

The Rule of Law
in
Italy

A STATEMENT BY
THE ITALIAN NATIONAL SECTION
OF THE
INTERNATIONAL COMMISSION OF JURISTS

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The answers to the Questionnaire submitted by the International Commission of Jurists were answered on behalf of the Italian Section of the Commission by its following members:

Prof. GIUSEPPE CHIARELLI President of the Faculty of Political and Social Sciences; Member of the Executive Committee of the Italian Association of Jurists.

Dott. GIOVANNI NOCCIOLI Judge at the Supreme Court of Cassation of Italy

Avv. GIOACCHINO MAGRONE Attorney; President of the Bar Association of Rome

Avv. MARCELLO BARBERIO- Attorney; Member of the Council of the Bar
CORSETTI Association of Rome; Vice-President, Italian Association of Jurists

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A. ADMINISTRATIVE AUTHORITIES AND THE LAW

1. Legislative Power

a) *Have any administrative authorities the right to make laws by virtue of their own authority?*

I. The administrative authorities have *not* the right to make laws by virtue of their own competence. The legislative function actually belongs to the two Chambers (Art. 70 of the Constitution).

Only "in extraordinary cases of necessity and urgency" may the Government (Council of Ministers) adopt, on its own responsibility, "*provisional* measures having force of law", called *Decreti-Legge* (Decree-Laws). These Decree-Laws have to be submitted to the Chambers on the same day to be made law; the Chambers are expressly convened, then they retire (in case of prorogation until the meeting of the new Chambers, Art. 61 of the Constitution), and re-assemble within 5 days. If, within 60 days from publication, the Decree-Law has not been made law, it becomes inoperative as from its issue; however, the Chambers may regulate by law the juridical relationships obtaining in the meantime on the basis of Decree-Laws that have not been made law (Art. 77 of the Constitution). The Decree-Law is issued by Decree of the President of the Republic after deliberation by the Council of Ministers (Art. 31, No 100, January 31, 1926) and is promulgated in the same form as a statute.

II. Among the instruments having force of law one may also include *military proclamations*.

It is provided that the Chambers alone have power to determine the "state of war" (Art. 78 of the Constitution). Following upon such deliberations, a decree may be issued by the President of the Republic (which Decree is understood must be Decree Law), ordering the institution of martial law (R.D. No. 1415, July 8, 1938). In the form of such law the Commander-in-Chief and, by delegation on his part, the Commanders of large units, may issue *proclamations*, that is, orders likewise deviating from the law in force (Art. 17 of Martial Law; Art. 251 of Penal Code of Martial Law).

Since the proclamation of the new Constitution, it is maintained by some that such power of regulation has diminished. A more correct opinion, however, would seem to be that such power has not been suppressed by tacit repeal but that it meets with limitations in the Constitution itself. Therefore, a power that is still compatible with the Constitution is the competency of the Commander-in-Chief to

issue proclamations “in matters pertaining to the law and to Military Penal Procedure” (Art. 17 and 20 of Penal Code of Martial Law). These proclamations are normative instruments *extra ordinem* issued in the exercise of a specific competence which is narrowly defined and circumscribed by the actual and *proclaimed* existence of a state of war. It may be doubted, however, whether there are compatible with the Constitution military decrees provided by Martial Law to be issued in a case where the Commander-in-Chief also assumes civil powers; in so far as such decrees are destined for civilians and not for military persons belonging to the mobilized armed forces they extend to the whole territory that is in a state of war not only to the actual operational theatre, which may coincide with the entire territory of the State.

A topical question is whether the powers of decree of the military authority may, in case of necessity, be transferred to the military organs of the NATO (delegation of authority).

III. *Emergency regulations*, deviating from the law in force, may be issued by the administrative authorities to whom the law assigns this power (notable examples being Art. 19 of municipal and provincial law and two laws on public security which assign power to the Perfect chief administrative officer; Art. 2 cit.: “measures indispensable to the upholding of public order and public security”).

Such measures bear the character of administrative instruments which are strictly limited in respect of time and territorial scope by the competence of the authority by which they are issued.

The Constitutional Court has acknowledged the lawfulness thereof under the following terms: “limited effectiveness in time in connection with the dictates of necessity and urgency; adequate substantiation; effective publication; conformity to the principles of juridical regulation” (judgment of July 2, 1956, No. 8).

IV. Decrees in the full sense are the *Regulations* issued by administrative authorities on the basis of a delegation of power by law. Unlike the decrees examined in the foregoing, they contain *secondary* norms which are intended to implement the law. For certain matters the possibility of issuing regulations is ruled out (*legislative reserve*; the Constitution provides numerous cases of legislative reserve). Regulations also bear the character of administrative instruments.

V. Included among the holders of legislative power in matters indicated by the Constitution (Art. 117) are the regions designated by the Constitution as autonomous entities. The competence to issue *regional laws* belongs to the legislative organ of the region (Regional Council). Regional laws must respect the general principles of State

legislation and, in the case of regions not endowed with special autonomy, they must respect the principles fundamentally established by the applicable law of the Republic Constitutional Law.

The Administrative Authorities of the region also have power to issue regulations.

b) Have any Administrative Authorities the right to make laws (or ordinances, decrees or regulations by virtue of authority delegated to them by some other organ or organs of the State? If so, by what organ or organs is such authority delegated?

The Government (Council of Ministers) may only issue instruments having force of law by delegation from Parliament. In such cases the instruments are *legislative decrees* or *delegated laws*.

The law whereby Parliament grants delegation (Delegating Statute) does not transfer legislative power but merely assigns to the Government the exercise of the legislative function for a definite purpose and for a limited time. Moreover, the law of delegation must contain a determination of the principles and guiding rules to which the delegated legislation has to conform.

c) By what procedure (if any) and before what body (if any) can the legality of a law, ordinances, decree or regulation made by an administrative authority be determined?

The legality of the aforesaid instruments may be contested in the following ways.

I. Constitutional legality (conformity to the Constitution and to the constitutional laws) of an *ordinary law* of the Republic may be a matter to be brought before the *Constitutional Court*. When, in a case before any juridical organ, questions arise as to the lawfulness of a law or a legal norm, judgment is suspended and the matter is deferred for decision by the Constitutional Court. The question may be raised by one of the parties, who retain their respective positions before the Constitutional Court, or it may be considered *d'office* by the judge. Should the Court declare that the norm is constitutionally unlawful, it becomes entirely inoperative as from the day following upon the publication of the decision.

The same procedure may be instituted by a *Decree-Law* or by a *Legislative Decree*. In respect of the latter the Constitutional Court may also judge whether such Decree is within the limits fixed by the Delegating Statute (excess of delegation).

Military proclamations are also subject to the same review procedure by the Constitutional Court in respect of constitutional legality.

II. *Emergency regulations*, including those under a), III, are as a rule subject to review by a *higher administrative authority*.

In any case, if injury is done to the rights of citizens which are guaranteed by the Constitution, the aggrieved party may appeal to the *ordinary courts* or to the *State Council* (pronouncement of the Constitutional Court No. 8).

III. Appeal against *Regulations* may be made to the *ordinary courts* or to organs of administrative jurisdiction (*Council of State* or *Administrative Provincial Commission*), if injury has been done directly to rights or legitimate interests granted to citizens by the law. In any case the Regulation may be contested together with the administrative measure through which it finds concrete application in the cases in which the aforementioned injury to rights or interests is confirmed.

IV. *Regional laws* may be impugned before Constitutional Courts like the laws of the State.

Appeal to the same court may be made by the State and by regions where these laws transgress the limits of the respective competence (dispute as to assignment).

2. **Activities (Other than Legislative) of Administrative Authorities**

a) *By what procedure if any can an administrative authority be compelled to carry out a duty which is imposed upon it by law?*

Failure by an administrative authority to fulfil an obligation arising from the law, constitutes unlawful behaviour on the part of such administrative body.

The aggrieved party, after having established by a warning summons the unwillingness of the administrative body to fulfil its obligation (silence after a suitable period dating from the warning summons), may appeal to the ordinary courts or to the administrative jurisdiction, according to whether an injury has been done to subjective rights or to lawful interests.

The administrative authority is obliged to conform to the decision of the judicial authority. If, however, it does not carry out such decision it cannot be forced to do so unless the obligation relates to a payment in money. The administrative authority can be ordered to make good the damage.

An ordinary law cannot in any way limit or preclude the aforementioned judicial remedies (Art. 113 of the Constitution).

b) *By what procedure (if any) can an administrative authority be restrained from carrying out acts:*

- I. *in excess, or misapplication, of powers vested in it by law,*
- II. *which would, if committed by a private individual, constitute a legal wrong?*

An administrative authority cannot be prevented from carrying out its own dispositions, as it cannot be forced into inaction.

However, the remedies indicated in the foregoing may be employed against such authority.

In cases where appeal is made to the Council of State against a measure of the public authority, the Council of State may, before giving its decision on the appeal, order a stay of execution of the measure if there are serious reasons for so doing (e.g., the danger that irreparable damage may result).

c) What remedies (if any) are available to the individual who has suffered damage as a result of acts of omission or commission falling under A 2. a) and b) above? In particular:

I. *against whom (e.g., the wrong-doing agent, the responsible organ, the State)?*

II. *if against or concerning the State or a State organ, does the complainant have the same facilities for making good his case that he would have against another private individual or where the State or a State organ was not concerned (e.g., compulsory production of State documents as evidence)?*

A party that has sustained damage through an unlawful act of commission or omission of the public authority is entitled to compensation in respect thereof, which compensation, if the public authority does not of its own accord make good the damage, may be obtained by an appeal to the judicial authority.

The State (public authority) has in fact a vicarious responsibility for unlawful acts committed by its agents.¹ According to the most recent jurisprudence, which has applied principles of common law on civil responsibility, the public authority is not responsible for violations of legal norms but also for damage caused through insufficient care or ability on the part of its agents (e.g., damage due to military operations).

An exceptional norm (Art. 7 of the Public Security Act) rules out any compensation for unlawful measures of the public security agencies in the exercise of powers assigned to them by law.

¹ It is to be noted that in Italian law the State possesses legal personality the Government Administrative Service being an expression of that personality.

Moreover, the responsibility of the public authority diminishes when the agent's act constitutes a malicious offence, which cannot as such be attributed to the State. On this point, however, there is some dissent in doctrine.

It is held, however, that the State is liable under civil law also for non-proprietary (physical) damage resulting from careless acts of its agents.

By Art. 28 of the Constitution not only the State but also officials and subordinates of that State are directly responsible towards the aggrieved parties for acts committed in violation of rights. This is a joint responsibility of the State and its officials. Therefore:

I. The action for recovery of damages may be brought either jointly or alternatively against the public authority and/or the official concerned; it cannot, however be brought severally, as the damages cannot be recovered twice. However, by the recent law regarding the juridical status of employees of the State (No. 13, Art. 23), Jan. 10, 1957, the aggrieved party may proceed against the employee only if the latter has acted maliciously or wantonly, otherwise he may only apply to the public authority. When the public authority is ordered to make good the damage, a suit for reparation is brought against the guilty official.

II. In judgments against the State, the citizen has brought the same guarantees of common procedure (principle of objection, peremptory charges, law of evidence, examining powers of judges). The judicial authority may order the public authority to produce documents.

d) By what body or bodies are the remedies available under A (2) above determined?

As has already been seen in the replies given to the questions under a) and b), the competent bodies to decide are the ordinary courts of justice, or any administrative authority, according to whether a complaint pertains to the violation of subjective rights or of lawful interests.

3. Administrative Authorities and Criminal Prosecutions

a) What person or body is ultimately responsible for the initiation or discontinuance of criminal proceedings?

The fundamental principle of the Italian Rules of Procedure is that a criminal trial – if no charge, summons or claim is necessary –

must be instituted officially on the strength of a plain statement of the offence. In this connection it is stated that bailiffs and judicial police agents must without delay make a report to the public prosecutor or to the cantonal judge on any offence of which they have in any way obtained knowledge, except in the case of an offence for which private prosecution is possible.

Other public officials and persons in charge of a public service are bound to report only offences not subject to private prosecution, of which they have obtained knowledge during the exercise of their functions or service.

The report must in a concise manner set forth the facts and circumstances that may be relevant to the penal procedure and the elements of evidence collected (Art. 2 of the Code of Penal Procedure).

The duty to report applies furthermore to civil and administrative judges when, in the course of a trial, any fact emerges in which an officially prosecutable offence may come to light.

Any person, even other than the aggrieved party, who has information as to an officially prosecutable offence, may give information thereof to the public prosecutor, to the cantonal judge or to an official of the judicial police.

Every citizen has the duty to report, under pain of penal sanction (Art. 364 of the Penal Code), any information he has received as to an offence against the personality of the State, for which the law lays down the penalty of hard labour.

Persons occupied in a health service who, in the course of their activities, have rendered assistance or service in cases which may present the character of officially prosecutable offences, must submit such matters in a report to the judiciary (or other authority whose duty it is to report thereon); the violation of such duty constitutes an offence, provided that such report exposes the person assisted to criminal proceedings.

In any case Art. 112 of the Constitution of the Republic declares that "the public prosecutor has the duty to conduct a criminal trial".

Moreover, in the meaning of Art. 74 of the Code of Penal Procedure, if it is considered that no criminal trial should be conducted in respect of the act in question, the public prosecutor requests the examining judge to pronounce a decree of filing. The examining judge, if he does not refuse to act on the request, issues a ruling of formal examination the department of the public prosecutor is, therefore, the responsible organ for instituting a criminal trial.

The decree of filing, if the foregoing premises hold good, is issued by the cantonal judge, who must, however, give notice thereof

to the public prosecutor, who can ask for the dossier and direct that a trial be conducted.

It is incumbent upon the public prosecutor at the Juvenile Court to institute and conduct a criminal trial in respect of all offences committed by persons under the age of 18 in the jurisdiction of the Court of Appeal for which the Juvenile Court is set up. In matters within the competence of the Juvenile Court, the said public prosecutor is vested with all the powers conferred by the law upon the Department of Public Prosecution.

A criminal trial, once it has been instituted, must find its conclusion in a judgment invariably to be pronounced by the judicial authority. In the examining phase: judgment of cancellation of trial (Art. 378 and 398 of the Code of Penal Procedure) or of acquittal, issued in the instruments preliminary to the trial (Art. 421 of the Code of Penal Procedure); or of conviction or pardon, as a result of deliberations.

The decision at the preliminary examination is given by the examining judge (or by the examining section); judgment concerning prosecution during the period prior to the trial is given by the judge who would have been competent to try the case.²

The law enumerates instances in which a criminal trial is suspended (on the same basis prescription similarly provides a cause for suspension).³

b) Does such a person or body enjoy a discretion in the exercise of the powers given under A (3) above?

The Department of Public Prosecution has no discretionary power to refrain from instituting a criminal trial or to prevent its

² Orders of non-committal for trial are given by the examining judge (or by the examining section): if the allegation is not substantiated, if the accused has not committed such act, if the person concerned is not chargeable or is not liable to punishment because the alleged act does not constitute an offence, or for any other reason, if he ceases to be punishable, if a criminal trial could not have been instituted or conducted. In the absence of sufficient evidence for bringing the accused to trial, the judge will declare that for lack of evidence the accused will not be committed for trial. Judgments affecting prosecution prior to the trial are issued if the act complained of ceases to be an offence, or if there is a reason whereby no criminal trial could be conducted or continued. The judge decides in the council chamber, the parties being heard.

³ Suspension is imposed, for example, for failure to identify the accused in the sense that the person present at the examination of trial is not the one against whom the criminal proceedings are directed (Art. 84 of the Code of Penal Procedure); in case of mental disability of the accused being such as to preclude his capacity for understanding and consciousness; on the assumption of doubt as to the death of the accused (Art. 89 of the Code of Penal Procedure), etc.

continuance. Art. 75 of the Code of Penal Procedure lays down that: "The institution of a criminal trial cannot be suspended, interrupted or stopped *except in the cases expressly provided by law*" (principle of irrevocability of a criminal trial).

c) *For what period can the authority responsible for criminal prosecutions hold an accused person in confinement without recourse to the court?*

The law enumerates instances in which, when the offender is caught in the act, it is the duty of the officials and agents of the judicial police (Art. 235 of the Code of Penal Procedure) to proceed to arrest the offender. The law itself, moreover, defines the concept of "flagrancy" of an offence.

Also in cases other than "flagrancy", the officials and agents of the judicial police or of the civil police force may detain persons charged with an offence for which a warrant of arrest is compulsory whenever the suspect may reasonably be expected to attempt or escape. The judicial police officials may detain the offenders for the time strictly necessary for interrogation, after which they must have them transferred immediately to prison, giving forth – with notice to the public prosecutor or to the cantonal judge and stating the hour and the day on which detention occurred. The same judicial police official must, within forty-eight hours from detention, notify the respective judicial authority of the grounds on which detention was ordered, together with the results of the summary investigations (Art. 238 of the Code of Penal Procedure).

The public prosecutor or the cantonal judge at once proceeds with the interrogation of the prisoner and, if he acknowledges the charge as justified, they confirm detention by a substantiated writ not later than forty-eight hours from receipt of the communication.

The law also provides for the case in which deferment is necessary and stipulates in this respect that "If necessary, whenever a request to this effect is received, before expiry of the aforementioned time, from the authority which instigated detention, such detention shall be deferred for a period up to the seventh day from the time when it was put into effect. The person concerned shall be notified of the writ of confirmation and the writ of deferment (art. 7

⁴ Art. 237 of the Code of Penal Procedure: "an offence is 'flagrant' when committed at the moment of apprehension. A continued offence is 'flagrant' until its continuance has ceased. An offender is also considered to have been offending in a 'flagrant' manner if, immediately after the offence has been committed, he is pursued by the police force, by the aggrieved party or by other persons, or if he is found in possession of the tools of the crime shortly after the commission of the act".

of the Act No. 517, of June 18, 1955, amending Art. 238 of the Code of Penal Procedure).

If detention is not confirmed, the law (Art. 338 of the Code of Penal Procedure as amended by the act No. 517 of June 18, 1955, makes provision, in particular for disciplinary actions and the institution of a criminal proceeding against the person effecting detention⁵. Furthermore, unconfirmed detention is devoid of all legal effect and is unlawful.

The Procurator General to the Court of Appeal shall at once notify the Minister of Justice of prosecutions and other measures that may have eventually been adopted in case of failure to observe the rules governing detention.

Persons arrested without an order or warrant of the judicial authority, and in cases other than those in which arrest is allowed or made compulsory, must at once be released by the official who effected the arrest or who brought in the prisoner.

After interrogation, the public prosecutor or the cantonal judge shall order by a substantiated writ that the arrested person at once released, if it is found that the arrest took place in a case other than those provided by law, or that it took place in error, or that the act does not hold good, or that the arrested person did not commit such act, or that the law does not provide for the act as being an offence, or that a criminal trial cannot be instituted. In such cases it is provided that the prosecution be placed on file in the manner set forth in the foregoing.

The judicial police officials who have effected the arrest of an individual without an order or warrant from the judicial authority, whenever they are not obliged to release him by virtue of the provisions set forth in the foregoing, shall do so immediately, and in any case within twenty-four hours on an order of the public prosecutor or the cantonal judge, unless these judges, having been informed of the arrest, consider a postponement to be necessary.

The officials or the agents of the judicial police or of the civil police force who have effected an arrest by order or warrant of the judicial authority must put the arrested person in prison and hand the official report of arrest, according to the rules and within the terms set forth above, to the authority that has issued the order or warrant.

Preventive detention, moreover, must not exceed the terms

⁵ Art. 606 of the Penal Code inflicts punishment by imprisonment with hard labour up to three years upon any public official who makes an arrest in (malicious) abuse of the powers attaching to his functions. For the purpose of applying the norm under consideration, both political science and jurisprudence have placed detention on the same footing as arrest.

laid down in this connexion by law. If it is instituted the connexion with a formal preliminary examination, the accused must be released if there is no committal for trial and if the period of preventive detention has already exceeded the following terms:

1) in cases where a warrant of arrest is optional, six months, if for the offence in question the law provides imprisonment with hard labour for a maximum term of more than four years;

2) in cases where the warrant of arrest is compulsory, two years, if for the offence in question the law provides the penalty of imprisonment for a maximum term of not less than twenty years or the penalty of hard labour; for one year, if the law provides a lesser penalty.

In the event of summary examination being instituted, if the duration of preventive detention has exceeded forty days without any request having been made by the Department of Public Prosecution for the writ of summons to trial or for an order of release, the public prosecutor shall hand the case papers to the examining judge or to the examining section in order that a formal preliminary examination may be instituted.

The cantonal judge shall, in the proceedings within his competence, release the accused when the duration of preventive custody has exceeded thirty days and no writ of summons to trial has been issued.

The public prosecutor, the procurator general and the accused may contest the decision given (in an affirmative or negative sense) regarding release. Impugnment by the Department of Public Prosecution does not delay the execution of the order of release.

It is not out of place to show that the right to personal liberty is established in Art. 13 of the Constitution of the Republic, according to which inspection or search of a person, or any other restriction of personal liberty, is not permissible except by a substantiated writ of authority and only in cases and forms provided by law.

The same rule directs that, only in case of necessity or urgency tacitly implied by law, may the public security authority take provisional measures, to be communicated to the judicial authority within twenty-four hours; and that, if not confirmed by the judicial authority within the ensuing forty-eight hours, such measures shall be annulled.

d) In the procedure applicable to criminal trials does the prosecutor have the same rights and duties, as regards presentation of the case and production of evidence, as the accused person?

By virtue of Art. 27 of the Constitutional Charter "the accused is not deemed guilty until finally convicted"; according to the Italian

system of trial, moreover, the proof of guilt has to be furnished by the prosecution. The sifting of the proofs furnished by the prosecution and by the accused is left to the discretion of the judge, who, however, has to embody in his pronouncements a statement of the reasons by which he was guided in arriving at his decision. Lack of substantiation regarding elements affecting the objects of decision entails nullity of the judgment rendered, which can be quashed in the court of cassation. The Department of Public Prosecution and the accused are on an equal footing as regards the right to produce evidence. However, owing to the necessity for secrecy of the investigation, the counsel for the defence is not entitled to take cognizance of the case papers at any time during the investigation (Art. 303 of the Code of Penal Procedure). The counsel for the defence of the parties are, however, entitled to be present at various stages (judicial tests, appraisals, house searches and investigations), subject to exceptions expressly laid down by the law.

e) What person or body (if any) can pardon or suspend the sentence of a convicted person?

The right to grant pardon and to commute sentences passed (by judgment that has become final) is reserved by the Constitution (Art. 87) for the President of the Republic.

As regards the right to suspend a sentence, certain distinctions are made.

1) Such suspension of sentence may be ordered conditionally by the judge when pronouncing judgment of conviction for not more than one year.⁶ The suspension of sentence is for the duration of five years if the conviction relates to a crime (serious offence), and of two years if it relates to a transgression (minor offence). Such suspension of sentence shall not be granted to a person who has had a previous conviction for crime, nor to habitual or professional offenders or transgressors, nor to an offender by inclination; nor in cases where a measure of personal security has to be introduced on account of the dangerousness of the offender.⁷ Subjection to security measures may only be ordered in the cases expressly provided by law (Art. 199 *et seq.* of Penal Code).

Conditional suspension of sentence is revoked by law if, within the above-mentioned periods of two years and five years, the con-

⁶ Not more, however, than two years, in the case of persons under the age of 18 or persons who have reached the age of 60.

⁷ The law has to determine the conditions for declaring a person a habitual or professional offender or transgressor, or an offender by inclination (Art. 102 *et seq.* of the Code of Penal Procedure).

victed person commits a crime or transgression of the same nature or does not fulfil an obligation imposed by the judge to make restitution or compensation to the aggrieved party. Conditional suspension may be granted more than once.

2) The execution of a sentence incurred by judgment that has become final must be deferred in cases tacitly provided in Art. 146 of the Penal Code (if such sentence has to be executed against a pregnant woman or against a woman who gave birth to a child less than six months previously, unless in this latter case the child dies or is entrusted to some other person than the mother).

In other cases specifically provided by law (Art. 147 of Penal Code) the deferment of execution of the sentence is optional (if a request for pardon is submitted or if the party to be deprived of liberty is in a state of serious physical disability; if the penalty of detention has been passed on a woman who gave birth to a child more than six months but less than one year before and there is no way of entrusting the child to a person other than the mother). The law provides, however, conditions and limits for such optional suspension of sentence.

In the event of a request for pardon having been submitted, postponement of execution of sentence shall, if appropriate, be ordered by the Minister of Justice; in other cases the power of postponement falls within the competence of the public prosecutor or of the cantonal judge who is competent to carry it into effect.

If the warrant for imprisonment has already been issued in cases where the penalty has to be compulsorily deferred (Art. 146 of the Penal Code, in conjunction with Art. 589 of the Code of Penal Procedure), release is ordered by the cantonal judge or by the public prosecutor who is competent to put it into effect. On the other assumptions in which the deferment of execution of sentence is optional, release can also be ordered by the Minister of Justice.

4. The Legal Position of the Police

a) What organ of the State is ultimately responsible for the conduct of the police?

The officials and agents of the judicial police exercise their powers (Art. 220 of the Code of Penal Procedure, amended by Art. 7 of the act of June 18th 1955, No. 517) subject to and under the direction of the Procurator General to the Court of Appeal and the public prosecutor they also have to carry out the orders of the examining judge and the cantonal judge.

At every judge's bench the judicial police official of highest rank is responsible to the procurator general, to the public prose-

cutor and to the cantonal judge for the acts of the officials and agents under his authority, and cannot be removed from the bench nor be deprived of the exercise of the judicial police functions without the consent of the procurator general.

In the penal sense, every agent or official or the judicial police is responsible for any offences he may have committed and which he may have ordered to be committed (save for specific exceptions provided by the Penal Code). However, *no proceedings may be taken without authorization by the Ministry of Justice, against officials or agents of the public security, or of the judicial police, or against military persons in the public security service, for acts committed in course of service and relating to the use of arms or other means of physical coercion* (Art. 16 of the Code of Penal Procedure).

In the political sense, the Government is responsible to Parliament for the activity of the judicial police and the security police.

b) What powers of arrest and confinement of accused persons are available to the police which are not accorded to the ordinary citizen?

Mention has already been made of the powers conferred on the police in dealing with the restriction of the personal liberty of the citizen and the limits of these powers (reply to question 3, letter c).

When an offender is caught in the act (*in flagrante delicto*) a private citizen is only authorized to effect arrest in cases where the arrest of offenders caught in the act is compulsory for the officials or agents of the judicial police or for the civil police force. The person who has effected the arrest shall without delay hand over the arrested person (together with any incriminating objects seized) to an officer or agent of the judicial police or of the civil police force, who shall draw up an official report of the happening and, if so requested, issue a certificate thereof to the person who effected the arrest.

c) What powers of search and other means of gathering evidence (e.g., wire tapping) are available to the police which are not accorded to the ordinary citizen?

The judicial police may through their officials, in cases where an offender is caught in the act ("*flagrante delicto*") or in case of escape⁸ (Art. 224 of Penal Code in conjunction with Art. 7

⁸ Except in such cases, searches by the judicial police may only be carried out by authorization of the Department of Public Prosecution.

of the Act of June 18th, 1955, No. 517), proceed also at night to carry out personal searches in any place where there is reasonable ground to believe that the suspect or escaped prisoner has taken refuge or that there may be objects to be sequestrated or clues that may be effaced or destroyed (should it not be possible to give notice hereof to the counsel for the defence, the reason for such failure to give notice shall, under pain of nullity, be stated in the official report on the police action; subject always to the right of intervention of the counsel for the defence). The official report of the search must within forty-eight hours be handed to the public prosecutor or to the cantonal judge.

The judicial police officials may, for the purpose of their duties, enter the offices and institutions of the public telephone service in order to transmit messages and to obtain information. For the interception or prevention of telephone messages they must, however, obtain an authorization from the nearest judicial authority, who will grant such authorization by a substantiated writ. The afore-said authority may also authorize the judicial police officials to open letters that are sealed or otherwise closed (Art. 226 of the Code of Penal Procedure).⁹

Moreover, in case of "flagrancy", when the offender is caught in the act and when it is urgent to collect proofs of an offence (Art. 235 of the Code of Penal Procedure) or to preserve clues, the judicial police officials may institute summary interrogation of the prisoner, summary seizure of evidence and acts of investigation, inspection, confrontation of the accused with witnesses, etc., the rules of formal examination being observed to the utmost extent possible without administering an oath, subject to express provision of the law.

The Supreme Court (Court of Cassation) has several times had occasion to declare that the elements of proof to which reference has been made are admissible even if the judicial police officials have not adhered to the rules prescribed by the code of usages for the employment of such means of evidence by the public prosecutor, the cantonal judge and the examining judge. The Supreme Court has constantly maintained in principle that the judge may, in the free formation of his decision, take into account any confessions and mentioning of accomplices collected by the judicial police, even

⁹ Judicial police officials and agents who violate the legal provisions relating to the exercise of their functions, or who refuse or delay the execution of an order of the judicial authority or who execute such order only in part or in negligent manner, may incur the penalty of censure and, in more serious cases, suspension of pay and employment, for a time not exceeding one month (penalties imposed by the Attorney General to the Court of Appeal).

if they are successively retracted before the trial when, as a result of reasonable evaluation, their credibility and value are upheld in the course of the trial. Moreover, – always according to the teaching of the Supreme Court – the proofs collected by the judicial police officials have the same juridical character as the reports of the prosecution. Thus, for example, during deliberations a statement made by a witness to a judicial police official may be read out, although the name of such witness was not included in the lists of witnesses produced by the public prosecutor or by the counsel for the defence of the accused.

In proceedings to establish facts, to take descriptive or photographic records or to perform any other technical operation relating to their functions, the judicial police officials may employ persons having expert knowledge of the subject-matter.

Except as regards the right to arrest the suspect within the limits stated in the foregoing, *the code of usages does not entitle a private person to perform other acts mentioned which fall within the competence of the judicial police.* A private person is therefore not entitled, for instance, to demand that other parties make depositions to him. Should such depositions, however, have been delivered to a private party, the judge may sift them in order to form his opinion regarding their merit in relation to other elements acquired. Certain other acts permitted by the law to the judicial police officials would, if performed by a private person, have constituted criminal offences. Thus, for instance, in the matter of house search, a private person who, against the will of the party concerned, arbitrarily made his way into or sojourned in the dwelling of another person, would commit the crime of disturbance of domestic peace and security.

d) What limits – directly by a legal prohibition or indirectly by exclusion of the evidence so obtained – are imposed on the methods employed by the police to obtain information or extract confession?

Even judicial police officials are prohibited from using any means that may tend to weaken or annul the consciousness or will of the accused, of the aggrieved party, of the witnesses or of any other person for the purpose of ascertaining the truth (as, for example, the employment of serums or hypnotism); this applies even if the person to be interrogated is willing to be subjected to such measures.

Evidence obtained by the said means could not, therefore, be taken into account by the judge. The Code of Penal Procedure of the Italian State also grants the accused the right of non-reply to questions put by the judge; besides, it is an inalienable right of the accused, that at any time when evidence is presented he shall be

in a position to defend himself directly. The principle is encountered also in Art. 88 of the Code of Penal Procedure according to which: "When the accused comes to be in such a state of mental disability as to preclude his capacity for understanding and volition, the judge shall, at any stage of judgment of the merits of the case, give an order for suspension of the proceedings." (It is evident that, if such mental condition had developed at the moment when the criminal act was committed, the judge would have to declare the accused not liable to punishment because of his being unaccountable).

It is stated that our system of criminal procedure is, in the matter of ascertainment of personal responsibility, based upon the discretion of the judge; in particular, Art. 308 of the Code of Penal Procedure provides: "The limitations which the civil laws impose in regard to evidence are not observed in criminal proceedings, except those regarding the condition of the persons." Therefore, the conclusion would seem warranted that any means of evidence not specifically provided by law may be used by the police (such as sound recordings or visual records), provided that the employment of such means is not contrary to our judicial order (as stated, for instance, in regard to the use of substances capable of destroying or weakening the capacity for understanding and volition of the interrogated person). It is then a matter for the judge, within the scope of the discretionary power entrusted to him by the law, to sift all the evidence for the purpose of reaching a decision.

e) To what extent are the remedies dealt with in the answer to A 2 c) above applicable in particular to the illegal acts or commissions of the police?

Art. 7 of the Public Security (approved by R.D. No. 773 of June 18, 1931), rules that "No indemnity is due on account of measures of public security authorities in the exercise of the rights assigned to it by law."

If the behaviour of an agent or official of the judicial police arises from the rights entrusted to these persons by law, they will have to answer for the damage caused to private parties, according to general rules.

Should this not be the case, it would seem in the present state of legislation that neither an agent, nor an official of the judicial police, nor the State is answerable for damage caused to private parties.

Indeed, Art. 28 of the Constitution, already quoted, stipulates that officials and agents of the State and of public bodies are personally liable under applicable laws (criminal, civil and administrative) for acts committed in violation of rights; and that only

in case of responsibility of officials and servants of the State does civil liability extend to public bodies.

There is, however, a need for an amendment of the above Art. 7 to make it compatible with the democratic principles by which the Constitution of the Italian Republic is inspired.

B. THE LEGISLATIVE AND THE LAW

Limitations of Lawmaking Power of the Legislative

1. *What legal limitations (if any) restrict the power of the legislative to make laws? In what instrument are these limitations defined? To what extent do you consider these limitations essential to the Rule of Law?*

The present Italian Constitution is rigid. It sets limits to the legislative power. Therefore, when making laws the legislative not only has to conform to the procedure laid down by the Constitution, but no norm or rule may be issued by ordinary law the contents of which are contrary to the general principles and norms set forth in the Constitution regarding either the polity of the State or the subjects of civil, ethico-social, economic and political relations. In these limitations is to be found the application of the principles of the *Rule of Law*, as they reduce the possibilities of arbitrary exercise of legislative power and guarantee that the latter will respect the fundamental rights of the citizen.

2. *By what procedure and before what body can laws of the legislative which are inconsistent with the limitations discussed in B 1 above declared invalid?*

Laws that violate the aforesaid limits may be declared invalid by the *Constitutional Court*, use being made of the procedure indicated under A, 1 c) I.

3. *Is a particular procedure laid down for the revision of the limitations mentioned in B 1 above? Can this procedure be circumvented for example by increasing the number of members of the legislative body in order to obtain a majority of two-thirds or three-quarters?*

The Constitution provides special procedure for the revision of its own norms (Art 138).¹⁰

¹⁰ Art. 138 of the Constitution provides: "The laws for the revision of the Constitution and the other constitutional laws are passed by each Chamber in two successive sessions with an intervening period of not less than three months and are ratified by absolute majority of the members present in the second voting. The laws themselves are submitted to a popular *referendum* when, within three months from their publication, a request to this

The guarantee constituted by such procedure cannot be evaded by altering the composition of the Chambers of Parliament vested with the power of review, firstly because both Chambers are elective and secondly because the guarantee itself consists, not in any particular constitution of the organ of revision but in a more complex procedure than that of formation as provided by the ordinary laws, which procedure may also give rise to a referendum.

4. *What powers has the legislative to punish a) its own members, b) members of the general public?*

Parliament has no power to punish either its own members or ordinary citizens.

The Speaker of the Chamber has merely disciplinary power to guarantee the free exercise of parliamentary functions. In the use of such power the Speaker may impose sanctions on members of Parliament (in the case of Deputies: by calling the deputy to order reprimand by name, exclusion from the House for the rest of the session, censure, prohibition from participation in the activities of the House for 2 to 15 days, prohibition from entering the House for 2 to 8 days; in practice such sanctions are never applied except, in rare cases, that of calling a deputy to order) and on outsiders who are present at the debates (expulsion; in case of outrage, arrest and bringing of the deputy before the competent authority; these sanctions, too, find no application in practice).

6. *In what respects does the procedure adopted under B 4 and 5 differ from the procedure followed in the ordinary courts?*

Parliament has no power to examine its own members under oath.

Citizens may be interrogated by a suitable commission when a Chamber has ordered an enquiry into a matter of public interest. The Commission of Enquiry has the same powers and the same limitations as the judicial authority (Art. 82 of the Constitution). For imposing upon citizens the duty to give evidence on oath the enquiry must, however, be ordered by an appropriate law.

6. *In what respects does the procedure adopted under B 4 and 5 differ from the procedure followed in the ordinary courts?*

effect is made by one-fifth of the members of one Chamber, or by five hundred thousand electors, or by five regional councils. The law submitted to *referendum* is not promulgated unless it has been ratified by the majority of the valid votes. No *referendum* is taken if the law has been ratified in a second voting by each Chamber with a majority of two-thirds of the members present.

We have seen under B 4 that there is no power of Parliament to punish citizens, and also that as regards members of Parliament the Speaker of the Chamber is vested with a simple disciplinary power relating to the development of the activities of the legislative assemblies.

Also as regards the power of Parliament to examine under oath, we have seen under B 5 that this does not exist in interrogations of its members and that, where special Parliamentary Commissions of Enquiry exist, they have the same powers and the same limitations as the judicial authority.

C. THE JUDICIARY AND THE LAW

Selection, Dismissal and Promotion of Judges

1. *By whom are the judges appointed?*

I. Judges in criminal matters

a) *The Criminal "Court of Assizes" of first instance* consists of a judge of appeal, who presides, a judge and six lay assessors, at least three of whom are of the male sex (see Law of December 27th, 1956, No. 1441).

The Criminal Appellate "Court of Assizes" consists of a judge of cassation, who presides, a judge of appeal and six lay assessors, at least three of whom must be of the male sex.

In both degrees of jurisdiction the President and the judge magistrate belong to the ordinary Bench; therefore, what is stated hereinafter applies to them also. It is, however, appropriate to make clear that the assignment of magistrates to the criminal courts of first instance or criminal courts of appeal is effected each year by decree of the President of the Republic on the proposal of the Minister of Justice.

The six lay judges are elected from citizens who meet the legal requirements¹¹ (Art. 9 of Act No. 287 of April 10, 1951), by the drawing of lots, which affords an absolute guarantee of secrecy.

b) *Military tribunals* (order approved by R.D. No. 1002 of September 9, 1941, and subsequent amendments).

The territorial military tribunals give judgment in benches composed of the President, a reporting judge and three military judges. The President and the military judges are appointed by decree of the President of the Republic and elected from officials having a particular rank (Art. 8). The reporting judges belong to the military magistracy. The office of public prosecution is exercised by the Military Procurator of the Republic.

The *Supreme Military Tribunal* (with headquarters in the capital) sits as a court consisting of the President (having a rank not inferior to general of an army corps) and of six judges, three of whom are officials, two State councillors and one military magistrate

¹¹ People's judges must fulfil the following requirements:

- a) Possess Italian citizenship and be in enjoyment of civil and political rights;
- b) good moral standing;
- c) age not less than thirty and not more than sixty-five;
- d) academic title (licentiate of first-grade high school for judges of the Criminal Court of Appeal).

(Art. 43, 44, 45), when the trial deals with special matters. Otherwise the tribunal consists of the President and six judges, three of whom are ordinary magistrates and one a military magistrate. The function of public prosecution is fulfilled by the Military Procurator General of the Republic and his deputees.

There are special rules concerning military courts-martial (Art. 57 *et seq.*).

Military magistrates are recruited through the medium of a competitive examination announced by the Minister of Defence, who appoints the members of the Examining Committee; this Committee is also competent to draw up the graduation list of successful candidates (called judicial observers). There are suitable rules to regulate promotions (cf. R.D.L. No. 122 of January 26, 1931 and successive amendments).

II. Judges in administrative matters

a) *The State Council.* The staff of the State Council consists of the president, sectional presidents, councillors, senior referendaries and referendaries.

The president, the sectional presidents and some of the councillors are appointed by the Government. The remaining councillors are promoted from senior referendaries and from referendaries who have completed a certain period of service in a particular assignment.

Referendaries are appointed from successful candidates in a suitable competitive examination which is open to officials of the State and of the two Chambers of Parliament, doctors of jurisprudence and persons who hold a particular degree.

b) *The Audit Department.* Magistrates of the Audit Department are graded, according to their functions (art. 10 of Act No. 161 of March 21, 1953), as vice referendaries, referendaries (and deputy procurators general), sectional presidents (and vice procurators general) and president.

Vice referendaries are appointed on the strength of a competitive examination for official titles and examinations according to regulation standard, from: a) officials on the staff of administrative departments of the State who hold the degree of doctor of jurisprudence, who have a certain seniority (four years' service in group A) and who have been qualified as of good standing for the last three years; b) barristers-at-law who have been entered for at least one year in the relevant professional list; c) officials of group B of the Audit Department who hold the degree of doctor of jurisprudence and who fulfil certain requirements as to service.

Promotions from vice referendary to referendary are made two-thirds by election and the other third in order of seniority, after

the award of eligibility for promotion on account of merit; promotions to the position of vice referendary are made on the basis of established seniority. Promotions from referendary to councillor (or to deputy attorney general) are made by election from among referendaries who have completed at least eight years effective service as referendary.

III. Judges in constitutional matters

a) *The Constitutional Court* (Articles 134 to 137 of the Constitution). The Constitutional Court consists of fifteen judges, one-third of whom are appointed by the President of the Republic, one-third by Parliament in ordinary session of the two Chambers and one-third by the ordinary and administrative Supreme Magistracy (Cassation, State Council and Audit Department), by vote.

Art. 135, para. 1, lays down the categories from which magistrates (also those in retirement) of the higher degrees of jurisdiction may be selected. The Court elects the President from among its members¹².

b) *Parliament*¹³. Parliament consists of the Chamber of Deputies and the Senate of the Republic (Art 55 of the Constitution).

The Chamber of Deputies is elected by voting, in universal and direct suffrage. All electors are eligible who at the time of the elections have reached the age of twenty-five (Art. 56 of the Constitution).

The Senate is elected on a regional basis; the senators are elected through the medium of direct, universal suffrage by electors who have passed the age of twenty-five; candidates are eligible for senatorship who have reached the age of forty. A person who has been President of the Republic is senator for life (except in case of renunciation). The President of the Republic may appoint as senators for life five citizens who brought fame to the country by their meritorious achievements.

¹² The Constitutional Court (Art. 134 of the Constitution) gives judgment on controversies relating to the constitutional legality of laws and other instruments having force of law, to the State and its regions; on disputes as to the allocation of duties within the powers of the State and disputes between the State and regions of the country; on accusations brought against the President of the Republic and Ministers in accordance with the Constitution (Art. 90 and 96 of the Constitution).

¹³ Each Chamber judges the right of admission of its members and any grounds for ineligibility that may have arisen (Art. 66 of the Constitution). Parliament, in ordinary session, deliberates on the bringing to trial of the President of the Republic for high treason or for any attack upon the Constitution (Art. 90) or of its ministers for any offences committed in the exercise of their functions (Art. 96).

Each Chamber elects from among its members the President and members of his office.¹⁴

IV. Ordinary judges

As regards ordinary judges a distinction has to be made, for their appointment, between the rules at present in force as an interim system (Section VII of the Constitution) and the other rules which, in accordance with the Constitution, will have to be adopted by the forthcoming legislation.

Rules at present in force.

Honorary judges

The following belong to the judicial order of honorary judges:

a) *The Conciliation Magistrate* (and Deputy-Conciliation Magistrate). These judges, apart from their mediating function, possess competence only in actions for moderate amounts.¹⁵ They are appointed by the senior President of the Court of Appeal on nomination by the Procurator General. Appointment is for a period of three years and may be renewed (Art. 124 of Judicial Procedure approved by R.D. No. 12 of January 30, 1941 and subsequent amendments). Eligible for appointment as Conciliation Magistrates and as Deputy-Conciliation Magistrates are: citizens of the male sex, resident in the municipality, who have shown themselves capable of worthily fulfilling these functions.

b. *The Honorary Cantonal Judge*. Eligible for appointment as Honorary Cantonal Judge are doctors of jurisprudence and deserving persons who have reached the age of twenty-five. Appointment is conferred by decree of the President of the Republic; it is valid for a period of three years and may be renewed.

*Ordinary magistrates (practising)*¹⁶

Ordinary magistrates are graded, according to their functions, as magistrates of the local Bench (who may perform the function of Cantonal Judge), of the Court of Appeal and the Court of Cassation.

Admission to the ordinary bench of magistrates is by competi-

¹⁴ A law is under discussion for altering in the constitution of the Senate.
¹⁵ Act No. 761 of June 18, 1956, brings the jurisdiction of a conciliation judge in respect of value up to Lire 25,000. This competence refers to controversies regarding movable assets.

¹⁶ The appellation "Ordinary Magistrate", without further specification, is used to denote an ordinary magistrate by profession.

tive examination open to doctors of jurisprudence who have reached the age of twenty-one and who are not older than thirty, who are of the male sex¹⁷, and who are in enjoyment of civil and political rights.

The successful candidates obtain appointments as *judicial observer*. The competition is announced by decree of the Minister of Justice; the examining committee is appointed by the same Ministry that also issues the graduation list of successful candidates. Appointment of the observer is by ministerial decree (Art. 12 of Judicial Procedure).

Appointment as *assessor* is conferred, through the medium of an examination, on judicial observers (after a period of probation of at least two years). The examination is announced by the Minister of Justice, who appoints the examining committee (consisting of magistrates only and presided over by a magistrate holding the rank of sectional president of the Court of Cassation) and approves the list of graduations without having power to examine the merit.

The decree of appointment of assessor is signed by the President of the Republic.

Promotions to the positions of *Magistrate of Appeal* and *Magistrate of Cassation* may be made after a certain number of years' service in lower functions.

The available posts are assigned in aliquot shares (by titles) to persons who have passed the competitive examination, announced by ministerial decree; the examining committee is at present appointed by the Minister of Justice, who approves (without having power to examine merit) the graduation list. The decrees of appointment are signed by the President of the Republic.

Another aliquot share of posts is conferred in order of seniority upon magistrates who are declared eligible for promotion by poll. Such eligibility for promotion is, after examination of the titles presented by the candidates, declared by the High Council of the Bench.

Appeal against the deliberations of the lower sections may be made to the United Sections of the High Council.

Leading posts for Magistrates of Cassation (Senior President, Procurator General, President of the High Court of the Waters, Procurator General to that Court, President and Procurator of the Republic in the most important centres as indicated in an appropriate list): These posts are assigned to Magistrates of Cassation on account of seniority and of merit.

Appointments to the functions of Senior President and Procurator General of the Court of Cassation or of Appeal, of Sectional

¹⁷ Art. 57 of the Constitution lays down that "all citizens of either sex may enter upon public functions." On the basis of such provision it currently is maintained by a lady scholar that the forthcoming legislative should abandon the requirement as to sex.

President and of Advocate General to the Court of Cassation, are granted on the proposal of the Minister of Justice after consultation with the Council of Ministers. The advice of the High Council of the Bench of Magistrates must previously be obtained. Appointment is by decree of the President of the Republic.

Rules prescribed by the Constitution, which should figure in future respective legislation now before Parliament.

The Constitution (Art. 104), acknowledging that the order of Magistrates is an autonomous body which is independent of any other power, entrusts the entire control over the Magistrature to a suitable constitutional authority, the High Council of the Bench.

Even at the present time, in the interim regime, there is an organ which has this name, but it has a different organization and a different function from that provided in the Constitution.

According to the Constitution (Art. 104) the High Council of the Bench is presided over by the Head of the State; according to law this Council must have among its members the senior president and the Procurator General of the Court of Cassation. Other members (whose number is not specified by the Constitution) are elected two-thirds by all ordinary magistrates from persons belonging to the various categories, and one-third by Parliament, in ordinary session, from university professors of legal faculties and barristers-at-law after fifteen years' practice.

The Council elects a Vice President from members nominated by Parliament. The elected members have a term of office of four years, are not immediately re-eligible and, as long as they are in office, cannot be entered in the professional lists nor be members of Parliament or of a Regional Council.

The High Council of the Bench (Art. 105 of the Constitution) attends to the assignment of duties, transfers, promotions and disciplinary measures in respect of magistrates.

In addition, the Constitution lays down the principle (Art. 106) that magistrates are appointed by the method of competition (without specifying whether by examinations or titles). It has, however, made two exceptions: a) possible appointment as Judge of Cassation on the ground of outstanding merit, on nomination by the High Council of the Bench, of university professors of legal faculties and barristers-at-law after fifteen years' practice, provided they are entered in the special lists for the higher degrees of jurisdiction.

This latter exception already exists, however, in the present judicial procedure but has found very rare application.

According to the Constitution the Minister of Justice alone – *without prejudice to the powers of the High Council of the Bench* – is concerned with the organization and working of the service relating to justice.

2. *Under what conditions can they be dismissed? Have any judges in fact been dismissed in the last ten years? (Give particulars, if possible).*

a) *Under what conditions can judges be dismissed?*

A magistrate is dismissed according to the law (Art. 29 of R.D.L. of May 31st, 1946, No. 511) in case of permanent or temporary prohibition from holding public offices¹⁸ as a result of criminal conviction, or as a result of sentence to imprisonment for an offence not due to negligence (different from an offence of battery, the infliction of very slight injuries or an ordinary assault).

If, for offences in respect of which conviction would entail dismissal according to law, a magistrate is acquitted on account of insufficient proof or by reason of the fact that the offence has ceased to be a crime or for reasons on account of which it is not possible to institute or proceed with a criminal trial, disciplinary measures are taken. (In all other cases of conviction the minister decides – in the present state of judicial procedure – whether disciplinary measures should be taken).

In respect of magistrates, neither the judicial procedure nor any other laws provide the sanction of dismissal, except in the case considered above in regard to criminal convictions.

Art. 18 of R.D.L. No. 511 of May 31, 1946, provides, however, that: “A magistrate who fails in his duties or who while in office or out of office conducts himself in such a manner as to render himself unworthy of the trust and consideration which he should enjoy, or who compromises the prestige of the judicial profession, is subject to disciplinary sanctions applicable in the following order: (Art. 19) reprimand; censure; loss of seniority; removal; dismissal.¹⁹

Rules at present in force.

In the case of observers, disciplinary sanctions are imposed by decree of the Minister of Justice (Art. 38 of D.L. No. 511 of 1946), consideration being given to the opinion of the judicial council at the Court of Appeal in whose district is the Office to which the observer is attached.

Observers may, moreover (Art. 3 of D.L. cit.), on account

¹⁸ Permanent prohibition from holding public offices is pronounced against judges who are sentenced to hard labour or to imprisonment for a term of not less than five years (Art. 29 of Penal Code). Temporary prohibition – for a period of not less than one year and not more than five years – is pronounced in case of offences committed in abuse of a public office and in further cases provided by the law (Art. 26 and 31 of Penal Code).

¹⁹ The essential difference between dismissal and removal is that dismissal may result in the total or partial loss of the pension rights. In its moral aspect dismissal is more serious than removal.

of apparently permanent illness or on account of supervening unfitness, be placed on half-pay or be discharged from office, by decree of the Minister, consideration being given, in the case of discharge from office, to the opinion of the judicial council.

Judicial councils (Art. 6 of D.L. cit.) are constituted at the seat of any Court of Appeal. Each council consists of the president of the court, who acts as chairman, the attorney general and five members, two of whom may act as substitutes.

Disciplinary jurisdiction over magistrates having a rank not higher than magistrate of the local Bench is within the competence of the judicial council at the Court of Appeal in whose district is the judicial office to which the magistrate belonged when he committed the act on account of which proceedings are taken.

When the judicial council is acting as disciplinary tribunal, the procurator general to the Court of Appeal is replaced by the senior sectional president or judge of that Court.

For magistrates of higher rank, the competence to give judgment is transferred to the disciplinary court for the Bench of Magistrates which is also competent to judge magistrates attached to the Ministry of Justice.

The disciplinary court has its headquarters in Rome and consists of the senior President of the Court of Cassation who presides and of eight members resident in Rome, elected according to the rules for the election of members who do not according to law form part of the High Council of the Bench (see remark on this in the foregoing). The elected members have a term of office of two years.²⁰

The duties of public prosecutor are performed by the Procurator General to the Court of Cassation (or by whoever takes his place – see above) or by the Procurator General to the Court of Appeal, for trials assigned to the disciplinary court or to the judicial councils as the case may be (Art. 26).

Disciplinary action is instituted, at the request of the Minister of Justice, by the public prosecutor to the competent disciplinary court.²¹

²⁰ The elected members must be: four Presidents of the Court of Appeal or Sectional Presidents of the Court of Cassation; two Procurators General of the Court of Appeal (or general cassation counsels); two judges of cassation (or equivalent magistrates) belonging to the regular judiciary and one appointed *ad hoc*. The eight magistrates who, by the number of votes follow in next order, are called upon to replace members who cease to hold office during a period of two years.

²¹ On commencing its proceedings the Disciplinary Tribunal may, at the request of the Minister or of the Department of the Public Prosecutor, after having heard the accused, order provisional suspension from duties and pay (in case of urgency such measures are adopted by the Minister, who must,

The preliminary investigation may be conducted summarily (by the public prosecutor) or according to formal usage, whenever a request to this effect is made by the said public prosecutor. In this case the investigatory functions are conferred by the president on one of the members of the disciplinary tribunal. As far as possible the rules of the Penal Code are observed.

When the preliminary investigation has been carried out (Art. 33), the public prosecutor formulates the motion (whether or not to proceed with the prosecution). The Tribunal will decide only upon the latter, if, decide on motion being made to this effect by the public prosecutor, it is considered that the evidence negatives the charges made. Otherwise the president, by his decree, fixes the date for the oral discussions and decides whether the witnesses and the experts that were heard during the investigation shall again be heard. The decree is communicated, at least ten days before the date fixed for trial, to the public prosecutor and to the accused, who has the right to appear in person.

In the oral proceedings (Art. 34) the duty of reporter is performed by a member of the tribunal, suitably appointed by the president.

The proceedings take place behind closed doors. The accused may obtain the assistance only of another magistrate of a rank not lower than judge or magistrate of appeal, or of one who tries cases before judicial councils or before the disciplinary court.

The opinion of the court is given after the taking of evidence, the conclusions of the public prosecutor and, lastly, after the accused has been heard.

If no sufficient proof has been obtained of the magistrate's guilt, but it is found that he has lost public esteem, the court may rule that he may be relieved of his functions.

Appeal against the decisions of the judicial council may be lodged with the disciplinary court by the accused, the public prosecutor and the Minister of Justice.

Disciplinary judgments in trials of magistrates have the character of judicial decision. Therefore, they do not admit of appeal to the State Council (the supreme organ of administrative justice). In place thereof, appeal may be to the Court of Cassation, by virtue of Art. 111 of the Constitution in respect of violation of law.

Rules prescribed by the Constitution in the matter of discipline

however, at the same time make a new application for disciplinary judgment). The Tribunal may, by virtue of its office, revoke the suspension. A magistrate who is accused in a criminal trial is, according to law, suspended from duties and pay and struck off the roll of the Bench of Magistrates from the day on which a warrant or order of arrest was issued against him or from the day of arrest without a warrant.

of Magistrates, which rules will come into force as soon as the High Council of the Bench has been set up in accordance with the provisions of the Constitution.

Art. 105 of the Constitution requires the High Council of the Bench to provide disciplinary measures for adoption in dealing with magistrates.

Consequently, the dismissal of a magistrate, according to the constitutional rules, can also be ordered only by the said Council. However, the Minister will retain the right to make a new demand for the instigation of disciplinary action.

The rules that will be prescribed by the proposed legislation cannot be contrary to those provided by the Constitution. In so far as the Constitution makes no provision, the future legislator has no restraints (art. 108 of the Constitution).

b. Have any judges been dismissed in the course of the last ten years? (Give details, if possible).

From investigations made, it does not appear that any judges were dismissed in the course of the last ten years.

There have been very few cases of removal of magistrates who were found guilty of having failed in their duties, compromising the prestige of the judicial order.²²

It is not possible to furnish detailed reports on this matter.

3. By whom are the judges promoted?

As has already been seen in the reply given to question C 1, promotions of judges are made by the Minister of Justices after an opinion has been given by the High Council of the Bench and, for the higher ranks, after deliberation of the Council of Ministers.

The bill to be placed before Parliament, which implements the Constitution, stipulates that the promotion of judges is a matter to be dealt with solely by the High Council of the Bench.

For more complete particulars we would refer to the answer given to question C 1.

4. What personal qualifications are required of judges? To what extent do laymen participate in the judicial process? What professional guidance are they given?

²² Researches made show that in the last ten years there have been three cases of removal. It is not impossible that some other very rare case may have occurred. For the difference between dismissal and removal see note No. 19.

a) As has already been seen in the reply to question C 1, it is required for judges that, besides complying with the standards of morality and good conduct, they hold the degree of doctor of jurisprudence, are in full exercise of civil and political rights and fulfil certain requirements as to age. For admission to certain benches of magistrates special requirements have to be met, as has been stated above.

b) Only in courts of assizes and in appellate courts of assizes not covered by the forthcoming legislation on the organization of the judiciary do lay judges take part in trials. As had already been seen, they have to meet a minimum educational standard; for the Court of Assizes they are required to have obtained the licentiate of a first-grade high school, and for the Appellate Court of Assizes the licentiate of a second-grade high school.

5. By what legal instruments are the conditions laid down in C (1-4, inclusive) guaranteed? Is any special procedure required to change them?

The requirements in question are established by law and guaranteed by the Constitution.

As regards possible alterations, we would refer to what has been stated under A and B.

D. THE LEGAL PROFESSION AND THE LAW

Admission, Supervision and Expulsion

1. What person or body is responsible for admission to supervision of and expulsion from the practicing legal profession?

The organs responsible for admission to or exclusion from the practice of the legal profession are bodies consisting of barristers and freely elected by barristers, namely:

- 1) The Councils of the Order of Barristers and Attorneys;
- 2) The National Forensic Council.

The bodies under 1) are set up at the seat of every District Court or Court of Appeal, and their members (whose number varies according to the number of those entered on its Rolls) are elected directly every two years by the barristers and attorneys practising in the territory concerned and are entered in a suitable list designated as the "Album". They decide in the first instance on any question regarding admission to or exclusion from the practice of the profession.

The body under 2) has twenty-three members, each of whom is chosen every three years by election from the members of the sections of the Council. It is the only one of its kind, is situated in Rome, and gives judgment in the second instance on any matter regarding admission to or exclusion from professional practice.

The representative of the public prosecutor is entitled to take part in the procedure both in the first instance and in the second instance, and may express his opinion; but only the professional bodies are competent to take decisions. The Department of Public Prosecution may contest the measures taken.

The decisions of the National Forensic Council may be contested before the United Sessions of the Court of Cassation only on the grounds of incompetence, excess of power and violation of the law. This is the only judicial intervention that is permitted in questions regarding admission to or exclusion from professional practice, which intervention is provided in order to guarantee absolute respect for the law and is obtained on application to the supreme jurisdictional organ of the Republic. Excluded from this control are all subjective valuations, which are exclusively and scrupulously entrusted to the professional organs.

2. What factors (if any), other than the professional ability and moral rectitude of the lawyer in question and the extent to which the supply of lawyers is adequate to the demand, are allowed to in-

fluence the decisions made by the person or body mentioned in D 1 above?

No factor may be taken into account nor influence the decisions in the matter of admission to or exclusion from the exercise of the profession, other than those relating to professional qualification (to be impartially considered: doctorate, practice, passing of suitable examinations, lapse of certain periods of time, etc.), juridical ability, morality, Italian citizenship, and residence in the place in which entry is requested.

All those who so apply and fulfil the legal requirements are admitted to the practice of the profession: at present there are no limitations in Italy in respect of number.

It must be added that admission is not possible, or exclusion is compulsory, for those engaged in activities considered by law to be expressly incompatible with the practice of the profession: among these are heads of commercial enterprises (merchants and industrialists), journalists, notaries public, office holders, collectors of public taxes.

Limitations of Freedom to Represent Clients

3. Subject to what limitations, directly imposed by the law or indirect (as for example, by the threat of a diminution in his future practice) is a lawyer free to advise his client and to plead on his behalf in judicial proceedings?

The counsel for the defence in Italy is not subject to any direct or indirect limitation. He is in any case free to advise his client and to defend him openly.

This principle is so firmly implanted in the minds of all Italian citizens that the question does not even arise.

Refusal to Represent Clients

4. Under what circumstances is a lawyer permitted to refuse to accept or to relinquish a brief from a client?

A barrister always has a full right to refuse to assist a client. This unrestricted right might, in theory, invite the assumption that a client is unable to find a counsel for his defence. In practice this never occurs, primarily because of the attitude set forth under E 3.

The assumption may prove correct only in extremely rare cases of offences which have aroused such indignation that it appears odious to undertake the defence. In such cases tradition requires

that the defence be undertaken and carried through free of charge by the barrister who is formally most representative of the locality, that is, by the President of the Council of the Order, who will be fulfilling one of his *implicit* duties, not prescribed by the law, but rooted in professional consciences.

The barrister may abandon the defence thus undertaken, if a just cause arises for doing so (Art. 2237 of the Civil Code).

This legal provision is flexible, in so far as the justice of the cause is necessarily left to subjective valuation.

In practice, since the relation between the defending counsel and the defendant is based on mutual confidence and since confidence is a highly subjective phenomenon, the barrister will have ample possibility of relinquishing a case.

For the rest, professional etiquette imposes a limit of a definite nature, viz., that the case shall not be relinquished for reasons or in a way detrimental to the defendant.

The behaviour of a barrister in this matter is of course subject to the control of the professional organs, which exercise disciplinary power over the persons on their lists.

E. THE INDIVIDUAL AND THE LEGAL PROCESS

Right to be Heard and Represented by Lawyer

1. To what extent has the individual citizen a right to be heard on all matters, however determined, in which his life, liberty or property are concerned?

Under Italian law the citizen always has the right to be heard in all proceedings, whatever their nature, which in any way affect his life, liberty or property.

This right is, in everyday life, guaranteed by the Constitution, which in Art. 24 confirms the inviolability of the right of defence and the freedom of appeal to judicial authority.

The law affords the citizen the opportunity to defend himself in the fullest measure and to be acquainted with all records that are submitted to the judge for examination, in order that his defence may be as complete as possible.

In the case of a criminal trial, the judge is obliged to give the accused a hearing and to institute an inquiry into all the facts and circumstances which the accused has set forth during the hearing.

In the stage of the general preliminary investigation, the records thus made up by the judge are temporarily kept secret in order to avoid any possible obstruction to finding out the truth; but they will afterwards be timely placed at the disposal of the accused and his defending counsel as an amplification of the right of defence.

A regrettable limitation of this principle is encountered in the case of taxation proceedings, in so far – at any rate up to the present – as the tax offices are not bound to reveal to a citizen any reports or particulars concerning the taxpayer of which they have made use in ascertaining the tax at issue.

2. To what extent has the individual citizen the right to legal advice and representation in the matters mentioned in E 1.

Under Italian law a citizen has in any case the right to be assisted and defended, especially in proceedings which in any way affect his life, liberty or property.

In fact, Italian law – in order to give every citizen a fuller guarantee and assurance of defence and to avoid any possibility of his sustaining detriment or loss on account of his limited knowledge of the legal norms in regard to substantive law and procedure – prescribes that in any proceedings the citizen must necessarily be

defended by a barrister (or attorney) at law. In criminal trials, if the accused does not designate a counsel for his defence, the judge makes official provision for the appointment of a defence counsel, who is obliged to take appropriate steps. Lack of a counsel for the defence renders the proceedings void. Excluded from this compulsory provision are: civil proceedings in respect of small values, penal proceedings in respect of minor offences the maximum penalty for which is a fine of three thousand lire and arrest for one month; taxation and disciplinary proceedings; but the citizen retains in any case *the right* to provide for his defence.

The law has special provisions to regulate assistance and representation in court in connection with the various civil, criminal, administrative and disciplinary trials.

Counsel for the defence are afforded the fullest possible opportunity of handling and expounding the defence of their clients. Italian barristers are most jealous of their right in this respect and are always ready to react energetically on the very rare occasions when a personal attitude of the judge, in regard to the conduct of the proceedings before him, might in any way restrict the exercise of this right.

3. *To what extent is the right (if any) under E 2 affected, if the individual has not the material means to secure the legal advice or representation necessary?*

The Constitution of the Italian Republic (art. 24 para. 3) confirms that "indigenous persons are assured, through suitable institutions, the means of conducting proceedings and defending themselves in any jurisdiction".

There are special provisions to regulate the institution of *free legal service (legal aid)*, whereby those who have not the material resources for proceeding and conducting their defence are assured the opportunity, free of charge, of being assisted and represented in court.

Especially in the case of a criminal trial, the accused and the other private parties may be extended the benefit of gratuitous defence by extremely simple and expeditious proceedings.

The same bodies that admit citizens to free legal assistance have to choose a counsel, whose duty it is to do what is necessary free of charge, unless he can recover from the opposing party.

Outside the initiative of the State the following institutions exist practically everywhere, especially in large cities:

a) associations for the free defence of the poor in penal proceedings, which associations are supported with equal enthusiasm by elder barristers desirous of helping the needy and by young

barristers eager to display their abilities; the defence they give is always free of charge;

b) offices for assisting workers of various categories in disputes with employers, on the initiative of trade unions and sometimes of political parties. In these cases the defending counsel's fee is usually contingent upon a successful result of the case;

c) offices for assisting persons injured or mutilated as a result of war, acting on behalf of servicemen's associations. In these cases, too, a contingent fee arrangement enables a successful counsel to recover from the client.

**F. TO WHAT EXTENT DO YOU CONSIDER
THAT THE REPLIES TO THE PRESENT
QUESTIONNAIRE REVEAL A SITUATION
IN WHICH THE FUNDAMENTAL
PRINCIPLES OF THE RULE OF LAW
AS UNDERSTOOD BY YOU ARE
JEOPARDIZED OR IGNORED?**

The principles of the Rule of Law are implemented in the Italian legal system; *mainly* through institutions of *administrative justice* and through the *constitutional guarantees*.

Administrative justice is implemented:

a) by the subordination of the Public Administrative Service to the jurisdiction of the ordinary courts in all cases in which there is a dispute on a subjective right which is assumed to have been violated by the Public Administrative Service (Art. 2 of the Act on Contentious Administrative Matters of 1865);

b) by the subordination of the Public Administrative Service to the jurisdiction of the administrative authority (State Council and Provincial Administrative Commission) in disputes relating to *lawful interests*, i.e. to those interests of the individual which are protected by reason of the guardianship of a public interest, for the prosecution of which a discretionary power is assigned to the Public Administrative Service: anyone who personally suffers detriment or loss arising from the unlawful use of this power may seek redress from the aforesaid jurisdictional bodies; a trial before these bodies provides the same guarantees as a trial before the ordinary judicial authority.

c) by the internal controls of the Public Administrative Service, which are implemented through the administrative hierarchy and may be put into action by appeals from the party concerned.

Administrative justice is limited by the ability of the ordinary Bench to annul acts of the Public Administrative Service (what can, however, be done by the aforesaid administrative jurisdictional authorities), and by the inability of the jurisdictional authority to act in principle as substitute for the Administrative Service in the performance of its tasks, which inability arises from the principle of the delegation of powers. But in any case a citizen has the right of compensation for damages, and on the other hand, it happens in practice only in exceptional cases that the Public Administrative Service does not conform to the jurisdictional decisions.

Constitutional guarantees consist essentially in the rigidity of the Constitution, which ensures that ordinary law cannot violate rights recognized by that Constitution; in the constitutional jurisdiction assigned to the Constitutional Court, which decides *de legibus* and not, like ordinary magistrates, *secundum legem*, but according to the Constitution; in the guarantee of the rights of action (art. 24 of the Constitution)²³, and lastly, in the guarantee of the independence and autonomy of the Judiciary.

²³ Art. 24 of the Constitution reads:

"All persons may institute judicial proceedings to vindicate their rights and lawful interests.

Defence is an inviolable right at every stage and in every phase of procedure. Persons without resources are afforded, through suitable institutions, the means of proceeding and defending themselves before any court.

The law determines the conditions and methods for the reparation of judicial errors."

