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FROM SCANDALOUS VERDICTS TO "SUICIDAL SENTENCES": THE REFORM OF THE COURTS OF ASSIZE UNDER THE FASCIST REGIME

THE JURY TRIAL IN ITALIAN CRIMINAL JUSTICE

As Tamas Antal points out, in Europe "the golden age of the criminal jury was in the second part of the 19th century"[1]. Italy was no exception.

Jury trial was introduced in the Italian peninsula in 1848 for crimes related to the press; 11 years later, however, it was extended to other serious crimes. The participation of laypersons in criminal cases was considered a bulwark of freedom: jurors voiced the popular opinion, while professional judges provided the necessary legal knowledge. No significant changes were brought in 1865 by the first Italian code of criminal procedure[2].

The reference model for the Italian legislator was the French jury: jurors did not have to pronounce a "guilty" or "not guilty" verdict, but rather answer "yes" or "no" to a series of questions that the president of the court read to them at the end of the trial. Lay judges had to evaluate the crime without considering the legal implications of their decision. After deliberation, the professional magistrates pronounced a sentence in favour or against the defendant in accordance with the jury's verdict.

On June 1874 the legislator approved a deeply innovative reform in order to overcome some deficiencies of the system. This reform, which represented an important turning point in the Italian history of the jury trial, changed the requirements for jurors, modified the procedure involved in preparing the lists of the

[1] T. Antal, *The codification of the jury procedure in Hungary*, „Journal of Legal History" 2009, issue 30, p. 280.

[2] The introduction of the jury trial in the Italian peninsula and the reforms approved in the following years have been studied recently, see M.N. Miletti, *Il palladio delle libertà. Il giurì nella penalistica napoletana postunitaria*, „La Corte d'Assise" 2011, issue 1, pp. 9-45.

eligible candidates, and clarified the role played by laypersons in the trial. Particular attention was given to the formulation of the questions addressed to juries. The legislator, indeed, wanted to reach a clear separation between the jurors' and the judges' duties: the former had to examine the facts, while the latter had to evaluate any legal aspects of the case and decide the appropriate punishment in the event of conviction. This distinction, however, was almost impossible to achieve in everyday practice, because the factual and the legal question are too closely connected.

Despite this reform, the discussion on the merits and demerits of jury trial continued in the following decades, fomented by scandalous verdicts that engaged a stimulating debate not only among legal experts, but also in the public opinion[3].

One of the most famous jury trial took place at the court of assize of Milan between 1903 and 1904. The defendant was Alberto Olivo, accused of killing his wife and dismembering her body[4]. The offender, who confessed the murder, denied the premeditation and claimed to have acted after a violent quarrel with the victim. During the trial the defendant suffered a convulsive seizure that probably made a great impression on jurors, who had to consider not only the commission of the murder, but also the possible insanity of the accused, the intentional element of the crime, and the existence of aggravating and extenuating circumstances. Jurors answered affirmatively to the first question about the commission of the fact and negatively to the third question about the intentionality: according to them, therefore, the defendant did not act with the intention of killing his wife. On the basis of this verdict, the court only convicted Olivo for contempt of corpse: the punishment consisted of twelve days in prison, that the culprit had already served.

A few years earlier a trial, held at the court of assize of Udine, had ended in a very different way. The defendant was Giovanni Martinich, accused of mistreating his father Antonio and killing his mother Giovanna. Despite extensive research, the body of the victim was never found. Nevertheless, the jurors pronounced a guilty verdict; as a consequence, the court sentenced Giovanni to thirty years imprisonment[5]. This case inevitably divided the public opinion: some peo-

[3] The most heinous trials were followed with great interest by ordinary people who attended the hearings or read the reports in the newspapers. For further information on the relationship between public opinion and administration of criminal justice see L. Lacchè, "*L'opinione pubblica saggiamente rappresentata*". *Giurie e corti d'assise nei processi celebri tra Otto e Novecento*, (in:) P. Marchetti (ed.), *Inchiesta penale e pre-giudizio. Una riflessione interdisciplinare*, Napoli 2007, pp. 89-147; and F. Colao, L. Lacché, C. Storti (eds.), *Processo penale e opinione pubblica in Italia tra Otto e Novecento*, Bologna 2008.

[4] About this famous trial see: C. Storti, *Giuria penale ed errore giudiziario: questioni e proposte di riforma alle soglie della promulgazione del codice di procedura penale italiano del 1913*, (in:) A. Gouron, L. Mayali, A. Padoa Schioppa, D. Simon (eds.), *Error iudicis. Juristische Wahrheit und justizieller Irrtum*, Frankfurt am Mein 1998, pp. 257-318.

[5] State Archive of Udine, Corte di Assise, Sentenze, No. 5, c. 493.

ple thought that the verdict was correct, while others believed that the accused should have been acquitted due to insufficient evidence. The Cassation, however, rejected the appeal proposed by the defence counsel and confirmed the decision.

Such questionable verdicts stimulated an intensive discussion between the defenders of the jury system and those who wanted to reduce, or even abolish, the role of laypersons in criminal justice. Despite increasing criticism, the new code of criminal procedure (1913) preserved the trial by jury, though some relevant innovations were introduced. This code, approved after years of projects and debates, remained in force for less than twenty years.

FROM JURY TRIALS TO MIXED COURTS

The preparatory works for new codes of criminal law and criminal procedure began in 1925 under the Fascist regime[6]: the role of lay judges in criminal cases was once again the subject of an extensive discussion among the most eminent legal experts. In this context the jury trial was criticized both scientifically and politically: this controversial institution indeed had not only revealed notable defects, but was also considered incompatible with the spirit of the new regime. The Minister of Justice Alfredo Rocco, however, did not completely reject the idea of a lay contribution in the administration of criminal justice and suggested the introduction of mixed courts composed by professional magistrates and lay judges, who had to work side by side and decide both the verdict and the punishment.

On June 1926 the Italian group of the International Association of criminal law met for a discussion over this proposal. The debate revealed a plurality of opinions. The committee's president Mariano D'Amelio agreed with the Minister: jury trials had to be abolished and replaced by mixed courts, whose functioning would be based on cooperation between professional judges and laypersons[7]. According to Professor Ugo Spirito, instead, the mixed courts represented an useless and harmful compromise, which would have led to great inconveniences[8]. There were also those who still defended juries. The lawyer Francesco Campolongo, for instance, thought that, with the appropriate modifications, the jury trial

[6] For more information on this topic see M. N. Miletti, *La scienza nel codice. Il diritto processuale penale nell'Italia fascista*, (in:) L. Garlati (ed.), *L'inconscio inquisitorio. L'eredità del codice Rocco nella cultura processualpenalistica italiana*, Milano 2010, pp. 57-107.

[7] M. D'Amelio, *La riforma della giuria*, „La Nuova Antologia" 1926, pp. 443-453. The same opinion was formulated by another eminent Italian jurist, D. Rende, see D. Rende, *La riforma della Corte d'Assise*, „La scuola positiva" 1927, No. VII, pp. 328-340.

[8] U. Spirito, *Giuria e scabinato*, „La Nuova Antologia" 1926, pp. 454-461.

could survive and give good results[9]. Despite this diversity of opinions, the compromise solution prevailed: the royal decree No. 249 approved in March 1931 replaced jury trials with mixed courts composed of two professional judges and five laymen assessors[10].

Not all citizens could become assessors. The law reform indeed prescribed specific eligibility requirements: laypersons had to be Italian citizens between 30 and 65 years old, enjoy civil and political rights, be known for keeping an uncorrupted moral and political conduct, and belong to one of the categories established by the law. From 1935 the membership of the Fascist regime became an essential requirement. Assessors were paid for their time and, if they had to serve outside the town of residence, they also received a compensation for travel and accommodation expenses. On the other hand, fines were imposed on lay judges who failed to appear without justified reason.

The biggest difference between jurors and assessors refers to the decision making procedure. As we have seen, jurors decided upon innocence or guilt of the defendant by answering detailed questions, and the sentence issued by the court was based on their verdict. In the mixed courts, instead, laypersons and professional magistrates formed a single bench which had to evaluate the facts and, in case of conviction, decide the appropriate punishment. The separation between the factual question, previously committed to jurors, and the application of law, entrusted to the court after the deliberation of the verdict, was finally overcome.

In the new system the decision was adopted by simple majority. After deliberation, the task of the assessors was finished: lay judges indeed were not involved in the writing of the sentence, which was usually committed to the president of the bench and signed by him and by the chancellor. Therefore the decision making procedure in the courts of assize was very peculiar: the deliberation of the judgment was committed to the whole bench, according to the principle of simple majority, while the drafting of the sentence was assigned to a single magistrate.

The responsibility entrusted to the reporting judge is not to be underestimated: in order to motivate the decision, he had to set aside his personal feelings and illustrate the majority opinion in a logical and rational way. In order to over-

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[9] F. Campolongo, *L'istituto della giuria e le riforme*, „La giustizia penale" 1926, No. 32, pp. 177-181.

[10] A. Frezzati, *La legge sui "Giurati" che muore, e quella nuova 27 Marzo 1931 IX N. 249 sulla riforma delle Corti d'Assise in attività al 1 Luglio 1931*, Treviso 1931. See also R. Orlandi, *La riforma fascista delle Corti d'Assise*, (in:) L. Garlati (ed.), *L'inconscio inquisitorio*… pp. 225-240. The evolution from jury trials to mixed courts also occurred in other Civil law European countries: in France, for instance, a mixed system (called *échevinage*) was introduced in 1941 under the Vichy Regime and remained in force after the World War II. J. M. Donovan, *Juries and transformation of Criminal Justice in France in the Nineteenth and Twentieth Centuries*, Chapel Hill 2010, pp. 166-168.

come, or at least reduce, any possibility of contrast, the lawyer Bruno Cassinelli wished for a respectful collaboration between professional judges and laymen assessors[11]. As we shall see, Cassinelli's fears were far from unfounded.

A DIFFICULT COHABITATION

In some situations, indeed, a conflict arose between legal orthodoxy, as represented by the magistrates, and the lay opinion of the assessors. The contrast between these two attitudes could take different forms and degrees.

An interesting episode took place at the court of assize of Venice in 1937[12]. The Venetian court had to judge two municipal employees, Mansueto Bozzato and Giuseppe Penzo, accused of abuse of office for personal gain. The employees had been appointed by the prefectural commissioner with giving subsidies to women with illegitimate children. According to the prosecutor, the defendants gave these subsidies only to mothers who paid them a small sum of money. The fraud, however, was not proved: therefore the court, considering also the excellent service provided by the defendants as municipal employees in previous years, acquitted them for insufficient evidence. The sentence was exceptionally written by assessor Achille De Bei and not by the president of the court.

The decision was appealed by both the public prosecutor and the defendants. The defence counsel demanded a full acquittal; the attorney general, instead, requested that the Supreme Court set aside the judgment and refer the case to another court for an error in procedure, as the sentence had been written by an assessor and not by the professional judge, as required by the law. Furthermore the prosecutor noted that the signing assessor was a close friend of Giuseppe Penzo, thus the impartiality of the judgment had been irreparably compromised.

Ernesto Pietriboni[13], attorney for Mansueto Bozzato, took advantage of this case in order to reflect on the functioning of the courts of assize after the reform approved six years earlier and analyse the role of laypersons in Italian criminal justice. In his statement of defence presented to the Supreme Court in November 1937, the lawyer pointed out that the secrecy of votes in the council chamber had

[11] B. Cassinelli, *La nuova corte d'assise*, „La scuola positiva" 1931, No. XI, pp. 207-211.

[12] State Archive of Venice, Corte di Assise di Venezia e Distretto (1871-1951), Sentenze, No. 11.

[13] Ernesto Pietriboni began his career as a lawyer in 1898 after graduating in law from the University of Padova. In 1946 he wrote *La criminologia della pratica*. In this work the author analysed important criminal matters, among them the issue of criminal models. For further details see G. Zironda, *Commemorazione di Ernesto Pietriboni*, „L'Ateneo Veneto" 1951, No. 135, pp. 93-113.

to be protected. Gathering information on the assessor who wrote the sentence, the prosecutor acted outside the established order. Pietriboni admitted that magistrates and lay judges could happen to disagree, but the assessors had to preserve their independence of judgment: if such independence were suppressed, it would be better to restore the jury trial, warts and all. In January 1938 the Cassation rejected both the appeals and confirmed the decision.

Sometimes the contrast between laypersons and professional magistrates became even more evident. The forced collaboration, indeed, could generate a conflict, especially when the president did not agree with the majority vote. Usually the disagreement occurred when lay judges supported the acquittal, while the president was in favour of conviction. Despite his personal opinion, he had the duty to write a sentence that respected the deliberation of the bench; at times, however, the sentence drawn by a disagreeing judge intentionally included contradictions, in order to induce the public prosecutor to appeal the decision. This kind of sentences are called "suicidal sentences", because they were purposely set up in such a way as to be reversed by the Supreme Court and lead to a new trial. The new judges could consider the defendant guilty and, in case of serious crimes, even sentence him or her to the death penalty[14]. This expedient, therefore, could have fatal consequences for the accused.

THE MULAS' CASE

The phenomenon of the "suicidal sentences" can be exemplified by the famous case of Francesco Mulas, a Sardinian shepherd charged with murder and robbery. In March 1937 Francesco and his sister went to Sassari to visit their sick brother. On the train Mulas met a man named Pietro Deschini, who was going to Ozieri, near Sassari, in order to buy some donkeys: for this reason he carried a check for 7.480 Lire. Once in Sassari, the two stayed in the same hotel and spent together a few hours. On 12 March the body of Deschini was found hidden in a wall nearby the Mulas' sheepfold. Few days later the Sardinian shepherd was arrested by the police.

The trial took place before the court of assize of Sassari, but no conclusive proof was found against the defendant. He was suspected essentially for three reasons: primarily he knew the victim, secondly the body of the victim was hidden nearby his property, thirdly, the day before the body was found a witness had heard three detonations coming from the supposed crime scene. But this was no more than a circumstantial evidence[15].

[14] The death penalty was officially abolished in 1889 and reintroduced in 1926.

[15] State Archive of Sassari, Corte d'Assise di Sassari, Procedimenti penali, No. 384, 2.

First of all Mulas claimed to have an alibi for the day of the crime: he said he had remained in Sassari until 15 March, so he could not have killed Deschini[16]. Secondly, if Mulas had been the culprit, he would never have hidden the body near his sheepfold, but somewhere else in order to remove suspicions from himself. Thirdly it was possible that the victim had been killed elsewhere and hidden there to put the blame on the accused. The inquiring authority indeed had found only a few drops of blood on the ground near the sheepfold, not enough for a murder committed on site. Furthermore, Deschini had been killed by a single gunshot, while the witness had heard three detonations, so there was no correspondence between his testimony and the mode of death. Based on these considerations, Francesco Mulas was acquitted due to insufficient evidence.

As usual, the task of writing the sentence was entrusted to the president of the bench. The judge had to write a sentence of acquittal in compliance with the decision adopted by majority vote, but he considered Francesco to be guilty. Therefore he wrote a contradictory sentence, in which the evidence was interpreted as in favour of conviction, while the decision consisted of an acquittal[17].

In the motivation of the sentence the judge noted with great detail why the accused should have been condemned. Primarily he turned his attention to the crime scene: the body of the victim was found near the Mulas' sheepfold and in the area nobody knew Pietro Deschini except for the accused. The evidence clearly showed that only Francesco Mulas and no one else could have persuaded the victim to go there in order to kill and rob him. Furthermore, the defendant's alibi was not strong enough to prove his innocence: Mulas indeed could have returned to Sassari on 15 March, after committing the crime, as though he had never left the bedside of his brother. According to the judge, the defendant had planned the criminal project as soon as he had known that Deschini carried a large sum of money. These considerations emphasized the social dangerousness of the accused.

Despite all these elements – as the magistrate wrote in the last part of the sentence – the court had expressed some doubts about the murder. First of all, it was possible that Deschini had been killed elsewhere and hidden near the Mulas' property in order to put the blame on him: according to the president, however, this possibility was not supported by evidence. Also, the court had been influenced by some deficiencies in the investigation leading to the hypothesis that the murder might have been committed by someone else, leaving the actual contribution of the defendant uncertain. But, as reported by the president, there were

[16] Actually, at first, Francesco Mulas denied knowing Pietro Deschini; only later he admitted meeting him on the train, nevertheless he continued to proclaim his innocence.

[17] State Archive of Sassari, Corte d'Assise di Sassari, Sentenze, 1938-1939, 1939, 12.

no concrete elements that could support this thesis. On the basis of these doubts, however, the court had decided to acquit Mulas for lack of evidence.

According to the defence counsel such a "suicidal sentence" aimed at inducing the prosecutor to appeal the decision and this was exactly what happened[18]. If the appeal had been accepted, the defendant would have been tried again: the new judges might find Francesco guilty and sentence him to the death penalty.

The defence of the accused in front of the Supreme Court was assumed by an important Italian jurist: Gennaro Escobedo[19]. In five defensive writings, Escobedo denounced the abuse committed by the president of the bench[20]. The lawyer defended the principle of legacy, a fundamental rule in every civilized society: if this principle were to fail, judicial anarchy would reign and the fate of innocents would be in serious danger. Escobedo also defended the institution of the court of assize: the professional judge could not replace a decision taken by the bench with his personal opinion. From his point of view, a "suicidal sentence" represented a real procedural fraud. Unfortunately in the Italian law there was no remedy for this kind of situations, because the legislator had too optimistically relied on respectful collaboration between professional magistrates and laymen assessors. According to Escobedo, the Supreme Court should reject the appeal, or refer the proceeding back to the same court and entrust the task of writing the sentence to another member of the bench. Lastly, Escobedo considered why the president saw Mulas as guilty. In reality, there were no positive evidence against the defendant: the reasoning of the judge consisted only of rhetorical declamations, to the tune of "Francesco Mulas is guilty and extremely dangerous".

In support of his analysis, Escobedo requested the opinion of twelve prominent legal experts: the criminologist Edmund Mezger, the professor Wolfgang Mittermaier, and a number of Italian jurists, among them Eugenio Florian, Filippo Vassalli, Piero Calamandrei, and Francesco Antolisei. Their different argumentations came to the same conclusion: the appeal proposed by the prosecutor, which would pave the way for a new trial, should have been rejected.

Eugenio Florian focused his attention on the peculiar decision-making procedure in the courts of assize. As we have seen, the procedure was divided in two phases: the deliberation of the judgment, entrusted to the whole bench, and the drafting of the sentence, assigned to a single judge. These two moments were

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[18] State Archive of Sassari, Corte d'Assise di Sassari, Procedimenti penali, 384, 2, cc. 24-33.

[19] Escobedo graduated in law from the University of Naples in 1889 and immediately began his career as a criminal lawyer. He was the founding editor of an important Italian journal: "La giustizia penale". Escobedo died in 1942 shortly after presenting his defence in the Mulas' case. For more biographical information see C. Storti, *Gennaro Escobedo*, (in:) E. Cortese, I. Birocchi, A. Mattone, M. N. Miletti (eds.), *Dizionario biografico dei giuristi italiani*, Bologna, 2013, No. I, pp. 803-804.

[20] G. Escobedo, *Le sentenze suicide con i pareri di Antolisei... et al.*, Milano 1943.

closely related: the sentence could not void the decision adopted by majority vote, otherwise the role of the assessors would become irrelevant[21]. Filippo Vassalli too pointed out this peculiarity and explained that in the Mulas' affair the president had severed the connection. The only possible remedy was to refer the case back to the same court, so that a new sentence could be written in accordance with the majority opinion[22].

This episode left a profound impression on Piero Calamandrei: the jurist noted that the president had committed a "judicial sabotage" by hiding in the sentence an "explosive device" in order to induce the prosecutor to appeal the decision. If the president did not feel up to writing a pronunciation contrary to his personal opinion, he should have given the task to another member of the bench. The Cassation, therefore, should have referred the proceeding back to the assize of Sassari, for the sole purpose of integrating the decision with a legally acceptable motivation[23].

According to Francesco Antolisei, the president, instead of acting as the incarnation of judicial correctness, in this specific case had failed his duty to faithfully report the arguments formulated by majority vote. In his opinion the motivation of the sentence was not contradictory, as much as lacking an adequate explanation of the doubts raised by the court. Even admitting a contradiction, the trial should not have been renovated, or the fraud committed by the president would be successful. Therefore the Cassation should have directed the judge as how to resolve the contradiction between the judgment and the final decision[24].

The strenuous defence supported by Escobedo reached its goal: the Supreme Court rejected the appeal presented by the prosecutor as unfounded. The defendant had been acquitted due to insufficient evidence, so it was logical that the motivation balanced the reasons in favour of conviction with the reasons in favour of acquittal. The decision therefore had been regularly deliberated in application of the principle of intimate conviction, that is the free evaluation of evidence by the judge[25].

Francesco Mulas would not be tried again: the danger of the death penalty was averted, but the debate continued. Pietro Giudice, the deputy attorney general at the Supreme Court, did not agree with the decision adopted by the Cassation. According to him, the sentence issued by the court of assize of Sassari was not the result of a procedural fraud, but only "the faithful reproduction of a faulty logical

[21] *Ibidem*, pp. 196-201.
[22] *Ibidem*, pp. 202-208.
[23] *Ibidem*, pp. 178-183.
[24] *Ibidem*, pp. 226-237.
[25] *Il Foro Italiano*, LXVII, 1942, II, *Giurisprudenza penale*, pp. 143-150.

process"[26]. The Supreme Court, therefore, should have accepted the appeal and referred the case to another assize.

THE TRIAL AGAINST GIUSEPPE FERRIGNO

Not all the defendants were as fortunate as the Sardinian shepherd. In the same turn of years the trial against Giuseppe Ferrigno, accused of triple murder, ended in a different way[27]. Giuseppe worked as an employee at the Association of lawyers and prosecutors in Palermo before being discharged for some irregularities committed in the exercise of his duties. After the dismissal, his work was entrusted to the accountant Antonio Speciale. On 5 October 1937 Giuseppe, after killing his wife Concetta Cornigliaro with a dagger, went to the association office and knifed to death his substitute. Finally he went to the house of the lawyer Giuseppe Bruno, the secretary of the association, and killed him with the same dagger.

The trial took place at the court of assize of Palermo. The judges had no doubts: the three murders had been premeditated and committed by the defendant. He had nevertheless acted in execution of a single criminal project and this point is very important, because in the Italian criminal law the connection among the crimes implies a milder application of punishment. For this reason, Giuseppe Ferrigno was sentenced to life imprisonment and not to death penalty.

The president of the bench, however, did not agree with the majority vote and in writing the motivation he excluded any connection among the three murders: thus he wrote a "suicidal sentence". The prosecutor appealed the decision. The reason for the appeal was clear: the court had condemned the defendant to life imprisonment because he acted in execution of a single criminal project, but in the reasoning of the sentence the judge had denied this connection.

On 12 April 1938 the Supreme Court accepted the appeal, voided the trial and returned the case to the assize of Agrigento. Therefore the triple murderer had to be tried again. According to the new judges, there was no connection among the crimes: based on this assumption, the court sentenced Giuseppe Ferrigno to death[28].

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[26] P. Giudice, *Le cosiddette sentenze "suicide" in Corte di Cassazione*, „Rivista penale" 1942, No. I, pp. 389-395. Cassinelli admitted that there was no absolute proof of the bad faith of the judge who wrote the sentence, however, in front of a manifest contradiction, it would be inconceivable to think that the majority committed a logical error in the decision making procedure. B. Cassinelli, *Motivazione fraudolenta delle sentenze*, „Il pensiero giuridico penale" 1942, No. XIV, p. 30.

[27] This case is mentioned in G. Bellavista, *Studi sul processo penale*, Milano 1976, p. 109.

[28] This case inspired the novel *Porte aperte* written by Leonardo Sciascia in 1987: even if the author focused his attention on death penalty and did not mention the phenomenon of the "suicidal

The defence counsel appealed the decision, but the Supreme Court dismissed the appeal as unfounded[29]. The lawyer of the accused tried to get a retrial, but the Cassation rejected also this petition, considering it inadmissible[30]. The death sentence was finally executed in Agrigento at dawn on 21 January 1939[31].

THE MURDER OF CARLO AND NELLO ROSSELLI

Despite the fall of the Fascist Regime and the enforcement of the Republican Constitution, the composition of the courts of assize did not change: professional magistrates and lay judges continued to work side by side, sometimes with unhappy results. Even after the end of the World War II, indeed, there was an episode of "suicidal justice"[32].

In 1949, before the court of assize of Perugia, the defendants Santo Emanuele and Roberto Navale were tried for having ordered the murder of Carlo Rosselli, whose death had happened in France twelve years before. Carlo Rosselli, an antifascist exile, and his brother Nello were killed in June 1937 by some French nationalists, better known as the *cagoulards*. According to the accusation, however, the *cagoulards* were only the material perpetrators of the murder: Emanuele, head of the third department of the Italian Military Intelligence Service (S.I.M.), allegedly would have transmitted to Major Navale the order from above to kill Carlo Rosselli, and Navale in turn would have charged the *cagoulards* with the murder. A series of documents proved the existence of such a mandate, but it was also necessary to demonstrate that the murder had been carried out in execution of the order received from Italy. According to the judge who wrote the sentence, the causal link was evident. After establishing that the mandate had been given and accepted, and after proving that the murder had been committed by those who had received this mandate, it came as a natural consequence that the killer had acted in execution of the order coming from Italy. The judge referred specific elements to support his reconstruction. The defence counsel raised objections against this inference: the *cagoulards*, who had been tried in France, had not mentioned any order received from Italian representatives and, moreover, they

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sentences", he proposed interesting consideration about the relationship between laypersons and professional judges in the trial. L. Sciascia, *Porte aperte*, Milano 1987.

[29] *Il Foro Italiano*, LXIV, 1939, II, *Giurisprudenza penale*, pp. 209-213.

[30] "Corriere della sera" 22 December 1938.

[31] "Corriere della sera" 22 January 1939.

[32] *Suicidal justice* is the title of an article published by Pietro Calamandrei: *Giustizia suicida*, „Il Ponte. Rivista mensile di politica e letteratura" 1950, No. VI, issue 2, pp. 187-195.

had independent reasons to kill Carlo Rosselli. The judge refused these objections: on the one hand the *cagoulards* had not mentioned any Italian accomplices simply because they preferred not to reveal their names, on the other hand the French would not have an interest of their own in the murder, given that the victim did not interfere with their activity.

The logical conclusion should have been a conviction of the defendants, but, contrary to the expectations, the decision was in favour of acquittal. The court indeed raised a doubt, feeble but sufficient to revoke the previous reasoning: it was not possible to exclude the existence in France of some "parallel criminal activity", of which the defendants were not aware. If so, Emanuele and Navale would have taken the blame for a murder which had occurred independently of their will. According to the reporting judge, this doubt was vague and based on uncertain assumptions, nevertheless the court decided to acquit the defendants for insufficient evidence.

Thus, like in the Mulas' affair, the judge wrote a contradictory sentence: rather than explain the arguments supporting the acquittal, he listed the reasons for a conviction. However, according to Calamandrei, who commented on the decision, the practical intent pursued by the magistrate was not fraudulent: the judge wrote a contradictory sentence only to "save his soul" by demonstrating that the defendants were actually guilty[33]. Hence, his sentence represented a form of "extreme protest", not a way to persuade the public prosecutor to appeal the decision. The prosecutor in fact did not petition the Supreme Court.

CONCLUSIONS

The reform approved under the Fascist Regime abolished the jury trial and introduced a system of mixed courts composed by professional magistrates and laymen assessors. This radical change allowed to overcome the separation between factual question and law question that had never been possible to completely achieve before. The cooperation between professional judges and laypersons, however, was very complicated in everyday practice: an unscrupulous president indeed could void the decision adopted by majority vote and change the fate of the accused.

As Francesco Antolisei pointed out, the reporting judge had a moral and legal duty to respect the majority opinion and draft a motivation in accordance with it. Piero Calamandrei noted that the president who was not ready to write a sentence contrary to his personal feeling could entrust this task to another member of the court. The legislator, however, had not specified what happened if a magistrate

[33] *Ibidem*, pp. 194-195.

wrote a contradictory sentence: such cases of "judicial self-harm"[34] remained unprovided for. The problem arose when the prosecutor appealed the decision to the Supreme Court. Given the legislative void, jurists looked for possible solutions: as we have seen, the most eminent legal experts believed that the Supreme Court should not have accepted such appeals. The alleged fraud committed by a judge in the exercise of his duties could not be supported by the highest court of the judiciary system.

Rather than solving the controversial issue of lay participation in Italian criminal justice, the reform raised new problems and led to unexpected consequences. The phenomenon of the "suicidal sentences" is therefore a prime example of how the "law on the book" and the "law in action" can sometimes significantly diverge.

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Summary

The aim of this article is to investigate the relationship between professional magistrates and laypersons in Italian criminal justice under the Fascist regime. The reform of the courts of assize, approved in 1931, abolished the jury trial and introduced a system based on cooperation between professional judges and laymen assessors. The two components of the bench had to work side by side and decide on the innocence or guilt of people charged with serious crimes. This forced collaboration resulted in the phenomenon of "suicidal sentences". The case of Francesco Mulas, accused of murder and robbery, is the most famous example of a conflict that could lead to fatal consequences. This paper seeks to analyse the reasons of this contrast and the remedies elaborated by eminent legal experts.

KEY WORDS

professional judges, laypersons, courts of assize, Mulas' case

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sędziowie zawodowi, sędziowie przysięgli, sądy zjazdowe, sprawa Francesca Mulasa