

# THE RULE OF LAW IN ITALY

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The subject seems to entail a twofold inquiry - (i) what the jurists of a country consider to be the Rule of Law, and (ii) how far the Rule of Law finds application in that country's legislation. The two spheres exercise a mutual influence upon each other. The doctrine has a tendency to idealize the system prevailing in its own country, and this system, in its turn, is to some extent the realization of some doctrine. But they ought to be examined separately, in so far as legal or political theory cannot be confused with positive law, if misunderstandings are to be avoided. The actual practice followed in the enforcement of the law would require yet another kind of research.

## I

### VARIOUS CONCEPTIONS<sup>1</sup>

#### The "Stato di diritto" as a Liberal Ideal.

Diverse expressions are often used in different legal systems to indicate institutions which are closely related, if not identical.

1) For recent Italian conceptions, see especially C. Caristia, in *Rivista di diritto pubblico*, Vol. XXVI (1934), pp. 388-408, and in *Archivio di studi corporativi*, Vol. VIII (1937), pp. 351-388; P. Bodda, *Lo Stato di diritto* (1935); F. Battaglia, in *Rivista internazionale di filosofia del diritto*, Vol. XVII (1937), 237-287, and Vol. XXV (1948), pp. 164-171; M. Ruini, in *Riv. di dir. pubbl.*, Vol. XXXIX (1948) pp. 170-193; the debates in *Quaderni di "Justitia"*, No. 2 (1953) and No. 6 (1955); N. Bobbio, *Politica e cultura* (1955), pp. 160-194; O. Ranalletti, *Istituzioni di diritto pubblico* (15 th ed., 1955), pp. 200-207; R. Treves, in *Riv. int. di fil. del dir.*, Vol. XXXIII (1956), pp. 333-340.

The "Rule of Law" may, to all practical purposes, be assumed to imply the same thing as the Italian "Stato di diritto", just as "self-government" is what the French understand now by "décentralisation".

The idea of the Rule of Law, came to Italy via the German "Rechtsstaat" at the end of last century, when German legal doctrine was at its height- though not the Rule of Law itself, which we had derived in the middle of the century from England in the wake of French constitutionalism. But it was agreed since the beginning that this corresponded to the English Rule of Law. The favor rapidly gained by the legal state cannot be understood, without remembering that it embodied the principles of liberal government, recently introduced into the country, as contrasted with the domination of the absolute princes of the past, and became the symbol of further liberal reforms. The successive loss and reconquest of a free government and the threat impending over it, together with the very subtlety of the question, may explain why probably in no other country, after Germany, has the nature of the legal state been debated so much as in Italy.

It did not take long to discover that the new formula, legal state, or state of law, implied a tautology. If it has to be understood as a state subject to law, limited by the law, enforcing the law, and so forth, that certainly means nothing. From the legal point of view, every state is a legal order. It does not matter whether we consider the state to be logically antecedent or subsequent to the law, or one and the same thing as the latter. A state cannot be imagined without being based on the law, however loose are these rules. This conception is merely formalistic, and can be applied to any state, whatever its system of government is. All states make their own law.

Two main contents are then given to the legal state - and may be detected without much difficulty, though they are not always expressed in a simple way and generally overlap.

A legal and restricted conception, or administrative, as it is called, starts from the consideration that the legislature cannot be

bound by law, according to what until recently was the prevailing opinion. The ends of the state have a political and not a legal relevance. The state can only be bound legally in the exercise of its administrative and judicial powers. It is especially when the administration is carried out according to the law, within the limits set by that law, that the state is legal. This is just the opposite of the "police state", where the absolute prince combined in his hands all the powers of the state, finding no legal limits outside those imposed by God. In the modern or constitutional state there is a plurality of constitutional agencies, powers are in principle divided among them, and the relations between the state and the individuals are regulated by the law. These relations therefore become legal relationships, and only in this way can the rights of the individuals against the state be legal and the state be said to be legal. If the administration oversteps its legal powers, the ordinary or administrative judge — and the latter in particular — will be there to check it and enforce the observance of the Rule of Law. Individual rights are thus secured. This is, in reality, the supremacy of statute law, with an executive acting in agreement with the rules established by the legislature, no matter what these are.

The wider, political or constitutional conception is not satisfied with this supremacy of the law and goes a step further. It looks beyond the law itself, and sees a legal state where the liberties of the individual are respected by the legislature as well, even if their guarantee will be social or political only. Here neither the legislator nor the administrator can act arbitrarily. There should be a perfect harmony between the rights of the state and those of the individuals. The state is not the beginning nor the end of all social and legal life. Individuals as well as groups have their "autonomy", understood as the faculty of creating their own law, a private or subject-made law, intertwined with state law. All the authors feel free to pour their own political ideals into the elastic framework of the legal state, especially linking it with democracy and the ensuing necessity of a representative legislative assembly and local self-government.

Both conceptions have as their core a single idea, however

vague its contours may be reputed - the protection of the individual against the state, on a narrow or wider scale. They are the product of the political theory of liberalism, without reference, of course, to any political party bearing this name. On the whole, it may be said that the legal state is a model, perhaps never fully realized, to which real conditions conform in varying measure. Its actual existence becomes a question of degree.

"Stato di diritto" as Compared with the Rule of Law.

The three elements composing Dicey's classical doctrine of the Rule of Law appear, on their surface, to be almost completely alien to Italian as well as Continental tendencies, in general — besides being somewhat at variance with English constitutional law of his times —, and in fact he himself stressed their insular peculiarities. Shall we then come to the conclusion that the parallel usually drawn on the Continent between the Rule of Law and the legal state is hasty? This should not be the case, as it will not be difficult to ascertain the analogy between the conception of the legal state and what is essential in Dicey's ideas, their deeper significance, apart from the ways in which he presented them.

The first meaning of Dicey's Rule of Law is the absolute supremacy of regular law as opposed to arbitrary powers on the part of the government. The legal conception mentioned above accepts the supremacy of the law as well as these wide powers, provided that they are authorized by the law. But Dicey's real thought is in agreement with the political conception in excluding arbitrariness of any kind.

Again, equality before the law is something unknown to non-common law countries, if it merely implies the exclusion of administrative law and tribunals. The latter may subject public authorities and officials to limitations more effectively than the law relating to private citizens, and the separation of powers is for us a prerequisite of individual liberty. But Dicey's equality implies fundamentally a protection of liberty through a law defining the powers of the administration and a court to check any abuse, and if we put it in this way, it will sound more familiar to Continental ears.

The Continental lawyer would also find it incorrect to say that constitutional law is not the source, but the consequence of the rights of the individuals. But behind this statement its author wanted to stress the necessity of providing remedies for the enforcement of individual rights, and all would agree upon this.

Even the critics of Dicey suggest that Rule of Law, once stripped of his Whig liberalism and individualistic outlook, simply means a free government, and stands as a principle to guide the conduct of any political party. The Rule of Law may then be taken as equivalent to the political conception of the legal state, although, as Jennings put it, it is easier to recognize them than to define them, both being rather unruly horses.

#### "Stato di diritto" and the Fascist State.

The polemic whether the fascist state was a legal state has still left some sparks and it is not entirely useless to recall it. In its heyday the sycophants wanted to disguise totalitarianism under a respected cloak, such as that provided by the legal state. Those who were still fighting a rearguard action against fascism clung to the legal state as a token of individual liberty. The formalistic approach to the "Stato di diritto" and the ambiguity of its content offered support to both positions. Any state is ruled by the law. Legal relationships between the administration and the citizens, according to the legal and technical conception, are certainly possible also in a dictatorship. Pure lawyers, as such, were not supposed to notice that lawless actions of people in authority were in fact taking place and remained unchecked. But even from a legal point of view it should have been apparent to them that the shifting line of the rights of the citizens against the state had sunk below security level, owing to the use of legislative powers on the part of the executive, the wide discretion conferred upon this, the curtailment of political liberties, and the restrictions set to judicial review. Legality thus becomes an empty word. The same lawyers are now ready to admit that at least some attenuations of the legal state had occurred under fascist rule. But some went as far as to affirm that the fascist state was more entitled to be called legal

than the liberal state, as more relations were regulated by the law than ever before, and that the corporate state was a refinement of the legal state. This is clearly the negation of everything the political conception of the state of law stood for, and a resort to this could only have had an emotional purpose. In the totalitarian system law and state do not represent any longer the end and the value of the individual and the social world. The law has become the will of a few, and the state an end in itself, the highest value. This could not entirely escape attention. In fact some recognized then with glee, and others with dismay, that the old liberal ideal was antithetic to the fascist spirit.

#### **The Rule of Law and the Marxist Point of View.**

Italian Marxists have followed those of other countries in arguing that the Rule of Law is just a bourgeois ideology. The contention has drawn sharp criticisms. It is admitted that, historically, the legal state is the result of the struggle of the bourgeoisie for its emancipation from an absolute ruler. True, the Rule of Law has been theorized and realized by that class. But the bourgeois have conquered it for everybody, as an achievement of mankind. Not even the legal state is an end in itself. It is a modern device to prevent the recurrence of absolute powers, a defence of liberty against any attack, even if it comes from a majority or the bourgeoisie itself. Under the Rule of Law socialism found the possibility of growing and often attaining power. Liberty is a universal value, and not a bourgeois institution. Personal and religious freedom, and freedom of speech, of the press and association, not to mention political freedom, are also for the benefit of the working class. This is what communists in capitalist countries always claim, with their denunciations of action alleged to be unconstitutional. When the bourgeois, in order to preserve their privileges, build up a fascist state, as the Marxists themselves interpret it, then the Rule of Law is over. That means that the legal state is not one and the same thing as the bourgeois state. In its machinery lies the highest guarantee of the individual liberty so far discovered, and Marxists has to this day been unable to produce a better one.

Whereas for the liberal-democratic tradition freedom can only be found within the state, the Marxist would object that the state is an instrument of domination, and not of freedom. The conservative liberal would retort that this is true of the proletarian state, which is for him irreconcilable with individual liberty. No man reluctant to go on with the experiment of collective property is allowed to save himself from tyranny. But progressive liberals, like Bobbio, are willing to concede that even a classless society can be ruled by the law, as this assumes a separation of functions, not of classes. An abuse of power is possible in any society in which there are rulers and ruled. Arbitrary decisions can be taken in a class as well as in classless society. The workers can use the legal state as an instrument for the protection of their liberty and security, as the bourgeois did, against the threat of absolute power. That would spell liberty for all, and not for the few alone.

"Stato di diritto" and the Welfare State.

The need of new social services, to reduce inequality among men and build a juster society, is felt in all quarters. Social rights are proclaimed by our Constitution alongside the traditional liberties though they are not completely enforceable. The burning problem of our times is coexistence - the reconciliation of the recent with the older ideals, of the social or welfare state with the Rule of Law. It is especially by the group of Roman Catholic lawyers that a broader conception of liberty has been shaped. The individual can freely enjoy all his freedom in social life only if he is helped and placed in the position to attain it. It is up to the Rule of Law to respect life, to let life develop itself in all its ends. And this respect for life means the organization of social conditions enabling the fight and the prevention of that great evil, that for many individuals life cannot be lived as a human life. The antinomy between individual rights and liberties, and social rights to a standard of living adequate to a real life of liberty, is only an apparent one. Liberty has to be realized through liberty.

This integration of liberty — or quest for equality or democracy, as it may also be put — requires the state to play a role more

extensive than the one which was characteristic of liberalism. There can be no doubt about it. The legal state was mainly satisfied with limiting its own activity. The welfare state rests primarily on action, to achieve the *bonum humanum*, to reform society, as it is asserted. Here springs the first difference between the two conceptions. Secondly, this liberty writ large, this equality cannot be secured without pruning or even removing some of the traditional individual liberties, such as economic liberties, free economic initiative, right of private property of means of production. It would be wrong to assume that no limitations existed before, but these are now imposed and claimed on an unprecedented scale. Lastly, a social state means planning, and this implies further wide discretionary powers of the executive.

These considerations seem to support the view that it would not be appropriate to modify the notion of the Rule of Law or legal state once more, enlarging it on one side, and restricting it on another, so as to fit in it the welfare or social state. They both have their definite historical identity. To add yet another meaning to the Rule of Law would not contribute to clarify the issue.

But the Rule of Law needs not be discarded as a relic of the past and retains all its importance, being a technique of free government. According to what one of our leading constitutional lawyers, Orlando, wrote almost sixty years ago, the legal state implies that the obligations imposed by the legislature on the citizen should be directed to the welfare of the community, reducing his sacrifice to the minimum and sharing it equally among all citizens. The state has now everywhere a function of initiative, of creation, which should not overshadow its previous function of defence. Where is the equilibrium, the *optimum*, to be found? The authority of the state has grown. The crisis of individual liberty is deep set. One of our greatest thinkers, Capograssi, has given repeated warnings that even in the West the subject is becoming a social function, that the objective, and not the subjective, is seen in him. When the state has undertaken to manage the very life of the individual, the individual has an essential interest, greater than ever before.



in the way in which the state is run. The problem is how to shape a welfare state within the framework of the Rule of Law. The structures of the past are getting old-fashioned. The new ones are being built empirically, tentatively, and often without our noticing them.

## II

### ACTUAL REALIZATION<sup>1</sup>

The scope of this inquiry has to be somewhat defined, as it might otherwise be extended to practically the whole field of Italian public law. Two main points require particular attention, namely the liberties of the individual, and the means of securing their protection. Time and time again the existence of the legal state is identified with them. Even with these simplifications, only some major problems could usefully be discussed, with a preference for those on which political or legal controversies are focussed at this moment.

#### A. INDIVIDUAL LIBERTIES

##### Relevance of Constitutional Declarations.

The experience of a recent past suggested to the constitution-makers of 1947 the express recognition of a large number of individual liberties. A general proclamation in a preamble, on the French line, did not appear to be sufficiently effective. These rights had to be restated again and in such a way as to be legally enforceable. The charter dedicates its first part to the rights and duties of the citizens, so as to enhance their importance, the government of the state being left to its second part. Most of these rules refer to

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1) The leading handbooks on constitutional law may be recalled here: C. Esposito, *La Costituzione italiana* (1954); E. Crosa, *Diritto costituzionale* (4th ed., 1955); C. Mortati, *Istituzioni di diritto pubblico* (3rd ed., 1955); P. Biscaretti di Ruffia, *Dir. cost.* (4th ed., 1956); F. Pergolesi, *Dir. cost.* (11th ed., 1956); G. Balladore Pallieri, *Dir. cost.* (5th ed., 1957). For some general remarks, see A. C. Jemolo, *La crisi dello Stato moderno* (1954).

men in general, including aliens, and not to citizens alone. To aliens in particular the right of asylum is conceded.

The value of this recognition varies considerably according to the technique employed. Art. 2 contains a key-rule: "The Republic recognizes and guarantees the inviolable rights of man, both as an individual and in the social formations where his personality develops". But it is immediately added that the Republic also "requires the fulfilment of the unrevocable duties of political, economic and social solidarity". The compromise laying at the roots of the whole charter comes here to the surface. The rights of man are "inviolable", but limited by the principle of "solidarity", which is apt to be very elastic. These, however, are merely declarations of principles, which are of some utility in understanding the Constitution and in the construction of existing and future legislation, but are not directly binding in themselves. They are followed by a detailed enumeration of rights and duties.

All liberties become legal rights of the individual in so far as the Constitution sets a limit to public authorities, besides fellow individuals. The general legal principles regarding this topic are to be found here, and not outside any written enactment. Some rights, such as that of religious liberty and freedom of political association, are secured by the charter in such a way, that both the legislature and the executive — not to mention the judiciary — are bound by the constitutional regulation of the matter, and have no power to modify it. Only a constitutional amendment, entailing a long and complicated procedure, could withdraw that guarantee. In many cases the executive alone is fettered by the Constitution, with the legislature acting as a mediator between them. Thus personal freedom and freedom of movement and expatriation may only be restricted by law, without, however, stepping beyond a certain line. A limited discretion may be left sometimes to the executive, for instance to decide when a public meeting ought to be forbidden. Individual rights are not all endowed with the same consistency. Anyway, they cannot be suspended in times of emergency, with the probable exception of a state of war.

Many of the rights affirmed by the Constitution are not sus-

ceptible of immediate application. The individual cannot claim the enforcement against the state of his right to work, to high education, to free medical assistance, and of many other social rights which the Republic is supposed to protect, unless legislation is passed, providing the necessary machinery. Without this, constitutional declarations remain a dead letter. The legislature has no power to violate these rights, but, on the other hand, cannot be compelled to act to foster them.

The Italian Constitution has for sometime remained unfinished, as some of its institutions are only now being brought to life. Individual liberties represented one of the sorest points. Our courts drew a distinction, which some called an irony, between constitutional rules of immediate application for all, or preceptive, and those addressed to the legislature only, containing a program for the future. Faced with the problem of the survival of many pre-Constitution enactments, restrictive of individual liberties, the judges felt uneasy before the vacuum that their implicit repeal would have left. Parliament, overburdened by more pressing demands or at loggerheads, failed to pass all the legislation required, and the executive was not in a hurry to forfeit its old powers, especially in police matters. The task of declaring them unconstitutional has since 1956 been bestowed upon the Constitutional Court, which has already started to slash them. Much having been done for the repeal of previous legislation incompatible with the Constitution, it is possible to say that in Italy the rule of law finds a large degree of realization.

Let us turn now to the actual position of some main individual rights.

#### Right to Equality.

All citizens are constitutionally equal before the law, without distinction of sex, race, language, religion, political opinions, personal conditions, and enjoy equal social dignity. The rule is certainly to be construed in the sense that any arbitrary disability or privilege is unconstitutional. But according to the Constitutional Court (Decisions Nos. 3 and 28, 1957), the principle of equality

does not prevent Parliament from issuing different rules to regulate situations which it considers to be different, thus adapting the law to the multifarious aspects of social life, provided, of course, that the law does not draw the distinctions already rejected by the Constitution. Equal treatment has however to be assured to everybody, when relevant subjective and objective conditions are equal. An act of the legislature restricting the capacity of single persons is not allowed, but some doubt has been raised in respect of laws conferring rights to single persons in a special position, such as a pension to the widow of a statesman. The Constitutional Court has decided that a legislative measure should apply to "categories of addressees, and not *ad personam*".

#### Personal Freedom.

Art. 13 of the Constitution lays down that "personal freedom is inviolable". To prevent arbitrary arrests, it prescribes that no form whatever of personal detention, inspection or search, nor any other restriction of personal liberty is allowed, except in the cases and manners established by the law, without room for discretion on the part of the executive. And even then a warrant of the judicial authority is required, showing the grounds of the measure. The police, however, may take the necessary steps in exceptional cases of need and urgency. But these cases too must be specifically indicated by the law. An Act of 1955 amended the code of criminal procedure, in compliance with the constitutional rules. In case of flagrancy, arrest is compulsory when the maximum penalty for a crime exceeds three years' imprisonment; it is authorized when the maximum penalty is not less than two years. Arrest is further allowed when there are good reasons to believe that a person is likely to escape, where he is seriously suspected, and when a warrant is compulsory, that is, for major crimes. These are provisional measures, as immediate notice of the arrest has to be given to the Public Prosecutor. Within 48 hours from the arrest the grounds of it and the results of the preliminary investigations are to be brought to his notice. The Prosecutor, who is a judge, must immediately question the prisoner, and may confirm his detention, within the following 48 hours,

with a motivated decree. If necessary, this period may be protracted to seven days. If detention is not confirmed, the prisoner must be set free, and disciplinary and criminal measures are applicable to those who carried out an unlawful arrest. At all stages the prisoner is notified of these measures and has a judicial appeal against them. For crimes for which a warrant of arrest is not compulsory, he can be provisionally released, at the judge's discretion.

All physical and moral violence to persons submitted to restrictions of their freedom is forbidden, and, if reported, will make the wrongdoer liable for damages as well as criminally. Forbidden is also the death penalty, with the exception of cases considered by war-time military legislation. Punishments cannot consist in treatments contrary to the sense of humanity, and must aim at reeducating the condemned person. Other classical principles of criminal law are restated in the charter, such as that attaining to the personal nature of criminal liability, which rules out collective punishments, and the other, according to which no one may be punished but by virtue of a law entered into force before the fact was committed. It should also be emphasized that analogy is excluded in criminal law, both in its substantive as well as in its adjective aspects. The *favor libertatis* compels a strict construction of rules implying a limitation of liberty.

The Constitutional Court (Decision No. 11, 1956) has held some measures of the 1931 Police Act to be unconstitutional and without any effect. They relate to such restrictions of liberty, as an order to find work and a fixed place of abode not to be changed without reporting, and imposing a curfew. An Act of December 1956, amended that Act with reference to these other police powers, such as confinement of people suspected to a place different from their usual residence, now requiring an order of the court.

Freedom of the person is also guaranteed by the prohibition of compulsory medical treatment without general legislation. And this in no case should violate the limits imposed by the respect of human person.

### Freedom of Association

According to Art. 18, citizens have the right to associate freely, without any authorization, for purposes which are not forbidden to individual subjects by criminal law. Two further restrictions are placed by the Constitution. Secret associations are forbidden, as they are presumed to have an unlawful purpose or to be contrary to the sense of responsibility of a democratic society. Freemasonry seems to fall within this provision, in view of the secrecy of its membership, though not of its aims. But it has been left so far undisturbed. Those associations are also forbidden which pursue, even indirectly, political aims by means of organizations of a military character. The past has shown that they are apt to create an atmosphere of intimidation, even if disguised under sport pretences. Political struggle should refrain from violence. The use of uniforms by members of associations, depending on, or connected with, political parties, is banned by an Act of 1948.

All citizens have the right to associate freely in political parties, in order to concur, with democratic method, to the determination of national policy. But this is not enough to show when a party has to be forbidden. If its action tends to hinder that free exchange of opinions which lies at the basis of democracy, to attain power by violence, its exclusion is clear. The formula is open to doubts with regard to parties which formally abide by the democratic method, but actually aim at an upheaval of the existing political system. No authority or procedure has been set up to deal with the case. The reestablishment of the disbanded fascist party, under any form, has, in any case, been constitutionally forbidden. There has been little question of the legality of monarchical movements, provided that they do not resort to threats or violence, although the republican form of government cannot be the object of a constitutional amendment. Limitations to the rights of judges, members of the armed forces on active service and the police, and diplomatic and consular representatives abroad, to join political parties may also be imposed by the law.

Labor unions are free. If they have a democratic organization they may be registered, but, for lack of legislation, they are living

under the common law of private associations, and collective labor agreements cannot be automatically extended to all those who belong to the trade concerned, as envisaged by the Constitution (Art. 39).

#### Miscellaneous Liberties.

The previous examples may show the way in which the Constitution and legislative enactments deal with individual liberties. There is no need for a detailed examination of the remaining liberties. Perhaps it will be sufficient to say that the Constitution, in the first and second chapters of its first part, considers as many individual and social rights as possible — freedom of domicile, restrictions on inspections, searches and seizures, freedom to move about and to sejour in any part of the national territory, freedom to emigrate, freedom and secrecy of correspondence, rights of parents to educate their children, freedom of arts, science and teaching.

Citizens have, in addition, the right to meet peacefully without arms. Notice to the police is required for meetings to be held in a public place, such as a street or a square. They may be prohibited on proved grounds of public security or safety. All have the right to manifest freely their thoughts by words, writings or any other means. The press cannot be subjected to licences or censorship (Art. 21). Consequently, the Constitutional Court (Decision No. 2, 1956) has invalidated legislation, submitting to police licensing the distribution and display of writings and posters. A seizure is allowed only by motivated warrant of the judicial authorities, when a crime is committed. The judicial police may act without a warrant in case of urgency, but has to report immediately to the judiciary. As a way to identify pressure groups acting on public opinion, the law may lay down general rules on the disclosure of the financial resources of the periodical press. Publications, shows and any other demonstration contrary to public morality are forbidden, and adequate steps may be taken to prevent and repress violations of this rule. Films must obtain a licence being shown to the public. The installation and exercise of radio transmitters also require a licence.

Religious freedom is a highly debated matter, which would lead us very far. It should be stated here that all are entirely free to profess their religious faith in any form, individual or associated, to propagate it and to worship in private or in public, provided their rites are not contrary to public morality. No disability is attached to members of any religious community. All religious denominations are equally free before the law. On the other hand, the Roman Catholic Church enjoys a privileged position, as the church to which the overwhelming majority of Italians belong. There is no established church, but the relations between the state and the Roman Catholic Church, as "the only religion of the state", remain settled by the Lateran pacts of 1929, preventing their unilateral regulation on the part of the state.

#### Economic Freedoms.

Many more restraints are placed by the Constitution, in the third chapter of its first part, on economic liberties, in accordance with the new ideas of a social or welfare state. Property is "recognized and guaranteed by the law", but is not inviolable, as it may be limited in order to assure its social function and make it accessible to all. Compulsory purchase against compensation is allowed for public purposes in cases fixed by the law, and limits may be set to succession rights. Duties and limits, including reclamation, may be imposed on property of land, to reach its national exploitation and establish equitable social relations. Private economic initiative is also free, but cannot be developed against social utility, or in a detrimental to human security, liberty and dignity. The law will determine the appropriate programs and controls, so that public and private economic activity may be directed at, and coordinated to, social aims. Though the executive cannot act without statutory authority, the law is left with wide powers to curtail economic liberties. But in a system of mixed economy like ours this has been a very haphazard and patchy work.

#### B. GUARANTEES OF INDIVIDUAL RIGHTS.

The rule of law would merely be a political principle, should the liberties constitutionally declared remain without effective legal



protection. There should be means of enforcing them, if they have to be considered as legal rights. It goes without saying that political as well as moral forces may be more powerful than the law. Of course, the whole political system must have that protection in sight. A democratic and parliamentary government, supremacy of a rigid constitution and, under it, of the law, separation of powers, control of administrators by the administration self — all represent precious guarantees of liberty. But in Italy the rule of law has always meant a judicial guarantee as well. Herein the best defence of individual liberties is felt to lie. This is due to the belief in the judiciary, which has to be examined first. Judicial control of the administration and judicial proceedings regarding a person under arrest seem then to offer special interest. The Constitutional Court, as a guarantee of the citizens before the legislature itself, is the last stone of the edifice of the "Stato di diritto" and well deserves attention. Its decisions and its very presence, as a power in being, act as a spur as well as a check on the legislature and the executive.

#### Independence of the Judiciary.

Independence of the judiciary is generally held to be part and parcel of the legal state. Yet, this is simply a means to an end, namely the independent so that they may be impartial, viz., fair, unbiased. To secure this, the Italian Constitution affirms the independence of both individual judges and of the judiciary as a body.

As to judges, it is laid down that they "are subject to the law only" (Art. 101.). Although they are public officials, there is no hierarchy among them, even if in practice the hierarchical spirit still remains. "Diversity of functions is their only difference" (Art. 107). The objective research of truth is their only guide, when interpreting and applying the law. Should their conscience not approve of positive law, rebellion against an unjust law is a highly discussed moral and even theological question, but not a legal one. Legally, they must enforce positive law - or resign. They are appointed as a result of open competitions and cannot be

removed from office. The election of lower unpaid judges is also envisaged, but not realized. Impartiality implies that judicial functions should be exercised by ordinary judges, and not by members of the executive. This is why no extraordinary or special judges may be established, but only specialized sections of the ordinary courts, with the possible participation of laymen. Juries are required in criminal proceedings before the Assize courts. The main administrative tribunals and military courts — having in peace — time jurisdiction over members of the armed forces only — are admitted. The remaining, and there are many of them, were supposed to be abolished within five years after the coming into force of the Constitution. But the rule has been construed as a simple recommendation to Parliament.

Whereas the relations between the executive and the legislature are very strict, especially in a parliamentary system, the judiciary has to be placed outside political influences. Judges have to be protected not so much from threats by the executive, which really have never been felt, as from its blandishments, if they want to make a successful career. The Constitution had in mind a sort of self-government of the judiciary. The guarantee of its independence is placed in a High Judicial Council. This body, which is presided over by the President of the Republic, and includes the two top-ranking judges, is composed for two-thirds of judges elected by their colleagues, and for the remainder by professors of law and lawyers, elected by Parliament, so as to prevent the formation of a closed caste, completely isolated. The Council should decide on appointments, destinations, transfers, promotions, disciplinary measures, in brief, on the whole judicial career. An Act establishing it has just been passed and is strongly criticized by members of the bench. It still leaves to the minister of justice powers of initiative before the Council, especially with regard to disciplinary proceedings, and of final decision, and the judiciary wants a complete independence of the executive and the exclusion of any remedy against the Council's determinations. The present boards temporarily operating are not all and entirely elected by the judges and leave wide powers to the minister. This is a thorny question,

as many executive posts, including appointments at the ministry of justice, usually leading to promotions, are filled by judges.

The legal profession is completely self-governed. Admission depends on examinations, and the law societies supervise the conduct of their members.

#### Judicial Review of Administrative Decisions 1.

The Constitution admits "always" a judicial protection against the acts of the administration. This seems to imply the abolition of the Acts of State, or *de gouvernement*, excluded from judicial review, with the exception of acts pertaining to the exercise of constitutional functions, such as dissolution of Parliament, appointment of ministers, etc., hardly affecting the citizen's rights. The rule that the administration must conform to the law applies to those acts as well, which are issued by administrative authorities in the exercise of a quasilegislative power, such as regulations or by-laws not endowed with force of law, that is, not requiring an act of Parliament for their repeal.

The jurisdiction of ordinary and administrative courts is based on the *locus standi*, a very subtle distinction, liable to raise difficulties in its application. A right of action in the general interest is rarely admitted. Ordinary courts decide disputes concerning individual legal rights, both of private and public nature, alleged to have been infringed by the administration's action. The court can declare the illegality of an administrative act, but not annul it, in strict observance of the principle of separation of powers, prevailing when the relevant Act was passed in 1865. But it can award damages, according to the same principles governing relations among private individuals. Contractual and tortious liability of public authorities, including government departments, and of their servants as well, probably jointly, is one of the pillars of the whole administrative system. Disputes can also concern some

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1) Up-to-date specialized works on this subject are S. Lessona, *La giustizia amministrativa* (1953); G. Zanobini, *Corso di diritto amministrativo* (vol. 2, 7th ed., 1954); E. Guicciardi, *La giustizia amministrativa* (3rd ed., 1957).

interests that are called legitimate, *i.e.* the alleged violation of legal provisions enacted for the immediate protection of a general interest, and only indirectly of an individual interest. They relate not to the existence of an administrative power, but to its exercise, and involve any illegality, such as procedural defects, lack of formalities, misuse of power. These controversies are decided by an administrative agency, the Council of State, and locally by provincial boards, partially elected, with an appeal to the Council. The Council sits judicially. Its members are administrative officials but enjoy a large degree of independence. They have proved to be impartial judges. The Council can annul illegal acts, but not award damages. Appeal to the Council is available against all sorts of acts, for both questions of law and fact. Against its decisions an appeal is granted to the Supreme Court of Cassation for lack of jurisdiction only. Sometimes the Council has jurisdiction over administrative discretion, even if legally exercised, that is, over the convenience of an act.

There is no room for quasi-judicial powers, when the law draws a clearcut distinction between administrative and judicial acts, especially with regard to the possibility of review. In fact, some cases are certainly on the borderline and are difficult to classify. An act is held to be administrative, even if the process for its issue bears some resemblance to the judicial. This is now an expanding practice, for a better protection of the citizen.

The extensive review of the exercise of discretionary power committed to the administration is a characteristic feature of the Italian, as of the French, Council of State. It offers an all-embracing remedy, going down to the purposes of administrative action and enabling the discovery of defects, which are unknown to disputes among individuals before ordinary courts. Error of law and fact, contradiction with precedent or contemporary acts, illogical grounds, different treatment of the same situation, bias, gross injustice - all fall within the jurisdiction of the Council. This tribunal itself developed them, deducting them from the general principles of existing legislation. Equality is one of them, and its violation can come out directly or through other symptoms, revealing a wrong exercise of discretion.

As a rule, before addressing himself to the administrative court the aggrieved person has to exhaust his administrative remedies. This means that he has to appeal to the higher authorities against the decision of their subordinates, unless a decision already comes from the top. Its expediency as well may be questioned. Decisions of local authorities and other public corporations are also, to some extent, subject to administrative remedies. The same power of annulment may be carried out *ex officio*, together with some other forms of administrative control.

We have no equivalent to an order of mandamus to compel the administration to carry out a legal duty. But against its silence or negative attitude there may be an appeal to the higher authorities or the Council of State or an action for damages before the ordinary courts. To restrain the administration from enforcing its act while a dispute is pending the Council may order a stay of execution.

Some further administrative tribunals are established to deal with special sets of disputes, but the Constitution prescribes their suppression.

On the whole, the system works well and affords a satisfactory protection of the individual. The decisions of the Council of State perhaps carry greater authority than those of ordinary courts.

#### Guarantees in Criminal Proceedings <sup>1</sup>.

The code of criminal procedure of 1930 was not wholly inspired by the liberalism of the 1947 Constitution. Its 1950 revision still leaves many reforms undelayable.

Criminal procedure is divided into two stages - inquiry and trial. The former aims at sifting information regarding crimes and deciding on the necessity of passing to the next stage; the latter

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1) On this special topic reference should be made to the most recent textbooks on criminal procedure: G. Foschini, *Sistema del diritto processuale penale* (1956); G. Leone, *Lineamenti di dir. proc. pen.* (4th ed., 1956); V. Manzini, *Trattato di dir. proc. pen.* (4 vols, 5th ed., 1956); S. Ranieri, *Manuale di dir. proc. pen.* (3rd ed., 1957).

aims at a decision on the information. One is prevailingly secret and in writing, the other public and oral.

Both stages are presided over by judges. An important part is played by the Public Prosecutor. His office is composed of an Attorney-General and his deputies, attached to each court, except the lower, where the inquiry is held by the judge himself. The members of the Prosecutor's office are subordinated to their head, and all to the minister of justice. The position of the Prosecutor is a very controverted topic. The contention that he belongs to the judicial power, as he looks after the enforcement of the law and also acts for the protection of the accused's interests, is rebuked by the argument that, according to the law, he exercises his functions "under the supervision of the minister of justice". He is a judge and belongs to the judicial "order", enjoying the same guarantees as other judges, but his functions are considered to be administrative, rather than judicial, by the leading opinion. He is said to be the "promoter of justice". His functions stretch to the field of private law proceedings as well, when they are believed to be of public concern, such as in family matters. On the whole, no objection is raised against his activities, but many would like to see him removed from the judiciary and transformed into an executive agency, representing the interests of the state.

It is the Prosecutor's task to institute proceedings, for which no discretion is left to him, and to submit his requests at the inquiry and at the trial. He is the head of the judicial police of his district. This is not so much a special body, as an activity of the police — though some of its members are exclusively dealing with this—, in so far as it is concerned with discovering crimes and finding out criminals and evidence. This is a repressive and not a preventive function. As a body, the police depends on the central administration.

The first stage of criminal proceedings, the inquiry, which may be preceded by some preliminary investigations, is summary or formal, according to whether it is simple and quick, or more thorough and longer. If the accused is still detained after forty days, the first type of inquiry gives way to the second. The sum-

mary inquiry is mainly of an administrative character, the formal is judicial. Not the Prosecutor, but a judge, is in charge of this, at the request of the former. No time limit is set for the formal inquiry, but the Prosecutor is supervising the judge in charge of it to speed it up. The principle now prevailing is that of a free conviction of the judge. It is up to him to look for evidence wherever he thinks fit and to appreciate it without limitations. The questioning of the accused is not a medium of proof, though it may be used by the judge to make up his mind. Any charge or modification of a charge has to be notified to the accused. The judge must also inform him of the fact for which he is charged, of the evidence against him as well as of its source, if this is not detrimental to the inquiry. The accused is then invited to defend himself and to call evidence on his favor. He is entitled to refuse to answer and has no duty to tell the truth, as he is not sworn. The constitutional principle that "defence is an inviolable right" implies that the accused has the right, and the duty as well — except for minor offences —, to be assisted by a trusted counsel during the inquiry. Apart from exceptional circumstances, a lawyer may refuse a brief, but, once he has accepted it, he may relinquish it only when the rights of the defence have been infringed. A poor person may be granted legal aid. Counsel is entitled to be present at various operations, such as searches or tests, to make remarks and applications, to file briefs, to examine records, etc. But more is still wanted, especially at the beginning of the inquiry, when the accused may be questioned and held incommunicado even for a long time, at the judge's discretion. The prosecution has some advantages at the inquiry, but is placed on the same footing as the defence at the trial.

When the inquiry is completed, the judge in charge of it gives notice to the Prosecutor. If the latter is of the opinion that the formal inquiry should be closed, he requests the judge to discharge the accused or to commit him to trial. The accused's counsel, after consulting the documents of the case, has five days time to make statements, and the judge must give his decision within the next fortnight, both periods being prorogable. The judge, in his decision, establishes whether the Prosecutor's request has to be followed, and discharges the accused or commits him to

trial. In some circumstances an appeal lies to the Supreme Court against his decision. During the inquiry the accused, if detained, has to be released after a period of detention ranging from thirty days to two years, according to the gravity of the charges, unless he is committed to trial.

The trial is the final stage, and the judge who carried out the inquiry cannot take part in it. It is considered to be an impartial judgment in fact and in law, followed by a command. Its publicity supplies another guarantee of impartiality for the accused, involving the control of the public. Special courts are not allowed, with the exception of the military. The decision must state its reasons, not only as a further guarantee, but also to provide grounds for an appeal. Sentence may be conditionally suspended by the court. The President of the Republic may grant a general amnesty when delegated by Parliament, but has powers to remit and commute punishments.

The presumption of innocence has two meanings. The first refers to evidence. The maxim *in dubio pro reo* is acknowledged by the code of criminal procedure as one of its cornerstones. In case of doubt the accused is to be acquitted. The other meaning attains to the status of the accused. Art. 27 of the Constitution lays down that "the accused is not considered guilty until final sentence". This principle is in keeping with the code. The accused is certainly not presumed guilty, but a presumption of innocence would be useless. Before a decision it is impossible to speak of a presumption of innocence - nor of a presumption of guilt either. During the trial the accused is not a guilty, but simply an accused, person.

The code also prescribes security measures, to be inflicted by the judge at the inquiry or at the trial. These measures are distinct from punishments, as they depend on the personality of the subject, on his being socially dangerous, run for an undetermined period and have a preventive character. They are the outcome of a proceeding aiming at deciding not whether a man has committed a crime, but whether he is likely to commit a new crime. The measure may be modified by the judge supervising its



enforcement. This proceeding is harshly criticized, for it was conceived as administrative, even if applied by the judiciary. As the liberty of the individual is at stake, it is felt that a real judicial proceeding should be adopted, with the fullest guarantees for the "interested person", as he is called, including the right to defend himself, which is not wholly secured.

#### Judicial Review of Legislation.

The desire to place any possible obstacle to a return of tyranny, and the need of finding a judge for disputes among the newly — and so far only partially — established regions, led the authors of the Constitution to follow the American example of a judicial review of legislation. But they decided to create a court *ad hoc*, without widening the traditional powers of the courts. It was felt that the political aspects of a control of this sort were not suited for them, and that the power of repealing an act of the highest representative body of the country should be left to a court composed with the participation of Parliament itself. The Supreme Court of Cassation remained the "vestal of the law", the new Constitutional Court would be the "vestal of the Constitution". Owing to the difficulties encountered by Parliament in reaching the majority required for the election of the five judges it had to choose, this Court started working only in 1956. The remaining ten judges are elected by the highest judicial authorities and selected by the President of the Republic, in equal number. Constitutional judges sit for twelve years, decide on their colleagues' retirement, and enjoy the same privileges as members of Parliament.

As already mentioned, the Constitutional Court declared unconstitutional many statutes issued before the Constitution. Not only Acts of Parliament and of regional legislatures, but also urgency ordinances, or decree-laws, and delegated legislation are submitted to its control. The former are ratified, and the latter is delegated, by Parliament. But by-laws and other rules without force of law made by administrative authorities are reviewable by ordinary and administrative courts, like administrative acts, even if they infringe the Constitution, just as they are for a breach of

the law. We have not that direct access to the Constitutional Court for any violation of the Constitution, like the *Verfassungsbeschwerde* adopted in Germany and in Switzerland, which some believe to afford the fullest guarantee to the citizens.

When in the course of a controversy before an ordinary or administrative court the question of the constitutionality of a statute is raised, it is for the court to decide whether the question is not "manifestly without foundation". If there is a reasonable doubt, it is submitted to the Constitutional Court. For regional affairs and encroachments between the powers of the state, a direct action lies before the Court. Should this decide for the "constitutional illegality" of a statute, the latter ceases to have force as from the publication of the decision in the official gazette. The statute is not formally repealed, as a tribute to the separation of powers.

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