

The Politics of Judicial Accountability in Italy: Shifting the Balance

Simone Benvenuti*

Judicial accountability – Court administration – Judicial politics – Judicial councils – Assessment and appointment of judges – Disciplinary responsibility – Liability of judges – Italy

INTRODUCTION

While judicial independence is a well-established principle in European constitutionalism, the same does not apply to judicial accountability. In both judicial reforms and academic scholarship, the discourse on judicial independence has indeed overshadowed that of judicial accountability.¹ Yet, the Council of Europe itself, long at the forefront of promoting judicial independence, acknowledged the relevance of the latter in Opinion No. 18 (2015) of the Consultative Council of European Judges, on the legitimacy and accountability of the judiciary.² Hence, it is particularly important to understand how the principle

*Senior researcher at the Judicial Studies Institute, Faculty of Law, Masaryk University. Email: simone.benvenuti@law.muni.cz. I am grateful to David Kosař, members of the Masaryk University Judicial Studies Institute, editors and anonymous reviewers for their suggestions and comments that significantly improved the original manuscript. The research leading to this article has received funding from the European Research Council under the European Union's Horizon 2020 research and innovation programme (grant no. 678375-JUDI-ARCHERC-2015-STG).

¹F. Contini and R. Mohr, 'Reconciling independence and accountability of judicial systems', 2 *Utrecht Law Review* (2007) p. 26; D. Piana, *Judicial Accountabilities in New Europe: From Rule of Law to Quality of Justice* (Farnham 2010); D. Kosař, *Perils of Judicial Self-Government in Transitional Societies* (Cambridge University Press 2016) p. 14.

²Consultative Council of European Judges, Opinion No. 18 (2015), *The position of the judiciary and its relation with the other powers of state in a modern democracy*. The Consultative Council of European Judges is an advisory body of the Council of Europe on issues relating to the independence, impartiality and competence of judges. It is composed exclusively of judges.

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of accountability is interpreted and relates to political backgrounds within specific national contexts.

In this regard, Italy is an important case study. While the Italian Constitution explicitly guarantees judicial independence, it does not refer to judicial accountability.³ Italy is also one of the first European countries to have adopted a strong judicial council model of court administration.⁴ This model later served as a template promoted by the European Union and the Council of Europe in Central and Eastern Europe for increasing judicial independence.⁵ At the same time, looking at debates held within the Constituent Assembly in 1946 and 1947, one can see that the Italian drafters extensively linked the judicial council with accountability issues from its very inception.⁶ Moreover, legal writings show that judicial accountability (*responsabilità del giudice*) has long been a subject of study for Italian legal scholars.⁷ Finally, judicial accountability, and more specifically the relationship between the judiciary and politics, played a role in the 'regime crisis' sparked by the collapse of the party system between 1992 and 1994.⁸ As a result, projects for reform addressing a proper balance in how, and to whom, judges should be accountable have marked the politico-legal discussion over the last 25 years.

This article analyses how the politico-legal debate has affected institutional reforms of judicial accountability in Italy since the enactment of the Constitution of the Italian Republic in 1948. It discusses the interaction between measures aimed at reshaping the accountability framework and the underlying political motivation for them.

³G. Di Federico, 'Independence and Accountability of the Judiciary in Italy: The Experience of a Former Transitional Country in Comparative Perspective', in A. Sajó (ed.), *Judicial Integrity* (Martinus Nijhoff 2004) p. 181 at p. 182. The judiciary is qualified as independent by Art. 104 of the Constitution, and Art. 101 states that judges are subject to the law. No provision refers to accountability, contrary to other state bodies and functions; see e.g. Art. 97 on civil servants.

⁴N. Garoupa and T. Ginsburg, 'Guarding the Guardians: Judicial Councils and Judicial Independence', 57 *American Journal of Comparative Law* (2009) p. 103 at p. 107.

⁵M. Bobek and D. Kosař, 'Global Solutions, Local Damages: A Critical Study in Judicial Councils in Central and Eastern Europe', 7 *German Law Journal* (2014) p. 1268.

⁶S. Benvenuti, 'Magistrature' [*Judiciaries*], in A. Buratti and M. Fioravanti, *Costituenti ombra. Altri luoghi e altre figure della cultura politica italiana nella stagione della Costituente* [*Shadow constituents: alternative places and figures of Italian political culture in the constituent phase*] (Carocci 2010) p. 385.

⁷See G. Volpe, 'Sulla responsabilità politica dei giudici' [*On judges' political accountability*], in E. Tosato (ed.), *Scritti in onore di Costantino Mortati. Aspetti e tendenze del diritto costituzionale* [*Writings in honour of Costantino Mortati. Selected issues and trends in constitutional law*] (Giuffrè 1977) p. 809; M. Cappelletti, 'Who Watches the Watchmen? A Comparative Study on Judicial Responsibility', 1 *American Journal of Comparative Law* (1983) p. 1; V. Vigoriti, *La responsabilità del giudice* [*The accountability of the judge*] (Il Mulino 1984), and literature referred to at p. 15, fn 4.

⁸Di Federico, *supra* n. 3, p. 195.

The concept of accountability lends itself to different meanings.⁹ Drawing on recent scholarship, this article defines judicial accountability as a *mechanism*, i.e. as ‘an institutional relationship in which a judge can be held to account by a forum’, which may entail negative or positive consequences (sanctions and rewards).¹⁰ This definition is narrower than the one adopted in Opinion No. 18 (2015)¹¹ and requires some clarification. Following the conceptualisation of accountability provided by recent scholarship, this article is interested in three dimensions: (i) who is accountable; (ii) to whom; and (iii) through what processes.¹²

This article deals with both ordinary (i.e. non-constitutional) judges and prosecutors in Italy, who largely share the same institutional framework. It focuses on the main institution to which judges are accountable – the *Consiglio superiore della magistratura*, the judicial council introduced in 1948 by the Constitution – and on the interaction among the principal actors *within* that council. It discusses only the three most important accountability mechanisms in the Italian situation: those affecting judicial careers, disciplinary responsibility, and civil liability. With regard to the first issue, a judicial career can be influenced by a variety of instruments, either ‘sticks’ or ‘carrots’; these include appointments to vacant positions, salary increases, and evaluations (positive or negative). On the second issue, disciplinary responsibility is a classical mechanism of judicial accountability, mostly related to legal or ethical (mis-) conduct, yet the approach to it can change over time and does so in the case under examination. Finally, civil liability most often works as a sanctioning mechanism insofar as it entails censure of judges’ decision-making behaviour and payment of damages.¹³ Judicial accountability debates often overlook this mechanism, but its political salience in the Italian context and the repeated reforms are particularly illuminating.

The aim of this article is not to investigate the practice of holding judges accountable, which is often termed *de facto* judicial accountability.¹⁴ The real

⁹ See e.g. M. Bovens, ‘Two Concepts of Accountability: Accountability as a Virtue and as a Mechanism’, 33 *West European Politics* (2010) p. 946.

¹⁰ Kosar, *supra* n. 1, p. 57. Judicial accountability mechanisms exist in any political system, even though in liberal-democratic regimes they need to fit with the normative requirement of avoiding *undue* influence. Their function is to connect judges with given environments and to reflect their values and expectations, also termed judicial virtues. They are just one device, among others, establishing such a connection, and the whole accountability framework can be understood only in such a broad context.

¹¹ See paras. 20–33.

¹² Kosar, *supra* n. 1, p. 40 ff. highlights six conceptual dimensions of judicial accountability: (i) who is accountable; (ii) to whom; (iii) through what processes; (iv) for what; (v) by what standards; and (vi) with what effects. While the first three dimensions are of interest here, the remaining dimensions are touched upon only indirectly, being strictly interrelated to the former ones.

¹³ Kosar, *supra* n. 1, p. 82.

¹⁴ Kosar, *supra* n. 1, p. 65 ff.

effects of institutional reform are inferred from the existing literature. Instead, this article analyses the rationales and justifications for institutional reform and argues that it is difficult to ensure a proper and stable balance-of-accountability framework *in abstracto* and *ex ante* in a general way, due to the ever-changing underlying socio-political conditions. Fixed, one-size-fits-all templates cannot ensure balance.¹⁵ More specifically, this article demystifies the myth of the Italian ‘self-governing’ *Consiglio superiore della magistratura*. According to this myth, the Italian judicial council, made up of a majority of judges charged with administering a system free from political interferences (hence ‘self-governing’), is mostly seen as *the* tool for independence. As we will see, a self-governing judicial body does not, however, necessarily enhance judicial independence, and can even undermine it under certain circumstances. Italian and international scholars share this conclusion,¹⁶ yet the myth still prevails when it comes to analysing judicial reform in Europe.¹⁷ What is often neglected, as the Italian case can teach us, is that judicial councils are flexible tools for achieving a balance in judicial accountability.

The structure of this article is as follows. The first section introduces the essential features of the Italian judiciary and the political background of its evolution during the post-war era of the Italian Republic. Subsequently, the *Consiglio superiore della magistratura*’s functioning with regard to accountability mechanisms is analysed, followed by a discussion of three key areas of reform affecting judicial accountability: the rules regulating the career system, notably evaluation, promotion, and appointment to specific positions;¹⁸ the rules regulating disciplinary responsibility; and those regulating the civil liability of judges.¹⁹ The last section focuses on the broader repercussions of the Italian case study.

ESSENTIAL FEATURES OF THE ITALIAN JUDICIARY AND THE POLITICAL CONDITIONS OF ITS POST-WAR DEVELOPMENT

The Italian judicial system is similar to the French-derived bureaucratic model.²⁰ Accordingly, the judge is a public officer who enters the profession at a young age

¹⁵ Any institutional framework indeed has the function of funnelling the relationships among the relevant actors within a given context. The characters of the actors and the context in which they operate are therefore crucial.

¹⁶ Garoupa and Ginsburg, *supra* n. 4, p. 106.

¹⁷ Bobek and Kosař, *supra*, n. 5.

¹⁸ Career accountability mechanisms therefore include both rewards and dual mechanisms, Kosař, *supra* n. 1, p. 87. I refer here to assignment to vacant positions (sometimes referred to as promotion), not to first appointment of judicial apprentices after they have passed a public competitive examination.

¹⁹ On civil liability as an accountability mechanism see Kosař, *supra* n. 1, p. 73 and 82.

²⁰ C. Guarnieri and P. Pederzoli, *The Power of Judges. A Comparative Study of Courts and Democracy* (Oxford University Press 2002) p. 54. On the origins of the Italian judicial system,

and passes through various stages of advancement. The career system of the Italian judiciary is therefore modelled on the typical features of the State's bureaucracy.²¹ At the same time, the Italian system has very specific historical origins.

While the French model, introduced by Napoleon, rested on the principle of the unity of the State,²² the Italian judiciary was geographically and socially fragmented. Until 1923, Italy had five regionally-based courts of *cassazione* (or Italian Supreme Courts),²³ and a tradition of judges' engagement with judicial politics reflected in the establishment of the General Association of Magistrates as early as 1909.²⁴ This fragmented judiciary was embedded in a centralised system of judicial administration within the Ministry of Justice, in which bodies of elected judges were created with the task of participating in the management of the judiciary; these bodies only had advisory competences.²⁵

see M. D'Addio, *Politica e magistratura (1848-1876)* [*Politics and the judiciary (1848-1876)*] (Giuffrè 1966).

²¹ Guarnieri and Pederzoli, *supra* n. 20, p. 49 f.

²² The 'unity of the State' approach considered the judicial function to be part of the executive function, and the judicial authorities a branch of executive power, M. Troper, *La separation des pouvoirs et l'histoire constitutionnelle française, I* (LGDJ 1980). On the general features of the French judicial organisation see T. Renoux and A. Roux, *L'administration de la justice en France* (PUF 1994); P. Truche, *Justice e istituzioni giudicarie* (La documentation française 2001).

²³ After the creation of the Italian State, the unification of the judicial system was not fully achieved and the Supreme Courts of Turin, Florence, Naples, and Palermo remained. In 1875, the Supreme Court of Rome was created by Law n. 2837 of 12 December 1875, having also the competence to decide on conflicts of jurisdiction among the former courts. M. Taruffo, 'L'incerta trasformazione della Corte di cassazione italiana', in C. Besso and S. Chiarloni (eds.), *Problemi e prospettive delle corti supreme: esperienze a confronto* [*Problems and perspectives of supreme courts: comparing experiences*] (ESI 2012) p. 123 at 123 ff.

²⁴ The *Associazione Generale dei Magistrati d'Italia* (AGMI) was founded in 1909 and had over 2,000 associate members in 1914, for a judicial body comprising between 4,000 and 5,000 magistrates, A. Pizzorusso, *L'organizzazione della giustizia in Italia. La magistratura nel sistema politico e istituzionale* [*The organisation of justice in Italy. The judiciary in the political and institutional system*] (Einaudi 1990) p. 55-60, A. Meniconi, 'La storia dell'associazionismo giudiziario: alcune notazioni' [*Notes on the history of judicial associations*], 4 *Questione giustizia* (2015) p. 220 at p. 223-224.

²⁵ Electivity of self-government bodies dates back to the Law n. 511 of 15 July 1907 establishing the first *Consiglio superiore della magistratura* composed of magistrates partly elected by the five regional courts of cassation. Just after Mussolini's rise to power, Royal Decree n. 2537 of 23 October 1923 laid down that all members of the judicial council were to be appointed by the Minister of Justice. While the first contemporary judicial council was established in France by the Constitution of 27 October 1946 (Arts. 83 and 84), the roots of such a template based on self-government must therefore be found in Italy. Here, under the *Statuto albertino* an 'Italian "way" to judicial organisation [developed.] characterised by the inclusion, within the predominant [French-derived] public-service model, of substantial elements of the corporatist model' functional to the integration of social bodies and civil society in the State, G. Volpe, 'Le origini dell'organizzazione corporativa della magistratura e i poteri normativi del CSM' [*The origins of the corporatist organisation of the judiciary and the normative powers of the CSM*], in A. Pace et al. (eds.), *Problemi attuali della giustizia*

The Fascist regime (1922-1943) did not radically change the organisation of the Italian judiciary, although centralisation and internal hierarchisation became more pronounced. Most significantly, the five courts of *cassazione* merged into a single body in 1923, and the reform muffled the elective character of the 'self-governing' bodies. In addition, the General Association of Magistrates was banned in 1926.²⁶

The above events explain why the 1948 constitutional remodelling was deemed necessary. The new Constitution devoted a specific chapter to the judicial system.²⁷ It set out the source of legitimacy of justice (it must be exercised 'in the name of the people') together with the principle of judicial independence ('Judges are subject only to the law').²⁸ It provided that recruitment must follow national competitive examinations while at the same time admitting the possibility of 'lateral' recruitment.²⁹ It envisaged a judicial council made up of a majority of magistrates.³⁰ It established strong guarantees of judicial independence such as the principle of the legal judge ('*giudice naturale*')³¹ and the rule of irrevocability of

in Italia, Atti del Seminario di studio tenuto a Roma l'8 giugno 2009 [Current problems of justice in Italy. Proceedings of the study seminar held in Rome on 8 June 2009] (Jovene 2010), p. 81 at p. 84.

²⁶ Royal Decree of 16 December 1926.

²⁷ Chapter IV, establishing the essential principles and rules concerning judicial organisation (Articles 101-110) and the exercise of the judicial function (Arts. 111-113).

²⁸ Art. 101.

²⁹ As mentioned, judges normally enter the profession at a young age 'at the bottom' and go through various stages of advancement. Art. 106 of the Italian Constitution adds the possibility of recruitment of judges at the Court of *cassazione* with previous outstanding experience as university professors of law or advocates.

³⁰ Arts. 104 (composition) and 105 (powers). In describing the composition of the *Consiglio superiore della magistratura*, the former starts by stating that 'the Judiciary is a branch that is autonomous and independent of all other powers' ('La magistratura costituisce un ordine autonomo e indipendente da ogni altro potere'). The principle of *autonomy and independence of the judicial branch* has been the object of wide scholarly attention. See e.g. G.F. Ferrari, 'Consiglio superiore della magistratura, autonomia dell'ordine giudiziario e magistrati' [*Consiglio superiore della magistratura, autonomy of the judiciary and magistrates*], in *Studi in memoria di Carlo Esposito* [*Studies in memory of Carlo Esposito*], IV (CEDAM 1974) p. 2263, and S. Bartole, *Autonomia e indipendenza dell'ordine giudiziario* [*Autonomy and independence of the judiciary*] (CEDAM 1964). The relevant literature is in Italian and, unfortunately, there is to my knowledge no comparative essay in English on this topic. With due caution, the concept is close to the 'independence of the judiciary' often referred to in international literature – a concept that is sometimes mixed up with that of the independence of judges, as pointed out by Kosař, *supra* n. 1, p. 408.

³¹ Art. 25(1). The principle has been implemented via an automatic system of case assignment, on which see G. Silvestri, *Giustizia e giudici nel sistema costituzionale* [*Justice and judges in the constitutional system*] (Giappichelli 1997) p. 169 ff. Thus, the assignment of cases to 'favoured' judges is not possible (but different rules exist for prosecutors). On case assignment as a 'dual accountability mechanism' see Kosař, *supra* n. 1, p. 55 and 91.

judges.³² It introduced the principle that all judges are equal and differences may only derive from the functions they exercise.³³ Finally, it introduced the obligation for prosecutors to institute criminal proceedings in order to avoid arbitrariness.³⁴ Overall, the new framework addressed the shortcomings of the bureaucratic roots of the Italian judiciary, and in particular the reduced status of a judge as equal to that of any common civil servant and subject to the same criteria for career advancement.³⁵ Yet the establishment of a new judicial organisation was neither linear nor carved in stone, as the original constitutional compromise was open to divergent developments.³⁶

First, the 1948 Constitution did not regulate in detail the system of judicial guarantees (*'guarentigie'*: irrevocability, disciplinary responsibility, supervision, etc), although in Article 107(3) it established the principle of the equality of judges, thus indirectly ruling out formal judicial hierarchy. Instead, it included a transitional provision establishing that until a new law on the judiciary in accordance with the Constitution was issued, existing laws would remain in force.³⁷ A new general law on the judiciary was, however, not immediately adopted and the overall structure of the judiciary initially remained similar to that of the interwar era. Judicial guarantees were only partially regulated and magistrates simply divided into three categories according to their functions.³⁸ This delay in implementation resulted from the convergence of interests between Christian Democrats (*Democrazia Cristiana*, the main party in government) and higher judges. The former were not eager to implement judicial guarantees due to the political proximity to the conservative higher judiciary in the first post-war period. This resulted in an equilibrium based on the external accountability of the judiciary to the Christian Democratic Minister of Justice filtered through the informal influence of the upper judicial hierarchy in

³² Art. 107(1). Art. 69 of the *Statuto Albertino* of 1848 recognised the principle while at the same time limiting it.

³³ Art. 107(3) of the Italian Constitution.

³⁴ Art. 112.

³⁵ Vigoriti, *supra* n. 7, p. 157; N. Zanon and F. Biondi, *Il sistema costituzionale della magistratura* [*The constitutional system of the judiciary*] (Zanichelli 2014) p. 279. On the 'bureaucratic' and 'professional' ideal-types of judicial organisation see Guarnieri and Pederzoli, *supra* n. 20, p. 66 f.

³⁶ For almost 70 years, the Italian institutional debate has been continually enlivened by the question of the reform of the judicial system (*'Ordinamento giudiziario'*), Pizzorusso, *supra* n. 24, p. 37-60. On the debate on the reform of the judicial council see also S. Benvenuti, *Il Consiglio superiore della magistratura francese. Una comparazione con l'esperienza italiana* [*The French High Council for the judiciary. A comparison with the Italian experience*] (Giuffrè 2010) p. 1-72.

³⁷ VII transitional provision of the Italian Constitution.

³⁸ See respectively Royal Decree n. 511 of 31 May 1946, and Art. 1 of Law n. 392 of 24 May 1951. The latter provides that 'ordinary judges are distinguished based on their functions as judges of tribunal, judges of court of appeal, judges of Court of cassation'.

appointments, promotions, etc, formally decided by the Minister of Justice. Members of the higher judiciary kept their grip on the judiciary, also after the actual establishment of the *Consiglio superiore della magistratura* in 1958 owing to the category-based electoral system for judicial representatives;³⁹ the structure of the judiciary remained pyramidal.

Impetus for reform was two-fold. Internally, the judiciary was subject to a process of democratisation; lower judges started challenging the hierarchical patterns and the lower judges managed to dominate the National Magistrates' Association. That Association was established in 1944 as a successor to the General Association of Magistrates. It acted as a forum in which judges gathered in different groups ('*correnti*') to discuss judicial policies.⁴⁰ Added to this were external pressures. The Communist Party, which was excluded from government, supported legislative implementation of constitutional guarantees that would enhance the position of less conservative lower judges, since they could rely on them as a channel to influence the political process. Lower judges could refer questions to the Constitutional Court to challenge judicial policies,⁴¹ while the *Consiglio superiore della magistratura* itself was also potentially a device for challenging or discussing these policies. This also explains why lower judges and the Communist party supported an extensive reading of the council's powers, i.e. not limited to appointments, promotions and disciplinary responsibility.⁴² Under these pressures, between the 1960s and the

³⁹ As expounded below (*see n. 62*), higher judges were thus able to dominate the *Consiglio superiore della magistratura*.

⁴⁰ C. Guarnieri, 'Judicial Independence in Europe: Threat or Resource for Democracy', 3 *Representation* (2013) p. 347 at p. 350. Initially, senior judges ruled the National Magistrates' Association. However, in 1957 a new generation of judges, so-called '*innovatori*' (reformers), gained the leadership and alienated the senior judges away from the Association. Starting from the 1960s a process of institutionalisation of these groups of judges brought to the establishment '*correnti*', formal associations acting within the broader National Magistrates' Association through their representatives. On the relevance of associations for understanding the development of the Italian judicial organisation, *see* A. Giuliani and N. Picardi, *La responsabilità del giudice [The accountability of the judge]* (Giuffrè 1995) p. 154 ff.

⁴¹ Law n. 87 of 11 March 1953 conferred upon any lower court the power to refer a question to the Constitutional Court. This power potentially transformed lower courts into devices for challenging governmental policies and for bypassing higher judges from the Supreme Court of *cassazione*, yet lower judges remained initially very cautious in the use of such power due to the influence higher judges and the executive had on their careers. *See* D. Piana and A. Vauchez, *Il Consiglio superiore della magistratura* (Il Mulino 2012) p. 27-51 (on the relationships between justice and politics in the post-war period).

⁴² *See nn. 76-81*. Since the 1960s, also minor government coalition parties (notably, the Socialist Party) favoured the implementation of constitutional provisions and supported reforms of judicial governance. This stance was also due to the fact that the Christian Democrats, as the party holding the larger share of seats, usually retained the Minister of Justice: C. Guarnieri, 'Origini, problemi

1970s, a non-hierarchical system was built around self-government with solid guarantees of independence. This development exemplified the ability of judges to influence institutional development under favourable political conditions.⁴³

By the mid-1980s, the system had started to malfunction.⁴⁴ Disagreement among governing parties⁴⁵ and between them and judicial associations (*correnti*) generated tensions affecting the functioning of the *Consiglio superiore della magistratura*.⁴⁶ In the first half of the 1990s, the party system collapsed as a result of political scandals and the indictment of political leaders, and new parties were established.⁴⁷ Post-war Italy is often labelled a fragmented consociational democracy, although one characterised by a certain degree of polarisation.⁴⁸ After the regime crisis, polarisation was strongly magnified, favoured by the 1993 reform of the Chamber of Deputies' and the Senate's electoral systems, which prompted the rise of an imperfect majoritarian democracy.⁴⁹ The judiciary settled at the centre of the political struggles, and clashed with the political classes, especially with the centre-right parties. This sparked the demand for institutional adjustment by the same parties. The judiciary and the centre-left parties offered resistance to these demands.

Over the last 25 years, political debate and legislative initiatives have touched upon various judicial accountability dimensions. But before this article zeroes in on the three accountability mechanisms, it will analyse the changes within the *Consiglio superiore della magistratura* itself.

e sviluppo delle "correnti giudiziarie", in A. Bevere, *I magistrati e le correnti. Alla ricerca dell'indipendenza da se stessi* [Magistrates and judicial associations. The quest for independence from themselves] (ESI 2008) p. 17 at p. 18-20.

⁴³ J. Crowe, 'The Forging of Judicial Autonomy: Political Entrepreneurship and the Reforms of William Howard Taft', 1 *The Journal of Politics* (2007) p. 73 at p. 84.

⁴⁴ Assessment of the 'good functioning' of the Italian system is not based here on any empirical investigation, but rather on assumptions shared by Italian legal scholars.

⁴⁵ Notably, the Socialist Party and components of the Christian Democrats, M. Bull and M. Rhodes, *Crisis and Transition in Italian Politics* (Routledge 1997) p. 164.

⁴⁶ Tensions were raised at the highest levels during Cossiga's presidency (1985-1992), R. Teresi, *La riforma del Consiglio superiore della magistratura* [The Reform of the Consiglio superiore della magistratura] (ESI 1994) p. 16-73, and Benvenuti, *supra* n. 36, p. 28.

⁴⁷ Silvio Berlusconi entered the political arena with his centre-right organisation; populist movements such as Lega Nord and MSI-Alleanza Nazionale arose; the centrist Christian Democrat party blew up into smaller factions; the Communist Party also split between a major social-democratic party and a smaller entity claiming the communist legacy.

⁴⁸ M. Bogaards, 'The Italian First Republic: "Degenerated Consociationalism" in a Polarised Party System', 2 *West European Politics* (2007) p. 503 at p. 505 ff.

⁴⁹ F. Lanchester, *La Costituzione tra elasticità e rottura* [The Constitution between elasticity and breach] (Giuffrè 2011) p. 131 f.

JUDICIAL COUNCIL: A FLEXIBLE INSTITUTION AT THE CORE OF THE REFORM DEBATE

The foundations

According to the constitutional and legal norms and principles, the *Consiglio superiore della magistratura* is the main actor in the administration and governance of the judiciary. Launched in 1959,⁵⁰ its tasks include judicial appointments, assignments, transfers, promotions, and disciplinary measures.⁵¹

The *Consiglio superiore della magistratura* has a mixed composition.⁵² Judges elect two-thirds of its members from among their peers, and Parliament in joint session elects the remaining third by two-fifths majority⁵³ from among law professors and advocates with at least 15 years' experience. The Constitution also provides for *de jure* members: the President of the Republic, the First President of the Court of *cassazione* (Italy's Supreme Court), and the General Prosecutor. The President of the Republic, an impartial authority with important political powers within the Italian government, holds the presidency of the council. The council designates a vice-president from among those members elected by Parliament.

This complex institutional arrangement was justified by the need to protect judicial independence in a state in which judges' subordination to the executive was traditionally coupled with their weak roots in society.⁵⁴ It was the outcome of a difficult compromise between multiple political and judicial actors. The resulting body is characterised by its *mixed legitimacy*. The prevailing internal legitimacy derives from the majority of its members being judges, but is attenuated by the conferral of the vice-presidency on the member elected by the Parliament, who acts as chair on a daily basis, in strict collaboration with the President of the Republic who holds the formal chairmanship. This configuration allows for a flexible balance between autonomy and indirect influence by the political environment.⁵⁵

⁵⁰ Law n. 195 of 25 March 1958.

⁵¹ Art. 105 of the Italian Constitution.

⁵² Art. 104 of the Italian Constitution.

⁵³ Art. 22 of Law n. 195 of 25 March 1958.

⁵⁴ P. Ridola, 'La formazione dell'ordine del giorno fra poteri presidenziali e poteri dell'Assemblea' [*The determination of the agenda between presidential powers and powers of the plenary*], in B. Caravita (ed.), *Magistratura, CSM e principi costituzionali* [*Judiciary, CSM and constitutional principles*] (Roma-Bari 1994) p. 66.

⁵⁵ See also F. Palermo and J. Woelk, 'L'indipendenza della Magistratura e le sue garanzie negli ordinamenti dei Balcani occidentali', in M. Calamo Specchia et al. (eds.), *I Balcani occidentali. Le costituzioni della transizione* [*Western Balkans. The conditions for transition*] (Torino 2008) p. 203 at p. 228. This is a different solution from the one originally adopted in France in 1958, which relied

Over the years, the balance between autonomy and outside influence has shifted. The Minister of Justice, for instance, initially had an exclusive right to initiate any procedure allowing the *Consiglio superiore della magistratura* to exercise its competencies regarding promotions and appointments to specific functions.⁵⁶ The Minister retained this important power until 1963, when the Constitutional Court limited its exclusive nature.⁵⁷ Furthermore, for the appointment of heads of court, the Minister's consent was necessary.⁵⁸ More precisely, according to the law, the *Consiglio superiore della magistratura* appoints court presidents on a proposal formulated by its competent committee 'in concert with the Minister of Justice'.⁵⁹ In 1992, however, the Constitutional Court made it clear that the notion 'in concert' does not involve a veto power of the Minister, even though the competent committee must truly and fairly seek agreement.⁶⁰ In other words, 'in concert' does not pertain to the outcome of the decision, but to the procedure and the method by which the outcome is determined.

The vicissitudes and the very functioning of the *Consiglio superiore della magistratura* depend greatly on the choices made with regard to the system for selecting members elected by judges from among their peers ('judicial component'), foreseen in the law establishing the council.⁶¹ The *Consiglio superiore della magistratura* was from its beginnings a body in which judges of the Supreme Court predominated. This was the result of a category-based system for the election of judges that favoured the top ranks of the judicial hierarchy.⁶²

solely on the legitimacy derived from the Head of State, who until 1993 designated all nine councillors, six of whom from among the judicial ranks. The Italian principle of mixed legitimacy, and its implementation, can be best compared to the French judicial council of 1946 that achieved mixed legitimacy through the prism of political pluralism. S. Benvenuti, *The French and the Italian high councils for the judiciary. Observations drawn from the analysis of their staff and activity (1947-2011)*, Paper presented at the XXII World Congress of Political Science on 'Challenges of Contemporary Governance', Madrid, Spain, 19-24 July 2012.

⁵⁶ Former Art. 11 of Law n. 195 of 25 March 1958.

⁵⁷ Judgment of the Italian Constitutional Court of 2 December 1963, case no. 168, declaring the unconstitutionality of Art. 11 of the Law on the exclusive power of initiative. Consequently, the *Consiglio superiore della magistratura* can initiate the procedure independently.

⁵⁸ Art. 11 of Law n. 195 of 25 March 1958.

⁵⁹ Art. 11 of Law n. 195 of 25 March 1958.

⁶⁰ Judgment of the Italian Constitutional Court of 9 July 1992, case no. 379. This did not completely settle the conflicts and the Constitutional Court had to reiterate its position in Judgment of 18 December 2003, case no. 380.

⁶¹ Art. 23 of Law n. 195 of 25 March 1958. In turn, the profile of members elected by the Parliament is contingent upon the party composition of Parliament, but, as mentioned, these members are in the minority.

⁶² Accordingly, each magistrate enjoyed the right to give his or her vote only to members belonging to his or her category (as mentioned, three categories were envisaged). This provided the

Consequently, the council had a strong hierarchical outlook that improved internal accountability and involved a certain degree of internal dependence.⁶³ At least hypothetically, junior judges were pressed to follow the case law of the Court of *cassazione*, aware that deviations from that Court's views could bear consequences for their careers. The judicial hierarchy was therefore able to determine career advancement through the Italian Supreme Court-dominated *Consiglio superiore della magistratura*.

The struggle over the judicial council's representation

The system for electing judicial members of the council underwent significant reform in the late 1960s and early 1970s.⁶⁴ First, the category-based system of representation was abandoned. Before 1967, magistrates could vote only for candidates belonging to their own category; now magistrates were allowed to vote for candidates from any category. Higher magistrates could therefore only be elected with the support of lower ranking magistrates. In 1975, the majority principle was replaced by a system of proportional representation within a single national constituency. This required the presentation of lists of candidates by magistrates.⁶⁵

Lower judges assembled within judicial associations strongly supported these reforms. They justified their position by the wish to eliminate the hierarchical appearance of the *Consiglio superiore della magistratura* and enhance its democratic character.⁶⁶ Furthermore, the potential diversification of its judicial members was thought to allow for mutual checks and balances among the representatives of the National Magistrates' Association's *correnti* in the council and to improve the council's decision-making autonomy. In terms of accountability, while the system still prioritised internal accountability, it now responded to a pluralist logic. The distribution of power within the judiciary changed by disempowering the higher judiciary in favour of rank-and-file judges and changed the functioning of internal accountability. Judges were no longer accountable to top court judges, but to their colleagues within the same court or district. Thus, the traditionally hierarchical system of accountability was replaced by a

Court of Cassation's members with an advantage over junior judges, Di Federico, *supra* n. 3, p. 185, and Pizzorusso, *supra* n. 24, p. 41. In 1975, the proportion between categories was also rebalanced in favour of lower judges.

⁶³ D. Piana and A. Vauchez, *supra* n. 41, p. 43-68.

⁶⁴ Law n. 1198 of 18 December 1967 and Law n. 695 of 22 December 1975.

⁶⁵ Until 1967, magistrates of the *Corte di cassazione* expressed a maximum of nine preferences within a single district, and the candidates obtaining a majority of votes were elected. Four single-member districts were envisaged for electing candidates representing courts of appeal, and four for candidates representing first instance tribunals. See Zanon and Biondi, *supra* n. 35, p. 32-36.

⁶⁶ G. Ferri, *Magistratura e potere politico [Judiciary and political power]* (CEDAM 2005) p. 24.

more complex system in which the *correnti* took centre stage through their representatives within the *Consiglio superiore della magistratura*.

However, in the long-term the ideas of checks and balances and enhanced decisional autonomy were challenged by the increasingly fossilised influence of judicial associations and the politicisation of the *Consiglio superiore della magistratura* due to the proportional system of representation (upon which basis the associations' political affiliation became the dominant factor). The former was particularly apparent, among other reasons, because of the phenomenon of the so-called '*lottizzazione*', i.e. informal agreements concluded among judicial associations during the appointment process to share vacant positions within the judiciary amongst themselves.⁶⁷

Since the mid-1980s several proposals have been tabled to change the electoral system. In 1985, the Christian Democrats – by then the largest governing party – launched a proposal aimed at neutralising the power of judicial associations within the *Consiglio superiore della magistratura*.⁶⁸ The following year, a request for a referendum on electoral norms of Law n. 195/1958 establishing the *Consiglio superiore della magistratura* was put forth, but the Constitutional Court rejected the possibility of a referendum on this subject.⁶⁹ The electoral system was modified in 1990.⁷⁰ The new Law replaced, among other things, the national electoral district with four territorial districts.⁷¹ The purpose was to favour territorial rather than politico-ideological representation in order to de-structure judicial associations and to reduce the council's politicisation. However, the law merely had the effect of stabilising the existing equilibrium among judicial associations thereby limiting internal pluralism. The introduction of a 9% electoral threshold in fact favoured the major, already-existing associations.⁷²

Further attempts at reform failed⁷³ until 2002.⁷⁴ Technically, the new law adopted in that year abolished the system of proportional representation with the

⁶⁷ Guarnieri, *supra* n. 42, p. 20-23.

⁶⁸ The proposal, which provided for the introduction of the *panachage*, was discussed in the 'Parliamentary committee for institutional reforms' (Commissione Bozzi) established in 1985.

⁶⁹ Judgment of the Italian Constitutional Court of 16 January 1987, case no. 29. This decision, asserting the impracticality of abrogating electoral norms that are essential to the functioning of a constitutional body, assumes the constitutional nature of the *Consiglio superiore della magistratura*, which has long been contested by part of the legal scholarship equating it to a mere administrative body.

⁷⁰ Law n. 74 of 12 April 1990.

⁷¹ The four territorial districts were determined by unifying courts of appeal through drawing lots. Two magistrates of cassation were elected within a national district.

⁷² Pizzorusso, *supra* n. 24, p. 43.

⁷³ For example, the proposals for introducing the single transferable vote promoted by the 'Committee for the reform of the electoral system of the Consiglio superiore della magistratura' (Commissione Balboni) in 1997.

⁷⁴ Law n. 44 of 28 March 2002. The 2002 reform was preceded in 1997 by the ultimately abandoned constitutional project on *Consiglio superiore della magistratura's* reform by the 'Commissione parlamentare per le riforme istituzionali', on which see n. 81 below.

lists affiliated with judicial associations. It introduced a majority system within a re-established single national electoral district.⁷⁵ The first objective of the law was to align the election of the judicial members of the council with the system for the election of members of Parliament, and thus to achieve systematic coherence with provisions regulating the formation of the legislative branch. However, it is difficult to see why the council's judicial members' electoral system needed fine-tuning to make it correspond with the electoral system of Parliament, as the two bodies had different goals. A second objective of the law was to facilitate the formation of stable majorities within the council, but, again, this objective was open to criticism, as there was no real need for stable majorities in the *Consiglio superiore della magistratura* as there was in parliamentary bodies. The real, more or less hidden, reason for reform was in fact the wish to tackle the fossilised influence of judicial associations. In this respect, however, the reform was totally ineffective due to the reintroduction of a national electoral constituency, which gave greater control to nationally-structured associations (while the parcelling of electoral districts favoured, at least theoretically, smaller and newly-established associations).

In order to properly contextualise and understand the outlined reform, it needs to be added that, in the meantime, council jurisdiction had expanded. Instead of a 'mono-functional' body focused on managing judicial careers it became a multi-functional body with increased powers.⁷⁶ The new powers included administrative competencies relating to court administration,⁷⁷ which in some cases had a normative or 'para-normative' character;⁷⁸ the coordination of the criminal policies of public prosecutors;⁷⁹ advisory powers relating to judicial policies (acts and regulations);⁸⁰ and

⁷⁵ In addition, according to this law, three different categories of judicial members are created: representatives of the Court of Cassation (two members), judges (ten members) and prosecutors (four members). All magistrates vote for all three categories.

⁷⁶ Some of these powers were centralised by marginalising local judicial councils (*consigli giudiziari*) established at the Court of Appeal level. These are elective bodies presided over by the president of the Court of Appeal. Local judicial councils de facto prepare most of the day-to-day decisions adopted by the *Consiglio superiore della magistratura*.

⁷⁷ These competences moved from the Minister of Justice and the presidents of courts and tribunals to the *Consiglio superiore della magistratura*. This shift happened de facto and was formally acknowledged in 1988. On the widened scope of the Council's competences see Pizzorusso, *supra* n. 24, p. 44.

⁷⁸ Such as directives, Benvenuti, *supra* n. 36, p. 57.

⁷⁹ A good example is the establishment of the *Commissione Antimafia* on 15 October 1982.

⁸⁰ A second possibility is to give opinions on legislative drafts or to propose projects affecting the judicial system. The latter was first acknowledged by Art. 10 of the Law n. 195 of 24 March 1958. However, this law provided a restrictive interpretation of the relative power that was limited to an internal 'dialogue' between the *Consiglio superiore della magistratura* and the Minister of Justice on government bills. The council in practice started interacting directly with the Parliament, providing opinions in relation to bills, even during their discussion in Parliament.

public statements.⁸¹ Overall, this magnified the power of the *Consiglio superiore della magistratura* in the political arena.

JUDICIAL CAREER: DISMANTLING THE HIERARCHY

As mentioned above, the career system of the Italian judiciary follows the bureaucratic model. Hence, judges are recruited at a relatively young age after graduation from law school. According to Article 106 of the 1948 Constitution, '[j]udges are appointed through competitive examinations'.⁸² The same article states that '[f]ollowing a proposal by the judicial council, university professors in the field of law and lawyers with fifteen years of practice and registered in specific professional rolls for higher courts, may be appointed for their outstanding merits as Supreme Court judges in Italy'. This provision was implemented only 50 years later,⁸³ and the number of judges recruited in this way is still small.⁸⁴ One reason for this is the judicial domination of the *Consiglio superiore della magistratura*, whose corporatist attitude prevented the opening up of judicial recruitment. In 2001, a new law was enacted to allow a second alternative recruitment channel, this time for lawyers with a certain amount of experience.⁸⁵ However, the judiciary de facto remains a highly restricted profession with a single, traditional recruitment channel.

The career system is structured by Article 107(3) of the Constitution. It establishes that '[m]agistrates are distinguished only by their different functions'. A broad interpretation of this provision since the mid-1960s led to the progressive

⁸¹ See L. Carlassare, 'Quattro note sul Presidente della Repubblica nel Consiglio superiore della magistratura' [*Four notes on the President of the Republic in the Consiglio superiore della magistratura*], 1 *Politica del diritto* (1986) p. 151, and Benvenuti, *supra* n. 36, p. 65 ff. This expansion explains the proposal to reduce the powers of the *Consiglio superiore della magistratura* contained in an (ultimately abandoned) constitutional reform project drafted in 1997. This project included a provision according to which the council carried out 'exclusive' administrative functions with regard to recruitment, appointments and promotions, Art. 124 of the draft project of the parliamentary committee for constitutional reforms (1997-1998).

⁸² In 1948, the principle had already been established that recruitment was possible through public competitive examinations, and without any probationary period, *see* Law n. 6878 of 8 June 1890. The system has not changed since. The need for greater skills and proficiency and proper selection just led to the addition of new requirements for participation in examinations, *see* Law n. 127 of 15 May 1997, Legislative Decree n. 26 of 30 January 2006, Law n. 111 of 30 July 2007.

⁸³ Law n. 303 of 5 August 1998.

⁸⁴ Direct recruitment cannot exceed 10% of the members of the Court, but the number of judges actually appointed is extremely low.

⁸⁵ Law n. 48 of 13 February 2001. This alternative competitive examination is open to lawyers younger than 45, who have five years' experience.

abolition of judicial ranks.⁸⁶ Within this system, judges can be formally promoted to a higher position and gain salary increases, even though they retain the same (lower) function.⁸⁷ Formal positions are not indeed limited in number – this is why it is labelled as system of ‘open positions’ (*ruoli aperti*).⁸⁸

The promotion to higher positions was originally based on seniority rather than on substantive criteria, since public competitive scrutiny was abolished and judges’ evaluations did not take place on a regular basis.⁸⁹ Consequently, promotions to higher positions became de facto automatic. Scholars described this system succinctly as ‘promotion without demerits’, to indicate that automatism was blocked only in cases of evident faults.⁹⁰ In fact, this system had initially positive effect since it greatly contributed to the emancipation of judges from the judicial hierarchy. However, it generated side effects in the long run. Automatism strongly weakened accountability for career advancement to higher formal positions, which in turn negatively affected magistrates’ professionalism in practice. At the same time, the *Consiglio superiore della magistratura*, dominated by judicial associations, retained huge leeway in making appointments to specific functions, which strengthened internal accountability.⁹¹

In order to counteract these two tendencies, the Parliament approved two general reforms between 2005 and 2007.⁹² While maintaining the seniority rule for advancement, the 2005 law introduced a merit-based assessment through written and oral examinations for promotion to a higher position. The 2007 law improved the system by introducing a regular

⁸⁶ Law n. 392 of 24 May 1951, Law n. 570 of 25 July 1966 and Law n. 831 of 20 December 1973. The former abolished ranks and established three categories of magistrates: tribunal, appeal, and cassation. The two latter laws abolished competitive examinations-based promotion from one category (position) to the other, so that promotion became possible based on seniority according to the category and following the evaluation of local judicial councils and a decision of the *Consiglio superiore della magistratura*. Thirteen years’ experience is required to become a judge of appeal and 28 years to become a judge of cassation.

⁸⁷ Following Judgment of the Italian Constitutional Court of 19 May 1982, case no. 86, it was not possible to be appointed as a judge of cassation without exercising the relevant functions, but magistrates were qualified for appointment and relative salary benefits were preserved.

⁸⁸ Pizzorusso, *supra* n. 24, p. 45-50.

⁸⁹ Evaluation is a task of local judicial councils. It is based on observations by the court president and is subsequently approved by the *Consiglio superiore della magistratura*, see for example Art. 3 of Law n. 570 of 25 July 1966.

⁹⁰ G. Di Federico, ‘Statuto, carriera e indipendenza dei magistrati ordinari in Italia’ [*Statute, career and independence of ordinary magistrates in Italy*], 1 *Rivista trimestrale di diritto e procedura civile* (1973) p. 1577 at p. 1589; see also Silvestri, *supra* n. 31, p. 162-169; Guarnieri, *supra* n. 40, p. 350. This is a notable example of simulated judicial accountability, Kosař, *supra* n. 1, p. 70.

⁹¹ Guarnieri, *supra* n. 42.

⁹² Law n. 150 of 25 July 2005, Legislative Decree n. 160 of 5 April 2006, and Law n. 111 of 30 July 2007, n. 111.

evaluation process.⁹³ The law also created a commission made up of judges, university professors, and qualified lawyers to assist the *Consiglio superiore della magistratura* in assessing scientific analytical competencies and skills necessary to be appointed as a Supreme Court judge.⁹⁴ Finally, it introduced the rule that court presidents are appointed for four years, with the possibility of reappointment for four more years.⁹⁵ Overall, the 2005-2007 reforms, which were approved by a centre-right and a centre-left majority respectively and witnessed a coincidence of intents, have proven to be ineffective mainly due to internal resistance against implementation. Only the measures aimed at regulating assessment for appointing heads of courts or members of the Supreme Court were successful.

DISCIPLINARY RESPONSIBILITY: THE LONG JOURNEY DISTANCING ITSELF FROM ITS BUREAUCRATIC APPROACH

The Constitution gives the *Consiglio superiore della magistratura* the power to adopt disciplinary measures against magistrates⁹⁶ upon the initiative of the Minister of Justice.⁹⁷ The law also confers the General Prosecutor with the power to initiate disciplinary procedures.⁹⁸ The disciplinary section of the *Consiglio superiore della magistratura* consists of the vice-president of the council (a non-judicial member elected by the Parliament), who presides over it, and five members, four of whom are magistrates.⁹⁹ According to legal scholarship, the disciplinary accountability framework is a *constitutional* (and not merely a bureaucratic) structure, since it involves the collaboration of the three state powers:¹⁰⁰ the Minister of Justice initiates the procedure based on the general framework for disciplinary offences and procedural guarantees set by the Parliament, while the *Consiglio superiore della*

⁹³ Art. 2 of Law n. 111/2007, amending Art. 11 of Legislative Decree n. 160/2006. During the first 28 years of a judge's career, the judicial council now formulates a reasoned assessment every four years. A negative assessment can involve the obligation to attend a training course, re-appointment to different functions, and even being forbidden from exercising given functions. Furthermore, judges cannot carry out the same functions for more than 10 years.

⁹⁴ See Art. 12, subsection 13, of Legislative Decree n. 160 of 5 April 2006. The reason for such a requirement lies in the constitutional relevance of a supreme court, which carries out functions inherently different from those exercised by lower courts, and connected to what Italian and French academics have termed as 'proactive' or 'normative' functions, Taruffo, *supra* n. 23, p. 123 ff.; L. Cadiet, 'Problèmes et perspectives de la Cour de cassation française' [*Problems and perspectives of the French Cour de cassation*], in Besso and Chiarloni (eds.), *supra* n. 22, p. 55 at p. 58.

⁹⁵ Art. 2 of Law n. 111/2007, amending Arts. 45 and 56 of Legislative Decree n. 160/2006.

⁹⁶ Arts. 105 and Art 107(1) of the Italian Constitution.

⁹⁷ Art. 107(2) of the Italian Constitution. Before 1946, the Minister of Justice was vested with full disciplinary powers, Giuliani and Picardi, *supra* n. 40, p. 148.

⁹⁸ Art. 14 of Law n. 195/1958 and Art. 14(3) of Law Decree n. 109 of 23 February 2006.

⁹⁹ Art. 105 of the Italian Constitution and Art. 4 of the Law n. 195/1958.

¹⁰⁰ M. Vietti, *L'ordinamento giudiziario* [*The judicial system*] (Giappichelli 2003) p. 60.

magistratura (*rectius*, its disciplinary section) is in charge of the disciplinary decisions. However, the original framework is characterised by a certain ambiguity.

Only in a 1971 decision has the Constitutional Court explicitly acknowledged the jurisdictional character of the disciplinary procedure.¹⁰¹ The Court stated that the disciplinary section is equivalent to a court (which explains the appeal to the Supreme Court, which decides upon it in joint session)¹⁰² and that ‘the law, through explicit and unambiguous provisions, conferred jurisdictional character to the function carried out by the disciplinary section’.¹⁰³ Nevertheless, hearings were not public. The *Consiglio superiore della magistratura* did not introduce the possibility of public hearings until 1985, and a law formalised the principle of public hearings only in 1990.¹⁰⁴

According to Article 107(1) of the Constitution, a judge may be suspended or assigned to a different function following a decision taken based on rules set by a law. Still, disciplinary offences had not been clearly defined until recently. Article 18 of the Royal Decree n. 511 of 1946 merely provided that a judge may be disciplined when he or she fails to maintain the duties of the office, shows untrustworthy and/or inconsiderate behaviour, or damages the reputation (*‘prestigio’*) of the judiciary.¹⁰⁵ In practice, even the most serious breaches of professional competencies, unless externally disclosed, were considered irrelevant, contrary to minor breaches that could harm the prestige of the judiciary.¹⁰⁶

The disciplinary section of the *Consiglio superiore della magistratura* had to fill in these very vague concepts (duties of the office, untrustworthy behaviour, reputation of the judiciary) in accordance with its own opinions.¹⁰⁷ This had two consequences. First the normative and the jurisdictional dimensions de facto became blurred within the disciplinary section, seriously undermining its impartiality.¹⁰⁸ Second, corporatist consensus among judicial associations (represented in the disciplinary section) favoured loose definitions of disciplinary offences, making the system ineffective and causing disciplinary responsibility to go underused.

¹⁰¹ Judgment of 2 February 1971, case no. 12.

¹⁰² Art. 17 of Law n. 195/1958.

¹⁰³ In this decision, the rule of in camera hearings and the diminished role of the advocate were at stake, among other matters; notwithstanding its clear position, the Court considered these two constitutional questions unfounded.

¹⁰⁴ Art. 1 of Law 74/1990, which maintains the possibility of exceptions

¹⁰⁵ This decree was adopted before the Constitution and envisaged a disciplinary court and disciplinary tribunals, jurisdictional in character, thus reforming the previous system based on a politico-bureaucratic understanding of disciplinary responsibility, Vietti, *supra* n. 100, p. 52.

¹⁰⁶ Zanon and Biondi, *supra* n. 35, p. 282.

¹⁰⁷ The plenary of the *Consiglio superiore della magistratura* also contributed to define disciplinary offences by resorting to its ‘para-normative’ powers, on which see *supra* n. 78.

¹⁰⁸ Vietti, *supra* n. 100, p. 54 ff. Hence, while the disciplinary system is no longer based on the old bureaucratic approach many commentators have underlined its practical shortcomings, Zanon and Biondi, *supra* n. 35, p. 328.

In reaction, the Italian Parliament somewhat formalised the definitions of disciplinary offences in 2005 and 2006. It is noteworthy that this was also the consequence of a 2001 European Court of Human Rights decision which criticised the lack of foreseeability of disciplinary offences.¹⁰⁹ The law also increased the Minister's powers for the procedures in disciplinary investigations and indictments.¹¹⁰ In turn, it addressed the 'legalisation' of disciplinary procedure, regarding the right to defence and the public viewing of hearings, cancelling all traces of a typical bureaucratic form of jurisdiction.¹¹¹

CIVIL LIABILITY: THE UNTOUCHABLE JUDGES – AND THEIR DEMISE?

Civil liability can be a mechanism for holding judges accountable for the exercise of their judicial functions. Here we must distinguish between State liability and individual liability.¹¹² In Italy, the State's liability traditionally overshadows individual liability. Individuals cannot sue judges directly; they can hold only the State liable for the misdeeds of a judge. Until 1988, the State could sue judges only in a very limited array of situations compared with other civil servants, and only as a right of recovery in case the State itself had been sued for a judge's behaviour.¹¹³

Articles 55, 56, and 74 of the (still in force) 1940 Code of Civil Procedure¹¹⁴ confined a judge's civil liability to wilful misconduct, fraud, or misfeasance (*'dolo, frode o concussione'*), and unreasonable refusal, omission, or delay in accomplishing a required procedure or legal obligation.¹¹⁵ Individual complaints required the Minister of Justice's authorisation to start the procedure to determine a judge's liability. If authorisation was given, the Supreme Court selected the competent judge.¹¹⁶

¹⁰⁹ ECtHR 2 August 2001, Case No. 37119/97 *NF v Italy*. Art. 1(1) and 2(6)-(7) of Law n. 150/2005 and Arts. 2, 3 and 4 of Legislative decree n. 109/2006 introduced three categories of disciplinary offences depending on whether they have been committed during or outside the exercise of the judicial functions and whether they result from committing a crime.

¹¹⁰ See notably Art. 2(6) of Law n. 150/2005 and Arts. 1-4, 14, and 17 of Legislative Decree n. 106/2006.

¹¹¹ Zanon and Biondi, *supra* n. 35, p. 317-321; Giuliani and Picardi, *supra* n. 42, p. 149. 'Legalisation' of accountability implies the reliance on stricter legal standards, Kosař, *supra* n. 1, p. 38.

¹¹² Kosař, *supra* n. 1, p. 82.

¹¹³ Therefore, only the State was liable vis-à-vis individuals. The restrictive approach is derived from the 19th century liberal idea that judging was an expression of State sovereignty and judicial decisions were fully ascribable to the legislative will, Zanon and Biondi, *supra* n. 35, p. 321 ff.

¹¹⁴ These three articles derive directly from Art. 783 of the 1865 Code of Civil Procedure.

¹¹⁵ Art. 55 of the Code of Civil Procedure 1940.

¹¹⁶ Art. 56. This article was in clear breach of Art. 25(1) of the Italian Constitution, establishing the principle of the legal judge. According Judgment of the Italian Constitutional court of 11 March 1968, case no. 2, the Minister's authorisation was not necessary to claim for State liability.

In 1987, a referendum was held to repeal the aforementioned articles of the Code of Civil Procedure with the aim of pushing Parliament to introduce the direct civil liability of judges in case of *gross negligence* ('*colpa grave*'). This initiative followed a striking episode of poor administration of justice¹¹⁷ as well as criticism from sectors of the political *élite* irritated by supposedly politically-biased public prosecutions of party members. The referendum resulted in the abrogation of Articles 55, 56, and 74 of the Italian Civil Code, which created a legal gap that Parliament was called upon to fill.¹¹⁸

Parliament subsequently¹¹⁹ maintained the principle that individuals can sue only the State, but extended the number of cases in which the State, within one year after it has paid compensation, can take recourse against a judge. Liability is incurred when the individual suffers material or non-material damage that is caused not only by wilful misconduct ('*dolo*') or a denial of justice, but also in case of *gross negligence* ('*colpa grave*').¹²⁰ Thus, even unintentional acts can give rise to civil liability.¹²¹ The new law also established a 'safeguard clause' ('*clausola di salvaguardia*'), according to which interpretations of legal provisions and assessments of facts and evidence can give no occasion for civil liability.¹²² The act also codified the rights of the defendant judge and introduced a stricter procedure for the selection of the competent judge.¹²³ Moreover, a declaration of admissibility of the claim by the tribunal replaced the Minister's authorisation.¹²⁴

Scholars consider the overall impact of the 1988 Law to be minimal.¹²⁵ First, not only was the extension of the second-degree liability of judges very restrictive,

¹¹⁷ In 1983, the journalist Enzo Tortora was indicted and arrested on the basis of serious criminal charges, for which he was sentenced to 10 years in prison in 1985. However, the Court of Appeal acknowledged his innocence in 1986.

¹¹⁸ M. Graziadei and U. Mattei, 'Judicial Responsibility in Italy: A New Statute', 1 *The American Journal of Comparative Law* (1990) p. 103.

¹¹⁹ Law n. 117 of 13 April 1988.

¹²⁰ Arts. 2 and 7 of Law n. 117 of 13 April 1988.

¹²¹ 'Gross negligence' was limited to specific cases, Art. 2(3). Art. 3 also provides a detailed definition of denial of justice. See G.F. Ferrari, *Introduction to Italian Public Law* (Giuffrè 2008) p. 180; E. Tira, 'La responsabilità civile dei magistrati: evoluzione normativa e proposte di riforma' [*Civil liability of judges: legislative development and reform proposals*], 4 *Rivista AIC* (2011) p. 1 at p. 5-8. The individual can ask for compensation for non-material damage, and for material damage deriving from deprivation of liberty.

¹²² Art. 2. The Judgment of the Italian Constitutional Court of 11 January 1989, case no. 18, considered this clause essential to protect the impartiality of the judge.

¹²³ Arts. 6 and 4.

¹²⁴ Art. 5 and Judgment of the Italian Constitutional Court of 9 October 1990, case no. 468.

¹²⁵ In the majority of cases, inadmissibility was declared at a preliminary stage; in case of admissibility, the liability of the State was affirmed very rarely – even less so the liability of the individual judge, Zanon and Biondi, *supra* n. 35, p. 327. See also Giuliani and Picardi, *supra* n. 42, p. 155.

but it also contradicted the underlying rationale of the 1987 referendum by maintaining the inability to sue judges directly. Indeed, the heated debate preceding the referendum addressed the increase of individual judges' accountability by introducing direct civil liability, not just the need to grant compensation to individuals who had suffered damage(s). Second, the judges themselves impeded the reform by interpreting the new provisions in a highly restrictive way. This had bearing on and affected all phases of the legal process, from the declaration of admissibility to the actual judging of individual liability.¹²⁶

Dissatisfaction with the legislative outcome of the 1987 referendum alone does not explain why civil liability has since often entered the political debate. Another explanation lies in the tide of judicial activism known as *Mani pulite* (Clean hands), that contributed to the legitimacy crisis of the political elite in the first half of the 1990s,¹²⁷ and that continued the subsequent 20 years, exacerbating the conflict between the judiciary and Berlusconi's newly-founded party.¹²⁸ New referendum proposals were submitted in 1996 and 1999, but were rejected by the Constitutional Court for lack of clarity inherent to the question.¹²⁹ Centre-right parties used the possibility of reforming the legislative framework as a threat against the judiciary.¹³⁰ Governmental bills attempted to introduce direct judicial liability for fraud and to simplify the procedure in cases of gross negligence. The main centre-left party also called for reform, but in a more balanced way, while judicial associations strongly opposed it. At stake were not just citizens' rights, i.e. the protection of citizens against miscarriages of justice and the ability of citizens to demand compensation even in cases of negligence, but also a just balance between justice and politics. Many asserted that episodes of judicial over-zealousness risked – and in some cases actually led to – influencing political dynamics.¹³¹

¹²⁶ M. Nisticò, 'La nuova legge sulla responsabilità civile dello Stato e dei magistrati. Inquadramento storico-sistematico e profili problematici' [*The new law on State and judges' civil liability. Historical framework and problematic issues*], *Osservatorio Costituzionale AIC* (2015) p. 1 at p. 6 ff., Zanon and Biondi, *supra* n. 35, p. 326 ff.

¹²⁷ C. Bohlen, 'Italy's "Clean hands" Judges Bite Their Nails', *The New York Times*, 2 June 1995, p. 3; A. Vannucci, 'The Controversial Legacy of "Mani Pulite": A Critical Analysis of Italian Corruption and Anti-Corruption Policies', *2 Bulletin of Italian Politics* (2009) p. 233 at p. 233-236.

¹²⁸ On the regime crisis, *see supra* nn. 47-49.

¹²⁹ Zanon and Biondi, *supra* n. 35, p. 326 ff.

¹³⁰ In 2012, a proposal for amendment presented by a member of the populist party Lega Nord, aimed at introducing individual liability for 'manifest infringement of the law', including the possibility of suing the judge. The amendment was about to be approved but was eventually rejected.

¹³¹ It can hardly be denied that prosecutions against centre-right party members and Prime Minister Berlusconi in the 1990s and 2000s, extending in the 2010s to centre-left as well, importantly determined the course of political events and further aggravated political instability. In this regard, Italy is a forerunner of this specific dimension of judicialisation of politics that has concerned other European democracies.

In the end, internal and external pressures resulted in the adoption of a new law on civil liability in February 2015.¹³² The law maintained the principle of the indirect liability of judges. However, it limited the ‘safeguard clause’ and broadened the categories of gross negligence and wilful misconduct.¹³³ It also removed the filter for the admissibility of the complaint¹³⁴ and made the complaint of the State against individual judges (in case the State itself had been convicted for the behaviour of the judge in question) mandatory and stricter.¹³⁵ Although the law did not fundamentally alter the civil liability framework, it marks a further step toward the increased civil liability of judges. The impact of the law still needs to be assessed, but the dogma of individual non-liability is fading away.

CONCLUSION

The previous sections focused on Italian reforms in three crucial areas for judicial accountability. They shed light on how the judicial accountability framework has changed over time and the conditions under which this happened. Leaving aside any consideration as to what the right balance in the judicial accountability framework should be, the Italian experience indicates the dynamism of such a balance.¹³⁶ In Italy, this balance shifted between the 1950s and the 1980s from a hierarchical system blending external accountability to the executive with internal accountability to the higher judiciary, to a framework of prevalently internal accountability rooted in the centralisation of the judiciary’s management of the (by the judicial associations dominated) *Consiglio superiore della magistratura*. Against this situation marked by institutional imbalance, a reaction followed starting in the second half of the 1980s, attempting to strengthen judicial accountability.

Collectively, the reforms adopted in the last 20 years followed three directions and revealed the underlying tension regarding accountability. First, they aimed to reduce the power of judicial associations within the *Consiglio superiore della magistratura* and to counter internal accountability. Second, they aimed to improve professional accountability, limitations to which stem from both outdated recruitment mechanisms and the crystallisation of the seniority rule for career advancement. Third, they ‘legalised’ the disciplinary procedure and made individual civil liability effective.¹³⁷

¹³² Law n. 18 of 27 February 2015.

¹³³ Art. 2.

¹³⁴ Art. 3.

¹³⁵ Art. 4.

¹³⁶ On this dynamic see Garoupa and Ginsburg, *supra* n. 4, p. 118.

¹³⁷ See *supra* n. 111. This process was also stimulated as mentioned by international jurisprudence, notably ECtHR 2 August 2001, Case No. 37119/97 *NF v Italy*.

This shows that the issue of reforming the institutional framework to adjust the balance *must be addressed* from time to time. To be sure, Italy is exemplary in this regard, yet it is not an exception. Similar dynamics characterise countries where politico-judicial relations are complex, a lack of homogeneity within the political and the judicial elites exists, or the party system lacks consolidation. While exceptional in this regard, the backlash in countries such as Hungary and Poland can be interpreted to an extent within this framework.¹³⁸ However, this trait is not unique to unstable or weakly-consolidated democracies.¹³⁹

Therefore, this article argues that it is difficult to ensure a proper and stable balance in the accountability framework and to define any balance *ex ante* and generally, due to the naturally unstable socio-political background and changing centre of gravity in politico-judicial relations. One will not achieve a proper balance in the accountability framework by the implementation of one-size-fits-all (and all-time) templates; rather one should try to achieve a substantive equilibrium among the relevant actors in a specific context. Judicial accountability (like judicial independence) is neither a dogma nor a unitary concept, but an instrumental and multidimensional concept which needs to be in accordance with underlying socio-political conditions. Moreover, as the balance changes over time, institutional arrangements and relationships evolve, and judicial government bodies are among some of the most important, one should reassess the balance from time to time.

This brings us to the lessons from the Italian-derived judicial council template. This article demystifies the myth about the Italian 'self-government' body in two ways. On the one hand, since its inception in 1948, the *Consiglio superiore della magistratura* was designed to ensure judicial accountability and not merely (external) judicial independence.¹⁴⁰ As a mixed institution, the council was indeed flexible enough in drawing up a satisfactory accountability balance.¹⁴¹ The

¹³⁸ M. Bánkuti et al., 'Disabling the Constitution', 23 *Journal of Democracy* (2012) p. 142-144; A. Sanders and L. von Danwitz, 'The Polish Judiciary Reform: Problematic under European Standards and a Challenge for Germany', *VerfBlog*, 28 March 2017, <verfassungsblog.de/the-polish-judiciary-reform-problematic-under-european-standards-and-a-challenge-for-germany/>, visited 17 April 2018. There, while current developments are inseparable from the broader picture of constitutional weakening, these are also a consequence of the unsatisfactory imbalance among domestic actors.

¹³⁹ The French case, with constitutional changes affecting the judicial council in 1946, 1958, 1993, and 2008, and a reform proposal being further discussed by the French Parliament in 2013, is also exemplary in this regard.

¹⁴⁰ Caution in relating the independence of the judiciary with judicial independence underlies the need to pay greater attention on individual independence of judges. On this, see D. Kosař, 'Politics of Judicial Independence and Judicial Accountability in Czechia: Bargaining in the Shadow of the Law between Court Presidents and the Ministry of Justice', 13 *EuConst* (2017) p. 96.

¹⁴¹ Garoupa and Ginsburg, *supra* n. 4, p. 130.

flexibility of the Italian judicial council template, which explains its success and persistence over space and time,¹⁴² also makes it clear that – paraphrasing Adrian Vermeule – the council is a ‘many’, not a ‘one’.¹⁴³ This is emphasised by the diverging perceptions of the *Consiglio superiore della magistratura* that, under a stable constitutional umbrella, underwent various changes over time. Today, the European institutional landscape is populated by a variety of such institutions that, under the ‘judicial council’ classification, work as tools with several functions, even with divergent utility and accountability rationales.

In short, the Italian example shows that flexibility is necessary to create a complex institutional framework in harmony with domestic conditions. From a normative perspective, what truly matters in accountability arrangements is the existence of a ‘system of checks and balances ... which prevents any principal from taking control of the majority of the accountability mechanisms’.¹⁴⁴ This consideration mirrors the stress placed by Italian legal scholarship on the importance of the composite structure of the *Consiglio superiore della magistratura*.¹⁴⁵ The council’s mixed composition was indeed essential to its proper functioning, and resulted from the constitutional and legal provisions first, but also from the social conditions of the judiciary and the political contexts.¹⁴⁶

This need to take the social conditions of the judiciary and the political contexts into account also puts the concept of the judicial council as a body made up of a majority of magistrates into perspective. The rationale behind the creation of the judicial council may lie in the principle of self-government, but can also have roots in the principle of a balance among powers. Looking at the council as a tool of judicial independence, without referring to its mixed judicial accountability, leaves an inaccurate or partial understanding of this body.

This is actually a major problem of Opinion No. 18 (2015), mentioned in the first paragraphs of this article. In its commendable praise for increased accountability of the judiciary, the advisory body of the Council of Europe unfortunately approaches judicial councils only as ‘representatives of the judiciary’.¹⁴⁷ While this is not in itself totally wrong, it insufficiently defines the nature of judicial councils and fails to address the ultimate premise for their establishment. In turn, Opinion No. 10 (2007) of the Consultative Council of

¹⁴² Garoupa and Ginsburg, *supra* n. 4, p. 130.

¹⁴³ A. Vermeule, ‘The Judiciary Is a They, Not an It: Two Fallacies of Interpretive Theory’, *University of Chicago, Public Law Working Paper No. 49*, p. 1.

¹⁴⁴ Kosař, *supra* n. 1, p. 410.

¹⁴⁵ Ridola, *supra* n. 54.

¹⁴⁶ This explains why, before the regime crisis, pressure for institutional change followed the decrease in the council’s internal substantive pluralism, due to judicial associations’ corporatist attitudes and the phenomenon of ‘lottizzazione’, *see supra* n. 67.

¹⁴⁷ Para. 31.

European Judges, on judicial councils rightly stresses the mixed nature of the councils and the relevance of electing judicial members (a principle that is supposed to allow pluralism, even though the Italian case warns against such immediate correlation). Still, the principle that judges should be the majority may prove too rigid, also in consideration of the structural information asymmetries in their favour. Imposing a template may limit the councils' main assets: their flexibility and a mixed composition. In this regard, the Action Plan of the Council of Europe on strengthening judicial independence and impartiality displays more cautiously reasoned formulations when it comes to judicial councils.¹⁴⁸

Scholars have therefore rebuked the problematic transplant of a 'strong' and judicially-dominated council in countries lacking significant segmentations within relatively small judiciaries, or where powerful judicial actors such as court presidents exist.¹⁴⁹ Institutional solutions need fine-tuning within their respective context. Several aspects are critical in this respect: awareness of the social structure of the judiciary, of its size, and of its internal segmentations, of the relevant agents and internal dynamics, of the relationships of their components within the broader political arenas and the structure of the political system. It is necessary to emphasise once more that the very features of any alleged accountability framework are based on historical legacies¹⁵⁰ as well as on the social and political background, since judiciaries are not monolithic bodies, but are internally marked by social and institutional segmentation.¹⁵¹

A proper understanding of existing councils and their internal structures in relation to these contextual elements is necessary. Identifying these conditions, to which little attention has been devoted, should be a task of future scholarship in this field. This would allow an assessment of conformity to substantive principles rather than to formal templates.



¹⁴⁸ Council of Europe, *Plan of action on strengthening judicial independence and impartiality*, CM (2016)36 final, April 2016.

¹⁴⁹ Kosař, *supra* n. 1, p. 301. D. Smilov, 'EU Enlargement and the Constitutional Principle of Judicial Independence', in W. Sadurski et al. (eds.), *Spreading Democracy and the Rule of Law? The Impact of EU Enlargement for the Rule of Law, Democracy and Constitutionalism in Post-Communist Legal Orders* (Springer 2006) p. 313, is one of the first writings taking on a critical stance in this regard.

¹⁵⁰ Kosař, *supra* n. 1, p. 411.

¹⁵¹ Kosař, *supra* n. 1, p. 393; Vermeule, *supra* n. 143.