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JUDICIARY POWER IN ITALY

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The formal organization of the Italian political system echoes the classical Montesquieu's tripartition of powers. The check and balance among the three main constitutional powers – the legislative, the executive and the judiciary – is firmly claimed by the constitution. Having said that, it has to be underlined that Italy is a parliamentary democratic regime, what gives a certain dominance to the two elected houses, the Senate and the Chamber of the Deputies.

Judiciary power is independent from any other republican power. It responds only to the law, and it is administered by its own organ of discipline: *Consiglio Superiore della Magistratura*, Csm, the Superior Council of the Judiciary. However, the Constitution placed certain interferences/limits on the fullness of the judiciary power:
1) the president of the Republic chairs the Csm[1], appoints one third of the fifteen constitutional judges,[2] grants pardons and commutes punishments[3].

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2) the minister of Justice, through administrative and procedural controls, may deal with specific activities carried on by the magistrates,
3) the parliament can rule at any moment on judicial matters.

What appears under 1) is not an attack on the autonomy of judiciary. Being the head of the state and the representative of the unity of the nation[4], the president is requested to play an activity of guarantee on topic issues of the state, including judiciary.
Furthermore, the president is empowered of moral suasion towards the other constitutional powers, with the aim of stimulating actions, persuading to cooperate, moderating conflicts, and assuring equilibriums. The sentence 1/2013 of the constitutional court, defined those activities as "potere di

1 Italian Constitution (from here on out: Const.), art. 87, 10. https://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf, p. 23.
2 Id., art. 135, 1, p. 37.
3 Ib., art.87, 11, p. 23.
4 Id. para. 1.

persuasione", a subtle and complex art derived from the role's authoritativeness and personal prestige, more than from the position in the pyramid of the constitutional powers[5].

The law March 24, 1958, n. 195[6] regulated the functioning of the Csm. It specifies that the provisions taken by the Council in the exercise of the function of "administration of jurisdiction" will be issued by decree of the president of the Republic[7], and that the president holds the power of dissolving the council in case it is in the impossibility to function[8]. Thanks to his substantial authoritativeness and formal authority, the head of the state should protect the Csm from the triple risk of dependence of the judiciary on the executive[9], party/parliamentary control over the judges, separate and corporative management of the self-government by the judges.

What is under 2) is not an attack on the autonomy of the judiciary either. The administration of justice is attributed to the Csm, whereas belong to the ministry of Justice the organization and operation of related services[10] and the power to originate disciplinary action against one or more judges[11]. Jurisdiction strictly understood is the exclusive prerogative of the judiciary; the management of services relating to justice belongs to the ministry; the administration of the jurisdiction to the Council.

To confirm the above, the content of the art. 16 ("Intervention by the Minister at Csm meetings") of the law n. 195 is a good case. The text says: "The minister may intervene at Csm meetings when he's required by the president, or when he deems it appropriate for making communications or offer clarifications. However he is not allowed to be present at the deliberation."[12]

Point 3) recalls the nature of parliamentary democracy, where the people's representatives are certainly entitled to modify the rules concerning the judiciary, with the only limit of respecting the constitution. When the modifications are proposed or carried on by the parliament without the

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5 The appeal to the court on the attribution conflict between the powers of the state, was brought by the president of the Republic, because during a criminal case, the authorized wiretaps overheard conversations of the president, and the prosecutor in court was ready to rely upon them for prosecution. The court decided that the recordings could not be used and had to be destroyed.

In point 8.3, the ruling wrote: "In order to effectively perform its role of guarantor of constitutional balance and 'judiciary of influence', the president has to constantly weave a network of connections to harmonize any conflicting positions and polemical harshness, indicate to the various holders of constitutional bodies the principles on the basis of which solutions to the various problems that gradually arise can and should be sought, that are as shared as possible. It is imperative that the president complements his formal powers all the time […] with a 'power of persuasion', a power essentially composed of informal activities […]. Informal activities are therefore inextricably linked to formal ones." (Corte costituzionale, 2013).

6 Here's the text: https://www.gazzettaufficiale.it/eli/gu/1958/03/27/75/sg/pdf.

7 Art. 17 of the law n. 195 rules: "All provisions concerning judges are taken, in accordance with the resolutions of the Superior Council, by decree of the president of the Republic countersigned by the minister […]. Id. p. 1270.

8 Art 31 of the law n. 195 rules: "If unable to function, the Superior Council is dissolved by decree of the president of the Republic, after hearing the opinion of the presidents of the Senate and the Chamber of deputies, and of the Presidential Committee.[…]. See https://www.gazzettaufficiale.it/eli/gu/1958/03/27/75/sg/pdf., p. 1272.

9 In the Italian constitutional system, the president of the republic is not the apex of the executive power.

10 Const., art. 110, p. 28.

11 Ib. art. 107, 2.

12 https://www.gazzettaufficiale.it/eli/gu/1958/03/27/75/sg/pdf., p. 1270.

consent of the judiciary, a conflict may arise, bringing out a disagreement between the two constitutional powers. A conflict between a parliament's political group (political party) and the judiciary or part of it, may also take place: it has to be noted that the Italian magistrates are organized in several interest associations, inevitably influenced by political ideas. At this respect, the Italian case is very rich, as it will be analysed further on.

The Italian Constitution on Judiciary Power

Title IV of the Italian constitution is dedicated to the judiciary. Ten articles (Artt. 101-110) of the section I state principles and organization, three articles (101-103) of the section II state the rules on jurisdiction.

Article 101 (Administration of justice) establishes the fundamental principles of the political and institutional environment for any judicial activity done on the name of the republic:
1) the sovereignty of the people over the exercise of justice ("Justice is administered in the name of the people", para. 1[13]),
2) the rule of law and the judiciary's independence ("judges shall be subject only to the law", para. 2).
Article 102 (Judges) defines in three paragraphs the basic rules for making the justice system to operate. Para. 1 requests the "ordinary courts" to carry out "The duties of the judiciary". Para. 2 forbids any "extraordinary or special judge". Para. 3 gives room to the possibility that "the people take direct part in the administration of justice."
Article 104 affirms and defends the independence of the judiciary, a principle which is strongly stated in para. 1: "The judiciary is an independent branch of government and shall not be subject to any other." The other six paragraphs deal with the organization of the judiciary, with special reference to the organ of self-government of the judiciary, the Csm, whose members are elected as follows: "Two-thirds [...] by all ordinary judges among those belonging to the several classes of them, and one-third by parliament in joint session, from among full professors of law and lawyers of at least fifteen years standing." (para. 4)[14]. In addition to the president of the republic, the council has two other members by right: the first president and the attorney general of the court of cassation (para. 3). Para. 7 forbids the members of the organ to be a member of the parliament or of a regional council.
Artt. 105 and 106 carry to practice the principle of autonomy and self-government of the council, giving the organ full jurisdiction "for employment, assignments and transfers, promotions and

13 Const., https://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf, p. 26.
14 The mechanism of the election by the parliamentarians can be seen as a direct and undue interference of the legislators with judiciary power autonomy. Being the parliamentarians organized in political groups, their choices will express partisan ideological evaluations, more than technical appreciation of the persons to be chosen.

disciplinary measures of judges" (art. 105), and making the judges appointed "through competitive examinations" (art. 106)[15].

Art. 107 further reinforces the practice of the above principles, stating that "Judges may not be removed from office; they may not be dismissed or suspended from office or assigned to other courts or functions unless by a decision of the High Council of the Judiciary", giving for granted the guarantee of defence. Judges are distinguished only by their different functions. The state prosecutor enjoys the guarantees established in the prosecutor's favour by the provisions concerning the organisation of judiciary[16].

Art. 108 ensure the functioning of current justice, fixing its total connection to the laws and unequivocally reaffirming the independence of the judiciary[17]. Art. 109 grants the legal authorities the power to the direct use[18] of the judicial police[19].

In relation to the correct placement of the judiciary in the constitution, the debate in the Constituent Assembly (June 1946 - December 1947) pointed out some inconsistencies in the system the elected legislators were producing: one of them concerned the self-government of the judiciary. Mauro Calamandrei, an authoritative liberal lawyer and a very respected voice in the assembly, intervened on the relationship between the council and political power:

> Many of you told me that I am arguing with jurist abstractions, that to put technical rather than political elements in the control and guarantee bodies is against a democratic constitution in which politics must penetrate all mechanisms. […] on the contrary I think […] that one of the fundamental requisites of a democratic order is precisely the safeguarding of certain rights against political interference. In settling this [new] order we consequently need a sense of "minoritary humility". […] in examining the matter of the judiciary self-government. I have been one of the supporters of the self-government, that the project [of constitution] accepted only in part. According to my proposal, the Csm had to be composed only by magistrates elected by the judiciary itself. On the contrary, it will be composed, half, of political elements elected by the legislative organs. [This formulation] prevents from now on the judiciary from obtaining absolute independence the big majority of magistrates deserve. […] in a few decades there will still be a judiciary, worthy of renewed Italy, worthy of full self-government, without which [absolute independence] it cannot guarantee impartially the life of a true democracy […] (Pajno, 2023).

15 Const., idem, p. 27.

16 Ib., p. 28.

17 Art. 108: "The provisions concerning the organisation of the judiciary and the judges are laid out by law. The law ensures the independence of judges of special courts, of state prosecutors of those courts, and of other persons participating in the administration of justice." Ib.

18 Art. 109: "The legal authorities have direct use of the judicial police." Ib.

19 The judicial police depends on the public prosecutor. It is made up of all members of the police force, although they belong to different security bodies (state police, carabinieri, finance guards, custodial officers, forest rangers). Artt. 55-59 of the Code of Criminal Procedure harmonized the engagement of the different profiles, ordering an autonomous title for the judicial police. Details and circumstances of its functioning are established by the above norms. Judicial police departments are established in every public prosecutor's office; they are made up of personnel from the judicial police services. The execution of the powers inherent to the judicial police has to be ordered by the judicial authority. Being structurally depending on various ministries and local powers, the judicial police is in a functional dependency, not in a hierarchical dependency on the judicial authority.

The impeccable considerations and fears expressed by Calamandrei about the risks of the limits to independence when politics and the judiciary mingle, will find confirmation in the course of republican history, as analysed below.

Judiciary under scrutiny

The Italian legal system has been set up by three different political subjects - kingdom, fascism and republic - through a historical process of overlapping,

Piedmont Kingdom carried on the political unification of the country and progressively adapted its "Statute"[20] and laws to the territories of the newly established Kingdom of Italy[21] This kingdom functioned as a constitutional monarchy until 1925, when fascist regime issued laws transforming the legal-institutional structure of the monarchical and liberal state into a totalitarian dictatorship. When, in 1946, the monarchy was abolished by popular referendum, the republican regime was set up, ruled by the 1947 constitution.

Notwithstanding the radical constitutional and legal differences of the three different political-institutional regimes, an element of coherence kept preserved: the *civil law*[22] system. In an Italian court no *stare decisis* is invoked, no former case or earlier judgment results decisive.
As a consequence, behavioral alterations of the rules governing the dialectic between constitutional organs, can be considered legal only when a written binding norm allows or requests those changes. The rule applies to any behaviors not fixed by the norm should arrive in formal relationships between the state institutions. In such a context, *ius* is intended as the entire *corpus* of written norms[23] presiding state and society behaviors, whereas the laws are the positive norms issued according to the constitutional procedures.

The judiciary system is commonly intended as the set of the state bodies able to decide on public and private controversies according to the law. In Italy the exercise of ordinary judicial functions is assisted by the guarantees provided by the constitution: autonomy from any other state power, subjection to the law alone, internal and external independence (i. e. from any hierarchical constraint and outer conditioning), provision of the natural judge previously established by law, irremovability. Supervisory and control powers of the Csm makes that Csm decides on careers, transfers, appointments, and any other measure concerning the status of the magistrates. The

20 In 1848, the king of Sardinia, Charles Albert, granted his subjects the "Statuto", often referred to as the "Albertine Statute" ruling the Savoyard state ever since. In 1861 the Albertine Statute was extended to the entire territory of the newborn state.
21 On 17 March 1861, Victor Emmanuel II of Sardinia was proclaimed king of Italy.
22 It should be understood as opposed to *common law*.
23 Natural law and custom, constitution, EU and national laws, international treaties, the judgments of local, national, international courts.

assignment of judges to the sections into which the offices are divided and to the colleges, the rules by which trials and cases are assigned to individual judges, are governed by a system of regulations called the “tabular system” (*sistema tabellare*). In general those rules are set by the Csm, and in practice by the individual managers of the offices. Every three years, the Csm issues the circular on the formation of tables, predetermining the methodology of “organization tables” to be adopted by each judicial office. The tables will implement the general rules established by the circular. The “tabular system” aims at implementing the constitutional principles on the preconstituted natural judge by law, and on the independence and impartiality of the judge. The aforementioned system operates through three branches: the constitutional, the ordinary and the special jurisdiction. Utmost of references are here reserved to the ordinary jurisdiction, which is given alone by constitution (art. 102[24]).

Being the above essential elements to frame the Italian judicial system, it is understood that this has to act within the political and constitutional system of tripartite division of powers, anything but rigid and well delimited. The principle collides with the stated existing porosity in the constitutional coexistence of the three powers: parliamentary, executive, judicial. That porosity is not at all guarantee of full independence and autonomy for any judiciary: in examining the power of judiciary in Italy, it is reasonable to ask ourselves how much the porosity of the system of the tripartite division of powers increases or decreases that power.

Two more factors have to be recalled. They are specific to the Italian constitutional and institutional situation.

The Italian constitution is probably the only one in EU to explicitly refers to the political parties as a structural factor of the democratic system. Article 49 of the constitution says[25]:

> Any citizen has the right to freely establish parties to contribute to determining national policies through democratic processes.

The constitutional right of associating in political parties has no exception and, albeit under certain conditions, allows magistrates to participate in political life. The ruling of the constitutional court 20 July 2018, n. 170[26] affirmed that this behavior was neither contradictory nor detrimental to political rights, admitting the candidacy in the elections and political assignments of magistrates. At the same time the court ruled active membership in political parties together with systematic and continuous participation in party activity as a disciplinary offense. It is worth noting that the question of constitutional legitimacy had been raised by the disciplinary section of the Csm, in

24 Art. 102 says: “Judicial proceedings are exercised by ordinary magistrates empowered and regulated by the provisions concerning the judiciary. Extraordinary or special judges may not be established. Only specialised sections for specific matters within the ordinary judicial bodies may be established, and these sections may include the participation of qualified citizens who are not members of the judiciary”. Const. id., p. 26.

25 Const., id., p. 15.

26 The text, in Italian, https://www.cortecostituzionale.it/actionSchedaPronuncia.do?anno=2018&numero=170

reference to the content of article 3,1,h of D. Lgs. n. 109/2006[27]: "Discipline of disciplinary offenses of magistrates, of the relative sanctions and procedure for their applicability, […]." The question of constitutional legitimacy had been raised by order of 28 July 2017, referring to articles 2, 3, 18, 49 and 98 of the constitution[28]. The constitutional court declared unfounded the questions of constitutional legitimacy.

According to the court, it must be preserved the meaning of the constitutional principles of impartiality and independence of the magistrates in every aspect of public life. It is a prerogative protected by the rules governing the disciplinary offence of enrolment or systematic and continued participation in political parties of magistrates. The distinction between exercising the passive electorate and actively and organically side with one political side, has to be preserved under all circumstances. At the same time, the prudent appreciation of the disciplinary section will establish concretely if judges temporarily out of office can exercise a political office. The court detailed that while joining a political party is a revealing case of a stable and continued adherence of a magistrate to a particular political party, any automatic sanction is excluded in the case of a specific assessment of the requirements of systematicity and continuity of the participation of the magistrate in the life of a political party. The objective disvalue of the first – said the court - is not susceptible to mitigation.

The correct interpretation and application of the constitution didn't avoid that pervasiveness and tentacularity of political parties jeopardize the principle of independence and autonomy of the judiciary. It is not question of the individual ideological and political beliefs of the single magistrate. The matter becomes delicate when different groups of magistrates are organized on ideological and party basis. It is a phenomenon which takes place in the Italian magistrates environment and can easily turn into episodes of "gang wars" within the judiciary power, and conflicts between sectors of the judiciary and external bodies. The judiciary risks to end up being candidate to repeated internal and external clashes, what, *inter alia*, confuses public opinion, even though the judiciary use to disguise the phenomenon as the exercise of the right to unionize. Confusion is increased by the manipulations carried out through the leak of news from documents

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27 Article 3 deals with disciplinary offenses outside the exercise of functions. Paragraph 1 letter h, considers a disciplinary offense: "systematic and continuous membership or participation in political parties".

28 Quotations from the constitution follow. Article 2: "The republic acknowledges and guarantees the inviolable rights of man, both as an individual and within the social groups in which one's personality is expressed. The republic requires that the fundamental duties of political, economic and social solidarity be fulfilled." Article 3: "All citizens possess equal social dignity and are equal before the law, without distinction of sex, race, language, religion and political orientation, personal and social conditions. […]". Const. ib., p. 5.
Article 18: "Citizens shall have the right to form associations freely, without authorization, for aims that are not forbidden to individuals by criminal law. […]". Const. ib., p. 8.
Article 98: "[…] The law may set limitations on the right to become members of political parties in the case of magistrates, career military staff in active service, law enforcement officers, and overseas diplomatic and consular representatives." Const. ib., p. 25.

or activities covered by the investigation secret, even though the prosecutors of the republic are bound by the secrecy of the investigation[29]. The reprehensible use of the mass media, especially newspapers, as an instrument of pressure on politicians and public opinion, appears as a trade off in which the journalist earns the news and the magistrate gains the necessary support to carry on inquisitorial thesis.

Almost all the magistrates are part of *Associazione Nazionale Magistrati* (Anm), the National association of magistrates: Anm defines itself as a nonpartisan (*apartitica*) organization, representing about 96 percent of Italian magistrates and aiming at "protecting constitutional rights, independence and autonomy of the judiciary"[30]. Anm specifies that it is not a union and consequently lacks any bargaining power on wages established by ministerial decree.

The conflictual matters arise from the internal organization of Anm in political currents[31]. Even though the currents do not identify themselves as belonging to a political party or ideology, media and public opinion place each of them in a specific spot on the political spectrum. When elections take place in Csm[32], the vast majority of votes is expressed on current base; when a magistrate takes a statement in public, media attributes it to the current he belongs.

A quick look at the positions of the Csm currents is needed.

Article 1 of *Magistratura Indipendente,* Mi (Independent Judiciary), statute defines the current a "free association of ordinary magistrates" , affirming "unity, non political nature, independence and autonomy of the judiciary". It is the oldest of the currents, usually considered as influenced by "moderate" politics, placed on the right in Csm.

Magistratura Democratica, Md (Democratic Judiciary), a member of the Csm, defines itself open to all magistrates enrolled or not in the Csm. It is also a member of *Magistrats europeèns pour la démocratie et les libertés,* Medel, identifying itself in the "militant" choices[33] enlisted in art. 2 of Medel Statute. To be noted that Anm is not a member of Medel. Md is usually credited with a progressive and left-wing political orientation.

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29 See artt. 329 of the Italian Code of Criminal Procedure, and 326 of the Penal Code.

30 https://www.associazionemagistrati.it/, where additional information can be found.

31 "I wrote 'currents'. This is a new word, alien to the lexicon of the judges, perhaps borrowed from the language of politics: the main ruling party, the Christian Democrats, was divided into 'currents', and currents were also present in other parties […]." Melis G., *Le correnti nella magistratura. Origini, ragioni ideali, degenerazion*i, https://www.questionegiustizia.it/articolo/le-correnti-nella-magistratura-origini-ragioni-ideali-degenerazioni_10-01-2020.php. The author is narrating the XII national congress of Anm, taking place in 1965 in Gardone. In his analysis, there the currents started operating as centres of power inside Anm, and losing the habit to research and proposal.

32 In September 2022 Csm elections took place. Twenty professional counsellor were elected: 19 of them belonged to the currents, 1 was independent. See Milella L., *Csm eletti i 20 togati. Dominano le correnti,* La Repubblica, 23 settembre 2022, https://www.repubblica.it/cronaca/2022/09/23/news/csm_eletti_i_20_togati_dominano_le_correnti_la_sinistra_di_area_e_md_supera_la_destra_di_mi-366906333/. The title reads: currents dominate Csm elections.

33 The reference goes to the priorities enlisted in article 2, such as: democratic rule of law, human rights, fundamental freedoms, protection of the human differences and minority rights especially migrants and less well-off in a perspective of social emancipation of the weakest, European political union concerned with social justice, democratization of judiciary. Additional information ca be found in https://it.wikipedia.org/wiki/Magistratura_democratica.

Autonomia e indipendenza, A&I, (Autonomy and Independence) presents itself as engine and protagonist of an effective change in Anm. Born in 2015, as a split from Mi, aims at "ensuring and promoting autonomy and independence of judiciary from any interference by any other form of *de facto* centers of power such as, for example, political, economic or financial ones". In its 2021 electoral program engaged itself explicitly in "refusing any form of collateralism with politics"[34]. The current is credited of a certain independence.

Unità per la costituzione, Unicost, (Unity for the Constitution), is open only to magistrates adhering to Anm. In its programmatic document, promotes a model of magistrate "free from preconceptions or ideological prejudices, cultural or social conformism, conditioning or collateralism to centers of political or economic power, fear for the consequences of his decisions and expectations of advantages or protagonism..."[35]. It is held to be on centrist positions.

Movimento per la giustizia, Mg (Movement for Justice*)* was born in the 80s as a split from Unicost. Art. 3 of the statute enlists the purposes of the association: at paragraph 3 reads "the preliminary and fundamental character of the 'moral question' […], refusal of any collateralism with political and economic centers of interest or power..."[36].

Area democratica per la giustizia, Area, (Democratic Area for Justice) is an electoral alliance between Md and Mg, in Anm. The Statute affirms in article 3: "Area comes from an idea of justice as an inalienable need for every person, common good and public function in service to society"[37].

In recent times, the most interesting episode which shed light on the contradictions within the Csm, has been the so called "caso Palamara", from the name of the magistrate involved.

Luca Palamara, was *s*ecretary general of the Anm in 2007, and its youngest president from 2008 to 2012. In 2014 he was candidate by the centrist current Unicost, and elected as a member of the Csm. In 2019 and 2020 media made known that he was under investigation, being accused of acting illegally as a mediator among currents in Csm, playing as "king maker" in the procedure related to the office of Public Prosecutor. In the meanwhile he had also been under investigation for corruption and dissemination of confidential information in Csm. In 2021 and 2022, he was accused of corruption, corruption in judicial proceedings, complicity in disclosing and using office secrets, trafficking in illicit influence. In may 2023, Palamara requested and got the plea deal to one year imprisonment with suspended sentence for trafficking in illicit influences. He has been expelled from Anm and removed from the judiciary by Csm decision. The latter decision has been definitively confirmed by the united sections of the court of cassation.

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34 More information in https://www.autonomiaeindipendenza.it/il-programma-di-autonomia-e-indipendenza/

35 Quotation, and more information, in https://www.unicost.eu/unicost/.

36 Quotation, and more information, in http://www.movimentoperlagiustizia.it/2012-10-09-13-26-52/statuto.html.

37 Quotation, and more information, in https://www.areadg.it/.

In an interview of 2020 he didn't deny his role as a mediator, affirming that many did the same, and that mediations in Csm where consistent with the currents' system in judiciary. He said that he didn't invent the currents, making precise that the method of agreements among currents was not illicit and produced appointments of excellent magistrates. He specified: "public prosecutor posts are coveted, they are places of power. It is true that the currents' system penalizes those who do not belong to it. It is a lie to deny that currents are shortcut. In Csm the judiciary's currents have a preponderant weight. The politician from the outside cannot affect magistrates, but this system favors the mixture"[38].

Behind its specific content, the Palamara *affair* appeared a sensitive issue because it is the protagonists themselves who connect it to the much larger and more relevant matter of judiciary power and the potential conflict between judiciary and politics. Many theorized that the case was useful to bring discredit of the entire judiciary to the maximum level and consequently stimulate the political class and public opinion to strengthen those in parliament and government who want a showdown with the judiciary. Csm e Anm have always opposed every attempt at substantial reforms of the judiciary, because they believe that they would end up weakening the power of the judiciary and undermining the liberal principle of check and balance guaranteed by the constitution. As an example of the debate that spilled over into the media on the two books referred to here, the attention goes to an article signed by M5S[39] senator Roberto Scarpinato. He wrote:

> After being disbarred from the judiciary, Palamara continued the activity of sabotage of the institutions making shore […] to a wide-ranging political operation, whose real objective is […] to undermine overall credibility of the entire judiciary, alienating popular trust and thus creating a favourable climate for the enactment of reforms aimed at normalizing it.

Scarpinato claimed that the two books added up truth and lies, so as

> to bring water to the mill of the vast array that has been trying to accredit for years the conspiracy thesis and mystifying, according to which the trials celebrated in the last thirty years against many exponents of the nomenclature of power, would have been established not for justice purposes but for hidden political goals. […] the historical truth is of a diametrically opposite sign […] Political and economic potentates have ridden the subsystem created by magistrates like Palamara to neutralize and penalize magistrates deemed dangerous for their absolute independence and facilitate the ascent of others deemed reliable.

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38 See https://www.youtube.com/watch?v=t2fNwEmnQiE. Palamara is interviewed by the journalist Sallusti in two subsequent books: Sallusti A. and Palamara L, *Il Sistema. Potere, politica, affari: storia segreta della magistratura italiana*, Rizzoli, Bur, 2021; Sallusti A. and Palamara L, *Lobby & logge: le cupole occulte che controllano "il sistema" e divorano l'Italia*, Rizzoli, Bur, 2022. He frontally accused Md and try to drag the whole Italian judiciary into disrepute.

39 "Movimento 5 stelle" (5 Stars Movement) is a populist party, leaning to left. Scarpinato R., *Il dinamitardo della giustizia*, Il fatto quotidiano, 11 February 2022. https://www.ilfattoquotidiano.it/in-edicola/articoli/2022/02/11/il-dinamitardo-della-giustizia/6489876/.

Given the authority of the person, even more relevant is the position expressed by the magistrate Nino Di Matteo[40], asserting that Palamara has been an active, important pawn, fully functional to a more extensive and tested gear (Lodato and Di Matteo, 2021).

As far as the confrontation between judicial power and political power is concerned, the most illuminating case undoubtedly came from so called “Clean Hands” judicial action. The name identifies the 1992-1994 nationwide judicial investigation carried on against political corruption, which resulted in the end of the political system governing Italy at that time and the disappearance of the political parties involved. Generally shared estimates say that at the end of the judicial activities driven by the impulse of the Milan pool[41], as many as 5,000 public figures had been under investigation, 1,300 convictions and definitive settlements were made, more than half of the members of the Parliament found themselves under indictment, more than 400 city and town councils remained dissolved. Between 31 and 41 persons including prominent politicians, businessmen and managers committed suicide[42], and a previous prime minister and leader of Socialist party fled the country taking refuge in Tunisia.

The opinions on an event splitting Italian post-war history in two, are neither shared nor serene.

At one extreme there is the positive opinion of those who affirm that it was necessary to put an end to an unsustainable situation of generalized corruption, with heavy costs for the national ethics and public finance (in self-defence: Borrelli, 1999; with more balance and a wider range: Buccini, 2021).

At the other extreme there is the negative opinion of those who report at least three limits in the pool actions: the non orthodox methods used to push people to confess, the technique of agitating public opinion in search of populist support against the political parties and the parliament, the lack of impartiality.

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40 Antonino Di Matteo became public prosecutor in Palermo in 1999. From 2010 to 2012 he was president of Palermo Anm district council. From 2019 to 2023 he was elected as a professional counselor (independent) in Csm. In 2022, he was a candidate for the presidency of the Italian republic. Threatened by the mafia, he has been under guard since 1993.

41 Francesco Saverio Borrelli (head of the pool), Antonio Di Pietro, Gerardo D'Ambrosio, Ilda Boccassini, Gherardo Colombo, Piercamillo Davigo, Armando Spataro, Francesco Greco, Tiziana Parenti where the magistrates in charge of Clean Hands investigation.

42 “There were 41 people who committed suicide; it happened in prison, outside of prison, or even before being officially investigated.” See https://www.italianodellafinanza.it/2021/05/23/i-suicidi-di-tangentopoli/. The same in https://www.ilriformista.it/mani-pulite-la-stagione-dei-suicidi-11945/. The authoritative online newspaper *ilPOST* wrote on 17 February 2022 (*Tangentopoli per chi non c’era)*: “Such large numbers have produced some confusion over the years. According to the pool, only in Milan the inquiry *Mani pulite* closed with 620 settlements before the judge for preliminary investigations; 635 people were acquitted; 661 convictions and 476 acquittals concerned people remanded to trial. As for suicides, their number is not known exactly: some sources speak of 31 people, others still of 41, but this is an evidently difficult and controversial estimate.” https://www.ilpost.it/2022/02/17/tangentopoli-personaggi/.

The latter opinion accepts the reasons behind the investigations, but asks whether the inquisitors held a political and ideological *animus pugnandi*, instead of the strict application of the law. The lawyer Alessandro Bernasconi (with other authors) theorized that in those years there was a "government of judges", supported by complicities that neither prevented nor limited it, in particular inside press and tv, "abdicating" the controlling role they deserve and opting for acting as pool speakers. The resulting allegation concerns the nature of the investigation: "a 'single thought' founded on moralistic and justicialist logics." "With corrupt politicians, [clean hands] wiped out political cultures behind.... [Clean hands] wiped out the parties [in government] and only saved Pci-Pds-Ds-Pd as a system of cadres and power"[43] (Bernasconi and others, 2022, cover 2; 36). In American literature it was theorized that Italian democracy was guillotined (Burnett and Mantovani, 1998).

Carlo Nordio, a previous magistrate and in few months minister of Justice in the center-right government of Mrs. Giorgia Meloni, in commenting both cases brought to attention here wrote that the operation Clean Hands was an illusion, and that the remedies were worse than the ills. With reference to Palamara scandal he wrote that citizens' distrust of justice had increased and that for years a civic will of rebellion had been circulating demanding a Copernican revolution of justice (Nordio, 2022).

A central question arises from the two case studies brought to attention: whether in a democratic regime the turnover and the replacement of the political class could come through judicial means, instead of the constitutional way of popular vote. Should traffic of influences within the Csm determine top positions in the justice system; should at the same time prevail the judicial route to political change; the justicialist theorem would be demonstrated as true, because in that scheme the political system would be *de facto* heavily influenced by "interference" from the judiciary.

As a matter of principle, in the democratic rule of law system, power conflicts between constitutional bodies have to be resolved in the constitutional court. Shortcuts appear aberrant and putting democracy at risk. Especially since on the wave of publicity and notoriety obtained thanks to the investigation, the personal career of magistrates engaged in sensitive "political" affairs often turned into political careers. The most sensational case concerned Antonio Di Pietro, the leading magistrate of the Milan pool, and the complete list is very long. One wonders why voluntary resignations are not offered earlier, not taking advantage of the clamor and avoiding to involve the judicial institution in political feuding.

Reforms on the horizon

43 Pds-Ds-Pd are the acronyms changed by the Italian communists with sudden decisions during the 90's, to replace the previous Pci, Italian Communist Party.

The same current Italian justice minister, Carlo Nordio, is a former magistrate. He has the task of carrying out the reform of the judiciary planned by the future winners, in their 2022 electoral programs.

Fratelli d'Italia, the most important partner in the governing coalition, pointed out the following in its electoral program (Fratelli d'Italia, 2022).

In principle "it is needed a justice reform putting an end to the distortions we have witnessed in recent decades, combining guarantees with equity and speed of the judgments." As for the reform of the judiciary, priority of the party goes to:

a- "separation of careers between investigating and judging judiciary, establishing separate access competitions and prohibiting the transition from one to the other";

b- "reform of Csm, establishing the draw for members aiming at defeating the allotment by currents which has greatly undermined the independence and authority of the judiciary";

c- "stop at the revolving doors between judiciary and politics …";

d- "reform of the civil and criminal process, in order to establish effective guarantees for the parties, equal conditions and reasonable duration";

e- others…

On 11 August 2022, the center-right electoral coalition made public the common electoral program (Fratelli d'Italia, Lega, Forza Italia, 2022). On point 3, three commitments for justice reform were announced:

a- "reform of justice and judiciary: separation of careers and reform of Csm";

b- "reform of the civil and criminal process: equal trial and reasonable duration, efficiency of procedures, stop at processing through the media and right to good reputation";

c- "reform of criminal law, rationalization of penalties and guarantee of their effectiveness, ..." .

On 15 Juin 2023, the council of ministers approved the draft law with amendments to the Criminal and Criminal Procedure codes, and proposals on judiciary.

The abolition of abuse of office[44] appeared as one of the main target of the draft law, aiming at canceling 3,623 convictions concerning in particular local administrators. Measures on separation of careers[45] and abolition of mandatory prosecution, together with traffic of influences in Csm,

44 The current article 323 of the penal code reads: "[…] the public official or the person in charge of a public service […] intentionally procuring for himself or for others an unfair patrimonial advantage or causes unjust harm to others, is punished with imprisonment from one to four years". The president of republic will request to avoid the complete abolition of the crime of abuse of office, in order not to collide with EU legislation. https://www.linkiesta.it/2023/07/riforma-giustizia-nordio-modifiche-parlamento/.

45 In late summer 2023, four projects on how to rule the matter were filed in Italian parliament, ready for being discussed at re-opening in September.

announced several times by the minister of Justice, were not included. Two more delicate issues - prescription and telephone tapping[46] – kept also on hold.

It has to be pointed out that the separation of careers between investigating magistrates (prosecutors and investigators) and judging magistrates (court judges and courts) requests a constitutional revision together with an equally sharp revision of the Csm[47].

Coincidentally, while the government decisions on the separation of careers were being implemented, press and tv reported news of possible indictments in the ranks of the government.

On July 8, Anm made an official and firm statement on the government measures, receiving immediate comments from government officials[48].

***Ius* and *lex*: the difference matters**

Check and balance constitutional systems establish democracies on a principle of shared and conflicting tripartite powers. In order do not ruin the state through continuos feuding aiming at making one power to prevail over the others and keep the balance working, those systems fix strict rules and give the constitutional supreme courts the task of resolving any power conflict should arise between the established powers. In doing so, check and balance systems calm down the beastly instincts of power, and institutionalize the behaviours, making the powers placed strictly in their owned usable space and consequently detectable and predictable.

The above systemic scheme may suffer. When one of the three powers violates the systemic unitarian structure, seeking gains for itself in violation of other powers space, the result of the sum zero game it triggered, is that one of the power win what the other(s) power(s) lose(s). In systemic terms the "total" of the sum will not change, but substantial changes may have occurred inside the system; the functions guaranteeing the productivity and subsistence of the system may have

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46 This is a very delicate matter, concerning – inter alia - the right to privacy and the arbitrariness in separating the criminally relevant facts and persons from the others. Please note that the action against Palamara was made possible by a Trojan in his phone.

47 As seen, the two categories belong to the same career, managed by the Csm, and protected by the constitution in terms of autonomy and independence. All candidates to enter the judiciary go through a single type of competition. From ever the judiciary implements a frontal opposition to the proposed modifications.

48 Anm, "following numerous positions taken by government officials", affirms that the project of separating the careers is against "equality of citizens before the law". Taking into consideration that those "positions" come from the ministry of Justice, writes that "incomprehensibility gives way to bewilderment." The statement concludes: "Anm reaffirms with conviction that the constitutional architecture on the separation of state powers is guaranteeing equality of citizens before the law and protection of fundamental rights in the face of any power. These are the foundations of the rule of law and constitutional democracy. Judiciary and exercise of jurisdiction are also in charge of the law". https://www.associazionemagistrati.it/doc/3999/rispettare-le-prerogative-della-giurisdizione.htm

Antonio Tajani, leader of the centrist party "Forza Italia", a junjor partner in government, declares: "I don't see any attacks on magistrates. We will continue with the reform of the Justice … Minister Nordio is a magistrate, it is evident that nobody is seeking revenge against the judges. Parliament makes laws, magistrates apply them" (Bechis, 2023).

Tommaso Foti, *Fratelli d'Italia* leader in the Chamber of deputies, declares: "I see from Anm statement that they search a fight […] In criticism there must be a principle of reciprocity, not exclusivity; otherwise one power would be more power than the other. […] It's not a crime to present a reform of justice in parliament" Rainews, 2023).

undergone strong alterations. It is not given for granted neither that the new systemic distribution of power has generated an equilibrium better than the previous one in terms of efficiency and effectiveness, nor that the new equilibrium is more just and satisfactory in terms of common good.

In terms of Italian political and constitutional system, an exemplification of this zero-sum game can be traced in the affair of parliamentary immunity.

In art. 68 of the constitution, the founding fathers established the immunity for the elected persons to parliament. In doing so, they strongly wanted to protect the mandate received from the people, so that the elected representatives were out of any malicious will: authoritarian executive, partisan struggles, pressure from economic powers, media hostility, mass agitations and passions.

When the thirty-year corruption issue turned into an arm wrestling between judiciary and politics, the above entered a process of underestimation. The magistrates engaged on the ground argued that immunity was an insurmountable obstacle to accountability assessment. With the complicity of the gigantic pressure of "Mani pulite" epic on the parliament, the constitutional law n. 3/1993[49] adopted on 29 October 1993, modified art. 68 of the constitution, cancelling the request for prior authorization of the relevant Chamber to proceed criminally against a parliamentarian and enforce an irrevocable sentence of conviction, in addition to the already foreseen case of *flagrante delicto*. Subsequently, on 20 Juin 2003 the law n. 140/2003[50] regulated the application of the new art. 68.

Carlo Nordio said on immunity during the election campaign of 2022: "The founding fathers […] wanted it precisely as a guarantee against improper interference by the judiciary. They knew very well that someone would use it to his advantage, but they accepted the risk because that of the overlapping of powers was enormously greater, as it later proved" (Antonucci, 2022). As minister of Justice, he reiterated it on several occasions, arguing that thanks to the new legislation on immunity the investigative system had gained speed and chances, but at the same time the principle of democratic protection of representatives of the people had been compromised. Nordio underlined the constitutional difference between the role and nature of a prosecutor (an appointed official, "irresponsible" for the consequences of his acts) and a parliamentarian (an elected by the people, "responsible" to the law and parliament)[51].

49 Here the text: https://www.gazzettaufficiale.it/eli/id/1993/10/30/093G0512/sg.

50 Here the text: https://www.gazzettaufficiale.it/atto/serie_generale/caricaDettaglioAtto/originario?atto.dataPubblicazioneGazzetta=2003-06-21&atto.codiceRedazionale=003G0164&elenco30giorni=false.

51 In many occasions Nordio has pointed out that the revision of the Italian Code of Criminal Procedure in force from october 2019 (https://www.gazzettaufficiale.it/atto/serie_generale/caricaDettaglioAtto/originario?atto.dataPubblicazioneGazzetta=1988-10-24&atto.codiceRedazionale=088G0492&elenco30giorni=false) was produced along the lines of the U.S. model of criminal investigation, in contrast with the provisions of the Italian Constitution on the criminal trial. In U.S.A. public prosecutor is elected and "responsible" to the voters for his behavior, what is not the case in Italy. During a debate (Milan, 26 May, 2022, https://www.radioradicale.it/scheda/669615/presentazione-del-libro-di-carlo-nordio-giustizia-ultimo-atto-da-tangentopoli-al?i=4433479) he called the figure of the Italian public prosecutor "insane", being "unique in the world" to share "immense power and no responsibility", "authorized, with absolute arbitrariness, to embark on any type of very expensive, very long investigation, whose result, even null, will never have to be accountable to anyone". Watch also at https://www.radioradicale.it/scheda/668946/la-riforma-dellordinamento-giudizia

In the tripartite system of liberal democracy, judiciary is the only one of the three powers not holding "politics" in its quiver. Whether executive and representative powers are conceived to transfer their own *weltanschauung* and interests into the institutions they are designed to conquer and administrate, judiciary is conceived not to practice ideologies or interests, but to apply and administer laws created by the other two powers. It is not the law that belongs to the magistrates, but the magistrates to the law. It may happen that the law corresponds to values and interests that do not belong to those who are called to judge. With the exception of very rare cases in which conscientious objection is admitted, the judge must judge according to the law.

This strict interpretation of the tripartite system of constitutional powers implies that the judiciary is obliged to wear its shirt of Nessus. It is understandable that it may be tempted to break the constraint and consider itself not so much instrument that applies the laws, as instrument of popular control over the misdeeds of politicians. The temptation has to be rejected, because to be "mouth of the law" is the limit set by the constitution for the judiciary. Should judiciary chose to cross that boundary and become "mouth of the sovereign people", attributing to itself prerogatives that go beyond those of the "administrator" of the law, it will automatically interfere with the production of laws by the political powers (representative, and executive) whose right-duty is also to regulate the behaviour of the judiciary[52]. Inescapable effect of such an option will be the continue effort of self-protection, i.e. the corporative entrenchment in self-defense of its own guarantees, aimed at a *de facto* subtraction of legislative power to parliament, the representative of the people.
The current relationship between politics and the judiciary in Italy has been correctly summed up by a previous high magistrate at the Court of Auditors, professor of Administrative law, Cinthia Pinotti:

> From the 1970s, the role of the judiciary changed radically […] Gradually but inescapably the judge becomes mouth of the constitution from mouth of the law. The constitution in turn becomes the first point of reference for the protection of rights, if necessary also "against" the law. (Pinotti, 2019, 113)

Pinotti motivates the growing role of judiciary during the following half century period, as a result of the so called "judicial substitution" to the failures of the politicians in fighting terrorism, mafia, criminal organizations, corruption, and in representing the general interest, affirming that, however, an extraordinary situation (the substitution) cannot replace the ordinary one (the title). In examining the Italian difficulty in having a "just justice", the author recalls the torment of Antigone, lost in the

rio?i=4430355, Treviso, Debate of 20 May 2022: *The reform of the judiciary*.

52 An appropriate example of how the risk may become reality, comes from the letter to minister Nordio signed by about 320 retired magistrates, declaring they "feel the need to intervene against the project of separating the careers". After enlisting the reasons behind their opposition, they conclude: "[Unless] the real intent [of the announced rules] is to allow the government to control the action of the prosecutor" (Frosina, 2023). Here the comment of the columnist Piero Sansonetti: "… this letter is the formal deed of foundation of a real party setting the imposition and leadership of the politics of justice and the definition of the limits of the rule of law as his goal" (Sansonetti, 2023).

eternal contrast between *lex* (expression of sovereignty) and *ius* (expression of sacredness proper to the ethical/natural dimension of justice), and concludes:

> *Lex* and *ius,* politics and justice, legislator and judge: two poles of a problem that has always been unsolved. If for half a century the need of reforming justice remained shared by all, how to give a just and equitable synthesis to dialectics bearing different interests […] in confrontation/clash between politics and judiciary, with citizens interested spectators (and electors, and judges, and waiting to be judged? It appears evident that the needed reform (constitutional and ordinary) of justice is far and that the dialectic between *lex* and *ius*, as it has evolved, tends to emphasize the role of the judge. […]. (Pinotti, 116-117)

In ancient Rome, *ius* was intended to elaborate and fix the principles to be respected by the senate and the people: Justinian collected them for future use. *Lex* was made of the specific rules to comply with. *Ius* was to jurists as *lex* to legislators. In present Rome it is necessary to recover the distinction between the two concepts, and act consequently.

Acronyms

A&I	Autonomia e indipendenza (Autonomy and Independence)
Anm	Associazione Nazionale Magistrati (National Association of Magistrates)
Area	Area democratica per la giustizia (Democratic Area for Justice)
Csm	Consiglio Superiore della Magistratura (Superior Council of the Judiciary)
M5S	Movimento 5 stelle (5 Stars Movement)
Md	Magistratura democratica (Democratic Judiciary)
Mg	Movimento per la giustizia (Movement for Justice)
Mi	Magistratura Indipendente (Independent Judiciary)
Unicost	Unità per la costituzione (Unity for the Constitution)

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