty of penal servitude. Moreover, when, in view of the financial circumstances of the offender, the fine fixed by the law can be presumed to be inadequate or ineffective, the judge is empowered to increase it up to three times the amount.

The principal penalties belonging to the category of contraventions are only two: the "arresto", a detentive imprisonment extending from five days to three years; and the fine of "ammenda" which consists in the payment of a sum from 20 to 10,000 Lire. "Arresto" is served in one of the establishments provided for the purpose with compulsory labour. A person sentenced to "arresto" may otherwise be employed at work different from the compulsory labour provided in the establishment, in accordance with his aptitude, and his previous occupations. The fine of "ammenda", similar to the provisions of "multa" can also be increased up to three times the maximum sum, if the judge presumes that a smaller payment may not be an effective punishment for the offender, in view of his wealth. Moreover, when all pun-

-ishments of fine (including the multa), can not be duly executed owing to the insolvency of the accused, the punishments are converted into the "reclusiones" under a limit of three years or the "arresto" for not more than two years.

Besides this, there are accessory penalties prescribed for both crimes and contraventions, such as interdiction from public offices or professions and loss of legal capacities etc. But they are inflicted as the penal effects of the principal penalties; thus they are not included in the application of penalties, which application is taken as one of the main references in the determination of the jurisdiction of criminal courts.

With knowledge of the principal penalties explained above, we can easily see how the extent of the jurisdiction of all criminal courts is determined:

The Praetorian Court may have the jurisdiction over criminal cases, which involve the imposition of:

- (1) Detentive punishment of either "reclusiones" or "arresto" for not more than a term of three years;
- (2) Pecuniary punishment of "ammenda".

The Tribunal may have the jurisdiction over cases which involve the imposition of:

- (1) Detentive punishment of "reclusiones" for not more than eight years;
- (2) Pecuniary punishment of "multa".

Besides, the Tribunal has jurisdiction to hear

and decide an appeal from the Praetorian Court.

The Criminal Section of the Court of Appeal only has jurisdiction over the appeal of criminal cases from the Tribunals.

The Court of Assize may have criminal jurisdiction only over cases involving the imposition of

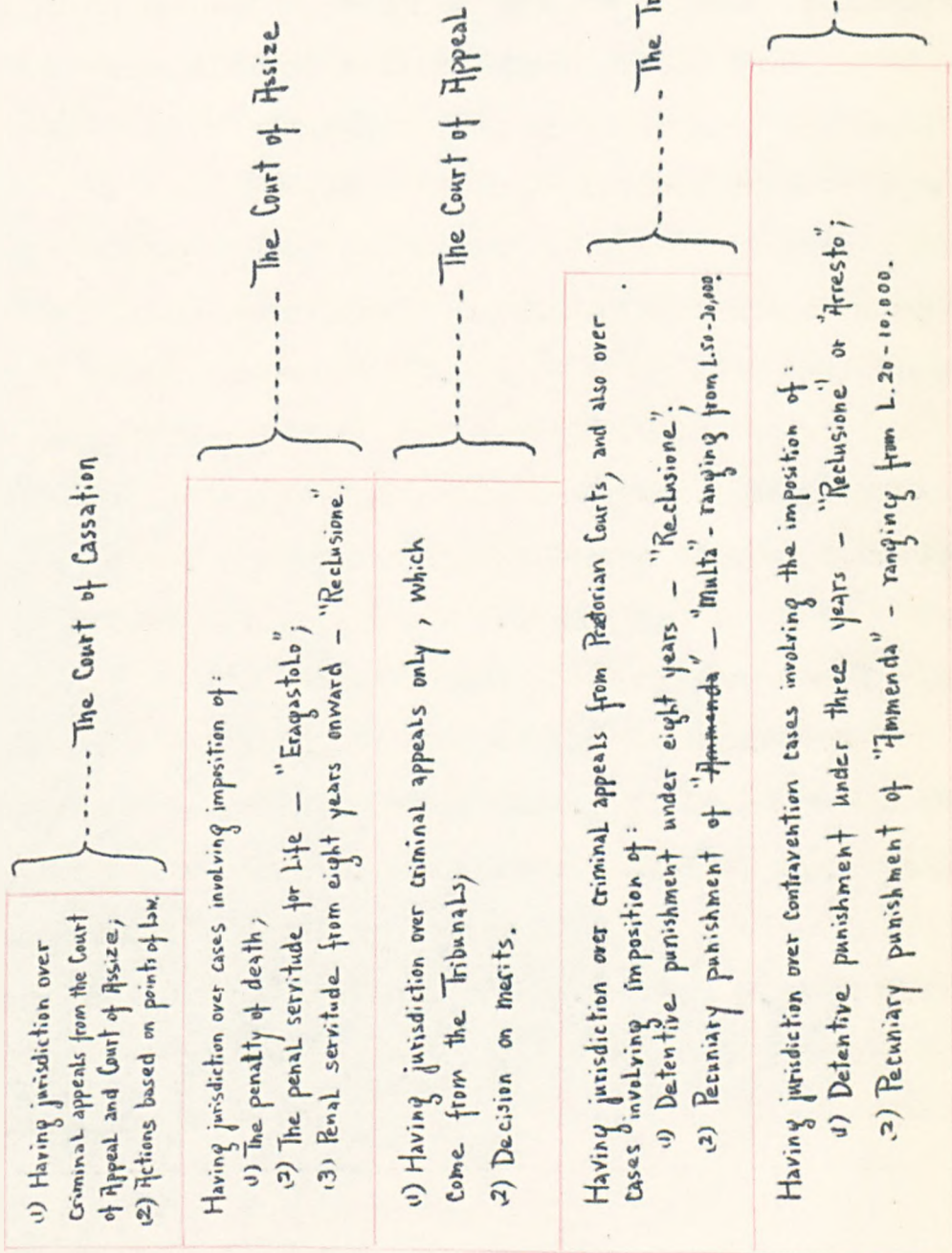
- (1) The penalty of death;
- (2) The "ergastolo", that is penal servitude for life;
- (3) Detentive punishment of "reclusiones" from eight years onward.

The Court of Cassation may have jurisdiction over criminal appeals from the Court of Appeal, and Court of Assize, based generally on errors in questions of law.¹
(See the diagram of p.28)

Further rules for safeguarding the competence of jurisdiction are rather complicated in view of the enormous number of detailed provisions prescribed in the Code. Still, some account of their functions is necessary. For these well-defined jurisdictions of the Criminal Courts may have to be modified to a certain extent when these rules come into effect. They do, however, correspond with the aggravating and extenuating circumstances of offences which have to be observed by a judge when he is undertaking

1. The most severe punishments can also be imposed by the Special Tribunal for the Defence of the State, upon these "political criminals"

B. The Judicial Hierarchy of the Criminal Courts:



his task. But in the preliminary process, prior to the trial, the public minister is bound to note these rules when he proceeds to prosecute the case and the judge must do likewise when he first takes cognizance of the matter.

The first of these rules is that the penalty to be inflicted upon the guilty person must be appropriate to the crime that he has committed or attempted. As the law says, the punishable crime must be the consequence of an injurious or dangerous act performed maliciously and intentionally by the accused. Failure to prove the direct relationship linking cause and effect diminishes the delictual nature of an act, even if it is deemed by the law as a punishable crime.

Secondly, with reference to a continued offence, that is, an offence committed by a single act, violating various provisions of the law or by a number of acts violating only the same provision of the law, the penalty, contemplated by the public minister, must not be more than the penalty for a single offence.

Thirdly, among the many extenuating circumstances, only the one dealing with the age of the offender shall be considered as a test of the competence of jurisdiction.¹

1. The circumstances are outlined as follow:

- A person who at the moment of committing an act, has not attained the age of fourteen years shall not be chargeable;
- A person who at the moment of committing an offence has only attained the age of eighteen shall have the penalty inflicted on him reduced.

The incompetence of jurisdiction constituted by disregard of the above-mentioned rules or by overstepping the jurisdiction assigned to the courts, can be declared at any stage of the process in the court of first instance. The consequence of its declaration is to make the action null and void and the subsequent process that follows is the transference of the case back to the office of the public minister. If controversies over the problem of incompetence arise between the judicial authority and the public minister, the task of solution is undertaken by the Court of Cassation. Other controversies between courts, over the jurisdiction of a case, are also solved by it. If such incompetence of jurisdiction is later discovered in the process of appeal, a Tribunal has the power to re-decide the case on its merits as a court of first instance, or to send back the case to the public minister, but a Court of Appeal will only be competent to nullify the decision on appeal and to transfer the case back to the public minister.

Remission of Jurisdiction:

In principle the jurisdiction of the criminal court, as has been defined in the preceding passages, is not accessible to alteration or modification, and the same holds true of the administration of civil jurisdiction. But in practice, in the administration of criminal jurisdiction, there are exceptions where a court is sometimes justified in exercising the powers of another. Such would be the case in the event of a demand of the public minister

attached to the Court of Appeal or the Court of Cassation. Instances like these are termed by the law "remission of jurisdiction". "Public policy" and "natural justice" are further grounds sometimes held to justify "remission". In addition, the proceeding can also be taken by litigants in person, at the risk of a fine, "ammenda" from 1,000 to 10,000 Lire, which will be imposed when their proposal for the remission of jurisdiction does not stand.

CHAPTER III

THE MINISTRY OF JUSTICE

.....

The MINISTRY OF JUSTICE

.....

The Ministry of Justice is one of the thirteen Departments of the State which together form the major machinery of the Italian Government. The Minister, its head, is naturally responsible to the Government, or to be more precise, to the Dictator himself. He is most certainly a prominent member of the dominating Party. But, as a rule, he is also a man of profound legal training or has acquired a certain position in the world of the judiciary. Otherwise, he can hardly be equal to the enormous duty laid on his shoulders. In comparison with that of the responsible officers of the judiciary in England, his responsibility is equivalent to all the judicial functions of the Home Secretary, the Lord Chancellor, the Attorney General, and even the Prime Minister, whose function is limited to appointing certain superior judicial personnel. In addition to judicial administration, he has also legislative duties as he supervises the drafting of new Codes reminiscent of the work of the various committees in the process of preparing the drafts of bills in England.

Functionaries:

The functionaries under the Minister, who assist in the performance of his heavy duties are divided generally into two groups. Some are stationed in the Ministry; others are scattered in the judicial courts all over the Country. The former

are State officials or civil servants who are subject to the same privileges and regulations as other State officials when they are in their respective offices. But in reality, they are qualified judges, recruited through the proper channels, and are only transferred there whether permanently or temporarily upon appointment. Such transfer, from the Bench to the Ministry, immediately confers upon them the status of State officials, under which Status their function is no longer irresponsible nor is their independence as sure as when they are on the Bench. In the meantime, their judgeship is naturally not removed but only falls into abeyance for so long as they are continuously engaged in the Ministry. All such transfers from the Bench to the Ministry or vice versa are at the discretion of the Minister of Justice. To the judicial personnel, transfer to the Minister is, however, regarded as the most lucrative promotion that they can expect in the long and weary climb through the graduated hierarchy of the bench.

The other group of functionaries, scattered in various courts are known as the Public Ministers. They are a group of over eight hundred persons, which include all the Attorney Generals and Public Prosecutors. These men, by virtue of their qualification are also judicial personnel, as are their colleagues in the Ministerial offices. Their process of recruitment, their status and rank are exactly the same as those of judges. Only, administratively, they form a separate class by themselves, which springs directly from the supreme Ministry of Justice. And the Ministry has actually become a sort of headquarters for all of them. The

nearest analogy in England may be sought in the Law Officers' Department which coordinates all the Law Officers in the various courts of criminal jurisdiction; only this Department is not so closely knit together nor as powerful as the Italian system of Public Ministers.

FUNCTIONS:

The Functions of the Ministry of Justice may be divided into four. The first is the general administration of the whole judicial system. This administration is not confined to immediate administrative measures such as are taken up by a court-president and limited to within the walls of a court. It is administration which affects the whole scheme of the judicature.

With reference to the judicial personnel, the Ministry is responsible for the recruitment of all the judges, public ministers, chancellors and secretaries. It appoints commissions annually to prepare adequate public examinations, either for recruiting the judicial personnel or for their promotions. Commissions are also appointed to deal with the task of "scrutiny" which is another method of promoting those judges of high rank on the basis of excellence of achievement. Official appointments to any judicial post are also issued by the Ministry. The phrase "Judges nominated by the King" as guaranteed in the "Statuto Fondamentale" and as printed on credentials, is merely a legal form. In respect to finance, it is quite true that all the funds for the judicial courts and personnel are appropriated by the State

Treasury, but detailed accounting is done by the Ministry itself. The monthly appropriations for courts, for instance, are remitted through the Ministry of Justice to the General Offices (Segretaria Generale) of each court, out of which the expenses of the court and the salaries of all attached staff are finally paid.

The administrative function of the Ministry is directed to the allocation of jurisdiction, the allocation of courts, the transference of judges and the internal formation of sections etc.. The lowest units, all the Local Conciliation Courts in their administration, are responsible to the Praetorian Courts of the same Province, the Praetorian Courts are answerable to the Tribunals and so on. Finally, all the Provincial Courts of Appeal are subordinate to the supreme Ministry in all administrative matters. Therefore the First Presidents of the eighteen Provincial Courts of Appeal and their six Detached Sections of Appeal are virtually the chief agents of the Ministry. That is to say, in the Provinces they are the first men who are responsible to the Ministry for the administration of all their respective provincial judicatures. Whenever the Ministry desires to communicate with an inferior court in one Province, that communication must be put through the high Court of Appeal of that Province. In short, any administrative order issued from the Ministry only descends to the successive lower courts by hierarchical means. And any petition from the lower units must also travel up step by step to the Ministry. This is the system that the Italian calls "the co-ordinate administration of justice".

The second function of the Ministry is not a function that is directly concerned with the Ministry itself. It is rather the major function of its scattered agents, the Public Ministers. By the Law of December, 39th, 1929, the latter have been authorized to represent the State in judicial courts. Hence, an immense power in the prosecution of offenders and the execution of judicial sentences was assigned to and is exercised by them. This power has been explained as the "jurisdiction of Public Ministers" in a previous chapter, and may possibly be defined as a distinct function originating from their own status. So long as the Public Ministers fulfil their duty, the Ministry will on no account interfere.

On the other hand, when looked at from the viewpoint of the close relationship between the Ministry of Justice and the Public Ministers, we may also consider that the functions of the two are really one in the broad sense and are not divided. That is to say, the jurisdiction of the Public Ministers is also the jurisdiction of the Ministry of Justice. Although there is no documentary source to prove the statement, that the power of the Ministry extends to represent the State, the Ministry is nevertheless authorized to direct, to control and to interfere with the whole judiciary in whatever circumstances. It can certainly insist upon the prosecution of certain cases if it desires, or restrain the Public Minister from accusing certain individuals. The system in fact provides that all Public Ministers shall be under

the effective control of the Ministry.

The third function of the Ministry is legislative. This function has again no documentary basis; nor is there any legal justification for an administrative Department taking up functions that lawfully belong to Legislative Chambers. As a matter of actual practice, however, the Ministry is undoubtedly a legislative authority.

This legislative function is mainly confined to the preparatory work of drafting legislation, undertaken with the assistance of a special Commission called the "Commission for the Reform of Codes". The latter includes mostly professors and scholars of law belonging to a Legislative Institute who devote their time to legal research, comparative studies, besides the drafting of Codes for the Ministry. The Ministry decides on the fundamental outlines and the Commissioners draft them into Laws. Whenever a new measure has been drafted, it must be accompanied by a "relazione" of the chief commissioner or of some other body or of the Minister himself. The next step is to submit the draft to the Duce for review. A deposit of the draft in the Duce's office may remain for a brief or a considerable period of time, depending largely upon the urgency of the legislation. For instance, the long delay over the enforcement of the Projects of the new Civil Code and its Procedures, drafted in 1937, was due entirely to the Duce's tardiness in reviewing them. But as soon as the Duce's approval is secured, the final reading and voting in the two

Legislative Chambers are matters of no significance.

The last function of the Ministry may be defined as the supervision of justice, and it is performed in co-ordination with these scattered functionaries, the Public Ministers. This function is very extensive and important. It may be considered that the exercise of this function over the judiciary is one of main justifications of the establishment of the Ministry.

With regard to the judicial personnel, it is the duty of the Ministry to see that good behaviour is maintained. If any one of them has violated his oath, a disciplinary charge, as the law provides, will be laid against him by the Public Minister. Respecting the administration of courts, the attached Public Minister should constantly observe whether the laws of the State are being kept in due manner in the General Administrative Council of each court. With regard to the judicial decisions of courts, it is again the duty of Public Ministers to see that they are properly executed. This explains how they have the power to direct the judicial police or sometimes even the ordinary police, and have also been entrusted with the charge of prisons and penitentiaries.

Conclusion:

In England this machinery is non-existent. Over the administration of the law there is no adequate supervision. The result of an illogical and piece-meal development does not often mean the strengthening of judicial independence; what it

implies is the lack of co-ordination and the inefficiency of the whole system.

In the United States of America, supervisory machinery over the judiciary is also absent and the result seems to be even more chaotic. For the exaggeration of the separation of the three Governmental powers places the State judiciary not under a supervising Department but on a plane above the two other powers. It is entrusted with the immense power of judicial supervision in order to ensure the constitutionality of all State legislation and the nine Justices of the Supreme Court have been consequently vested with a power which is much too much in excess of that warranted by a purely judicial power. They interpret the Constitution; they construe the enactments of Congress or suppress them when they are unconstitutional from their point of view; in a broad sense, they may even venture to the interpretation of natural law, political promises and individual interest, although such ventures are not necessarily in conformity with the will of the American public. Over all these functions there is, however, no measure of supervision and necessary reforms are still a distant prospect.

Up to the present, these two great democratic Countries still cherish the argument that "to place justice under a politically administered Department would reduce its independent character to a sham". They have failed to see that the

maintenance of this pure judicial independence is not directed towards the realisation of a system of a unified control. For the absolute independence of the judiciary in the sense of the giving of judicial decisions and the keeping and carrying out of them with resolute force, does not depend on the fact that the judicial courts or their personnel are absolutely free from any adequate measure of supervision. The truth may be that, between them, adjustment and reorientation are still possible. It is regrettable that the two great Democracies of the world have not yet come to grasp this important fact.

CHAPTER IV

COURTS

THE COURTS

Historical :

Since the Unification of Italy in the 19th century, the scheme of the Italian courts, like the realm of their jurisdiction, has been decreed in accord with the Codes concerned. So the result of that legislative bulwark of the judicature which has been gradually assured in the course of the last seventy years, is that each detail of that scheme has become institutionally permanent, regular and systematic. Despite the drastic reform that the Fascist Regime has recently undertaken in the penal law and its procedure, the major part of the scheme of courts is nevertheless unaltered.

General Features:

The whole scheme of the Italian courts is indeed very regular, logical and simple. This must seem particularly true in the eyes of those who are acquainted with the irregular arrangement of the English courts. Perhaps it is due to piecemeal reforms that the courts in England have each become exceedingly distinctive in nature and so uncoordinated in their roles that they may even induce people to believe that they are not the units of one judicature. Nor is it believable that from them a judicial hierarchy can be logically erected; whereas the procedures that they each employ seem as if specialized to the

jurisdiction assigned to them and their distribution is, in general not in accordance with population densities — for they are frequently irrevelantly scattered over wide areas or concentrated in metropolitan centres. Again, their personnel, whether highly paid or totally unpaid, do not form one distinct occupational category or profession and no general rules can be imposed upon them. In Italy, the scheme of courts is, like most Continental systems, much more simple. Although the number of both courts and judges is far greater than in England, the scheme imposed upon them is uniform and compact and hence should be easier to understand, not only for the legal professions but also for the masses who have little legal knowledge. In Italy, the organisation of the judicature is governed by legislation; in spite of its numerous provisions, this legislation has the order and technical simplicity which are essential to smooth administration. After all, the justice of a State should not be so exclusive, even though it remains nominally open to the general public, as the "Ritz Hotel" of London¹; nor should it be a subject as difficult and as technical as Higher Mathematics, so that it must be reserved for the few initiated. That justice must be popularized is an essential point in the functioning of the judicature. Its administration must be orderly and simple, so as to make the essential ideas of the

1. "In this Country justice is open to all like the Ritz Hotel" says Mr. Justice Mathew, in Solicitor's "English Justice".

whole system of the judiciary intelligible to the masses. With a simplified scheme of courts firmly established, the way is paved for the popularization of judicial justice. Instead of ranging the courts as a number of "Ritz Hotels" which are at the disposal only of the exclusive class, they must rather resemble numerous and cheap provisional stores which are in easy distance of both rich and poor housewives. In order to bring justice within reach in this manner, the adoption of a logical and simply organized scheme of courts is necessary, such as that in Italy or in other Continental States.

In the preceding chapter, it has been explained that the hierarchy of the Italian courts is formed according to the allocation of jurisdictions, particularly with regard to the subject-matter and value. Now we shall observe another factor, which also helps in the formation of such a hierarchy; the territorial distribution of courts. In Italy all the judicial courts are evenly allotted in various administrative areas throughout the Country. The general rule of distribution is for the inferior courts to be located in smaller districts, and the superior courts in larger districts.¹ The supreme court is thus, according to the same rule located in the State Capital. The allotment in accordance with

1. Whether a district is large or small is not to be judged according to its area, but by the size of its population.

this rule is shown as follows:

| | | |
|--------------------------|----|---------------------|
| Local Conciliation Court | in | Commune; |
| Praetorian Court | .. | Mandamento; |
| Tribunal | .. | City Commune; |
| Court of Appeal | .. | Provincial Capital; |
| Court of Assize | .. | ; |
| Court of Cassation | .. | State Capital. |

Administratively speaking, the communes are subject to the control of the mandamento to which they are attached and the latter are subject to the City Communes and so on. Thus, accordingly, the judicial courts attached to these areas are likewise made hierarchical. For instance, over the personnel of the Local Conciliation Court, a Praetorian Court exercises the supervising power and also hears their appeals and over a number of Praetorian Courts a Tribunal will have the same powers. The Provincial Courts of Appeal, beyond the Tribunals, are however the most superior units and are under direct control of the supreme Court of Cassation. Although there are exceptions to what has just been explained, which are made in accordance with local requirements, yet the usual practice well corresponds with the fundamental rule of the distribution.

As a result of this systematic distribution, the Italian courts, with all their assigned jurisdictions, become localized. Or, in other words, in Italy one finds a judicial court even in the smallest administrative area, in the Commune for instance, and people living within this delimited area need only to travel a few miles at the most to seek for judicial justice, provided

their claims are not over a value of 400 Lire. If their claims are of higher value, then they must be brought up to a court belonging to a larger circuit i.e., the Mandamento, or a City Commune, the distance of which is within fairly easy reach of the people. However, they may if they wish completely avoid travelling any notable distance, since the Code of Civil Procedure has provided that in any civil suit brought before a court superior to the Local Conciliation Court, the parties concerned are not required to put in an appearance.¹ But such localization of judicial courts and jurisdictions does not preclude a concentration of courts in the larger towns or cities. For instance, in the cities one can often discover a number of courts which are located within the vicinity of one another and are only a few miles apart. But the fact that needs to be stressed is that all such courts are of different hierarchical grades and this has very fortunately saved the Italian judicature from such an awkward situation as that found in the concentration of judicial courts in England. In Italy, the concentration is merely limited to a variety of judicial courts; among them it may be pointed out, no two courts or more are exercising a coordinated jurisdiction, or that of a coordinated hierarchical grade. The reason for this evolution is the fact that usually that city or

1. This has been altered in the new Code of Civil Procedure enforced on April 1, 1939. See page(200)

town, in which the courts are concentrated, may happen to be located in a Provincial Capital which was originally a City Commune, and which at the same time includes a smaller mandamento. So the concentration of all these courts of the involved areas becomes a natural consequence but no conflict or distributional irrelevancy or jurisdiction need arise. The situation therefore compares favourably with that of England where courts, except the County Courts and the Court of Assize, are all thickly concentrated in London and a few metropolitan centres.

The formation of the Italian judicature, according to the scheme of the localization of courts and jurisdiction etc, has a very comprehensive basis. It is not only simply provided for in the allotment of courts and their assigned jurisdictions but also in the arrangement of judges who preside over the courts. It does not mean of course that the latter must be recruited from the districts where the courts are situated. What the law requires is that they must take residence in those districts in which the assigned courts are located. A more detailed discussion of the provisions for the Italian judicial personnel will be taken up in the following chapter.

One more feature of the Italian judicature should be stressed. The majority of Italian courts have both civil and criminal jurisdictions assigned to them. In England, judges of the King's Bench alone are assigned with the two jurisdictions. In Italy, the judges are usually assigned the power to exercise

one kind of jurisdiction only, but the courts are assigned with two different jurisdictions at the same time. The only exception to this rule is found in the Local Conciliation Court which is purely a civil court and also in the Court of Assize which is a purely criminal court. All the rest of the judicial courts are of a mixed nature.

This jurisdiction assigned to a court, if it is of a mixed type, is exercised however by two or more sections subdivided under the direction of the First President of a court. To each section, one of the two jurisdictions is assigned together with particular judges and staff. In a busy court there may be more than two sections but in a court which has only a limited volume of litigations, minute subdivision is naturally dispensable.

Besides the ordinary penal and civil jurisdiction, the majority of the Italian courts also have assigned to them a variety of special jurisdictions such as jurisdiction over labour disputes, offences committed by minors and controversies over the use of public water and so on. The other sections which are often divided for special jurisdictions are usually called special courts and hence are not ranked nominally as coordinated departments of the regular courts. Again, in these special courts, besides the judges transferred from the regular courts, there are often experts participating in the trials. Some of the procedure that these special sections adopt is laid down by statutes which

are often a little different from those legislated in Codes. These special courts are very numerous in the Italian judiciary. While such a scheme of special courts may be considered as a novelty in England, on the Continent it is a common feature of many of the existing judicatures.

Another feature that the Italian courts share in common with the other Continental judicatures is the complete absence of juries in civil proceedings. But in Italy, since the enforcement of the new Code of Penal Procedure in 1930, what has become an even more striking feature is that the jurisdiction even if it is criminal is only adjudged by judges and assessors. There are no juries in the English sense of the word nor anything equivalent to the French and German juries. But before 1930, a jury system existed in Italy in the high criminal courts for grave crimes, political offences and commitments concerning the "stampa" (press), which was almost similar to that of France or Germany. That system, which was virtually copied from the French juries, was retained in Italy for nearly sixty years, from approximately 1870-1930. But since the Fascist Regime, it has been regarded as the expression of democratic ideas and has thus been abolished.¹

1. See the "Realizazione al di S.E. Il Guardasigilli", by Signor Alfredo Rocco.

Now in the place of the former jury-system the assessor-system has been substituted, in connection with the criminal process before the Court of Assize. It is claimed to be a copy of the German lay-judges (Schöffen). In Germany, these lay judges participate only in the criminal trials in the comparatively inferior courts, and their number on one Bench is usually under three persons. But in Italy, this system is much modified. So far as the Statute of July 5th, 1934 provides, the Italian assessors never sit in inferior criminal courts. It is only in the high criminal Court of Assize which has been contemporarily set up with the System of New Criminal Justice that they sit on the bench of judges. The usual number on one bench is five, which is much larger comparatively than that of the German Schöffen. These assessors do not sit, however, as the English juries, only to give verdict. Virtually, they and the trained judges form one group, sitting side by side with each other. As a general rule, they seem to fit in quite suitably, representing as they do in their black uniforms the Fascio. Again, these men are authorized not only to adjudge the facts of a case but also to resolve disputes over legal points. Furthermore, against their judgments the law provides no appeal in a superior court. Another point of the system that is being modified in Italy is connected with the qualification of these lay judges. Besides the long list of preliminary requirements about their qualifications, they must

1
 above all be, as the law provides, salient figures among the Fascists. In the first chapter it has been explained that, in Italy, although all the judicial magistrates have now become Fascists, yet, owing to their genuine refined characters and their indifference to politics, those among them who are more elderly have not yet been absorbed into the new role that the State has created for them. But now these lay Fascists are not always as refined, legal-minded and as indifferent as those elderly and trained judges. The Italian people, particularly the masses of modern Fascists, are so bent in displaying their temperament which they call "LO SPIRITO FASCISTO" in whatever circumstances. In this high and newly established Court of Assize there is, as they probably realise, an ideal chance to express the new field of Fascist justice. But to the parties or prisoners, who are unfortunately involved in the proceedings, it will certainly be a disadvantage and a danger for these excited beings to sit in so superior a court and upon cases as serious as the trial of the most grave crimes.

The Scheme of Courts:

The long hierarchies of Italian courts, both civil and criminal are each composed of five courts. Of the civil courts, there are the Local Conciliation Courts, the Praetorian Courts, the Tribunals, the Courts of Appeal and the Court of Cassation. Of the

1. See the Decree of Oct. 10th, 1934, issued by the Duce.

criminal courts, there are the Praetorian Courts running upward, until between the last two superior courts the Court of Assize is added. Careful scrutiny suggests that the Italian judicature represents a combination of the French and German systems.

The Local Conciliation Court is quite a good equivalent of the French Cantonal Judge. The other four, with the exception of the Praetorian Court are equivalent to the French Tribunal of First Instance, the Court of Appeal, the Court of Assize and the Paris Court of Cassation respectively. The Praetorian Court which finds no analogy in the French courts is an equivalent of the German Office Court which is also a court of first instance, assigned with both the civil and criminal jurisdictions and presided over by trained judges. The exact comparison of the three judicatures may be illustrated in the following table.

| ITALIAN COURTS | FRENCH COURTS | GERMAN COURTS |
|--|--|----------------------------|
| (T.693) ¹ Local Council ⁿ Ct. | Cantonal Judges | |
| (T.972) Praetorian Courts | | (T.1759) Office Courts |
| (T.138) Tribunals | (T.360) ² Tribunals of 1st Inst. & Cor. Tris. | (T.159) Regional Courts |
| (T.24) Courts of Appeal | (T.26) Courts of Appeal | (T.27) Supreme Reg. " |
| (T.9) Courts of Assize | Courts of Assize | |
| (T.1) Court of Cassation | (T.1) Court of Cassation | (T.1) Imperial Court |

1. "T" means the total number of Courts.

2. "Tribunals of First Instance and Correctional Tribunals" (T.360)

From the foregoing table one can easily see that Italy possesses a greater variety of courts than the two others combined and also that the total number of courts is greater than that found in either of the other two. The logical result of such a variety and abundance of judicial organs should be a diffusion of facilities for the quick securing of justice by the people and this result is actually obtained in the Italian system. Volumes of disputes do get settled smoothly, swiftly and cheaply in the two inferior courts.¹ In the high courts, however, such diffusion of facilities is not often found. A civil case, for instance, before the Tribunal, may be postponed for years or sometimes, civil cases or appeals may become permanently pending, neither the courts nor the parties involved seeing any possibility of concluding them.² But such defects are not, however, a necessary outcome of the system itself. They are rather caused by the imperfection of the civil procedure by which the courts are bound in the process of exercising their functions. Of this, more shall be said in a later chapter on judicial procedures.

-
1. In 1936, the Courts of Local Conciliation settled two fifths of the cases of the total lawsuits and the Prætorian Courts settled one fourth. These two inferior courts together settled more than seven eighths of the total suits in that year. *Anuario Statistico Italiano*.
 2. This has been altered since the enforcement of the new Code of Civil Procedure on April 1. See page (202).

THE LOCAL CONCILIATION COURT

Features:

The Local Conciliation Courts are civil "courts" and the lowest among the various ranks. They are the units constituting the basis of the whole Italian judicature. Therefore their study marks the starting point of a description of the whole scheme.

In comparison with the constitutions of the other judicial courts, this Local Conciliation Court is in fact so insignificant and unimportant that people as a rule do not regard it as one of the regular courts. Instead, it is often described as a public arbitrator, an administrative court or a rent-collecting agency. Even in accordance with the legal provisions that govern the organ at issue, it is not defined as a "court" but a recognised "office" for conciliation.

The inferiority or insignificance of this "court" may be attributed to a number of causes. The limited scope of its jurisdictions is probably the chief cause. As we have seen in the second chapter on "Jurisdiction" concerning "matter and value", the Local Conciliation Court has only the power to dispose of actions on claims not exceeding £4.3.4; and in respect to "territory" as we have seen, it is only assigned to a "comune" which is the smallest administrative area of the whole Kingdom. In the second place, there is no formal procedure adopted in the Local Conciliation Court. Actually there is even no trial, as such is usually

held in other judicial courts. The proceeding before the Local Conciliation Court is a voluntary and simple process, and the responsibilities for its various parts of procedure fall equally on the magistrate and upon the involved parties since its sole purpose is to arrive at a compromise. The Code concerned prescribes for it a summary procedure, quite different from the procedures adopted in the higher courts.¹ In the third place, the magistrates assigned to these courts are not of judicial rank. They are recruited from prominent laymen who usually have had no legal training and officially they are known as "Conciliators". In the fourth place, the Local Conciliation Court has no discretionary powers. It cannot strike out claims or stay proceedings. All the hearings before it will be held on fixed dates (called "fixed hearing"); whether the parties to a suit will enter an appearance or not, is entirely a matter for their own decision. Thus even the continuation or discontinuation of litigation is only a matter of the will of the parties. Again, orders issued by the Local Conciliator are enforced differently from those issued by other courts. Even judgments rendered by it are only to be executed on the ground of private contracts, for which means of force are not generally employed. Finally, the Local Conciliation Court is not, like other courts, subject to the exclusive control of the Ministry of Justice. This is because it is partially administered by the local administrative machinery. This

1. See Chapter 7, page .

constitutes the sole exception to the rule whereby the entire judiciary is subservient to the Ministry.

This organ for conciliation has been proved unimportant in terms of judicial power in these densely populated cities. Since the Local Conciliation Court is only fit to settle petty squabbles of neighbours, it naturally fails to secure much qualitative importance in the life of industrial and commercial areas. Thus in certain cities in Italy, we find that the Local Conciliation Courts are either situated in a deserted outskirts or confined in one or two rooms amidst the crowded buildings, led up to by many gloomy corridors and narrow winding stairs. They are only frequented by poor tenants or people of the working class. The jurisdiction available to them is for the most part the recovery of rents in arrears or the redress of debts up to 400 Lire. To the mass of the population in cities or to the category of solicitors, these Local Conciliation Courts are usually unheeded. Throughout the countryside, however, they have proved more essential. Their value in maintaining peace and justice in a comparatively backward rural environment is highly esteemed. To the peasants, an action of damage done to their farms or a claim of petty debt under the sum of 400 Lire is a very serious matter.

In spite of the inferiority of the Local Conciliation Court as one of the judicial courts and its insignificance in city life, it has nevertheless been proved to be a most useful machinery which settles annually the majority of these unimportant lawsuits

and it always achieves an amazing record in the reports of the "Annuario Statistico Italiano". In 1934, the total of the civil and commercial suits was 1,476,051 but the Local Conciliation Courts settled 433,952 and among them there were only 3,424 cases which were appealed to the Praetorian Courts. In 1935 and 1936, nearly the same figures were reported and therefore it can be calculated that on the average the Local Conciliation Courts in Italy settle about one third of the total judicial cases per annum.

Chief Function: Conciliation

The primary function of the Local Conciliation Court as has been noted, is to settle a dispute between disputants. By this alone it differs widely from the functions of other judicial courts. Despite its insignificance in point of organisation, its function is nevertheless esteemed. For in general, conciliation or compromise is regarded as a virtue among Italians and is highly commended in their ways of life. This is even true of the highest judicial courts. Conciliation is weighed in the view of judges and emphasized at many points in the Code of Civil Procedure. In the Civil Tribunal or Court of Appeal, for instance, a postponement of hearing agreed and submitted by both parties, so as to allow time for an arrangement of a possible conciliation, is never found rejected by the Court. Of course, there are defects which derive from over emphasis of conciliation, but the idea itself is admirable. Of those defects, we shall see more in a later chapter.

Circuit:

The circuit of the Local Conciliation Court as has been noted in the previous pages, is the "commune" which is the smallest area among all the administrative areas of the State. Yet this commune bears no historical connection with the mediaeval federal communes of the Renaissance period A.D. 1100-1789. The evolution of the present communes is the direct result of the re-division of provinces, towns, "mandamento" and communes under the French Domination (1802-1815). These communes are however the basic areas for local administration, varying greatly in size and population. At present there are 7,340 small communes forming a network which covers the whole Kingdom.

As a rule, there is one Local Conciliation Court in each commune but where a commune is situated in two "mandamenti", the larger administrative areas, then there are two Local Conciliation Courts. Again, extra Local Conciliation Courts for a borough within the commune can be instituted by edict if the population exceeds six thousand. According to the recent statistics of 1938 the total number of Local Conciliation Courts is 7,693, but among them, 353 are those other than communal establishments.

Administration:

We have seen that the Local Conciliation Courts are not as the other judicial courts, subject to the absolute control of the Ministry of Justice. Save for the appointment of magistrates and the disciplinary measures for the presiding personnel, the

Local Conciliation Courts are in many respects administered by the local administrative authorities of the communes. For instance, financially, all the expenses of these Courts are borne by the communal authorities and their locations are also designated in the same manner. Even in the matter of recruiting magistrates the communal authorities choose and nominate the suitable candidates. All that is left for the judiciary to do is to issue the appointments in accordance with the panels submitted.

From consideration of the administration of these courts, there emerges a complicated problem with reference to the nature of these courts, i.e., whether they are municipal institutions or judicial courts. In the case of many of the points discussed, the Local Conciliation Courts seem not to be purely judicial courts. Indeed, most of the academic figures and lawyers in Italy do not view the Local Conciliation Courts as among the regular judicial bodies. In many books on the Italian judiciary the Local Conciliation Court does not appear among the judicial courts. Again, upon enquiry, one is usually informed that the Local Conciliation Court is far from being ^a well-equipped judicial court. However, the problem evoked around the administration of the Local Conciliation Court is probably the most essential factor in any such opinions formed by the academic circle.

The Local Conciliation Court may not be purely judicial in its nature, yet neither can it be called a municipal judicature. For the subject-matter of its jurisdiction is almost

identical with that of the higher courts, only less extensive in scope. The constitution of the Local Conciliation Court in itself is, however, quite different from that of an administrative court. The mere fact of its administration being undertaken by the municipal authority is not sufficient to transform it into a municipal court. Therefore the Local Conciliation Court can neither be a regular judicial court nor a court for the municipality. There is more truth in the statement that this is a judicial court but of a complicated nature.

Comparison:

The Italian Local Conciliation Court, as has been noted resembles in many respects the Cantonal Judge in France. In the recruitment of the presiding magistrates, in the limited extent of the jurisdiction and in the prominence of their functions throughout the countryside, the two are very much alike. If the French Cantonal Judge can be said to be an invention of the French Revolution, then the Italian Local Conciliation Court can probably be pointed to as a consequence of the Napoleonic Empire established in Italy by Bonaparte from 1802-1815. It is, indeed, this period in which all the Italian systems concerning administration and jurisdiction originated.¹ The chief difference between the two judicatures is that the French Cantonal Judge exercises penal jurisdiction over contraventions, while the Local

1. See "History of Italian Law" by Calisse.

Conciliation Court is a purely civil judicature, apart from its power to impose a fine of 5 Lire on its staff or witnesses for failure to fulfil their duties. Again, all the jurisdiction assigned to the Local Conciliation Court is voluntary. It is neither a necessity nor a formality for litigants to take steps to settle their dispute at the Local Conciliation Court before entering into a formal process in a higher court. But with the French system, it is supposed to be necessary for litigants to give the Cantonal Judge a chance of settling their dispute before a proper suit is brought before a higher court. Although Dott. Battista insists that the Praetorian Court is the equivalent of the French Cantonal Judges, the writer is firmly convinced that it is the Local Conciliation Court and not the regular judicial court of the Praetor which is more of an equivalent to the Cantonal Judges.¹

1. See "Nozioni di Ordinamento Giudiziario", Battista, p.25. Also, the "Courts and Judges", Enser, pp.47-49.

THE PRAETORIAN COURT

The Praetorian Court is an inferior court. The Court, inferior though it is, exercises both civil and penal jurisdiction, a fact which is characteristic of a court little advanced in institutional equipment, although in the field of penal jurisdiction it has only the power to judge the least serious criminal charges and to impose minor penalties. In civil jurisdiction, notwithstanding the fact that it only judges litigations of first instance upon claims ranging from Lire 400 to 5,000, it exercises jurisdiction over appeals from the Local Conciliation Court. Again, in practice, the "Annuario Statistico Italiano" confirms that these Courts, spreading over the whole Country, may annually settle 25 % of the total judicial actions. This figure, second only to that of the Local Conciliation Courts, shows that they are certainly more useful in many respects than the higher courts.

There are in Italy nine hundred and eighty two Praetorian Courts. Normally the assigned circuit of each Praetorian Court is a "mandamento" which, as has been noted, is a larger administrative area than the "comune", the circuit of the Conciliation Court. But, in practice, this rule has been widely modified. As a result of the modification, the number of existing Praetorian Courts is not equal to all the "mandamento" in the Kingdom. In

some mandamenti, there may be more than one Praetorian Court, in others there may be none. It may also happen that one Praetorian Court is allotted to a small "commune" while in a larger city whose area includes two or more "mandamenti" there may also be only one Praetorian Court. In general, the arrangement of the Praetorian Courts in Italy is very uneven; in consequence, many kinds of Praetorian Courts evolve which are quite different in their assigned circuits, although generally similar in their organization. The following is a summary of the kinds of Praetorian Courts which now obtain in the Italian judiciary.

- 1.) "The Praetorian Court of Mandamento" is at present the only kind of Praetorian Court having the "mandamento" as its assigned circuit, and is undoubtedly the genuine example of the Italian Praetorian Courts. In the old days these were the only Praetorian Courts existing in Italy; the number of these Praetorian Courts has been greatly reduced although they are still in the majority.
- 2.) "The Urban Praetorian Courts" are located in cities. Each of their circuits includes two or more "mandamenti". The conditions for their establishment are: (1) a population exceeding 40,000; (2) the prior existence of at least one Praetorian Court of mandamento. As a rule when the Municipal Authority thinks it necessary, it makes a request to the Ministry of Justice and an Urban Praetorian Court will be instituted over and above the two or more Praetorian

Courts of Mandamento. The main significance of these Urban Praetorian Courts is that they only exercise penal jurisdiction, which is an exception to all the other Praetorian Courts.

3.) "The United Praetorian Court" occurs whenever, in a number of attached and densely populated "mandamenti" several Praetorian Courts of Mandamento are located. In this case, they must be united into one Urban Praetorian Court in the nearest city and henceforth the newly composed court becomes a United Praetorian Court. Such a United Praetorian Court is the most complicated development of all the Praetorian Courts and in it many sectional divisions may exist to exercise the various kinds of jurisdiction. Moreover, a greater number of judicial personnel may be assigned to it.

4.) "The Detached Praetorian Court" is instituted in a number of "communes" where, for certain reasons, the Praetorian Courts of Mandamento have been curtailed. These "communes" are usually located in vast country districts beyond the range of jurisdiction of any near-by Praetorian Court.

Each Praetorian Court in Italy consists of one Praetor sitting on the bench and two Auditors acting as Court Chancellor and Public Minister. The Praetors and Auditors are as a rule the newly recruited judges and "judicial-apprentices" and in age are all, comparatively speaking, youngsters whose mannerisms are very different from those elderly personages seen in the higher courts

of justice. When such a young Praetor presides over a trial, he never acts with patience because he has not yet learned the art of patience. Instead of questioning the parties, witnesses or lawyers in low deep and confident tones as an elderly judge usually does, he shouts at them in the most irritating manner or sometimes converses with them in an unnecessarily amicable fashion. The strength of his voice, the vigour of his movements and the ferocious temper which he usually exhibits when faced with the perplexity of a complicated litigation or criminal trial often arouse ringing laughter from the crowded audience or even irresistible amusement from the prisoners on trial.

Civil cases in the Praetorian Court are still dealt with summarily as distinguished from the "formal procedure" adopted in nearly all the higher civil courts.¹ In a criminal case, the preliminary process is the institution of a criminal charge, again a summary procedure called "summary instruction"² but the regular trial is not much different from that in a higher criminal court.

It has been noted that in civil and commercial jurisdiction the Praetorian Court may decide actions relating to personal property or benefits derived from immovables, when the claims range from Lire 400 to 5,000. In penal jurisdiction, it has the power to resolve cases involving the infliction of penal servitude under three years and pecuniary penalty from Lire 20 to

1 and 2, see chapter 7, page (211).

10,000. Over and above this, the Praetorian Court also exercises a number of special jurisdictions, such as (1) labour jurisdiction over "individual dispute" when the claim does not exceed Lire 5,000; (2) Praetors may exercise supervisory power over any "family council"; (3) ⁱⁿ criminal actions, Praetors as substitutes for the General Prosecutors attached to the Provincial Courts of Appeal may also receive information on crimes or issue warrants of arrest etc., as substitutes for the "Instruction Judges".¹

As has been noted, the Italian Praetorian Court is equivalent to the German "Office Court", (Amtsrichter), but does not resemble the French "Cantonal Judges" as Italian jurists have often thought. A parallel between these two judicial courts is strongly supported by (1) the similarities existing in their assigned jurisdictions and (2) in the qualifications of their presiding judges² and also in the fact that the special jurisdiction of the Italian Praetorian Court over the "family council" is of German origin in principle. For the ancient legal principle "Mundium" upon which this special jurisdiction has been based is a creation of the administration of justice

-
1. Supervision over the family council is a practice based upon the ancient legal principle of "mundium" or "mams" in which the State in place of the natural leader of families is allowed a certain "tuterial authority" over the welfare of private families. In Italy this "tuterial authority" of the State is traditionally exercised by the Praetors. See arts. 251, 271, 282-287, 303 of the Civil Code.
 2. The two Courts exercise both the civil and penal jurisdictions and the value of civil claims at the Praetorian Court is fixed at £40 and at the German Office Court is at £50.

in the German Period in Italy A.D. 568-1100.¹ The only difference that can be found between these two Courts is the fact that the German Office Courts in proportion to the larger State territory of Germany have larger circuits assigned to them than the Italian Praetorian Courts. However, these two Courts both represent a diffusion of facilities for the small litigant, offering him quick and cheap justice of high quality and in neither France nor England is there any exact equivalent to this provision.

1. See "A History of Italian Law", by Carlo Calisse.

THE TRIBUNAL

As a court of first instance, the Tribunal is the highest in the hierarchy of all the civil courts. Amongst the criminal courts, it is also the highest having first-instance jurisdiction for the less serious crimes. However, in a variety of comparatively unimportant cases, it is already a high court of appeal for the Praetorian Courts. Again, in comparison with the two inferior courts that have just been considered, this Tribunal is certainly more complicated and advanced in the development of its institutional arrangements and in the jurisdiction assigned to it. Even the judicial proceedings of the Tribunals, as provided by the law are regulated by "formal procedure" which is for the most part different from that practised in both the Courts of Local Conciliation and in the Praetorian Courts.

In view of the institutional arrangements, a Tribunal is usually divided into a number of Sections. To each of them the First President of the Tribunal appoints a Sectional President and assigns him most specific jurisdiction. Therefore the so-called Civil Tribunal is in fact no more than a Civil Section of the Tribunal and a Criminal Tribunal merely a Criminal Section of the Tribunal. Since the Law of October 4, 1928, (No. 2299) has been in force, one of these Sections has become customarily the special section for labour jurisdiction

and it is often known to the public as one of the Special Courts for labour disputes. This special section, despite the similar field of its jurisdiction, its uniform internal constitution and its trained judges and president as compared with the other sections of the Tribunal, has, nevertheless been regarded as one of the many distinctive features of Fascist justice. Moreover, its existence has often caused much discussion and criticism in international circles.

But, as an exception to the rule stated, the various jurisdictions of a Tribunal may also be confirmed confined to one section, if the average amount of business before the Tribunal is not great. In such Tribunals there would of course be no Sectional Presidents but there will be a mixed section and the First President of the Tribunal will direct the whole arrangement of this section. When these Sections are established, the First President usually takes over the presidency of the First Section which always possesses civil jurisdiction. For the other sectional presidencies, he may nominate from the presiding judges those with seniority and experience. He is also responsible for other arrangements regarding personnel. For instance he is authorised to transfer judges from one Section to another. On occasions of urgency, he may even transfer a Praetor from the Praetorian Court to perform service at the Tribunal. Or, for the same cause, he may request the transfer of a judge

from other Tribunals. The First President is also authorised to act in the case of other administrative arrangements such as the fixing of public hearing, the giving of permission to judges for temporary absence or the issuing of orders. In brief, the First President of the Tribunal is like the First President of other courts shouldering the full responsibility of the administration of the court.

In the Tribunal, there must be three judges to preside over the hearing of cases.¹ This is the so-called "Collegial Principle" that is adopted in most of the Continental courts. The one who sits in the centre is usually the First President or a Sectional President of that Tribunal. Besides this, there is an Usher who announces the case at issue and a Chancellor whose function it is to keep the record of proceedings etc. If it is a criminal trial, there must always be a Public Minister present, although on civil hearings the Public Minister may also be present. Both the Magistrates and the Public Ministers belong to one category of "Magistratura Collegiale", which is parallel to the categories of Conciliators and Praetors. In this category there are various grades; those who serve in the Tribunals compose the few inferior grades and are generally given the title of Judges. But those who are assigned to

1. Now altered according to the new Code of Civil Procedure; see page (205).

higher courts are naturally of higher grades and are given the title of Councillors. They are a class of fully trained and qualified judges, fully comparable to English judges. The details concerning the Judges of the Italian Tribunals will be dealt with in the following chapter on the "Judicial Personnel".

Secondly, in respect to jurisdiction, we may remind ourselves that a great variety of jurisdiction is assigned the Tribunal. In the second chapter we saw that in the first instance a Tribunal exercises jurisdiction over civil claims exceeding Lire 5,000 or commercial ~~jurisdiction~~ litigations under the value of Lire 1,500. In the criminal jurisdiction, it tries serious and important charges which may involve detentive punishment from three to eight years or pecuniary penalty ranging up to Lire 20,000. As a court of appeal, the Tribunal has power to decide both the civil and criminal appeals from all the Praetorian Courts.¹ Besides, it exercises special jurisdiction over individual labour disputes, both in the first instance and over appeals from the Praetorian Courts.

Again, in respect to jurisdiction, the Tribunal exercises another specific jurisdiction, namely, the guardianship of orphans left by those who died in war. This duty is devolved on one of the Judges. The context of such guardianship is arranged in accord with the Civil Code. The arrangement is that in each judicial year the First President of a Provincial

1. This has been altered according to the new Code of Civil Procedure; see page (205) .

Court of Appeal appoints a Judge in any of the Tribunals situated in the chief towns or the Provincial Capital to bear the full responsibility of the said task. But this function has only been conferred lately by the Law of 1929, (No.1397) and can well be viewed as one of the new aspects of Fascist justice.

Finally, some of the Tribunals retain the power of supervision over penitential establishments or those so-called "special establishments" which happen to be situated within their circuits. According to Art.144 of the Penal Code, the execution of detentive punishments should be supervised by the Judge. The Law prohibits, however, the leaving of such serious matters to the unreserved disposal of those officers in charge without proper supervision. In the matter of conditional release of convicts, for instance, or admission to work in the open etc., cases have to be decided by magistrates. Such functions, besides being discharged by these Judges appointed from Tribunals are also exercised by a number of Praetors from the Praetorian Courts. But whenever these magistrates find defects in the institutional arrangements of the abovementioned establishments, giving rise to grievances, they do not have the discretionary power to reform the organisation in order to remove the grievances. For such institutional reforms as are necessary must rely on the Ministry of Justice acting at the instance of the Public Ministers.

Thirdly, in so far as the assigned circuits are concerned, the Tribunal's area is only the City-Commune, which is actually the same area as that assigned to the Courts of Local Conciliation. The former, however, is situated in the Provincial Capital or in other important towns which have become the centre of the people's economic life. As a matter of fact, there is no exact allotment of Tribunals; hence, in consequence of the Laws of March 24th and December 28th and 30th, 1923, a List of City-Communes has been issued wherein the Tribunals should be instituted. According to that list, there are 138 Tribunals in the Italian State.

In the Italian judiciary, the Tribunal is the court which more than any of the others bears resemblance to a great number of judicial courts of other States. It is comparable to the County Court in England; to the Tribunal of First Instance and the Correctional Tribunal in France; to the Regional Court in Germany. These corresponding courts in the respective countries are for the most part the busiest judicial units and have achieved great importance in the life of the people. But in Italy, the reverse is the case. According to the "Annuario Statistico Italiano" of 1938, the judicial work of the Tribunals covers annually about one tenth of the total judicial cases. The percentage is much lower than that of the two inferior courts and that of the Court of Appeal. The reason for such a development is primarily the fact that the Italian judiciary has too many courts. The greater number of first instance jurisdictions are now undertaken by

the numerous Praetorian Courts by means of a process which is often more efficient and less expensive. It is natural that little should be left to the Tribunals. Another reason is connected with the inefficient procedure adopted by the Civil Tribunals. We know that before a Civil Tribunal cases are conducted with formal procedure. Parties are not required to put in an appearance. Civil cases are for the most part left entirely to advocates. As a rule the latter always prefer a negotiation between themselves to a public fight before the Court. While the negotiation is in progress, they will have the trial postponed again and again and in this case, the Court has no prerogative to stop this postponement. Finally, the advocates may reach a settlement more lucrative to themselves than to the parties; they will then cancel the litigation pending in the Tribunal. The Court again has no power to refuse the cancellation. The result of such an unusual development is, however, the general diminution of judicial cases that the Tribunals might settle.

In view of these defects, abolition of the Civil Tribunals or a thorough reform of the Tribunal's civil procedure would most likely prove to be adequate reforms. In the Draft of the new Civil Procedure the latter method has already been projected and the judiciary seems to be obviously anxious for this reform. But to the advocates, it is naturally not welcome in spite of the fact that they are not free to argue

or object in the same way as many distinguished English lawyers did against the proposals for general legal reform in England.

THE COURT OF APPEAL

The Courts of Appeal only deal with civil and criminal appeals. They rank, as the ordinary appellate courts of other countries, next to the supreme court of the whole judicature. In Italy there are at present twenty two such superior courts. Amongst them, eighteen are allocated to Provincial Capitals and are commonly known as Provincial Courts of Appeal.¹ Six are located in important communes and are named Detached Sections of the Court of Appeal.² But both of them are assigned with equivalent powers and separate staff. It should particularly be understood that the six Detached Sections are all recognised as autonomous organs. Both judicially and administratively, they are not under the control of the Provincial Courts.

The main function of these appellate Courts, as has been noted, is confined to judicial appeals and these appeals are all brought from interlocutory decisions rendered by the Civil and Criminal Tribunals.³ As we have already seen, the judicial work of the Tribunals has been limited to only one tenth of the total judicial cases in a year, and appeals from that small percentage cannot be more numerous. According to the "Anuario

1. They are: Ancona, Aquila, Bari, Bologna, Brescia, Cagliari, Catania, Catanzaro, Firenze, Genova, Messina, Milano, Napoli, Palermo, Roma, Torino, Trieste, Venezia.

2. They are: Caltanissetta, Fiume, Lecce, Perugia, Potenza, Trento.

3. See the new provision on pages (215), and (226).

Statistico Italiano" of 1938, the percentage of the judicial cases which have been annually decided by the Courts of Appeal, is only 1.4% and is equal to one in five of the Tribunal decisions. Apart from this record, the twenty two Courts share among themselves about 300 cases each year on special subject matters which are mostly of the first instance jurisdiction.

The obvious conclusion to be drawn from the statistical records is that this Court of Appeal is not an organ of first importance in so far as its judicial function is concerned. Its significance must rather be attributed to other factors, which are not closely associated with that function. One is its administrative responsibility, conferred by the Ministry of Justice for the whole judiciary of one Province. The other is its special classes of jurisdiction which involve a number of unusual subject matters such as labour disputes, public water regulations and juvenile offences. Its administrative responsibility has been fully explained under the discussion on the judicial control of the Ministry of Justice.¹ The special jurisdiction will be explained presently in connection with the Court's institutional structure.

The First President who is directly appointed by the Ministry of Justice from the qualified Councillors of superior rank, presides over each Court of Appeal. It is he who directs the administration of the whole Court in appointing Sectional Presidents,

1. See page (84).

-37-

transferring Councillors between Sections or Judges from Tribunals and confirming decisions given by the Court etc.. Besides this, he has power over the administration of all the judicial courts in his Province. He and his Court in one Province stand in a relation that is similar to that between the Minister of Justice and his Ministry in the State. In rank he is third among all the judicial personnel. His salary is Lire 3,000 a month which is also the third highest in the scale of the Italian judicial salaries.

The institutional structure of the Court of Appeal has been well-developed, particularly along the line of the sectional division. But the technicalities of judicial routine there are even less complicated than those of the Tribunals or the summary procedure of the Praetorian Courts. However, its most striking feature is the abundance of subordinate organs, each possessing distinct jurisdiction. They are different, of course, from the six Detached Sections that have just been mentioned for the latter are instituted in Communes, as independent courts with powers and organisation equivalent to those of the eighteen Provincial Courts. These Sections which we are now going to consider are only the subdivisions or departments of the Courts of Appeal.

It is the usual practice for a judicial court to be divided into several Sections such as the Civil, the Commercial and the Penal, etc.. But here in a Court of Appeal, a great number of other Sections are added, some of which are known as the Special

Courts. It is interesting to note however that these Sections are not all formed on a uniform plan, despite the fact that they are all subdivisions of the same Court.

The Civil and Commercial Section:

The Civil and Commercial Section is usually regarded as the First Section of the Court. Comparatively speaking, this Section is the one with the most business. Hearings in this Section are before five Councillors, with the First President of the Court usually assuming the Sectional presidency. This Section also keeps its own Chancellor, Usher and even its own court-room and office. Although they are all under the same roof as the main court-building, yet they seem to form a quite independent organisation.

The jurisdiction of this Section is confined to appeals on the interlocutory judgments rendered by the Tribunals. These interlocutory judgments are pronounced for cases which are adjudged in the first instance before a Tribunal. But against the final judgments of the Tribunal, pronounced on appeal from the Praetorian Courts, there lies no further appeal to this Court.

The Penal Section:

The Penal Section has four Councillors, and one of them is appointed as the Sectional President. In addition to its own staff such as its Chancellors and Ushers, there is a Public

Minister and a small staff attached to him. This Public Minister is officially of the same rank as the Councillors serving in that Court and his training and recruitment are similar to that of the latter.

The court-room of this Section is usually located in a large lofty chamber on the ground floor where there is sufficient audience to fill the allocated space, as the adopted procedure seems much too advanced and monotonous for the common people. Again, in a Court of Appeal, neither the prisoners nor the private parties to a case put in an appearance. It therefore seems as if the attraction is insufficient to draw a curious crowd.

The jurisdiction of this Section is also confined to appeals criminal appeals of course, from the Penal Section of Tribunals, and are likewise based on interlocutory judgments involving the imposition of "Reclusiones" or "Multas". This is because criminal appeals from the Praetorian Courts, regarding less serious crimes, are brought to a conclusion with the delivery of a final judgment by the Tribunals and no further appeal can be brought before the Court of Appeal.

The Section of Instruction:

In close connection with the Penal Section is the Section of Instruction for criminal charges. In the old days, there was the Section of Accusation working in its place, but the Section of Instruction has been substituted for it since the enforcement of

the new Code of Criminal Procedure.

As a rule, the first president of the Court appoints the whole staff of five Councillors for this Section. These Councillors^{are} of the same judicial rank as the Councillors of other Sections. For daily routine work, however, only three of them sit. Again, in this Section, the summary procedure is adopted, as an exception to the formal procedure that is generally adopted in the Court of Appeal. Moreover, the Section has power to require the personal appearance of parties in order that they may answer questions before the Court.

Special Sections:

There are also other Sections assigned with special jurisdiction and called Special Sections, or sometimes, the Special High Courts. They are the Labour Court, the Tribunal for Public Water and the Juvenile Court. As all are only affiliated organs of the high Provincial Court, the composition of them is for the most part similar to that of the Sections considered above. But, owing to the special nature of their jurisdiction, experts or technicians are often assigned to the bench as assistants.

The Labour Court at the high Provincial Court is not only a court of first instance for collective labour disputes but also a high court for appeals brought from the Tribunals over individual labour disputes. The decisions on appeal rendered by this Court are final but its first instance decisions may be carried on appeal to the supreme Court of Cassation.¹

1. See chapter 7 on "Special Justice".

The Tribunals for Public Water are not instituted in every Provincial Court of Appeal. They are only attached to eight Courts which are located in the larger Provincial Capitals. The Jurisdiction assigned to them since the Law of 1919 is confined only to such subject matters as navigation, hydro-electric power, fishing and utilization of water power, matters which have owing to the geographical factor become frequent centres of dispute in the economic life of the people. Beyond these Tribunals, there is a Supreme Tribunal for Public Water, instituted in Rome to deal with appeals from the decisions of these Special Tribunals of Public Water.

The Juvenile Court in Italy was first established in 1934 and only adjudges individuals under the age of eighteen. Its jurisdiction is mainly criminal and reformatory, but in certain respects also civil. In name, the Juvenile Court is part of the Court of Appeal, but most of its internal arrangements and judicial routines are regulated by special legislation. Generally speaking, this Section differs considerably from the other Sections.

The particular features, constitutions, jurisdictions and procedures etc. of Special Sections of the Labour Court will be fully discussed in a later chapter on the Italian Special Justice.

THE COURT OF ASSIZE

The Courts of Assize are all distributed on the same lines as the Courts of Appeal, one to eight being situated in each district of the Courts of Appeal. Altogether there are ninety one Courts of Appeal in the Kingdom. These Courts are all first instance courts dealing with major criminal offences. They may impose the death penalty and life imprisonment. As judicial units they are considered to be as high as the Courts of Appeal and beyond them there is only the supreme Court of Cassation.

The first notable feature of the Assize Court is its Bench (Unico Collegio), which is composed of two thoroughly trained Councillors and five lay Assessors. One of the former is appointed as First President from among the Sectional Presidents of the Appellate Court. The other is appointed from among either the Councillors of the Courts of Appeal or the Sectional Presidents of the Tribunals. The five Assessors are nominated from among those working in public offices and academic or medical circles. Otherwise, they may be the chief officers of the local Corporations and Party-organisations. Moreover, they must be holders of an institutional certificate or university diploma and they must be between thirty and sixty years of age. In conformity with the Law of Oct. 10th, 1934, they must also be members of the Fascist Party. But the judicial magistrates, military men and advocates are not admitted to the office of Assessor. The nomination of Assessors is made by the Ministry of Justice for a term of four

years. The reward for sitting one day in Court is fifty Lire, which is about ten times the reward of the ordinary English jury, which is one shilling a head per case.

The system of the Unico Collegio bench is cited as a parallel to the German system of lay judges, and it does not differ much from the ordinary jury system. But, in point of fact, it is neither an exact copy of the German schöffⁿen nor an equivalent to the jury system. The German lay judges, as we know, only preside over the Office Court and Regional Courts which are equivalent to the Italian Praetorian Court and Tribunal. Above them there are the high Jury Courts, Supreme Regional Courts for appeals and the Imperial Court at Leipzig. Again, the judicial power of the German lay judges, though expanded both in law and in fact, is rather limited with regard to its scope. But their Italian counterparts preside over the highest criminal courts of first instance and are assigned with a field of jurisdiction which is in comparison virtually unlimited. Furthermore, their decision is final throughout the whole course of criminal procedure. Apart from a revision before the supreme Court of Cassation, which can grant a new trial, there is practically no remedy for a decision since it can neither be altered nor can other means of adjusting grievances or injustices contained in it be resorted to. Such unreasonable but authoritative expansion of the powers of the Italian lay Assessors is good evidence of the fact that an accused person before the high Court of Assize is in no sense protected against

-44-

the abuses of the lay Assessors. Secondly, the German lay judges sit in small numbers, usually not more than two of them on the Bench. Moreover, it is an acknowledged practice that the more serious the charge, the less the number of lay judges sitting on the bench. In the court dealing with the most serious crimes, there is no lay judge; instead, a jury sits with three trained judges. But in Italy, the practice is entirely different. The judicial Assessors sitting on one case are five in number and the trained judges on the bench are reduced to two, the power of these latter being equal to that of the lay Assessors. It is to be remembered that in Italy only the inferior Praetorian Court is presided over by a single trained judge. The bench of the Tribunal consists of three judges and the bench of the Court of Appeal consists of four or five. Why should the bench of this, the highest of the criminal Courts, be presided over by only two thoroughly trained judges? The answer given by the authority is rather ambiguous; it is explained that "this arrangement is a most radical and rational reform of the old jury system."

Again the Unico Collegio is different from the ordinary jury system. The main difference is that the jury's work is confined to nudging the facts of a case. The judge in the chair usually sums up the case when the trial is over and leaves the verdict to the jury. But sentence can only be given by the judge, and the jury have nothing to do with it. This is the general procedure in

the Anglo-American courts and some French or German courts wherever the jury system is in operation. The Italian Assessors, however, take part in the proceedings of the bench, enter into the "deliberation" in Camera, and participate in the voting of the sentence.

The advantage of this system is said to be twofold. For the direct benefit of the accused, it is thought wise to have on the bench representatives from the community to which he belongs, who will not only echo the public feeling in the interest of the public weal but also be sympathetic towards the accused. It has also been claimed in support of the new judiciary that the union of the free citizens and magistrates will reinforce the prestige of the bench.¹

All these arguments seem hardly tenable. It is a well known fact that in Italy the entire press is controlled by the State and public opinion, as we know it, has long been suppressed. It is ridiculous to presume its existence or to claim adequate regard has been paid to it. Nor is it probable that public feeling in favour of the accused would be shown by these lay Assessors, since these men are all Fascists and their feelings are coloured in the same way as were those of all partisans of political parties. There cannot be the slightest doubt that their sympathy will be lavished on their fellow partisans. If the accused happens to be their political opponent or is known as

1. See "Relazione della Commissione Parlamentare del 1931" and "Relazione al Re di S.E. Il Guardasigilli" by Signor A. Rocce.

such, little mercy will be shown even if the charge at issue is not political.

Finally, there is not much substance in the phrase "free citizens", mentioned above. No one could now sincerely believe that "free citizens" could still live in a Fascist State. The Fascists themselves are surely not free citizens, still less are the non-Fascists who are constantly suppressed by the Fascists. Moreover, there is no place in the Kingdom for anti-Fascists. Thus, in point of fact, a union of "free citizens" and magistrates is impossible in the circumstances and a union of five sevenths Party partisans and two sevenths trained judges can not ensure the traditional prestige that a judicial court should have.

It is of great interest to note, in the above discussion, a great variety of contradictory arguments which have been advanced by the Fascists in defence of their judicial reforms. First they declare that the Fascist judiciary should have nothing to do with any democratic principles. As the jury system is of democratic origin, they have resolutely adopted the system of lay assessors, which, so they think, is of German origin; but at the same time it is claimed that the system is in substance not much different from the jury system and, it is argued, public opinion is upheld by the introduction of lay assessors. All such arguments, in addition to such highly polished phrases as the "public conscience" and the "free citizen" etc. are paradoxical, and do not conform

to the plain facts. In the Prefaces attached to the Law of March 23, 1931 and that of July 5th, 1934, which authorized the establishment of the Assize Court, one finds that the writers are in an awkward position in advancing these unnatural and dishonest arguments.

Another notable feature of the Court of Assize is that there is no appeal granted against its decisions. The only check to the lack of coherence between the provisions of the law and the requirements of actuality is the possibility of revision before the supreme Court. This denial of appeal is a worse defect than the composition of the Bench, for the decisions of this Court are reached by vote, five sevenths of the votes being cast by the lay Assessors. The correctness of any such decision is naturally doubtful. Moreover, the lay assessors, owing to the absence of any legal training and their lack of integrity, are prone to judge partially. Although such an evil is unavoidable, even in the jury system, it is accentuated in the Italian system of Assessors. The power of the jury is limited to the giving of verdicts but the assessors are given full powers of jurisdiction. Abuses of judicial power can therefore be more serious. Finally, it is a general rule of the Italian judiciary that one appeal and one revision, before two high courts, must be given separately to every judicial sentence, in order to enable either party to adjust its grievance against an inferior court. The procedure in this Court is therefore the only exception to the rule. In the decision of this highest criminal Court, no appeal is granted, in spite of the

fact that the most serious punishments may be imposed.

In view of these special characteristics attaching to the Court's composition, jurisdiction and procedure, it seems evident that the possibility of appeal from ^{its} the decisions to a well-constituted bench of trained judges, should be of first importance. As yet, however, any such provision has been overlooked, the denial of appeal to the decision of the Assize Courts being in perfect harmony with the Fascist conception of criminal procedure.

THE COURT OF CASSATION

The Court of Cassation is the highest Italian Court. It is a central and single Court with no regional counterparts. The situation was different prior to 1923, when five Courts of Cassation, at Turin, Florence, Naples, Palermo and Rome each retained their rights within their respective districts independent of civil jurisdiction. The Court in Rome, however, received special powers, among which the most eminent were those of jurisdiction over criminal cassations and supreme power to settle conflicts of jurisdiction.¹ The other Courts were worked out on a rather uniform plan. The chaos at the time seems to have been even more serious than that now manifested in England between the House of Lords and the Court of Appeal where two Courts, one after the other, exercise the same amount of power in the interpretation of the same body of laws.² The result of such chaos in Italy was confusion of interpretation and the incomplete unification of the civil and criminal laws and procedures; this situation prevailed from the time of the great judicial reforms in 1870. In 1923, the Fascist Regime resolutely abolished the five Courts of Cassation, centralizing supreme appellate jurisdiction and so completing the long-evolving unity of the Nation's

1. See "Jurisdiction" page (60)

2. See "Courts and Judges" by Ensor, page 13.

Civil and Criminal Codes. That consolidation of the Italian judiciary in 1923 is generally recognised as one of the few notable and useful measures passed by the Fascist Regime in its early years.

Composition of the Court:

This united Court of Cassation is now located in Rome. Its exact position is in the left wing of the magnificent Palazzo di Giustizia, in which the Ministry of Justice and a number of local courts are also situated. In this enormous building, the Court actually occupies only a suite of five rooms on the second floor, which are all strung together in the shape of a semi-circle, with their entrances opening into a single corridor. The rooms are not equal in size; some of them are very lofty and dark; some are much smaller and brighter. But they are all well-constructed, with marble finishings and furnished with beautifully carved screens, benches and desks etc.. Within these rooms five Sections are located which constitute the parts of the supreme Court. The other compartments on the same floor extending over a space much larger than that of the court rooms, are assigned to the Presidents, Councillors, Chancellors and other staff of the Court, as their private offices.

Of the five Sections, three are civil and two are criminal. But they are each alike in being presided over by an equal number of personnel, namely, five councillors, one sectional president, one Chancellor and one Usher. In a Criminal Section or even in a Civil, one Public Minister is of course present. At the head is the First President of the Court, who is next in importance to the Minister of

Justice. He directs the administration of the supreme Court, as well as indirectly the administration of all the judicial courts. He appoints the Sectional Presidents of his own Court, and recommends the First Presidents of the lower courts. For the promotion of judges of high rank, his recommendation is also indispensable. Therefore, in the sphere of purely judicial officials he is indeed the man of first importance. His Status naturally regarded as the summit of a judge's career and his monthly salary — 10,000 Lire (= £105) — as accorded by the Statute of 1923, is also the highest that exists among all the judicial salaries in Italy. At the moment, the presidency of the Supreme Court is occupied by a very elderly and refined man, named Mariano d'Amelio, who was kind enough to give the writer a short interview and, upon learning that the latter was a student in England, complained that the English people were not interested in any other judicial systems than their own.

One thing respecting the composition of the Cassation Court particularly deserving attention is the corporative deliberation which is participated in by all the Presidents and Councillors of the five Sections. "Deliberation" in Italian courts means a secret convention "in camera", which as a rule is held only among the judges who have presided over a given trial. In Camera, the judges freely discuss the common issue among themselves and a final decision thereby reached. But here, in the Cassation Court, the rule regulating ordinary deliberations is not kept. The prevailing rule and that which must be perfectly complied with, in

consideration of the Court's major function, is the unification of interpretation. All the cases brought before the Cassation Court are usually discussed and settled in a united convention attended by the whole assembly of the Court's judges, which may sometimes number over thirty persons. Moreover, the vote in support of the final decision of this supreme Court must be absolutely unanimous.

The list of trials for each Section is prepared by a special group of magistrates who are inferior in rank to the Councillors of the Cassation Court. But the monthly alteration of the presiding personnel from one Section to the other is entirely at the discretion of the First President. The latter, as a rule, may also take up a sectional presidency himself. Trials before the Court, of whatever nature, or in whatever Section, are all held with an open door, just as in the trials held in any of the lower courts. But, as a matter of fact, a large audience never appears, largely because no parties nor witnesses to any pending issues are required to put in an appearance. One sees only a long bench of elderly Councillors and two or three advocates making long and monotonous speeches, in turn followed by another solemn speech from the public prosecutor, which may last longer than the two previous speeches. It will be appreciated that such a hearing does not stir the public interest to any great extent.

Functions:

The present Court of Cassation in Rome, as provided in the Law of December 30th, 1923, is instituted for the paramount function of unifying the law in the Kingdom and upholding its exact interpretation. In the meanwhile, the essence of its function is the consolidation of the whole legal system. The rule is that all the merits of a case must be settled at the inferior courts and only disputes on points of law are to be decided in this supreme Court. That is why the Court of Cassation does not judge as a court of first instance, nor does it alter any appellate decision as a court of appeal. Its judicial work is confined to either confirming or nullifying a judgment rendered by any of the courts that are inferior to it. If a decision on cassation is confirmed, (that means the motion is rejected) the process practically ends; what follows is only the enforcement of a confirmed judgment.¹ But in the event of a nullification, the case at issue (meanwhile there is no existing decision), is given over to a competent court for fresh trial. Concerning these provisions, one thing is of considerable importance, namely, that there is virtually no limitation imposed by the value and subject matter of a case, to restrict it from proceeding to the supreme Court. In Italy, whenever a judicial case is considered "impugnabile" by virtue of its legal aspect, leave is granted to appeal to the Cassation Court. The chance for each case is, moreover, equal and the material value of the issue is not a decisive

1. See pages (217), and (226).

factor.

Secondly, apart from its major function, the Court of Cassation is also engaged in the task of regulating the "power of the judiciary and the administrative authority". It is particularly concerned with the judicial courts and the numerous administrative courts. In this context, the "revocation" against the Council of State and its capacity to sit as a superior administrative court are also worth noting, since the law provides that wherever a decision rendered by the latter involves grave jurisdictional defects, the Court of Cassation can exercise discrimination power. Another aspect of its exercise of discrimination power is that over disputes arising from conflicts of jurisdiction between two judicial courts. Such disputes usually occur when a case has been brought up with duplicate proceedings before two different courts. The solution is resort to a common superior court. In case the two conflicting courts are themselves superior courts, as the Courts of Appeal or the Court of Assize, their common Superior court is then the Cassation Court. Otherwise over such conflicts, the latter Court would only exercise discrimination power in the course of appeal, if the issue had already been tried in a lower court.

Thirdly, in the sphere of civil and criminal jurisdiction, the function of the Cassation Court is a little different. In the former, the Court can only nullify judgments rendered by any appellate courts. But in the latter jurisdiction, the Court can

-55-

also nullify an inappellate judgment as rendered by any specific court. That is to say, even a sentence declared by the high criminal Court of Assize, though inappellate in principle, is yet granted with a cassation before the supreme Court. Thus the conclusion that may be drawn from the rules mentioned above is that in Italy, each judicial case can have appeal to one appellate court and (on points of law) to the Court of Cassation. There can therefore be altogether three trials for a case. If, for instance, a case is tried in the first instance at the Local Conciliation Court, the two successive trials will be held at the Praetorian Court and the Court of Cassation. If the first trial has taken place at the Praetorian Court, the next appeal is to the Tribunal¹, or if the first trial is before the Tribunal, then the appeal is before the Court of Appeal; but the third trial, which is merely held in the interest of law, will be conducted before the supreme Court of Cassation. So the process of appeal does not necessarily go through all the successive tribunals, which are hierarchically ranged above the court where the case first presents itself. Moreover, the three trials are each of different nature. None of them repeats the same function. As can be easily seen, the trial of first instance is confined to a preliminary examination of the facts and an application of the law to the facts so found. The trial on appeal, held at a higher court, aims at determining the validity of the previous judgment (At this stage, new questions

1. This has also been altered since April 1, 1939; see chapter 7, page (213), and (226).

of fact may still be introduced) The Court is, however, authorised to consider the issue both on law and on merits. But the third trial before the Court of Cassation is strictly confined to points of law. Its sole function is to examine the application of the law by an appellate court in any given case in order to see whether it is correctly interpreted or not. Regarding the merits of a case, the decision come to at the appellate stage is practically final. A subsequent hearing before this supreme Court is mainly concerned with the consolidation of rules and laws in the system.

Conclusion:

The conclusion to be drawn from the above discussion on the judicial functions of the Cassation Court is that, in Italy, litigation is, on the whole, conducted on a very deliberate and carefully worked out plan. In the first place, the chances of appeal are at least evenly distributed, and the privilege of demanding an ultimate revision on points of law before the supreme Court of Cassation is granted whenever desired. No limitation is set upon the value of an appellate claim. Indeed, there is no such weary drifting from nowhere to nowhere as is found in a civil suit in England, where procedure demands passage through at least three different courts, before the supreme court can be reached. Also owing to the high charges of lawyers and the extreme tardiness of execution in the latter

courts a less well-to-do party to a suit cannot possibly hold out long enough for his case to proceed to the House of Lords. But in Italy, as well as in other Continental Countries, the inconveniences of the English system of justice are fortunately non-existent. Litigation before the Italian courts during whatever stage, is, comparatively speaking, much cheaper and more expeditious.

In the second place, the judicial work of each court in Italy is precisely assigned, so that apart from possible conflicts of jurisdiction, overlapping of power is usually not found. As has just been noted, the three trials to which each case is entitled, are held under distinct jurisdictions. Hence one problem which is faced in cases before the House of Lords in England, is again non-existent. As Mr. Ensor has pointed out in his valuable book on "Court and Judges", the judicial work of the House, which is confined to hearing appeals from the Court of Appeal, fulfils virtually the same function as that once exercised by the latter Court. He says that "having had the law interpreted in the Court of Appeal by three judges who are supposed to stand on the very top pinnacle of English judicial quality, why go on to seek a fresh interpretation from four or five more whom no body can pretend to be either better or indeed different in any way?" Thus Mr. Ensor frankly admits his doubts as to the wisdom of such an extremely exalted tribunal existing at all, resulting as it does in an enormous increase in the cost and imposing considerable delay upon the litigants.¹ In this respect at least, Italy has been one of

1. See Ensor, page 13.

of the more happily situated countries, since she possesses a well-planned judiciary, which shows no such perplexing defects as those found in the English system.

It must be admitted, however, that the available statistical records of the judicial work of the Cassation Court do not prove the system to be as beneficial as might have been expected. In the "Annuario Statistico Italiano" of 1938, it is stated that from 1934-36, the average civil and criminal cases coming before the Cassation Court numbered 3,990 annually, of which only 18% had their preliminary decisions nullified and rewarded with new trials. More than 65% of the cases were rejected. In criminal jurisdiction, the average was 9,621 cases a year which amounted to more than two thirds of the Court's civil litigation. But the percentage of the rejected cases was as high as 84%. Those granted leave for new trials were only 16%.

It can easily be seen by these records that the judicial function of the Italian supreme Court is mainly focused on the unification of law. When it is viewed from the private parties' point of view, it is not at all a useful organ, designed to serve the private interest of the people. For in practice, it has so far proved that the chance in favour of an appellate party succeeding is slight. Whenever a judgment has been given on a case of appeal by any appellate court, it is practically final. It matters little whether or not it comes up for "cassation". Moreover, it may have already been brought up before the supreme

Court. Whatever the case, the final result of the judgment will most probably be the same. Moreover, the provision of "cassation" in the Italian system does not involve a stay of execution. In other words, once a judgment has been delivered by an appellate court, it is then capable of being executed and that execution proceeds irrespective of the outcome of a further "cassation" at the supreme Court that may follow. Hence it must be remembered that the Cassation Court exists only in the interest of law. Therefore suits before it that may only serve the interest of private parties, are not at all encouraged.

CHAPTER V

THE JUDICIAL PERSONNEL

.....

THE JUDICIAL PERSONNEL

The judicial personnel of the Italian courts consists mainly of the Conciliators, Magistrates, Assessors, Chancellors and Secretaries. Each of them forms a distinct professional group. The Conciliators are recruited from the lay people and function at the Local Conciliation Courts. The Assessors are also recruited from the lay people, for a maximum term of four years, to sit on the bench of the Assize Courts. The Chancellors are the clerks of the courts, who keep the records of trials and look after the circulation of all the judicial documents. Their offices, attached to the various courts, are generally known as the Chancelleries, which are to a certain extent equivalent to the registrars of the English courts. The Secretaries of the Italian courts are recruited on the same conditions as the Chancellors, only their function is to assist the Public Ministers, and to attend to the administrative work involved in the activities of the courts and to act for the most part as the court treasurers.

The Magistrates compose the chief category so far as their judicial functions and the significance of their status are concerned while those just mentioned would be more appropriately called accessory functionaries. The former are generally given the title of "Judicial Officials" and their profession is generically termed the "Judicial Magistracy". They now constitute a total of 4,755 persons who function in all the courts superior to the Conciliation Courts. As a rule, these people are trained from the

beginning as Judicial Officials and their profession is neither mixed up with any other judicial profession nor with the profession of advocate or solicitor. It is moreover distinguished from the others by the esteem attaching to it. However, in this point, the Italian differs greatly from the English system of "judicial officials" in which officials are all appointed from among the most successful lawyers and are generally termed "judges".

In Italy a student has a number of careers open to him upon graduation from any law university or its equivalent; he may either become a Judicial Official, a lawyer, a Chancellor, or Secretary of the Court. To be a Judicial Official is naturally the most esteemed career and the qualifying examination is also of the highest standard. The profession of lawyer may be more lucrative but the qualifying examination is equally elaborate and later the competition for business, caused by the over supply of lawyers, is exceedingly trying. To be a Chancellor or a Secretary is, however, the last choice, since this career is not only inferior to that of a Judicial Official but also less profitable than the vocation of a lawyer. Moreover, once having chosen one of these three careers, the choice is henceforth decisive and permanent. There is no possibility of transfer half-way, unless the one is given up and the other is started from the beginning. As the other two members of the judicial personnel, the Conciliator and the Assessor, are only recruited from the lay people, their careers are not often desired by legal students, nor are their appointments reckoned as within the proper judicial profession.

THE CONCILIATORS AND ASSESSORS

The Conciliators are recruited from the laymen and are not required to possess legal training or judicial experience. Their status is, as a rule, not designed for law students nor is their function considered, strictly speaking, proper judicial work. Their main duty in the Local Conciliation Court is not to judge between disputants but only to persuade them to reach a compromise.

Each Conciliation Court in Italy is staffed with one of these Conciliators, one Vice-Conciliator, and clerks. As there are at present about 7,663 Conciliatorian Courts in the whole Kingdom, a rough calculation puts the total Conciliators at about fifteen hundred persons. According to the provision of the Decree concerned, (of Dec. 26th, 1892 and of July 28th, 1895), all these Conciliators are appointed by the First President of the Provincial Court of Appeal with the approval of the General Prosecutor attached to the same Court. The panels of candidates for conciliatorship, according to which the appointments are made, are provided by the various administrative authorities of the Commune and they are, as a rule, subject to annual revision every August.

The qualifications for admission to the panel are numerous. They are: (1) An age of over 25 years, (2) Residence

in the Commune, where the Court is situated, (3) A period of public service, be it civil, judicial, diplomatic or military, official rank not being considered to count. Even a clerk in the court, or a secretary in the Communal service, may be eligible for the post, but other civil servants or officials, who are in office at the time of enlistment, are ineligible.

The arrangement of the Conciliators is also subject to the control of the high Court of Appeal in the Province to which the Communes belong. The First President alone can alter their arrangement whenever he thinks fit. For instance, when a Conciliator is impeded from working for proper reasons, the President can instruct another Conciliator from a neighbouring Commune to take his place. Permission for temporary leave must also be obtained from the Court of Appeal. Unless the leave involves a period in excess of thirty days, a special permit issued from the Ministry of Justice is necessary. Moreover the Court of Appeal is assigned the power to dismiss a Conciliator and such dismissal is usually due to the discovery of ineligibilities or to the violation of judicial discipline. All the discipline and disciplinary charges of the "Judicial Official" are applicable to the category of Conciliators. Even these civil actions for damage which may be brought against the "Judicial Officials" for fraud or extortion etc., committed in the fulfilling of their duties, can also be taken against the Conciliators. They may only be exempted from abstention and recusation as described in the second chapter on Jurisdiction.

This Italian system of Local Conciliators springs from an early origin. It was in 1865 that the Italian judiciary began to adopt this system which, according to the writer's point of view, was a copy of the French Cantonal Judge; in both England and Germany, there are no corresponding systems. Concerning its historical background and the comparison between it and the French system of Cantonal Judges, much has been said in the previous chapter dealing with the Local Conciliation Court. This also applies to the lay Assessors of the high criminal Courts of Assize whose recruitment, functions and significance etc., have already been discussed in another chapter in connection with the Assize Courts.

THE MAGISTRATES

Praetors of the Praetorian Courts:

The Magistrates or Judicial Officials of the Italian courts are mainly subdivided into two categories. The first is that of the Praetors, whose vocation as a whole is literally termed the "Magistracy of the Praetorian Courts". Their sphere of jurisdiction is confined to the circuit of Praetorian Courts, and, throughout their careers, they cannot be transferred to a superior court on a permanent appointment without passing a transference examination.

The Praetors are now a category of 1,519 persons. Among them there is a hierarchy of seven grades, extending from the 11th up to the 5th grade of the entire scale of judicial rank

-6-

in Italy.¹ But promotion from a lower grade to a higher usually means years of waiting, and even when they are upon the verge of promotion, candidates must take laborious examinations. Altogether one may serve up to seventeen years in the various ranks of this hierarchy. The highest rank of all is the Post of First Praetor.

In Italy, public examination is the fundamental method for recruiting Magistrates. Apart from that, there are also a number of other conditions, regulating the preliminary qualifications of aspirants, which seem to become stricter with the passage of time. In 1923-24, it was provided that aspirants for Praetors must be graduates in law from Italian universities or other equivalent schools and secondly they must be respectable citizens of Italy between the ages of 21 - 30. But in 1924, the Law of April 19th modified the previous provisions and added that all aspirants for Praetors, besides (1) being graduates in law and Italian citizens, (2) must be members of the National Fascist Party and (3) must not be suspected in any case whatsoever of errors or obstinacies considered as incompatible with the status of a Judicial Official. Again, (4) candidates must be in good health and to prove this, they have to submit certificates from reliable doctors or submit themselves to the medical examination provided for the purpose. The age limit (5) however, has been prolonged from 21-34.

1. See Table A on the following page.

Table A.

Practors of the Praetorian Courts

| Grade | | Number |
|-------|------------------------------|--------|
| 5th | First Praetors ----- | 80 |
| 6th | Praetors of the First Class- | |
| 7th | Praetors of the Second Class | 1,189 |
| 8th | Praetors of the Third Class- | |
| 9th | Adjunct Praetors ----- | |
| 10th | Auditors, Vice Praetors----- | |
| 11th | Auditors ----- | 250 |

Total 1,519

The First Examination:

The public examination provided for the recruitment of Praetors consists mainly of two parts. The one is written and is confined to a variety of subjects on substantive laws such as the Civil, Commercial and Penal Codes. The other is an oral test on the Administrative and Corporate Laws, Civil and Penal Procedures, over and above those touched upon in written examinations. These public examinations are held once a year in Rome and are in the charge of a Commission, nominated by the Ministry of Justice and supervised by the Superior Council of Magistrates. The Commission usually consists of seven high Judicial Officials from the Courts of Appeal or from the Court of Cassation. They examine the candidates in accordance with the methods mentioned above and decide later who are to be the qualified Praetors. The minimum average mark in all subjects is set at 70 and that in each subject is 60.

As soon as the preliminary conditions have been fulfilled and the examination has been successfully passed, the candidate is appointed as an Auditor of the Praetorian Court by the Minister of Justice at a monthly salary of 600 Lire (= £6.6.1). But before assuming office, a pledge must be taken by the declaration of the following oath: "the candidate must promise loyalty to the King, to observe the laws and rules of State and to fulfil the duty entrusted to him as a man of conscience and honesty". Such an oath, however, is not only taken

by the Praeters, but by nearly all the judicial personnel upon their appointment.

If after a six months' apprenticeship in this lowest grade as an Auditor, the man is proved to be worthy and efficient, he can be immediately promoted to the 10th grade on the recommendation of a Tribunal's First President, and he will henceforth possess the title of "Auditor, the Vice Praeter" and his monthly salary will be raised to 900 Lire. If a candidate passes the examination with full marks, he will be at once appointed to the 10th grade as the "Auditor of Honour" whose rank and salary are however, equivalent to those of the "Auditor, the Vice Praeter".

The function of the Auditors is to assist the Praeters while they themselves are not yet assigned with full powers of jurisdiction, nor are they entitled to the exclusive privileges of Praeters. During the term of their apprenticeship, they are not irremovable since, in fact, they are constantly subject to the supervision of the First President of the local Tribunal and are also at the immediate disposal of the Ministry of Justice.

The Second Examination:

As an Auditor, whether Vice Praeter or Auditor of Honour, apprenticeship is served in the 10th grade for twelve months. After that, promotion to the rank of "Adjunct Praeter" follows, provided another series of laborious examinations has been passed with success. This second examination is similar to the

previous one and is the charge of a Commission composed of seven or more high Magistrates from either of the two highest Courts. The examination itself consists of two parts, only in subject matter the two examinations are different since the latter is aimed at testing the candidate's notion of practice. The written part is confined to the composition of two written judgments with reference to the Civil Commercial and Penal Codes. The oral part is devoted primarily to questions on Procedure. Those who pass are promoted to the 9th grade as "Adjunct Praetors" whose salary is 1,000 Lire. It is only upon attaining this rank that they begin to exercise the full powers of jurisdiction assigned to the Praetorian Courts, but they still do not possess the privileges to which a high Magistrate is entitled.

One has to be stationed for at least three years in this rank of "Adjunct Praetor" and one is then qualified for further promotion, and also for the possession of the full privilege of irremovability from whatever judicial appointment one may hold. Promotion is then from the 9th grade to the 8th and must be recommended by the First President of the Provincial Court of Appeal. The 8th grade is "Praetor of the Third Class" in which office one must serve for four years. The next rank is "Praetor of the Second Class" and the minimum term of service is raised to eight years. But for the rank of "Praetor of the First Class" one need only serve for two years before final promotion to the highest Praetorian rank of "First Praetor". Meanwhile the monthly salaries of the three previous ranks: the 8th, 7th and 6th are raised to round about 1,500

Lire; that of the First Praetor is alone 2,000 Lire per month.

The Magistrates Bench:

The second main category of Judicial Officials is termed "the Collegial Magistracy" which consists of all the Magistrates serving on the Tribunals, the Courts of Appeal, the Courts of Assize and the supreme Court of Cassation. These are now a total of 3,236 persons. The hierarchy that they have formed among themselves, comprises all the Italian judicial ranks.¹ Magistrates of the 11th or 10th grades have the title "Auditors of Tribunals". Those from the 9th grade up to the 6th are all given the title of "Judges". But both of them serve in the Tribunals. Magistrates from the 5th grade upward have the title "Councillors" and function only on the benches of the two highest Courts.

In the statement above, three points are in need of explanation. One is that, in Italy, only the Magistrates of the Tribunals are officially, as well as habitually, termed the "Judges". Readers should not confuse the term with that of "judges" in England, for the latter is actually equivalent to the whole range of Italian Judicial Officials or Magistrates. The second point is that the total number, 3,236, of the Collegial Magistrates, includes also the Public Ministers. They are included in the Collegial Magistrates because they are recruited on the same conditions, classified according to the same judicial ranks and regulated by the

1. See Table B on the following page.

-12-

Table B

| Grade | | Number |
|-------|--|--------|
| 1st | First President of the Court of Cassation..... | 1 |
| 2nd | General Prosecutor of the Cassation Court..... | 1 |
| 3rd | First Presidents and Attorney Generals of the Courts of Appeal, Sectional Presi- dents and Advocate Generals of the Court of Cassation..... | 48 |
| 4th | Councillors and Assistant General Prosecu- tors of the Court of Cassation..... | 250 |
| 5th | Councillors and Assistant General Prosecut- ors of the Courts of Appeal..... | 1,034 |
| 6th | Judges and Assistant Prosecutors of the First Class..... | |
| 7th | Judges and Assistant Prosecutors of the Second Class..... | |
| 8th | Judges and Assistant Prosecutors of the Third Class..... | 1,652 |
| 9th | Adjunct Judges..... | |
| 10th | Auditors of Tribunals..... | 250 |
| 11th | | |
| <hr/> | | |
| Total | | 3,236 |

same rules as those of the Judges and Councillors. Public Ministers, who rank from the 8th grade to the 6th are all given the title of "Assistant General Prosecutors", "Attorney General" and "General Prosecutors" of the Courts of Appeal, or of the Court of Cassation, if functioning at the latter. The third point is that the total number of Magistrates, of 3,236 persons, includes even the administrative personnel serving at the Ministry of Justice. There are altogether 250 Magistrates of various ranks who have been transferred from their judicial posts at the courts to the Ministry as civil servants. Among them there are Judges, Councillors as well as Assistant Prosecutors and Assistant General Prosecutors. The last and the most essential point, that should be explained, is the reason for these Magistrates being termed "Collegial Magistrates". This term is intended to indicate that these Magistrates, when they sit to give judgment, always sit as a group. In other words, it means that they never sit alone. For in Italy, the colloquial principle is strictly observed in nearly all the judicial courts, except in the two inferior Courts of Local Conciliation, and of Praetorian Court. Though in the Praetorian Court one often sees three Praetors sitting on the bench, in fact it is only the one in the centre who judges the pending case; the other two are the so-called "Auditors of the Praetorian Courts", who do not, however, form a part of the presiding bench. But in the superior Courts the minimum number of Magistrates forming a bench is three, and the bench of the various Courts usually run as follows:

- 1) In Tribunalsthree Collegial Magistrates¹
- 2) In Courts of Appeal
 - a) The Civil Section..five
 - b) .. Penal .. four
- 3) In Courts of Assize ... two²
- 4) In the Court of Cassation
(in whatever Section) seven

The various sizes of bench are quite definite and are hardly ever altered. In the case of the absence of one Magistrate, a deputy is appointed to take his place by the Court's First President either from other Sections or from Courts of equivalent rank. If, however, a judgment has been given by a bench not consisting of exactly the lawful number, the parties involved are thereby authorized to appeal for the "revocation" of that judgment and it will most probably be annulled by a new decision given by the supreme Court of Cassation.

These Collegial Magistrates are also recruited by public examination, but the standard is now higher and the field covered wider in comparison. Even the conditions of entry are stricter and harder to fulfil than those qualifying candidates for Praetorships. For instance, one of the conditions is the so-called "moral qualification" of candidates, which implies not only the moral conduct of the candidate himself, but also the traditional reputation of his family and the individual moral conduct of all his family members. In this one respect, we may point out that the Italian principle has been much influenced by the Napoleonic tradition of

1. In accordance with the new Code of Civil Procedure of 1939, there is only one Judge sitting for the civil litigation in the Tribunal. 2. Beside, there are five Assessors.

judicial aristocracy, which emphasizes the honour which attaches to high judicial office and the necessity of the holder of such a position living up to a decent standard of conduct.

The public examination for the Collegial Magistrates takes place once a year in Rome. But the procedure of application for entry has to be performed by aspirants at the office of the Assistant Prosecutor in each of their local Tribunals. Such application must be accompanied by a series of credentials such as (1) An official copy of the birth certificate (2) A documentary proof of the applicant's Italian citizenship (3) A diploma granted by any law university of the State, (4) A certificate of good conduct (5) A certificate of good health, which must be signed by the military doctor or the official "Provincial Communal Doctor" (6) A photograph of "formato vista" signed by the State Royal Notary (7) A post remission of 50 Lire and above all (8) The applicant's certificate of membership in the Fascist Party. After the submission of these documents the Assistant Prosecutors in charge will conduct an extensive inquiry into the moral qualifications of the aspirants. If ⁱⁿ this stage shortcomings are discovered which are not compatible with the honourable status of the Collegial Magistrates, the aspirant concerned may be barred from entry to the public examination.

When the procedure of entry is completed, the Ministry of Justice will appoint a Commission to decide upon the various subjects of the examination. This Commission is composed of seven Councillors of the Courts of Appeal, and two prominent Professors

of the State Universities. The power of supervision over this Commission is officially exercised by the Minister of Justice, but habitually it is undertaken by the Superior Council of Magistrates.

The contents of the examination are divided into two parts. The written part usually consists of Roman Law, Administrative Law, Civil and Commercial Code, and the Penal Code, to be completed within eight days, and the pass mark in each of these subjects is set at 60. But the oral part can only be entered by those candidates who have already passed the written part with success. And on this occasion the whole Commission must be present. Each Commissioner may put questions to the candidates on whatever subject of law he thinks fit and the minimum pass mark is also fixed at 60. But the minimum average of these two parts is set at 70.

The Bench of the Tribunals:

Those who have got through the examination will be appointed to the rank of "Auditor of the Tribunal" in thirty days. But these posts are usually limited to the number of vacancies left on the benches of the Tribunals. If there are too many qualified candidates, the Commissioners have to choose among them. Such a choice often falls on any who happen to have been wounded in war or decorated with honours for military service. If there are no such persons, the choice then falls on those possessing seniority or those who are the descendants of prominent Italian families.

The function of the Auditors of the Tribunals is to assist the Judges, since they themselves are neither assigned with full

jurisdiction, nor entitled to the privilege of irremovability. They are only apprentices to the Judges and in the meantime their judicial competence is not recognised. Their monthly salary is from 600-900 Lire and their term of apprenticeship is from a year and a half to two years; these conditions are both similar to those of the Auditors of the Praetorian Courts.

Promotion from the rank of Auditor to the rank of "Adjunct Judge" can only be obtained on condition that the Auditors have passed another examination which centres round the subject of practice. This examination takes place at the end of their term of apprenticeship. The Commission in charge consists also of seven Councillors of the Courts of Appeal or of the Court of Cassation. The written part is confined to the composition of judgments on selected cases and the oral part is confined to questions on positive law. But success in this examination depends not only upon satisfactory marks but also upon a number of other references such as (1) the favourable votes of Commissioners (2) the official report on their work as Auditors (3) their academic titles and (4) the marks which they achieved in the first examination. One more point worthy of note is that those Auditors who fail in this second examination twice in four years are not only rejected from entering for the third time but are also dismissed from their original judicial rank as Auditors.

Those who have passed the examination with success are appointed as "Adjunct Judges" by the Minister of Justice and their salary is

-18-

raised to 1,000 Lire a month, which is equivalent to that of the Adjunct Praeters'. They are stationed in this post for three years, after which they can be promoted without examination to the rank of "Judge" or "Assistant Prosecutor of the Third Class" where they must serve for four years. Then they may again be promoted in the same way to the rank of "Judge or Assistant Prosecutor of the Second Class" to serve for eight years and thence to "Judge" or "Assistant Prosecutor of the First Class" which is the highest rank among the Judges or Assistant Prosecutors of the Tribunals. But all these promotions must be recommended by the Judicial Council of Magistrates¹ attached to the Provincial Court of Appeal and approved by the Superior Council of Magistrates,² incorporated in the supreme Court of Cassation. Moreover their promotions are open to such objections as may be made by any interested party on the grounds of the Judges' mischievous conduct, bad reputation or inefficiency etc., but the final decision is in the hands of the Superior Judicial Council of Magistrates. If the Judge concerned has been definitely proclaimed as "rejected from promotion" by the Superior Judicial Council, he will then be dismissed from whatever judicial post he holds for good. If no such objection is made and the promotion is sanctioned, he will be officially

1. See page (176).

2. See page (176).

appointed to his new post by the Ministry of Justice and upon such appointment he is not required to take the judicial oath. The monthly salary for these three ranks is approximately 1,500 Lire, which amounts to £260 annually; this is only equivalent to one sixth of the annual income of the English County Court judges.

At present there are 1,652 persons serving in the four above-mentioned ranks which are all allotted to the Tribunals. Because of this, the Judicial Officials in these ranks are termed the "Collegial Magistrates of the Tribunals".

The Bench of the Courts of Appeal:

The third examination recruits "Collegial Magistrates of the Courts of Appeal" from the Collegial Magistrates of Tribunals or from the rank of "First Praetors". This examination is called the "Titled Examination"; it is arranged only for the titled Magistrates and neither law graduates nor scholars are permitted to enter. The conditions of entry are usually strict.

(1) For the Collegial Magistrates, the minimum term of service in the Tribunals required as a qualification is eight years, four years of which must have been served in the ranks of the "Judge" or "assistant Prosecutor".

(2) If the candidate is a First Praetor, who does not belong to the Collegial Magistrates, his required minimum term of service in the Praetorian Courts is nineteen years .

- (3) The candidate must be of mature years.
- (4) All application forms must be submitted to the Ministry of Justice accompanied by reports of their judicial service and a number of their written works (i.e. judgments, orders etc) as evidence. In the meantime they must report to their Head Official advising him of their application and the latter is then obliged to inform the Ministry of the Candidate's conduct, service and so on.
- (5) Such applications must be subsequently considered and sanctioned by the Judicial Council of Magistrates who are attached to the Courts of Appeal.

a) This Title Examination takes place once a year. The judicial posts aimed at are, however, limited to four tenths of all the vacancies left on the bench of all the Appellate Courts. The body in charge is not in this case a specially nominated Commission but the Superior Council of Magistrates which is attached to the Ministry of Justice. The contents of the examination are also different from those of the other examinations mentioned above though before 1933 they were more nearly similar to each other. The aspirants are not now required to be present for the examination. What they have to do is to submit their "judicial works" (lavori giudiziari) such as their written judgments, orders, and charge-sheet or addresses (of Prosecutors') for a "deliberate examination" conducted by the Second Section of the said Superior Judicial Council of Magistrates. After that, the Council will report the results which are

reached by the majority of votes of all the examiners to the Ministry. Aspirants who have obtained favourable results will be pronounced "prometable" and will soon be appointed to the rank of "Councillor" or "Assistant Prosecutor General of Courts of Appeal". But those who have failed twice in such examinations will be barred from entering a third time in the two following years.

b) The other method going with the Title Examination is called the "Scrutiny" which is employed to recruit the other six tenths of all the vacant posts at the Courts of Appeal. The "Scrutiny" is again a new method of promoting Magistrates, which is not effected by examinations, but instead by the "official appointment" on the grounds of the Magistrates' "merit", "distinct merit" and "seniority". In this case, aspirants are not required to submit their judicial works but only reports of their service, which should first be confirmed by their head Officials. With such reports as a basis, the First Section of the Superior Judicial Council of Magistrates will judge whether the aspirants are competent for the rank of "Councillor" and "Assistant Prosecutor General" of the Appellate Courts.

The "Scrutiny" does not take place at regular intervals. It is only arranged when there is need of it and the judicial posts for which applicants may try cannot be more than a hundred and fifty. The aspirants, like those in the Title Examination, are only likely to be the Judges and Assistant Prosecutors or the First Praetors. The difference in the regulations is that the

former may be appointed on either of the grounds: the "distinct merit" or the "merit", while the latter can only be appointed on grounds of "distinct merit". Again the promotion of the Magistrates on the grounds of "distinct merit" must be agreed to by a unanimous vote of the Council members but that on the grounds of "merit" may be passed by the majority of votes. But in both cases, aspirants who are more advanced in age will stand a better chance.

The Procedure of the "Scrutiny" commences with the submission of a "domanda" (petition) by aspirants, which is equivalent to the "application form" of the Title Examination. This "domanda" is "deliberated" upon by the Judicial Councils of Magistrates and in the meanwhile it is also challengeable by any interested party on the grounds of the aspirant's incompetence. And such a challenge will be settled by the Superior Judicial Council of Magistrates. If the "domanda" is approved and recommended by any of the Judicial Councils, the aspirant concerned is then ordered to submit his report of service and his Head Official may be requested to give information. All these data are subsequently considered by the Superior Council and the Ministry will only confer appointment on an applicant who is favoured by the Council's report.

The position of "Councillor" of the Court of Appeal or "Assistant Prosecutor General" must be served in from four to six years before the next promotion to the Court of Cassation is made

possible. But in the meantime, appointment to the post of First President of the Tribunals is also possible and the accompanying salary and rank are equivalent to those possessed by the Appellate Court Councillor's.

The Bench of the Court of Cassation:

Magistrates of the Court of Cassation are given the title of "Councillors" and "Assistant Prosecutors General" and are all promoted from the Councillors and Assistant Prosecutors of the Courts of Appeal. The method of promotion is also by means of the Title Examination, which is set on an almost similar standard to that of the first Title Examination to promote Magistrates of the Courts of Appeal from Magistrates of the Tribunals. Here, only those Councillors or Prosecutors who have served from four to six years in the Courts of Appeal or the Courts of Assize may compete in this examination which takes place regularly within the first three months of each year. The posts competed for are also limited to the vacancies available in the Court of Cassation. Aspirants should first submit their application forms and then their reports of service, all of which must be examined by the First Section of the Superior Judicial Council of Magistrates on whose recommendation the Ministry will make appointments.

The Councillors and Assistant Prosecutors General of the Court of Cassation are the Magistrates of the 4th judicial grade, who are equivalent, to a certain extent, to the Law Lords

of the House of Lords in England. In Italy, there are now 250 of these superior Judicial Officials at the supreme Court of Cassation. Their monthly salary is 3,000 Lire which is less than one tenth of the salary of these English Law Lords (£5,000 per annum).

Above the Councillor, and Assistant Prosecutors General of the Cassation Court, there are the "Sectional Presidents" and the "Attorney General of the Court of Cassation" and the "First Presidents" and "General Prosecutors of the Courts of Appeal" who are all Magistrates of the 3rd grade. Their promotion from the rank of "Councillor" and "Assistant Prosecutor General" of the Court of Cassation takes place only through the "deliberation" of the State Council of Ministers. The conditions of this promotion are that (1) the candidates must have served at least three years in the Court of Cassation and (2) their age must be sufficiently senior for the appointment concerned. The work of those competitors who are accepted and accordingly promoted into the new rank is often heavier than that of the Councillors' or Assistant General Prosecutors' of the Cassation Court. Their monthly salary, however, is none the less 3,000 Lire which is not greater than the salary previously received by them.

The Superior Magistrate in the 2nd judicial grade is the "General Prosecutor of the Court of Cassation" who is the first of all the Public Ministers and whose monthly salary is 5,000 Lire. That is the first judicial grade is the "First President of the Court of Cassation" the highest of all the Judicial

Officials whose monthly salary is 10,000 Lire. These two important Magistrates are both promoted from the high Magistrates of the third judicial rank, who have been either First President and General Prosecutor of the Court of Appeal or Sectional President and Attorney General of the Cassation Court. Moreover, their appointments must also be made by the State Council of Ministers upon the recommendation of the Minister of Justice.

A notable point respecting the last three appointments is the possibility of the direct interference of the State Council of Ministers, which is the equivalent of a Cabinet; moreover, its influence is next only to the Grand Council of the Fascist Party. The Head of the Government, Mussolini, is the President of this Council and in its meeting, besides the various Ministers, who are its normal members, the Secretary of the Fascist Party also participates. Thus, we see that in Italy judicial appointments or promotions, on the whole, are made strictly in accordance with decreed schemes, such as upon the results of the public examinations, the Title Examinations and the Scrutiny, and here, political influence has little place. But the three most important appointments in the judiciary are now made by the highly political Council of the State and this appears in contrast to the spirit of all those methods which are so strictly decreed. For these appointments are usually made in favour of those (serving in the high judicial ranks) who are on the best terms with the Government and hence the political flavour of the Italian Magistracy has become particularly noteworthy. Such a situation, however, resembles the English judiciary, where many

important judicial appointments are made by the Prime Minister in favour of his most influential political followers at the Bar. But, in the writer's opinion, the present situation in the Italian judiciary regarding this particular point, is better than the comparable position in England. The reason is that in spite of the fact that the highest judicial appointments in Italy are made to politically favoured aspirants, they must have already served as Magistrates in the various judicial ranks from fifteen to twenty five years and during this long period they have for long been entitled to the judicial privilege of irremovability; they are not therefore in a position in which they are likely to yield to political influence as much as those appointed from the Bar. Moreover, in Italy, that group of fifty superior Magistrates who have been appointed by the State Council of Ministers have only the jurisdiction of "cassation" and the larger part of their powers is over judicial administration. But in England, apart from the titled judges, even the appointments of the overwhelming majority of magistrates and justices of the peace who handle at least 80% of the Country's criminal justice are also made by the Lord Chancellor and pass to those who have been active in local politics. These Magistrates receive no pay nor have they been trained either before or after their appointment. Their political consciousness and their ignorance of the law and the duties which they must undertake may be a very dangerous factor in judicial justice and by their blunders they may cause the public very serious grievances.

The Judicial Councils and the Supreme Judicial Council of Magistrates:

Before the discussion passes to a number of rules and conditions, applicable to all Judicial Officials, a few lines must be written about the Judicial Councils, and the Supreme Judicial Council of Magistrates, which Councils have been repeatedly mentioned in the preceding pages. Here we shall give a fuller account of their nature, organisation and functions. These two Councils are composed solely of Collegial Magistrates; the Praetors, or other inferior judicial personell, are not qualified to be members. The Judicial Councils of Magistrates are attached to each Provincial Court of Appeal, so that their number corresponds to that of the latter courts. Each of these Councils is composed of four members, the First President, the General Prosecutor, one Sectional President and Councillor - all belong to their attached Court of Appeal. The latter two members are nominated annually by the First President, and their posts may also be assigned to the Magistrates of a Detached Section of the Court of Appeal. The Supreme Council of Magistrates is incorporated into the Court of Cassation in Rome, which is composed of the First President of the Cassation Court, who often takes the chair, the General Prosecutor, and six Councillors of the Court of Cassation. Two more seats are allotted to the Public Ministers, who are of the same judicial rank as the Councillors. Such appointments are not then made by the First President, but by the State Council of Ministers, upon

the proposal of the Minister of Justice , for a minimum term of two years.

Moreover the Supreme Council of Magistrates is subdivided into two Sections. One is presided over by the First President, and the other by the General Prosecutor, but each of them is composed of at least five members, including the Chairman. Furthermore, the functions assigned to them are also different.

The functions of the Judicial Councils, and the Supreme Judicial Council of Magistrates are as follows.

- 1) To decide on the promotion of Collegial Magistrates by the methods of "Scrutiny", and the "Title Examination".
- 2) To settle protests lodged by any interested party, or the Ministry of Justice, against the aspirants' application for promotion by the above-mentioned methods.
- 3) To define "merit" and "distinct merit", which are the two available conditions of promotion by "Scrutiny".
- 4) To nominate "judicial functionaries" from the rank of the Bar, or from that of the university Professors. Since the introduction of the Title Examination in 1923, however, such a possibility has been prohibited, and the function is not now exercised.

The nature of these Councils of Magistrates is a little complicated. They are not, however, the authorized machinery for judicial administration, for which the Ministry

of Justice is the only responsible organ. Yet their functions are indeed administrative in so far as they promote Magistrates, though they are also judicial from the standpoint of settling the disputes involved in the promotions and of defining the conditions of "merit" and "distinct merit". However, in the former respect, the power exercised by the Councils is far from absolute, for the decree for promotion is also issued by the Ministry of Justice, to which the Councils of Magistrates only give a sort of authoritative advice. Again, the staffs of these Councils are all Magistrates who are not, like the staff of the Ministry taken as State Officials, even though they are subject to the designation of the State Council of Ministers, and to the constant supervision of the Ministry of Justice. From the description of these complicated aspects of the Judicial Councils and the Supreme Council of Magistrates, both regarding their organisation and functions, we can only conclude that they are solely advisory bodies to the Ministry of Justice in specified spheres of judicial administration, and legally they acquire no independent status.

Rules and Conditions:

A. "Local Residence"

The Italian Judicial Officials (to a certain extent also the Local Conciliators and the lay Assessors) are subject to a number of rules and conditions. One of them is the "Local Residence" rule which requires a Judicial Official to take up residence in the district of the court to which he is assigned. If he moves

from his district without the permission of his superior Official he may be subject to the disciplinary penalty of "suspension" from office. But temporary absence for travelling or a longer absence caused by "substitution" when he serves in the place of another Judicial Official in a Court of the neighbouring district, will not be regarded as a violation of the rule.

The merit of this rule is to ensure that the Magistrates are well acquainted with local conditions, so that they can conduct jurisdiction in conformity with the will of the local population, for Italy, before she was united as a Kingdom in 1865 had for long consisted of a number of Feudal States, each maintaining its own customs and economic life besides its own judicial systems. Even now, after the Kingdom has been unified for more than seventy years, many of the districts still retain their traditional customs and their specific economic life, despite the fact that they have already been subjected to the national judicial system for a considerable period. But these differences are retained mainly for the sake of their different geographical backgrounds, which do not in the long run tend to diminish.

Owing to the enforcement of this rule of "Local Residence" and also that of the localization of jurisdiction and courts¹, there has never been the system of "judge on assize" in Italy. All the Judicial Officials must be attached to their prescribed circuits. Even in the criminal Courts of Assize, the name of which may sug-
1. See Chapter II, page (65).

-gest a resemblance to the English Assize Courts, both the Councillors and the lay Assessors must take up permanent residence in the local districts. The system is not therefore like that regulating the judges of the English Assize Courts, since the latter are dispatched from other courts and are only "on assize" while serving in the Assize Courts in various parts.

B. Exemption and Incompatibility:

The second rule is the "exemption and incompatibility" of Judicial Officials, which rules that Magistrates are exempted from whatever public service, except military service, that is extraneous to their judicial function. Again, it stipulates that Magistrates can be neither trustees, Communal Secretaries, nor Assessors, nor public employees nor administrative officers. Above all they must not be engaged in commerce, or in other professions while they remain in their judicial posts. The principle is that they shall not have undesirable relations with the outside world, so that they can concentrate on, and be loyal to, their duties. Likewise, they must be cool-headed and impartial when dealing with the various litigants in Court.

Other aspects of the "exemption and Incompatibility of Judicial Officials" have been explained in the second Chapter (on Jurisdictions), under the heading of "restrictions on the part of judges". Under these restrictions, Magistrates are restricted from judging cases which involve, as the disputing parties, personal relations, great friends, or enemies, or

-32-

which touch upon their personal interests. But, in these respects, violation of the rule is not considered as of disciplinary importance to the Magistrates' status, as such violation is merely reckoned as disregard for the "security of pure justice." Hence, the action of "recusation" which may be brought up by one of the litigants for the purpose of exempting a Magistrate from judging a case on the above-mentioned grounds is considered by the First President of the Court concerned, and not by any Disciplinary Commission.

C. "Aspettativa" and "Dispensa dal Servizio":

The "aspettativa" is another rule under which Magistrates may request leave of absence from their respective offices. Literally the word "aspettativa" means "the retired list" or "anticipation", but here it implies temporary discharge from service, either for illness or other personal reasons. Furthermore, the Magistrate who has obtained such leave of absence, expects to return to his post when the prescribed term expires. Permission for "aspettativa" of Magistrates, whatever the conditions, is given by the First President of the Court of Cassation, or of the Courts of Appeal, with the advice of a special Commission attached to the latter Court. The maximum term for sick leave is set at two years; for other causes, at only one year. In the meanwhile, the salary of the Magistrate on leave is paid continuously; but those colleagues who have done extra work on account of

-33-

his absence, are entitled to a certain small percentage.

The "despansa dal servizio" is also a leave of absence on grounds of illness or incapacity, and is only in question for long periods. It means, however, that the term of absence requested corresponds to the period of illness or of incapacity. Permission for such a long period of absence must be given by the Ministry of Justice upon the proposal of the First President of the Court to which the Magistrate concerned belongs. But application on grounds of ill health means that the applicant may be subjected to a medical examination, by order of the Ministry, either before or after sanction is given. If, during such an examination, the Magistrate concerned is discovered to be in good health, he will be immediately warned to resume his work, for one theory of the Italian judiciary is, that once a Judicial Official has pledged his loyalty to his sacred duty, he must not abandon it without proper reason. If, however, he disregards the warning issued by the Ministry, urging him to resume his duty, he will then be ordered to resign from his judicial post, or he may be subjected to discipline.

D. The Seniority and Retirement of A Judicial Official:

The Judicial Officials' seniority of service, or of age, as has been mentioned, is one of the most essential factors in promotion. Whatever methods of promotion are adopted, whether it be the Title Examination, or the Scrutiny, those who are senior

-34-

in age, and in service, always stand a better chance of success. Although the two avowed conditions of promotion, particularly in the Scrutiny, are "merit" and "distinct merit", "seniority" of either service or age, although not expressed as a third condition, is in practice an undecreed condition, which is always the first consideration of Judicial Councils, or the Supreme Judicial Council of Magistrates. Even in the recruitment of Praetors, or of Collegial Magistrates, the aspirant's seniority of age is a decisive factor in his success. For instance, if two aspirants have both passed the public examination satisfactorily, and one is twenty-five, and the other thirty, then, if only one of them is to be chosen, the latter will certainly have preference.

Seniority of service, - which means the number of years that a Magistrate has served in the court, - has more weight in promotion by Scrutiny, or by the Title Examination, than age seniority. Seniority of service does not, however, include the time spent on "aspettativa", which has been obtained on grounds other than illness. Nor does it include the days passed by the Magistrates in serving the penalty of "suspension of office". Even if the period of "aspettativa" is allowed on grounds of illness, only half of it will be calculated in considering seniority of service.

The result of the prevalence of this undecreed rule of "seniority" in the appointment of Judicial Officials is, that those who are now serving in the superior Courts as Magistrates

are all elderly persons, especially in the supreme Court of Cassation, where most of the men who preside on those long benches have passed their sixtieth year. That they all have grey or silver hairs is an easily observable fact; hence they do not wear wigs. All that they wear are small caps (in the shape of a cook's cap, but with smaller tops) of black velvet, with gold trimmings, though, for most of the time, they prefer to remove them and place them carefully on the desk in front of them. This is in contrast to the scene in the inferior Courts, where, as a general rule, there are mostly young folks, fresh from the universities. The scene, for instance, at a Praetorian Court, has already been described in a previous chapter, and is in great contrast to that in the supreme Court of Cassation.

The retiring age for all the Italian Magistrates is now fixed at 70. The rule is that, as soon as they reach this age, they are obliged to retire from their judicial posts and they are then entitled to a pension, which is approximately 1,000 Lire. In addition they may also be granted a title of honour, as a reward for service, which is done by promoting them to a higher judicial rank. But the Magistrate, when he is 70, is supposed to place himself voluntarily on the retiring list, without direction from either the Ministry, or his superior Official. The procedure is first to place the petition in the hands of the First

-36-

President of the Magistrate's Court, or of the General Prosecutor's, if the petitioner is a Public Minister. Through the latter it will then travel hierarchically to the Ministry of Justice, and approval will be finally given by the Minister of Justice.

The compulsory retirement of judges on the grounds of the age limit is, however, a common regulation prevailing among many continental judiciaries. The advantage of having such a regulation seems to be that it is taken for granted. For instance, there are few animated discussions on this subject in Italian judicial works. Still, the writer is of the opinion that an age limit of seventy seems too high to safeguard the efficiency of judicial duties. Sixty or sixty five would probably be a more adequate limit.

In England a reform in this respect would prove advantageous since her judges and Magistrates all serve under practically no age regulations. As Mr. "Barrister" states, "the English magistrates once appointed, are rarely removed, and hundreds of them go on sitting into the eighties and nineties and even occasionally after their hundredth birthday. It is not uncommon, especially in the country, to find a bench of an average of 75 or 80 and the proportion of serious deafness is generally over $33\frac{1}{3}\%$ and sometimes reaches 100% ". All these unusual phenomena are rarely seen on the Continent and in Italy they are actually non-existent. Should England introduce a regulation regarding the age limit for judges and Magistrates, she would certainly achieve a most useful reform.

The Discipline and Disciplinary Charge of Magistrates:

Apart from the rules and conditions mentioned above, the Italian Magistrates are also subject to a severe professional discipline while they are serving in the judicial courts, or even in the Ministry of Justice. That is to say, they must always behave properly, be absolutely obedient to their superior Officials and loyal to their respective duties etc.. During normal times, all the disciplinary measures are under the control of the First President, and the General Prosecutor of the attached Courts or Tribunals. In the Praetorian Courts such power is exercised by the First Praeters. If any Magistrate should happen to violate the discipline, either in conduct or in duties, he would immediately be placed under the disciplinary charge, which is initiated by one of the two above-mentioned high Judicial Officials, or else by the First Praetor, if the charge only involves a Magistrate of the Praetorian Court.

A number of special Commissions constitute the disciplinary tribunals for such charges against Magistrates. Those which settle charges involving Magistrates of the Courts of Appeal, the Tribunals and the Praetorian Courts are termed the "District Disciplinary Commissions". Another, which is nation-wide and which is attached to the Supreme Court of Cassation only judges charges involving the high Magistrates of the latter Court. On top of all these is the Supreme Commission, incorporated in the Ministry of Justice which only has jurisdiction over disciplinary appeals,

brought up from either of the two Commissions mentioned above, and also over charges upon which the most severe penalty of "destitution" may be inflicted.

The disciplinary penalties which the various Commissions may impose on the accused Magistrates are four in number. Out of them all, the "reprehension" (*la riprensione*) is the slightest, and is carried out only in the form of a verbal rebuke. Offences such as slight negligence or deficiency of service, improper conduct towards superiors, colleagues or subordinates and irregular conduct in a Magistrate's private life etc., may all result in the infliction of this penalty of "reprehension" which is executed either by the President of a District Disciplinary Commission or else by the chief Magistrate to whom the accused is subordinated. In the event of this occurrence, the accused must appear in person to listen to the "reprehension" of the executor. If he refuses to submit himself to personal appearance or shows great reluctance and offends the executor while he is being admonished, the authority has the power to impose a severer disciplinary penalty in place of "reprehension". The severer penalty is termed the "suspension" which we shall discuss presently.

The second disciplinary penalty is the "*l'ammenda*", which is one of several pecuniary penalties obtaining in Italian criminal justice.¹ Here, however, it is borrowed as one form of disciplinary penalty for accused Judicial Officials, and the payment is

1. See Chapter II, page .

-39-

reduced to only 10 to 200 Lire, its original payment being a sum of from Lire 20 to 10,000. The "l'ammenda" is imposed by an order of a Court or Tribunal, to which the accused Magistrate belongs, or by a decree issued by the First President of an Appellate Court, and is confirmed by the deliberation of its District Disciplinary Commission. The main offense that may invite the infliction of "l'ammenda" is a Magistrate's negligence in the exercise of his assigned functions.

"Suspension" is the third kind of disciplinary penalty and is much more serious in nature. According to this, an accused Magistrate can be temporarily deposed from his post for a maximum period of three months, and his salary for that period must also be forfeited. So severe a penalty may be inflicted upon (1) anyone who has failed to appear for the execution of "reprehension", (2) anyone who does not observe the rule of "local residence", (3) anyone whose conduct contravenes the Decorum of Administration (4) anyone who has made use of his judicial office for private purposes and (5) anyone who has by his conduct shown grave abuse of his position. Moreover, when a Magistrate is arrested under a warrant from the court, he will also be assumed to be suspended from his post.

Last among the disciplinary penalties is the "destitution" which means dismissal from whatever judicial post a man may hold

for good. Offences resulting in the infliction of "destitution" are usually grave abuses of either judicial power or of confidence. In addition, destitution may result from the betrayal of the honour of the judicial profession, rudeness and imprudence to superiors, provocation of subordinates or offences against the honourable status of the King, the Royal family, the Legislative Chambers and so forth.

The disciplinary dismissal of judicial Officials can only be inflicted by a decree of the Ministry of Justice, issued on the advice of the Supreme Commission incorporated in the Ministry. But the accused Magistrate may still appeal to the Ministry within the thirty days following the publication of the decree, confirming the "destitution". The procedure usually commences with the submission of a "citazione" (state men) by the accused Magistrate, and within a certain period the latter, usually accompanied by one barrister and the opponent who is usually the First President or General Prosecutor of the latter's Court, will appear at a hearing held at the same Supreme Commission which has made the decision. If the decision on "destitution" has been reaffirmed after the appellate hearing, the accused's dismissal is final. In this case, he is never able to return to any judicial post, unless his opponent applies to the Ministry for the restitution of his judicial rank.

-41-

The disciplinary administration of Judicial Officials is a significant feature of the Italian judicial system. Such an administration, on the whole, has its merits in spite of the fact that the idea of placing free and independent judges under severe disciplinary control may seem impossible to the judiciary of either England or the United States. In Italy, Judicial Officials are ill paid compared with the high salaries of the judges in the two latter States and bribery in Italy is by no means non-existent in the circle of State Officials, though it cannot be said with certainty that the same holds in Judicial circles. But, in view of the latter's low salaries, and the prevalence of bribery among State Officials, it is quite possible for the public to assume that Judicial Officials are likely to fall to such weakness. Therefore, the first merit of the judiciary adopting a severe scheme of disciplinary control is to forestall any possible suspicion of venality such as might be whispered about the Italian Judicial Officials. For in disciplinary charges, it is provided that venality of Magistrates is punished by the most severe disciplinary penalty of "destitution". It is then thought that Magistrates in the face of such a disastrous consequence dare not run the risk of committing venality and that at the same time the public, in view of this safeguard, can always maintain their confidence in the purity of the judicature.

The second merit of disciplinary control is to avoid rudeness, temperament or gross discourtesy on the part of Magistrates; moods which are not always shown to their superiors, colleagues or subordinates but to the lay parties, the accused and the advocates who are involved in public hearings. For, in the Italian Courts, it is the job of Magistrates to squeeze every detail of the facts under dispute from the parties, the witnesses or the accused. The consequences of treating laymen with rudeness or discourtesy will be a disciplinary punishment. Moreover, during the hearing at an open court, the Italian Magistrates are entitled to a prerogative of directing the court orders. They may forbid advocates to speak, if they think fit, or they may make retorts during their speeches, or may interrupt on any occasion if they exceed their prerogative. The situation as such is exceedingly trying for the advocates, inasmuch as it is a serious hindrance to the smooth process of court hearings. But, as the disciplinary control of Magistrates provides any ill treatment of laymen and advocates by the presiding bench of the court implies an "improper manner to the subordinate" or even an "abuse of judicial powers" which may incur the infliction of the disciplinary penalty of "reprehension" or "suspension" and hence, the Italian Magistrates do not, as a rule, indulge in these irregularities. A still further reason is that all the Italian Magistrates are sufficiently trained in law and procedure and are comparatively speaking richer in academic learning than even the

average judges in England. Though the Italian people are generally excitable and hot tempered, the Italian judicial Magistrates nevertheless form a select group and are exceptionally quiet and refined. One often sees on the bench of those superior Courts and Tribunals an exceedingly calm and reserved attitude on the part of the presiding Magistrates. During the hearing of cases they are, in general well mannered, rather courteous and patient to the advocates. The writer has even witnessed a scene in one of the Penal Sections of the supreme Court of Cassation where a long bench of highly ranked Councillors have waited in silence for about thirty minutes for a barister taking part in the debate, who has been delayed. But in the inferior Praetorian Courts, occasionally young praetors shout to parties or advocates in harsh tones though not infrequently they converse with them extraordinarily amicably at the next moment or even allow the latter to step on to the raised platform and to lean on their desk in order to share with them in the reading of a map or other written matter.

The present system of disciplinary control of the Italian Magistrates is, however, not perfect despite all the merits which have just been noted. The first most notable problem is that in accordance with this system, the Magistrates are practically controlled by their colleagues, since all the above-mentioned

Disciplinary Commissions are only composed of Judicial Officials. It cannot be fair to have people spied upon and adjudged at the same time by those belonging to their own ranks. As usual, in such a situation, those who judge them may too easily be most sympathetic towards people of their own class or they may, on the other hand possess a sort of jealousy against their successful colleagues and the judgment given by them under such psychological influences can hardly be reliable and just. But, if we look at the other side of the problem, we shall see that it is difficult for the judiciary to authorize people outside the judicial circle to deal with disciplinary charges against them judges. The consequence of such procedure would be even worse if this task were assigned to the State Officials or to a State Department entirely related to the judiciary. Judicial independence, no matter how little is still left in a Totalitarian State, would be completely crushed if this hypothetical case were to exist. Therefore, in view of such difficulties, there is at present no other method sufficiently preferable to take its place.

The second problem of disciplinary control is its tendency towards the weakening of the independent status of the judges. For it is of vital importance that the independent character of the judges should be reserved in whatever circumstances as only this is compatible with their professional dignity. They should be straightforward and truthful in dealing with human disputes.

-45-

Again, their conscience should be completely free from outside pressure, freedom from political or governmental influence not being alone sufficient. What is still more important is the preservation of their spiritual freedom. Too much self-consciousness or mental suppression may seriously affect the high efficiency and real value of their judicial work.

THE CHANCELLORS AND SECRETARIES OF THE COURTS

Apart from the Magistrates and Public Ministers, there is in each judicial court a staff of Chancellors and Secretaries whose positions are more or less equivalent to those of the clerks, recorders and registrars in the English courts. Although these two groups of personnel, as has been mentioned above, are recruited under the same conditions, classified in the same ranks and administered in accordance with the same rules, their functions in the courts are different in every detail. The Chancellors are the chief assistants of the Magistrates so their function is mainly to assist the latter in the management of the public hearing of cases and to exercise all other judicial functions. Apart from this, they have to undertake the transmission of judicial statements, the delivery of court orders and judgments, correspondence with outside associations, the registration of judicial cases, the deposit of all judicial documents and the supply of information concerning the dates of case-hearings, the

forms of execution of sentences or other matters of court procedure. The Secretaries are assistants to the Public Ministers, therefore their function at court is only to help the Assistant Prosecutors or the General Prosecutors in the exercise of their assigned functions. At the hearing of cases, one Chancellor, at least, is always present and sits at the right end of the bench which seems to be the assigned position of the Chancellors. But no Secretary is ever required to appear in the open court, for this position is only attached to the office of Public Ministers. On particular occasions, however, when the presence of a Public Minister is necessary, he may be sent as the Minister's delegate.

Chancellors and Secretaries are the administrative employees of judicial courts or the subordinates of judges and are not entitled to the special privileges of the Magistrates such as complete independence and irremovability from judicial posts etc. They are subject to the control of the Ministry of Justice as their appointment, transference and discharge are all at the disposal of the latter Ministry. In the courts to which they are assigned, they also have no independence. On duty, they have to submit to their attached Magistrates or Public Ministers. In administration, they are directly supervised by the Chief Chancellors or the Chief Secretaries and indirectly by the First President or General Prosecutor of their assigned courts. In so far as disciplinary administration is concerned, they are subject to the judgment of "the Council of Administration and of Discipline for Chancellors and Secretaries," which is incorporated into each Provincial Court

-47-

of appeal and the supreme Court of Cassation in Rome. Nevertheless any infliction of disciplinary penalties upon Chancellors or Secretaries has to be confirmed by the Ministry of Justice.

The Recruitment of Chancellors and Secretaries is undertaken by means of public examination. The conditions of entry are six. The aspirant must be (1) an Italian citizen (2) between the age of 18-25, (3) a graduate of a high school, technical or commercial institute. (4) possessed of some training in the civil laws (5) possessed of good health and (6) of good conduct i.e. his personal conduct must not be considered "censurable" in any respect.

The examination takes place in Rome or sometimes in a Provincial Capital each year. A special Commission nominated by the Ministry is in complete charge of it. Its context is more or less similar to the public examination for recruiting Praetors or Collegial Magistrates; only the subject matter is very elementary in respect of law and emphasis is laid on the point of general education. Those who have passed the examination with success will be appointed to the "Volontari" by the Ministerial Decree; these are the Chancellors or the Secretaries of lowest rank and their monthly salary is only 450 Lire (=£5.0.0).

Another Commission which is known as the "Commission of Vigilance and Discipline" or in disciplinary charges as the "Council of Administration and Discipline" undertakes the subsequent promotion of Chancellors and Secretaries. The methods adopted by it are also the "Scrutiny" and the qualifying examination,

the general scheme of which is similar to that of the Magistrates'. However, the judicial ranks to which they may be promoted are only the four most inferior grades, as shown in the two tables on pages 7 and 12. The highest rank is occupied by the Chief Chancellor or the Chief Secretary and exactly corresponds to the rank of a "Judge" or Praetor of the Second Class" who is comparatively speaking a very inferior person among the Magistrates. Yet, the fact that these Chancellors and Secretaries, insignificant as they are, are classified in the same judicial rank as the Magistrates, is, nevertheless a characteristic feature of the classification of unimportant judicial employees.

At present there are 5,510 persons serving in the various ranks of Chancellors and Secretaries of the judicial courts, but the former make up a larger proportion (80%) of the total personnel. Again, these 5,510 Chancellors and Secretaries do not all serve in the judicial courts; a number of them, say approximately 270 persons of both categories, are assigned to posts at the administrative Ministry of Justice, where they are, as are the Magistrates on transference, considered as State employees and in the meantime they have to abandon their role as judicial subordinates in the courts.

CHAPTER VI

PROCEDURES

PROCEDURES¹

Nearly all the most serious problems of a purely judicial and technical nature of the Italian judiciary were, until yesterday, to be found in the sphere of civil procedure. On April 1st, this year, the new Code of Civil Procedure went into force, removing many of the abuses which for three quarters of a century had defaced the system. Yet all this does not mean a swift and easy removal of all the traditional and deep-rooted practices in the actual treatment of civil litigation. Another reason which keeps alive the problem is that the contents of this new Code of Civil Procedure constitute such a contrast to the old Code, that reforms in it appear to be too drastic and lack sufficient preparation.

Procedure in the Italian courts, as in the case of any other judicature, varies considerably according to both the nature of the case and the importance of the ~~(involved)~~ subject matter involved. This implies that there is always a substantial difference between the procedure of the civil suit and the criminal charge, and again between the process of the more important and that of the less important cases. The main differences are thus those of "civil procedure" and "criminal procedure", and "formal" and "summary judgment".

1. This chapter was written after the enforcement of the new Code of Civil Procedure. The contents are therefore in accord with the new law.

Prior to the reform in procedure on April the 1st in both the quantity of provisions and the technical treatment of litigation, there was a lack of proportion between the then existing Civil Procedure and the Criminal Procedure, which has since retained its prevalence. The Civil Procedure was administered by the old Code of 1865 which consisted of nearly a thousand articles, and also there was much technical elaboration in the treatment of cases. But the penal procedure, as has been noted, is regulated by a new Code of 1934, which consists of six hundred and fifty five articles. Compared with the former, it is more simple and less technical. The case resembles, however, to a certain extent, the "disproportion" now existing between the civil and criminal procedures of the English courts. By the recent reform of April 1, civil procedure in the Italian courts came under the administration of a new Code which only retains two thirds of the total articles of the old Code of Civil Procedure. This has turned the new civil procedure into a procedure that is obviously too simple to be a well-planned scheme for treating civil litigants litigation. Particularly this seems true by comparing it with the elaboration and complexity of the old Code: the comparison is now the stock criticism of the new Code. Again, to compare the new civil procedure with the present penal process, the latter which was once considered to be "more simple" is now seemingly the one that is more elaborate

than the new civil procedure. The former had even more articles, apart from the complexity of its substantive provisions. Since it has long been a universal practice of judiciaries that the procedure of civil litigation is always the more elaborate and more advanced in technique, the situation now prevailing in the reformed Italian judiciary is undoubtedly a departure from general practice. The departure is backed of course by the unusual stress laid on the administration of criminal justice by the Fascist Government.

The Civil Procedure:

The problems in the old civil procedures of the Italian Courts may be summarized briefly :-

- 1) The civil litigants were prohibited from entering into a personal appearance before any court which is hierarchically higher than the Praetorian Court.¹

Litigants in a civil suit in Italy took little part in the "formal process" before these higher courts. They only appeared on the testimony of facts, which is not held at the same time, nor necessarily in the same court, where the hearing of the whole suit is going to be held. They might appear for the so-called "verbal process" (Processo verbale) before the Local Conciliation Court and the Praetorian Court or before the Commercial Tribunal while the

1. Art. 156, the old Code of Civil Procedure.

hearing is on, but before the Civil Tribunal and the Civil Court of Appeal, no civil suit would be acceptable without the representation of lawyers. As a result of this provision, the personal appearance of litigants before any higher civil courts was rendered meaningless. If they had appeared, however, before the bench, their position was little different from that of onlookers. Therefore in Italy, a more complex civil suit before any higher court was monopolised as a rule by lawyers of both parties. The truth is that once the litigant had entrusted the matter into the hands of a lawyer, his role in the whole process was practically accomplished.

2) The documentary form of debate.

Before the judgment of a civil case was reached by the bench, lawyers representing the two parties engaged in a debate which was not undertaken in the form of verbal arguments or speeches but by reading quickly and solemnly the short "Conclusion" of their statements (Citazioni) which would be handed up to the bench right after the reading was over. In other words, it practically made no difference if the lawyer did not read the "Conclusion" or if there were no such debate at all. The most serious consequence was to render the "hearing of a civil case before these higher civil courts a pro-

-cess that served no purpose.

3) The continual postponement of the hearing of civil cases.

The hearing of civil cases under the old procedure might be continuously postponed upon a mutual agreement of the lawyers who represented the two opposing parties. As there was no provision in the old Code to limit such postponement, the Court could have no power to reject such agreement. As a result of this unsound practice, the hearing of a civil case might be postponed for years and years upon a mutual agreement among the two lawyers. Meanwhile the lawyers could bargain between themselves until they came to the most profitable terms, then compromise the suit of their clients and have the suit cancelled at the Court. Whether or not their clients would have any real benefit out of such compromise was not, however, their main concern since the fact is that as long as they were employed and the hearing was being postponed, they would continue to be paid. One more well-known trick was for a lawyer to sell his client to a richer opponent by private bargain with the latter's advocate. In such a situation, not only did the benefit of litigants go by the board but the administration of judicial justice also suffered severely.

The present Code of Civil Procedure enforced on April the first, has removed all these difficulties and vices by inserting a thoroughly new provision. As regards the first and second problems, the second article of the new Code states that "No court can act upon a "domanda" (request) without having a debate having been (verbally) held or without those parties against whom the 'domanda' will take affect having entered an appearance¹ With reference to the third problem of "postponement of hearing", the Article 281 states that "apart from those cases to which a postponement is expressly permitted by the law or the bench concerned, in response to a request made, (or verbally made) by the parties personally on mutual agreement, a civil hearing can only be postponed once and for a period of not more than two months."²

The subject of civil procedure is very large and complicated. In the Italian case, in spite of the drastic abridgment that has been made in the new Code, it is still impossible to depict the subject in its entirety. What is proposed in the present chapter is no more than an outline confined to the modes of conducting actions in the various civil courts, whereas the proceedings on execution of a final judgment, the rules of evidence and so on, are not treated here.

-
1. "Il giudice non puo stat sulla domanda se non siano state debitamente citate o non siano altrimenti comparse le parti contro le quali la domanda deve proporsi....."
 2. "Oltre i casi di sospensione espressamente stabiliti dalla legge, il giudice, su richiesta anche verbale fatta d'accordo dalle parti personalmente puo sospendere il procedimento per una sola volta e per un periodo non superiore a due mesi."

-7-

Civil procedure under the old rules of the Code of 1865 was divided into "Formal and Summary Procedure" (Procedimento Formale e Procedimento Sommario). The former was, as a rule, adopted in the higher civil courts, namely the Tribunal and the Court of Appeal, and the latter was in the Local Conciliation Court, the Praetorian Court and the Commercial Tribunal whereas the procedure in the supreme Court of Cassation did not follow either of these forms. But appeals from the Praetorian Court to the Civil Tribunal might also be treated summarily. The main difference between the Formal and Summary Procedure was that in the former, the hearing of a case was fixed and the parties to a suit could not act in person, while ⁱⁿ the latter, the hearing was fixed beforehand on certain dates of the session and litigants were permitted to act in person without the representation of lawyers.

Now, in accord with the new Code, this division of the Formal and Summary Procedures has been superseded in name though all the substantial differences between these two Procedures, except those reforms which have just been mentioned above, are retained, namely the "Procedure in Tribunals" and "The Procedure in the Conciliation and Praetorian Courts". The civil procedure in the Courts of Appeal and of Cassation are separately arranged under the title of "Impugment" (Della Impugnazione)

a) Procedures in the Civil Tribunals:¹

An action in the Tribunal is commenced by the submission of a "Citazione" which is in a printed form purchasable at the Court by the lawyer of the Plaintiff in which the latter fills in his claim or demand, names his opponent and states the facts and evidence involved etc.¹ As soon as the Chancellery (the office of Chancellor) of the Tribunal has received this Citazione, it will immediately notify the Defendant of the matter and such Notice includes always a copy of Citazione. This Notice is an equivalent of the "Writ of Summons" issued from the Central Office of the Supreme Court in London or from the District Registry in the other parts of England.

1. Articles 131-304, the new Code of Civil Procedure.

Its usual statement runs as follows:

1. The Tribunal to which the claim is proposed.
2. The name and address of both the Plaintiff and Defendant
3. The object of the Plaintiff's claim or demand.
4. The evidence.
5. A summary of the material facts on which the Plaintiff relies for his claim.
6. The term within which the Defendant should enter an appearance. (Article 131)

After the service of the Notice, the Defendant must enter an appearance ("Cestituzione" or Compensa del Convenute"), within twenty to forty days from the acceptance of service. This term may be abridged to ten if the case is urgent or it may be prolonged to sixty days if the Defendant is resident abroad. During the "Comparsa" or "Appearance" of the Defendant at the Chancellery of the Tribunal, he should, however, (1) "Specify the motive of his intention to resist the claim" (2) "Indicate the evidence which he intends to produce" and (3) "State his story of the material facts which are involved in the case". All these statements of defence are called "La Risposta" in Italian.

The Plaintiff of the case should also call at the Chancellery to enter an appearance ("Cestituzione dell'attore") within eight days of the "Notice of Citazione" and should deposit all his proposed evidences, his original "Citazione", his credential to the Attorney who has been engaged to conduct his case and these documents intended to be communicated to the other party, in the office of the Chancellery. All these documents of the Plaintiff and those submitted by the Defendant go into the Court Archives (Fascicle) after having been registered on the "General List" (Ruolo Generale). All documents in this Court Archive may be inspected or referred to by any involved party or the judges who are later assigned to the case. Furthermore, when the case has been committed for trial, all the records of the "hearing" should also be kept in this Archive mainly for the use of the Court of Appeal if the unsuccessful party

eventually appeals.

Once more as regards the "Appearance" (Costituzione) of parties: if the Defendant, for instance, does not enter an appearance within the time stated in the Notice, he will be liable to a pecuniary penalty of 1,000 Lire for contempt of court. If, however, it is the Plaintiff who fails to appear, the same penalty will be imposed on him. If both the Plaintiff and Defendant should fail, the whole process would be cancelled.

Up to this stage, when the Chancellery has already communicated the documents in the Court Archive to each of the relevant parties, the main objects of the action and the questions of fact or law at issue etc should all be taken as ascertained and the process as a whole is quite ready to be set down for trial. Here it is interesting, however, to notice that this simple step in the Italian civil procedure covers the whole length of all the elaborate preliminary proceedings on "pleading" in the English civil courts which consist mainly of the communications of statement of claim, defence, counter claim, defence to counterclaim etc and the discovery of particulars and further and better particulars. This proceeding in the English courts may not be very long but it certainly involves much technicality and complexity which is absent in the Continental civil proceedings.

The issues of the case are now defined. The prosecution must now bring on the action for trial. This step, in accordance with the Italian Code, is not to be taken only by the Plaintiff as is

the case in English law, but may also be taken by the Defendant, not on application to dismiss the action for want of prosecution but merely to set down the action for trial as does the Plaintiff before the term of sixty days allowed for such prosecution expires. This "Petition" (il ricorso) to set down the action is addressed to the President of the Tribunal who exercises his prerogative to specify a date of the trial and to assign the trial-judge as well as specifying the section in case the Tribunal consists of many Sections which will take up the trial. As there is no jury in the Italian courts, the mode of trial before a Civil Tribunal is uniform, i.e. one judge (formerly three judges) and the place of trial has, of course, been long determined according to the rules of jurisdiction¹ so that there is no possibility of transferring the action to any other court than that in which the Plaintiff has started the action. Furthermore, all the dates of trial are specified.

Within the twenty days following the submission of the Petition, the President should issue a Decree (Decreto di designazione del giudice) in which he gives the specified date of the trial and determines the trial-judge or the trial-section, after having examined the action as it has been represented in the Court Archive. The action may involve a third party who may also enter

1. See Chapter II "Jurisdiction".

an appearance at the Chancellery. If, however, no third party is involved, as soon as the Decree is issued, all the parties to the case will be immediately notified of the date of the First Hearing (La Prima Udienza) by the Court Chancellery and meanwhile the action can be entered in the List of Hearings and can come on before the Court when the date specified occurs.

Now we come to the so-called "First Hearing" of the action. The trial-judge and his Chancellor would appear on the bench and the Counsel and their clients should appear below. If, as soon as the Usher has announced the hearing of the case, it is discovered that one or both of the parties, or their Counsel, has failed to appear within the time stated in the Notice of the Decree, the case will proceed according to the rules of the "default of appearance" which has been stated in the preceding pages where the party in default can be punished with a fine of 1,000 Lire for his contempt of court. Over and above this, the President of the Tribunal will issue another specified date for the so-called "Second Hearing" and notice of this hearing will also be duly given by the Court Chancellery. If, however, in this Second Hearing, the "Default of appearance" of parties should again occur, both the rule and its consequence would be different. The Code says that if the Defendant does not appear within the time stated for the hearing, the Court may enter judgment in favour of or against him in his absence. If the Plaintiff is in Default of appearance, the Court will dismiss the action from the List of Hearings unless the Defendant, who appears, requests the hearing to proceed.

The hearing of the action in the Civil Tribunal usually consists of all or some items of the following:

- (1) Before the case is opened, the parties concerned may request a postponement of the hearing on mutual agreement.
- (2) If there is no such request from the parties, the judge should first attempt a "conciliation". This rule in the Italian procedure is allowed no exception. Furthermore, it is not only applicable to the First Hearing of an action but to any subsequent hearings that may eventually take place. If the attempt is successful, the "Conciliation" would have the same validity as that of a final judgment.
- (3) If the attempt at "Conciliation" fails, the Plaintiff will then open the case by stating again his claim or demands and the defendant will open his in succession. Meanwhile evidence for both sides is laid before the Court.
- (4) Any trial-judge, as we have seen in the previous Chapter on "Jurisdiction" (in the Section on the "Restrictions on Judges") is liable to be challenged by either party, normally on ground of suspicion of bias or partiality. This right of any civil party to challenge the trial-judge must be exercised at this stage before "discussion" of the case begins.
- (5) Now the hearing comes to its main stage, i.e. the so-called "discussion". Discussion means "debate" or "making of speeches" by the Counsel of the two opposite parties. If the discussion is long and does not finish at one hearing, it

may be continued in a subsequent hearing.

6. After the "discussion" of Counsel, the Judge will deliver a "Decision" either verbally, if it is in the same hearing, or in a written and sealed form which will be made public. If, however the trial-judge finds that the material facts on which the Plaintiff relies for his claims are not sufficient or his claim or demand itself is vexatious and baseless, he may instead give a "Sentence" to strike out the action from the Court's records on ground of the abuse of the Court. Both the "Decision" and "Sentence" are the final judgments of Tribunal to which the unsuccessful in the case can appeal to the Court of Appeal.

B) Procedure in the Conciliation and Praetorian Courts:

According to the old Code of Civil Procedure, the proceedings in the inferior courts such as the Conciliation and Praetorian Courts were conducted in an informal atmosphere called the "Summary Procedure". In this procedure, the "Citazione" of the "Formal Procedure" was replaced by the "Biglietto in Carta Libera" which is also a petition but with written in no prescribed manner. But now, in accord with the new Code of Civil Procedure, over and above the supersession of the classification of Formal and Summary Procedure, the "Citazioni" as a written pleading to the courts is equally employed in the proceedings in either the Conciliation or the Praetorian Courts, though the hearings before these are held on "fixed dates" and the appearance of the parties is absolutely

"voluntary". Before the Conciliation Court, there may be no "Citazione" for the procedure permits that a party may commence his action by simply presenting himself at one of the "fixed hearings".

This particular procedure of the Conciliation Court is in fact very admirable, for it saves not only the time and costs of purchasing a "Citazione" and having it written (usually by a Solicitor) and submitted but also the difficulties that may be caused by the illiteracy of the Italian masses.

The preliminary process of "entering an appearance" should take place in the ten days following the "Notice of the Citazione" or it may be postponed till so late as the first hearing of the case at which the two parties should put in an appearance. As has been mentioned before, parties to an action in either the Conciliation or Praetorian Court can conduct their case in person, though it is rarely done in the Praetorian Court, where the proceeding is almost as technical, as in the Tribunal.

The hearing in the Conciliation Court takes the form of a "verbal process" in a very informal atmosphere. There is no "discussion" nor representation by Counsel, as the whole process is no more than a conversation with the purpose of conciliation. As regards the rest of the proceeding in the Conciliation Court and particularly in the Praetorian Court, they are not much different from those in the Civil Tribunal, except with reference to the appeal, the application for a new trial from every final judgment of the Conciliation Court lying to the Praetorian Court and that from the latter lying to the Court of Appeal.

C.) "Impugnment":

Appeal or application for a new trial in the Italian civil procedure is called "Impugnment". "The appeal" is only one kind of "Impugnment" which is permitted to all the final judgments given in the first instance. The proceeding runs like this: an appeal from the final judgment of the Conciliation Court lies to the Praetorian Court and that from the "Decision" or "Sentence" of the latter or of the Civil or Commercial Tribunal lies to the Court of Appeal. According to the old Code of Civil Procedure, the appeal from judgment of the Praetorian Court should lie to the Civil Tribunal; but now, under the new Code, we may note a significant difference: the appeal from the Praetorian Court lies also, like the appeal from the Tribunal, to the Court of Appeal and the present Civil Tribunal becomes a Court of first instance, no longer exercising jurisdiction over appeals.

The process of appeal is begun by the appellant by giving a Notice of Motion to the Conciliation Court within ten days or within twenty days to the Praetorian Court or the Tribunal, from the date when the judgment was pronounced. In this Notice of Motion the appellant must state his grounds of appeal and a summary of the facts concerned. As regards "competence" of jurisdiction, mainly in respect of "matter and value", the original claim, if it were made in the Conciliation Court, must have been over Lire 300 and if in the other courts, over

Lire 2,000. Otherwise, leave to appeal from the Court which has given the disputed judgement will be refused on the ground of "incompetence of jurisdiction".

Before the hearing of appeal takes place in an appellate Court, the latter may conduct at the discretion of its First President a preliminary hearing to investigate the motion in order to determine whether there are sufficient grounds for a new trial. As regards procedure of appeal in the Praetorian Court, it is nearly the same as that of the hearing of an action at first instance. Only before the high Court of Appeal, the procedure of appeal begins to be specialized. In the first place, the bench is plural ("collegial") with three highly ranked Councillors and, in the second place, one of them must have been appointed by the First President of the Court, as the "Relator" who begins the hearing by stating briefly the facts of the case and the ground for the application. In the third place, when the "discussion" between Counsel is over, these three trial Councillors retire from the bench and confer privately, the so-called "deliberation" in camera. Judgment is by majority vote.

The second kind of "Impugnments" is "Cassation" (Cassazione) which is an appeal from the Court of Appeal to the supreme Court of Cassation in Rome. Notice of this "Impugnment" must be duly given by the appellant in the forty days following the "Notification" of the last judgment. The grounds for such application at the Court of Cassation are generally one or more of the following:

1. "default of jurisdiction on the side of judicial authority"
2. "default of jurisdiction on the side of parties;"
3. "the nullity of judgment or procedure;"
4. "violation or false application of law."¹

The application for "Cassation" does not in principle stay the execution of the judgment upon which the "Cassation" is based, though the appellant should now pay a sum to the account of the supreme Court as a security for indemnity which might be incurred to the successful party for his fruitless application of "Cassation". The amount of such security is 150 Lire for an appeal originated from the Praetorian Court or 600 lire for that from the other Courts. Parties to the "Cassation" should also enter into appearances at the Court Chancellery within the appointed dates to deposit documents and to issue statements or counterstatements. As soon as the date of the hearing is fixed by the First President of the Cassation Court, parties are then entitled to issue "Memoranda" to be submitted within eight days before the hearing. The following is a summary of the main points of the hearing at the Court of Cassation:

1. The "Relator-Councillor" reports on the case at issue
2. The Counsel of parties make speeches in turn.
3. The presiding Public Minister states his opinion, particularly on the grounds of appeal.

1. Art. 364, Code of Civil Procedure.

-19-

4. Counsel may submit brief statements in defence of their clients against points raised by the Public Minister.
5. The whole bench, which usually consists of five or seven Councillors, will retire for "deliberation" in camera.

There are two points in the process outlined above that may be noted as characteristic features of the procedure in the Court of Cassation. One is the participation of the Public Minister on the hearing of all civil appeals. The other is that the secret "deliberation" of the bench of one Section may be converted at the discretion of the First President into a "United Conference of many Sections" by adding the Councillors on the benches of other Sections. Yet the functions of the latter "deliberation" are similar to those of the former, since the transformation means only that the case at issue is an extremely difficult one.

A point that distinguishes the procedure from the English judicial procedure is that the Italian supreme Court of Cassation cannot give any judgment which ought to have been given in the Court below, not even vary the judgment which the appeal is based upon, whereas the House of Lords in England, while sitting as the supreme Court of Appeal has full power to do so. The Italian supreme Court is only allowed to exercise three distinct powers:

1. Art. 381, Code of civil Procedure.

-20-

First, to confirm the judgment on appeal which means actually to dismiss the appeal from the Court's jurisdiction.

Second to reverse the judgment without a new trial, which is only applicable when the chief ground of appeal is the "default of jurisdiction on the side of judicial authority" and where the "reverse" alone can dissolve the dispute in issue

Third to reverse the judgment with a new trial before the Court of Appeal from which the "Cassation" originated or before a new Court of Appeal, if the approved ground of "Cassation" is the "default of jurisdiction on the side of parties."

The third kind of "Impugnment" is "Revocation" (Revocazione) which is an application for a new trial. The grounds for such application are generally (1) The Judge or Councillors admitted false documents, evidences or witnesses, (2) The Trial-Judge or Councillors were later discovered to have bias in favour of the opponent and (3) The damages incurred from the sentence to the appellant are excessive or inadequate. The Notice of this application can be given and served within a year from the date when the judgment on appeal was entered and executed.

In the civil procedure of the English Courts, these grounds for the application for a "Revocation" outlined above are merely a part of the grounds of ordinary appeal at a higher appellate Court. For in England there is practically no such difference as exists between the "Appeal" and "Cassation" or between the "Cassation" and "Revocation" in Italian procedure. Appeal in the English courts is of one type. It seems however that in this respect the latter system provides a greater facility for litigants to appeal, in spite of the fact that the enormous costs which will thus be incurred may seriously embarrass the successful but less wealthy litigant.

Criminal Procedure.

A. Preliminary Proceedings.

The preliminary step in the institution of criminal proceedings is the establishment of the crime. But this crime to be established, must be one of the crimes defined: the Penal Code, otherwise no matter how serious the act involved may be the judicial authority cannot deal with it as a punishable offence. Such is the interpretation drawn from the 1st Art. of the new Italian Penal Code, which, as it seems, coincides with the basic legal principle of "nulla poena sine lege".

The forms or method of establishing the delict as defined in the Code of Penal Procedure are four. The first and the most common course is called "Rapporte", which is in fact a form of official document for the police to report a crime to the judicial authority. The second is called "Referte", which is a provision to enable professional men such as medical doctors or lawyers to inform when a crime has been disclosed to them in the practice of their professions. The third is called "Denuncia", which means the "denunciation" of a crime by one who had participated in it or by any third party who has discovered its existence. The fourth is "Querela", which is the usual form of initiating a criminal charge by the party injured.

In principle all punishable crimes must first be notified Assistant Prosecutor attached to the local Praetorian Court and from him the matter will be transmitted immediately to the Attorney General attached to the Provincial Court of Appeal at whose discretion the charge will be finally assigned to the "Section of Instruction" of the Tribunal or the Court of Appeal or to the "Commission of Instruction" of the "Special Tribunal for the Defence of the State",¹ to whose jurisdiction the case should belong. There then takes place the preliminary examination or "instruction" as it is called in Italian.

Usually those accused of a charge of flagrant misdemeanour are arrested at once without warrant or detained in their own residence before the preliminary examination by either the "judicial police", "functionaries of public security", "Royal Carabinieri" or "Communal Podesta". But in those charge which are less serious in nature, it is in the power of the instruction Judge or Councillor to issue warrants², though in a case of urgency, any Public Minister or Praetor may exercise the same power.

1. It is here that ordinary and special justice divide. For special justice, see chapter 7, page (230).

2. Four kinds:

- | | | |
|----|--------------------------|------------------------------|
| a. | Warrant of appearance | (Mandato di comparizione) |
| b. | " " seizure | (" " cattura) |
| c. | " " arrest | (" " arresto) |
| d. | " " immediate appearance | (Mandato di accompagnamento) |

-24-

The preliminary examination of a criminal charge may be undertaken in two forms, i.e., by "formal" or "summary instructions". The former is of course for the serious charges which may be ultimately indicted at the high criminal Court of Assize or at the Tribunal. The other is (1) For charges indictable at the Praetorian Court and (2) For offences which though not flagrant render the offender at once liable to arrest and detention.

At the preliminary examination, the hearing is held by the instruction judge or sometimes by his Chancellor. But according to the Code of Penal Procedure, the Public Minister may also assist in such proceeding. The purpose of the whole proceeding is to find out whether there is sufficient evidence to support the charge against the accused. Therefore the power of the instruction judge is in fact considerable. He can order "judicial experiments" to be made, house to be searched, material evidence to be seized, experts or technicians to be consulted, witnesses to be questioned, documents to be confirmed and translated etc. The law says that his power within the year which is allowed to him as the maximum period for instruction is absolutely "coercive". All processes undertaken during the instruction must be recorded in the presence of both the judge and accused and such record will have the effect of evidence. If however after the

-25-

instruction is completed no sufficient prima facie evidence is secured which could support the charge at issue, the offender should be immediately released with a sentence given by the instruction judge. Otherwise, a different sentence of instruction will be given declaring the charge against the accused to be "indictable" at a certain Court or Tribunal. The latter sentence, which affirms the charge is named the "sentence of revision" in Italian.

B. Trial.:

Trial procedure in a criminal case in the Praetorian Court, Tribunal and the Court of Assize, is more or less uniform. What seems to be a distinctive feature is rather the institutions of these courts and also the quantitative differences in the jurisdiction which they exercise. A crime which will probably be punished by penal servitude up to three years or by a fine within Lire 10,000, is tried at the Praetorian Court of the district in which the crime is committed, with only one Praetor on the bench. A charge that may result in more severe punishment such as penal servitude up to eight years or a fine up to Lire 50,000 will be assigned to the Tribunal. The trial there will be held before a bench of three Judges. A charge to be tried before the High Criminal Court of Assize must be likely to involve the infliction of

-26-

the death penalty, penal servitude for life or from eight years onward. Trial before this high criminal court is held with a bench of two Councillors and five Assessors.

Proceedings of trial before these three courts are all begun by the issue of a "Citazione" by their First Presidents or First Praetor in response to the "sentence of revision" transferred from the Section of Instruction and the "indictment" (richiesta) from the Public Minister attached to the trial court. A definite date for the trial will be named in this "Citazione", which, according to the Code of Penal Procedure must be within fifteen days (or even less, if the trial is to be held at the Praetorian Court or Tribunal) from the date when the "Citazione" was served upon the injured party upon Counsel for the accused, upon the Public Minister who prosecutes the charge, upon any private civil party or parties who may have lodged claims for damages against the accused and upon witnesses, experts or technicians who may be chosen to give evidence. Besides the date of trial, this "Citazione" should also indicate the prima facie fact of the case, the name of the accused and the date to deposit evidence etc. As soon as the "Citazione" is served, the parties should enter into an appearance (comparizione) within the following week at the Court Chancellery.

-27-

For the trial, the accused must first be "arraigned" before the court. In the case of a less serious crime, the accused, if he has been released on bail and does not surrender his bail at the time appointed, must then be arrested by force. Those accused of serious crimes, who are already in custody, while appearing before the court, stand (while being interrogated) or sit in an enormous iron cage, not unlike those we see in the zoo whose space may well accommodate five or six persons. Such cages in all the criminal courts in Italy make a very unpleasant impression upon those in court.

Trial is begun by the President of the bench or the presiding Praetor in a "reading" (lettura) of the accusation submitted by the Public Minister or the injured party, which will be immediately followed by an "interrogation" of the accused on oath. The President or Praetor may ask the accused any question as he thinks fit and the latter is obliged to answer each of them. These questions may go into the details of the crime, the life history of the offender or any other sphere which the bench may consider relevant to the charge. For the ultimate aim of the interrogation is to derive as much as possible the objective truth of the charge from the words of the accused. Interrogation in the criminal procedure of the

-28-

Continental Courts has great importance. Without it, any sentence would be null and void.¹

The next item is the testimony of witnesses or the examination of evidence. Witnesses in the Italian Courts can only be questioned by the bench and are not at all obliged to answer any question put to them by either the Public Minister or Counsel. Before they begin testimony, they are requested to take an oath as does the accused.

The third stage is the speech of the Public Minister. His speech repeats the case against the accused in detail.

The fourth stage is the speech of Counsel for the accused, which may be converted into a "debate" if there is present also Counsel for the injured party. Debate or speech may take considerable time. But Counsel for the accused is always entitled to the "last word". Otherwise the sentence to be given will again be null and void.²

After this, the bench retires for "deliberation" in the camera.

1. Art.441, the Code of Penal Procedure.

2. Art.468, the Code of Penal Procedure.

C. Appeal.

The right of appeal in Italian criminal procedure is exercised by both the Public Minister and the persons who have been convicted. But in accord with the new Penal Procedure, appeal by the former is more encouraged. This is of course a practice derived from the dominating political doctrine of the "saliency of the State". It is sharply distinguished from the practice in the English courts where the "Crown" is given no right of appeal to the Court of Criminal Appeal on decisions of acquittal or those in favour of the accused, apart from this limited further appeal to the House of Lords.¹ In Italy, in the first place, the Public Minister can appeal on whatever decision and in whatever Court he thinks fit. In the second place, when the Public Minister desires to appeal to a higher criminal court, his Notice is to be given within 20 to 30 days from the date when the sentence was given, whereas the maximum period allowed to the one who was convicted, to issue his notice of appeal, is only three days.²

1. See Stephen's Commentaries on Laws of England", 19th edition, vol. IV, p.237.

2. Art.199, the Code of Penal Procedure.

-30-

Appeal in a criminal case is, as in civil procedure, to be conducted in one or more of the three following ways:-

1. "The Appeal" which is the process of appeal on both questions of law and fact, goes from the courts of first instance to the courts which are one rank higher. That is to say: A criminal appeal from the Praetorian Court lies to the Tribunal and that from the latter lies to the Court of Appeal. But against the decision of the high criminal Court of Assize, no "Appeal" is allowed. Again, against the decision of the Tribunal, given on appeal from the Praetorian Court, no second "Appeal" is permitted before the Courts of Appeal.

2. "The Cassation", which is a further appeal to be brought before the supreme Court of Cassation from the Tribunals or from the Court of Appeal on their decisions given on "Appeal" and from the Court of Assize on its decision given in first instance. Cassation before this supreme Court is only permitted on a question of law.

The "Appeal", mentioned above, stays for a time the execution of a sentence but the Cassation" does not, except in the case of a death penalty when the Minister of Justice may order a stay of execution.

3. "The Revision" which is the counterpart of the "Revocation" of the civil procedure. "Revision" lies to

the same court which has given the decision on appeal. In the Tribunal, the Court of Appeal, and the Court of Cassation, only one Judge or Councillor will be appointed to deal with the "Revision" of sentences and the procedure conforms to the provision of "formal instruction". The grounds for such application are:

1. When the sentence contradicts another sentence given for a similar crime in court;
2. When the trial judge has admitted false evidence or facts;
3. When new facts have been discovered after the conviction tending to establish the innocence of the accused.

The procedure of a trial on "Appeal" in the Tribunal resembles in general the trial at first instance, where the Court consists of three Judges and the prisoner, being convicted of a more serious crime, is obliged to enter into an appearance. But in the Court of Appeal, the bench consists of four councillors and one of them must be appointed as "relator" who will begin the "Appeal". The rest of the trial is similar to that before the Tribunal. What should be observed is rather the procedure by trial in the supreme Court of Cassation where the bench consists of seven councillors and trials are conducted with unbelievable

expedition and smoothness. Another notable point is that the prisoner does not appear in person but is represented by counsel. The following is a summary of the main stages in any penal section of the Court of Cassation:-

- 1) The Chancellor announces the trial and the counsel (if there are any) take their seats;
- 2) The "relator" relates the "Cassation".
- 3) Counsel make speeches.
- 4) The Public Minister accuses.
- 5) Counsel may submit a short written statement rejecting accusation just made by the Public Minister.

A trial at the Court of Cassation on the full programme outlined above, may will be finished in five minutes, though not infrequently a whole trial may take only two minutes if there is no counsel representing the injured party or the accused.

The atmosphere of the Cassation Court is very informal. For instance, when the Counsel is making his speech, the President of the bench (usually the Sectional President) may interfere with him freely and sometimes quite impertinently. Meanwhile Councillors on the bench who are not very interested in Counsel's speech, shuts his eyes and relaxes as if taking a nap. And the Chancellor, having performed his duty in announcing the case, may pass the time in reading newspapers.

CHAPTER VII.

SPECIAL JUSTICE

.....

SPECIAL JUSTICE

Special Justice in Italy has found its expression mainly in the "Special Tribunal for the Defence of the State", and partly in the Court of Labour Jurisdiction. The organisation, personnel and procedure etc. of the Special Tribunal form a separate order by themselves in which there is practically nothing resembling the practice of any of the ordinary judicial courts. In the Court of Labour Jurisdiction, however, many of the essential features retain the significance of ordinary justice.

The Special Tribunal for the Defence of the State:

The Special Tribunal for the Defence of the State was established in the November of 1926 to exercise an exclusive jurisdiction over a great number of crimes which are defined in the new Penal Code as the most serious of all punishable crimes. These crimes, in general, bear the title of "crimes against the personality of the State", and are enumerated in 72 articles which compose the whole of the first part of the Second Book of the new Penal Code. Again, "the personality of the State" is divided into two: the "international" and the "internal personality". Crimes against the "international personality", include mainly "offences against the integrity", independence or unity of the State

-2-

(Art.24), "treason" (Arts.242-256), "espionage" (Arts.259-269) and "anti-national activities committed abroad" (Art.269). The ultimate purpose of having these provisions is to protect the dominance of the "Strong State" and to increase the prestige of the Fascist Party. The crimes against the internal personality of the State represent, however, a different aspect. Thus, one division of these crimes is confined to "attempts or offences against the life, liberty, and honour of the King, the regent, the queen, the heir to the throne and the princes and princesses of the Royal Family" (Arts.276-279). Immediately following, however, there are equivalent provisions providing for "attempt or offences against the life, liberty, and honour of the Head of the Government" i.e. Mussolini" (Arts.280-283). The remainder of this category of crimes is in general confined to "crimes against the political rights of Italian Nationals", Foreign States and their Heads of Government", "the institution of the State", and "conspiracy", etc. (Arts.283-313), for the most part they are not unlike the equivalent laws of other States.

The Special Tribunal for the Defence of the State has a national jurisdiction and has therefore its permanent seat in Rome. Above it, there is no higher tribunal. According to the Law of August 4, 1931, (No.674) the Head of the Government is the only Authority who may design or alter its internal organisation

-3-

and the arrangement of the staff etc. Hitherto, this power was normally exercised by the Ministry of War.

The total staff of the Special Tribunal numbers 73 persons but none of them is recruited from the judicial personnel nor from the category of advocates. They are drawn entirely from the officers, members, or employees of the Army, the Navy, the Air Force or the Fascist Militia of the State and are appointed by the Head of the Government. The bench includes a President, Vice-President, the President of Commission of Instruction, the General Prosecutor, the Vice and Assistant General Prosecutors, Judges, Councillors for Revision, Chancellors, and Secretaries, etc. But, as a rule, none of these has ever been trained properly in law or judicial procedure, nor is such training a necessary qualification for the Special Tribunal. The annual outlay for the salaries of all these persons as issued in the Law of March 29, 1938 is Lire 2,000,000.

In the Special Tribunal for the Defence of the State, there are no sub-divisions. There is an equivalent to "Section of Instruction" as found in the judicial Tribunal or the Court of Appeal which often deals with the preliminary examination of a trial called the "Commission of Instruction", to which is assigned one President, one Vice-President and a number of Judges and other

-4-

functionaries. As a rule, the proceedings in this "Commission of Instruction" open with the laying of an "information", which information is normally transmitted from the General Prosecutor attached to the Ordinary Court of Appeal¹ or obtained directly through other means. Since the Code of Martial Law of 1869 has authorized this Tribunal to suspend any legal formalities, it is quite allowable for the Commissioners of Instruction to arrest and to detain people with or without warrant. Furthermore, this preliminary examination may linger on and on without limit. Innocent people may thereby be kept in custody for one or two years, merely for the purpose of conducting a preliminary examination and no accused at this stage is entitled to legal assistance from any professional advocate.

The procedure of trial before the Special Tribunal as well as the preliminary proceeding in the Commission of Instruction is, in practice, conducted mainly by the Ministry of War. The following is a summary of the main stages of trial before the bench of the Special Tribunal as they have been adopted in practice during the last thirteen years.

1. See the Penal Procedure, page (219 -).

- 1) The trial before the Special Tribunal for the Defence of State is not open to the public and as a rule is conducted in secrecy. The only exception to this rule is that reporters of the Government or Party Press may be admitted if they can produce a certificate.
- 2) Although at this stage of trial, the accused may theoretically have legal assistance from advocates, in practice, any advocate who acts in the Special Tribunal on behalf of the accused must be a Fascist. And such Fascist advocates usually demand tremendous fees from their clients.
- 3) The decision given by the Special Tribunal is practically final, though, in principle a "revision" which lies in the power of the "Councillors for Revision" attached to the same Tribunal is not prohibited if it is approved by the President of the Special Tribunal and by two "Counsel" of the Militia. But this has never been carried out in practice.
- 4) The sentence of death given by the Special Tribunal is to be executed within twenty four hours from its proclamation by the Militia. And confiscation of any property belonging to the convict has always been projected as an assessory punishment, although in principle, the Special Tribunal may not use such means of punishment on a prisoner, on whom the sentence of death or penal servitude has already been passed.

The Labour Court.

The jurisdiction of the Labour Courts as defined in the Labour Charter and also in the new Code of Civil Procedure (Arts. 412-428) may be divided into three classes, 1) Settlement of disputes arising from the enforcement of labour contracts, 2) The observance of other existing rules and 3) The formulation of new labour conditions.

The labour contract implies in the first place the so-called "collective contracts" entered into by two legally recognised syndicates or professional associations. The binding force of such contracts extends not only to the contracting syndicates but also to their affiliated organisations. Such collective contracts might deal with conditions of labour or disciplinary regulations etc. Disputes, in respect of such contracts are to be settled in the Labour Court. In the second place, the labour contract implies the "individual contracts", which are entered into by two individuals such as a worker and an employer who belong to two different syndicates. The contents of these contracts are, in general, within the three aspects mentioned above, so their enforcement is also a sign to the jurisdiction of the Labour Court.

The rules binding all recognised syndicates in Italy are formulated by the National Council of Corporations, (the highest of the Liaison organs) on behalf of the State. Obligatory rules

in questions of co-ordination of relief work or of the various regulations dealing with labour problems are legislated by virtue of a power conferred by the Head of the Government. But rules or agreements concerning the collective economic relationships of several syndicates must be ratified by the National Council of the Corporation, upon the request of an interested syndicate with the consent of the Head of the Government. Controversies in respect of these rules are also allotted to the jurisdictions of the Labour Court.

The formulation of new labour conditions is permitted prior to the expiration of an old labour contract, provided that these alterations are necessitated by new circumstances other than those for which the original contract was concluded. But such alteration is only permitted in the case of a collective contract and an individual contract cannot be reconditioned while the collective contract which makes possible the existence of an individual contract remains unaltered. The demand of workers for the formulation of such new labour conditions is also subject to the consideration of labour magistrates.

Any dispute arising from an individual labour contract or from the application and interpretation of a collective contract which is binding on both parties in the dispute is termed an "individual labour dispute". Such a dispute is often incurred between two individuals, i.e. a worker and an employer. When any dispute arises from a collective labour contract between two

syndicates, either referring to the drafting of a new contract or to the introduction of new labour conditions etc.: this dispute is then termed a "collective labour dispute".

From a legal point of view the differentiation of labour disputes into "individual" and "collective" is extremely important since the courts to try these two different disputes and the procedures adopted are entirely different. An individual dispute, since the parties are not unlike those to an ordinary civil suit, is settled in the ordinary Civil Courts in accord with Civil Procedure, just the same way as a civil suit is settled. But a collective dispute, since it is a new form emerging from the Fascist Corporative reform, is assigned to more specific Labour Courts, attached to the Provincial Courts of Appeal. In a strict sense only this latter court for collective labour disputes may be called "the Labour Court" since the others which try individual labour disputes are merely the ordinary civil courts.

Moreover judicial decisions given on these two different disputes are not on the same footing. Decisions on collective disputes have always a prior claim over those on individual disputes. The most noteworthy case is that the latter may be null and void if found "incompatible" with either a previous or a subsequent decision given on a collective labour dispute.

All the Italian labour courts, whether dealing with individual or collective labour disputes, as has been noted, are actually

the Praetorian Courts, the Tribunals, the Courts of Appeal, and the supreme Court of Cassation of ordinary justice. Apart from a few important modifications, a labour case in these courts follows ordinary procedure. Moreover, since April 1, of this year, the labour procedure by the individual dispute is no longer provided for by special legislation but by the new Code of Civil Procedure (Arts. 412 - 428). The important modifications introduced to the proceedings of both individual and collective labour disputes are 1) the introduction of the so-called "technical jurisdiction" and 2) the intervention of the legally recognised syndicates, the State Liaison organs and the National Council of Corporations.

The staff of all these labour courts are the Praetors, Judges, Councillors and Public Ministers of ordinary Justice. Just as in a civil action, an individual labour dispute in the Praetorian Court or the Tribunal is heard by only one Praetor or Judge. Again labour jurisdiction in the Praetorian Courts as in the case of civil jurisdiction, does not exceed a claim of 10,000 Lire but that the Tribunal is over the value of 10,000 Lire. In the Court of Appeal where only "collective labour disputes" and also appeals on individual labour decisions are heard, the bench consists of three Councillors with often a Public Minister and experts in the case of a hearing of a collective dispute. In the Supreme Court of Cassation, only Cassation in questions of law both concerning individual and collective labour

decisions are heard; the bench there maintains its usual number of seven highly ranked Councillors with the participation of one Public Minister.

The Court of Appeal in its capacity as a "Labour Court" judging "collective labour disputes" is worthy of further examination. As has been mentioned in the previous chapter on "Courts", the Labour Court is only one of the Special Sections attached to each Provincial Court of Appeal and the total number coincides therefore with that of the latter. Its bench consists of five persons; three are Councillors, transferred from the attached Court of Appeal for the purpose and one of them is often appointed as President of the Labour Court. Two out of the five are the so-called "Expert Advisers" chosen as a rule from a panel.

The "Experts" in the Italian labour courts rank as "technical judges". The labour jurisdiction is called "technical jurisdiction". These Experts are generally divided into two classes: the "Expert Adviser" and the "Expert Citizen".

The Expert Citizens (Cittadini Esperti), are assigned on occasion to the Praetorian Court or the Tribunal when an individual labour dispute is on trial and it is their duty to assist the bench respecting technical details. For each trial of a labour dispute there are two Expert Citizens; without them, the sentence would be null and void unless, in the opinion of both parties, the participation of Expert Citizens can be dispensed with.

All the available Expert Citizens have their names listed in panels; these panels are reviewed every two years. The inscription of experts on such panels must be recommended in the first place by the various legally recognised syndicates and in the second place by the "Labour and Social Welfare Department of the Provincial Economic Councils". These Expert Citizens are chosen in equal numbers from both the categories of workers and employers in proportion to the various existing enterprises in one Province. They will then be distributed to either the panel of a Praetorian Court or that of a Tribunal in whose circuit the Expert has resided continuously for more than three years. The following is a summary of other qualifications of entry to the panels.

- 1) All persons must be Italian citizens and over the age of 25.
- 2) They must possess adequate capacities and must not be in charge of any syndicate.
- 3) They must be of good moral and political conduct and must never have been in a state of "insolvency".

All the panels for the Praetorian Courts and Tribunals must be approved by the First Presidents of the Provincial Courts of Appeal in consultation with the President of the Labour Court. After such panels have been decreed and pronounced all the Expert Citizens enlisted may be challenged by any legally recognised syndicates.

The Expert Advisers are the technical judges of the Labour Court attached to the Provincial Court of Appeal to exercise only jurisdiction over "collective labour disputes". A number of them are listed on a panel which is formed in nearly the same manner as the panel of Expert Citizens. But on special occasions, Expert Advisers may also be appointed from outsiders with the consent of the parties and of the First President of the Court of Appeal to which the Labour Court is attached. But here the qualification demanded of the Expert Advisers are stricter since over and above those demanded of an Expert Citizen, the Expert Advisers must possess a university degree and enjoy a reputation for the "highest, and most irreprehensible moral and political conduct." Again their services in the Labour Courts are rewarded; the pay is 100 Lire per day while they are serving on the bench in addition to their monthly salary of Lire 1500 - 2000 which is equivalent to that of a Councillor in the Court of Appeal.

Before we consider the procedure of the Labour Court, let us look first at a number of rules either definitely expressed in law or frequently adopted in practice in the judicial process of a labour action. They are:-

- a. In the Labour Court or other ordinary Courts of Justice, two parties to a labour action are both in principle entitled to an equal chance in presenting their claims or defences and counter claims or rejoinders etc. to the Court, although in practice, the attitude of the bench, as evidence in the last

ten years, has always been more favourable to the workers.

b) To expedite the labour proceeding, another important rule comes into action. In the labour proceeding postponement of hearing is not permitted apart from the one appeal and one Cassation that are regularly permitted to reach judicial action. Here there is no notorious gap as was found in the old civil procedure of the Italian Courts which subjected the civil process to an everlasting postponement, ¹⁾ for a "speedy settlement" is now essential to the judicial process of a labour dispute.

c) The third rule is that conciliation must be first attempted by the Liaison Organs before a dispute is submitted to a jurisdiction of a Labour Court. Furthermore, the Court must also attempt a conciliation between the parties before the hearing is actually commenced and such attempt must be renewed again and again throughout the whole judicial process since only the certain failure of such attempts will induce the Court to deliver a final judgment.

d) The fourth rule is the observance of "local usage" or custom. From the labour decisions delivered between 1927 - 1930, evidence may be found that the Labour Courts tend to give greater weight to "local usage" than to the rigid.

1) See chapter 6, page .(202).

-14-

terms of the law concerned whenever the former appears to be more favourable to the position of the workers in spite of the fact that such preponderance of "local usage" has been denounced in principle by the State in 1930. The only exception that is theoretically allowed to this principle is in the case of "fixing new labour conditions for employing workers in a branch office."

The procedure adopted in the Praetorian Courts and Tribunals for the action of "individual labour disputes" remains largely in the form of the ordinary civil proceedings. The only modification is the participation of two Expert Citizens on the bench and one Public Minister as the representative of the State. As the civil procedure of both the Praetorian Court and the Tribunal has been described in the preceding chapter, there is no need of repetition here.

The procedure of the labour action on the "collective dispute" followed in the "Labour Court" differs considerably however from that of the "individual labour dispute". In the first place, the procedure is provided by a special law: the Royal Decree of July 1, 1926 not as in the latter case by the Code of Civil Procedure. In the second place, this procedure more than ever aims at a "speedy settlement" for the "collective labour dispute" at issue. Thus, when a "Demanda" is made at the Court-Chancellery, the President of the Labour Court must fix a date of hearing within twenty four

hours. In the third place, more extensive interference from the State is allowed in the judicial process of the "collective labour dispute". Here the Public Minister is not only required to be present at all the hearings but his permission is also necessary in the event of the cancellation of a case from the "General List of Hearings". In the fourth place, from the decision of the Labour Court, there is only one "cassation" on questions of pure law permitted before the Supreme Court of Cassation. As in the case of sentences given by the high criminal Court of Assize, "the appeal" on both questions of law and of fact is not made available in view of the serious nature of the case.

For each action of the "collective labour dispute" there will probably be two hearings; the first will be arranged for the purpose of attempting a conciliation between the two parties and in this the Expert Advisers are not required to be present. If such an attempt fails the Court will then fix a subsequent hearing in ten days to try the dispute and appoint the two Expert Advisers who should preside over the formal trial. The parties will then be given five days to hand in their "conclusive statements".

The trial is in fact commenced at the second hearing. The whole process is very similar to a civil proceeding held before the Court of Appeal apart from the presence of the Expert Advisers of the Public Minister. The advice of the former will be heard by the Councillors during the "deliberation" in Camera, but

-16-

the "conclusive opinion" of the latter must be heard in the open court before the bench withdraws. A judgment given by the Labour Court or a conciliation reached at the preliminary hearing bears the same effect as a new Collective Labour Contract. But a revision before the same Court, or a "cassation" before the supreme Court of Cassation is only allowed on "the judgment" given after the deliberation not on the conciliation reached in any preliminary hearings.

CHAPTER VIII.

CONCLUSION

.....

CONCLUSION.

The survey of the Italian judicature has made it clear that two points must be clearly grasped before judgment of the system as a whole is possible. Firstly, the relation between the judicature and the official political and economic theories. Secondly, the differences between the Italian and Anglo-Saxon judicatures. It is true that the Italian judicature has been modified considerably by the dominance of the State and the emphasis upon the supreme interests of the State; yet it is equally true that the Italian judicature, merely as a system of "ordinary justice" has nevertheless its proper place among the judiciaries of the continental system. Nevertheless over and above its many purely judicial characteristics common to most continental judicatures, many other characteristics stand out prominently as "the judicial system of a Fascist State". These characteristics centre mainly round the fact that the Fascist judiciary tries "crimes against the State" in a Special Tribunal and by a non-judicial process, whereas a democratic judiciary tries the same in the ordinary judicial courts and by ordinary procedure, although both systems may impose penalties which are more severe than those that they will impose on ordinary crimes.¹

1. Readers are here reminded to note the severe punishments imposed by the English Courts upon the agents of the I.R.A.

The following is a Summary of the more distinctive features of the Italian judicial system as they have come into view after a survey in turn of its laws, courts, judges, and procedure.

First, in Italy there is a Ministry of Justice which administers the whole system of judicial courts and judges and partly the system of "special justice", i.e., the "Labour Courts". The "Special Tribunal for the Defense of State", which is the greater part of "special justice" is under the direct control of the State.

Second, the judicial courts of all ranks are localized and jurisdictions allotted to each of them are precisely defined in the Codes concerned. Normally, there is no possibility nor necessity to transfer the jurisdiction of a case from one Court to another.

Third, the Italian judges and prosecutors form one judicial profession and are classified into uniform official ranks. Moreover they earn the same scales of salaries and submit to the same disciplinary measures as have been provided to supervise the "Judicial Officials".

Fourth, all "Judicial Officials" are recruited from the law university graduates. The only method of recruitment is strict public competition. Their later promotion from one rank to another is again by taking a more advanced examination after minimum periods of service in each grade. "Promotion by appoint-

ment" (scrutiny) is a privilege limited to a few who have already reached the highest rank in a particular category.

Fifth, the Italian judges try both civil and criminal cases, and even the prosecutors, in addition to their normal criminal jurisdiction, are entitled to interfere in the matrimonial cases.

Sixth, procedure in the Italian Courts is comparatively simple as compared with that in the English Courts. Particularly is this the case with civil procedure, where the long and complicated preliminary process in the English civil courts on "Pleading" is entirely omitted in the Italian Courts. Furthermore the jury-system does not exist. The only lay elements among the judicial personnel are the "Conciliations" and "Assessors", whose status and functions are in no way similar to those of the jurors.

Seventh, it has been noted that, apart from all these judicial courts in Italy, there is the "Special Tribunal" for the Defence of State", established mainly for the purpose of condemning the anti-Fascist and suppressing so-called "political crimes" or "crimes against the personalities of State". This "extraordinary tribunal" (Tribunale straordinario, as defined in the Statuto Fondamentale) is a clear violation of the fundamental principles of the judiciary, which are laid down in the Italian Statuto Fondamentale (Art.71), and there is practically

nothing that can justify this violation. Due to the establishment of this non-judicial organ, much of the objective value of the Italian judicial system as a whole, is apt to be distorted and obscured.

Finally, we one may ask:

Is there any equality in Italian law and justice? To answer this question one must again bear in mind the differences that exist between "special" and "ordinary justice".

In the sphere of special justice, men brought before the "Special Tribunal for the Defence of State" belong to one type, i.e., the Anti-Fascists or those suspect of Anti-Fascism. These men have to submit entirely to the despotism of the State, and the question whether they can have an equal chance in justice need not be entertained. For it has long been a fact that in Italy "there is no place for the Anti-Fascist". Before the "Labour Court" the situation is better. There, on the one hand, are two opponent parties, i.e. the worker and the capitalist. The problem that is before us, is whether before this Court, both the worker and employer have an equal chance to win the case. The answer is that, due to the powerful interference of the State with labour jurisdiction, the chance of either party would, in no sense, be dependent on the impartiality of the judge. For the ultimate purpose of the State in this "special justice" is to compromise the disputes between workers and employers, not, however, to

afford either one of them a free chance to fight to the end for judicial justice.

Secondly in the sphere of "ordinary justice", this problem of "equality before the law" could be discussed in two aspects. The one is whether the law provides or practice permits an equal chance before any ordinary court of Justice for both the Fascist and non-Fascist. The next is whether there is such an equality between the poor and the rich.

In civil suits between two individual opponents where one is a Fascist and the other is not, there has been no bias whatever so far as the practice of the last few years stands, on the part of the judges in favour of the litigant who is a party member. Only, as is sometimes conceivable, in the case where one of the parties is a body corporate which is backed eventually by the local Fascist Party, the judge who has been assigned to the jurisdiction of the case, may privately receive letters and threats urging him to give a favourable decision to the party indicated. And in one or two instances, these unfortunate judges who were involved in such cases were actually compelled to surrender their independence in face of threats.

As to litigation between the rich and the poor, in which no political interest is involved, Italian law and justice has proved to be one of the most just and fair in rendering to both parties an equal chance to fight for justice. Like the judiciaries

-6-

of other continental states, the Italian system of judicial justice is popular with the masses. To seek a decision or a compromise from the Courts is always a normal method of solving disputes among the people, the poor and the rich alike. The chief factors which appear to encourage the mass litigants are however numerous. They are namely: 1) The certainty of the substantive laws. 2) The fairness of the cost and also of the fees of lawyers which are both reasonably fixed in scales by the Ministry of Justice. And 3) the great number of localised courts and judges, which is a great convenience to the people.

THE END