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Rule of Law in Europe

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Protecting Judicial Independence by Strengthening Public Confidence in the Judiciary

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1 Introduction

Protection of judicial independence has become a matter of great concern for the European legal space in recent years, and both European courts have intensively been addressing the topic in their judgments. Indeed, judicial independence lies at the very core of the rule of law, which is a cornerstone of both the Council of Europe and the EU, as Article 3 of the Statute of the CoE and Article 2 of the TEU make clear. At the same time – despite any recent claim to the contrary – the rule of law and judicial independence itself are an essential part of the shared constitutional identity of all the States that have freely adhered to these two international organisations.

In my intervention I would like to share some thoughts drawing from my specific experience as a judge of a constitutional court – of course, subject to the caveat that I am going to say only reflects my personal opinions, and not necessarily those of my court.

More specifically, I will focus on a particular aspect of the protection of judicial independence that has not been touched upon by the other distinguished speakers, namely the connections between *judicial independence* and *public confidence in the judiciary*.

As I will try to show, the Italian situation vividly illustrates how vital this connection is. From a both *de iure* and *de facto* perspective, Italian courts and prosecutors enjoy a very high degree of independence from any other power of the State – possibly one of the highest in a comparative perspective. Yet in recent years the judiciary as a whole has been experiencing the most serious crisis of public confidence since the birth of the Republic in 1946. This climate may well create the conditions for legislative reforms curtailing judicial independence, and ultimately undermining the very rule of law, as has happened in some European countries, which other speakers have referred to in their interventions.

To analyse this connection, I will firstly say some words on the situation of judicial independence in Italy from an objective perspective (Sect. 2). I will then try to briefly explain the causes of the confidence crisis in the judiciary I mentioned (Sect. 3). Finally, I will reflect on some possible strategies to overcome this crisis and avoid thereby the worrying scenarios we have been witnessing in other member States of the EU, drawing some suggestions from the recent experience of the Italian Constitutional Court itself – an institution which, while not being formally part of the judiciary power, is often seen itself, in the public opinion, as a judicial actor (Sect. 4).

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2 Judicial Independence in the ICC's Jurisprudence

As anticipated, in Italy not only judges, but also public prosecutors undoubtedly enjoy a very high level of *de iure* and *de facto* independence from political powers.

The principle of independence of the judiciary «from any other power» is enshrined in Article 104 of the Constitution. According to Article 105, appointments, promotions and disciplinary proceedings for judges fall under the exclusive competence of the High Council of the Judiciary, which is composed, on its part, by two thirds of judges elected by their colleagues, and only by one third of members elected by Parliament. The 'internal' independence is guaranteed by Article 101, according to which judges are subject only to the law – such a provision ruling out any hierarchical subjection of judges to any other judges, except for merely organisational matters. According to Article 106, judicial appointments are based on public competitive examinations. Once elected, a judge may not be removed from office unless by decision of the High Council of the Judiciary at the outcome of a disciplinary proceeding, in which the person concerned fully enjoys their defence rights (Article 107), the decision itself being then subject to judicial review before the Joint Sections of the Court of Cassation. Public prosecutors enjoy the same constitutional status as judges (Article 106) and are subject to the authority of the same High Council of the Judiciary. The Minister of Justice only has responsibility for the organisational functioning of the services involved with justice, but has no authority over judges and prosecutors (Article 110).

All these guarantees have been strictly and consistently enforced by law and practice after the enactment of the Constitution in 1948, so that it is correct to say that the principle of independence of the judiciary – including, crucially, public prosecutors, who are recognised as part of that power – has not been seriously questioned in my country so far.

Only sporadically has it been necessary for the Constitutional Court to reaffirm this principle vis-à-vis legislative provisions that are not in line with this principle.

For example, in 2021 the Court struck down a provision allowing honorary judges, recruited through temporary contracts by the High Council of the Judiciary, to act as members of the judiciary panels in civil appeal proceedings[1]. While recognising that the measure was functional to tackle the judicial backlog in the Italian courts of appeals, the Court observed that the Constitution only allows that honorary judges deal with cases of minor relevance, precisely to ensure that judicial functions are carried out by judges recruited through public competitive examinations and enjoying full independence from the political powers and, internally, from the very judiciary power, which is ultimately responsible – through the High Council – for the prorogation of the temporary contracts for honorary judges.

More interesting from a comparative perspective is, perhaps, the Constitutional Court case law on independence of public prosecutors. In a previous judgment, for example, the Court had struck down a provision setting forth an obligation on police officers to inform their superiors on the investigations led by public prosecutors in which they cooperate[2]. The provision was deemed to be incompatible with Article 109 of the Constitution,

[1] Judgment No 41 of 2021.

[2] Judgment No. 229 of 2018.

establishing that public prosecutors avail themselves of police officers placed under their direct authority. The Court held that this obligation violated the constitutional guarantee of independence of public prosecutors from the executive, since it enabled superior police officers – not placed under the direct authority of public prosecutors, and reporting instead to the government – to exercise a control over, or at least to receive information of, the investigations carried out by public prosecutors through police officers who functionally operate under their exclusive direction.

The actual performances of judges and public prosecutors in Italy confirm the high degree of independence they enjoy not only *de iure*, but also *de facto*. At least since the beginning of the Nineties a conspicuous number of prosecutions involving members of parliament and prominent government officials – including a prime minister in office – have taken place in Italy; and many of these prosecutions have actually led to convictions, sometimes with the effect of banning the individuals concerned from holding public office for a certain period of time. Notwithstanding the notorious capacity of the local mafias to infiltrate public offices and even control the core of the public administration in certain parts of the Italian territory, public prosecutors and courts have been able, especially in the last forty years, to indict and convict a remarkably high number of people for mafia-related offences, thereby significantly weakening the power of those organisations. Even more remarkably, Italy has been the first country where an investigation launched by a local public prosecution office has led to the conviction of various US intelligence agents for their involvement in the extraordinary renditions program coordinated by the US administration in the aftermath of 9/11, to which the ECtHR also referred in its well-known *El-Masri* judgment[3]. And this conviction was particularly significant, since the investigation was carried out without any cooperation by government agencies, which had refused to give any information to the prosecutors on the grounds of State secrecy[4].

3 Judicial Independence and Public Confidence in the Judiciary

Yet the overall picture in my country is far from ideal, due to a very serious crisis of public confidence in the judiciary that risks undermining the public perception of the importance of the very principle of judicial independence in a democracy[5].

The recent experiences of attacks against judicial independence in other EU member States, carried out by governments and parliaments freely chosen through democratic

[3] ECtHR (GC), El Masri v. The Former Yugoslav Republic of Macedonia (2012), App. No. 39630/09.

[4] Extensively on the investigation, the following criminal proceeding and the intervention of the Constitutional Court, see judgments No 106 of 2009 and 24 of 2014 by the Constitutional Court itself.

[5] See the recent EU Commission Staff Working Document 2022 Rule of Law Report – Country Chapter on the rule of law situation in Italy, at 3: 'The level of perceived judicial independence in Italy continues to be low among the general public' (pointing out that only 37% of the general population perceive the level of independence of courts and judges to be 'fairly or very good' in 2022) (https://ec.europa.eu/info/sites/default/files/29_1_194038_coun_chap_italy_en.pdf) accessed 27 January 2024.

elections, is an ominous sign. In those States, public opinion has hardly reacted against such attacks, either because of a lack of understanding of the key role of judicial independence for the rule of law and democracy, or – more probably – because of a general lack of trust in the judicial systems in those same countries. A reaction came late, mostly prompted by international organisations rather than by national actors, apart of course from the judicial institutions themselves.

It is not by chance that for a very long time the ECtHR has been stressing that "justice must not only be done, it must also be seen to be done"[6]: the *appearance* of impartiality of the judiciary is just as important as its *being* impartial and independent from other powers. And it is not by chance either that the CoE's *Plan of Action on Strengthening Judicial Independence and Impartiality*, adopted by the Committee of Ministers in 2016, in its very introductory words stresses that "it is of primordial importance that judicial independence and impartiality exists in fact and is secured by law, and that public confidence in the judiciary, where it has been lost, is restored and maintained"[7]. The two aims are inextricably linked.

A lack of public confidence in the judiciary is not an Italian prerogative, admittedly. In many countries throughout the world, judges and prosecutors are widely seen by sectors of public opinion as part of those elites towards which a generic feeling of resentment is rising.

However, the Italian situation is particularly worrying for some special reasons.

Firstly, the functioning of the Italian judicial system has always suffered from the excessively lengthy proceedings, in almost every sector of the law[8]. There are of course good reasons to argue that Italian judges and prosecutors are hardly responsible for that: the causes manly lie both in the complexity of the procedures envisaged by the law, and in the excessive number of cases which need to be dealt with, that no legislative reform has been able to reduce so far. But the fact remains that Italian courts, despite the strong personal commitment of their members and their widely recognised professional skills, are incapable of rendering justice within a reasonable time. This is, inevitably, perceived by public opinion as a failure to render justice at all.

Secondly, the very strengths of the Italian judiciary in terms of independence from political powers, in particular the abundance of indictments and convictions concerning politicians, often give rise to accusations towards courts and prosecutorial offices that they are themselves pursuing political agendas – a fact that also contributes to undermine the moral authority of the judiciary, seen as a 'partial' actor in the political arena. While similar accusations are common everywhere in the world, and are to some extent inevitable in such cases, the criticism becomes less groundless in the light of the disturbing gap, in the recent Italian experience, between the great quantity of investigations and prosecutions involving politicians and the smaller number of final convictions. Indeed, the very opening of an investigation, and more still a prosecution, already damages the political life of the person concerned, even if he or she is eventually acquitted.

Finally, recent judicial investigations and the following scandals have shown a network of improper connections between some politicians and some members of the High

[6] ECHR, De Cubber v. Belgium (1984), App. No. 9186/80, at 26.

[7] At 7 (https://rm.coe.int/1680700285) accessed 27 January 2024.

[8] See, again, the mentioned EU 2002 Rule of Law Report (n 5) at 10.

Council of the Judiciary, with the aim of controlling or at least influencing the appointments of judges and prosecutors in senior positions. This has created, in the public opinion, an impression of partisanship of the judiciary, which is further enhanced by the longstanding, and highly criticised, practice that gives a key role, in the decision-making process of the High Council itself, to the various judicial associations representing judges and prosecutors, which are often perceived as improper 'political' factions within the judiciary.

All these factors, of course, do not undermine the *factual* independence of judges and prosecutors, which continues to be one of the strongest in a comparative perspective; but, certainly, they weaken the moral authority of the judiciary as a whole in public eyes, and risk undermining the acceptance of their decisions – which could also lead, in a long- or mid-term perspective, to possible refusals to comply with those decisions by the political institutions. After all, at least since the 18th century we know that the judiciary is 'the least dangerous branch' of the State, having no sword nor purse to enforce their decisions, which are to be respected simply on the grounds of the legal – and ultimately moral – authority of the institutions that have made them.

Besides, a widely shared mistrust towards the judiciary could all too easily create the conditions for legislative reforms curtailing judicial independence, perhaps with the concealed aim of shielding the actions of political powers from the scrutiny that can only effectively be performed by strong and independent courts and prosecutors.

4 Possible Strategies to Strengthen Public Confidence in the Judiciary

How could, then, public confidence in the judiciary be rebuilt in such a scenario?

Let me start by the general suggestion contained in the CoE's Plan of Action of 2016: on the one hand, "transparency" should be ensured "in the workings of the judiciary and in its relations with the executive and legislature"; and on the other hand, the judiciary itself should adopt "a proactive approach towards the media and to the dissemination of general information"[9].

Transparency and communication appear to lie at the core of this recommendation. Preservation of judicial independence cannot sensibly mean lack of *accountability* to the public: courts and prosecutors do not certainly need electoral support, at least in Europe; but they do need to enjoy trust among the public – and trust cannot be taken for granted. Trust must be acquired, and maintained, through an ongoing dialogue with the public, by showing what is the proper function of the judiciary, and how this function is actually carried out.

These observations seem to be obvious, but they are not. At least in Italy, judges – even constitutional judges – tend to think that, unlike politicians of all sorts, they should perform their duties in silence, speaking only through their formal judgments. The problem is, of course, that these judgments – even if they are readily available on the internet, as is the case of the judgments by the Constitutional Court – are often too long, too technical, too complicated to be read and understood by anyone without a legal background.

[9] At 11.

This is why my Constitutional Court has felt a compelling need, in recent years, to adopt a proactive approach toward the media and the public in general[10], as suggested by the mentioned Plan of Action. Just as other supreme, constitutional and international courts[11], we have started to publish press releases on our most important decisions, in a language that can be easily understood by the general public, summarising in plain terms the core of the judgment – its ruling, but also the essential reasons supporting it. Our experience shows that newspapers and in general media reports tend to simply reproduce the press release itself, thereby granting a correct communication to the public on the content of the judgment – which of course does not rule out the possibility that the judgment is criticised, but at least ensures that the critique is not itself based on a misunderstanding of the judgment.

Beyond the communication concerning single judgments, we have also thought it is necessary to improve the knowledge of our court and its vital function in a constitutional democracy. To this end, we have decided to put in place a multifaced strategy which includes, beyond the well-established internet website with all the relevant information about the Court and its judgments, a Twitter and an Instagram account, as well as series of podcasts recorded by judges – sometimes in dialogue with prominent public figures – explaining in simple terms the Court's jurisprudence on sensitive matters[12]. In the pre-Covid era we had also engaged in lectures at secondary schools, as well as a tour in several Italian penitentiaries that was eventually documented in a film produced by the Italian TV State broadcast, and later shown in schools and public events[13].

A similar communication policy should probably be performed by the judiciary as a whole, including public prosecution. The strategy could be, of course, differently shaped, according to the different size and financial means of each judicial office; but its aim should remain that of sharing the essential information about what the judiciary does in its day-to-day activity, to the service of the public.

In the absence of a proactive communication by the courts, the pieces of judicial news that tend to be published by the media are precisely those that are most damaging for the reputation of the judiciary: isolated episodes of judicial corruption, improper links between judges and politicians, systemic failures in the handling of the caseload, etc. Therefore, a counter-narrative is needed to show the many strengths of our judicial systems and their vital role in preserving the rule of law, people's rights, and the basic conditions of our social life.

A specific effort must be employed, in my view, in explaining why it so important that this role be performed by actors that are independent from any other power, and do not directly respond to the electorate for their performance – this last point seeming indeed counter-intuitive, and being perhaps the most difficult to explain to a layperson. I vividly remember when a good friend of mine – a well-educated person, working as a manager in an important firm – candidly confessed to me that he could not understand

[10] For a recent detailed description of the Court's policy in this respect, see D.Stasio (2020).

[11] On the communication practices put in place by the European and Inter-American courts of human rights see, extensively, S. Steininger (2022).

[12] See https://www.cortecostituzionale.it/categoriePodcast.do accessed 27 January 2024.

[13] See https://www.cortecostituzionale.it/jsp/consulta/vic2/vic_home.do accessed 27 January 2024.

why on earth judges and prosecutors should not be democratically elected, like any other person holding a power, as happens in the majority of US jurisdictions. What is so obvious for all of us, is not necessarily such for our fellow citizens.

Communication, transparency, and ultimately accountability should, in sum, be our keywords. Flaws, shortcomings, systemic failures should not be denied – they should instead be fairly acknowledged, along with the expression of concrete commitments to fix them in the framework of realistic strategies, and according to reasonable timetables. At the same time, positive results – in tackling the caseload, granting prompt responses to judicial challenges, ensuring protection to neglected rights, or bringing criminals to justice, as far as public prosecutors are concerned – should be properly highlighted, in a sober but self-confident way.

Judgments themselves need to be explained to the public, especially when they concern matters that have attracted attention in the media, such as in cases involving prominent public figures and politicians. The reasons why, for example, a member of the government is convicted, or instead is acquitted after being indicted of a serious crime by the public prosecutions, deserve to be communicated in clear and well-balanced terms, since the community who has elected her has every right to know why she is stripped from the office by the decision of a non-elected court, or is finally declared innocent after being sent to trial by a prosecutor who has also not been elected. A communication service, or an especially trained spokesperson – as suggested, again, by the CoE's Plan of Action – could be in the best position to perform such a delicate task, which requires the capacity, at the same time, to understand the technicalities of a judgment, to extract its core reasoning and to explain it in an easily understandable way – something which might appear difficult for trained jurists, but is in the end so much in line with the idea famously expressed once by Lord Donaldson, that the law is no more than 'common sense under a wig'.

Communication may not be a magic solution for the crisis of trust towards the judiciary, which is so dangerous for the judicial independence and for the rule of law itself. However, an effective communication policy is surely a necessary step to be undertaken, by judges and prosecutors in Europe, without any further delay.

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