Bulletin of Italian Politics
Vol. 2, No. 2, 2010, 39-54

From Constitutional Body to Policy Arena: Politics, Inescapable Companion of the Italian Judicial Council

Daniela Piana
University of Bologna

Abstract: The new architecture of the Italian Republic, set up in 1948, foresaw the creation of a High Judicial Council, entrusted with full competences in recruiting, promoting, assessing, and training judges and prosecutors. The new body began what has been called a long process of institutionalisation, which ended around the end of the 1970s. Such a process expanded its capacities to steer and govern the whole court system. Whereas it is fairly common to see scholarly works addressing the conflict that exists in Italy between the judiciary and the executive branch, the organisational behaviour of the Council has been much less analysed. This article considers this aspect in detail and points to the development of the Council from a constitutional body – ensuring the independence of members of the judiciary – to a policy arena, in which practices of governance, competence and know how, ways of solving problems and conflicts have been developed over the years.

Keywords: Italian politics, courts, Judicial Council, professionalism

The creation of a High Judicial Council, a self-governing body entrusted with the appointment, promotion, transfer, removal and training of judges and prosecutors, stems from the principle that insulation of the judicial branch may better ensure citizens and institutions fair, impersonal, and impartial application of the law. Judicial independence is indeed vital for the effective functioning of a democracy.[1] By entrusting governance of the judiciary to a body, a majority of whose members consists of judges and prosecutors, one may assume that judicial independence is more effectively assured than it is by a model of governance in which the power to appoint, promote, remove, and train judicial staff is entrusted to the ministry of justice. As a matter of fact, the institutional design of a self-governing judiciary is based on the presupposition that judicial decision-making should be rendered accountable only through internal (intra-judicial) mechanisms of accountability.[2] Furthermore, high judicial councils are institutions characteristic of judiciaries within which career paths and modes of professional qualification are bureaucratic in nature. Such arrangements enable judges and prosecutors to be appointed after they have obtained a law degree and to develop their expertise and professional

identity within the judiciary. The organisation that most resembles this pattern of governance is the public administration (Damaska, 1986; Guarnieri and Pederzoli, 2002).

The number of high judicial councils[3] has grown exponentially in recent decades. Not only have they been introduced – through a 'game of high politics' – in long-established democracies such as the Netherlands, but they have also become characteristic features of countries that have recently democratised in areas such as central and eastern Europe, the Middle East, and Latin America. Models of high judicial councils differ, sometimes considerably, from country to country. They can be placed along a continuum ranging from a maximum (full competence in judicial governance) to a minimum degree of authority (judicial governance is shared with the ministry of justice, as in the Netherlands). It should be noted, however, that all the countries in which democracy has recently been consolidated have decided to create, among the three branches of the State, a body designed to ensure the independence of the judiciary through the exercise of exclusive competence with regard to judicial appointment, promotion and discipline (Cox, 1996; Ferejohn, 1999; Garoupa and Ginzburg, 2009).[4]

The Italian high judicial council (Consiglio Superiore della Magistratura, CSM) represents the epitome of a 'neo-Latin' model of judicial governance, so defined because of its dominance within southern European countries. Created by articles 104 and 105 of the 1948 Constitution, the CSM came into existence in 1956, progressively gained power and visibility in the 1960s and 1970s, and then became a fully-fledged policy-making arena (Piana and Vauchez, forthcoming).

This article seeks to address the issues related to the relationship between politics and the administration of justice in Italy from the point of view of the need to strike a balance between judicial independence, and judicial accountability. Despite the tendency of public debate and the media to frame this issue as a 'war of the gods', i.e. as a great battle between the executive and the judicial branches, it would be much more insightful – and presumably less ideological – to discuss the same issues from a comparative perspective, by interpreting the battle that seems to characterise Italian politics as a way of dealing with a necessary and inherent feature of any liberal democracy: the pattern of constitutionalism as a pattern of accountabilities activated within an institutional setting regulated by law (Palombella, 2010; Piana, 2010). This article aims to address the institutional position of the CSM from the point of view of its location within a constitutional framework through which all powers are held accountable. Furthermore, the author suggests that the organisational transformation of the Italian judicial system after the War prepared the terrain for a transformation of the institutional features of the CSM. Whilst it was initially set up as a pioneer of Italian constitutionalism, it gradually

became a policy arena, whose boundaries became increasingly porous and open to penetration by external influences, as logics of action emerged within the National Association of Magistrates (ANM).

The article is organised as follows. It first classifies the Italian model of judicial governance according to a typology of constitutionalism based on scholarly works in the fields of law and politics. Then it discusses the impact of reforms enacted in 2006 on the mechanisms of accountability to which Italian judges and prosecutors are subject. It concludes with some critical remarks about the intrinsic and inescapably political dimension of the CSM, where 'political' is here understood as the quality of an action aiming at dealing with an asymmetry of resources in a context where one actor tries to influence the action of any other. (cfr Oppenheim, 1985; Panebianco, 2004). Accordingly, it seems that a set of strongly entrenched institutional guarantees of judicial independence, embodied in the design of the CSM, might well be subverted if the political dimension of judicial governance is not properly balanced by mechanisms of judicial accountability.

Patterns of judicial accountability in Italy

At the most abstract level, constitutionalism is about limited government. Limitations stem from the application of general and impersonal rules, valid *erga omnes*. To be sure, this general principle has been incorporated into the political and institutional design of Western and later non-European democracies in many different ways. One way of distinguishing them is by observing the role performed by legal norms in restraining the exercise of political power: how much do they matter? From where does their legitimacy derive? This analytical perspective makes it easier to spot the prototypical differences that unquestionably exist among Western democratic constitutional settings. Whereas the concept of the rule of law properly refers to the British experience of 'limited government', some of the features exhibited by the British ideal-type of constitutionalism characterise the institutional setting of the United States too. In particular, judicial governance is in both cases informed by a horizontal model of power, where power is distributed among several political actors. Inter-operability of know-how and expertise acquired in the legal profession and in the judicial profession characterises the recruitment, promotion, and training mechanisms in the judiciary. Lawyers and policy makers are frequently recruited to the judiciary (Caenegem, 1991). A peculiar feature of the US, which in this respect differs substantially from the UK, is the existence of judicial restrictions on the free exercise of the will of the majority. The Supreme Court is, as a matter of fact, the jurisdiction of last instance, entitled to protect individual and minority interests against the tyranny of the majority (Caenegem, 1987).

In continental Europe, due to the straightforward importance of the sovereign State, the large majority of countries have experienced a constitutionalism in which legal norms are created through an intentional process of law making (positive law). By 'intentional' we mean legislative and regulative law-making. Therefore, beyond the *sui generis* experience of the constitutionalism that emerged in the UK, it is possible to identify two ideal-types of European constitutionalism, the French and the German models, to which correspond two ideal-types of judicial governance: the neo-Latin model and the continental one (Guarnieri and Pederzoli, 2002). French constitutionalism recognises in the volition of the majority (the will of the people represented in Parliament) the first and most important source of legal norms. Law is therefore legitimate by virtue of being positive law, law 'made' through the will of the people. In this context, the judiciary plays a minor role, since it is asked to enforce the rules in a just way by strict application of the legal norms produced in the parliamentary assembly. Judicial independence is guaranteed by ensuring that adjudication is carried out by strictly applying statutory law. The main mechanism used to ensure that judicial behaviour is consistent with the obligations set out by the majoritarian assembly is bureaucratic judicial training. Judges are selected according to the same model of recruitment used for civil servants, and are socialised into an *esprit de corps*, which ensures that their behaviour is consistent with the criteria defined by senior justices. The latter are vested with the power of guaranteeing the coherence of the legal system. French constitutionalism gives primacy to the Court of Cassation, which represents the highest jurisdiction in the judicial system. Neither discretion nor arbitrariness in adjudication are admissible by the French conception of the constitutional State.[5] French judicial institutions were subject to a first thoroughgoing change immediately after the end of the Second World War. The constitution adopted in 1946 established the Conseil Supérieur de la Magistrature,[6] a truly autonomous institution of governance, whose members include representatives of the executive (the President and the Ministry of Justice) as well as persons nominated by the legislative branch. The CSM is thus, even if indirectly, democratically legitimate (its members are legitimated by their nomination by the democratic branches of the State). In the southern European countries, parliamentary democracy reveals the most extensive development of judicial insulation. Indeed, after the authoritarian regimes, judicial councils were introduced in Italy, Spain, Portugal and Greece in order to insulate judges from the prospect of being influenced by the executive (Guarnieri and Pederzoli, 2002).

The neo-Latin model, which emerged from this evolution, is to be found in southern European democracies that had experienced authoritarian regimes. Even through the degree of authority entrusted to the high judicial council varies from country to country, as does the way

the members of the councils are selected, all these countries converge toward a strong insulation of the judiciary from the other branches of the State. Regardless of the differences among them, the countries where judicial governance exemplifies the neo-Latin model are characterised by: 1) the existence of a suspicious attitude toward the executive, which is viewed as being potentially intrusive in the way courts adjudicate; 2) an increasing level of judicial activism (Piana, 2010); 3) a high level of demand for justice on the part of civil society, whose actors have a limited capacity for dealing with dissent and conflict by extra judicial means of dispute resolution (Merryman, 2007; Nelken, 2002).

The French case still remains 'a-typical' since it represents the outcome of a process of institutional change which came about during the transition from the Fourth to the Fifth Republic. French constitutionalism has always had a strong aversion to the judicial branch. As Montesquieu (1748) put it, courts are a branch without power. The supremacy of the legislative branch mirrors the belief in the primacy of the popular will as the ultimate source of norms and values. The creation of the Conseil Superieur de la Magistrature reflects a different logic whereby, on the one hand, the possibility of overwhelming influence on the part of the executive was still felt as a possibility and, on the other hand, the cohesiveness and the organisational ties characteristic of the French judiciary were considered not only as necessary, but also as desirable (Troper, 1980; Royer, 2001).

The second ideal-type of constitutionalism, German constitutionalism, is strongly attached to the vision of *Rechtsstaat*, which interprets the legitimacy of the law as procedural correctness and respect for the *Gründnorm*, i.e. the fundamental rule of the State. The State, which is the repository of the *Gründnorm*, is endowed with the power to determine the fundamental norms of the legal system. The legal accountability of judges functions predominantly as a guarantee of judicial independence. In this system, undue interference is not expected from the executive, but rather from the legislative branch. The risk that a majority might overturn the fundamental principle of the rule of the constitutional State is avoided by adopting a strong constitutional mechanism of judicial review. The review is carried out by an *ad hoc* institution, specialised in monitoring the formal and substantive consistency of statute law with the *Gründnorm*.

Legal and judicial traditions inherited by the pre-unitary Italy were multiple and diversified. The monarchic State drew such models from the experience of both Austrian rule (in the North-East) and Napoleonic rule (in the North West). The organisational model adopted to shape the State was developed and formalised under Napoleonic rule during the first decade of the nineteenth century and incorporates two pillars of the so-called Latin model: the Cour de Cassation as a temple of the coherence and consistency of the legal order and the Conseil d'Etat as a source of the

norms concerning administrative law. Codification and synoptic rationality characterised both the French ideal-type and the initial constitutionalism adopted in Italy following Unification (Guarnieri, 2007).

However, the experiences undergone by Latin countries during the first half of the twentieth century, and in France during the post-Second World War era (Guarnieri and Pederzoli, 2002), created space for the demand for autonomy of the judiciary from the executive. The invention of the High Judicial Council is therefore a variation on the ideal-type of French constitutionalism, whose organisational pattern is preserved through the hierarchy centred on the Court de Cassation and the Conseil d'Etat. The organisational innovation represented by the High Judicial Council represents a surreptitious change in the distribution of power among the branches of the State. This change did not become manifest before the 1980s, when the activity of the high judicial councils and the growth in judicial activism apparent in Western democracies (Russell and O'Brian, 2001) began to interact (Burbank, 2003).

Accordingly, the Italian judicial system is characterised by the following pattern of accountability.[7] Legal accountability is ensured by the knowledge of the law of judicial staff and in particular by the training process that takes place within the judicial system. Legal accountability is further ensured by and large through a structure composed of layers of jurisdiction, from ordinary courts to the Court of Cassation. The mechanism of appeal plays, in this context, a pivotal role as a way of subjecting judges to the control of the highly ranked justices sitting in high courts. Institutional accountability is safeguarded by the way in which judicial governance is organised. In Italy judicial personnel are governed by a body a majority of whose members are judges and prosecutors, who belong to the same institutional body and share the same career path. Professional accountability is ensured by the informal control peers exercise over each other. For the legal professions generally, professional accountability can be ensured by means of control exercised either by the bar – as happens in UK – or by legal scholars – as happens in Germany – or even by the judicial body as a corporation (Piana, 2010). The Italian system has moved from a situation in which professional standards were set by legal scholars – legal formalism was dominant – to a situation in which professional standards are set by different factions of the ANM. A further dimension of judicial accountability is associated with court management. Budgeting and resource allocation set rigid constraints on the way justices and public prosecutors act. The timeframe that characterises certain types of proceedings – such as family or labour disputes – and the backlog of court cases are also important aspects of managerial accountability. In Italy the High Judicial Council is supposed to ensure the efficiency of each judicial office's resource management. Recently the CSM has provided for standards of performance, which will be implemented in the near future. A

final yet crucial dimension of judicial accountability is societal accountability. Societal accountability refers to the fact that judges and prosecutors are answerable to citizens with regard to the way they operate. However, this may happen both by making transparent the way they allocate resources and by providing for a customer-oriented and user-friendly set of services, such as the intensive use of internet-based communication. In Italy uptake of the Internet as an instrument of public communication has been slow and has been obstructed by both a lack of financial resources and an old-fashioned attitude on the part of staff. However, in some courts of appeal web sites have been set up.

The CSM should be analysed and assessed against this general background. Whilst the CSM ensures the legal and institutional accountability of the Italian judiciary, the other three dimensions of judicial accountability have been enacted outside the CSM or, when within the CSM, because of logics of action that were external to the CSM. A specific and relevant case is the importance of the ANM, which has functioned as a laboratory of ideas and legal ideologies for decades. The development and consolidation of factions, expressing contrasting visions of judicial policy, heightened the externalisation of the mechanisms of professional accountability. Career advancement was associated more or less directly with the support of one faction or another. Endorsement of a specific vision of judicial policy or of the role of judge was considered a precondition for enjoying the support of one faction or another.

Is it just the maintenance of the same constitutional design?

Article 104 of the Italian Constitution stipulates that the CSM is an autonomous body, three quarters of whose 24 members are elected and one quarter nominated. Elected members are chosen from among judges and prosecutors. The remainder are 'lay' members drawn from highly reputed professors of law, legal scholars and, in some very rare cases, former politicians, selected by Parliament. The President of the Republic is head of the CSM.

The constitutional design of the Italian State underwent a long transformation which *de facto* brought about some critical changes in the balance of power. In 1956 the Constitutional Court started work, and it increasingly questioned the monopoly of the Court of Cassation in determining the fundamentals of domestic legal doctrine.[8] This had an impact on the role the CSM performed in the governance of the judiciary. For decades the Court of Cassation had been the temple of the conservative current of legal scholars and it helped perpetuate its influence on the legal system by means of the mechanism of appeal and, following the creation of the CSM, through the role of the highest judges of the Court within the CSM. The weakening of the conservative side of the judicial hierarchy,

mainly represented by senior judges, coincided with a strengthening of the more progressive part of the judiciary (Borgna, 2000). This was reflected in the composition and leadership of the ANM. The judiciary began to lose that homogeneity which had characterised it since the unification of Italy. Senior judges, who had always acted as mediators and bridges between the judiciary and the political elite, started to lose their capacity to keep the judiciary as a whole united. Junior judges, some of whom endorsed extremely progressive and radical positions, began to perceive the judiciary as a body engaged in governing social processes, rather than being simply engaged in the perpetuation of a formalist and positivist legal doctrine.

Reform of the electoral system used for selection of members of the CSM accelerated this process of radical transformation. From 1968, all judges and prosecutors, of whatever level or function, were allowed to express a vote in elections for the appointment of members of the Court of Cassation and the appeal courts. More than one half of the magistrates elected to the Court of Cassation in 1968 were members of the ANM. Meanwhile, among those of the CSM's members selected by Parliament, the proportion of conservatives became a minority.[9]

The new generation of CSM members adopted a policy that was highly innovative both in terms of professional and institutional accountability. Prior to the change of leadership, professional standards were laid down by the most senior judges, namely the judges of the Court of Cassation. Following the change, standards became more and more elusive and were for the greater part determined by the capacity of the single judge or prosecutor to emerge and distinguish herself by her involvement in social and political events or by her capacity to gain the support of a faction of the ANM. The 1970s saw this process pushed even further owing to the sudden appearance of terrorism and the exposure of the judiciary generally to the threat of terrorist attacks (Maddalena, 1997; Borgna, 2008). Institutionally speaking, hierarchy within the Italian judiciary was weakened and fragmented since senior judges' powers of scrutiny of ordinary magistrates' actions were now distributed not only vertically, between levels of the judicial hierarchy, but also horizontally, among the various judicial offices across the national territory. Rather than being accountable to more senior colleagues, individual magistrates became increasingly responsive to the colleagues they were collaborating with within their own judicial offices and, in some noteworthy cases, to civil-society or political actors. The inverse relationship between the strength of the hierarchy and the capacity of the hierarchy itself to resist the influences and pressures exerted by the external environment opened a breach in the insulated iron cage of the Italian judiciary (Freddi, 1978).

In terms of policies, throughout the 1970s and 1980s, the CSM became a clearing house for the development of more modern and progressive approaches to judicial matters. The fundamental goal of the new CSM

leadership was to link the body to other social and political institutions, in order to enable it to overcome its isolation. The CSM, which had been created to insulate the judiciary from the political and social environment, was transformed into an instrument to enable it to contest that insulation. In 1968 Magistratura Democratica, the most progressive tendency of the ANM, proposed the establishment of a permanent commission entrusted with the task of dealing with Parliament and the executive and the planning of judicial governance (Zagrebelsky, 1998).

The increasingly public discussion of judicial policy gradually transformed the Italian judiciary and in particular changed the relative significance of the different mechanisms of accountability governing the administration of justice. Of utmost importance was the rapid increase in the size of the judicial agenda, both in terms of the number of problems dealt with and of the complexity of cases and legal issues the judiciary was required to handle. Italy has not escaped the broad process of expansion of the judiciary associated with the multiplication in the number of sources of law that has taken place in recent decades: supranational bodies, especially the European Union, and international organisations have intervened extensively in the production of law by coming into contact with national legal systems. The judge who had once been the '*buche de la loi*', a concept which formed the basis of the model of judicial self-government, became a judge engaged in broad and complex tasks of interpretation and integration of the norms of hard and soft law. Whereas behavioural standards had once been set by senior judges – responsible, incidentally, for decisions concerning their junior colleagues' career paths – such standards now began to be drawn from several sources, including political and civil-society arenas.

The increasing role of the media that occurred at the same time undermined the judiciary's insulation and transformed individual judges, and even more dramatically prosecutors, into media personalities (Mittone and Gianaria, 1994). As some magistrates readily admit, terrorism and later the dramatic fight against organised crime – especially in the South – overturned the judiciary's insulation, making it a highly exposed body, one whose processes of governance formally took place in accordance with the precepts of a model of insulation, but which in fact managed its relations with the external environment mainly through contingent plans, emergencies, situations of urgency and so forth.

Today, the statute that came into force in 2002 (law no. 44 which amends law no. 195/58) sets the number of members of the CSM at 24 and stipulates that of these, 16 must be magistrates and eight must be legal scholars. The latter are selected by the two chambers of Parliament by means of a secret vote where the majority voting in favour must be three fifths. Of the magistrates, two must be selected from among judges of the Court of Cassation, four from among prosecutors and ten from among

ordinary judges. Election takes place by means of simple majorities voting in favour of individual candidates. The majoritarian principles were designed to discourage the application of any distributive logic among the four component parts of the ANM.

In 1999, a resolution passed by the CSM in virtue of its para-normative power led to reform of the internal organisation of the Italian judiciary. The judicial councils that sit alongside each appeal court became officially recognised actors of judicial governance, and they complement the activity of the CSM. Judicial councils are supposed to have a merely consultative function, in particular in the drafting of the professional assessments that are required for the promotion of judges and prosecutors. They exercise a form of managerial accountability thanks to their control and management of human and financial resources.

The most significant change to have affected the hierarchical structure of the Italian judiciary is the one brought about by the decree passed by Parliament on 27 January 2006. This law touches upon both the role of the judicial councils and the principles of professional accountability governing decisions about the promotion of judges and prosecutors. The law endorses the principle of administrative decentralisation in order to improve the efficiency of judicial offices. The main driving force behind the reform is the idea that if the judicial councils are closer to the courts and public prosecutors' offices, then they are better placed to monitor their performance. Moreover, and this is an important element of institutional innovation, they are expected to be more familiar with the needs that should be addressed by the judiciary within the area concerned. Local government and local judicial offices are therefore thought of as parts of the same socio-political system. This perspective seems quite innovative and contrasts radically with the perspective underlying the constitutional provisions establishing centralised systems of judicial governance under the CSM's leadership. It should be noted too that the judicial councils include six magistrates for judicial offices counting 350 employees; a legal scholar nominated by the National University Council (CUN), and two lawyers, nominated by the National Bar Association (Consiglio Nazionale Forense). A judicial council has also been created at the level of the Court of Cassation. The mechanisms of accountability that are affected by this reform are institutional, managerial, professional, and societal (Giangiacomo, 2006).

With regard to institutional mechanisms, promotion is decided centrally but is significantly influenced by the reputation a magistrate has been able to build locally. Moreover, the capacity of a prosecutor to establish positive and cooperative relationships with the local public administration has become very important. In particular, in the fight against petty crime, collaboration with the police, the municipality and civil-society actors located in the area covered by the jurisdiction of a given

prosecutor's office is of utmost importance. This point will be discussed further in relation to the reform of professional standards.[10]

In principle, managerial accountability should be strengthened by the reform. Judicial councils are required to report to the CSM about the allocation of resources. In some cases, the leading role of the chief justice of the Appeal Court has meant that issues related to resource allocation, judicial procedures and the time frames governing investigations (as well as training and specialisation needs) have come to be addressed in a collective, open, and shared way within judicial councils.

With regard to societal mechanisms, the decentralisation of judicial governance heightens the significance of relations between the judicial office and the public, local citizens. In parallel with this reform, the CSM and some of the leading courts have started to develop a policy of public communication using information and communication technologies to make the judiciary more accessible to the public. This is a process that still has a long way to go.

The most significant and far-reaching change yet is represented by the amendment to the procedure used to assess the professional qualifications of chief and deputy-chief judges and prosecutors. The law passed in 2006 (bill no. 160, later amended by law no. 111/2007)[11] provides for all magistrates to be subjected to an assessment procedure every four years until they reach the twenty-eighth year of service, after a maximum of seven assessments. This represents a considerable innovation with regard to magistrates' career paths. High-ranking positions, which had been permanent since the CSM came into being, have, as a consequence, become temporary and are now subject to periodic scrutiny (Borraccetti, 2008). A further important innovation is represented by the weakening of seniority as the absolute criterion for promotion through the introduction, as additional criteria, of entrepreneurship, communicative capacity, managerial abilities and the suitability of the candidate for the local context in which s/he is to work.

In a nutshell, fifty years after their creation under the auspices of the republican constitution, the Italian judiciary and the judicial council have undergone important changes impinging upon all accountability mechanisms. In particular, internal hierarchies, once designed to ensure the coherence of judicial decision-making and the correct application of principles of seniority in promotion decisions, have to a large extent given way to context-based, functional and performance-oriented decision-making and processes of professional qualification. Does this entail more or less space for political influence? To what extent is judicial independence accordingly undermined?

Politics, inescapable companion

If there is a judicial system in Europe whose relations with the political system are antagonistic, then it is the Italian system. The Constitution adopted in 1948 failed to include provisions that would ensure institutional peace among the various branches of the State, partly because of the authoritarian legacy, which left in the collective memory of the founding fathers the threat of a judiciary kept in thrall by the executive; partly because of the penetration of a distinctively political logic, thanks to negotiations among the different factions (which can be placed along a continuum from the radical left to the conservative right) of the ANM.

This state of affairs has worsened since the ascent of Silvio Berlusconi to the office of Prime Minister. However, a fairer and more balanced assessment of the role played by the CSM within the constitutional framework of Italy can be made by considering both the strategies adopted by the CSM for dealing with the executive and the policies it has formulated and implemented with regard to the governance of the judiciary. In a nutshell, the CSM has become a policy arena characterised by logics of action similar to the ones that exist in more traditional policy arenas, such as parliamentary or ministerial committees. Consensus is not built on the basis of a common and unquestioned endorsement of a set of values laid down by senior judges – as it was at the beginning of the Republican era immediately after 1948. Rather, it results from the negotiation that takes place among the ANM's internal factions. Lately factions have lost some of their capacity to keep judicial personnel cohesive and engineer consensus on specific aspects of judicial policy (Borgna, 2000). Recent findings have shown that younger magistrates are increasingly oriented towards a new understanding of judicial professionalism, whereby managerial competence is one of the attributes a chief judicial officer should seek to acquire, and where engaging in public discussion is seen as positive. Again, it seems that two souls are animating the Italian judicial system. On the one hand, younger chief justices and prosecutors have endorsed a more modern and performance-oriented view of their function. Others, more interested in acquiring a public profile, endorse attitudes that draw more from politics than from the traditional stereotype of the '*dottori della legge*', the shy performers of the sacred functions of justice. For the reasons described above, generalisations will not be easy as long as the judiciary is characterised by a wide variety of professional attitudes and personal profiles.

However, the CSM still performs as a policy arena in which political resources (leadership and legitimacy) are used by individual members to set the agenda; to elicit preferences; to aggregate votes in the plenary sessions; to lead the discussion and the final deliberations. The whole process of standard setting which has taken place in recent years represents an extremely revealing case of the CSM having acted as an arena in which

the expertise of a few scholars and the leadership of some members have converged and given rise to a range of instruments of performance assessment.

The most striking evidence of this state of affairs is the role played by the media in rendering visible and in over-exposing judicial cases involving politicians accused of corruption. This trend, which dates back to Tangentopoli and the Mani Pulite affair – a set of events that has left a deep and indelible trace in the Italian collective memory – has radically changed the way in which the administration of justice is perceived by both politicians and citizens. Justice has become heavily influenced by processes of social moralisation and is increasingly thought of in instrumental terms, as a field of action parallel to the political arena, rather than as an independent realm dominated exclusively by law (Violante, 2009).

Returning to the five types of accountability listed at the end of the second section, two critical issues emerge from the co-existence of a highly insulating model of judicial governance and a model of the administration of justice inspired by political logics of action. The initial constitutional design, in which the CSM was embedded, entrusted the administration of the judicial system to the mechanisms of legal accountability and internal institutional accountability. In other words, the Constituent Assembly was driven by the idea that the action of judges and prosecutors would be governed by two logics: a legal one – ensured by legal accountability – and a judicial one – ensured by the maintenance of hierarchy under the tutelage of the CSM, and by protection of the individual judge from any external influences, i.e. any external non-judicial logics of action. The urgency of the fight against terrorism and the mafia, and the democratic legitimacy given to the CSM by the new election system, weakened the internal hierarchy enabling other logics of action to influence members of the judiciary, especially chief justices and prosecutors. Consequently, the initial constitutional provisions proved to be in need of incisive reform.

Moreover, new types of accountability – managerial and societal – seem today to be in the spotlight. The latter merits some additional comment. In a society in which liberal and democratic values are firmly rooted and shared by rulers and ruled alike, and where pluralism is manifestly characteristic of the media, societal accountability may be a healthy way of counter-balancing the potential influence of politics on the judicial system. However, recipes should not be appraised in the abstract, and the appropriateness of such a solution for Italy remains an open question. If constitutional principles are to find counterparts in terms of actual social and political practices, then managerial mechanisms of accountability must be strengthened so as to counterbalance the inevitable personification of the administration of justice. This would enable chief justices and prosecutors to be held accountable for the way they allocate resources, but without corroding their independence. A further viable

solution would be the development of policies to enhance interaction between the appeal courts and local communities, given the strong cultural identities of Italian regions and provinces. For instance, policies could encourage better communication with the bar and civil-society associations in matters of court management as well as greater degrees of collaboration between chief prosecutors and local authorities on criminal policy (Piana, forthcoming). These kinds of policies are not completely unknown in Europe (Fabri, 2005; Contini and Mohr, 2007; Yein, 2005). The most important barrier to be overcome in efforts to improve the governance of the Italian court system is the sort of collective myopia with which judicial governance is typically considered. The CSM is a constitutional instrument whose main purpose is to ensure the proper functioning of mechanisms of accountability in the judicial field. This may happen only if proper checks and balances are activated. If one mechanism is getting weaker, then another should be strengthened to compensate. This does not mean that politics should be evicted from processes of judicial governance. On the contrary, it means that politics is part of judicial governance and should accordingly be checked and counterbalanced.

Notes

[1] High judicial councils are late institutional inventions in modern politics: they are bodies 'designed to insulate the functions of appointment, promotion, and discipline of judges from the partisan political process, while ensuring some level of accountability. Judicial councils lie somewhere in between the polar extremes of letting judges manage their own affairs and the alternative of complete political control of appointments, promotion, and discipline' (Garoupa and Ginzburg, 2009: 6).

[2] This form of accountability stems from the principle according to which judges and prosecutors made accountable solely to the law perform their functions better and more fairly if they work in a bureaucratic organisational setting. This setting is accordingly able to ensure that their ways of acting reflect purely legally-oriented and law-based roles. Impersonality of adjudication is in this way guaranteed.

[3] High judicial councils are so named to distinguish them from local judicial councils, which are engaged in running ordinary courts and prosecutors' offices. In Italy, as we shall see, they have only consultative power.

[4] On the whole this phenomenon, which has been widely praised by international actors as a clear sign of pro-democratic attitudes on the part of nascent reformist elites, has also been associated with expansion of the agenda of judicial decision-making.

[5] According to the French version of constitutionalism that was developed during the nineteenth century, the judge was considered as a *bûche de la loi*.

[6] Title IX of the Constitution of 1946.

[7] The analytical framework used here is described and discussed in Piana (2010).

[8] In reality, with expansion of the reach of EC law, the Constitutional Court began to dominate relationships with the European Court of Justice and the European Court of Human Rights.

[9] Selection of the 'lay' members reflects a logic of political bargaining and logrolling in that it is governed by distributive criteria: all political parties participate in the process of selection and expect to obtain the election of their own favoured candidates to the CSM.

[10] The point is confirmed by two interviews with deputy chief prosecutors, working in Turin and in Cosenza, conducted by the author in January and May 2010.

[11] The CSM implemented this law by means of deliberation no. 20,691, on 4 October 2007.

References

Borgna, P. (2000), "Vecchie correnti, nuovi magistrati", *MicroMega*, 1, pp. 235-242

Borgna, P. (2008), *Difesa degli avvocati. Scritta da un pubblico accusatore*, Rome: Laterza.

Borraccetti, V. (2008), "Il dirigente dell'ufficio di procura dopo la riforma dell'ordinamento giudiziario", *Questione giustizia*, 1, pp. 5-25.

Burbank, S. B. (2003), "What Do We Mean by 'Judicial Independence'?", *Ohio State Law Journal*, 24, pp. 323-333.

Caenegem, R. C. (1987), *Judges, Legislators and Professors*, Cambridge: Cambridge University Press.

Caenegem, R. C. (1991), *Legal History: A European Perspective*, London: Hambledon.

Cox, A. (1996), "The Independence of Judiciary: History and Purposes", *Dayton Law Review*, 21, pp. 565-66.

Contini, F. and Mohr R. (2007), "Reconciling Independence and Accountability in Judicial Systems", *Utrecht Law Review*, 3 (2), pp. 26-43.

Damaska, M. (1986), *The faces of justice and state authority: a comparative approach to the legal process,* New Haven: Yale University Press.

Fabri, M. (2005), "Policies to enhance the quality of justice in Europe", in M. Fabri et al. (eds.), *L'administration de la Justice en Europe. L'évaluation de sa qualité*, Montchrestien: LGDJ.

Ferejohn, J. (1999), "Independent Judges, Dependent Judiciary: Explaining Judicial Independence", *Southern California Law Review*, 72, pp. 353-84.

Freddi, G. (1978), *Tensioni e conflitto nella magistratura*, Bari: Laterza.

Garoupa, N. and Ginzburg, T. (2009), "Guarding the Guardians: Judicial Councils and Judicial Independence", *American Journal of Comparative Law,* 57, pp. 201-234.

Giangiacomo, B. (2006), "I consigli giudiziari", *Questione giustizia*, 1, pp. 93-102.

Guarnieri, C. (2007), "Courts and Marginalized Groups: Perspectives from Continental Europe", *International Journal of Constitutional Law*, 2, pp. 187-210.

Guarnieri, C. and Pederzoli, P. (2002), *The Power of Judges*, Oxford: Oxford University Press.

Maddalena, M. (1997), *Meno grazia, più giustizia*, Milan: Donzelli.

Merryman, J. (2007) [1969], *The Civil Law Tradition:: An Introduction to the Legal Systems of Europe and Latin America*, 3rd edition, Palo Alto, CA: Stanford University Press.

Mittone, A. and Gianmaria, F. (1994), *Il processo come spettacolo*, Bologna: Il Mulino.

Montesquieu, C. (1748), "De l'esprit des lois", in C. Montesquieu, *Oeuvres complètes*, Paris: Gallimard, 1951.

Nelken, D. (2002), "Comparative Sociology of Law", in D. Nelken, *An Introduction to Law and Social Theory*, Oxford: Hart.

Oppenheim, F.E. (1985), "Constraints on Freedom as a Descriptive Concept", *Ethics*, 95, pp. 305–9

Palombella, G. (2010), "Rule of law as Institutional Ideal", *Comparative Sociology*, 9 (1), pp. 4-39.

Panebianco, A. (2004), *Il potere, lo stato, la libertà*, Bologna: Il Mulino.

Piana, D. (2010), *Judicial Accountabilities in New Europe. From Rule of Law to Quality of Justice*, Farnham: Ashgate.

Piana, D. and Vauchez, A. (forthcoming), *Il Consiglio superiore della magistratura*, Bologna: Il Mulino.

Royer, J.-P. (2001), *Histoire de la justice en France*, 2nd edition, Paris: Puf.

Russell, P. and O'Brian, D. (2001), *Judicial Independence in the Age of Democracy*, Charlottesville, VA: University of Virginia Press.

Troper, M. (1980), *La separation des pouvoirs et l'histoire constitutionnelle française*, I, Paris: LGDJ.

Violante, L. (2009), *Magistrati*, Turin: Einaudi.

Yein, N. (2005), "Pays Bas", in M. Fabri et al. (eds.), *L'administration de la Justice en Europe et l'évaluation de sa Qualité*, Montchrestien: LGDJ.

Zagrebelsky, V. (1998), "La magistratura ordinaria dalla Costituzione ad oggi", *Storia d'Italia*, Annali XIV, Turin: Einaudi.