

International Network of Judicial Reformers
Judicial Corporatism
(Causes an possible remedies – focus on the Italian experience)

Discussion Paper of the Online Discussion
Held on April 18 2024
(text drafted by Maurizio Salustro)

Introduction

To the discussion were invited as speakers:

- Mr. Gianfranco Gallo, Deputy Prosecutor at the Prosecution Office in Rome, Italy (with previous experiences as a judge in the South of Italy and abroad in Kosovo with the UN Mission –UNMIK-), and
- Mr. Maurizio Salustro, retired Italian Magistrate (with experience as a judge and a prosecutor in Italy and abroad in both UN and EU Missions).

The debate was opened and moderated by Mr. Kakha Tsikarishvili from the International Network of Judicial Reformers. Several participants followed the on-line event. The discussion was quite alive. The main focus was on the Italian experience. The following account incorporates topics raised by the participants during the discussion.

Judicial Corporatism - the Italian experience

At the **beginning of the XXth century**, the Italian judiciary was organised in a hierarchical way. The influence of the Minister of Justice and the surveillance of the higher courts over lower magistrates impeded any real independence, which was not really considered to be a value. The judiciary was expected to act according to interests of the leading class.

As proof of this, in 1909, the Minister of Justice, speaking in front of the newly founded General Association of Italian Magistrates highlighted two dangers connected with the existence of a judges' association:

1. the equality among associates, which opposed the judicial hierarchy (according to the Minister, a newly appointed magistrate discussing as equals with a court president would damage the dignity and authority of the latter);
2. the combativeness of any “associative phenomenon” (a magistrate had to stay separate from the society, avoiding any criticism in order to remain the cold mouthpiece of the law).

The **fascism** found a judicial system already well under control. It just increased the hierarchy and subordinated the judiciary to the Fascist Party (party membership became a requisite to be appointed as a magistrate). Moreover, in 1925, the Association was dissolved and its leaders were expelled from the judiciary, formally because of their anti-state stance but in reality because they were against fascism.

After the Second World War, a new Constitution was adopted. It sanctioned a series of values and fundamental rights and freedoms, such as equality, personal dignity, individual rights, social rights, etc. These values became the guiding principles for the judicial interpretation of the law. As for the judiciary, it was clearly stated that: 1) judges were subject only to the law (external independence), and 2) all judges were equal among themselves (internal independence) the only possible distinction being their different functions.

In the meantime, in 1944 the judges' association had been reinstated, under the name of Associazione Nazionale Magistrati – ANM. In the fifties, internal groups of the ANM were established. As we will see shortly, elements of corporatism are linked to the activities of these internal groups.

As the Constitution was formally in force but not immediately implemented, during the **sixties and the seventies**, the internal groups of the ANM played a progressive role by:

- opposing internal merit exams for career progression, managed by the so-called "high judiciary";
- fighting against any type of career, hierarchy and distinction between “high” and “low judiciary”.

The equality among magistrates, which presupposes the exclusion of any type of career, was seen as a condition for the internal independence.

These concepts were summarised in the formula that a magistrate should be “without hope nor fear”; that is, that from the exercise of jurisdiction should derive no hope of advancement or benefits and no fear of sanctions or disadvantages.

The phases described so far can be recapitulated as follows.

Initial idea

- Nature of judicial functions: neutral and apolitical, purely technical; therefore, the judiciary is organized on hierarchical bases (“high/low judiciary”).
- Judges: they live isolated not only from the society but also from their own colleagues.
- Criticism of judicial decisions: it is not allowed and considered as a sort of lese-majesty.
- Prevalent model of judge: a bureaucrat, a pure legal technician, mouthpiece of the law.

After Constitution

- Role of the judge: a conservator of the existing order, but also a transformer who implements the constitutional project.
- Task of the Republic: guaranteeing the rights of the weakest and removing factual inequalities, among other means through jurisdiction.
- Slow implementation of the Constitution: problem of the existing legislation, still largely of fascist origin.

Conclusions:

- the old image of the judge as a mouthpiece of the law becomes untenable;
- the stereotypes of a judge as a mere technician framed in a hierarchical system (right-wing ideology) or an executor of laws expressing the will of the ruling class (left-wing ideology) are both unacceptable;

- the roles of the judge and public prosecutor (both magistrates) can be, and are, publicly debated.

During the following years, especially **from the nineties onwards**, the progressive push of the internal groups of the ANM slowly faded. More or less coinciding with the crisis of the Italian political/institutional system (the so-called “First Republic”), the internal groups, aka currents, of the Association ceased to be places of cultural debate and became centres of power, mainly for the role they played in the election of the judicial members of the High Judicial Council (Consiglio Superiore della Magistratura – CSM)¹.

The currents were more and more regarded as, and actually became, a tool for protection and promotion of individual magistrates.

Nowadays, equality among judges and internal independence are threatened by new forms of career and careerism introduced into the judicial system. This is due to many factors, like:

- the periodic professional evaluation of magistrates and the important role played in this by heads of offices;
- the subsequent strengthening of the powers of the leaders;
- the competition (inevitable after the criterion of seniority was abandoned) for the assignment of managerial offices;
- the attention given by individual magistrates to the accumulation in their curricula of the most varied titles, considered relevant for their career.

In a nutshell, the old careers and the old hierarchy seem to be reborn. There are again hope of promotions and fear of negative consequences. Both damage the independence of the judiciary and promote competition and careerism.

The judicial corporatism resurfaces. In this, the internal groups of the ANM played a negative role, as magistrates who decide to be the members only of the Association and not to enlist in any current feel like being abandoned and without any protection.

There are examples where many magistrates apply for the same managerial position (e.g., President of a first or second instance court) and the decision is the result of a negotiation among the currents, which seem to apply a criterion of more or less fair distribution of positions of power. If this is the logic, of course candidates who are “lone wolves” have little chances to be selected.

For sake of completeness, it has to be said that the CSM is composed of 33 members, three of which are members by right: the President of the Republic, the President of the Supreme Court of Cassation and the General Prosecutor of the Supreme Court of Cassation.

Two thirds of the remaining 30 members are magistrates (judges or prosecutors) elected by all their colleagues. The last third (10 lay members) are elected by the Parliament in plenary session (the two Chambers together) among university professors of law and attorneys who have been practising for at least 15 years.

The presence of lay members is aimed at avoiding that the CSM became a sort of closed caste. Unfortunately, the lay members instead of opposing the habit of negotiating appointments, took part in it.

¹ Each current would chose its candidate, who would receive full support for his/her electoral campaign.

Possible remedies

It is very difficult to identify possible remedies against the involution of the judicial system described above.

The main cause of the problem is represented by the change in the internal groups of the ANM, which became centres of power. The question is, why did the currents lose their original nature?

One possible answer is that they mirrored the decline of the political class and started focusing on power games, the same way political parties abandoned ideologies. If someone stops having a vision of the overall social organization and thinks that nothing can be really changed, what is left is struggle for power.

Key values passed into the background and the most important things became personal promotion and individual benefits.

The first step to reverse the trend could be going back to those constitutional values that had pushed the judiciary over the old model of a magistrate.

Any form of hierarchy and career should be counteracted, professionalism assessments should be reduced to an evaluation of possible unsuitability.

A cultural battle should be started to oppose the prestige associated with the organizational functions of the heads of office. Those functions should be seen as aimed at allowing the other magistrates in the office to deliver a better service to the public. The highest ambition of a magistrate should be the best exercise of the jurisdiction.

As for the appointments to managerial positions, the criterion of “seniority” tempered by “specific functional experience” could be adopted. In other words, the former criterion would be the general one, surmountable only in presence of a significant candidate’s experience in the same functions at issue.

Further, since the “power” of the currents stems from the election system of the judicial members of the CSM (candidates not connected to any internal group have zero chances to be elected), alternative ways of selection should be explored. One option could be to create a list of magistrate with certain requisites (seniority, assessments of suitability...), among which the members of the CSM could be chosen by lot.

Finally, it is fair to underline how in Italy the Constitution has always been a sort of “lighthouse”, guiding the democratization process. On the contrary, there are countries where the Constitution does not have the same authority and judicial corporatism is very powerful. The speakers deem that in such cases, changes should start by enhancing the legal framework. At a certain point, provisions strengthening external and internal independence of the judiciary will have to be implemented and eventually judicial corporatism will have to bow its head.