



## *Italian Perspectives on the Judiciary*

By Giuseppe Franco Ferrari<sup>1</sup>

### **Abstract:**

This article deals with the problems concerning the independence of the judiciary in Italy. First of all, it analyzes the historical causes that characterize the current Italian situation: the condition of the judges during the fascist dictatorship and the resulting reasons why the founding fathers of the Republic trusted the judiciary in a very limited way. Then, the paper seeks to explain the unique problems that today undermine the independence of judiciary - the practice of judges running for political offices, the progressive politicization of the High Council of the judiciary, the judicial intervention in economic matters and the trend of judges making public statements to matters under judicial scrutiny - and explores the effectiveness of the current guarantees given judges to secure their independence. Such a situation derives at least in part from the vacuum created by the crisis of the political class which started in the 1990s.

**Key words:** judicial power, independence of the judiciary, Italian Constitution, judges as legislators, responsibility of judges.

### **Introduction**

The paper examines independence of the judiciary in Italy, viewing it from two standpoints: freedom of the judiciary from political interferences and the need for judges to desist from taking an ideology based approach to matters that come under judicial scrutiny. This article argues that while judicial independence is a necessary condition for proper and effective vindication of rights and freedom, to completing dispensing with responsibility of judges for their actions may in fact undermine citizens' rights.

This paper addresses the relationship between judges and politics from a general point of view, stressing the anomalous situation that prevailed in Italy soon after the Second World War. It focuses on five main tensions between judicial power and political processes in a broad sense: (i) the practice of judges standing, or being nominated for, political office; (ii) the progressive politicization of the High Council of the judiciary; (iii) judicial intervention in economic matters; (iv) the contemporary trend of judges making public statements on or giving wide publicity to matters under judicial scrutiny. (v) prosecutorial discretion. The paper goes on to assess various guarantees that are given to judges to secure their independence and the effect of performance appraisal on judges. The paper proceeds to examine the civic responsibility of judges and prosecutors emphasizing the need to balance the guarantee of judicial independence with the need to ensure that judicial discretion is exercised within certain limits in order to ensure effective and impartial administration of justice.

### **1. Judges and politics: an anomalous situation**

The Italian judiciary reached a level of independence which the Western world would consider as satisfactory about twenty years after the Second World War.<sup>2</sup> In the last months of the liberal-democratic State immediately before Mussolini took the power, the acting minister of justice (Giulio Alessio) is said to have tried to actively encourage local prosecutors to prevent or punish fascist violence, such as occupation of town buildings, riots and killings. Such pressure was not effective: the recently conquered independence apparently prevented prosecutors from feeling compelled to support the police forces. The Association of magistrates labelled the fascist taking of power as 'renewal'. The regime, however, did not return the favour: immediately after establishing the new regime, the Mussolini government abolished the High Council of the judiciary with its elective component and created a new one consisting of five members only, all designated by the Government. Between 1923 and 1926 about one hundred magistrates were expelled or compelled to retire, on alleged grounds of reorganization of offices, health reasons or with clear political motives. In 1926 judge association was banned. All civil servants, magistrates among them, were compelled to take an oath of loyalty to the regime and none of them seem to have refused. In 1930 the government informally introduced classes on fascist culture for all magistrates. Their career progression was made dependent on evaluation by higher level judges and new assignments were to be made not by the Council, but ad hoc committees nominated by the Minister. In 1931 popular juries were abolished for most crimes. According to the words of Alfredo Rocco, professor of criminal law and main author of both the Criminal Code of 1930 and

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<sup>2</sup> For a more detailed account see *Judicial Independence: Italian Perspectives*, in *The Culture of Judicial Independence in a Globalized World*, Leiden-Boston, Brill, 2016, 61.

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the Criminal Procedure Code of 1931, independence was then a 'state of mind'. Mussolini nominated many cassation judges and prosecutors as senators, before the abolition of the Senate in 1938. In 1949, when further reorganization took place, the judiciary consisted of about 5.000 magistrates.

It is not hard to understand why the founding fathers of the Republic at the Constituent Assembly of 1946-47 did not trust the judiciary. They decided to create a new Constitutional Court, composed by professional judges only for one third, to determine questions of constitutionality of statutes. For the same reason, they provided constitutional safeguards of judicial independence.<sup>3</sup> By the 1960s, the promise made in Article 101 of the Italian Constitution that the judiciary would be independent and free had been fulfilled: the idea that judges were subject only to the law had taken root, resulting in minimal interference from the executive and reduced judicial deference to Parliament. Independence from other State institutions was also in place.<sup>4</sup>

Since then, changes in the Italian political and judicial landscape have resulted in a dramatically different situation. The increasing tendency of judges and prosecutors – who together make up 'judicial' office holders in Italy – to become politicised has put the judicial independence at risk. This has happened in a number of ways. First, it has become ever more acceptable for judicial office holders to run for elected office or in any event to accept political nominations (see section 1.1). Second, the High Council of Magistrature, the self-governing body responsible for management of judicial office holders, has become politicized as a result of the presence of ideological factions elected by judicial office holders on a proportional basis (section 1.2): belonging to such a faction has become important in order for members of the High Council to have better chances of being assigned to offices which have executive control over the judiciary. Third, judicial office holders – especially prosecutors – have become more and more inclined to use judicial means to step in to deal with economic issues which really require political or administrative solutions instead (section 1.3). Fourth, they have become ready to speak out about the merits of proposed legislation and applicable regulations, going beyond discharging the functions of their judicial office (section 1.4). Fifth, prosecutors do not accept limits on their powers of investigation, citing as a pretext the constitutional principle obliging them to institute criminal proceedings (section 1.5).

This increased politicization is exacerbated by judicial office holders' lack of accountability: their tenure is beyond discussion; their salary and additional benefits increase automatically without any relation to the duties they have carried out (section 3); the means by which they may be subjected to discipline are very limited (section 4); and their accountability towards citizens affected by gross violation of domestic and European Union (EU) laws was nearly non-existent up until a very recent legislative intervention forced by European sanctions.

In other words, judicial office holders are able to engage in politics – or at least to take political stances – while escaping almost all responsibility. The Italian public relies on them for an increasing number of functions beyond their judicial sphere, but the absence of remedies against judicial mistakes, and delays in doing justice in both civil and criminal proceedings, are a source of popular resentment.

This resentment is unlikely to lessen given the growth of populist political parties in Europe who position themselves against what they perceive to be unaccountable elites. If judicial office holders are not to be threatened by this, it will take a good measure of self-restraint on their part, limiting their engagement in politics, whether directly or indirectly. This may not, however, be enough: some recourse to legislation may be necessary to support or even force changes in the mind-set of judicial office-holders. In the absence of either of these routes to change, a radical shift in popular attitudes towards the judiciary, from seeing it as protector of the nation to an elite worthy only of criticism or even contempt, is possible. It remains to be seen whether the democratic balance enshrined in Italy's Constitution can be maintained and protected.

The more the judiciary moves towards the centre of political power and plays a pivotal role in its management, either due to its own merits, or due to the inability of other public institutions to take the lead, the stronger the need for judicial independence and impartiality. Today, politicians and civil servants are compelled to abide by statutory regulations that grow ever so stricter, designed to ensure good governance. Judicial office holders, however, operate in a regulatory environment where there are very few formal rules of conduct regulating their behaviour. If their independence is to be confirmed in this new context of the judiciary being at the centre of political life, judges must accept being constrained by clear rules similar to those that apply to the other branches of the government.<sup>5</sup>

### **1.1. Judges and prosecutors elected or nominated to political offices**

Before the 1990s judges were not widely inclined towards running for political or administrative offices. Immediately after the emergence of "Mani pulite" ("Clean hands", a judicial investigation into political corruption), Antonio Di Pietro, formerly public

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<sup>3</sup> Article 101 states: "Justice is administered in the name of people. Judges are subjected only to law". Article 102 states: "Judicial proceedings are exercised by ordinary magistrates empowered and regulated by the provisions concerning the judiciary. Extraordinary or special judges may not be established. Only specialized sections for specific matters within the ordinary judicial bodies may be established, and these sections may include the participation of qualified citizens who are not members of the judiciary. The law regulates the cases and forms of the direct participation of the people in the administration of justice".

<sup>4</sup> This statement is widely shared by Italian public law scholarship. However, no application of the Smithey and Ishiyama index or of any other similar mechanism has taken place. On the index see S.Smithey, J. Ishiyama, *Judicious choices: designing courts in post-communist politics*, 33 *Comm. & Post Comm. Studies* 163, 2000.

<sup>5</sup> For similar conclusions see e.g. S. Cassese, *Il paradosso delle regole (inesistenti) per i magistrati*, *Corriere della sera* (Milan, 21 December 2015)

prosecutor in Milan, who was actively involved with the investigation, entered politics by founding a party called “Italia dei valori”, which at the 1998 general election won 3.9% of the popular vote and gained one Senator; in 2006, his party secured 17 Members of the Chamber of Deputies and five Senators, with the result that he was designated Minister of Public Works. Di Pietro resigned both from his office as public prosecutor and a member of the prosecutorial magistracy.

Di Pietro was not the first example of a judicial office holder turning to politics. Oscar Luigi Scalfaro was briefly a judge from 1942 to 1946, before being elected to the Constitutional Assembly in 1946 and embarking on a political career which culminated in his being President of Italy from 1992 to 1999. Luciano Violante, judge and public prosecutor from 1966 to 1983, served from 1979 as MP in the Chamber of Deputies with the Communist Party. Claudio Vitalone, judge and prosecutor between 1961 and 1979, was then elected to the Senate as a Christian Democrat for four terms, serving as Minister for foreign commerce in 1992-1993. Thereafter, he returned to the Court of Appeals of Florence serving as a judge until retirement. Gerardo D’Ambrosio, former Prosecutor and later Chief of the Milan Prosecutors’ Office (1957-1999), was elected to the Chamber of Deputies in 2006 with the DS Party (the new name of the old Communist Party), after his retirement in 2002.<sup>6</sup>

Since the turn of the millennium, though, it has become increasingly common for judicial office holders to hold local and national office through election or government nomination – even in towns or regions where they had been carrying out judicial duties up to six months prior to those elections. It is even possible to stand for political office without resigning or retiring from judicial office: the judicial office holder simply takes temporary leave of absence which he/she is entitled to by law, and returns to the previous judicial office if unsuccessful in the election, or after serving her term if successful. The only limitation is that a judicial officer must not, for five years, return to an office located in the constituency where they stood for election.<sup>7</sup>

Recently, for instance, the mayors of Bari (Michele Emiliano, mayor 2004-2014, President of the Puglia Region from 2015, and previously prosecutor in office at Bari) and Naples (Luigi De Magistris, 2011-present, formerly prosecutor at Potenza and Naples) were judicial office holders at the time of their election. An earlier example is the mayor of Genoa (Adriano Sansa, 1993-1997), who returned to judicial office after completion of political term of office.

In the 16th Legislature (2008-2013) there were six judicial office holders elected from the PdL (the right-wing party led by Silvio Berlusconi);<sup>8</sup> two elected from the IdV led by Di Pietro;<sup>9</sup> and nine elected from the DP, the current left-wing party.<sup>10</sup>

We may note two important instances in the 17th Legislature. Pietro Grasso, formerly a national anti-mafia prosecutor, was returned from the DP and promptly nominated to be President of the Senate – an office second only to the President of Italy in seniority. Antonio Ingroia, famous for several mafia investigations in Sicily from 1987 to 2012 (albeit none of which resulted in conviction), founded a new Party (Rivoluzione civile) which fielded candidates in almost all the constituencies for the Chamber of Deputies. After failing to be elected, he tried to return to judicial office. The only one where he eventually could get back to work was Aosta, where no list of his party’s candidates had been presented; he disliked the new position and therefore resigned, quickly taking up the chairmanship of a company controlled by the regional government of Sicily, where he remains.

As a result of the “Mani pulite” (Clean Hands) judicial inquiry, which uncovered large scale corrupt and illegal practices involving people right across the political parties,<sup>11</sup> the political class in Italy has lost much of its traditional legitimacy and authority. The emergence of populist parties, especially the Five Star Movement headed by Beppe Grillo, a comic actor, prompted the two leading traditional parties to enrol magistrates in order to reassure voters and commentators of honesty and reliability of their candidates as well as to be able to boast of being affiliated to respected office holders.

Today, it is not necessary for the High Council of the Magistrature to authorize a prosecutor or judge to run for political office. There is growing public dissatisfaction about the lax controls over the judiciary and the National Association of Magistrates (ANM) has recently suggested a set of new rules which the High Council could formally adopt. It is not clear, however, whether the High Council could do so: the former Minister of Justice, Andrea Orlando, has indicated that a statute would in fact be necessary as an effective means of regulating judges and prosecutors.<sup>12</sup>

6 Other examples were Gianfranco Amendola, elected representing the Green Party (1989-1994), who then returned to judicial office; Tiziana Parenti, elected from Forza Italia (1994-2001) after resigning from office; and Ferdinando Imposimato, elected from the Communist Party (1987-1996), who on the contrary returned to the judicial career, reaching the office of adjunct president of the Court of Cassation.

7 According to a formal prohibition contained in Article 8 of Presidential Decree 361 of 1957.

8 Alfredo Mantovano and Alfonso Papa in the Chamber of Deputies; Giacomo Caliendo, Roberto Centaro, Pasquale Giuliano, Francesco Nitto Paola in the Senate.

9 Federico Palomba and Di Pietro himself.

10 Gianrico Carofiglio, Felice Casson, Gerardo D’Ambrosio, Silvia Della Monica, Anna Finocchiaro, Alberto Maritati in the Senate; Donatella Ferranti, Lanfranco Tenaglia, Doris Lo Moro in the Chamber of Deputies.

11 See Alberto Vannucci, *The Controversial Legacy of ‘Mani Pulite’: A Critical Analysis of Italian Corruption and Anti-Corruption Policies*, (2009) 1:2 *Bulletin of Italian Politics* 233-64 [http://www.gla.ac.uk/media/media\\_140182\\_en.pdf](http://www.gla.ac.uk/media/media_140182_en.pdf) and “The ‘Clean Hands’ (Mani Pulite) Inquiry on Corruption and its Effects on the Italian Political system” *Em Debate, Belo Horizonte*, v 8, n 2, pp 62-68, abr. 2016 <http://opiniaopublica.ufmg.br/site/files/artigo/Alberto-Vannucci.pdf>.

12 See the note dated 28 September 2015, of the Association of Italian Lawyers, suggesting that judges returning to the bench from political roles should at least be assigned to judging and not prosecutorial functions, as member of boards of three or five and not as individual judges, and be out of contention for later assignments of directive offices.

At the same time many other magistrates have been appointed to what are not strictly political offices, but which have political implications. These include appointments as: members or presidents of independent authorities (such as the Data Protection Authority); counsel to the President of the Republic;<sup>13</sup> secretaries general of the Constitutional Court<sup>14</sup> or of the High Council of the Magistrature;<sup>15</sup> counsel to the Prime Minister with special functions such as simplification of legislation and administrative regulations<sup>16</sup> or the adoption of international agreements;<sup>17</sup> counsel to the Speaker of the Senate, to Ministers, to Presidents or Vice-Presidents of Independent Authorities on antitrust or privacy. Some of them have been on leave for many years, ranging from 10 to 24, but could re-enter judicial office any time after completing their assignment. No official data are available about the total number of judges and prosecutors entrusted with such extra-judicial responsibilities, but their number is estimated to be around one hundred.<sup>18</sup>

## 1.2. The Politicization of the High Council of Magistrature

Judicial office holders in the High Council belong to political segments or factions, usually called “streams”. A left-wing faction, Democratic Magistracy (MD), now allied with other smaller factions composing the so-called Area, is opposed by a right-wing faction, Independent Magistracy (MI), while at the centre of the ideological spectrum is Constitutional Magistracy (Unicost)<sup>19</sup>. Recently, the current President of the National Association of Magistrates (ANM), Piercamillo Davigo, frankly admitted in a widely circulating newspaper<sup>20</sup> that some of the most important offices could have been assigned according to the political affiliations of the nominees and in accordance with their numerical strength in the Council. As a result, it may be the case that nominees’ talents, career and work experience are undervalued or subordinated to political factors. Furthermore, since the careers of prosecutors and judges are unified, so that a magistrate can work as prosecutor for years and then take up a judicial appointment or vice versa, ideological preferences risk affecting even strictly judicial functions.

It was the creation of MD in 1964 and its growing consolidation between 1964 and 1969 that began to break the unity of approach of the national association (the ANM)<sup>21</sup> and the traditional reasoning of the judges. The MD aimed to undermine the widespread belief in the need for unity and coherence in the legal system, creating in its stead an alternative jurisprudence which approached cases not merely from a technical or strictly legal viewpoint, but from a political viewpoint. This approach gave precedence to values enshrined in the Constitution, which had not been fully implemented since its adoption in 1948, but this came at the cost of increased polarization within the judicial system, greatly diminishing the ability of the Court of Cassation to guarantee uniformity of judicial interpretation and predictability of judicial decisions. The constitutional imperative that subordinates magistrates only to the law (Article 101) came to be interpreted as referring to the individual judge or prosecutor, and not to the judiciary as a whole. In MD’s approach, accordingly, the decisions of judges in lower courts should take no cognizance of judicial hierarchy, unless a rule of precedent is enshrined in the Constitution. Instead, equality among judges, and their subordination only to the law, mean that hierarchy is excluded in favour of distinguishing judges only by function. Judicial equality in turn means that each judge or prosecutor may—and even must—base his decisions on his cultural engagement, in a way which makes evident the relationship between judicial choices and politics.

Since the 1970s the growth of factions has created an ideological dividing line in the judicial structure. The representatives of the different sections of the High Council of the Magistrature are elected on a strictly proportional basis and normally behave as party members. Candidates for executive or quasi-executive posts are closely scrutinised, notionally on their previous performance, but always keeping in mind their ideological affiliation to his faction; majorities are formed either through agreements or with harsh divisions on party lines, which often end up with judicial controversies on the legitimacy of the election in the administrative tribunals. This situation has aroused lively discussions about the real measure of independence of judges and prosecutors assigned to their offices under some sectional label.<sup>22</sup>

13 Stefano Erbani, Enrico Gallucci and Franca Zacco.

14 Carlo Visconti, formerly an anti-mafia prosecutor.

15 Paola Pieraccini.

16 That is the statute designed to reduce the number of laws and regulations by organising and systematising a given set of rules in the legal system (leggi di semplificazione amministrativa). Paola Farina was appointed as one of the expert to deal with this: see D.M. 5 December 2012.

17 Silvia Della Monica.

18 An overview in A. Zaccaria, Le “chiamate” dirette dei magistrati allo svolgimento di funzioni politiche, Quad. cost., 2015, 426.

19 The current composition of the High Council is as follows: of the 8 members elected by Parliament on July 19, 2018, 3 belong to the 5 Star Movement, 2 to the Lega, 1 to the PD and 2 to Forza Italia; of the members elected by judges and prosecutors Unicost has 5 members, Area 4 (7 in the former composition), MI grows from 3 to 5 members. Mr. David Ermini, the PD parliamentary member, has been elected vice-president, the president being the President of the Republic, with a 13>11 majority.

20 See La Repubblica (Milan, June 8, 2016). Similar admissions were made by the former Attorney General, Ciani, on official occasions in 2013.

21 For a history of Magistratura democratica V. Zagrebelsky, La Magistratura ordinaria dalla Costituzione ad oggi, in Storia d’Italia, Annali 14, Legge, diritto giustizia, L. Violante (Ed.), Turin, 1998, 713 and G. Palombarini, Giudici a sinistra. I 36 anni della storia di Magistratura democratica: una proposta per una nuova politica per la giustizia, Naples, 2000.

22 See, e.g., the official periodical of the National Association of Magistrates (ANM), La Magistratura, n. 1-2, 2014.

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Presently, there is widespread consensus in Parliament on the need for substantial reform of the elective system of the HCM. Hopefully, some other representative formula could mitigate, if not eliminate, the ideological polarization of the Council and perhaps deal with the polarization of judicial personnel as well.<sup>23</sup>

### 1.3. Judicial intervention in economic matters

One of the most notable consequences of the aggressive role adopted by the judiciary in the last twenty years has been a tendency to intervene in disputes which have enormous economic implications without fully comprehending the impact of judicial intervention on national economy.

The most prominent case in recent years relates to the ILVA steel plant at Taranto in southern Italy. The ILVA factory was founded in 1964, under the name of Italsider, by the IRI, a State holding company, and sold to the Riva family in 1995, during the first wave of privatization in Italy. It already had problems with water pollution and air contamination, which were aggravated by a lack of new investments in the plant. In 2012, the local prosecutors started negotiations with the shareholders, and after some months finally decided to order the seizure of the plant, which employs about 15.000 workers and indirectly supports the employment of thousands more in the local area, for decontamination. Thus, the prosecutors stepped in where central and local government had not acted. Then the central government decided to approve a law-decree,<sup>24</sup> which is constitutionally applicable in emergency situations only, whereby a government-appointed supervisor is responsible for the management of the plant, including its decontamination, and is able to authorise the sale of finished products even where such products might have resulted from possible infringements of environmental standards. The public prosecutor opposed the decree in the Constitutional Court, arguing that it would be a violation of the separation of powers principle because of pending proceedings arising from an earlier prosecutorial decision.<sup>25</sup> The Court quickly decided for the government,<sup>26</sup> declaring that there was no conflict of powers. In the meantime, the whole company continues to be under the management of a State supervisor, and its economic value is likely to have dramatically diminished. In early 2016, public tenders were called for its sale. While bids had been received, many observers doubted that it will be successful: foreign investors could be deterred from making offers by the complexity of both the environmental situation and the judicial litigation. Finally the plant has been sold to the Indian company Arcelor Mittal on September 5, 2018. The work force has decreased to 10.700.

The ILVA case is the best illustration of the wide margin of appreciation that judicial office holders claim, including the ability to resist even the intervention of government and Parliament through legislation. The appropriation of the exclusive power of balancing different constitutional values and principles, such as human health, environmental quality, and gainful employment of workers showed the firm belief of at least some parts of the judiciary that their role as sole guarantors of the Constitution made it necessary to fight political battles with other State institutions. All concerns about independence have been set aside, and the judiciary wants to play a leading role on the political stage.

The ILVA case is not alone: there are other examples, though not on the same scale. Around the same time, the chief of the old Acqua Pia Antica Marcia (APAM) group, Francesco Bellavista Caltagirone, was arrested in connection with serious allegations of corruption, detained for about five months at Imperia at the age of almost 75 and then released and acquitted from all charges. Meanwhile the APAM group had been entrusted to a judicial commissioner. During that period, it went bankrupt and its hotel sector with five thousand workers had to be sold off.<sup>27</sup>

Similarly, in 2014 the chief counsel of the Ministry of the Environment was arrested by the Milan prosecutor and detained for about six months on charges of making some unexplained payments. The information had been collected from telephone tapping. In fact the defendant had, in his capacity as a commissioner for the decontamination of the former industrial site of Rodano -Piolello, ordered prompt payments in order to avoid a penalty of 670 million euros which would have arisen owing to the commencement of sanctions proceedings against Italy. He was released and the accusations set aside, but the conclusion of the whole land decontamination operation was jeopardized or at least slowed down.

### 1.4. Judges as legislators and as publicity seekers

The ANM as well as individual judges and prosecutors often publicly express their opinions concerning legislation and their effect in the light of case law and on proposed legislation, not only from a legal point of view but also from a political perspective. Statements are made about topics such as immigration, biotechnology and family law, legal regulation of telephone tapping and other techniques of evidence collection, and environmental law. There is apparently no bar to such dissemination of personal or collective opinions. However, in many cases the dividing line between freedom of speech of individuals and discretion or self-restraint of officers is thin.

Judicial office holders are not hesitant to express extra judicial opinions. In fact, many members of the judiciary cherish being in the limelight, and often push their way on to the public stage. There are several different ways in which office holders have achieved

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23 A discussion about possible reforms in *Il futuro delle toghe tra carrierismo e modernità*, *Il Sole 24 ore* (Milan, August 14, 2015).

24 Law decree 207 of 2012, transformed into law 421 of 2012.

25 The whole story is told e.g. by S. Staiano, *Politica e giurisdizione. Piccola cronaca di fatti notevoli* in [www.federalismi.it](http://www.federalismi.it), and the articles of A. Sperti and G. Arconzo in *Diritto Penale Contemporaneo* (2013)(1).

26 Ord. 17 of 2013.

27 See e.g. *La Repubblica*, December 6, 2014.

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this, some with less effort on their part than others. To give one example, in the ILVA case discussed above, the Taranto prosecutor became involved at the request of the executive itself, which asked for comments during the legislative process on the law-decree being drafted. This, in the event, was not successful, since the judge of the preliminary investigation raised a jurisdictional dispute<sup>28</sup> in front of the Constitutional Court against the government.

To give another example, chief prosecutors are authorized by statute to liaise with the press, maintaining direct contact with journalists regarding arrests, searches or other similar measures. Reporting of action taken by the chief prosecutors naturally put them in the limelight. From the viewpoint of the investigated person, such publicity can amount to condemnation in the court of public opinion; from the viewpoint of the prosecutor, it is a way of gaining popularity, perhaps with an eye to career advancement.

The most recent well known instance is where a prosecutor requested the incumbent President of the Republic, Giorgio Napolitano, to testify in a mafia trial at Palermo about events that unfolded some twenty-five years ago, when he was President of the Chamber of Deputies as a member of the minority left-wing party, and presumably without informing him of what he was required to testify about. He finally agreed to testify on video from the presidential palace, while he opposed the use of "indirect" tapping of some of his conversations with a former Minister by raising a jurisdictional dispute in front of the Constitutional Court, which ordered their destruction.<sup>29</sup>

### 1.5. Uncontrolled prosecutorial discretion

Another controversial issue, widely discussed in the last two decades, concerns the implementation of the principle obliging prosecutors to commence criminal proceedings, codified in Article 112 of the Constitution<sup>30</sup>. From a theoretical viewpoint this provision stems from the need to exclude any interference by the executive and to ensure that prosecutions in all appropriate cases be instituted. Thus not giving any wide discretion to choose what cases are to be prosecuted. In practice, the lack of resources and ideological preferences make it impossible to avoid individual or institutional choices. There is, furthermore, no tradition of the Court of Cassation or the office of Attorney General of adopting general guidelines on prosecutorial discretion. Demands to improve the present situation by adopting such standards have gone unheeded: eminent members of MD jealously guard what they see as their prerogative to decide when and how to commence prosecution under Article 112, and so have strongly opposed any guidelines. Some prosecutorial offices have adopted local practices, though these have proved inadequate. For instance, in 2013 the prosecutor of Rome decided to limit the number of proceedings that the office may institute in a year: such an approach obviously increases the amount of discretion available, since the number of crimes about which prosecutors have to make decisions is much higher than the cap. The debate is still alive, and it might lead to a revision of the constitutional provision, though this is not likely to happen any time soon. Meanwhile, in spring 2015,<sup>31</sup> a new Article 131 bis of the Criminal Code<sup>32</sup> was introduced in order to enable prosecutors to refrain from instituting proceedings for trivial sentences.

### 2. Career progress and disciplinary proceedings

Disciplinary proceedings are initiated by the Minister of Justice or the Advocate General of the Court of Cassation, through the High Council. Its first committee, working as a disciplinary division, takes the initial decision, which needs to be confirmed by the plenary session. Against such final decision an appeal lies to the Grand Chamber of the Court of Cassation. Disciplinary action may be taken against a judge only for failure to perform his judicial duties or for misconduct affecting his judicial duties, whether or not such misconduct occurred in the exercise of judicial functions. The possible final sanctions are: a transfer; a freeze on or a reduction of his salary; or a reprimand.

Disciplinary sanctions, however, are rare, of little value and often contested in the Court of Cassation. The popular belief is that disciplinary accountability is in fact quite limited.

### 3. Salary, vacations and legal status

Judges and prosecutors secure office through public competition common to both categories. According to a 1941 statute, their progression up to the Courts of Appeal and Cassation took place by way of further competition. Article 107.3 of the Constitution then stated that judicial office holders can be distinguished only by function. Therefore, in the 1960s,<sup>33</sup> several laws introduced an automatic career progression, on the basis of seniority, with the exclusion of those deemed unworthy of promotion. Only recently has the seniority system been modified, with the introduction of criteria founded on professional capacity, diligence and engagement.<sup>34</sup>

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28 Art. 37 of Law 87/1953 states that "conflicts between branches of government shall be resolved by the Constitutional Court provided that the conflict arises between bodies that have the competence to express the final will of the branches of government they belong to" and "whose competences are regulated by the Constitution". See J.O. Frosini, *Constitutional Justice*, in G.F. Ferrari, *Introduction to Italian Public Law*, Milan, 2nd ed., 2018, 190-192.

29 Dec. 1/2013. See E. Tira, 'Il conflitto di attribuzione tra il Presidente della Repubblica e la Procura di Palermo in materia di intercettazioni indirette o casuali', *Rivista AIC* 4/2012.

30 Art. 112 of the Italian Constitution states: "The public prosecutor has the obligation to institute criminal proceedings". See G. Neppi Modona, *Article 112*, in *Commentario della Costituzione*, Bologna, 1987, 39 ff.

31 Legislative decree No. 28 of 2015.

32 The article excludes the punishment in case of 'trivial offences', when the damage has not been serious and the person is not a 'habitual delinquent'.

33 L. 570 of 1966.

34 Legislative decree 160 of 2006; L. 111 of 2007.

All judicial office holders are thus compelled to go through a performance appraisal every four years, up until their twenty-eighth year of work. Such evaluations should be the only criterion for promotions to the directorate level.

Pay and benefits of judicial office holders, however, continue to follow seniority independent of the functions they carry out: this privilege remains fiercely guarded. In 2010, a set of measures to deal with the financial crisis,<sup>35</sup> including the freezing of salary increases for all civil servants, was declared to be a violation of the independence of magistrates<sup>36</sup>.

#### 4. Length of civil and criminal suits and performance appraisal

One of the longest standing defects of the Italian judicial system has been the unusual delay in the determination of civil and criminal suits, dating back to the time of the creation of the unified State in the 19th Century. The difficulty in reducing the number of years necessary for the conclusion of a legal dispute was not overcome even after the promulgation of the Republican Constitution and the ratification of the European Convention on Human Rights, which the Italian government promptly supported at the end of the 1940s and which Parliament incorporated into Italian law in 1955.<sup>37</sup> Article 6 of the Convention guarantees the right of every person to have his civil or criminal dispute heard and settled by an independent and impartial tribunal “within a reasonable time”.

According to official European statistics,<sup>38</sup> Italy ranks 21st in Europe in terms of length of time taken to determine civil or commercial suits, mostly those for debt recovery, though the data of five other countries are unknown. The average number of days to conclude first-instance litigation is around 590, which amounts to more than double the average number of days for the member States of the Council of Europe. Debt recovery through court process takes about 1,185 days, which places Italy in 147th place globally, well behind many African countries, as the World Bank records in its annual report.<sup>39</sup> As a result, Italy has garnered the highest total number of convictions for violations of Article 6(1) of the European Court of Human Rights (ECHR): 1,189, against 282 for France, 102 for Germany and 27 for the UK.

There has been much inconclusive discussion in academic literature and in newspapers,<sup>40</sup> on the reasons for such poor performance. There are probably too many barristers and solicitors,<sup>41</sup> since no cap on numbers has ever been introduced. In the past, it was thought that lawyers often deferred hearings in order to prolong litigation and increase the costs of litigation. In more recent years, internationalization of commercial controversies has made multinational clients more and more demanding and this means that they are able to make comparisons with other jurisdictions as regards efficiency. Judicial delays and inefficiencies could deter foreign investors from considering Italy a good option. Others have identified the irrational distribution of judicial offices in the territory as a possible reason of law’s delays: small jurisdictions with too few judges, often anxious to move to more prestigious posts, could be responsible for making procedures painfully slow. However, in 2013<sup>42</sup> the Monti government imposed a partial reorganization of judicial offices, including the abolition or merger of many of them, which in the South could not be completed due to the need to keep State judicial presence at the local level in order to counter deeply-rooted criminal behaviour.

At the same time the Civil Procedure Code has been amended at least fifteen times since 2005.<sup>43</sup> Specialized sections of courts for commercial and industrial businesses have been created in order to rely on more competent judges and possibly speed up cases.<sup>44</sup> The competence threshold for justices of the peace at the bottom of the court structure has been raised, in order to ensure that they are well equipped to hear the bulk of minor cases. Yet, they are often criticized for lack of legal knowledge and intellectual capacity.<sup>45</sup> Some forms of alternative dispute resolution (ADR) have been made compulsory at least as a filter before starting litigation, mainly in the labour sector. This has had the effect of concentrating more powers in the President of the Administrative Tribunal as well as in the judges, since it is up to them to declare the impossibility to proceed on the merits in the cases in which the ADR was not fully pursued.<sup>46</sup>

35 L. 78 of 2010.

36 Constitutional Court, dec. 223 of 2012.

37 L. 848 of 1955.

38 2015 Scoreboard, Communication from the Commission to the European Parliament, the Council, The European Central Bank, the European Economic and Social Committee of the Regions, COM (2015) 116 final, fig. 5.

39 World Bank, Doing Business Report, 2015.

40 See e.g. *Il fatto quotidiano* (Rome, 18/20 August 2014).

41 It is estimated there were about 247,000 in October 2015, set against a total population of 60 million. Source: Digilex.

42 L.148 of 2011; Leg. Decree 155 of 2012; Leg. Decree 156 of 2012.

43 The first time with L. 80 of 2005, the last one with L. 132 of 2015.

44 L. 273 of 2002, and later L. 27 of 2012.

45 See e.g. O. Vidoni Guidoni, *Quale giustizia per il giudice di pace? Nascita e consolidamento di una magistratura onoraria*, Milan, 2006.

46 Leg. D. 104 of 2010, which came into force on September 16, 2010. Concerning such measures see L.P.Comoglio, ‘La durata ragionevole del processo e le forme alternative di tutela’, (2007) *Rivista di diritto processuale*, 591. Later on the Constitutional Court declared unconstitutional mandatory ADR (Dec. 6 December 2012, no. 272), compelling the Legislator to pass an alternative scheme for mandatory mediation. The new scheme now allows parties to withdraw from mediation, although they are compelled to experience ADR.

This last measure has produced good results, making the administrative process in this non-judicial sector conform to European standards. Elsewhere, the average length of civil and commercial suits has not been significantly reduced. Official statistics confirm that in 2013 the average length of a first instance civil suit reached 14 months, 2 months more than in 2005; on appeal the average length of a civil case had increased to 35 months, 7 more than eight years earlier, and up to 40, almost 5 months more, in the Court of Cassation.<sup>47</sup> Furthermore, regional statistics continue to differ: in some Southern regions, litigation takes much longer, while in the North better performances are more common, with the possible exception of the courts of some large cities. As a result, there is a general feeling that judges should take some blame for the law's delays, regardless of the fact that public expenditure on the judicial system is low. An example of the effect of this shift in public opinion is that the holidays of magistrates have been cut down from 45 to 30 working days,<sup>48</sup> following a short period of intense discussions including heavy criticism by their national association.<sup>49</sup>

The real problem might be that there is no tradition in the judiciary of measuring efficiency and even gathering data. The collection of information about the number and length of pending suits is very recent.<sup>50</sup> Methods of evaluating the quality of the work of judges and prosecutors have only recently been formalized; again, this delay has been due to some resistance by the judiciary itself, the ANM and even (less recently) the High Council, all of which have objected on the ground of the principle of independence, which they claim would be compromised by qualitative and quantitative assessment of judicial performance. Such corporatist defence, though, has proved insufficient to resist the pressure of other stakeholders in the legal system, still less the pressure of wider public opinion. Judicial office holders' inefficiencies are likely to be incompatible with contemporary economic and societal needs in an increasingly globalized world. The consciousness that justice delayed is justice denied is slowly beginning to alter the traditionally passive, and pro-judge, attitude of much of the population. Even the popular press has recently begun to report stories about delays in handing down judgments, sloppy or inadequately-written opinions, and contradictions between authorities, matters which were previously excused or overlooked on the ground of the judges' independence. The final step would now be for the High Council to take a less protective attitude towards judicial office holders' inefficiencies and mistakes and instead allow more frequent institution of disciplinary proceedings.

In the criminal sphere the problems are more or less the same, though aggravated by the direct effect of the length of criminal processes on the life, liberty and image of citizens. The criminal procedure code of 1930 was comprehensively reformed in 1990, after having been substantially modified in previous years through legislative additions, in order to update it and make it compatible with the Republican Constitution, and partial striking down by the Constitutional Court. The 1990 reforms aimed at introducing an accusatorial model of criminal procedure after the American example, setting aside the old inquisitorial system. This fundamental change has not been fully implemented because some existing legal provisions are incompatible with the planned model and the way in which this model has been applied in practice is not satisfactory. Some examples may explain this conclusion.

First, a prosecutor may obtain from the judge conducting a preliminary inquiry<sup>51</sup> up to three extensions of the first six-month term, thus reaching a total length of 24 months plus the 45 (now reduced to 30) days of summer recess, at least for many serious crimes<sup>52</sup>. After that, however, the prosecution office has no time limit before deciding between instituting criminal proceedings and letting the matter lie<sup>53</sup>. Therefore, years can elapse before a suspect knows his fate. A trial can be started several years after the supposed commission of the crime, even when the prescribed limitation period of 6, 7.5 or 10 years has already elapsed or is close to its end. Recently,<sup>54</sup> in response to popular demand for justice in corruption cases, a bill was approved by the Chamber of Deputies in order to lengthen such terms with a view to granting judges more time to perform their investigations. From the defendants' side though, the new bill widened the power of the prosecutorial office to hold the subjects investigated in a kind of limbo of uncertainty.

Secondly, the three-level system offers a chance that the Court of Cassation will declare the verdict of the Court of Appeal a nullity, once or even twice, so that the stages of the criminal process can be up to six years or more, with obvious extension of its total duration to a decade or even more. From this viewpoint, systematic violations of the reasonable duration principle guaranteed by the ECHR are very likely. The recent criminal litigation involving an American defendant (Amanda Knox) and a British victim has brought international attention to inadequacies of the Italian criminal justice system.

47 See Ministry of Justice, *Censimento speciale sulla giustizia civile*, Roma, 2014, with commentary by C. Dallara, L. Verzelloni, *Dalle riforme processuali agli aspetti organizzativi: come analizzare la durata irragionevole dei processi civili?*, in (2015) 9(2) *Paradoxa* 34ff..

48 L.D 132 of 2014, converted into L. 162 of 2014. A question of constitutionality of this provision has been raised to the Constitutional Court: Ragusa Tribunal, ord. 23 September, 2014. The administrative Tribunal of Rome has rejected the suit against the Ministerial Decree of 13 January 2015 implementing the statute provision.

49 See e.g. *Il sole* 24 ore (Milan, 25 January, 2015).

50 A serious effort started about 2000: since 2002 the clearance rate has been 110% per year, contributing to the elimination of the arrears.

51 Under the Italian Code of Criminal Procedure, each phase of the criminal proceeding is handled by a different judge.

52 Art. 405, code of criminal procedure.

53 A 2017 statute ("Orlando reform", law n. 103, June 23rd, 2017) now states that if the office of the prosecution active in the court of first instance, after the expiration of the investigation terms, do not ask the judge of the preliminary investigation an acquittal or a referral to judgement, the office of the prosecution operating in the court of appeal can take upon the investigation.

54 AC 2150-A, approved on March 24, 2015. A new text (S.2013) is now under consideration by the Senate.

Thirdly, the long duration of criminal cases tends to encourage the prosecution to ask the judge conducting a preliminary investigation for provisional measures,<sup>55</sup> mainly arrest, which can take months, or even years for the most serious crimes. It is common knowledge that the majority of the detainees in Italian jails are not convicts but detainees under provisional measures. Furthermore, bail or parole release are not often used and they are not efficiently implemented. The length of criminal trials, therefore, implies a sort of anticipation of punishment for the defendant who is later acquitted. In fact, they may lead to suits against the State for damages for wrongful imprisonment, an area now regulated by a statute of 2011.<sup>56</sup> It must be added that preliminary measures like search and arrest are usually surrounded by wide media publicity; and it is not a rare event that the investigated person knows about his status through the media rather than through official sources. Such circumstances can only add to the measure of reputational and personal damages in case of a later acquittal.<sup>57</sup>

The manner in which criminal investigations and trials are conducted, that is the absence of certainty in timing and length, does not only limit the efficiency of the criminal justice system as a whole. It also leads to social and economic problems, conditioning defendant's individual choices in private business and public life, and jeopardizing public policies when the defendant holds a public office when his legal position is not clear. Yet finding solutions for these defects will itself be a time-consuming process, because effective remedies are predicated upon being able to measure the quality and quantity of judicial output with a view to improvement. The fact that in Italy the introduction of techniques for measuring judicial independence<sup>58</sup> is a very recent development – and one which judges, as discussed above, object to – means this will take time.

## 5. Civic responsibility of judges and prosecutors

The full and constitutionally-guaranteed independence of all members of the judiciary and the growing trend towards the widening of their discretion even in sensitive matters, often deeply intermingled with politics, the surfacing of clear political divisions inside the body of magistrates and, finally, the complete exemption from all manner of consequences for any mistakes have helped to develop a need for prosecutors and judges to be in some way accountable. The initial trigger was the infamous Tortora case: in 1985, Enzo Tortora, a famous talk show host was convicted at first instance for drug trafficking following a tip-off from some gang members. The appeal court found the accusations to be false and based on a criminal strategy which had nothing to do with Mr Tortora, who was deliberately targeted. He died of cancer a few months after his release. The case shook public opinion, stirring up discontent regarding the total immunity granted to judges under Articles 55, 56 and 75 of the Civil Procedure Code. The Constitutional Court had declared that such regulations were compatible with the Constitution, though it stated that the general rules applicable to all civil servants were also extended to judicial office holders at all levels, including the responsibility for malice and fraud.<sup>59</sup>

After the Tortora case, a referendum was held by popular initiative for the repeal of the applicable statute, which was approved by a landslide majority.<sup>60</sup> Parliament was then compelled to adopt a new statute, law 117 of 1988, named after the then Minister of Justice Vassalli. According to the Constitutional Court,<sup>61</sup> this statute achieved a reasonable balance between independence and accountability. The statute, however, included an exhaustive list of cases of gross negligence as a requisite for liability and a general clause (a safeguard clause) excluding its application in matters of interpretation of statutes, facts and evidence.<sup>62</sup> All claims had to be proposed by the aggrieved party against the State, which could institute compensation action against the member of the judiciary concerned. Each claim, furthermore, had to pass a filter of admissibility. A further referendum proposal in 1997 was declared inadmissible by the Court<sup>63</sup> due to lack of clarity of the question.

The results of the statute of 1988 were very limited. At the end of 2010, about 62% of all suits had been declared inadmissible; only a total of 18 of those declared admissible had reached a concluded trial and only in four of them was the plaintiff successful.<sup>64</sup>

Meanwhile, Italy was implicated in sanction proceedings activated by the European Union due to lack of protection of the citizens from damage caused by a jurisdictional body for gross violations of European law.<sup>65</sup> The result of the European sanctions of 2011 was the creation of a sort of 'double treatment of damage', with gross violations of EU law and of domestic statutes differently addressed.

55 According to official data of the Ministry of Justice, at the end of 2015 out of 52.164 detainees, only 33.896 served time of imprisonment after a final judgement.

56 L. 89 of 2011, so called "Legge Pinto". See F. Bonaccorsi, Irragionevole durata dei processi e responsabilità del magistrato: too much ado about nothing, *Danno e responsabilità*, 2013, 955.

57 In 2014 the State paid about 53 million Euros for unjust detention cases, 43% more than the previous year. 71 million Euros have been paid due to Strasbourg verdicts for violation of the ECHR.

58 See e.g. F. Contini, R. Mohr, *Judicial Evaluation. Traditions, Innovations and Proposals for Measuring the Quality of Courts Performance*, Saarbrücken, 2008.

59 Decision no. 88 of 1963. The whole story is told, for instance, by M. Cicala, *La responsabilità civile del magistrato*, Milan, 1988 and more recently by F. Verde, *La responsabilità del magistrato*, Bari, 2015. See also V. M. Caferra, *Il processo al processo. La responsabilità dei magistrati*, Bari, 2015.

60 Of 80.29% of the valid votes, 9 November 1987.

61 Decision no. 18 of 1989.

62 Article 2.2

63 Decision no. 34 of 1997.

64 Data elaboration from parliamentary proceedings concerning the bill introduced in 2011.

65 After decisions such as, to take recent examples, C-224/01 *Kobler* (2003); C-173/03, *Traghetti del Mediterraneo* (2006).

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Such a result was untenable.<sup>66</sup> Parliament was finally compelled to step in, by including both EU and domestic violations in the new regulation. Law 18 of 2015 has now repealed the exclusion from responsibility for all cases of denial of justice, violation of statutes or EU law, and misinterpretation of facts or evidence due to malice or inexcusable negligence. Civil actions for compensation can be started by the State against the responsible member of the judiciary within two years<sup>67</sup>. The preliminary admissibility filter, once applied to claims for damages, has been repealed. To sum up, the responsibility of magistrates is still indirect, in the sense that it follows the previous declaration of State responsibility. A partial step forward has been made by the extension of responsibility to all possible judicial misbehaviour.<sup>68</sup>

The results prescribed by the EU have been reached – in terms of having a statute in force, at least. It remains to be seen whether the application of that statute in practice will successfully balance citizens' freedoms from judiciary's abuse of power with the enduring independence it deserves in order to fulfil its constitutional functions.



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66 See e.g. A. D'Aloia, La responsabilità civile del giudice alla luce della giurisprudenza comunitaria, in AA.VV., Problemi attuali della giustizia in Italia, Naples, 2010; F. Biondi, La riforma della responsabilità civile del magistrato: una responsabilità più dello Stato che dei magistrati, Quad.cost., 2015, 409.

67 Disciplinary proceedings follow a different path.

68 About the amount of the indemnification for the excessive duration of civil and criminal cases, see L. Mattina, Violazione della ragionevole durata del processo: il quantum dell'equa riparazione ex lege Pinto, Danno e resp., 2015, 819.