Justice and Politics: The Italian Case in a Comparative Perspective

by Carlo Guarnieri[*]

I. Introduction

In the field of administration of justice, all democratic regimes have to satisfy two contradictory demands: the democratic accountability of all those exercising political power and the safeguard of judicial impartiality through guarantees of independence.[1] The first flows directly from the basic principle of any democratic government—the people's sovereignty. The second is equally important since judicial impartiality in disputes involving the State—the main example being the criminal process—is one of the basic guarantees of citizens' freedom in a modern constitutional regime.

The growing political significance of judicial actions, a trend more or less evident in all democratic regimes with roots that lie in deep transformations of the relationship between the citizen and the State, has made it difficult to define the judicial role in passive, executory terms, such as depicting the judge as *la bouche de la loi*[2] and the judiciary as *pouvoir nul*.[3] But if judges are exercising political power more openly, the need to make them accountable becomes stronger. Thus, the result has been an increase in the tensions between democratic accountability and judicial independence, although in a constitutional democratic regime neither of these two principles have to be privileged. Since both of them are an intrinsic part of its nature, they have to be balanced one against the other in some way.

Because of the complexity of the factors involved, there is no ultimate solution to the relationships between politics and the judiciary

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1. Martin Shapiro, *Morality and the Politics of Judging*, 63 TUL. L. REV. 1555, 1589 (1989); MAURO CAPPELLETTI, THE JUDICIAL PROCESS IN COMPARATIVE PERSPECTICE (1989).

2. JOHN BELL, POLICY ARGUMENTS IN JUDICIAL DECISIONS (1983)(citing MONTESQUIEU, 11 DE L'ESPRIT DES LOIS ch. 6 (1748)(translation: "the mouth of the law").

3. *See generally* CAPPELLETTI, *supra* note 1 (translation: "not empowered").

in a constitutional democracy.[4] Actually, different institutional settings are able to satisfy the aforementioned demands, both because there are different ways of settling the balance between these two demands and because the same sort of balance can be satisfied by different settings. In order to assess the Italian case in a truly comparative way, the treatment of this contradiction in other major democratic regimes must be explored.

II. THE JUDICIARY IN DEMOCRATIC REGIMES

Generally speaking, notwithstanding some common characteristics which will become evident, the judiciaries of democratic regimes differ in some significant aspects.[5] Specifically, the organizational setting in which they operate is different: bureaucratic, for the judiciary of civil law systems, and professional, for those of common law. Unlike common law judicial organizations, the judiciary of civil law countries have the following characteristics:[6]

1) the selection of judicial personnel is made through examinations at a youthful age, usually right after completion of university studies, and no consideration is given to the candidate's previous non-judicial experience;

2) the professional training of the judge takes place largely within the judicial body; and

3) organizational roles are ordered according to a hierarchy of ranks. Advancement up the career ladder is competitive and promotions are granted according to formal criteria combining seniority and merit—merit being assessed with great latitude in judgment by a hierarchy of superiors.

4) The approach to work performance and role assignment is of a "generalistic" type. The participants are supposed to be capable of playing all organizational roles formally associated with their rank.

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4. Shapiro, *supra* note 1, at 1557-58; W. Murphy, *Constitutions, Constitutionalism and Democracy*, *in* CONSTITUTIONALISM AND DEMOCRACY (D. Greenberg et al. eds., 2d ed. 1993).

5. CARLO GUARNIERI, MAGISTRATURA E POLITICA IN ITALIA 51-82 (1992).

6. For what follows, see Giuseppe Di Federico, *The Italian Judicial Profession and Its Bureaucratic Setting*, 21 JURID. REV. 40-57 (1976) and GIORGIO FREDDI, TENSIONI E CONFLITTO NELLA MAGISTRATURA (1978). FOR AN ACCOUNT OF JUDICIAL SELECTION IN FRANCE AND GERMANY, SEE BELL, *Principles and Methods of Judicial Selection in France*, 61 S. CAL. L. REV. 1757 (1988) and Clark, *The Selection and Accountability of Judges in West Germany; Implementation of a Rechtsstaat*, 61 S. CAL. L. REV. 1795 (1988).

They are, in other words, to adjust without strain to an extreme variety of diverse tasks, be they to adjudicate a criminal case, a bankruptcy case, a family case, a fiscal case, or to perform as a public prosecutor, and at the same time compete for higher status and positions. The most relevant consequence is that the judge or magistrate is recruited, not for a specific position, but for a wide set of roles. Thus, in the course of a professional career, the judge will tend to change jobs frequently, making the guarantees of independence more problematic because of the influence of the hierarchy of superiors on these changes.

5) In civil law countries, judicial guarantees of independence from the political system generally tend to be weaker. Moreover, due especially to points 3) and 4) above, judges in these countries tend to enjoy a lower degree of *internal* independence, that is, independence vis-a-vis other judges.

In spite of these differences, in both civil and common law judicial organizations there is a need for a check to ensure that the institutional goals are pursued by their members.[7] The problem is obviously dealt with in a different way in Anglo-Saxon judiciaries. Since they tend to employ individuals trained mainly outside the organization, usually with lengthy apprenticeships, they rely less upon internal controls. In Continental Europe, where the personnel is recruited without significant professional experience, young judges are placed at the bottom of the pyramid-like structure where their careers are constantly monitored by an organizational hierarchy.[8]

The organizational setup conditions the reference group, a fact which tends to impact the judges' behavior.[9] In bureaucratic judiciaries the reference group will tend to be inside the organization. Indeed, it is inside the organization that judges tend to be socialized professionally. Moreover, the hierarchical structure entrusts higher ranking judges with strong powers in order to influence the behavior of lower ranking ones, because the higher echelons can control promotions, transfers, and disciplinary proceedings. The case of professional or common law judiciaries is different, since their organizational setting does not lend itself to entertaining notions of a hierarchy, at least in terms similar to Continental Europe.[10] In this case the reference group of judges will

7. EDWARD GROSS & AMITAI ETZIONI, ORGANIZATIONS IN SOCIETY (1985).

8. FREDDI, *supra* note 6.

9. W. MURPHY & J. TANENHAUS, THE STUDY OF PUBLIC LAW (1972); J.L. Gibson, *From Simplicity to Complexity: The Development of Theory in the Study of Judicial Behavior*, 5 POLITICAL BEHAVIOR 7-49 (1983).

10. P.E. Geller, *Staffing the Judiciary and "Tastes" in Justice: A Commentary on the Papers by Professors Bell and Clark*, 61 S. CAL. L. REV. 1849, 1852-53 (1988).

tend to be external to the judicial organization. This is true even accounting for the difference between the English judiciary, whose reference group primarily constitutes a small professional group (the Bar), and the American judiciary, whose composition seems much more diversified and whose recruitment process allows for different types of professional and political influences.[11]

Generally, similar distinguishing characteristics can be found in the content of judicial role orientations. Civil law judiciaries in particular have traditionally defined the judicial role in executory, non-political terms.[12] Even though this is now changing, it is true that more activist role definitions can be found in a common law country like the United States.[13] In Great Britain the prevalence of less activist orientations can be explained by the social and professional background of the judges together with some characteristics of the political system discussed below.[14]

In contrast to the civil law systems, the judiciaries in democratic regimes are characterized by the following common features:

1) the process through which judges are recruited is almost always directly influenced by the political environment. This influence is exercised in different ways. The most important variation is that in civil law countries the process is normally some kind of public competition run by the Ministry of Justice, and therefore by officers or magistrates who are more or less answerable to the political branches. Conversely, in common law countries the political branches of government are directly involved in the appointment process. This is the case in England where the Lord Chancellor (and to a lesser extent, the Prime Minister) has a prominent role, and certainly in the United States, where, at the federal level, appointments are made by the President with the advice and consent of the Senate. In a number of states, judges are elected by local voters, often for limited terms of office.

2) Judicial guarantees of independence, which are always strong and in some cases very strong, are arranged in such a way as to leave

11. P.S. Atyiah, *Lawyers and Rules: Some Anglo-American Comparisons*, 37 SW. L. J. 545 (1983); Gibson, *supra* note 9.

12. JOHN MERRYMAN, THE CIVIL LAW TRADITION 36 (2d ed. 1985).

13. For more details and an attempt at comparing the activism of different judiciaries, see *Judicial Activisim in the United States*, JUDICIAL ACTIVISM IN COMPARATIVE PERSPECTIVE (Kenneth Holland ed., 1991). Holland finds the American judiciary the most active.

14. L. JAFFE, ENGLISH AND AMERICAN JUDGES AS LAWMAKERS (1969); J. BELL, POLICY ARGUMENTS IN JUDICIAL DECISIONS (1983).

some avenue of influence to other political institutions. The avenue of influence is wider and more pervasive in the case of Continental Europe and is reserved to exceptional circumstances in Anglo-Saxon countries.

3) Prosecution is entrusted to magistrates or officers directly or indirectly responsible to some of the political branches, if not to the voters themselves. Existing prosecuting systems range from the classical ministerial structure, either in its centralized (France) or federalized (Germany) version, to a semi-autonomous governmental organization (the Crown Prosecution Service in England), to the peculiar setting of the U.S. federal prosecution, which is more or less under executive control,[15] and finally to the direct election of the chief prosecutor, as is the case in many American states. Only in France do prosecutors and judges belong to the same corps, even though French prosecutors are directly accountable to the Minister of Justice. Elsewhere, judges and prosecutors belong to separate organizations, although they may, under certain conditions, cross over from one branch to the other.[16]

These institutional traits act as checks on judicial power by providing a means by which other branches of government—or, in some cases, the voters themselves—can *indirectly* influence the behavior of judges and the political significance of the judicial system. The influence on the process of recruitment, even when only indirect,[17] helps assure that the values of the individuals who perform judicial functions will not be too inconsistent with those prevailing in the political system. The position of the prosecuting branch is one of the elements that guarantees the passivity of the judicial system and allows the political environment to regulate the demands for action placed upon it.[18]

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15. JAMES EISENSTEIN, COUNSEL FOR THE UNITED STATES: U.S. ATTORNEYS IN THE POLITICAL AND LEGAL SYSTEMS 1 (1978).

16. Only in France and in Italy does the same term—*Magistrature* or *Magistratura*—refer to personnel able to perform both prosecutorial and judicial roles. In Anglo-saxon countries "judiciary" refers only to judges. The same is true for Germany where *Richtertum* refers to judges and *Staatsanwaltschaft* to public prosecutors. Another source of misunderstanding could be that the French or Italian magistrates are far different from the English magistrates, a term actually designating lay judges.

17. In Continental Europe the recruitment of judges is brought about through public competition. In this case political influence cannot be exercised directly, but its strength will be inversely related to the cohesion or the *esprit de corp* of the judicial bureaucracy.

18. According to Alexander Hamilton, "[t]he judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution . . . [It] has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever."

Generally, in democratic regimes the relationships between the judiciary and the political system have been arranged in two ways which roughly correspond to the basic distinction made previously. In civil law countries the political branches—the executive and to a lesser extent the legislative—exercise influence on a judiciary organized along bureaucratic, hierarchical lines through the powers they have over high ranking judges and magistrates. The wider the powers entrusted to the political branches, the stronger this influence will be. Further, the stronger the power of the higher ranking judges and the higher the degree of cohesiveness of the whole judiciary, the stronger this influence will be. The highest influence will be found where the political branches have strong powers over a judiciary organized on a strict hierarchical, pyramid-like line.[19]

In contrast, the influence of the political system in Anglo-Saxon countries is channelled through the recruitment process and, more indirectly, through the reference group of the judiciary. Due to this setting the general values and the role orientations of the judiciary can be, at least in the long run, affected by the political environment. Of course the structure of the political system is also material. A consensual setup that tends to foster a certain fragmentation of political power will support an increase of the political significance of the judiciary.[20] Thus, the more consensual setting of the American political system allows much more political significance to be placed on judicial actions than does the more majoritarian Westminster model in Great Britain which promotes the concentration of power in the executive branch. In the latter case an analysis of British political development shows how the slow but steady consolidation of its majoritarian traits, together with the extension of political participation, has been associated with a decline of the political significance of the judiciary.[21]

In summary, a look at both models shows that a compromise is sought between the two principles of judicial independence and dem-

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THE FEDERALIST No. 78. As underlined by CAPPELLETTI, *supra* note 1, at 30, the passivity of judicial procedure plays an important role in assuring the democratic legitimation of judicial independence.

19. From this point of view, the centralized judicial system of France allows more political influence, at least on the part of the national executive, than the federal one of Germany.

20. For a discussion of the well-known distinction between consensual and majoritarian democratic regimes, see AREND LIJPHART, DEMOCRACIES: PATTERNS OF MAJORITARIAN AND CONSENSUS GOVERNMENT IN TWENTY-ONE COUNTRIES xiii (1984).

21. SHIMON SHETREET, JUDGES ON TRIAL: A STUDY OF THE APPOINTMENT AND ACCOUNTABILITY OF THE ENGLISH JUDICIARY (1976).

ocratic accountability even though the common law model could be considered more in tune with the need to safeguard judicial impartiality without endangering responsiveness. In these countries the check on judicial power is obtained by influencing the values of the judicial corps in a general way, rather than with attempts at directly conditioning judicial behavior.

III. DEMOCRATIC ACCOUNTABILITY AND JUDICIAL INDEPENDENCE IN THE ITALIAN CASE

Traditionally, the Italian judiciary has been structurally very similar to other Continental European judicial organizations; during the Unification (1859-1870), the influence of Napoleonic models of governmental organization was especially strong. Even later, notwithstanding some minor adjustments that perfected its bureaucratic traits, the basic structure did not change much until the end of the Second World War.

As a reaction to past abuses—occurring, but with different intensity, during both the liberal and the fascist regimes—the guarantees of judges and public prosecutors vis-à-vis the executive branch were somewhat reinforced immediately after the war in 1946. However, the hierarchical character of the judiciary was left untouched. The Constitution of 1948 envisaged the institution of a self-governing body of the judiciary, namely the Higher Council of the Judiciary, two-thirds of which was composed of magistrates elected by their colleagues and one-third lawyers and law professors elected by Parliament. All decisions concerning the status of magistrates had to be assigned to the Council. Special guarantees for public prosecutors were also foreseen, while the principle of compulsory prosecution of criminal offenses by the public prosecutor was written into the Constitution.

At first, the constitutional design in the realm of the administration of justice was not implemented. Not until 1959 did things begin to change, leading to a great increase in both internal and external independence of Italian judges.[22] In that year the constitutionally-mandated Higher Council of the Judiciary was instituted which progressively took away the powers of the executive in the administration of judicial personnel— both judges and public prosecutors. The second major modification in the organization of the judiciary concerned the system

22. *See* Di Federico, *supra* note 6; Giuseppe Di Federico and Carlo Guarnieri, *The Courts in Italy*, *in* JEROLD WALTMAN & KENNETH HOLLAND, THE POLITICAL ROLE OF LAW COURTS IN MODERN DEMOCRACIES 153-80 (1988); GUARNIERI, *supra* note 5, at 93-97.

of promotions. Under pressure from the majority of lower ranking magistrates, who were strongly organized in their professional association, Parliament passed a series of laws between 1963 and 1973 which dismantled the traditional system of promotions. The result of this policy is that, today, candidates possessing the seniority to compete for promotion at the different levels of the judicial hierarchy are no longer evaluated, as they were until the 1960s, either on written and oral exams, or on their written judicial works, but instead on a "global" assessment of their judicial performance. In fact, as a result of this global assessment, all candidates who fulfill the seniority requirements are promoted to the highest ranks. This can be explained in part by the way in which the composition of the Higher Council is determined.

As a general result of these processes, a peculiar judicial setting has emerged in Italy, when seen in comparison with other democratic regimes.[23] First, Italian magistrates currently enjoy higher guarantees of both internal and external independence than those found in any other democratic country. The traditional hierarchy has been completely dismantled. In both the process of recruitment and professional socialization and in administering the guarantees of their status, Italian judges and public prosecutors are subject only to limits which are unquestionably less restrictive than those found elsewhere. All decisions relating to them are taken only by the Higher Council of the Judiciary, two-thirds of whose members are magistrates elected by the entire judicial corps. Thus, the Italian judiciary is not subject to the external controls often criticized but still prevalent in France, which remains most faithful to the hierarchical traditions typical of a bureaucratic setting, making its judiciary strongly conditioned by the executive branch. The Italian judiciary is even less restricted than its counterpart in Germany, which is influenced to a certain extent by both the executive and legislative branches. In addition, the recruitment of Italian magistrates, unlike recruitment in common law countries, is completely removed from any institutional intervention on the part of the political environment.

On the other hand, little has changed, except for the aforementioned dismantling of judicial hierarchy, in the bureaucratic setting of the Italian judiciary. The same mode of recruitment, which focuses exclusively on the bottom, with the categorical exclusion of any lateral entry, allows only young graduates with no professional experience into the corps. In addition, the "generalist" approach to work performance and

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23. *See* Appendix, Table 1.

role assignment has not changed substantially. Training is still handled internally even though those instruments that once allowed the judicial elite to control and influence this process are no longer working. At present, unlike the process in other civil law countries,[24] after a short and casual apprenticeship of about one year, the young magistrate is entrusted with judicial (or prosecutorial) functions, and her professional competence is not subject to later evaluations. The result is an Italian judiciary that combines *in an original way* features typical of Continental systems with elements found in Anglo-Saxon judiciaries.

The uniqueness of the institutional setting of the Italian judiciary becomes even more clear considering the position of public prosecutors. In most democratic countries institutional ties exist between the prosecuting officers and the political system.[25] Even with some variation from country to country, specific mechanisms are always in place that allow the prosecution to be influenced by the political environment, at least along general lines. Only Italy shows a different setup in that the institutional means at the disposal of the political system are few and are scarcely used. The status of public prosecutors is identical to that of judges. In fact, as previously discussed, prosecuting magistrates and judges are part of the same body that governs itself through the Higher Council of the Judiciary.[26]

Therefore, Italy stands out for the unusual relationships that exist between the judiciary and the other governmental branches, since the latter are almost completely devoid of *institutional* means of influence over the former. There are basically two types of judges within dem-

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24. A training period of at least two years—sometimes even more—is always foreseen. In common law countries the situation is, as we have seen, completely different.

25. This statement applies also to cases other than those considered here. *See, e.g.*, for Canada, BRIAN A. GROSMAN, THE PROSECUTOR: AN INQUIRY INTO THE EXERCISE OF DISCRETION 24 (1969)("Decisions to initiate or not to initiate criminal proceedings are made by the police for individual or policy reasons and are not always subject to judicial supervision or legislative control.") and C. Baar, *The Courts in Canada*, *in* WALTMAN & HOLLAND, *supra* note 22, at 53-82; for the Netherlands, Austria, Switzerland and Norway, HANS-HEINRICH JESCHECK & RUDOLF LEIBINGER, FUNKTION UND TATIGKEIT DER ANKLAGEBEHORDE IM AUSLANDISCHEN RECHT 83-190, 191-328, 329-494, 484-544 (1979)(pinpoint citations ordederd for countries in list respectively); for Spain, F. GRENADOS, EL MINISTERIO FISCAL (DEL PRESENTE AL FUTURO) (1989); for Sweden, J. Board, *The Courts in Sweden*, *in* WALTMAN & HOLLAND, *supra* note 22, at 181-98.

26. At least for a long time and, to a certain extent, even today, the principle of compulsory prosecution has been interpreted in such a way as to imply a "judicialization" of the role of the public prosecutor. *See* CARLO GUARNIERI, PUBBLICO MINISTERO E SISTEMA POLITICO (1984) (chapter one being most relevant).

ocratic regimes. The common law judge is usually an established professional, recruited at a mature age, who is granted extensive guarantees of independence. The civil law judge enters the judiciary through public competitive examinations, usually right after graduating from a university. He will most often spend his entire working life there, going through the stages of a long career while subject to continuous evaluations from higher ranking colleagues and, in certain cases, from the Minister of Justice. In the common law case, the political branches intervene only during the judge's recruitment or in the rare case of a serious breach of conduct. There is not a judicial career as such because the judges are called to fill specific positions and promotions to higher levels are not always foreseen, at least institutionally. However, a civil law judge does remain subject to various forms of control that limit his independence, perhaps because the initial examination is not believed to be sufficiently reliable. Therefore, at least from these points of view, the Italian setting is today radically different from both traditions.

A principal result is that the actions of Italian magistrates can greatly affect the political environment and, more significantly, the other structures of government.[27] Such political significance supported by the strong guarantees of independence is remarkable in the criminal field due to an arrangement that allows prosecuting magistrates to decisively influence the requests addressed to the criminal justice system regardless of the principle of compulsory prosecution.[28] It is difficult to comprehensively assess the extent to which such institutional conditions have been employed for concrete interventions.[29] However, they allow for politically significant interventions due not only to the *de facto*

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27. *See, e.g.*, GIUSEPPE DI FEDERICO, GLI INCARICHI EXTRAGIUDIZIARI DEI MAGISTRATI (1981); Giuseppe Di Federico, *The crisis of the Justice System and the Referendum on the Judiciary, in* 1 ITALIAN POLITICS: A REVIEW 26 (R. Leonardi & P.G. Corbetta, eds. 1989)(noting "the control that the judiciary, represented by an aggressive elite of the professional association, has been able to exert on the legislative process in matters relating to justice"); F. ZANNOTTI, LA MAGISTRATURA, UN GRUPPO DI PRESSIONE ISTITUZIONALE, L'AUTODETERMINAZIONE DELLE RETIBUZIONI (1989).

28. Even though the principle of compulsory prosecution has been written into Article 112 of the Constitution, it is in practice very often misapplied. *See* Giuseppe Di Federico, *The Crisis of the Justice System and the Referendum on the Judiciary, supra* note 27 and Giuseppe Di Federico, *Obligatorietà dell'azione penale, coordinamento delle attività del pubblico ministero e loro rispondeza alle aspettative della comunità, in* ACCUSA E RUOLO DEL P.M. NELL'EVOLUZIONE DEL SISTEMA ITALIANO (1991). For the general problems involved in its implementation see GUARNIERI, *supra* note 26, at 125-52.

29. *See* Di Federico, *The Crisis of the Justice System and the Referendum on the Judiciary, supra* note 27 and Di Federico, *Obligatorietà dell'azione penale, coordinamento delle attività del pubblico ministero e loro rispondeza alle aspettative della comunità, supra* note 28.

discretion enjoyed by public prosecutors but also to the delays in the criminal process. This tends to put the emphasis on the *initiative*—the charging decision—as opposed to the judgment.

However, it must be stressed that political interventions are more likely to occur today than in the past. This is true because of the pressure put on by interested political actors and also because the present-day judicial organization no longer seems capable of upholding the traditional definition of the judicial role. Of course these facts are independent of the general transformation that has occurred in the judicial role in democratic regimes.[30] As in other civil law nations, the traditional concept of the judge is that of a technical, passive relator of academic doctrine.[31] As previously shown, the influence of higher ranking judges has been radically reduced. The influence of academic doctrine has also lessened, not only because it appears today much more diversified than before—many are advocating a more activist posture by the judges—but also because of the organizational mechanism that once supported its importance. That is, the evaluation of judicial rulings (and therefore the judges' conformity to the trends of the doctrine) as a basis for career advancement are no longer working.[32]

Moreover, two other important phenomena seem to be related to such an institutional setting. The first is the development of organized factions (*correnti*) inside the judiciary.[33] This phenomenon can be found in France and Spain, but has acquired higher relevance in Italy because of the role, unheard of in other countries, that the correnti play in crucial decision-making bodies such as the Higher Council of the Judiciary. As has been illustrated, these organized factions were born

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30. CAPPELLETTI, *supra* note 1; P. Pederzoli, *Il giudice nei regimi democratici*, *in* 20 RIVISTA ITALIANA DI SCIENZA POLITICA 293-329 (1990).

31. FREDDI, *supra* note 6 and MERRYMAN, *supra* note 12.

32. *See* Di Federico, *supra* note 6 and Giuseppe Di Federico, *Le qualificazioni professionali del corpo giudiziario: carenze attuali, possibili riforme e difficoltà di attuarle*, *in* 33 RIVISTA TRIMESTRALE DI SCIENZA POEILIZA DELL AMMINISTRAZIONE 21-60 (1985); GIORGIO REBUFFA, LA FUNZIONE GIUDIZIARIA (1986); MIRJAN DAMASKA, THE FACES OF JUSTICE AND STATE AUTHORITY: A COMPARATIVE APPROACH TO THE LEGAL PROCESS 48 (1986). We should not miss the important role played in stimulating a more critical approach to positive law by the introduction, in 1956, of the judicial review of legislation, as well as by the increasing role of the EEC norms and regulations. *See* CAPPELLETTI, *supra* note 1.

33. The professional association of the Italian magistrates (ANM) is officially divided into ideologically differentiated factions, each with a stable, even if small, organizational structure. The main factions are, from left to right: *Magistratura Democratica*, *Unità per la Costituzione*, and *Magistratura Indipendente*.

from conflicts that developed within the judiciary over a specific theme, namely the career. They have become the instrument through which the magistrates effectively articulate their demands to Parliament and to the government even though the strength of the correnti is due mainly to the influence they exert on the Higher Council. The changes in the body's electoral rules, especially the introduction in 1975 of a proportional system with competing lists of candidates, have strengthened the correnti; since 1976, all magistrates elected to the Higher Council have belonged to one or another *corrente*. In fact, the possibility of being represented in the Council has been offered to all the main groups.

Yet the role of the correnti cannot be understood without noting the dismantling of the hierarchical structure of the judiciary. This has occurred by the *de facto* exclusive association of rank with length of service which has deprived the Council of criteria with which to evaluate magistrates. This becomes relevant, for example, in making appointments to higher positions or in deciding on transfers when service applicants compete for the same position.[34] When the Council finds itself in the position to choose among candidates of the same rank, who are all, at least formally, equally qualified, the tie of a candidate to a faction or a party may become highly relevant. In other words, the transfer or "promotion" to a given position occurs, when not on the basis of simple seniority, very likely as a result of a deal among the factions and the parties, which often support one another in reciprocal exchanges.[35] In this way, magistrates—at least a not insignificant number in some degree "interested" in decisions to be made by the Council—cannot fail to take into account the logic of its decision-making, being aware of the complex configuration of factional and party forces that play a role in it.

Given this internal politicization, it is natural that there has emerged a development of connections between the judiciary and the larger political environment. The origin of these connections can be traced to the period when the lower ranking magistrates tried to reform, or more accurately to abolish, the career system. At that time, they successfully influenced the political parties to achieve their goals. But the growing political significance of the Italian judiciary in the last 20

34. Di Federico, *Le qualificazioni professionali del corpo giudiziario: carenze attuali, possibili riforme e difficolta di attuarle*, *supra* note 32; REBUFFA, *supra* note 32, at 62-68.

35. We have to remember that the Higher Council is presently composed, outside of the 20 magistrates elected by the corps, of ten lawyers or law professors chosen by Parliament, usually along strict party lines.

years has also given a strong incentive to the political class to carefully cultivate the judiciary. Personal ties are difficult to document in full. They often have been reported to be based on the flourishing of extrajudicial duties assigned with remarkable frequency to many magistrates by the political and social environment.[36] Another sign of the development of such connections, and of their ramifications in other institutions, is the growing number of magistrates who have been elected to Parliament and experienced rapidly rising political careers.[37] Personal ties often support more complex relationships among groups, or factions, of magistrates and parties.[38] In the latter case, there are naturally some connections of an ideological nature. The most visible one is that between the Magistratura Democratica and the parties of the left.[39] But there are also different ties that may be called "opportunistic." In any case, such connections, which often cause tension and conflict, principally tend to produce the exchange of reciprocal favors between magistrates and parties.[40] Such exchanges have found a useful institutional seat in the Higher Council, where representatives of the magistrates' factions continuously interact with the representatives of both government and opposing political parties.[41] Yet, it is difficult to conceive of politicians and magistrates as two distinct and opposing groups because of the strong ties that in some way bind them. This phenomenon

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36. The range of extrajudicial duties of Italian magistrates is extremely wide. Among them an important role is played by well-paid appointments as an arbitrator, often in disputes between state-owned companies, or by appointments as a consultant for various governmental departments. For more details see DI FEDERICO, GLI INCARICHI EXTRAGIUDIZIARI DEI MAGISTRATI, *supra* note 27 and F. ZANNOTTI, LE ATTIVITÀ EXTRAGIUDIZIARIE DEI MAGISTRATI ORDINARI (1981)(this is a study based on 16 years of research sponsered by the Instituto Politica Amministrativo of the University of Bologna).

37. In the present Parliament there are 13 magistrates. There have also been some cases of magistrate ministers or deputy ministers. Magistrates elected to parliament or performing governmental functions are on leave from their corps but keep the right to be reinstalled after leaving their political or administrative jobs. However, their career—i.e., their "promotion" by seniority to higher ranks—is not affected by the time spent on leave outside the corps.

38. ZANNOTTI, *supra* note 27 (1989).

39. S. PAPPALARDO, GLI ICONOCLASTI MAGISTRATURA DEMOCRATICA NEL QUADRO DELLA ASSOCIAZIONE NAZIONALE MAGISTRATI (1987).

40. This context could explain, for example, the long and often ineffective—at least until a few months ago—investigations into political corruption as well as parliamentary generosity in setting judicial salaries. For some data on the connections between politicians and magistrates at the local level note the research carried out by DONATELLO DELLA PORTA, LO SCAMBIO OCCULTO: CASI DI CORRUZIONE POLITICA IN ITALIA (1992)(the book looks at corruption in Genoa, Florence, and Catania).

41. Rebuffa, *supra* note 32.

is exemplified by the conflict that erupted, most intensely between 1990 and 1992, between the President of the Republic and the Higher Council. The alignments which emerged inside the Council at that time can be interpreted as evidence that the conflict was not simply between magistrates, on the one hand, and politicians, on the other.[42] Such conflicts have, until recently, acted as a sort of check on the power of the judiciary, because they have affected its actions even though they were not institutionally foreseen.

IV. SOME TENTATIVE CONCLUSIONS ON THE ITALIAN CASE

Not surprisingly, the growth of judicial power in Italy has triggered strong responses from the political environment. The cooptation of magistrates by political forces, even though not always successful, has been made easier by their low institutional identification. Their mode of recruitment makes them bureaucratic but not unburdened by subsequent checks. Another consequence has been the increasing role of the Higher Council. In recent years, the political significance of this body has steadily increased, progressively eroding the traditional position enjoyed by the Court of Cassation as the apex of the judicial system. Even though the Court of Cassation remains the court of last resort, at least in the "ordinary" jurisdiction,[43] the Higher Council exercises a potentially strong influence on the behavior of judges through the role it plays in administering their status. The Italian case can be interpreted as an example of the rather obvious statement that power systems are complex. It is impossible to completely conceal the influence of the political environment on the judiciary. In every democratic regime the judiciary is in some way influenced by politics: "The 'disconnectedness' of the judicial process from the political system . . . is only relative . . . What distinguishes judicial from other kinds of political actors is not that the judges are outside the system but that they are related to it in a different fashion than are other decision makers."[44] If this connection is not achieved, at least primarily, through institutional means, it will be achieved through non-institutional ones—extrajudicial duties—or through an exploitation of the few that are institutional, for example, through the role played by the Higher Council.

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42. It was at this time when President Cossiga was confronted by the Vice-President, a former Christian Democrat politician and lay member of the Council, and by the majority of both magistrates and lay members.

43. In Italy, as in other civil law systems, there is a separate judicial system for administrative matters with the Council of State at its apex.

44. J. Peltason, *Judicial Process*, 8 INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL SCIENCES 283-91 (1968).

In Italy the exchanges between politics and the judiciary do not follow the main models outlined above. The internal hierarchy has been dismantled. Therefore, the power of the higher ranking judges as well as that of the government has been dramatically reduced, especially in comparison with other civil law countries, even though the political system is able to exercise influence through its representatives in the Higher Council. Some magistrates have been able and willing to pursue unorthodox policies even though they are not held in any way democratically accountable for their decisions. On the other hand, the shortcomings of this setting are also clear. There is little guarantee of the professional quality of the judiciary, and as the decision-making inside the Higher Council demonstrates, political considerations have spread through the judicial corps. Thus, Italian judges and magistrates can be said to have become highly politicized, with their behavior conditioned by political considerations both internal and external to the corps.

In this context, the political election of April 1992 marked a new phase in the evolution of the Italian political system. The decline of the electoral fortunes of all main parties, as well as the rise of new parties—a trend that has been reinforced by following the administrative by-election—has shown an emerging new attitude in public opinion, at least in Central and Northern Italy. This attitude has had an immediate impact, for example, on the recent willingness shown by many businessmen to give evidence to prosecutors investigating corruption of public officials. In this new situation, prompted by a spreading popular dissatisfaction with the performance of the political system as well as a growing internal conflict between and inside parties, the judiciary, or at least a part of it, has decided to take its chance. But in the beginning only a few prosecutorial offices decided to follow the example of Milan where the most relevant corruption investigation has been carried out.

The offices in the South have so far shown a remarkable degree of caution. Only recently have the prosecutors in Naples started to investigate many notorious scandals that have plagued that area, and the intent of their initiatives is not always clear. Even placing former Prime Minister Andreotti under investigation on charges of organized crime connections was decided only after a new chief prosecutor, a magistrate from Turin, was appointed to the office in Palermo. Actually, only part of the judiciary, that less connected with the traditional political parties, is resolutely moving to fight corruption. The rest have taken a "wait and see" attitude.

As a general evaluation, based on a comparative analysis of the institutional setting of the judiciary in other democratic countries, it

can be said that the powers in the hands of the Italian judiciary are undoubtedly quite strong. Yet, whether these powers will be effectively used depends primarily on the judiciary's willingness to act, or more specifically on its sensitivity to pressures from the various social and political forces. Therefore, these powers can be employed in order to fulfill different goals, more or less desirable. As an example of the former, in addition to the investigations of political corruption, the recent success in the fight against organized crime should be mentioned. Even though some of the credit for these developments must go to organizational reforms of the police forces and prosecution, as well as to weakening traditional ties between organized crime and some members of the political class, some sectors of the judiciary are displaying a new attitude. On the other hand, one cannot fail to notice that the rights of the citizens in the criminal process are not well safeguarded. Even though the process has assumed, at least since 1988, an "accusatorial," American-style appearance,[45] the broad powers enjoyed by the prosecution as well as the organizational connection between the prosecutor and the judge, who both belong to the same corps, create an imbalance between the two conflicting parties, openly disadvantaging the defendant.

All in all, the strong powers presently enjoyed by the Italian judiciary are the product of its peculiar institutional setting as well as of the present weakness of the national political class.[46] Even though "government by the judiciary" in the Italian version is likely to endure until the political system finds a new equilibrium, Italy will stand out among democratic regimes as a special case of judicial power.

45. For an enthusiastic account of the 1988 reform passed on October 24, 1988, see E. Amodio & E. Selvaggi, *An Accusatorial System in a Civil Law Country: The 1988 Italian Code of Criminal Procedure*, 63 TEMP. L. REV. 1211-24 (1989).

46. For an attempt at explaining the factors that lie behind this peculiar setting see GUARNIERI, *supra* note 5, at 118-33.

APPENDIX

TABLE 1 — The Judiciary and Politics: The Institutional Setting[47]

	France	Germany	England	United States[48]	Italy
PROSECUTION					
structure	centralized	federal	centralized	federal	centralized
personnel	magistrate[49]	officer	officer	officer	magistrate
responsibility	direct[50]	direct	indirect	direct[51]	independent
JUDGES					
recruitment	public compet./ judicial school	pract. training/ public compet.	appointed by executive	appointed by exec. and legis.	public competition
career	yes	yes	no	no	yes, by seniority
status[52]	Pres. Rep. Min./ Jus. Higher Council	Ministry of Justice/ Legislature[53]	Lord Chancellor	President/Dept. of Justice	Higher Council
removal	Higher Council	Discp. Courts	Legislature	Legislature	Higher Council

47. For more details, see GUARNIERI *supra* note 5, at 51-82 and 93-97.
48. At the federal level.
49. Judges and prosecutors belong to the same corps.
50. To the Minister of Justice.
51. For the practice, see EISENSTEIN, *supra* note 15.
52. Institution(s) in charge of promotions, transfers, etc. In common law countries, as pointed out in the text, promotions take place in a different context than in civil law countries.
53. At the federal level. At the state level, the situation is more complex.