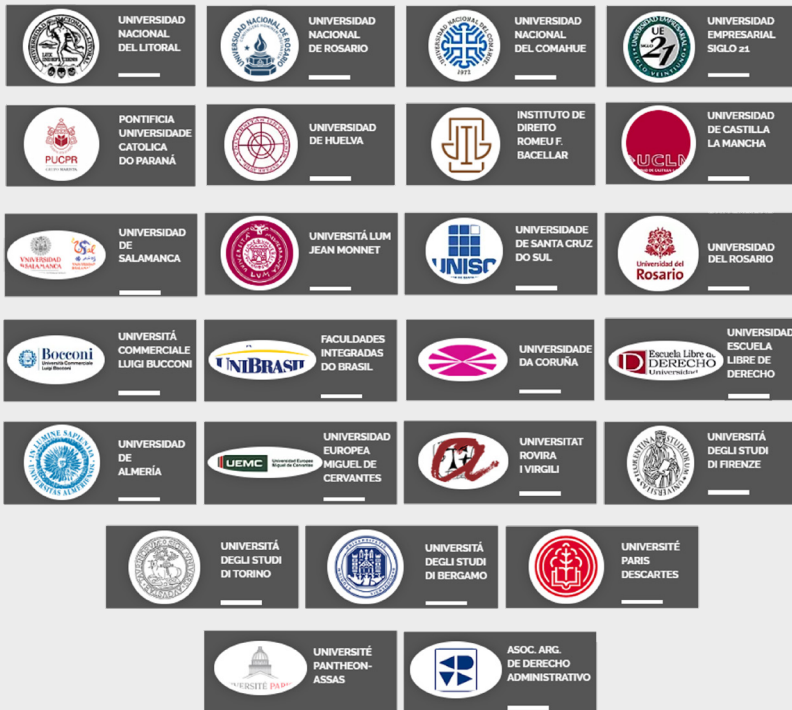


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# The Organization of the Judicial System in Italy

## *La organización del sistema judicial en Italia*

GIUSEPPE FRANCO FERRARI <sup>1,\*</sup>

<sup>1</sup>Università Commerciale Luigi Bocconi (Milan, Italy)

ferrari.giuseppe@unibocconi.it

<https://orcid.org/0000-0001-7467-0443>

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### ABSTRACT:

This paper provides a complete overview of the organization of the Judicial system in Italy with the aim to examine the relationships between the various organs operating in its field. It analyzes the structure and functions of all the bodies involved in various ways in the administration of justice: the Ministry of Justice, which exercises essentially organizational powers and which has the task of guaranteeing the overall efficiency of the system; the self-governing bodies of the judiciary, which ensure its independence from other State Powers, and the single judicial offices dislocated over the peninsula. Particular attention is dedicated to the complex system governed by the laws set in order to provide for disciplinary procedures and job evaluation, which involve both the efficiency of the judges and their relationship with the bodies involved in the administration of the system.

**Keywords:** Italy; judicial system; ministry of justice; judiciary independence; administration.

### RESUMEN:

*Este trabajo ofrece una visión completa de la organización del sistema judicial en Italia con el objetivo de examinar las relaciones entre los distintos órganos que operan en su ámbito. Asimismo, analiza la estructura y las funciones de todos los órganos que intervienen de diversas maneras en la administración de justicia: el Ministerio de Justicia, que ejerce esencialmente competencias organizativas y que tiene la misión de garantizar la eficacia global del sistema; los órganos de autogobierno de la judicatura, que garantizan su independencia respecto de otros poderes del Estado; y las oficinas judiciales únicas diseminadas por la península. Se dedica una atención especial al complejo sistema regulado por las leyes establecidas para prever los procedimientos disciplinarios y de valoración de puestos de trabajo, que implican tanto la eficacia de los jueces como su relación con los órganos que intervienen en la administración del sistema.*

**Palabras clave:** Italia; sistema judicial; ministerio de justicia; independencia judicial; administración.

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\* Full Professor of Constitutional Law at Bocconi University (Milan, Italy). Visiting Professor and Fulbright Scholar at the University of Virginia School of Law, Charlottesville. Visiting Professor at the Universities of Barcelona and Coimbra, and at the London School of Economics. E-mail: ferrari.giuseppe@unibocconi.it.



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## 1. THE ORGANIZATION OF THE ADMINISTRATION OF JUSTICE

### 1.1. THE MINISTER OF JUSTICE

The Minister of Justice, created in 1861, besides having the legislative initiative and being politically responsible within the limits of his/her mandate, also has administrative powers. Those substantially decreased after the end of the fascist regime and the approval of the Republican Constitution. Today, he/she is charged with the organization of the structures necessary to the functioning of the justice machinery, including the predisposition of a sufficient number of courts, the assigning of magistrates in conformity with the approved plants, their work in comparison with the workload and their behaviour.<sup>1</sup> Furthermore, he/she can request information from the presidents of any court about the functioning of justice and may demand sending him/her all useful communications.<sup>2</sup> He/She receives all reports about possible cases of malfunctioning of judicial offices from the judicial councils;<sup>3</sup> he/she supervises all judicial offices and magistrates in order to exercise disciplinary action when needed.<sup>4</sup> He/She keeps all the relations with the Superior Council, takes part in its hearings when making communica-

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<sup>1</sup> ITALY. Presidenza della Repubblica italiana. **Decreto legislativo n. 300/1999**. Available at: <https://www.parlamento.it/parlam/leggi/deleghe/99300dl.htm>, see in particular art. 16-19; ITALY. Corte costituzionale della Repubblica italiana. **Sentenza 168/1963**. Available at: <https://www.giurcost.org/decisioni/1963/0168s-63.html>.

<sup>2</sup> ITALY. Parlamento della Repubblica Italiana. **Legge 195/1958**. Available at: <https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:1958>, see in particular art. 14.

<sup>3</sup> ITALY. Parlamento della Repubblica Italiana. **Decreto Legge 25/2006**. Available at: <https://www.camera.it/parlam/leggi/deleghe/testi/06025dl.htm>, see in particular art. 15.

<sup>4</sup> ITALY. Presidenza della Repubblica italiana. **R.d.lgs. 511/1946**. Available at: [http://presidenza.governo.it/USRI/magistrature/norme/dlvo511\\_1946.pdf](http://presidenza.governo.it/USRI/magistrature/norme/dlvo511_1946.pdf), see in particular art. 13; ITALY. Parlamento della Repubblica Italiana. **D.p.R. 916/1958**. Available at: [http://www.edizionieuropee.it/LAW/HTML/38/zn71\\_01\\_003.html](http://www.edizionieuropee.it/LAW/HTML/38/zn71_01_003.html), see in particular art. 56.



tions or giving clarifications is deemed necessary, without attending its deliberations,<sup>5</sup> making requests or observations, receiving proposals on organizational matters,<sup>6</sup> giving his/her consent on the assignment of directive offices<sup>7</sup> and countersigning the decrees of the President of the Republic, plus ratifying its deliberations and implementing them if necessary.<sup>8</sup>

The relationship between Minister and Superior Council is not entirely defined by the Constitution and pertinent statutes: The Constitutional Court has done its best defining such relationship in terms of loyal cooperation.<sup>9</sup>

There has also been a problem of defining the respective prerogatives of the Minister of Justice and the President of the Republic in terms of the power of pardon. Traditional scholarship believed that the concurring will of both authorities would be necessary in order to cancel or reduce a penalty.<sup>10</sup> In 2006, the Constitutional Court decided in favor of the President, stating that the ministerial proposal is not necessary and that the presidential prerogative prevails.<sup>11 12</sup>

<sup>5</sup> ITALY. Parlamento della Repubblica italiana. **Legge 195/1958**. Available at: <https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:1958;195>, see in particular art. 16.

<sup>6</sup> ITALY. Parlamento della Repubblica italiana. **Legge 195/1958**. Available at: <https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:1958;195>, see in particular art. 10.

<sup>7</sup> ITALY. Parlamento della Repubblica italiana. **Legge 195/1958**. Available at: <https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:1958;195>, see in particular art. 11.

<sup>8</sup> ITALY. Parlamento della Repubblica italiana. **Legge 195/1958**. Available at: <https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:1958;195>, in particular art. 17.

<sup>9</sup> ITALY. Corte costituzionale della Repubblica italiana. **Sentenza 168/1963**. Available at: <https://www.giurcost.org/decisioni/1963/0168s-63.html>; ITALY. Corte costituzionale della Repubblica italiana. **Sentenza 379/2002**. Available at: <https://www.giurcost.org/decisioni/2004/0379s-04.html>; ITALY. Corte costituzionale della Repubblica italiana. **Sentenza 380/2003**. Available at: <https://www.giurcost.org/decisioni/2003/0380s-03.html>; ITALY. Corte costituzionale della Repubblica italiana. **Sentenza 200/2006**. Available at: <https://www.cortecostituzionale.it/actionSchedaPronuncia.do?anno=2006&numero=200>

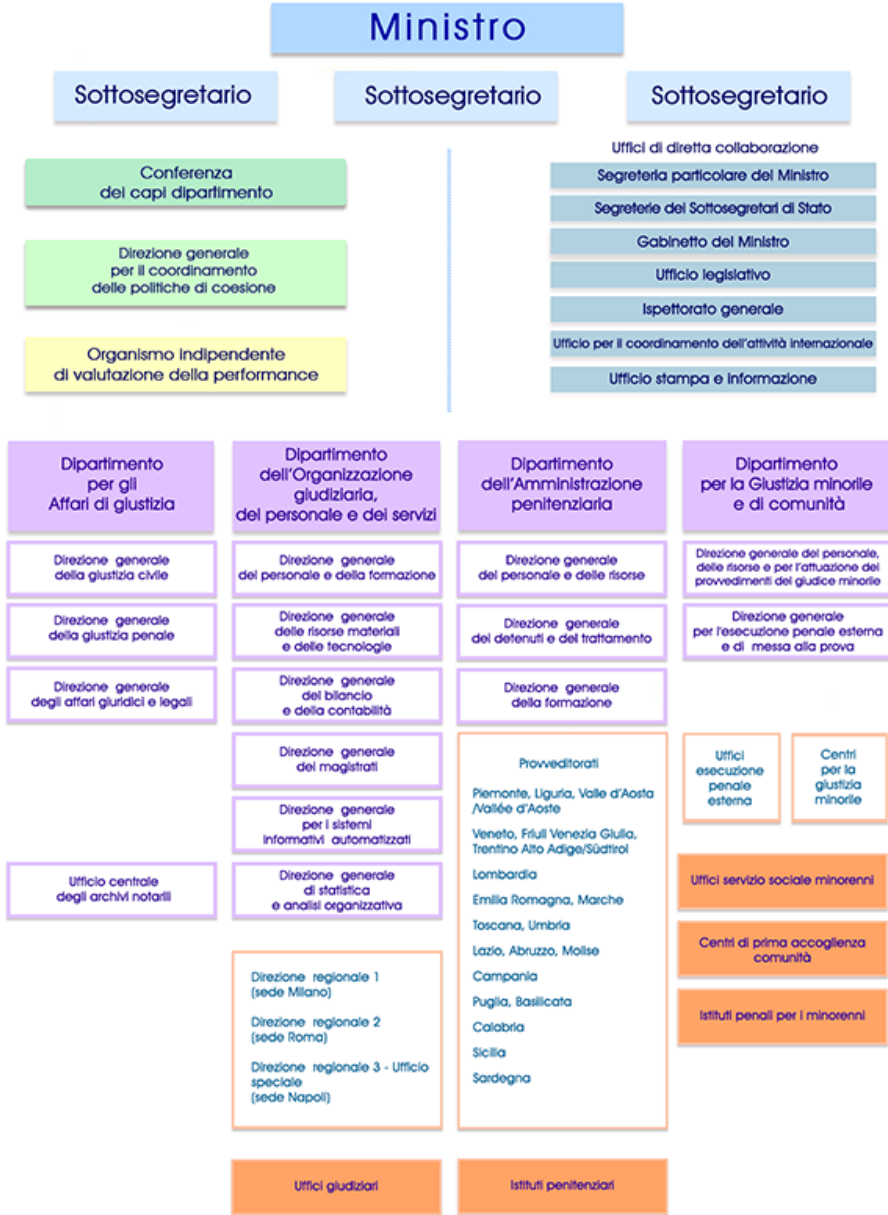
<sup>10</sup> See e.g. ZAGREBELSKY, Gustavo. **Amnistia, indulto, grazia**. Imprenta: Milan, 1974; while MORTATI, Costantino. **Istituzioni di diritto pubblico**. 8th ed, Padua, 1969, p. 732, considered it a presidential act.

<sup>11</sup> ITALY. Corte costituzionale della Repubblica italiana. **Sentenza 200/2006**. Available at: <https://www.cortecostituzionale.it/actionSchedaPronuncia.do?anno=2006&numero=200>.

<sup>12</sup> Table 1 (Source, Ministry of Justice, website), October 2015.



d.p.c.m. 15 giugno 2015 n. 84



Source: [giustizia.it](http://giustizia.it) (Minister of Justice's website)



## 1.2. THE SUPERIOR COUNCIL OF THE JUDICIARY

The Superior Council of the Judiciary is the main overseer of the judiciary, being constitutionally responsible of its independence from all the other powers. According to art. 104 of the Constitution, the Council is composed of three ex-officio members (the President of the Republic, acting as president, the President of the Court of Cassation and the Advocate General), sixteen magistrates elected by their colleagues<sup>13</sup> and eight persons elected by Parliament with a joint resolution among university law professors and lawyers with at least fifteen years of experience. They are elected with a three-fifths majority of the members in the first two ballots and of the voting members from the fourth ballot onwards. Of the sixteen magistrates, two must be Cassation judges or prosecutors, ten are merit judges and four first or second instance prosecutors. The election takes place in three national constituencies, in each of which the one the majority decided on takes the posts.<sup>14</sup> The initial proportional representation system<sup>15</sup> has been substituted by the described majoritarian system in 2002,<sup>16</sup> with the same statute that also reduced the number of its members to the present dimension. The change in the electoral formula has not remedied the most important problem, namely the strong division of the members in politically denominated factions (the so-called “streams”).<sup>17</sup> Segments of the National Association of Magistrates (ANM) harshly compete for the election and the winners usually support candidates running for directive and semi-directive offices along sectional lines. This inconvenience has often been pointed out, but was never eliminated.

The Council members are elected for a term of four years and may not be re-elected immediately.<sup>18</sup> The non-judicial (“lay”) members, while in office, cannot be members of Parliament or of a Regional Council, nor can they be registered as members of the legal profession.<sup>19</sup> All members of the Council enjoy a special immunity regarding opinions expressed during the exercise of their functions and concerning matters in accordance

<sup>13</sup> The only non-eligible magistrates are those not exercising judicial function on the date of the election and those who have not yet reached their first professional evaluation after three years in office: l. 195 of 1958, arts. 23-24.

<sup>14</sup> ITALY. Parlamento della Repubblica italiana. **Legge 195/1958**. Available at: <https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:1958;195>, see in particular art. 23.

<sup>15</sup> ITALY. Parlamento della Repubblica italiana. **Legge 695/1975**. Available at: <https://www.gazzettaufficiale.it/eli/id/1975/12/31/075U0695/sg>, see in particular art. 27.

<sup>16</sup> ITALY. Parlamento della Repubblica italiana. **Legge 44/2002**. Available at: <https://www.camera.it/parlam/leggi/02044l.htm>, reformulating art. 27 of l. 195 of 1958.

<sup>17</sup> DI FEDERICO, Giuseppe. “Lottizzazioni correntizie” e politicizzazione del CSM: quali rimedi? **Quaderni costituzionali**, n 2, p. 279-297, 1990.

<sup>18</sup> ITALY. **Costituzione della Repubblica Italiana**, art. 104. 6

<sup>19</sup> ITALY. **Costituzione della Repubblica Italiana**, art. 104. 7



with their competences. Nevertheless, such privilege is not included in the Charter, but is simply guaranteed by a statute.<sup>20</sup>

According to art. 105 of the Constitution, the Council has several functions. Those include the power to appoint, assign, move and promote members of the judiciary, and to take disciplinary actions against them. The Minister of Justice formerly executed most of these powers. The Constituent Assembly tried to make the Superior Council a kind of self-governed body of the Judiciary. However, the presence of a political component elected by Parliament reflected a sort of mistrust for an institution that had not resisted the dictatorship, had not refused to take part in the tribunal of the race in 1938,<sup>21</sup> nor had refused to take the oath of allegiance that at least a dozen university professors had objected.

A presidential committee, formed by the vice-president, who must be a lay member, the President of the Court of Cassation and the Advocate General of the same Court, promotes and manages the works of the Council and is responsible of its financial resources.<sup>22</sup> The President creates a certain number of other commissions at the beginning of every year after receiving a proposal of the presidential committee, respecting the proportion of two thirds of judicial members and one third of lay members. They make proposals to the Council, whose deliberations are adopted in its full composition.

The disciplinary action is promoted by both the Minister and the Advocate General, chief of the public prosecutor's office operating in the Court of Cassation.<sup>23</sup> One of the most important commissions within the Council is obviously the disciplinary section. It is composed of six members, presided ex officio by the Vice-president of the Council, who is responsible of all disciplinary sanctions.

The minimum quorum required for all deliberations is fifteen, ten of which must be judicial members and five lay members. In case of an even vote, the President or the Vice-President has the decisive vote.<sup>24</sup> All the acts of the Council must be in accordance with the general principles governing the administrative procedure. The need for the acts to be motivated is justified by the possibility of recourse being filed by the magistrates concerned or by any other legitimated subject in the Administrative Tribunal

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<sup>20</sup> The Constitutional Court (dec. 148/1983) considered such source (L. 195/1958, art 32-bis) sufficient.

<sup>21</sup> Actually, one of its members, Gaetano Azzariti, was nominated to the Constitutional Court by the President in 1955 and was soon elected President in 1957, after having been Minister of Justice in 1943 in the first Badoglio Government, immediately after the fall of Fascism.

<sup>22</sup> ITALY. Parlamento della Repubblica italiana. Legge 195/1958. Available at: <https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:1958;195>, see in particular art.2.

<sup>23</sup> ITALY. Parlamento della Repubblica italiana. **Legge 195/1958**. Available at: <https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:1958;195>, see in particular art. 4.

<sup>24</sup> ITALY. Parlamento della Repubblica italiana. **Legge 195/1958**. Available at: <https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:1958;195>, see in particular art. 5.



of Rome, and in appeal in the Council of State. The disciplinary judgements, however, can be impugned only in the Court of Cassation in its plenary composition. Such controversies are very frequent, both in the disciplinary area and in cases of promotion to important offices. There, the administrative judges often declare void nominations that were made following sectional criteria. On many occasions, the Council tried to avoid the implementation of annulment judgements by the Council of State.

The Council also has normative powers concerning the organization and working of judicial offices. It can publish opinions, even in case they are not requested by the Minister, on bills concerning the administration of justice. Periodically, it publishes a report on the state of justice, and can open so-called “protection files” in defence of judicial bodies or individual magistrates publicly criticized by the media or politicians. In that way it reaffirms the independence of the Judiciary as a whole. Some of these powers are not funded in constitutional norms, but the Constitutional Court stated that art. 108 is absolute towards the Executive but relative towards the Judiciary. Therefore, the general rules of art. 104 are sufficient to support the adoption of regulations by the Council in fields belonging to its constitutional competence.<sup>25</sup>

### 1.3. THE JUDICIARY COUNCILS

The Judicial Councils are the peripheral administrative bodies of the Judiciary, created in each court of appeal. The Councils comprise: two ex officio members, the President of the Court of Appeal, who has presiding functions, and the Chief of the Public Prosecutor’s Office. In addition, there is a number of magistrates working in the district of the Court of Appeal, law professors designated by the National University Council after nomination by the Deans of the Law Schools included in the district and lawyers having at least ten years of experience, who are designated by the National Bar Council after their nomination by local Bars. The Council’s term is four years and their non-ex officio members are not immediately re-eligible.<sup>26</sup>

The Councils express opinions about the office tables, the criteria for the distribution of the workload and the substitution of magistrates, who are prevented from work for different reasons. They furthermore give advise on the organization and function of the Justice of the Peace’s office; opinions and proposals. Also after being requested to do so by the Superior Council, they advise with regard to the retirement, resignation, readmission to office of judges and prosecutors, and proposals in accordance with teaching activities for in-service training. Furthermore, they report malfunctions in the

<sup>25</sup> ITALY. Presidenza della Repubblica italiana. **Decreto legislativo n. 72/1991**. Available at: <https://www.parlamento.it/parlam/leggi/deleghe/99300dl.htm>.

<sup>26</sup> ITALY. Parlamento della Repubblica Italiana. **Decreto Legge 25/2006**. Available at: <https://www.camera.it/parlam/leggi/deleghe/testi/06025dl.htm>, arts. 9, 12-bis, 13.





working of the Judicial Offices of the district to the Ministry. A special section of the Councils is also responsible for the evaluation of Honorary Judges and Justices of the Peace.<sup>27</sup>

The Directive Council of the Court of Cassation deserves a special mention. It is composed ex officio of the President of the Court, the Advocate General and the President of the National Bar Council. It also includes another eight magistrates, two of whom carry out prosecutorial functions, plus two law professors designated by the National University Council, and a lawyer with at least twenty years of experience, who is nominated by the National Bar Council. Such council has more or less the same powers than the other District Councils.

#### 1.4. THE ADMINISTRATION OF THE JUDICIAL OFFICES

The Chief of the Judicial Office (President of the Tribunal or of the Court of Appeal, Chief Prosecutor of the Tribunal or the Court of Appeal) is head of the office and represents it in the relationships with other judicial offices or public agencies in judicial matters. He/She is also responsible for all organizational measures concerning personnel management and judicial activities. The Chief of a Judicial Office can preside the first chamber of his/her court or any other chamber he/she chooses to, while the Chief of the Prosecutor's Offices has more powers of distributing the affairs between his/her substitutes or re-activating an affair when he/she deems it necessary.

In practice, such discretionary powers are rarely used, lest the chief be criticized for attempting at the concrete independence of his/her colleagues. However, in the last decade, several voices in the media have suggested more centralization in the management of the Prosecutor's Offices would be necessary, in order to achieve a better rationality and to reduce the discretion in initiating the proceeding. According to art. 112 of the Constitution, initiating the proceeding should become one duty. The twofold meaning of such provision was to protect the public prosecution as a function from the other branches, mainly from the Executive, and to force it to work in the public interest, not necessarily against the investigated subjects. In practice, in the last twenty years, the rule of mandatory proceeding initiation has faded away and a minimally restricted discretion is clearly perceived, often due to the capacity or the individual case or of the investigated persons, who attracted the attention of the public opinion and the media.

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<sup>27</sup> ITALY. Parlamento della Repubblica Italiana. **Decreto Legge 25/2006**. Available at: <https://www.camera.it/parlam/leggi/deleghe/testi/06025dl.htm>, arts. 10, 15, 42-ter and 42-quinquies.



## 2. JUDGES AND PROSECUTORS

### 2.1. THE JUDICIAL OFFICES

The offices are divided between civil jurisdiction and criminal jurisdiction and public prosecutors. Civil and criminal justice is administered by: Justices of the Peace, the Courts, the Courts of Appeal, the Court of Cassation, the Youth Courts, the "*Tribunale di Sorveglianza*", sitting both as a single judge and as a panel of judges. The Assizes Courts and Courts of Assizes of Appeal integrate the criminal judiciary. Ordinary jurisdiction is administered by "professional" judges and by Honorary judges, who form part of the judiciary.

Honorary Magistrature is composed of: Justices of the Peace, Honorary Judges, Court Honorary Judges attached to the judicial offices, Honorary Deputy Prosecutors attached to the prosecuting offices, experts of the courts and the Juvenile Divisions of the Courts of Appeal, lay judges of the Courts of Assizes, as well as experts working for the "*Tribunale di Sorveglianza*" and the specialised agricultural divisions.

The Constitution prohibits the establishment of new "*extraordinary or special*" judges. However, chambers specialising in specific sectors may be set up within ordinary jurisdiction bodies, characterised by the concurrent presence in the same judicial body of ordinary judges and qualified citizens, who are not members of the judiciary (art. 102 of the Constitution).

Special judges established prior to the Constitution are: administrative judges, the State Auditors' Court and military judges.

Pursuant to the *reform of the single first instance judge* (Leg. Decree no. 51 of 19th February 1998), the courts of first instance have been reorganised by abolishing the *Pretura* and assigning its competence to the *Tribunale*, which now sits both as a single judge court for matters of minor complexity, and as a panel of judges for more advanced cases. Similarly, the Public Prosecutor's Office at the *Pretura* was abolished and the Tribunal assigned its functions to the Public Prosecutor's Office. In the same regard, Honorary Judges attached to the abolished *Pretura* had their titles changed from "*Honorary Deputy Pretore*" to "*Honorary Court Judge*".

### 2.2. THE OFFICES OF THE PUBLIC PROSECUTORS

Prosecuting functions are held by the General Prosecutor at the Court of Cassation and the Courts of Appeal, and by Prosecutors attached to Tribunals and Youth Courts (a total of 169 courts). The various prosecutors, each at the head of an office, are responsible for the organization of the office and perform the functions assigned to the public prosecutor, unless those are delegated to other magistrates of the office.



As stated by the Constitutional Court, the Prosecutor is a “magistrate belonging to the judiciary in the position of institutional independence from any other state power”.<sup>28</sup>

The following powers are assigned to the prosecutor: He/she supervises compliance with the law and the prompt and regular administration of justice; he/she oversees the protection of state rights, assures the protection of the rights of legal persons and legal protection of incapable adults. Additionally, he/she prosecutes crimes and applies security measures and eventually enforces judgments and other decisions made by judges (as required by law).

The functions of the public ministry regarding criminal matters are obviously the most important ones.

Since the reform of 2006, the Prosecutor of the Republic has been considered the sole responsible institution for prosecution and may nominate a substitute among the Deputy Prosecutors. The Chief Prosecutor, therefore, determines the criteria for the organization of the offices, and the criteria for assigning the proceedings, according to the types of crime. The Prosecutor is also responsible for determining the criteria for the use of the Judicial Police and of the employment of the staff assigned to the office.

In order to deal with some particular types of crimes (related to organized crime), within their office the Prosecutors established the Anti-Mafia District Directorate appointing the magistrates who are part of it and after consulting the National Anti-Mafia and Counterterrorism Prosecutor.<sup>29</sup>

### 3. DIRECTIVE AND SEMI-DIRECTIVE OFFICES

The assignment of magistrates to directive and semi-directive offices and their functions are governed by Legislative Decree no. 160/2006. The assignment of directive and semi-directive offices is decided by the Superior Council of the Judiciary, after consulting the Minister of Justice. In theory, the assignment depends only on the parameters of aptitudes and merit, which are included in a comprehensive and unitary judgment.

Directive and semi-directive offices performing administrative tasks comply with the directives of the Superior Council of the Judiciary, and have administrative support functions for the exercise of jurisdiction. The chief of a directive office has higher-level organizational tasks compared to those of the chief of a semi-directive office of the same type. Semi-directive offices can assist directive offices in their management and organization of judicial work. Semi-directive offices are divided into semi-directive judicial functions of first instance, semi-directive high judicial functions of first instance,

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<sup>28</sup> ITALY. Presidenza della Repubblica italiana. **Decreto legislativo n. 190/1970**. Available at: <https://www.giurcost.org/decisioni/1970/0190s-70.html>

<sup>29</sup> ITALY. Presidenza della Repubblica italiana. **Decreto legislativo n. 159/2011**. Available at: [https://www.bosettiegatti.eu/info/norme/statali/2011\\_0159.htm](https://www.bosettiegatti.eu/info/norme/statali/2011_0159.htm); see art. 102.



semi-directive judicial functions of second instance and semi-directive prosecutorial functions of second instance.

Semi-directive judicial functions of first instance are the President of Chamber at the Ordinary Court, the President and the Deputy President of the Section for preliminary investigations and the Deputy Prosecutor at the Ordinary Court. Semi-directive high judicial functions of first Instance are the President of the Section for preliminary investigations at the Ordinary Court of Bari, Bologna, Catania, Florence, Genoa, Milan, Naples, Palermo, Rome, Turin, Trieste and Venice.

As far as semi-directive judicial functions of second Instance are concerned, they must be identified in the President of Chamber at the Court of Appeal.

Finally, the General Prosecutor at the Court of Appeal represents semi-directive prosecuting functions of second Instance.

Alike semi-directive offices, directive offices are divided into directive offices of first instance, High Judging Directive Offices of First Instance, High Prosecutor Directive Offices of First Instance, Judging Directives Offices of Second Instance, Prosecutor Directive Offices of Second Instance, Directive Offices of Legitimacy, Prosecutor Directive Offices of Legitimacy, Higher Directive Offices of Legitimacy, Higher Prosecutor Directive Offices, Apical Directive Office of Legitimacy and Apical Prosecutor Directive Office of Legitimacy.

Directive Offices of First Instance are the President of Ordinary Courts, the President of Youth Courts, the Chief Public Prosecutor at the Ordinary Courts and the Public Prosecutor at the Youth Courts.

The High Judging Directive Offices of first instance are the President of the Ordinary Courts of Bari, Bologna, Catania, Florence, Genoa, Milan, Naples, Palermo, Rome, Turin, Trieste and Venice Ordinary Courts and the President of the Court of Surveillance referred to in Table A annexed to Law no. 354/1975.

The categories of judging Directives Offices of second instance, Prosecutor Directive Offices of second instance and Directive Offices of Legitimacy are composed by the President of the Court of Appeal, the General Public Prosecutor at the Court of Appeal and the President of Section of the Court of Cassation.

Prosecutor Directive Offices of Legitimacy, Higher Directive Offices of Legitimacy and Higher Prosecutor Directive Offices are, respectively, the General Public Prosecutor at the Court of Cassation, the Deputy President of the Supreme Court and the President of the High Court of public waters, and the Deputy General Public Prosecutor at the Court of Cassation.

Finally, Apical Directive Offices of Legitimacy coincide with the President of the Supreme Court, while apical Prosecutor Directive Offices of Legitimacy coincide with the General Public Prosecutor at the Court of Cassation.



## 4. DISCIPLINARY REGULATIONS

In terms of personal liability, judges are usually liable for offences when committed both as private individuals and in their capacity as public officials. In 1988, statute 117 of that year introduced a compensation for damages to the injured private party who was deprived of his/her personal freedom following a denial of justice or because of wilful misconduct or gross negligence. The compensation is charged on the State, which in turn can claim compensation from the responsible judge up to a maximum of one-third of his/her yearly salary at the time the procedure was opened. There is, however, no limit in case of wilful misconduct.

Disciplinary liability is actioned by the Minister of Justice or the Advocate General of the Court of Cassation, through the Superior Council. Its first committee, working as a disciplinary division, makes the first decision, which needs to be confirmed by the plenary session. Against such final decision, an appeal can be lodged at the Grand Chamber of the Court of Cassation. The judge's disciplinary responsibility can be activated due to failure to comply with his/her duties inherent to the exercise of the judiciary functions or with regard to any misconduct that could jeopardize the prestige of the judiciary, regardless of whether the fact occurred in the exercise of judicial functions.

Along with the judgment establishing the existence of this type of violation, the Disciplinary Section enforces the following sanctions:

- *Warning*, which is a call to the magistrate to comply to his/her duties in relation to the offense committed;
- *Official reprimand*, that is a formal declaration of reproach contained in the judgment;
- *Reduction of service length* (in terms of retirement benefits), for not less than two months and not more than two years;
- *temporary inability to exercise executive or semi-executive offices*, for not less than six months and not more than two years;
- *suspension* from magistrate's functions from three months to two years, which implies the suspension from the salary and the placement of the magistrates;
- *removal*, implying the dismissal of the magistrate, implemented by decree of the President of the Republic.

## 5. JOB EVALUATION

All judges are evaluated every four years until the seventh professional evaluation, which takes place in the twenty-eighth year of service. After that, no evaluation process shall take place. The Superior Council of the Judiciary carries out these evaluations. Independence and impartiality are essential aspects of the magistrates' activity and of the judicial functions. The evaluation considers professional competence and commitment.



The law has identified evaluation indicators: professional training; competence in different areas of jurisdiction; productivity (number of pronounced measures); quality and amount of carried out judicial work, compliance with deadlines; commitment to good performance of the office.

The professional evaluation is carried out based on the judge's personal file as well as the reports of judicial offices and of the Judiciary Council. Every four years, the latter expresses an opinion to the Superior Council of the Judiciary with regard to the performance of the magistrates of the district office. At the end of the procedure, the CSM resolution may provide:

- A positive judgment all the parameters are positive - the judge achieves a salary increase and the possibility to carry out superior functions;
- A non-positive judgment there are weaknesses in the evaluation parameters; after a year, the magistrate is subjected to re-evaluation;
- A negative judgment there are serious weaknesses in the evaluation parameters; the resolution of the Council must specifically spot the weaknesses and, if necessary, prescribe the retraining of the magistrate, assign him/her to other functions, deny his/her access to directive or semi-directive offices.

After two negative judgments, the magistrate is released from service.

## 6. SOME CONSIDERATIONS ABOUT ORGANIZATIONAL MODELS

Summing up, the organizational model of the administration of justice in Italy is still highly centralized, though the initial concentration of powers in the Minister has given way to a similar concentration in the Superior Council. This collegial body has been conceived as an instrument, actually as the main instrument, of self-government of the judiciary<sup>30</sup>. However, the inclusion of a political component happened due to the mistrust of the Constituent Assembly toward the corps of magistrates, whose loyalty to the former regime had been complete. The creation of district councils at the local level has not significantly altered the structure of the system, since the devolution of powers to these bodies was only limited.

Neither the Superior Council nor the local councils, however, are independent agencies.<sup>31</sup> The Superior Council holds its constitutional role as an instrument of self-

<sup>30</sup> See e.g. MERLINI, Stefano. **Il Consiglio Superiore della Magistratura, la Costituzione e la democrazia, Quale giustizia**, 1971, FERRARI, G. Consiglio Superiore della Magistratura, autonomia dell'ordine giudiziario e magistrati. In **Studi in onore di C. Esposito**. Padova, 1974; BONIFACIO, Franco; GIACOBBE, Giovanni. **Art. 104**. In BRANCA, Giuseppe (coord.). **Commentario della Costituzione**. Rome-Bologna: Foro italiano, 1986.

<sup>31</sup> There is therefore no room in this context for the agencification problem, in the meaning of LURIE, A. REICHMAN, SAGY, Y. **The Regulation of Judges: Institutional Realisms and the Hidden Importance of Agencification, The Regulation of Judges**, 2016. A review of the council system as applied in many European States has been tempted at least by VOERMANS, Wim; ALBERS, Pim. **Councils for the Judiciary in**



-government, while the local councils have a statutory foundation only. The main aim of both is tempered by the presence of one third of experienced lawyers and university professors in each of them. There is, therefore, no problem of independence of judges and prosecutors with respect to the bureaucratic bodies. The quantity of resources available at the national level and their distribution between judiciary offices, including the division between public prosecutor's offices and courts, still depends on the Minister, who answers to the Parliament with respect to the budget and its use. Nevertheless, the Superior Council developed many instruments in order to influence the allocation of available resources, conditioning the Minister and the Government, though such interplay has not attracted much scholarly attention.

All interference of bureaucracy in the work of magistrates can therefore be excluded in the Italian context, due to both the absence of an independent agency and to the quite circumscribed influence of the administrative personnel in the judicial sphere. It must be kept in mind that even top civil servants working with the Minister as legislative experts or legal counsels are traditionally magistrates on special leave, often obtained as of right, since only recently the Superior Council started to limit such improper use of judicial personnel.

From another perspective, the equal footing of public prosecutors and judging magistrates in terms of legal status and them sharing a common career have been a full guarantee of immunity from encroachment by political instances<sup>32</sup>. The offices of the public prosecutors would call any interference by the Minister or any another political authority in the activation power of criminal investigation a crime.

The absence of any influences by the Executive and/or by bureaucracy does not mean that the judiciary is immune against threats of its full independence. Yet the main menace comes from inside.

In the end, the constitutional model of self-government has generated a kind of corporatist attitude. Promotions depend more on the strength of the "stream" to which the candidate for a directive or semi-directive post belongs than on the real quality of his/her work or on his/her specific experience. Unless he/she has incurred serious disciplinary sanctions that usually are however impugned in the Grand Chamber of the Court of Cassation, the disciplinary behaviour and the quality and quantity of his/her work are almost irrelevant. Promotions are decided in the restricted circle of the Superior Council along factional lines, and the consent of the Minister has become a mere formality.

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**EU Countries.** Strasbourg, 2003 Available at SSRN: <https://ssrn.com/abstract=1271182>, and GAROUPA, Nuno, GINSBURG, Tom. The comparative Law and Economics of Judicial Councils, *Berkely Journal of International Law*, n. 53, 2008.

<sup>32</sup> Much attention, to the contrary, is dedicated by public law scholars to the possible interference of magistrates in the carrying out of the legislative function by Parliament, also due to delays in the recourse to statutes in ruling grey areas in sensitive fields: see e.g. the debate *Giudici e legislatori*, in *Dir. Pubbl.*, 2016, 483-625.



The irrelevance of political and bureaucratic factors and the tendency of the judicial corporation to be self-referring, in line with the decline in power and representation capacity of the political class, has exposed the whole category to a different danger. The tendency to look for the spotlight, to obtain the headlines of front-pages of the most popular newspapers, and having fostered relationships with columnists and media journalists seem to have a negative impact. Many prosecutors and some judges believe that promotions can depend more on celebrated investigations or trials than on serious evaluations by the Superior Council, even when they end up in complete dismissals after years of media mud.

Even though the introduction of the on-line process (the so-called digitalization) has been very useful from the viewpoint of the reduction of time in civil and administrative litigation, it did not contribute to the transparency and accountability of the judiciary. Unlike other countries, in Italy it is impossible to know the workload of a court or of individual judges, the number of cases brought to conclusion or of decisions written in a certain amount of time. On the inauguration of the judiciary year, presidents of tribunals and courts used to declare the progress in the elimination of back cases or in the acceleration of work. Yet, no individual data is available to the bar. In other words, the judiciary shows reluctance to introduce full transparency even in presence of the new technological devices, invoking independency as a primary value. Independency from the Executive, from Parliament, from bureaucracy are no longer in discussion. The protection of independency seems to be more and more frequently interpreted as a privilege of the corporation. At the same time some invasion of the political sphere is getting normal, due to the retreat of the political class from spaces once peacefully reserved to it.<sup>33</sup>

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<sup>33</sup> The GRECO Group of the Council of Europe has recently underlined the tendency of magistrates to mingle into political activities and recommended that the issue should be dealt with at legislative level (Group of States against Corruption, Fourth Evaluation Round, Corruption prevention in respect of members of parliament, judges and prosecutors, Evaluation Report, Italy, Strasbourg, 17-21 October 2016).





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