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History of the Italian Judiciary in the Republican Period (1946-2022). Between institutional and ideological change and continuity

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Introduction

The expansion of the role of the judiciary in Italy on the political and institutional level has become an extremely relevant issue in recent years, in particular after the collapse of the so-called First Republic political system in 1992-1994, triggered by the Clean Hands (*Mani Pulite*) judicial investigation[1]. The transformation of the role played by the Italian judiciary on the political and institutional level since 1992, however, can only be understood by considering the changes the judiciary experienced in the previous decades.

In recent years, the expansion of judicial power in Italy has received increasing attention in the field of political science research and organisational studies[2]. However, historical literature is quite scarce[3]. While, indeed, there exists a vast literature on the history of the Italian judiciary

[1] See C. *Guarnieri, Mani pulite: le radici e le conseguenze*, in «Il Mulino», 2002, n. 2, pp. 223-231; C. Guarnieri, *Giustizia e politica. I nodi della Seconda Repubblica*, Bologna, Il Mulino, 2003; C. Guarnieri and P. Pederzoli, *La magistratura nelle democrazie contemporanee*, Rome-Bari, Laterza, 2002. On the expansion of the judicial power among the democratic political systems see in particular *The global expansion of judicial power*, edited by C. N. Tate and T. Vallinder, New York, New York University Press, 1998; R. Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism*, Cambridge, Harvard University Press, 2004; R. Hirschl, The Judicialization of Politics, in *The Oxford Handbook of Law and Politics*, edited by K. Whittington and G. Calderia, Oxford, Oxford University Press, 2008.

[2] See C. Guarnieri, *Magistratura e politica in Italia. Pesi senza contrappesi*, Bologna, Il Mulino, 1992; S. Righettini, *La politicizzazione di un potere neutrale. Magistratura e crisi italiana*, in «Rivista italiana di scienza politica», 1995, n. 2, pp. 227-265; C. Guarnieri and P. Pederzoli, *La democrazia giudiziaria*, Bologna, Il Mulino, 1997; G. Di Federico, Italy: a peculiar case, in *The global expansion of judicial power*, edited by C. N. Tate and T. Vallinder, New York, New York University Press, 1998, pp. 233-242; C. Guarnieri and P. Pederzoli, *La magistratura nelle democrazie contemporanee*, cit.; G. Di Federico, *L'indipendenza della magistratura in Italia: una valutazione critica in chiave comparata*, in «Rivista trimestrale di diritto e procedura civile», 2002, n. 1, pp. 99-128; C. Guarnieri, *Giustizia e politica. I nodi della Seconda Repubblica*, Bologna, Il Mulino, 2003; G. Di Federico, Judicial independence in Italy, in *Judicial Independence in Transition*, edited by A. Seibert-Fohr, Berlin Heidelberg, Springer, 2012, pp. 357–401; C. Guarnieri, L'espansione del potere giudiziario, in *La seconda Repubblica. Origini e aporie dell'Italia bipolare*, edited by F. Bonini, L. Ornaghi and A. Spiri, Soveria Mannelli, Rubbettino, 2021, pp. 143-162.

[3] For an extensive illustration of the historiography on the Italian judiciary see *Bibliografia di storia della magistratura*, edited by G. D'Agostini, in «Le Carte e la Storia», 2010, n. 1, pp. 40-83; F. Venturini, *Vecchi e nuovi studi sulle magistrature*, in «Le Carte e la Storia», 2011, n. 1, pp. 115-132.

during the liberal age[4], Fascism[5], the period related to the transition to the Republic, and the Constituent phase[6], contributions focused on the Italian judiciary in the Republican period are far less numerous[7].

Furthermore, the literature on the history of the judiciary in the Republican period is characterised by being produced almost entirely by magistrates or former magistrates[8], in particular by members of the associative groups within the judiciary belonging to the "progressive" area, as we will see. This aspect, on the one hand, allows us to have direct testimony of magistrates about the development of the judiciary body on the institutional and cultural level, o; one other hand it raises several questions about the impartiality of the proposed reconstruction of the events.

This research analyses the historical development of the ordinary judiciary[9] in Italy during the Republican period. The study, therefore, also in order to delimitate the scope of the research,

[4] See M. D'Addio, *Politica e magistratura (1848-1876)*, Milan, Giuffrè, 1966; P. Marovelli, *L'indipendenza e l'autonomia della magistratura italiana dal 1848 al 1923*, Milan, Giuffrè, 1967; G. Neppi Modona, *Sciopero, potere politico e magistratura, 1870-1922*, Bari, Laterza, 1969; P. Saraceno, *Alta magistratura e classe politica dalla integrazione alla separazione. Linee di una analisi socio-politica del personale dell'alta magistratura italiana dall'unità al Fascismo*, Rome, Edizioni dell'Ateneo & Bizzarri, 1979; P. Saraceno, *Storia della magistratura italiana. Le origini: la magistratura del Regno di Sardegna*, Rome, University of Rome "La Sapienza", Scuola speciale per archivisti e bibliotecari, 1993, fifth edition; A. Gustapane, *L'autonomia e l'indipendenza della magistratura ordinaria nel sistema costituzionale italiano. Dagli albori dello Statuto albertino al crepuscolo della Bicamerale*, Milan, Giuffrè, 1999, pp. 1-43; A. Meniconi, *Storia della magistratura italiana*, Bologna, Il Mulino, 2012, pp. 21-142; F. Venturini, *La magistratura sabauda di fronte allo statuto albertino: equilibrio tra i poteri o primato della politica?*, in «Le Carte e la Storia», 2012, n. 1, pp. 9-22.

[5] See G. Neppi Modona, La magistratura e il Fascismo, in *Fascismo e società italiana*, edited by di G. Quazza, Turin, Einaudi, 1973, pp. 127-181; P. Saraceno, Magistratura e Fascismo, in *Il Parlamento italiano, 1861-1988*, vol. 12.1, *Il regime fascista: dalla conciliazione alle leggi razziali*, Milan, Nuova CEI, 1990, pp. 301-302; A. Gustapane, op. cit., pp. 45-99; A. Meniconi, Magistrati e ordinamento giudiziario negli anni della dittatura, in *Lo Stato negli anni Trenta: istituzioni e regimi fascisti in Europa*, edited by G. Melis, Bologna, Il Mulino, 2008, pp. 183-200; A. Meniconi, *Storia della magistratura italiana*, cit., pp. 145-243.

[6] See F. Rigano, *Costituzione e potere giudiziario. Ricerca sulla formazione delle norme costituzionali*, Padua, Cedam, 1982; P. Saraceno, *Le «epurazioni» della magistratura in Italia. Dal Regno di Sardegna alla repubblica: 1848-1951*, in «Clio», 1993, XXIX, pp. 505-523; G. Neppi Modona, La magistratura dalla Liberazione agli anni cinquanta. Il difficile cammino verso l'indipendenza, in *Storia dell'Italia repubblicana*, edited by F. Barbagallo et al., vol. III, tomo 2, Turin, Einaudi, 1997, pp. 81-137; A. Gustapane, op. cit., pp. 99-199; G. Focardi, *Le sfumature del nero: sulla defascistizzazione dei magistrati*, in «Passato e presente», 2005, n. 64, pp. 61-87; A. Meniconi, *Storia della magistratura italiana*, cit., pp. 247-286.

[7] Worthy of mention are R. Canosa and P. Federico, *La magistratura in Italia dal 1945 a oggi*, Bologna, Il Mulino, 1974; E. Bruti Liberati, La magistratura dall'attuazione della Costituzione agli anni novanta, in *Storia dell'Italia repubblicana*, vol. III, tomo 2, Turin, Einaudi, 1997, p. 147; V. Zagrebelsky, La magistratura ordinaria dalla Costituzione a oggi, in *Storia d'Italia*, Annali, 14: Legge, diritto, giustizia, edited by L. Violante, Turin, Einaudi, 1998, pp. 767-770; S. Senese, La magistratura nella crisi degli anni Settanta, in *L'Italia repubblicana nella crisi degli anni settanta*, vol. IV, *Sistema politico e istituzioni*, edited by G. De Rosa and G. Monina, Soveria Mannelli, Rubbettino, 2003, p. 412-3; A. Meniconi, *Storia della magistratura italiana*, cit., pp. 287-351; E. M. Fracanzani, *Le origini del conflitto. I partiti politici, la magistratura e il principio di legalità nella prima Repubblica (1974-1983)*, Soveria Mannelli, Rubbettino, 2014, pp. 26-7; E. Bruti Liberati, *Magistratura e società nell'Italia repubblicana*, Rome-Bari, Laterza, 2018.

[8] F. Venturini, *Vecchi e nuovi studi sulle magistratur*e, in «Le Carte e la Storia», 2011, n. 1, p. 124.

[9] The ordinary judiciary is the branch of the judiciary which handles civil and criminal cases.

which is already quite broad, will not examine the history of the "special" branches of the judiciary, that is, administrative and military courts, as well as the courts of auditors. Instead, the research will take into account the main historical events concerning the constitutional jurisdiction ,which directly impacted the development of the ordinary judiciary.

The primary contribution of this research, as compared to the existing literature consists not only in its long-period analysis, which embraces the entire Republican period, but also, above all, in its multidisciplinary approach. The research aims to combine the study of judicial institutions with the analysis of ideologies within the judiciary, also considering changes that occurred in the political and legal system, as well as the impact determined by some high public profile judicial events.

First of all, the research will examine the evolution of the principal judicial institutions, in particular the Higher Council of the Judiciary, which is the body entrusted by the Constitution with all the decisions concerning the status of magistrates, and the judicial offices (public prosecutors and judges), which constitute the judicial system as a whole. With regard to the HCJ, the attention will be focused on its establishment and the subsequent gradual expansion of its powers both inside and outside the judicial organisation. As far as judicial offices are concerned, the study will focus on the changes in the judicial system, with particular attention to the evolution of the internal organisation within judicial offices and the relations between the latter and the HCJ.

The analysis of the historical development of the judiciary, however, cannot ignore an analysis of the ideological dynamics within the judiciary. The historical examination of the judiciary, indeed, cannot be limited to the reconstruction of the development of the formal institutions of which the judiciary is composed, or to the decisions taken by the latter, but it must also take into account the ideological dimension in which the judicial actors behave. Examining judicial institutions only by considering the development of the formal structures and of the official decisions adopted by them, as noted by Di Donato, «would mean severely limiting research on their real functioning and sterilising it by relegating it to a normative formalism that would bring institutional historiography to the same level as the worst historiography of law», focused exclusively on the evolution of normative sources, but completely uninterested in the field of interactions between social actors[10].

The relevance of the ideological and cultural dimension in the study of the history of the judiciary emerges with particular evidence in relation to the Italian case, which is characterised by the existence of very intense associative and ideological dynamics. As we will see, the importance of the ideological dimension emerges especially around the role played by the main association of the Italian judiciary, the National Association of Magistrates, and by the internal groups that compose it, the so-called *correnti*. It is precisely the analysis of the ideological dynamics within the judiciary that will make it possible to accurately grasp the matrix of some significant institutional changes experienced by the judiciary in the Republican period, which

[10] F. Di Donato, *La ricerca storica sulla magistratura. Aspetti metodologici e linee prospettiche*, in «Le Carte e la Storia», 2012, n. 2, p. 6.

otherwise, from a perspective limited to the study of formal structures, would remain unexplored.

The historical development of the Italian judiciary will therefore be analysed, drawing from a double perspective: an institutional-formal one and an ideological one. Finally, in order to provide a comprehensive historical reconstruction, it appears to be necessary to extend the research to the main events that occurred in three other areas of particular relevance.

Firstly, the Italian political system. In particular, it will be emphasised how the changes in the political context (for instance, the season of “De Gasperi centrism”, the formation of centre-left governments, the period of terrorism and national solidarity, the fall of the so-called First Republic and the Berlusconi era), and in some cases even statements of politicians about judges, have influenced the development of the judiciary from both institutional and ideological point of view.

Secondly, the research will consider the main reforms that occurred in civil and criminal law, both substantive and procedural, and the impact that they have had on the judiciary. Above all, attention will be paid to the criminal sector, in particular to the 1988 reform of the code of criminal procedure, but a look will also be given to some significant innovations that occurred in the field of civil law, such as the approval of the Workers’ Statute in 1970 and the subsequent reform of labour proceedings.

Finally, the study will take into consideration the impact that some high public profile judicial cases had on the development of the Italian judiciary and on its relations with the other powers of the State: from the 1975 oil scandal to the 1992 Clean Hands investigation, ending with the long series of trials and allegations which involved Silvio Berlusconi after he entered politics in 1994.

As pointed out above, in order to fully understand the role played by the judiciary in the Italian institutional context, it was deemed necessary to carry out a research based on a long-term perspective, covering the development of the judiciary during the entire Republican period (from 1946 to 2020), also in light of the gaps in the literature. While the use of such a broad temporal perspective proved fundamental in order to examine the dynamics of the institutional and ideological development of the judiciary in a unified framework, it obviously prevented an in-depth analysis of each individual event. Precisely for these reasons, I decided to enrich the research with two in-depth studies, characterised by a much more detailed and profound level of analysis, focused on two events considered of particular relevance in the historical development of the Italian judiciary: the first concerns the politics and the abolition of the career system within the judiciary (the in-depth study is located at the end of the chapter "The Sixties"); the second concerns the "Conso decree" affair (found at the end of the chapter "The Nineties").

In terms of methodology, the research is based on a historical investigation. At the same time, it relies also on some concepts of political science as tools to further develop the historical analysis. In particular, in order to examine the institutional and ideological changes experienced by the Italian judiciary in a systematic way, the research will make use of some important

concepts coming from historical institutionalism, and specifically the recent theory of gradual institutional change[11]. The basic idea behind this approach is that institutional changes do not necessarily occur abruptly and suddenly, after long periods of stability and only as a result of exogenous and environmental shocks (critical junctures), but they can also occur gradually and incrementally as products of endogenous changes, which are less evident but, if added up, can come to radically change the functions and purposes of the institutions themselves. In this context, particular attention is put on power dynamics as well as ideological dynamics within institutions[12].

The research is based on the analysis of different primary sources, secondary sources and normative sources. The main primary sources are constituted by: the official bulletin of the HCJ («Notiziario Csm»), published from 1961 to 2000, in which are reported the main resolutions adopted by the HCJ over the years (recommendations, circulars, resolutions, promotions, transfers, etc..), as well as the reports of the main plenary sessions; the journal «La Magistratura», official organ of information of the National Association of Magistrates (NAM), published from 1947 to 2010; the journal «Rassegna dei magistrati», organ of information of the Union of Italian Magistrates, published from 1961 to 1978. The books edited by the NAM containing the reports of the main congresses held by the association itself will also be examined with particular attention. The research will also rely on memoirs and autobiographies of magistrates, historical and law contributions, parliamentary records, press articles and interviews.

The research is composed of nine chapters. The first chapter describes the original characteristics of the Italian judiciary before the birth of the Republic in 1946, in the awareness that every institutional transition – such as that from Monarchy to Republic – implies the maintenance of certain organisational and ideological factors. The second chapter focuses on the Constituent period and on the fundamental institutional arrangement outlined by the Constitution with regard to the judiciary. The following chapters analyze the main events that have characterised the historical development of the Italian judiciary on the political-institutional and ideological level. Each chapter is dedicated to a decade of the Republican period (with the exception of the eighth, which deals with the first 22 years of the 2000s, too close to the present to be the subject of a detailed historical analysis). The final chapter proposes an overall long-term analysis of the changes experienced by the Italian judiciary on the

[11] P. A. Hall and R. C. R. Taylor, *Political Science and the Three New Institutionalisms*, in «Political Studies», 1996, 44(5), pp. 936-957; P. Pierson, Big, slow-moving, and… invisible: macrosocial processes in the study of comparative politics, in *Comparative Historical Analysis in the Social Sciences*, edited by di J. Mahoney and D. Rueschemeyer, Cambridge, Cambridge University Press, 2003, pp. 177–198; Id., *Politics in Time: History, Institutions, and Social Analysis*, Princeton, Princeton University Press, 2004; *Beyond Continuity: Institutional Change in Advanced Political Economies*, edited by W. Streeck and K. Thelen, Oxford, Oxford University Press, 2005; S. Steinmo, Historical institutionalism, in *Approaches and Methodologies in the Social Sciences: A Pluralist Perspective*, edited by D. Della Porta and M. Keating, Cambridge, Cambridge University Press, 2008, pp. 118-138; J. Mahoney and K. Thelen, *Explaining Institutional Change: Ambiguity, Agency, and Power*, Cambridge University Press, Cambridge, 2009; K. Thelen and J. Conran, Institutional change, in *The Oxford Handbook of Historical Institutionalism*, edited by di O. Fioretos, T. G. Falleti and A. Sheingate, Oxford University Press, Oxford, 2016, pp. 51-70.

[12] W. Streeck and K. Thelen, op. cit.; J. Mahoney and K. Thelen, op. cit.

institutional, organisational and ideological levels in the Republican period, with particular reference to the effects determined by these changes on the balance between political and judicial power. In particular, four phases of the historical development of the Italian judiciary during the Republican period will be identified.

1. The origins of the Italian judiciary

The Liberal Age

Before beginning to examine the historical development of the Italian judiciary in the Republican period, it is necessary to briefly outline the original features of the Italian judiciary before the birth of the Republic in 1946.

Although the transition from Monarchy to Republic in 1946 and the coming into force of the Constitution led to significant changes in the institutional setting of the country, in 1948 the Italian judiciary retained some of the fundamental features developed during the previous century, particularly since the unification of the country. After all, any process of institutional transition or discontinuity implies the maintenance of some elements of continuity, since it seems impossible to imagine a transition that involves a complete reset of the previous institutional set-up[1].

The basic structure of the Italian judiciary was defined after the unification of the country, which began in 1861 with the birth of the Kingdom of Sardinia and was completed in 1870 with the annexation of the Papal State. This process determined the extension to the entire nation of the French Napoleonic model of judiciary already present in the Kingdom of Sardinia[2].

The Albertino Statute, adopted in 1848 in the Kingdom of Sardinia and then extended to the rest of Italy between 1861 and 1870[3], provided a series of guarantees (albeit limited) of independence for the judges.

Article 68 of the Statute stated in fact that «justice emanates from the King and is administered in his name by such judges as he shall appoint», providing a judiciary composed of officials appointed by the executive and with limited autonomy. The judiciary was characterised by a pronounced hierarchical structure that ensured supervision of the magistrates' activities by the Minister of Justice and by the heads of the courts of appeal and the courts of Cassation[4]. Article 73 of the Statute, moreover, established that «the interpretation of the laws, in the form obligatory upon all citizens, belongs exclusively to the legislative power». The judge was thus conceived as *bouche de la loi*,

[1] L. Lanzalaco, *Le politiche istituzionali*, Bologna, Il Mulino, 2005, pp. 47-48; P. Grilli di Cortona, *Il cambiamento politico in Italia. Dalla Prima alla Seconda Repubblica*, Rome, Carocci, 2007.

[2] See P. Marovelli, *L'indipendenza e l'autonomia della magistratura italiana dal 1848 al 1923*, Milan, Giuffrè, 1967; P. Saraceno, *Storia della magistratura italiana. La magistratura del Regno di Sardegna*, Rome, 1993; A. Gustapane, *L'autonomia e l'indipendenza della magistratura ordinaria nel sistema costituzionale italiano. Dagli albori dello Statuto albertino al crepuscolo della Bicamerale*, Milan, Giuffrè, 1999; C. Guarnieri, *Giustizia e politica. I nodi della Seconda Repubblica*, Bologna, Il Mulino, 2003, p. 87; A. Meniconi, *Storia della magistratura italiana*, Bologna, Il Mulino, 2012, pp. 21 ff.; F. Venturini, *La magistratura sabauda di fronte allo statuto albertino: equilibrio tra i poteri o primato della politica?*, in «Le Carte e la Storia», 2012, n. 1, pp. 9-22.

[3] As outlined by Pombeni, the 1848 Albertino Statute, although amended in the following years, «remained the fundamental charter of the Italian state until 1946». In P. Pombeni, *Partiti e sistemi politici nella storia contemporanea*, Bologna, Il Mulino, 1994, p. 424.

[4] A. Meniconi, *Storia della magistratura italiana*, cit., pp. 27 ff.; F. Venturini, *La magistratura sabauda*, cit., p. 10.

according to the French tradition, charged with the task of merely applying the law according to the (unique) interpretation provided by the legislator[5].

On the other hand, through some innovative provisions, the Statute introduced some guarantees of independence of the judiciary from the executive power. In fact, it introduced the principle of non-removability of judges after three years of service, although this guarantee did not apply to district judges (*giudici di mandamento*) and public prosecutors (article 69); it provided that the judicial organisation could be altered only «by legislation» (article 70); it introduced for the first time the principle of natural judge, establishing that «no one shall be withdrawn from his natural judges» and that «consequently, no extraordinary tribunals or commissions shall be created» (article 71); it established that court hearings shall be public (article 72)[6].

From this emerged a picture of light and shade, in which the judiciary, on the one hand, was endowed – at least formally – with autonomy in the exercise of its functions but, on the other hand, from the organisational perspective, it was subject to the power of the executive, so much to be considered as a sort of branch of state administration, albeit with a special status[7].

This original setting of the Italian judiciary was confirmed in 1865, with the approval of the first law on the judicial system (*legge sull'ordinamento giudiziario*, r.d. 6 December 1865, n. 2626). This statute, which would remain in force until 1941, introduced the recruitment of magistrates through public exams, conducted before a commission appointed by the Minister of Justice. However, it has been calculated that between 1865 and 1890 only half of the magistrates were recruited through competition, while the other half continued to be recruited directly by the Minister of Justice within certain categories (lawyers, notaries, professors of law)[8].

The Minister of Justice was explicitly recognised as the hierarchical apex of the judicial organisation. This role was exercised through the heads of courts, who exercised supervision over the magistrates[9]. The public prosecutor was expressly conceived as the representative of the executive power at the judicial office, placed under the direction of the Ministry of Justice[10].

The guarantee of non-removability, provided for judges with three years of service, was limited by the possibility for the Minister of Justice to order the transfer of magistrates to different offices «for the utility of the service» (Article 199 of the law), while maintaining parity of rank and salary. This provision was widely used by the political authorities to transfer magistrates who had violated the instructions of the government[11].

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[5] A. Gustapane, op. cit., p. 3; A. Meniconi, *Storia della magistratura italiana*, cit., p. 29; F. Venturini, *La magistratura sabauda*, cit., p. 10.

[6] See A. Meniconi, *Storia della magistratura italiana*, cit., pp. 27-29.

[7] A. Gustapane, op. cit., pp. 3-4.

[8] P. Saraceno, Il reclutamento dei magistrati italiani dall'unità al 1890, in *Università e professioni giuridiche in Europa nell'età liberale*, edited by A. Mazzacane, C. Vano, Naples, Jovene, 1994, p. 548; A. Meniconi, *Storia della magistratura italiana*, cit., p. 59.

[9] A. Gustapane, op. cit., p. 12.

[10] Ivi, pp. 13-16.

[11] Ivi, p. 16; A. Meniconi, *Storia della magistratura italiana*, cit., pp. 61 ff.

Lastly, the statute introduced a system of career advancement based on seniority. However, until 1876 it was not be possible to talk of building a career in the judiciary, given the possibility for the Minister of Justice to appoint magistrates to the higher levels of jurisdiction (courts of appeal and court of Cassation) and the presence of regional rankings, which did not allow to ground the career system on uniform parameters[12].

In the following years, the judiciary experienced a gradual expansion of its guarantees of independence from the executive[13]. In 1873 a decree of the Minister of Justice, Paolo Onorato Vigliani, limited the discretionary powers of the government in the transfer of magistrates. Between 1876 and 1880 a first real judicial career system was established, trough the unification at national level of the regional rankings for promotions and the establishment of a central advisory Commission for promotions and function changes, composed of magistrates of the Supreme Court[14].

In 1890, thanks to a reform promoted by Giuseppe Zanardelli, it was introduced the obligation of public competition for access to the judiciary, while it was exceptionally left to the Minister of Justice the right to directly appoint university professors and lawyers as magistrates of the courts of appeal and the Supreme Court. In this way, the Italian judiciary began to acquire the typical features of a bureaucratic organisation, that is, an organisation whose members are recruited at a young age through public examinations, accomplish professional training and socialisation within the judicial organisation, and progress in a system of career characterised by hierarchical ranks[15].

Two reforms approved in 1907 and 1908 by the Minister of Justice Vittorio Emanuele Orlando further strengthened the independence of the judiciary, introducing the guarantee of non-removability from the office (not only from the function) also for the praetors. Above all, these reforms provided for the establishment of a Higher Council of the Judiciary, composed of senior magistrates, partly elected by their colleagues and partly appointed by the government. Although the Council was charged with only advisory powers in the field of assignments, promotions and transfers of magistrates, its establishment contributed to strengthen the degree of independence of the judicial organisation vis-à-vis the political power[16].

The judiciary, thus, progressively established itself as a body separated from politics and endowed with some degree of independence, as confirmed also by the emergence of some high public profile judicial cases, such as that concerning the Banca Romana of the end of the century. In 1909, moreover, the General Association of Italian Magistrates (GAIM) was founded. The association was born with the aim of asking for improvements of salary for judges and greater independence of the judiciary[17].

In terms of internal organisation, the Italian judiciary continued to be characterised by a hierarchical structure. The heads of the courts of appeal and the magistrates of the Supreme Court (which was

[12] A. Meniconi, *Storia della magistratura italiana*, cit., p. 52.

[13] A. Pizzorusso, *L'organizzazione della giustizia in Italia*, Turin, Einaudi, 1990, pp. 34-36.

[14] A. Gustapane, op. cit., pp. 17-19; A. Meniconi, *Storia della magistratura italiana*, cit., pp. 71-80.

[15] C. Guarnieri, *Giustizia e politica*, cit., p. 90.

[16] A. Pizzorusso, op. cit., pp. 35-36; A. Gustapane, op. cit., pp. 21-26; A. Meniconi, *Storia della magistratura italiana*, cit., pp. 113-119.

[17] Ivi, pp. 91-92; S. Pappalardo, *Gli iconoclasti. Magistratura democratica nel quadro della Associazione nazionale magistrati*, Milan, Franco Angeli, 1987, pp. 15-17.

unified in a single Court of Cassation based in Rome in 1888 in criminal matters and in 1923 in civil matters) played an important role in promoting and directing the activities of magistrates, representing the main channel of transmission of political influence on the judiciary[18].

Fascism Era

The advent of Fascism led to the gradual disappearance of the margins of autonomy and independence gained by the judiciary after the national unification.

In 1923, the reform of the judicial system promoted by the Minister of Justice Aldo Oviglio abolished the electivity of the HCJ, whose members would be appointed by the Minister, and downsized the functions of the body in the field of career of magistrates. The reform strengthened the hierarchical structure of the judiciary, as the regime did in other areas of the public administration[19].

The guarantee of non-removability was again excluded to prosecutors, while the power of the Minister of Justice to transfer the magistrates was extended. Punitive disciplinary measures were taken against magistrates found to be less politically aligned, in particular against the leaders of the AGMI, which was dissolved in December 1925. Moreover, in 1923 and 1926 the regime applied to the judiciary the law which allowed the dispensation from service of public officials deemed incompatible with government directives[20].

The action of the judiciary, particularly after the appointment of Alfredo Rocco as Minister of Justice in 1925, was also influenced by the exacerbation of the authoritarian regime, that is with the abolition of many civil and political freedoms and the introduction of more repressive measures, such as the Single Text of the Public Security Laws of 1926 and 1931, and the new penal code and the code of criminal procedure in 1930. Judicial activity was also influenced by transfers of magistrates and the establishment of special courts, through which matters of great political significance were taken away from the ordinary judiciary[21].

Only in a second phase, from the late 1930s, the fascist regime intervened on the judiciary with totalitarian reforms, such as the introduction of the obligation for judges to join the fascist party, the ideological indoctrination of young magistrates through courses of political preparation and the obligation of the Roman salute[22].

During this second phase, the Fascist regime also approved in 1941 the reform of the judicial system, by the initiative of the Minister of Justice Dino Grandi. The reform maintained the fundamental structure of the existing judicial system, but further reduced the autonomy of the judiciary. The statute expanded the powers of the Minister of Justice to control the activity of magistrates and strengthened

[18] C. Guarnieri, *Giustizia e politica*, cit., p. 91.

[19] A. Aquarone, *L'organizzazione dello Stato totalitario*, Turin, Einaudi, 1965, p. 9; G. Neppi Modona, La magistratura e il Fascismo, in *Fascismo e società italiana*, edited by G. Quazza, Turin, Einaudi, 1973, pp. 127-181; A. Pizzorusso, op. cit., pp. 36-37; A. Meniconi, *Storia della magistratura italiana*, cit., pp. 145-147.

[20] P. Saraceno, Le «epurazioni» della magistratura in Italia. Dal Regno di Sardegna alla repubblica: 1848-1951, in «Clio», 1993, XXIX, pp. 505-523; A. Meniconi, *Storia della magistratura italiana*, cit., pp. 147-152.

[21] A. Aquarone, op. cit., pp. 101-104.

[22] Ivi, pp. 243-245; C. Guarnieri, *Giustizia e politica*, cit., pp. 93-94.

the hierarchical structure of the judiciary, granting increased powers of supervision to the heads of offices and to the Court of Cassation. The law included a table (Annex F) in which the judicial corps was classified in eleven hierarchical ranks, starting with the judicial auditor and ending with the first president of the Supreme Court. The reform also transferred the competence over promotions of judges from the HCJ to the Minister of Justice, limited the guarantees of independence of magistrates (such as the principle of non-removability) and made the procedures for transferring magistrates easier[23].

Overall, the Italian judiciary surrendered to the authoritarian pressures of the fascist regime without opposing much resistance, with few exceptions. It is equally true, however, that there was never a complete subordination of the judiciary to the totalitarian state, nor a deep and internal adherence of judges to fascist totalitarianism[24].

From Fascism to the Republic

The transition from Fascism to the Republic was characterised by the abolition of the most repressive laws in the field of civil rights and the restoration of some basic guarantees of independence of the judiciary, while maintaining the hierarchical structure established under the fascist regime.

Before the institutional referendum of 1946, by the initiative of the Minister of Justice Palmiro Togliatti, the law on the guarantees of the judiciary was approved (*legge sulle guarentigie della magistratura*, R.D.lgs 31 May 1946, n. 511). The law restored the guarantees abolished by the fascist regime, extending to prosecutors the principle of non-removability from the office and from the function. For the first time, moreover, prosecutors were granted with full independence from the Minister of Justice, who no longer had the power of «direction» on prosecutors provided by the previous system, but had a power of mere «supervision» on them[25].

The law reintroduced a Higher Council of the Judiciary elected by the entire judiciary, albeit indirectly, composed of thirteen senior magistrates and with advisory functions on promotions, transfers and disciplinary measures concerning the magistrates.

Particular attention needs to be given to the issue of the purge of the magistrates involved in the fascist regime, occurred after the end of World War II. This activity was carried out through the establishment of ad hoc structures, such as the High Court of Justice, the Extraordinary Court of Assizes and Special Sections. This issue has been subject to several historiographic studies since the 1970s[26].

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[23] A. Aquarone, op. cit., pp. 245-246; C. Guarnieri, Giustizia e politica, cit., p. 94; V. Zagrebelsky, La magistratura ordinaria dalla Costituzione a oggi, in Storia d'Italia, Annali, 14: Legge, diritto, giustizia, edited by L. Violante, Turin, Einaudi, 1998, pp. 713-718; A. Meniconi, *Storia della magistratura italiana*, cit., pp. 225-231.

[24] A. Aquarone, op. cit., pp. 240-246; A. Meniconi, *Storia della magistratura italiana*, cit., p. 175.

[25] E. Moriondo, *L'ideologia della magistratura italiana*, Bari, Laterza, 1967, p. 96; A. Meniconi, *Storia della magistratura italiana*, cit., pp. 257-8; E. Bruti Liberati, *Magistratura e società nell'Italia repubblicana*, Rome-Bari, Laterza, 2018, kindle edition, position 172.

[26] See C. Pavone, La continuità dello Stato. Istituzioni e uomini, in *Italia 1945-48. Le origini della Repubblica*, edited by E. Piscitelli, Turin, Giappichelli, 1974, pp. 139-289; M. Flores, L'epurazione, in *L'Italia dalla Liberazione alla*

As noted by Focardi, these studies have been greatly influenced by the judgement given by various protagonists of the time who, in different ways, perceived and consequently contributed to spreading the image of a «failed» purge, if not a «joke» purge[27]. What emerges is the image of a judiciary that, after being deeply involved in the fascist crimes, substantially survived the transition from Fascism to the Republic without any damage, thanks to a purge limited to very few cases and practically fake[28].

However, thanks to access to new archival sources, more recent studies have made it possible to develop a more comprehensive interpretation of this issue. While it is true that the number of magistrates formally purged after the fall of Fascism was quite small, quantified in a few dozen cases, it is equally true that about 400 magistrates (out of more than 4,000) were subjected to purging procedures[29]. In other words, there was an attempt to «defascistize» the judiciary. This starting point makes it possible to trace with greater precision the reasons behind the very limited number of magistrates actually ejected from the judiciary at the end of the purge procedures.

First of all, given that it was obviously not possible to completely eject all magistrates who had worked under Fascism, it emerged the difficulty of distinguishing between the active political involvement of magistrates in the regime and the technical and executive activity carried out by the magistrates in a perspective of "service to the State". It was precisely to this technical activity that many magistrates referred to in defending themselves against accusations of involvement with Fascism before the courts set up for the purge. After all, this problem was particularly evident in relation to judicial activity, the evaluation of which required the study of a large amount of judicial material and a complex technical analysis of the contents of the judgments[30].

The second cause of the modest results of the purge in the judiciary is linked to the lack of personnel in the judicial corps. In 1943, already before the purge, the judiciary lacked 381 magistrates compared to the projected headcount, almost 8% of the total. In September 1947, after the first phase of the purge carried out mainly in the intermediate level of the judiciary, about 1.000 magistrates were lacked, about 21% of the total of 4.967 magistrates envisaged[31]. In addition, also a high number of forced retirements of magistrates took place, in order to avoid purge procedures. Therefore, the lack of personnel, in part exacerbated by the first purges, inevitably contributed to slowing down the entire purge operation in the judiciary.

Repubblica, Milan, Feltrinelli, 1977, pp. 413-467; G. Rossini, L'epurazione e la "continuità" dello Stato, in *Democrazia cristiana e Costituente nella società del dopoguerra*, edited by G. Rossini, Rome, Cinque Lune, 1980, volume 2, pp. 721-751; G. Neppi Modona, La magistratura dalla Liberazione agli anni cinquanta. Il difficile cammino verso l'indipendenza, in *Storia dell'Italia repubblicana*, edited by F. Barbagallo, vol. III, *L'Italia nella crisi mondiale. L'ultimo ventennio 2. Istituzioni, politiche, culture*, Turin, Einaudi, 1997, pp. 81-137; P. Saraceno, *I magistrati italiani tra Fascismo e repubblica. Brevi considerazioni su un'epurazione necessaria ma impossibile*, in «Clio», 1999, n. 1, pp. 65-96; G. Focardi, *Le sfumature del nero: sulla defascistizzazione dei magistrati*, in «Passato e presente», 2005, n. 64, pp. 61-87.

[27] G. Focardi, op. cit., p. 61.

[28] See the evaluations by C. Pavone, op. cit., p. 239; M. Flores, op. cit., pp. 413-414; V. Zagrebelsky, *La magistratura ordinaria dalla Costituzione a oggi*, cit., pp. 720; G. Neppi Modona, *La magistratura italiana e l'epurazione mancata (1940-1948)*, in «Le Carte e la Storia», 2017, n. 1, pp. 25-37; E. Bruti Liberati, *Magistratura e società*, cit., kindle edition, chapter I, section 6, La mancata epurazione nella magistratura e alcune brillanti carriere.

[29] G. Focardi, op. cit., p. 64.

[30] A. Meniconi, *Storia della magistratura italiana*, cit., pp. 250-254; G. Focardi, op. cit., pp. 70-76.

[31] G. Focardi, *Le sfumature del nero*, cit., pp. 81-84.

The third reason, probably the most important one, behind the limited purges in the judiciary is linked to political factors. The purge was characterised by a first "upward" phase, between the summer of 1944 and the first half of 1945, and a "downward" phase, which began with the crisis of the Parri government and its replacement by the De Gasperi executive on 10 December 1945[32]. We could say that the first "ascending" phase of the purge reflected the political context that characterised the first period after the Liberation, with the country crossed by deep tensions and disorders, and more than ever politically divided between those who aspired to a deep socialist revolution and those who, instead, hoped for a return to normality, rather than any palingenesis[33]. The most revolutionary pressures found their point of reference in the system of National Liberation Committees, that pushed for a massive purge in Italian society. The second phase of the purge, the "descending" phase, coincided instead with the realization, especially by De Gasperi but also by some sectors of the left-wing forces, of the fragility of the country, the need to rebuild the nation and the need to initiate a phase of normalization and pacification. In this context, it became clear that it was not possible to imagine dismissing thousands of officials from the public administration without at the same time endangering the very stability of the institutions of a country that appeared devasted by the war.

This problem was emphasized with great lucidity already in 1945 by Arturo Carlo Jemolo:

> Was it possible for things to go differently? The ideal would have been a complete, radical renewal of the ruling class: new men everywhere. Unfortunately, this was not possible. Prison and exile have given us back some very elected men, but not the personnel for this complete renewal. [...] There was no way to renew the administration, even if only in the first four [hierarchical] ranks, the judiciary, the armed forces, the university, without risking destroying the backbone of the country. And no politician would take on the tremendous responsibility of finishing destroying a country already so ruined, in order to implement justice.[34]

Among legal scholars, moreover, a critical debate developed about the opportunity to derogate from the principle of non-retroactivity of criminal law in order to punish not the common crimes committed by the fascists (which were already punishable according to the criminal laws then in force), but rather the political activity carried out by the fascist hierarchs[35].

A fundamental step in the process of normalisation of the country was represented by the decision of the Minister of Justice Togliatti to grant, on 22 June 1946, a broad amnesty for many crimes committed by fascists and partisans. The measure, which in Togliatti's view aimed to strengthen the role of the PCI in the process of stabilisation and normalisation of the country, was adopted the day

[32] G. Melis, *Note sull'epurazione dei ministeri, 1944-1946*, in «Ventunesimo secolo», 2003, n.4, pp. 17-52.

[33] G. Bedeschi, *La prima Repubblica (1946-1993)*, Soveria Mannelli, Rubbettino, 2013, kindle edition, chapter 1, section 1, Il governo Parri e il Partito d'azione.

[34] A. C. Jemolo, *Le sanzioni contro il Fascismo e la legalità*, in «Il Ponte», 1945, n. 4, p. 284.

[35] See the exchange of views between Arturo Carlo Jemolo and Piero Calamandrei, in Ivi, pp. 277-286. See N. Picardi, *La storia della Cassazione, la Cassazione nella storia (1944-1956)*, in «Rivista trimestrale di diritto e procedura civile», 1996, pp. 1252-3, which quotes another statement by Jemolo, who in 1948 said he was glad that «the Italian Republic does not have the shadow of convictions imposed by virtue of the principle of the retroactivity of penal norms».

after the referendum of 2 June 1946 in which Italians chose the republic and elected the Constituent Assembly[36].

[36] R. Canosa and P. Federico, *La magistratura in Italia dal 1945 a oggi*, Bologna, Il Mulino, 1974, pp. 138 ff.; S. Colarizi, *Storia politica della Repubblica. Partiti, movimenti e istituzioni. 1943-2006*, Rome-Bari, Laterza, 2007, pp. 29 ff.; G. Bedeschi, op. cit., kindle edition, chapter 1, section 3, I primi governi De Gasperi, il referendum monarchia-repubblica, la Costituente.

2. The Constituent period

The positions of the parties

The drafting of the Constitution was the result of a long process that took place from October 1944 to December 1947[1].

The first venue for discussion amongst politicians, scholars, magistrates and technicians on the organisation to be given to the State was the Commission for the reform of the administration, set up in October 1944 and chaired by the professor of administrative law Ugo Forti[2]. In November 1945, the commission was replaced by the Commission for studies on the reorganisation of the State, set up by the Ministry for the Constituent Assembly, again under the chairmanship of Forti, with the aim of preparing the work of the Constituent Assembly in anticipation of the latter's elections in June 1946. In particular, the issue of the institutional position of the judiciary was discussed within the subcommittee on the organisation of the State. The composition of the subcommittee made the discussion particularly sensitive to the demands of autonomy coming from the judiciary: the direction was in fact entrusted to Emanuele Piga, section president of the Court of Cassation and president of the National Association of Magistrates (NAM), reconstituted in 1945[3]. In the subcommittee there were also other magistrates, such as Andrea Torrente and Gaetano Azzariti, and jurists close to the positions of the judiciary, such as Piero Calamandrei and Massimo Severo Giannini[4]. In the final report, the subcommittee affirmed the need to ensure the existence of an authentic judicial power, while maintaining forms of connection between the judiciary and politics[5].

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[1] On the Costituent period see *Alle origini della Costituzione italiana*, edited by G. D'Alessio, Bologna, Il Mulino, 1979; E. Cheli, *Costituzione e sviluppo delle istituzioni in Italia*, Bologna, Il Mulino, 1981; A. Pizzorusso, *L'organizzazione della giustizia in Italia*, Turin, Einaudi, 1990, pp. 37-40; G. A. Romeo, *La stagione costituente in Italia (1943-1947). Rassegna della storiografia*, Milan, Franco Angeli, 1992; P. Pombeni, *La Costituente. Un problema storico-politico*, Bologna, Il Mulino, 1995; L. Ferrajoli, *La cultura giuridica nell'Italia del Novecento*, Rome-Bari, Laterza, 1999, pp. 49-62; A. Gustapane, *L'autonomia e l'indipendenza della magistratura ordinaria nel sistema costituzionale italiano. Dagli albori dello Statuto albertino al crepuscolo della Bicamerale*, Milan, Giuffrè, 1999, pp. 109-199; C. Guarnieri, *Giustizia e politica. I nodi della Seconda Repubblica*, Bologna, Il Mulino, 2003, pp. 97-100; L. Paladin, *Per una storia costituzionale dell'Italia repubblicana*, Bologna, Il Mulino, 2009, pp. 46-65; D. Piana and A. Vauchez, *Il Consiglio superiore della magistratura*, Bologna, Il Mulino, 2012, pp. 15-26.

[2] E. Balboni, Le riforme della pubblica amministrazione nel periodo costituente e nella prima legislatura, in *Scelte della costituente e cultura giuridica. II. Protagonisti e momenti del dibattito costituzionale*, edited by U. De Siervo, Bologna, Il Mulino, 1980, pp. 225-312.

[3] R. Canosa and P. Federico, *La magistratura in Italia dal 1945 a oggi*, Bologna, Il Mulino, 1974, p. 79; S. Pappalardo, *Gli iconoclasti. Magistratura democratica nel quadro della Associazione nazionale magistrati*, Milan, Franco Angeli, 1987, p. 73.

[4] F. Rigano, *Costituzione e potere giudiziario. Ricerca sulla formazione delle norme costituzionali*, Padua, Cedam, 1982, p. 84; A. Pizzorusso, op. cit., pp. 37-8; A. Meniconi, *Storia della magistratura italiana*, Bologna, Il Mulino, 2012, pp. 278-9; D. Piana and A. Vauchez, op. cit., pp. 16-17.

[5] D. Piana and A. Vauchez, op. cit., pp. 17-18.

Once the Constituent Assembly was elected, in June 1946, the subject of the judiciary was assigned to the second section of the Second subcommittee of the Commission of the Seventy-five, established in order to predispose the section of the draft of the Constitution concerning the constitutional organisation of the Republic. The political forces present at the Constituent Assembly decided to assign to the Second subcommittee mainly technical exponents, i.e. jurists and constitutionalists, while they preferred to assign mainly political exponents to the First subcommittee, in charge of preparing the section relating to the rights and duties of citizens[6]. Even in the second section of the Second subcommittee there were some magistrates[7].

The discussion started from the projects for the reform of the judiciary presented by Piero Calamandrei (*Partito d'azione*), Giovanni Leone (*Democrazia cristiana*) and Gennaro Patricolo (*Uomo Qualunque*). All projects proposed the recognition of full independence to the judiciary. On the one hand, Calamandrei and Leone's projects suggested the provision of forms of connection between the political power and the judiciary: the first through the identification of a «commissioner of justice» chosen from among the general prosecutors on the proposal of the parliament, the second through the inclusion in the Higher Council of the Judiciary of members elected by the parliament and the creation of public prosecutors responsible to the Minister of Justice. On the other hand, Patricolo's project was characterised by the proposal of a complete dissolution of the connection between justice and politics, through the introduction of a Minister of Justice elected by the magistrates[8].

The discussion in the Second subcommittee delimited the scope of the debate that then took place in the in plenary session of the Assembly from 20 to 27 November 1947, and which focused mainly on the connections between the judiciary and political power. The final discussion and approval of the articles in the Assembly, moreover, took place in a rather hurried manner, so much so that it is possible to say that the section of the Constitution concerning the judiciary was mainly the result of the debate that took place within the Commission of Seventy-five[9].

Obviously, it is not possible to analyse in detail here the debate that took place in the Constituent Assembly on the role that the Constitution should have recognised to the judiciary. In general, despite the variety of positions among the parties, and even within the parties themselves, what clearly emerges is that all political parties shared the idea that it was necessary to ensure to the judiciary full independence from the other powers of the State, in particular from the executive. This conviction arose in reaction to what had happened during Fascism, when the judicial activity had been profoundly influenced by the regime[10].

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[6] F. Bruno, I giuristi alla Costituente: l'opera di Costantino Mortati, in *Scelte della Costituente e cultura giuridica, II, Protagonisti e momenti del dibattito costituzionale*, edited by U. De Siervo, Bologna, Il Mulino, 1980, p. 61.

[7] I refer to Edmondo Caccuri, Gesumino Mastino, Raffaele Recca, Antonio Romano, Oscar Luigi Scalfaro (all of Democrazia Cristiana), and Milziade Venditti (Uomo qualunque). See A. Meniconi, *Storia della magistratura italiana*, cit., p. 278, footnote n. 136.

[8] F. Rigano, op. cit., pp. 112-117; A. Gustapane, op. cit., pp. 109-125; D. Piana and A. Vauchez, op. cit., pp. 19-20.

[9] E. Cheli, *Costituzione e sviluppo delle istituzioni in Italia*, cit., pp. 36-37; A. Pizzorusso, op. cit., pp. 38; A. Meniconi, *Storia della magistratura italiana*, cit., p. 279, footnote n. 138.

[10] F. Rigano, op. cit., p. 30; C. Guarnieri, *Magistratura e politica: il caso italiano*, in «Rivista italiana di scienza politica», 1991, n. 1, p. 16; L. Chieffi, *La magistratura. Origine del modello costituzionale e prospettive di riforma*, Naples, Jovene, 2000, pp. 18-19.

If the recognition of independence and autonomy to the judiciary constituted a shared premise, different positions emerged in relation to the ways through which establish forms of political responsibility of the judiciary and mechanisms of connection with the representative institutions.

In particular, the left-wing parties (Socialist and Communist) focused their attention on the danger that the constitutional provisions could transform the judiciary into a "closed caste", that is a body isolated from the other powers of the State. The Constitution should have, of course, recognised full independence to the judiciary, but at the same time it should have provided a series of mechanisms to allow judges to operate in accordance with the will of the masses, which were identified as the only source of sovereignty. In the view of the leftist forces, in fact, the memory of the surrender of the judiciary to the fascist regime should have induced the constituents not to recognize absolute autonomy to the judiciary, thus avoiding the risk that the judiciary could later work against the process of reversal of capitalism. For these reasons the left-wing forces proposed the introduction of forms of political control over judicial activity by the Minister of Justice and the HCJ, the direct participation of the people in the administration of justice, for example through the election of a part of the judicial personnel, and also the reservation of the power of constitutional review to a special body appointed by parliament and not to the ordinary judiciary[11].

The positions within the Democrazia Cristiana and the liberal and centrist lay parties were more varied. If on the one hand, some hoped for the recognition of absolute autonomy to the judiciary, others favoured the introduction of cautious forms of coordination between the judiciary and other powers of the State, such as the election of lay members of the HCJ by the parliament[12].

The idea that the judiciary could acquire excessive autonomy over the other powers on the constitutional and institutional level did not represent a real risk for the DC and the liberal and lay forces. In line with the legal culture of the time, centred on the traditional model of legal positivism on which the nineteenth-century liberal state was founded, the exponents of these parties conceived the judicial function as a merely technical function. The central idea was that the enforcement of the law by the judge did not involve margins of discretion and consisted just of the application of the only interpretation provided by the legislator[13]. This perspective was based on the exaltation of the principle of legal certainty, seen as an essential factor in guaranteeing freedom for individuals, even more so after the totalitarian experience of Fascism[14].

The leftist parties conceived the judicial function in a profoundly different way, with the aim to overcome - for political purposes - the formalistic and liberal approach. For socialists and communists, the judge was not called to simply apply the rules established by the legislature, but to interpret the law in a way that corresponded to the social conscience and the aspirations of the masses. In the perspective of the leftist parties, in fact, the myth of the apolitical and technical nature of the

[11] F. Rigano, op. cit., pp. 40-48, 104-112. A. Gustapane, op. cit., pp. 129-130, 134-136.

[12] F. Rigano, op. cit., pp. 22-26, 90-104. A. Gustapane, op. cit., pp. 142-174.

[13] G. Tarello, Orientamenti della magistratura e della dottrina sulla funzione politica del giurista-interprete, in *L'uso alternativo del diritto*, vol. 1, edited by P. Barcellona, Rome-Bari, Laterza, 1973, p. 72; *Scelte della Costituente e cultura giuridica*, two volumes, edited by U. De Siervo, Bologna, Il Mulino, 1980; F. Rigano, op. cit., pp. 74-84, 102; M. Fioravanti, Costituzione, amministrazione e trasformazioni dello Stato, in *Stato e cultura giuridica in Italia dall'Unità alla Repubblica*, edited by A. Schiavone, Rome-Bari, Laterza, 1990, pp. 68-87.

[14] F. Biondi, *La responsabilità del magistrato: saggio di diritto costituzionale*, Milan, Giuffrè, 2006, pp. 74-76.

judicial function served only to mask the conservative purpose of the capitalist order on behalf of the bourgeoisie[15].

The work of the Constituent Assembly saw the prevalence of the formalistic conception of the judicial function[16]. The conception of the judge as a mere applicator of the law, according to the only interpretation provided by the legislator, on the one hand, certainly does not correspond to the proper way of exercising the judicial activity[17], on the other hand, it represented the result of the legal culture of the time, rather than the result of a deliberate choice of the conservative political parties aimed at limiting the autonomy of the judiciary. It is also possible to hypothesize that what made it difficult to overcome the formalistic conception of the judicial function was precisely the alternative conception of the judge advanced by the left-wing parties, a conception that aimed to pursue a precise political objective, namely the reversal of the capitalist-bourgeois system and the realization of the socialist revolution[18].

The proposals of the judiciary

The judiciary actively participated in the debate on the drafting of the Constitution, through the elaboration in 1946 of a series of proposals on judicial power addressed to the Minister of Justice and the Constituent Assembly, and through an intense pressure activity on political actors carried out by the National Association of Magistrates[19]. In this pressure activity, as pointed out above, the judiciary could rely on the presence of several magistrates at the Ministry for the Constituent Assembly and at the Constituent Assembly.

On 17 October 1946, the Supreme Court approved an outline of proposals, addressed to the Minister of Justice, on what should be the position of the judiciary in the constitutional system. The scheme provided for: full independence of all members of the judiciary, including prosecutors, from any other power; the non-removability of function and office of magistrates; the recruitment of magistrates through national competition; the uniqueness of civil, criminal and administrative jurisdiction in the Court of Cassation (although not rejecting the hypothesis that, on some limited matters, some special jurisdictions could be maintained); a series of procedural guarantees, such as the principle of the natural judge, the non-retroactivity of the criminal law, the publicity of trials, the motivation of judgments[20].

On 19 October 1946 the Minister of Justice was also sent the final report of the Commission appointed by the Minister himself to examine proposals relating to the position of the judiciary in the

[15] F. Rigano, op. cit., pp. 60, 106-111.

[16] Cfr. L. Chieffi, op. cit., pp. 23 ff.

[17] On the discretion inherent in the judicial activity see M. Luciani, Interpretazione conforme a Costituzione, in *Enciclopedia del Diritto*, Annali IX, Milan, Giuffrè, 2016, pp. 391-476. See also M. Cappelletti, *Giudici legislatori?*, Milan, Giuffrè, 1984, pp. 63 ff.; C. Guarnieri, *Giustizia e politica*, cit., pp. 25-28.

[18] F. Rigano, op. cit., pp. 106-107; P. Pombeni, *La Costituente*, cit., pp. 87-89.

[19] *Attività del Comitato direttivo centrale*, in «La Magistratura», 1947, n. 1, p. 2. See E. Moriondo, *L'ideologia della magistratura italiana*, Bari, Laterza, 1967, p. 137; S. Pappalardo, op. cit., p. 82.

[20] *Posizione del Potere giudiziario nella Costituzione e Ordinamento giudiziario. Proposte della Corte Suprema di Cassazione e della Commissione nominata dal Ministro Guardasigilli*, Rome, Tipografia delle Mantellate, 1946, pp. 3-19.

Constitution[21]. The Commission was composed by, among others, Gaetano Miraulo (president of the Commission, then appointed in 1947 president of the NAM), Francesco Acampora, Ernesto Battaglini, Andrea Torrente, Giuseppe Flore and Mario Stella Richter.

In many aspects, the Commission's proposals converged with those of the Supreme Court, such as the unity of jurisdiction, the non-removability of function and office of magistrates, recruitment through public competition and the principle of the natural judge. On other aspects, however, the Commission developed more radical proposals, which aimed to achieve a complete disentanglement of the judiciary from the other powers of the State. The power to administer the judicial system in fact was completely taken away from the executive and entrusted to the Higher Council of the Judiciary. The latter was considered an organ of the judicial power itself, empowered with the competence on all measures concerning the status of magistrates and also on the deliberation of expenses. The HCJ was supposed to be chaired by the first president of the Court of Cassation, also called "the Head of the Judiciary". In addition, it was envisaged that the rules related to the judicial system could be enacted or modified «only by force of law, after consultation with the Higher Council of the Judiciary». In short, the proposals put forward by the Commission moved towards the establishment of a judicial corps completely separated from the other powers.

On 3 November 1946, the National Assembly of the National Association of Magistrates also approved a motion of proposals addressed to the Constituent Assembly regarding the drafting of articles concerning the judiciary. In the document, the NAM asked for the recognition of full independence and autonomy of the judiciary; the election of the President of the Supreme Court (defined as the «Head of the Judiciary») by magistrates; the establishment of a Higher Council of the Judiciary composed and elected only by magistrates, and with competence over everything concerning the status of magistrates; the establishment of a Constitutional Court headed by the President of the Supreme Court and composed, at least for half, of high-ranking magistrates elected by the judiciary; the unity of civil, criminal and administrative jurisdiction, with the abolition of special courts; the establishment of a judicial police force placed under the direct control of public prosecutors[22]. Also, in this case, the proposals went in the direction of the creation of a judicial body completely disentangled from the other powers of the State[23].

The strike of magistrates

The debate in the Constituent Assembly on the constitutional position of the judiciary was influenced by an initiative led by the judiciary itself: the first strike of magistrates.

In the spring of 1947, in fact, the magistrates were the protagonists of lively labor unrest, aimed at asking increases of their salaries, considered inadequate compared to the actual cost of living. The protests led to a strike, called by committees of magistrates arisen spontaneously in the territory, which surprised the National Association of Magistrates, then chaired by Emanuele Piga. The association, indeed, based its activity on two fundamental principles: apoliticism and opposition to

[21] Published in Ivi, pp. 21-36.

[22] «La Magistratura», 1946, n. 9-10.

[23] V. Zagrebelsky, La magistratura ordinaria dalla Costituzione a oggi, in *Storia d'Italia*, Annali, 14: Legge, diritto, giustizia, edited by L. Violante, Turin, Einaudi, 1998, p. 745.

any form of syndicalism. The leaders of the NAM believed that the associative activity of the judiciary should never involve, on the one hand, a trespassing into the field of politics and, on the other, a corporative defense of the particular interests of their category. On the contrary, the objective - at least explicitly - of the NAM should have been the protection of the autonomy and independence of the judiciary, and the defense of freedom and democracy, profoundly damaged during Fascism[24].

At the time, the governing bodies of the NAM were composed mainly of magistrates serving in Rome and belonging to the so-called "high judiciary" (magistrates of the Supreme Court and heads of judicial offices). The inadequacy of the economic treatment was felt especially by the "low judiciary", that is, the magistrates serving in the peripheral judicial offices and placed at the base of the organisational pyramid (praetors, tribunal judges, deputy prosecutors), who decided to promote protests in different parts of Italy against the directives of the NAM. For the first time there emerged a crisis of representation in the category of magistrates, so much so that in the face of the agitation, the leaders of the NAM decided to resign[25].

The leaders of the NAM, although resigned, tried to bring the claims within the association activity. On 6 May 1947, in fact, the central executive committee of the association approved a public announcement in which, after criticizing the government for not having respected the commitments made for an improvement in the salaries of magistrates, it was emphasized as it had «come to determine a situation of serious moral and material distress in all magistrates, which has caused, outside of any initiative of the Association, a committee of agitation to take decisions that cannot be shared only for the method of struggle adopted»[26].

At the end, the crisis was overcome through the satisfaction by the government of the magistrates' demands for an improvement in salaries and through a reshuffle of leadership of the NAM: Gaetano Miraulo, section president of the Court of Cassation, was elected new president of the association in place of Piga, with Ernesto Battaglini and Domenico Peretti Griva as vice presidents[27].

The judiciary in the Constitution

As is well known, the political forces managed to reach a compromise during the constitution-making process, despite the rupture in May 1947 of the governmental collaboration between the DC, the PSI and the PCI. In concomitance with the beginning of the Cold War, the left-wing parties were ousted from the executive and De Gasperi formed a government led by the Democrazia Cristiana. In spite of this radical change, the constituent process, though experiencing some turbulence, continued on the basis of a shared spirit among the political forces. The constituents, in fact, aware of the historical significance of their task, focused their attention on long-term prospects, trying to isolate the work of the assembly from the problems of contingent politics. Both the Christian Democrats and the

[24] F. Scalambrino, *Lo sciopero dei magistrati del 1947*, in «Questione giustizia», 1984, n. 1, pp. 219-256; E. Moriondo, op. cit., pp. 113-123.

[25] E. Moriondo, op. cit., pp. 140-142.

[26] *Attività del Comitato direttivo centrale*, in «La Magistratura», 1947, n. 1, p. 2.

[27] *L'Assemblea Generale dell'Associazione*, in «La Magistratura», 1947, n. 1, p. 1. Cfr. E. Moriondo, op. cit., pp. 142-143; F. Rigano, op. cit., pp. 68-69.

Socialists and Communists, moreover, wanted to avoid provoking radical ruptures in the institutional balance, also for reasons of political tactics[28].

The most radical proposals put forward by the judiciary, aiming at creating a judicial body closed in on itself and completely disentangled from the other powers, were not accepted by the constituents. Nevertheless, Title IV of the Constitution (Articles 101-113), devoted to the judiciary, marked a decisive strengthening of independence and autonomy of the judiciary in Italy[29]. In fact, concerned by the risk that a political force could win the elections and concentrate all powers in its own hands, the parties ended up outlining in the Constitution an institutional system characterised by an accentuated distribution of power among the various bodies, including the judiciary[30].

The Constitution, thus, recognised to the judiciary a significant degree of independence, both external, that is towards the political branches, and internal, that is vis-à-vis other judges, in particular magistrates in charge of higher functions[31].

With regard to external independence, first of all the Constitution establishes that «judges are subject only to the law» (Article 101, paragraph 2), thus removing them from any form of external and internal conditioning in the exercise of their functions[32].

The Constitution then recognizes the judiciary as «a branch that is autonomous and independent of all other powers», providing for the establishment of a Higher Council of the Judiciary composed of two thirds of magistrates elected by the judiciary and one third of lay members elected by parliament (Article 104). The prevalence of the judicial component is mitigated by the attribution of the presidency to the President of the Republic and by the election of a vice-president chosen from among the lay members. The HCJ has exclusive jurisdiction over all measures concerning the status of magistrates, for instance recruitment, assignments, transfers, promotions and disciplinary measures (article 105), while the Minister of Justice «has responsibility for the organisation and functioning of those services involved with justice» (article 110)[33].

The Constitution also affirms the principle of non-removability of magistrates, providing that they may not be suspended from office or assigned to other courts or functions «unless by a decision of the High Council of the Judiciary, taken either for the reasons and with the guarantees of defense established by the provisions concerning the organisation of Judiciary or with the consent of the judges themselves» (Article 107, paragraph 1).

[28] E. Cheli, *Costituzione e sviluppo delle istituzioni in Italia*, cit., pp. 52-55.

[29] V. Zagrebelsky, *La magistratura ordinaria dalla Costituzione a oggi*, cit., pp. 733 ff.; L. Chieffi, op. cit., pp. 15 ff.; A. Meniconi, *Storia della magistratura italiana*, cit., p. 281; D. Piana and A. Vauchez, op. cit, p. 24.

[30] G. Maranini, *Storia del potere in Italia, 1848-1967*, Milan, Corbaccio, 1995; P. Pombeni, Christian Democracy in Power, 1946-63, in *The Oxford Handbook of Italian Politics*, edited by E. Jones and G. Pasquino, Oxford, Oxford University Press, 2015, pp. 255-267.

[31] On the concepts of external and internal independence see N. Zanon and F. Biondi, *Il sistema costituzionale della magistratura*, Bologna, Zanichelli, 2014, pp. 81-149.

[32] Ivi, pp. 85-7.

[33] See L. Chieffi, op. cit., pp. 46 ff.; D. Piana and A. Vauchez, op. cit, p. 24.

The Constitution introduces the principle of natural judge, establishing in article 25 that «no case may be removed from the court seized with it as established by law», thus providing an absolute reserve of law for the rules concerning the competence of judges[34].

The Constitution removes the public prosecutor from any form of conditioning or "supervision" by the Minister of Justice, leaving, however, to the legislator the task of defining by law the precise location of the public prosecutor in the judicial system (Article 107, paragraph 4)[35]. Article 112, moreover, introduces the principle of mandatory prosecution, with the aim of protecting the public prosecutor from any influence by political power. The introduction of this article, however, was not accompanied by any reflection on the effective capacity of the judicial system to respect this principle, with the result that - as we will see – it underwent profound transformations in the course of time[36]. Prosecutors are also given the task of supervising the activity of the judicial police during investigations (article 109).

The Constitution also introduces the principle of the uniqueness of jurisdiction (article 102), establishing that the judicial function must be exercised, as a rule, by the ordinary judiciary and prohibiting the establishment of special judges. The only exceptions are those explicitly mentioned by the Constitution itself: the Council of State, the Court of Auditors and the military courts (Article 103).

The Constitution maintains the traditional bureaucratic structure of the judiciary, providing for a career with promotions and identifying public exam as the main means of recruiting magistrates (articles 105 and 106, paragraph 1)[37]. In partial acceptance of the claims made by the left-wing forces in the Constituent Assembly, it is foreseen the possibility for the law on the regulations of the judiciary to allow «the appointment, also by election, of honorary judges for all the functions performed by single judges» (article 106, paragraph 2). In this context, it is noticeable also the provisions of article 102, paragraph 3, according to which «the law regulates the cases and forms of the direct participation of the people in the administration of justice».

As far as the internal independence of the judiciary is concerned, three articles of the Constitution are particularly relevant: Article 101, paragraph 2, already mentioned above, which establishes the subjection of the judge «only to the law», ensuring full independence in the exercise of judicial functions; Article 107, paragraph 1, which guarantees the non-removability of magistrates also at the internal level, providing limits to the power of the HCJ to transfer them; and Article 107, paragraph 3, according to which «judges are distinguished only by their different functions»[38]. The latter article, in particular, prevents the judiciary from being organized on a hierarchical structure, establishing the

[34] See A. Meniconi, *Storia della magistratura italiana*, cit., p. 281.

[35] E. Cheli, *Costituzione e sviluppo delle istituzioni in Italia*, cit., pp. 42 ff.

[36] Cfr. G. Neppi Modona, Commento all'art. 112 (e 107 comma 4), in *Commentario della Costituzione*, edited by G. Branca, vol. IV, Bologna, Zanichelli, 1987, pp. 39-85; G. Di Federico, *Prosecutorial independence and the democratic requirement of accountability in Italy: Analysis of a deviant case in a comparative perspective*, in «British Journal of Criminology», 1998, 38(3), pp. 371-387; E. Antonucci, *The evolution of the principle of mandatory prosecution in Italy. A problematic case of gradual institutional change*, in «International Journal of Law, Crime and Justice», 66 (2021), 100481.

[37] See C. Guarnieri, *Giustizia e politica*, cit., p. 100.

[38] See N. Zanon and F. Biondi, *Il sistema costituzionale della magistratura*, cit., pp. 130-149.

distinction of magistrates only by diversity of functions, that is public prosecutors, judges, magistrates of first instance, magistrates of appeal and magistrates of Cassation. This article, therefore, while prohibiting hierarchical relationships between magistrates, does not exclude a distinction of magistrates according to their functions, nor does it make incompatible with the Constitution charging some magistrates with directive managerial functions (such as president of court or chief prosecutor) or semi-directive functions (such as president of court section or deputy prosecutor), since these functions relate to the management of judicial offices but cannot involve interference in the activities carried out by other magistrates[39]. Later, we will see how the interpretation of this article by judges changed over time.

The articles of the Constitution concerning the process of constitutional review are particularly relevant for the evolution of the ordinary judiciary. The Constitution entrusts the power of constitutional review to a special organ, not belonging to the judiciary, the Constitutional Court, providing a structural link between this organ and the ordinary judiciary. The Court is composed of fifteen judges appointed for one third by the President of the Republic, for one third by the Parliament in common session and for one third by the supreme ordinary and administrative judiciary (articles 134-137)[40].

The functional link between the ordinary judiciary and the Constitutional Court was further strengthened first by Constitutional Law n. 1/1948, which attributed to the ordinary judge the power/duty to submit to the Constitutional Court any doubts of constitutional legitimacy that he considers not manifestly unfounded (article 1); then by Law n. 87 of 1953, which clarified that the judge can/must raise the question of constitutional legitimacy only if his judgment cannot be defined independently of the resolution of that question (article 23). Thus, a true «functional interdependence» between the ordinary judiciary and the Constitutional Court emerged: both the constitutional judge and the ordinary judge became co-protagonists in the control of constitutional legitimacy[41]. This interdependence, as we will see, deeply marked the development of the ordinary judiciary, especially from the mid-1960s.

The constituents were scarcely aware of the reforming potentialities inherent in the introduction of diffused constitutional review and, therefore, of the fact that this would have entailed the immediate enforcement of the principles and rules contained in the Constitution[42]. In line with the traditional model of juridical positivism, political forces and legal scholars initially struggled to conceive the Constitution as a fundamental law, placed at the top of the sources of law and immediately enforceable by judges, in the same ways as the other laws[43]. Starting from the mid-sixties, the

[39] See Constitutional Court, judgement n. 80/1970; N. Zanon and F. Biondi, *Il sistema costituzionale della magistratura*, cit., pp. 131-136.

[40] E. Lamarque, *Corte costituzionale e giudici nell'Italia repubblicana*, Rome-Bari, Laterza, 2012, kindle edition, chapter 1, Le scelte dei Costituenti nel loro esito storico.

[41] Ivi, chapter 1, position 728. Cfr. P. Pederzoli, *La Corte costituzionale*, Bologna, Il Mulino, 2009, pp. 52 ff.

[42] M. Fioravanti, Costituzione, amministrazione e trasformazioni dello Stato, in *Stato e cultura giuridica in Italia dall'Unità alla Repubblica*, cit., p. 72.

[43] F. Rigano, op. cit., p. 195; L. Ferrajoli, *La cultura giuridica nell'Italia del Novecento*, cit., pp. 55-57.

traditional approach of legal formalism would give way to a gradual "discovery" of the Constitution by the judiciary[44].

Finally, two transitional provisions of the Constitution were of great importance. The Charter in fact established, on the one hand, that until the new law on the judicial system was issued, the provisions in force would continue to be observed (the 1941 law on the judicial system, partially modified in 1946) and, on the other hand, that until the Constitutional Court was established, the decisions related to constitutional review would be conducted in the forms and within the limits of the provisions already in existence before the implementation of the Constitution, that is to say by the Court of Cassation[45].

The reaction of the judiciary

The results obtained in the Constitution satisfied the Italian judiciary. In an article published in «La Magistratura» journal, the vice-president of the NAM, Ernesto Battaglini, affirmed that in front of the approval of the Constitution for the judiciary the final balance was «clearly in credit»[46]. While noting that in Title IV of the Constitution dedicated to the judiciary «there are certainly some shadows, deficiencies and deviations», Battaglini stressed that overall «there are provisions through which the aspirations that for decades had been futilely advocated by the judiciary are finally realized». In particular, for Battaglini what appeared to be particularly relevant was the recognition of the autonomy of the judiciary, as well as the recognition - even if indirect - of the existence of «a judicial power, equal in sovereignty and independence to the other powers of the State».

The vice-president of the NAM also highlighted «the liberation from any interference of the executive or governmental power», with «the entrusting to the Higher Council of the Judiciary of all the powers relating to the government and regulation of the judiciary». He also positively emphasized the affirmation of the uniqueness of the jurisdiction of the ordinary judiciary, as well as the establishment of the detachment of the judiciary from the 1923 bureaucratic public service system, with the recognition of the «distinction of the judicial function from all the other functions exercised by State employees».

On the other hand, Battaglini expressed concern about the constitutional provisions concerning the election of the vice-president of the HCJ among the lay members, the postponement to the new law on the judicial system of the definition of the guarantees of independence of public prosecutors, and also the attribution to the supreme ordinary and administrative magistrates of the task of electing one third of the components of the Constitutional Court («a vague, hybrid and uncertain mixture between ordinary and administrative magistrates»).

Positive considerations about the constitutional provisions concerning the judiciary were also expressed, in the same issue of «La Magistratura», by Vincenzo Chieppa, magistrate of the Supreme Court and director of the journal. According to Chieppa, the Constitution, «severing the tentacles that bound the personnel of the judiciary to the Ministry of Justice», laid «the necessary premises to sweep

[44] See chapter 4.

[45] See A. Meniconi, *Storia della magistratura italiana*, cit., p. 285.

[46] E. Battaglini, *Bilancio*, in «La Magistratura» 1947, n. 3-4, p. 1.

away, with urgency, the moral and legal abomination that is the judicial system created by Fascism, replacing it with rules suited to the needs of a democratic justice, that is independent, honest, capable»[47]. Similarly, according to Renato Angeloni, it was possible to «consider a truly existing a Third Power in the Constitution of the new Italian Republic»[48].

The journal edited by the NAM, moreover, mentioned the action of pressure carried out by the association on the political actors during the constituent works, through the distribution to the parliamentarians of a pamphlet with the judges' proposals on the draft of the Constitution, as well as the frequent talks with parliamentary groups and deputies[49].

With regard to the problem of the economic treatment of magistrates, the journal stressed in a positive way the unanimous approval by the Constituent Assembly, on 28 November 1947, of a motion which ruled that the independence of the judiciary could not be achieved without the economic independence of magistrates, and reminded the parliament «the need for a concrete solution»[50].

[47] V. Chieppa, *Senza soste*, in «La Magistratura» 1947, n. 3-4, p. 1.
[48] R. Angeloni, *Il terzo potere esiste*, in «La Magistratura», 1947, n. 3-4, p. 4.
[49] *Attività del Comitato*, in «La Magistratura», 1947, n. 3-4, p. 3.
[50] G. Colucci, *Prospettive economiche*, in «La Magistratura», 1947, n. 3-4, p. 7.

3. The Fifties

The slow implementation of the Constitution

Some fundamental provisions of the Constitution concerning the judiciary were implemented with a delay of several years.

The laws establishing the Constitutional Court were passed in 1953 (Constitutional Law n. 1/1953 and Law n. 87/1953), and the Court held its first hearing only in 1956. The law establishing the Higher Council of the Judiciary was approved by Parliament in 1958 (Law n. 195/1958), and the Council took office in 1959. A new law on the judicial system will be approved only in 2005 and 2006, although - as we shall see - the organisation of the judiciary will undergo numerous changes over the decades, determined by legislative measures, constitutional jurisprudence, initiatives of judicial actors (in particular the HCJ)[1]. Also, other constitutional provisions remained unimplemented for a long time, such as those concerning the institution of the National Council of Economy and Labour (instituted in 1958), the regions (instituted in 1970) and the introduction of the referendum (regulated by law in 1970).

For these reasons, the period relating to the first legislature of the republican history and the first three De Gasperi governments (1948-1953) has often been critically defined as the period of the «constitutional freezing» or the «majority obstructionism»[2]. According to this interpretation, the failure to implement the Constitution was the result of a strategic choice by De Gasperi and the more conservative sectors of the State aimed at preventing the adaptation of the institutional structure of the nation to the innovations contained in the Constitution. In some cases, this interpretation ends up explicitly attributing to the DC and De Gasperi the aim of carrying out a repressing plan of citizens' liberties[3].

As noted by Brunelli, this interpretation not only appears ungenerous with respect to the legislative activity actually carried out during the De Gasperi period, but it is often unrelated to a thorough analysis of the historical and political reasons that led to the delayed implementation of the Constitution[4].

The reasons of the delays in the implementation of certain constitutional provisions are, in fact, to be found above all in the political climate experienced by the nation after the Constitution came into

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[1] F. Dal Canto, *Le trasformazioni della legge sull'ordinamento giudiziario e il modello italiano di magistrato*, in «Quaderni costituzionali», 2017, n. 3, pp. 676-7.

[2] See, in particular, the evaluations expressed in P. Calamandrei, *L'ostruzionismo di maggioranza*, in «Il Ponte», 1953, n. 9, pp. 129-136; E. Cheli, *Costituzione e sviluppo delle istituzioni in Italia*, Bologna, Il Mulino, 1981, p. 57; A. Pizzorusso, Le stagioni della Costituzione, in *Commentario della Costituzione*, Disposizioni transitorie e finali I-XVIII – Leggi costituzionali e di revisione costituzionale (1948-1993), Bologna-Rome, Zanichelli-Il Foro italiano, 1995, pp. XXXI ff.

[3] This is the interpretation provided in R. Canosa and P. Federico, *La magistratura in Italia dal 1945 a oggi*, Il Mulino, Bologna, 1974, p. 166.

[4] G. Brunelli, *La prima legislatura repubblicana: virtù e limiti dell'eccezione degasperiana*, in «Quaderni costituzionali», 2019, n. 1, pp. 11-29. Cfr. L. Paladin, *Per una storia costituzionale dell'Italia repubblicana*, Bologna, Il Mulino, 2009, p. 102.

force. As underlined above, the constitutional pact between the political forces began to break down as early as May 1947, with the break-up of governmental collaboration between the DC and the Left following the beginning of the Cold War[5]. In spite of this radical change, the constituent process managed to conclude on the basis of a climate of collaboration between the parties that by then no longer found expression in government. The result, therefore, was that the Constitution was born «as an "authentic" product (that is characterised by an intrinsic homogeneity), but also considerably distorted by the contingent reality of the country»[6]. The Constitutional Charter, in other words, did not register the upheavals that in the meantime had taken place at the political level from the early months of 1947.

The overwhelming victory of the Democrazia Cristiana in the elections of 18 April 1948 confirmed the detachment of the Constitution from the contingent political context. The elections, in fact, deeply and definitively lacerated the social and political fabric on which the constituent pact had been founded, placing a hard mortgage on the possibility of an immediate implementation of the Constitution through political-parliamentary means[7]. After all, the rupture of the social and political balances that had governed the Constituent Assembly became evident in the occasion of the riots (in some cases of insurrectionary nature) that followed the Togliatti's assassination attempt in July 1948[8].

The elections, in other words, determined the definitive rupture of the balance reached by the political forces during the constituent stage, orienting the process of development of politics and institutions in a direction opposite to that outlined by the Constitution, marked by a climate of reciprocal delegitimization between government and opposition[9]. The consociative character impressed by the Constituent Assembly on the political system was replaced by the sharp polarization introduced by the Cold War[10]. In this scenario, characterised by deep political tensions and by serious economic and social concerns, the priority of the executive became, therefore, granting the very survival of the institutional order on which the country was founded, which it was believed would be put at risk by the implementation of certain constitutional provisions that had been elaborated with the objective of guaranteeing the pluralism of the political and institutional system[11].

This led to a paradox, as pointed out by Cheli: «If during the first legislature the Constitution formally manages to survive, this happens only to the extent that the implementation of the Constitution is frozen: constitutional evasion, at this stage, is the price to be paid for the survival of the 1948 charter»[12]. The delayed implementation of several constitutional provisions, some of which

[5] S. Colarizi, *Storia politica della Repubblica. Partiti, movimenti e istituzioni. 1943-2006*, Rome-Bari, Laterza, 2007, p. 37.

[6] E. Cheli, op. cit., p. 55.

[7] M. Fioravanti, Costituzione, amministrazione e trasformazioni dello Stato, in *Stato e cultura giuridica in Italia dall'Unità alla Repubblica*, edited by A. Schiavone, Rome-Bari, Laterza, 1990, p. 495.

[8] G. Bedeschi, *La prima Repubblica (1946-1993)*, Soveria Mannelli, Rubbettino, 2013, kindle edition, chapter 2, section 2, Un conato insurrezionale: l'attentato a Togliatti. Episodes of violence, with insurrectional traits, had already been reported during 1947, for example on the occasion of the occupation of the Milan prefecture in November of that year.

[9] P. Pombeni, *La Costituente. Un problema storico-politico*, Bologna, Il Mulino, 1995, pp. 147-8.

[10] P. Scoppola, Una crisi politica e istituzionale, in *L'Italia repubblicana nella crisi degli anni settanta*, vol. IV, Sistema politico e istituzioni, edited by G. De Rosa and G. Monina, Soveria Mannelli, Rubbettino, 2003, p. 20; S. Colarizi, *Storia politica della Repubblica*, cit., p. 51.

[11] E. Cheli, op. cit., p. 60.

[12] Ibidem.

concerning the judiciary, finds its deepest reasons in the contrast between the consociative premise on which the Constitution was based and the subsequent political situation, marked by deep divisions between the parties[13], as well as in the undeniable presence of contrasting views on the role that some fundamental bodies should have played in the institutional system[14].

The rupture of the balance between the political forces also affected the very conception of the Constitution, which in the years following its promulgation became a real ground for political conflict. The leftist forces, in fact, began to interpret the Constitution not as the basic law of the State organisation, but as the foundation of a profound political renewal, emphasizing the innovative significance of some of its provisions[15]. Around the Constitution thus there developed much more radical conceptions than those that emerged in the Constituent Assembly. This contributed to placing the Constitution at the centre of the political conflict. The delayed implementation of the Constitution was interpreted by the leftist forces as a betrayal of the Resistance, that is, a betrayal of the premises of radical transformation of Italian society that had been planted by the liberation from Fascism. The responsibility for this betrayal was attributed to the DC and its government allies. In the first three decades after the Second World War, the myth of the betrayed of the Resistance constituted one of the core issues of political conflict in Italy[16]. Only in the course of the following legislatures, the reduction of the social-political fractures (determined also by the progressive departure of the left-wing forces, first of all the Psi, from the Soviet revolutionary model) will allow to gradually rebuild a climate of sharing of some fundamental values of democratic coexistence[17].

From 1948 to 1958 the National Association of Magistrates promoted an intense mobilisation to urge the political forces to implement the constitutional provisions regarding the independence of the judiciary.

Already at the end of the first post-war congress of the NAM, held in Florence on 30 October and 1 November 1948, the magistrates asked for the approval of the law establishing the Higher Council of the Judiciary, the approval of the law on the judicial system and the detachment of the judiciary from the hierarchical structure of public bureaucracy, as provided by Article 107 of the Constitution, with consequent recognition of the autonomy of the economic treatment of magistrates[18].

The battle for the separation of the judiciary from the bureaucratic order of the State and for the establishment of the HCJ was conducted by the NAM also through the establishment, in July 1949, of the Action Centre for Judicial Reform, composed of parliamentarians, lawyers and magistrates, and chaired by the first president of the Italian Republic, Enrico De Nicola[19].

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[13] E. Galli della Loggia, Il mito della Costituzione, in *Miti e storia dell'Italia unita*, edited by G. Belardelli et al., Bologna, Il Mulino, 1999, pp. 193-4.

[14] L. Paladin, op. cit., pp. 98-9.

[15] M. Dogliani, *Interpretazione della Costituzione*, Milan, Franco Angeli, 1982; E. Galli della Loggia, *Il mito della Costituzione*, cit.; D. Piana and A. Vauchez, *Il Consiglio superiore della magistratura*, Bologna, Il Mulino, 2012, p. 28.

[16] E. Galli della Loggia, La Resistenza tradita, in *Miti e storia dell'Italia unita*, cit., pp. 157-161.

[17] S. Colarizi, *Storia politica della Repubblica*, cit., pp. 72 ff.

[18] E. Battaglini, *I temi del Congresso*, in "La Magistratura", 1948, 6, p. 1; *Mozioni approvate all'unanimità*, in "La Magistratura", 1948, 6, p. 2.

[19] See «La Magistratura», 1949, n. 7 and n. 8.

The detachment of the judiciary from the public administration

As noted above, Article 107, paragraph 3, of the Constitution introduced a very important principle for guaranteeing the external and internal independence of the judiciary, namely the distinction of magistrates «only by their different functions». This principle implied the distinction of the judiciary from the branches of the public administration, organized according to hierarchical degrees.

The implementation of the constitutional provision, through the detachment of the judiciary from the public bureaucracy, became one of the main objectives of the mobilisation of the associative judiciary in the postwar period.

In March 1950 Renato Angeloni in «La Magistratura» pointed out how, in the intentions of the constituents, the separation served not only to ensure the independence of the judiciary, but also to lay the groundwork for the solution of the problem of the economic treatment that had long afflicted the magistrates: since the magistrates were no longer equated with other civil servants, the State would have been able to set salaries for magistrates more suited to their function, without necessarily having to extend this treatment to other civil servants[20].

In particular, the journal recalled the words expressed in the Constituent Assembly by Giovanni Leone, who had clarified the meaning of the distinction of magistrates «only by their different functions», provided for by article 107 of the Constitution: «This formula expresses our following opinion: since a judicial order has been created, a hierarchy of functions is necessary within this order. Thus the Court of Cassation has a higher competence than the lower courts of merit: but in this hierarchy should not enter the ranks, as for state employees. It is not necessary for the judiciary to maintain the diversity of ranks that, if I'm not mistaken, is due to Fascism, that is, the equivalent to military ranks»[21]. For these reasons, the NAM said that it would not cease to insist on the implementation of Article 107 of the Constitution.

On 28 October 1950 the Minister of Justice Attilio Piccioni presented to the Senate the bill on the distinction of magistrates according to their functions and on the economic treatment of magistrates. The bill, in addition to improving salaries of magistrates, provided for the distinction of magistrates according to the functions of magistrates of tribunals, magistrates of appeal, magistrates of Supreme Court and magistrates with higher directive functions[22]. The proposal did not satisfy the National Association of Magistrates, not only for the inadequate improvement in the economic treatment, but especially for the provision of a fourth category of magistrates (that of magistrates «with higher directive functions»). The NAM thus reiterated, as it had already done on the occasion of the congress in Florence in 1948, that in light of the constitutional provisions «it was possible to distinguish magistrates only into categories of magistrates of tribunal (or first instance), magistrates of the court of appeal and magistrates of the Court of Cassation»[23].

[20] R. Angeloni, *L'art. 107 della Costituzione*, in «La Magistratura», 1950, n. 3, p. 1.

[21] Ibidem.

[22] See *Il disegno di legge sullo svincolo*, in «La Magistratura», 1950, n. 12, p. 6.

[23] *Proposte di emendamenti al disegno di legge sullo svincolo*, Ivi, p. 8.

The protests of the NAM were accepted by the Senate, which amended the bill. The text was approved first by the Senate and then definitively by the Chamber of deputies on 9 May 1951. The law (n. 392/1951) established the principle that «ordinary magistrates are distinguished according to their functions as magistrates of tribunal, magistrates of the Court of Appeal, and magistrates of the Court of Cassation». The law also provided for an economic treatment for magistrates that was clearly greater to that of public service categories.

The approval of the law was greeted with enthusiasm by the associative judiciary. In «La Magistratura», the vice-president of the NAM, Ernesto Battaglini, defined the event as «a memorable stage in the difficult path towards the new judicial system»[24]. With the definitive separation of the judiciary from the public administration it was in fact «established an autonomous judicial order, thus realizing an age-old aspiration, which until now had encountered fierce resistance».

However, the detachment of the judiciary from the bureaucratic structure of the public administration raised a new type of problem in the following years. In fact, being separated from the state bureaucracy, the judiciary was excluded from the measures through which the legislator periodically improved the economic treatment of state employees, in order to adapt it to the cost of living[25].

In 1956 the worsening of the magistrates' salaries compared to the cost of living prompted the judiciary to announce a form of radical protest that again took by surprise the leaders of the NAM, whose presidency the year before had passed to Vincenzo Chieppa. On 6 May 1956, at the end of an extraordinary assembly of the association, the central executive committee of the NAM was outnumbered. So the assembly adopted an agenda in which the magistrates, given the lack of improvements of their economic treatment, announced they would not hesitate «to refuse their cooperation to the other powers of the State»[26].

The rupture induced the members of the central executive committee to resign, but then they revoke their resignation in the face of a step back by the promoters of the approved agenda. The "rebels" indeed excluded that it was their intention to «speak of abstention from judicial functions» and criticised the «big misunderstanding» created by a part of the press around the interpretation of the approved agenda[27].

The crisis within the NAM was not completely resolved, so much so that in June 1956 was even called an internal referendum to determine how to carry out the protest. In the light of the results of the referendum, the central executive committee announced a sort of a "white strike", through the «full compliance with the procedural and regulatory provisions»[28]. In other words, it called for the respect of numerous rules provided for by the codes of criminal and civil procedure (such as the assistance of the court clerk to the activity of the judge or the collection of witness evidence in the presence of a judge) which, in the absence of personnel and resources, were systematically violated

[24] E. Battaglini, *Valore di una legge*, in «La Magistratura», 1951, n. 6, p. 1.

[25] See E. Battaglini, *Il trattamento economico*, in «La Magistratura», 1951, n. 9, p. 1; R. Canosa and P. Federico, op. cit., p. 176; F. Zannotti, *La magistratura, un gruppo di pressione istituzionale: l'autodeterminazione delle retribuzioni*, Padua, Cedam, 1989.

[26] *Gli ordini del giorno*, in «La Magistratura» 1956, n. 5, p. 2.

[27] *L'assemblea generale di Roma*, in «La Magistratura», 1956, n. 5, p. 2.

[28] *Le deliberazioni del C.d.c.*, in «La Magistratura», 1956, n. 6-7, p. 1.

in the daily activity of justice. In order not to deny its basic assumptions of "apoliticism" and opposition to any form of syndicalism, the association specified that the protest «obviously did not consist on "non-cooperation", nor, in any way, on an union activity aimed at advancing economic pressure». For these reasons, the protest was defined as a «movement to revitalize the judicial function»[29].

The demands of the judiciary were accepted by the legislator in 1959 with the approval in parliament of a law that introduced unlimited biennial increases for the salaries of magistrates[30].

However, as we will see later, the improvement of salaries would have represented in the following decades one of the central themes of the pressure of the judiciary on politics[31].

The Court of Cassation and the establishment of the Constitutional Court

The role played by the Court of Cassation in the delayed implementation of the Constitution has often been criticised in the literature[32]. As noted above, in fact, the Constitution had given the Supreme Court the task of exercising the power of constitutional review until the Constitutional Court was established, which will happen only in 1956. As early as 1954, jurist Giorgio Balladore Pallieri attributed responsibility for the lack of constitutional implementation to three types of failure: the failure of the legislator, the failure of the government and the failure of the judiciary, the latter for having «adopted a benighted attitude, seeking every pretext for not applying the new rules» and for having «continued in the old habit, contracted during Fascism, of showing itself too prone to the wishes of the government»[33].

In particular, this critical approach is based on the well-known distinction made by the unified sections of the Court of Cassation, since the sentence of 7 February 1948, between programmatic constitutional norms and preceptive constitutional norms (the latter in turn divided into norms of immediate application and norms of deferred application). According to the unified sections of the Supreme Court, only the constitutional norms containing complete, clear and explicit precepts were immediately enforceable and therefore determined abrogative effects, while all the other norms, because of their vagueness and uncertain formulation, could not be applied without the intervention of the legislator. This distinction paved the way for a partial implementation of the Constitution, limited only to those norms that were immediately enforceable, and for the maintenance of various norms introduced during the fascist period, such as those included in the Single Text of the Public

[29] V. Chieppa, *La nostra azione*, in «La Magistratura», 1956, n. 8, p 1.

[30] See *Gli scatti biennali ai magistrati*, in «La Magistratura», 1959, n. 5, p. 6.

[31] See F. Zannotti, op. cit.

[32] See R. Canosa and P. Federico, op. cit., pp. 186 ss; G. Palombarini and G. Viglietta, La Costituzione e i diritti. Una storia italiana. La vicenda di Md dal primo governo di centro-sinistra all'ultimo governo Berlusconi, Naples, Edizioni Scientifiche Italiane, 2011, pp. 31-2; A. Meniconi, *Storia della magistratura italiana*, cit., pp. 287 ff.; E. Bruti Liberati, *Magistratura e società nell'Italia repubblicana*, Rome-Bari, Laterza, 2018, kindle edition, chapter I, section 7, La magistratura alla prova della democrazia.

[33] G. Balladore Pallieri, *La costituzione italiana nel decorso quinquennio*, in «Foro padano», IV, n. 1, 1954, col. 45, pp. 34 ff.

Security Laws and in the code of criminal procedure, which appeared to be in contrast with the system of guarantees provided for by the Constitution[34].

Recalling the harsh judgment expressed at the time by Balladore Pallieri, the distinction made by the unified sections of the Supreme Court has generally been interpreted in the literature as a sign of the Supreme Court's desire to defend the fascist legislation and to prevent a full implementation of the Constitution[35]. The story, as noted by Luciani, has ended up being represented with «hagiographic tones, if not with a cinematic plot», that is, as a story marked by the presence of good actors (some judges of merit and some sections of the Supreme Court), bad actors (especially the unified sections of the Supreme Court) and heroes (the Constitutional Court)[36]. The story, however, cannot be reduced to a simple struggle between good and bad actors, but should be examined taking into account its legal and political-institutional aspects.

From a juridical point of view, the position of the Court of Cassation cannot be analyzed without referring to the juridical and constitutional culture that characterised Italy in those years. At the centre of the legal culture of the post-war period remained the positivist and statist model of law typical of the liberal age. This model was based on the belief that the Constitution constituted a law of mere regulation of the relations between public powers (in particular the legislative one) and of simple definition of the limits of their activities, rather than a fundamental law placed at the apex of the system of the sources of law, immediately activable by judges (even in its principles) and meant to operate not only in political relations, but also in civil, social and economic ones[37]. This approach was so widespread as to prevail even among some jurists who called for the implementation of the Constitution[38]. This approach determined the tendency in the judiciary and in legal doctrine to evaluate the relationship between previous laws and the Constitution according to the chronological criterion and not the hierarchical one, and therefore to think in terms of abrogation rather than invalidity[39]. In this way, as Fioravanti points out, «the normativity of the Constitution was therefore entrusted almost exclusively to its ability to bind the legislator and all public powers, directing them towards its implementation»[40]. The fundamental problem, as highlighted above, was that the set of public powers imagined by the constituents to implement the Constitution had in the meantime come apart, first with the breakup of the governmental collaboration between the DC and the left and then

[34] R. Canosa and P. Federico, op. cit., pp. 188-192; N. Picardi, *La storia della Cassazione, la Cassazione nella storia (1944-1956)*, in «Rivista trimestrale di diritto e procedura civile, 1996, pp. 1247-1265; S. Bartole, *Interpretazioni e trasformazioni della Costituzione repubblicana*, Bologna, Il Mulino, 2004, pp. 41 ff.

[35] See in particular R. Canosa and P. Federico, op. cit., p. 204; E. Bruti Liberati, *Magistratura e società nell'Italia repubblicana*, Rome-Bari, Laterza, 2018, kindle edition, chapter I, section 7, La magistratura alla prova della democrazia.

[36] M. Luciani, *Dottrina del moto delle Costituzioni e vicende della Costituzione repubblicana*, in «Rivista AIC», 1/2013, pp. 6-7.

[37] M. Fioravanti, Costituzione, amministrazione e trasformazioni dello Stato, in *Stato e cultura giuridica in Italia dall'Unità alla Repubblica*, edited by A. Schiavone, Rome-Bari, Laterza, 1990, pp. 492-4; L. Ferrajoli, *La cultura giuridica nell'Italia del Novecento*, Rome-Bari, Laterza, 1999, pp. 57-9; M. Fioravanti, *L'attuazione della Costituzione: il ruolo della cultura costituzionale*, Relazione al Convegno "La Costituzione della Repubblica Italiana. Le radici, il cammino", Bergamo, 28-29 October 2005, pp. 5 ff., http://www.astrid-online.it/static/upload/protected/Fior/Fioravanti-ruolo-cultura-cost_28_10_.pdf. Cfr. G. Azzariti, *La mancata attuazione della Costituzione e l'opera della magistratura*, in «Foro Italiano», 1956, 79, IV, pp. 1-16.

[38] M. Fioravanti, *L'attuazione della Costituzione*, cit., p. 6.

[39] M. Luciani, op. cit., pp. 7-8.

[40] M. Fioravanti, *Costituzione, amministrazione e trasformazioni dello Stato*, cit., p. 495.

after the elections of 1948, which had permanently disrupted the social and political fabric on which the constituent pact was founded[41].

The positivist model of law was also based on the idea that the State preceded the Constitution and that, consequently, the introduction of the latter should never have disturbed the continuity of the former, that is the subject who had enacted the constitutional provisions. The previous norms could be abrogated only by other laws, enacted in implementation of the Constitution. The disapplication or abrogation of the norms had therefore to take place with prudence, so as to guarantee the continuity of the State and its legislation[42]. In 1956, the first president of the Court of Cassation, Ernesto Eula, made this position clear, pointing out that the Court's interpretation had made it possible to «give immediate life, on the legal level, if not to all, to many norms of the Constitution», and at the same time to «determine a procedure of gradual implementation of the Constitution, in accordance with the ongoing reorganisation of the State and with the formation, inevitably gradual in its progress, of collective feeling and democratic conscience»[43]. In short, as admitted by the first president of the Cassation, the Supreme Court endorsed the extreme caution shown by the government majority - concerned about the stability of the institutional system - in the implementation of the Constitution.

From a general perspective, moreover, the thesis sustained by the unified sections of the Supreme Court could not be considered unfounded: it is not possible to deny, in fact, that in the Constitution there are also provisions of a generic nature or that outline objectives of social development for the future, provisions that naturally lend to different interpretations[44]. Moreover, it is significant that some of the main critics of the interpretation of the Supreme Court, such as Piero Calamandrei, in the constituent phase had actually stressed the programmatic and generic character of several constitutional provisions[45]. It is also significant the fact that some constitutional principles were discovered by the Constitutional Court very late after its institution[46].

Having contextualized the reasons behind the position of the Supreme Court, there is no doubt that the distinction between programmatic and preceptive constitutional norms was often exercised in an extensive manner by the Supreme Court itself. As a result, the Constitution was reduced to «a sort of mosaic, some pieces of which were immediately taken into consideration, while many others remained - temporarily - completely excluded from the picture»[47].

The question was resolved with the coming into operation of the Constitutional Court in 1956. With the first ruling (n. 1/1956), the Court affirmed its exclusive jurisdiction on constitutional review of the laws, even those enacted before the Constitution came into force, and with regard to all the constitutional provisions, regardless of their programmatic or preceptive formulation[48]. The ruling

[41] E. Cheli, *Costituzione e sviluppo delle istituzioni in Italia*, Bologna, Il Mulino, 1981.

[42] M. Fioravanti, *L'attuazione della Costituzione*, cit., p. 6.

[43] Cited in R. Canosa and P. Federico, op. cit., p. 202.

[44] V. Zagrebelsky, La magistratura ordinaria dalla Costituzione a oggi, in *Storia d'Italia, Annali, 14: Legge, diritto, giustizia*, edited by L. Violante, Turin, Einaudi, 1998, p. 726; L. Paladin, op. cit., p. 75.

[45] P. Pombeni, *La Costituente*, op. cit., pp. 112-119.

[46] E. Lamarque, *Corte costituzionale e giudici nell'Italia repubblicana*, Rome-Bari, Laterza, 2012, kindle edition, position 1143.

[47] L. Paladin, op. cit., p. 79.

[48] M. Fioravanti, *Costituzione, amministrazione e trasformazioni dello Stato*, cit., p. 498.

opened a breach in the constitutional model to which the judiciary was accustomed, breaking down the two pillars on which the theses that had prevented the full normativity of the Constitution were based, that is the impossibility of declaring the unconstitutionality of a law enacted prior to the coming into force of the Constitution and the unenforceability of the principles contained in it[49]. As Luciani pointed out, only the Constitutional Court, that is only the judge called in a monopolistic position to exercise the power of annulment of laws, could have affirmed such innovative principles for the legal culture of the time[50].

The establishment of the Constitutional Court had a profound impact on how judges conceived their function and their relationship with the law[51]. The entry into operation of the Court broke the traditional conception of the judge as a mere executor of the law. Since constitutional provisions are largely expressions of ethical, political and social values, the judgement of constitutional legitimacy «is substantially transformed into a comparison of ordinary laws with values»[52]. The ordinary magistrate is also called upon to make this comparison, albeit in a preliminary way, having to assess the not manifest groundlessness of the question of constitutional legitimacy. The judge, therefore, is no longer limited to identifying the norm to be applied to the concrete case, but carries out a much more penetrating evaluation. This change produces important effects on the identity of the magistrate. The comparison of the law with a set of values inevitably leads the judge to take into greater consideration his own ideological and political beliefs[53].

This different relationship with the law also determines a new way for the judge to relate to political power. The judge must scrutinize the law in the light of constitutional values before applying it. This makes the judge «a critic before being an enforcer of the law»[54]. Instead of feeling like a mere enforcer of the laws wanted by government and parliament, the judge begins to feel like the owner of an autonomous function, clearly distinct from that of the political power[55].

Very soon, an intense functional relationship developed between the Constitutional Court and the ordinary judiciary, which, as we shall see, deeply affected the evolution of the judiciary itself[56].

Another factor contributed to the overcoming of the image of the judge "mouth of the law": the crisis of the State's monopoly of the jurisdiction, determined by the establishment of supranational and international courts, such as the Court of Justice of the European Community in 1952 and the European Court of Human Rights in 1959[57].

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[49] M. Fioravanti, *L'attuazione della Costituzione*, cit., p. 8.

[50] M. Luciani, op. cit., p. 9. See E. Bruti Liberati, *Magistratura e società nell'Italia repubblicana*, cit., chapter II, section 1, La Corte costituzionale e la sentenza n. 1.

[51] E. Lamarque, op. cit., kindle edition, position 1214.

[52] M. Capurso, *I giudici della Repubblica. Giudici soggetti alla legge o giudici di fronte alla legge?*, Milan, Edizioni di comunità, 1977, p. 25.

[53] Ivi, pp. 24-5.

[54] S. Senese, La magistratura nella crisi degli anni Settanta, in *L'Italia repubblicana nella crisi degli anni settanta, vol. IV, Sistema politico e istituzioni*, edited by G. De Rosa and G. Monina, Soveria Mannelli, Rubbettino, 2003, pp. 405-6.

[55] M. Capurso, op. cit., p. 25.

[56] E. Lamarque, op. cit., chapter 1, section 7, L'interdipendenza funzionale.

[57] M. Morisi, *Anatomia della magistratura italiana*, Bologna, Il Mulino, 1999, p. 15; N. Picardi, *La giurisdizione all'alba del terzo millennio*, Milan, Giuffrè, 2007, pp. 174 ff.

The establishment of the HCJ

The Higher Council of the Judiciary was established at the end of a ten-year legislative process[58]. The bill for the establishment of the autonomous governing body of the judiciary was formally presented by the government only in November 1954, after a long preparatory period.

The delays, as highlighted above, were mainly due to the government's concerns about the need to introduce such an important institution as the HCJ without upsetting the fragile institutional balance on which the country was based, ensuring forms of coordination between the judiciary and the other powers of the State.

These needs were highlighted very clearly by the Minister of Justice Attilio Piccioni in a speech to the Senate on 21 June 1950: «It must be premised that each of us is loyally ready to implement the constitutional norm, but that the implementation of the constitutional norm, independence and autonomy [for the judiciary], cannot and must not mean the disappearance of any concrete connection with the other powers and the public opinion; we cannot reach the point of creating a State within the State»[59]. According to the Minister, there were several aspects that still needed to be clarified: the nature of the decisions adopted by the HCJ, the relationship with the Minister of Justice («The Minister must remain the Minister of Justice: the Constitution expressly declares this», Piccioni recalled), the composition and powers of the HCJ.

The concerns of the government about the possibility that the law establishing the HCJ could determine the transformation of the judiciary into a caste, closed in on itself, were reiterated by the undersecretary of State for Justice Egidio Tosato in an intervention at the NAM Congress which took place in Naples on 4-7 November 1950: «The constitutional provisions appear clear and unambiguous: autonomy is not sovereignty and therefore, when it comes to establishing the nature and the limits of such autonomy and consequently the forms and the methods of exercising the powers attributed to the Higher Council, anyone who is familiar with such matters immediately perceives their extreme complexity and difficulty»[60]. According to the undersecretary, it was necessary to reconcile the autonomy of the judiciary with the position of parliament, with the role of the President of the Republic and with the general responsibility of the Minister of Justice and the government toward the Chambers.

Over the years, the associative judiciary advanced radical proposals regarding the powers and the composition of the HCJ. At the end of the Congress of the NAM in Florence in 1948, the magistrates proposed the establishment of a Higher Council of the judiciary composed of 42 members, two thirds of whom were elected by the judiciary (twelve magistrates of the Supreme Court, eight magistrates of appeal and eight magistrates of first instance) and one third by the parliament. The prevalence of the magistrates of Cassation was also confirmed with reference to the method of election, which provided for the establishment of eight constituencies and a separate college for the Supreme Court. It was also proposed to set up a board of the High Council, chaired by the first president of the Court

[58] See D. Piana and A. Vauchez, op. cit., pp. 37 ff.

[59] Parliamentary record, Senate of the Republic, 21 June 1950, p. 17627.

[60] *Il Sottosegretario On. Tosato*, in «La Magistratura», 1950, n. 12, p. 2.

of Cassation, with the task of coordinating the activities of the Council[61]. This last suggestion in fact entailed the deprivation of the President of the Republic from the task of coordinating the internal activities of the Council.

Faced with the concerns expressed by the Ministers of Justice and the government in the course of time, the associative judiciary did not seem to reconsider its positions. In the closing motion of the Congress of 1950, the NAM pointed out that the link between the HCJ and the legislative power could be achieved through the presence of a lay component in the HCJ and through the possibility for the Minister of Justice to promote disciplinary proceedings against magistrates. The NAM, actually, even proposed the recognition of the power of judicial review on the decisions of the HCJ to a special section of the HCJ itself, and not to the ordinary or administrative judge[62].

In October 1952, speaking at the Congress of the NAM in Venice, the Minister of Justice Adone Zoli reiterated the importance of defining forms of connection between the HCJ and the other powers of the State, stressing the permanence of divergences from the position of the associative judiciary[63].

The bill on the establishment of the HCJ was presented by the government to the Senate for the first time in November 1954 by the Guardasigilli Michele De Pietro. A decisive impulse to the approval of the law was provided by the change in the political situation of the country, characterised by the beginning of a slow process of opening dialogue of the DC with the Socialists. The beginning of this new political phase was confirmed by the election, on 29 April 1955, of Giovanni Gronchi as President of the Republic, with the support of a heterogeneous majority in parliament that also included socialists and communists. As soon as he was elected, in fact, Gronchi drew attention to the need to fully implement the Constitution, receiving the satisfaction of the journal edited by the NAM[64]. Gronchi, a man of the Christian Democrat left, had always supported the need for the DC to keep an open dialogue with the Socialists, to gradually bring them to assume government responsibilities[65].

However, the process of approval of the bill was not rapid. The government's fear that the text would eventually lead to the isolation of the judiciary from the other powers of the State always slowed down its approval. These concerns were also highlighted by Minister Aldo Moro in an intervention at the NAM congress in Naples in April 1957[66].

The law establishing the HCJ was finally approved by Parliament in March 1958. The final text reflected the concerns of politics. The HCJ was composed of 24 members, of whom three sit by right of office (the President of the Republic, the First President and the Prosecutor General of the Supreme Court), fourteen are elected by the magistrates (six magistrates of the Supreme Court, four magistrates of appeal and four magistrates of tribunal, elected by colleagues belonging to the same category) and seven are elected by Parliament. The law gave the Higher Council the jurisdiction over all measures

[61] *Mozioni approvate all'unanimità*, in «La Magistratura», 1948, 6, p. 2.
[62] *Le mozioni conclusive del congresso*, in «La Magistratura», 1950, n. 12, p. 4.
[63] *Il discorso del Guardasigilli*, in «La Magistratura», 1952, n. 10, p. 2.
[64] *Giovanni Gronchi Presidente della Repubblica*, in «La Magistratura», 1955, n. 4-5, p. 1. Cfr. L. Paladin, op. cit., pp. 129 ff.; D. Piana and A. Vauchez, op. cit., pp. 41-2.
[65] G. Bedeschi, *La prima Repubblica (1946-1993)*, Soveria Mannelli, Rubbettino, 2013, kindle edition, position 1478.
[66] *Il discorso del Ministro On. Moro*, in «La Magistratura», 1957, n. 4-5, p. 4.

concerning the status of magistrates, such as recruitment, assignments, transfers, promotions and disciplinary measures, but it assigned the power of initiative on all these matters to the Minister of Justice. The Council had to deliberate on appointments of magistrates to management positions in judicial offices in consultation with the Minister of Justice. The Presidential Committee was to be composed of the Vice-President, who chaired it, the First President and the Prosecutor General of the Court of Cassation. The law also established that the measures adopted by the Council could be contested before the Council of State on the grounds of legitimacy, while the disciplinary measures could be appealed before the unified sections of the Supreme Court. The law also established that all measures concerning magistrates were adopted, in accordance with the deliberations of the HCJ, by decree of the President of the Republic countersigned by the Minister of Justice, or, in the cases provided for by law, by decree of the Minister of Justice[67].

During the legislative process, the law had already been harshly criticised by the National Association of Magistrate. With a motion adopted at the end of the congress in Naples on 6-9 April 1957, the judiciary had argued that the bill «contrasted with the principles set by the Constitution»[68]. For the NAM it was necessary to exclude the power of initiative of the Minister of Justice, the concerted procedure for the conferral of management positions, and the possibility of appeal the Council's decisions before any courts. Moreover, it was necessary to re-establish the equal composition between the various categories of magistrates and the election by all magistrates, without distinction of category.

The proposals put forward by the NAM were not taken up by the legislator, who limited himself to reducing from ten to six the number of members elected by magistrates in the Supreme Court category. The day after the approval of the law, the associative judiciary expressed its satisfaction for the establishment of the HCJ, the result of a decade-long battle. The president of the NAM Vincenzo Chieppa defined the constitutional implementation of the HCJ «a great achievement that puts the Italian legislation at the forefront of all other legislations»[69]. At the same time, the president of the association of magistrates underlined the rejection of some of the proposals put forward by the judiciary and hoped for an improvement of the new body through legislative revision.

The position of the associative judiciary was reaffirmed at the congress of Sanremo on 6 October 1959. On that occasion, the National Association of Magistrates with a motion called for the revision of the law establishing the HCJ so that it would be «recognised without limitation the autonomous power of initiative of the Higher Council of Judiciary» and that it would be «established an electoral system based on a single national constituency», so that all magistrates could participate in the election of representatives, without distinction of categories[70].

[67] Constitutional jurisprudence later clarified that the transformation of the deliberations of the HCJ into a presidential decree or a ministerial decree does not presuppose control by these bodies over the content of the decisions taken by the Council, but only the formal transformation of these into administrative acts. On this see N. Zanon and F. Biondi, *Il sistema costituzionale della magistratura*, Bologna, Zanichelli, 2014, pp. 66-7.

[68] *Le mozioni conclusive*, in «La Magistratura», 1957, n. 4-5, p. 5.

[69] V. Chieppa, *Il Consiglio Superiore della Magistratura è fatto*, in «La Magistratura», 1958, n. 3, p. 1.

[70] *Le mozioni approvate*, in «La Magistratura», 1959, n. 8, p. 4. See also *Le proposte*, in «La Magistratura», 1959, n. 9, p. 1; *Le mozioni approvate*, in «La Magistratura» 1959, n. 10, p. 1-2.

The first Higher Council of the Judiciary took office on 18 July 1959. The first term was characterised by a limited autonomy of the body with respect to political power. The autonomy of the HCJ was limited not only by the power of initiative of the Minister of Justice, but also by the inadequate allocation of organisational and financial resources for the functioning of the body. For the first few years, the activities of the HCJ were carried out at some offices of the Ministry of Justice, and only in February 1962 the body obtained its own venue (Palazzo dei Marescialli in Rome). Until 1967, the HCJ was also devoid of financial autonomy, since its expenses were related to the budget of the Ministry of Justice[71].

However, the presence of functional, organisational and financial limits did not prevent the HCJ from enjoying a certain degree of autonomy and independence from political power since its early years. On some occasions, in fact, the Council went so far as to adopt decisions in clear contrast with the will of the executive, as we will see later in the field of promotions of magistrates.

In 1963 the Constitutional Court declared the constitutional illegitimacy of the provisions that attributed to the Minister of Justice the power of initiative for the deliberations of the Higher Council of the Judiciary concerning the status of magistrates (ruling n. 168/1963). The decision was very important because it granted the HCJ an autonomous capacity for action[72]. At the same time, the Constitutional Court ruled out the constitutional illegitimacy of the provisions of the law establishing the HCJ that provided for the over-representation of the magistrates of the Supreme Court, the possibility of appealing the decisions of the Council, the procedure for the conferral of management positions in agreement with the Minister of Justice, and the adoption of the HCJ measures in the form of a decree of the Head of State countersigned by the Minister of Justice.

In particular, the Constitutional Court stated a very important principle in the light of the radical views advanced by a large part of the judiciary. According to the constitutional judges, in fact, from the autonomy recognised by Article 150 of the Constitution to the Higher Council «does not derive [...] a clear separation of duties between the Minister of Justice and the body responsible for the government of the Judiciary, as would occur if, to the latter, was recognised (which is not, as is clear from the preparatory work) a full autonomy, including financial, concerning the judicial order». The autonomy provided for by the Constitution «does not exclude, however, that between the two bodies, in compliance with the competences assigned to each, there may be a relationship of collaboration», with the result that the services entrusted to the Minister of Justice by Article 110 of the Constitution cannot be limited to services concerning the personnel of chancelleries and secretariats, judicial districts, facilities and the means necessary for the exercise of judicial functions, «but also include both the organisation of the offices in their numerical efficiency, with the assignment of magistrates on the basis of the organisational charts, and the functioning of the offices in relation to the activity and behaviour of the magistrates who are assigned to it»[73].

[71] R. Canosa and P. Federico, op. cit., pp. 237-8; D. Piana and A. Vauchez, op. cit., p. 57; A. Meniconi, *Storia della magistratura italiana*, cit., p. 309.

[72] D. Piana and A. Vauchez, op. cit., p. 74.

[73] Constitutional Court, ruling n. 168/1963.

In conclusion, while recognizing to the HCJ an autonomous capacity of action, the Constitutional Court rejected the theses of those who advocated the transformation of the Council into a body isolated from the other powers of the State.

Previously, between March and November 1962, with a series of decisions, the Council of State had also rejected these theses, defining the HCJ as a body of constitutional relevance (rather than a "constitutional body"), since at the apex of the judicial system is the Court of Cassation and not the HJC, whose function is merely auxiliary and instrumental to the exercise of jurisdiction. The Council of State had also affirmed the possibility of appealing the decrees of the Head of State and the Minister of Justice issued to implement the HCJ's decisions[74].

Subsequently, the Constitutional Court would confirm the position of the Council of State, reaffirming the argument of the constitutional relevance of the HCJ (rulings n. 44/1968 and n. 148/1983) and confirming the possibility to appeal the decisions adopted by the Higher Council (ruling n. 44/1968).

As with the Constitutional Court, the coming into operation of the HCJ had a significant impact on the institutional and ideological development of the Italian judiciary. First of all, it strengthened the degree of independence of the judiciary from political power. The power to adopt measures concerning the status of magistrates was in fact entrusted to a representative body, composed for two thirds of magistrates themselves[75].

Secondly, the establishment of the HCJ had profound consequences on the hierarchical organisation of the judiciary. In a "traumatizing" way with respect to traditional values, this body provided for the participation of lower-ranking magistrates in decision-making processes that concerned the entire judicial corps and that also included the evaluation of the suitability of higher-ranking magistrates to hold certain positions of strategic importance[76].

The establishment of the HCJ, finally, stimulated the interest of judges to political commitment. Magistrates were called upon to elect every four years the members of a body charged with playing a leading role in the field of judicial policy. As we shall see, this led to the emergence within the judiciary of various groups with different political agendas, which would lead to intense electoral competitions not dissimilar to the political ones[77].

[74] See *Le deliberazioni del Consiglio Superiore della Magistratura sono soggette alla giurisdizione del Consiglio di Stato?*, in «La Magistratura», 1962, n. 8-9, p. 4.

[75] C. Guarnieri, *The judiciary in the Italian political crisis*, in «West European Politics», 1997, 20(1), pp. 157-175.

[76] G. Freddi, *La magistratura come organizzazione burocratica*, in «Politica del diritto», 1972, III, p. 336; G. Freddi, *Tensioni e conflitto nella magistratura. Un'analisi istituzionale dal dopoguerra al 1968*, Rome-Bari, Laterza, 1977, p. 138; G. Di Federico, *La professione giudiziaria in Italia ed il suo contesto burocratico*, in «Rivista trimestrale di diritto e procedura civile», 1978, n. 2, p. 810; E. Bruti Liberati and L. Pepino, *Autogoverno o controllo della magistratura? Il modello italiano di Consiglio superiore*, Milan, Feltrinelli, 1998, p. 44; D. Piana and A. Vauchez, op. cit., p. 72.

[77] R. Ricciotti, *La giustizia in castigo*, Rome, Volpe, 1969, p. 122.

Justice and media

In the 1950s, the clamor generated by some criminal cases led public opinion and legislators to turn their attention to some serious deficiencies of the judicial system: the abuse of pre-trial detention in prison, the use of force by judicial police to obtain confessions, the limitations of the right of defense, miscarriages of justice[78].

In other words, it clearly emerged the contrast between a penal system based on certain guarantees provided for by the Constitution and a criminal procedural system of fascist origin, that for the most part survived the change of regime, and in many cases appeared in contrast with fundamental rights and freedoms[79].

The code of criminal procedure then in force (the Rocco code) was based on a mixed trial system, partly inquisitorial and party adversarial, since it identified two distinct procedural phases marked by antithetical principles: the investigative phase and the public trial phase. The investigative phase aimed at searching and collecting all evidence considered necessary for the determination of the truth. This phase was dominated by the investigating judge, while the prosecutor served an auxiliary role to the judge (this phase could be twofold: the formal instruction, conducted by the investigating judge with the support of the public prosecutor, and the summary instruction carried out by the public prosecutor). The trial phase was dedicated to the hearing of the defendant and to the final decision. The investigative phase presented the characteristics of an inquisitorial trial, being written, secret and with no opportunity of defense, while the trial was inspired by the principles of the adversarial model, being oral, public and with the possibility of exercising the right of defense. In practice, however, the trial often did little more than serve as a repetition of the investigative phase. The findings of the investigation were naturally given more weight than the facts presented at trial by the defendant, thereby making the investigative phase the crucial factor in determining the verdict[80]. If, therefore, in theory, the code of criminal procedure aimed to outline a mixed trial system, in practice the procedure was essentially inquisitorial, with serious limitations to the right of defense of citizens and their fundamental freedoms[81].

With the law n. 517/1955, the parliament amended the code of criminal procedure introducing greater guarantees in favour of the suspect and the defendant. In the following years, the legislator approved further guarantees, intervening above all in the investigative phase. The new provisions, however, met the resistance of a part of the judiciary, which struggled to adapt its culture to a more adversarial kind of penal system[82].

In April 1953, the "Montesi case" constituted the first case of "trial by media" in the history of the Republic, with implications on both judicial and political levels. The scandal aroused a wide-ranging

[78] F. Colao, *Giustizia e politica. Il processo penale nell'Italia repubblicana*, Milan, Giuffrè, 2013, pp. 71 ff.
[79] Ivi, pp. 45 ff.
[80] G. Lozzi, *Lineamenti di procedura penale*, Turin, Giappichelli, 2009, pp. 6-10.
[81] W. T. Pizzi and L. Marafioti, *The New Italian Code of Criminal Procedure: The Difficulties of Building an Adversarial Trial System on a Civil Law Foundation*, in «The Yale Journal of International Law», 1992, vol 17, n. 1, pp. 3 ff.
[82] F. Colao, op. cit., p. 87.

debate even within the judiciary, in particular regarding the relationship between justice and freedom of press, and the issue of the publication on newspapers of investigative reports classified as secret[83].

In front of the proliferation of trial by media cases, in February 1955 the NAM decided to establish a national committee and local committees for relations between justice and the press, composed of representatives of the judiciary, journalists and editors, with the aim of ensuring the right to inform on criminal matters but also the proper conduct of criminal proceedings and the autonomy of magistrates[84]. In the following years, the National committee for justice and the press took positions on the occasion of some judicial events, calling especially the attention of journalists to the respect of the laws on secrecy of investigations. However, in April 1959 the same president of the NAM Vincenzo Chieppa recognised that on the concrete level the activity of the committees had not been «adequate» as the affirmation of the principles[85].

[83] On the Montesi case see F. Grignetti, *Il caso Montesi. Sesso, potere e morte nell'Italia degli anni '50*, Venice, Marsilio, 2006; G. Stephen, *Dolce vita: sesso, potere e politica nell'Italia del caso Montesi*, Milan, Rizzoli, 2012.

[84] *Rapporti fra giustizia e stampa*, in «La Magistratura», 1955, n. 4-5, pp. 1 e 3; *Comitati giustizia e stampa*, in «La Magistratura», 1955, n. 8-9, p. 4.

[85] *I comitati "Giustizia e stampa"*, in «La Magistratura», 1959, n. 4, p. 7.

4. The Sixties

The abolition of the career system of magistrates

Between 1963 and 1973, the traditional career system of magistrates was abolished through a series of law adopted by Parliament, under pressure of the associative judiciary. The result of these reforms considerably strengthened the independence of the judiciary, particularly in its internal dimension.

At the time, the career mechanism of magistrates was governed by the 1941 law on the judicial system, slightly amended after the birth of the Republic. After entering the career following a competitive examination, with the title of trainee judge (*uditore giudiziario*), after two years the magistrate had to pass another technical examination to be appointed as adjunct judge (*aggiunto giudiziario*). This was followed by a further three-year apprenticeship, after which, if he was considered eligible, the magistrate would be promoted to magistrate of tribunal. During his career, the moments of selection were those which allowed magistrates to be promoted to magistrate of the Court of Appeal and to magistrate of the Supreme Court after having passed special competitions[1]. The system provided that promotions to magistrate of appeal and to magistrate of the Supreme Court were made through competitions (based on exams or title evaluations) and assessments by seniority.

The process of abolition of the traditional career system cannot be understood without referring to the changes experienced at that time by the judiciary on the ideological and cultural level.

Since the late 1940s, the associative judiciary – particularly the "low judiciary" – began to criticise the principal method of selection used for promotions, namely the competitions based on title evaluations. The professional activity of the magistrate was evaluated by judging commissions (mainly composed of magistrates of the Court of Cassation) on the basis of the judicial work written by the candidates, such as verdicts and indictments. According to critics, the evaluation of the works did not allow for adequate evaluation of the real skills and capacities of magistrates. The system was accused of pushing magistrates to write long and sophisticated verdicts, feeding careerism, depriving magistrates of time for the exercise of judicial activity, and excessively conforming the decisions to the jurisprudence of the Supreme Court. This kind of competition also produced the feeling of privilege and favouritism: not having direct knowledge of the magistrate, it was believed that the members of the judging commissions often relied on indirect means, such as ties of friendship with the candidate. Finally, it was pointed out that most of the positions were assigned to magistrates serving in judicial or ministerial offices based in Rome, and therefore close to the magistrates of the Supreme Court who formed the judging commissions[2].

[1] L. Pomodoro and D. Pretti, *Manuale di ordinamento giudiziario*, Turin, Giappichelli, 2015, pp. 103 ff.

[2] See in particular V. Rongetti, *Il sistema delle promozioni*, in «La Magistratura», 1949, n. 8, p. 4; M. Berutti, *«Si sa» - (In tema di concorsi)*, Ivi, p. 4-5; G. Piazzalunga, *A proposito di Concorsi*, in «La Magistratura», 1950, n. 8, p. 3; S. Accolla, *Ancora sulle promozioni*, in «La Magistratura», 1950, n. 13, p. 2; G. Nicotra, *Sul sistema delle promozioni*, in «La Magistratura», 1952, n. 7, p. 4; L. D'Orsi, *Disservizio e promozioni*, in «La Magistratura», 1952, n. 8-9, p. 4; A. Nigro, *La carriera dei magistrati*, in «La Magistratura», 1955, n. 4-5, p. 2.

Already by the end of the 1940s, the idea that competitions based on title evaluation were not an adequate means for the promotion of magistrates appeared to be quite widespread in the associative judiciary. The same "high judiciary" (from which the leaders of the NAM were from) seemed to be aware of the limits of this type of competition, so much so as to promote a public discussion on this subject on the journal edited by the association since 1949[3].

The idea that it would be appropriate to abolish competitions based on title evaluations and maintain assessments by seniority as the main means of promotion was fairly well accepted by the majority of magistrates. Different positions, however, emerged on whether or not to introduce a different method of promotion (a different kind of evaluation of the magistrates' activity or a competition based on exams) that would allow to reward magistrates with exceptional skills, in order to avoid a flattening of qualities and a loss of interest of magistrates to improve themselves.

However, what was not questioned in this first phase was the existence of a ranking of judicial functions, that is, the idea that the exercise of the function of magistrate of appeal required a higher competence than that of magistrate of first instance, as well as the exercise of the function of legitimacy requires a higher competence than that of merit[4]. In evidence of this, as seen above, in 1951 the NAM had welcomed the approval of the law that had separated the judiciary from the bureaucratic order of the public administration with the recognition of three jurisdictional functions of increasing prestige.

At the end of the congress in Venice on 12-15 October 1952, the National Association of Magistrates approved a motion in which it underlined the need to ensure to magistrates also the guarantee of «internal independence» and asked that promotions to courts of appeal and to the Court of Cassation would take place on the basis of a twofold system: competitions based on exams and assessments by seniority[5].

The proposal was reiterated in a motion approved at the end of the Turin Congress of 23-25 October 1954. On that occasion, however, the first signs of tension between the high and the low judiciary began to emerge. In the final plenary assembly of the congress, in fact, an agenda was presented, but not voted on, in which a part of the NAM asked for the suspension of competitions based on title evaluations. The lower rank magistrates asked promotions would occurred only through assessments by seniority. Above all, they also asked for the «detachment of salary from career, establishing that all increases in initial salary are determined solely by seniority, whatever the function exercised» and this «in accordance with the constitutional principle of equality of magistrates in the diversity of the function»[6]. For the first time, in other words, a different interpretation of Article 107 of the Constitution emerged. According to this new interpretation, Article 107, by establishing that magistrates «are distinguished only by their different function», not only aimed to exclude the judiciary from the hierarchical classification by ranks of the civil service, but also meant to affirm the

[3] F. Bianco, *Lineamenti di un nuovo ordinamento giudiziario*, in «La Magistratura», 1949, n. 1, pp. 3-4; M. Roberti, *Gradi gerarchici e ruoli aperti*, in «La Magistratura», 1949, n. 2, p. 2; R. Angeloni, *Un problema fondamentale*, in «La Magistratura», 1949, n. 4, p. 3; V. Rongetti, op. cit.

[4] G. Freddi, *Tensioni e conflitto nella magistratura. Un'analisi istituzionale dal dopoguerra al 1968*, Rome-Bari, Laterza, 1977, pp. 130-1.

[5] *Le mozioni conclusive approvate*, in «La Magistratura», 1952, n. 10, p. 4.

[6] *La sospensione dei concorsi per titoli*, in «La Magistratura», 1954, n. 9-10, p. 6.

equality of judicial functions. This is, as is evident, a radically different interpretation from that provided by the constituents themselves at the time of the drafting of Article 107.

The tensions within the magistrates' association emerged clearly at the congress of the NAM held in Naples on 6-9 April 1957. At the end of the congress, with a motion approved by a small majority of votes, the judiciary proposed the abolition of «any form of advancement», demanding that the economic treatment of magistrates to be regulated «exclusively on the basis of seniority and family situation»[7]. According to this proposal, magistrates would be assigned to the functions of appeal and Cassation «after at least ten years of effective exercise of the judicial function, in compliance with the criterion of seniority». The motion pointed out that «for the purposes of a proper administration of justice it is essential that magistrates be placed in conditions of absolute equality, whatever the specific function assigned to them». In another passage it was stressed that «the judicial function is not, moreover, susceptible to a ranking of values, each of its activities being an immediate expression of the same sovereign power; and consequently that the transition to a different judicial activity, including that of the Supreme Court, should not constitute a promotion and should not imply advantages of an economic nature». The new interpretation of article 107 of the Constitution was thus formally accepted for the first time by the National Association of Magistrates.

The position taken by the congress contrasted with the warnings expressed by the then Minister of Justice, Aldo Moro. Speaking at the congress, in fact, Moro, while acknowledging that the «perfect system» for promotions of magistrates had not yet been found, expressed his concerns about a possible abolition of any form of promotions of magistrates with these words:

> It would be extremely dangerous if the judiciary, alone among all the bodies that make the State operate, were to dry up in a mechanical automatic career development. Precisely because of the particular importance of the function of the magistrate, an accurate, rigorous and serious selection is indispensable; if it were lacking, the judiciary would suffer, and would be deprived of that prestige and dignity that arise not only from the height of the function, but also from the height and intellectual dignity of those who are called to exercise it.[8]

The impact of the congress on the associative life of the judiciary was disruptive. The approval of the minority motion on promotions led the executive committee of the NAM to resign[9]. On 26 April 1957, the magistrates of the Court of Cassation gathered for the first time in a general assembly, at the end of which they asked for the elaboration of a reform of promotions that would allow to overcome the limits of the competitions based on titles evaluation and to assess in the best possible way the qualities of the magistrates, but at the same time rejected the new interpretation provided by young magistrates to Article 107 of the Constitution. According to the Court of Cassation, this article involved in fact a distinction of magistrates by function: «This distinction, which corresponds to the procedural system, cannot but determine within the judiciary a scale of values, which implies a progressive technical and professional improvement for the highest functions, gained through experience»[10]. Accordingly, the magistrates of the Supreme Court stated that «any form of flattening

[7] *Le mozioni conclusive*, in «La Magistratura», 1957, n. 4-5, pp. 5-6.
[8] *Il discorso del Ministro On. Moro*, ivi, p. 4.
[9] *Dimissionario il Direttivo dell'Associazione Magistrati*, ivi, p. 6.
[10] *L'assemblea generale della Corte Suprema si pronuncia sul Consiglio Superiore e sull'ordinamento giudiziario*, ivi, p. 2.

is incompatible with this scale of value and also in conflict with Article 105 of the Constitution, which attributes to the Higher Council the complicated assessment relating to the advancement of magistrates, thus excluding a mechanical progression by the mere passing of time».

The internal crisis within the association was temporarily overcome a few weeks later with a general meeting, which rejected the resignation of the executive committee. The assembly resized its position on promotions, asking for the abolition of competitions based on titles evaluation and the postponement of the problem of selection to a more in-depth study[11].

In August 1959 the Minister of Justice Gonella presented an outline of a bill to reform the system of promotions which provided for the abolition of competitions based on titles evaluation, replaced by competitions based on exams and assessment by seniority for promotions for court of appeal and Court of Cassation[12].

In November 1959, however, the NAM changed its demands, asking for the introduction of a system of progression in the functions based on the principle of «open roles». The system provided that magistrates, after a certain period of time (twelve years for magistrates of tribunal and six years for magistrates of appeal), would be subjected to an assessment and, if judged eligible, would be appointed to higher positions and receive the corresponding salary. The actual functions of appeal and Cassation would be assigned as and when there were vacancies[13]. The magistrates would therefore have obtained the title and the relative economic treatment regardless of the availability of positions in the organisational chart.

It became clear at this point that the real objective of the majority of the judiciary was no longer the abolition of the competition based on titles evaluation and the achievement of an adequate economic treatment for all, but the cancellation of any form of internal career in the judiciary[14]. In the report attached to the bill on promotions, the Minister of Justice stressed, in fact, that the demands of the associative judiciary on the problem of economic treatment had already been satisfied with the introduction of a system of salary increases linked to seniority. A reform of 1956 and one of 1959 had in fact first introduced four-year salary increases for each category of magistrate and then unlimited salary increases. These mechanisms, as the Minister pointed out, made it «possible after a reasonable number of years to reach the salary established for higher functions»[15].

The Higher Council of the Judiciary played a leading role in promoting the demands of the associative judiciary at the political level. In addition to propose the introduction of a system of progression of

[11] *L'assemblea generale*, in «La Magistratura», 1957, n. 6-7, pp. 1-4; V. Chieppa, *Vento di Bologna*, in «La Magistratura», n. 8-10, p. 1.

[12] *Verso la soppressione degli scrutini per titoli*, in «La Magistratura», 1959, n. 7, p. 2.

[13] *Il C.D.C. propone all'assemblea generale di Napoli i ruoli aperti e modifiche alla legge sul Consiglio Superiore*, in «La Magistratura», 1959, n. 9, p. 1; *A Napoli l'Assemblea generale straordinaria vota all'unanimità i ruoli aperti e a schiacciante maggioranza l'adeguamento del Consiglio Superiore*, in «La Magistratura», 1959, n. 10, pp. 1-2.

[14] R. Ricciotti, *La giustizia in castigo*, Rome, Volpe, 1969, p. 132; G. Freddi, *Tensioni e conflitto nella magistratura. Un'analisi istituzionale dal dopoguerra al 1968*, Rome-Bari, Laterza, 1977, p. 137.

[15] *La relazione ministeriale*, in «La Magistratura», 1960, n. 5-6, p. 6. Cfr. *Gli scatti biennali ai magistrati*, in «La Magistratura», 1959, n. 5, p. 6.

functions based on "open roles"[16], the Council decided on its own initiative not to announce the competitions based on titles evaluation for the year 1960, although the new law on promotions had not yet been approved[17]. The same thing happened in 1961 and 1962[18]. When questioned in the Senate on the reasons that had prevented the organisation of competitions in 1960, the then Minister of Justice Guido Gonella was forced to point out that, in light of the rules contained in the law establishing the HCJ, the Minister could call the competitions only after having asked the Higher Council to call them and after the Council had adopted a resolution. Having asked the HCJ to deliberate on the competitions, receiving a negative response, the Minister stated that he could only «adapt to the negative behaviour of the body competent to deliberate on the matter»[19]. Moreover, the decision of the HCJ not to hold competitions from 1960 to 1962 led the Council of State in 1963 to condemn the Ministry of Justice on the following grounds: «It is obvious that the consideration that, as is well known, reforms of the judicial system are in progress, intended, among other things, to revise the current rules on the advancement of the judiciary, cannot have any weight. The law must be applied as long as it is in force; and no authority can, without incurring an overflow of power, suspend the application of the law in force - which only the legislative power could do - pending a planned reform»[20]. Consequently, the refusal of the Ministry of Justice to call competitions in the absence of the HCJ's decision constituted a «violation of the law». With the adoption of the opinion unfavourable to the government and the decision not to organize the competitions provided by law, the HCJ showed significant autonomy from the political power.

The demands of the NAM were accepted by the political parties. The acceptance of the requests of the judiciary was favoured by the changes occurred in the political context. Since the mid-1950s, the left-wing parties began to develop increasingly close relations with some sectors of the judiciary, especially the progressive ones. At the heart of this rapprochement were primarily strategic reasons: opposition parties became increasingly interested in strengthening the judiciary's guarantees of independence vis-à-vis the executive from which they were excluded or which they could not fully control. This was especially true for the Partito Socialista Italiano[21]. On the other hand, the internal fragmentation within the DC favoured the development of alliances between the judiciary and some factions within the governing party, which decided to fulfill the wishes of the judiciary[22].

At the end of this chapter there is an in-depth study of the parliamentary work that led to the approval of the laws, strongly desired by the associative judiciary, which abolished the career of magistrates. In particular, the focus will be on the reasons that led the political forces to accept the demands of the

[16] *Il parere del Consiglio Superiore della Magistratura sulla riforma del sistema delle promozioni*, in «La Magistratura» 1960, n. 5-6, pp. 3-4. Cfr. R. Canosa and P. Federico, *La magistratura in Italia dal 1945 a oggi*, Il Mulino, Bologna, 1974, pp. 236-7.

[17] *Notiziario del Consiglio Superiore*, in «La Magistratura», 1960, n. 1, p. 2.

[18] *Ultimissime*, in «La Magistratura» 1960, n. 10, p. 1; *La risposta dell'On. Gonella ad una interpellanza del Sen. Monni*, in «La Magistratura», 1961, n. 3, p. 6; *Notiziario del Consiglio Superiore*, in «La Magistratura», 1962, n. 3-4, p. 5.

[19] *La risposta dell'On. Gonella ad una interpellanza del Sen. Monni*, in «La Magistratura», 1961, n. 3, p. 6.

[20] *La sentenza del Consiglio di Stato sul mancato bando dei concorsi negli anni 1960-1962*, in «Rassegna dei magistrati», 1963, n. 1, p. 19. Cfr. R. Canosa and P. Federico, op. cit., p. 241.

[21] C. Guarnieri, *Magistratura e politica: il caso italiano*, in «Rivista italiana di scienza politica», 1991, XXI, n. 1, pp. 19-20.

[22] Ivi, p. 23.

magistrates and on the presence, or absence, of an awareness of the effects that these reforms would have on the development of the judiciary.

In December 1962, the Parliament reformed the system of promotion of magistrates by approving Law n. 1/1963. The law abolished competitions based on titles evaluation and established the adoption of assessments by seniority at fixed date as the normal means of progression to the positions of magistrate of Court of Appeal and magistrate of Court of Cassation, and of competition by examinations as an exceptional means, for a limited number of positions. The measure did not abolish the evaluation of titles, as requested by the associative judiciary. The law, in fact, provided that the assessment to be promoted to the category of appeal and Supreme Court was based on the evaluation of judicial work of the magistrates[23]. The measure was in any case welcomed by the National Association of Magistrates[24].

In 1966 the Parliament intervened again on the matter by approving Law n. 570/1966, called "Breganze Law", from the name of its main promoter. The law abolished the competition by exams and provided for the passage from the category of magistrate of the tribunal to that of appeal at the completion of eleven years of service, subject to the favourable opinion of the judicial council[25]. The HCJ would have proceeded to the appointment as magistrate of appeal after evaluation of the opinion of the judicial council, with the possibility of «taking, in the form and manner deemed most appropriate, any further element of judgment that it deems necessary for the best evaluation of the magistrate» (Article 3 of Law n. 570/1966). Following the demands of the NAM, the measure introduced the mechanism of "open roles" promotion. Magistrates of appeal who, due to a lack of vacancies, had not been able to exercise their functions, would have continued to exercise their previous functions in the offices to which they were assigned, but would have received the salary relative to the higher function[26].

The abolition of the career was completed by Law n. 831/1973. This law, approved by Parliament under pressure from the NAM, extended the mechanism of "open roles" to include promotions to the Supreme Court[27].

Although introducing the mechanism of open roles promotion, and thus effectively abolishing the career in the judiciary, the new rules provided for the maintenance of a mechanism of evaluation of magistrates, by both the judicial councils and the HCJ. In particular, the laws provided that the

[23] See in particular articles 15 and 29 of the law n. 1/1963.

[24] *Un punto di approdo*, in «La Magistratura», 1962, n. 10-12, pp. 1-2.

[25] The judicial councils constitute the peripheral administrative bodies of the judicial system. They are established in the Courts of Appeals and have advisory functions towards the Higher Council of the Judiciary. The regulation of judicial councils has varied over time. According to the legislation in force since the 1960s, the councils consisted of two ex officio members, the first president and the general prosecutor of the Court of Appeal, and eight members elected every two years from among all the magistrates in the district. The councils performed consultative functions on the organisation of offices and the evaluation of the professionalism of magistrates, providing (non-binding) opinions to the HCJ. The rules on judicial councils, as will see later, changed in 2007. On this see G. Scarselli, *Ordinamento giudiziario e forense*, Milan, Giuffrè, 2013, pp. 129-130; L. Pomodoro and D. Pretti, *Manuale di ordinamento giudiziario*, Turin, Giappichelli, 2015, pp. 73-6.

[26] See *Una Legge difficile. "La Breganze"*, in «La Magistratura», 1967, n. 1-2, pp. 11-16.

[27] See G. Lattanzi, *La «carriera» dei magistrati tra vecchio e nuovo ordinamento giudiziario*, in Quaderni costituzionali, 1983, n. 1, p. 146.

evaluation of the activity of magistrates for the purpose of their promotion would continue to take into account judicial work, that is, their titles. In particular, Law n. 570/1966 on promotion to magistrate of appeal provided that the scrutiny of the magistrate would focus «on the magistrate's abilities and the activity carried out in the last five years» (Article 1). In these categories, as specified by the same speaker of the measure in parliament, were «clearly included the above-mentioned titles», although these could not «certainly determine a decisive assessment»[28].

For each promotion, therefore, both the technical-professional skills of the magistrate, according to the parameters of preparation, effort and diligence, and the judicial work written by the magistrate should have been verified. However, the absence in the new laws of specific references to the evaluation of titles allowed the HCJ to interpret the new rules in a very discretionary way. The HCJ elected in 1968, in fact, immediately decided to exclude the titles from the evaluations for promotions[29].

Therefore, despite the evaluation procedures formally provided for by the law, in practice seniority became the main criterion for the career advancement of magistrates[30]. As pointed out by Di Federico, on the basis of an extensive interpretation of the new rules, the HCJ transformed the evaluation of the professional skills of magistrates into an «empty ritualism», providing for the promotion of all magistrates who had reached the minimum of seniority, including those who in the meantime did not exercise judicial activity because, for example, in charge of extra-judicial functions or elected to parliament, excluding only those with serious disciplinary and criminal proceedings or convictions[31].

The rules, in other words, as noted by Di Federico, were interpreted and applied «in ways that go beyond the most extreme laxity to become in fact an implicit refusal to carry out, in substantial violation of specific provisions of law, any form of effective assessment of the professionalism of magistrates for all career steps»[32]. In this way, «the ancient dream of all bureaucratic bodies» was realized, that is, to make merit coincide with the mere assessment of seniority[33].

The data confirm this critical judgment. If, for example, in the period 1952-1962, at the time of retirement, the majority of magistrates (52.2%) were still at the first level of career advancement, that of magistrate of appeal, and the corresponding salary, figures for the period following the reforms show that almost all magistrates were promoted with highly positive evaluations, except in rare cases

[28] *Relazione della 2a commissione permanente sul disegno di legge approvato dalla Camera dei deputati nella seduta del 9 dicembre 1965*, Senate of the Republic, 22 June 1966, p. 4. See the in-dept study at the end of this chapter.

[29] G. Di Federico, Magistrati ordinari: organico, reclutamento, valutazioni della professionalità, carriera, tramutamenti e attribuzione delle funzioni giudiziarie, trattamento economico, in *Ordinamento giudiziario. Uffici giudiziari, Csm e governo della magistratura*, edited by G. Di Federico, Bologna, Bononia University Press, 2019, p. 327.

[30] G. Di Federico, *La professione giudiziaria in Italia*, cit., p. 811; V. Zagrebelsky, La magistratura ordinaria dalla Costituzione a oggi, in *Storia d'Italia, Annali, 14: Legge, diritto, giustizia*, edited by L. Violante, Turin, Einaudi, 1998, p. 759.

[31] G. Di Federico, Le qualificazioni professionali dei magistrati: carenze attuali, possibili riforme e difficoltà di attuarle, in *Manuale di ordinamento giudiziario*, edited by G. Di Federico, Padua, Cedam, 2004, p. 403. Cfr. F. Dal Canto, *Lezioni di ordinamento giudiziario*, Turin, Giappichelli, 2018, p. 151.

[32] G. Di Federico, L'indipendenza della magistratura in Italia: una valutazione critica in chiave comparata, in *Manuale di ordinamento giudiziario*, cit., p. 333.

[33] Ivi, p. 405. Cfr. R. Ricciotti, *La giustizia in castigo*, cit., p. 132; L. Paladin, *Per una storia costituzionale dell'Italia repubblicana*, Bologna, Il Mulino, 2009, p. 221.

of serious demerit: from May 1979 to March 1988, out of 7.973 magistrates evaluated, 7,921 were promoted (99.3%) and only 52 "rejected" (0.7%)[34].

The abolition of the career system and the disappearance of effective forms of evaluation of professionalism had a radical impact on the evolution of the Italian judiciary.

First, the reforms considerably strengthened the independence of the judiciary, externally, thus in relation to political power, but also and above all internally. The abolition of the career, in fact, eliminated the influence of the heads of offices and the Supreme Court, which in the past had played a leading role in the promotion procedures. The reform thus consolidated the process of dismantling of the traditional hierarchical structure within the judiciary, favouring the development of an institutional culture based on the highest level of autonomy of each magistrate[35].

Secondly, the feeling of greater independence induced magistrates to exercise the penal action with greater determination in relation to the economic, political and administrative sectors[36]. This expansion of autonomy, however, was accompanied by the disappearance of forms of effective assessment of the work of the magistrates, with the result that the feeling of independence frequently ended up bordering on a feeling of irresponsibility[37].

Thirdly, the career reforms also conditioned the work of the HCJ. The dismantling of the traditional hierarchical structure deprived the HCJ of criteria for evaluating magistrates, for example, for the assignment of management functions, as well as for deciding on transfers in general, when several candidates compete for the same post[38]. This caused a consolidation of the relevance, for the purposes of the decision, of the factional or political connections[39]. In this way, as we will see in detail later, appointment of magistrates to higher positions by the HCJ became based mostly on the practice of *lottizzazione*, that is according to affiliation of judges to the groups inside the associative judiciary[40].

The secession of the high judiciary and the birth of the so-called *correnti*

The protest against the traditional career system and the hierarchical structure led to a deep fracture between the high and the low judiciary. Following the approval in March 1960 of the motions in the general assembly of the National Association of Magistrates in favour of the abolition of the career, the magistrates of the high judiciary constituted an associative group called "Union of magistrates of the courts", then became "Union of Italian Magistrates" (UIM), chaired by Giuseppe Virzi, president

[34] G. Di Federico, Le valutazioni della professionalità dei magistrati, in *Anatomia del potere giudiziario. Nuove concezioni, nuove sfide*, edited by C. Guarnieri, G. Insolera and L. Zilletti, Rome, Carocci, 2016, p. 80.
[35] V. Zagrebelsky, *La magistratura ordinaria dalla Costituzione a oggi*, cit., p. 761.
[36] G. Lattanzi, op. cit., p. 154.
[37] Ibidem.
[38] C. Guarnieri, *Magistratura e politica: il caso italiano*, cit., p. 25.
[39] V. Zagrebelsky, *La magistratura ordinaria dalla Costituzione a oggi*, cit., p. 760; G. Di Federico, *Le valutazioni della professionalità dei magistrati*, cit., p. 82.
[40] G. Di Federico, *«Lottizzazioni correntizie» e «politicizzazione» del C.S.M.: quali rimedi?*, in «Quaderni costituzionali», 1990, n. 2, pp. 279-297.

of the first civil section of the Court of Cassation[41]. The group was initially formed within the NAM, but the irremediable fractures led on 7 January 1961 to the exit of the group from the association. In 1961 the new association also began to edit a journal called «Rassegna dei magistrate», which over the years constituted the fundamental platform for ideological debate within the Union[42].

In their motivation for leaving the NAM, the senior magistrates complained first of all about the lack of consideration given to their requests within the association and expressed their opposition to the proposals put forward by the NAM about the equal representation of the categories in the HCJ and the abolition of the career[43]. «We admit the indiscriminate progression to economic effects», the senior magistrates said, «but we are strongly opposed, in the interest of justice, to the flattening of the career, which would damage not only the administration but also the most talented elements, which in the early career advancement must find encouragement and reward to administer justice well»[44]. As a result, the senior magistrates claimed they could accept the abolition of competitions based on titles evaluation, but asked for the introduction of a system that would ensure the necessary selection, and only when there was a need to fill positions in the organisational chart[45].

The magistrates of the UIM also criticised the request of the NAM to suspend the competitions based on titles evaluation, asking repeatedly that, until the reform of promotions was approved, the laws then in force were applied and then the competitions were announced: «We think, in fact, that the judge who says: "disapply the current law because we do not like it or it does not suit us" denies its essential function, which is to respect the law, to interpret and apply it»[46].

In the following years, the ideological differences between the UIM and the NAM extended far beyond the issues of associative debate and promotion reform. The magistrates belonging to the two associations began to manifest two different conceptions of the role of the jurisdictional function: the first, embraced by the UIM, according to which the task of the judge is to apply the rules in the most possible technical way, respecting the intent of the legislator, and mainly protecting the principle of legal certainty; the second, advanced by the NAM, and in particular by its more progressive groups, according to which the task of the judge is to immerse himself in civic culture and to elaborate positive responses to the deep and rapid transformations taking place in society, applying in a broad way the principles contained in the Constitution[47].

In the following years, the UIM would continue to be the bearer of the most traditionalist instances of the judiciary, in defense of the maintenance of a hierarchical structure of the judicial system and against the risk of a politicization of the judicial function[48]. As we will see, the fracture between high

[41] *Appello ai Magistrati delle Corti*, in «La Magistratura», 1960, n. 3-4, p. 4; *Assemblea generale straordinaria a Bologna il 10 luglio*, in «La Magistratura», 1960, n. 5-6, p. 1; V. Chieppa, *Ai Magistrati dell'Associazione*, in «La Magistratura», 1960, n. 7, p. 1; *L'Assemblea generale straordinaria di Bologna*, in «La Magistratura», 1960, n. 10, pp. 1-2.

[42] See R. Ricciotti, *La giustizia in castigo*, cit., pp. 145-154.

[43] *L'assemblea dell'Unione magistrati delle Corti*, in «Rassegna dei magistrati», 1961, n. 1, pp. 5-19.

[44] Ivi, p. 11.

[45] See *Ancora sul tema delle promozioni*, in «Rassegna dei magistrati», 1961, n. 1, pp. 25-28.

[46] *L'assemblea dell'Unione magistrati delle Corti*, in «Rassegna dei magistrati», 1961, n. 1, p. 10.

[47] G. Freddi, op. cit., pp. 143-4; V. Zagrebelsky, *La magistratura ordinaria dalla Costituzione a oggi*, cit., p. 765.

[48] See the issues of «Rassegna dei magistrati». In addition, see G. Colli, *Pagine di una storia privata*, Rome, without publisher, 1989.

and low judiciary will mark the action of the associative judiciary until 1979, when, in the face of the terrorist emergency, the UIM will decide to dissolve and rejoin the NAM.

Among the main reasons for the secession of the UIM were, as pointed out above, the way in which the debate within the NAM had been taking place for some years, increasingly conditioned by the mobilisation of its internal factions (the so-called *correnti*), which were pushing for renewal.

The term "*correnti*" began to spread as early as 1957, especially after some votes took place within the assembly of the National Association of Magistrates in which the leadership had been outvoted through the systematic use (for some, the abuse) of delegations by some organized groups.

Already in 1957, moreover, the president of the NAM Vincenzo Chieppa drew attention to the turbulence caused by the prominence of organized groups within the association: «We believe that the groups can have citizenship in the Association only as organs of preparation, propulsion and control of the statutory governing bodies, but [that they] cannot and should not act externally, replacing the organs themselves, nor internally overlap them [...]»[49]. For the president of the NAM, the association could not «turn into a quintana of activist factions, organized and operating in the deteriorating forms of political assemblies». For these reasons, the groups were asked to abandon «every trace of faction and inferior activism»[50].

The first group to form within the NAM in 1957 was Terzo Potere, which became the bearer of the demands for change coming from the younger magistrates against the hierarchical structure of the judicial system and the career system[51]. The secession of the high judiciary (the common "enemy" of the low judiciary) favoured the emergence of different cultural orientations in the associative judiciary[52]. In 1962 the group Magistratura Indipendente, with a conservative line, was born in order to counter the progressivism of Tp. In 1964 the group Magistratura Democratica was born. It also promoted progressive views, but sought to overcome the corporate perspective that characterised the action of TP[53].

The adoption by the NAM, in April 1964, of the proportional method for the election of the central executive committee institutionalized the presence of the three different groups within the association[54].

In view of the elections, the three groups made explicit their own ideological positions[55].

Terzo Potere proposed the «full independence of the judge», through the abolition of the system of promotions and its replacement with a system of career advancement based on seniority; the reform of the HCJ with the abolition of the consultation with the Minister of Justice for the conferral of management functions; the affirmation of the non-appealability of the measures of the Council; the

[49] *Le vie da seguire*, in «La Magistratura», 1957, n. 6-7, p. 4.
[50] On this see C. Gentile, *Convivenza*, in «La Magistratura», 1958, n. 3, p. 5.
[51] On the history of Terzo potere see in particular S. Letizia, *Terzo potere. Storia dell'associazionismo giudiziario dal 1960 al 1986*, https://sergioletizia.files.wordpress.com/2016/01/terzo-potere-corrente-della-n-magistrati.doc
[52] R. Ricciotti, *La giustizia in castigo*, cit., p. 156; S. Pappalardo, op. cit., pp. 90-1.
[53] R. Canosa and P. Federico, op. cit., pp. 270 ff.
[54] *Il nuovo Statuto*, «La Magistratura», 1964, n. 4, pp. 1, 5-10. Cfr. «La Magistratura», 1964, n. 5-6.
[55] See «La Magistratura», 1964, n. 9-10.

introduction of an electoral system without distinction of categories; the introduction of a system of automatic economic progression and without regard to the functions exercised. More generally, Terzo Potere advocated «a radically new vision of justice in our country, which has as its engine a free judge, immersed in the spirit that pervades our Constitution, a man of our time, who in the interpretation of the law feels the contact and the breath of our era and its transformations»[56]. What was proposed was therefore the figure of a magistrate embedded in the dynamics that crossed the Italian society and able to accommodate these new social demands in its judicial activity.

Magistratura Democratica's vision was more radical[57]. For Md, the judiciary and the judicial function had to adapt to the «new table of values resulting from the Resistance and consecrated in the Constitution»[58]. For the magistrates of MD, in fact, the «great and innovative scope» of the Constitution and its «deepest and most authentic political meaning» lay in the fact that the fundamental principles of the new order provided by the Constitution were not merely ideal, but constituted «real legal rules, binding, for the future, every state power and every contingent political majority». The magistrates were therefore given the task of implementing these principles by taking them as «interpretative standards» in their jurisdictional activity. The movement aimed to achieve the «complete independence of the judiciary», through the overcoming of the hierarchical structure at the top of which were the Court of Cassation and the Minister of Justice; the complete «exclusion» of the concept of career from the judicial system; the reform of the HCJ with the elimination of any distinction of category in the elections; the introduction of the elective appointment of honorary magistrates. The overall objective was «the formation of a new type of judge, who knows how to be aware of being an instrument of delegated and partial exercise of popular sovereignty, and therefore knows how to mediate in his jurisprudence the needs expressed by the same»[59]. It follows «the need for the widest and deepest democratization of the exercise of the function, so that popular sovereignty is always able to exercise its control, and so that the magistrate is prevented from feeling detached from the social body, closed in the ebony tower of an exclusive technicality, or, even worse, placed above the social body itself, as part of a caste depository of a isolated power».

Some points of the MD's program, and in particular the reference to the link between judicial activity and popular sovereignty, recalled the views expressed by the left-wing parties during the Constituent process. It is no coincidence that, in an intervention published in the same issue of «La Magistratura», Riccardo Pacifici of MD supported the opportunity for the NAM to establish an «official contact» with the political parties for the approval of the laws necessary to ensure the full independence of the

[56] *Esposizione programmatica di "Terzo potere"*, ivi, p. 5.

[57] On the history of MD see R. Canosa and P. Federico, op. cit., pp. 280 ss; *Storia di un magistrato. Materiali per una storia di Magistratura Democratica*, edited by M. Ramat, Rome, manifestolibri, 1986; S. Pappalardo, op. cit.; *Giudici e democrazia. La magistratura progressista nel mutamento istituzionale*, edited by N. Rossi, Quaderni di «Questione Giustizia», Milan, Franco Angeli, 1994; G. Palombarini, *Giudici a sinistra. I 36 anni della storia di Magistratura democratica: una proposta per una nuova politica per la giustizia*, Naples, Edizioni scientifiche italiane, 2000; *L'eresia di Magistratura democratica. Viaggi negli scritti di Giuseppe Borrè*, edited by L. Pepino, Quaderni di «Questione Giustizia», Milan, Franco Angeli, 2001; G. Palombarini and G. Viglietta, *La Costituzione e i diritti. Una storia italiana. La vicenda di Md dal primo governo di centro-sinistra all'ultimo governo Berlusconi*, Naples, Edizioni Scientifiche Italiane, 2011.

[58] *Mozione di "Magistratura Democratica"*, in «La Magistratura», 1964, n. 9-10, p. 4.

[59] Ivi, p. 5

judiciary[60]. The attention was directed in particular to the opposition parties, after the governing parties had shown themselves incapable of achieving the expected reforms. Finally, MD's motion fully recognised the right of the press to report and criticise judicial measures.

Although it took some positions to extremes, MD shared the core of progressive proposals also put forward by Terzo Potere. The ideological closeness between the two groups was confirmed by the presentation at the elections of a list called Concentration which aimed not to disperse the votes destined to Terzo Potere and MD. The emergence of progressive instances in the judiciary was favoured by the particular political climate of that time, characterised by the birth of the centre-left government, which had raised significant hopes for change in society[61].

The electoral program of Magistratura Indipendente appeared to be more conservative[62]. MI's program proposed the abolition of the economic career of the magistrates, with salary based solely on length of service, and the reform of the HCJ, with the recognition of a full power of initiative and the election of members by all magistrates without distinction of category. The magistrates of MI said instead «decidedly contrary» to the introduction of the elective judge, which could not ensure «neither the absolute independence nor the necessary preparation of the judge», pushing the judge «at the mercy of political alignments» and thus «eliminating the guarantee of equal treatment for all citizens»[63].

From the very beginning, the competition between the groups seemed to go beyond the mere dialectical confrontation between the various positions within the associative judiciary, turning into a real competition between different political visions. The electoral campaign between the *correnti* was also upset by the distribution of an anonymous booklet entitled «Comrade judge», signed by «a group of magistrates», in which MD and TP were accused of being crypto-communist and in which the «fellow judges» were invited to deepen their notions of Marxism-Leninism[64].

The first proportional elections of the National Association of Magistrates saw the victory of Terzo Potere with 41% of the votes, followed by MI (33%) and MD (19%). Following the elections, an executive committee was constituted, presided over by Mario Berutti, based on an agreement between TP and MD. The alliance between the two *correnti* will allow the two most progressive groups to maintain the leadership of the NAM almost uninterruptedly until 1968[65].

[60] R. Pacifici, *Il monologo e la democrazia*, in «La Magistratura», 1964, n. 9-10, p. 3.

[61] G. Palombarini and G. Viglietta, op. cit., pp. 41-2.

[62] On the history of MI see R. Ricciotti, *La giustizia in castigo*, cit.; M. Cicala, *Tutte toghe rosse? L'area moderata fra cultura, politica e magistratura*, in «Critica penale», LVI, September 2000, III-IV, pp. 199-231; P. Borgna and M. Maddalena, *Il giudice e i suoi limiti. Cittadini, magistrati e politica*, Rome-Bari, Laterza, 2003.

[63] *Programma della lista "Magistratura Indipendente"*, in «La Magistratura», 1964, n. 9-10, p. 4.

[64] *Un atto ignobile*, in «La Magistratura» 1964, n. 9-10, p. 1. Sulla vicenda cfr. R. Ricciotti, *La giustizia in castigo*, cit., pp. 175-6; S. Pappalardo, op. cit., pp. 154-6.

[65] S. Pappalardo, op. cit., pp. 166-7; D. Piana and A. Vauchez, *Il Consiglio superiore della magistratura*, Bologna, Il Mulino, 2012, p. 106.

In the following years, the groups strengthened their relevance, endowing themselves with organisations spread throughout the Italian territory and playing an increasingly penetrating role within the NAM and the HCJ[66].

Already at the end of 1965, in an intervention in «La Magistratura», Adolfo Beria di Argentine - one of the main representatives of MD - stressed that, a little more than a year after the reform of the statute of the Nm, the *correnti* had become «a living reality within the Association». However, for Beria di Argentine it should not be overlooked «the presence of the danger of a degeneration of the function of the correnti when the controversy that they provoke is conducted with ways and means that exceed the limits of a healthy dialectic»:

> In fact, they already threaten to assume the forms and the role of real associations, constituting themselves as autonomous bodies. Their disputes, in addition to the ongoing struggle between the two associations of magistrates, have sometimes taken on harshly polemical tones and have adopted means or systems similar to those of the most acrimonious political struggles, such as personal attacks and clever deformations of the truth.[67]

The "discovery" of the Constitution

As pointed out above, the institutional and ideological changes experienced by the judiciary between the end of the 1950s and the beginning of the 1960s contributed to the development within the judiciary of a new conception of the role of the judge in society and his relationship with the Constitution and the law[68].

Following the entry into operation of the Constitutional Court in 1956, but especially since the early Sixties, in the lower judiciary there spread a new image of the judge, who did not limit his activity to the application of the rule according to the only interpretation provided by the legislator, in line with the liberal formalistic conception of law until then dominant, but was open to the changes taking place in society and tried to respond to them through an interpretation of the law more sensitive to the principles expressed in the Constitution[69].

The “discovery of the Constitution” was favoured by the changes experienced by the Italian legal culture, traditionally focused on the formalistic and positivistic conception of law. The development of the studies of analytical philosophy and sociology of law challenged the traditional legal paradigm, opening the space to the critical analysis of new dimensions of law: the underlying ideologies of legal doctrines, the social role of jurists, the behaviour of judges, the political and cultural choices expressed through jurisprudence[70]. From this crisis a new generation of jurists and judges emerged,

[66] D. Piana and A. Vauchez, op. cit., p. 99.

[67] A. Beria di Argentine, *Il gioco delle correnti ed i limiti del gioco*, in «La Magistratura», 1965, n. 11-12, pp. 1-2.

[68] A. Pizzorusso, *L’organizzazione della giustizia in Italia*, Turin, Einaudi, 1990, p. 51.

[69] M. Capurso, *I giudici della Repubblica. Giudici soggetti alla legge o giudici di fronte alla legge?*, Milan, Edizioni di comunità, 1977, pp. 24-5

[70] L. Ferrajoli, *La cultura giuridica nell’Italia del Novecento*, Rome-Bari, Laterza, 1999, p. 35.

characterised by a rethinking of the traditional categories of legal science in a constitutional perspective and by an openness to the theme of social conflict[71].

These ideological changes had an important impact within the judiciary. In September 1963, at the end of the Congress of the NAM in Alghero, the associative judiciary approved - on the initiative of the group Terzo Potere - a motion which for the first time emphasized the distance between justice and the needs of society in profound transformation. The magistrates were in fact defined as «the first witnesses of the conflicts that arise between the law itself and the social reality that it is intended to regulate, as well as the material and non-material complex factors which prevent a fully effective performance of the judicial function»[72].

In 1964, on the occasion of the first proportional elections of the NAM, as pointed out above, the progressive groups, in particular MD, explicitly highlighted the need to create a new figure of magistrate, capable of grasping the "political" relevance of his activity and to operate in coherence with the needs of society.

In May 1965 one of the leaders of Terzo potere, Salvatore Giallombardo, with an intervention in «La Magistratura» made clear what was, according to his group, the real issue at the centre of the debate (and conflict) within the judiciary: «It consists in establishing whether the judge must remain clinging to the fetishism of the technical-juridical interpretation of the norm, to the myth of the abstract and mummified certainty of law or must not, rather, seek and derive the concrete command with a mind aware of the interests at stake, the institutional principles of the system, in perpetual transformation with the very flow of society and life»[73]. What was argued was therefore the need to free the magistrate from the traditional bureaucratic and hierarchical mechanisms, perpetuated by the Court of Cassation and the heads of offices, and from the legal formalism, allowing him to adhere to a «historical-evolutionary interpretation» of the law capable of responding to the needs of citizens.

This new vision of law was explicitly affirmed at the congress of the National Association of Magistrates in Gardone on 25-28 September 1965, mainly dedicated to the subject «judicial function and political direction in the Constitution»[74]. The general report on the subject was entrusted to jurist and political scientist Giuseppe Maranini, who in previous years had devoted increasing attention to the issue of independence - especially internal - of the judiciary, publicly supporting the mobilisation of the "low judiciary"[75]. At the end of the congress, several motions were passed.

In the final motion on the «judicial function and political direction in the Constitution», the magistrates' congress declared itself «decidedly opposed to the conception that claims to reduce interpretation [of law] to a purely formalistic activity indifferent to the content and the concrete impact of the norm in the life of the country». «The judge, on the contrary» - continued the final motion of Gardone - «must be aware of the political and constitutional scope of its function of

[71] Ivi, p. 70; A. Meniconi, *Storia della magistratura italiana*, Bologna, Il Mulino, 2012, pp. 310-11.

[72] *Mozione conclusiva dell'XI congresso*, in «La Magistratura», 1963, n. 8-9, p. 1.

[73] S. G., *La necessità del momento*, in «La Magistratura», 1965, n. 5, p. 8.

[74] The reports, summaries and acts of the congress are published in Associazione nazionale magistrati, *Atti e commenti. XII Congresso nazionale, Brescia-Gardone, 25-28 settembre 1965*, Rome, Arti Grafiche Jasillo, 1966.

[75] See E. Capozzi, *Il sogno di una Costituzione. Giuseppe Maranini e l'Italia del novecento*, Bologna, Il Mulino, 2008, pp. 220-240.

guarantee, so as to ensure, even in the impassable boundaries of its subordination to the law, an application of the rule in accordance with the fundamental purposes intended by the Constitution»[76].

From this, according to the motion of the NAM, derived that

> it is up to (...) the judge, in a position of impartiality and independence with respect to every political organisation and every centre of power: 1) to apply directly the norms of the Constitution, when this is technically possible in relation to the concrete fact under dispute; 2) to refer to the examination of the Constitutional Court, even ex officio, the laws that do not allow themselves to be interpreted according to the constitutional dictate; 3) to interpret all laws in accordance with the principles contained in the Constitution, which represent the new fundamental principles of the state legal system.[77]

On a cultural level, the approval of the motion constituted a significant moment in the history of the Italian judiciary. Symbolically, in fact, it certified the completion of the process of conversion of the culture of the judiciary to the new legal paradigm introduced by the Constitution[78]. If in 1948 the constitutional norms were conceived by magistrates as norms destined to operate exclusively on the level of relations between public powers, and in particular as a set of principles inspiring the action of the legislator, in 1965 those same norms were by now conceived by a large part of the Italian judiciary as the highest norms of the legal system, immediately enforceable and on which to base the interpretation of laws[79].

The motion's reference to the direct application of constitutional principles was undoubtedly an innovative statement with respect to the juridical culture of the time, especially if we consider the difficulties shown until then by the high judiciary in adapting to the new juridical model introduced by the Constitution[80].

The Gardone congress, however, was also the venue of a profound contrast between the progressive groups TP and MD and the more conservative MI. The contrast emerged in a particular way around the content of the final motion on the subject «judicial function and political direction in the Constitution», approved at the end of a complicated confrontation between the groups.

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[76] Principi generali. Mozione concordata dalle tre correnti Magistratura Democratica, Magistratura Indipendente e Terzo Potere, in Associazione nazionale magistrati, *Atti e commenti. XII Congresso nazionale, Brescia-Gardone, 25-28 settembre 1965*, cit., pp. 309-10.

[77] Ibidem. The preamble to the motion approved by the congress states that «the problem of political direction within the judicial function does not, of course, arise in terms of contingent political direction, which is up to the political forces, holders of the legislative and executive functions, but in terms of the protection of the political-constitutional direction, since the Constitution has codified certain fundamental political choices, imposing them on all the powers of the State, including the judiciary, and attributing to the latter, as well as to the Head of State and the Constitutional Court, the task of guaranteeing their respect».

[78] S. Senese, La magistratura nella crisi degli anni Settanta, in *L'Italia repubblicana nella crisi degli anni settanta, vol. IV, Sistema politico e istituzioni*, edited by G. De Rosa and G. Monina, Soveria Mannelli, Rubbettino, 2003, p. 413; E. Lamarque, *Corte costituzionale e giudici nell'Italia repubblicana*, Rome-Bari, Laterza, 2012, kindle edition, position 1885.

[79] M. Fioravanti, *L'attuazione della Costituzione: il ruolo della cultura costituzionale*, Relazione al Convegno "La Costituzione della Repubblica Italiana. Le radici, il cammino", Bergamo, 28-29 October 2005, pp. 7-9, http://www.astrid-online.it/static/upload/protected/Fior/Fioravanti-ruolo-cultura-cost_28_10_.pdf

[80] L. Paladin, *Per una storia costituzionale dell'Italia repubblicana*, Bologna, Il Mulino, 2009, pp. 217-8.

During the congressional debate, in fact, the progressive groups, and in particular the representatives of MD, advanced rather radical views about the political function of the judge[81]. Roberto Sciacchitano, for example, defining the Constitution as both «political program and formal law», argued that through the control of constitutional legitimacy «the judiciary exercises a "political" function», albeit «in a broad sense», adding that «it is precisely the law, indeed the fundamental law of the state, to give judges the task of carrying out an ex-post political control on the work of legislative bodies»[82]. Arnaldo Cremonini also argued that, through the interpretation of the law in the light of constitutional principles, «every magistrate participates [...] directly and personally to the function of control on the political-legislative direction adopted by the majority political force», thus concluding that each judge «must be fully aware of the political-constitutional scope of its function of guarantee»[83]. For Dino Greco, the Constitution dictated a precise «line of development of the national community, precepts to whose observance all the powers of the State and therefore also the judiciary are bound»[84].

It is evident that from these statements derived the recognition in the Constitution of a precise political program and the consequent attribution to the judiciary of a true function of control and substitution with respect to the legislator in the implementation of that program, especially in the face of the changes taking place in society[85]. This scenario was outlined at the congress in an even more explicit way by the magistrate Marco Ramat, also one of the main representatives of MD, in a report focused on the judgment by equity. Highlighting the contrast between a Constitution that imposed «a renewal of society» and the «inertia of the legislator», Ramat invited judges to implement a jurisprudence by equity, which would find its inspiration «along Article 3 of the Constitution»[86]. Ramat, moreover, advanced a deep criticism towards the principle of legal certainty:

> Legal certainty is not the purpose of jurisprudence; the purpose of jurisprudence is justice, which will generally coincide with certainty [...] but cannot sacrifice itself totally to certainty. [...] In epochs of political tyranny, certainty is a supreme good that defends against the arbitrariness of power [...]; but in more politically fortunate epochs certainty, if exalted and cultivated with the same dedication, can become an obstacle to justice; all the more so when society moves faster than its legislation.[87]

The positions expressed by the progressive magistrates resumed - bringing it to its extreme consequences - the reflection advanced at the opening of the congress by Maranini about the participation of the judiciary in the «function of political direction». The scholar had argued that both constitutional judges and ordinary judges, being called upon to assess the legislative text in the light of the constitutional provisions and principles, exercise a function of «political direction»[88].

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[81] See R. Ricciotti, *La giustizia in castigo*, cit., pp. 187-90.

[82] Associazione nazionale magistrati, *Atti e commenti. XII Congresso nazionale*, cit., p. 250.

[83] Ivi, pp. 288-9.

[84] Ivi, p. 290.

[85] See G. Palombarini and G. Viglietta, op. cit., p. 61.

[86] M. Ramat, Giudizio di equità, in Associazione nazionale magistrati, *Atti e commenti. XII Congresso nazionale*, cit., p. 131.

[87] Ivi, pp. 126-8.

[88] G. Maranini, Funzione giurisdizionale ed indirizzo politico nella Costituzione, in Associazione nazionale magistrati, *Atti e commenti. XII Congresso nazionale*, cit., pp. 11-31. See P. Costa, *L'alternativa "presa sul serio": manifesti giuridici degli anni Settanta*, in «Democrazia e diritto», n. 1-2, 2010, p. 247.

Maranini's thesis, hardly sustainable from a technical-juridical point of view[89], aroused intense reactions during the congressional debate. In particular, Giovanni Leone, at the time Christian Democrat deputy and professor of criminal procedure at the University of Rome, denied that it was possible to talk about political direction of the judiciary, stating that this thesis would have provoked «serious misunderstandings» and subverted «the order of the State and the division of powers»[90]. Maranini's thesis, moreover, was harshly criticised by the exponents of Magistratura Indipendente[91].

Concerned that the positions of progressive groups could determine the theorization of a political function of the judge, the conservative group asked and obtained the insertion of some clarifications in the final motion of the congress[92]. First of all, the thesis put forward by Maranini and the progressive groups about the participation of the judiciary in the function of political direction, hardly defensible on a technical-legal level, was downsized. The group of MI also asked and obtained the inclusion in the motion of the reference to the «insurmountable boundaries of subordination to the law». The more radical theses put forward by the progressive groups, in the direction of an explicit theorization of the political function of the judiciary, were then strongly reduced in the final text of the motion approved by the congress, by virtue of the resistance opposed by Magistratura Indipendente.

The radical positions of the progressive groups, however, resulted in the approval of other motions by majority of votes by TP and MD, and with the opposition of MI. Through these motions, the congress asked for a limitation of the functions of the Court of Cassation and the temporary nature of the appointment of magistrates assigned to the Supreme Court, the establishment of an elective honorary judiciary to be entrusted with jurisdiction in criminal and civil matters for cases of minor importance, and the introduction of a judgment by equity that would be based on the principles established by Article 3 of the Constitution[93].

In the following months, the contrasts that emerged between the groups of the associative judiciary around the main motion of the congress ended up by spilling over into the very interpretation of the contents of the motion. In other words, even the interpretation of the contents of the motion became a political battleground between the associative groups. On the one hand, in fact, the progressive groups - especially MD - emphasized the innovative character of the motion, in particular underlining the importance of the attribution to the judiciary of the function of ensuring the political direction contained in the Constitution[94]; on the other hand, the conservative current of MI downsized the character of "rupture" of the motion, highlighting how the action of the group had put a «brake» on the much more radical and «dangerous» statements expressed by MD and TP about the political function of the judiciary[95].

The difference in interpretation of the final motion appeared radical. For the magistrates of MI, affirming the centrality of the Constitution in the activity of interpretation of the law meant definitely

[89] See for all T. Martines, *Indirizzo politico*, in «Enciclopedia del diritto», XXI, Milan, Giuffrè, 1971, pp. 134-171.
[90] Associazione nazionale magistrati, *Atti e commenti. XII Congresso nazionale*, cit., p. 286.
[91] Ivi, pp. 286, 291-2.
[92] R. Ricciotti, op. cit., p. 188.
[93] Associazione nazionale magistrati, Atti e commenti. XII Congresso nazionale, cit., pp. 302-5, 315-320.
[94] *Posizione ortodossa*, in «La Magistratura», 1965, n. 11-12, p. 5. See V. Zagrebelsky, op. cit., p. 769.
[95] M. Boccassini, *La pace sia con noi*, in «La Magistratura», 1965, n. 11-12, p. 7.

overcoming the positivist legal model of liberal origin, still widespread in the high judiciary, recognizing the supremacy and direct applicability of the principles contained in the constitutional text[96]. For the magistrates of Magistratura Democratica affirming the centrality of the Constitution meant to recognize in it a true political program, centred on the principle of social justice set out in Article 3 of the Constitution. Although the constitutional rules for their generic character lent themselves to different interpretations, for MD they outlined a precise political program to the implementation of which all organs of the State, including the judiciary, had to provide[97]. This was the first form of explicit theorization of the political role of the judge and the function of substitution of judicial power with respect to the legislative power[98].

In addition to its symbolic importance in terms of the development of the constitutional culture of the judiciary, the Gardone congress of September 1965 assumed importance above all for the political interpretations that the progressive groups, and in particular MD, gave to the principles affirmed on that occasion.

This is also confirmed by what, as we shall see, happened in the following years. The recognition in the Constitution of a precise political program and the attribution to the judiciary of the task of implementing that program led the magistrates of MD to explicitly overcome the concept of evolutionary jurisprudence, in favour of the concept of alternative jurisprudence, founded on the vision - of Marxist inspiration - of justice based on class struggle[99].

The crisis with President Saragat

At the beginning of 1967, after having obtained the abolition of the system of promotions to the category of magistrate of appeal with the "Breganze law", the judiciary was the protagonist of a serious institutional contrast with the President of the Republic, Giuseppe Saragat, around the subject of the economic treatment of magistrates.

The separation of the judiciary from the public administration, insistently requested by the same magistrates and obtained in 1951, led to a paradox, namely the exclusion of the judiciary from the measures through which the legislator periodically improved the economic treatment of state employees to adapt it to the trend of the cost of living.

Believing that improvements in salaries should also include the judiciary, by virtue of the special role of importance recognised by the Constitution, in the following years the magistrates gave rise to very intense forms of protest.

On 29 January 1967, precisely because of the exclusion from economic negotiations between the government and the categories of public employees, the extraordinary assembly of the NAM

[96] Cfr. R. Ricciotti, op. cit., pp. 188-9.

[97] See the contents of the MD's program, as well as the statements made by Ramat at the Gardone congress, mentioned above.

[98] G. Palombarini and G. Viglietta, op. cit., p. 61. See D. Marafioti, *Metamorfosi del giudice. Riflessioni su giustizia e potere*, Soveria Mannelli, Rubbettino, 2004, p. XV.

[99] See in particular *Per una strategia politica di Magistratura democratica*, Congresso di Magistratura democratica, Rome 3/5 December 1971, without publisher. See also V. Zagrebelsky, op. cit., pp. 772-776.

approved a motion in which it asked the government and parliament to solve the economic problem of the judiciary, aggravated by the «continuous erosion due to economic devaluation», with the threat of a strike if the government did not «provide concrete evidence of wanting to solve» the economic problem of the judiciary[100]. The intention of the association was to proclaim the abstention of magistrates from their activities, and not - as had happened in 1956 - a "white strike". In other words, it would have been the first real strike of the judiciary in the history of the Republic.

On 21 February, speaking at the HCJ, the President of the Republic, Saragat, harshly opposed the initiative of the NAM, defining the magistrates' strike as «legally inadmissible», referring to the constitutional principles and the particular function reserved for the judiciary. Saragat recalled that precisely because of the sovereign character of the function exercised by the judiciary, the Constitution recognizes to the magistrates «special guarantees and a very special status», but «these guarantees and this status cannot but correspond to special responsibilities, obligations and duties, including that of ensuring the continuity of an essential, sovereign, insusceptible of interruption function». For these reasons, the President called the magistrates to «a sense of responsibility»[101].

Following Saragat's speech, the HCJ voted on an agenda in which all magistrates were invited to «abstain from any manifestation not in keeping with the constitutional position and prestige of the judiciary»[102].

President Saragat's intervention had considerable public and political importance. On 9 April 1967, the date to which the decision on the strike had been postponed, the general assembly of the NAM decided to postpone the strike pending the outcome of negotiations with the government[103]. The demands of the judiciary were then accepted by the executive, which recognised the extension to the magistrates of the economic benefits recognised to public employees and the strike was not carried out[104].

The 1967 reform of the HCJ

The declaration of unconstitutionality in 1963 of some provisions relating to the law establishing the HCJ led the parliament to review the rules on the functioning of the autonomous governing body of the judiciary. This reform was concluded with the approval of Law n. 1198 in 1967. The law was approved with the broad consensus of the political forces, including the left-wing parties, reflecting the reformist tendencies of the political climate of the time, characterised by the birth in 1963 of the first government with the direct participation of the socialists.

The law strengthened the autonomy of the Council, establishing that in order to adopt its deliberations it did not need the initiative of the Minister of Justice and recognizing the accounting autonomy of

[100] *L'assemblea straordinaria dell'associazione*, in «La Magistratura», 1967, n. 1-2, p. 2.

[101] *Testo del discorso pronunciato dal Capo dello Stato nella seduta del Consiglio Superiore della Magistratura del 21 febbraio 1967*, in «Notiziario Csm», 1967, n. 2, pp. 27-29.

[102] *Ordine del giorno approvato dal Consiglio Superiore della Magistratura dopo il discorso pronunciato dal Capo dello Stato, nella seduta del 21 febbraio 1967*, ivi, p. 29.

[103] *L'assemblea generale dell'associazione unanime*, in «La Magistratura», 1967, n. 4-5, p. 1.

[104] See «La Magistratura», 1967, n. 11-12, p. 2.

the body, whose budget would no longer depend on the Ministry of Justice but on a separate chapter of the State budget[105].

The law also intervened to modify the electoral system of the Council. On this point as well, the measure met the requests made by the lower judiciary, albeit partially. The law introduced an election mechanism in which in a first phase each category (Tribunal, Court of Appeal and Court of Cassation) nominated its candidates and in a second phase all magistrates could express their preference without distinction of category. The magistrates of tribunal, thus, could also choose the representative of the category of Court of Cassation[106]. The extension of the right to vote to all magistrates, without distinction of category, had the effect of progressively pushing even the magistrates of appeal and Cassation to move closer the positions of the low judiciary, thus contributing to dissolve even more the hierarchical structure within the judicial order.

The first elections of the HCJ with the new electoral system, in 1968, allowed the *correnti* of the NAM to put in the minority the representatives of the high judiciary: of the fourteen elected magistrates, ten were the expression of the NAM, and only four of the UIM[107]. The 1968 HCJ elections also marked the moment of greater prestige of the more progressive groups of TP and MD, which obtained eight members, against two from MI and four from UIM[108]. This growth of the left-wing groups was favoured by the diffusion of the 1968 climate of protest within the judiciary.

The wave of protest. Against the principle of authority

The large wave of protests carried out by students and workers in 1968 and 1969 produced profound effects on the development of the Italian judiciary. The judiciary was personally involved in the political and social conflict taking place in the country[109]. This happened first of all on the criminal level, since judges were called to settle the numerous criminal proceedings that arose in those years concerning, for example, cases of occupation of universities and factories, clashes between demonstrators and police and episodes of violence[110].

But the period of contestation had an impact on the judiciary also at ideological and cultural level[111]. On the one hand, it prompted the low judiciary to strengthen its protest against the hierarchy and the principle of authority within the judiciary; on the other hand, it led the more progressive groups of the judiciary to broaden their openness to the changes taking place in society and, in some cases, to radicalize their conception of the political role of the judge. According to the progressive sectors of

[105] D. Piana and A. Vauchez, op. cit., p. 76.

[106] R. Canosa and P. Federico, op. cit., p. 352; G. Ferri, *Magistratura e potere politico. La vicenda costituzionale dei mutamenti del sistema elettorale e della composizione del Consiglio superiore della magistratura*, Padua, Cedam, 2005, pp. 59-66.

[107] D. Piana and A. Vauchez, op. cit., pp. 77-8; A. Meniconi, *Storia della magistratura italiana*, cit., p. 316.

[108] R. Canosa and P. Federico, op. cit., pp. 351-2.

[109] S. Senese, *La magistratura nella crisi degli anni Settanta*, cit., p. 414.

[110] E. Bruti Liberati, *Magistratura e società nell'Italia repubblicana*, cit., kindle edition, position 2677.

[111] R. Canosa and P. Federico, op. cit., pp. 365-6.

the judiciary, indeed, the explosion of social conflict and the development of student and worker protests constituted the signal of the need for a more decisive break with tradition[112].

The implications of the wave of protests were faced above all by the groups that theorized a greater openness of the judge to society (the progressive groups of MD and TP). According to them, the contestation contributed in fact to highlight once again the crisis experienced by legal formalism and the need to open the world of justice to social change, adopting an evolutionary interpretation of law[113]. The ideological debate on new ways of interpreting law had already begun in the second half of the 1960s, but it was in the two-year period 1968-1969 that it found its momentum in the light of student and workers' protests.

For Mario Barone, president of the National Association of Magistrates and member of TP, the wave of contestation was due also to the distance of justice from the actual social reality. According to him, it was impossible not to notice how «legal conservatism» ended up «accentuating more and more the detachment of principles and legal institutions from the forms of social life to which they, interpreting them, must or should be applied»[114]. In Barone's opinion, it was precisely «in the backwardness of the law, compared to the historical-evolutionary process» and «in the lack of confidence, if not even in the denial, of the relativity of the legal systems» that «the protest movements found their foundation or nourishment», investing «the traditional assets of society». For this reason, the president of the NAM hoped for «an abandonment of legalism and a return to natural law»: «In a society that renews itself with ever increasing dynamism, [...] the problem of justice as safeguarding of order, certainty of the norm, equality of treatment takes on a completely new dimension, since it involves the same political problem of power and, even more, of the social distribution of power». Therefore, it was necessary to adapt the interpretation of law to social changes, keeping in mind that «if law is certainty, it must be so in a concrete and explicit way, capturing the dynamics of social living, interpreting them and grasping their meanings».

For Marco Ramat (MD), in the face of protest, the judiciary should not «close in on itself, clinging to a formalistic and only apparently neutral conception of legality», but on the contrary should «be sensitive to the signs of contradiction and divisions present in society, trying to translate them into balanced values»[115]. Once again, the criticism shifted towards the principle of legal certainty. According to De Marco (MD), the judicial function could not «disregard the evolutionary address of the Constitution in force», which had «transformed the role of the interpreter from a conservator of a static crystallized order, such as that typical of agricultural society, to an instrument of evolution for the achievement of constitutional purposes, typical of the dynamic society in transformation»[116]. This led to the need for the interpreter to be «sensitized to the reality that surrounds him» and to acquire «awareness of his own function in democratic society, so that he is not reduced to formalistic

[112] P. Costa, op. cit., p. 253; G. Palombarini and G. Viglietta, op. cit., p. 30.

[113] See in particular A. Mortarino Majno di Capriglio, *Il diritto e la contestazione totale*, in «La Magistratura», 1968, n. 9-10, p. 14.

[114] M. Barone, *Dove va il diritto?*, in «La Magistratura», 1968, n. 7-8, pp. 1-2.

[115] M. Ramat, *La Magistratura, oggi*, in «La Magistratura», 1969, n. 3-5, p. 1.

[116] L. De Marco, *Il ruolo della magistratura e il nuovo ordinamento giudiziario*, in «La Magistratura», 1969, n. 6-8, pp. 1-2.

positions»[117]. In fact, according to De Marco, «the certainty of law cannot exist for itself. The illusion that the certainty of relations alone is sufficient to achieve justice is fallacious»[118].

Antonio Porcella (MD) described the protests of Roman students in Rome, in front of the Supreme Court, as a sign of «increasingly large gap between judges and civil society, that is, between those who exercise part of the sovereign powers of the State and the people that, according to the Constitution, is the source and owner of every state sovereignty»[119]. For these reasons, he spoke out against legal formalism and in favour of an evolutionary interpretation of law, also hoping for «a direct confrontation [of judges] with citizens on the decisions of their colleagues», which would lead to «a greater awareness of judges to be at the service of the community».

The conviction of some groups in the judiciary of the need to adopt an evolutionary-historical interpretation of law contributed to strengthen the criticism against the principles of authority and hierarchy within the judiciary, embodied by the Court of Cassation and the heads of judicial offices. In the opinion of the progressive groups, it was in fact the Court of Cassation and the heads of the offices that prevented the opening up of the judiciary to society, the former through the affirmation of conservative interpretative guidelines, the latter through the exercise of forms of conditioning against the members of the office. The climate of contestation thus provided a boost to the criticism of the hierarchical structure within the judiciary, already present for several years within the judiciary. In 1969 Ramat clearly highlighted the similarities between the contestation that took place within the judiciary against the principles of hierarchy and authority, and the student and workers' protest: «I believe that in no sector of the country is there a more active and tenacious contestation than the one that has taken place and continues to take place in the judiciary»[120].

Also for Luigi De Marco (MD), the hierarchical structure within the judiciary constituted «a valid instrument not only for the preservation of the pre-existing order, but also for the perpetuation of it through the frustration of the same legislative interventions aimed at the evolution claimed by the continuous transformation of social reality»[121]. Similarly, for Mario Franceschelli, the relationships of magistrates with the heads of the offices should have been «intensified and developed on the level of cooperation and collaboration, since they could no longer be placed on a bureaucratic-hierarchical level»[122].

The theme of democratization of the judicial system thus found new impulse in the ideological debate within the judiciary. It is significant that on the occasion of the elections of the central executive committee of the NAM in 1969 all the judicial groups, including the most conservative MI, took a stand in this direction, focusing their attention on the internal organisation of judicial offices. Thus, MD stated in its program that the prosecutor's office should be composed of magistrates «not subject to hierarchical power» and also proposed the abolition of the power of assumption enjoyed by the

[117] Ibidem.

[118] L. De Marco, *Giustizia ingiusta*, in «La Magistratura», 1969, n. 3-5, pp. 4-5.

[119] A. Porcella, *Società civile e giudici*, in «La Magistratura», 1968, n. 4-6, p. 4.

[120] M. Ramat, *Discorso di un giudice alla "contestazione globale"*, in «La Magistratura», 1969, n. 1-2, p. 3.

[121] L. De Marco, *Il ruolo della magistratura e il nuovo ordinamento giudiziario*, in «La Magistratura», 1969, n. 6-8, p. 1.

[122] M. Franceschelli, *I magistrati e la crisi*, in «La Magistratura», 1968, n. 11-12, p. 1.

managers of the offices[123]. Similarly TP, after specifying that «the conferral of functions of legitimacy should not in any way constitute a "promotion"», proposed «the temporary and elective nature of management positions» and the «personalization of the functions of the public prosecutor, with the power for each magistrate to carry out criminal prosecutions and the prohibition for the manager to take over the proceedings or to replace the magistrate who is invested of them»[124]. Finally, MI too, while showing more caution on the matter, hoped for «a more direct and conscious participation of all magistrates in the management of the offices to which they belong», through the adoption of assemblies[125]. These proposals would be reiterated by all the groups in the following years. The objective of the associative judiciary, in short, as recognised in 1969 by De Marco, became the complete «democratization» of the judicial organisation, so as to ensure «the maximum diffusion of power»[126].

Criticism of the authority of the Court of Cassation even led some to propose that the HCJ be given the function of criticizing judicial activity in order to resolve the contrast between the jurisprudential interpretations put forward by the judges of merit and those of the Court of Cassation, despite the fact that the Constitution had given the latter the nomophylactic function[127].

The wave of contestation within the judiciary against the principles of authority and hierarchy found its culmination in the criticism of the ceremonies of inauguration of the judicial year that took place (and still take place) every year in January at the Court of Cassation and the Courts of Appeal. The criticism of the low judiciary was directed in particular against the content of the speeches made by the general prosecutors, considered too solemn and distant from the social reality of the country. These speeches, it was pointed out in «La Magistratura», included «statistical information and information on the functioning of the offices», but also «evaluations of jurisprudential orientations, sociological diagnoses, political assessments, on the opportunity for legislative reforms»[128]. What was contested was the tendency to attribute these evaluations «to the judiciary, as a single body, and not to the individual magistrates who propose them». In other words, the criticism of the principle of authority led large sectors of the associative judiciary to deny the general prosecutors any form of legitimacy to intervene on behalf of the Italian judiciary[129].

As a result of this protest, in 1969 the NAM decided not to participate, for the first time in history, in the inauguration of the judicial year at the Court of Cassation, in the presence of the President of the Republic and the highest officials of the State, preferring to participate in counter-inaugurations organized by groups of magistrates, lawyers, student movements and left-wing forces[130]. Counter-inaugurations were also held in other Italian cities, such as Milan, Bologna, Turin and Bari[131].

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[123] *Programma dell'azione associativa proposto da "Magistratura democratica"*, in «La Magistratura», 1969, special issue, p. 2.
[124] *Il programma di Terzo potere*, ivi, p. 6.
[125] *Per una Magistratura libera ed autonoma, presidio dello Stato democratico e della libertà dei cittadini*, ivi, p. 4.
[126] L. De Marco, *Il ruolo della magistratura e il nuovo ordinamento giudiziario*, in «La Magistratura», 1969, n. 6-8, p. 2.
[127] See in particular R. Sciacchitano, *Vertice funzionale e vertice di potere*, in «La Magistratura», 1968, n. 1-3, p. 10.
[128] S. Mannuzzu, *Magistratura e opinione pubblica*, ivi, p. 1.
[129] R. Ricciotti, *La giustizia in castigo*, cit., p. 241.
[130] A. Chiavelli, *Inaugurazione e contro*, in «La Magistratura», 1969, 1-2, p. 1.
[131] R. Canosa and P. Federico, op. cit., pp. 366-7; G. Palombarini, op. cit., p. 63.

The counter-inaugurations, which according to the promoters should have marked the further democratization of the judicial system, ended up in some cases by putting the judiciary in paradoxical situations, also reported by the media[132]. Several members of the judiciary ended up participating in counter-inaugurations in which it was the same justice to be the subject of heavy accusations by the student and workers' movements, such as that of being «classist»[133]. Despite these tensions, this kind of counter-inaugurations took place also in the following years[134].

The climate of contestation that existed within the associative judiciary also spread to the Higher Council of the Judiciary. The Council elected in 1968 was characterised by particular activism, also because of the presence in it of several protagonists of the battles of the NAM of those years and of the Gardone congress[135].

As noted above, at the beginning of the 1960s the HCJ had contributed to strengthening the demands of the associative judiciary for the abolition of the career system. Until 1968, however, the HCJ had reacted with some caution to the more radical demands coming from the associative judiciary. In 1965, for example, the Council expressed itself by majority of votes in favour of the reform of promotions of magistrates of appeal, defending, however, the principle of distinction of functions among magistrates and also the maintenance of a form of evaluation of titles[136]. In the same year the HCJ also hoped, again by majority of votes, to maintain the over-representation of the magistrates of the Supreme Court in the Council[137]. In February 1967, as mentioned above, the HCJ took a position against the strike called by the NAM for the economic treatment[138]. Moreover, it called the judicial councils to concretely evaluate the aptitude of magistrates for promotions, also taking into consideration the judicial works[139].

The actions of the HCJ radically changed after the 1968 elections. First of all, as pointed out above, the new Council ruled out the exclusion of evaluation of titles from the assessment for the promotion of magistrates. In this way, in contrast to the will of the legislator, the promotions of magistrates to higher functions were based on the mere principle of seniority, becoming in fact automatic.

The new Council was characterised, moreover, by an accentuated interventionism on the political scene. This also produced tensions at the institutional level.

On 16 July 1968, the HCJ unanimously approved the establishment of a «Commission for relations with the parliament and the government and for judicial planning». The commission's tasks included

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[132] See «Rassegna dei magistrati», 1969, n. 1, pp. 36-41.

[133] R. Ricciotti, *La giustizia in castigo*, cit., pp. 239-40; G. Palombarini, op. cit., p. 64.

[134] G. Palombarini, op. cit., pp. 86-8.

[135] E. Bruti Liberati, *Magistratura e società nell'Italia repubblicana*, cit., kindle edition, position 2265.

[136] *Ordine del giorno approvato dal Consiglio Superiore nella seduta del 9 aprile 1965*, in «Notiziario Csm», 1965, n. 4, pp. 37-46.

[137] *Testo della mozione approvata dal Consiglio Superiore nella seduta del 13 luglio 1965*, in «Notiziario Csm», 1965, n. 6, pp. 81-91.

[138] *Ordine del giorno approvato dal Consiglio Superiore della Magistratura dopo il discorso pronunciato dal Capo dello Stato, nella seduta del 21 febbraio 1967*, in «Notiziario Csm», 1967, n. 2, p. 29.

[139] *Criteri di massima – Approvati dal Consiglio nella seduta del 20 marzo 1967 – per l'applicazione della legge 25 luglio 1966, n. 570, concernente «Disposizioni sulla nomina a magistrato di corte di appello»*, in «Notiziario Csm» 1967, n. 3, pp. 47-8.

preparing an «annual report on the problems of justice» to be submitted to parliament, and reporting to the Ministry of Justice and to parliament «legislative deficiencies and difficulties of interpretation»[140]. The initiative aroused a lot of criticism from political figures, who accused the HCJ of unduly expanding its powers[141].

In October 1968 the Head of State Giuseppe Saragat refused to sign the decree, explaining that in this way the HCJ would have exceeded its powers with respect to the Ministry of Justice, which according to the Constitution is responsible for the organisation and functioning of those services involved with justice, and with respect to the parliament, which is responsible for judicial planning[142]. Saragat pointed out that the Council cannot have direct relations with the government as a whole, but «only with the Minister of Justice», and that the establishment of direct relations with the parliament through the presentation of an annual report «is contrary to our constitutional order, in that it would create a situation of political responsibility of the Higher Council towards the Chambers»[143]. The crisis was overcome with the presentation of a revised project approved by the HCJ that provided for a new denomination of the commission, called «for the reform of the judicial system and for the administration of justice», the elimination of the reference to «relations with the government and with the parliament», and the drafting of an annual report addressed to the parliament, not in a direct way, but through the Minister of Justice[144].

The activism of the new HCJ also resulted in the approval of measures which welcomed the protests of the judiciary against the principles of authority and hierarchy within the judiciary.

Since 1968, the Council began to attribute to itself a series of additional powers[145]. In particular, the HCJ began to exercise a sort of regulatory activity, consisting in the approval of circulars, deliberations, resolutions aimed at regulating the internal organisation of judicial offices; acts not provided for by the Constitution but only by the internal rules of procedure[146]. Through this regulatory activity, the HCJ began to intervene in a steady way on the judicial political direction of courts and prosecutorial offices, thus further attenuating the powers of the heads of the offices[147]. As pointed out in scholarship, moreover, the self-attribution by the HCJ of regulatory powers in matters not provided for by law raises serious concerns about it constitutional legitimacy, since the Constitution reserves to the legislator the power to intervene in matters of judicial order[148].

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[140] *Costituzione di una Commissione speciale per i rapporti con il parlamento ed il governo e per la programmazione giudiziaria*, in «Notiziario Csm», 1968, n. 5, p. 95.

[141] E. Bruti Liberati, *Magistratura e società nell'Italia repubblicana*, cit., kindle edition, position 2296.

[142] D. Piana and A. Vauchez, op. cit., p. 81.

[143] Cited in G. Di Federico, *Da Saragat a Napolitano. Il difficile rapporto tra Presidente della Repubblica e Consiglio superiore della magistratura*, Milan-Udine, Mimesis, 2016, pp. 20-1.

[144] *Costituzione di una Commissione speciale per la riforma giudiziaria e per l'amministrazione della giustizia*, in «Notiziario Csm», 1969, n. 2, pp. 28-29. See G. Di Federico, *Da Saragat a Napolitano*, cit., p. 22.

[145] G. Bognetti, Il Presidente e la presidenza di organi collegiali, in *Il Presidente della Repubblica*, edited by M. Luciani and M. Volpi, Bologna, Il Mulino, 1997, p. 249.

[146] R. Canosa and P. Federico, op. cit., p. 392; V. Zagrebelsky, *La magistratura ordinaria dalla Costituzione a oggi*, cit., p. 751; N. Zanon and F. Biondi, *Il sistema costituzionale della magistratura*, cit., pp. 46-9; E. Bruti Liberati, *Magistratura e società nell'Italia repubblicana*, cit., kindle edition, position 2742.

[147] D. Piana and A. Vauchez, op. cit., pp. 79-80.

[148] See in particular N. Zanon and F. Biondi, *Il sistema costituzionale della magistratura*, cit., 47-8.

Since 1968, through the approval of a series of circulars the HCJ introduced the so-called "tabular system", that is a set of rules governing the procedure for the formation of annual tables for the composition of the courts[149]. The introduction of the tabular system assumed great importance because, with the aim of protecting the principle of the natural judge and to ensure an effective organisation of judicial offices, it ended up strengthening the process of dismantling the hierarchy within the offices and attenuating the role of the heads. In its circulars, in fact, the Council established that before formulating proposals for the assignment of magistrates to the various sections of courts, the heads of these offices should consult the interested parties, «inviting them to formulate observations and requests»[150]. The Council also provided for the transmission of the proposed tables to the Council itself and its timely communication to the magistrates who were members of the offices, so that they could send the Council any «comments and requests»[151]. The introduction of the tabular system represented the final blow to the hierarchical principle within the judicial system[152]. The tabular system introduced by the HCJ will be transposed in law by the Parliament only at the end of the 1980s[153]. Moreover, as we shall see, initially limited to courts, in 1987 the tabular system will be extended autonomously by the HCJ also to the prosecutorial offices.

Also in 1968, the HCJ, taking inspiration from an experience initiated by the head of the court of Rome, legitimized the assemblies of the office as a moment of organisational collaboration and of co-responsibility of each magistrate in the management of the office[154].

The HCJ ended up accepting the protest of the judiciary against the opening ceremonies of the judicial year. In November 1969, in view of the inauguration of the 1970 judicial year, the HCJ drew the attention of the general prosecutors to the content of the report for the opening ceremony of the judicial year, which was to be «directed exclusively to a complete information on the state of the administration of justice», and invited the heads of the courts to ensure that the inauguration took place «with the utmost restraint»[155]. The Council also decided to send its members to the inaugurations, pointing out to them «the opportunity to participate personally in any collateral events that take place in the form of a civil and democratic debate on the issues of justice»[156].

In short, the student and worker's protests had a profound influence on the institutional and cultural development of the judiciary, accentuating the tendencies already present aimed at the expansion of the independence of magistrates and the elimination of hierarchical mechanisms in the judicial organisation[157].

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[149] *Circolare 14 maggio 1968, n. 7671*, in «Notiziario Csm», 1968, n. 4, p. 70; *Circolare 31 ottobre 1968, n. 16773*, in «Notiziario Csm», 1968, n. 6, p. 106; *Circolare 11 novembre 1969*, in «Notiziario Csm», 1969, n. 11, p. 141. See E. Bruti Liberati, *Magistratura e società nell'Italia repubblicana*, cit., kindle edition, position 2279.

[150] *Circolare 11 novembre 1969*, in «Notiziario Csm», 1969, n. 11, p. 142.

[151] Ibidem.

[152] A. Meniconi, *Storia della magistratura italiana*, cit., p. 326.

[153] N. Zanon and F. Biondi, *Il sistema costituzionale della magistratura*, cit., p. 211.

[154] *Delibera 16 luglio 1968*, in «Notiziario Csm», 1968, n. 5, p. 93. Cfr. E. Bruti Liberati, *Magistratura e società nell'Italia repubblicana*, cit., position 2279.

[155] *Inaugurazione dell'anno giudiziario 1970: risoluzione approvata dal Consiglio nella seduta del 20 novembre 1969*, in «Notiziario Csm», 1969, n. 11, p. 143.

[156] Ibidem.

[157] Cfr. R. Canosa and P. Federico, op. cit., p. 463.

In depth study. Politics and the abolition of the career of magistrates

This section aims, through the analysis of parliamentary reports, to examine in more detail the parliamentary work that led to the adoption of the laws that abolished the career of magistrates. The purpose is to investigate the reasons that led the parties to accept the requests of the associative judiciary and the presence, or not, of the awareness of the effects that these reforms would have had on the development of the judiciary.

As we have seen, the first step towards the abolition of the career in the judiciary was taken with the approval of Law n. 1/1963, which abolished the competitions based on titles evaluation, on which the criticism of the associative judiciary had focused. Not only the "low" judiciary, but also the "high" judiciary had in fact come to the conclusion that the comparison of titles was not the most appropriate means on which to base the promotion of magistrates. However, while the "low" judiciary was moving towards the request for a total abolition of the career of magistrates, with the equalization of the different functions (tribunal, appeal, Cassation) and the passage between functions through mere seniority, the "high" judiciary rejected the equalization of functions and opposed the abolition of any form of evaluation for the advancement of magistrates.

In August 1959, Minister of Justice Gonella presented a draft of a bill to reform the system of promotions, which provided for the abolition of competitions based on titles, replaced by competitions based on examinations and seniority tests for promotions for Courts of Appeal and Court of Cassation. The proposal, therefore, accepted the request for the abolition of competitions based on titles, but not the more radical requests coming from the low judiciary.

Trying to find a mediation between the various internal positions, in November 1959 the National Association of Magistrates proposed the introduction of a system of progression in the functions based on the principle of “open roles”. The system provided that magistrates after a certain period of time (twelve years for magistrates of tribunal and six years for magistrates of appeal) would be subjected to scrutiny and, if judged to be eligible for promotion, would be appointed to higher positions and would receive the relative salary. The actual functions of appeal and Cassation would be entrusted as they had vacancies[158]. The magistrates would then have obtained the qualification and the relative economic treatment regardless of the availability of posts.

The Higher Council of the Judiciary endorsed the proposal of the NAM expressing a favourable opinion to the bill of the Minister, but proposing the introduction of a system of advancement by open roles[159].

On 18 July 1960 Minister Gonella officially presented the draft law on promotions to the Court of Appeal and the Supreme Court. In his report, the minister emphasized the need for a reform «called for by the majority of magistrates on the essential consideration that the current system of

[158] *Il C.D.C. propone all’assemblea generale di Napoli i ruoli aperti e modifiche alla legge sul Consiglio Superiore*, in «La Magistratura», 1959, n. 9, p. 1; *A Napoli l’Assemblea generale straordinaria vota all’unanimità i ruoli aperti e a schiacciante maggioranza l’adeguamento del Consiglio Superiore*, in «La Magistratura», 1959, n. 10, pp. 1-2.

[159] *Il parere del Consiglio superiore della magistratura sulla riforma del sistema delle promozioni*, in «La Magistratura», 1960, n. 5-6, pp. 3-4.

competitions based on titles does not guarantee adequate selection»[160]. The Minister pointed out that the draft law provided for the abolition of competitions based on titles, which could «not correspond to the level of culture and quality of service provided» by magistrates. The bill thus provided for the adoption, as a normal means of progression to the posts of magistrate of appeal and Cassation, of the assessments by seniority at fixed date and as an exceptional means, for a limited number of posts, the competition by examinations.

The most radical proposal from the judiciary in favour of open promotions was therefore rejected. For the Minister, in fact, it was «evident the anomaly and absurdity» of a system that could have provided for «the possibility of promoting eight times the number of magistrates established by the organisational chart»: «It should be added that, since the judges examined could certainly be appointed, regardless of the selection imposed by the limit of vacancies, there could be a relaxation in performance and quality»[161]. Moreover, for the Minister, «the difference between the judgement of pure legitimacy institutionally entrusted to the Court of Cassation and the judgement of merit carried out by the lower court» was evident, as were «the undeniable» differences between the functions carried out by the magistrate of the court and the magistrate of appeal. From a constitutional point of view, moreover, it was not disputable that Article 107 of the Constitution indicated that «within the judiciary, while there should be no hierarchy of grades, there are, however, differences in jurisdictional functions».

Therefore, the Minister concluded: «Since the value of progression with respect to functions according to the traditional order is undeniable, magistrates of court, appeal, Cassation, and Cassation with management functions, the constitutionality of a system which, by ensuring the prerogatives attributed to the higher jurisdictional functions to those who continue to exercise the lower functions, is circumventing the concept of hierarchy of functions desired by the Constitutional Charter should be doubted»[162].

The central point of the government's proposal was therefore the abolition of competitions based on titles. In the final report of the Senate Justice Committee, the rapporteur Antonio Romano (DC) pointed out that the «thorny problem of promotions» had «been discussed at several Congresses of the Association of Magistrates», such as Venice in 1952, Turin in 1954 and Naples in 1957[163]. In particular, Romano shared the magistrates' protests against the competition for titles, which had «created an anxious career fever in the minds of magistrates, fomenting unease, discontent and agitation».

«In an environment where there is so much need to attend with serenity to the daily exercise of the very high function of rendering justice», Romano added, «careerism is very dangerous and ends up directing the activity of magistrates not to the tasks of the administration of justice, but to the pursuit

[160] *Disegno di legge "Norme sulle promozioni a magistrato di Corte di appello e di Corte di cassazione"*, Senato della Repubblica, 18 July 1960, p. 2.
[161] Ivi, p. 4.
[162] Ivi, p. 5.
[163] *Relazione della 2a commissione permanente sul disegno di legge "Norme sulle promozioni a magistrato di Corte di appello e di Corte di cassazione"*, Senate of the Republic, 27 January 1961, p. 4.

of a faster career». The rapporteur therefore concluded: «The abolition of competitions based on titles will give magistrates back the peace of mind they need for orderly work»[164].

It is noteworthy that, although he referred to the Congresses of the NAM, the rapporteur did not mention the more radical proposals made by some groups of the association in the most recent congresses, aimed at the total abolition of the career system and the introduction of the mechanism of "open roles" promotions.

These proposals had in the meantime been accepted by the Socialist Party, which in the Chamber of Deputies, on 28 January 1960, had presented a bill (Amadei and others) providing for the dismantling of the career system. According to the proposal, the assignment of a different judicial function should not constitute promotion and therefore no career could exist in the judiciary. The bill, following to the more radical proposals put forward by the NAM, therefore provided for the levelling of economic treatments for magistrates with same seniority, whatever the function performed, and the assignment to the functions of appeal or Supreme Court after a period of no less than eight years following promotion to magistrate, with the possibility of continuing to perform the previous functions (open roles). The assignment to the functions of appeal or Cassation was decided by the HCJ, at the request of the person concerned, on the basis of a non-binding opinion of the judicial council, on the basis of a merely technical assessment of judicial activity.

In the course of the debate, other bills were also presented, in particular that of Liberal MP Aldo Bozzi, which was based on the unification of the functions of magistrates of tribunals and magistrates of appeal into a single category of magistrates of merit. After ten years, magistrates of merit would have obtained the salary then provided for magistrates of appeal and could have been assigned to perform the functions then provided for the latter. The career system was maintained only for promotions to magistrate of the Court of Cassation, to be carried out by competitive examination or by assessments by seniority after at least sixteen and twenty-three years of service respectively. The Communist Party, on the other hand, put forward a proposal aimed mainly at improving the economic treatment of magistrates.

During the debate in the Senate, both the Socialists and Communists spoke out against the proposal put forward by the government. For both left-wing parties, in fact, the government text represented a step forward compared to the initial situation, especially in virtue of the abolition of competitions based on titles evaluation, but it did not entirely realize what they considered to be the aspirations of the Italian judiciary, or rather of the NAM (the split of the UIM had taken place in the meantime), namely the abolition of the career system, considered incompatible with the Constitution.

For Ottolenghi (PSI), the government project had «stopped halfway»: «Having recognised the need for assessments by seniority to be permanently valid, it did not, however, draw from this premise the logical, necessary consequences that are embodied in the well-known formula of "open roles"»[165]. Papalia, of the Socialist Group, also referred to the contents of the Amadei proposal to emphasize

[164] Ivi, p. 5.

[165] Verbatim record, Senate of the Republic, assembly, afternoon session, 3 February 1961, p. 16515.

how it was intended to structurally resolve the dysfunctions of the judicial organisation, in particular «careerism», through promotions by open roles[166].

For Gramegna (PCI) it was a «partial» bill, as it did not change the entire judicial system but merely dealt with promotions in the judiciary[167]. The Communist Party, therefore, also, as reiterated by Vaccaro, was in favour of the establishment of promotions by open roles, as it «assure[d] equal treatment for all without the limitations imposed by the organisational chart, implementing equality and equal treatment among magistrates regardless of the various situations of advantage or disadvantage in which, in relation to it, some may find themselves», and thus in this way it «more closely approximate[d] to the current Constitution»[168].

During the vote in the Senate, however, while the Communist Party reiterated its vote against the government's proposal, the Socialists preferred to abstain, explaining that a negative vote would have meant «burying for at least six months the law on the promotions of magistrates that is so eagerly awaited by them», and hoping for subsequent amendments to the text[169]. The bill was thus approved by the Senate on 2 March 1961.

Once it passed to the Chamber of Deputies, to the Justice Committee in deliberative session, the government bill was combined with another bill concerning the increase in the personnel of the judiciary and modified through a package of amendments presented by the Christian Democrat majority, which, however, did not affect the fundamental structure of the system of promotions provided by the text approved in the Senate. Thus, the adoption of the system of promotions by open roles proposed by the NAM and accepted by the Socialist and Communist Parties was again rejected.

The examination of the bill slowed down considerably, so much so that discussion in the Justice Committee did not begin until 6 April 1962. The delays in parliamentary work significantly affected the discussion and approval of the text itself. Indeed, what emerges from an analysis of the parliamentary records is the prevalence, in both the majority and the opposition, of a general perception of urgency in the adoption of a reform of promotions in the judiciary. The sense of urgency was especially determined by the non-implementation, from 1959 onward, of the competitions based on titles, which were opposed by the associative judiciary and never called by the Higher Council of the Judiciary[170].

The suspension of the competitions, as Justice Minister Bosco himself pointed out, had resulted in serious personnel shortages in the judiciary that needed to be remedied as soon as possible[171]. It was precisely the serious personnel deficiencies in the judiciary that prompted the government to amend the proposal by providing for a system of promotions in excess. Magistrates declared eligible for promotion would in fact be granted promotion to functions of appeal and Supreme Court after a specified period of time regardless of the availability of the corresponding posts. In this way, within

[166] Verbatim record, Senate of the Republic, assembly, 22 February 1961, p. 16644.
[167] Verbatim record, Senate of the Republic, assembly, afternoon session, 3 February 1961, p. 16518.
[168] Verbatim record, Senate of the Republic, assembly, 23 February 1961, p. 16701.
[169] Verbatim record, Senate of the Republic, assembly, 2 March 1961, p. 16925.
[170] See in particular the verbatim reports of the meetings which took place in the Justice Committee of the Chamber of Deputies on 27 April 1962, 18 July 1962, 25 October 1962 and 30 October 1962.
[171] Verbatim record, Chamber of Deputies, Justice Commission, 25 October 1962, p. 997.

a few years, the law would have made it possible to fill the personnel shortages in the meantime caused by the lack of competitions. This system, however, would later cause predictable criticalities, especially in the case of the Supreme Court, as the latter could not accommodate hundreds and hundreds of magistrates promoted in excess.

The sense of urgency among the political parties was further amplified by the sudden and drastic decision taken by the NAM on 4 November 1962 to call a three-day strike in protest against the economic adjustment proposals made by the Minister of Justice, which were deemed «manifestly derisory»[172]. The initiative, deeply criticised by the UIM[173], was called off following the government's allocation of more resources for increases in the economic treatments of magistrates[174].

In this context, sharing the sense of urgency, the Socialist Party and the Communist Party, while reiterating their criticism of the bill, which they considered only partial, decided to abstain from voting on the text, which was approved by a majority vote on 5 December 1962. Transmitted to the Justice Committee of the Senate for deliberation, the bill was approved on 19 December 1962, with the Socialists and Communists voting in favour.

In summary, with the approval of Law n. 1/1963 all the major political parties, both government and opposition, accepted the demands coming from the associative judiciary for the abolition of competitions based on title evaluations. Since the early 1960s, moreover, the opposition parties, the PSI and the PCI, were particularly sensitive to the more radical demands coming from the NAM aimed at the abolition of the career system.

During the discussion of the law, moreover, the Socialist Party did not avoid drawing attention in parliament to the internal dynamics of the associative judiciary. In particular, on 21 February 1961, in the course of a lengthy speech, Socialist Senator Jodice went so far as to call the exit of senior magistrates from the NAM, with the following establishment of the Union of Courts, a «most serious fact»; a fact that «undoubtedly does enormous damage to the decorum and prestige of the judiciary»[175]. «[It is a] deplorable, distressing venture that of the magistrates of the courts that caused the split of the magistrates, because it is clear the speciousness of the arguments they put forward to justify their actions», Jodice added, retracing the steps that had led to the departure of the high judiciary from the NAM[176].

To Senator Zotta, who recalled the autonomy of the legislature with respect to the activities of the groups of the judiciary, Jodice replied that one could not hide «the gravity of the gesture that the Union of Magistrates of the Courts has made, with having caused the split», and one could not but think that the magistrates of the Union of the Courts had not «realized the repercussions that in public opinion such a fact would have had». In conclusion, making clear the close relationship between the PSI and the NAM, Jodice explicitly stated: «I do not doubt that this contrast, which is one of ideas

[172] *Le sedute del Comitato Direttivo Centrale*, in «La Magistratura», 1962, n. 10-12, pp. 1-2.
[173] See «Rassegna dei magistrati», 1962, n. 11-12.
[174] *Le sedute del Comitato Direttivo Centrale*, in «La Magistratura», 1962, n. 10-12, p. 2.
[175] Verbatim record, Senate of the Republic, assembly, 21 February 1961, p. 16558.
[176] Ivi, p. 16560.

and methods, and which concerns the planned reforms in the area of career and promotions, should be resolved in favour of the National Association of Magistrates»[177].

The process of discussion and approval of the Breganze Law (n. 570/1966) took place in a different political context, characterised by the season of the "organic centre-left" with the participation of the PSI in the government (1963-1968). The climate within the associative judiciary in the meantime had also changed profoundly, with the emergence of the various groups in the NAM, the development of a new conception of the role of the judge in society and his relationship with the Constitution and the law, and the worsening of the ideological contrast between the NAM and the UIM. Moreover, in September 1965, as examined above, the Gardone congress of the NAM marked the emergence of very radical ideological positions regarding the political role of the judge, especially among the progressive groups.

In addition, the absence of a situation of "urgency" regarding the judiciary's personnel, such as that which had been recorded during the discussion of Law n. 1/1963, induced the opposition parties, particularly the PCI, to adopt - at least initially- more extreme positions.

As seen above, the Breganze bill did not envisage the total abolition of the career of magistrates, but rather a system of advancement to functions of appeal based on the mechanism of open roles: after completing eleven years of service, magistrates of tribunals would be appointed as magistrates of appeal upon deliberation of the HCJ, after the favourable opinion of the judicial council based on the evaluation of the magistrate's industriousness, ability, diligence and preparation. Magistrates who, due to lack of vacancies, had not been granted the functions of appeal would continue to perform their previous duties in the offices to which they were assigned.

It should be noted that, initially, during the work in the Justice Committee of the Chamber of deputies, the DC position on the bill appeared rather ambiguous. At the end of the debate in committee, in fact, the majority rapporteur, Valiante (DC), had come out in favour not of the Breganze proposal, but of the bills presented by the socialist Martuscelli and the liberal Bozzi, both of which provided for the unification of the roles of magistrates of tribunals and magistrates of appeal into a single category of magistrates of merit[178].

Valiante had also made very strong remarks in favour of the proposed unification of the functions of magistrates of merit. Indeed, the Christian Democrat MP had criticised the widespread idea that functions of appeal were «more delicate and complex» and therefore should be «assigned to the most capable, the best, the most deserving judges»[179]. This idea, Valiante asserted, stemmed from «a false approach to the problem that has been supinely accepted, that is, which is based on the hierarchical-pyramidal structure, considered unquestionable, of the judicial order». For the rapporteur, therefore, there was no need to exaggerate the «enhancement» of the function of appeal, not least because it was necessary to reaffirm «as the highest interest of a democratic society, and therefore as the ambition of the judiciary, that of reducing the need for a new trial with the most effective systems, that is by ensuring that the case has the widest and most penetrating treatment in the first instance, and that the

[177] Ivi, p. 16561.

[178] *Relazione di maggioranza della Commissione Giustizia, relatore Valiante*, Chamber of Deputies, 21 October 1965, p. 19.

[179] Ivi, p. 7.

outcome responds for a considerable percentage (we would say without hesitation: to the maximum) to truth and justice». For these reasons, Valiante concluded that he believed «it is far more useful to organize the judiciary in such a way that the capable, the good, perhaps the excellent, are to be found in all degrees of jurisdiction, and alongside the mediocre, rather than to have all the mediocre or the bad on one side»[180]. From a reading of Article 107 of the Constitution, moreover, it followed, according to the rapporteur, that the functions of magistrate of tribunal and magistrate of appeal were interchangeable, while only the functions of the Supreme Court were defined as «superior» and thus deemed not interchangeable. In light of these considerations, Valiante argued in favour of «a structure of the judicial order based on a single fundamental distinction: magistrates of merit and magistrates of legitimacy»[181].

Valiante's position, as he himself recalled in the report, received numerous endorsements in the committee but also triggered numerous controversies within the Christian Democrat majority[182]. In order to unblock the situation and not prevent the approval of the reform on the promotions of magistrates of appeal, the majority and the government decided to intervene by agreeing on the text of the Breganze bill later approved in committee.

During the parliamentary debate in the chamber, Christian Democrat MPs definitively clarified the party's position in favour of the Breganze proposal. MP Bonaiti (DC) emphasized that through the bill a «substantial unification of the roles of the magistrates of the court of appeal would be achieved, with the abolition of the evaluations that every year really disturbed the serenity of so many magistrates and the efficiency of the offices to which they are attached». However, he specified that the Christian Democrat majority had wanted to «take this step and surround this courageous innovation with some caution», namely that of «accompanying career progression, as a result of seniority alone, with a prior and positive evaluation on the activity carried out by the magistrate»[183].

In his speech Bonaiti stated:

> We thought it useful to preserve this instrument of evaluation, moving from the consideration that it is not a question here of regulating the position of an ethereal and angelic host, living and operating in the hyperuranic stratosphere, but of a complex of men who, even if they are awarded the most noble and prestigious function, remain men, and as such bear the burden of faults and miseries common to all mortal beings. It arises from this that even in the regulation of the most noble function of the magistrate, suitable means should be maintained to stimulate and regulate wills and repress defects and shortcomings, without any intentions of compression, let alone violation of the freedom and autonomy of magistrates, being drawn from this.[184]

MP Amatucci (DC) also defended the bill, criticizing those who argued that the transition from magistrate of tribunal to magistrate of appeal should take place only by seniority: «The Constitution itself speaks of promotions where it lists the powers of the Higher Council. Does the concept of promotion include that of advancement, that is, of passage to a higher category, or not? Is an evaluation of substance implied? Obviously, yes. On the other hand, one would not understand the

[180] Ivi, p. 9.
[181] Ivi, p. 13.
[182] Ivi, pp. 19-20.
[183] Verbatim record, Chamber of Deputies, assembly, 26 November 1965, p. 19291.
[184] Ivi, p. 19292

function of the Higher Council if in order to promotions one had to mechanically follow the criterion of seniority»[185].

The innovative nature of the reform was also highlighted, albeit with some distinctions, by Socialist Party exponents. For Martuscelli, the reform, while affecting a «limited part» of the judicial system, that is, that relating to the career, entailed in particular two fundamental innovations: the abolition of assessments by seniority, at the time entrusted to commissions composed of members of the Court of Cassation, and the possibility that promoted magistrates could be used in so-called inferior functions through the system of open roles[186]. Highlighting the first aspect, Martuscelli asserted how the main «positive fact» of the reform consisted precisely in «taking the judgment on magistrates away from the Supreme Court. Lower magistrates are freed from subjection to the Supreme Court, because the judgment is delegated to a body elected by the magistrates themselves»[187].

Consequently, while reiterating some «perplexities» about the Breganze proposal, «we are, however, in favour, together with the enormous majority of the judiciary, of the spirit that animates the bill itself», Martuscelli said on behalf of the Socialist Party. He added:

> Unlike the opponents, we see the bill as a step toward judicial reform, which should entrust the judicial function - this fundamental function of the state, not separate from but harmoniously connected with the other functions of the State for the achievement of the common ends of progress and civilization - to a judiciary not poisoned by careerism, not torn by divisions and contrasts, but serene and dignified, composed of free and equal magistrates, an irreplaceable instrument of dignity, freedom, and equality of citizens.[188]

The opponents Martuscelli was referring to were represented by the political forces of the extreme left, which initially opposed the contents of the Breganze proposal in very harsh tones.

In fact, if in 1962 the PCI had found it acceptable - given the serious personnel shortages in the judiciary due to the suspension of competitions - to speak out in favour of a law that abolished competitions based on titles but maintained the traditional career structure of magistrates, this was no longer considered acceptable by the Communists in 1965. For the Communist group, there was no longer any room for downward mediations: what was needed, as explicated by Communist MP Guidi in the minority report at the end of the work of the Judiciary Committee of the Chamber of deputies on 21 October 1965, was a «restructuring of the entire judicial system, in a democratic sense," starting with "overcoming the career structure in the judiciary»[189]. For the Communist rapporteur, it indeed followed from Article 107 of the Constitution that:

> (a) judges are, as members of an autonomous order, equal to each other and are distinguished only by diversity of functions;
>
> (b) the judicial system must reflect this reality and therefore be horizontal and egalitarian, not already vertical, bureaucratic and hierarchical;

[185] Verbatim record, Chamber of Deputies, assembly, 29 November 1965, p. 19308.
[186] Verbatim record, Chamber of Deputies, assembly, 26 November 1965, p. 19286.
[187] Ivi, p. 19290.
[188] Ibidem.
[189] *Relazione di minoranza della Commissione Giustizia, relatore Guidi*, Chamber of Deputies, 21 October 1965, p. 26.

(c) the judge has no hierarchical superiors of any kind;

(d) the assignment of a different judicial function should not constitute promotion, because promotions presuppose ranks and ranks presuppose hierarchy, which on the other hand does not exist with respect to judicial functions either.[190]

These requirements were considered incompatible with the contents of the proposal put forward by the Christian Democrats, which did not envisage the equalization of judicial functions and the annihilation of all forms of career advancement, but rather provided for a system of advancement to functions of appeal based on the mechanism of open roles.

Rather than providing, in fact, for the unification of the categories of magistrates of tribunal and magistrates of appeal (with the recognition to magistrates of the economic treatment provided for magistrates of appeal after twelve years), for the communist Guidi the Breganze proposal confirmed «the demarcation between judges of merit» and revived «a strong characterization of the evaluation of the magistrate in a bureaucratic and pedagogical sense, reproducing the connotations of the career»[191].

The communist criticism was part of a broader reflection on the role the judiciary should play in relation to the changes taking place in society. Guidi himself referred critically to «a judicial order decoupled from civil society», to a «vertical rupture between the needs of civil society and the policy directions of the judiciary that are at the antipodes of the same», and that ended up involving new economic and social relations, issues of labor, housing, and welfare[192].

The criticism from the Communist group was reiterated in the plenary of the Chamber of deputies by MP Pellegrino: «We need to free the judge from the nightmares of promotions, to take him away from the ties of the career that entangle him, to relieve him of the burden of preparing the beautiful sentence in order to bind him to the right sentence. This is what Italian society wants from its judges, this is the need we ourselves feel and which is stressed by the magistrates themselves is [...]»[193].

For Pellegrino any discourse on the problems of justice could not therefore «not start from the judge, from his ideal moral material conditions in order to see how the Italian judge is placed today historically in relation to the democratic state and civil society»[194].

In this critical context, the reference made by the Communist MP to the conclusions reached by the NAM at the Gardone congress held a few weeks earlier takes on particular importance:

From Gardone recently came an encouraging, exciting word for all of us. At the congress organized by the magistrates' association, a motion passed by acclamation states that the congress declares itself decidedly opposed to the conception that claims to reduce interpretation to a purely formalistic activity, indifferent to the content and concrete impact of the norm in the life of the country. The judge, on the contrary – the motion continues –must be aware of the political-constitutional scope of his or her guarantee function, so as to ensure, even within the insurmountable confines of his or her subordination

[190] Ivi, p. 27.
[191] Ivi, p. 29.
[192] Ivi, pp. 27-8.
[193] Verbatim record, Chamber of Deputies, assembly, 26 November 1965, p. 19284.
[194] Ivi, p. 19281.

to the law, an application of the norm that conforms to the fundamental purposes intended by the Constitution.[195]

«Honor to the magistrates of our country who are breaking the delay and proclaiming that they feel they are protagonists of the new era of the Italian people!», commented the same Communist MP, who continued: «The choice that the Italian magistrates made in Gardone is not a contingent, partisan political choice, but the choice that places them in the vein of the country's progress as the Constitution commands»[196].

The conclusions of the Gardone congress of the NAM, therefore, had wide prominence in the parliamentary discussion regarding the Breganze bill. Even another MP of the extreme left, such as Cacciatore (PSIUP), in justifying his opposition to the bill read the entire motion passed on 28 September 1965 at the end of the Gardone congress[197].

It is clear how the left-wing parties tended to interpret the contents of the concluding motion of the NAM congress in a rather radical way, emphasizing the political role of the judge in society, similar to the interpretations offered by the more progressive factions of the judiciary.

While emphasizing the importance of the conclusions of the Gardone congress, the PCI also initially polemicized with the National Association of Magistrates, guilty, according to the Communists, of accepting the "downward compromise" proposed by the government in matters of promotions and careers. On 21 March 1965, in fact, the extraordinary assembly of the NAM had approved an agenda in which it expressed «confidence in the prompt approval» of the Breganze proposal, which, among all the proposals, appeared «likely to be implemented quickly, also following the favourable opinion by the Budget Committee»[198].

Thus, at the end of the work of the Justice Committee, the minority rapporteur, Communist MP Guidi, went so far as to criticise «some weaknesses, inspired by corporate interests, expressed at the decisive moment by the National Association of Magistrates - which although it boasts unquestionable merits on the level of the ideal debate relating to the problems of justice», which had «contributed» and had «been used to force the substitution of the government's project for the much more advanced contents, supported by the majority of the Commission»[199].

Even during the discussion in the assembly, Communist MP Pellegrino expressed his «amazement» at the fact that the National Association of Magistrates, which was to be «credited with leading a decisive, courageous, noble for the implementation of the Constitution in the points that concern the judicial system, and which had shown that it was determined not to give up on the unification of merit roles, to banish every institution and concept that still in Italian legislation with regard to magistrates could even remotely recall the career», had suddenly given in, accepting the Breganze proposal[200].

[195] Ibidem.

[196] Ibidem.

[197] Verbatim record, Chamber of Deputies, assembly, 29 November 1965, p. 19323.

[198] *L'Assemblea generale del 21-3*, in «La Magistratura», 1965, n. 4, p. 2.

[199] *Relazione di minoranza della Commissione Giustizia, relatore Guidi*, Chamber of Deputies, 21 October 1965, p. 26.

[200] Verbatim record, Chamber of Deputies, assembly, 26 November 1965, p. 19285.

Later, the communist MP Sforza downplayed the party's criticism towards the NAM, stating that the association's adhesion to the Breganze proposal had been determined by the slowing down of parliamentary work and the fear that «the proposal could be buried»[201]: «The Association of Magistrates accepted the Breganze proposal because it was forced to do so. Faced with the alternative - either to accept this law, which does not solve the underlying problems, but takes some steps forward, or to do nothing - the choice is not difficult»[202].

During the debate in the Chamber of deputies, the PCI's criticism of the Breganze proposal softened, probably also due to the favourable position now expressed by the associative judiciary towards the bill.

For the Communist Party, as explained by Guidi on 1 December 1965, behind the discussion on the promotion system lay a much broader issue, concerning the links between the judicial function and popular sovereignty, the full implementation of the Constitution, and the need to intervene in the role of the Court of Cassation. In fact, the Supreme Court was once again accused in parliament of having acted, with its jurisprudence, «in antithesis» to the needs of democratization of the country and implementation of the Constitution[203]. In the words of the communist exponent, however, there emerged the feeling that in some sectors of the associative judiciary more innovative ideas were spreading than in the past regarding the relationship between judge and society, as demonstrated by the conclusions of the Gardone congress. In short, there was an ideological change that could not be ignored by the PCI and that, indeed, had to be taken into special consideration as a sign of "maturation" of the judiciary itself. In the assembly Guidi stated:

> There is today [...] a broad criticism, a vigorous accusation coming from public opinion, from the Constitutional Court and from an important wing of the judiciary itself. That is why, ladies and gentlemen, we perceive in this struggle also conducted by a part of the Italian judiciary the sign of a struggle that is also ours, of so much of the Italian people who have been demanding the implementation of the Constitution for years.[204]

Consequently, while reiterating his criticism of the Breganze proposal («it is not capable of resolving the problem of career progression in the judiciary»), Guidi announced the choice of the PCI not to vote against, but to abstain from the vote on the measure, somehow expressing the hope that the more radical theses put forward by the progressive sectors of the associated judiciary might soon become dominant in the category:

> If we abstain, if we do not come to a negative vote, it is because we do not want, above all, to separate ourselves from the expectations of a part of the world of justice, which will certainly make its own experiences, Honorable Minister, which will understand tomorrow the value of the criticism that we confirm, which will certainly arrive in a broader and more united way, before long, at the conclusion that the problem of the elimination of careers must be tackled in a coherent and organic manner.[205]

[201] Verbatim record, Chamber of Deputies, assembly, 29 November 1965, p. 19322.
[202] Ivi, p. 19320.
[203] Verbatim record, Chamber of Deputies, assembly, 1 December 1965, p. 19449.
[204] Ibidem.
[205] Verbatim record, Chamber of Deputies, assembly, 1 December 1965, pp. 19449-19450.

The Breganze bill was approved by the Chamber of Deputies on 9 December 1965. The NAM welcomed the approval of the text, stating that it had «substantially accepted the thesis of the National Association of Magistrates»[206].

The examination of the bill in the Senate, to which the text was forwarded, took place much more quickly and with much more conciliatory tones between the political parties.

Even the Communist Party (as well as the PSIUP), probably also in virtue of the wide adhesion by then expressed by the NAM towards the Breganze proposal, chose the path of compromise once and for all, so much so as to express themselves in favour of approving the law. Speaking in the assembly on 1 July 1966, Senator Kuntze reiterated her criticism of the bill, in particular that of not having fully implemented the constitutional principles in relation to the functions exercised by magistrates, through the «abolition of the career in the most complete, most absolute and most total manner, freeing the judiciary from any. hierarchy, from any pyramidal organisation»[207]. For the Communist senator, on the contrary, the draft law had taken «steps backwards compared to the original drafts», in particular by not unifying the category of magistrates of merit[208]. In spite of this, the Communist exponent pointed out that the system offered by the law gave the magistrate «greater guarantees» than in the past and concluded by expressing support for its approval, also referring to the need to accommodate the requests of the associative judiciary:

> In the face of this bill, which constitutes the fulfilment, albeit partial, of a long and I would like to say painful wait on the part of Italian magistrates, I believe that Parliament has a duty to meet these long-standing aspirations, even if in an incomplete and unsatisfactory manner, and to bring - I believe this is the most important thing, ladies and gentlemen - an element of peacefulness and serenity to the Italian judiciary, as a guarantee above all of a healthy justice, which does not want learned sentences but wants right sentences, and doctrine is not always the sister of justice. To guarantee, I was saying, a more serene healthy justice: therefore the approval of this bill is in the interest not only of magistrates but of all citizens.[209]

Like Kuntze, other communist exponents also expressed themselves in favour of the approval of the law, like Morvidi:

> The magistrates are pressing for approval by the Senate and we declare that we will fully approve the bill submitted to us. [...] I affirm that by means of the Breganze bill we are taking a good step forward on the road to the autonomy of the judges of the merit precisely in homage to the dictate of the Constitution: to the substantial and essential dictate and not only to the accidental and in a certain sense formalistic, as some seem to sustain.[210]

In the course of the debate in the assembly, Poet (PSI) reiterated that the Breganze bill found the socialist parliamentarians «lined up on clearly favourable positions» and he hoped on behalf of the party that the measure could «receive in its entirety and without further postponement its final

[206] *La Camera approva la proposta Breganze*, in «La Magistratura», 1965, n. 11-12, p. 1.
[207] Verbatim record, Senate of the Republic, assembly, 1 July 1966, p. 24417.
[208] Ivi, p. 24420.
[209] Ivi, p. 24425.
[210] Ivi, p. 24429.

approval by this Assembly, thus meeting the legitimate and no longer delayable expectations of Italian magistrates»[211].

What emerges very significantly from the analysis of the parliamentary reports, however, is the tendency of the Christian Democrat senators to reiterate the concept that the bill did not in any way entail the unification of the categories of magistrates of tribunals and those of appeal, and the elimination of professional evaluation for the transition between the two functions. In the final report on the work of the Senate Justice Committee, Berlingieri clearly stated:

> From the context of the present bill, it is clear that there is a substantial difference between the functions of magistrates of tribunal and those of appeal, and it is also clear that there is an unquestionable guarantee with regard to their qualities and the serious selection of those who have demonstrated requirements of greater ability. Therefore, based on these considerations, the text of the bill maintains the distinction between these two categories of magistrates, differentiating their functions, and explicitly classifying as «appointment» the progression in functions, that is the passage from one to the other category, albeit with open roles, which may allow those promoted to remain in the same offices to which they were assigned, thus obviating the drawbacks of "supernumerary".[212]

In the course of the debate in the assembly, Ajroldi also reiterated: «It is not correct to say that this reform entails appointment by seniority, appointment by seniority which is excluded, among other things, by Article 103 of the current law on the judicial system»[213]. In the opinion of the Christian Democrat MP, in fact, «the diversity of the functions of first instance and appeal has its own objective content of particular importance and one should not think that, through this recognition, one wants, as has sometimes been said, to create positions of discrimination between the good, the discreet and the mediocre»[214].

«It is mistaken to believe that the intention is to abolish the selective criterion with a consequent levelling out of abilities», confirmed MP Pafundi (DC), adding that the bill established «precise rules for the evaluation of the judge's ability and activity, an evaluation entrusted to the Judicial Council and the Higher Council of the Judiciary, also providing for the hypothesis of referring the candidate to a new evaluation at the end of the next two-year period»[215]. «There is therefore no automatic promotion», Pafundi added, «as is wrongly claimed and as we have already heard here, but a different system of evaluation that replaces the examination of the judgements, which, divorced from the file, do not always offer a guarantee of exact evaluation, with the full assessment of the candidate's personality and the work performed in the function of justice».

It is equally significant that the Minister of Justice Reale himself, on 12 July 1966, during the session in the assembly for the approval of the bill, wanted to reiterate this concept: «It was unanimous in this debate that this law in no way makes the progression of magistrates of tribunal to magistrates of appeal automatic and general and without exception, but substitutes - as Senator Pafundi pointed out - one evaluation for another of their ability and their right to progression»[216]. For the Minister there

[211] Ivi, p. 24434.
[212] *Relazione della Commissione Giustizia, relatore Berlingieri*, Senate of the Republic, 22 June 1966, p. 4.
[213] Verbatim record, Senate of the Republic, assembly, 30 June 1966, p. 24362.
[214] Ivi, p. 24363.
[215] Ivi, p. 24367.
[216] Verbatim record, Senate of the Republic, assembly, 12 July 1966, p. 25080.

was no «doubt» that it had to be an «assessment not of pure form, but of substance and serious and complete», as indicated by Article 3 of the law, which specified that «particular account should be taken of the magistrate's industriousness, ability, diligence and preparation demonstrated in the performance of his duties»[217].

Obviously, Minister Reale added, in order for the evaluations to be substantial and serious, it was «necessary» that the judicial councils take «their high task of evaluation seriously; seriously from the point of view of thoroughness; seriously from the point of view of objectivity and impartiality»[218].

During the debate in the assembly, attention was drawn to the need for an effective evaluation of the work of magistrates by the judicial councils by Senator and lawyer Nicola Pace (MSI), with words that later, as we have seen, would prove prophetic:

> The judgments that the judicial councils will be about to issue I hope will be to be different from those current opinions that are standardized in the eulogistic exaltation of each and every one. Our experience tells us that today the opinions that the judicial councils issue for the scrutiny tests are nothing but incense-bearing exaltation of all the candidates; and I have never encountered, in my long professional and parliamentary life, an opinion that has desecrated a magistrate of all possible qualifications for participation in the scrutiny. But, you will tell me, that was an opinion, whereas now it is about something else, it is about the allocation of functions. And, since this is the case, I hope that this greater weight of the judgement or opinion that the judicial council is about to issue will commit it to pronouncements of a more lively and severe conscience, will commit it to responses of greater responsibility.[219]

An analysis of the parliamentary reports reveals a second significant and crucial element from a political point of view: the conviction on the part of the government and the political forces that the evaluation that the judicial councils should have carried out for the appointment as magistrate of appeal should also have included an examination of the judicial work produced by the magistrates. In other words, the abolition of competitions based on evaluations of titles and then also of the scrutiny system should not have meant the exclusion of the judicial work produced by magistrates in the course of their activity from the elements submitted to the evaluation of the judicial councils.

On this aspect, the rapporteur of the measure, Berlingieri, had already been very clear at the end of the examination by the Senate Justice committee:

> It has been lamented somewhere that the scrutiny, in which titles, that is judicial work, are decisive, has been abolished. It should be noted that the present bill provides for the evaluation of the magistrate's activity over the last five years, and of his capacity (Article 1), which clearly includes the said titles, which certainly cannot be a determining evaluation. In fact, the magistrate's capacity, value and preparation are expressed in a sum of various activities, such as constitution, temperament and industriousness [...].[220]

[217] Ibidem.

[218] Ivi, p. 25081.

[219] Verbatim record, Senate of the Republic, assembly, 30 June 1966, p. 24348.

[220] *Relazione della Commissione Giustizia, relatore Berlingieri*, Senate of the Republic, 22 June 1966, p. 4.

In short, even if titles could not play a decisive role in the evaluation of professionalism of a magistrate, the law stipulated that they should still be taken into consideration by the judicial councils.

During the debate in the assembly, this aspect was reiterated by several parliamentarians, including exponents of left-wing forces.

In particular, Christian Democrat Senator Murdaca pointed out:

> The new system [...] makes it possible to examine works without being bound to examine certain works from a certain period. When it is said in Article 1 of the bill that the Higher Council proceeds with the appointment after examining the reasoned opinion of the judicial council on the magistrate's abilities, it is obvious that an opinion on abilities cannot be given except through knowledge and examination of the magistrate's work. My considerations are corroborated by the content of Article 3 of the same bill, in which the elements of evaluation are provided for; in fact, to give greater importance and relevance, the title of the said article is precisely «Elements of evaluation», and among these are listed the criteria that the judicial council and the administrative council must take particular account of. The content of the article meets the strictest requirements, as it imposes an overall assessment of the magistrate's qualities and especially of his abilities, diligence and preparation demonstrated in the performance of his duties.[221]

Taking up Murdaca's affirmations, Ajroldi (DC) also reiterated that the magistrate's evaluation should be «based on the industriousness, ability, diligence and preparation demonstrated in the performance of his duties»: «This does not mean that the judgements pronounced or the indictments should not also be taken into account; but that is not the title that counts, or rather it is not only the title that counts, but the overall judgement on the work performed by the magistrate»[222].

The communist senator Kuntze, confirming some criticism of the bill, concluded on 1 July 1966: «However, the supporters of titles can still be satisfied: as the distinguished rapporteur recalls in his report, titles will unfortunately continue to be evaluated, but it will not be an absorbing and decisive evaluation; we hope at least this after the approval of this bill»[223].

Finally, even the Minister of Justice Reale, before the approval of the text in the Senate pointed out that according to Article 3 of the bill «after the opinion expressed by the judicial council, the Higher Council of the Judiciary has the power to take, in the form and manner deemed most appropriate, any further element of judgement that it deems necessary for the best evaluation of the magistrate, including, when necessary, the titles but not in an absorbing manner, as noted by the rapporteur Berlingieri and Senator Kuntze»[224].

In short, there is no doubt that in the legislator's intention, the assessment of professionalism of a magistrate for appointment to the function of appeal should also have taken into consideration the judicial work produced by the magistrate himself (such as judgments, requisitions, etc.). Moreover, there was a widespread awareness that up to that time, the judicial councils had not carried out

[221] Verbatim record, Senate of the Republic, assembly, 30 June 1966, pp. 24353-4.
[222] Ivi, p. 24364.
[223] Verbatim record, Senate of the Republic, assembly, 1 July 1966, p. 24420.
[224] Verbatim record, Senate of the Republic, assembly, 12 July 1966, p. 25080.

substantive evaluations of the professionalism of magistrates in their vetting procedures, constantly adopting opinions of a laudatory nature on the work of magistrates.

In spite of this, none of the parliamentarians - especially those belonging to the Christian Democrat majority - put forward the idea of including a direct reference to the scrutiny of judicial work in the evaluation of magistrates' professionalism in the bill.

The final text of the law, approved by the Senate chamber on 12 July 1966 with the favourable vote also of the PCI, and then definitively by the Justice Committee of the Chamber of deputies, in a legislative capacity, excluded any reference to the titles of magistrates.

In Article 1, the law (n. 570/1966) states that «magistrates of tribunals, eleven years after promotion to that position, shall be subject to evaluation by the judicial councils for the purpose of appointment as magistrates of the Court of Appeal» and that «the Higher Council of the Judiciary shall make the appointment, after examining the reasoned opinion of the judicial council, on the magistrate's abilities and on the activity carried out in the last five years».

In Article 3, the law specifies the «elements of evaluation», excluding any direct reference to the judicial work of magistrates:

> The judicial council and the administrative council, in formulating the opinion referred to in the preceding articles, must take particular account of the magistrate's industriousness, ability, diligence and preparation demonstrated in the performance of his duties.
>
> In individual cases, the Higher Council has the power to take, in the form and manner it deems most appropriate, any further element of judgement it deems necessary for the best evaluation of the magistrate.

It was precisely the failure to include a reference to the evaluation of judicial work that allowed the HCJ, under pressure from the NAM, to interpret the law in a manner substantially contrary to the will of the legislator, excluding the examination of judicial work from the evaluation of the professionalism of magistrates.

The reinterpretation of the law on promotions to function of appeal by the HCJ is closely linked to the electoral reform of the Council itself. As examined above, the electoral reform of 1967 extended the right to vote to all magistrates, without distinction of category, allowing court magistrates to also elect representatives from the appellate and especially the cassation categories. The implementation of this reform brought the positions of the magistrates of appeal and of Court of Cassation closer to the more radical positions of the magistrates of tribunal, who demanded the total abolition of the career in the judiciary.

In 1967 the HCJ, elected on the basis of the previous electoral system and therefore more influenced by the positions of the magistrates of Cassation, had provided a restrictive interpretation of the law on the promotion of magistrates of appeal, in line with the positions expressed by the legislator. On 20 March 1967, in fact, the Higher Council adopted a resolution stating that the evaluation of professionalism of a magistrate exercised by the judicial council and the HCJ itself could not

disregard the «evaluation of the judicial (or administrative) work of the candidate»[225]. «It is in fact evident that a serious evaluation on a judge's ability cannot be expressed without assessing his judgements, his indictments, his grounds for appeal», the HCJ clearly stated, while emphasizing the need to carry out a «global, overall assessment» of the magistrates' work[226].

A few days earlier, the National Association of Magistrates had reacted harshly against the judicial councils that were applying the law according to the legislator's indications, and therefore also taking into account the examination of judicial work in the professional evaluation of magistrates. In fact, on 12 March 1967, the central executive council of the NAM unanimously approved an agenda on the application of the Breganze Law in which it stated:

> Noting with deep regret that some judicial councils have imposed, in the application of Law N. 570 of 25-7-1966, the presentation of judicial work and that this system constitutes a patently violation of the letter and spirit of the law itself; recalls that the Breganze Law is founded on the consideration of the identity of the functions of judges of merit, at every level, an identity made even more evident by the system of open roles. From this principle it follows that the magistrate's evaluation is based on direct knowledge of the members of the judicial councils, knowledge of which is also a normal prerequisite for the appreciation of judicial work; it commits the members of the councils in office not to compromise the new system implemented by the law and invites all colleagues to use the democratic weapon of the vote, electing to the new judicial councils only magistrates who are fully confident that they share the renewal principles of the law itself, and, first of all, that of the elimination of the examination of judicial work.[227]

It is evident that, contrary to what was claimed in the agenda, the position of the NAM was in stark contrast to the indications provided by the legislator at the time of the approval of the Breganze Law.

In 1968 the new electoral system of the HCJ allowed the factions of the NAM to outvote the representatives of the high judiciary within the Higher Council: of the fourteen magistrates elected, as many as ten were expressions of the NAM, and only four of the UIM. This meant that the HCJ adhered to the NAM's interpretation of the law on the promotion of magistrates of appeal.

Following the elections, in fact, the HCJ decided to provide a radically opposite interpretation of the Breganze law to that provided by the previous Higher Council (and the legislator), ruling the exclusion of the examination of judicial work from the professional evaluation procedures of magistrates[228].

As pointed out in the section “The abolition of the career of magistrates”, the result of this interpretation by the HCJ was the disappearance of any form of effective evaluation of magistrates' performance for the purposes of promotion to magistrate of appeal. In practice, seniority became the main criterion for the career advancement of magistrates.

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[225] *Criteri di massima – approvati dal Consiglio nella seduta del 20 marzo 1967 – per l’applicazione della legge 25 luglio 1966, n. 570, concernente «Disposizioni sulla nomina a magistrato di corte di appello»*, in «Notiziario Csm», 1967, n. 3, p. 2.

[226] Ibidem.

[227] *Richiamati i Consigli giudiziari all’osservanza della legge Breganze*, in «La Magistratura», 1967, n. 3, p. 24.

[228] G. Di Federico, *Magistrati ordinari*, cit., p. 327.

The abolition of career advancement, as seen above, was completed with the approval of Law n. 831/1973, which extended the mechanism of open roles advancement also to promotions to the Supreme Court. The law, in fact, provided for the appointment of magistrates of appeal, after seven years of service, to the rank of magistrate of Cassation by the Higher Council of the Judiciary, subject to the reasoned opinion of the judicial council. The professional evaluation would be global and based on the examination of the elements of preparation, technical-professional capacity, industriousness and diligence demonstrated in the exercise of duties, previous service record. Again, the law provided that the magistrates of the Supreme Court would continue to exercise their previous functions until they were assigned to an office corresponding to their new functions, while receiving the higher salary, according to the open roles system.

The bill was presented by the government in February 1973, although the first proposals were made by Socialist and Christian Democrat exponents as early as 1970. The law was debated and quickly approved by parliament (between February and December 1973), again with both the PSI and PCI voting in favour.

Also in this case, the presentation of the bill was motivated by the government with the need to also adapt the procedures for the appointment of magistrates to the functions of Supreme Court to the Constitution. The evaluation for appointment as magistrate of the Supreme Court was taken away from the scrutiny commissions and entrusted directly to the Higher Council of the Judiciary, subject to the opinion of the judicial councils. Moreover, the evaluation was freed from the mere examination of judicial work produced by magistrates but took the form of an overall judgement on the technical and professional abilities of magistrates[229].

The discussion and approval of the bill took place in rather conciliatory tones among all the political forces. In this context, however, the criticism levelled by MP Oronzo Reale (PRI), who had already been Minister of Justice twice and would shortly return to that position again, deserves to be emphasized. On 27 November 1973, during the examination of the measure in the Justice Committee of the Chamber of deputies, in a legislative capacity, Reale contested the claim that the reform implemented the rules contained in the Constitution:

> In my opinion it is rather a reversal of the constitutional principle, because in Article 107, paragraph 3, of the Constitution it is written that magistrates are distinguished from each other only by diversity of functions. In this case, however, the qualification of a magistrate (magistrate of Cassation, president of section) no longer means that that magistrate exercises a corresponding function, but only that he has that rank and receives that salary. All magistrates will therefore only be distinguished by rank, not by function [...].[230]

Reale was therefore against the approval of the reform, which he said represented «a trade union victory of a fierce category and not the realization of a general interest of the country»[231].

[229] *Disegno di legge Modifiche dell'Ordinamento giudiziario per la nomina a magistrato di Cassazione e per il conferimento degli uffici direttivi superiori*, Senate of the Republic, 9 Debruary 1973; *Relazione della Commissione Giustizia, relatore De Carolis*, Senate of the Republic, 28 March 1973.

[230] Verbatim record, Chamber of Deputies, Justice Commission, 27 November 1973, p. 345.

[231] Ivi, p. 348.

Considering the manner in which the laws on appointments to the Court of Appeal and the Supreme Court were interpreted and applied by the judicial councils and the Higher Council of the Judiciary, and the consequences of this activity – that is the disappearance of any form of effective evaluation of the magistrates' work - the words expressed on 1 March 1973 by the Christian Democrat Senator Follieri during the examination of Law n. 831/1973 are worth recalling.

During the discussion in committee, in fact, Follieri, while emphasizing the positive aspects of the measure, stated that he had to «bitterly note - and parliament must be made aware of this - that the Breganze law functioned with a certain automatism which unfortunately does not work in favour of either the judicial councils or the Higher Council of the Judiciary which approved the suitability of magistrates»[232].

In other words, in the first years of the implementation of the Breganze Law, the problem of the disappearance of effective forms of professional evaluation of magistrates had already emerged. Follieri launched a real alarm to his colleagues:

> It has happened, and a magistrate himself recently denounced it, that for about 1400 magistrates interested in attaining a higher rank, the judicial councils, in order to be able to assess their abilities, requested «reports» in which - almost as if it were a printed matter - the same things were said for everyone: all the candidates were capable, they were superlatively gifted, they were knowledgeable in doctrine and jurisprudence and so on. In short, we arrived at the «standardization» of judgements and all this was covered with a veil, so to speak, by the Higher Council of the Judiciary because, in the end, only seven magistrates, out of about 1400, were declared unsuitable. Well, it seems to me that this percentage is too low and therefore we must take care that the judgments that the judicial councils must give - and which the Higher Council of the Judiciary must then review - are actually serious, well-considered because, in the end, they will affect the judges of legitimacy.[233]

These numbers relating to the first years of application of the Breganze Law were recalled in the Senate assembly by Senator Filetti (MSI), who criticised the HCJ for having reduced itself «to the very modest rank of seniority recorder»:

> From the report by councilor Giovanni De Matteo at the recent congress of the Union of Magistrates in L'Aquila, it emerges that in the four-year period 1968-72, out of 1,354 magistrates subjected to the decisions of the Higher Council of the Judiciary, only seven (I repeat seven) did not obtain the appointment as a judge of appeal. Nor does the bitter irony of those who have pointed out that, with a slight modification, the famous formula *estote todos caballeros*, with which, according to tradition, Charles V, out of gratitude, elevated all the citizens of Alghero to the dignity of knighthood, seems totally out of place. At the time, the general «knighthood» was conferred; now the principle has been legislated in Italy that no magistrate should be denied the title of «councilor»: all magistrate councilors![234]

It is significant that the above statements were not only not taken into consideration during the discussion of the measure in parliament, but were accompanied by the same authors announcing that

[232] Verbatim record, Senate of the Republic, Justice Commission, 1 March 1973, p. 475.

[233] Ibidem.

[234] Verbatim record, Senate of the Republic, assembly, morning session, 10 April 1973, p. 6606.

they would vote in favour of the bill then under discussion concerning the appointment of magistrates of the Court of Cassation.

An analysis of the parliamentary reports shows, again, that there was a widespread feeling of urgency among the political forces to approve the measure, especially in view of the delays in parliament's consideration of the proposal. This feeling of urgency appeared to be closely linked to the need to proceed with the approval of an organic reform of the judicial system: in other words, only the definitive overcoming of the problem of "promotions" in the judiciary - with the extension of the system of progression by open roles also to the functions of Supreme Court - would have finally allowed the reform of the judicial system, required since 1948 by the Constitution, to be tackled in an organic manner.

On 22 November 1973, speaking in the Justice Committee of the Chamber of deputies, MP Felisetti (PSI) clearly stated that the approval of the measure was «justified not so much by a conviction of its substantial validity, but rather by a kind of state of necessity». This state of necessity, in the opinion of the socialist MP, was «derived from two causes: one contingent, the other fundamental»: «The contingent one is pressure from the magistrates, the other from the lack of reform of the judicial system»[235].

With regard to the magistrates' pressure, Felisetti referred to the «recent agitations of some magistrates' circles», in particular the Roman section of the NAM, which had adopted an agenda putting forward the hypothesis of a strike, denouncing the dysfunctions of the judicial system and «the need to proceed with the rapid approval of the law on progression to the Supreme Court»[236].

The second factor underlying the «state of necessity», for Felisetti, was «the fact that the reform of the judicial system had not been carried out»:

> Parliament, for the press of things, is inclined to legislate episodically and sectorially, in a sometimes disjointed and disorganized manner, making novelties and changes to the structures of the existing orders, when instead it should have and should have acted by reforming the load-bearing structures, that is the legislations. And so, in the case at hand, we would not be at this point if the new judicial order had been legislated on time.[237]

At the same session, Spagnoli also announced the Communist Party's vote in favour, pointing out that he saw the measure «as a real anticipation of a reform, which we want to see in the near future, of the judicial system»[238]. MP Manco (MSI) also announced his favourable vote, explicitly stating that it was «a vote provoked by a state of necessity»[239].

Moreover, the Minister of Justice himself, Mario Zagari, on 6 December 1973, before the final approval of the measure clearly expressed the government's perspective on the law in these words:

> What matters here is that the new law anticipates, in the sense indicated, the future choices of a global revision of the system and in any case represents a definitive break with the past and

[235] Verbatim record, Chamber of Deputies, Justice Commission, 22 November 1973, p. 333.
[236] Ibidem.
[237] Ivi, pp. 333-4.
[238] Ivi, p. 338.
[239] Verbatim record, Chamber of Deputies, Justice Commission, 27 November 1973, p. 353.

> with the logic that characterizes the current system. When the structures of the current judicial system have fallen and the career and hierarchy based on functions have been practically demolished [...] it will be easier to build a truly new system on the rubble of the old. In this sense, the new discipline can be considered as a bridge-law, as a compulsory passage between the old and the new that stimulates everyone - and first of all the government - to start a revision of the judicial system that is no longer sectorial, but global, and this also to meet, as has rightly been said, the needs connected to the reform of the codes.[240]

Ultimately, the approval of the law on the appointment of magistrates of the Supreme Court was motivated by the parties with the need to complete the work of abolishing the old system of promotion of magistrates as soon as possible, so as to finally deal with the reform of the judicial system.

The long phase of the emergency, first terrorist and then mafia, would further delay the hoped-for organic reforms of the codes of criminal procedure and the penal code, while an organic reform of the judicial system would have to wait, as we shall see, until 2005.

At the beginning of the 1970s, therefore, the only structural reform that could be called accomplished was the one concerning the abolition of the career system of magistrates. Ultimately, what emerges from the analysis of the parliamentary work is the will of the political forces, both government and opposition, to satisfy the corporative interests of the NAM by cancelling the traditional system of promotion of magistrates, but at the same time a lack of awareness of the effects that these measures would have had, starting with the disappearance of effective forms of evaluation of magistrates' professionalism.

[240] Verbatim record, Chamber of Deputies, Justice Commission, 6 December 1973, p. 403.

5. The Seventies

The new role of the judiciary and the HCJ

The process of enhancement of the role of the judiciary on the institutional level, which began at the end of the 1960s, was further strengthened in the early 1970s.

Emblematic of this change was the approval in 1970 by the Higher Council of the Judiciary of the first report on justice, significantly entitled «Social reality and administration of justice». The document certified the new role assumed by the HCJ and the judiciary in the institutional context and society[1].

The report stated that the task of the Council was not to achieve «a corporative government of the judiciary», but to «achieve the fundamental interest of the community and to ensure the freedom of the judge in the jurisdictional moment». The HCJ, therefore, could not «limit itself to playing a merely bureaucratic role», but it had to «frame its activities in an organic vision of the needs of the community and the social and structural framework in which the administration of justice is called to operate»[2]. The report also explored the issue of the relationship between the Council and the other powers of the State. The document underlined the opportunity for an «ever deeper connection of the Higher Council of the Judiciary with the other powers of the State»[3]. Subsequently, after restating that the Council played a central role in the administration of justice and that it could not be «reduced to a mere advisory body of the Ministry of Grace and Justice», the report went so far as to highlight «the opportunity» of «establishing organic and direct relations between the Council and parliament», so that the latter could «take account, as fully as possible, not only of the way in which judicial activity is carried out, but also of the causes of any deficiencies and remedies that may be recommended by a body with particular expertise»[4]. The report reiterated the concept by stating that it would be «appropriate to attribute to the Council the qualification of advisory body of the Chambers and the Government», introducing for example «compulsory opinions for the Government and optional opinions for the Parliament [by the Council] on bills and proposals of parliamentary initiative concerning the administration of justice»[5].

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[1] D. Piana and A. Vauchez, *Il Consiglio superiore della magistratura*, Bologna, Il Mulino, 2012, p. 83.

[2] *Consiglio superiore della magistratura, Realtà sociale e amministrazione della giustizia. Relazione annuale sullo stato della giustizia*, Rome, Csm, 1970, p. 226.

[3] Ivi, p. 182.

[4] Ivi, pp. 183-4.

[5] Ivi, pp. 184-5. Article 10, paragraph 2, of the law establishing the HCJ, N. 195/1958, provides that the Council may make proposals to the Minister of Justice «on changes to judicial districts and on all matters relating to the organisation and operation of justice-related services» and that it shall give opinions to the Minister «on draft laws relating to the judicial system, the administration of justice and on any other matter relating to the aforesaid matters». It follows from the interpretation of the rules that the HCJ cannot give opinions directly to parliament, without the intermediation of the Minister of Justice. According to part of the scholarship, moreover, the HCJ could not provide opinions without the request of the Minister of Justice. On this see N. Zanon and F. Biondi, *Il sistema costituzionale della magistratura*, Bologna, Zanichelli, 2014, pp. 61-5.

In other words, in the report the HCJ reaffirmed its will, already expressed two years earlier on the occasion of the event concerning the establishment of the Commission for relations with the Parliament, to strengthen its role in the institutional system. In particular, the Council expressed itself in favour of an expansion of its consultative function vis-à-vis political bodies in legislative procedures concerning judicial matters.

With regard to the new role of the judiciary in society, the report of the HCJ definitively expressed the new figure of the judge already affirmed by the NAM at the congress of Gardone in 1965. After devoting an entire chapter to the analysis of the «transformations of social reality», the report rejected the «mechanistic theory of the interpretation» of law, that is the idea that the judge is «called to apply the will of the legislator through a syllogistic procedure having the character of automaticity», the conception of the judge as «a robot». On the contrary, for the HCJ it was necessary to recognize that «the procedure of the interpreter advances in uncertainty», that the law does not provide «always and only a correct decision», that the language used in legislation is «mostly vague, ambiguous, to some extent polyvalent», and that «the norm is not something static, closely linked to the will of the legislator who created it, but is something alive». From this acknowledgement, the HCJ stated in the report, it appeared «evident» that the judge could not «reduce himself to a mere reader of the normative text», but had to be «also the expert of social life» and «be able to grasp in it the values that qualify the norm». Therefore, the judge had to try to give to the norm to be interpreted «that meaning and scope that is more in keeping with the values that emerge from the current human and social reality». This, however, it was specified immediately afterwards, «does not mean that the judge [...] must overcome the principle of his subordination to the law, a principle that remains valid as a guarantee for all»[6].

The report of the HCJ consolidated the new figure of the judge open to the transformations of society, against the excesses of legal formalism. For these reasons, the report of the HCJ also drew attention to the need for a specialization of the judge: «The criminal judge, for example, is not really able to fulfill his function if he ignores [...] forensic medicine, criminal anthropology, sociology, psychology and so on»[7]. Also on these aspects, therefore, the HCJ confirmed the will to strengthen its function as the top of the judicial organisation, giving itself a role that, as underlined by Piana and Vauchez, went «well beyond the field of career management, coming to the identification of the principles of professional excellence: that is to say in an area - that of the definition of the "good" judge – which until then was an exclusive prerogative of the Court of Cassation»[8].

This new conception of the role of the judge was confirmed by the HCJ also in the 1971 report on justice. In the document, the Council emphasized the need to establish «an apparatus», which, «while respecting legality», would ensure the judicial system «the participation of social conscience», so that it would not be «expression of arid bureaucratic methods or authoritarian positions of those in charge», but would implement «a continuous link between the living customs and the legal system»[9].

[6] *Consiglio superiore della magistratura, Realtà sociale e amministrazione della giustizia. Relazione annuale sullo stato della giustizia*, Rome, Csm, 1970, pp. 153-5.
[7] Ivi, p. 160.
[8] D. Piana and A. Vauchez, op. cit., p. 83.
[9] *Consiglio superiore della magistratura, Società italiana e tutela giudiziaria dei cittadini. Prime linee di riforma dell'ordinamento giudiziario. Relazione annuale sullo stato della giustizia*, Rome, Csm, 1971, p. 27

The report recalled, in fact, that the «democratic and social State does not limit its institutional task to the recognition and guarantee of the fundamental rights of the citizen», but also tends «to ensure in practice to the human person [...] the effective enjoyment of the rights that are provided»[10]. In this context, judges too, «in addition to carrying out their traditional function of guaranteeing the rights of the citizen», should therefore «concur, together with the other powers of the State, in carrying out a promotional function»[11]. Consequently, it hoped for the affirmation of a judge «whose knowledge is enlightened by the sense of participation in his own time»[12].

The HCJ consolidated its role as head of the judicial administration also through the strengthening of the regulatory activity. During the 1970s, the tabular system introduced in 1968 became established as an indispensable practice in the management of the judicial system.

At the same time, the Council's measures aimed at further attenuating the hierarchical structure within the judicial offices became more numerous. With a resolution passed on 16 July 1971, for example, the HCJ addressed the issue of the powers of the heads of offices by revoking a measure of appointment of two deputy prosecutors to the general prosecutor office of Naples[13]. In 1975 the HCJ also affirmed that the revocation of the assignment of an affair to the magistrate in charge of it could be carried out only for serious reasons stated in the corresponding measure[14].

The Council came to consider its circulars obligatory for the heads of the offices, so much so that it decided to give notice of violations of the directives in the personal files of the heads of the offices Consequently, these violations would be taken into consideration by the HCJ in the evaluation of professionalism of magistrates. All this in the absence of a law attributing this power to the Council[15].

The tendency of the HCJ to strengthen its influence on the coordination and supervision of the internal functioning of judicial offices, as will be seen below, was further consolidated during the period of the terrorist emergency.

The Tolin case and the alternative jurisprudence

The 1960s ended with significant changes within the associative judiciary that would have a radical impact on the development of the judiciary.

Faced with student and workers' unrest, in fact, some progressive components of the judiciary took their ideological positions to extremes. This happened above all within Magistratura Democratica,

[10] Ivi, p. 5.

[11] Ivi, p. 631.

[12] Ivi, p. 28.

[13] F. Colitto, *Il Consiglio superiore della magistratura. I primi tre quadrienni*, Campobasso, Casa molisana del libro, 1972, pp. 560-1. Cfr. E. Bruti Liberati, *Magistratura e società nell'Italia repubblicana*, Rome-Bari, Laterza, 2018, kindle edition, position 2279.

[14] E. Bruti Liberati and L. Pepino, *Autogoverno o controllo della magistratura? Il modello italiano di Consiglio superiore*, Milan, Feltrinelli, 1998, p. 133.

[15] G. Di Federico, *Il contributo del Csm alla crisi della giustizia*, 2012, p. 21, http://www.difederico-giustizia.it/wp-content/uploads/2013/02/CSM-e-crisi-giustizia.pdf

where from the very beginning there coexisted a component that referred explicitly to Marxist ideology and more moderate components.

The openness to the demands put forward by the "youth of 1968" and by the workers' movements induced in some cases the progressive magistrates to show forms of indulgence towards the protest actions, often violent, emerged in those years. A judge in service at that time, Marcello Maddalena, later stated that the judiciary «certainly showed towards the first manifestations of political violence of the left a complacency never practiced until then»[16]. Also Francesco Misiani, one of the most active magistrates in MD in the 1970s, admitted in 2004: «I must admit, with today's eyes, that there were crimes. The social and political context, the ideology, was a veil for us. In fact, at that time, many of us came to justify violence for political purposes»[17].

The radicalization of the ideological line of MD generated tensions both within the group, both between MD and other groups. The tensions emerged clearly on 30 November 1969, when the national assembly of MD met in Bologna and adopted an agenda in which they expressed criticism towards the public prosecutor of Rome, Vittorio Occorsio, who had ordered the imprisonment of Francesco Tolin, director of the magazine Potere Operaio, for the crimes of apologia and entrapment in relation to some articles published in the magazine. These articles incited workers to violence right while labor unrests were taking place at the Fiat factory in Turin. The investigation and the imprisonment were triggered by an article that portrayed Giovanni Agnelli sitting on an armchair of the Confindustria (Confederation of Italian Industry); under the armchair there was a worker's hand with a lighted Molotov bottle[18].

In the document, MD affirmed that the recent cases had «endangered in various ways the constitutional freedom of manifestation and dissemination of thought» and expressed «its deep concern» in the face of what could only «appear as a systematic design operating with various instruments and at different levels, aimed at preventing some people's freedom of opinion, and as a serious symptom of backwardness of civil society»[19].

The magistrates of MD, in other words, publicly criticised the work of a colleague, exposed in a delicate investigation concerning the defense of public order, accusing him of being part of a «systematic design» aimed at restricting freedom of opinion. Through this initiative, MD brought to the extreme consequences the orientation inaugurated some years before in favour of the criticism of judicial decisions adopted by magistrates (the so-called «interference»)[20]. From MD's point of view, criticism of the activities of other magistrates aimed to encourage the opening of the judge to society, so as not to leave him «alone in front of his conscience», but «help him to understand critically all aspects of his task» and involve him in social processes[21].

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[16] P. Borgna and M. Maddalena, *Il giudice e i suoi limiti. Cittadini, magistrati e politica*, Rome-Bari, Laterza, 2003, p. 48.

[17] C. Bonini and F. Misiani, *La toga rossa. Storia di un giudice*, Milan, Tropea, 1998, p. 27.

[18] S. Pappalardo, *Gli iconoclasti. Magistratura democratica nel quadro della Associazione nazionale magistrati*, Milan, Franco Angeli, 1987, p. 228.

[19] R. Canosa and P. Federico, *La magistratura in Italia dal 1945 a oggi*, Il Mulino, Bologna, 1974, p. 379; E. Bruti Liberati, *Magistratura e società nell'Italia repubblicana*, cit., kindle edition, position 2928.

[20] S. Pappalardo, op. cit., p. 298.

[21] D. Pulitanò, *Giudice negli anni '70. Un'esperienza di Magistratura democratica*, Bari, De Donato, 1977, p. 64.

The day after the approval of MD's agenda, Occorsio, believing that the document constituted a criticism of his work, announced his resignation from the NAM. In the meantime, MI and the UIM accused the progressive group of illicit interference in an ongoing proceeding. The tensions in the associative judiciary and public opinion were exacerbated by the massacre of Piazza Fontana, which occurred a few days later, on 12 December 1969, whose responsibility was initially attributed to members of the anarchist world and the extra-parliamentary left[22].

The approval of the Tolin agenda provoked a crisis within the NAM and MD. Mario Barone and Alfredo Chiavelli, president and secretary of the NAM, adhered to the initiative of MD on the case Tolin, ending up being involved in the controversy. The executive committee of the Association had to resign, being replaced by a provisional board composed of representatives of Terzo Potere[23].

The affair opened a crisis within MD. The approval of the agenda was harshly criticised in «La Magistratura» by some members of the group. In particular, Alessandro Criscuolo and Ignazio Micelisopo criticised that part of MD which, «perhaps under the influence of protest movements», had «begun an activity that could appear to be driven not so much by the ideals of democratization of the judiciary and justice, but by the desire to let ideologies and aims prevail on behalf of strangers to the group and the association»[24]. According to the two magistrates, the «generic wording of the agenda could give rise to serious misunderstandings», first of all that the idea that «some magistrates wanted to challenge the other powers of the State (as well as the judiciary as a whole)». Secondly, the two representatives of MD stressed the need to «avoid that initiatives of this kind, as coming from an organized and influential group of magistrates» came «to represent interference or be interpreted as such in relation to the work and decision of a single judge». In that case, the fact had assumed «particular gravity» because «no care was taken - undoubtedly demonstrating a poor sense of responsibility - not to pass the agenda to the press just at the coincidence of a high-profile criminal trial, with which it could be connected»[25].

The crisis pushed the more moderate components of MD to abandon the group. In the following weeks, the split group gave life, along with some members of TP, to a new group called Giustizia e Costituzione, then called Impegno Costituzionale[26].

As highlighted in the literature, the ideas expressed by MD, especially since 1969, significantly influenced the cultural development of the Italian judiciary, not only for their content, but also for the reactions that they caused inside and outside the judiciary[27].

The departure of the moderate component from MD, in fact, prompted the progressive group to a further radicalisation of its positions[28]. The recognition in the Constitution of a precise political

[22] S. Pappalardo, op. cit., pp. 237-8; G. Palombarini, *Giudici a sinistra. I 36 anni della storia di Magistratura democratica: una proposta per una nuova politica per la giustizia*, Naples, Edizioni scientifiche italiane, 2000, pp. 76-9.
[23] *Nuovo presidente per i magistrati, ma alcuni già chiedono le elezioni*, in «La Stampa», 23 December 1969.
[24] A. Criscuolo and I. Micelisopo, *Ragioni di una crisi. In merito ai recenti avvenimenti in Magistratura Democratica*, in «La Magistratura», 1970, n. 1, p. 8.
[25] Ibidem.
[26] S. Pappalardo, op. cit., pp. 238-52; G. Palombarini, op. cit., p. 79.
[27] V. Zagrebelsky, La magistratura ordinaria dalla Costituzione a oggi, in *Storia d'Italia, Annali, 14: Legge, diritto, giustizia*, edited by L. Violante, Turin, Einaudi, 1998, p. 772.
[28] S. Pappalardo, op. cit., p. 266.

program of economic and social development and the assignment to the judiciary of the task of implementing this program led the magistrates of MD to explicitly overcome the concept of evolutionary jurisprudence in favour of the concept of alternative jurisprudence, based on the vision - of Marxist inspiration - of justice based on class struggle[29]. The group also spread the idea that all the interpretative activity of law had a discretionary nature. It was believed, in other words, that neutrality is impossible whenever value judgments and evaluative moments are required. Considering the judicial decision a necessarily political act, MD decided to make an explicit choice of side, that is, to adopt a jurisprudential interpretation in favour of the weaker classes[30].

This change of route was made explicit by the report approved by MD at the end of an ideological conference held in Rome on 3-5 December 1971[31]. In the first part of the report, the group clearly explained the fundamental premise of its ideological orientation: «The actual justice is a class justice»[32].

Recalling the Marxist interpretation of the bourgeois state based on capitalist relations of production and class struggle, the magistrates of MD stated that legal formalism and the impartial interpretation of law were «perfectly functional to bourgeois domination»[33]. They claimed that bourgeois law did not take into account the «economic and social inequalities», sacrificing them in the name of an impartial interpretation of the law in reality functional to consolidate the interests of the ruling class: «Rigor, consistency and completeness of the system, fidelity of the judge to the law, technical nature of judicial activity are thus the theoretical cornerstones on which the entire edifice of bourgeois justice rests»[34]. According to the magistrates of MD, this system had been undermined by the promulgation of the Constitution and in particular by the «program of substantive equality expressed by article 3», that is, by the enunciation of the constitutional rights of freedom of association, right to health, education and work[35]. Article 3 of the Constitution, in fact, according to the magistrates of MD imposed «the Republic to achieve substantive equality of all citizens» and represented a principle «unenforceable in this system without its transformation in a socialist direction»[36].

On the basis of these principles, in the second part of the report approved at the Rome conference, the members of MD went so far as to put forward a «proposal for a political strategy». This political strategy answered to the name of alternative jurisprudence:

> The alternative role that democratic magistrates intend to play in opposition to the traditional forms of class justice is based on a conscious choice of side of political content opposite to that which inspires the bourgeois jurisprudence of authoritarian or reformist-rationalizing inspiration: a choice no more

[29] P. Costa, *L'alternativa "presa sul serio": manifesti giuridici degli anni Settanta*, in «Democrazia e diritto», n. 1-2, 2010, pp. 253-4.
[30] S. Pappalardo, op. cit., pp. 206-7; P. Costa, op. cit., pp. 257 ff.
[31] The report, presented by Vincenzo Accattatis, Luigi Ferrajoli and Salvatore Senese, is published in *Per una strategia politica di Magistratura democratica*, *Congresso di Magistratura democratica*, Rome, 3/5 December 1971, without publisher.
[32] Ivi, p. 1.
[33] Ivi, p. 13.
[34] Ivi, p. 17.
[35] Ivi, p. 18.
[36] Ivi, p. 23.

> politicized, but politicized in a different and opposite sense, that is, oriented not to the defense and service of the capitalist order in force but to the emancipation of the subordinate classes.[37]

The alternative jurisprudence had to develop on two levels, one of content and one of method.

With regard to the first aspect, the objective of the alternative jurisprudence should have been the «promotion of judicial choices» in which «the prevalence of interests functional to the emancipation of the subordinate classes would be affirmed: protection of the right to strike against the reasons of the "common good" or of the "general interest" [...]; protection of the right to liberty against the reasons of authority or of "public order" [...]; protection of the rights of the worker against the reasons of private property or "free" economic initiative [...]»[38]. What was proposed, therefore, was an «unequal right» aimed at interpreting the rules in favour of the «subordinate classes»[39]. The «full and unconditional option in favour of the working class» thus became the cornerstone of Md's ideological vision[40].

This led to an apparent contradiction, which was later admitted by some representatives of the same group[41]. The group, on the one hand, claimed to want to give full effect to the principle of equality provided by the Constitution, on the other, however, it proposed the unequal application of the law in favour of the "subordinate classes", thus determining a violation of the principle of equality. In other words, if, on the one hand, the supporters of the alternative jurisprudence claimed that they wanted to fully implement the Constitution, on the other hand, they, by claiming the prevalence of some principles over others, ended up denying the implementation of many constitutional provisions (first of all, those in defence of public order and private property).

With regard to the second aspect, that of the method, the report approved by MD proposed a totally different way for the judge to approach the judicial controversy: «No longer extracting from the fact the legally relevant elements with respect to the norm to be applied, but, on the contrary, inserting the norm into the fact considered in its interest to verify whether, after such an operation, the norm is still applicable»[42]. As is evident, this method entailed the complete overturning of certain fundamental principles at the root of the modern legal system, first and foremost that of legal certainty, opening the doors to a creative and political use of the law[43].

In the report MD also made explicit the ultimate objective of the strategy of the alternative jurisprudence, namely the creation of a connection with the articulations of the «class movement», so as to «participate, together with the workers, in the process of formation of class consciousness»[44]. The overthrow of the capitalist «structure» was to be «pursued day by day», «through the erosion of capitalist power in the factory, the affirmation of proletarian hegemony in society, the crisis of the

[37] Ivi, p. 22.

[38] Ivi, p. 24. Su questo cfr. D. Pulitanò, *Giudice negli anni '70*, cit., pp. 55-75.

[39] G. Palombarini, op. cit., p. 102.

[40] S. Pappalardo, op. cit., p. 280.

[41] See G. Palombarini, op. cit., p. 101.

[42] *Per una strategia politica di Magistratura democratica*, cit., p. 25. On this see L. Ferrajoli, Magistratura democratica e l'esercizio alternativo della funzione giudiziaria, in *L'uso alternativo del diritto, vol. 1, Scienza giuridica e analisi marxista*, edited by P. Barcellona, Rome-Bari, Laterza, 1973, 105-122.

[43] See S. Pappalardo, op. cit., p. 291; P. Borgna and M. Maddalena, op. cit., pp. 63-4.

[44] *Per una strategia politica di Magistratura democratica*, cit., p. 37.

dominant ideology and repressive apparatuses». «Revolution, in short», it was asserted, «is a difficult process, not an impossible act»[45].

The issue of the «alternative use of the law» was also the subject of a conference held in Catania in May 1972, with the participation of many representatives of MD and jurists[46]. Also on that occasion, all the contradictions that characterised the conception of the alternative use of the law emerged. If on the one hand, in fact, the centrality of the Constitution and the need to give concrete implementation to the rights and freedoms contained therein were affirmed, on the other hand a partial application of the constitutional provisions in favour of the "subordinate classes" was advocated, therefore in favour of some rights to the detriment of others[47].

It was evident in this interpretation, as noted by Capurso, «the attempt to drag the judiciary power to compete with the parliament and if anything to replace it [...] occupying a space certainly reserved for the holders of the function of political direction»[48]. It was evident, in other words, the objective of MD to act as a real political subject[49].

The encroachment of the judiciary into the political sphere was, after all, a requirement of the very strategy of the alternative use of law. «There is an indispensable condition in order for a jurisprudence of the kind illustrated above to be practised in practice», Luigi Ferrajoli, an exponent of MD, stated at the conference on the alternative use of law: «In order for it to be really oriented in favour of the subordinate classes, a simple voluntaristic act of the judge who has made a political choice of class is not enough, but it is necessary that the chosen jurisprudential solutions draw inspiration from and find correspondence and support in interests and social forces that are in an antagonistic position with respect to the balance of power»[50]. For these reasons, Ferrajoli hoped for the opening of the judge to the outside world, the overcoming of the «corporative and caste-like closure of his role» and the «direct participation to the political clash in organic connection with the class movement»[51].

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[45] Ivi, p. 38.

[46] The acts of the conference are published in *L'uso alternativo del diritto*, two volumes, edited by P. Barcellona, Rome-Bari, Laterza, 1973.

[47] See G. Palombarini and G. Viglietta, *La Costituzione e i diritti. Una storia italiana. La vicenda di Md dal primo governo di centro-sinistra all'ultimo governo Berlusconi*, Naples, Edizioni Scientifiche Italiane, 2011, pp. 100-1.

[48] M. Capurso, *I giudici della Repubblica. Giudici soggetti alla legge o giudici di fronte alla legge?*, Milan, Edizioni di comunità, 1977, p. 40.

[49] V. Zagrebelsky, *La magistratura ordinaria dalla Costituzione a oggi*, cit., p. 774.

[50] L. Ferrajoli, *Magistratura democratica e l'esercizio alternativo della funzione giudiziaria*, cit., p. 118.

[51] Ivi, p. 119. At the 1972 Catania conference, the concept of the alternative use of law was also the object of some criticism. Jurist Antonio Pavone La Rosa, for example, posed the following question: «What guarantees will it be possible to introduce to prevent the judge's choice from being resolved into an arbitrary choice, to prevent the exercise of the judicial function from becoming an instrument, on the skin of the litigants, for the implementation of the political ideology of the individual judge, to prevent equal cases from being decided unequally, thus sacrificing that value of the "certainty of law" (understood not so much as the need for jurisprudential uniformity over time, but as the need for equality with regard to the jurisprudential applications of the law) which in my opinion [...] is still a cornerstone of the organisation of a modern society?». According to Antonino Cataudella, Ferrajoli and MD «disguise as fidelity to the constitutional dictate what is instead a reference to a right that lies outside the system and its possibilities of expansion». The two quotations are taken from *L'uso alternativo del diritto, vol. 2, Ortodossia giuridica e pratica politica*, edited by P. Barcellona, Rome-Bari, Laterza, 1973, p. 67 and p. 138.

The radicalisation of the ideological orientation and the adoption of the strategy of alternative jurisprudence induced MD in the following years to strengthen explicitly its connections with the parliamentary and extra-parliamentary leftist parties and movements[52]. The change of attitude of the PCI towards the judiciary also favoured this process. Since 1968, the Communist Party attenuated its distrust of the judiciary, perceiving that the behaviour of magistrates, especially those younger and of lower grade, were more progressive than the past and could support the battles of the labor movement[53]. Starting especially in the seventies, so, the PCI developed an increasingly close relationship with the most progressive sectors of the judiciary, supporting in parliament the requests for corporative advantages advanced by the associative judiciary[54].

In July 1970, on the occasion of the elections of the NAM, MD provided explicitly in its program «the connection with the forces that are fighting for the effective implementation of the right to study, home, health care, for democracy in the factories, and generally with those who are fighting against the inhumanity of the current organisation of work, school and society»[55]. In 1971 Domenico Pulitanò reiterated: «The link with popular forces is necessary, not because Magistratura Democratica claims to be something more than a group of magistrates, but precisely because a group of democratic magistrates cannot exist and act as such without having behind it sufficient social forces to give concrete content to its action»[56].

In March 1973, in an even clearer way, the general assembly of MD approved a resolution in which it affirmed the «need for Magistratura Democratica, as an expression of one of the contradictions opened up at the institutional level by the struggles of the working class in recent years» to build «a constant and articulate relationship with the political and union forces of the left, and with the other democratic forces operating in the institutions». This relationship had to allow to «seek, in respect of mutual autonomy and without aprioristic preclusions, political objectives (from mobilisation on individual issues of practice to regulatory reforms) in a strategic unitary framework intended to beat the reactionary design and neocapitalist restructuring»[57].

In January 1970 the funeral of Ottorino Pesce, deputy prosecutor in Rome and among the main exponents of MD, died of a heart attack, aroused scandal. The funeral was attended by numerous PCI militants, carrying red flags. At the end of the ceremony, communist militants and even several magistrates greeted the coffin of Pesce raising their fists[58].

The opening of the group to the political forces of the left was also confirmed by the candidacy - and subsequent election - of the secretary of MD Generoso Petrella in the lists of the PCI in the 1972

[52] S. Pappalardo, op. cit., p. 269.

[53] C. Guarnieri, *Magistratura e politica: il caso italiano*, in «Rivista italiana di scienza politica», 1991, n. 1, p. 21; C. Guarnieri, *The judiciary in the Italian political crisis*, in «West European Politics», 1997, 20(1), p. 161.

[54] G. Di Federico, La crisi del sistema giudiziario e la questione della responsabilità civile dei magistrati, in *Politica in Italia. I fatti dell'anno e le interpretazioni. Edizione 88*, edited by P. Corbetta and R. Leonardi, Bologna, Il Mulino, 1988, pp. 113-4.

[55] *Una politica per la giustizia*, in «La Magistratura», 1970, n. 6-7, p. 6.

[56] D. Pulitanò, *Giudice negli anni '70*, cit., p. 71.

[57] *La risoluzione del Congresso di Firenze di M.D.*, in «La Magistratura», 1973, n. 2-5, p. 8.

[58] S. Pappalardo, op. cit., pp. 253-4.

national political elections. In 1979 another prominent member of MD, Luciano Violante, became a member of parliament, again in the ranks of the PCI[59].

Even the tendency of MD to criticise the work of the judges knew in the early seventies a further strengthening. Emblematic was the case of the magistrate Franco Marrone, who on 2 May 1970 during a debate organized in Sarzana by Lotta Continua, intervened on the Valpreda trial talking about «the reaction of the owners and of course of the magistrates who are their servants»[60].

Moreover, although the magistrates of MD rejected the accusations of wanting to use the law for political purposes, the ideology behind the thesis of alternative jurisprudence often led to positions that left little doubt about the political role assumed by sectors of the judiciary. «A bourgeois judge, as such, cannot build socialism; he can, however, maximize universal freedoms and egalitarian programs, so as to facilitate the work and struggles of those who work for socialism», Domenico Pulitanò clearly wrote in 1971[61].

The tendency of the PCI to develop closer relations with MD favoured the tendency of the other parties to establish links of various kinds with individual magistrates and other associative groups, favouring the satisfaction by the politics of corporative demands advanced by the judiciary, but also the process of politicisation of the judiciary[62].

The criticism of the "myth" of the certainty of law, carried forward by MD in a radical way, but shared with more moderate tones by other groups within the progressive judiciary, helped to further weaken the role of the Supreme Court, identified as the centrent of a conservative and static interpretative model. From this there emerged the theorisation of the substantial irrelevance of the jurisprudential orientations elaborated by the Cassation and the valorisation of a plurality of orientations; in other words the affirmation of a judicial power even more diffuse and decentralised.

The activism of the judiciary

In the first half of the 1970s there was an exceptional activism of the judiciary[63]. In the early years of the decade, judges increased their interventions in areas that had undergone profound changes since the end of the 1960s, such as labor, industrial relations, environment, health and, more generally, civil and social rights. This process was favoured by two factors.

The first factor, shared by Italy with other countries in the Western world, was the growth of the welfare state and the approval of numerous legislative measures which determined a massive expansion of civil and social rights. Among the reforms approved in the Seventies, those of particular note are the Statute of Workers and the laws on the new labor trial, divorce, the right to defense, the prison system, family law, environmental protection, the interruption of pregnancy and the

[59] See F. Venturini, *I magistrati eletti al parlamento italiano, 1861-2013: dati e metodologia*, in «Rivista trimestrale di diritto pubblico», 2017, pp. 175-226.
[60] Cited in G. Palombarini, op. cit., p. 94.
[61] D. Pulitanò, *Giudice negli anni '70*, cit., p. 61.
[62] C. Guarnieri, *Magistratura e politica: il caso italiano*, cit., pp. 21-2.
[63] E. Bruti Liberati, *Magistratura e società nell'Italia repubblicana*, cit., kindle edition, position 2729.

establishment of the national health service[64]. This expansion of rights and the growing role of the welfare state was inevitably followed by an expansion of the role of the jurisdiction. Social legislation, indeed, often limited itself to defining the aims and general principles to be achieved, granting judges ample room for interpretation and action[65].

Secondly, the growth of judicial activism was encouraged by the gradual awareness of the judiciary of its institutional role and independence. This awareness was encouraged by the generational renewal within the judiciary and by the extension of the social background of magistrates, but above all by the profound changes - examined above - that had taken place in the meantime in the judicial system, in particular the abolition of the career system and the progressive dismantling of the hierarchical structure.

Decisive, however, were also the cultural and ideological changes known by the judiciary in those years, and in particular, the process of ideological radicalization experienced by that part of the judiciary closer to the leftist area, especially MD. «I cannot deny that in my decisions at the time, and I speak of my decisions as a judge, has not influenced, and much, my ideology», magistrate Francesco Misiani will admit in 2004[66].

The main protagonists of this season of judicial activism were the praetors. This was favoured by the particular structure of the office. The praetor, in fact, combined both investigative and judicial functions and enjoyed a particular autonomy of initiative. The activism of the praetors emerged with particular evidence in the field of labour disputes in light of the innovations introduced by the Statute of Workers and the reform of the labour trial[67]. The law granted workers a series of rights in the workplace, strengthened the mechanisms of protection against illegitimate dismissals (providing, for example, the reinstatement of workers dismissed without just cause) and gave the judge the power to verify any anti-union behaviour of companies. The Statute, in this way, allowed for more penetrating judicial interventions and also contributed to satisfying the desire, widespread among progressive judges, to affect economic and social imbalances[68]. Fundamental, however, was the rediscovery by the praetors of institutions already provided by the Italian legal system but fallen into disuse, such as the emergency measures provided by Article 700 of the Code of Civil Procedure of 1940, which allowed judges to intervene immediately with precautionary measures in disputes, for example, ordering employers to reinstate employees fired[69].

Thanks to the new rules introduced by the legislation, the praetors were able to enter factories and deliver their judgments within days, most often ruling in favour of the workers[70]. According to a comparative study by Hepple, during the 1970s «the national average of decisions in favour of the

[64] See S. Rodotà, *Libertà e diritti in Italia dall'Unità ai giorni nostri*, Rome, Donzelli, 1997, pp. 109-112.
[65] M. Cappelletti, *Giudici legislatori?*, Milan, Giuffrè, 1984, pp. 22 ff.; M. Morisi, *Anatomia della magistratura italiana*, Bologna, Il Mulino, 1999, pp. 11-18.
[66] C. Bonini and F. Misiani, op. cit., p. 29.
[67] S. Pappalardo, op. cit., pp. 284-5; G. Palombarini, op. cit., p. 100.
[68] See R. Canosa, *Storia di un pretore*, Turin, Einaudi, 1978, pp. 35-6.
[69] See R. Canosa, *Storia di un pretore*, cit., pp. 39-40; A. Proto Pisani, *I provvedimenti di urgenza ex art. 700 c.p.c. (anni settanta)*, in «Il Foro Italiano», vol. 135, n. 5, May 2012, pp. 169-172.
[70] G. Palombarini and G. Viglietta, op. cit., pp. 98-9.

worker by the praetors was three to one, compared to about four to one against the worker in British employment tribunals»[71].

Some of these judicial decisions received great emphasis in the media because of their "originality". In April 1970, for example, the magistrate of Rome Gabriele Germinara acquitted a group of workers who, in dispute with the employer, had occupied the factory, on the grounds that «the occupation of a factory must be framed in the right of collective self-defense of labor relations»[72].

The labor section of the tribunal of Milan was one of the most active judicial offices. One of the magistrates who made up the section, Romano Canosa, among the main exponents of MD, in 1978 described the ideological reasons behind their judicial activity with these words:

> I have always thought - and in the section I was not the only one to think so - that in a capitalist system of production (but not only in this one) the only way to contain within tolerable limits the exploitation, the wear and tear, in a word the subalternity of the working class, is to stiffen to the maximum extent possible what with an innocent term is called mobility and that in reality means free transfers, dismissals, eliminated or almost eliminated "absenteeism", increased powers of small and large hierarchies (bosses, little bosses) in the factory.[73]

Canosa also admitted the lack of neutrality in the application of the law by the office: «It will be said that it was a "fiscal" attitude, incompatible with the neutrality of the judge. The answer is that, in a situation marked by a natural and irrepressible imbalance between the two parties, to the advantage of one of them, a penetrating control over the behaviour of the advantaged party is the least that can be demanded to be truly neutral and impartial»[74].

The action of the praetors in the labor sector favoured the development of a greater commitment of magistrates in other areas, such as the protection of health, land and urban planning, the fight against food fraud and corruption[75]. The intense action of the magistrates began to diminish towards the end of the Seventies, in the face of the progressive development of a new system of industrial relations and a new form of dialectic between unions, companies and government, and following the explosion of terrorist violence[76].

Overall, a cultural change seemed to invest the entire judiciary in the direction of a more courage action towards political and economic powers[77]. In that period, in fact, the opening of criminal proceedings, focusing on the conduct of exponents of the main political parties, and therefore with considerable political impact, became more and more frequent.

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[71] B. Hepple, *Labour Courts: some comparative perspectives*, in «Current Legal Problems», 1988, 41, p. 173. See *Sindacato e magistratura nei conflitti di lavoro*, two volumes, edited by T. Treu, Bologna, Il Mulino, 1975-1976.

[72] *Perché non è reato occupare la fabbrica*, in «La Stampa», 3 April 1970. Cfr. R. Canosa, *Storia di un pretore*, cit., pp. 47-68.

[73] R. Canosa, *Storia di un pretore*, cit., pp. 47-8.

[74] Ivi, p. 48.

[75] G. Palombarini, op. cit., pp. 100-1.

[76] Ivi, pp. 127-8. See R. Canosa, *Storia di un pretore*, cit., pp. 83-4.

[77] E. Bruti Liberati, *Magistratura e società nell'Italia repubblicana*, cit., kindle edition, chapter III, section 7, Il nuovo attivismo della magistratura penale e gli ostacoli frapposti.

Indicative of this change was the so-called "oil scandal", which emerged in early 1974. The administrative secretaries of the main governing parties (DC, PSI, PSDI, PRI) were investigated by three Genoese magistrates on charges of having received bribes from Enel and oil companies to implement energetic policies contrary to nuclear power plants. Five ministers were referred to the parliamentary commission responsible for ministerial prosecutions. Two of them were referred to the judgment of parliament, where the majority voted for their acquittal[78].

The scandal had a great impact on public opinion, bringing to light for the first time the existence of a wide system of illicit financing of the main governing parties. The wave of controversy caused by the scandal prompted politicians to intervene on the subject of party financing. In a very short period of time, the parliament approved Law n. 135/1974, which introduced a mechanism for public financing of parties. The law introduced a ban on parties receiving funding from public administration bodies, public agencies or state-owned companies. As far as private companies were concerned, the law stipulated that contributions to parties had to be approved by the competent corporate body and regularly entered into the balance sheet[79]. The law was presented as an instrument for the moralization of political life, but ended up leaving unresolved the problem of illicit financing of the Italian political system, as was later confirmed by the emergence of the Clean Hands investigation in 1992[80].

Two years later, in February 1976, Italian politics was shaken by a new criminal scandal, the Lockheed affair, concerning episodes of corruption for the purchase of military aircraft from the United States. The scandal ended up involving important politicians and high public officials. Former ministers Luigi Gui and Mario Tanassi were indicted by parliament at the request of the investigating commission (the Constitutional Court convicted Tanassi and other defendants, acquitting Gui). Although he was declared extraneous to corrupt acts by the investigating commission, even the President of the Republic Giovanni Leone was overwhelmed by political controversy and forced to resign in June 1978[81]. The oil scandal and the Lockheed case deeply affected the credibility of the political class, so much so as to be considered a sort of «first Tangentopoli»[82].

Overall, the opening of criminal investigations against important personalities of the institutions and politics highlighted the process of strengthening of the judiciary vis-à-vis the political power and also its penetration into spheres of activity that previously seemed precluded to its intervention. This process did not occur without critical aspects. Capurso, for example, underlines the growing tendency of the judge to express himself on the contents of the discretionary choices legitimately adopted by public administrators[83].

In this period, however, the activism of the judiciary towards political figures found a strong limitation in the institution of the authorization to proceed provided by the Constitution (Article 68) to subject a parliamentarian to criminal proceedings. Another limitation was represented by the

[78] P. Craveri, *La Repubblica dal 1958 al 1992*, Turin, Utet, 1995, p. 541.
[79] Ivi, p. 544.
[80] G. Bedeschi, *La prima Repubblica (1946-1993)*, Soveria Mannelli, Rubbettino, 2013, kindle edition, position 4075.
[81] P. Craveri, op. cit., p. 546; G. Crainz, *Storia della Repubblica. L'Italia dalla Liberazione ad oggi*, Rome, Donzelli, 2016, kindle edition, position 4908.
[82] S. Colarizi, *Storia politica della Repubblica. Partiti, movimenti e istituzioni. 1943-2006*, Rome-Bari, Laterza, 2007, p. 122.
[83] M. Capurso, op. cit., pp. 31-2.

procedure of indictment of the parliament against the prime minister and ministers, which was also provided for by the Constitution at the time (Article 96). Although the purpose of the authorization to proceed was to prevent a member of parliament from being prosecuted on the basis of persecutory motives, parliament often made improper use of the prerogative granted by the Constitution, opposing in several cases the action of the judiciary against members of the Chambers even in the clear absence of any form of judicial persecution[84]. Faced with the growing attention of the judiciary to the crimes committed by politicians, the frequent denial of the authorization to proceed by the parliament led to increasing tensions between the judiciary and the political power[85].

The 1975 electoral reform of the HCJ

As highlighted above, the growing judicial activism of the judiciary in the fields of labor disputes, industrial relations and civil and social rights strengthened the process of convergence of the left-wing political forces, in particular the PCI, with the more progressive sectors of the judiciary. This convergence led the left-wing parties to support in parliament the reform proposals put forward by the judiciary[86]. This was encouraged by the increasing involvement of opposition parties, in particular the PCI, in the legislative process, also favoured by the reform of parliamentary regulations in 1971.

Therefore, on the legislative level, the left-wing parties supported the reform of the procedure for promotion of magistrates to Supreme Court in 1973, which completed the abolition of the internal career of the judiciary, and the introduction of the proportional method for the election of the HCJ in 1975. An important element in explaining the change in attitude of the PCI was the perception on the part of this party that the behaviour of magistrates, and in particular that of younger magistrates in lower positions, could be more "progressive" than in the past[87]. The result was, as Di Federico points out, that the PCI tended «to favour the expansion of the powers of the judicial subsystem in the political system, to oppose or prevent any initiative to reduce them, to support the requests for corporative advantages put forward in various forms by the judiciary»[88].

The opposition parties, in other words, understood that the strengthening of the judiciary could help limit the powers of the government, and so they decided to meet the demands of the associative judiciary. This orientation was most evident in the PCI, which, being excluded from the government, was most interested in limiting its powers, since it had no hope of gaining access to them in the immediate future.

The convergence of the PCI to the progressive groups of the judiciary led other parties to get closer to the judicial groups as well. The reaction of the other parties, in other words, was to compete with the PCI in satisfying the desires of the judiciary, to establish links with individual magistrates and judicial groups, and to influence the HCJ's decisions, especially those concerning the conferral of

[84] Ivi, pp. 42-4.

[85] See F. Cazzola and M. Morisi, *La mutua diffidenza. Il reciproco controllo tra magistrati e politici nella Prima Repubblica*, Milan, Feltrinelli, 1996.

[86] G. Di Federico, *La crisi del sistema giudiziario*, cit., pp. 113-4.

[87] C. Guarnieri, *Magistratura e politica: il caso italiano,* cit., pp. 20-1.

[88] G. Di Federico, *La crisi del sistema giudiziario*, cit., p. 113.

management positions to magistrates[89]. Thus, also the parties that were part of the governing majority ended up accepting the requests of the judiciary.

In this context, the approval by parliament in October 1975 of the law reforming the electoral system of the HCJ took on particular importance. The intervention of the legislator was also prompted by the effects determined by the previous majority system in the elections of the HCJ in 1972, when Magistratura Indipendente had obtained 40% of the vote, winning 13 seats out of 14[90].

The measure radically changed the method of election of the members of the HCJ, providing that the election took place in a single national college and with a method of distribution of seats of a proportional type on the basis of competing lists, with a threshold of 6%. The mechanism provided for by the previous reform of the nomination of candidates by the respective categories of magistrates was also overcome[91]. The reform completed the transition from a category-based representation, reflecting the traditional hierarchical structure of the judiciary, to a political-ideological representation[92].

The introduction of the proportional system with the vote for competing lists constituted «a crucial step in the transformation of the HCJ into an "endopolitical" body»[93]. The reform recognised in fact the role played by the judicial factions, offering to all the associative groups the possibility to be represented in the Council and opening in this way the door to a real electoral "arena" between the different judicial groups, induced to accentuate their ideological character and to act as real political parties[94].

In February 1975 the same HCJ expressed itself in favour of the introduction of the proportional system for the election of the boy, highlighting the new role played by the judicial factions:

> This system seems to be more in line with the constitutional principle according to which the elective bodies must be characterised in function of the proportional representation of the electorate. On the other hand, the dialectic established within the judiciary, the confrontation between the different positions of thought that have become evident in it, suggest ensuring a fair proportional representation of the entire judiciary body within the body of self-government.[95]

Obviously, even before 1975, the judicial factions had exercised a growing influence on the activity of HCJ and, therefore, on the internal dynamics of the body. For these reasons, it is possible to affirm

[89] C. Guarnieri, *Magistratura e politica: il caso italiano*, cit., p. 21.

[90] D. Piana and A. Vauchez, op. cit., p. 109.

[91] G. Ferri, *Magistratura e potere politico. La vicenda costituzionale dei mutamenti del sistema elettorale e della composizione del Consiglio superiore della magistratura*, Padua, Cedam, 2005, pp. 21-9.

[92] Ivi, p. 23.

[93] Ivi, p. 91.

[94] C. Guarnieri, *Magistratura e politica: il caso italiano*, cit., p. 25; G. Ferri, *Magistratura e potere politico*, cit., pp. 91-3; G. Melis, *Le correnti nella magistratura. Origini, ragioni ideali, degenerazioni*, in «Questione giustizia», 10 January 2020, https://www.questionegiustizia.it/articolo/le-correnti-nella-magistratura-origini-ragioni-ideali-degenerazioni_10-01-2020.php.

[95] *Parere sul disegno di legge n. 1543 di iniziativa dei senatori Viviani e Coppola concernente la riforma del sistema elettorale per il Consiglio Superiore della Magistratura, presentato alla Presidenza del Senato il 25 febbraio 1974*, in «Notiziario Csm», 1975, n. 2, p. 17.

that the 1975 reform constituted more the product than the cause of the presence of the judicial groups in the autonomous governing body of the judiciary[96].

In any case, the introduction of the proportional electoral system assured to the HCJ the full representativeness of the judicial body, both in the judicial field and in the political-institutional one[97]. The tendency of the HCJ to strengthen its role on the political-institutional level, as we shall see, was further consolidated during the years of the terrorist emergency.

Previously, the role of the HCJ in the management of the judicial organisation had been enhanced by the 1973 reform concerning the procedure for promotion of magistrates to Supreme Court. The reform had important consequences for the judicial organisation. The reform eliminated the only remaining element of selection for career progression and with it also the last remaining power in the hands of the Supreme Court, namely to govern the procedure for promotion of magistrates to the highest judicial functions. The role of the Supreme Court within the judicial order was thus further weakened, to the advantage of the HCJ, which became the fundamental body in the management of the careers of the judges[98].

The introduction of the proportional system for the election of members of the HCJ and the consolidation of the role of the Council determined a shift of the centre of gravity of the mobilisation of the associative judiciary from the NAM to the Higher Council of the Judiciary[99].

The terrorist emergency

The period of the terrorist emergency, from the massacre of Piazza Fontana on 12 December 1969 to the early 1980s, had a significant impact on the development of the Italian judiciary, from institutional, organisational and ideological perspectives.

Also the judiciary became the target of attacks by terrorist organisations against the institutions of the State. Violence against magistrates, especially those involved in anti-terrorist investigations, manifested itself through kidnappings, injuries and murders.

Terrorist violence against magistrates began on 18 April 1974 with the kidnapping of Mario Sossi, deputy prosecutor in Genoa, by a group of the Red Brigades (*Brigate Rosse*, BR) called "XXII October", a terrorist group that Sossi had investigated the previous year. The kidnapping of Sossi marked a breakthrough in terrorist violence, the magistrate being the first representative of the institutions to be the victim of a kidnapping. Sossi was freed after a month of imprisonment and only after the Court of Appeal of Genoa decided to accept the proposal made by the terrorists to exchange the liberation of the magistrate for the release of the terrorists belonging to the BR under trial, amidst much controversy in the political arena[100]. After the release of Sossi, the measure of release for the terrorists was challenged by the general prosecutor of Genoa Francesco Coco and annulled by the

[96] G. Ferri, *Magistratura e potere politico*, cit., p. 78.

[97] D. Piana and A. Vauchez, op. cit., p. 87.

[98] G. Ferri, *Magistratura e potere politico*, cit., pp. 92-3.

[99] This phenomenon was the object of critical reflection on «La Magistratura». See in particular the articles published on «La Magistratura», 1977, n. 1-2 and n. 3-4.

[100] V. Satta, *I nemici della Repubblica. Storia degli anni di piombo*, Milan, Rizzoli, 2016, pp. 331 ff.

Supreme Court. Prosecutor Coco paid a high price for this decision. On 8 June 1976, in fact, the general prosecutor of Genoa was killed by the Red Brigades. Coco was the first magistrate to fall victim to terrorism.

Between 1976 and 1980 terrorist violence against magistrates experienced a tragic escalation. Ten magistrates were killed by terrorism from the right and left. The right-wing terrorism killed Vittorio Occorsio, deputy prosecutor in Rome (10 July 1976), and Mario Amato, deputy prosecutor in Rome (23 June 1980). The list of victims of left-wing terrorism is longer: Francesco Coco, general prosecutor of Genoa (8 June 1976); Riccardo Palma, magistrate assigned to the direction of penal institutions (14 February 1978); Girolamo Tartaglione, director general of Criminal Affairs at the Ministry of Justice (10 October 1978); Fedele Calvosa, prosecutor of Frosinone (8 November 1978); Emilio Alessandrini, deputy public prosecutor in Milan (29 January 1979); Nicola Giacumbi, public prosecutor in Salerno (16 March 1980); Girolamo Minervini, deputy director at the Directorate of Penal Institutions (18 March 1980); Guido Galli, investigating judge in Milan (19 March 1980). Also worthy of mention is the killing on 12 February 1980 of Vittorio Bachelet, vice-president of the HCJ[101].

Faced with the multiplication of episodes of terrorist violence against magistrates, the HCJ intensified the tendency to strengthen its role on the political and institutional level.

Between 1973 and 1974, the HCJ adopted a series of resolutions addressed to parliament and to the political forces which complained about the «dysfunctions of the administration of justice»: lack of personnel of the judiciary but also of clerks and secretaries, obsolete judicial buildings, lack of technical tools, irrational territorial distribution of judicial offices. To overcome these problems, and to avoid a «paralysis of justice», the HCJ repeatedly called on politicians to implement organic reforms of the codes and the judicial system, a planning of infrastructure renewal and measures for the recruitment of staff[102].

Even in the aftermath of the Sossi kidnapping and the Brescia massacre, the HCJ reiterated this position, stressing «the need for a more intense collaboration between the judiciary and other powers of the State»[103]. The autonomous governing body of the judiciary recalled its previous deliberations, urging again the reform of the codes and the judicial system and the need to provide effective means to speed up the judicial machine.

[101] R. Canosa, *Storia della magistratura in Italia. Da Piazza Fontana a Mani Pulite*, Milan, Baldini & Castoldi, 1996, pp. 77-85; *Il libro degli anni di piombo. Storia e memoria del terrorismo italiano*, edited by M. Lazar and M. Matard-Bonucci, Milan, Rizzoli, 2010; E. Bruti Liberati, *Magistratura e società nell'Italia repubblicana*, cit., kindle edition, chapter III, section 9, Il terrorismo e il ruolo della magistratura.

[102] *Disfunzioni dell'amministrazione della giustizia. Ordine del giorno approvato nella seduta del 12 luglio 1973*, in «Notiziario Csm», 1973, n. 7, p. 3; *Insufficienza dell'organico di magistrati, funzionari di cancelleria, dattilografi giudiziari e personale ausiliario in alcuni uffici giudiziari della Repubblica*, in «Notiziario Csm», 1973, n. 9, p. 3; *Provvedimenti straordinari relativi all'amministrazione della giustizia. Deliberazione adottata nella seduta del 5 aprile 1974*, in «Notiziario Csm», 1974, n. 4, p. 3.

[103] *I problemi della giustizia*, in «Notiziario Csm», 1974, extraordinary issue, p. 4.

The tendency of the Council to increase its role on the institutional level was made emblematic by the content of the report on the state of justice sent by the HCJ itself to parliament in 1976[104]. In the report, the HCJ, in addition to proposing the figure of the judge open to society outlined in the previous reports, put forward a series of proposals for reform of the judicial system, including the strengthening of the role of the HCJ in relation to other powers of the State. The report again criticised the provision of the law establishing the HCJ (art. 10 of Law n. 195/1958), which provided for the possibility for the HCJ to propose opinions on reforms of justice to the Minister of Justice and not directly to parliament:

> This is a limitation completely unjustified and that must be removed from the legal system, for the need to allow the Higher Council of the Judiciary to play in respect of all administrative and legislative bodies of the State its natural function of initiative and stimulus that, by express provision of law (cited art. 10, second paragraph), is not limited to the government of the judiciary, but it is extended to the administration of justice in the broadest sense.[105]

In the report it was therefore proposed the introduction of optional opinions to the parliament by the HCJ on proposed laws concerning the administration of justice. At the same time it was «suggested that a constitutional provision should be made to extend to the Higher Council of the Judiciary the power of legislative initiative, already provided for other bodies other than parliament»[106]. In this way, the HCJ would have become the body of legislative initiative in matters of justice.

Following the resumption of terrorist violence against magistrates in 1976, with the murders of Coco and Occorsio, the HCJ reaffirmed its centrality on the political-institutional level, addressing a «pressing appeal to the other public powers» to give «an immediate solution to the problems of the administration of justice», whose efficient functioning was «an essential condition to re-establish a climate of security and social peace, which all citizens expect»[107]. The Council recalled the proposals for the reform of the legal system and the strengthening of judicial structures contained in its report to parliament. Parliament and government, in the opinion of the autonomous governing body of the judiciary, had to «become aware of the absolute necessity of guaranteeing with all possible means the physical and moral integrity of magistrates, and of all those who participate in judicial functions»[108].

From 1977, the Council began to directly intervene in the definition of policies aimed at combatting terrorism. Indeed, after again urging parliament «to enact without delay the legislative measures aimed at ensuring greater effectiveness and speed in criminal justice»[109], the HCJ adopted, in full autonomy, two very significant initiatives.

In July 1977, the HCJ organized a series of meetings with the presidents of the courts of appeal and the general prosecutors, with the participation of the Minister of Justice and the Minister of the

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[104] *Consiglio superiore della magistratura, L'adeguamento dell'ordinamento giudiziario ai principi costituzionali e alle esigenze della società. Relazione al parlamento sullo stato della giustizia*, Rome, Csm, 1976.
[105] Ivi, p. 323.
[106] Ibidem.
[107] *Ordine del giorno approvato all'unanimità dal Consiglio Superiore della Magistratura, presieduto dal Capo dello Stato, nella seduta del 15 luglio 1976*, in «Notiziario Csm», 1976, n. 13, p. 6.
[108] Ibidem.
[109] *Problemi relativi all'ordine pubblico ed all'amministrazione della giustizia*, in «Notiziario Csm», 1977, n. 7, p. 3.

Interior[110]. Following these meetings, the Council approved a series of directives addressed to the judicial offices aimed at «a more rapid treatment of the proceedings relating to organized crime and crimes of greater social alarm»[111]. With the directives the HCJ invited the heads of the judicial offices to «increase the number of magistrates in the penal sector», through a «redistribution of magistrates». The heads of the offices were also invited to «plan the conduct of criminal work in such a way as to allow first and foremost the prompt handling of the most serious trials». As will be seen later, the approval of the directives constituted a fundamental step in the evolution of the methods of exercising the criminal action in Italy.

A few weeks later, on 29 September 1977, the HCJ was the protagonist of a second very important initiative. The Council approved the criteria for the formation of the composition tables of the judicial offices for the year 1978[112]. In the preparation of the tables the presidents of the courts of appeal were invited to follow a series of principles, first of all the «distribution of magistrates between civil and criminal sections»: «The urgent need to strengthen the criminal sector for the prompt handling of proceedings relating to organized crime and crimes of greater social alarm [...] implies a redistribution of magistrates also through the variation of the current ratio between magistrates employed in the in the criminal sector and those employed in the civil sector». The Council stated that «within the same office the managers, in principle, must assign to the criminal sector at least half of the magistrates of the workforce», adding that the strengthening should concern «both the trial phase and the investigative phase»[113].

In the course of the following years, in particular in the two-year period 1978-9, the HCJ once again advanced «pressing appeals» to parliament and the political forces to adopt urgent measures to combat the phenomenon of terrorism, asking for a greater allocation for the Ministry of Justice in the state budget for an increase in personnel and structures, a revision of the judicial districts, a broad decriminalisation of minor offences and the institution of a monocratic judge of first instance[114].

In short, during the period of the terrorist emergency, the HCJ fully asserted itself as the body put at the apex of the judicial organisation and as the representative body of the judiciary's instances on the political-institutional level[115].

In the field of criminal policy, after a number of years marked by measures aimed at extending the rights and guarantees of persons subject to criminal proceedings, 1974 saw the beginning of a phase marked by a series of emergency measures that toughened criminal repression, giving priority to the

[110] See *Incontro del Consiglio Superiore della Magistratura con i Capi delle Corti di tutti i distretti. Circolare 19 maggio 1977, n. 2450*, in «Notiziario Csm», 1977, n. 8, pp. 3-4.

[111] *Iniziative immediate per una più rapida trattazione dei processi relativi alla criminalità organizzata e ai delitti di maggiore allarme sociale*, in «Notiziario Csm», 1977, n. 11, pp. 5-6.

[112] *Criteri relativi alla formazione delle tabelle di composizione degli Uffici Giudiziari per l'anno 1978. Circolare n. 5520*, in «Notiziario Csm», 1977, n. 11, pp. 4-17.

[113] Ivi, p. 5.

[114] See *Proposte di provvedimenti urgenti e di provvedimenti a medio termine anche in relazione alle iniziative promosse dalle associazioni dei magistrati*, in «Notiziario Csm», 1978, n. 3, pp. 9-12; *Problemi relativi alla grave situazione della giustizia ed alla difesa dell'ordine democratico*, in «Notiziario Csm», 1978, n. 4, pp. 3-4; *Provvedimenti definitivi in tema di giustizia e di ordine pubblico*, in «Notiziario Csm», 1978, n. 8, pp. 3-6; *Risoluzione circa le iniziative legislative da riassumere in parlamento e le indicazioni di proposte prioritarie*, in «Notiziario Csm», 1979, n. 14, pp. 3-5.

[115] D. Piana and A. Vauchez, op. cit., pp. 86-7.

defense of institutions[116]. Decree Law n. 99 of 11 April 1974 introduced a significant extension of the time limits of pre-trial detention. In the same year, special structures for the fight against terrorism were set up, such as the Special Unit of Judicial Police, entrusted to General Carlo Alberto Dalla Chiesa[117]. In 1975, the approval of the Reale Law (n. 152/1974) strengthened the powers of the police in the repression of street violence, in particular by extending provisional arrest[118].

The approval of these measures allowed to inflict a first blow to the terrorism of the left, leading to the arrest or killing of the main protagonists of the initial group of the Red Brigades. After a reduction in violence, however, from the second half of 1976 terrorist activity experienced a new resurgence.

The criminal response of the State against terrorism was deeply influenced by the trial against the historical leaders of the Red Brigades, opened in Turin in May 1976[119]. The defendants decided to transform the Turin trial into a «guerrilla trial», refusing to defend themselves ex officio and inviting the «revolutionary vanguards» to «carry the attack to the heart of the State»[120]. In the following months, the Turin trial was characterised by a series of murders, including that of the president of the bar association of Turin Fulvio Croce and the Roman judge Riccardo Palma. In order to allow the trial against the Red Brigades to take place, the government intervened by issuing a series of law decrees which, among other things, established the interruption of the period of pre-trial detention as long as the trial was suspended or postponed for reasons of force majeure. The trial ended on 23 June 1978 with the conviction of most of the defendants[121].

The resumption of the terrorist emergency prompted the legislature to intervene with new measures aimed at strengthening the activity of the magistrates and the police, and at speeding up trial procedures. Among these, Law n. 533/1977 and Decree Law n. 59/1978, passed during the kidnapping of the DC president, Aldo Moro, stand out. The adoption of heavy anti-terrorist legislation was made possible by the opening, in 1976, of the season of "national solidarity", characterised by the external support of the PCI to the government majority led by the Christian Democrats[122].

The tragic outcome of Moro's kidnapping led the government to adopt further measures to intensify the fight against terrorism. The novelty, as we shall see in the next chapter, was represented by the introduction of rewarding measures for terrorists, which would gradually lead to the exit from the emergency.

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[116] F. Colao, *Giustizia e politica. Il processo penale nell'Italia repubblicana*, Milan, Giuffrè, 2013, pp. 164 ff.; A. Baravelli, *Istituzioni e terrorismo negli anni Settanta. Dinamiche nazionali e contesto padovano*, Rome, Viella, 2016, p. 34; A. Baravelli, *Il fascino discreto della necessità. La via italiana all'antiterrorismo penale (1975-1982)*, in «Memoria e Ricerca», XXVII, n. 61, 2/2019, pp. 225-238; A. Baravelli, *Per una storia della risposta penale al terrorismo italiano (1976-82)*, in «Meridiana», n. 97, 2020, p. 73-88; R. Orlandi, *L'emergenza figlia delle garanzie? Riflessioni intorno alle norme e alle pratiche di contrasto alla mafia e al terrorismo*, in «Meridiana», n. 97, 2020, pp. 89-104.

[117] D. Della Porta, Il terrorismo, in *Storia d'Italia, Annali, 12: Legge, diritto, giustizia*, edited by L. Violante, Turin, Einaudi, 1998, p. 391.

[118] F. Colao, *Giustizia e politica*, cit., pp. 169 ff.; A. Baravelli, *Istituzioni e terrorismo negli anni Settanta*, cit., pp. 35 ff.

[119] E. R. Papa, *Il processo alle Brigate Rosse (Torino, 17 maggio 1976 – 23 giugno 1978)*, Milan, Franco Angeli, 2017 (first edition Turin, Giappichelli, 1979).

[120] A. Baravelli, *Per una storia della risposta penale*, cit., p. 77.

[121] E. R. Papa, op. cit., p. 119.

[122] D. Della Porta, *Il terrorismo*, cit., pp. 397-8; S. Colarizi, *Storia politica della Repubblica*, cit., p. 128.

The judiciary in the face of terrorism

In order to fully understand the changes determined by the terrorist emergency on the judiciary, it is necessary to observe the way in which magistrates reacted, at an ideological and cultural level, to the phenomenon of terrorism.

The dominant interpretation within the judiciary about terrorism was that of the "blocked system", which was very widespread in social sciences in those years[123]. Terrorism was interpreted by the judiciary as the result of a blocked institutional system, incapable of responding and adapting to the profound changes experienced by Italian society. At the basis of the explosion of the conflict, in other words, there was the inability of the institutional system to respond to collective demands. The conflict then ended up manifesting itself also towards the judiciary, considered a fundamental part of the institutional structure of the State. The reflections published by magistrates in the journal «La Magistratura» in those years are very significant on this aspect.

In 1976, for example, Astolfo Di Amato, an exponent of Terzo Potere, commented on the killing of Francesco Coco stating that the judiciary had «ended up by being oppressed by the burden of the conflicts of a community grown in a disorderly manner, full of tensions and anxiety of participation, to which it was not able or there was not the will to ensure a more fair and balanced organisation, consistent with its real dynamic»[124]. «The principles of real democracy, solidarity and freedom», Di Amato added, «which constitute the fundamental structure of the Constitution, have remained largely unimplemented. The weight of the lack of social renewal has ended up falling on justice, the stopper knot of any system». Mario Barone, who in the meantime had moved from TP to Magistratura Democratica, took the same position, arguing that terrorism could not be defeated through «recourse to new emergency measures», but rather «by creating political, social and economic conditions» that would guarantee «peaceful coexistence, effective possession of civil liberties, and the democratic development of institutions»[125].

This interpretation of the terrorist phenomenon was also clearly expressed by Adolfo Beria di Argentine (Impegno Costituzionale):

> It has occurred, unfortunately, that the very serious social problems of development and coexistence of our country have not been solved and continue to be addressed only in the pathological phase, by a judiciary on which the social tensions that should find their solution elsewhere are discharged. As a result, the judiciary has become the target of the forces of terrorism who, through ruthless intimidation, pursue their plan to undermine the State.[126]

In March 1979, following the murder of Emilio Alessandrini, the group Impegno Costituzionale approved a statement affirming that the role of the judiciary in the fight against terrorism was «only a part of the necessary, overall institutional response that falls to the legislative and executive powers», and included «public and political moralization» and «social reforms that can no longer be

[123] See G. M. Ceci, *Il terrorismo italiano. Storia di un dibattito*, Rome, Carocci, 2013.

[124] A. Di Amato, *Di giustizia si muore*, in «La Magistratura», 1976, n. 3-4, p. 16.

[125] M. Barone, *Clima politico e politica delle riforme*, ivi, p. 16.

[126] A. Beria di Argentine, *Ricatto alla magistratura*, ivi, pp. 16-17.

postponed»[127]. Given these premises, IC launched an appeal to magistrates to commit themselves to prosecuting not only crimes linked to terrorism, but also «those crimes of serious economic crime which are among the direct causes of the situation of exasperated social conflict and among the indirect causes of terrorism insofar as they give rise to consent to terrorist actions»[128].

The terrorist phenomenon was therefore interpreted by the judiciary following the ideological approach that had been affirmed at the Gardone congress in 1965, which can be summarized as follows: the judicial system must open itself to the social, economic and cultural changes experienced by the nation; if conflicts and violence emerge in society, this means that the legal system has not been able to open itself sufficiently and respond adequately to these changes. The ideological-political aspects related to the terrorist phenomenon ended up being put aside, in favour of an interpretation centered on the idea of a "blocked system". This interpretation inevitably ended up calling into question also the role of the judicial system: the task of adapting the law to social changes is first of all up to the legislator, but since also the judge must contribute to the adaptation of the legal system, through the exercise of the jurisdictional function (especially according to the progressive groups of the judiciary) then the emergence of terrorism also signaled the existence of a crisis of justice.

The prevalence of this interpretation is confirmed by the initiatives taken by the associative judiciary during the 1970s, all centered on the issue of the «crisis of justice». Significantly, in the spring of 1976 the National Association of Magistrates held a congress entitled «Judicial structures and politics of reform», with the aim of denouncing the condition of deficiency experienced by the judicial administration and to indicate the reforms necessary to revitalize justice[129].

The president of the NAM, Corrado Ruggiero, announced the congress underlining that it coincided with «a particularly delicate moment for our country, characterised by a serious economic crisis, acute social tensions and above all by a worrying and widespread alarm for the very survival of free institutions regained at the price of hard sacrifices»[130]. «Today more than ever», Ruggiero added, «Italian magistrates are responsibly aware of being holders of one of the fundamental functions of the democratic State and intend to play, in the fullness of their powers and in the refusal of any conditioning that is not the exclusive one of their subjection to the law, the role of guardians of the essential rights recognised by the Constitution to all citizens». The president of the NAM recalled article 3 of the Constitution, stating that the magistrates had «the primary duty to contribute with their decisions to "remove those obstacles of an economic or social nature which constrain the freedom and equality of citizens, thereby impeding the full development of the human person and the effective participation of all workers in the political, economic and social organisation of the country"». For these reasons, Ruggiero emphasized that the congress had the objective of «inviting, once again, the competent bodies to put in place an immediate remedy to a situation that is almost a failure and close to complete paralysis», which prevented «satisfying, in a rapid and adequate manner, the ever more pressing demand for justice that comes from the citizens»[131].

[127] *I magistrati sollecitano riforme per la lotta contro il terrorismo*, in «La Stampa», 6 March 1979.
[128] Ibidem.
[129] The acts of the congress are published in *Giustizia e politica delle riforme*, edited by V. Mele, Bari, Dedalo, 1978.
[130] C. Ruggiero, *Magistrati a congresso*, in «La Magistratura», 1976, n. 2, p. 1.
[131] Ibidem.

As mentioned in the previous paragraph, the HCJ also focused its attention on the issue of lack of resources for justice, approving a series of resolutions addressed to parliament and the government in favour of greater investment in the judicial sector.

In addition to the protests regarding the lack of resources for justice, the associative judiciary also put forward more corporative demands. In February 1975, the government's failure to adjust magistrates' salaries in accordance with the indications provided by a law passed in 1970 (n. 1080) led the NAM first to proclaim a state of agitation and then to implement a "white strike", consisting of strict compliance with the rules. The protest prompted the government to comply with the commitments taken in the matter of magistrates' salaries[132]. In the following years, the lack of improvement in magistrates' salaries, combined with the general crisis in the justice system, led the NAM to carry out a second strike, with a total blockade of trials (excluding the urgent ones) on 21 and 22 June 1978, a further strike from 19 to 21 September 1978, followed by a "white strike", which was suspended on 28 September only after an appeal by the Head of State Sandro Pertini[133].

However, considering the government's responses to be unsatisfactory, the NAM decided on a new strike on 6 October 1978, followed by the resumption of the white strike from 16 to 25 October[134]. The NAM's initiatives aroused great public interest and had a significant impact on the functioning of justice, leading to the postponement of a large number of trials, including those of particular importance. The protest of the judiciary did not stop. In December 1978, the executive committee of the NAM invited magistrates not to participate in the inauguration of the judicial year at the Court of Cassation and at the various Courts of Appeal. Following the controversy aroused by the decision in the public debate, the NAM decided to revoke the clamorous initiative, while denouncing once again the state of abandonment of justice[135]. The protests stopped only after the parliament decided to meet the demands of the judiciary, approving in April 1979 a new reform of the economic treatment of magistrates (Law n. 97 of 1979), which provided for the introduction of a mechanism of automatic adjustment of the salaries of the magistrates. This system was then consolidated by Laws n. 27 of 1981 and n. 425 of 1984[136]. The introduction of automatic adjustment of magistrates' salaries deprived parliament and the government of the possibility of intervening in a discretionary manner on the economic treatment of magistrates[137].

The interpretation of terrorism as a consequence of the "blocked system" was taken to extremes by the most radical components of the progressive groups within the judiciary. This occurred especially

[132] See «La Magistratura», 1975, n. 1-3; *Magistrati: un'ampia adesione allo sciopero*, in «La Stampa», 6 February 1975; S. Letizia, *Terzo potere. Storia dell'associazionismo giudiziario dal 1960 al 1986*, https://sergioletizia.files.wordpress.com/2016/01/terzo-potere-corrente-della-n-magistrati.doc

[133] *Scioperano i giudici, i processi "saltano"*, in «La Stampa», 21 June 1978; *I magistrati si astengono dal lavoro. Giustizia paralizzata fino a giovedì*, in «La Stampa», 19 September 1978; *Appello di Pertini: i magistrati sospendono lo sciopero bianco*, in «La Stampa», 29 September 1978. Cfr. S. Letizia, op. cit.

[134] «La Stampa», 4 October 1978, «La Stampa», 7 October 1978; «La Stampa», 14 October 1978.

[135] *Perché i magistrati sono decisi a disertare l'anno giudiziario*, in «La Stampa», 19 December 1978; *I magistrati presenti all'Anno giudiziario*, in «La Stampa», 23 December 1978.

[136] F. Zannotti, *La magistratura, un gruppo di pressione istituzionale: l'autodeterminazione delle retribuzioni*, Padua, Cedam, 1989, pp. 235 ff.

[137] C. Guarnieri, *Magistratura e politica: il caso italiano*, cit., p. 10.

in the case of MD, which during the 1970s experienced a further radicalization of its ideological positions and accentuated its ties with the parliamentary and non-parliamentary leftist forces.

For Magistratura Democratica the most serious danger seemed to be constituted, more than by terrorism, by the risk of an authoritarian involution of the country, through the exploitation of the terrorist phenomenon by the government and the introduction of exceptional measures for the protection of public order. For these reasons, the group repeatedly took a stand against the tightening of criminal legislation to combat terrorism, advocating a position particularly concerned with the protection of judicial guarantees[138].

In May 1975, Mario Barone, illustrating MD's program for the elections of the NAM, affirmed that the phenomenon of terrorist violence had been «stirred up like a scarecrow», whose «prevalent use» was that of «propitiating the expectations of drastic and exceptional measures, basically of a reinforcement of the apparatus of repression»[139]. For Barone and for MD, it was the «umpteenth attempt to divert the attention of the country from the real reasons of a general crisis, due to the enormous delay in the political and cultural development of society» and which could not be overcome by «leaving only some of its manifestations to emerge, isolated from the endemic causes that fomented its occurrence». In the opinion of the group, there existed «a crisis that was above all economic», aggravated by the «weight of a corporative regime», which had «created and multiplied parasitic privileges, and enormous clientelist superstructures», and which had generated «injustice and discomfort, destined to strike vast sectors of the population, of the working class, of the small bourgeoisie». Thus, the crisis affected «above all those marginalized by the productive system, the underdeveloped areas of Southern Italy, the masses of women, and young people seeking their first employment». From this deep crisis depended «also the spread of crime», which therefore could not be solved through the use of more repressive measures in terms of public order: «Even under the fascist regime, the introduction of the death penalty was preceded by an alarmist campaign on the increase in crime, and this sanction, as is known, once introduced in the Rocco code was intended primarily to hit the authors of political crimes, that is political opponents»[140].

On the basis of this radical interpretation of terrorism, MD also rejected the theory of "opposing extremisms". The danger represented by left-wing terrorism was in some ways resized: the only real danger was constituted by the strategy of fascist subversion, to which the so-called "left-wing" violence should also be traced back. «The merely manipulative function of the theory of the opposing extremisms is demonstrated», Barone stated in the 1975 MD electoral program, «by the fact that the criminal fascist subversion cannot be opposed by anything other than the so-called "brigatism"; a contrast of pure convenience, because it is clear that in one case as in the other, apart from the acronyms and the flag-waving colors, there is only one design: to throw the country into chaos, only one side can benefit from this criminal spiral of bloodshed»[141]. The «system of power», in short, denounced crime and emphasized «artificially» the social alarm «through skillful doses of journalistic

[138] G. Palombarini and G. Viglietta, op. cit., pp. 126-7.
[139] M. Barone, *Ordine pubblico e alternativa politica*, in «La Magistratura», 1975, n. 4-5, p. 12.
[140] Ibidem.
[141] Ibidem.

and radio-television information», «as a pretext for authoritarian interventions». For these reasons, Barone reiterated MD's opposition to the Reale law:

> We must [...] convince the country that criminality, both common and political, is not solved through liberticidal measures or with increases in punishment, as terrorist as ineffective, and even less by putting the war helmet on the policemen's head, but by attacking the phenomenon in its real causes; through an effective reduction of the area of marginalization and a proposal of authentic alternative values, through a decisive overcoming of the current corrupt management of power, and above all through a process of democratization of the police force, of democratic modernization of the structures of justice, of reform of the prison institution, in order to reduce the criminogenic values to a minimum.[142]

The criticism of the magistrates of MD against the adoption of legislative measures aimed at strengthening the fight against terrorist organisations in some cases seemed to give way to a sort of indulgence towards left-wing violence. A historical exponent of MD, such as magistrate Ilda Boccassini, in her memoir published in 2021 will admit: «Among us there were those who considered the Red Brigades "comrades who make mistakes" (in some ways legitimizing them, while condemning the conduct) and those who instead - I among them - had a more clear-cut position, repudiated the use of violence, but at the same time fought so that the state did not slip into an authoritarian drift, with a special legislation of fully repressive nature, from which it would then be difficult to go back»[143].

Another progressive group, such as Terzo Potere, also proposed this position in its electoral program of 1975, albeit in an attenuated form, concentrating its calls on the «fight against the resurgence of Fascism» and against the risks of an authoritarian involution: «It is necessary that the judiciary be a vigilant guarantor of the Constitution against any authoritarian involution. In this sense it must be reaffirmed the commitment to verify in the appropriate venues the constitutional legitimacy of those legislative reforms, which, formally addressed to the protection of public order, are substantial expression of authoritarian tendencies»[144].

It was, however, above all the positions expressed by MD in the face of the terrorist phenomenon that caused tensions within the associative judiciary.

In April 1974, following the Sossi kidnapping, Romano Ricciotti (MI) in «La Magistratura» journal denounced the links between terrorist violence and the «climate of aggression, at first only verbal, that certain press, certain politicians, certain agitators have created and nourished for a long time»[145]. In particular, Ricciotti targeted some arguments put forward by Marxist political forces: «For years the Marxist analysis of the structure of bourgeois society and of the mechanism of the oppression of the proletariat has been vulgarized by saying and writing that "judges are the servants of the masters"». «The preaching of hatred bore fruit. One could not point to the judiciary as the armed arm of the class enemy for long without, sooner or later, criminal fanaticism - always ready to awaken in Italy - directing its weapons against the judicial order», the magistrate added. Ricciotti did not make explicit reference to MD (although, as noted above, the claim that judges were «servants of the

[142] Ibidem.

[143] I. Boccassini, *La stanza numero 30*, Milan, Feltrinelli, 2021, kindle edition, page 320.

[144] *Programma di «Terzo Potere»*, in «La Magistratura», 1975, n. 4-5, p. 7.

[145] R. Ricciotti, *I frutti dell'odio*, in «La Magistratura», 1974, n. 3-4, p. 4.

masters» had also been advanced by exponents of the progressive group), but indirectly emphasized that «most of the magistrates» in those years had continued «to do their duty, repressing private violence, kidnapping, arson and whatever else was perpetrated by the troublemakers». The Sossi kidnapping, Ricciotti concluded, «is the result of the preaching of violence, but also of the tolerance of those who should not tolerate»[146].

Magistratura Indipendente moved indirect criticism towards MD also after the murder of Francesco Coco in 1976. In «La Magistratura», Carlo Adriano Testi attacked the «instrumentalizations and speculations» put forward by «some politicians and individual magistrates», such as the thesis according to which Coco's murder «would be an obstacle to the democratic development of law». On the contrary, Testi stressed that by killing Coco the aim was «to destroy the ideal symbol of the magistrate who is loyal only to the law»[147]. In July 1976, following Coco's assassination, the HCJ, the judicial members of which belonged for the most part to MI's group, approved an order of the day in which it «appealed to magistrates» to refrain from attitudes that could «in any case disturb the trust of citizens in an impartial, independent judiciary subject only to the law»[148]. In 2000 Mario Cicala, a historical exponent of MI, will confirm the hard judgment on the positions expressed by MD during the season of terrorism: «To many of us, magistrates "not of the left", it seemed that the attacks of Magistratura Democratica on Calabresi, Sossi and Coco had, certainly unintentionally, contributed to forming a cultural climate prodromic of violence»[149].

The tensions in the associative judiciary worsened further in April 1977, following the congress held by MD in Rimini[150]. For the first time within MD prevailed the component that advocated a greater closeness to the extra-parliamentary groups of the left. In the final motion of the congress, the democratic magistrates, after having highlighted that terrorism originated from the crisis situation of the country and from the marginalization of large sections of the population, affirmed:

> From this situation arise irrepressible tensions of a different nature. Among them there are some groups that pursue pseudo-revolutionary subversive hypotheses that are frankly adventuristic with the method of political crime and terrorism, and factions of spontaneous movements that indulge in acts of violent vandalism. With regard to both, different from each other, MD has only to pronounce the firmest condemnation.[151]

The attention of the group ended up focusing, once again, on the risk that the terrorist phenomenon could be exploited by government institutions and determine an authoritarian involution. Faced with this scenario, MD in the motion attributed to itself the «fundamental task» of «fighting in the country as a political and cultural entity to oppose together with all progressive forces any process of authoritarian involution and for the abrogation of the exceptional legislation in force». The group, in conclusion, had to «strive to ensure a complete and free deployment of the legitimate social dynamics

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[146] Ibidem.

[147] C. A. Testi, *In memoria di Francesco Coco*, in «La Magistratura», 1976, n. 3-4, p. 16.

[148] *Ordine del giorno approvato all'unanimità dal Consiglio Superiore della Magistratura, presieduto dal Capo dello Stato, nella seduta del 15 luglio 1976*, in «Notiziario Csm», 1976, n. 13, p. 7.

[149] M. Cicala, *Tutte toghe rosse? L'area moderata fra cultura, politica e magistratura*, in «Critica penale», LVI, September 2000, issue III-IV, p. 210.

[150] The acts of the congress are published in *Magistratura democratica, Crisi istituzionale e rinnovamento democratico della giustizia*, Milan, Feltrinelli, 1978.

[151] Ivi, pp. 332-4.

arising from the crisis, even if considered contradictory to the prevailing strategies in the labor movement». This did not mean, the motion specified, «neither adhering to nor identifying with such struggles, but simply allowing the instances expressed by them to reach the political forums responsible for mediating them and not to be preventively removed or blocked by repressive institutional interventions»[152].

MD's position, clearly influenced by the new wave of contestation brought forward by the so-called "movement of 1977"[153], triggered numerous reactions both inside and outside the judiciary. The group in fact, now acting as a real political subject, not only explicitly chose to support the forces of the extra-parliamentary left, but also ended up approaching the terrorist phenomenon with undoubted ambiguity.

The Council of Ministers asked the Minister of Justice to consider disciplinary action against the authors of some speeches made at the congress of MD[154]. In «La Magistratura», Antonio Rossi, an exponent of MI, highlighted «the increasingly pronounced tendency» of MD «to take a distinctly political role», a position deemed unacceptable because it «distorted totally the institutional role of the judiciary»[155]. Apart from the political inclination, what appeared unacceptable to the MI member was the ambiguity of MD in front of the terrorist phenomenon:

> Certainly, the approved motion explicitly condemns the groups that pursue subversive adventuristic plans with the method of political crime and those spontaneous that indulge in acts of violent vandalism, but it also takes the burden of distinguishing one from the other, indicating them as "different from each other". This distinction appears to be completely unjustified with regard to the destabilizing effects that the actions of all those groups objectively produce on the social and institutional fabric and which, in any case, in the context of the motion, ends up providing, in concrete terms, a not negligible psychological alibi for those who, albeit on a different side of the institutional crisis, also adopt - more or less systematically - the method of violence also practiced by subversive groups, rather than the democratic method of civil confrontation.[156]

In Rossi's opinion, the refusal expressed by the MD motion to «adhere to or identify» with the protest groups ended up «becoming purely recitative», given that immediately afterwards the progressive group called for the commitment of the magistrates to guarantee «a complete and free deployment of those forces» and to ensure «judicial protection to their demands by using the instrument of alternative jurisprudence». This was confirmed by the «indulgence» shown in some speeches towards certain sections of the autonomist protest (which "basically" - it was said - only asks for a better life [...]) and towards the "so-called" deviants (who are such only "because of the system")».

Also Vladimiro Zagrebelsky (Impegno Costituzionale) expressed perplexity about the conclusions of the congress of MD in Rimini: «The repudiation of collateralism with political forces and trade unions is accompanied by political choices and operational guidelines that seriously worry»[157]. For the

[152] Ibidem. Cfr. S. Pappalardo, op. cit., pp. 326-7.

[153] On the movement of 1977 see *Il movimento del '77. Radici, snodi, luoghi*, edited by M. Galfrè and S. Neri Serneri, Rome, Viella, 2018.

[154] S. Pappalardo, op. cit., pp. 336-7.

[155] A. Rossi, *Ormai è tempo di scelte*, in «La Magistratura», 1977, n. 14, pp. 26-27.

[156] Ibidem.

[157] V. Zagrebelsky, *Tutelare la libertà o promuovere la protesta?*, ivi, p. 28.

magistrate it appeared «meaningless» the distinction attempted by MD between protecting and promoting the protest: «Then remains equivocal the passage of the motion that says that one should not necessarily "neither adhere nor identify with such struggles", since in fact they are seen with favour and supported on the jurisprudential ground». In Zagrebelsky's opinion, MD's position appeared even more equivocal considering «the continuous osmosis that exists between the groups of non-violent protest [...] and the organisations of violent subversion; the connections are very dense and are now known to all».

In the following months, MD further radicalized its political line, so much so that it was the only judicial group to take a public position on the referendum to abrogate the Reale law which was held in June 1978, expressing itself in favour of the abrogation[158].

In 1978, the increase in terrorist violence against institutions, including the judiciary (three magistrates were killed in the course of the year), pushed the judicial groups to mitigate the contrasts and to make common front. For the first time in almost thirty years, the leadership of the NAM was made up of a unitary board composed of representatives of all groups. In this climate, in March 1979, there was also the merger between Terzo Potere and Impegno Costituzionale, with the birth of the current Unità per la Costituzione (Unicost), which would become the majority group in the judiciary. Also in 1979, the UIM decided to dissolve and merge into the NAM[159].

The formation of a unitary board did not cancel the tensions between the groups. The unitary board lasted only three months and in the following years unity would be achieved only for brief periods. The groups continued to divide, above all around the initiatives adopted by politics in the fight against the terrorist emergency. In general terms, for Magistratura Indipendente, the delicate situation of public order made it necessary to tighten up legislation on the prevention and repression of terrorism; Unicost was in favour of the government's initiatives, but drew attention to the need not to excessively reduce the protection of individual guarantees; finally, MD continued to remain strongly critical of any finalistic use of criminal legislation[160].

The radicalism of MD's positions regarding the fight against terrorism contributed to create tensions within the same group. This happened in particular on the occasion of the so-called "trial of 7 April", centred on the investigations initiated by the public prosecutor's offices of Padua and Rome in 1979 against numerous exponents of Autonomia Operaia, including Toni Negri, Emilio Vesce and Oreste Scalzone. The basic assumption of the investigations was that in Italy there existed a single armed party, of which the Red Brigades were the military structure, whose objective was to promote the armed struggle against the State. All the organisations that over the years had practiced political violence were articulations of a single armed party, which had as its inspirers some professors of the University of Padua, first of all Toni Negri[161]. The hypothesis advanced by the magistrates of the existence of a single armed party was later denied in court, even if the defendants were sentenced to

[158] *Attività dei gruppi*, in «La Magistratura» 1978, n. 3-4, p. 44.

[159] See *Avvio all'unità associativa*, in «Rassegna dei magistrati», 1978, n. 2-12, pp. 61-63.

[160] See C. R. Calderone, *I frutti amari della demagogia e della retorica*, in «La Magistratura», 1978, n. 3-4, pp. 7-8; *I documenti approvati*, ivi, pp. 16-17; *Il IV congresso nazionale di Magistratura Democratica*, in «La Magistratura», 1979, n. 4-6, p. 21; *Speciale elezioni*, in «La Magistratura», 1980, n. 1.

[161] G. Palombarini, op. cit., p. 158; G. Galli, *Piombo rosso. La storia completa della lotta armata in Italia dal 1970 a oggi*, Milan, Baldini Castoldi Dalai, 2004, kindle edition, position 2136.

heavy sentences for participation in subversive association[162]. The event created problems within MD, dividing the group between those who publicly denounced what were considered degenerative aspects of the proceeding, such as the use of pre-trial detention in prison and the use of documentary evidence to substantiate the accusations, and those who instead called for confidentiality and prudence[163].

The effects of the terrorist season

The period of fight against to the terrorist emergency deeply influenced the development of the Italian judiciary, determining important changes at institutional and ideological level.

From the institutional perspective, there occurred a strengthening of the powers of the judiciary, in particular of public prosecutors, who were given more incisive criminal instruments for the repression of crimes.

In addition, the HCJ consolidated its role as the organisational apex of the judiciary, but also as a representative of the instances of magistrates on the political-institutional level.

The centrality assumed by the HCJ in the definition of criminal policies and in the coordination of the activities of judicial offices led to a further weakening of the role played by the heads of judicial offices. Moreover, some deliberations adopted by the same HCJ were important. For example, on 23 April 1975, the HCJ delimited the areas of intervention of the heads of the prosecuting offices, establishing with a resolution that «the assignment of a criminal proceeding to the magistrate in charge of investigating it cannot be revoked except for serious reasons that must be specified in the relative provision»[164].

The role of office managers was also reduced due to the methods of intervention adopted by the judiciary to combat terrorism. In order to make investigations more efficient, many prosecutors' offices began to set up operational units of magistrates with specialist skills in dealing with certain crimes (the so-called "pool"). This was a radical innovation in judicial organisation because it was based on the responsibility and collaboration between individual magistrates, rather than on the hierarchical relationship between the chief prosecutor and the deputy prosecutors. The role of the chief prosecutor thus changed from that of "superior" of the office to that of coordinator of the work of the magistrates, leading to a further break in the hierarchical structure and a strengthening of the process of democratization of the prosecutorial offices[165].

[162] Nevertheless, in the following years, various testimonies of repented terrorists would confirm the existence of a not infrequent collaboration between the armed struggle formations and Autonomia Operaia. On this see A. Baravelli, *Istituzioni e terrorismo negli anni Settanta*, cit., p. 190.

[163] G. Palombarini, op. cit., pp. 161-2; G. Palombarini and G. Viglietta, op. cit., pp. 151 ff. Cfr. *La magistratura di fronte al terrorismo e all'eversione di sinistra*, edited by Magistratura Democratica, Milan, Franco Angeli, 1982.

[164] *Assegnazione di procedimenti penali a magistrati*, in «Notiziario Csm», 1975, n. 7, p. 4.

[165] E. Bruti Liberati, *Magistratura e società nell'Italia repubblicana*, cit., kindle edition, chapter III, section 9, Il terrorismo e il ruolo della magistratura. Cfr. A. Baravelli, *Istituzioni e terrorismo negli anni Settanta*, cit., p. 187.

«It must be noted that the heads of the offices are left with little more than a representative position», Massimo Krogh emphasized in 1979 in «La Magistratura»[166]. Within the prosecutor's offices, in fact, criminal proceedings were by now generally assigned to magistrates by means of automatic mechanisms, with the result that, even if the power to dispose of cases was still formally attributed to the chief prosecutors by article 70 of the law on the judicial system, in fact it was little exercised.

Forms of specialized collaboration also developed between magistrates of different offices. As underlined by two magistrates who played a leading role in the fight against terrorism, Gian Carlo Caselli and Armando Spataro, especially after the Moro affair in 1978, there occurred «the autonomous initiative of prosecutors and investigating judges, who created spontaneous coordination between judicial offices and groups specialized in the terrorism sector»[167]. The magistrates operating in the cities most exposed to terrorism, such as Turin, Milan, Genoa, Padua, Bologna and Rome, began to meet in order to exchange information on investigations and also to elaborate jurisprudential guidelines to be applied in a uniform way. This evolution, as highlighted above, was favoured by the initiatives of the HCJ, which since 1977 periodically organized meetings between the general prosecutors with the aim of achieving forms of coordination of investigations.

The period of contrast to the terrorist emergency brought about another significant effect on the judicial organisation, namely the intensification of the relationship between prosecutors and police forces. The need to counter the wave of terrorist violence with effectiveness and immediacy led the prosecutors to establish closer relations with the judicial police. Magistrates began to participate in the search for evidence from the earliest stages of the investigation, exercising a real role in directing the activity of the judicial police[168]. In 1982 the magistrate Luigi De Ruggiero acknowledged how one of the effects of terrorism on the management of criminal proceedings had been precisely «the habit of prosecutors and investigating judges to participate even in the earliest stages of investigations, in the initial search for evidence»[169]. Contrary to the practice of delegation, therefore, the direction of the judicial police by the public prosecutor, long called for by the same magistrates, became a reality.

In this way, a «functional dependence» of the police on the initiative of the judiciary developed, which favoured a mutual growth in professionalism and specialization[170]. This was a fundamental change for the development of the judiciary: once the phase of the terrorist emergency was over, this new ability of the prosecutors to actively participate in the search for evidence through close direction of the police forces would be used in the following decade to combat organized crime and political corruption[171].

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[166] M. Krogh, *Il dopo "I capi"*, in «La Magistratura», 1979, n. 1-3, p. 45.

[167] G. C. Caselli and A. Spataro, La magistratura italiana negli anni di piombo, in *Il libro degli anni di piombo*, cit., p. 408.

[168] E. Bruti Liberati, *Magistratura e società nell'Italia repubblicana*, cit., kindle edition, chapter III, section 9, Il terrorismo e il ruolo della magistratura

[169] L. De Ruggiero, I problemi posti dai processi di terrorismo, in *La magistratura di fronte al terrorismo e all'eversione di sinistra*, cit., p. 30.

[170] G. C. Caselli and A. Spataro, op. cit., 410.

[171] E. Bruti Liberati, *Magistratura e società nell'Italia repubblicana*, cit., kindle edition, chapter III, section 9, Il terrorismo e il ruolo della magistratura.

On a cultural level, the changes experienced during the phase of the terrorist emergency contributed to enhancement of the feeling of independence of the Italian judiciary, both with respect to political power - by which it was invested with increasingly penetrating powers with the aim of defeating terrorism - and internally, with the consolidation of an extremely widespread and decentralized organisation.

6. The Eighties

The overcoming of terrorism

The 1980 was a difficult year in terms of the fight against terrorism, especially for the judiciary, which was the victim of increasing violence on the part of both left-wing and right-wing terrorist groups. On 12 February 1980 Vittorio Bachelet, vice-president of the HCJ, was killed. In March, within a few days, left-wing terrorism killed three magistrates: Nicola Giacumbi, Girolamo Minervini and Guido Galli. On 23 June 1980, right-wing terrorism killed Mario Amato. At the same time, 1980 was a turning point for the defeat of the armed struggle[1].

The repentance and collaboration of some prominent terrorists, such as the head of the Red Brigades' column in Turin, Patrizio Peci, led to a change of strategy in the fight against terrorism in the area of criminal policy. Confronted with the potential of the collaboration of terrorists with the justice system, the strategy of politics moved from the tightening of penalties to the introduction of rewarding programs for terrorists who had collaborated with the justice system. The enactment of Law n.15 of 1980 (the so-called Cossiga Law) and Law n. 304 of 1982 marked an important change in the strategy of the fight against terrorism, by providing reductions in penalties for those who had collaborated with justice and provided evidence to reconstruct the criminal events. The first steps of the reward legislation had already been taken in 1978 at the time of Moro's kidnapping with Law Decree n. 59 of 21 March 1978[2].

The introduction of the reward legislation was supported by the main political forces, including the PCI, but criticised by the more radical components of the left and by the Radical Party, which considered the measures harmful to individual rights. There were also differences of opinion within the judiciary. The magistrates most active in the fight against terrorism were the ones who pushed for the introduction of the rewarding norms, and overall the judiciary welcomed the enactment of the laws. Some sectors of the judiciary, particularly those closest to the leftist ideology, however, expressed criticism about the danger of restricting the rights of defense of suspects and defendants[3]. This criticism produced tensions within the same groups, since some of their exponents were involved in the front line in the fight against terrorism and had expressed themselves in favour of the rewarding norms.

Even after the adoption of the first law on penitents in 1980, the debate among magistrates continued, creating a division between those who considered the rewarding norms too favourable to terrorists

[1] M. Galfré, *La guerra è finita. L'Italia e l'uscita dal terrorismo: 1980-1987*, Rome-Bari, Laterza, 2014, p. 12.

[2] D. Della Porta, Il terrorismo, in *Storia d'Italia, Annali, 12: Legge, diritto, giustizia*, edited by L. Violante, Turin, Einaudi, 1998, pp. 415-6; V. Satta, *La legislazione premiale antiterrorismo in Italia. Dalla vicenda Moro alla fine degli "anni di piombo"*, in «Mondo contemporaneo», n. 1-2018, pp. 5-34; A. Baravelli, *Il fascino discreto della necessità. La via italiana all'antiterrorismo penale (1975-1982)*, in «Memoria e Ricerca», XXVII, n. 61, 2/2019, pp. 234-6.

[3] S. Pappalardo, *Gli iconoclasti. Magistratura democratica nel quadro della Associazione nazionale magistrati*, Milan, Franco Angeli, pp. 360-1.

and those who believed that this was the price that the State had to pay to complete the fight against terrorism[4].

In the meantime, the reinforcement of the role of the judiciary on the political-institutional level was confirmed by an initiative adopted in March 1981 by a group of magistrates involved in investigations against terrorism. On 6 March 1981, in fact, about twenty-five magistrates from numerous Italian cities (Milan, Turin, Bergamo, Rome, Naples, Genoa, Venice, Florence, Taranto) involved in investigations on terrorism met in a secret location in Rome to exchange information on the fight against the terrorist phenomenon. At the end of the meeting, the magistrates drew up a document in which they urged politics to adopt measures in favour of the rescue of penitent terrorists: «The participants [...] unanimously agreed on the necessity that the legislative power should rapidly [...] adopt further legal measures in favour of "penitent terrorists"»[5].

The process of enhancement of the role of the judiciary on the political-institutional level was also confirmed by what happened during the phase of overcoming of terrorism, in particular starting in 1983, when the political forces began to discuss the introduction of measures to encourage dissociation from terrorism. The legislator, after having introduced dispositions aimed at facilitating the repentance or collaboration of terrorists, wondered whether it was opportune to enact norms aimed not at favouring active collaboration on the part of terrorists, but - through the provision of reduced penalties - simple dissociation of terrorists from the criminal groups to which they belonged.

The political debate was in fact characterised by a new resounding initiative of a group of magistrates. At the beginning of 1984, a group of 36 magistrates involved in the fight against terrorism sent a letter to various institutional authorities (including the President of the Council of Ministers, the Minister of Justice and the Minister of the Interior) in which, «with the strictest respect for the competences of the legislator and, in general, of the recipients» of the letter itself, it was affirmed that «the introduction of legislation aimed at rewarding, in any way, ambiguous forms of dissociation» could be «dangerous» for the fight against the terrorist phenomenon[6]. Although the magistrates had sent the document confidentially, in April 1984 the news of the sending of the missive was published in the press and the story landed in Parliament with the presentation of a parliamentary question to the then Minister of Justice Martinazzoli. On 28 January 1985, Minister Martinazzoli confirmed what had been reported in the press by distancing himself from the magistrates' letter, specifying that the evaluations contained therein «can only refer to those who expressed them»[7].

The law on "Measures in favour of those who dissociate themselves from terrorism" was approved in 1987 (n. 34/1987). The law provided a new and stricter definition of the concept of dissociation: it was considered «conduct of dissociation from terrorism the behaviour of those who, accused or convicted of crimes having the purpose of terrorism or subversion of the constitutional order, have definitively abandoned the organisation or the terrorist or subversive movement to which they

[4] Cfr. *E' giusto perdonare i terroristi pentiti?*, in «La Stampa», 15 June 1980; *La legge sui pentiti divide i magistrati*, in «La Stampa», 31 August 1981; *«Troppi favori ai pentiti»*, in «La Stampa», 9 January 1982; *«La legge sui pentiti è necessaria ma lo Stato paga un premio alto»*, in «La Stampa», 25 May 1982; *«Lo Stato dà il premio ai terroristi ma è il prezzo per vincere la lotta»*, in «La Stampa», 7 June 1982.

[5] *I magistrati delle Br chiedono nuove leggi a favore dei «pentiti»*, in «La Stampa», 7 March 1981.

[6] V. Satta, op. cit., pp. 20-1.

[7] M. Galfré, op. cit., p. 192.

belonged, keeping together the following conduct: admission of the activities actually carried out, behaviour objectively and unequivocally incompatible with the permanence of the associative bond, repudiation of violence as a method of political struggle». The introduction of the reward legislation, together with a series of interventions in the prison field, constituted a fundamental step to overcome the terrorist emergency[8].

The mafia emergency

Right in the most delicate phase of the fight against terrorism, the State and the judiciary were called to face a new emergency of public order, this time linked to the mafia offensive against the State.

The attack of the mafia organisations against the institutions of the State began in 1979, with the killing of the director of the mobile squad of Palermo Boris Giuliano and of magistrate Cesare Terranova. The offensive of the mafia, however, intensified at the beginning of the eighties, with the killing of other magistrates such as Gaetano Costa (1980), Giangiacomo Ciaccio Montalto (1983), Bruno Caccia (1983) and Rocco Chinnici (1983), members of the police, such as Prefect Carlo Alberto Dalla Chiesa (1982), and politicians, such as the President of the Region of Sicily Piersanti Mattarella (1980) and the regional secretary of the Communist Party Pio La Torre (1982)[9].

Politics reacted to the mafia offensive by passing the Rognoni-La Torre Law (n. 646/1982) in 1982, which for the first time introduced the crime of mafia association into the Italian penal code, providing for the adoption of patrimonial measures applicable to the illicit accumulation of capital.

The judiciary reacted to the mafia violence by replicating some organisational and operational models used in the fight against terrorism: the constitution within judicial offices of groups of magistrates specialized in the fight against the mafia phenomenon, as in the famous case of the team set up by Antonino Caponnetto in Palermo, author of the investigation that would lead to the "Maxi Trial"[10]; the development of a closer relationship between prosecuting action and the activities of the judicial police; the consolidation of recourse to mafia penitent, as in the case of Tommaso Buscetta[11].

On 13 May 1982, following the assassination of Pio La Torre, the HCJ held a session in the presence of the Head of State Sandro Pertini, at the end of which a document was approved in favour of an incisive action of the judiciary and institutions against the mafia. The document stressed that the mafia phenomenon could not be fought only on the level of criminal repression, but that it required «a strong revival of democratic life, a profound renewal of public structures and a new functioning

[8] See V. Satta, op. cit., p. 16; G. Licciardi, *La rivoluzione è finita, la guerra continua. Carceri, pentiti e dissociati 1980-87*, in «Meridiana», n. 97, 2020, pp. 105-122.

[9] See E. Bruti Liberati, *Magistratura e società nell'Italia repubblicana*, Rome-Bari, Laterza, 2018, kindle edition, chapter IV, section 11, Magistratura e mafia.

[10] On the Maxi Trial see F. Colao, *Giustizia e politica. Il processo penale nell'Italia repubblicana*, Milan, Giuffrè, 2013, pp. 273 ff.

[11] In the case of mafia crimes, the use of penitents was recognised in article 8 of Legislative Decree no. 152 of May 13, 1991, converted into Law n. 203 of July 12, 1991. See D. Pulitanò, *Strategie di contrasto a terrorismo e mafia. Fra giustizia penale e storia*, in «Meridiana», n. 97, 2020, pp. 59-72.

of the State and public bodies»[12]. The HCJ, moreover, announced that it had taken «in its autonomy, but with an invitation to participate to the executive bodies», the initiative of a meeting between magistrates involved in the fight against the mafia, «believing to favour in this way and in its natural seat, the formation of a common operational design, in the investigation techniques, of the judicial bodies interested in the phenomenon [...]»[13].

A few weeks later, in June 1982, the HCJ promoted a study meeting with magistrates involved in mafia criminal proceedings. At the end of the meeting the magistrates approved a document in which they addressed to the HCJ and to the parliament operative proposals to improve the contrast to the mafia organisations[14].

The commitment of the HCJ in the fight against the mafia upsurged in September 1982, when the members of the autonomous governing body of the judiciary unanimously approved the establishment of a permanent anti-mafia committee[15]. The committee was given the task of coordinating the judicial activity of countering the mafia through «the promotion of operational meetings between magistrates and, in general, any initiative aimed at overcoming, in respect of the independence of magistrates and the competences of the offices, the territorial and functional fragmentation of the work of individual judges and offices». The committee would have had to «favour the connection in central and peripheral centre between the investigating judiciary and the authority of judicial police», as well as stable relationships with the other organs of the State[16].

The anti-mafia committee played an important role in the following years, through the promotion of periodic meetings with magistrates involved in the fight against the mafia, the carrying out of cognitive investigations by sending delegations to the judicial districts most directly interested in the mafia phenomenon, and the preparation of an anti-mafia plan (approved by the plenum of the HCJ on 14 July 1983) also containing proposals for legislative intervention to improve the response of justice to the mafia phenomenon[17].

In short, the mafia emergency, like the terrorist one, induced the HCJ to strengthen its relevance on the political-institutional level and its role as the apex body of the judicial organisation.

The tightening of criminal legislation against organized crime and the adoption of new methods of organisation and investigation within the judicial offices allowed the judiciary to achieve important successes in the fight against the mafia. In particular, in December 1987, the Palermo Court of Assizes issued the sentence of first degree of the Maxi Trial of Palermo against Cosa Nostra. The trial ended with 360 convictions (for a total of 2.665 years in prison) and 114 acquittals. For the first time the members of Cosa Nostra were condemned as belonging to a unitary mafia organisation of a vertical type[18].

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[12] *Riunione del Csm sul problema della lotta alla mafia e alla criminalità organizzata*, in «Notiziario Csm» 1982, n. 6, p. 4.

[13] Ibidem.

[14] *Incontro di studio con i magistrati impegnati in processi di mafia*, in «Notiziario Csm», 1982, n. 8, pp. 3-4.

[15] *Compiti della lotta contro la criminalità organizzata*, in «Notiziario Csm», 1982, n. 11, p. 3.

[16] Ibidem.

[17] *Comitato Antimafia, Proposte di interventi e iniziative*, in «Notiziario Csm», 1983, n. 10, pp. 3-12.

[18] See S. Lupo, *1986. Il maxiprocesso. Novecento italiano*, Laterza, 2014, ebook.

The victory of the judiciary and the State in the Maxi Trial, confirmed in the subsequent levels of judgment (in appeal in December 1990 and in Cassation in January 1992), provoked the harsh reaction of the mafia, which returned to kill magistrates: Alberto Giacomelli (1988), Antonio Saetta (1988), Rosario Livatino (1990), Antonino Scopelliti (1991). The mafia violence exploded again in the two-year period 1992-1993, with the attacks in which died, among others, the two magistrates symbol of the fight against Cosa Nostra: Giovanni Falcone and Paolo Borsellino.

The P2 scandal

The growth of the autonomy and independence of the judiciary determined, starting from the beginning of the 1980s, the emergence of numerous and relevant criminal investigations towards leading political and economic-financial figures[19].

The reasons behind the growing activism of the judiciary in the fight against crimes in the political and economic spheres were both institutional and cultural.

From the institutional point of view, as underlined above, magistrates could now count on very high guarantees of independence, both with respect to political power and to their hierarchical superiors.

At the beginning of the 1980s, the Italian judiciary constituted an effective power of the State, endowed with high autonomy and independence. At the congress of the NAM held in Mondovì on 24-27 June 1982, significantly dedicated to the relationship between the judiciary and the other powers of the State, the president of the association, Adolfo Beria di Argentine, lucidly underlined the considerable strengthening of independence experienced by the judiciary in previous decades: «It would be hypocritical on our part to deny being an institution, perhaps, too powerful. To confess one's power is also to recognize that one must absolutely bring it into consonance with the power of others. And we are powerful», Di Argentine said[20]. The NAM president also placed attention on the reasons that had made the judiciary so «powerful»:

> We are powerful: a) because the increasingly polycentric character of the Italian powers has meant that their relative weight has decreased, which has not happened for us who therefore remain a unitary centre of exercise of power; b) because the great novelties and the great tensions that have been accumulating over the years have created new spaces for judicial activity, and even pushed the political authority to invest us, almost in terms of league, also delicate tasks in important areas of social life (from the field of labor to that of family, the regulation of leases and more); c) because in dealing with this complex interweaving of new tasks, we have developed a progressive connection and professional convergence with the Italian administrative jurisdictions (Council of State, Court of Auditors, Regional Administrative Courts, Military Justice and Advocacy of State) [...]; d) because the instruments we have at our disposal (I am thinking about the exercise of the penal action, the issuing of subpoenas and arrest warrants, the same judicial communication) have such a strong immediacy and social impressiveness as to make in practice citizens of every level and class absolutely "dependent" on the exercise of our power for their freedom and assets; e) because finally we have been able to defend the

[19] See E. M. Fracanzani, *Le origini del conflitto. I partiti politici, la magistratura e il principio di legalità nella prima Repubblica (1974-1983)*, Soveria Mannelli, Rubbettino, 2014, pp. 235 ff.

[20] A. Beria Di Argentine, *Convegno di Mondovì: il saluto del presidente dell'Anm*, in «La Magistratura», 1982, n. 3 pp. 6-8. Cfr. *«Il giudice e il potere». I magistrati a congresso*, in «La Stampa», 21 June 1982.

> institutional autonomy of the judiciary from the influence of other powers that are more or less institutional and more or less uncovered. And there is nothing in a country like ours that is equal to autonomy as a factor of increasing power.[21]

But the growing commitment of the magistrates in the contrast to crimes against the public administration and economic-financial crimes also found its origins in an ideological and cultural change experienced by the judiciary itself. As underlined above, the terrorist emergency was interpreted by the judiciary as one of the symptoms of the crisis of a blocked institutional system, incapable of responding to the needs of society. In this context, some sectors of the judiciary, particularly those with more progressive orientations, came to believe that terrorism - and therefore the crisis of the institutional system - was also fueled by the dissatisfaction of society's demands for the moralization of political life.

This idea was explicitly affirmed by Magistratura Democratica in its electoral program for the elections to the HCJ in June 1981:

> There is a growing awareness that the condition of the isolation of terrorism is also the ability of institutions, and therefore of the judicial institution, to construct an overall response to the needs and values of justice and moralization from whose incomplete or denied satisfaction terrorism draws nourishment and pretext. This awareness has given rise to a new impetus for interventions aimed at eliminating traditional areas of impunity in criminal matters, from the increasingly violent mafia criminality inserted in the dominant social bloc, to the criminality of the so-called white-collars and of power holders.[22]

In this sense, the statements made by magistrate Sergio Mattone, also of Md, are also significant:

> From a certain moment onwards, even MD undoubtedly senses certain very strong problems of crime such as white-collar crime in the public administration and terrorism. It then threw to the winds residues of mistrust and exercised the instrument of the criminal trial with great awareness, with a strong identification, becoming aware of the fact that a rationalization of the institutional system, of the democratic framework, a possibility of institutional "cleansing" could also pass through the "criminal trial". The scandals of recent years such as the Gelli case, the P2 affair, the Mediobanca... I don't know if it is by chance but they are entrusted to MD judges. This, of course, has great significance.[23]

The group Impegno Costituzionale also put forward this interpretation of the terrorist phenomenon, calling on magistrates to pursue with greater commitment «those crimes of serious economic crime which are among the direct causes of the exasperated situation of social conflict and among the indirect causes of terrorism»[24].

The diffusion within the judiciary of the idea that in order to overcome the crisis of the institutional system it was necessary to satisfy the demands of moralization contributed, as Denti already pointed out in 1983, to the emergence of an ever-increasing tendency within the judiciary «to make the

[21] Ibidem.

[22] *Programma di Magistratura democratica*, in «La Magistratura», 1981, n. 1-2, p. 36.

[23] Cited in S. Pappalardo, *Gli iconoclasti. Magistratura democratica nel quadro della Associazione nazionale magistrati*, Milan, Franco Angeli, 1987, p, 362.

[24] *I magistrati sollecitano riforme per la lotta contro il terrorismo*, in «La Stampa», 6 March 1979.

exercise of the jurisdictional function an instrument of knowledge of the facts of greater political and social resonance»[25]. In other words, within the judiciary there spread the conviction that what was needed, and what was requested by public opinion, was «to know the phenomena», so that the trial represented, «in addition to a judgement of the past, a prognosis of the future»[26].

Throughout the 1980s, the activism of the judiciary in the field of repression of crimes in the political and economic sectors was publicly supported by the PCI, which in 1981, through the mouth of the secretary Enrico Berlinguer, adopted the "moral issue" as its main strategic instrument of political struggle[27].

The autonomy and independence of the judiciary were further strengthened by an important ruling of the Constitutional Court in 1984 (n. 170), which allowed ordinary judges not to apply a law if they had found a contrast with a directly applicable regulation of the European Community. The acquisition of such a power represented a very important moment for the judicial culture, since it ended up by assimilating the activity of the ordinary judge to that of the constitutional judge[28].

The most politically significant criminal case that emerged in those years was the scandal of the P2 Masonic lodge. The case emerged in March 1981, when the investigating judges of Milan Giuliano Turone and Gherardo Colombo, investigating the banker Michele Sindona for the bankruptcy of Banco Ambrosiano, searched several homes of the financier Licio Gelli, finding a list of nearly a thousand members of the P2. In the following weeks the media began to reveal some names of personalities found in the list, which was made public by the Prime Minister Arnaldo Forlani in May 1981. The lists of P2 members included numerous politicians (including two ministers in office), high-ranking state and intelligence officials, magistrates, entrepreneurs, editors and journalists[29].

The publication of the list aroused an unprecedented political scandal, leading to the fall of the Forlani government and the formation in June 1981 of the Spadolini government, which established a parliamentary commission of inquiry into the P2. The scandal was aggravated by the accusations made against the P2 of carrying out subversive purposes and even being involved in some massacres. The trials in the following years will rule out the criminal and subversive nature of the lodge, even if Licio Gelli will be convicted for misdirection in the trial for the massacre of Bologna.

On the political level the criminal scandal was ridden mainly by the Communist Party, which attacked the DC and the PSI for the involvement of some members in the investigation, accusing the governing parties of wanting to exclude the PCI from the political system and pursue authoritarian aims.

A part of politics, however, reacted harshly to the initiative of the judiciary. The leader of the Socialist Party, Bettino Craxi, criticised the work of the magistrates, especially after the arrest in May 1981 of Roberto Calvi, president of Banco Ambrosiano and linked to the P2 lodge. The arrest of Calvi,

[25] V. Denti, *La cultura del giudice*, in «Quaderni costituzionali», 1983, n. 1, pp. 39-40.
[26] Ibidem.
[27] S. Colarizi, *Storia politica della Repubblica. Partiti, movimenti e istituzioni. 1943-2006*, Rome-Bari, Laterza, 2007, p. 181.
[28] E. Lamarque, *Corte costituzionale e giudici nell'Italia repubblicana*, Rome-Bari, Laterza, 2012, kindle edition, position 2180.
[29] E. M. Fracanzani, op. cit., pp. 235-254.

accused of currency offences, shook the Italian financial world, leading to a stock market crisis, which had to close for a week due to excessive declines.

During the debate in the Chamber of Deputies on the confidence vote to the new Spadolini government, on 10 July 1981, Craxi expressed strong criticism of the actions of the judiciary, accusing it of employing intimidating methods and of not taking into consideration the effects of its own initiatives on the economic-financial level: «When handcuffs are put without any legal obligation […] on financiers who directly or indirectly represent groups that account for almost half of the stock exchange listing, it is difficult not to foresee uncontrollable reactions [...]»[30].

The effects of the investigation into the P2 led some representatives of the main government parties, in particular the DC, PSI and PSDI, to put forward some proposals for judicial reform. These proposals aimed, on the one hand, to revise the discipline of the civil responsibility of magistrates, widening the cases of compensation following miscarriages of justice, and, on the other, to strengthen the guarantees of citizens with regard to the activity of the public prosecutor, introducing the possibility of challenging the magistrate and requesting the assumption of proceedings by the general prosecutor[31].

Criticism of the work of magistrates and the presentation of proposals for judicial reform were interpreted by the judiciary as attempts by the political power to undermine the autonomy and independence of the judicial body. The concerns expressed by the magistrates involved in the investigations and by the groups of the associative judiciary led the President of the Republic Sandro Pertini to intervene on 23 July 1981 at the HCJ in defense of the autonomy of the judiciary: «The impartiality, independence and autonomy of judges are values that must be defended firmly against any insidious internal and external to the judicial order»[32]. As we shall see, this was only the first episode of conflict that characterised the relations between politics and the judiciary in the 1980s.

The P2 scandal, while consolidating the importance of the judiciary on a public and political level, also ended up involving some magistrates. In April 1981 the vice-president of the HCJ, Ugo Zilletti, resigned due to his involvement in one of the strands of the investigation into Calvi and his relations with the P2[33]. The HCJ opened a disciplinary investigation against nineteen magistrates included in the lists of P2 affiliates. Among the names that stood out was Domenico Pone, leader of Magistratura Indipendente. The disciplinary proceedings ended with the expulsion from the judicial order of two magistrates and the imposition of less serious disciplinary sanctions against seven other magistrates[34].

[30] *Il caso Calvi entra alla Camera. Pesanti giudizi sui magistrati*, in «La Stampa», 11 July 1981.

[31] *Giudici «più responsabili» di fronte agli accusati?*, in «Stampa Sera», 4 July 1981; *Il governo del presidente laico nasce fra le polemiche dei cinque partiti*, in «La Stampa», 12 July 1981. See P. Craveri, *La Repubblica dal 1958 al 1992*, Turin, Utet, 1995, p. 938; E. M. Fracanzani, op. cit., p. 239.

[32] *Pertini: «L'attacco ai magistrati mina l'ordinamento democratico»*, in «La Stampa», 24 July 1981.

[33] See «Notiziario Csm», 1981, n. 8, pp. 3-4.

[34] *Provati i legami tra la loggia P2 e alcuni giudici*, in «La Stampa», 17 March 1983.

The conflict between politics and the judiciary

In the months following the P2 scandal, the tensions between a part of the political world, in particular the PSI, and the judiciary intensified[35].

A first sign of conflict emerged in June 1982 at the congress of the National Association of Magistrates in Mondovì[36]. In the preceding weeks, the Socialist Party had put forward proposals for institutional reform aimed at making the public prosecutor more responsible. At the congress of the NAM, the Minister of Justice Clelio Darida reassured the judiciary, stating that the government had «never thought of legislative measures to place the public prosecutor in the hands of the executive or parliamentary bodies or to undermine its powers»[37]. The Socialist undersecretary of Justice Gaetano Scamarcio, however, was the protagonist of a quarrel with some magistrates during his speech. In his speech Scamarcio made reference to some «clamorous judicial episodes», which made «legitimate some reservations about the independence and autonomy of a certain judiciary or perhaps better on how the judge should act». For the undersecretary, the country was living the «season of the maximum politicization of the judge» and the judiciary had now gained «the power to affect political life». «The judiciary is power and its tools are deadly: judicial communication and preventive detention», Scamarcio said, «through these tools, after all well known by the judge, it is possible to hunt for the excellent suspect»[38].

The groups of the judiciary reacted compactly to what were considered dangerous attempts of politics to limit the independence of magistrates. «Recently, the usual proposals to submit the public prosecutor to the executive have resurfaced, revealing in no uncertain terms the clear will of parties to politically influence the Italian judiciary», Enrico Ferri wrote in «La Magistratura»[39]. «Today, more than yesterday [...] it appears imperative and vital that the judiciary is united», Ferri added. On the basis of these premises, within Magistratura Democratica there emerged a position of contrast to the initiatives for the reform of justice and the judicial system proposed by the politicians, which took the name of «constitutional resistance»[40].

At the end of the Mondovì congress in 1982, the judiciary found the internal unity that had been missing since Gardone[41]. The 1980s were in fact characterised by a continuous decrease in internal conflict within the judiciary[42]. The overcoming of internal divisions within the judiciary was confirmed in 1983 by the formation of a unitary board of the NAM. In other words, the unity that the magistrates had not been able to find even in the face of the terrorist emergency, was achieved in the

[35] See L. Cafagna, *La grande slavina. L'Italia verso la crisi della democrazia*, Venice, Marsilio, 1993, pp. 112-113.

[36] On the congress of Mondovì see «La Magistratura», 1982, n. 1-2.

[37] *Darida assicura la magistratura: il pm indipendente dalla politica*, in «La Stampa», 25 June 1982.

[38] *E' scontro aperto tra politici e magistrati: «Andate a caccia dell'imputato eccellente»*, in «La Stampa», 26 June 1982.

[39] E. Ferri, *Le tentazioni del potere*, in «La Magistratura», 1982, n. 1-2, pp. 7-8.

[40] G. Palombarini and G. Viglietta, *La Costituzione e i diritti. Una storia italiana. La vicenda di Md dal primo governo di centro-sinistra all'ultimo governo Berlusconi*, Naples, Edizioni Scientifiche Italiane, 2011, p. 226.

[41] *Mozione unitaria del XVII congresso dell'Anm*, in «La Magistratura», 1982, n. 3.

[42] G. Palombarini, *Giudici a sinistra. I 36 anni della storia di Magistratura democratica: una proposta per una nuova politica per la giustizia*, Naples, Edizioni scientifiche italiane, 2000, p. 209; E. Bruti Liberati, *Magistratura e società nell'Italia repubblicana*, cit., chapter IV, section 9, La ritrovata unità nell'Anm. The weakening of the ideological conflict within the judiciary is confirmed by the decrease in the publication of «La Magistratura» journal and the reduction of the ideological character of the articles published in it.

face of what is considered an action of the political class aimed at reducing the spaces of independence of the judiciary.

The tensions with politics induced the judiciary not only to find unity within itself, but also to strengthen its sense of institutional independence and its commitment to fighting crime involving political figures. The hypotheses of reform of the public prosecutor's office put forward by some sectors of politics were in fact interpreted as an attempt by politics to gain forms of impunity from their own wrongdoing. This thesis was clearly expressed by Elena Paciotti (MD) on «La Magistratura» in June 1982:

> In this climate, a violent reaction has been maturing against those sectors of the judiciary that had shown that they had not renounced the exercise of their functions even in the presence of power intrigues well able to intimidate, dissuade or involve. The instrumental and acrimonious debate which immediately followed about the powers of the investigating judges and public prosecutors transformed a delicate institutional issue, full of problematic implications, into a battleground of uncovered partisan interests, summarized in the peremptory claim of impunity, to be implemented through the recovery of direct control over the judiciary.[43]

Another event that contributed to further enhance the spirit of unity in the judiciary was the investigation opened by the Public Prosecutor's Office of Rome in March 1983 against the members of the HCJ with the accusation of embezzlement in relation to some expenses of the Council, including the consumption of coffee during the council sessions (for this reason the case went down in history as «the cappuccinos scandal»)[44]. The investigation was interpreted by the magistrates as a step in the offensive launched by some sectors of politics against the judiciary (the Roman magistrates were in fact considered close to some political circles, in particular Christian Democrats)[45]. The investigation produced strong institutional tensions, so much so that even the hypothesis of dissolution of the Higher Council was raised. The crisis was overcome with the decision of the President of the Republic Pertini to preside over a session of the HCJ on 15 March 1983 and not to put on the agenda the suspension of the investigated members, considering it an optional and not obligatory choice[46]. A few months later, in July 1983, the investigation into the expenses affair ended with the acquittal of all suspects.

In the spring of 1983, tensions between the judiciary and the political class intensified following the multiplication of inquiries against local administrators and political figures[47]. In particular, magistrates began investigations for corruption against numerous local administrators in Rimini, Turin and Rome. The judicial scandals caused strong political controversy and contributed to the resurgence of legislative proposals aimed at reforming the role of the public prosecutor[48].

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[43] E. Paciotti, *Magistrati e potere*, in «La Magistratura», 1982, n. 1-2, p. 6.

[44] E. M. Fracanzani, op. cit., p. 278.

[45] E. Bruti Liberati, *Magistratura e società nell'Italia repubblicana*, cit., chapter IV, section 3, Gli attacchi al Csm.

[46] *Deliberazione del Presidente della Repubblica in data 15 marzo 1983*, in «Notiziario Csm», 1983, n. 3, p. 3. See R. Canosa, *Storia della magistratura in Italia. Da Piazza Fontana a Mani Pulite*, Milan, Baldini & Castoldi, 1996, pp. 121-8.

[47] E. M. Fracanzani, op. cit., pp. 283 ff.; E. Bruti Liberati, *Magistratura e società nell'Italia repubblicana*, cit., chapter IV, section 10, Tangentopoli anni Ottanta.

[48] See *Politici in rivolta contro i giudici: «Ora abusano del loro potere»*, in «La Stampa», 31 March 1983.

Criticism of the initiatives of the judiciary by some sectors of the political sphere appeared in several cases to be driven by a certain intolerance of legal controls. In other cases, however, the criticism could not be considered unfounded. Several judicial events of that period were, in fact, characterised by the violation of the secrecy of investigations and by the wide recourse to measures of pre-trial detention in prison against suspects. All this contributed to the emergence of a climate of anticipated guilt in public around suspected persons. In some cases, in addition, such as the inquiry on the municipality of Rome, the accusations made by the magistrates soon proved to be unfounded and the cases ended with the acquittal of the suspects[49]. Repeated condemnations by international courts of the excessive protraction of pre-trial detention in prison in Italy led parliament to approve in August 1982 a law establishing the Tribunal of Liberty, charged with verifying the existence of the requirements of measures restricting personal freedom[50].

As had already happened during the P2 scandal, the Socialist Party led by Bettino Craxi was the political force most critical of the judiciary. Behind this criticism, there was also the conviction on the part of the Socialists that the judiciary and the role of the courts should have been part of the «great reform» of the institutional setting imagined by Craxi[51]. This project was seen by magistrates belonging to MD as a «neo-authoritarian project»[52]. The tendency of the socialists to criticise the work of the magistrates and to advance suspicions about the political use of justice also pursued the objective of distinguishing the Psi from the PCI, which had adopted a position of explicit support for the investigations of prosecutors[53].

In April 1983, at the national direction of the Psi, Craxi put forward a series of proposals for the reform of the judiciary, in particular the public prosecutor. Among other things, Craxi proposed the establishment of a «General Prosecutor Commissioner of Justice», as a body of connection between the judiciary and other powers of the State. The Commissioner was to be appointed by the President of the Republic, choosing from a shortlist presented to him by Parliament, to which he would be politically responsible[54].

The judiciary reacted harshly to the hypotheses of reform put forward by the PSI. During an extraordinary meeting of the NAM in Rome, about 500 magistrates unanimously criticised the reform proposals of the public prosecutor, accusing politics of wanting to reduce the autonomy of the judiciary. The member of the HCJ Raffaele Bertone came to speak of an attempt to «bulgarize» the judiciary[55]. Craxi, in turn, reacted to the position taken by the magistrates with clear words: «There have been some loud voices that do not fit in well with a meeting of magistrates. [...] Fortunately, the

[49] E. M. Fracanzani, op. cit., p. 284.

[50] This is law 12 August 1982, n. 532. See F. Colao, op. cit., p. 204.

[51] See P. Marconi, La «giustizia giusta», in *La grande riforma di Craxi*, edited by G. Acquaviva and L. Covatta, Venice, Marsilio, 2010, pp. 91-110.

[52] G. Palombarini, op. cit., p. 262.

[53] S. Colarizi, *Storia politica della Repubblica*, cit., p. 181.

[54] G. Ferri, *Magistratura e potere politico*, cit., pp. 103-5.

[55] *Adesso è contro i partiti la requisitoria dei giudici*, in «Stampa Sera», 18 April 1983.

legislative power belongs to the democratically elected representatives of the people and not to the leaders of the magistrates' association»[56].

In August 1983 the first Craxi government was born. The program of the new executive foresaw a series of judicial reforms: reform of the penal process in order to strengthen the guarantees of the citizens towards the restrictive measures of the liberty, the revision of the judicial communication and the reinforcement of the investigative secret, the approval of a law on the civil responsibility of the magistrates, the reform of the electoral system of the HCJ in order to avoid an excessive «politicization» of its components[57].

In January 1985 it was presented the final report of the Bicameral Commission for institutional reforms, established two years earlier and chaired by MP Aldo Bozzi[58]. A chapter of the report was dedicated to the judicial administration. The report limited itself to proposing a number of constitutional amendments aimed above all at strengthening some guarantees of those subject to criminal proceedings. Due to the lack of agreement between the political forces, however, the Bicameral Commission did not make any proposals regarding the most divisive issues, such as the separation of careers between judges and prosecutors and the powers of the HCJ. Thus, while stressing the «excessive 'politicization» of the autonomous governing body of the judiciary, the Commission referred to the legislator the task of reforming the electoral law of the HCJ.

The fracture between political power and the judiciary emerged clearly on 27 November 1985, when Prime Minister Bettino Craxi criticised the judgement with which the Court of Rome had convicted three socialist parliamentarians and two journalists of the socialist newspaper «Avanti!» for defamation of a magistrate. The premier defined the decision of the judges «a dark chapter for democracy», determining the protests of the NAM[59]. The Higher Council of the Judiciary, considering Craxi's words as detrimental to the autonomy and independence of the judiciary, decided to put the matter on the agenda of a session of the Council, focused on «recent statements by the President of the Council of Ministers and the independence of the judiciary»[60]. Having heard about the initiative of the HCJ, the President of the Republic Francesco Cossiga sent on 3 December a letter to the vice-president of the HCJ Giancarlo De Carolis in which he expressed his firm conviction on the «inadmissibility of a debate or intervention of the HCJ on acts, behaviours or statements of the President of the Council of Ministers»[61]. In the letter, Cossiga emphasized that in our system of institutional bodies, the evaluation of the behaviour of the Prime Minister was «attributed exclusively to parliament» and could not «be understood as being in any way invested in an organ, even if of high administration, such as the Higher Council of the Judiciary». The President of the Republic motivated his decision by highlighting «the extraneousness to the circuit of political syndication of the HCJ», an organ to which «in no case and to no extent powers of political direction could be attributed», and

[56] *«Facinorosi» per Craxi i giudici che hanno bocciato il piano psi*, in «La Stampa», 19 April 1983; *Intanto si allarga la polemica sul nuovo Pubblico Ministero*, in «Il Corriere della Sera», 20 April 1983.
[57] *La criminalità in tre pagine*, in «La Stampa», 31 July 1983.
[58] *Relazione della Commissione parlamentare per le riforme istituzionali, IX legislatura*, pp. 1-80.
[59] *Craxi attacca la sentenza che condanna l'«Avanti"»*, in «La Stampa», 28 November 1985.
[60] G. Ferri, *Il Consiglio superiore della magistratura e il suo presidente. La determinazione dell'ordine del giorno delle sedute consiliari nella prassi costituzionale della presidenza Cossiga*, Padua, Cedam, 1995, p. 3.
[61] Letter published on «Il Tempo», 17 December 1985.

which instead had «to wait in absolute independence to its unique and distinctive responsibility of administrative body of the judiciary»[62].

The decision of the Head of State determined the harsh reaction of the members of the HCJ, which in a sensational way decided to resign[63]. The unprecedented institutional crisis was resolved only after Cossiga sent a letter to the Presidential Committee of the HCJ stating: «There is nothing in my act addressed to the Council and in my decisions relating to the order of its work, which is in any way and in any respect to be understood as limiting the guarantee of autonomy and independence of the judiciary». The Head of State therefore invited the councilors to withdraw their resignation, appealing to their «sense of responsibility towards the institutions of the Republic», also in consideration of the effects that such a decision could have had «on the functioning of the Council and, therefore, on that of the same administration of justice»[64].

The President's appeal was accepted by the councilors, who withdrew their resignations, but reiterated the request for a debate on the issue proposed on the agenda[65]. For his part, Craxi rejected the criticism of undue interference in the judiciary, appealing to the freedom of criticism and stressing that as Prime Minister he had no power to influence judges[66].

On 19 December 1985, the Head of State put an end to the clash with the HCJ around the Craxi affair by intervening at the Council. In the course of the long intervention Cossiga affirmed that to have defined the Council as «organ of high administration» had not had «any reductive meaning»[67]. Afterwards, Cossiga praised the role played by the HCJ in the previous years during the historical period «of the emergency», but underlined that the emergency constituted «an exceptional situation», which could not be «assumed as a normal condition of life of the system» if we did not want to «definitively compromise the principles of juridical civilization which we intend to be inspired by». Consequently, Cossiga pointed out to the Council that the time had come to «return with prudence, but with firmness and decision, to the climate of legal and operational normality». At the end of the session, the councilors approved a document through which the HCJ reaffirmed «its constitutional function of guaranteeing the independence of the judiciary and of the individual magistrates, also with regard to external influences of any origin»[68].

The ceasefire reached between President Cossiga and the HCJ turned out to be only provisional. At the heart of the contrast between the Head of State and the Council were two radically different visions regarding the role and functions that the Council itself should have exercised on the basis of constitutional provisions. There was also in Cossiga's mind, as we will see in more detail in the next chapter, the conviction that the autonomous governing body of the judiciary had over the years

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[62] See R. Canosa, *Storia della magistratura in Italia,* cit., pp. 131-5.

[63] *Dimissioni dei componenti togati del Csm*, in «Notiziario Csm», 1985, n. 19, p. 3.

[64] Letter published on «La Stampa», 6 December 1985.

[65] *Revoca delle dimissioni dei componenti togati del Csm*, in «Notiziario Csm», 1985, n. 19, pp. 3-4.

[66] *Una lettera di Craxi. Posso criticare anch'io*, in «La Stampa», 7 December 1985.

[67] Discorso del Presidente della Repubblica al Consiglio Superiore della Magistratura, in *Discorsi e interventi del presidente della Repubblica Francesco Cossiga 1985-1992*, edited by M. Cacioli, Segretariato Generale della Presidenza della Repubblica - Archivio storico Discorsi Cossiga, p. 140-1. See *Seduta del 19 dicembre 1985 ore 17*, in «Notiziario Csm», Notiziario straordinario n. 7, 8 March 1986, pp. 16-58.

[68] *Sui poteri del Csm*, in «Notiziario Csm», 1985, n. 20, p. 3. See R. Canosa, *Storia della magistratura in Italia*, cit., pp. 133-4.

expanded its powers beyond the functions provided for by the Constitution, and that it was therefore necessary for the body to return to its normal sphere of operation.

A few weeks later, in January 1986, Cossiga was in fact the protagonist of a new clash with the HCJ. The Head of State opposed the proposal put forward by a group of councilors to modify the rules of procedure of the Council concerning the election of the vice-president. The proponents suggested inviting the candidates for vice-president to a sort of exposition of their programs in front of the Council, in order to be able to publicly debate them, so as to overcome the practice that saw the Council elect the candidate already subject to an agreement reached by the parties and magistrates outside the institutional venue[69]. In a letter sent to the members of the Council, President Cossiga expressed his «clear disagreement with the proposed regulatory changes for reasons of constitutional and ordinary legitimacy[70]». The President motivated his dissent by underlining, among other things, that «a preventive debate on the appointment of the vice-president leads in fact and induces in law to a configuration of the office of vice-president as holder of an autonomous power of immediate and mediated direction and ordering, which ousts the president of the Republic, configuring his presidency as a completely formal and ceremonial duty». The proposal to base the election of the vice-president on the evaluation of a political program, if accepted, would have determined the establishment of a sort of diarchy at the top of the body, foreign to the rules governing the functioning of the Council, erasing the position of primacy attributed to the Head of State[71]. Also this time the HCJ, faced with the remarks of the Head of State, decided to retrace its steps, giving up the project to change the regulation.

The contrast between politics and the judiciary also manifested itself within the Higher Council of the Judiciary, leading in July 1987 to a deep division between the lay members and the members of the judiciary. This contrast also originated from some statements made by Bettino Craxi, who in the meantime no longer held the post of Prime Minister. On 11 July 1987, the socialist leader criticised the pre-trial measures adopted by some magistrates against some members of the PSI in Tuscany and in particular an administrative officer: «The arrest», Craxi said, «was, in an absolutely evident way, the result of a serious judicial error. A more scrupulous reading of the documents and congruous information would have allowed the general prosecutor to avoid an injustice»[72].

Craxi's words once again aroused the protests of the judiciary. Some of the members of the HCJ proposed the approval of a document criticizing Craxi's declarations, which were considered detrimental to the autonomy of the judiciary. The initiative, however, found the opposition of the lay members, who threatened to leave the session at the time of the vote, thus making the quorum missing. In the opinion of the lay members, the HCJ had the right-duty to take a position when the autonomy and independence of the judiciary had been offended by another institutional power, but it should not intervene every time to defend the honorability of individual magistrates who were considered offended by statements of political figures[73]. At the end, the judicial and lay members found an

[69] G. Ferri, *Il Consiglio superiore della magistratura e il suo presidente*, cit., pp. 49 ff.

[70] *Messaggio di Cossiga al Csm: «Le regole non si cambiano»*, in «Il Corriere della Sera», 8 January 1986.

[71] R. Canosa, *Storia della magistratura in Italia*, cit., pp. 136-7.

[72] *Craxi: grave errore giudiziario*, in «La Stampa», 12 July 1987.

[73] See «Notiziario Csm», 1988, n. 7 pp. 28-73; *Csm spaccato per la polemica tra Craxi e la magistratura*, in «La Stampa», 17 July 1987; *I giudici ricuciono lo strappo*, in «La Stampa», 22 July 1987.

agreement, approving a document in which they reaffirmed the freedom of criticism of the judiciary, although stressing that «polemics hasty or exasperated» could «disorient public opinion with the risk of delegitimizing the jurisdiction or conditioning the magistrates»[74].

Overall, the HCJ did not accept the calls expressed by the Head of State in favour of a return of the autonomous governing body of the judiciary in the areas of its competences. On the contrary, it has been pointed out that during the 1980s, the Council «considerably extended its powers and its competences, compared to those established in the Constitution»[75], continuing the process already started at the end of the 1960s. The HCJ strengthened its role as the apex of the judicial organisation, consolidating the practice of carrying out inspections and inquiries when faced with situations of crisis in judicial offices. The Council, moreover, as seen above, attributed to itself the task of representing the judiciary outside and therefore to protect the dignity of judges against behaviours and criticism of individuals or bodies of the State considered harmful to the independence of the judiciary[76].

The referendum on civil liability of magistrates

On 8 and 9 November 1987 a series of abrogative referendums were held in Italy. One of them concerned the issue of the civil liability of magistrates. As noted above, since the beginning of the 1980s, in the public and political debate there arose the need for a reform that would make magistrates more responsible for judicial errors that they committed. This debate was sparked by the numerous episodes of unjust imprisonment and miscarriages that occurred over the years.

At the time, the issue of civil liability of magistrates was disciplined by certain articles of the code of civil procedure (Articles 55, 56 and 74). Judges could be held liable only in cases of willful misconduct, fraud, extortion in the execution of their duties or denial of justice (that is when they refused, omitted or delayed, without a justifiable reason, to decide about the parties' demands or, in general, to perform an act of their office), thus excluded any liability for negligent conduct. The discipline protected magistrates not only by considerably delimiting the area of offences, but also by providing for a preventive examination of the judge's liability action. It was foreseen, in fact, that the action to hold the judge liable should be authorized by the Minister of Justice, and that, once ministerial authorization had been given, the Court of Cassation would choose the judge called to decide the action claiming liability. This discipline, in the light of these procedural limitations and difficulties in its practical application – given that it is arduous to prove the prove the malicious intent of the magistrate – was criticised for a long time and qualified as insignificant and unusable, so much so that some considered it a «masked impunity» of magistrates[77].

[74] «Notiziario Csm», 1988, n. 7, pp. 63-64.

[75] R. Canosa, *Storia della magistratura in Italia*, cit., p. 165.

[76] G. Bognetti, Il Presidente e la presidenza di organi collegiali, in *Il Presidente della Repubblica*, edited by M. Luciani and M. Volpi, Bologna, Il Mulino, 1997, p. 250.

[77] E. Fassone, *Il giudice tra indipendenza e responsabilità*, in «Rivista italiana di diritto e procedura penale», 1980, n. 1, pp. 3-33; *La responsabilità civile dello Stato giudice: commentario alla Legge 13 aprile 1988 n. 117 in tema di risarcimento dei danni cagionati nell'esercizio delle funzioni giudiziarie e responsabilità civile dei magistrati*, edited by N. Picardi and R. Vaccarella, Padua, Cedam, 1990.

The issue was brought to the centre of the political debate by the criminal affair involving the famous television host Enzo Tortora, arrested in June 1983 on charges of Camorra association and drug trafficking, based mainly on the revelations of some alleged penitents. The investigation of the Neapolitan public prosecutors and the arrest of the presenter received great emphasis on the media, upsetting the Italian public opinion, which was divided between guilty and innocent.

After having spent seven months in prison, on 17 September 1985 Tortora was condemned to ten years of imprisonment in first instance. The sentence, however, was annulled on 15 September 1986, when Tortora was acquitted of all charges by the Court of Appeal of Naples for the groundlessness of the accusations made against him[78]. The clamorous result of the trial pushed different political forces, in particular radicals, socialists and liberals, to propose the issue of the reform of the civil liability of magistrates, for which already in March 1986 they had announced a collection of signatures to call a popular referendum[79].

In the following months the government proposed a reform of the legislation on the civil liability of magistrates that could avoid the referendum[80]. The proposal was strongly criticised both by the judiciary and by the HCJ, which approved an unfavourable opinion to the measure[81]. In the following months, the majority parties were unable to reach an agreement on the reform.

The referendum was held on 8 and 9 November 1987, and the Italians voted by a very large majority (80%) in favour of the repeal of the current rules on the civil liability of magistrates, calling for a reform of the discipline.

The outcome of the vote, undoubtedly influenced by the controversy that followed the Tortora case, took the Italian judiciary by surprise, signaling a loss of confidence on the part of citizens in the judicial institution[82].

Having overcome this bewilderment, the judiciary reacted very harshly to the reopening of a debate among parties on the civil liability of judges. The judicial groups and even many judicial offices came to launch a sort of ultimatum to politics, threatening to block justice, through the strict application of the codes of criminal procedure, if the parliament had not passed quickly satisfactory rules on the civil liability of judges[83]. The widespread perception among magistrates was that politics wanted to reform the civil liability of magistrates in order to reduce the degree of autonomy and independence of the judiciary.

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[78] E. Bruti Liberati, *Magistratura e società nell'Italia repubblicana*, cit., kindle edition, chapter IV, section 7, Il referendum sulla responsabilità civile dei magistrati.

[79] The Tortora case was also the subject of a session of the HCJ held on 25 September 1986. See *Estratto dei verbali delle sedute in data 25 settembre 1986 concernenti: «Problemi attuali del processo penale anche in relazione a quanto emerso nella opinione pubblica in occasione di recenti processi e sentenze»*, in «Notiziario Csm», 1986, Notiziario straordinario n. 28.

[80] See *Se il giudice sbaglia pagherà*, in «La Stampa», 17 December 1986.

[81] *Magistrati in rivolta*, in «La Stampa», 18 December 1986; *No del Csm a Rognoni*, in «La Stampa», 3 February 1987. For an overview of the internal debate within the associative judiciary around the referendum see «La Magistratura», 1987, Numero speciale referendum giustizia.

[82] See «La Magistratura», 1987, n. 4.

[83] *Ultimatum dei giudici al Parlamento*, in «La Stampa», 19 November 1987.

These tensions influenced the discussion of the new law on the civil liability of magistrates, approved by parliament on 13 April 1988. The measure, in fact, only partially satisfied the demands made by the promoters of the referendum.

The law (n. 117/1988) broadened the cases of civil liability of magistrates, also adding gross negligence in relation to specific conduct. Civil liability, however, was excluded in any case for the interpretation of legal rules as well as the finding of facts and the evaluation of evidence (article 2, paragraph 2). The minister's authorization was eliminated, but a form of direct responsibility of the magistrate was nevertheless excluded. The action for compensation for wrongful damage had to be exercised against the State, then the magistrate responsible must be subject to disciplinary proceedings and to a claim of indemnity by the State. In addition, the action against the State was also subject to a filter, represented by the judgement of admissibility expressed by the court that hears the complaint[84].

The new rules were strongly criticised by the promoters of the referendum, who accused the legislator of having betrayed the will of the people. Subsequently, the scholarship has shown how the limits provided by the new law have led to the maintenance of a situation of substantial irresponsibility of both the judge and the State for damages caused by wrongdoing in the exercise of judicial function[85]. The data confirm the failure of the reform. In fact, the vast majority of claims for compensation have been declared inadmissible already in the preliminary phase[86] and, from 2005 to 2014, only nine appeals have been concluded with a sentence of conviction[87].

Finally, it is worthy noting that on the occasion of the abrogative referendum of November 1987, the Italians also expressed themselves in favour of the abolition of the legislation then in force on the prosecution of ministers and, in particular, the abolition of the parliament's Committee of Inquiry, considered excessively lenient towards politicians. The subsequent Constitutional Law n. 1 of 16 January 1989 abolished the Committee of Inquiry, attributing competence for ministerial offences to the ordinary judge, subject to parliamentary authorization.

The reform of the criminal procedure

The loss of legitimacy experienced by the judiciary following the Tortora case, made explicit by the outcome of the 1987 referendum on the civil liability of magistrates, offered the legislator a window of opportunity to complete the very long process of reform of the code of criminal procedure, which

[84] M. Graziadei and U. Mattei, *Judicial Responsibility in Italy: A New Statute*, in «The American Journal of Comparative Law», 1990, vol. 38, n. 1, pp. 103-126; N. Zanon and F. Biondi, *Il sistema costituzionale della magistratura*, Bologna, Zanichelli, 2014, pp. 324-6.

[85] N. Picardi, *La responsabilità del giudice: la storia continua*, in «Rivista di diritto processuale», 2007, pp. 283 ff.; C. Cosentino, L*a responsabilità civile del magistrato tra inefficienze interne, moniti della Corte di Giustizia e modelli alternativi*, in «Danno e responsabilità», 2010, 3, pp. 230 ff.; G. Ferri, *La responsabilità civile dei magistrati nell'ordinamento italiano e le prospettive di riforma*, in «Diritto e società», 2012, 1, pp. 151-185.

[86] N. Zanon and F. Biondi, *Il sistema costituzionale della magistratura*, cit., p. 327.

[87] Technical report attached to the bill S. 1626 submitted by the government in 2015.

had been underway since 1965[88]. The new code of criminal procedure came into force on 24 October 1989 (Presidential Decree n. 447 of 22 September 1988).

The entry into force of the new code led to the transition from a mixed trial system, mostly inquisitorial, to an adversarial trial system, based on the principles of equality between the prosecution and defense, neutrality of the judge (it was abolished the figure of the investigating judge who at the same time was responsible for conducting investigations and judging the accused) and the formation of evidence in the trial through the principle of parties' confrontation. Another important novelty was the introduction of alternative proceedings to trial, such as the plea bargaining or the summary trial, aimed at avoiding the complexity of the trial. On the whole, the new code therefore strengthened the guarantees of the defense, placing the latter on an equal level with the prosecution[89].

The incorporation in the Italian trial system of institutions of an adversarial nature met with strong resistance from the judiciary. Italian judges, accustomed to an inquisitorial tradition, and therefore to being active protagonists in the search for evidence, found it difficult to adapt to a new procedural model which relegated the judge to the role of a third party and the public prosecutor to a partisan actor[90]. The new code was also accused by a part of the judiciary of being excessively conservative and reducing the ability of the judicial system to combat the most serious forms of crime[91].

The Constitutional Court shared the resistance of the ordinary judiciary, so as to pronounce a series of sentences in 1992 that restored some provisions belonging to the old inquisitorial code, in particular those that governed the use in trial of information collected by the public prosecutor and the police during the investigation[92]. The Court's intervention gave rise to a conflict with the parliament which, as we shall see, would only end in 1999.

The entry into force of the new code of criminal procedure, accompanied by adjustments of the law on the judicial system, had very important effects on the development of the judiciary.

First of all, the reform strengthened the role played by the public prosecutor, concentrating in him the powers relating to the conduction of investigations[93]. The new code attributed to the prosecutor the direction of investigations by the police, formally recognizing the new type of relationship that had developed in many judicial offices between investigating magistrates and the judicial police. The new

[88] C. Guarnieri, *The judiciary in the Italian political crisis*, in «West European Politics», 1997, 20(1), pp. 164-5.

[89] M. Fabri, *Criminal Procedure and Public Prosecution Reform in Italy: A Flash Back*, in «International Journal for Court Administration», 2008, 1(1), pp. 3–15; G. Lozzi, *Lezioni di procedura penale*, Turin, Giappichelli, 2017; P. Tonini, *Manuale di procedura penale*, Milan, GIuffrè, 2019.

[90] William T.Pizzi and L. Marafioti, *The New Italian Code of Criminal Procedure: The Difficulties of Building an Adversarial Trial System on a Civil Law Foundation*, in «The Yale Journal of International Law», 1992, vol 17, n. 1, pp. 1-40; P. Pederzoli and C. Guarnieri, *Italy: a case of judicial democracy?*, in «International Social Science Journal», 1997, 49(152), 1997, p. 258; W. T. Pizzi and M. Montagna, *The Battle to Establish an Adversarial Trial System in Italy*, in «Michigan Journal of International Law», 2004, n. 2, pp. 445 ff.; G. Illuminati, *The Frustrated Turn to Adversarial Procedure in Italy (Italian Criminal Procedure Code of 1988)*, in «Washington University Global Studies Law Review», 2005, 4, p. 573; P. Pederzoli, *La Corte costituzionale*, Bologna, Il Mulino, 2008, p. 238.

[91] P. Pederzoli, *La Corte costituzionale*, cit., p. 238; F. Colao, op. cit., p. 312.

[92] W. T. Pizzi and M. Montagna, op. cit., pp. 449 ff.; P. Pederzoli, *La Corte costituzionale*, cit., pp. 239-40; F. Colao, op. cit., pp. 325-6.

[93] P. Pederzoli and C. Guarnieri, *The judicialization of politics, Italian style*, in «Journal of Modern Italian Studies», 1997, 2:3, p. 323.

code in fact established that «the public prosecutor directs the investigations and disposes directly of the judicial police» (article 327), and also provided for the obligation of the police to report without delay to the public prosecutor the news of the crime (article 347). The new code of criminal procedure thus placed in the hands of the prosecutor the responsibility for all decisions concerning investigations carried out by the police. According to Di Federico, the role of the public prosecutor in the investigative phase «is in fact that of an independent policeman»[94]. As we will see later, this innovation constituted a fundamental factor for the birth of the Clean Hands investigation.

The new code also institutionalized the new way of acting of the public prosecutor in the early stages of investigations that had emerged in some offices in the years of the fight against terrorism, establishing that «the public prosecutor and the judicial police take notice of crimes on their own initiative and receive news of crimes» (article 330). In this way, the activity of investigation was transformed from an activity aimed at forming evidence to an activity aimed at «identifying sources, persons, documents and objects», and ended up taking place in a phase prior to the notification of the crime itself[95]. The public prosecutor could therefore promote and carry out on his own initiative investigative activities of any kind on any citizen whenever he believed that a crime had been committed[96].

The reform also formalized the overcoming of the hierarchical model of organisation of the prosecutor's office, through the modification of article 70 of the law on the judicial system. The new article 70 established that the chief prosecutor was responsible for «directing the office and organizing its activities». The reference to delegation was eliminated and replaced by the notion of designation: «The prosecutor exercises personally the functions of the public prosecutor's office, when he does not designate other magistrates attached to the office». In this way, any reference to the existence of relationships of dependence between the head of the prosecutor's office and individual magistrates disappeared[97]. This legislative amendment formalized the changes that had taken place in the previous decades in the relationship between chief prosecutors and deputy prosecutors, examined in the preceding pages. Even before the reform, in fact, the original formulation of article 70 of the law on the judicial system did not correspond to the actual relationships between the managers of the offices and the deputy prosecutors, who had gone to acquire more and more operational autonomy[98]. Over the course of time, the HCJ also continued to adopt decisions aimed at limiting the powers of the chief prosecutors, while at the same time strengthening its own role as the head of the administration of justice. On 5 March 1986, for example, the HCJ had established with a resolution that the revocation of a measure of assignment of criminal proceedings had to be «adequately motivated» and that, failing that, the deputy prosecutor to whom the proceedings had been subtracted could «request

[94] G. Di Federico, *Prosecutorial independence and the democratic requirement of accountability in Italy: Analysis of a deviant case in a comparative perspective*, in «British Journal of Criminology», 1998, 38(3), p. 377; G. Di Federico, *Diritti umani e amministrazione della giustizia*, in «Archivio penale», 2012, n. 1, p. 4.

[95] F. Colao, op. cit., p. 328.

[96] G. Di Federico, *Diritti umani e amministrazione della giustizia*, cit., p. 4.

[97] V. Zagrebelsky, *Modifiche all'ordinamento giudiziario e nuovi ruoli del pubblico ministero e del giudice*, in «Cassazione penale», 1989, pp. 2122-2132; *Ordinamento giudiziario: organizzazione e profili processuali*, edited by D. Carcano, Milan, Giuffrè, 2009, p. 193.

[98] V. Zagrebelsky, *Sull'assetto interno degli uffici del pubblico ministero*, in «Cassazione penale», 1993, p. 716.

written reasons for the measure and possibly invoke the intervention of the HCJ to protect its independence and the proper administration of justice»[99].

Finally, the new code of criminal procedure introduced articles 7-bis and 7-ter into the law on the judicial system, providing for the obligation for judicial offices to regulate their activities with the tabular system, following the indications of the HCJ. The new rules therefore gave full recognition to the power that the HCJ had self-assigned to itself to regulate the internal organisation of judicial offices[100].

Even though the new legislation merely acknowledged the role of the HCJ in the procedures of the judicial offices, the system had already been extended in 1987 to the public prosecutor's offices by a circular of the HCJ[101]. This autonomous choice of the HCJ would have found legislative recognition, as we shall see, in 1998. With the extension of the tabular system to the prosecutor's offices, the powers of the chief prosecutor were further limited, since he was called upon to establish objective and predetermined criteria for the assignment of proceedings to the magistrates of the office.

At the end of the 1980s, therefore, the hierarchical structure within the prosecutor's office could be considered completely dismantled. The role of the office manager changed definitively from that of hierarchical "superior" to that of coordinator of the work of the magistrates, endowed with ample autonomy and independence. In other words, it was completed that process of personalization of the prosecutorial functions and atomization of the judicial organisation, on which already in 1983 Domenico Marafioti had called attention with concern, so as to foreshadow the danger of the emergence of a «republic of prosecutors»[102]. In particular, the scholar had highlighted how the process of autonomy and independence of magistrates could risk going «to the point of anarchy and judicial atomism», and how it was therefore necessary to avoid «that every office of the prosecutor could consider itself as that of a squire of the penal action, of which it would not have to account to anyone, detached from a harmonious and coherent institutional apparatus [...]»[103].

The task of the chief prosecutor became primarily that of coordinating the work of the members of the office in order to guarantee a correct and uniform exercise of the penal action. In this context, there was another significant change in the relationship between political and judicial power.

As recalled in the previous chapter, in 1977, during the phase of the terrorist emergency, the HCJ, with a series of directives, invited the heads of the investigative offices to plan the activities of their own offices in such a way as to guarantee a more rapid treatment of trials relative to organized crime

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[99] *Sulla distribuzione dei processi e successivo mantenimento degli incarichi presso gli uffici delle Procure della Repubblica*, in «Notiziario Csm», 1986, n. 8, p. 18.

[100] L. Pomodoro and D. Pretti, *Manuale di ordinamento giudiziario*, Turin, Giappichelli, 2015, p. 5.

[101] *Formazione delle tabelle di composizione degli uffici giudiziari per l'anno 1988 (circolare prot. n. 6308 in data 19 maggio 1987)*, in «Notiziario Csm», 1987, n. 8, p. 14-23. As early as June 1981, the HCJ had prepared a proposal for legislative innovation on the assignment of judicial affairs «according to objective criteria», expressing its support for extending this system to prosecutorial offices as well. See *Proposta di innovazione legislativa sull'assegnazione degli affari giudiziari secondo criteri oggettivi (Approvata dal Consiglio nella seduta del 2 giugno)*, in «Notiziario Csm», 1981, n. 11, pp. 4-11.

[102] D. Marafioti, *La repubblica dei procuratori. Le inquietanti tendenze dell'integralismo giudiziario*, Bari, Informazioni & Commenti, 1983.

[103] Ivi, pp. 77-80.

and crimes of greater social alarm. On the basis of this indication, on 16 November 1990, the chief prosecutor of Turin, Vladimiro Zagrebelsky, passed, for the first time in Italy, an internal memo explicitly aimed to set «criteria in the conduct of preliminary investigations regarding crime reports»[104]. Recognizing the impossibility of treating all the crime reports received by the office, the prosecutor established that proceedings should be dealt with on the basis of a scale of priorities: proceedings with suspects subjected to pre-trial detention, then proceedings related to offences to be considered serious, and finally the residual proceedings. In the internal memo, prosecutor Zagrebelsky affirmed that the identification of priority criteria did not conflict with the principle of mandatory prosecution provided for by the Constitution (article 112), because «failure to exercise a prompt and properly prepared penal action for all the crime reports which are not unfounded, does not derive from assessments of opportunity related to individual crime reports, but finds its grounding in the objective limited capacity of the entire judicial system, and this office in particular, to cope with all the workload»[105].

The approval of the Zagrebelsky's internal memo gave rise to lively discussions in the legal field, since it revealed both the inability of the judicial system to respect the constitutional principle of mandatory prosecution (due above all to the high number of crime reports and the scarcity of resources), and the attribution to the chief prosecutors of the power to define priority criteria in the exercise of the penal action, albeit in the absolute autonomy of the individual magistrates[106].

Since the initiative of Zagrebelsky, it become common practice for chief prosecutors to define priority criteria in the management of crime reports[107]. As a result of this process, the principle of mandatory prosecution provided for by the Constitution has been de facto replaced by an opposite principle of discretion, which attributes to public prosecutors the power to define priorities in the exercise of the penal action.

This transformation raises several concerns in terms of the functioning of the judicial system and the relationship between political power and the judiciary.

Firstly, the definition of priorities by individual public prosecutors makes the exercise of the penal action in Italy nonhomogeneous. Each public prosecutor's office can establish its own priorities, with the consequence that a crime can be considered a priority (and then prosecuted) in one area under the jurisdiction of a particular prosecution office, but not in another area covered by a different office. This situation clearly leads to an indirect violation of the principle of equality of citizens before the law, creating a huge paradox, given that the principle of mandatory prosecution was enshrined in the Italian Constitution with the aim of guaranteeing the equal treatment of citizens before the law. Secondly, and more importantly, at the end of this process, public prosecutors and the HCJ have gained a substantial and de facto power to control and define a consistent share of public policy in

[104] The circular is published in V. Zagrebelsky, *Una «filosofia» dell'organizzazione del lavoro per la trattazione degli affari penali*, in «Cassazione penale», 1991, pp. 362-368.
[105] Ivi, p. 364.
[106] L. Verzelloni, *Il lungo dibattito sui criteri di priorità negli uffici giudicanti e requirenti*, in «Archivio penale», 2014, 66 (3), pp. 815-822.
[107] E. Antonucci, *The evolution of the principle of mandatory prosecution in Italy. A problematic case of gradual institutional change*, in «International Journal of Law, Crime and Justice», 66 (2021), 100481.

the criminal sector, without any form of democratic accountability and at the expense of the political bodies which, in a system with discretionary prosecution, should be entitled to do so[108].

[108] G. Di Federico, *Prosecutorial independence*, cit.; D. Vicoli, *Scelte del pubblico ministero nella trattazione delle notizie di reato e art. 112 Cost.: un tentativo di razionalizzazione*, in «Rivista italiana di diritto e procedurale penale», 2003, pp. 251-293; E. Antonucci, *The evolution of the principle of mandatory prosecution in Italy*, cit.

7. The Nineties

The 1990 electoral reform of the HCJ

In 1990 the Parliament intervened again to modify the electoral system of the HCJ, with Law n. 74/1990. The legislator moved mainly with the intention of attenuating the role played by the judicial factions in the electoral procedures and within the autonomous governing body of the judiciary. On 15 March 1990, during the discussion in Parliament, the rapporteur of the bill Raffaele Mastrantuono explained the reasons for the reform with these words: «The most recent events in the world of the judiciary and the HCJ have shown how this body has moved away from the model assumed by the Constitution, recording a widespread politicization in the judiciary, its clear division into factions, into sides often collateral to political parties, with serious consequences on the outside image of the magistrate, who is not and has not appeared impartial as it should be»[1]. For the rapporteur «a real political structure has become established within the judiciary», which appeared «more dedicated to the care of electoral clienteles than to the tasks of jurisdiction». This, in the opinion of the rapporteur of the measure, had impacted the functionality of the HCJ, which had seen «role got expanded» and had «given itself an internal structure that follows the models of parliamentarianism that are not very suitable for a body that was not established to perform functions of political representation, but rather of high administration»[2].

The process of degeneration of the associative groups of the judiciary, towards their transformation into real centres of power, had emerged clearly since the early 1980s, in conjunction with the fading of the political and ideological differences between the different judicial factions. In 1983 one of the protagonists of the associative judiciary, Vladimiro Zagrebelsky, underlined how, with the reduction of ideological differences between the factions, the reason for affiliation to the groups of the National Association of Magistrates was «increasingly that of the search for protection, not only when the magistrate asks for something excessive and not due, but even when he asks only what is lawful and due»[3]. This tendency, Zagrebelsky pointed out, was «accentuated by the considerable elasticity of the criteria followed by the Council» when it was necessary to make choices among several magistrates.

The process of affirmation of *lottizzazione*, that is the sharing of positions of power, between the judicial factions, as the main method for the decisions of the HCJ was accompanied by a process of increasing politicization of the activity carried out by the judicial groups. In other words, as noted by Zagrebelsky, there was a growing «conviction that, especially in order to obtain directive positions», it was «necessary to obtain the support of political parties», indirectly represented in the Council by lay members[4].

[1] Verbatim record, Chamber of Deputies, 15 March 1990, p. 51040.

[2] Ibidem.

[3] V. Zagrebelsky, *Tendenze e problemi del Consiglio superiore della magistratura*, in «Quaderni costituzionali», III, n. 1, 1983, p. 129.

[4] Ivi, p. 130. See G. Di Federico, *«Lottizzazioni correntizie» e «politicizzazione» del C.S.M.: quali rimedi?*, in «Quaderni costituzionali», 1990, X, n. 2, p. 290.

The influence of the judicial groups on the activities of the Council emerged with particular evidence in relation to the conferral of directive managerial positions (for example, president of the court, chief prosecutor, president and general prosecutor of the court of appeal, first president of the Court of Cassation) and semi-directive positions (as president of the court section, deputy prosecutor, etc.). The law establishing the HCJ left the Council wide discretion on these appointments, limiting itself to providing that the plenum of the Council deliberate on a proposal formulated by its own commission in agreement with the Minister of Justice. The law on the judicial system established that the conferral of directive and semi-directive positions should take place on the basis of a verification of seniority, merit and aptitude requirements. However, the abolition of the magistrates' career, with the reforms enacted between 1963 and 1973, as noted above, meant that there was no effective system for evaluating the professionalism of magistrates. Since then, almost all magistrates had been promoted by the HCJ with highly positive and enthusiastic evaluations. As a result, since the 1980s, the procedures for the conferral of directive and semi-directive positions had become increasingly conditioned by the membership of candidates in the judicial groups, rather than by meritocratic logic. In the absence of an agreement between the judicial groups, the fundamental criterion for appointment was seniority of service[5].

The role played by the judicial factions in the procedures for conferring directive and semi-directive positions was also the object of a warning by the President of the Republic, Sandro Pertini, in 1981. On 9 July 1981, speaking at the inauguration of the new Higher Council of the Judiciary, Pertini had stressed «the need for rigorous checks on the suitability of magistrates for the exercise of management functions», inviting the Council to indicate to the judicial councils the need to highlight, in the motivations of the opinions for the career progression of magistrates, «the particular aptitude of each of them for the exercise of specific functions, with particular reference to directive ones, and those of legitimacy or merit»[6]. In this way, the Head of State expressed his concern about the risk that management positions could be conferred by the HCJ on the basis of the membership of candidates in the judicial groups rather than the merit of the magistrates.

The need to address the degeneration of the associative groups was also felt by some sectors of the judiciary. The criticism emerged clearly in January 1988, following the failure of the HCJ to appoint Giovanni Falcone, one of the most experienced magistrates in the fight against the Mafia, as chief of the office of inquiry of the tribunal of Palermo. At the end of a long discussion, full of contrasts, the Council decided to appoint Antonino Meli as the new investigating counselor of Palermo, on the basis of his greater seniority compared to Falcone[7]. Following the controversial decision of the HCJ, in April 1988, some magistrates gave life to a new associative group called Verdi, which later became Movimento per la giustizia. The group brought together exponents of various groups and some magistrates who had distinguished themselves in the 1970s in the fight against organized crime,

[5] L. Pomodoro and D. Pretti, *Manuale di ordinamento giudiziario*, Turin, Giappichelli, 2015, p. 118; F. Biondi, *Sessant'anni ed oltre di governo autonomo della magistratura: un bilancio*, in «Quaderni costituzionali», n. 1, March 2021, p. 33.

[6] Insediamento del Consiglio Superiore, 9 luglio 1981, in *Discorsi e messaggi del presidente della Repubblica Alessandro Pertini*, edited by R. Gallinari, Segretariato Generale della Presidenza della Repubblica, Rome, 2009, p. 150, https://archivio.quirinale.it/discorsi-bookreader//discorsi/Pertini.html.

[7] See E. Bruti Liberati, *Magistratura e società nell'Italia repubblicana*, Rome-Bari, Laterza, 2018, kindle edition, position 4556

proposing a transversal program that aimed above all to overcome the system of judicial factions and «associative careerism» to the benefit of the affirmation of a new professionalism among magistrates. While refusing political characterizations, the new group would gradually be positioned in the area of the left of the associative judiciary[8].

Law n. 74/1990 introduced three innovations in the electoral system of the HCJ: the election of magistrates of merit in four distinct territorial constituencies, the introduction of the single preference, the raising of the threshold for access to the distribution of seats from 6% to 9% at the national level. The electoral reform, however, provided for the maintenance of the list vote. This allowed the judicial groups to continue to operate as protagonists of the elections and made sure that the entire electoral procedure maintained a high level of politicity[9].

The associative judiciary harshly criticised the approval of the reform, interpreting it as an attempt by politics to limit the independence of the Council by reducing the representation of small associative groups. On 13 February 1990, the president of the NAM, Raffaele Bertoni, made an appeal to the Head of State, Cossiga, asking for an intervention «on the political power» so that this would resolve «adequately the troubles of justice» and not reduce «a fundamental institution such as the Council to a body for the defense of sectorial and corporative interests»[10]. The Head of State rejected the magistrates' appeal underlining that such an intervention would have been «in contrast with the principles and the constitutional correctness»: «In fact, the examination of bills concerning a matter which, in the forms regulated by the Constitution, falls within the full autonomy of the Parliament, privileged seat of popular sovereignty, is in progress before the Chambers», Cossiga affirmed[11].

The conflict between Cossiga and the judiciary

In the first two years of the 1990s a deep conflict between the President of the Republic Francesco Cossiga and the HCJ and the judiciary as a whole developed. Since the beginning of 1990 Cossiga began to address increasingly harsh criticism towards the factions of the judiciary, accused of acting politically, and towards the HCJ itself, accused of acting outside its constitutional powers[12]. The critical remarks by Cossiga were concentrated in the final part of his presidential mandate, coinciding with that phase, which opened between the end of 1989 and the beginning of 1990, remembered as the season of the president's "pickaxes" against the institutional system, aimed at recalling the political

[8] D. Piana and A. Vauchez, *Il Consiglio superiore della magistratura*, Bologna, Il Mulino, 2012, pp. 115-6; G. Melis, *Le correnti nella magistratura. Origini, ragioni ideali, degenerazioni*, in «Questione giustizia», 10 January 2020, https://www.questionegiustizia.it/articolo/le-correnti-nella-magistratura-origini-ragioni-ideali-degenerazioni_10-01-2020.php

[9] G. Ferri, *Magistratura e potere politico. La vicenda costituzionale dei mutamenti del sistema elettorale e della composizione del Consiglio superiore della magistratura*, Padua, Cedam, 2005, p. 38.

[10] *La ribellione dei magistrati*, in «Il Corriere della Sera», 14 February 1990.

[11] *Cossiga: è scorretta ogni interferenza sulla riforma del Csm*, in «La Stampa», 15 February 1990.

[12] See *E. Antonucci, I presidenti della Repubblica e le degenerazioni delle correnti nella magistratura: da Pertini a Mattarella (1978-2020)*, in «Storia e Politica», 2021, n. 2, pp. 289-323.

forces on the need to reform institutions after the fall of the Berlin wall and the end of the bipolar world[13].

On 8 June 1990 Cossiga criticised the political activism of the HCJ, defining it as «an uninhibited and tumultuous body of the State»[14], causing the resignation of the MD member Elena Paciotti. A few days later, on 13 June, he rejected with a hard letter the invitation addressed to him by the judicial groups to return to preside over a plenary session. Cossiga refused the invitation, explaining that the HCJ had now become a political body, warning the Council not to syndicate the work of the Head of State and to commit «further illegalities» and harshly criticizing the role assumed by the factions:

> The nature of representation substantially political assumed, even terminologically, by some components of the HCJ and the political character that the Council has come to assume, claiming powers that end up affecting the same jurisdiction, thus implementing a policy of justice through inquiries, investigations, pronouncements of various kinds, do not allow a participation of the President of the Republic even if he was convinced - but he is not - of the legitimacy of these behaviours.[15]

In the letter, Cossiga added that in the face of this «not shared self-expansion of competence and of legal uncertainty about the being and doing of the HCJ», he «could not compromise his position and function as Head of State and supreme impartial body of political-institutional guarantee of the system».

Afterwards Cossiga specified that, in his opinion, the process of politicization of the judicial groups had been determined by the introduction of the proportional system for the election of the members of the HCJ: «Just as it is not true that the habit does not make the monk, the monk is also made by the habit, the electoral law makes the organ and if you make a proportional electoral law, with competing lists and votes of preference, it is logical that political teams are formed»[16].

The clash between Cossiga and the associative judiciary also originated in the further ideological radicalization experienced by some factions, in particular Magistratura Democratica. «MD knew since a long time that the President of the Republic was nothing more than a political opponent, and that he had to be treated as such», one of the leaders of MD, Giovanni Palombarini, would later write[17].

A second moment of conflict between Cossiga and the judiciary took place in November 1990, following the emergence of the "Gladio case", the secret military structure that operated in Italy - under the coordination of NATO and the CIA - after World War II with the aim of resisting a possible communist invasion. The clandestine paramilitary structure was discovered by the investigating judge of Venice, Felice Casson, while he was conducting investigations on the 1972 Peteano massacre. On 24 October 1990, after a conversation with Casson, Prime Minister Giulio Andreotti revealed to the Chamber of Deputies the existence of Gladio. The revelation provoked a harsh political clash between government and opposition. On the one hand, there were those who believed that Gladio was a fully

[13] G. Mammarella and P. Cacace, *Il Quirinale. Storia politica e istituzionale da De Nicola a Napolitano*, Rome-Bari, Laterza 2011, pp. 216 ff.
[14] *Cossiga: faccio quello che devo fare*, in «La Stampa», 9 June 1990.
[15] *Cossiga mette il Csm sott'accusa*, in «La Repubblica», 14 June 1990.
[16] Interview to «Il Giornale», 27 November 1991.
[17] G. Palombarini, op. cit., p. 266.

legitimate structure, especially in relation to the context of the Cold War (a thesis that was later accepted by the Roman magistrates, to whom the dossier on Gladio was sent). On the other hand, there were those, in particular the Communist Party, who maintained that Gladio was illegitimate and had operated in an anti-democratic manner to prevent the rise to power of the PCI[18].

Political tensions increased when, on 8 November 1990, judge Casson delivered to the Quirinale a document in which he announced his willingness to proceed with the hearing of the President of the Republic as a witness on the events related to the massacre of Peteano and Gladio, and consequently asked to know the availability of the President in this regard[19]. Cossiga opposed the request, expressing juridical concerns about judge Casson's initiative, and the government announced the submission of a dispute about the allocation of powers before the Constitutional Court[20]. The strong climate of institutional tension was overcome when judge Casson stated that he had not wanted to cite or summon the President of the Republic but only wanted to ascertain the availability of the President to be heard as a witness[21]. At that point Cossiga denied, in accordance with the government, the willingness to testify and no jurisdictional dispute was submitted before the Constitutional Court[22].

However, this event had further consequences on the institutional level. The Minister of Justice Giuliano Vassalli, in fact, took a critical stand on the controversy between Cossiga and Casson. On 9 November, specifying to speak on his own behalf, Vassalli criticised the initiative of Casson stating to find in it «serious anomalies» of juridical order. The minister's statement led to the harsh reaction of the NAM, which accused the government of wanting to influence the actions of the judiciary. The group of Magistratura Democratica proposed the inclusion on the agenda to the HCJ of a discussion about the Minister's statements. Also in this case, as happened previously with the Craxi case, President Cossiga refused the inclusion of the agenda, stating that it was «likely to configure in itself a real usurpation of power»[23]. The HCJ complied with Cossiga's decision, approving however a document in which the same HCJ was entrusted with a study of the norms of the internal regulations in order to verify if the President of the Republic actually had the power to determine the definition of the agenda (the commission for the regulations would not be able to express an opinion on the matter)[24].

Beyond the personal motivations, what pushed President Cossiga to harshly criticise the work of the HCJ was the conviction that the autonomous governing body of the judiciary had, in the course of the previous decades, expanded its competences beyond the powers provided for by the Constitution. The expansion of the role of the HCJ, in the opinion of the Head of State, appeared to be closely linked to the expansion of the jurisdictional function itself. In this context, Cossiga made many calls

[18] See G. Ferri, *Il Consiglio superiore della magistratura e il suo presidente. La determinazione dell'ordine del giorno delle sedute consiliari nella prassi costituzionale della presidenza Cossiga*, Padua, Cedam, 1995, pp. 86-7.
[19] *Cossiga testimone? Decide il governo*, in «La Stampa», 9 November 1990.
[20] *«Caso Cossiga, decida la Consulta»*, in «La Stampa», 11 November 1990.
[21] *Casson: non ho mai citato Cossiga*, in «La Stampa», 13 November 1990.
[22] *Il Presidente: «Non andrò dai giudici»*, in «La Stampa», 22 November 1990.
[23] *I fulmini del Quirinale sul Csm*, in «Il Corriere della Sera», 22 November 1990.
[24] G. Ferri, *Il Consiglio superiore della magistratura e il suo presidente*, cit., pp. 100-1.

during his presidency in order to respect the fundamental principle of the subjection of the judge to the law[25].

This conviction induced Cossiga to establish in July 1990 a study commission at the Presidency of the Republic, composed of nine jurists and chaired by the former president of the Constitutional Court Livio Paladin. The commission was given the task of analyzing the activities carried out by the HCJ since its birth, in order to ascertain «what tasks and activities the HCJ» had «exercised on the effective level and on the basis of what normative grounds or customs or interpretative or modifying practice, or recourse to acts»[26]. In the idea of the Head of State, the commission would have had to outline a series of proposals for constitutional reform of the HCJ that would then have been up to parliament to discuss.

The study commission chaired by Paladin delivered its final report to President Cossiga in February 1991.

The commission identified the existence of two different conceptions of the role of the HCJ on the basis of constitutional provisions: one qualified the Council as the administrative apex of the judicial order, called upon to exercise exclusively the functions provided for by the Constitution; the other conceived the Higher Council as a body of political representation of the judiciary, legitimated to adopt acts and interventions not provided for by constitutional provisions. The Presidential Commission decided not to express an opinion about the nature of the HCJ, preferring to examine the individual functions attributed to it[27].

The Commission underlined how, in the face of the norms of the law on the judicial system, that were often «ambiguous, disorganized and out of sync», since the 1960s the HCJ had begun a sort of regulatory activity, through the adoption of acts and measures (in particular circulars) not provided for by law, in order to fill the gaps in the judicial system. While considering this activity in principle legitimate and necessary, the commission called on parliament to reform the laws on the HCJ and on the judiciary, with the aim of «clarifying and rationalizing» the scope of the subjects governed by law and those entrusted to the HCJ's regulations and circulars[28].

As for the HCJ, the commission proposed the reduction of the number of members, from thirty to twenty or fifteen, in order to reduce the «politicization» of the body; the redefinition of the powers due to the President of the Republic about the management of the sessions, with the introduction of a mechanism of delegation to a Council member[29]; the entrusting of the disciplinary power to an

[25] See *Insediato il Csm, si discute dei suoi poteri*, in «Il Corriere della Sera», 27 July 1990.
[26] *Cossiga mette il Csm sotto tutela*, in «La Stampa», 27 July 1990.
[27] *Relazione della Commissione presidenziale per lo studio dei problemi concernenti la disciplina e le funzioni del Consiglio Superiore della Magistratura*, Segretariato generale della Presidenza della Repubblica, 1991, pp. 117-119, https://www.csm.it/documents/21768/144530/Relazione+Paladin/a46735f9-5794-4a2e-afa0-3c645c9ea192
[28] Ivi, p. 178
[29] This, the report stated, was also due to the fact that «it has proved materially impossible for the Head of State to actually exercise the presidency of the college, especially since the volume of work carried out by the HCJ has made the same commitment resulting from participation in the sessions of the plenum absorbing or too burdensome» (Ivi, p. 166).

external body to the HCJ, in order to avoid the anomaly of having both administrative and judicial functions coincide in the Council[30].

With regard to the judicial system, the commission suggested that the legislator should specify the scope of the powers of the Minister of Justice and the HCJ, define the criteria to be followed in the conferral of directive positions and extra-judicial functions, and introduce mechanisms to ensure the professional qualification of magistrates. On this last aspect, the commission used very strong words: «It is necessary [...] to repair the current automaticity of the judicial 'career', which in essence has produced the transition from meritocracy to gerontocracy»[31].

The NAM expressed a cautiously positive opinion on the proposals put forward by the presidential commission, but warned against changing the composition of the HCJ and its electoral system. The group of MD saw instead in the proposals of the commission an attempt to «resize the autonomous government of the judiciary»[32].

The contrast between the President of the Republic and the judiciary reached its peak in November 1991, when the Head of State once again opposed the inclusion of certain matters on the agenda of the plenary meeting of the Council. In particular, Cossiga opposed the examination of some issues concerning the interpretation of some norms of the code of criminal procedure, especially concerning the relations between heads and substitutes of public prosecutors' offices, the discussion of which would have implied an «usurpation of power» by the Council[33]. In spite of the communication of the Head of State, however, the HCJ decided to include the topics in the agenda of the session of 20 November. The decision of the HCJ provoked the hard reaction of the Head of State, who sent a missive to the vice-president of the body, Giovanni Galloni. In the letter Cossiga stated that, by formulating an agenda without the knowledge of the president, the Council had «placed itself outside the law» and had «seriously compromised the relations with other bodies of the State»[34]. The President then warned the Council members that he would have considered the plenary session of the Council «null and void» and that he would have exercised his powers to avoid «the consummation of such a serious illegality». Vice-president Galloni (already involved in a clash with Cossiga a few months earlier due to some statements of the latter on the reform of the public prosecutor's office) replied to the Head of State by defending the legitimacy of the decision of the Council[35]. In subsequent replies, the President reiterated that he would have adopted any measure aimed at preventing the Council from discussing the agenda without his consent, even threatening the dissolution of the body or the suspension of the session through the use of public force[36].

[30] Ivi, pp. 135-6.

[31] Ivi, p. 178.

[32] *Csm, la cura prevista: meno potere*, in «Il Corriere della Sera», 8 February 1991.

[33] *Cossiga: il Csm viola la Costituzione*, in «La Stampa», 15 November 1991.

[34] *Cossiga: Csm anti-Costituzione*, in «Il Corriere della Sera», 15 November 1991.

[35] *Cossiga e giudici, a colpi di piccone*, in «La Stampa», 16 November 1991.

[36] *Cossiga: caccerò dall'aula il Csm*, in «La Stampa», 18 November 1991. See R. Canosa, *Storia della magistratura in Italia. Da Piazza Fontana a Mani Pulite*, Milan, Baldini & Castoldi, 1996, pp. 190-1; A. Meniconi, I presidenti e la magistratura, in *I presidenti della Repubblica: il capo dello Stato e il Quirinale nella storia della democrazia italiana*, edited by S. Cassese, G. Galasso and A. Melloni, Bologna, Il Mulino, 2018, p. 1151.

The serious institutional crisis was overcome by the decision of the majority of the Council not to hold the session in question on 20 November. The same day, however, the NAM announced a strike for the day of 3 December 1991 with the aim of defending «the constitutional order, the autonomy and independence of the judiciary, the role that the Constitution assigns to the HCJ and the dignity of Italian magistrates»[37]. At the centre of the protests of the magistrates there was in particular the behaviour held by the Head of State towards the HCJ, so that the initiative was defined the first strike of judges against the Head of State in the history of the Republic[38]. Cossiga commented on the initiative by explaining that he had never threatened the independence of the judiciary and that the «death of the independence of judges» was due to the idea of «a political government of the judiciary»[39]. Later, the Head of State appealed to judges not to join the strike, calling it a «fraud» and an «irresponsible act harmful to the constitutional order»[40]. The appeal of president Cossiga was not followed and on 3 December 1991 the Italian magistrates abstained from work. According to the NAM, at least 80% of magistrates took part in the strike[41].

Cossiga's criticism towards the HCJ was the main reason of the magistrates' strike, but not the only one. The protest of the magistrates was in fact also directed against the government, accused of wanting to undermine the independence of the judiciary.

First of all, the magistrates protested against the establishment of the National Anti-Mafia Directorate (DNA), decided by the government on 15 November 1991, at the proposal of Minister of Justice Claudio Martelli[42]. The structure had been conceived by Minister Martelli and Giovanni Falcone (called by Martelli to direct the General Directorate of Criminal Affairs of the Ministry) in the context of strengthening the fight against organized crime. Based at the General Prosecutor's Office of the Court of Cassation, the DNA - which still exists today - is composed of a national anti-mafia prosecutor (appointed by the HJC in agreement with the minister of Justice) and twenty deputy prosecutors. The DNA has the task of giving impetus and coordinating at national level the activities carried out by the district anti-mafia directorates, spread on all the Italian territory within the 26 courts of appeal[43].

The judiciary strongly opposed the institution of the DNA, seen as an attempt by politics to centralize and hierarchize the structure of the public prosecutor, limiting the degree of autonomy and independence[44]. The establishment of the DNA was first decided by a legislative decree approved by the government on 25 October 1991. The measure gave the national anti-Mafia prosecutor a power of hierarchical supervision over the district directorates, including the power to intervene directly in investigations or to take them over in the event of incompetence or inertia on the part of the peripheral

[37] *La rivolta dei magistrati*, in «La Stampa», 21 November 1991.
[38] *Una bomba nel palazzo*, in «La Stampa», 21 November 1991.
[39] *Cossiga: la mia forza è solitudine*, in «Il Corriere della Sera», 21 November 1991.
[40] *Cossiga ai giudici: non scioperate*, in «La Stampa», 1 December 1991.
[41] *«Il Presidente non è riuscito a bloccarci»*, in «La Stampa», 4 December 1991.
[42] See *Superprocura per decreto e «assicurata»*, in «Il Corriere della Sera», 16 November 1991.
[43] See L. Pomodoro and D. Pretti, op. cit., pp. 245-8.
[44] *L'Associazione magistrati: con la Superprocura si vuole lottizzare anche il pubblico ministero*, in «Il Corriere della Sera», 13 October 1991.

offices. It also established that the DNA should act in accordance with the anti-crime guidelines drawn up by the government and approved by parliament[45].

In the following hours, the measure was harshly criticised by the associative judiciary. The NAM accused the government of wanting to subject the public prosecutor to political power[46]. Some members of the judiciary used very strong words against the executive's project. The former president of the NAM, Raffaele Bertoni, for example, said that the anti-mafia super-prosecutor's office would be in the judiciary «what the cupola is in the mafia»[47]. The same Bertoni, moreover, called for the resignation of Minister Martelli: «There is an evident incompatibility between the Italian Constitution and Minister Martelli. The Constitution can also be changed, but until it changes, Minister Martelli must change!»[48]. Later, in order to speed up the process of approval of the measure and to meet the criticism coming from the judiciary, the government decided to withdraw the legislative decree and to establish the DNA through a decree-law, approved on 15 November 1991 (d.l. n. 367). The new text eliminated the hierarchical powers of the National Anti-Mafia Prosecutor, limited his power of assumption and no longer provided for the link between the DNA and the directions indicated by the government and parliament. Despite these changes, however, the associative judiciary continued to strongly criticise the institution of the DNA, considering it an attempt to hierarchize the office of the prosecutor in order to subject it to the executive. This prompted the NAM to justify the strike of 3 December 1991 also with reference to the institution of the DNA[49].

Subsequently, the concerns about a limitation on the independence of the judiciary led the commission for management appointments to reject Falcone's nomination as DNA's chief prosecutor, as he was considered too close to political power, and to initially prefer Agostino Cordova[50]. The nomination procedure by the HCJ was not concluded because of the Capaci massacre. After the killing of Falcone, members of the government asked the HCJ to reopen the terms of presentation of the candidatures for the nomination to super-prosecutor, in order to allow Paolo Borsellino to apply for it, but the Council rejected the proposal[51]. After the assassination of Borsellino on 20 July 1992, the appointment of the super-prosecutor experienced a new delay, ending in October 1992 with the appointment of Bruno Siclari, general prosecutor in Palermo[52].

The strike of 3 December 1991 was motivated by the magistrates also in relation to the behaviour adopted by Minister Martelli in the procedures for the conferral of management positions. Article 11, paragraph 3 of Law n. 195/1958 provided - and still provides - that on the conferral of management positions the Council deliberates on the proposal, formulated in agreement with the Minister, of a commission formed by six of its members, four of which are elected by the magistrates and two elected by the Parliament. Over time, however, at the HCJ a different routine had been affirmed: the

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[45] G. Di Federico, *Il pubblico ministero italiano in prospettiva comparata*, October 2019, p. 11, footnote n. 18, https://buponline.com/az13zg/uploads/lettura-di-approfondimento-1.pdf. See *Superprocura, giudici in rivolta*, in «La Stampa», 26 October 1991; *Il governo vara l'armata antimafia*, in «Il Corriere della Sera», 26 October 1991.

[46] *Antimafia, i giudici processano Martelli*, in «La Stampa», 27 October 1991.

[47] *«Superprocura quasi golpe»*, in «Il Corriere della Sera», 27 October 1991.

[48] *Antimafia, i giudici processano Martelli*, in «La Stampa», 27 October 1991.

[49] *Magistrati in sciopero contro Cossiga e il ministro*, in «La Repubblica», 29 November 1991.

[50] See *Braccio di ferro per la superprocura*, in «La Stampa», 26 February 1992.

[51] See *Csm, no a Borsellino. Martelli: è battaglia*, in «La Stampa», 2 June 1992.

[52] *Veleni al Csm per la nomina di Siclari*, in «Il Corriere della Sera», 31 October 1992.

competent commission submitted to the plenary assembly the list of candidates with its own evaluations, in order to obtain a first informal assent; then the same commission turned to the minister in order to reach an agreement, and then returned to the Council for the adoption of the resolution[53]. In 1991, Minister Martelli contested this procedure, arguing that it did not allow the government to effectively participate in the formation of the proposal, as required by law, since the consultation with the minister was requested only after the assembly had given its initial assent to the appointment, in clear contrast to the law[54]. Martelli's stance led the HCJ to change its regulation, providing for the request of the consultation before the deliberation of the plenary assembly[55]. The HCJ, however, decided to apply the new rules only for future cases and not for appointments in progress. The difference of opinion turned into a clash when the minister refused to give course to the appointment of the president of the court of appeal of Palermo deliberated by the HCJ. The HCJ decided to propose a conflict before the Constitutional Court, which adopted the ruling n. 379/1992. The Court, on the one hand, established that the consultation had to be necessarily inspired by the principle of loyal collaboration, since it was «an essential and necessary element of the procedure for conferring management positions to magistrates». For the Court, the consultation could neither be limited to a non-binding opinion, nor substantiate an agreement between the two bodies, but had to consist in a concerted activity, or in a constructive discussion, fair and objectively aimed at the formulation of a common proposal. On the other hand, however, the Constitutional Court stated that, in case serious and insuperable disagreements remain over the name of the proposed magistrate following consultation with the minister, it is up to the HCJ to deliberate on the appointment to be made[56].

With the election of Oscar Luigi Scalfaro as President of the Republic on 28 May 1992, the relations between the HCJ and the Quirinale returned to be characterised by a relaxed atmosphere. The Scalfaro presidency was characterised, in fact, by a climate of "appeasement" between the Quirinale and the HCJ and by the constant work of the Head of State in defense of the autonomy and independence of the judiciary[57]. The past as a magistrate of the President of the Republic contributed to the affirmation of this collaborative climate. Scalfaro, indeed, affirmed several times that he never wanted to give up the toga he wore in 1942[58].

The "Clean Hands" inquiry

The "Clean Hands" investigation began on 17 February 1992, with the arrest of Mario Chiesa, an exponent of the Milanese socialist party, at the request of the public prosecutor Antonio Di Pietro. In the following weeks the investigation expanded after Chiesa began to collaborate with the judiciary,

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[53] C. Salazar, *Il Consiglio superiore della magistratura e gli altri poteri dello Stato: un'indagine attraverso la giurisprudenza costituzionale*, in «Forum di quaderni costituzionali», 2007, p. 36, https://www.forumcostituzionale.it/wordpress/images/stories/pdf/documenti_forum/paper/0010_salazar.pdf; F. Dal Canto, *Lezioni di ordinamento giudiziario*, Turin, Giappichelli, 2018, p. 134.

[54] See N. Zanon and F. Biondi, *Il sistema costituzionale della magistratura*, Bologna, Zanichelli, 2014, p. 59.

[55] See «Notiziario Csm», 1992, n. 1, n. 6 and n. 7.

[56] F. Dal Canto, *Lezioni di ordinamento giudiziario*, cit., pp. 134-5; N. Zanon and F. Biondi, *Il sistema costituzionale della magistratura*, pp. 59-60.

[57] Constitutional Court, ruling n. 279 of 1992. See A. Meniconi, *I presidenti e la magistratura*, cit., pp. 1152-5.

[58] G. Di Federico, *Da Saragat a Napolitano. Il difficile rapporto tra Presidente della Repubblica e Consiglio superiore della magistratura*, Milan-Udine, Mimesis, 2016, p. 58.

revealing the existence of a system of illegal party financing in favour of almost all Italian parties and corruption[59]. When the extent of the investigation emerged, the head of the Milan Public Prosecutor's Office, Francesco Saverio Borrelli decided to set up a specialized pool composed of several magistrates, including, in addition to Di Pietro, Gherardo Colombo and Piercamillo Davigo, and coordinated by Deputy Prosecutor Gerardo D'Ambrosio.

In the following months, the investigation expanded to other prosecutors' offices in Italy and ended up involving thousands of people including ministers, party secretaries, parliamentarians, local politicians, industrialists, entrepreneurs and public officials[60]. In all, according to unofficial journalistic estimations, there were more than 25,000 notices of investigation and about 4,500 arrests[61]. The judiciary indicted the leaders of the main parties of the First Republic, such as Andreotti, Forlani, Craxi, La Malfa, Longo and Altissimo, with the wide support of the media and public opinion. The anger of the public opinion culminated on 30 April 1993 with the throwing of coins against Bettino Craxi in front of the Hotel Raphael in Rome, a few hours after the Chamber of Deputies denied four authorizations to proceed, out of six total, against him.

The Clean Hands inquiry could not have been born without the profound changes - examined above - experienced by the judiciary in the preceding decades, especially the remarkable strengthening of the autonomy and independence of magistrates, both in relation to political power and within the judicial offices[62].

Another important factor for the birth of the investigation was represented by the innovations introduced by the new code of criminal procedure. In June 1993, in an intervention published in the «MicroMega» journal, the Milanese prosecutors Di Pietro, Colombo and Davigo stressed how the new code had «significantly influenced» the progression of the Clean Hands inquiry, making «the investigation of the public prosecutor more agile», cancelling the figure of the investigating judge and thus «concentrating investigative powers in a single body», and allowing «more covered investigations in the first six months in which a person is investigated»: «All this has given a greater possibility of movement to the public prosecution»[63]. As Di Pietro later pointed out, particularly significant was the attribution to the public prosecutor of the power to direct the judicial police: «The new code of criminal procedure, approved on 24 October 1989, began to produce its concrete effects precisely between '90 and '91 by modifying the role of the prosecutor. Before, the public prosecutor

[59] See R. Canosa, *Storia della magistratura in Italia*, cit., pp- 203-211;; G. Colombo, Lettera a un figlio su Mani pulite, Milan, Garzanti, 2015; M. Feltri, Novantatré. L'anno del terrore di Mani pulite, Venice, Marsilio, 2016; G. Benedetto, *L'eutanasia della democrazia. Il colpo di Mani pulite,* Soveria Mannelli, Rubbettino, 2021; G. Buccini, Il tempo delle mani pulite, 1992-1994, Roma-Bari, Laterza, 2021; I. Pellicciari, *Quale dimensione internazionale di Mani pulite*, in *Mani pulite, Governo dei giudici, pensiero unico: 1992-2022*, edited by A. Bernasconi, Milan, Luni editrice, 2022, pp. 17-46.

[60] L. Chiara, Politica e magistratura negli anni della Seconda Repubblica: profili storici, in *Processo e legge penale nella Seconda Repubblica. Riflessioni sulla giustizia da Tangentopoli alla fine del berlusconismo*, edited by A. Apollonio, Rome, Carocci, 2015, pp. 26-7.

[61] *Mani pulite 25 anni dopo: i volti, i fatti, i numeri*, in «Rainews.it», http://www.rainews.it/dl/rainews/media/Tangentopoli-Mani-Pulite-25-anni-dopo-volti-fatti-numeri-b8f11d5c-4726-4355-8311-85c28b7c4620.html

[62] See C. Guarnieri, *Magistratura e politica: il caso italiano*, in «Rivista italiana di scienza politica», 1991, XXI, n. 1, p. 12; C. Guarnieri, *Mani pulite: le radici e le conseguenze*, in «Il Mulino», March-April 2002, p. 223.

[63] G. Colombo, P. Davigo, A. Di Pietro, *Noi obbediamo alla legge, non alla piazza*, in «MicroMega», 5/1993, p. 8.

was the notary who controlled the activity of the police, while now he is the head of the judicial police and directly coordinates the investigative work»[64]. The innovation introduced by the new code was also important because it allowed the judicial police to answer only to the prosecutor and no longer depend functionally on the government apparatus. This factor was also emphasized by Di Pietro: «Under the previous legislation, a chief of the police squad, a captain of the operations department or of the tax police answered to the Ministry of the Interior, the Ministry of Defense and the Ministry of Finance, and it was difficult for them to carry out investigations on the same principals who had to provide them with the means, personnel and structures to do so»[65]. Even the assistant prosecutor of the Milan public prosecutor's office, Gerardo D'Ambrosio, later emphasized the importance of the innovations introduced by the new code of criminal procedure for the birth of the Clean Hands investigation, in particular the creation of the public prosecutor's office and the transformation of the notice of guarantee (to be notified to the suspect at the beginning of the investigation) into information of guarantee (to be notified to the suspect only at the moment in which it is necessary to carry out an act for which the participation of the lawyer is required)[66].

Moreover, as mentioned in the previous chapter, between January and June 1992 some rulings of the Constitutional Court had further increased the weight of preliminary investigations in criminal proceedings[67]. In particular, in June 1992, the Constitutional Court, accepting the resistance of the ordinary judiciary, established the constitutional illegitimacy of the norms contained in the new code of criminal procedure which provided for the exclusion as evidence, in trial, of the statements made by witnesses during investigations to the public prosecutor and the judicial police. By virtue of these rulings, the judge became free to base his decisions also on these statements, although denied or retracted in the hearing by the witness[68]. In this way, the Court restored some principles of the previous inquisitorial system and reinforced the tendency of prosecutors to collect statements from witnesses of corruption cases during the investigation phase, often characterised by the use of pre-trial detention in prison.

As pointed out in the conclusion of the previous chapter, moreover, the organisation of the prosecutor's offices was now characterised by an extreme personalization of the prosecutorial function, that is, by the absence of effective hierarchical powers of the heads of the offices and by the profound autonomy of the substitutes in conducting investigations. This structure, already consolidated in 1986 by the HCJ with its own decision, was further confirmed by a resolution approved by the HCJ on 25 March 1993, which recognised full autonomy of action to the individual prosecutor not only in the hearing but also in the preliminary investigation phase[69]. Each substitute prosecutor could therefore enjoy absolute autonomy in the conduct of investigations, so much so that

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[64] *Antonio Di Pietro. Intervista su Tangentopoli*, edited by G. Valentini, Rome-Bari, Laterza, 2000, p. 19.

[65] A. Di Pietro with M. Zapparoli Funari, *Politici. Da Craxi a Berlusconi, da Bossi a Fini, da Prodi a Grillo a Monti, quattordici ritratti insoliti*, Milan, Ponte alle Grazie, 2012, p. 24.

[66] G. D'Ambrosio, *Il Belpaese. L'Italia che ho vissuto raccontata agli italiani che verranno*, Milan, Carte Scoperte, 2011, pp. 97 and 101.

[67] R. Orlandi, Diritti individuali e processo penale nell'Italia repubblicana, in *Diritti individuali e processo penale nell'Italia repubblicana. Materiali dell'incontro di studio, Ferrara, 12-13 November 2010*, edited by D. Negri and M. Pifferi, Milan, Giuffrè, 2011, p. 75.

[68] See V. Grevi, *La lotta alla mafia cambierà i processi*, in «Il Corriere della Sera», 7 June 1992.

[69] *Quesito proposto dal Procuratore della Repubblica presso la Pretura di Torino*, in «Notiziario Csm», 1993, n. 3., pp. 23-31.

during the period of Clean Hands some chief prosecutors, such as that of Rome, clearly admitted that they were not aware of the investigations carried out by their own deputies[70].

Along with institutional, organisational and procedural factors, another important factor that favoured the birth of the Clean Hands investigation was the particular ideological approach developed by the judiciary towards political power.

The Clean Hands investigation began in a context characterised, as examined above, by a deep conflict between the judiciary and politics. The presentations of proposal of reform of the HCJ and of the judicial system, the behaviour of President Cossiga, the establishment of the National Anti-Mafia Directorate and the clash between Minister Martelli and the HCJ over the conferral of management positions: these episodes were interpreted by the judiciary as a sign of the political class's desire to limit the independence of the judiciary[71].

Further tensions between politics and judiciary were recorded in December 1992, when in the Parliamentary Commission for Institutional Reforms (known as the De Mita-Iotti Commission) was approved an amendment in favour of the separation of careers between judges and prosecutors and the abolition of automatic career progression of magistrates[72]. The decision was strongly criticised by the NAM and considered the latest attempt to place the public prosecutor under the control of political power[73]. The proposal, also criticised by president Scalfaro[74], was later set aside by the parliamentary commission, which would exclude any intervention on the judiciary in its final constitutional revision project[75].

Moreover, in the period prior to Clean Hands, within the judiciary became even more popular the idea that it was up to the magistrates to respond to the demands for change coming from the citizens and to solve the ills of a political-institutional system that was believed to be in crisis, due above all to the role of the parties. In this context should be placed the harsh attack that the president of the NAM, Raffaele Bertoni, advanced on 26 November 1990 against «the partitocracy that governs our country»[76]. The president of the magistrates' association explained that the financial allocations foreseen for the judicial system had grown in a «derisory» way: «Much more has been done to finance actions of various kinds, that is, in substance, to finance in a surreptitious and hidden way, and in illegal forms, those leeches of national resources that are the political parties, the tentacles of that real octopus into which they have turned». Faced with a situation of this kind, for the president of the NAM it appeared of fundamental importance to contrast the crimes committed by political figures:

[70] See E. Scalfari, *Un imputato molto eccellente*, in «La Repubblica», 31 October 1993, in which the words of the then chief prosecutor of Rome, Vittorio Mele, about the initiative of a magistrate in his office are cited: «In short, I do not know and I am not required to know. The substitute prosecutors are fully autonomous in their work. There are circulars from the HCJ about this».

[71] On this see the programs presented by the associative groups for the March 1992 NAM's executive board elections, published in «La Magistratura», 1992, n. 1.

[72] *Carriere distinte per pm e giudicante*, in «La Stampa», 4 December 1992.

[73] See C. Castelli, *Una commissione per la restaurazione*, in «La Magistratura», 1992, n. 4, 1.

[74] See *Scalfaro: la magistratura non si tocca*, in «La Stampa», 24 December 1992.

[75] The draft constitutional revision was never debated by parliament due to the early conclusion of the legislature.

[76] *I giudici all'attacco dei partiti*, in «La Stampa», 27 November 1990.

> The return to the law must be our watchword since illegality is increasingly spreading in the country. There is mafia crime and everyday crime; but at the same time the practice of abusing power, dissipating and misappropriating public money is rampant. And there is no sentence of condemnation of public administrators that does not make their party friends cry scandal. Evidently there is someone who not only wants to manage the public thing as a private affair, but who even claims to do so with a license of impunity. Prison must also be reserved for thieves in palace.[77]

This new conception of the role of the judiciary was confirmed by the deliberation approved by the NAM at the end of the congress of Vasto in June 1991, which stated: «In Italian society there is strong alarm about the growth of organized crime and corruption in political and administrative life. It is necessary to know how to give a realistic and effective response»[78]. On the basis of this assumption, the NAM proposed decriminalization measures so as to concentrate the available resources in the prosecution of the most serious crimes.

In other words, as noted later by a former magistrate, in that period «the judiciary felt invested with a function that went well beyond the verification of individual responsibility». In the Seventies and Eighties the magistrates felt entrusted with the mission of freeing Italy from terrorists, «in the Nineties and later, from the corrupt»[79]. Precisely for these reasons, after all, the initiative of the magistrates was called "Clean Hands" by the media[80].

It was not by chance, as D'Ambrosio recalled, that the birth of Clean Hands investigation was anticipated by the establishment within the Milan public prosecutor's office of a specialized section for the fight against corruption, composed of expert magistrates, as had happened during the period of the fight against terrorism[81]. The prosecutor's office, according to D'Ambrosio, «had the ability to understand that the time had come to try to put a brake on what had become a habit»[82].

In addition, the same magistrates involved in the inquiry on several occasions made explicit reference to the necessary «renewal» of the ruling class on an ethical and moral level[83]. The chief prosecutor of Milan, Francesco Saverio Borrelli, came to define the investigation as an «action of cleaning and purification of public administration»[84], while judge Italo Ghitti, as early as April 1992, in the initial phase of the investigation, declared: «Our objective is not represented by individuals, but by a system that we are trying to clean up»[85]. Also the general prosecutor of Milan, Giulio Catelani, went so far as to define the investigation as «a legal, wise revolution»[86] and even a «war»[87]. Together with the new code of criminal procedure, therefore, a crucial role in the story was played by the particular

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[77] Ibidem.

[78] *Documento conclusivo del XXI Congresso dell'Anm*, in «La Magistratura», 1991, n. 1, p. 29.

[79] *L. Violante, Tangentopoli: giudici contro?*, in «Il Politico», 2019, n. 2, p. 172.

[80] See D. Nelken, Il significato di Tangentopoli: la risposta giudiziaria alla corruzione e i suoi limiti, in *Storia d'Italia, Annali, 14: Legge, diritto, giustizia*, edited by L. Violante, Turin, Einaudi, 1998, p. 601.

[81] G. D'Ambrosio, op. cit., p. 103.

[82] Ibidem.

[83] See *«Da Milano colpi alla piovra»*, in «La Stampa», 21 July 1992; *«Questo Parlamento è quello che è»*, in «L'Unità», 1 May 1993; *«Vogliono frenare il rinnovamento»*, in «La Stampa», 29 May 1993.

[84] *«Da Milano colpi alla piovra»*, in «La Stampa», 21 July 1992.

[85] *La geografia del malaffare*, in «Il Corriere della Sera», 4 April 1992.

[86] *«La valanga tangenti non è finita»*, in «La Repubblica», 8 May 1993.

[87] *Il giudice Catelani: la guerra è in corso. No a leggi-condono*, in «Il Corriere della Sera», 19 June 1993.

interventionist ideology of the judiciary, which drew its origins from the committed praetors of the 1970s[88].

The progress of the Clean Hands investigation was influenced by and, in turn, profoundly affected the development of the Italian political system and the judiciary itself. The inquiry took place in a context characterised by a process of severe weakening and delegitimization of the party system, already evident in the 1980s and accelerated by the collapse of the Berlin Wall in 1989 and the end of the bipolar world[89]. The crisis of the party system was closely linked to the situation of growing difficulty of the Italian economy and the inability of politics to meet the stringent commitments arising from European integration[90]. The process of delegitimization of the political system, which clearly emerged on the occasion of the political elections of 1992, was further aggravated by the offensive launched by the Sicilian Mafia against the State in the following months, with the killing of Giovanni Falcone on 23 May 1992 and the assassination of Paolo Borsellino on 19 July 1992.

In May 1992, in an interview with «L'Espresso», prosecutor Borrelli himself stressed how the Clean hands investigation had «grown thanks to a new climate, perhaps due in part to the electoral situation, perhaps also to the pickaxes that, in various ways, hit the party system», but «above all to the feeling of tiredness, if not nausea, that has spread through the community in the face of the systematic and predatory occupation of certain public sectors by political circles»[91]. In another statement, adjunct prosecutor Gerardo D'Ambrosio identified the results of the April 1992 elections as one of the reasons for the acceleration of the Clean Hands investigation:

> After the elections, when we realized that the four governing parties would not achieve a majority in Parliament, we sensed that it was time to accelerate the investigation: the entrepreneurs would have felt uncovered, without protection, and would have collaborated in the investigation. The intuition was excellent. We had formidable support from the media, and the queue of entrepreneurs who wanted to talk began to form. Clean Hands suddenly experienced its magic moment.[92]

In another memoir, Piercamillo Davigo highlighted the importance of economic factors for the emergence of the investigation, and in particular the budgetary constraints introduced with the signing of the Maastricht Treaty:

> After 1992 there was [...] an overall weakening of the illegal system and its ability to maintain adequate control in terms of profit distribution and protection from criminal investigation. In addition (and this is a deep conviction of mine) there had objectively reached a sort of ceiling in the dissipation of resources: the constraints on public spending, established by international agreements, no longer allowed for the continuation of the previous trend. As a tightening of public finance intervened, bribes went to corporate budgets and no longer to the public administration. This created very strong denial

[88] F. Colao, *Giustizia e politica. Il processo penale nell'Italia repubblicana*, Milan, Giuffrè, 2013, p. 351.

[89] S. Colarizi, *Storia politica della Repubblica. Partiti, movimenti e istituzioni. 1943-2006*, Rome-Bari, Laterza, 2007, pp. 182 ff.; G. Orsina, *Genealogy of a Populist Uprising. Italy, 1979-2019*, in «The International Spectator», 2019, 54(2), pp. 50-66.

[90] L. Cafagna, *La grande slavina. L'Italia verso la crisi della democrazia*, Venice, Marsilio, 1993; L. Chiara, op. cit., p. 27; G. Orsina, *Genealogy of a Populist Uprising*, cit., p. 53.

[91] *Non esistono intoccabili*, in «L'Espresso», 10 May 1992, p. 15.

[92] B. Vespa, *Storia d'Italia da Mussolini a Berlusconi*, Milan, Mondadori/Rai Eri, 2004, p. 329.

> mechanisms on the part of business operators in various sectors. Bribes now strangled those who paid them.[93]

The judicial initiative contributed to the definitive collapse of the political system. The investigations of the judiciary, supported by wide media coverage and public enthusiasm, determined the disappearance from the public scene of the main traditional parties (DC, PSI, liberals, republicans, social democrats) and the main political protagonists of the First Republic. The investigation touched only marginally the PDS and contributed to the success of new parties such as the Northern League. From the judicial scandal came a message of delegitimization not of individual politicians, but of the entire political system[94]. From this profound delegitimization derived the success in the 1994 elections of Silvio Berlusconi and his Forza Italia.

Faced with the crisis of the party system, the judiciary assumed a central role on the political-institutional level. The growth of the judiciary's political role was immediately evident, particularly around the issue of the so-called "political solution" to "Bribesville".

A few months after the beginning of the investigation, it became clear how widespread the system of illicit financing of parties was and how it represented a structural phenomenon of degeneration of the Italian political system, closely linked to the existence of a blocked democracy without alternation[95]. It soon became clear how difficult it was for the Italian judicial system to handle such a high number of criminal proceedings involving illicit party financing. As a consequence, in the political debate, but also within the judiciary itself, it emerged the idea that it was necessary on the one hand to relieve the judiciary of such a high number of proceedings, centred on a substantially political crime (introduced in 1974 but widely violated), allowing it to pursue more efficiently the most serious crimes such as corruption, and on the other hand to safeguard the institutional system of the country from the risk of a systemic collapse[96].

Some political figures thus began to advance the idea of decriminalizing the crime of illicit party financing. On this matter there was a significant precedent. Three years earlier, in fact, on 12 April 1990, a decree of the president of the Republic had granted amnesty for certain crimes committed up to 24 October 1989, the date on which the new code of criminal procedure came into force, including illegal financing of political parties. This, in addition, was one of the reasons why the Clean Hands inquiry affected the PCI/PDS only in an incidental way: due to the amnesty, all cases of illicit

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[93] P. Davigo, *La giubba del re: intervista sulla corruzione*, edited by D. Pinardi, Rome, Laterza, 2004 (second edition), pp. 48-9.

[94] The corruption investigations were accompanied in 1993 by the opening of a series of criminal proceedings against former Prime Minister Giulio Andreotti, who was accused of mafia association. The trials lasted several years; in the end Andreotti emerged unscathed, amid acquittals and the passing of the statute of limitation. See S. Colarizi, *Storia politica della Repubblica*, cit., p. 199.

[95] G. Bedeschi, *La prima Repubblica (1946-1993)*, Soveria Mannelli, Rubbettino, 2013, kindle edition, chapter 8, section 4, Il crollo della «prima Repubblica».

[96] See *Noi, spiati e pedinati. Colloquio con Francesco Saverio Borrelli*, in «L'Espresso», 6 September 1992; G. M. Flick, *Lettera a un procuratore della Repubblica. Con la risposta di Francesco Saverio Borrelli*, Milan, Il Sole 24 Ore, 1993, pp. 102-103.

financing to the PCI from the USSR before the fall of the Berlin Wall could not be investigated in 1992[97].

At the end of a debate within the governing parties, on 5 March 1993 the Amato government approved a decree - the so-called Conso decree, from the name of the then Minister of Justice Giovanni Conso - which decriminalized the crime of illicit financing of parties. The decree foresaw the transformation of the crime into an administrative offence, the restitution to the State by the guilty party of a sum equal to three times the amount illegally received, and disqualification from public office for three to five years. The measure provided for retroactive application and was therefore also valid for ongoing proceedings[98].

The measure was immediately met with heavy criticism. The media and opposition parties harshly criticised the measure, defining it as a «clean slate»[99]. The NAM attacked «the attempt to reduce the judiciary to a controller of legality only towards citizens who do not hold positions of power» and defined «justified the fear that the decriminalization decree marks the substantial impunity for the past, and encourages the violation of the law for the future»[100].

On 7 March, in an unprecedented way, even the Milanese pool took a position. The chief prosecutor Francesco Saverio Borrelli read in front of cameras and journalists a statement prepared by the group in which it was stated that the measure would end up frustrating all the work of the judiciary:

> We do not allow [...] anyone to present as we requested, wanted or approved the initiatives in question. Government and Parliament are sovereign in the determinations of their competence, but we hope that each one assumes in front of the Italian people the political and moral responsibilities of their choices, without shielding our work or our opinions. As far as our opinions may be of interest, they are of a nature, scope and meaning exactly opposite to the meaning of the measures adopted. We believe, in fact, that the foreseeable result of the approved legislative changes will be the total paralysis of investigations and the impossibility of ascertaining the facts and the responsibility of those who committed them.[101]

For the first time in history, therefore, the magistrates of a public prosecutor's office publicly opposed a decree passed by the government, asking in essence that it should be withdrawn[102]. And this happened. The protests of public opinion and the judiciary, fed by the information system, induced the president of the Republic Oscar Luigi Scalfaro not to sign the decree, arguing that this could have prevented the referendum against the law on public funding for parties that would be held 18 April of that year[103].

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[97] See E. Bruti Liberati, *Magistratura e società nell'Italia repubblicana*, cit., chapter V, section 10, Due pesi e due misure.

[98] See *La mazzetta verrà restituita tre volte*, in «La Stampa», 6 March 1993.

[99] See «La Stampa», 6 March 1993; «Il Corriere della Sera», 6 March 1993.

[100] *Sulla depenalizzazione del finanziamento ai partiti*, in «La Magistratura», 1993, n. 1, p. 24.

[101] *Il comunicato della procura di Milano*, ivi, p. 23. See P. Davigo, *L'occasione mancata. Mani pulite trent'anni dopo*, Bari-Rome, Laterza, 2021, pp. 57-8.

[102] M. De Pizzo, *La trattativa fallita. Il decreto Conso e il crollo delle due repubbliche*, Formiche, Editore Base per altezza, 2012, e-book, position 995.

[103] Scalfaro justified his decision on the grounds of the «objective impossibility» that the decree would be converted into law by the parliament before the date of the referendum, «dealing with delicate, complex and controversial subject matter and also taking into account the significant commitments already foreseen by the calendars of the work of the two

Minister Conso's clarifications were in vain: «Decriminalization does not mean a clean state, but entrusting the assessment of a series of offences to the administrative authority, with the possibility for the person concerned to appeal before a civil judge»[104]. The minister explained that the intervention made «even more serious» the position of those who were called to answer only for the violation of the law on the financing of parties: «Instead of a penalty applicable only at the end of a long trial, with the risk the crime passes the statute of limitations, and therefore destined to end in nothing, there is an administrative penalty equal to three times the sum received, applicable in a very short time. With the addition of other automatic sanctions that effectively remove those responsible from all public and private offices».

The subsequent facts would have proved Minister Conso to be right. According to unofficial estimates, in fact, about 40% of the proceedings resulting from the Clean Hands investigation ended up failing due to the expiry of the time limit specified under the statute of limitations[105]. The decriminalization of the crime of illicit financing of parties would therefore have helped the judicial system to prosecute more effectively the most serious crimes against the public administration, such as bribery and corruption.

The Clean Hands scandal also contributed to the emergence of a new type of relationship between the judiciary and the mass media. The media, in particular television (both public and private, especially Mediaset, owned by Berlusconi) and newspapers emphasized the activism of the magistrates and gave ample space to judicial initiatives[106]. Through the constant attention paid by the media to the investigation, the action of the judiciary received widespread popular support and magistrates appeared as «a sort of champion of collective morality to achieve a great work of clean-up of the entire political class»[107]. A climate of collective indignation and anticipated blaming of the suspects developed around the investigation, which often took the form of a media-judicial pillory[108].

In this context, there occurred an overturning of the function of the notice of prosecution: introduced by the new code of criminal procedure as an institution aimed at strengthening the guarantees of persons subject to investigation, it was transformed by the media into an early verdict of guilt, which forced the persons concerned to abandon any task even before the accusations against him were evaluated in court[109]. In this way, the preliminary investigation phase, rather than constituting a preparatory phase of the trial, ended up becoming the central phase of the criminal proceedings,

Chambers». See *Tangentopoli, Scalfaro blocca il condono*, in «La Stampa», 8 March 1993; S. Colarizi, *Storia politica della Repubblica*, cit., p. 198. On the debate within the NAM see «La Magistratura», 1993, n. 1, pp. 17 ff.

[104] *«Giudici liberi di indagare»*, in «La Stampa», 7 March 1993.

[105] Another 40% ended with convictions and 20% with acquittals. See *Da Mani pulite a Mani sbiadite. L'onestà è ancora un protocollo*, in «Il Corriere della Sera», 15 February 2012.

[106] E. Bruti Liberati, *Magistratura e società nell'Italia repubblicana*, cit., kindle edition, chapter V, section 5, Il ruolo dei media e il protagonismo dei magistrati.

[107] A. Giovagnoli, *La Repubblica degli italiani. 1946-2016*, Rome-Bari, Laterza, 2016, kindle edition, position 5384.

[108] S. Colarizi, *Storia politica della Repubblica*, cit., p. 197; L. Violante, *Tangentopoli*, cit., pp. 168-9.

[109] C. Guarnieri, *The judiciary in the Italian political crisis*, in «West European Politics», 1997, 20(1), p. 168; F. Colao, op. cit., pp. 347-51.

capable of determining disruptive consequences on the community, on individuals and on the political sphere well before the trial or the preliminary hearing[110].

For example, the spread in June 1992 of rumors, later denied, on a possible involvement of Craxi in the investigation induced the socialist secretary to take a step back in the negotiations for the formation of the new government[111]. On 11 February 1993 unfounded rumors - later denied by the Milan public prosecutor's office - about the involvement in the Clean Hands investigation of the then Prime Minister, Giuliano Amato, led to a stock market crash. On 5 July 1993 the Milan public prosecutor, Francesco Saverio Borrelli, in order to avoid a stock market crash was forced to formally deny the rumors that the then president of IRI, Romano Prodi, was under investigation.

On 1 April 1993 even the Head of State, Oscar Luigi Scalfaro, in an intervention at the plenary assembly of the HCJ, highlighted the change undergone by the notice of prosecution, «born as protection of the addressee», which however «has suffered a serious distraction». This, in the opinion of the Head of State, was also confirmed by the linguistic expression frequently used: «Reached by the notice of prosecution». «Reached is a verb that tends to be aggressive», Scalfaro affirmed, also inviting magistrates to be careful of the «spotlight» of the media[112].

In this context, the case of Enzo Carra, spokesman for the DC secretary, Arnaldo Forlani, caused much discussion. Arrested on 4 March 1993, Carra was taken to the courtroom of the Milan tribunal in chains and handcuffs and placed inside a defendant's cage. The next day the photographs of Carra were published in all the major newspapers, despite the fact that they were clearly damaging to his dignity[113].

The assumption by the judiciary of a function of moralization of the institutions of the country led the same magistrates to an excessive use of the means provided by the criminal procedure. The Clean Hands pool was accused of making excessive recourse to pre-trial detention even in the absence of precautionary needs, with the aim of inducing suspects to cooperate with justice and reveal the names of accomplices of crime[114]. Even if the Milanese prosecutors always rejected the accusations of abusing of pre-trial detention, it is equally true that the same members of the Milan prosecutor's office admitted on several occasions to using imprisonment to obtain the cooperation of suspects. As early as November 1992, prosecutor Borrelli stated that pre-trial detention was used «when we are certain of the responsibility of the person and we have good reason to believe that he is dangerous. Dangerousness that disappears when the person has severed his ties with the environments in which he has operated. The rescission of these ties is demonstrated by concurrent facts. For example, by collaboration»[115]. This conception implied that the suspect, although having the right not to answer

[110] G. Neppi Modona, *Italian Criminal Justice against Political Corruption and the Mafia: The New Model for Relations between Judicial and Political Power*, in «Osgoode Hall Law Journal», 1994, 32(2), pp. 405-6; M. Nobili, *Scenari e trasformazioni del processo penale*, Padua, Cedam, 1998, pp. 102-3; C. Guarnieri, *Giustizia e politica. I nodi della Seconda Repubblica*, Bologna, Il Mulino, 2003, pp. 157-8.

[111] Craxi was investigated for the first time in December 1992.

[112] *Estratto del verbale della seduta antimeridiana dell'1 aprile 1993*, in «Notiziario Csm», 1993, n. 10, pp. 123-124. See *Scalfaro: l'avviso di garanzia è stravolto*, in «La Stampa», 2 April 1993.

[113] E. Bruti Liberati, *Magistratura e società nell'Italia repubblicana*, cit., kindle edition, chapter V, section 8, La dignità della persona e gli arrestati in manette.

[114] Ivi, chapter V, section 7, Questioni e momenti controversi. La custodia cautelare in carcere.

[115] Borrelli's interview in «L'Unità», 27 November 1992.

to the investigators, in case of non-cooperation continued to be considered a dangerous subject and therefore to be placed under arrest until he had cooperated with the prosecutors[116].

A few months later, during a conference, Borrelli affirmed: «We do not imprison people to make them talk: we release them when they talk because it means that they have cut the bridges with the past»[117]. Two years later, the same Borrelli will declare: «But, at the end of the day, is it really so scandalous to wonder whether the shock of pre-trial imprisonment has not produced positive results in the search for truth?»[118].

On 8 July 1993, in a public speech, even the president of the Republic Oscar Luigi Scalfaro recalled the magistrates not to make excessive use of pre-trial detention: «There is no doubt that imprisonment to convince the suspect to talk does not respect the inviolable rights of man. Preventive detention is a justified exception, it cannot become the rule»[119].

The inquiry also clearly revealed all the difficulties in applying the adversarial innovations contained in the new code of criminal procedure, in a country with an inquisitorial tradition. Not always, especially in the investigation phase, did judges seem to play the role of guarantor that the code attributed to them[120]. This emerged in particular in Milan, where the prosecutors managed, through a procedural expedient of dubious legitimacy, to convey almost all requests for capture and arrest in a single judge of preliminary investigations, Italo Ghitti[121]. As a result, a mixture of roles between prosecutors and judges developed. Judges, who under the new code of criminal procedure were supposed to play a third and impartial role, manifested on several occasions a participatory role in the activities of the investigative bodies, feeling involved in a work of «cleaning» the institutional system and the «palace»[122]. The confusion between the roles was also fed by the media, which during the period of Mani pulite frequently used the term "judges" to refer to the prosecutors authors of the investigations.

In this context of popular indignation, trial by media and frequent use of pre-trial detention in prison, there were several cases of suicide by people involved in the Clean Hands investigation, such as the socialist deputy Sergio Moroni and the former president of Eni Gabriele Cagliari. Both of them, before killing themselves, wrote some letters - later made public - in which they denounced the consequences caused by the trial by media and accused the magistrates of using pre-trial detention as a mean of pressure on the suspects[123].

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[116] N. Colajanni, *Mani pulite? Giustizia e politica in Italia*, Milan, Mondadori, 1996, p. 66.

[117] Of a different opinion is Gian Domenico Pisapia, one of the "fathers" of the new code of criminal procedure, who said on that occasion: «The current overly broad use of pre-trial detention requires a limit and strong control». See *Giudici a confronto a St-Vincent*, in «La Stampa», 5 June 1993.

[118] *«Ma quella legge non fermerà Mani pulite»*, in «La Repubblica», 17 February 1995.

[119] *Scalfaro, una lezione ai giudici*, in «La Stampa», 9 July 1993.

[120] G. Neppi Modona, *Italian Criminal Justice against Political Corruption*, cit., p. 402; F. Colao, op. cit., p. 346.

[121] See the statements made by Guido Salvini, at the time a member of the Milanes office of judges of preliminary investigations, in «Il Dubbio», 8 December 2021.

[122] See *La geografia del malaffare*, in «Il Corriere della Sera», 4 April 1992; *Parla uno dei giudici: «Ora il palazzo va ripulito a fondo»*, in «Il Corriere della Sera», 29 April 1992.

[123] Moroni's letter, addressed to the president of the Chamber of deputies, Giorgio Napolitano, is published in «La Stampa», 4 September 1992. Cagliari's letters are published on the website www.gabrielecagliari.it

Particularly hard was the accusation launched by Cagliari:

> The goal of these magistrates, those of the Milan prosecutor's office in particular, is to force each of us to break, definitively and irrevocably, with what they call our "environment". Each one of us, whose dignity has already been compromised in the eyes of public opinion by the mere fact of being investigated or, worse, having been arrested, must adopt an attitude of "collaboration" that consists of betrayals and denunciations that make him treacherous, unreliable, untrustworthy: that is, that he becomes what they themselves call a "traitor". [...] The conviction I have formed is that the magistrates consider prison to be nothing more than an instrument of work, of torture, psychological torture, where practices can mature or go mouldy, indifferently, even if it is a matter of people's skin. [...] They are destroying the basic foundations and the very culture of law, they are irrevocably going down the road that leads to their authoritarian state, to their regime of total asociality.[124]

A broken balance

The Clean Hands investigation constituted the moment of rupture of the balance between political power and judicial power in Italy, an issue that would cross all the following decades without ever finding a solution[125].

The moment of rupture of this balance can be symbolically identified in the position taken by the NAM and the Milan prosecutor's office against the Conso decree in March 1993. Starting from that moment, in fact, the ways of intervention of the judiciary on a political level changed.

In the previous years, as Zannotti pointed out in 1989, the judiciary had played an increasing role in political processes, so much so that it could be properly considered an institutional pressure group, that is, as an «organized group that promotes actions with the aim of influencing political decisions that are closely related to its own homogeneous interests, without assuming direct responsibility for command»[126]. For Zannotti, the pressure group constituted by Italian magistrates fell into the broader category of institutional interest groups, since magistrates belong to a formal organisation (the ordinary judiciary), are professionals and perform the function of adjudicating disputes over the concrete application of rules[127]. The pressure actions carried out by the judiciary had been aimed at everything related to judicial policy, and in particular the structure, the organisation, the personnel and the forms and the methods of allocation of jurisdiction[128]. Specifically, during the Republican period, the judiciary - through the NAM - had carried out an activity of pressure on public decision-makers to protect its particular interests, such as the improvement of economic treatment and the defense of guarantees of independence and autonomy of the judicial corps.

Zannotti's analysis needs to be updated in light of subsequent events. Since 1993, indeed, the nature of the pressure exercised by the judiciary changed profoundly. Starting with the case of the Conso

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[124] Letter of 3 July 1993, published on the website www.gabrielecagliari.it

[125] L. Cafagna, op. cit., p. 139; A. Giovagnoli, op. cit., position 5397; C. Guarnieri, L'espansione del potere giudiziario, in *La seconda Repubblica. Origini e aporie dell'Italia bipolare*, edited by F. Bonini, L. Ornaghi and A. Spiri, Soveria Mannelli, Rubbettino, 2021, p. 142.

[126] F. Zannotti, *La magistratura, un gruppo di pressione istituzionale: l'autodeterminazione delle retribuzioni*, Cedam, Padua, 1989, p. 61.

[127] Ivi, p. 64.

[128] Ivi, p. 61.

decree, in fact, the judiciary began to exert pressure on political processes not so much in defense of its own particular interests, but by being the bearer of citizens' demands for justice. That is, the judiciary, through the NAM and individual magistrates particularly exposed on a public level, explicitly began to play a role of political representation of general interests, represented by the demands of citizens for the moralization of public life.

In other words, as Righettini points out, there was a process of «politicization of a neutral power», that composed of magistrates, who, «outside the normal exercise of their institutional role, publicly become bearers and "representatives" of political demands and political solutions, playing a counterbalancing function to the role of mediation and legitimation played by the political class»[129]. The political demands publicly collected by the judiciary are mainly constituted by the restoration of legality of the democratic system and morality in politics. The magistrates thus, especially through recourse to the mass media, have given rise to «new ways of communicating with other constitutional powers, with the political class and with public opinion that in fact have been configured as the emergence of a new leadership within the democratic regime»[130]. The result has been «a process of redefinition of the balance between institutional arenas and actors in relation to some fundamental issues: the protection of the legality of the democratic system and the moral question»[131].

The case of the Conso decree, as previously pointed out, was emblematic from this point of view. The public prosecutor's office of Milan acted as a real political subject, opposing the approval of a decree adopted by the government[132], believing it had to play a role of representation of the demands for justice coming from the citizens.

Given the importance of the historical development of the judiciary, the case of the Conso decree is examined in detail in the in-depth study at the end of this chapter.

The process of transformation of the role of the judiciary was also confirmed by the reaction of the judiciary to the decision expressed by Parliament on 29 April 1993 to deny four authorizations to proceed out of six against Craxi. The Chamber of Deputies voted in favour of the authorizations to proceed for the crimes of illicit financing and one episode of corruption, while rejecting the authorization for two hypotheses of corruption, one of receiving stolen goods and one request for a search. Prosecutor Borrelli announced on behalf of the public prosecutor's office the presentation of a conflict of attribution before the Constitutional Court against the parliament, claiming that the latter had invaded the sphere of attribution of the judicial order[133]. The appeal was submitted but the subsequent abolition of the institution of the authorization to proceed against parliamentarians made the appeal before the Constitutional Court fall.

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[129] S. Righettini, *La politicizzazione di un potere neutrale. Magistratura e crisi italiana*, in «Rivista italiana di scienza politica», 1995, n. 2, pp. 243-4.

[130] Ivi, p. 252.

[131] Ivi, p. 251.

[132] Already between September and October 1992, the magistrates of the Milan public prosecutor's office had become the protagonists of an initial form of intervention on the political level, publicly criticizing the approval of an anti-corruption decree, later never converted into law. The magistrates' initiative was not accompanied by the same media emphasis and public support later recorded on the occasion of the Conso decree affair. See *«Quella legge non va. Il governo la ritiri»*, in «La Stampa», 25 September 1992; *Aiuto, il governo ci blocca*, in «L'Espresso», 4 October 1992.

[133] *Borrelli sconcertato: non finisce qui*, in «Il Corriere della Sera», 30 April 1993.

Also the president of the NAM, Mario Cicala, harshly criticised the vote of the parliament stating: «The public will assess the serious responsibility assumed by those who, by refusing permission to proceed, have taken away an investigation to the natural judge: it is a vote that scandalizes every person who has a sense of the rule of law and every citizen who expresses a demand for new political and institutional behaviour»[134]. With a note the same NAM commented on the decision of parliament criticizing the «vested interests of a small majority of parliamentarians who claim to prevent judges from doing justice»[135]. The association, moreover, recalled that «public opinion demands new political and institutional behaviours; it refuses impunity and privileges». These tough stances against the legitimate exercise by the parliament of a function provided by the Constitution were motivated by the judiciary not so much because of the defense of its independence, but rather to protect a more general demand that was claimed to come from the citizens, namely that of moralization of political life and change of the political order then in force.

This was also confirmed by the words with which, the day after the vote on the authorization to proceed against Craxi, the prosecutor Gerardo D'Ambrosio criticised the decision of the PDS to withdraw its ministers from the newborn Ciampi government: «Adults who lead the country», D'Ambrosio said, «are asked for maturity, coolness, reasoning and not just indignation», otherwise they run the risk of «playing into the hands of those who do not want renewal», even more so in a parliament like that, «an expression of the old party logic»[136]. Later, D'Ambrosio would have started a political career, holding the position of senator from 2006 to 2013 in the ranks of the Left Democrats and then the Democratic Party.

The new role assumed by the judiciary as a political representative of the instances of political and institutional moralization of the citizens was confirmed by the positions expressed by the magistrates at the Congress of the NAM in June 1993, significantly entitled «Jurisdiction and politics between present and future of the institutions». On that occasion, the president of the Association, Mario Cicala, recalled that «the judiciary is an instrument of popular sovereignty which is expressed through the law», and that therefore «when it applies the laws, and makes them effective and operational, the judiciary implements the political sovereignty of the Italian people»[137]. «The ever-increasing number of criminal proceedings, their ever-increasing incisiveness are the result of the collaboration with justice of citizens, of economic operators who rebel against the oppression of malfeasance», stressed Cicala. Consequently, «there is no opposition between politics and jurisdiction; there cannot be because corruption is not a physiological way of being of politics». The president of the NAM added:

> There is no authentic democracy when under its forms are hidden real power relations based on the decay of civic and moral customs, on intertwining between criminality and men belonging to the institutions. For these reasons, the ongoing judicial inquiries do not constitute an overlapping of the judiciary on politics, but rather one of the tools through which the people become aware of the crisis

[134] Ibidem.

[135] *Rifiuto dell'autorizzazione a procedere nei confronti dell'On. Craxi*, in «La Magistratura», 1993, n. 1, p. 25.

[136] *«Questo Parlamento è quello che è»*, in «L'Unità», 1 May 1993.

[137] The text of the speech is published in M. Cicala, Giurisdizione e politica tra presente e futuro delle istituzioni. XXII Congresso nazionale Milano-Como, 10-13 giugno 1993, in *Cento anni di Associazione magistrati*, edited by E. Bruti Liberati and L. Palamara, Milanofiori-Assago, Ipsoa, 2009, pp. 161-165.

> of politics, of its failure; it is therefore put in a position to regain possession of the sovereignty that is its responsibility, making choices that allow to "get out - as they say - from Bribesville.[138]

For Cicala «only a country that has contained and reduced the oppression of crime can adequately address its social, political and economic needs, and then "get out from Bribesville" through the overall renewal of political and social structures». For these reasons, the president of the NAM, on behalf of the judiciary, warned

> against sudden "clean slates" implemented by law; against the adoption of favourable measures that grant inadmissible privileges to specific categories of defendants; against solutions that can in any way endorse the too widespread opinion that an unscrupulous and dishonest conduct brings in the end a few inconveniences and, however, more advantages than a clean and honest conduct.[139]

At the same time, Cicala added, the judiciary felt «the duty to recall the "clean slates" implemented through refusals of authorization to proceed that overlap with the judicial activity, limit and condition it».

Resuming the reflection of Cicala, in the final motion of the Congress of the NAM magistrates said that regulatory interventions for an exit from Bribesville could not «translate into favourable measures that grant inadmissible privileges to specific categories of defendants»[140].

The expansion of the role of the judiciary on a political level did not encounter the resistance of the political class, which, on the contrary, definitively surrendered to the action of the magistrates. On 29 October 1993, at the end of a procedure that lasted only six months, the parliament approved the Constitutional Law n. 3/1993, which amended article 68 of the Constitution, abolishing the authorization to proceed against members of parliament. The reform maintained the authorization for arrest (except in cases of flagrante delicto) and the authorization for house searches and wiretapping, but gave prosecutors the power to initiate criminal proceedings against members of parliament without requesting prior authorization from parliament[141]. In the absence of a mechanism to protect parliamentarians from judicial investigations, the latter have had an even greater impact on the political system from the earliest stages, thanks also to the emphasis placed on the events by the media[142].

The imbalance of power between the judiciary and politics was confirmed by the events that took place after the victory in the March 1994 elections of the centre-right coalition led by Silvio Berlusconi[143]. The television stations and newspapers owned by the tycoon had been in the front row in giving evidence to the Clean Hands inquiry and in celebrating the work of the Milan prosecutor's office.

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[138] Ivi, p. 162.

[139] Ibidem.

[140] *«Giurisdizione e politica tra presente e futuro delle istituzioni»*, in «La Magistratura», 1993, n. 2-3, p. 12.

[141] See E. Bruti Liberati, *Magistratura e società nell'Italia repubblicana*, cit., kindle edition, chapter V, section 6, Parlamentari inquisiti e autorizzazione a procedere.

[142] C. Guarnieri, *L'espansione del potere giudiziario*, cit., p. 157.

[143] S. Colarizi, *Storia politica della Repubblica*, cit., pp. 206 ff.

After his victory in the elections, Berlusconi proposed to Di Pietro the position of Minister of the Interior and to Davigo that of Minister of Justice, but the proposals were rejected[144].

The support of the new party of Berlusconi to the work of the judiciary was confirmed in the programmatic declarations of the government on justice: «This government is on the side of the work of moralization of public life undertaken by talented magistrates, by the great press of information and by those sectors of the political and social world that in that work are recognised»[145].

In July 1994, however, the government, with the new Minister of Justice Alfredo Biondi, was the protagonist of a harsh clash with the Milan public prosecutor's office.

On 13 July 1994 the Council of Ministers issued a decree-law (n. 440/1994) containing «modifications to the code of criminal procedure in terms of simplification of proceedings, precautionary measures and the right of defense». The Berlusconi government's measure was aimed at reducing the excessive use of pre-trial detention by magistrates. The measure established the principle that pre-trial detention in prison should represent the extrema ratio. Consequently, it limited the use of pre-trial detention to the most serious crimes (such as organized crime, terrorism, subversion, crimes against the person and property etc.), providing for the use of house arrest for all other crimes - including those against the public administration. The decree also included a series of provisions aimed at rebalancing the relationship between the prosecution and the defense in the trial and also limiting the early blaming of suspects on the basis of a simple notice of prosecution. On this last point, in fact, the measure provided for the secrecy of the notice of prosecution until the closure of the investigation and established that the prosecutor would have informed the suspect only when he had to perform an act to which the defender had the right to attend[146]. The President of the Republic, Oscar Luigi Scalfaro, signed the decree without objecting to any issue of constitutionality or opportunity.

The day after the approval of the decree, however, the magistrates of the Clean Hands pool, Di Pietro, Colombo and Davigo, read a statement in front of the press and television cameras in which they opposed the decree and announced their resignation from the investigation. «Today's decree law», magistrates stated, «in our opinion no longer allows us to effectively deal with the crimes we have investigated so far. In fact, persons reached by overwhelming evidence regarding serious acts of corruption will not be able to be associated with prison even to prevent them from continuing to commit crimes or plotting to prevent the discovery of previous misdeeds, sometimes even buying the men to whom we had entrusted investigations against them». While specifying that they would still apply the new rules, the magistrates of the Milan prosecutor's office added:

> However, when the law, due to obvious disparities in treatment, contrasts with feelings of justice and fairness, it becomes very difficult to perform one's duty without feeling that one is an instrument of injustice. We have therefore informed the public prosecutor of our determination to request, as soon

[144] E. Bruti Liberati, *Magistratura e società nell'Italia repubblicana*, cit., kindle edition, chapter VI, section 1, La "discesa in campo" di Silvio Berlusconi. See Antonio Di Pietro. *Intervista su Tangentopoli*, cit., pp. 128-132.

[145] Parliamentary record, Senate of the Republic, 16 May 1994, p. 12.

[146] *Una rivoluzione: manette meno facili*, in «Il Corriere della Sera», 14 July 1994. See A. Biondi, Il D.L. 440/1994 (c.d. "decreto Biondi"): un atto "frainteso" di civiltà giuridica, in *Processo e legge penale nella Seconda Repubblica*, cit., p. 156.

> as possible, the assignment to another and different task, in which the contrast between what our conscience feels and what the law imposes is not strident.[147]

The position taken by the Clean Hands pool also led public opinion to react harshly against the government's intervention. Hundreds of citizens made outrageous phone calls to the offices of newspapers and televisions[148]. The measure was renamed the "Save the Thieves" decree. Faced with protests, some of the parties that made up the majority (the Northern League and National Alliance) asked for the withdrawal of the measure[149].

In the following days, there were numerous protests against the approval of the decree and in support of the Clean Hands pool. There occurred even worker strikes[150]. Also magistrates from other judicial offices joined the protest of the Milanese prosecutors, announcing that they wanted to be relieved of their commitments and assigned to other tasks. The president of the NAM Elena Paciotti defined the measure «unacceptable»: «The poor in jail, the rich at home»[151].

On 20 July 1994 also the HCJ took position on the affair, approving a deliberation in which critical judgments were expressed towards the Prime Minister Berlusconi and the Minister of Defense Cesare Previti. Berlusconi had justified the decree-law by talking about «prevarication, illegality, abuse» in the use of pre-trial detention, Previti had referred to the existence of «a thousand Tortora cases», talking about «incivility». In its resolution, the HCJ defined the words of Berlusconi and Previti as «seriously damaging to the independence and prestige of the judiciary»[152]. The autonomous governing body of the judiciary stated that «the sometimes improper use of pre-trial detention» constituted «a real problem», but it could not be addressed «only when the harsh experience of prison touches some figures or even for single types of crime». The issue, instead, required «a very thorough reflection first of all by the parliament». In the resolution the HCJ added:

> Generic statements are not acceptable [...] at a time when judicial intervention has made an important contribution to the effort to restore respect for the law in this country, deserving the consent of the entire public opinion. Abuses and illegalities, if and when they are committed, can well be ascertained and pursued in the competent seats, with the already existing normative instruments. Those statements certainly do not contribute to the improvement of institutions. This objective is pursued, however, with concrete initiatives aimed at enhancing the promptness and efficiency of judicial intervention and to promote the rapid celebration of the trials.[153]

The position taken by the HCJ generated protests from the government: «Nothing authorizes the judiciary to deliberate censorship of any kind on the heads of the executive power», the Minister for Relations with Parliament Giuliano Ferrara said[154]. But the initiative of the HCJ was also criticised

[147] The text of the statement written by the Clean Hands pool is published in «La Stampa», 15 July 1994. See G. Colombo, op. cit., pp. 48-50; P. Davigo, op. cit., pp. 149-151.

[148] See *Centralini impazziti: siamo coi giudici*, in «Il Corriere della Sera», 15 July 1994; *Tutti al telefono: tradimento*, in «La Stampa», 15 July 1994.

[149] «La Stampa», 16 and 17 July 1994.

[150] See *Fermata di protesta alla Waya. Martedì manifestazione in piazza*, in «La Stampa», 16 July 1994.

[151] *L'Anm: un provvedimento inaccettabile*, in «Il Corriere della Sera», 15 July 1994; *Le reazioni*, in «La Repubblica», 15 July 1994.

[152] The text of the deliberation is published in «Questione giustizia», 1994, n. 2-3, pp. 436-7.

[153] Ibidem.

[154] *Il Csm sfida Scalfaro e governo*, in «La Stampa», 21 July 1994.

by the Head of State Oscar Luigi Scalfaro. In a phone call to the vice-president of the HCJ Galloni, Scalfaro defined the intervention of the Council «an undue activity» and underlined the necessity that «interventions of this kind, which are not within the competence of the Higher Council, should never occur, because they are seriously damaging to the balance of relations between the organs of the State»[155].

Faced with pressure from public opinion and the judiciary, the Berlusconi government decided to take a step back. The text converting the decree into law was not approved by parliament and the executive decided to replace it with a bill to be discussed in Parliament. The measure was never approved due to the early fall of the Berlusconi government[156].

A few weeks later, on 3 September 1994, Antonio Di Pietro spoke at a conference of industrialists in Cernobbio and put forward the proposal to set up a negotiating table between magistrates, entrepreneurs and the world of culture to develop proposals to be submitted to the legislature to "get out" from Bribesville[157]. In truth, according to what was revealed in the following days by the media, the magistrates of the Milan public prosecutor's office had already prepared the draft of a bill, together with some university professors and lawyers[158]. The proposal did not concern offences against the public administration committed in the past, for which it was considered unacceptable any form of «clean slate», but aimed to prevent cases of widespread corruption from re-emerging in the future[159].

Di Pietro specified that the intent of the investigative group was not to replace the legislator, but only to make technical proposals. Several political figures, however, criticised the magistrates' initiative, considering it to be a demonstration of the Milanese team's desire to replace Parliament[160]. In the following days, Di Pietro rejected these criticisms in an interview, with statements that confirmed the group's awareness of its political role: «If only we wanted to collect signatures on one of our bills, you know what would happen: we would collect millions of signatures in a few hours, we could flood parliament with millions of faxes. But this is not what we wanted to do»[161].

Further tensions between political power and the judiciary emerged in November 1994, when Prime Minister Silvio Berlusconi was notified of an invitation to appear before the magistrates of the Milan public prosecutor's office, charged with the crime of corruption. The invitation was delivered to Berlusconi on 22 November, while the Prime Minister was attending the United Nations World Conference on Organized Crime in Naples. The news of the investigation was published in the «Corriere della Sera» newspaper the same day, in violation of investigative secrecy. A few weeks earlier, the same prosecutor of Milan Saverio Borrelli in an interview with the «Corriere della Sera» had expressed himself on the status of the investigation with these words: «We are close to high

[155] Ibidem.; *Scalfaro rimette in riga il Csm*, in «La Repubblica», 21 July 1994.

[156] Some limits on the use of pre-trial detention were introduced in August 1995 by the new majority supporting the Dini government. This intervention was also criticised by the associative judiciary. For Mario Cicala, vice-president of the NAM, it was in fact a «dangerous retreat of legality». On this see «La Stampa», 4 August and 23 August 1995.

[157] Di Pietro's speech is published in «Il Corriere della Sera», 4 September 1994.

[158] See the draft of the proposal published in *Quattordici articoli contro i corrotti*, in «La Repubblica», 5 September 1994.

[159] See *Pugno di ferro contro i corrotti*, in «La Repubblica», 4 September 1994; *«Basta con lo scontro, collaboriamo»*, in «Il Corriere della Sera», 4 September 1994.

[160] See R. Canosa, *Storia della magistratura in Italia*, cit., pp. 224-5.

[161] *Il giudice, l'ira e il dolore,* in «La Repubblica», 7 September 1994.

political levels»[162]. The affair had great media coverage on an international level and led to serious consequences on a political level, contributing to the distancing of the Northern League from Forza Italia and the subsequent fall of the government[163]. Subsequently, Berlusconi was acquitted of some charges and cleared of others due to expiry of the time limit specified under the statute of limitations.

A few months earlier, in May 1994, the chief prosecutor of Milan Borrelli had expressed himself with these words on the hypothesis of leading a new government: «To an appeal of this kind by the Head of State, we could respond with a complementary service»[164].

The Berlusconi government was replaced in January 1995 by a technical executive led by Lamberto Dini. The Dini government remained in office until May 1996, when early elections were called. The period of the Dini government was also characterised by a conflict between the executive and the judiciary, in particular the Milan prosecutor's office.

In May 1995 the new Minister of Justice, Filippo Mancuso, ordered inspections of the Milan public prosecutor's office to investigate a series of alleged irregularities by the magistrates in the conduct of the Clean Hands investigations, including the abuse of pre-trial detention[165]. Inspections had already been carried out on the orders of the previous Minister Biondi and had concluded with the appreciation of the ministerial inspectors for the work of the Milanese magistrates[166]. Also in May 1995, however, Minister Mancuso asked the general prosecutor of the Court of Cassation to initiate disciplinary proceedings against the members of the Milanese team of magistrates for alleged pressure on the inspectors sent by the Ministry. The initiative did not involve Di Pietro, who had resigned from the judiciary in December 1994.

The action of the Minister generated a lot of political controversy and was considered by some parties as an attempt to intimidate the magistrates of Milan. The same president of the Council Dini took the distances from the action of the minister. The tensions exploded after the summer, when the Pds decided to present a motion of no-confidence against the Minister of Justice, accusing him of not having dealt with the serious crisis of justice, preferring instead to take initiatives that had determined conditions of conflict within the government[167]. The motion of no-confidence was approved by the Senate and Mancuso was forced to leave his post as minister[168].

A few days earlier, the NAM had also intervened in the controversy, issuing a manifesto in which it defined the action of the Minister Mancuso «inadequate and counterproductive» and stated that his inspection activity «instead of ensuring the necessary disciplinary supervision of the work of magistrates, subjects to control and hinders the activities of the offices most committed to the protection of legality»[169].

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[162] *Borrelli: su Telepiù siamo a una svolta*, in «Il Corriere della Sera», 5 October 1994.
[163] S. Colarizi, *Storia politica della Repubblica*, cit., p. 217; L. Chiara, op. cit., p. 30.
[164] *«Al governo solo se ci chiama Scalfaro»*, in «Il Corriere della Sera», 1 May 1994.
[165] *«Le mie 14 accuse al pool»*, in «La Stampa», 12 May 1995.
[166] See E. Bruti Liberati, *Magistratura e società nell'Italia repubblicana*, cit., kindle edition, chapter VI, section 3, Il governo Dini e il ministro della Giustizia Mancuso.
[167] See Parliamentary record, Senate of the Republic, 19 October 1995.
[168] R. Canosa, *Storia della magistratura in Italia*, cit., pp. 231 ff.
[169] *Una svolta sulla giustizia*, in «La Magistratura», 1995, n. 3-4, p. 33.

The D'Alema Bicameral Commission

After the victory of the centre-left majority in the 1996 elections, the relations between the executive and the judiciary returned to calm, but only for a brief period.

On 24 January 1997 the Bicameral Commission for Institutional Reform, chaired by Massimo D'Alema, was established. The debate mainly concerned the form of government and the electoral system, but attention was also paid to the reform of the Higher Council of the Judiciary and the judicial system. The justice reform proposals were outlined in what was called the "Boato draft", from the name of the rapporteur Marco Boato, presented in October 1997[170].

The Boato draft provided for the division of the HCJ into two distinct sections, one for the judges and one for the prosecutors. The text foresaw that the members of each section of the HCJ would be elected for three fifths among the magistrates and for two fifths by the Senate of the Republic. The HCJ would have then elected a vice-president among the members designated by the Senate.

The Boato draft did not foresee a separation of careers between judges and prosecutors, but it did introduce some limits for the passage from one function to another. All ordinary magistrates would initially have to perform judicial functions for a period of three years, and then be assigned by the HCJ to perform judicial or prosecuting functions. The transition between the exercise of judicial functions and those of the public prosecutor would subsequently be allowed following a competition. Moreover, in no case could the functions of criminal judges and those of the public prosecutor be carried out in the same judicial district. The measure established that magistrates would be judged on the disciplinary level by a new body, the Court of Justice, composed of nine members chosen by the HCJ (six among the members and three among the lay members).

The Boato draft also provided for a series of rules on jurisdiction aimed at strengthening the guarantees of persons subject to criminal proceedings, including the introduction of the principle of due process[171].

The measure did not change the principle of mandatory prosecution, but provided that the public prosecutor «initiates investigations when he has knowledge of a crime», thus ending the practice that saw the prosecutors independently initiate investigations even in the absence of notice of crime and on the basis of mere suspicions.

The proposals for constitutional reform generated repeated protests from the judiciary. Both the NAM and individual magistrates, such as the Milan prosecutor Francesco Saverio Borrelli, intervened several times to oppose what was seen as yet another attempt by politicians to limit the independence of the judiciary[172].

In January 1998, at the national congress of the NAM, the president Elena Paciotti reiterated her criticism of the reform that provided «an unequivocal message in the direction of a reduction in the autonomy of the judiciary», obtaining the consent of the president of the Republic Oscar Luigi

[170] The text of the constitutional bill can be found at https://www.camera.it/parlam/bicam/rifcost/docapp/relass7.htm

[171] Article 130 of the constitutional bill.

[172] See *La rivolta dei magistrati*, in «La Stampa», 30 October 1997; «La Magistratura», 1997, n. 2 and 3-4.

Scalfaro[173]. In an interview with the «Corriere della Sera», public prosecutor Gherardo Colombo defined the Bicameral as «daughter of the blackmail of criminal powers on politics», arguing that politics aimed to «reduce the independence of the magistrate» so as to continue the «hidden pacts»[174].

The reform proposals were not pursued because of the failure of the agreement between the political forces in June 1998[175].

Anyway, the principle of due process was introduced two years later through Constitutional Law n. 2/1999, which amended Article 111 of the Constitution. The first two paragraphs of the article state: «Jurisdiction is implemented through due process regulated by law. All court trials are conducted with adversary proceedings and the parties are entitled to equal conditions before an impartial judge in third-party position. The law provides for the reasonable duration of trials». The reform constituted the final act of the dispute that had been going on since 1992 between parliament and the Constitutional Court over certain provisions of the new code of criminal procedure[176].

In addition, Legislative Decree n. 51 of 1998 established, from 2 June 1999, the single judge of first instance, suppressing the office of the praetore and thus abolishing a symbolic figure of the Italian judiciary during the republican period[177]. Legislative Decree no. 51/1998, moreover, extended the tabular system to the public prosecutor offices. The measure introduced in fact article 7-ter paragraph 3 in the law on the judiciary, which gave the HCJ the task of «determining the general criteria for the organisation of the offices of the public prosecutor and the possible division of them into working groups»[178]. As pointed out above, the system of tables had already been extended to the prosecution offices by a circular of the HCJ. The reform did nothing more than give legislative recognition to a power that the HCJ had assigned itself.

In the meantime, the entry into politics of the former prosecutor Antonio Di Pietro became very important. In 1996, the former prosecutor accepted Prodi's proposal to become minister of Public Works in the centre-left government. In the following years, after founding his own party Italia dei Valori, Di Pietro became a member of the parliament, a member of the European Parliament and again a minister, playing a leading role on the political scene, fighting battles in favour of the fight against corruption and the affirmation of legality in politics.

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[173] *«Giustizia e riforme costituzionali»*, in «La Magistratura», 1998, n. 1, pp. 2-6.

[174] *Colombo: Bicamerale figlia del ricatto*, in «Il Corriere della Sera», 22 February 1998.

[175] See L. Chieffi, *La magistratura. Origine del modello costituzionale e prospettive di riforma*, Naples, Jovene, 2000, pp. 88 ff.

[176] P. Pederzoli, *La Corte costituzionale*, Bologna, Il Mulino, 2008, pp. 241 ff.; E. Lamarque, *Corte costituzionale e giudici nell'Italia repubblicana*, Rome-Bari, Laterza, 2012, kindle edition, position 2654; See «La Magistratura», 2000, n. 1.

[177] E. Bruti Liberati, *Magistratura e società nell'Italia repubblicana*, cit., kindle edition, chapter VI, section 5, L'abolizione del pretore.

[178] G. Di Federico, *Il contributo del Csm alla crisi della giustizia*, 2012, p. 22, http://www.difederico-giustizia.it/wp-content/uploads/2013/02/CSM-e-crisi-giustizia.pdf; L. Pomodoro and D. Pretti, *Manuale di ordinamento giudiziario*, Turin, Giappichelli, 2015, p. 259.

In-depth study. The "Conso decree"

As highlighted above, the case of the "Conso decree" symbolically marked, from a historical point of view, the transformation of the judiciary from a pressure group committed above all to the protection of its particular interests to a real political subject, committed to the representation in the political arena of the demands of justice and moralization of public life coming from the citizens.

Given its importance in terms of the historical development of the judiciary, the case of the "Conso decree" deserves to be investigated in depth, in particular to understand how it was possible to arrive at such a head-on clash between the government and the Milan prosecutor's office and the judiciary as a whole.

The first person to propose a "political solution" for Tangentopoli was, on 2 July 1992, the socialist Ottaviano Del Turco, at that time deputy secretary of CGIL. In an interview with «La Stampa», Del Turco proposed a sort of "amnesty" for politicians involved in investigations relating to illegal party funding. In the interview, Del Turco distinguished between offences committed by those who had received money for personal use and those who, instead, had received funding to run the party machines:

> These are the managers who rent movie theaters and sound systems for party meetings, who print posters, who take care of the facilities of the branches. Colossal hypocrisy: no one ever asks where the money comes from to do all these things. Everything is taken for granted, as if the money rained down from heaven. Instead, often that money is the result of an illegal way of obtaining financing. [...] The judiciary must do its duty in an exemplary manner. But at the end of the investigations we will have to take into account the difference between the cost of a life as a king and the cost of democracy.[179]

For these reasons, while not justifying the illegal actions, Del Turco put forward the proposal of an "amnesty", but only after the parties had been able to reform themselves, in particular by establishing «strict systems of control over the election campaign of candidates and the origin of funding» and ensuring «the clarity of their budgets»:

> If the parties give concrete evidence of renewal and re-establish a climate of trust, then there will be a need for a new Togliatti. I mean Togliatti, Minister of Justice, who in 1946, with great courage, was able to go against the tide and propose a measure that would make history (amnesty for fascists, ed.). I hope for a measure that gives the sense of closure of an era. And the facts of these days show that the era of the great "historic compromise" between the party system, the judicial system and the economic-financial system that dominated the post-war period is definitely over. This is demonstrated by the conflict that has exploded between the judiciary and the parties. Now the time has come for a new balance.

For Del Turco, in short, on the one hand the parties had to prove their «self-reform», on the other hand the magistrates had to show that «the prosecution of individuals» did not turn «into a trial against politics».

Del Turco's proposal, which did not foresee the immediate application of an amnesty for politicians, but took a long-term perspective, was immediately rejected by the political forces, including several members of the Socialist Party. For parliamentarians, in fact, the intervention risked being interpreted

[179] *Del Turco: amnistia alla Togliatti*, in «La Stampa», 2 July 1992.

as an escape from responsibility. «Done now», declared Massimo D'Alema (PDS), «would trigger a popular revolt»[180]. Overwhelmed by the criticism, Del Turco himself withdrew his proposal and apologized publicly[181].

A few weeks later, on 26 July 1992, Gherardo Colombo, a member of the Milanese Clean Hands pool, gave a surprise interview to the weekly magazine «L'Espresso» in which he proposed for the first time the idea of a «remission» for those involved in episodes of illegal financing and corruption. After stating that he was «absolutely opposed» to the idea of an amnesty, Colombo put forward his proposal for a remission:

> Parliament passes a law that sets a precise, peremptory deadline, say a few months. By that date, the politician or entrepreneur not yet involved in the investigations presents himself to the judges, tells everything and returns the money or indicates to whom he gave it. Those who behave in this way will be exempt from punishment, will not go on trial, although they will have to be banned, for a reasonable period of time, from exercising public functions. For those who do not, the law will continue to apply: and for them it will not be easy to get away with it because, from the admissions of those who have collaborated, it will always be possible to identify who they are.[182]

Colombo's intervention was endorsed by the chief prosecutor of Milan, Francesco Saverio Borrelli, as confirmed by the latter to «L'Espresso» on 6 September 1992[183]. In other words, the proposal of «remission» was not made by Colombo personally, but was shared and supported by the head of the Milan public prosecutor's office. Borrelli declared: «We have to ask ourselves whether the national community is capable of withstanding the state of tension that will result from the continuation and multiplication of investigations of this kind»[184]. The head of the Milan public prosecutor's office then summarized the contents of Colombo's proposal, addressed to all those likely to be involved in the investigations: «They should come forward spontaneously within a period of time to be established, confess their wrongdoings, return the ill-gotten gains and withdraw from public life»[185].

In December 1992, Colombo reiterated the contents of his proposal in an interview with the magazine «MicroMega». The magistrate pointed out, first of all, the reasons that made it necessary to intervene legislatively in the management of the numerous criminal proceedings opened in the context of the Clean Hands inquiry:

> Every day, in fact, something new happens in the investigation. And I am convinced that it is not possible for the community to endure a process of this kind. Because it inevitably creates a situation of uncertainty, of difficulty in the relationship between private individuals and the public administration, the works are blocked and the citizens do not feel sufficiently guaranteed towards those

[180] *Bocciata l'amnistia per i corrotti*, in «La Stampa», 3 July 1992.
[181] *Del Turco su Tangentopoli*, in «La Stampa», 4 July 1992.
[182] *Parlate e sarà condono. Colloquio con Gherardo Colombo*, in «L'Espresso», 26 July 1992, p. 14.
[183] «Before he spoke, Colombo had forewarned me and asked what my opinion was: I considered not to advise against it», Borrelli declared. See *Noi, spiati e pedinati. Colloquio con Francesco Saverio Borrelli*, in «L'Espresso», 6 September 1992, p. 16.
[184] Ibidem.
[185] Ibidem.

> who have public responsibilities. A solution must be found, not so much with regard to the procedural matter, but with regard to the indirect, but very important, repercussions outside the trial.[186]

Subsequently, Colombo confirmed the contents of his own proposal:

> Who presents himself to the magistrate declares all that he knows about himself and about the people with whom he has come into contact. He returns what he has appropriated, gives precise and detailed indications to recover the money. For a reasonable time, neither so short nor so long, he will be banned from public office. [...] What does the collaborator receive in return? Exemption from the application of the main penalty, imprisonment. This waiver by the State does not seem particularly burdensome. In fact, I think that the essential thing is to be able to put an end to this way of acting immediately. After all that has happened, in fact, bribes are still being paid.[187]

In this case as well, Colombo explained that the aim of the proposal was to prevent the political forces from closing the whole Clean Hands affair with an amnesty: «It has happened countless times in our country. Such initiatives would be neither current nor possible as long as people are focused on these deviant aspects of collective life. But they could become so the moment public attention wanes»[188].

In 2012 Colombo recalled his proposal with these words: «I realized that in the face of the enormity of what was emerging, it would be difficult or impossible to provide a solution through the trial»[189]. «I had come to the conclusion», Colombo reiterated in 2015, «that it would be impossible to root out corruption through a criminal investigation, however vast, in-depth and articulate. In fact, the investigations would have lasted for years, the timeframe would have expanded enormously, and the statute of limitations would have involved the vast majority of positions»[190].

From the statements made by Colombo, it is clear that the proposal was in sharp contrast with the idea of an amnesty or a simple decriminalization of the crime of illegal financing of parties. As observed at the time by Giovanni Maria Flick, in the perspective of the Milanese magistrates, the solution to the crisis triggered by the Clean Hands inquiry should have consisted, in substance, in the extension of the reward legislation to crimes against the public administration, similar to what had happened previously in the fight against terrorism and the Mafia[191].

The entire investigative strategy set up by the Clean Hands pool was based on the collaboration of the suspects and on the collection of information aimed at identifying the accomplices of illegal activities. The same use of pre-trial detention in prison, as we have seen, responded to this need, as admitted by the same magistrates: the Clean Hands pool requested and obtained the preventive detention of suspects on the assumption of their social dangerousness; dangerousness that was considered to disappear only once the suspect had cooperated with the prosecutors (see the section "The 'Clean hands' inquiry"). This was certainly an extreme interpretation of the rules on pre-trial detention, but it was consistent with the objective that the Milanese magistrates had set themselves

[186] *Senza il condono non vinceremo la corruzione*, in «MicroMega», 5/92, p. 42.
[187] Ibidem.
[188] Ivi, p. 43.
[189] *Mani Pulite ha fallito. Colloquio con Gherardo Colombo*, in «L'Espresso», 27 January 2012.
[190] G. Colombo, *Lettera a un figlio su Mani pulite*, Milan, Garzanti, 2015, pp. 78-9.
[191] G. M. Flick, op. cit., p. 108.

from the beginning of the investigation: not to pursue individual criminal conduct, but to clean up the ruling class and the public administration on the ethical and moral level.

It is from this element that we must start to fully understand the events that characterised the "Conso affair".

Already between September and October 1992, the magistrates of the Milan public prosecutor's office made a first political intervention against the government, publicly criticizing the approval of an anti-corruption decree, which later was never converted into law. The initiative of the magistrates was not accompanied by the same media attention and the same support of public opinion as during the "Conso affair", but it was very important, especially if one examines the contents of the criticisms made by the magistrates against the government.

On 17 September 1992, the Council of Ministers approved a decree-law that increased the penalties for corrupt and corrupting persons, and, above all, provided for the possibility of seizing the assets of those accused of corruption, extortion, embezzlement and abuse of office, similarly to what was provided for Mafia defendants[192]. The measure had been invoked directly by the President of the Republic, Oscar Luigi Scalfaro, in a meeting with Prime Minister Giuliano Amato[193].

The chief prosecutor of Milan, Francesco Saverio Borrelli, immediately expressed himself against the approval of the decree («I don't like it at all»), stating that it could have hindered the investigations:

> More than recovering a few crumbs of what's left we are now interested in ascertaining the facts. I understand that people want to recover what was wrongfully earned, and that will be done, as much as possible. But we need to continue to use this willingness to cooperate with justice that has come from the business world at medium, low and sometimes high levels. Now, with these corporate and patrimonial measures, there is a risk that this willingness will change.[194]

On 24 September 1992, Borrelli reiterated his criticism even more clearly, claiming that the decree could have a «negative impact» on investigations, advancing suspicions of the unconstitutionality of some of the rules contained in the measure and essentially inviting the government to «withdraw or amend the decree»[195].

A few days later, the three representative magistrates of the Clean Hands pool, Di Pietro, Davigo and Colombo, took a stand against the decree approved by the government in an interview with «L'Espresso»: «It seems to us that the decree is only apparently punitive, in reality it is counterproductive for the evolution of the investigations. In fact, it can break the thread of cooperation that, with great difficulty, we had managed to establish with corrupt and corrupting parties». The magistrates added: «It seems to us an unfair measure. It affects, in fact, only those who, by collaborating, have finally allowed to uncover the pot of corruption. It also seems inappropriate because it constitutes an objective obstacle to the ascertainment of the facts». For the pool, in fact, if one wanted to «truly undermine» the phenomenon of corruption, it was necessary to «incentivize

[192] *Ai corrotti saranno sequestrati i beni*, in «La Stampa», 18 September 1992.
[193] *I corrotti come i mafiosi*, in «La Stampa», 16 September 1992.
[194] *I giudici di Mani pulite: «Il decreto ci danneggia»*, in «La Repubblica», 23 September 1992.
[195] *«Quella legge non va. Il governo la ritiri»*, in «La Stampa», 25 September 1992.

those who collaborate with justice», while «the measure issued by the government seems to go in the opposite direction»[196].

The magistrates then went so far as to put forward a counter-proposal for legislative intervention: «On the basis of our experience in recent months, we would consider it appropriate to introduce a measure that would provide incentives for those who know - corrupt and corrupting parties, authors and victims of the offence of concussion, and embezzlers - to change course and close with the past».

The magistrates of the Milan public prosecutor's office concluded the interview by proposing the introduction of rules that could encourage the repentance of suspects: «After all, the reward legislation is a tool that has already given good results in the fight against terrorism, and even in the fight against the Mafia is proving to be the most effective. So we ask ourselves: why not apply it also to crimes against the public administration?».

Ultimately, the fear of the magistrates of the Milan public prosecutor's office was that the decree approved by the government would have ended up "closing the mouth" of the dozens of "pentiti" who, in the previous months, had allowed the Clean Hands investigation to extend in an exorbitant manner.

Through these critical interventions, the Milan public prosecutor's office clearly went beyond the sphere of its competence, ending up by publicly contesting the content of an act legitimately adopted by the government. In fact, the object of the criticism of the Milan public prosecutor's office was the content of a judicial policy adopted by the executive (following the recommendation of the Head of State): a choice that consisted in the increasing of penalties and the introduction of precautionary measures (such as seizure) for suspects of crimes against the public administration, and not in the introduction of a reward legislation as requested by the Milan public prosecutor's office.

The Milan public prosecutor's office reiterated its judicial policy line in November 1992 through the mouth of Di Pietro. In an article published in the weekly magazine «Panorama», the magistrate in fact highlighted - partly repeating statements already made previously - the opportunity for «a measure that incentivizes "those who know" (corrupt and corrupting parties, authors and victims of the offence of concussion, and embezzlers) to change course and close with the past: a reward legislation, therefore, that already in the phase of terrorism has given good results and in the fight against the mafia is proving to be the only weapon of interdiction»[197].

The so-called anti-corruption decree passed by the government was later never converted into law by Parliament, also because of criticism from the judiciary.

It is important to take into account the story of the "anti-corruption decree" and the political line expressed by the Milan public prosecutor's office in order to fully understand the case concerning the Conso decree.

At the end of 1992, while the investigation continued to extend, involving also the secretary of PSI Bettino Craxi, the political parties began to examine in Parliament some bills to modify the discipline

[196] *Aiuto, il governo ci blocca. Colloquio con Gherardo Colombo, Piercamillo Davigo, Antonio Di Pietro*, in «L'Espresso», 4 October 1992, pp. 44-46.

[197] *A corrotto che fugge… Intervento di Antonio di Pietro*, in «Panorama», 15 November 1992, p. 114.

of party financing, also with the aim of preventing - in case of approval of a reform - that in April 1993 the referendum abrogative of the law on public financing to parties promoted by the Radicals could be held[198].

On 12 February 1993 the media reported with great emphasis the words expressed by Antonio Di Pietro during a public meeting in Bergamo with representatives of the police. During the debate, in fact, Di Pietro said that it was necessary to «seek a political solution» for the Clean Hands scandal: «I am for a political solution, otherwise something can happen every day»[199]. In the magistrate's opinion, given the extent of the investigation, a political solution was needed, involving «new electoral rules», «a new law on contracts» and «a new system of public procurement». The magistrate also let himself go to an outburst: «This morning fifteen people came to my office to confess, we can't take it anymore. It is necessary to find a solution»[200]. However, while calling for a «political solution», Di Pietro added that he did not want «to be misunderstood, criminal responsibilities must still be prosecuted».

With his declarations, the magistrate symbol of the Clean Hands pool seemed to invite politics more to deal with the general causes of the crisis of the institutional system («we find ourselves before a sick democracy», he affirmed[201]), rather than to find solutions on a strictly procedural level, so much so as to say he was «contrary to the hypothesis of remission» advanced months earlier by his colleague Colombo[202].

A few days later, meeting the requests made by the Milanese magistrates in the previous months, the Minister of Justice Giovanni Conso drew up a draft measure that provided for: the extension of the possibility of plea bargaining for the crimes covered by the Clean Hands investigation, through the confession of crimes and an active collaboration with the magistrates; the return of money deemed sufficient to compensate for the damage caused by the commission of the crime; and the prohibition from public and political offices and managerial positions in companies[203]. The draft measure, discussed by Minister Conso also in a summit with the president of the Republic Scalfaro and the Presidents of the two Chambers[204], seemed to satisfy the requests made since July 1992 by the members of the Milan public prosecutor's office in favour of the introduction of rules that could encourage the cooperation of suspects. It is no coincidence that the text drafted by Conso was initially named by the press as a «save the pentiti» measure.

In the following days, newspapers confirmed that the road taken by the experts of the Ministry of Justice consisted in a sort of re-proposition of the reward legislation passed in 1982 for repentant terrorists, through the approval of rules that would allow politicians and businessmen to avoid prison

[198] *Tangentopoli verso l'assoluzione*, in «La Stampa», 31 December 1992; *Ai partiti non più soldi pubblici*, in «La Stampa», 3 January 1993.
[199] *«Pochi i veri disonesti, molti invece i pecoroni»*, in «Il Corriere della Sera», 12 February 1993; *Di Pietro: politici, subito una soluzione*, in «La Stampa», 12 February 1993.
[200] *Di Pietro: «Non ce la faccio più»*, in «La Repubblica», 12 February 1993.
[201] *«Pochi i veri disonesti, molti invece i pecoroni»*, in «Il Corriere della Sera», 12 February 1993.
[202] Ibidem.
[203] *«Niente carcere per chi confessa»*, in «La Stampa», 18 February 1993.
[204] *Piace poco la bozza sul condono*, in «La Stampa», 19 February 1993.

following collaboration with prosecutors[205]. In an interview with «Panorama», Giulio Catelani, general prosecutor of Milan, also took a position in favour of this line: «We can also hypothesize a form of reward treatment for those who confess; however, it must be established whether the accused has confessed everything. [...] Since this is impossible, one can only establish a mechanism for revoking the reward in the event that it is discovered that the confession has not been full or has even been false. For this purpose, one could take a cue from the law on terrorism»[206]. Particular attention, moreover, was paid by the government to the definition of new rules in relations between entrepreneurs and the public administration[207].

On 24 February 1993, Prime Minister Giuliano Amato spoke to the Chamber of Deputies, stating: «It's time to give political answers that the judges themselves are asking for and reproaching us for not having adopted yet»[208]. In particular, for the Prime Minister there were four «very urgent» measures to get out of Tangentopoli: new rules for contracts; new rules for financing politics; new strong and credible controls on the actions of the public administration; interventions on crimes committed up to that time, which, «without clean slates and ensuring restitutory and interdictory sanctions, regulate with equilibrium the crimes of the past»[209]. On the same occasion, the secretary of the Christian Democratic Party, Mino Martinazzoli, argued that the time had come to «begin to say that using the word 'steal' for everything is immoral»: «The violation of the law on public financing is not theft. It is an irregularity»[210].

On 2 March 1993 the Constitutional Affairs Committee of the Senate approved a proposal for reform of the rules on party financing that abolished the law in force, decriminalizing the crime of illicit financing of parties and replacing it with an administrative fine. The proposal was approved with the votes of only the majority parties (DC, PSI, PSDI and PLI)[211].

The approval of the reform, even if provisional, influenced the elaboration of the measures that, according to the government, should have constituted the "political solution" to Tangentopoli. According to journalistic reports, in fact, the majority forces, in particular the Christian Democrats, pushed to transform the text approved by the Senate into a decree-law, despite the opposition of Minister Conso[212]. Conso himself, in fact, in an interview given on 3 March 1993, stated that he would never have signed "a clean slate" in favour of those subjected to the Clean hands investigations: «Decriminalizing the crime and reducing it to a purely administrative sanction: a fine and that's it. This would be the dreaded clean slate, to which I am personally opposed. [...] I can tell you that such a law would not bear my signature»[213].

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[205] *Conso: nessun condono*, in «La Stampa», 22 February 1993.

[206] *Prenderli con filosofia. Intervista con Giulio Catelani*, in «Panorama», 7 March 1993, p. 47

[207] *Conso cerca la «soluzione politica» e Borrelli gli chiede una rettifica*, in «Il Corriere della Sera», 26 February 1993.

[208] *«Chi porta soldi al partito non è ladro»*, in «La Stampa», 25 February 1993.

[209] Ibidem.

[210] Ibidem.

[211] *Cancellate le sanzioni penali*, in «La Stampa», 3 March 1993.

[212] *Il condono si allontana*, in «La Stampa», 4 March 1993; *Il finanziamento pubblico ai partiti. Conso perplesso sulle nuove misure*, in «Il Corriere della Sera», 4 March 1993.

[213] *«Io non firmerò colpi di spugna»*, in «La Repubblica», 3 March 1993.

In the end, after several days of negotiations within the government, on 5 March 1993 the Council of Ministers approved the package of measures aimed at providing a political solution to Tangentopoli. The package consisted of four decree-laws (concerning the financing of parties, the unblocking of contracts halted due to judicial inquiries, the competence of the Court of Auditors on the control of acts of the public administration and decriminalization of crimes) and three bills to be sent to Parliament (concerning the extension of plea bargaining to crimes against the public administration, the abbreviated judgment and the rules on praetorial judgments)[214].

The most important measure was undoubtedly the decree law on party financing, later renamed "Conso decree" by the media. The decree reproduced the text of the law approved by the Senate, but introduced more sanctions. The decree decriminalized the crime of illicit financing of parties, transforming it into an administrative offence, providing for the sanction of payment of a sum equal to three times the amount illicitly received and disqualification from holding public office for three to five years. The measure provided for retroactive application and was therefore also valid for ongoing proceedings[215].

Another very important provision of the Conso package was the bill on plea bargaining. According to the bill, people accused of crimes against the public administration would be able to obtain the application of the sentence on request. The possible opposition of the public prosecutor to the plea bargaining agreement would not have been binding, but in order to avoid a trial and avoid going to prison thanks to probation, the defendant would have had to admit the alleged facts and provide the judge with the broadest possible reconstruction. It was not necessary to call others to account: «This is so as not to fall into delation», Minister of Justice Conso explained[216]. The text also provided for the immediate application of the sanction of expulsion from political life, with the prohibition to run for political office, and the sanction of the restitution of sums illegally received.

The press reports and the statements of the protagonists themselves show how the Minister of Justice was against the approval of a decree-law on the decriminalization of the crime of illicit financing to parties and that he accepted this solution on condition of strengthening the sanctions provided for violations of the regulations and introducing interdiction measures[217]. «That's why it's not a clean slate», Conso claimed while illustrating the contents of the approved measures at a press conference:

> No criminal trial, it is true. But in compensation there will be the immediate payment of a large sum: three times the amount illegally received. In addition, we have established a sort of tabular system, according to which there will be more or less long suspensions. It depends on the amount involved. Those who have committed offences should leave, get out of the way, because they disturb politics.[218]

Minister Conso also referred to the «political solution» hoped for by Di Pietro: «To magistrate Di Pietro, who has called for a political solution, it is a credit to him that he has realized that all his work

[214] *«Questo non è un colpo di spugna»*, in «Il Corriere della Sera», 6 March 1993.
[215] The full text of the decree law was published in «Il Sole 24 Ore», 7 March 1993.
[216] *Tangentopoli, come evitare il carcere*, in «La Stampa», 7 March 1993.
[217] *E Conso fa i conti con la politica*, in «Il Corriere della Sera», 6 March 1993; *La mazzetta verrà restituita tre volte*, in «La Stampa», 6 March 1993; *Il giorno più lungo di Amato. Contrasti con il Guardasigilli*, in «L'Unità», 6 March 1993.
[218] *«Questo non è un colpo di spugna»*, in «Il Corriere della Sera», 6 March 1993.

is only preparatory and is likely to remain fruitless, because our system, which provides for extremely long trial times, favours the guilty»[219].

The decree was immediately criticised by the opposition parties. The secretary of the PDS, Achille Occhetto, declared: «This majority demonstrates that it does not have the ability to keep up with the moral and intellectual change that the country needs today». The Northern League spoke of «dirty measures»: «The government's desire to impede the progress of the Clean Hands inquiry seems evident. Our impression is that this minister is on the side of Tangentopoli, while we are with the judges», the leader of the League at the Chamber, Marco Formentini, said[220]. In the following hours, all the opposition political forces took a position against the decree, considering it a «clean slate» on the Clean Hands investigations[221].

On 7 March, in an interview with «La Stampa», Minister Conso rejected the accusations of having drafted a "clean slate" in favour of the Clean Hands suspects: «Decriminalization does not mean a clean slate, but entrusting the assessment of a series of offences to the administrative authority with the possibility for the person concerned to oppose before the civil judge»[222]. The Minister explained that the intervention made «even more serious» the position of those who were called to answer only for the violation of the law on the financing of parties: «Instead of a penalty applicable only at the end of a long trial with the risk of the expiration of the crime and therefore destined to end in nothing, there is an administrative penalty equal to three times the amount paid, applicable in a very short time. With the addition of other automatic sanctions that effectively disqualify those responsible from all public and private offices».

On the same day, however, in an interview with «L'Unità», Minister Conso admitted that he would have preferred to adopt a draft law rather than a decree-law: «The decree-law was Amato's idea. But this does not mean to take a distance from it»[223]. The Minister again rejected the accusation that the government had adopted a "clean slate", recalling that the measure provided for «strong administrative sanctions and equally strong accessory measures, such as the removal from public office».

The Minister of Justice also clarified the reasons behind the government's choice. Conso recalled that they were dealing with an unusual crime, introduced only in 1974 («it is not, therefore, a natural crime»), contained in a law that had proven to work badly: «The 1974 law provided for an excessive penalty. That is why it was not enforced. Penalties were too harsh; imposing them seemed unfair. It was, after all, an experimental law». In other words, for the Minister, it was impossible not to consider the failure of a law introduced on the wave of popular indignation, following a criminal scandal and never really applied. Hence the decision to decriminalize the crime, while providing for the immediate application of sanctions and the removal of the guilty from public office:

> The current law provides for a maximum penalty of 4 years. But who was really being punished? Let's see. How long does a trial last? You do the preliminary investigation, you go to trial, you go to appeal,

[219] Ibidem.
[220] *Sarà battaglia in Parlamento*, in «Il Corriere della Sera», 6 March 1993.
[221] *Sarà battaglia alle Camere*, in «La Stampa», 7 March 1993.
[222] *«Giudici liberi di indagare»*, in «La Stampa», 7 March 1993.
[223] *Conso: «Il decreto l'ha voluto Amato»*, in «L'Unità», 7 March 1993.

> then to the Court of Cassation. Much, much time passes. And the expiration under the statute of limitations, for such a crime, comes soon. Moreover, if the defendant decides to plea bargain, he gets off with two years. And two years are covered by probation. So he stays in his seat of power. And he does not return the money he illegally received. In short: the old system guaranteed, in fact, impunity. The new procedure provides, on the contrary, the restitution of the ill-gotten money (multiplied by three) and the removal from public office. You pay immediately. And a lot.[224]

Previously, the Prime Minister Amato, in an interview with «La Stampa», had also rejected the criticism, stressing the strengthening of the sanctions: «We have created a system of inhibitory sanctions that are combined with pecuniary sanctions. And this is to respond to a need for justice. The culprit not only pays, but can no longer do certain things for varying periods of time according to the seriousness of the fault»[225]. The Prime Minister added: «I challenge anyone to say that this is a clean slate. I am with Minister Conso, and I repeat his words: the government has done exactly what the judges of Milan, Di Pietro and Gherardo Colombo in the lead, asked for». In another passage of the interview, Amato dismissed the doubt that the measures would have made the action of the magistrates more difficult: «Not at all. They asked us to intervene». And on the accusations of having adopted a "clean slate": «The real clean slate, as Conso explained, is a ten-year long criminal trial with no results. Ours is a device that is triggered immediately, with automatic sanctions, just as the people want».

Having reached this point, it seems useful to highlight two fundamental elements, which will help to better understand the events that occurred later.

First, in the face of an investigation that was growing every day and that, according to the magistrates themselves, risked paralyzing the country's judicial and economic system, the government, under pressure from the majority political forces, decided to decriminalize the crime of illegal party financing. In other words, the government removed from the jurisdiction of the ordinary judiciary the prosecution of a crime that had been systematically violated, so as to allow the judicial system to prosecute more effectively the most serious crimes against the public administration, such as concussion and corruption. This was an entirely legitimate political decision, but - and this is the first element to be taken into consideration - it sharply contrasted with the intentions of "cleaning" and "moralization" brought forward by the judiciary and with the proposals put forward in previous months by the Milan public prosecutor's office, aimed at encouraging the introduction of reward legislation for alleged corrupt and corrupting individuals.

The second crucial element to be noted is the way in which the Prime Minister Giuliano Amato publicly motivated the reasons for the adoption of the measures, stating that they had been «requested» by the magistrates of Milan, «Di Pietro and Gherardo Colombo in the lead». As pointed out above, neither Di Pietro nor Colombo ever asked the government to decriminalize the crime of illicit party financing. Rather, the request made by the Milan public prosecutor's office since July 1992 was to introduce incentives that could encourage and reward the cooperation (in other words, the repentance) of suspects, so as to make it possible to close many criminal proceedings before the trial and not to clog up the judicial machine.

[224] Ibidem.

[225] *«Non faccio colpi di spugna»*, in «La Stampa», 6 March 1993.

It is by taking these two elements into consideration that it is possible to understand the events that followed the approval of the decree law by the government.

In addition to the opposition parties, also the judiciary began to criticise the measure adopted by the government.

The National Association of Magistrates criticised «the attempt to reduce the judiciary to a controller of legality only towards citizens who do not hold positions of power» and defined «justified the fear that the decriminalization decree marks the substantial impunity for the past, and encourages the violation of the law for the future». For the association of magistrates, in fact, the so-called «political solution» should have «consisted not in erasing faults of the past but in elaborating systems that would prevent similar illegalities in the future»[226]. For Magistratura Democratica, the measure represented a «clean slate»[227].

The former president of the NAM, Raffaele Bertoni, declared that the Clean Hands inquiry had been «mortally wounded»: «Di Pietro and his colleagues are halved magistrates because they will only be able to deal with certain crimes, excluding instead crimes such as party financing»[228]. A few weeks earlier, Bertoni had intervened on the inquiry with these words: «Why can we prosecute car thieves and not state thieves? Politicians must not complain, magistrates must respect the law; they are citizens like others. Actually, they are of first rate, because they have parliamentary immunity»[229]. Bertoni, like Di Pietro and D'Ambrosio, would later enter politics and be elected in the ranks of the left-wing parties.

In an interview with «La Repubblica», Gerardo D'Ambrosio harshly criticised the measures adopted by the government:

> The political class responsible for a system of power that was based on bribes has decided to absolve itself. What we have done, and what they do not tolerate, is that we have reached the guard level, we have reached the heart of the system. It had happened another time, after the massacre of Piazza Fontana. At that time they succeeded in preventing us from bringing to light the strategy of tension, they took away our investigations, they transferred the trial to Catanzaro. Now this game, with the new code, is no longer possible and so the rescue in extremis is attempted with these measures. This moment is as delicate as it was then.[230]

The coordinator of the Milanese team reiterated his criticism of the Conso decree in another interview with «L'Unità»: «None of us asked for this. It seems to me, instead, evident that a political class of power reached by a series of measures acquitted itself, and this cannot but leave its mark. Yes, it seems to me that we can speak of self-acquittal»[231].

The vice-president of the Higher Council of the Judiciary, Giovanni Galloni, also announced the Council's intention to express an opinion on the contents of the measures adopted by the government,

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[226] *Sulla depenalizzazione del finanziamento ai partiti*, in «La Magistratura», 1993, n. 1, p. 24.
[227] *A Milano silenzio e tanta amarezza. L'Anm: «Provvedimenti paradossali»*, in «Il Giornale», 7 March 1993.
[228] *«I giudici sono dimezzati»*, in «La Stampa», 7 March 1993.
[229] *Craxi-giudici, è guerra*, in «La Stampa», 31 January 1993.
[230] *D'Ambrosio: «Assolvono se stessi e le loro tangenti»*, in «La Repubblica», 7 March 1993.
[231] *«La classe politica si autoassolve»*, in «L'Unità», 7 March 1993.

despite the fact that no request had come from the Minister of Justice. The proposal to examine the measures in order to express an opinion had been put forward by two councilors belonging to Magistratura Democratica. «At the request of the minister», Galloni declared, «the HCJ has the right to issue opinions on any measure concerning the judicial system or projects to modify the code». In the event that the minister or other institutional bodies «do not deem it necessary to request an opinion from the HCJ on those matters», Galloni stated, «the Council can equally adopt a resolution» to express its position[232]. Also on the occasion of the Conso decree, therefore, the HCJ showed its tendency to expand its powers, in particular those concerning the expression of opinions on government initiatives.

The turning point came on the afternoon of 7 March, when, in an unprecedented way, the entire Milanese pool of Mani pulite took a stand against the decree. The chief prosecutor, Francesco Saverio Borrelli, read a public statement prepared by the team in front of television cameras and journalists in which it was argued that the measure would end up thwarting all the work of the judiciary:

> We learned from the press about the contents of the measures adopted by the Council of Ministers on the subject of party funding and interventions for the so-called "political solution" of the problems related to proceedings for crimes against the Public Administration and for violation of the regulations on the funding of political parties. We also learned that these initiatives would be justified on the basis of statements made by us. As magistrates, we have the unbreakable duty to apply the laws of the State, whatever they may be, except for the equally unbreakable duty to object to their constitutional illegitimacy when this occurs. However, we do not allow anyone to present the initiatives in question as requested, desired or approved by us. Government and Parliament are sovereign in the determinations of their competence, but we hope that each one assumes in front of the Italian people the political and moral responsibilities of their choices, without shielding our work or our opinions. As far as our opinions may be of interest, they are of a nature, scope and meaning exactly opposite to the meaning of the measures adopted. We believe, in fact, that the foreseeable result of the approved legislative changes will be the total paralysis of investigations and the impossibility of ascertaining the facts and the responsibility of those who committed them.[233]

The initiative of the Milan public prosecutor's office was unprecedented. For the first time in history, in fact, the magistrates of a public prosecutor's office publicly opposed a decree issued by the government, essentially requesting that it be withdrawn.

From a formal point of view, some of the remarks made by the Milanese magistrates could not be considered unfounded. In fact, the public prosecutor office criticised in particular the fact that the measures adopted had been «justified» by the government on the basis of the statements made by the magistrates, which, however, had been of «exactly opposite scope and meaning to the sense of the measures adopted». This, as pointed out above, was true.

On the other hand, the conclusive statement of the Clean Hands pool, according to which the result of the approved measures would have been «the total paralysis of investigations and the impossibility of ascertaining the facts and the responsibility of those who committed them», did not correspond to the truth. The "Conso decree", in fact, would have prevented magistrates from prosecuting the crime of illicit financing of parties, but would have left magistrates free to prosecute the most serious crimes

[232] *«Colleghi io non ci sto»,* in «La Stampa», 6 March 1993.
[233] *Il comunicato della procura di Milano*, ivi, p. 23.

against the public administration, such as corruption and extortion. In the case of a connection between illicit financing and a crime, moreover, the former would have fallen within the scope of the criminal trial[234].

In this way, the statement read by Borrelli in front of the cameras of the main Italian television channels constituted an explicit criticism of the judicial policy decision legitimately adopted by the government, namely that of not flooding the judicial machine with proceedings concerning the crime of illicit financing of parties, speeding up the processing of proceedings concerning the most serious crimes.

It is worth remembering that the solution adopted by the government was defined as «satisfactory and acceptable» by an illustrious jurist such as Gian Domenico Pisapia, the father of the new code of criminal procedure[235]: «What mattered, I believe, was to keep the problem of party financing separate from that of more serious offences chargeable to some. In any case, with this decriminalization, I don't think we can talk about a clean slate. This was a "sui generis" crime: we are not dealing with real criminal offences. We are in the realm of offences that had been heavily sanctioned perhaps thinking that this could be a deterrent, but which in reality (no one had ever paid attention to it again) was not deterrent and as such did not work». «In their essence», Pisapia added about crimes related to party funding, «they are facts that often consist of a failure to register and therefore it is not that you can say 'in this way you legitimize theft'»[236].

In the section "A broken balance" it was stated how the "Conso affair" symbolically represented the moment of breaking the balance between politics and judiciary. This is because, starting from that affair, the judiciary began to exert its pressure on political processes not so much in defense of its own particular interests, but by becoming the bearer of citizens' demands for justice. Claiming that the measure approved by the government would have led to the «paralysis» of the Clean Hands investigations, the Milan prosecutor's office certainly went so far as to play a political role in representing the demands for justice coming from the citizens.

The transformation of the judiciary, in this specific case of the Milan public prosecutor's office, into a true political subject can also be traced in another fundamental detail.

The criticism of the Milan public prosecutor's office towards the initiative taken by the government was only in the conclusion of the press release. Examining the statement, the main concern of the Milan public prosecutor's office appears to be to distance itself from the initiative adopted by the government, that is to make clear to the public that the measures in question had not been approved at all - as claimed in particular by Prime Minister Amato - at the request of the magistrates themselves.

In other words, the main objective of the Milan prosecutor's initiative seemed to be to address directly the public opinion that in the previous months had supported the investigations of the magistrates with ardor and indignation, elevating them to symbols of the moral renewal of the country. In other

[234] *«Giudici liberi di indagare»*, in «La Stampa», 7 March 1993.

[235] From 1975 Pisapia was chairman of the ministerial commission that drafted the new code of criminal procedure in 1988.

[236] *Soluzione accettabile*, in «La Stampa», 7 March 1993.

words, what the Milan public prosecutor's office could not accept was losing the support of public opinion, just as a politician fears losing the support of his constituency.

The comments made by the protagonists of the affair themselves confirm this analysis.

In a memoir published in 2021, Piercamillo Davigo, after having defined the Conso decree as «ridiculous», points out that what annoyed the magistrates of the Clean Hands team the most was the government's reference to their alleged requests:

> We were struck, however, by the fact that, in public statements, members of the government had stated that the initiative was consequent to a request from the Milan magistrates who were investigating this crime. The prosecutor of the Republic, on our behalf as well, made a statement to the media specifying that the government could exercise its duties in the way it thought fit, but taking responsibility for it and not sheltering behind a request from the magistrates that never existed.[237]

But the most solid confirmation of the analysis proposed here was provided by the chief prosecutor of Milan, Francesco Saverio Borrelli, in an interview given in October 1993: «That time we intervened with a rather harsh statement because we did not want the solution proposed to be presented to the people as a solution suggested by the Milanese magistrates»[238].

The subsequent exchange of questions and answers between the interviewer and Borrelli is of fundamental importance:

> Excuse me, Prosecutor, but what did you care? You are technicians, not politicians. What do you need consensus for?
>
> «How, what did we care? You want to totally devalue the moral factor?».
>
> What moral factor?
>
> «It is one thing to work with the awareness or illusion of being in consonance with the legalitarian conscience of the people in whose name we pronounce our measures, it is another thing to feel surrounded by distrust or contempt».

It is evident from the statements made by Borrelli that the Milan public prosecutor's office conceived its role in a political perspective.

Ultimately, the transformation of the Milan public prosecutor's office into a real political subject is to be found not only in the expression of a public criticism (through the use of the most penetrating means of mass communication) against a choice of judicial policy legitimately adopted by the government, but above all in the tendency to play a role of representation of the demands for justice of the public opinion and to protect this relationship of consensus established with the citizens. As examined above, and as will emerge even more clearly in the next chapter, these ways of intervention - and thus this transformation - would later be replicated by the National Association of Magistrates and thus by the judiciary as a whole.

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[237] P. Davigo, *L'occasione mancata. Mani pulite trent'anni dopo*, Bari-Rome, Laterza, 2021, pp. 57-8.

[238] *Borrelli: da Scalfaro critiche ingiuste*, in «Il Corriere della Sera», 3 October 1993.

Although the magistrates of the Milan public prosecutor's office were right in denying that the "Conso decree" was in accordance with their proposals, the initiative of the public prosecutor's office, both for the communication methods used and for the contents and objectives mentioned above, clearly constituted an anomaly in the relations between politics and judiciary.

As seen above, the criticism of the opposition forces, but above all the position taken by the Milan public prosecutor's office, fed by the information system, induced on 8 March the President of the Republic Oscar Luigi Scalfaro not to sign the decree, claiming that this could have prevented the referendum against the law on public financing to parties that would have been held a few weeks later[239]. A few hours after the decision of the Head of State, in the evening of 8 March, a crowd composed of thousands of people demonstrated to express support for the magistrates under the Palace of Justice in Milan[240].

The following day, the adjunct prosecutor of Milan, Gerardo D'Ambrosio, said he was «satisfied» with the decision of Scalfaro, who, «thanks to his sensitivity as a magistrate», had «understood that it was not the case to sign that decree» and that «public opinion would not have liked an intervention on these issues, done so, with urgent procedure»[241]. In 2012, D'Ambrosio clearly stated that «the Conso package was withdrawn because of our reaction»[242].

In 2002, in an interview, the head of the public prosecutor's office of Milan Borrelli admitted that his position on the Conso decree «had been - needless to deny it - a form of pressure on the Parliament»: «To tell the truth, I had decided to intervene in order to contradict what the government was saying, namely that we had asked for that decree»[243].

Borrelli, however, justified the action of «pressure» carried out by the prosecution by referring to the general context of weakening of politics:

> I don't want to say that we were the only interlocutors of politics (it would be assuming too much from ourselves), but in fact we were the only voice heard. At that time, our offices were the destination of an incessant pilgrimage of a large number of political figures, who came here to clear their minds, ask for advice, try to understand the dimensions and the quality of the Tangentopoli phenomenon. I don't say they were hanging on our lips, but almost. Therefore, today it is hypocritical to say that the prosecutors have played a supplanting role or even usurped the functions of politics, because at that time the feeling was exactly the opposite: it was the political world that came to us to get news, ideas and suggestions. Therefore, if we were in some way politically accredited interlocutors, even our position against the Conso decree was part of the climate, of the aura of that historical moment.[244]

On closer inspection, Borrelli's words confirm the presence (and the magistrates' awareness) of a situation of imbalance of power between politics and the judiciary. Faced with a weakened political world, the magistrates of Milan intervened with an action of «pressure» to block a decision

[239] *Tangentopoli, Scalfaro blocca il condono*, in «La Stampa», 8 March 1993.
[240] *E al grido di "Bo-rre-lli" un corteo sfila per Milano*, in «La Repubblica», 9 March 1993.
[241] *D'Ambrosio: blitz evitato*, in «La Stampa», 9 March 1993.
[242] *Mani Pulite? Il Paese perse la grande occasione per battere la corruzione*, in «L'Unità», 12 February 2012.
[243] Intervista a Saverio Borrelli, in G. Barbacetto, P. Gomez, M. Travaglio, *Mani pulite. La vera storia*, Rome, Editori Riuniti, 2002, pp. 692-3.
[244] Ivi, p. 693.

legitimately adopted by the government. In other words, the profound weakening experienced by politics did not make the encroachment of the judiciary into the sphere of politics, particularly in the area of defining judicial policies, any less anomalous.

According to press reports of the time, Scalfaro's refusal to sign the decree following the intervention of the Milanese prosecutor's office was interpreted by many politicians as the definitive defeat of politics in the face to the judiciary. On this point three exponents of the Socialist Party expressed their opinion, such as Mario Raffaelli: «What are we talking about? By now we have already lost, yesterday there was the defeat of the political power against the judges»; Rino Formica: «That statement read by Borrelli on television without anyone rebel has ratified the supremacy of judges»; and Claudio Signorile: «We must take note, there has been a turning point. Now only one power counts, theirs»[245].

Another socialist member of parliament, Enrico Manca, on the other hand, underlined how it was impossible to imagine that Cossiga was unaware of the contents of the decree-law: «But let's be serious, if I knew that it would be a decree, how could Scalfaro not know! The Head of State knew everything, this is the truth»[246]. Stefano Rodotà (PDS) said that it was Scalfaro himself who convinced Conso to sign the decree[247].

In June 2008 the former Prime Minister Amato said in an interview that Scalfaro did not sign the decree Conso «after the pronouncement of the Milan prosecutor»: «The veto of a group of magistrates to a legislative provision was a reprehensible episode»[248]. The former Head of State Scalfaro denied, however, the statements of Amato with these words: «I had no news of "pronouncement of the Milan prosecutor's office" and my friend Giuliano Amato knows well that I have never conditioned my decisions to wills extraneous to my institutional duties»[249]. Even if it is unlikely, to say the least, that Scalfaro did not have news of the pronouncement expressed by the Milan prosecutor's office on all Italian televisions, the facts that happened "behind the scenes" between the government, the Quirinale and the Milan prosecutor's office around the Conso decree are still to be clarified on a historiographic level.

In the meantime, what is clear from the reconstruction of events carried out here is that the thesis of those who claim that, before the public intervention of the Milan prosecutor's office against the Conso decree, everyone agreed on the political solution for Mani pulite: the government, the parties and the judiciary[250].

On 9 March 1993, in an interview with «Il Giornale», minister Conso said he was surprised by the reactions expressed against the decree by the Milan magistrates:

> Twenty days ago, there were very prominent statements (those of Di Pietro, ndr), interpreted precisely in the sense in which our decree was going. Now, but only now, we learn that they did not mean this.

[245] *«Noi politici abbiamo perso, ora sono i giudici a governare»*, in «La Stampa», 9 March 1993.
[246] Ibidem.
[247] Ibidem.
[248] *Amato dice addio alla politica. «Craxi e il '92? Feci scelte giuste»*, in «Il Corriere della Sera», 2 June 2008.
[249] *«Era un colpo di spugna, decisi io di non firmare»*, in «Il Corriere della Sera», 3 June 2008.
[250] I refer to the argument advanced in M. De Pizzo, op. cit.

> If they had explained themselves better and immediately, we would have avoided losing so much time in misunderstandings and uncertainties.[251]

Conso's statement is rather surprising, especially if one considers, as has already been pointed out, that the contents of the decree differed from the proposals previously put forward by Di Pietro and the other members of the Milan public prosecutor's office.

On 10 March 1993, President Amato intervened in the Senate to report on what had happened regarding president Scalfaro's refusal to sign the decree-law. In a tumultuous session, characterised by protests, interruptions and even near brawls, the Prime Minister rejected the accusation of having wanted to take the investigations in progress away from the magistrates: «Minister Conso said over and over again in the newspapers and in televised statements that, by virtue of the principle of connection, in any case in which there was or will be a connection between illicit financing, receiving stolen goods, concussion and corruption, the jurisdiction over these facts, including those decriminalized, remains of the criminal judge: and this is a principle that in no case was or intended to be undermined»[252]. Amato pointed out how this principle would also apply to Craxi, since the latter was under investigation not only for illegal financing, but also for more serious crimes such as corruption and concussion.

«The Head of State, for constitutional reasons related to the forthcoming referendum, has decided not to sign the decree in question», Amato said in the Senate, before revealing that Minister Conso had «advised him not to use the form of a decree-law for that measure»:

> The advice reflected an awareness that, by adopting it as a decree, it would be placed in greater prominence than other measures, the importance and consistency of which was, in fact, attenuated by that same decree. It is a fact that many have ignored the fact that for the most serious crimes, perpetual expulsion from political life was foreseen (we have been reproached for not having done so, and we had done so), and this has largely been the case, because that decree, which concerned only the case of illicit financing, did not foresee such a serious sanction. I must therefore acknowledge that my colleague Conso made a suggestion that unfortunately the government did not accept.[253]

The distance between the contents of the Conso decree and the positions expressed by the Milan public prosecutor's office was also clearly confirmed by an event that took place after the "Conso affair".

In fact, on 10 June 1993, Antonio Di Pietro spoke at the congress of the National Association of Magistrates, reading a text agreed upon with his colleagues Davigo and Colombo, containing the proposals of the team to «get out of Tangentopoli, neither with clean slate, nor with lynchings in the streets or exasperated intransigence». The only way to go, in the opinion of the magistrates, was «the application of the law» which consists, for the public prosecutor, «in the obligatory exercise of the criminal action», while, for the accused, «in a rapid and fair trial»: no «amnesties, pardons, variously painted clean slates». The legislator, however, was required to adopt a series of measures to speed up trials, in particular:

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[251] *E Conso pensa alle dimissioni*, in «Il Giornale», 9 March 1993.

[252] Parliamentary record, Senate of the Republic, 10 March 1993, morning session, p. 12.

[253] Ivi, pp. 14-15.

> Incentives for procedural collaboration in order to facilitate the collection of decisive elements for the reconstruction of the facts, the identification of the authors of the crimes and the destination of the proceeds. Enlargement of the possibility of recourse to alternative procedures and, significantly, to plea bargaining. Adequate injunctive measures to prevent those who have committed crimes against the public administration from continuing to be involved in public affairs. Measures to allow companies to resume operations according to transparent market rules.[254]

As it clearly emerges, this was a reiteration of the proposals already made in the previous months. In particular, the fact that the first proposal consisted again in the introduction of incentives that could encourage the cooperation and repentance of suspects is particularly relevant[255].

Even the head of the Milan public prosecutor's office, Borrelli, stressed in the following hours that the proposals made by Di Pietro did not represent a novelty: «They are those that we have always supported. Perhaps this time the echo has been greater because expressed in a solemn public occasion, which is the congress of magistrates»[256]. Borrelli also declared that he had authorized Di Pietro's intervention and rejected the criticism of those who accused magistrates of interfering in the work of parliament: «But how? Some representatives of the political world first come to us to ask for clarification on how to deal with the bribery earthquake (and I assure you that there have been many visits) and then they are shocked if we try to show a way out?»[257].

As in the case of the intervention against the Conso decree, Borrelli was once again aware of the imbalance of power between politics and the judiciary. As highlighted above, however, this situation did not make the encroachment of the judiciary into the sphere of politics any less anomalous.

The Minister of Justice Conso welcomed the proposals of Di Pietro, Colombo and Davigo, declaring that «it was important for the government to have indications that came from the judiciary» and recalling, referring to the events of March, that he had not been «the father of decriminalization for illicit party financing»[258].

In the following days the Minister of Justice began to elaborate a new measure that would meet the demands of the Milanese magistrates, so much so that he met Di Pietro several times to agree on the text[259]. Conso, also speaking at the Congress of the NAM on 13 June 1993, said he was «decidedly contrary to any hypothesis of decriminalization»: «The illicit financing of parties will be treated as all other crimes, from the smallest to the largest. Period»[260]. The new measure never saw the light of day, above all because of criticism from the opposition forces, who considered that the parliament in force at the time did not have the legitimacy to intervene in the matter.

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[254] *«La mia ricetta per Tangentopoli»*, in «La Stampa», 11 June 1993.

[255] The only critical voice within the prosecutor's office was that of Gerardo D'Ambrosio, who stated: «I welcome anything that serves to speed up trials [...]. I disagree, however, on the incentive for trial collaboration. The "gathering of decisive elements," as colleagues say, must take place through investigative activity. Leaving room for reward legislation, on the other hand, takes us down a risky road». Cited in ibidem.

[256] *Borrelli: il decreto serve. Non è una bandiera bianca*, in «La Stampa», 13 June 1993.

[257] Ibidem.

[258] *E Conso ringrazia: ha ragione. Adesso rimettiamoci al lavoro*, in «La Stampa», 11 June 1993.

[259] *Un decreto ispirato da Di Pietro*, in «La Stampa», 12 June 1993.

[260] *Conso: non depenalizzo proprio nulla*, in «La Stampa», 14 June 1993.

8. The 2000s

Berlusconi and the judiciary

The years of the second and third Berlusconi government (June 2001-May 2006) were characterised by a high level of conflict between the executive and the judiciary. Tensions between politics and the judicial power emerged from the first months, following the announcement of the centre-right majority to intervene to reform the HCJ and the judicial system. Tensions were exacerbated by a number of very critical statements by the government regarding the judiciary. In November 2001, for example, Prime Minister Berlusconi accused the judiciary of having carried out a «civil war»: «Foreign journalists do not want to take note that an entire political class, that of democratic and Western origin, has been swept away by a part of the judiciary. Justice has been used illegitimately for the purposes of political struggle»[1]. Criticism towards the judiciary was also advanced by the undersecretary of the Interior, Carlo Taormina, and by the Minister of Justice himself, Roberto Castelli. The latter, on 4 December 2001, in the Senate criticised the «part of the judiciary» that «still intends to make political struggle not through the normal democratic instruments but improperly using the judicial actions»[2].

The criticism of Berlusconi and government representatives referred to the growing role assumed by the judiciary on the political level since the Clean Hands investigation and the high number of criminal proceedings initiated by the judicial offices against politicians, in particular Berlusconi himself. There is no doubt that Berlusconi, during his career in politics, became the subject of particular attention from the judiciary at the criminal level, so much so that he was involved in a total of 36 criminal proceedings, only one of which, as we shall see, ended with a conviction against him[3].

The judiciary reacted strongly to the government's criticism. In January 2002, on the occasion of the inauguration of the judicial year, the magistrates presented themselves at the ceremonies wearing the gown, left the courtroom when the government representatives took the floor, and read a document drafted by the NAM. In the document, the NAM took a position in defense of «the autonomy and values of independence», asking that «the right to criticise judicial decisions does not turn into systematic denigration of the entire institution»[4]. In Milan Saverio Borrelli, general prosecutor and symbol of the Clean Hands inquiry, launched a harsh attack against the government, criticizing «the reforms announced, or rather threatened at every turn with transparent punitive intentions towards an independent judiciary», and advancing the invitation to magistrates to «resist, resist, resist as on the line of Piave»[5].

A few weeks later, the NAM decided to buy some advertising space in Italian newspapers to explain to the public the reasons for the protests. «Reforming justice», the document claimed, «means enabling us to work better and faster, guaranteeing the rights of citizens, without limiting the

[1] See *«Negli Anni 90 in Italia una guerra civile»*, in «La Stampa», 1 November 2001.

[2] *«Alcuni magistrati puntano a ribaltare il voto»*, in «La Stampa», 5 December 2001.

[3] See *Silvio, trentasei processi: tante assoluzioni ma anche prescrizioni e amnistie*, in «Il Mattino», 25 October 2021; *Non basta una assoluzione per riabilitare Berlusconi*, in «Domani», 25 October 2021.

[4] *In tutta Italia i magistrati protestano*, in «La Stampa», 13 January 2002.

[5] *Borrelli: resistere come sulla linea del Piave*, in «La Stampa», 13 January 2002.

independence and autonomy of magistrates, who perform their duty with conscience, balance and sacrifice. Unfortunately, some of the reforms we have been talking about lately would not even serve to improve the functionality of justice. Today we magistrates are concerned. We bought this space to tell you all about it»[6]. The tendency of the NAM to establish a direct relationship with public opinion and to play a leading role in the political debate was confirmed in September of the same year, when the association of the magistrates decided to organize a theatrical performance centred on a simulated trial, in order to show the consequences of some bills then under discussion in parliament[7].

In March 2002 the Parliament approved the reform of the electoral system of the HCJ (see the next section), amidst protests from the associative judiciary, according to which it jeopardized the criterion of «representativeness»[8]. Further tensions were recorded in April 2003, when the Court of Milan condemned the defendants in the trial Imi-Sir for corruption in judicial acts, including Cesare Previti, member of the Parliament and close associate of Berlusconi[9].

But the hardest clash between politics and the judiciary was registered during the long legislative procedure of approval of the law of the judicial system (Law n. 150/2005), which lasted over three years, from March 2002 to July 2005.

The associative judiciary mobilized throughout the process of approval of the measure to denounce the danger of an impairment of the autonomy and independence of the judiciary, going so far as to strike four times, despite appeals by the Head of the State to desist[10]. Never in the history of the Italian Republic had there been such a level of mobilisation of the judiciary regarding a law being debated in parliament.

Certainly, the repeated attacks by President Berlusconi on the judiciary, particularly the «left-wing» judiciary, accused of being «politicized» and of carrying out a «judicial persecution» against him, his associates and his party colleagues, contributed to this rise in tensions[11].

However, also some representatives of the judiciary also used very strong tones against the government. On 8 February 2004, for example, the secretary of the NAM, Carlo Fucci, criticised the reform of the judicial system then under discussion, stating that it aimed at the «fascistization of the judiciary», evoking Mussolini's reform of 1923[12]. In 2006 Magistratura Democratica decided to participate actively in the Committee for the no vote in the referendum on the draft revision of the Constitution approved by the centre-right majority (the reform was then rejected by 61% of voters)[13].

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[6] See *Lettera aperta dei magistrati ai cittadini*, in «La Stampa», 26 January 2002.

[7] *Mettiamo in scena la legge che paralizzerà la giustizia*, in «La Repubblica», 18 September 2002.

[8] See *Riforma del Csm, con il sì dei socialisti*, in «La Stampa», 28 March 2002.

[9] See «La Repubblica», 29 and 30 April 2002. The convictions were confirmed on appeal and finally in the Supreme Court in May 2006.

[10] The magistrates' strikes were held on 20 June 2002, 25 May 2004, 24 November 2004 and 14 July 2005. See «La Magistratura», 2002, n. 1-2; «La Magistratura», 2003, n. 3-4; «La Magistratura», 2004, n. 3-4.

[11] See *Berlusconi: persecuzione politica, i giudici non decidono sul governo*, in «La Stampa», 30 January 2003; *Berlusconi: è la conferma di una persecuzione*, in «La Stampa», 30 April 2003.

[12] See *L'Anm ha deciso, due giorni di sciopero a marzo*, in «La Stampa», 9 February 2004; *Bufera sull'Anm, Fucci si dimette*, in «La Stampa», 10 February 2004.

[13] G. Palombarini and G. Viglietta, *La Costituzione e i diritti. Una storia italiana. La vicenda di Md dal primo governo di centro-sinistra all'ultimo governo Berlusconi*, Naples, Edizioni Scientifiche Italiane, 2011, pp. 379-80.

The tensions between politics and judiciary were finally aggravated by the approval of a series of measures in the field of justice that aimed to strengthen the guarantees of suspects and to protect the position of Prime Minister Berlusconi in numerous judicial proceedings concerning him: the law on international rogatory letters (Law n. 367/2001), the partial decriminalization of false accounting (Law n. 61/2002), the Cirami law on legitimate suspicion on the impartiality of the judge (Law n. 248/2002) and finally the Schifani law (Law n. 140/2003). The latter measure introduced a prohibition to prosecute the five highest offices of the State, including the President of the Council of Ministers, until they ceased to hold office. The law was declared unconstitutional by the Constitutional Court in January 2004 (ruling n. 24/2004)[14].

Reform of the HCJ and the judicial system

In March 2002 the centre-right majority approved a new reform of the electoral system of the HCJ.

Law n. 44 of 28 March 2002 changed the composition of the body, reducing the number of elected members from 30 to 24. As far as the electoral mechanism is concerned, the law abolished the competing lists for the election of members, providing for the expression of the vote through a preference for individual candidates. Three national constituencies were also provided for the election of judges, prosecutors and Supreme Court magistrates. The introduction of the category of prosecutors was intended to reduce the presence of prosecutors in the Council, favoured by the media over-exposure enjoyed by investigative magistrates[15]. The reform marked the transition from a proportional electoral system with list voting to a system that formally excludes the presence of groups, providing only individual candidacies[16].

Also in this case, the legislator acted with the will to attenuate or eliminate the influence of the judicial factions in the electoral competition, favouring the election of "independent" candidates. Also in this case, however, the result was not achieved.

The formal abolition of competing lists did not prevent the groups from continuing to informally play their role in the selection and promotion of candidates for elections to the HCJ. Moreover, the extension of the constituencies to the national level made it even more unlikely that a direct relationship could be established between candidates and voters and that the election could take place without the support of organisations rooted in the territory such as the judicial factions, which consequently saw their role even strengthened[17].

[14] See S. Colarizi, *Storia politica della Repubblica. Partiti, movimenti e istituzioni. 1943-2006*, Rome-Bari, Laterza, 2007, pp. 249-50; E. Bruti Liberati, *Magistratura e società nell'Italia repubblicana*, Rome-Bari, Laterza, 2018, kindle edition, chapter VII, section 1, Le leggi ad personam e aggressione alla magistratura.

[15] F. Biondi, *Sessant'anni ed oltre di governo autonomo della magistratura: un bilancio*, in «Quaderni costituzionali», n. 1, March 2021, p. 17.

[16] G. Ferri, *Magistratura e potere politico. La vicenda costituzionale dei mutamenti del sistema elettorale e della composizione del Consiglio superiore della magistratura*, Padua, Cedam, 2005, pp. 3-5; D. Piana and A. Vauchez, *Il Consiglio superiore della magistratura*, Bologna, Il Mulino, 2012, p. 95.

[17] G. Ferri, *Magistratura e potere politico*, cit., pp. 158-60.

As mentioned above, even this reform of the electoral system of the HCJ was strongly criticised and resisted by the associative judiciary, which complained about a reduction in the internal representation of the body and perceived «punitive steps» in the intervention of the legislator[18].

In July 2005, Parliament completed the reform of the judicial system. Law n. 150/2005 was the first organic reform of the judicial system approved in the Republican period[19]. As noted above, the law was approved at the end of a long legislative path that lasted from March 2002 to July 2005, characterised by constant protests by the judiciary.

The reform was first approved by Parliament on 30 November 2004. Following the approval of the law, the NAM reiterated its «strongest dissent and deepest concern for a text that puts at risk the independence of the judiciary, changes the balance between the powers of the State, decreases the guarantees of citizens»[20].

On 16 December 2004 the President of the Republic, Carlo Azeglio Ciampi, sent the law back to the Chambers of Parliament, noting four profiles of «manifest unconstitutionality», all of which could be traced to the excessive oversizing of the role of the Minister of Justice and the undersizing of the role of the HCJ[21]. The law was amended by Parliament and finally approved on 20 July 2005, again amidst the protests of the NAM. The law, said the NAM in a note, would serve «only to bureaucratize the judiciary and to make the role of judges and prosecutors less free and independent»[22].

The law changed the system of career, replacing the system of advancement based on the mechanism of "open roles" with a system based on competitions, thus foreshadowing a return to the system in force in the past. In fact, the law established that the passage from one function to another (from magistrate of tribunal to magistrate of appeal and then to magistrate of the Supreme Court) would take place by means of a competition based on qualifications and examinations or only on qualifications. The measure also provided for the establishment of the Higher School of the Judiciary, composed of magistrates, jurists and lawyers, responsible for organizing compulsory professional refresher courses for magistrates. At the end of the courses, the school would have provided an evaluation of magistrates, a prerequisite for allowing them to participate in competitions for career advancement[23].

The law also introduced limits on the transition between judicial and prosecutorial functions. In fact, the text provided that the transition from one function to another was possible only within the third year of service, after a training course and competition for qualifications, and only for offices located in a different district.

The third important change concerned the internal organisation of public prosecutors' offices. The law strengthened the hierarchical structure within the prosecution offices. In particular, the public

[18] See *Riforma del Csm, con il sì dei socialisti*, in «La Stampa», 28 March 2002.

[19] F. Dal Canto, *Le trasformazioni della legge sull'ordinamento giudiziario e il modello italiano di magistrato*, in «Quaderni costituzionali», 2017, n. 3, pp. 671-702.

[20] *Passa la riforma della Giustizia. Dalla Camera l'ultimo via libera*, in «La Repubblica», 1 December 2004.

[21] *Messaggio del presidente Ciampi alle Camere sull'ordinamento giudiziario*, in «La Magistratura», 2004, n. 3-4, pp. 3-5.

[22] *Una pessima riforma dell'ordinamento giudiziario*, in «La Magistratura», 2005, n. 1-2, p. 111.

[23] See L. Pomodoro and D. Pretti, *Manuale di ordinamento giudiziario*, Turin, Giappichelli, 2015, pp. 104-5.

prosecutor became the «exclusive owner» of the penal action, with power of delegation and directive towards other magistrates. The reform then repealed Article 7-ter, paragraph 3, of Royal Decree n. 12 of 1941, according to which the HCJ determined the general criteria for the organisation of the offices of the public prosecutor. Under the new law, the prosecutor determined the criteria for organizing the office and the criteria for assigning cases to magistrates, transmitting these measures to the HCJ[24].

Finally, the law introduced a stricter disciplinary system, providing for a precise list of unlawful conduct, and intervened on the role and composition of judicial councils. With regard to the latter, the reform provided for the inclusion in the judicial councils, for the first time, of members not belonging to the judiciary, such as university professors, lawyers and members elected by the regional council, with the aim of strengthening the openness of the judicial system to the external world. The reform also extended the powers of the councils, which were given the task of supervising the management of the district, formulating opinions on the activities of magistrates and adopting measures on the status of magistrates[25].

Following the early fall of the government, the political elections of spring 2006 and the birth of the Prodi government, the new centre-left majority accepted the protests of the associative judiciary, first by suspending the effectiveness of Law n. 150/2005 and then by approving Law n. 111/2007. The measure represented a sort of «counter-reform» with respect to the intervention of the previous centre-right government[26].

The system established by Law n. 111/2007 is still in effect. With regard to the career of magistrates, the law separated again career advancement (and thus the actual exercise of functions) from the evaluation of professionalism. The career has been divided into seven seniority levels, at four-year intervals, to which access is gained after an evaluation of professionalism. The positive outcome of the professional assessment entails both the passage to the next salary level and the possibility of taking part in competitions for access to the various functions, based on the assessment of titles only. Compared to the previous law, the reform has removed the power of the Higher School of the Judiciary to participate in the evaluation of professionalism of magistrates, entrusting it only with the competence for the training of magistrates and the organizing of refresher courses[27].

The reform has reduced the obstacles provided for the passage from the function of prosecutor to that of judge and vice versa. The law establishes that the transfer can be requested no more than four times during the entire career and after at least five years of continuous service in the function exercised. It entails the transfer of the magistrate to a judicial office in a different region.

The reform has also modified some norms concerning the internal organisation of the prosecutor's offices, attenuating the hierarchical structure. The public prosecutor remains the exclusive holder of the penal action, however, the clause according to which this action was exercised «under his

[24] N. Zanon and F. Biondi, *Il sistema costituzionale della magistratura*, Bologna, Zanichelli, 2014, pp. 253 ff.; L. Pomodoro and D. Pretti, op. cit., p. 259.

[25] D. Piana and A. Vauchez, op. cit., pp. 208-9; L. Pomodoro and D. Pretti, op. cit., pp. 76-84.

[26] See A. Perrone Capano, Consiglio superiore e associazionismo, in *Il potere dei conflitti. Testimonianze sulla Storia della magistratura italiana*, edited by O. Abbamonte, Turin, Giappichelli, 2017, p. 67.

[27] See L. Pomodoro and D. Pretti, op. cit., pp. 106-9.

responsibility» has been cancelled. The measure with which the public prosecutor is entrusted with a specific matter is no longer qualified as a delegation but as an assignment. Finally, in the event of revocation of the assignment, the magistrate is given the right to submit written observations[28].

The law also modified certain aspects of the previous reform of judicial councils. It has increased the number of judges in the judicial councils and eliminated the components elected by the regional councils, maintaining the presence of university professors and lawyers (who are excluded, however, from deliberations concerning the evaluations of professionalism of magistrates). In addition, the measure eliminated the task of judicial councils to supervise the behaviour of magistrates as well as the possibility of adopting measures regarding the status of magistrates[29].

The reforms of 2006-2007 also affected the rules governing the conferral of directive and semi-directive functions, which, as seen above, had been the object of criticism regarding the conditioning exercised by the judicial groups. The law of the judicial system now provides that the conferment of these functions is based on an evaluation of the merit of the candidates, with particular reference to experience and organisational and managerial aptitude[30]. Moreover, the temporary nature of appointments has been established, with the assignment of duties for four years, renewable once for another four years following an evaluation by the HCJ.

However, the objective of reducing the influence of the judicial factions in the procedures for conferring directive and semi-directive posts does not appear to have been achieved. The temporary nature of these mandates and the increased discretion of the HCJ in the choice of the managers have not, in fact, eliminated the corporativist distribution of management posts among the groups[31]. This tendency is confirmed by the emergence of the practice of the so-called "package appointments", namely those appointments that are decided by combining several positions in various judicial offices at the same time, so as to ensure the balance between the judicial factions[32].

What is important to note above all is that in the following years the reform of the judicial system has been the subject of substantial interpretative and regulatory activity by the HCJ, which has led to changes in the effects of some of its provisions[33].

The most incisive interventions have occurred in the field of the internal organisation of public prosecutor's offices. Through a «constitutionally oriented» interpretation, the HCJ has intervened to mitigate some of the novelties contained in the reform. The HCJ has moved in two directions: on the one hand, it has strengthened the guarantees of autonomy of individual prosecutors vis-à-vis the chief

[28] See L. Pomodoro and D. Pretti, op. cit., p. 10.

[29] See L. Pomodoro and D. Pretti, op. cit., pp. 76-84; G. Scarselli, *Ordinamento giudiziario e forense*, Milan, Giuffrè, 2013, pp. 131-3; G. Di Federico, Consiglio superiore della magistratura: composizione, funzioni, iter e forma delle decisioni, in *Ordinamento giudiziario. Uffici giudiziari, Csm e governo della magistratura*, edited by G. Di Federico, Bologna, Bononia University Press, 2019, pp. 273-4.

[30] L. Pomodoro and D. Pretti, op. cit., pp. 119 ff.

[31] F. Biondi, *Sessant'anni ed oltre di governo autonomo della magistratura*, cit., p. 34.

[32] G. Di Federico, *Il contributo del Csm alla crisi della giustizia*, 2012, p. 12, http://www.difederico-giustizia.it/wp-content/uploads/2013/02/CSM-e-crisi-giustizia.pdf

[33] See D. Piana and A. Vauchez, op. cit., p. 176.

prosecutors, on the other hand, it has enhanced the role of the HCJ in relations with the chief prosecutors.

With a series of resolutions, starting from 2007, the HCJ has continued to attribute to itself a function of control over the internal organisation of the public prosecution offices, stating that, despite the new norms, «the constitutional structure in force requires and justifies, even for the prosecutorial offices, a guiding role of the Higher Council of the Judiciary as the top body of the organisation and all judicial offices»[34]. On the basis of this assumption, the HCJ has first established that the organisational projects adopted by the prosecutors, while no longer having to be approved by the HCJ, require an «acknowledgement» by the Council, which may be accompanied by comments. These observations are not considered binding, but the prosecutor must adequately justify why he or she does not intend to comply with them. In addition, the HCJ has also provided that the criteria adopted by the prosecutors for the organisation of the offices assume relevance for the purposes of evaluations of professionalism[35].

Through its resolutions, the HCJ has also reduced the discretionary powers of the managers of the prosecution offices and strengthened the autonomy of substitute prosecutors. With regard to the power to assign proceedings to substitute prosecutors, the HCJ has established that it requires the adoption of a «reasoned measure» by the chief prosecutor[36]. It also clarified that the assignment must be configured so as not to negatively affect the autonomy of the substitute prosecutor. Consequently, it held that, as a rule, the performance of individual acts must be assigned to the magistrate who already follows that procedure, while the assignment of acts to a different magistrate is possible only in exceptional cases[37].

The HCJ has also intervened to regulate the procedures for the assignment of proceedings. The law establishes that with the assignment act for the handling of a procedure the prosecutor can also establish the «specific» criteria with which the magistrate must comply. Through a resolution, however, the HCJ intervened by establishing that these principles «should tend to be connected to those defined in general»[38]. Finally, the HCJ has stressed the importance of the motivation of the measure of revocation of the assignment of a procedure and has reserved the possibility to intervene at the request of the substitute prosecutor. It has thus established that the chief prosecutor, upon receiving the written observations of the substitute, must transmit them without delay to the HCJ, together with the act of revocation, for the verification of the existence, reasonableness and congruity of the motivation. The circulars provide that, in case of unjustified revocation, the Council may take

[34] *Consiglio superiore della magistratura, Risoluzione in materia di organizzazione degli uffici del Pubblico Ministero*, 21 July 2009, p. 1, in www.csm.it. See A. Nicolì, *Gli organi requirenti, in Ordinamento giudiziario. Uffici giudiziari, Csm e governo della magistratura*, cit., p. 164.

[35] N. Zanon and F. Biondi, *Il sistema costituzionale della magistratura*, cit., p. 254; L. Pomodoro and D. Pretti, op. cit., p. 260.

[36] *Consiglio superiore della magistratura, Disposizioni in materia di organizzazione degli uffici del Pubblico Ministero a seguito dell'entrata in vigore del D.L.vo 20 febbraio 2006 n. 106*, resolution of 12 July 2007, p. 6, in www.csm.it.

[37] See N. Zanon and F. Biondi, *Il sistema costituzionale della magistratura*, cit., p. 255.

[38] *Consiglio superiore della magistratura, Disposizioni in materia di organizzazione degli uffici del Pubblico Ministero a seguito dell'entrata in vigore del D.L.vo 20 febbraio 2006 n. 106*, resolution of 12 July 2007, p. 7.

the appropriate measures (such as reporting the case to the holders of disciplinary action or initiatives for the transfer of office)[39].

In essence, the HCJ has intervened with a wide interpretative activity on the rules introduced by the legislator, in some cases even introducing procedures not provided for by law[40].

In practice, therefore, even if the reform has introduced mechanisms to strengthen the hierarchical structure within the prosecution offices, the internal organisation of the prosecution has remained characterised by a strong personalization of functions or, in the best of cases, by a highly attenuated hierarchy[41].

Also the definition of more rigorous forms of evaluation of the professionalism of magistrates has not determined the desired effects. As highlighted by Di Federico, the magistrates evaluated positively from September 2007 to September 2014 were 99.1%, while those with non-positive and negative evaluations were 0.9%, a figure similar to that recorded in the past (the rate of magistrates negatively evaluated from 1979 to 1988 had been 0.7%)[42]. The dysfunctions caused by this system have also survived in the field of the conferral of management positions: since the professionalism evaluations are generally all highly laudatory, it becomes difficult for the HCJ to select the most suitable candidate to head the judicial offices, with the result that the appointment is conditioned by forms of evaluation unrelated to professionalism, and linked to factional and ideological affiliations.

A new season of conflict

The period 2008-2011 was again characterised by a high level of conflict between politics and the judiciary.

The growth in the incidence of the action of the judiciary on political dynamics was confirmed by the judicial affair that in January 2008 involved the Minister of Justice Clemente Mastella. On 16 January 2008, the Minister resigned following the opening of an investigation against him and his wife for alleged offences against the public administration[43]. Speaking at the Chamber, Mastella announced his resignation stressing the need to «open a fundamental question of democratic emergency between politics and the judiciary»[44].

The scandal had an immediate impact on the already fragile political balance on which the centre-left majority was based. The party led by Mastella, the Udeur, left the government majority and on 24 January 2008 the Prodi government was dismissed by parliament. After a series of consultations, the President of the Republic Giorgio Napolitano dissolved the Chambers early and called new elections.

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[39] See N. Zanon and F. Biondi, *Il sistema costituzionale della magistratura*, cit., p. 255-6; G. Di Federico, *Da Saragat a Napolitano. Il difficile rapporto tra Presidente della Repubblica e Consiglio superiore della magistratura*, Milan-Udine, Mimesis, 2016, p. 94-5; A. Nicolì, op. cit., pp. 168-70.

[40] N. Zanon and F. Biondi, *Il sistema costituzionale della magistratura*, cit., p. 254.

[41] A. Nicolì, op. cit., p. 166.

[42] G. Di Federico, Le valutazioni della professionalità dei magistrati, in *Anatomia del potere giudiziario. Nuove concezioni, nuove sfide*, edited by C. Guarnieri, G. Insolera and L. Zilletti, Rome, Carocci, 2016, p. 80.

[43] See *Mastella indagato: mi dimetto*, in «Il Corriere della Sera», 17 January 2008.

[44] Parliamentary record, Chamber of Deputies, 16 January 2008.

Nine years later, on 12 September 2017, Mastella and his wife will both be acquitted by the tribunal of Naples[45].

The period of the fourth Berlusconi government (May 2008-November 2011) was characterised by even deeper contrasts between politics and the judiciary.

Tensions emerged almost immediately, as early as June 2008, following the presentation by the government of a bill that tightened the requirements for conducting wiretaps during investigations and strengthened the ban on publication in the media of wiretaps covered by investigative secrecy. Moreover, some centre-right parliamentarians proposed suspending for one year the hearing phases of trials for crimes committed up to June 2002 and with a sentence of less than ten years' imprisonment, so as to induce the judiciary to give priority to trials for more serious crimes. The proposal was called the «save-the-prime minister law» by the oppositions and some of the media because, if approved, it would also have led to the suspension of a trial for corruption (the Mills case) involving Silvio Berlusconi[46]. In truth, the norm (subsequently not approved) would also have implied the suspension of the statute of limitations. Moreover, the trial concerning Berlusconi, at the time, was already destined for a sentence of acquittal on the merits or because of the alleged crime had lapsed due to the statute of limitations (in 2012 the proceedings concluded with a sentence of prescription)[47].

The proposals were harshly criticised by the NAM, especially for the impact that it believed these would have on the functioning of the judicial system. For the association, the approval of the law on the suspension of trials would have produced an «unprecedented chaos», leading to the postponement of 100.000 trials[48].

In the following three years, the conflict between Berlusconi and the judiciary reached its peak.

On the one hand, Prime Minister Berlusconi and his government majority accentuated their attacks on the judiciary, also because of the opening of new criminal cases against the Prime Minister (in particular those regarding alleged tax fraud by Mediaset and the sex scandal). Over the years, Berlusconi accused the magistrates of being «subversive», «Taliban», of constituting a «party», a «criminal association», and of representing a «metastasis»[49]. The government also proposed and quickly obtained the approval of a new law, called the Alfano Law (n. 124/2008), which provided for the suspension of criminal proceedings against the four highest offices of State, including the Prime Minister. In October 2009 the law was declared unconstitutional by the Constitutional Court (ruling n. 262/2009). Following the declaration of constitutional illegitimacy of the Alfano Law, in April 2010 the centre-right majority approved Law n. 51/2010, which extended the scope of application of

[45] See *Mastella assolto 9 anni dopo la caduta di Prodi: «Ho sofferto tanto»*, in «Il Corriere della Sera», 13 September 2017; C. Guarnieri, L'espansione del potere giudiziario, in *La seconda Repubblica. Origini e aporie dell'Italia bipolare*, edited by F. Bonini, L. Ornaghi and A. Spiri, Soveria Mannelli, Rubbettino, 2021, p. 152.

[46] *Via alle norme salva-premier*, in «Il Corriere della Sera», 17 June 2008.

[47] On the impossibility of defining the proposal as a «save-the-prime minister law» see B. Tinti, *Ma certi processi si possono sospendere*, in «La Stampa», 24 June 2008. Tinti at the time was adjunct prosecutor in Turin.

[48] *L'Anm: stop a 100mila processi*, in «La Repubblica», 19 June 2008.

[49] See *«Vogliono darmi sei anni e farmi dimettere»*, in «Il Corriere della Sera», 26 June 2008; *Berlusconi accusa i pm: bande di talebani*, in «Il Corriere della Sera», 27 February 2010; *Berlusconi, affondo contro i pm*, in «Il Corriere della Sera», 24 March 2010; *Berlusconi: magistrati eversivi*, in «Il Corriere della Sera», 17 April 2011.

the legitimate impediment for the Prime Minister and Ministers[50]. Subsequently, the law was first declared partially unconstitutional by the Constitutional Court (ruling n. 23/2011) and then abolished following a repeal referendum held in June 2011.

On the other hand, the judiciary also accentuated its presence on the political scene. The NAM, chaired by Luca Palamara and lead by a progressive board composed by Unicost, MD and Movement for Justice-Article 3, repeatedly took a position to respond to the attacks of the Prime Minister against the judiciary, but also to criticise some measures under discussion in Parliament, such as the introduction of the crime of illegal immigration, the reform of the discipline of wiretaps, the law on the so-called short trial and the introduction of the "tax shield".

The NAM's commitment to opposing the approval of the wiretapping reform was particularly intense. The political opposition forces and the media gave life to a vast protest movement against the approval of the law, renamed «gag law». The NAM actively participated in the mobilisation, taking a stand against rules that marked «the death of criminal justice in Italy» and represented «an objective favour to the worst offenders»[51]. The bill, approved by the Chamber of deputies in June 2009, was never finally approved by Parliament.

In September of the same year, the NAM also intervened in a very critical way on the proposal under discussion in parliament that provided for the introduction of the tax shield: «Criminal law requires certainty and effectiveness of the penalty, and cannot tolerate such frequent recourse to amnesties or pardons, especially in the sensitive area of economic and tax crimes»[52]. The NAM also expressed criticism of the proposed law on the so-called short trial, which provided for the introduction of maximum time limits for the conduct of trials: «It does not give justice to the victims of crime», while there is a risk of «giving impunity to those who have committed criminal acts»[53]. Als,o this reform was not approved.

Also, the HCJ accentuated the expression of critical opinions towards the legislative reforms on justice under discussion in Parliament.

Through an extensive interpretation of the rules concerning the expression of opinions, the HCJ considered that it could also provide opinions on legislative initiatives of the government for which the Minister of Justice had not asked for opinions, as well as on amendments presented in the course of parliamentary work and on bills on which the HCJ had already given its opinion[54]. The HCJ, moreover, broadened the scope of its opinions, believing that its task was to express its opinion not only on the profiles that strictly concerned the judicial system and the organisation and functioning of justice, but also, in a more general way, «the discipline of the fundamental rights constitutionally

[50] Legitimate impediment is the institution in criminal procedural law that provides for the postponement of a hearing by the judge in the event of the defendant's excused absence.

[51] *Intercettazioni, passa la fiducia. Dall'opposizione protesta al Colle*, in «La Repubblica», 11 June 2009.

[52] Associazione nazionale magistrati, *Sanatoria per i reati fiscali e societari*, 7 June 2010, in www.associazionemagistrati.it

[53] *Anm: giustizia in ginocchio, troppi regali ai colpevoli*, in «La Repubblica», 13 January 2010.

[54] G. Di Federico, *Da Saragat a Napolitano*, cit., p. 64.

guaranteed»[55]. Part of the scholarship has criticised this self-expansion of the advisory powers of the HCJ. In Zanon's opinion, we are «in the presence of one of those exorbitances understandable only with sociological or politological instruments, as part of a strategy for the enlargement of the spaces of institutional power and political force of a body which is, after all, the expression of a powerful corporation»[56].

The expression of critical opinions by the HCJ aroused, in some cases, political controversy, both for the timing with which they were formulated (for example when the bill had already been approved by a branch of Parliament[57]), and for their particular content. In the case of the opinion on law decree no. 92/2008, for example, the HCJ went so far as to argue the «inappropriateness-unsuitability» of recourse to decree laws on the subject of the judicial system and justice, insofar as the use of this instrument «would make it impossible to have a productive dialogue with the operators of justice and with the Higher Council itself»[58]. On other occasions the HCJ went so far as to take a position on the constitutionality of the government's legislative initiatives. This practice was condemned by the Head of State himself, Giorgio Napolitano, with a series of letters addressed to the HCJ, in which he recalled that the assessment of the constitutional legitimacy of the provisions contained in the bills is the responsibility of other organs of the system, namely the Head of State himself at the time of promulgation and the Constitutional Court if invested in the matter[59].

Between 2008 and 2011, therefore, the government's attacks on the judiciary led the judicial corps to further strengthen its role on the political-institutional level. This phenomenon was also grasped by the Head of State, Giorgio Napolitano, who on 27 November 2009 invited the magistrates not to overstep their institutional boundaries. «The interest of the country requires that the spiral of a growing dramatization, which is being witnessed, of controversies and tensions not only between opposing political parties but between institutions invested with distinct constitutional responsibilities be stopped», Napolitano declared. «It should be reiterated», the President added, «that nothing can bring down a government that has the confidence of the majority of Parliament, as it rests on the cohesion of the coalition that has obtained from the citizens-voters the consensus necessary to govern. It is essential that all parties make an effort of self-control in public statements, and that those who belong to the institution responsible for the exercise of jurisdiction, strictly adhere to the performance of that function»[60].

The tensions between the government and the judiciary were also manifested through a strike by magistrates on 1 July 2010 to protest against the cuts in salaries of the judges provided by the government's measures.

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[55] N. Zanon, *I pareri del Consiglio Superiore della Magistratura tra leale collaborazione e divisione dei poteri*, in «AIC», 2009, p. 11, https://www.associazionedeicostituzionalisti.it/old_sites/sito_AIC_2003-2010/materiali/convegni/roma20090608/zanon_aic.pdf

[56] Ibidem.

[57] This occurred in the case of the expression of opinion by the HCJ on the security bill introducing the crime of illegal immigration. On that occasion, the Head of State Giorgio Napolitano sent a message to the HCJ to emphasize the appropriateness of «a more timely formulation of opinions on bills being examined by parliament». See «*Il reato di clandestinità paralizzerà la giustizia*», in «Il Corriere della Sera», 11 June 2009.

[58] Cited in N. Zanon, *I pareri del Consiglio Superiore della Magistratura*, cit., p. 7.

[59] See N. Zanon and F. Biondi, *Il sistema costituzionale della magistratura*, cit., p. 65.

[60] See *Napolitano chiede "autocontrollo": "Basta tensioni tra le istituzioni"*, in «La Repubblica», 28 November 2009.

From Monti government to Renzi government

The early fall of the Berlusconi government and the birth of the technical government led by Mario Monti (November 2011-April 2013) brought calm to the relationship between the executive and the judiciary. Even after the end of the season of "berlusconism"[61], however, the relationship between the judiciary and politics remained characterised by a marked imbalance in favour of the former, as confirmed by the high number of judicial investigations opened against members of the political class[62].

The technical government, through the action of the minister of Justice Paola Severino, set aside the most divisive reforms of justice, such as that of the HCJ and the criminal trial, intervening on the revision of the judicial geography (D. Lgs. 155/2012), the reform of civil justice (D.L. 179/2012, D.L. 83/2012) and the strengthening of the fight against corruption (Law n. 190/2012, D. L.gs. 235/2012, 33/2013, 39/2013).

Precisely with regard to the fight against corruption, the tendency of the NAM to act as a representative of the citizens' demands for justice was confirmed. In October 2012, for example, the NAM urged the approval of the anti-corruption reform, evoking the spectre of Tangentopoli: «It is necessary to stop the new Tangentopoli. Against the corrupt, faced with the spread of scandals, urgent action is needed. To do nothing would be a very bad signal for citizens. The law under discussion is a useful first step, even if incomplete, which must immediately be followed by further reforms»[63].

On the level of relations between political power and judicial power, the approval of Law n. 190/2012, the so-called "Severino Law", and its implementing decrees is of particular importance. The measures introduced a series of provisions aimed at more effectively combating corruption within the public administration. In particular, they establish the ineligibility for political elections and the prohibition of assuming government positions for those who have been definitively convicted of crimes against the Public Administration with sentences of more than two years of imprisonment. If the conviction occurs during the course of the parliamentary mandate, the Chamber to which the person belongs shall assess whether to rule on disqualification. The implementation of these provisions led the Senate, on 27 November 2013, to declare Silvio Berlusconi's disqualification from the office of Senator, in light of his final sentence of four years' imprisonment for tax fraud.

But there is another provision contained in the Severino law that takes on particular relevance in terms of the relationship between political power and the judiciary. The law, in addition to extending the conditions of ineligibility to local administrators (municipal, provincial and regional), also introduces, with regard to the latter, the immediate suspension from office for eighteen months (extendable by another twelve) following non-final convictions for crimes against the Public Administration. The rule has led in a number of cases to the suspension of important local administrators, such as presidents of regions, on the basis of mere first-degree convictions, which were often overturned in subsequent levels of judgment with the acquittal of the accused politicians. Although the rule has

[61] For an analysis of the phenomenon of "berlusconism" see for all G. Orsina, *Il berlusconismo nella storia d'Italia*, Venice, Marsilio, 2013.

[62] See Guarnieri, *L'espansione del potere giudiziario*, cit., p. 153.

[63] See *L'Anm: fermiamo la nuova tangentopoli*, in «Il Fatto Quotidiano», 16 October 2012.

been recognised as constitutionally legitimate by the Constitutional Court, it has thus de facto given the judiciary further power to influence the functioning of elective political bodies on the basis of only provisional convictions. In 2015, for example, Campania's governor Vincenzo De Luca was suspended from office under the Severino law in light of a first-degree conviction for abuse of office[64]. The suspension measure was in turn suspended by the tribunal while waiting for the Constitutional Court to rule on any profiles of unconstitutionality of the Severino law. In February 2016 De Luca was acquitted on appeal of the charges[65].

The political elections of 2013 were characterised by the success of the anti-system party of the 5 Star Movement, bearer of a program focused on the moralization of political life and support to the action of the judiciary. The affirmation of M5s put in crisis the bipolarism that had marked the Italian political system since 1994, forcing the main parties to create a large coalition government.

After the brief experience of the Letta government (April 2013-February 2014), marked by the final sentence against Silvio Berlusconi and his subsequent disqualification as a senator, the birth of the Renzi government (February 2014-December 2016) led to a resumption of tensions between the executive and the judiciary. The tensions were determined by a series of government interventions in the field of justice and by the particular attitude shown by Premier Renzi towards the associative judiciary.

In particular, in 2014, the Renzi government intervened by reducing the vacation period of magistrates from 45 to 30 days (Decree Law n. 132 of 12 September 2014) and introducing a cap on the compensation of public employees, including magistrates (2014 Stability Law). In addition, with the decree law reforming the public administration (Law n. 90/2014), the retirement age of magistrates was reduced from 75 to 70 years. The initiatives were criticised by the NAM, but Prime Minister Renzi explicitly opposed the interventionism of the association of magistrates in the political debate. «I expect magistrates not to comment on the formation of laws that concern them, as I - out of respect for the principle of separation of powers - do not comment on the formation of judgments», Renzi declared in April 2014[66]. The response of the president of the NAM Rodolfo Sabelli was immediate: «Just as you can comment and criticise the judgments, you can comment and criticise the laws»[67].

Further tensions between politics and the judiciary were recorded between the end of 2014 and the beginning of 2015 on the occasion of the approval of the reform of the law on the civil liability of magistrates (Law n. 18/2015). The intervention was due to the need to follow up on a series of condemnations of the European Court of Justice against Italy for the limits placed on the civil liability of magistrates by the discipline then in force in cases of violation of EU law. The new discipline confirms the structure of the previous legislation, with an indirect responsibility of the magistrate. In fact, the new law establishes that citizens may take legal action against the State if they believe they have suffered unjust damage as a result of conduct, an act or a judicial measure carried out by a magistrate, in the exercise of his/her functions, with malice, serious misconduct or denial of justice.

[64] *Campania a rischio ingovernabilità*, in «Il Messaggero», 28 June 2015.
[65] See *De Luca assolto, ora può governare*, in «Il Messaggero», 6 February 2016.
[66] *Il premier rompe il tabù e lancia la sfida alle toghe*, in «Il Giornale», 19 April 2014.
[67] Ibidem.

If the State is unsuccessful, it will be obliged to take legal action against the magistrate. However, the new regulations contain important innovations. The law maintains the so-called "safeguard clause", confirming that the magistrate cannot be called to answer for the activity of interpretation of the law and evaluation of facts and evidence, but excludes from this scope of non-liability cases of fraud, gross negligence and manifest violation of the law and EU law. In these cases, therefore, also the interpretative activity of law and evaluation of fact and evidence can give rise to the civil liability of the magistrate. The law then redefines the cases of serious misconduct, with the aim of making the determination of the area of responsibility more objective. The third main novelty introduced by the new law is the abrogation of the filter of admissibility of the compensation request before the court of the district of the court of appeal[68].

The National Association of Magistrates interpreted the reform of the law on civil liability as an attempt to reduce the independence of the judiciary, so much so that it even hypothesized holding a strike during the discussion of the law in parliament[69]. Following the approval of the law, the president of the NAM Sabelli said that the reform had a «political value» and that it was «intended to send a message» to magistrates: «It will try to intimidate the judge, but judges will not be intimidated»[70]. The president of the NAM, moreover, launched a «challenge» to politics: «We want to challenge politics in the field of reforms for good justice». For the NAM, not only had politics not made «good reforms» for justice, placing among its priorities the law on the civil liability of magistrates, but had waved this flag to «hide its inability» to develop «serious and concrete» interventions. The NAM went so far as to propose a plan composed of ten interventions to reform justice[71].

The NAM confirmed, therefore, its centrality on the political level. Already in previous months, the association of magistrates had criticised the reform of civil and criminal justice proposed by the government Renzi, calling it «disappointing» and the result of «compromise and yielding to pressure and vetoes»[72]. In particular, for the NAM the government had made a «weak choice» on the reform of statute of limitations, since the reform did not touch the 2005 reform, considered the «product of one of the various ad personam laws» of the Berlusconi government. The association of magistrates had also criticised the interventions proposed by the government to combat corruption, following the

[68] F. Biondi, *Sulla responsabilità civile dello Stato e dei magistrati. Considerazioni a margine della legge n. 19 del 2015*, in «Questione giustizia», 2015, n. 3, pp. 166-174; F. Dal Canto, *La legge n. 18/2015 sulla responsabilità civile dello Stato per fatto del magistrato: tra buone idee e soluzioni approssimative*, in «Questione giustizia», 2015, n. 3, pp. 187-196.

[69] See *Responsabilità civile, toghe in guerra: "Sciopero se si lede indipendenza"*, in «La Repubblica», 10 November 2014.

[70] *Responsabilità civile, Anm: "Da governo tentativo di normalizzare magistratura"*, 26 February 2015, https://www.ilfattoquotidiano.it/2015/02/26/responsabilita-civile-anm-governo-tentativo-normalizzare-magistratura/1457484/. Statistics provided in 2021 by the Ministry of Justice show that following the 2015 reform there has been no increase in the number of magistrates' liability cases. On this see *Responsabilità civile dei giudici, 8 condanne in 11 anni. Costa: "Legge da cambiare"*, 14 May 2021, https://www.repubblica.it/politica/2021/05/14/news/giustizia_dati_responsabilita_civile_giudici-300861873/.

[71] See *Strumenti anti-corruzione, più personale e risorse. La sfida delle toghe al governo*, in «Il Corriere della Sera», 27 February 2015.

[72] Associazione nazionale magistrati, *Dal Governo riforma della giustizia inefficace e frutto di compromesso*, 9 September 2014, in www.associazionemagistrati.it

emergence of some criminal cases: «The indignant tones would remedy the weakness of the reforms, moreover largely more announced than realized»[73].

The political centrality of the NAM became even more evident starting in April 2016, following the election of former Clean Hands prosecutor Piercamillo Davigo as president of the association. Under Davigo's presidency, in fact, the magistrates' association accentuated its interventionism in the political debate and its role as a representative of demands for the moralization of the country's public life. In particular, some statements made by Davigo in April 2016, referring to the period of Tangentopoli, aroused controversy: «Politicians have not stopped stealing. They have stopped being ashamed. They shamelessly claim what they used to do on the sly»[74].

In January 2016, moreover, the group of Magistratura Democratica decided to join the Committee for the No to the referendum on the constitutional reform then being approved in parliament[75]. The reform, in the opinion of the group, put «at stake the democratic architecture of the Republic». MD was the only faction of the judiciary to officially join a referendum committee. The victory of the "no" vote in the constitutional referendum on 4 December 2016 prompted Prime Minister Renzi to resign.

The subsequent period of the Gentiloni government (December 2016-June 2018) was characterised by more peaceful tones between politics and the judiciary. However, moments of tension were not lacking. In January 2017, a few weeks after the birth of the government, the NAM decided to defect the inauguration of the judicial year in protest against the failure to extend the entry into force of the reform of the retirement age and the failure to allocate resources for the justice sector[76].

Further tensions were registered during the approval of the reform of the discipline of wiretapping (D. Lgs. 216/2017). The reform, called "Orlando reform" from the name of the minister then in office, Andrea Orlando, introduced measures aimed at ensuring the confidentiality of intercepted conversations, with the aim of countering the practice of publishing criminally irrelevant interceptions on the media and the phenomenon of media pillory against suspects or defendants[77]. The NAM expressed several concerns about the reform, in particular criticizing the strengthening of the powers of the judicial police in the procedures of transcription of intercepted conversations[78].

The concerns of the judiciary were accepted in the political arena by the M5s, which following the 2018 general elections gave birth to a government first with the Northern League (June 2018-September 2019) and then a government with Pd, Italia Viva and left-wing parties (September 2019-February 2021), both led by Prime Minister Giuseppe Conte. The wiretapping reform was in fact first suspended and then amended in the directions desired by the associative judiciary, with the approval of Decree Law n. 161/2019.

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[73] See *I magistrati: sulla corruzione misure deboli*, in «Il Corriere della Sera», 21 December 2014.

[74] «*I politici rubano più di prima. Ma adesso non si vergognano*», in «Il Corriere della Sera», 22 April 2016.

[75] Magistratura democratica, *Md nel Comitato per il "No"*, 12 January 2016, https://www.magistraturademocratica.it/articolo/referendum-riformemd-nel-comitato-per-il-no_12-01-2016.php

[76] *Anno giudiziario, l'Anm assente per protesta in Cassazione*, in «Il Corriere della Sera», 15 January 2017.

[77] On the phenomenon of media pillory see E. Antonucci, *I dannati della gogna. Cosa significa essere vittima del circo mediatico-giudiziario*, Macerata, Liberilibri, 2021.

[78] See *Intercettazioni, ecco il decreto (e le polemiche)*, in «Il Corriere della Sera», 30 December 2017.

On criminal matters, the M5s-Lega government majority intervened by tightening criminal sanctions for numerous types of crimes, in particular corruption offences, through the approval of the so-called "Spazzacorrotti law" (Law n. 3/2019)[79]. The measure also introduced the interruption of the statute of limitations after the judgment of first instance, whether it is a conviction or an acquittal. The abolition of the statute of limitations was criticised by jurists, lawyers and also some representatives of the judiciary, as it was considered detrimental to the principle of reasonable duration of the process in the absence of structural interventions capable of speeding up the judicial system[80].

The HCJ scandal

In June 2019, the HCJ was overwhelmed by a serious scandal, following the opening of an investigation for corruption against Luca Palamara, former president of the NAM and former component of the HCJ. The investigation revealed the existence of a large system of allocation of offices and positions of power by the Council based on the membership of magistrates to the different judicial factions. The investigation also confirmed the existence of very close relationships between judicial groups and political figures[81].

The scandal caused great clamor on a public level and led to disruptive consequences: the resignation of six members of the HCJ, the resignation of the president of the NAM and the general prosecutor of the Court of Cassation, the expulsion of Palamara from the judicial order.

On 21 June 2019, speaking at the extraordinary plenary session of the HCJ, the Head of State Sergio Mattarella denounced the «disconcerting and unacceptable picture» that emerged from the investigation, which had «produced seriously negative consequences for the prestige and authoritativeness of the whole judiciary». He also called for the HCJ to «react firmly to any form of degeneration»[82].

A year later, on 18 June 2020, Mattarella denounced again the degeneration of the system of judicial groups. For the Head of State, the judiciary had to «necessarily undertake to recover the credibility and trust of citizens», so «seriously put in doubt» by the facts that emerged from the scandal. The documentation collected as part of the judicial inquiry, for Mattarella seemed to «present the image of a judiciary bent over itself, concerned with building consensus for internal use, aimed at the allocation of positions», and gave a glimpse of «a wide spread of the serious distortion developed around the criteria and decisions of various tasks in the autonomous government of the judiciary»[83].

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[79] . E. Amodio, *A furor di popolo*, Rome, Donzelli, 2019; Cfr. Guarnieri, *L'espansione del potere giudiziario*, cit., pp. 160-161.

[80] See *Processo alla riforma*, in «Il Foglio», 14 November 2018.

[81] See N. Zanon and F. Biondi, *Chi abusa dell'autonomia rischia di perderla*, in «Quaderni costituzionali», 2019, n. 3, pp. 667-70; A. Nappi, *La crisi della magistratura: origine e possibili rimedi*, in «Giustizia insieme», 24 June 2020, https://www.giustiziainsieme.it/it/attualita-2/1193-la-crisi-della-magistratura-origine-e-possibili-rimedi-di-nello-nappi

[82] S. Mattarella, *Intervento all'Assemblea plenaria straordinaria del Consiglio Superiore della Magistratura*, 21 June 2019, https://www.quirinale.it/elementi/30468

[83] S. Mattarella, *Intervento in occasione della cerimonia commemorativa del quarantesimo anniversario dell'uccisione di Nicola Giacumbi, Girolamo Minervini, Guido Galli, Mario Amato e Gaetano Costa e del trentennale dell'omicidio di Rosario Livatino*, 18 June 2020, https://www.quirinale.it/elementi/49518

The seriousness of the scandal considerably reduced the degree of legitimacy of the judiciary in front of public opinion, offering politics a window of opportunity to reform the HCJ. In August 2020, the Minister of Justice Alfonso Bonafede presented a bill to reform the Council, with «the objective of disrupting the system that has been created due to the so-called degeneration of judicial factions»[84].

The presence of divergent positions within the new government majority prevented the approval of the reform in Parliament.

In June 2022, during the technical government led by Mario Draghi (February 2021-October 2022), a law amending the electoral system of the HCJ was passed (Law n. 71/2022). The reform increased the number of members of the HCJ from 20 to 30 (20 magistrates and 10 laymen) and introduced a majority electoral system based on binominal constituencies, with a proportional corrective. Again, the legislative intervention aimed to reduce the influence of judicial factions in the electoral competition by introducing an element of unpredictability in the election procedures. Once again, however, the result does not appear to have been achieved.

In the first HCJ elections voted on the basis of the new electoral system, in September 2022, only one independent candidate, that is not supported by any group, out of twenty was successful in being elected.

On the other side, the government, with the action of Minister of Justice Marta Cartabia, succeeded in amending the legislation about the statute of limitation, introducing a cap of two years on appeal trials and a cap of one year for proceedings before the Court of Cassation. If these time limits are not respected, proceedings are automatically annulled, except those involving very serious crimes.

[84] *Giustizia, stretta sulle nomine del Csm. E stop alle porte girevoli toghe-politica*, in «La Stampa», 8 August 2020.

9. Conclusions

During the Republican period, the Italian judiciary has experienced profound changes on the institutional, organisational and ideological level. These changes have had significant effects on the balance between political and judicial power.

On the basis of the historical reconstruction carried out in this research, it is possible to identify four phases of the development of the Italian judiciary during the Republican period.

The **first phase**, from 1946 to 1959, was characterised by the achievement by the judiciary of independence, both external, that is, in relation to the political power, and internal, that is, in relation to the guarantees of independence of the individual magistrate with respect to possible conditioning by colleagues in the performance of the function. Crucial in this regard were the introduction of guarantees of independence by the 1948 Constitution, the approval in 1951 of the measure that established the detachment of the judiciary from the public administration, and finally the coming into operation in 1959 of the HCJ, competent over all decisions concerning the status of magistrates.

In the **second phase**, from 1960 to 1980, the Italian judiciary experienced a significant expansion of its external and internal independence. The particularity of this process is to be found in its ideological and endogenous origin. This expansion, in other words, began with changes in the ideology of judicial actors, specifically the so-called "low judiciary" (praetors, court judges, deputy prosecutors), who came to question the very concept of a career within the judiciary and to endow judges with a role of substitutes for politics.

The **third phase**, which runs roughly from 1980 to 1992, represents the season of conflict between politics and the judiciary, determined by the emergence of more and more criminal inquiries against political and economic-financial figures. The conflict between politics and the judiciary escalated particularly during the years of the two Craxi governments (1983-1987).

The **fourth phase**, which opened in 1993 and is still ongoing, is characterised by the breakdown of the balance between political and judicial power, with an invasion of the latter into the field of the former. The breakdown of the balance between political and judicial power clearly emerged on the occasion of the events relating to the Conso decree in 1993. Since then, the balance between the two powers has never been restored. The judiciary has continued, through major judicial inquiries, to deeply influence Italian political life, aided by an information system that has continued its tendency to transform judicial cases into trials by media.

For the last thirty years the relationship between politics and the judiciary has been characterised by a strong imbalance of power in favour of the latter. As this research demonstrates, in order to explain the role acquired by the Italian judiciary since 1993 is necessary to examine the changes it experienced in the preceding decades. Only a naïve person, indeed, can believe that the breakdown of the balance between political and judicial power happened suddenly. On the contrary, just as in the case of an earthquake, the emergence of the overwhelming power of the judiciary was the result of the

accumulation of tensions between different institutional and ideological "faults" in the preceding decades.

Evidently, this phenomenon has a series of political implications.

Firstly, each prosecutor holds absolute de facto autonomy in the exercise of investigative activities, from which derives an enormous power of conditioning on the public, political and economic life of the country. This power – emphasized by the great attention paid by the media to the early stages of judicial events – is combined with the absence of effective procedures for evaluating the work of magistrates and forms of political responsibility.

Each prosecutor can open an investigation into any person or event on his or her own initiative, regardless of the existence of a criminal report, with the result that investigations based on mere suspicions often turn out to be completely unfounded. The democratic life of our country certainly could not escape unscathed from the overwhelming power of prosecutors. It is enough to recall the summons sent by the Milan prosecutor's office in November 1994 to then Prime Minister Berlusconi, precisely in the days when the Cavaliere was chairing an international conference on organized crime in Naples. Tensions between the majority parties, fueled by the media-judicial circus, led to a government crisis even though, years later, the investigation would end in a deadlock.

But the most striking example of the judiciary's ability to influence our democracy is that of Justice Minister Clemente Mastella, who was forced to resign in 2008 because of an investigation opened against him by the small prosecutor's office in Santa Maria Capua Vetere. In 2017 he was acquitted of all charges, but by then it was impossible to repair the damage caused by this unbearable mechanism.

The prosecutor, in short, has boundless power that can overwhelm individual citizens as well as an entire government, with irreparable consequences, and without being called to account for them.

The limitless discretion of magistrates is compounded by the role assumed by the Higher Council of the Judiciary. Just the fact that in everyday (and also academic) language the HCJ is referred to as the "self-governing body of the judiciary" gives an idea of how far over time it has deviated from the dictates of the Constitution, which instead referring to the judiciary speaks of an "autonomous and independent order". Never before, in fact, does the HCJ seem to play the role of the self-governing body of the magistrates, taking decisions that affect the entire judiciary, without any form of counter-balance with other institutions. In several cases, it even adopts regulatory acts (resolutions, circulars and deliberations) capable of subverting the content of laws concerning judicial organization passed by parliament. Not to mention the strong pressure exerted whenever politics tries to reform the judiciary and the criminal system.

The Higher Council of the Judiciary is joined by the National Association of Magistrates, which has become a real political subject, dedicated not only to the protection of its own corporate interests, but also, and above all, to the representation of citizens' demands for moralization of public life. Does parliament attempt, for example, to pass a reform that decreases penalties for certain crimes against public administration? There goes the NAM's immediate opposition to the passage of the law, so much so that its rejection, also thanks to the support of the media system, often turns into a veto against the judicial affairs discussed in parliament.

Until today, the “judiciary issue” has yet to be resolved. With the birth of the Meloni government in October 2022, the political debate shows no sign of quieting down, and the programmatic lines of Justice Minister Carlo Nordio confirm how topical are the issues that have affected the expansion of judicial power for decades: the role of the public prosecutor, the reform of the HCJ, the separation of careers, the principle of mandatory prosecution, the evaluation of magistrates, the management of judicial offices, and the reform of the penal code and trial.

It will need to be verified, as always, whether these proposals will be followed by concrete legislative action, however, there is the sense that the balance between politics and the judiciary in Italy can never be restored until a cross-party consensus emerges to overcome partisan interests and bring about a radical constitutional reform. A reform without any punitive intent towards the judiciary, but simply capable of restoring a balance between powers, which is essential in a true liberal-democracy.

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