

**Independence and accountability of the judiciary in Italy.  
The experience of a former transitional country in a comparative perspective\***

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**1. Introduction**

One of the most visible evolutions of the modern democratic state is the increasing political relevance of the judiciary<sup>1</sup>. The spread of legislation protecting a wide range of social and economic interests of the citizens has generated ever increasing occasions for them to resort to judges for the protection of their rights (on matters such as health, social security, education, labor relations, family relations, commercial relations, recreational activities, the media, etc.). There are very few areas of vital interest for citizens that have remained untouched by judicial decisions<sup>2</sup>. Moreover, the dangerous evolution of criminal activities (from those in the metropolitan areas to those that have acquired an international dimension) has made judicial repression of crime ever more important for the citizens and the community as a whole. One can certainly say, therefore, that the very well being of the citizens has become far more dependent than in the past on the content of judicial decisions and on the expediency with which they are rendered. For those and other reasons the workload of the courts has increased considerably and the work of judges has become far more complex. Such developments in the political relevance of the judicial power has in turn spurred, in some democratic countries more than in others, the search for adequate means to render the working of the judiciary more accountable while at the same time safeguarding its independence. In this light one can read the efforts of many democratic states to devise and implement more stringent measures to insure that the judges, throughout the period of their service, perform their duties with professional competence, diligence, efficiency, impartiality, and at the same time maintain a posture that inspires the confidence of the citizens. [These values, though all equally important for the proper working of the judicial system, are, at the same time, difficult to combine at the operational level.]

The analysis of the judicial systems of transitional countries of the past, like Italy, Spain and Portugal, as well as my experiences in the last decade as consultant for judicial reform in transitional countries of Central-Eastern Europe and of Latin America have made me aware that scholars and members of the legal professions of those countries who are engaged in devising and revising the features of their judicial systems tend to concentrate their attention on the measures intended to protect judicial independence and disregard those that favor accountability. Such an attitude is fully understandable in view of their experiences with their previous undemocratic political regimes, but not necessarily adequate for the future functional needs of their judicial systems.

The participants in this convention are for the most part scholars and members of the legal professions interested in judicial reform in transitional countries. I thought it would be of some interest to present a brief analysis of the unbalanced relation between judicial independence and

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<sup>1</sup> C. Neal Tate and Torbjorn Vallinder (eds.), *The Global Expansion of Judicial power*, New York University Press, 1995.

<sup>2</sup> The literature on this phenomenon is quite ample. See, for example, L. Friedman, *Total Justice*, Russell Sage Foundation, New York 1985; K. Maleson, *The New Judiciary. The effects of expansion and activism*, Dartmouth Publishing Co., Aldershot, 1999.

judicial accountability in Italy, a former transitional country, where most of the basic features of the judicial system regarding judicial independence were adopted in the period immediately following the downfall of a dictatorial regime, soon after World War II.

Actually, for those interested in judicial reform with a special concern for judicial independence the Italian case might be of interest for the following reasons:

a) Among the civil law countries with a consolidated democratic system Italy is certainly the one where judicial independence has acquired the highest recognition both in terms of the amplitude of the law provisions formally intended for its protection and in terms of the way in which those provisions have been interpreted.

b) The Italian case shows that when the value of judicial independence is pursued as an end in itself at the expense of other important values (such as accountability and guarantees of professional competency) a series of negative consequences ensue. In particular, Italy's experience shows that the very provisions intended to protect judicial independence when carried too far may, paradoxically, turn out to be self-defeating, *i.e.*, detrimental to judicial independence.

c) Italy is the only democratic country where public prosecutors enjoy the same guarantees of independence as judges.

In the following pages, I shall briefly describe how judicial independence is protected in the area of judicial personnel management (from recruitment to retirement). Special reference will be made to the structure and policies of the *Consiglio Superiore della Magistratura* (the Higher Council of the Magistracy, hereafter CSM). In particular, I shall briefly indicate how decisions are taken concerning some of the issues that bear crucial relevance for the protection of judicial independence, such as recruitment, career, extra-judicial activities, discipline and salaries. Finally, I shall deal briefly with some relevant features of the role of the Ministry of Justice.

This presentation will address only the "ordinary judicial system", comprising around 92% of all Italian career magistrates. Ordinary justice in Italy deals with all criminal cases and the great majority of civil cases. In any case, the career magistrates of the other judicial systems (*i.e.*, administrative courts and courts of accounts) do enjoy guarantees of independence similar to those of the magistrates of the courts of ordinary justice<sup>3</sup>. The Constitutional Court, composed of 15 members, operates within a fully autonomous, self regulating structure separate from the ordinary and administrative courts.<sup>4</sup>

Two caveats for the reader:

a) The terms "magistrate" has a different meaning in different countries. In Italy as well as in France it is used to include both judges and public prosecutors. In both countries they are jointly recruited and can move from one position to the other even recurrently in the course of their career<sup>5</sup>.

b) When in this presentation I maintain that, on the basis of our research data, one aspect of the working of the judicial system "derives" or is "induced by" another I do not mean that there is a simple "cause-effect" relation between the two. What I mean is that our research data show that one of the two aspects (or changes introduced in that aspect) is certainly a major factor influencing

<sup>3</sup> There are, however, two aspects of the administrative justice system that have to be taken into account in assessing its independence. The first is that a minority of the judges of the higher court (*Consiglio di Stato*) are appointed by the Executive; the second is that the judges of one of the sections of the *Consiglio di Stato* do not perform judicial functions temporarily, but have instead the official task of advising the Executive on legal matters.

<sup>4</sup> Their term of office is nine years; five members are appointed by the President of the Republic, five are elected by the magistrates of the higher courts, five are elected by Parliament with a qualified majority. Doubts related to the full independence of the judges of the constitutional court have been recently advanced in two respects: a) with reference to their system of appointment, and in particular with respect to the powers of the President of the Republic (whose term of office is 7 years) to appoint in full autonomy 1/3 of the judges; b) because immediately after leaving the Court constitutional judges often undertake a political career in the ranks of one of the political parties or are appointed as ministers or heads of important public agencies. Proposals for reform have been recently advanced which would prohibit for a number of years after the termination of their service as judges their election to legislative assemblies or their appointment in public agencies.

<sup>5</sup> In England and the US the term "magistrate" is used instead, to indicate only judges having specific functions. In Spain it is used to indicate a specific level of the career of judges.

the occurrence or characteristics of the other. For most of the relations described hereafter, I could suggest several other sources of influence, internal or external to the judicial system.

## 2. The Higher Council of the Magistracy (CSM)

In order to protect judicial independence, the Italian Constitution, enacted in 1948, provides that all decisions concerning judges and prosecutors from recruitment to retirement (promotions, transfers, discipline, disability etc.) be within the exclusive competence of a Council composed prevalently of magistrates (*i.e.*, judges and prosecutors) elected by their colleagues. More specifically, it provides that two thirds of the members must be magistrates and that one third of the members be elected by Parliament among law professors and lawyers with 15 years of professional experience. It further provides that the CSM be presided over by the President of the Republic -de facto only a symbolic presidency- and include among its members the President of the Supreme Court of Cassation and the General Prosecutor of Cassation. The elected members of the judiciary are renewed *in toto* every four years<sup>6</sup>. At present there are 27 members of the CSM.

The first CSM came into existence only in 1959 (eleven years after the enactment of the Constitution). Since then, its role has progressively expanded far beyond that of managing judicial personnel. Its influence on the internal functioning of courts and prosecutor's offices is in many ways remarkable. The CSM has also acquired considerable influence on the decisions of the executive and legislative powers concerning all matters affecting the magistrates and the judicial system. The expansion of the role of the CSM beyond the formal boundaries provided by the Constitution has at times generated conflicts with the other powers, including the President of the Republic.

For reasons that will become clear, while considering the modifications in the career system, it is important to underline a specific aspect of the evolution of the CSM that concerns its composition. From 1959 to 1968 the higher ranks of the magistracy were greatly over-represented and were elected only by their peers. From 1968 no higher ranking magistrate can be elected to the CSM without the electoral support of the lower ranking magistrates. It is worth noting that no other Higher Council of the Magistracy of Continental Europe (*i.e.* those of France, Spain, Portugal) has such a prevalence of members elected by the magistrates, nor an electoral law that makes those members so prone to the corporate expectations of the lower ranks of the judiciary (see Table 1).

## 3. Recruitment

As in other countries of Continental Europe, in Italy the recruitment of career magistrates takes place, usually once a year, on the basis of national competitive examinations opened to law graduates of "good moral standing". The recruitment model is basically the same as that adopted for the entrance in the higher ranks of national ministerial bureaucracies<sup>7</sup>.

The CSM decides on the admission of the candidates to the competitions and appoints the examining commissions, which are presided over by a high ranking member of the judiciary, and are composed for the most part of magistrates and some university law professors. Previous professional experience is not required nor is it in any way evaluated in the process of selection. Applicants for the entrance examinations are selected on the basis of their general institutional knowledge of several branches of the law as tested by written and oral exams. Our research data show that the exams are far from "measuring" accurately the actual knowledge of the candidates. In civil law countries of Western Europe the recruitment of judges through public competitions is considered to be the best way to guarantee a non-partisan selection and, by the same token, also conducive to a better protection of judicial independence. In some of those countries, like Italy, it is the only system of recruitment of career judges, in others, like France and Spain, it is largely

<sup>6</sup> The structure and functions of the CSM are regulated in arts. 104-107 of the Constitution.

<sup>7</sup> G. Di Federico, "The Italian judicial profession and its bureaucratic setting", *The Judicial Review, The Law Journal of Scottish Universities*, 1976, pp. 40-55.

prevalent (in France, for example, around 20% of the career magistrates is recruited from amongst the legal or paralegal professions<sup>8</sup>).

The great majority of the successful candidates enter the competition between the ages of 23 and 27. In the last decades the number of applicants for the entrance examination in the magistracy has increased enormously. Recurrently there are more than 10,000 applicants and more than 5,000 of them that actually show up for the written examinations (the number of positions available are, on average, around 200 for each competition). Our research data show that the increase in the number of candidates is due mainly to two causes: on the one hand, to the fact that salaries and career developments in the judiciary have become far more advantageous than those of the other sectors of public service<sup>9</sup>; on the other hand, because of the constant visibility given by the media to the role played by quite a few members of the judiciary in the last 35 years or so (mainly magistrates exercising investigative functions) in the “fight” against terrorism, organized crime and corruption. Our data show that in the last 20 years there has been a constant increase in the number of newly recruited magistrates who desire to be assigned to investigative functions<sup>10</sup>.

This model of selection – in Italy as well as in other Continental European countries – is based on the assumption that the magistrates thus recruited will develop their professional competence and will be culturally socialized within the judicial structure where they are expected to remain – and indeed usually remain – for the rest of their working lives ascending a career ladder whose steps are based on evaluations which in various ways take into account seniority and merit<sup>11</sup>.

#### 4. Initial Training and Continuing Education

The system of recruitment briefly described above bears implications for initial training and continuing education, which are quite different and more complex than those of the systems where recruitment occurs among experienced lawyers and is intended to fill a specific vacancy in a specific court. Instead in Italy, as well as in other Continental European countries, young law graduates without previous professional experience are recruited to satisfy indistinctly the functional needs of the entire court system of the nation. Furthermore, in Italy, as well as in France, they are also expected to satisfy the functional needs of prosecutors’ offices. In other words, newly appointed magistrates are expected to fill indiscriminately the several kinds of vacancies existing at the lower level of jurisdiction throughout the country which are in fact quite different from one another. In other words, they are expected to perform, depending on their assignment, a great variety of judicial functions which require rather different professional qualifications and training. Thereafter, they may ask to be transferred from one court or prosecutor’s office to another and, when promoted, be assigned to fill still different vacancies at the higher levels of jurisdiction. The task of providing adequate institutions to insure not only an effective initial training and a satisfactory continuing education but also specific programs for those who are transferred to a different judicial function, becomes in such a system quite complex<sup>12</sup>. In several European countries (such as France, Spain and Portugal) specialized schools with a permanent staff have been created in the last decades. Not yet in Italy. The nature and content of programs of initial training and continuing education are decided from time to time by the CSM.

#### 5. Career

Let us now consider briefly the evolution of the career system. In Italy, as in all the other countries of civil law tradition having a similar system of recruitment (France, Spain, Germany,

<sup>8</sup> A. Mestitz, *Selezione e formazione dei magistrati e degli avvocati in Francia*, Cedam, Padova 1990. pp. 208-9.

<sup>9</sup> A. Negrini, Origini territoriali e motivazioni di scelta della carriera, in G. Di Federico (a cura di), *Caratteristiche socio-culturali della magistratura: le tendenze degli ultimi 20 anni*, Cedam, Padova 1989, in particular Table 17 at page 58.

<sup>10</sup> G. Di Federico “Il pubblico ministero: indipendenza, responsabilità, carriera separata”, in *L’Indice penale*, 1995, n. 2, pagg. 430-35.

<sup>11</sup> G. Di Federico, *The Italian Judicial profession...*, *op. cit.*

<sup>12</sup> A. Mestitz, *Selezione e formazione...o. cit.*, p.276.

Portugal, etc.), recurrent evaluations of professional performance of the magistrates are provided for, to serve a variety of basic functions: in the first place to verify that the young magistrates have actually acquired the necessary professional competence, and thereafter to choose among them those that are most qualified to fill the vacancies at the higher levels of jurisdiction. Last but not least, to ensure that magistrates maintain their professional qualifications throughout their many years of service (usually 40-45) and until retirement (compulsory retirement age is now at 72).

Traditionally, and until the mid-60's, there were seven evaluations of professional performance along the career ladder, but only two of them were highly competitive and selective: i.e. the one in order to become a magistrate at the appellate level, and the one to become a magistrate at the cassation level. Professional performance was evaluated by examining commissions composed of higher ranking magistrates on the basis of the written work of the candidates (opinions, pleadings, etc.<sup>13</sup>).

The three successive steps of the career (representing a mere 1.18% of all positions available in the entire judicial structure) would as a rule be acquired, short of disability or maximum age retirement, on the basis of seniority in the rank of magistrate of cassation. The first of those three further career steps ("magistrate of cassation with superior directive functions"), led to promotion to a limited number of positions such as those of president of appellate court, of appellate prosecutor general, of president of a section of the Court of Cassation, of general advocate of cassation. The other two steps involved promotion to the top positions of Prosecutor General of the Court of Cassation and First President of the Court of Cassation<sup>14</sup>.

Our research data show that prior to the mid-60's approximately 55% of the magistrates would terminate their career at the age of 70 as appellate magistrate, and that a good number of those would reach that level of career only during the very last years before retirement. During the late 50's and early 60's, this career system was widely criticized by a large majority of the magistrates (above all by those who had still to go through the very selective competitive steps of the career) on the ground that professional evaluations based on the written opinions of the candidates and placed in the hands of a limited number of higher ranking magistrates was hindering (internal) judicial independence and inducing among the lower ranking magistrates a diffused conformism with the judicial interpretations of a "conservative" judicial elite that had entered the judiciary (magistracy) during the fascist regime<sup>15</sup>.

The laws regulating promotions were radically changed by Parliament between 1963 and 1973 under pressure of the CSM, of the powerful Association of Magistrates and with the support of the leftist parties (most notably of the numerous parliamentarians of the Communist Party). The new laws did indeed require that evaluation of professional performance be maintained for all the steps of the existing career, but left to the CSM wide discretion in defining how to decide on the matter. By then the system for the election of the magistrates in the CSM had already been changed as described above, making two thirds of the Council extremely responsive to the career expectations of their colleagues. The result has been that those new laws regulating the career of the magistrates have been interpreted by the CSM with such extreme self complacency as to amount to a *de facto* refusal to enforce any form of professional evaluation. So much so that promotions "for judicial merit" to the highest ranks are granted even to those magistrates that take prolonged leaves of absence to perform other activities in the executive or legislative branches of

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<sup>13</sup> G. Di Federico, *The Italian judicial profession...op. cit.*

<sup>14</sup> In the bureaucratic judiciaries organizational roles are ordered according to a hierarchy of ranks to which differential degrees of material and psychological gratification are attached. There is a very specific relation between the hierarchy of ranks and the jurisdictional hierarchy of courts in the sense that judges promoted to a higher rank must be assigned to courts that are higher in the jurisdictional ladder, or else be assigned to lower jurisdictional courts and functions only in a supervisory capacity (like that, for example, of president of a lower court). This system still obtains in countries of western continental Europe (like France, Spain, Portugal, Germany), but, as we shall see, has been substantially altered in Italy.

<sup>15</sup> G. Freddi, *Tensioni e conflitto nella magistratura*, Laterza, Bari 1978, pp.115-147.

government<sup>16</sup>. At present, and for the past 30 years, the evaluation of candidates having the minimum seniority requirements to compete for promotion at the different levels of the judicial hierarchy of ranks is no longer based either on written or oral exams, nor on the evaluation of their written judicial work, but on a “global” assessment of their judicial performance decided by the CSM<sup>17</sup>. All candidates having the required seniority are, short of serious disciplinary or criminal violations, promoted. Those promoted in excess of the existing vacancies nevertheless acquire all the economic and symbolic advantages of the new rank, but remain *pro tempore* to exercise the lower judicial functions of their previous rank<sup>18</sup>. In fact most of them will never acquire the higher judicial position formally connected with their new career ranks. In other words, the young law graduate by simply passing an entrance examination, where his/her general knowledge of various branches of the law is tested, can rest pretty much assured that the mere passing of time will lead him/her in 28 years and with no further checks of professional qualifications to reach the peak of the judicial career, which until the mid-60’s was reserved for only a little over 1% of the magistrates. While only some 100 magistrates reached the upper level of the judicial career until the mid 60’s (and they all occupied the high judicial positions formally connected to their high career rank), now there are constantly more than 2500 (and, of course, most of them still exercise their judicial functions at the lower levels of the jurisdictional ladder),<sup>19</sup>

As a rule, when substantive changes are introduced in one of the basic functional components of an organization other changes, often unintended, automatically follow in their wake. Judicial organizations are no exception. The changes introduced in the career system brought about quite a few relevant modifications in the personnel management system of the magistrates (judges and prosecutors). We will mention here only those that most directly affect judicial independence, i.e. the radical lowering of guarantees concerning the professional qualifications of the magistrates, the higher discretion of the CSM in decisions that deeply affect the expectations of judges and prosecutors, the surge of extra-judicial activities.

## 6. Evaluation of Professional Qualifications and Independence

In civil law countries which recruit young law graduates with no previous work experience - and which therefore have a system of judicial career - professional qualifications are guaranteed by recurrent, substantial evaluation of professional performance during the 40-45 years of service (see above, sections II and IV). Such a system still obtains in various forms in civil law countries of Western Europe like France, Germany and Spain. In Italy, instead, those evaluations, though still required by the law, have been *de facto* eliminated by the CSM, whose composition and electoral system is such as to favor the corporate career expectations of the magistrates (see above, sections I, II and IV). After recruitment, the development of professional skills, their refinement and updating is pretty much left to the initiative and goodwill of the young graduate for the entire period of his or her career. The modifications of the judicial career introduced in the 60’s and early 70’s in the name of better protecting judicial independence have, therefore, resulted in a radical lowering of the citizens’ traditional guarantees with regard to the professional qualifications of their judges and prosecutors. It has often and rightly been stated that high standards of professional qualifications are not only a precondition for competent exercise of the judicial function, but also and no less the

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<sup>16</sup> G. Di Federico, *Le qualificazioni professionali del corpo giudiziario...op.cit.*, pp. 19-26

<sup>17</sup> *ibidem*.

<sup>18</sup> Thus one of the basic traditional characteristics of western continental judicial bureaucracies, summarily described above in note 4 has been radically changed in Italy.

<sup>19</sup> In the early 60’s the law provided for 6,882 ordinary career magistrates and the number of judicial or prosecutorial positions reserved to those that reached the top of the career was 102. The last increase in the number of magistrates provides for 9,109 of them (in addition there are around 10,000 honorary magistrates) and the number of positions reserved for those that have reached the top of the career is 112. This means that over 2,000 of those that have already been promoted to the highest ranks of the career still occupy judicial or prosecutorial positions of a lower level. It also means that most of them will never be assigned to a judicial or prosecutorial role corresponding to their high career rank.

best personal antidote against improper external influence on professional behavior<sup>20</sup>. In this sense, one can correctly state that the radical lowering of the traditional guarantees of professional qualifications caused by the elimination of any substantial form of evaluation of professional performance during the 40-45 years of service has *per se* brought about also the substantial lowering of one of the main institutional guarantees of independence.

The recurrent, detailed evaluations of professional performance in the course of the life-long judicial career had, in many ways, great relevance in all decisions concerning transfers from one court to another and also for role assignment in the various court and prosecutor's offices. The *de facto* abolition of the detailed evaluations of professional performance, once recurrently made in written form during the course of the entire career, has enormously increased the discretion of the CSM in reaching its decisions in those matters, matters that are as a rule emotionally loaded for the magistrates who, from time to time, compete to be assigned to a more desirable location or to an important office. Our research data clearly shows that in the course of the past 30 years Italian magistrates have progressively realized that their aspirations in those matters must of necessity be cultivated through personal ties with the decision makers and that, no less important, their behavior should not contradict the expectations of the decision makers<sup>21</sup>. The few magistrates who, with their behavior or utterances, have patently ignored those expectations have seen their requests in those matters patently disregarded by the CSM.

In the managing of the relations between the CSM and the magistrates, a special role is played by their colleagues elected to the CSM in the electoral lists of the four factions of the National Association of Italian Magistrates (ANMI). For this very reason almost all magistrates become members both of the ANMI and one of its factions. To be a member in good standing of one of the factions of the ANMI might also be crucial in obtaining the needed support in another area where the decisional discretion of the CSM is, due also to the lack of a detailed code of conduct, quite high, i.e., in disciplinary proceedings.

## 7. Independence and Extra-Judicial Activities

Extra-judicial activities are rather numerous in Italy, and certainly more numerous and threatening for judicial independence and the proper working of the division of powers than in other countries having a long established democratic system<sup>22</sup>. Extra-judicial activities performed on a full or part time basis by Italian magistrates in the last 30 years number in the tens of thousands. Just to give an idea of the extent of the phenomenon let us first consider the type of activities to which the ordinary magistrates may be destined on a full time basis (meanwhile they are placed on leave of absence by the CSM). I shall begin with those off-the-bench activities that bring the magistrates to operate more directly and visibly in partisan politics. Such a phenomenon was rather limited until the 70's: at each national election just a few magistrates (2 or 3) were elected to Parliament. Since then, the phenomenon has constantly grown. In the general election of 1976, twelve magistrates were elected to Parliament, most of them as candidates of one of the two major parties, i.e., the Communist Party and the Christian Democratic Party. In the last national elections of 1996, 50 members of our ordinary magistracy participated in the electoral race as representatives of various parties, and 27 of them were elected (10 senators and 17 deputies). Two others have recently been elected to the European Parliament. In the last 10 years two magistrates have been elected president of regions (another one was recently defeated for that very job); furthermore, in the same period we have had several magistrates-ministers, magistrates-undersecretaries of State, mayors of small and large cities, magistrates elected in the regional and municipal assemblies and in

<sup>20</sup> A. Mestitz, *Selezione e formazione...op. cit.*, pp.35-38.

<sup>21</sup> G. Di Federico, "Lottizzazioni correntizie e politicizzazione del CSM: quali rimedi", in *Quaderni Costituzionali*, 1990, n. 2, pp.69-87.

<sup>22</sup> G. Di Federico, "Gli incarichi extragiudiziari dei magistrati: una grave minaccia per l'indipendenza e imparzialità del giudice, una grave violazione del principio della divisione dei poteri", in F. Zannotti, *Le attività extragiudiziarie dei magistrati ordinari*, Cedam, Padova 1981, pp. XIII-LXXVI.

charge of various branches of local governments. In the early 90's a member of the magistracy was also elected national secretary of a political party (the *Partito Social Democratico*). Other positions to which the magistrates are recurrently destined full-time are those needed to fill all the executive jobs at the ministry of justice (at present 136) and to serve in other ministries as heads of cabinet, heads of the secretarial units of ministers and undersecretaries, members of the legislative departments of various ministries, consultants to parliamentary commissions, consultants to European or other international organizations, and so on (altogether 248 as of March 2000). Then there are part-time extra-judicial activities. These include consultants to local and national governments, study commissions and teaching appointments (918 such extra-judicial activities have been authorized by the Higher Council of the Magistracy in the last 13 months). Only recently another kind of extra-judicial activity, and a very lucrative one, i.e. arbitration, has been cancelled only for the ordinary magistrates (but not for those in the administrative courts).

The foreign observer will certainly be struck not only by the number and kinds of extra-judicial activities that are allowed in Italy but also by the confusion between the magistracy and the political class that ensues therefrom, a confusion that is far from fully revealed by merely considering the rather high number of magistrates who are active in party politics (in assemblies or executive agencies at the international, national and local level) for at least two reasons. Firstly, because -as is obvious- the number of magistrates that entertain relations with the various political parties to obtain those very much sought after positions is far higher than that of those who are successful. Secondly, because a good many of the extra-judicial activities of lesser relevance are obtained under the more or less direct sponsorship of the various political parties. Recurrently they become - or are in any case sought and perceived by the magistrates as - intermediate steps for the acquisition of the political credit and party support needed for the attainment of more gratifying extra-judicial positions.

No less surprising for the foreigner is to learn that at the end of their mandate as party representatives (in Parliament, in the Executive, etc.) the magistrates return to their judicial activities. It is even perfectly legitimate for them to judge a political leader of a party fiercely opposed to the one that the judges themselves had represented for many years in the immediate past.<sup>23</sup>

The possibility for our judges to play prominent roles as representatives of political parties – and thereafter go back to their judicial functions - or to acquire a vast array of extra-judicial activities that are bestowed upon them through the benevolence of external sources is certainly a very limited phenomenon in countries of Anglo-Saxon tradition. Apart from other important considerations (like, for example, the adoption of detailed codes of judicial conduct regulating the matter and their concrete enforcement in the US), the very structure of the judiciaries of those countries precludes the phenomenon of extra-judicial activities from assuming a dimension of any size. In those countries judges are, as a rule, recruited among experienced lawyers to fill a specific vacancy in a specific court. Their destination to other activities – and especially full time activities – would immediately and most visibly raise the question of the efficient functioning of their courts.<sup>24</sup>

The relation between courts and judges is rather different in most civil law countries. As we have already said, in Italy and other western continental European countries magistrates are

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<sup>23</sup> The most evident case occurred last November when a judge of the Court of Cassation, Pierluigi Onorato, who had previously been for many years an MP for the Communist Party – wrote an opinion in which a notoriously anti-communist politician, Marcello Dell'Utri, was sentenced. It is certainly of interest to note that the opinion written by the former communist MP ruled that, in addition to other penalties, the anti-communist MP Dell'Utri be dismissed from his position as member of both the European and Italian Parliaments.

<sup>24</sup> In this regard let me recall as an example that when U.S. President Truman appointed Justice Jackson to the post of American Prosecutor at the Nuremberg War Crime Trials, Chief Justice Stone harshly and recurrently complained not only because that appointment endangered the credibility of the Supreme Court, but also and no less because of the manifold negative consequences on the proper and efficient operation of the Supreme Court deriving from the protracted absence of one of its members.



recruited, predominantly or exclusively, from among young inexperienced law graduates, just like any other corps of civil servants. Furthermore and no less important, they are recruited to satisfy indistinctly the functional needs of the entire network of the courts of the nation (in Italy as in France they are also expected to satisfy the functional needs of prosecutors' offices) and they are at each level of the career functionally inter-changeable. It is quite normal that they -like other civil servants - be available for any functional need of other public institutions. So, when the magistrates obtain full time functions other than the judicial ones, they are not formally taken away from a specific position in a specific court – as would be the case in common law countries – but instead they are taken indiscriminately from the entire corps of the magistracy and in case of need can be replaced by transferring to that judicial office either one of the newly recruited young magistrates or, in the case of a higher court, by transferring a magistrate already in service. In the latter case, however, the procedure and conditions under which the CSM can transfer a magistrate are strictly regulated by the law in order to respect another constitutional provision intended to protect judicial independence, i.e. the so called principle of “immovability”.

The phenomenon of extra-judicial activities. is not uncommon in countries where judges and prosecutors are recruited (jointly or separately) just like other civil servants serving in the various national bureaucracies. In fact the phenomenon of magistrate-parliamentarians is present, though in a much more limited form, also in France and Spain, where magistrates may also be assigned to full- or part-time service in other public agencies. The question thus arises: why has the phenomenon of extra-judicial activities, and in particular of those that are more evidently political in nature, taken on far greater dimensions in Italy than in other countries of Continental Europe, starting from the early 70's?

The main causes of such a phenomenon are, once again, to be traced mainly to the two closely related changes that have occurred in the composition of the Higher Council of the Magistracy and in the career system, changes that have greatly differentiated, from the early 70's, the career system of the Italian magistrates from those still obtaining, in various forms, in countries like France, Spain, Germany or Portugal. As pointed out above, since the 70's promotions to the different levels of the judicial hierarchy of ranks is no longer based either on written or oral exams, nor on the evaluation of written judicial work, and promotions “for judicial merit” to the highest ranks are granted by the CSM even to those magistrates who take prolonged leaves of absence to perform other activities in the executive or legislative branches of government. This opened up the possibility of acquiring rewarding extra-judicial appointments, be they part-time or full-time, without any prejudice to the development of a full fledged judicial career, and continues to inspire an increasing number of magistrates.<sup>25</sup>

## 8. Salaries and Independence

Through a complex combination of judicial initiatives, judicial decisions and powerful pressures on Parliament, prosecutors and judges obtained (in 1984) salaries, pensions and retirement

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<sup>25</sup> Some of the promotions that were decided by the CSM in the first years of the 70's eliminated any doubt and any residual restraint that the magistrates might have entertained on the matter and vividly portrayed to them the advantages of looking for and acquiring prestigious and lucrative extrajudicial appointments. Oscar Luigi Scalfaro -later to become president of the Republic- and Brunetto Bucciarelli Ducci were among the very few magistrates that until then had been elected to Parliament. They had been elected respectively in 1946 and 1948 when they were young magistrates at the bottom of the judicial career. Since then they had always been re-elected as MPs. Until the early 70's they had not progressed in their judicial career. In 1973 they were promoted by the CSM retroactively “for judicial merit” step by step up to the top of the judicial career without having performed judicial functions for a single day in more than 25 years. The advantages for the two magistrates, and for those that later followed in their footsteps, were not only those of the acquisition of a socially prominent position, but also others of a less immaterial nature: until 1993 the members of the judiciary elected to Parliament would receive a double salary and a double pension, i.e. both those of an MP and those of a magistrate. At present they still receive, in due time, the additional pension and the double exit bonus in addition to the other many fringe benefits that are granted to the former members of Parliament. Naturally I could proceed to illustrate also the nature and material advantages of many other extra judicial activities of our magistrates, but it would take too long and certainly be beyond the scope of this presentation.

bonuses that are by far the highest in public service<sup>26</sup>. They have furthermore obtained that the increases in their salaries, pensions and substantial retirement bonuses be based on an automatic mechanism that year after year increases to their advantage the difference between their economic *status* and that of other sectors of the public service. These measures were, once again, requested, justified and obtained as a means to further guarantee the independence of judges and prosecutors from possible, even indirect pressures from the legislative and/or executive branches of government. The very satisfactory level of salaries, retirement benefits, pensions and the automatic mechanisms for their future pay increases were also advocated to foster among magistrates the sense of security, present and future, that is thought to be a necessary prerequisite for an independent and detached exercise of the judicial and prosecutorial functions.

## 9. Independence and Efficiency

Among the nations of the European Union, Italy has always received, year after year, by far the highest number of monetary sanctions for the violations of art. 6, par 1 of the European Convention on Human Rights which requires that judicial proceedings be terminated in a reasonable time. Civil proceedings that last more than 10 years tend to be the rule rather than the exception. The number of criminal proceedings lasting 10 years and more are also numerous and increasing (in 1998 alone the number of criminal proceedings that was terminated under the statute of limitation amounted to more than 130,000). It seems reasonable to assume that various aspects of the Italian judicial system contribute to that unenviable distinction. In particular, two of them, both intended to protect internal independence: a) the elimination of any substantial form of professional evaluation in the course of the career; and b) the continuing policies of the CSM aimed at minimizing the powers and means of supervision and coordination of the heads of courts and prosecutor's offices with regard to the work of the magistrates.

For much that those two aspects of the Italian judicial system might be relevant for the very poor performance and inefficient working of the Italian courts and prosecutor's offices, others are equally relevant. In the first place, the lack of managerial skills: the heads of courts and prosecutor's offices, as well as the magistrates holding executive positions at the Ministry of Justice, are not chosen on the basis of their professional capacities in management, this not being within the realm of the legal culture<sup>27</sup>. The same power structure of courts, prosecutor's offices and Ministry of Justice is such as to keep exclusively in the hands of the magistrates all decisions concerning the operations of the judicial system. Our extended experience in consulting and experimenting in the field of court technologies clearly shows that any attempt to formally assign even a minimum of decisional autonomy to non-judicial personnel possessing the knowledge and professional skills needed to modernize court management has always been rejected in the name of judicial independence<sup>28</sup>. However, this resistance to the introduction of modern managerial methods and skills in the courts may also be found in more or less radical form in countries other than Italy. This resistance seems to be an integral component of the judicial culture. In the course of my experiences and interviews with judges of "Latin Europe", for example, I have always had the very distinct impression that, even unwittingly, they firmly and emotionally believe that any

<sup>26</sup> G. Di Federico, "Costi e implicazioni istituzionali dei recenti provvedimenti giurisdizionali e legislativi in materia di retribuzioni e pensioni dei magistrati", in *Rivista trimestrale di diritto pubblico*, 1985, n. 2, pp. 331-73; . G. Di Federico, "Costi e implicazioni istituzionali dei recenti provvedimenti giurisdizionali e legislativi in materia di retribuzioni e pensioni dei magistrati", in *Rivista trimestrale di diritto pubblico*, 1985, n. 2, pp. 331-73; F. Zannotti, *La magistratura, un gruppo di pressione istituzionale. L'autodeterminazione delle retribuzioni*, Cedam, Padova 1989.

<sup>27</sup> G. Di Federico, Proposte per la modernizzazione dell'apparato giudiziario italiano, in G. Di Federico, G. F. Lanzara, A. Mestitz (a cura di), *Verbalizzazione degli atti processuali, tecnologie video e gestione dell'innovazione nell'amministrazione della giustizia*, Consiglio Nazionale delle Ricerche, Roma 1993, pp. 403-15.

<sup>28</sup> G. Di Federico, "Tecnologie e giustizia: difficoltà passate e future", in M. Fabri, F. Contini, A. Negrini, *Progettazione organizzativa e information technology nell'amministrazione giudiziaria italiana*, Working Papers IRSIG-CNR, Edizioni Lo Scarabeo, Bologna 1999, pp.1-7.

organizational mechanism directed at stimulating and verifying their personal productivity is incompatible with the proper exercise of the judicial function and irremediably in conflict with their independence.

### 10. The Ministry of Justice and Independence

In many countries the role of the Ministry of justice is often suspected of representing an actual or potential threat to judicial independence. In the political systems of Western continental Europe, the Minister of Justice is formally responsible before of Parliament for the proper functioning of the judicial system. *De facto* his actual role varies considerably from one country to another. It is therefore worth considering his actual powers in Italy. The Italian Constitution explicitly assigns to the Minister of Justice two tasks: a) the “organization and functioning of the services of the justice system”; and b) the prerogative of initiating disciplinary proceedings against magistrates. Like his or her colleagues of other countries of western continental Europe, he or she is in charge of preparing and managing the budget of the entire judicial and jail system. He or she also has the responsibility for recruiting most of the non-judicial personnel of the courts and of the prosecutorial offices (once assigned to a court, non-judicial personnel are hierarchically subordinate only to the magistrate heading that court). Over 130 full-time magistrates are in charge of all the executive positions (high, intermediate and low) at the Ministry of Justice, even of those executive positions in charge of very specialized technical decisions (regarding, *e.g.*, the construction and maintenance of courts and jails or the planning and implementation of modern technologies in the courts and prosecutor’s offices, etc.). The investigations that the Minister may need in order to promote disciplinary proceedings before the CSM are to be conducted exclusively by the magistrates of the Ministry. However, in most cases the General Prosecutor of the Court of Cassation initiates the disciplinary proceeding, and the investigations are then conducted by the magistrates of his or her office. The prosecutorial function in disciplinary matters is in any case reserved to the magistrates of the General Procuracy. Worth noting is that for several decades the Minister of Justice has been quite reluctant to initiate disciplinary proceedings whenever there has been even the slightest possibility that his/her initiative might be criticized by his/her political opponents or by the ANMI as an attempt to intimidate the magistrates.

There is a widespread conviction among the magistrates - a conviction that has proved to be successful so far - that all the executive positions in the Ministry must be strictly maintained in their hands as a guarantee that the Ministry of Justice will not take initiatives detrimental to judicial and prosecutorial independence. Even when assigned by the CSM to serve at the Ministry of Justice the magistrates remain under the full authority of the CSM regarding matters of discipline, promotions and future destinations or role assignments as magistrates. As a consequence, in conducting their activities at the Ministry they are much more concerned with fulfilling the expectations of their professional association and of their colleagues who have been elected as members of the CSM rather than the expectations of the Minister himself. The CSM has repeatedly shown its determination to disregard the requests or aspirations of those very few magistrates who did not conform to its expectations while serving at the Ministry of Justice<sup>29</sup>.

Indeed, the role of the Italian Minister of Justice is much weaker than that of his colleagues in other countries of western continental Europe in many other respects as well. To illustrate this point, a summary comparison with the role of the French Minister of Justice might suffice, limited obviously to those aspects that are more closely related to judicial independence:

a) In Italy the CSM is self-activating for all its decisions except for those concerning discipline (for which the CSM acts as judge). In contrast, the section of the French CSM (*Conseil*

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<sup>29</sup> G. Di Federico, “I diritti della difesa: la drammatica testimonianza degli avvocati penalisti e le difficili prospettive di riforma”, in G. Di Federico, D. Giori, A. Marino, A. Negrini, *Codice di procedura penale e diritti della difesa. L’opinione degli avvocati penalisti italiani*, Working Papers IRSIG-CNR, n. 7, Lo Scarabeo, Bologna 1996, pp. 199-201.

*Supérieur de la Magistrature*, see Table 1) that decides on the judges may, concerning most of its decisions, act only at the request of the Minister of Justice.

b) In Italy the Minister of Justice is not a member of the CSM. In France the Minister of Justice is the Vice-President of the CSM, and presides over all the meetings except for those in which the presidential role is performed by the President of the French Republic.

c) In Italy all the activities related to initial and continuing education of the magistrates are fully in the hands of the CSM. In France the *École Nationale de la Magistrature* is connected to the Ministry of Justice and the Minister himself chooses its director from among magistrates of his/her trust.

d) In Italy public prosecutors are totally independent of the Minister of Justice. All decisions concerning public prosecutors from recruitment to retirement are taken by the Italian CSM. In France prosecutors are hierarchically subordinated to the Minister of Justice, with regard to their promotions, transfers, role assignment, discipline, and so on. The section for prosecutors of the French CSM has only advisory powers. Furthermore the French Ministry of Justice has the responsibility to issue directives to the prosecutors in the area of criminal initiative and priorities. In Italy, in contrast, such policy matters are *de facto* totally in the hands of the prosecutors themselves.

In sum one can say that the powers of the Minister of Justice in France *vis-à-vis* the working of the network of courts and prosecutor's offices are recognized to be an integral part of the democratic system of constitutional checks and balances. In Italy, instead, the powers of the Minister of Justice are not only far more limited from a formal point of view, but are also informally very much curtailed by the prominent role played by the magistrates in the day-to-day working of the Ministry.

## 11. Concluding Remarks

At the outset of this presentation I briefly recalled the reasons for which in modern democracies judicial power has acquired far greater political relevance than in the past. I have also summarily indicated the initiatives undertaken by many states to render the activities of the judges more accountable. In no way can one underestimate the difficulties of combining at the operational level the protection of judicial independence with the need to devise and implement measures to insure that the judges, throughout the period of their service, perform their duties with professional competence, diligence, efficiency, impartiality. To insure furthermore that while in office their behavior be such as to inspire the confidence of the community, which in democracy is a basic source of legitimacy for the judicial function. With all the caution deriving from the difficulties of striking a satisfactory balance between judicial independence and accountability, and without any pretense to offer viable solutions on the basis of the experiences of other countries, I nevertheless believe that the brief analysis of judicial independence conducted so far may provide in several respects a profitable ground of reflection for those that are interested in judicial reform with a special concern for judicial independence. I venture to indicate the following:

1. The relation between judicial independence and effective evaluation of professional qualifications in countries where judges are recruited for a specific judicial position from among experienced lawyers is different from that which obtains in countries where judges are recruited from among young graduates on the basis of their theoretical knowledge of the law. In the latter countries, the need to insure the development and refinement of professional skills can hardly be attained without evaluating, recurrently, professional performance on its merits in the course of a life-long service. At the same time, one cannot deny that, by doing so, those who are entrusted with the power to evaluate judicial performance might indirectly influence the judges under evaluation to conform to the (more or less well-perceived) expectations of the evaluators.<sup>30</sup> Neither should the guarantees of professional qualifications be sacrificed in the name of judicial independence (as in

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<sup>30</sup> G. Di Federico, "The Italian judicial profession and its bureaucratic setting", *op. cit*

Italy), nor should the value of independence be sacrificed by too strict a control on the content of judicial decisions. One of the main functions assigned to the judicial councils of the countries of “Latin-Europe” is certainly that of protecting both of those values conjointly. The composition of those Councils and the ways in which their members are chosen (different from country to country, as shown in Table 1), seem to be relevant elements of their proper functioning.<sup>31</sup>

2. Professional excellence reinforces judicial independence and makes a judge less prone to external influence. This is certainly an additional reason to favor the creation of agencies for the initial and continuing education of judges.

3. In varying degrees and different ways, the Ministries of Justice of western continental Europe are conceived as part of the checks-and-balances mechanisms intended to insure court efficiency and accountability, and also to guard against the perils that the corporate leanings of a bureaucratically recruited judiciary, if left to itself, may result in the lowering of the guarantees of professional qualifications. The French Ministry of Justice is certainly intended to perform such a role. Complaints are sometimes voiced in various European countries that such a role of the Ministry of Justice may endanger judicial independence. It is difficult to say if, and to what extent, those complaints are substantiated by facts. However, a radical lowering of the powers of the Minister of Justice, such as that which has taken place in Italy, certainly does not seem to be, *per se* and without other institutional adjustments, the best solution to foster a proper equilibrium among the values of professional excellence, accountability, efficiency and independence.

4. The Italian case shows the importance of establishing a detailed code of judicial conduct to better protect the substance and image of judicial independence, and to provide an adequate “border maintenance” between the judiciary on the one hand and the other powers (legislative and executive) on the other. A detailed code of judicial conduct is not only important to avoid the possibility that, through the acceptance of extra-judicial appointments, participation in partisan activities, or improper behavior in or outside the court, the independence and impartiality (actual and/or perceived) of the judge might be compromised.<sup>32</sup> It is also a protection of judicial independence because a detailed code of ethics, by severely restricting the discretionary powers of those in charge of judicial discipline, relieves the judges from the fear that they could be sanctioned for the content of their judicial decisions.

5. Judicial discipline may prove more effective in strengthening judicial accountability when procedures are established to provide avenues of participation for the citizens.<sup>33</sup>

6. Organizational and technological modernization of the courts may be important in promoting a functional equilibrium among the values of independence, accountability and efficiency by rendering fully transparent the inner workings of the court system, and less discretionary the evaluation of work performance.

In this paper I have dealt with judicial independence with reference to the Italian judicial system where judges and prosecutors belong to the same corps and where, unlike other democratic countries, prosecutors enjoy the same guarantees of independence as the judges. However

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<sup>31</sup> The French Presidential Commission on judicial reforms appointed in 1997 (known as “Truche Commission”) proposed that, in order to avoid the prevalence of corporate leanings, the majority of the Council’s members should not be magistrates. The reform of the Spanish Council of 1985 provided that all the 12 members representing the judges should no longer be elected by their colleagues but instead by Parliament.

<sup>32</sup> A good model to be adapted to the local needs could be the code of judicial ethics of the American Bar Association. For an annotated presentation see J. M Shaman, S. Lubet, J. J. Alfani, *Judicial Conduct and Ethics*, Michie Law Publishers, Charlottesville, Va. 1995. For the Code adopted in Canada see *Ethical Principles for Judges*, Canadian Judicial Council, website [www.cjc.ccm.gc.ca](http://www.cjc.ccm.gc.ca)

<sup>33</sup> For the mechanisms that may be employed to link judicial accountability to the citizen’s expectations, without encroaching on judicial independence, one may look at the experiences of the various judicial conduct organizations operating in various States of the USA. Such organizations permit participation in various ways: a) by allowing the citizens to file their complaints; b) by including representatives of the citizens in the panels that promote investigations, conduct the hearings, and decide on minor sanctions; c) by informing the citizens who have filed complaints of the outcome of the disciplinary proceeding or of the reasons why their complaints could not be considered.

“independence” does not have, and cannot have, the same meaning and implications when used with reference, respectively, to judges and prosecutors, due to the different functions that they are expected to perform. . That is why in democratic countries the guarantees of independence for the judges are, as a rule, quite different from those that concern the prosecutors. To discuss such differences and illustrate in detail the negative consequences that might occur for the proper functioning of the judicial system, as in Italy, when they are not properly taken into account would be complex and, in any case, outside the scope of this paper.<sup>34</sup> Suffice it here to recall that judicial independence is thought to be a necessary (though not sufficient) condition to insure some of the basic characteristics of the judge’s role, *i.e.*, his/her her being a passive agent who impartially adjudicates a controversy, submitted to him by conflicting parties, after having given each party an equal chance to present the reasons in their favor. It is therefore necessary to create the best conditions to avoid that the judge’s decisions be unduly influenced from within or without the judiciary. Furthermore, in a democratic system the same legitimacy of the judge’s role depends not only on being impartial but also on appearing impartial and independent.

The functional characteristics of the prosecutors’ role are rather different. Far from being passive agents their role is by its very nature essentially active. Actually their primary function is to initiate and conduct criminal action, to act as a party in judicial proceedings and also in many countries, Italy included, to supervise or direct the police during the investigative phase. Unlike the judge, the prosecutor is not supposed to be passive, neutral or impartial in the judicial process, nor the legitimacy of his/her role may depend on appearing as such.

Quite evident is also the difference between the judge and the prosecutor with regard to internal independence. The efficient and effective performance of the prosecutor often requires that his/her activities be hierarchically coordinated with those of other members of his/her office or with prosecutors belonging to other prosecutors’ offices. Obviously any such coordination regarding the substance of the judges’ activities and decisions would be a clear violation of their independence. In other words, while it would certainly be a violation of judicial independence if the president of a court should authoritatively instruct the judges of his or her court on how to deal with and adjudicate the cases pending before each of them, the same behavior on the part of the head of a prosecutor’s office would instead be considered legitimate and even necessary for the effective performance of the office, and regularly occurs in democratic countries, both in Europe and elsewhere.

Some of the main differences between judges and prosecutors regarding external independence are equally evident. In all countries the number of criminal violations is such that a good many of them cannot be effectively prosecuted. The definition of the priorities to be followed then becomes of necessity an integral and important part of the choices that need to be made both for the effective repression of criminal phenomena and to insure that all citizens be treated equally in relation to criminal law<sup>35</sup>. Due to the great political relevance of such choices, in most democratic countries they are in various ways, and with different degrees of transparency, defined within the democratic process and become in various ways binding for the prosecutors<sup>36</sup>. In this

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<sup>34</sup> For the negative consequences connected to a conception of prosecutorial independence as coterminous with judicial independence, see Giuseppe Di Federico, “Prosecutorial Independence and the Democratic Requirement of Accountability in Italy. Analysis of a Deviant Case in a Comparative Perspective”, *British Journal of Criminology*, Summer 1998, pp. 371-87.

<sup>35</sup> In some countries -for example England and the Netherlands- prosecutors are not only instructed on the priorities to be followed but are also provided with a list of cases for which prosecution is not in the public interest. For an analysis that deals with this and other aspects of the prosecutorial systems in England and Wales, Scotland, Holland and Germany, see Julia Fonda, *Public Prosecutors and discretion: a comparative study*, Oxford University Press, Oxford 1995

<sup>36</sup> *ibidem*. A French reform commission (*Commission de réflexion sur la justice*), established in 1997 by the President of the Republic Chirac, was officially asked, among other things, to explore the possibility of a new set-up in which public prosecution would no longer be subject to the Ministry of Justice. On this point the French reform commission, presided over by the president of the Court of Cassation, gave a clear cut answer: “..the judicial policies of a nation

respect the external independence of prosecutors does not entail that they should not receive binding instructions of a general nature from outside their corps and should not be held responsible for following those instructions. Rather it entails that they should not receive and be bound to follow *ad hoc* non-transparent instructions with regard to specific cases, so as to avoid that such instructions be unduly used to influence the conduct (actively or by omission) of public prosecution for partisan or discriminating purposes<sup>37</sup>.

Before closing I must confess that I have had a constant feeling of uneasiness while writing this paper, i.e. that it may be misunderstood or, worse, be used for purposes that may run against my own intentions and beliefs. In no way does this paper underestimate the crucial importance of a fully independent judiciary for the proper functioning of a democratic community. However independence is an instrumental value and not an end in itself. It is primarily intended to create the most favorable conditions under which the judge may decide in an impartial way, *sine spe ac metu* (without fear or hope). And it is my firm conviction that those interested or actively engaged in judicial reforms should be made aware that measures adopted with the intention to promote judicial independence should not in any case gravely undermine other values equally important for the proper functioning of the judicial system, such as the guaranties of professional qualification and performance, short of generating -as in the Italian case- serious dysfunctional consequences.

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must, in a democracy, be maintained among the responsibility of the executive in the person of the Minister of justice and, as a consequence it [the Commission] has decided against total autonomy for public prosecution”.

<sup>37</sup> For example, in 1993 the French Parliament approved a law (art. 3, Loi 93-2), which provides that the Ministry of Justice can give such instructions only in written form. In England, the Attorney General is formally empowered to terminate criminal initiatives (*nolle prosequi*). In recent times such a power is *de facto* open to public scrutiny, has been used only on very rare occasions, and when used has not generated criticisms.

**TABLE 1 - Judicial Councils in France, Italy, Portugal and Spain**

	<b>Italy*</b>	<b>France**</b>	<b>Spain***</b>	<b>Portugal****</b>
<b>No. of members</b>	<b>27</b>	<b>12</b>	<b>21</b>	<b>17</b>
<b>Presidency</b>	President of the Republic	President of the Republic	President of the <i>Tribunal Supremo</i>	President of the <i>Tribunal Supremo</i>
<b>Ex officio members</b>	President Supreme Court of Cassation General Prosecutor Court of Cassation	Ministry of Justice (as Vice President)		
<b>No. Of members from outside the Judiciary</b>	<b>8</b> law professors or lawyers elected by Parliament with a qualified majority	<b>3</b> appointed members: 1 by the President of the Republic 1 by the President of the Chamber of Deputies 1 by the President of the Senate	<b>8</b> Jurists elected by Parliament	<b>8</b> appointed members: 7 appointed by Parliament 1 appointed by the President of the Republic
<b>No. of members of the judiciary elected or appointed</b>	<b>16</b> Elected by their colleagues (†)	<b>7</b> elected members 1 judge of the Conseil d'Etat elected by his colleagues 5 judges and 1 prosecutor elected by their colleagues	<b>12</b> judges elected by Parliament	<b>7</b> judges elected by their colleagues <b>1</b> judge appointed by the President of the Republic

\**Consiglio Superiore della Magistratura* -

(†) As judges and prosecutors belong to the same corps and as the Council decides on matters concerning both judges and prosecutors, the active and passive electorate coincide.

\*\**Conseil Supérieur de la Magistrature* : Judges and prosecutors belong to the same corps but there are two different sections of the Council, one for the judges and one for the prosecutors. The section here represented decides on matters related to the judges

\*\*\**Consejo General del Poder Judicial*.

\*\*\*\**Conselho Superior da Magistratura*. In addition, Portugal has also established a different Council for prosecutors, i.e. the *Conselho Superior do Ministério Público*.



