Regulating Judges in Italy

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1. The Political Backdrop

"More sentences and less interviews"; "It is time to open the eyes: real reforms for the citizens". The first phrase is of the Italian Prime Minister Matteo Renzi (who took office in April 2013), around the 20th of December 2014,[1] while the second phrase comes from the site of the Italian Association of Judges and Prosecutors.[2]

It looks like there is still a quite harsh confrontation between the executive and the powerful Association of Judges and Prosecutors (Association of Magistrates – *Associazione Nazionale Magistrati*), which in Italy represents more than 95% of the about 9.000 judges and prosecutors.

This gives a first hint of the current "political backdrop" in which the policies that deal with the regulation of judges are going to be debated and, maybe, implemented.

However, this quite harsh confrontation is much less conflictual than few years ago. Indeed, in the last twenty years, there has been a constant clash between the judiciary and the executive led by the former Prime Minister Silvio Berlusconi (until November 2011).

Nevertheless, Berlusconi's government accomplished a reform in 2005-2007, which dealt with some sensitive issues about the regulation of judges and prosecutors; such as their recruitment, assessment, and discipline, which will be briefly described in this work.

It is a matter of fact that the Italian justice system does not work properly. In particular, the Italian judiciary suffers of a huge caseload, an excessive length of judicial proceedings, and a general lack of legitimacy among the Italian citizens (Commission for the Efficiency of Justice 2014, Fabri 2009).

For some policy makers, the poor performance of the Italian judiciary, in particular the unreasonable length of the proceedings, is also due to an excessive self-regulation and self-reference power of judges and prosecutors, without any real mechanism of accountability. The judges and prosecutors' attitude is seen very conservative, with a very strong protection of their own privileges, opposing to any governance reform of their status, which is considered needed to try to increase productivity.

On the judiciary side, the executive proposals to improve the functioning of the justice system were, and still are, useless, quite often perceived as punitive, and a threat to judges and prosecutors' independence.

[1] http://video.corriere.it/renzi-magistrati-parlino-piu-le-sentenze-meno-le-interviste/03670b60-8393-11e4-a2cc-02f7f9acc66f; http://www.huffingtonpost.it/2014/12/21/matteo-renzi-intervista-messaggero_n_6361804.html.

[2] http://www.associazionemagistrati.it/, download 12 December 2104.

This was certainly the perception in the recent past with the Berlusconi's government, when most of the ruling about the judicial system were considered by judges and prosecutors as a reaction to the criminal investigations on the Prime Minister.

However, as the above mentioned statements reported, even with a different political coalition ruling the country, there is still a confrontation, sometimes quite rude, between the judiciary and the executive.

The new executive reform package about the administration of justice is supposed to touch several issues, such as the code of civil procedure, alternative dispute resolution, anti-corruption law, civil liability for judges and prosecutors. Some proposed changes were just presented that they were immediately criticized by both the Judicial Council and the Association of Magistrates.

I will try to single out in a very limited (probably too limited) number of pages some of reasons behind such a difficult situation, using, partially, the lenses (values, processes, resources, outcomes) suggested by the editors of this book.

Indeed, the Italian case has some of the values for a regulatory regime for judges enshrined in the Constitution, and instill in years of practice. Namely independence, impartiality, and, in a different way, representativeness, are strongly rooted in the judiciary, while some other values, such as accountability, transparency, efficiency have much weaker foundations in the "regulatory pyramid".

The description of the very complex process in the regulation of judges is certainly one of the key issue to try to understand how Byzantine is the judges' regulation, and the dramatic negative effect on the outcomes. This is particularly true for the appointment of the chief judges and the management of courts and prosecutor's offices, as it will be briefly described.

Resources are consistent with what has just been mentioned. Salaries and pensions for judges are among the best in the public sector, while physical infrastructure, support staff, security, even though they are quite variable from court to court, are certainly lacking.

As we will see, the Italian case shows a progressively empowerment of the judiciary in the decision making process and on the day-to-day self-regulation of judges and prosecutors. It should not come to a surprise that they fight for not changing a regulatory status that make them among the most privileged employees within the public sector.

2. The Values Enshrined in the Constitution for the Regulation of Judges

The Italian judiciary system stems from the classical Napoleonic bureaucratic structure, with a roman and civil law tradition (Cappelletti 1984a).

Italy was unified under the Savoia Monarchy in 1861. The law of judicial organization of 1865[3] gave the full managing of the public prosecutor's office with a strict hierarchical structure to the Ministry of justice, while judges enjoyed some independence. Public prosecutors and judges careers were clearly separated until 1890, when the two careers were merged.

[3] Real Decree 6 Dec 1865, n. 2626.

In 1907 was established the Superior Council of the Magistracy, with 21 judges coming from the highest rank. The Council had just some consultative functions to the Ministry of justice. In 1909 the Association of Magistrates was created.

Then, during the Fascist authoritarian regime (1922-1942), the Council did not really have any significant power, while the Association of Magistrates was closed in 1925. The independence of judges was deeply affected by a strong hierarchical setting with the possibility to transfer or to apply a disciplinary sanction to judges and prosecutor by the Minister of Justice.

With the law n. 12 of 1941, the judiciary was even more strictly controlled by the Ministry of justice, with The Council of the Ministers in charge to appoint the heads of the various judicial offices.

In addition, special courts were established to prosecute the political opponents, which was one of the authoritarian face of the regime.

Right after the Second World War, and the end of the Fascist period, one of the first Act of the post-war government was the Legislative decree n. 511, 31 May 1946 (*legge sulle guarentigie*), which intended to re-establish some rules of independence for judges that were restrained during the authoritarian regime. (Guarnieri, Pederzoli 2001).

Judges and prosecutors regained some autonomy from the Ministry of Justice. For example, the irremovability principle was re-introduced, meaning that judges and prosecutors could not be moved from their office without their consent, or as a consequence of a disciplinary proceeding.

Then, the 1948 Italian Constitution enshrined the values of independence and autonomy of the judiciary from any other authority, and established the Superior Council of the Magistracy (*Consiglio Superiore della Magistratura – CSM*) for both judges and prosecutors (from now on the Judicial Council), which started its activity eleven years later in 1959.[4]

The establishment of just a Council for both judges and public prosecutors was probably a backlash after the authoritarian regime. The goal was to increase the independence of public prosecutors, who were under the strict control of the executive power during the Fascist period, and to have a consistent group of values shared among judges and prosecutors.

This was, and still is, a peculiarity among the other European countries, which has certainly contributed to increase the autonomy and the political pressure capability of judges and prosecutors, as a single powerful policy actor.

Indeed, in the Italian justice system, public prosecutors are part of the judiciary and they do not have whatsoever any ties with the executive power. Both judges and prosecutors belong to the magistracy (*magistratura*), as members of the same body they are called magistrates (*magistrati*).

The Judicial Council is the key player in the regulation of judges and prosecutors, and its strong legal legitimacy, as mentioned, comes straight from some articles of the Italian Constitution.

The Council is composed of twenty-seven members: sixteen judges and prosecutors elected by their colleagues,[5] eight law professors or lawyers with at least fifteen years of experience in the

[4] Law n. 195, 24 May 1958

[5] The composition and the electoral system of the Judicial Council were changed by statute no. 44 of 28 March 2002. Currently, the sixteen judges and prosecutors (*magistrati*) elected members of the judiciary must be as

legal profession elected by the Parliament[6] and three permanent (*ex-officio*) members.[7] Every Council remains in office for four years, and members cannot be immediately re-elected (art. 104 Italian Const.).

The election of the magistrates for the Council is *de facto* dominated by the three major factions (literally *streams* - *correnti*) of the National Association of Judges and Prosecutors. It is very rare that candidates are elected to the Council if one of the three factions does not sponsor them. These three political factions of the Association are in some how close to the right-left political spectrum (conservative-progressive). They behave within the Council as strong lobbies for their associates, with many negative consequences for the functioning of the Council and, therefore, of the courts and prosecutor's offices (Di Federico 2012a).

Generally speaking, the large majority of judges and prosecutors do not have direct ties to political parties, but they cannot avoid to have ties with the factions of the Association, which play an important role in the Council and, therefore, in the career, and working position of each judge and prosecutor. For example, the transfer from one court to another, the judicial function performed, the assignment to an extra judicial activity (side-job), the assessment, the election as head of a judicial office, are dealt with by the Judicial Council.[8]

These functions are enshrined in art. 105 of the Italian Constitution, which clearly states that the Judicial Council is the institution in charge of recruitment, promotion, transfers, and discipline for judges and prosecutors.

The recruitment process is mentioned in art. 106 of the Constitution, which states that judges and prosecutors have to be selected through a public competition among the law graduates, plus some kind of additional training, which stresses their knowledge of formal and abstract law.[9] Usually there is one public competition per year,[10] with a written test (civil, criminal, and administrative law), and then, if passed, an oral interview on several law matters.

Judges and prosecutors are then initially assigned to the Italian courts and prosecutor's offices based on the availability and the rank in the examination.[11]

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follows: 10 judges, 4 public prosecutors and 2 judges or public prosecutors working in the Supreme Court or in the Public Prosecutor's Office attached to the Supreme Court.

[6] These members are elected at a joint session of the Parliament with a qualified majority of three fifths of all the members (about 915 people), or a majority of three fifths of the voters after the second ballot.

[7] Permanent (*ex officio*) members of the Judicial Council are: the President of the Republic, the President of the Supreme Court of Cassation and the Chief (called General prosecutor) of the public prosecutor's office attached to the Supreme Court. The President of the Judicial Council is the President of the Republic, who is elected by the Parliament for a seven year term, but for the day-to-day operations of the Council, the Constitution (art. 104 Italian Const.) provides for the election of a vice-president from among the members elected by the Parliament.

[8] The increasing and complex functions carried out by the Council has also increased the number of employees of the Council that are supposed to be about 200 (these data are not public).

[9] Legislative Decree 5 April 2006, n. 160

[10] At the last competition, there were about 20,000 applicants, and generally speaking less than half really show to take the exams. The posts for each competition are usually about 300.

[11] In Italy, there are about 9,000 professional magistrates. 6,302 are judges, 2,108 are prosecutors. There are also about 200 judges and prosecutors who are performing some kind of extra-judicial activity, such as working at the Ministry of Justice or in other ministries or Government office. (e.g. detached to the Constitutional court or to the Judicial Council). Then, there are 680 apprentice judges and prosecutors in training. Along with the so called "professional judges", Italy has a large number of "temporary judges". They serve in the courts of limited jurisdiction in both criminal and civil matters as justices of the peace (about 2,000, statutory ceiling 4,690), or

In general, judges and prosecutors start their career in the judiciary when they are about thirty years old, and they stay in the judiciary until retirement at seventy.[12]

The fundamental irremovable principle for both judges and prosecutors is stated in art. 107 of the Italian Constitution. Therefore, they cannot be transferred from one office to another without their consent, as a fundamental safeguard of independence from internal and external pressures.

As a general principle, judges and prosecutors are neither politically accountable for their decision, nor hierarchically controlled or disciplinary accountable for their interpretation of the law (Cappelletti 1984b).

Since its establishment, there has been a constant increase of the role of the Judicial Council in all the judicial administration matters. This also stems from several laws and Constitutional court decisions that have progressively empowered the Council.[13]

In addition, during the years, the traditional bureaucratic and hierarchical setting was progressively dismantled by both Parliament and, more effectively, by several Circular notes (they are considered "secondary law"), and law interpretation of the Judicial Council, strengthening the values of internal and external independence, as well as of professional autonomy of judges and prosecutors.[14]

This frame has increased the political role of the Council's members, and the factions within the Association of Judges and Prosecutors, due to their very important role in the Judicial Council members' election and in the lobbying activity within the Council.

Only the general budget for the functioning of justice is within the Ministry of Justice, which is in charge (art. 110 Italian Cost.) of the organization and the operation of judicial offices

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judges in the first instance courts of general jurisdiction (about 2,000, statutory ceiling 2,650) or prosecutor's office (about 1,700, statutory ceiling 2,076) under the supervision of the professional judges. The law establishes a ratio between the number of professional posts and the number of temporary judges or prosecutors in each office. Judicial Council website, download 1st December 2014 http://astra.csm.it/organicoOrdinari/orgord.php). These temporary judges and prosecutors have a peculiar status. They are still regulated by the Judicial Council, but they do not have all the protections and safeguards that do apply to professional judges. Their salary is also based on the numbers of hearings and sentenced produced. Their reform is always on the agenda, but nothing has really been done in several years. It is interesting to note that more than 50% of the judges are female, while the percentage is proportionally lower in the public prosecutor's office where there is a majority of men. Female were admitted to judgeship only in 1963. Even today, most of the chief judges or heads of the public prosecutor's office are men, so female are under-represented in the apical positions in comparison to their overall number within the judiciary.

[12] Judges and prosecutors were used to retire at 75, but a recent law will bring the age for retirement at 70. This is still a different status form the other public employee who are supposed to retire at about 67.

[13] For example in 1963 (sentence n. 168 of 1963) the initiative power of the Minister of justice over the Council (meaning that the Council could make a deliberation after the impulse of the Minister of Justice) was quashed by the sentence of the Constitutional Court (Cavallini 2010). In 1975 the electoral law for the Council was amended, so that every single judge no matter the seniority of the functional role could vote and be voted for the Council. In this way, the senior judges lost a lot of power while the young generation raised their representation within the Council. Then the Constitutional Courts stated that the Council had the final word on the election of court presidents and chief public prosecutors, nullifying *de facto* the role of the Minister of justice.

[14] Indeed, the Parliament with some laws in the early 60's avoided the magistrates examinations to move up in the career ladder. In this way the promotions started to be based only on seniority and then the election of the head of the offices turned to be much more connected to the "political decisions" of the members of the Council then on merit. (Di Federico 2005).

(procurement, information technology, administrative personnel, budgeting etc.).[15] This dualism is source of tensions between the judiciary and the executive power, with the classical "pass the buck", as far as the responsibility for the poor performance is concerned (Fabri 2006).

The increased role of the Council, and of judges and prosecutors in the judicial policy making, is due to the above-mentioned factors, but also to a general weakness of the Italian political system, due to a widespread perception of corruption and a very fragmented political arena.

In addition, a number of judges and prosecutors are members of the Parliament. At the time of this writing, the heads of the Justice Commission of both branches of Parliament are held by two former magistrates, as well as the President of the Senate was a well know anti-mafia prosecutor. Judges also hold powerful positions in various Ministries, such as head of ministerial cabinet, or head of the ministerial legislative offices. They also hold key positions within the Ministry of Justice, such as the head of the Department of Prisons, and the head of the General Directorate for information and communication technologies, with more than 100 judges and prosecutors who have been detached to the Ministry of Justice from their judicial functions.

Judges and prosecutors do also seat in international organizations, such as the Council of Europe Committees, or they serve as experts in international cooperation projects.

This very widespread presence in the Government and in the policy-making arenas has certainly played a major role in making Italian judges and prosecutors a powerful elite.

3. The 2005-2007 Reform for the Regulation of Judges

As mentioned, a major reform about the regulation of judges took place in 2005-2007, with the center-right executive. One of the issue dealt with the career progression of judges and prosecutors.

The career of judges and prosecutors, before the 2006 reform, was *de facto* based only on seniority, with four different "steps" along the professional life of judges and prosecutors. This was due to Parliament laws and Judicial Councils interpretations that allowed each magistrate, with few exceptions, to reach the highest level of seniority and salary after 28 years of service. This was possible even though the judges or the prosecutors never changed their working position. For example, judges of the first instance court could reach the top salary level even though they perform the same judicial functions in the same office.

In brief, the argument behind this policy was that judges or prosecutors at the first instance layer can have a very heavy caseload or deal with very difficult matters, so it would not be "fair" to avoid the advancement in the career and the related better salary.

It is also worth mentioning that due to the economic crisis all the personnel of the public sector has suffered a salary freeze in the last years. Judges and prosecutors challenged this law before the Constitutional Court, which sentenced the rule unconstitutional as far as the judges and prosecutors is concerned. Consequently, as far as I know, judges and prosecutors are the only pubic employees who still enjoy a salary increase every two years, notwithstanding the freeze for all the other public employees.

[15] However, the heads of the procurement division, ICT division, and administrative personnel within the Ministry of Justice are held by judges.

The 2005-2007 reform also introduced a quite complicated evaluation for each magistrate carried out by the Judicial Council.

This quite complicated and time consuming assessment takes place for each judge or public prosecutor every four years. It is based on several information coming from the head of the judicial office (e.g. statistics), the local judicial board, and the local lawyer association. The assessment ends with a positive, non-positive, or negative evaluation.[16]

The assessment is then used for salary increases and to change the judges or prosecutors' function or office, but only on the judge or prosecutor's request because of the principle of irremovability. The Judicial Council for each position makes a formal detailed comparative assessment among the various candidates. The comparative assessment has to take into consideration the previous assessments and the specific "attitude and merit" to cover that function.

According to the law,[17] the assessment of each magistrate carried out by the Judicial Council every four years has to take into consideration three fundamental criteria such as: independence, impartiality, and balance.[18] These criteria are considered pre-requisites to carry out the judicial function; therefore, they must be rated positive to proceed with the assessment of the other criteria.

Then, four other criteria have to be assessed such as: professional skills (*capacità*), productivity (*laboriosità*), diligence (*diligenza*), commitment (*impegno*).

For each criterion, the Council has drafted a quite detailed definition. For example, "professional skills" means the magistrate legal knowledge based on the capacity to quote updated law, doctrinal, and jurisprudence changes. For prosecutors, they have to show the capacity to carry on good arguments and investigative skills, also taking into consideration the development of the case. Then, the professional skills should also take into consideration the management of the hearings, as well as the coordination of the personnel and the relationship with other judicial offices.

The "productivity" is defined as the number, quality and timeliness of cases dealt with by judges and prosecutors', taking also into consideration their specific working conditions (e.g. maternity leave, administrative tasks, complexity of the case etc.).

As far as the "diligence" is concerned, the assessment takes into consideration the days spent in the court office, the punctuality during the hearings, the timeframes setting for writing sentences, the attendance to internal meetings.

[16] If the assessment is non-positive, the magistrate goes through another assessment by the Judicial Council after one year. If the assessment is negative, the procedure is done again after two years. The magistrate who gets two negative assessments in the row can be dismissed. Both the non-positive or negative assessment have to follow a very cumbersome procedure, very similar to an adversarial procedure.

[17] Law 111, 30 July 2007, art. 11/2, then the various very detailed Circular notes of the Judicial Council to implement it, see in particular Circular note n. 20691.

[18] As known, these principles are considered the cornerstones of any judiciary in democratic countries. See United Nations (1985); Council of Europe (1994, 1998); Judicial Group (2002), The Bangalore principles; European Network of Council for the Judiciary (2010); Consultative Council of European Judges of the Council of Europe (2010); Seibert-Fohr (2012).

The "commitment" is supposed to be assessed on the availability of judges or prosecutors to make substitutions, and the attendance of training classes organized by the National School of the Magistracy.

It is worth mentioning that for the magistrates that do not perform judicial functions in courts or prosecutor's office (e.g. detach to a Ministerial office, or members of the Parliament), the assessment is still carried out by the Judicial Council, which will be based on a report drafted by the authority in which the magistrates is working.[19]

On my view, this sounds quite bizarre. Judges are assessed by the Judicial Council even though they do not serve as judges or prosecutors. Therefore, they can keep progressing in their career even though they do not perform any judicial function.

Data on this assessment exercises are not public (which is something quite peculiar and that should be changed), but it looks like that the number of positive evaluations is very high, which may raise some perplexity on the effectiveness of this exercise, considering also the very time and resource consuming process.

This complex assessment system by peer review, which was supposed to finally introduce some kind of effective evaluation of judges and prosecutors, does not really seem to have reached the goal, since it looks quite unlikely that almost all the 9,000 magistrates reach a positive assessment. So, this reform seems to have produced "much ado about nothing".

The legislative decree n. 160 of 2006 also introduced a limit to the shift of position between prosecution and judgeship, and vice-versa, which was previously unlimited.[20] The change of functions is now possible for no more than four times in the career life, and after at least five years of continuous service in the same position. The shift is not allowed in the same region or judicial district, with very few exceptions. The change must be approved by the Judicial Council, after a (formal) check that the candidate is qualified to move from prosecution to judgeship or vice-versa.

Another sensitive issue for the regulation of judges addressed by the 2006 reform[21] was the selection of chief judges and chief prosecutors. The selection of the "best candidate" should be based on "merit" and "attitude", with another quite complicated evaluation process carried out by the Judicial Council, which ends with an election among a restricted number of candidates.

According to the Circular notes of the Judicial Council, for the selection of the heads of offices, the "merit" criterion is supposed to take into consideration the whole quantitative and qualitative judicial activities of the magistrate. In somehow, it is a "consolidated evaluation" of the criteria used to the assessment of each magistrate, which takes place every four years.

The "attitude" deals more with the candidates ability to organize, to plan, and to manage the resources of the office. This criterion must take into consideration the previous experiences in managerial positions in courts or prosecutor's offices. These general criteria are then split in several other details items, which appear to make the evaluation exercise wasteful and very complex to manage.

[19] Art. 11/16 Legislative decree 160/2006.
[20] Royal Decree n. 12 of 1941.
[21] Law n. 150 of 2005, then Legislative decree n. 160 of 5 April 2006, and Circular notes of the Judicial Council to implement the Legislative decree.

According to art. 11 of statute no. 195 of 1958, the Minister of Justice is also supposed to consent, jointly with the Judicial Council (*concerto*), to the appointment of heads of courts and prosecutor's offices. In practice, the decision is made by the Judicial Council and only confirmed by the Minister, after the Constitutional Court sentenced that the principle of judicial independence enshrined in the Italian Constitution entrusts the Judicial Council to deal with the career of judges and prosecutors; therefore the last word on the selection of the head of courts and prosecutor's office is of the Council.[22]

As a general rule, since the Judicial Council's decisions are administrative, the candidates that are not elected can file a claim to the Administrative Court in Rome, and most of the time they do. After the decision of the first instance court for administrative matters is also possible to file an appeal before the Council of State, court of last resort for administrative matters. The conflict and the length of these proceedings often produce a long impasse in the management of the judicial office.

Notwithstanding this very detailed procedure to collect "objective" information for a comparative assessment among the candidates, in practice the election to these prestigious positions is still heavily affected by the candidates' membership to one of the faction of the Italian Association of Magistrates.

A decision making process for the career development and the assignment of apical position in the judicial offices, which is based on information that are really difficult to get and to compare, has *de facto* increased the role played by the factions of the judges' Association represented within the Judicial Council.

Just recently, the sensitive post of head of the prosecutor's office in Palermo, the regional capital of Sicily, has drawn a lot of debate due to the election of the youngest professional and apparently, less qualified candidate. The candidate elected did not have any previous experience in leading a prosecutor's office, but he was sponsored by the largest faction of the Association of Judges, and he served as member of Eurojust (European public prosecutors' coordination office in The Hague); a political appointment by the previous center-right executive coalition.

Apparently, this is a typical case in which the membership and political ties of the candidate were much more appreciated than the assessment of "merit and attitude".[23]

One of the faction of the Association of Judges and Prosecutors, who sponsored a different candidate, in its website reported quite strongly its disappointment, stating that the magistrate elected had much less experience and professional skills of the other two candidates that at the end of the comparative assessment were defeated.[24] On the same tone, were the comments of some newspapers that highlighted that the political ties were predominant in this selection process.[25]

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[22] Constitutional court judgment n. 379 of 1992. Then, Law n. 24 of 2010 (based on law decree n. 193 of 2009) has stated that the Minister of justice can argue the different assessments about the managerial attitude of each candidate. However, this does not really affect the final decision, which is within the Judicial Council.

[23] At the time of this writing, the case has been brought before the Administrative Court, which has quashed the appointment for "lack of motivation" by the Judicial Council, and sent it back to the Council for reconsideration.

[24] See *http://www.magistraturademocratica.it/mdem/intervento_all.php?a=on&id=2270, download 18 Dec 2014*

[25] This is just the last example of many that could be done on this issue.

While it has been established an *aura* of "objective criteria" for this complex decision making process, in practice it is a political discretionary process that affect the internal independence of judges and prosecutors.

Indeed, the election of heads of office is mainly based on a "political balance" among the three different factions of the powerful Association of Judges and Prosecutors that are represented within the Council.

The 2006 reform also introduced a time limit in the managerial position of courts, The heads of judicial offices can hold their position for no more than two terms of four years each. The second, and last term, as head of the same office, can be granted after an assessment made by the Judicial Council. The assessment is based on the organizational and management results reached, as well as the judicial function still carried out, considering the size of the office, and then the percentage of time spent as adjudicator in comparison to the managerial tasks. The magistrate also has to draft a report about the activities and the results achieved. Information are also collected from the local Judicial Board and the local BAR association.

Official data on the number of heads of judicial offices that have been confirmed after the assessment are not available, but, as far as it is known, it looks like almost all the heads of the offices have been confirmed for a second term.

Finally, it is also worth mentioning that the law (art. 3 d.lgs. n. 109 of 2006) does not allow judges and prosecutors to be member of a political party. However, it sounds quite inconsistent that judges and prosecutors can be elected in the national or the local Government within a political party and then, at the end of their political term with some restrictions, they can go back to the bench or serve as public prosecutors.

This also happens for magistrates who are called upon to be part of the Government in ministerial positions as deputy minister or head of Ministers cabinet. After, this parenthesis in their working life – that in some cases can be for many years – they can go back to the bench or in public prosecution.

The 2006 reform also dealt with disciplinary proceedings. For more than sixty years the disciplinary actions against judges and prosecutors were based on article 18 of the Royal decree n. 511 of 1946 (*legge sulle garantegie*), which was quite generic. Indeed, art. 18 entailed that judges and prosecutors could be disciplinary accountable if they do not carried out their duties, or they put in place behaviors that jeopardize the trust and the high consideration of the judicial function. This broad definition allowed the disciplinary board of the Judicial Council to have a very fluctuant jurisprudence and, generally speaking, to be very lean with judges and prosecutors.

The center-right coalition with the Legislative decree n.109 of 23 February 2006, singled out the behaviors that are supposed to be disciplinary sanctioned, and set a minimum sanction for the most important ones. The new law also introduced a kind of "compulsory disciplinary initiative" in the hands of the public prosecutor attached to the Court of Cassation, who has to start a disciplinary proceeding every time a complaint is filed. There were several other procedural changes that cannot be explored in this paper.

However, data show that even the new rules do not change much about the lean "disciplinary peer review" carried out by the Judicial Council, even though the Association of Judges and Prosecutors states that the disciplinary procedure, as it is, is very effective.

It has been debated for years if the disciplinary board for judges and prosecutors should be, as it is right now, within the Judicial Council with a majority of magistrates, or a new organism should be established outside the Judicial Council to strengthen the disciplinary function (Cavallini 2011). The debate is still just a debate and any change would not be simple since it would require a Constitutional amendment.

4. The 2104-2015 Reform Proposals

As mentioned, the center-left executive who took office in April 2013 announced a package of reform for the justice sector. It was organized in twelve actions approved by the Council of Ministers the 30th of June 2014, and listed in the Ministry of justice website.[26]

Among the twelve actions proposed, three of them deal with the regulation of judges and prosecutors (magistrates).

However, at the time of this writing, two of them are still just headings in the executive program. The first one is supposed to amend the career process of judges and prosecutors to stress the "merit" and to avoid the pressure of the three factions of the Association of Judges within the Judicial Council. The second one should deal with the composition of the disciplinary board for judges and prosecutors within the Judicial Council. However, for both of them there are not available further details yet.

The third one, which has been very recently enacted by the Parliament,[27] amended the former law on civil liability for judges and prosecutors.

Law n. 117 in 1988 introduced the civil liability for judges and prosecutors in Italy. This law, in brief, entails that a citizen who felt harmed by a sentence can file a complaint against the State before a different court from the one that enacted the sentence. The complaint can deal with gross negligence (*colpa grave*), or intentional fault (*dolo*). The court can immediately reject the case based on some criteria fixed by the law, or it can consider the case for decision.

If the State is convicted to pay a certain amount of money as damage, it has the possibility to file a complaint against the judge who issued the complained sentence, and then recovery as compensation at least part of the damage paid. This amount cannot be above one third of the net salary of the judge.

However, this quite complicated procedure, as far as I know, has never been really used, therefore the executive proposed some amendments, also under the pressure of the European Court of Justice that with a recent sentence stated that the civil liability law did not fit with the European Law.[28]

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[26] https://www.giustizia.it/giustizia/it/mg_2_7.wp;jsessionid=C224E0F7896E10D25CAC49380A6BA70B.ajpAL02

[27] Law n. 18, 27 February 2015, which came into effect March 19, 2015.

[28] Judgment c-379-10 of the 24 November 2014 delivered by the third chamber of the European Court. "The Court: declares that by excluding all liability of the Italian State for damage caused to individuals through an infringement of European Union law on the part of a court adjudicating at last instance when that infringement results from an interpretation of the rules of law or an assessment of the facts and evidence carried out by that court and by limiting that liability to cases of intentional fault or serious misconduct, pursuant to Article 2(1) and (2) of Law No 117 on the reparation of damage caused in the exercise of judicial functions and the civil liability of judges of 13 April 1988 the Italian Republic has failed to fulfill its obligations under the general principle that Member States are liable for the infringement of European Union law by one of their courts adjudicating at last instance".

The main amendments, without getting into too many and complex details, deal with the definition of gross negligence (*colpa grave*), including the clear and gross misapplication of the law, both national or European. Then, it extends from two to three years the possibility to file the claim before a different court, and it removed the preliminary formal check to reject the case by the judge.

The National Association of Judges was very strongly against these amendments, and when the Law was enacted stated: "It is an awful message; politics approved a law against the magistrates [which is] a threat to judicial independence".[29] This law has just been challenged by a judge before the Constitutional Court.

Civil liability is just one issue of the much broader topic of "accountability" in the justice field (Contini 2007, 2014), which cannot be addressed in this paper, however it gives, once more, the idea of the strong position of judges and prosecutors when their regulatory status is at stake.

Another symptomatic example deals with vacation days. Recently the executive has attempted to reduce the number of vacation days of magistrates from 45 to 30 days, as it is for all the other public employees, by a law decree.[30] I wrote "has attempted", because also such an apparently easy issue has been challenged by some magistrates before the Constitutional Court.

In addition, it should not come as a surprise that the Judicial Council has already stated that the law decree was poorly written and therefore, on point of law, the number of vacation days are still 45 for most of the judges and prosecutors that carry on judicial functions.

5. Concluding remarks

It is a matter of fact that the judiciary, the Judicial Council, and the powerful Association of Judges and Prosecutors, have dramatically increased their policy making influence and confrontation with the legislative and executive powers.

Along the years, the Constitutional rules, the establishment of a powerful Judicial Council of the Magistracy, some laws enacted in the 60's and 70's have progressively strengthen and empowered the political role of judges and prosecutors, making them one of the most powerful agent in judicial policy making.

Then, the widespread functions addressed by the Council and its electoral rules, have also contributed to the establishment of a strong Association of Judges and Prosecutors, which is *de facto* a powerful trade union divided into 3 rather conflictual factions, which plays a significant role in judicial policy making and magistrates' career.

The result is a strong and self-reference organization, which is quite impermeable to both external and internal pressure for change.

This is eased by the power of the Judicial Council to enact "secondary rules" (indeed the real implementation rules) for the functioning of the judiciary, as well as for all the matters related to the status of judges and prosecutors. These "secondary rules" are often written to safeguard the self-interest of judges and prosecutors.

[29] www.corriere.it/politica/15_febbraio_24.

[30] Judges and prosecutors do not have a strict number of working hours, so they working days are quite flexible and they can decide to work from home.

This should not come again as a surprise, because the Judicial Council is an organism in which seat the different factions of the trade union of judges and prosecutor, with an overwhelmed majority of two-third within the Council.

The Judicial Council also controls the Judicial School, which is in charge of the continuous training of judges and prosecutors. The Council appoints its board and it has a strong influence on the syllabus and on the teachers, who are usually judges and prosecutors. It is a matter of fact that even in the selection of teachers their membership to one of the faction of the Association of Judges and Prosecutors is kept into consideration. Teachers coming from different perspectives and universities have always had a limited space within the School. This is another example of the self-reference and the inner circle that featured the Italian judiciary.

In addition, judges and prosecutors hold a widespread network of key policy making positions, not only within the Ministry of justice, but also in other Ministries, international organizations, and within the Parliament. This has further increased the role and the self-regulating status of judges and prosecutors without *de facto* any effective accountability system. This has produced a quite strong and impermeable judiciary, which has castling itself in a refractory position to any change that may affect their status.

The attempts to change the regulation of judges in order to introduce some kind of accountability mechanisms and increase the productivity have been quite unsuccessful so far, due to the self-protecting resilience of the judiciary, and in particular of the Judicial Council an of the Association of Judges and Prosecutors.

On this respect, the words of the Association of Judges and Prosecutors are quite clear: "the magistrates reject any conservatism, but they also reject any false idea of innovation. They ask for actions that can improve the effectiveness of judicial administration; they reject any attempt to reform the justice system through the reform of the judges' status".[31]

Judges and prosecutors do have a large independence in their decision-making process, but their regulation system under such a strong and politicized Judicial Council put the system at risk.

In particular, the process of election to the highest position of judicial offices is still political oriented by the different factions of the Association of Magistrates, with a potential dangerous liaison with the members of the Council elected by the Parliament. The decision making process is several times based on political networking. It is enmeshed in a dangerous logic of exchange.

As this paper showed, the process of regulation of judges and prosecutors carried out by the Judicial Council is very detailed, complex and extremely regulated by laws, circular notes, and codified practices. This entails a cumbersome bureaucratic apparatus and a very ineffective and time consuming decision-making process, which goes to the detriment of the functioning of the administration of justice.

Independence and impartiality, as foundations values for the judiciary in democracies, are merely instrumental. Courts are not established to provide judges with independence, but to solve conflicts impartially and in reasonable time.

As this work shows, there is the need to balance the self-interests of judges and prosecutors, which are strongly safeguarded by the Council, and the institutional interests, which, on the

[31] Statement by the general assembly of the Association of Judges and Prosecutors, Rome, 9 November 2014.

contrary, are quite weak. The "regulatory pyramid" needs to be redressed to improve the functioning of the administration of justice.

Indeed, the outcomes of the delivery of justice are really the missing point. So much emphasis is put on safeguards of magistrates' interests, rules and procedures that the outcomes instead of being the lighthouse for any policy making process are left in a corner. This is true for the everlasting procedure that deal with the magistrates regulations (i.e. assessment, election of head of division or court, organizational schema of judicial offices), and it is even truer for the overall performance of the Italian judiciary, which are still very disappointing, even though they can be very different from court to court.

The right to self-governance has to be balanced with openness, accountability, and effectiveness of the delivery of justice.

The relationship between the regulation of judges and judicial independence is crucial, and it will become more problematic as resources shrink. It is not easy to have clear-cut between decisional impartiality and independence, which is fundamental for a democratic system, and operational autonomy, which is not. For example, decisions about working days, facilities, use of information and communication technologies, resource allocations, affect the judges' job satisfaction and morale, but they need to be addressed having in mind the organizational effectiveness of these decisions and not the personal, even legitimate, interest of the judges.

On the one hand, the "regulating pyramid" must protect the basic values such impartiality and independence at its foundations, but, on the other hand, it should provide rules to effectively manage a large and complex entity operating on an increasingly cutback budget.

In an environment where the first instinct is to assess any reform proposal from the perspective of "how will it impact me", it is difficult to have changes and improve the institutional performance.

The re-establishment of checks and balances in the regulation of judges and prosecutors, which do entails values, resources, processes, and outcomes, is needed, even though this is just one of the issue to be addressed to regain some efficiency and a better quality of the Italian administration of justice.

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