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## JURY REFORM IN ITALY

MORRIS PLOSCOWE\*

The jury was first introduced into modern continental criminal procedure by Revolutionary France in 1791. Many European countries in the years during and immediately after the French Revolution followed the French example. But the jury did not reach Italy until much later. Napoleon did not establish the jury in Italy because he did not believe that this institution was adapted to the conditions existing there. This opinion was shared by the leading Italian criminalist of the day, Romagnosi, who, in 1807, prepared a code of criminal procedure for the kingdom of Italy. For similar reasons the Austrians refused to introduce the jury into Lombardy and Venetia when they held these Italian provinces in the post-Napoleonic period, despite the fact that the jury had become an integral part of the Austrian criminal procedure.<sup>1</sup>

Although certain propositions for the introduction of the jury were made in the early decades of the nineteenth century, the jury did not appear in Italy until 1848<sup>2</sup> when Piedmont introduced it for the trial of press offenses. Once introduced with this limited competence, the jury aroused a public opinion which demanded its extension to other offenses.<sup>3</sup> In the Code of Criminal Procedure of 1859 the competence of the jury was extended to political offenses and to the offenses for which the penal code provided the severest penalties. The introduction of the jury into the criminal procedure of Piedmont was not preceded by any serious debate. The institution entered the Italian law as an affirmation of the liberal principles which also dictated the Piedmontese Constitution. As the other Italian states were annexed to Piedmont in the movement for the unification of Italy, the jury was extended to them.<sup>4</sup>

The jury of the 1859 Code was a reproduction of the jury in France. The Code made the right to serve upon the jury dependent

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<sup>1</sup>See S. Cicala, *La Giuria e il nuovo Stato* (Milano, 1929), pp. 98-99; Andreano Fabiani, *La Riforma del giudizio per giurati* (Catanzara, 1930), p. 15 *et seq.*

<sup>2</sup>Cicala, *loc. cit.*

<sup>3</sup>E. Pessina, *Il Diritto penale in Italia*, in the *Enciclopedia del diritto penale Italiano*, Vol. II (Milano, 1906), pp. 644-5.

<sup>4</sup>Fabiani, *op. cit.*, p. 18.

upon the right to vote and introduced the distinction that the jury must decide upon the facts and the court upon the law.<sup>5</sup> The jury was fundamentally recast by the law of June 8, 1874, which, with the modifications introduced by the Code of Criminal Procedure of 1913, provided the fundamental rules governing the jury in Italy until its abolition last year.<sup>6</sup>

The Italian corte d'assise consisted of ten laymen as jurors and a President, a magistrate chosen from among the ranks of superior judges.<sup>7</sup> The jurymen were chosen from among twenty-one categories of individuals so as to obtain at least a minimum of culture, intelligence and social standing.<sup>8</sup> This court was competent to try the graver offenses<sup>9</sup> and political and press offenses.<sup>10</sup> The President of the corte d'assise had a very large power. He directed the proceedings.<sup>11</sup> He interrogated the witnesses<sup>12</sup> and the accused.<sup>13</sup> When all the evidence was in it was the duty of the President to formulate a series of questions relating to the existence of the offense, the participation of the accused therein, the attenuating or the aggravating circumstances of its commission, and the circumstances which excluded or established the responsibility of the accused.<sup>14</sup> The answers to these questions, instead of a global formula of guilty or not guilty, constituted the verdict of the Italian jury. By means of the questions, the Italians sought to apply the principle that the jury is judge of the facts and the Court is judge of the law.

The jury did not vote its "yes" or "no" answers to the questions in secret. Nor was it permitted to deliberate together. The jury had to answer the questions in the presence of the President of the Court, the Prosecuting Attorney, and the lawyer for the defense. The significance of the questions was explained to the jurors by the President, but any discussion regarding them was forbidden.<sup>15</sup> It was not necessary that the jury's decision be unanimous; six votes against

<sup>5</sup>Pessina, *loc. cit.*

<sup>6</sup>Cicala, *op. cit.*, pp. 106-107.

<sup>7</sup>Reggio Decreto, Dec. 30, 1923, no. 2786, articles 51-54.

<sup>8</sup>The law of 1874 abandoned the principle that the right to serve on the jury is dependent upon possession of the right to vote. For the qualifications of jurymen under this law, see L. Mortara, *Istituzione di ordinamento giudiziario* (Firenze, 1906), pp. 202-208.

<sup>9</sup>That is, offenses punishable by more than five years imprisonment or for life.

<sup>10</sup>Art. 14, Code of Criminal Procedure of 1913.

<sup>11</sup>Art. 385, *Ibid.*

<sup>12</sup>Art. 391, *Ibid.*

<sup>13</sup>Art. 388, *Ibid.*

<sup>14</sup>Arts. 444-451, *Ibid.*

<sup>15</sup>Arts. 455-460, *Ibid.*

the accused were sufficient for conviction.<sup>16</sup> If the jury voted for conviction, the judge pronounced sentence.<sup>17</sup> Although decisions of the lower Italian courts could be appealed on both fact and law to the Court of Appeal,<sup>18</sup> the decisions of the *corte d'assise* could only be taken to the *corte di cassazione* on errors of law.<sup>19</sup>

At the time of the discussion of the law of 1874 which prescribed the fundamental organization of the jury, there was a thorough discussion of the merits of the jury. Although there was some opposition to the jury, the great majority of speakers and writers were in favor of it. The jury was hailed by Mancini as "the palladium of public liberties." The jury was also eloquently defended by Pisanelli who stated, "I am sure that this institution . . . will remain as long as the liberties of our country are not abolished, and certainly they never will be."<sup>20</sup>

As time went on there was an increasing opposition to the jury. The three leaders of the positivist school of criminal law, Lombroso, Ferri and Garofalo were all opposed to it. The jury was blamed for many inexplicable and scandalous verdicts which represented the "negation of justice."<sup>21</sup> The ignorance of the jury, its lack of capacity for its functions, was also emphasized. A flat contradiction was indicated between the slow formation of the magistrate who was only permitted to judge the less serious cases and the jury which was judge of the most serious cases.<sup>22</sup> Despite the fact that the jury was chosen from categories which should have assured at least a minimum of intelligence, culture, and social standing, the quality of the citizens called upon to serve on the jury was not satisfactory. There was an aversion to jury service on the part of the better class of citizens. The right of taking exception to jurymen, exercised by the Prose-

<sup>16</sup>Art. 463, *Ibid.*

<sup>17</sup>Art. 469, *Ibid.*

<sup>18</sup>Arts. 477-478, *Ibid.*

<sup>19</sup>Art. 500, *Ibid.*; Mortara and Aloisi, *Spiegazione Pratica del Codice di Procedura Penale* (Torino, 1917), Vol. II, p. 397.

<sup>20</sup>For this discussion and these quotations see Fabiani, *op. cit.*, p. 18 *et seq.*; see also refutation of critics of the jury and arguments in its favor in L. Lucchini, *Elementi di Procedura Penale* (Firenze, 1895), p. 189 *et seq.* Compare above statements with opinion of Pessina, *op. cit.*, p. 661, "Despite the criticisms which are in part justified, the dominating opinion of our period is that the jury is one of the essential conditions of liberty . . . and is a potent method of education of the multitude in the sentiment of justice."

<sup>21</sup>See Francesco Pujia, *La nuova Corte d'Assise*, *Rivista Penale*, Vol. II (1931), pp. 238-242. R. Garofalo, *Previsione sulla nuova Corte d'Assise*, *Rivista Penale*, (1931) Vol. II, fasc. 6, pp. 604-607; Massari, *Il processo penale* (Naples, 1932), p. 163.

<sup>22</sup>Pujia, *loc. cit.*; F. Catinelli, *Psicologia delle Corti d'Assise* (Trani, 1928), Chap. II, p. 19 *et seq.*

cutor and the counsel for the accused, served to decrease still further the quality of the jury. There was left to serve on the actual jury, according to one writer, "the amorphous mass of mediocrity."<sup>23</sup>

Besides these criticisms of the quality of the jury, there were criticisms of the procedure by which the jury reached its verdict. The system of putting questions to the jury led frequently "to a kilometric multiplication of questions" and to a "complication and confusion" which "were the cause of illogical, contradictory and idiotic verdicts."<sup>24</sup> The presence of the representatives of the Prosecution and counsel for the defense at the time of voting did not add to the serenity of the jury's deliberation, the voting being sometimes disturbed by counsel for the defense.<sup>25</sup>

The situation in regard to the functioning of the jury in Italy before the Fascist reform is summed up by former Minister of Justice Rocco: "The judgments of juries were not functioning very well, but with the extension of the suffrage which has lessened the quality of the jurymen and with the new code of criminal procedure (1913) which has complicated and rendered more difficult the whole procedure in the formation of the verdict, things have reached such a point that radical measures are required."<sup>26</sup>

In view of the difficulties with the jury, there was a strong movement for its abolition and for the substitution of a court composed of magistrates alone.<sup>27</sup> Nevertheless, there were many who, although recognizing the defects in the organization and functioning of the jury, did not believe that they were irremediable. These partisans of the jury wished to eliminate its defects but keep the institution. They looked upon the jury as "a guarantee of the liberty and safety of the people in the administration of justice which it would be dangerous to suppress."<sup>28</sup> It was also stated that public opinion would not approve the abolition of the jury.<sup>29</sup>

<sup>23</sup>L. Ventrella, *Ancora sulla questione della giura*, Scuola Positiva, Vol. X (1930), pp. 366-370; see also Catinelli, *loc. cit.*

<sup>24</sup>Ex-Minister of Justice Rocco, in *Lavori Preparatori del Codice Penale e del Codice di Procedura Penale*, Vol. I, p. 27; and in the same volume, comments of Sarocchi, p. 92. See also criticisms of Cicala, *op. cit.*, p. 158 *et seq.*

<sup>25</sup>Pujia, *loc. cit.*

<sup>26</sup>*Lavori Preparatori*, Vol. I, p. 275.

<sup>27</sup>See F. Catinelli, *op. cit.*, writers cited in Chapter 1; and pp. 59-61, E. Pili, *Relazione sul progetto di un nuovo Codice di Procedura Penale* (Sassari, 1929), pp. 14-15; for a discussion and criticism of the views of the abolitionists, see Cicala, *op. cit.*, pp. 205-207.

<sup>28</sup>*Lavori Preparatori*, Vol. I, p. 133; for other opinions favorable to the jury see Fabiani, *op. cit.*, p. 337 *et seq.*; L. Ventrella, *loc. cit.*; see also Cicala, *op. cit.*, p. 207 *et seq.*, who reviews all the various projects for the reformation of the jury.

<sup>29</sup>*Lavori Preparatori*, Vol. I, p. 91.

A third current of opinion provided the basis for the Fascist reform of the *corte d'assise*. The desirability of lay elements assisting professional judges in the trial of the most serious offenses was recognized. Such offenses cannot be judged by technical and juridical concepts alone. The judges must have some insight into the sentiments that such offenses stir up in the popular mind.<sup>80</sup> But admitting the participation of lay elements in the trial of cases, does not necessitate the retention of the jury with its traditional separation of fact and law. According to these thinkers, it would be preferable to fuse the lay element and the popular element into one body. Thus the magistrates could place their scientific and technical culture at the disposition of the lay elements and the laymen could bring a knowledge of the popular conscience to the magistrates. Such a court, composed of a limited and well selected number of citizens and judges could therefore sit together in judgment upon the facts and upon the law.<sup>81</sup>

The new *corte d'assise* as it is organized by the royal decree of March 23, 1931 (n. 249) consists of two judges and five laymen. The two magistrates must be of high rank, the President having the rank of associate judge in the *corte di cassazione*, the highest Italian court, and the other judge being chosen from among the associate justices of the *corte d'appello* or magistrates of equal rank. The magistrates who are to serve in the *corte d'assise* are named every year by royal decree on the nomination of the Minister of Justice.<sup>82</sup> The five laymen, or assessors, who compose the court must be chosen from certain definite classes of individuals.

An assessor must possess the following qualifications: He must (1) be an Italian citizen; (2) have the enjoyment of full civil and political rights; (3) be not less than 30 or not more than 65 years old; (4) be morally and politically above reproach; (5) belong to one of the following categories of individuals: (a) members of the Grand Council of Fascism, Senate, Chamber of Deputies, National Council of Corporations, even after cessation of functions; (b) members of the Italian Academy and of certain other learned societies; (c) certain high provincial officials (*presidi e rettori*), even after the cessation of their functions; (d) mayors (*podestà*) of communes of more than 10,000 inhabitants; (e) authors of scientific and literary works

<sup>80</sup>Rocco, in *Lavori Preparatori*, Vol. I, p. 114. Compare with *Relazione al Re*, cited in Massari, *op. cit.*, p. 167.

<sup>81</sup>D. Rende, *Relazione sulla Riforma della Corte d'Assise*, *Scuola Positiva* (1927), pp. 328 *et seq.*

<sup>82</sup>Article 2, Royal Decree, March 23, 1931, n. 249.

and other notable works of intellect; (f) graduates of a University or institution of superior instruction; (g) graduates of higher schools (licenziati da un Istituto media) who pay direct taxes of at least 1,000 lira; (h) certain higher functionaries and pensioners of the State and employees and pensioners of provinces and communes who are graduates of higher schools of learning, military officers in reserve of a rank not lower than captain; (i) presidents and secretaries of legally recognized syndicates, secretaries of the Fascist party and political secretaries of Fasci of more than 10,000 inhabitants, even after the cessation of their functions.<sup>83</sup> By restricting the selection of the assessors to the above groups, the Minister of Justice expected them to be endowed with the qualities of "seriousness, honesty, equilibrium, intelligence and knowledge of social conditions."<sup>84</sup>

Every two years the podestà or mayor of each commune makes up the list of those qualified as assessors. This list is transmitted, along with the petitions of those who believe themselves unduly omitted, to the Chief Justice of the court of appeal of the district.<sup>85</sup> The Chief Justice decides whether the petitions are to be allowed. Together with the Chief Prosecuting officer of his court (Procuratore Generale) the Chief Justice obtains the necessary information concerning the moral and political antecedents and any other useful information concerning the candidates. These magistrates then send to the Minister of Justice the list of names of those whom they propose as candidates, for at least double the quota fixed for the particular district. The Minister of Justice decides definitely which individuals are to serve as assessors in each district. On the nomination of the Minister of Justice, the assessors are named for two years by royal decree. This appointment becomes definite upon taking of the oath before the President of the Court. At the end of the two-year term, the assessor may be confirmed for another two years. The nomination as assessor may, however, be revoked at any time within the two-year period for "grave motives" by royal decree on the proposition of the Minister of Justice.

The five assessors who are to serve in a particular trial are chosen from among those residing in the jurisdiction of the Court.

<sup>83</sup>Art. 4. *Ibid.* The following employments are incompatible with that of an assessor: (a) magistrates and functionaries in the judicial service; (b) military in active service; (c) functionaries or agents of the police and pubblica sicurezza, in active service; (d) lawyers.

<sup>84</sup>Relazione al Re, cited by V. Manzini, *Trattato di Diritto Processuale Penale Italiano* (Torino, 1931), Vol. II, p. 178, note 1.

<sup>85</sup>Art. 7, Royal Decree, March 23, 1931. The list prepared by the podestà of the commune is posted for ten days and those who believe themselves unjustifiably omitted have five days in which to appeal.

At the beginning of each session of the *corte d'assise*, nine names are drawn by lot by the President of the Court. From these nine assessors for a session, five are chosen to serve in each particular case.<sup>86</sup>

The essential difference between the assessor and the old jurymen is that the former is considered on the same plane as the professional magistrate. Assessors are also "giudici istituiti dal Re" within the sense of the Italian Statuto.<sup>87</sup> In order to enhance the prestige of these temporary judges they are considered as on an equal plane with judges of the Court of Appeal. The *corte d'assise* itself is considered as a branch of the Court of Appeal. In view of the new character assigned to the lay element in the *corte d'assise*, there is no place for the traditional distinction between fact and law. Magistrates and assessors constitute one judicial college. There is no distinction in functional competence between them. Both judges and assessors proceed, deliberate, and vote on all questions of fact and law.<sup>88</sup> Whereas the jury in the old *corte d'assise* was not required to reveal the reasons for its decision, the new *corte d'assise* hands down a written opinion.

Any criticism of the new *corte d'assise* must take into account the fact that the Italians took the middle road between those who urged the retention of the jury and those who urged its complete abolition. Complete exclusion of lay elements from a place in the administration of criminal justice could have been easily justified under the present Fascist ideology. The participation of the ordinary citizen in the trial of criminal cases could have been repudiated along with the other individualistic concepts of the French Revolution. Instead, the Fascist recognized that a citizen who is outside the world of jurists may bring elements of value to the judging of criminal cases. Professional judges are shut up in a world of paragraphs, provisions and textual interpretations. A criminal justice placed exclusively in their hands may result in a lack of harmony between the popular consciousness and the administration of the criminal law. In order to keep the criminal law in touch with the popular mind and obtain for its judg-

<sup>86</sup>See description of the formalities in the choice of assessors in Manzini, *op. cit.*, Vol. II, pp. 182-186.

<sup>87</sup>Manzini, *op. cit.*, Vol. II, p. 177.

<sup>88</sup>There are some exceptions to this general rule. Before the trial has begun certain acts are within the competence of the President of the Court alone. Only one of the judges may be charged with the performance of particular acts outside the court. The decisions may only be written, as a general rule, by the judges.



ments popular support, the participation of lay elements in the trial of cases is retained.

Unqualified support may be given to the principle of limiting the choice of assessors to the citizens possessing some degree of culture and intelligence. The function of deciding upon questions relating to the life, liberty and property of a fellow citizen are too important to be left to individuals who do not possess the necessary understanding which will make it possible for them to reach rational decisions. The present reform by setting up definite, clearly defined categories of individuals from whom the assessors must be taken, has pointed the way toward the solution of the problem of how to obtain a higher quality of jurymen.

Nevertheless the means chosen by the Italians for the selection of the assessors cannot be followed in any country which remains true to liberal ideas. In the first place, it is evident from a perusal of the categories from which the assessor must be chosen, what a large place is made for those who have or have had some connection with the government. In the second place, the assessors are named to their post and hold it at the will of the Minister of Justice, who also names the judges who are members of the Court. The government, of which the Minister of Justice is a member, therefore picks its own judges in the *corte d'assise*.

The significance of the new character of the *corte d'assise* is very well brought out by Longhi, the chief prosecuting officer in Italy, in an article, "*Plastica delle Corte d'Assise*."<sup>39</sup> He states that previously a *corte d'assise* could be composed of opponents of the government or of its partisans, depending upon the hazards of selection by lot. At present the first eventuality, is impossible because assessors cannot be nominated who are not both morally and politically above reproach. Later processes of selection, furthermore, permit the assurance of a complete understanding between the assessor and the state which he is called upon to defend.

This means simply that since the magistrates and assessors are picked by the government, the latter no longer has anything to fear from the decisions in the *corte d'assise*. In cases of a political character, therefore, the Italians will not have the benefit of judgment by an independent tribunal but will be left to the mercies of a party justice.

Thus one of the principal advantages of the jury in the eyes of its partisans has disappeared from the new *corte d'assise*. The old

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<sup>39</sup>In *Rivista Penale*, Vol. III (1931), No. 5, pp. 437-443.

jury was regarded as a bulwark against the oppressive action of public authority. This was possible because the jury was composed of a group of citizens independent of the government, who were free to give their judgments in accordance with their reason and their conscience. But this guarantee to the individual in the *corte d'assise* is regarded as unnecessary by Fascist doctrines. After proclaiming the necessity of strengthening the executive branch of the government, the Fascists also declare that there is no room in the Fascist state for the distrust of governmental authority which characterizes liberal doctrines.<sup>40</sup> The individuals in the Fascist state must have faith in governmental authority and this faith has supplanted the guarantees which the individual had in the old *corte d'assise*.

It must be pointed out that the political character given to the reform of the *corte d'assise* is not an essential part of its structure. Categories might be set up which do not emphasize the relation of the assessor to the government. The choice of the assessor might be taken out of the hands of executive branch of the government and placed in the hands of the courts. By so doing, it would be possible to assure assessors of a non-partisan character. It would be possible therefore for another country which is not laboring under the political ideology of Italy, to establish a similar reform and yet retain for the new organization the qualities of independence from authority which is characteristic of the jury.

The fusion of the assessors and magistrates into one judicial college resolves the many thorny problems resulting from the traditional separation of fact and law in the organization of the jury. In France, an attempt to meet similar problems has been made, by the passage of a law giving the jury a dominant influence upon the fixation of the penalty while retaining the exclusive competence of the jury in matters of fact.<sup>41</sup> The new organization of the *corte d'assise* permits the judgments of the court to be characterized by the simplicity and expeditiousness which are to be found in judgments of courts composed of magistrates alone. The intimate collaboration of laymen and professional judges in all decisions permits an elasticity in the formation of decisions which was not possible under the old organization.

But the new organization may lose one of the principal advantages of the jury, its spontaneity. It is possible for a verdict of a jury to be representative of the public conscience because the jurors are uninfluenced by the magistrates in reaching their decisions. But

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<sup>40</sup>See the discussion in Alfredo Rocco "La Trasformazione dello stato (Roma, 1927), for a concise statement of Fascist political doctrines.

<sup>41</sup>This was done by the law of March 5, 1932.

in the new organization, in view of the much closer relationship between layman and the professional judge, it may be that the former, awed by the greater experience, the greater technical competence and the greater learning of the magistrates, may simply register the opinions communicated by the judge.

Because of the general dissatisfaction with the jury, the Italian reform bears watching. It is too early as yet to determine whether or not the political nature of the new court makes impossible an independent expression of popular sentiment. One thing does appear evident. The new court is obtaining a very much higher percentage of convictions than did the old jury.<sup>42</sup> But the meager figures of convictions obtained do not give any insight into the character of the cases disposed of, and the relation between the political nature of the court and the disposition of the case. Life in Italy at present is characterized by submission to public authority. The great percentage of convictions in the new court may be but another manifestation of the necessity felt by Italians, under the Fascist regime, of upholding the arm of authority. It is possible that if there is a reaction and hostility to authority begins to reappear in Italian life, this spirit may be reflected by a resistance of the assessors to the wishes of the government and by a lower percentage of convictions.

The figures of convictions obtained also give no insight into the relative influence of the lay elements and the professional judges in reaching decisions. It is not clear whether or not the assessors are merely rubber stamping the opinions expressed by the magistrate or whether they are exercising an independent control of their own. If the assessors do not merely echo the opinions of the judges, if they do give an expression of popular sentiment, if they are independent of the government, then the new organization retains the advantage of the old jury and at the same time provides the simpler, more expeditive machinery, which the administration of criminal law requires today under the complicated conditions of modern life.

<sup>42</sup>Rivista Penale, April-May, 1932, pp. 568-594. The statistics are in reports of various speeches on the operation of the new corte d'assise made by prosecutors. Statistics such as the following are given: In the court of Cagliari, there were 40% acquittals under the old jury in the first half of 1931. After that date the percentage of acquittals fell to 8%; in the court of Firenze, of 46 cases judged by the old jury, there were 19 acquittals; of 36 judged by the new court, there were but 5 acquittals. Needless to say, all the prosecutors quoted are in favor of the new reform.