

Gabriella Mangione*

SOME BRIEF REMARKS ON THE CONTROVERSIAL RELATIONSHIP BETWEEN THE JUDICIARY AND POLITICS IN ITALY

Abstract

The relationship between the judiciary and the political sphere and the dilemma over whether the judiciary has been a victim of politics, or whether politics has been a victim of the judiciary, have been hot topics for some time in Italy. Since a major scandal engulfed the High Council of the Judiciary, the courts have become the principal focus of the reform efforts of the Draghi Government, which took office in February 2021.

The contribution briefly illustrates the figure of the Judicial Power within the Division of Powers and the evolution of the judge's role within this system. Following a brief premise on the evolution of the role of judges during the last two centuries, the principle of the independence of the judiciary in the Italian Constitution will be outlined before final comments on the controversial relationship between the judiciary and politics.

Key words

independence of the judiciary – politics – Italy – High Council of the Judiciary

INTRODUCTION

The relationship between the judiciary and the political sphere and the dilemma over whether the judiciary has been a victim of politics, or

* Gabriella Mangione, Full Professor, Insubria University, Como, Italy; gabriella.mangione@uninsubria.it; ORCID (0000-0002-2297-4864).

whether politics has been a victim of the judiciary, have been hot topics for some time in Italy. However, since a major scandal engulfed the High Council of the Judiciary, the courts have become the principal focus of the reform efforts of the Draghi Government, which took office in February 2021. Today, the self-governance body of the Italian judiciary, which is provided for under the Constitution, appears to have lost legitimacy in the eyes of prosecutors, and indeed Italians in general, and justice in many cases appears to have turned into an instrument for political controversy, rather than a guarantor of social equilibrium.¹

¹ See A. Sallusti, L. Palamara, *Il sistema. Potere, politica affari: storia segreta della magistratura italiana* [The System. Power, Politics, Scandals: The Secret History of the Italian Judiciary], Rizzoli, Milan, 2021. This book is based primarily on conversations between the journalist Luca Sallusti and Luca Palamara, a former judge and former member of the High Council of the Judiciary. This person, who found himself at the epicentre of this scandal, has become emblematic of judicial malpractice and was expelled from the judiciary in October 2020. The picture painted by this confessional book is that of a justice system controlled by “factions”, genuine power groups composed of judges who divide up the most important appointments in the various prosecutors’ offices, as well as judges who share power in order to secure promotions and prestigious appointments. Career progression for judges, which is one of the main tasks of the High Council of the Judiciary, appears to be decided not on the basis of each judge’s ability or merit, but rather on the basis of power relations, which often intersect with politics. Similarly, many judgments are apparently resolved not with reference to the truth, or the search for the truth, but to the relations between certain investigative judges and other trial judges. All of this in actual fact has been addressed by a great many studies and investigations for some time, which it is not possible to list in this study, carried out not only by judges and lawyers, but also by political scientists, sociologists, and journalists. Amongst the great many studies that engage with the issue of judges’ morality, which point to a serious crisis within the Italian judiciary, see Francesco Cossiga, *Discorso sulla giustizia. Poteri e usurpazioni*, Liberilibri, Macerata, 2008. This is a collection of the most significant, although in some cases less well known, speeches given by this former President of the Republic throughout his long life. He was also a politician and university professor. As early as 30 years ago Francesco Cossiga called for radical reforms to the High Council of the Judiciary which “is not a good self-governance body for the judiciary since, although it purports to be independent and apolitical, it is in actual fact politicised and is itself a source of parties and political deals”. Cossiga, who was renowned for his radical assertions, went so far as to brand the National Judiciary Association (see below note 46) a ‘criminal enterprise’. More recently see Stefano Zurlo, *Il libro nero della magistratura. I peccati inconfessati delle toghe italiane nelle sentenze della Sezione disciplinare del CSM* [The Black Book of the Judiciary. The unconfessed sins of Italian judges in the decisions of the Disciplinary Section of the CSM], Baldini & Castoldi, Milan, 2020.

The recent scandal has profoundly affected the public images of judges, who were once respected officials enjoying widespread trust. The moral drama inherent within this situation is clearly apparent from the words of the new Justice Minister who, in stressing citizens' mistrust in the judicial system, asserted that "something has gone wrong within the relations between the judiciary and the people, in whose name the judiciary performs its function. This urgently has to be repaired. Judges need to be independent and impartial".²

It is important to stress that charges of rampant malpractice cannot be levelled against the judiciary as a whole. Far from it. Italian history and current affairs offer countless examples of exemplary judges who never succumbed to corruption, who embody that figure of an upstanding, apolitical, autonomous, and independent judge, with a strong sense of ethics, distant from undue influence of any type, and ready even to give his or her life in the cause of justice.³ This study will not address the extremely broad issues touching on the crisis of the judiciary, which will rather be left in the background.

This contribution will briefly illustrate the figure of Judicial Power within the Division of Powers and the evolution of the judge's role within this system. Following a brief prelude on the evolution of the role of judges during the last two centuries, the principle of the independence of the judiciary in the Italian Constitution will be outlined before finally commenting on the controversial relationship between the judiciary and politics.

² These words were pronounced by Minister of Justice Cartabia on 4 June 2021 during a meeting with the heads of the political groups comprising the majority concerning the reorganisation of the High Council of the Judiciary and the judicial system. Repubblica 5 June 2021 currently available at: https://www.repubblica.it/politica/2021/06/04/news/giustizia_riforma_cartabia_violante-304106225 [last accessed 30.6.2021].

³ See C. Fijnaut, "Twenty Years Ago: The Assassinations of Giovanni Falcone and Paolo Borsellino", in Hans-Jörg Albrecht, André Klip (eds.), *Crime, Criminal Law and Criminal Justice in Europe: A Collection in Honour of Professor Cyrille Fijnaut*, Martinus Nijhoff Publishers, Leiden Boston, 2013, p. 61. See also the heroic example of Blessed Rosario Livatino, the judge murdered by the mafia and recently called by the Pope a "martyr of justice", currently available at: <https://www.vaticannews.va/en/pope/news/2021-05/pope-francis-beatification-rosario-livatino-mafia-corruption.html>. [last accessed 30.6.2021].

I. THE SEPARATION OF POWERS AND THE EVOLUTION OF THE ROLE OF THE JUDGE

Western democracies are based on the principle of division of powers. This principle comes from the renowned theory of Montesquieu and those of other political thinkers, such as John Locke. In fact, the idea that the separation of sovereign power between various branches of a state's government system is an effective way to prevent abuse is rooted in the philosophical tradition of classical Greece. Plato and Aristotle are said to have contributed to this idea.

The "division of powers" is an institutional model that rigorously appertains to the history of the modern western state, and more precisely to that phase in which the so-called "absolute" state was superseded by the "liberal" (rule of law) state.⁴

The model was intended to prevent the establishment of prevaricating regimes and to guarantee the political liberty of the individual.

According to Montesquieu⁵ "Individual political liberty is a tranquillity of mind arising from the opinion each person has of his safety. In order to have this liberty, it is requisite that government be so constituted that one man need not be afraid of another".

The liberty of which Montesquieu spoke was directly promoted by apportioning power among political actors in a way that minimized opportunities for those actors to determine conclusively the reach of their own powers. This general aim was to avoid an excessive concentration of powers. Under this model, the political authority of the state was divided into legislative, executive, and judicial powers. Montesquieu asserted that, to most effectively promote liberty,⁶ these three powers must be separate and act independently. This had been achieved in Britain by assigning three essentially different governmental activities to separate actors. In fact, a first version of the "division of powers" had

⁴ See the fundamental contribution by G. Bognetti, *La divisione dei poteri*, Giuffrè, Milan, 2001, translated as *Dividing Powers. A theory of the separation of powers*, edited by Baraggia and Vanoni, Cedam Wolters Kluwer, 2017.

⁵ See Montesquieu, C. L. de S., Baron de La Brède et de Montesquieu, *The Spirit of the Laws* (in French: *De l'esprit des lois*, Book XI).

⁶ *Ibid.*

materialized, at the institutional level, with the great English laws (i.e., the Bill of Rights and Act of Settlement) following the “glorious revolution” of 1688 – laws that, among other things, deprived the Crown of the claimed power to create legislation in derogation of common law and statutes, and guaranteed the independence of judges. Subsequently, even under the influence of the well-known theorization of Montesquieu and other political thinkers,⁷ alternative versions of the model were established in various legal systems. For example, in the constitutions of the former American colonies that had become states, as well as in the federal system of 1788.

The term “separation of powers” appears nowhere in the American Constitution. Nevertheless, the division of federal authority among three distinct but interdependent branches is one of the defining features of the American government system. Similarly, although merely the precarious result of a violent revolution, the model was also established in France with the constitution of 1791.

With reference to the judicial power that is relevant for the current contribution, the function of the judiciary – in order to guarantee that the rights of citizens would be effectively recognized and enforced, in accordance with law, in the event of a dispute – should be entrusted to a body of judges capable of judging impartially, free from undue pressure of any kind and especially of a political nature. The full independence of the judiciary from the other two Powers of the state was therefore a fundamental principle of the liberal division of powers.

The complete independence of the judiciary was recognized by all the systems that adopted the model. Under this model, the judge had to decide strictly on the basis of the pre-established positive law: this was an essential condition to ensure security of persons and avoid the property of citizens becoming compromised. It was thus necessary for the Courts to refrain from acting as semi-legislators, as sometimes occurred under the absolute state regime and in other political systems. The French Montesquieu and the American Doctrine were united and firm on this point: the judiciary must be limited to being a faithful “spokesman for the law”, impervious to temptations of creative integra-

⁷ This theory was already expressed by J. Locke in his work, *Two Treatises of Government*, Awnsham Churchill, London, 1689.

tion. Therefore, it was appropriate to consider the Judiciary a non-Power since it did not give effect to a will of its own, but to choices that were completely and exclusively of others.

Montesquieu asserted that, “*le juge n’est que la bouche qui prononce les paroles de la loi*”. Similarly, in Federalist No. 78, Alexander Hamilton wrote that the Judiciary branch of the proposed government would be the “weakest of the three branches” because “it had no influence over either the sword or the purse (...). It may truly be said to have neither FORCE nor WILL, but merely judgment.”⁸ In the same essay, the influential interpreter and promoter of the U.S. Constitution quotes Montesquieu’s comment that, “Of the three powers [...], the judiciary is next to nothing”. In order to effectively reduce the judiciary to a non-Power, the liberal era embraced the idea of a legal system composed of specific, clear, uniform rules that were seldom amended. Working with such a system, the judge was able to issue judgments that merely applied to the facts of strict “logical deductions” from the existing precepts of objective law. However, this situation changed at the end of the 19th century.

The Industrial Revolution brought radical change to every sphere of human life with the consequent rising of the “interventionist state.”⁹ The state had abandoned the principle of *laissez-faire* and began intervening extensively in civil society, including in economic and social spheres. And such intervention resulted in a “mixing” of traditional functions.

Since the end of the 1800s until the present, laws have been (and continue to be) passed with great speed – by both the legislative and executive branches, as well as by the public administration – so that, now, the legal order is no longer comprised of a few laws – our current legal system is made up of an overabundance of legal rules. Laws are not enacted only by Parliament, as was the case throughout the 1800s. Government and the public administration also issue a conspicuous quantity of standards and rules, which are additionally revised and change over time. Public administration has been granted a considerable number of

⁸ A.M. Bickel, *The Least Dangerous Branch. The Supreme Court at the Bar of Politics*, Yale University Press, September 10, 1986. See also G. Bognetti, *Diritti dell’uomo*, Digesto IV – discipline privatistiche, sez. civile, Turin, 1989, p. 383; Id, *Lo spirito del costituzionalismo americano. Breve profilo del diritto costituzionale degli Stati Uniti*, La costituzione liberale, Giappichelli, Torino, 2000.

⁹ See G. Bognetti, *supra note 4*, pp. 35–48 (English translation).

discretionary powers to carry out specific actions. The current system is made up of a gigantic mass of laws and rules, and Parliament – which, since the extension of suffrage, has been elected as a representative organ of the whole population that it serves – has progressively changed to the point that it is now very different from the nineteenth-century Parliaments in which the aristocracy and bourgeoisie issued the laws. Owing to the variation in law-making authority, the judiciary decides disputes based solely on pre-established legal rules only in exceptional circumstances.

Today, judges often rule in the second instance¹⁰ after the administrative organs have decided. The powers to regulate and resolve disputes have been greatly transferred to the bodies of the public administration. Courts no longer mechanically apply the law, regardless of how detailed. Instead, regulation, administrative action, and judging are distributed randomly, between the various Powers that make up the state.

The judiciary can no longer be considered “the least dangerous branch”. In the current context, it would be very wrong to believe that the judge continues to be the spokesman for the law: a mere implementer. The logical, mechanical jurisprudence of the nineteenth century has been replaced by jurisprudence that reflects having to apply gigantic masses of rules coming from different and poorly harmonized sources. Thus, the jurisprudence of today must inevitably adapt and develop law. This role of the judge as the creator of law has been highlighted by Mauro Cappelletti,¹¹ a well-known figure in legal doctrine. Judge-made law is no longer limited to common law countries, but also occurs in civil law systems where laws are based on written parliamentary legislation.

There is no doubt that today’s judges collaborate with the legislative system and contribute significantly to the evolution of the regulatory system of a society. The judicial apparatus often results in the integration, as well as the correction, of laws, and deeply reshapes prescrip-

¹⁰ On this matter see M. Calabrò, “Non-judicial Models of Protection: the Administrative Appeals”, *Ius Publicum Network Revue*, 1/2013 (Mai 2013), available at: http://www.ius-publicum.com/repository/uploads/13_06_2013_14_47_Non-judicial-model-of-protection_EN.pdf [last accessed 30.6.2021].

¹¹ M. Cappelletti, “Who Watches the Watchmen? A Comparative Study on Judicial Responsibility”, *The American Journal of Comparative Law*, Oxford University Press, 1983, Vol. 31, No. 1, pp. 1–62.

tive data. This presents very delicate challenges as regards the limit of a judge's corrective/innovative power in compliance with democratic principles as concerns acts of political will. However, the issue of the limits of judicial power is very complex and will not be discussed in the present contribution. Here, the discussion is limited to highlighting two instances (one German and one Italian) in which the judge has clearly taken a leading role, resulting in the Courts apparently becoming a major player in the political landscape.

II. TWO EXAMPLES OF JUDICIAL ACTIVISM IN GERMANY AND IN ITALY

As concerns the German case, in 2017, the Bundestag passed a law (the "Law to Fight Child Marriage"¹²) prohibiting child marriages, aimed at protecting girls from premature marriage. Accordingly, since July 2017, a marriage is deemed to be invalid (and thus null and void, without exception) if one of the parties was under age 16 when the wedding took place. If one partner was between 16 and 18 years of age, the German authorities may invalidate the marriage. This applies both to marriages that take place in Germany, and to marriages taking place outside of the borders of Germany.

The discussion was triggered by a Bavarian case involving the arrival of a Syrian couple – a 14-year-old girl married to her 21-year-old cousin – in August 2015, at the time of the country's so-called "migration crisis". Specifically, the case concerned the refusal by the Youth Welfare Office (the *Jugendamt*) to recognize their marriage and the subsequent separation of the girl from her husband, which caused the husband to bring legal action against the *Jugendamt*. What is interesting is that the family court in Aschaffenburg found for the *Jugendamt* (which claimed to be the girl's legal guardian), but in May 2016, an appeals court in Bam-

¹² See *Gesetzentwurf der Bundesregierung vom 17. Mai 2017, Drucksache 18/12377* available at: <https://www.bundesregierung.de/breg-de/aktuelles/ehemuendig-ab-18-jahren-481606> [last accessed 30.6.2021]. By July 2016, 1.475 foreign citizens were registered as living in Germany and being married, while being under the age of 18 years and hence being considered as children.

berg overturned the decision and ruled that the marriage was valid because it had been contracted in Syria. According to the court, since child marriages are permitted under Sharia law, they should be recognized under German law too, effectively legalizing under German law child marriages that are contracted under Sharia law. This ruling – which was defined as an “intensive course in Syrian Islamic marriage law”¹³ – provoked a storm of criticism, as the Bamberg court was said to have *applied Sharia law over German law to legalize a practice that is prohibited in Germany* [emphasis added]. In December 2018, the Federal Court of Justice (the *Bundesgerichtshof*, *BGH*), the highest court of civil and criminal jurisdiction in Germany, ruled¹⁴ that the new law prohibiting child marriages may be unconstitutional because all marriages, including child marriages regulated by the Sharia law, are protected by German Basic Law (*Grundgesetz*). According to many, these judgments, which in fact open the door to the legalization in Germany of child marriages regulated by Sharia law, *are one of the many cases in which German courts – intentionally or unintentionally – promote the creation of a parallel Islamic legal system in the country.*¹⁵ Rightly so, then, the Federal Constitutional Court is now reviewing whether the law does in fact violate the Constitution.¹⁶

¹³ See the opinion of Winfried Bausback, Bavarian Minister of Justice at that time, available at: <http://www.bayern.de/bundesrat-stellt-sich-hinter-die-nichtigkeitsloesung-bei-der-kinderehe-bayerns-justizminister-bausback-die-beste-loesung-fuer-den-schutz-junger-maedchen-setzt-sich-durch/> [last accessed 30.6.2021].

¹⁴ See http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=pm&pm_nummer=0186/18 [last accessed 30.6.2021].

¹⁵ Representatives of the Christian Democratic Union of Germany (CDU) and the Christian Social Union of Bavaria (CSU) have stated “children belong in school, not in a marriage bed”. See for example the opinion of the Bundestag member Christina Schwarzer available at: <https://christina-schwarzer.de/schwarzer-gegen-kinderehe/> [last accessed 30.6.2021]. In February 2017 the German Minister of Justice had introduced his new draft legislation on child marriages with a similar media-effective catch phrase: ‘Girls belong in school, and not in front of the altar’. Similarly, the then Minister of Justice, Heiko Maas (of the Social Democratic Party of Germany, SPD), declared “children should play, learn, and become independent. Only when they have become adults should they freely decide whether and whom to marry. See *Gesetz gegen Kinderehen. Das ist aus den neuen Regeln in Deutschland geworden*, in Focus online, currently available at: https://www.focus.de/politik/deutschland/gesetz-gegen-kinderehen-das-ist-aus-den-neuen-regeln-geworden_id_9973544.html [last accessed 30.6.2021].

¹⁶ The question of whether some foreign marriages that do not fulfil the requirements under the laws of Western countries are nevertheless worthy of protection is

Instead, when it comes to judicial activism in Italy, the decisions by a number of courts permitting stepchild adoption (or the possibility for same-sex couples to adopt children), despite the wishes of Parliament is a prime example of how our court¹⁷ system currently shapes national law. Indeed, after a long parliamentary debate, the law on civil unions (Cirinnà Law) excluded possibility of such adoption. With Law no. 76 of 20 May 2016, the Italian Parliament enacted legislation to regulate civil unions between persons of the same sex,¹⁸ thereby reforming family law in a manner that is destined to have far-reaching consequences for Italian law and more generally on society as a whole. The Cirinnà Law – which takes the name of the Senator who sponsored the bill, and has been welcomed by many as an act of civility – resulted from a com-

a very sensitive issue as is clear from the experience of Denmark. According to the law enacted in 2016, couples seeking asylum in Denmark can be separated if one party is younger than 18. In fact, under Danish law, each couple must be assessed *individually*. The centre-right politician Inger Støjberg, who served as Immigration Minister from 2015 to 2019 is now facing a rarely-used impeachment procedure for illegally ordering the separation of *all* underage couples seeking asylum. In total, during her mandate, 23 couples were separated. Most of the women among the separated couples were between the ages of 15 and 17 and came from Syria. Some couples had already had children, or the women were expecting children. A team of academics led by Nadjma Yassari and Ralf Michaels has authored a comparative assessment for the German Federal Constitutional Court that examines the phenomenon of early marriage in the context of various legal systems and cultures. See Max-Planck-Institut für ausländisches und internationales Privatrecht, *Die Frühehe im Rechtsvergleich: Praxis, Sachrecht, Kollisionsrecht*, (Early Marriage in Comparative Law: Practice, Substantive Law, Choice of Law), *Rabel Journal of Comparative and International Private Law (RabelsZ)*, Vol. 84, No. 4, pp. 705–785, October 2020, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3730202 [last accessed 30.6.2021]. See also Nadjma Yassari and Ralf Michaels (eds), *Die Frühehe im Recht Praxis, Rechtsvergleich, Kollisionsrecht höherrangiges Recht*, Mohr Siebeck, Tübingen, 2021.

¹⁷ Also in other countries the Courts have *de facto* permitted surrogate motherhood even though it is prohibited by law. See for example German Federal Court of Justice (*Bundesgerichtshof*), judgment of 10 December 2014. See also Spanish Supreme Court (*Tribunal Supremo*), judgment of 20 October 2016.

¹⁸ The law entered into force on 5 June 2016. See law on civil unions and formal cohabitation (*Regolamentazione delle unioni civili tra persone dello stesso sesso e disciplina delle convivenze*) currently available at: <http://www.gazzettaufficiale.it/eli/id/2016/05/21/16G00082/sg> [last accessed 30.6.2021]. See G. M. Cavaletto, “Civil Unions in Italy”, *Italian Politics*, Vol. 32 (2017), p. 194, Berghahn Books. See also E. Povoledo, “Italy Approves Same-Sex Civil Unions”, *The New York Times*, 11 May 2016.

promise¹⁹ and thus leaves many unanswered questions. The very term “civil unions”, as opposed to “marriage”, was born out of compromise. The law sparked off a broad debate concerning a core issue within Italian policymaking and doctrine:²⁰ the issuing of the growing importance of the judiciary compared to the representative political power of Parliament.

An evident demonstration of the delicate compromise struck by the Cirinnà Law between contrasting political forces is provided by the issue of the above-mentioned so-called “step-child adoption”, i.e. the adoption of the biological child of a cohabitee. Having been originally provided for in the draft legislation, it was removed following numerous public demonstrations²¹ on the basis of an agreement reached with

¹⁹ Italian legislation does not refer to *marriage* between persons of the same sex. This is due to the strong opposition encountered by the draft legislation both in Parliament and on the streets, along with a landmark decision of the Constitutional Court from 2010. In judgment 138 of that year the Court in fact held that, within the Italian system of constitutional law, there is no inseparable link between the concept of marriage and the concept of a family comprised of two people of the opposite sex. Also in the judgment no. 170 of 2001 the Constitutional Court has held that the difference in sex of the married couple is an indispensable prerequisite for the existence of a marriage. The Constitutional Court held that “all legislation governing the institution of marriage contained in the Civil Code and in special legislation postulates the difference in sex of the married couple against the backdrop of a consolidated concept of marriage dating back thousands of years” which is implemented by Article 29 of the Constitution. (See judgment no. 138 of 2010 of the Constitutional Court, Conclusions on points of law, no. 6). The Court points out that the academic literature reaches the same conclusion, and the majority of it is minded to conclude that any same-sex marriage will be void, even though some commentators speak of invalidity. See A. Sperti, *Constitutional Courts, Gay Rights and Sexual Orientation Equality*, Hart Publishing, Oxford, 2019.

²⁰ The literature in this area is vast. We limit ourselves to noting two recent works by illustrious authors in support of opposing views. See S. Cassese, *I tribunali di Babele. I giudici alla ricerca di un nuovo ordine globale*, Donzelli, Rome, 2009 and G. Valditara, *Giudici e legge*, Pagine, Rome, 2015. For an overview (in English) of the problems relating the role of the Judiciary in Italy and in other western countries, see L. Pineschi (eds.), *General Principles of Law – The role of the Judiciary*, Ius Gentium, Comparative Perspectives on Law and Justice, Vol, 46, Springer, 2015.

²¹ On 30th January 2016, two million people gathered at Rome’s Circus Maximus to demonstrate against the Cirinnà Law. Indeed the law was enacted against an extremely turbulent legislative backdrop, following a procedure that was forcibly expedited and inappropriate. See D. Agasso, *Family Day participants: “We are here for the family, we are not against anyone*, 30 January 2016, <https://www.lastampa.it/vatican-insider/>

great difficulty between the governing majority and the centre-right opposition, on the grounds that the stepchild adoption provision is a “Trojan horse” that could undermine the prohibition of surrogacy in Italy. In contrast to several European countries, surrogate motherhood in Italy is still strictly prohibited.²² This is apparent, not only from paragraph 20 of the Cirinnà law, but also – extremely clearly – from Law 40/2004,²³ which sets out the rules for assisted reproductive technology (ART).

en/2016/01/30/news/family-day-participants-we-are-here-for-the-family-we-are-not-against-anyone-1.36556815 [last accessed 30.6.2021].

²² According to leading figures in the LGBT movement and many other politicians, it would enable Italy, as a backward country with deep-seated discrimination, to cast aside a mediaeval mindset, enabling the concept of parental responsibility to be expanded to the couple irrespective of sexual orientation. See la Repubblica, “*Unioni civili, Cirinnà: “Quasi pronto ddl sulle adozioni gay”*”, 26 february 2016, available at: http://www.repubblica.it/politica/2016/02/26/news/unioni_civii_cirinna_-134271079/ [last accessed 30.6.2021]. According to many, this practice “seriously violates the rights of women and children. It commodifies the female body, maternity, and human life, and should be combated in all of its manifestations, and indeed outlawed on an international level”. See the interview of Elena Centemero, President of the Equality and Non Discrimination Commission Council of Europe available at: <http://www.ilgiornale.it/news/politica/adozioni-gay-centemero-fi-pratica-legata-maternit-surrogata-1356008.html/> [last accessed 30.6.2021].

²³ See the Law 10 February 2004, the Italian Parliament, which was enacted by Parliament after a very long period of consideration. The law begins with the statement that recourse to ART is allowed only in order to assist in the resolution of reproductive problems arising as *a result of human sterility or infertility* [emphasis added], so as to guarantee the rights of all the persons involved, including the “embryo” (Article 1). After this initial statement, the law lists a long series of prohibitions. In particular, recourse to the assistance of a third party is expressly forbidden. Breaches of the ban are punished by heavy fines (between 600,000 and 1 million euros) or even imprisonment (3 months to two years, see Paragraph 6 of Article 12). It is not superfluous to note that according to a decision of the Court of Cassation issued in 2014 in a complex case, a child was removed from parents who had paid a surrogate mother in Ukraine. The couple were charged with fraud and the child was put up for adoption. The Court of Cassation confirmed the overall findings of the Brescia Court of Appeal. Neither of the two parents was actually a parent of the minor. Thus, even according to Ukrainian law, which provides that at least 50% of the genetic heritage must originate from the commissioning couple, the surrogacy contract was to be considered void. The couple was investigated for interference with civil status and the removal of the child from the applicant couple was “justified” also by the unlawful conduct of the declarants in wilfully seeking to circumvent the Italian legislation. The decision is available at: <https://www.penalecontem->

Despite the ban on surrogacy in the 2004 Law, taking advantage of the loopholes in the Cirinnà law, the Italian courts have begun to allow surrogacy.²⁴ In February 2017, the Trento Court of Appeal ruled for the

poraneo.it/upload/1394865082TRIBUNALE_BRESCIA_FECONDAZIONE.doc.pdf [last accessed 30.6.2021].

²⁴ In a landmark ruling, the Trento Court of Appeal decided that both applicants – a male couple, both Italian – could be officially named as the father – and not just the parent who was biologically related. See order of the Court of Appeal of Trento of 27 February 2017, available at: <http://www.articolo29.it/wp-content/uploads/2017/02/Ordinanza.pdf>. [last accessed 30.6.2021]. In its decision, the court held that parental relationships in Italy should not be determined only by the biological link. “On the contrary, one must consider the importance of parental responsibility, which manifests itself in the conscious decision to raise and care for the child”. The decision by the Trento Court of Appeal gave full validity and effect in Italy to the decision of the Supreme Court of Canada, a country in which children acquire citizenship according to the *jus soli*, ruling “unlawful the refusal by the civil registrar of a municipality in the Trentino region to add the second father to the birth certificate” and recognizing the need to safeguard the needs of the child. A few months after the ruling of the Trento Court of Appeal, a court in Florence (see order 7 March 2017, Florence Juvenile Court) recognized the overseas adoptions of children by two same-sex couples in rulings which were hailed by the gay rights community as a new step for Italy. The Juvenile Court has recognized British and U.S. adoptions as legal in Italy, allowing the Italian citizenship of the parents to be passed on to the children. Also the judgment of the Milan Court of Appeal is situated within this line of case law, albeit with its own particular circumstances. (See order of the Court of Appeal of Milan of 28 October 2016, currently available at: <http://www.articolo29.it/wp-content/uploads/2017/01/Corte-app-Milano-trascrizione-nascita-gemelli.pdf> [last accessed 30.6.2021]). As for the other case, it concerned a homosexual couple which sought to register two twins born in California following recourse to in vitro fertilization and surrogate motherhood. The civil registrar in Milan refused to register the babies’ birth certificates, barring the men from registering the boys as their legal children. At first the Court of Milan found against them, although the couple subsequently appealed and the Court of Appeal of Milan *partially* granted their request. As the men had used separate semen samples to inseminate the eggs, the court held that each of them could now register his biological child as his own. However, the babies could not be recognized as the children of the couple, and cannot be considered brothers, even though they share the same genetic mother, who donated both eggs. Despite these special circumstances – reflecting a situation that arises only in very rare cases as twins are normally conceived at the same time– the judgment is worthy of note: it represents the first occasion that an Italian court has established that a child’s best interest comes before [the legality of] how he or she was born. It is not superfluous to note that in the world of human embryology, the birth of twins to two different fathers (bi-paternal twins) is not unheard of, but is very rare. The so called “heteropaternal superfecundation” is rather common in the animal world. Finally it is also important to note a recent judgment of

first time that two gay partners should be legally recognized as the fathers of two children born to a surrogate mother in Canada through artificial insemination. Thus, Italian same-sex couples have now started to petition the courts on a case-by-case basis to recognize adoptions granted overseas. The President of a gay parents' group asserted that litigation "is the only way that we can safeguard our children. In the absence of clear laws we hope now that all Italian courts follow this path".²⁵ So this is what is happening.

Indeed the Cirinnà Law contains various ambiguous formulations, which appear to throw into relief the legislature's choice to grant formal recognition to situations of cohabitation, whilst however leaving to the courts the definition of the most problematic aspects of the legislation for the governing majority. The relationship between judges and the law, which is construed in such a manner as to give less importance to the text of the legislation as compared with the specific facts of the case to be resolved, is particularly delicate in relation to laws for which the intention of the legislature is subjected to the ability of the courts to "adapt" it to the needs of society – especially if that intention is fuzzy as in this case. The role assumed by the judiciary, having been called upon to resolve the ambiguity and plug the gaps in the law, is very evident, and has made possible the birth of "new families" using surrogate mothers, even though this contrasts with the limits laid down under national law.

Some commentators²⁶ consider that the judgments allowing for two fathers or two mothers, which have been recognized in spite of the fact

the Court of Cassation, which allowed the registration in the civil registry of a foreign birth certificate in which two mothers were indicated. Court of Cassation, Civil Division, judgment of 26 October 2016 – 15 June 2017, n. 14878.

²⁵ See Marilena Grassadonia's interview on Italian television, currently available at: <http://www.rainews.it/dl/rainews/articoli/storica-decisione-a-Trento-si-asi-genitorialita-coppia-papa-f9f248cc-d177-4a65-afc3-4ae369449230.html> [last accessed 30.6.2021].

²⁶ See the interview of Cesare Mirabelli, former President of the Constitutional Court, available at: <https://www.avvenire.it/famiglia-e-vita/pagine/il-ddl-cirinn-a-rischio-incostituzionalit-> [last accessed 30.6.2021]. M. Finocchiaro, "Quel "vizio" ricorrente di anticipare le scelte devolute al legislatore", in *Guida al Diritto, Sole24Ore*, 2017, Issue 28, p. 59. See also C. Cardia, *L'inumano strappo. Utero in affitto e diritti fondamentali* in *Avvenire*, 2017, available at: <https://www.avvenire.it/opinioni/pagine/l-inumano-strappo> [last accessed 30.6.2021].

that a prerequisite for this is the use of a surrogate mother (i.e. a practice not in any way permitted under Italian law), are indicative of *inappropriate lawmaking activity* on the part of the courts. According to an even more radical thesis, a “de facto subversive operation” is in progress which is “justified by a highly precise political goal: altering the legal order of the state in a ‘progressive’ manner through interpretation of the law in the light of constitutional principles, thereby achieving change that free elections and parliamentary majorities have been unable to secure”.²⁷

It was under these controversial circumstances that the Constitutional Court issued its recent judgment, no. 33 of 9 March 2021, in which it was called upon to rule on this judicial activism specifically in the light of the fact that surrogate pregnancy is prohibited in Italy.²⁸

The Court ruled on the question raised by the Court of Cassation as to whether it is constitutional for the Italian judicial authorities to refuse to give effect to a foreign decree that has recognized two Italian men, who have entered into a civil partnership, as the parents of a child born abroad to a surrogate mother.

The Constitutional Court started by reiterating that the prohibition on surrogate pregnancy, which is enshrined in criminal law, pursues the objective of protecting the dignity of women whilst also seeking to avoid the risk of particularly vulnerable women being exploited owing to circumstances of social and economic hardship. As a consequence, the Court ruled the question inadmissible, while stressing the need for urgent legislation to ensure due protection of the child’s best interests, including recognition of the legal relationship with the non-biological parent.²⁹ In calling on the legislator to take action, the Court thus held that it was not possible to recognize in Italy foreign rulings establishing parent-child relationships.

²⁷ G. Valditara, *supra note* 20, p. 143.

²⁸ See <https://www.gazzettaufficiale.it/eli/id/2021/03/10/T-210033/s1> [last accessed 30.6.2021].

²⁹ Judgment No. 33 of 2021, in English available at: <https://www.cortecostituzionale.it/actionRicercaSemantica.do>.

III. THE INDEPENDENCE OF THE JUDGE IN THE ITALIAN CONSTITUTION

At the time the new Constitution was created (i.e., 1948), the independence of the judiciary was an extremely important principle in Italy, as illustrated by the legal dissertations of the competent authorities and consultations of the minutes and preparatory acts. Piero Calamandrei, a great jurist and member of the Constituent Assembly, said that the separation between justice and politics is the “beating heart”³⁰ of the separation of powers.

After the dramatic fascist experience, Italy had to be rebuilt morally and legally. In this regard, it is important to note that the Italian Constitution is the product of the patient work of compromise of the Constituent Fathers (who belonged to deeply heterogeneous political forces), and that this has influenced the role assigned to the judiciary.

The Italian Constitution amounts to the end-point of a political process that started with the fall of Fascism, followed by the assertion by anti-fascist political parties organized into the Committee of National Liberation (C.L.N.) of their leading role within that political process. Despite being profoundly divided amongst themselves, these political parties shared the common aim of creating a state that was not only diametrically opposed to the fascist state but also, broadly speaking, substantially different from the pre-fascist state.

The essential values of the democratic state, such as freedom, equality, and solidarity, represent the *common* starting points of the political forces present within the Constituent Assembly, as the conceptual and foundational basis for the new Constitution. Leaving aside these *common elements* for the various political groupings present within the Constituent Assembly, it is important to note the highly heterogeneous and profoundly diverse composition of the ideological groupings represent-

³⁰ See the speech on the Government and judiciary, read on 13 November 1921 at the University of Siena (at which time he was a tenured professor), published in the volume “*Governo e Magistratura*”, in *Opere giuridiche*, edited by Mario Cappelletti, volume II, Morano Napoli (1966), p. 195. This speech makes evident the clear denunciation of the undue interference of the executive in judicial activity, in a period in which Fascism was catching on in Italy.

ed by the deputies elected within the Constituent Assembly. This was certainly a cause for the compromise status of various rules within the Constitution, and indeed of the Constitution as a whole. There is full agreement within the literature concerning the fact that the Italian Constitution is the result of a compromise between Catholic, Liberal, Socialist, and Marxist political forces.³¹

It is important to underline that both sides of the political spectrum were driven by the concern that the other side would win: Catholics and Liberals thought that the success of the left meant adopting the Soviet model; Socialist and Marxist political forces, instead, thought the Centre Alliance meant fascist restoration. The result was a strong push to guarantee the independence of judges and their absolute alienation from politics.

The Republican Constitution of 1948, therefore, was particularly careful to establish appropriate mechanisms to ensure the independence and impartiality of judges. Indeed, the judiciary must be independent and impartial if it is to adequately and properly perform its duty of ensuring that the rules of the legal system are respected and rigorously applied.³²

A judiciary that succumbs to the demands of politics is not in the position to provide all citizens with the essential benefit of legal certainty. The Italian Constitution therefore consecrates, in its second part, the entire Title IV of the Judiciary (Articles 101-113). Article 101 establishes in its first paragraph that "Justice is administered in the name of the people". The second paragraph states "Judges are subject only to the law". The wording of Article 101 is deliberately short and concise. The Constituents conceived it as "an epigraph",³³ as an initial word in the whole

³¹ See M. Einaudi, "The Constitution of the Italian Republic", *The American Political Science Review*, Vol. 42, No. 4 (Aug., 1948), pp. 661-676. See also G. Amato (Prime Minister of Italy from June 1992 to April 1993 and from April 2000 to June 2000 and current judge of the Constitutional Court), "Italy, The rise and Decline of a System of Government", *4 Indiana International & Comparative Law Review*, 225 (1994), especially p. 226.

³² See Report on Part Two of the draft Constitution: Title IV "The Judiciary", Title VI "Constitutional guarantees", Article 101, afternoon session 6 November 1947, currently available at: <https://www.nascitacostituzione.it/03p2/04t4/s1/101/index.htm?art101-016.htm&2> [last accessed 30.6.2021].

³³ See M. Ruini, Presidente della Commissione per la Costituzione, *Atti dell'Assemblea Costituente*, Session 20 November 1947.

of Title IV dedicated to the Judiciary; the shorter and more lapidary, the better. The first paragraph “Justice is administered in the name of the people”, paraphrases Article 68 of the Albertine Statute “justice is administered in the name of...”, except the words “the king” are replaced with “the people”.

By comparing the provision from the Albertine³⁴ Statute with the Constitution, it is possible to grasp the meaning and the extent to which developments in the principles of jurisdiction have taken place. The judicial system that existed in Italy, at a time when the Constituent Assembly made its choices on the question of justice, derived substantially from the judicial organization established in the Kingdom of Sardinia, and adapted the Napoleonic organizational model of the Judiciary that was dependent on the Minister of Justice and based on the French bureaucratic model.

In the statutory period, the judiciary was configured as a hierarchically organized administrative structure on which the Government, and in particular the Minister of Justice,³⁵ exercised relevant functions. Articles 68-73 of the Albertine Statute dedicated to the judicial order contained few and general principles connoted by transparent stratification of monarchic absolutism. Article 68 sanctioned the direct emanation of justice from the king and the administration of justice by the judges he appointed. The following provisions, while consecrating the principle of the immobility of judges³⁶ (but not for all: for example, judges with less than three years’ service were excluded) did not confer on the judiciary the legal order that was (and still is) a necessary precondition for an autonomous and independent body.

³⁴ As is known, the Albertine Statute (4 March 1848) was a constitution granted to his subjects by King Charles Albert of Piedmont-Sardinia. It became the constitution of the Kingdom of Italy when Italy was unified under Piedmontese leadership in 1861 and remained in force, albeit with changes, until 1944. In the two-year period from 1944 to 1946, with successive legislative decrees, a transitional constitutional regime was adopted that remained valid until the entry into force of the Constitution of 1 January 1948.

³⁵ According to the criterion traditionally accepted up to that time in Italy, questions relating to the recruitment and careers of judges were attributed to a governing body, namely the Minister of Justice.

³⁶ Art. 68 provided “justice emanates from the King and is administered in his name by the magistrates he appoints”.

In the Italian Constitution, the independence of the judiciary is enshrined in Article 104, according to which, "The Judiciary is a branch that is autonomous and independent of all other powers". The Constitution has not only set out these fundamental principles, but has also taken appropriate steps to ensure their implementation. To this end, the Constitution appropriately amended the traditional criterion of that period, which founded the Minister of Justice's decisions relating to the recruitment and career of judges. In fact, it is clear that when the government has the power to decide on the career of judges – as evidenced in the Proceedings of the Constituent Assembly – it also has the power to influence, albeit indirectly, the performance of the judicial function in order to obtain, in certain disputes in which it has a particular interest, decisions in accordance with its wishes. Breaking with this experience, the Constituent Assembly wanted to consecrate the constitutional guarantees of independence of the judiciary by removing this competence from the Minister of Justice and assigning it to a new body established by him: the High Council of the Judiciary. In the new system, the Minister performs administrative functions that simply concern "the organization and operation of services relating to justice" (in accordance with Article 110 of the Constitution). The constitutional provision in Article 104, which proclaims the autonomy and independence of the judiciary from all other Powers, is therefore a fundamental provision that marks an important break with the past.

The Constituent Assembly came to the formulation of the provision just mentioned, following an extensive debate in which there emerged in a clear manner the idea of making the ordinary judiciary a Power of the State separate from the other Powers. This last solution was especially supported by those³⁷ who were well aware of the conditioning and interference that the executive had exerted on the judiciary in the pre-Republican period. The independence of the judiciary refers to the judiciary as a whole, but it is a constitutional guarantee intended to impact the concrete exercise of the jurisdictional function that pro-

³⁷ See Piero Calamandrei according to whom "it is a very serious attack on the separation of powers ... To affirm on the one hand that the law is the same for all and on the other hand leave to the executive power the possibility of making it observed only in cases where it does not bother the party that is in government is such a nonsense that it is not worth spending many words" in *"Governo e magistratura"*, p. 203.

protects each single magistrate from any conditioning that may derive from Powers other than the judicial.

Article 107 states that magistrates are immovable: this means that magistrates, without their consent, may not be transferred to a place other than the one they have been previously assigned. It also provides for the possibility that a judge may be transferred to another location (again, by order of the High Council of the Judiciary) if he is unable to administer justice at his place of residence in the conditions required by the prestige of the judiciary.

IV. THE HIGH COUNCIL OF THE JUDICIARY (CSM)

To guarantee the autonomy and independence of the judiciary, the Italian Constitution provides that all measures concerning the career and, in general, the status of ordinary magistrates must be adopted by a body that is detached from the government.³⁸

Judges are civil servants: if these tasks had not been entrusted to the CSM, it would not have been possible to prevent the government from using the administrative powers relating to the career and status of such officials to influence the autonomy of the individual judiciary, as was the case in the previous system.

According to Article 104, the High Council of the Judiciary is presided over by the President of the Republic. The first president and the general prosecutor of the Court of Cassation are members by right. All the ordinary judges belonging to the various categories elect two thirds of the members, and one third are elected by Parliament in joint session from among university professors of law and lawyers with fifteen years of practice. The Council elects a vice-president from among those members designated by Parliament. Elected members of the Council remain in office for four years and cannot be immediately re-elected. They may not, while in office, be registered in professional rolls, nor serve in Parliament or on a Regional Council. The High Council of the Judiciary is therefore elected by a very large majority (two thirds, precisely), and by

³⁸ See https://www.ency.eu/images/stories/pdf/factsheets/italy_csm.pdf [last accessed 30.6.2021].

the body of all the magistrates voting on a perfectly equal footing with one another.

The Constitution does not establish a number of required members of the CSM, but merely establishes the relationship between those elected by the magistrates (the so-called “togated” members) elected by their peers, and the lay members, i.e. two thirds and one third. With the presence of the latter, the constituents wanted to prevent the autonomy and independence of the judiciary from being transformed into the creation of a sort of caste separated from all the powers of the State and jealous of its privileges. For the same reason, the Presidency has been given to the Head of State, even if the presidency is predominantly symbolic.

The implementation of these specific constitutional provisions has always been the subject of debate and controversy, which, as mentioned above, has been exacerbated considerably in recent times. In particular, the question of the choice of the type of electoral system by which to elect the judges as members is very controversial. For this reason, since 1958, the year the CSM was created, six laws have been created to date – one after the other, the last being passed in 2002. Prior to the 2002 reform, there were 20 togated members and 10 lay members. Now, however, there are 16 togated members and 8 lay members.

It should be noted that the electoral system of the CSM by the same magistrates inevitably causes opposing groups to form within the association and encourages competition between members. As long as this system is in force, we must expect a judiciary that is internally divided into organized factions, which carries the risk of a degeneration of the Judiciary.

All this is capable of compromising the independence of the single judge and his ability to decide without outside influence, which is a fundamental feature of a well-organized judiciary in a democracy. If it were possible to adopt the method of drawing lots for judges, this would perhaps be an appropriate antidote to any temptation to over-associate. In this regard, it seems useful to recall here the constitutional provision of Article 98, paragraph 3, which highlights how the Constituents sought to ensure the independence of the Judiciary. It states, “the law may set

limitations on the right to become members of political parties in the case of magistrates”.³⁹ Nonetheless, a law has never been enacted.

On this point, however, there is a recent decision of the Constitutional Court⁴⁰ that stated that magistrates cannot participate in a “systematic and continuous” way in political parties. This is a principle that the Constitutional Court established by ruling on the so-called “Emiliano affair”, involving the Governor of Puglia, former Mayor of Bari, who was a public prosecutor before entering politics and was also subject to a disciplinary process.⁴¹

CONCLUDING REMARKS

Without entering into an extremely complex series of problems, which cannot be addressed in this study, I will set out several grounds for reflection on the controversial relationship between the judiciary and politics in Italy.⁴² In this context, it was stated that “a magistrate should be and should appear to be ‘a priest of the law’, to use an emphatic expres-

³⁹ Magistrates are not the only category of citizens whose right to associate may be limited: this rule also applies to categories such as professional soldiers in active service, police officers and agents, and diplomatic and consular representatives abroad. See Article 98 of the Constitution.

⁴⁰ See judgment No. 170 of 4 July 2018 currently available at: <https://www.cortecostituzionale.it/actionSchedaPronuncia.do?anno=2018&numero=170> [last accessed 30.6.2021].

⁴¹ See G.F. Ferrari, “Italian Perspectives on the Judiciary”, *International Journal for Court Administration*, Volume 10, Issue 1, 2019, currently available at: <file:///C:/Users/USER/Downloads/265-1036-1-PB.pdf>; Id, G.F. Ferrari, “Judicial Independence in Italy”, in Shimon Shetreet, Wayne McCormack (eds.), *The Culture of Judicial Independence in a Globalised World*, Brill Nijhoff, Leiden Boston, 2016, p. 61. With reference to the political foundations of judicial independence in the European Union, see Di P. P. de Albuquerque, K. Wojtyczek (eds.), *Judicial Power in a globalized World: Liber Amicorum Vincent de Gaetano*, Springer, 2019.

⁴² There is an extremely rich literature on Judicial Power. In particular, the issue of the relationship between the judiciary and politics has been engaged with in the Italian literature on such a scale that even an attempt to present an account of it in this study would be extremely arduous and indeed most likely inappropriate. We shall thus limit ourselves to referring to various commentaries on the Constitution (Articles 98, paragraph 3) along with the extremely comprehensive bibliography provided in these. In English language see above the previous note.

sion". And it is not acceptable that, after spending a few years as major, regional administrator, parliamentarian, or minister, a magistrate goes and sits again on the judge's bench.⁴³ In fact, a magistrate can participate in politics in many ways and party membership is just the most obvious way. For example, those magistrates who belonged to a certain drift of the Judiciary, who several months before the constitutional referendum of 4 December 2016 decided to join and publicly ride the campaign for "No" with a manifesto that defined the Renzi government as "authoritarian", were not registered with parties.

The taking of such a public position by the Judiciary (or of a substantial portion on it) regarding the merit of a Constitutional reform in progress cannot but arouse great apprehension. In doing so, the Judiciary projects itself into the political struggle and competes, as a party between the parties, in the process of legislative formation of the law.

Disquieting events of this kind have occurred with some frequency recently (even with reference to laws that are in the process of being formed or have just entered into force), and judges have defended themselves by asserting their right to express their opinions like all citizens, especially in matters in which they have particular expertise. But this is a groundless defence. Citizens, by virtue of Article 21 of the Constitution,⁴⁴ have the right to criticize laws and judgments. But for the organs of the State, the logic of the division of powers comes into play, which, among other things, implies obligations of confidentiality and indirect support towards the bodies that perform the other state functions, and therefore also a certain limitation on the right to express oneself.

If the Executive branch were to openly criticize judgments of the Judiciary, the latter would have good reason to consider such an act as an affliction (and this claim is substantiated by the legitimate, vehement protests by judges that occurred a few years after a Prime Minister dared to attack the conduct of a judicial body). Similarly, public criticism or reproach of a law or measure by some other power by magistrates to

⁴³ S. Cassese, *La svolta, Dialoghi sulla politica che cambia*, Il Mulino, Bologna, 2019, p. 214.

⁴⁴ Art. 21 of the Constitution: Everyone has the right to freely express their thoughts in speech, writing, or any other form of communication.

the press or media constitutes a serious violation of those rules of constitutional correctness that must govern the relations between Powers.⁴⁵

These rules are flexible, especially in situations of general crisis. However, the importance of their utmost respect cannot be questioned. By behaving differently, judges cause the Judiciary to deviate from its function established by the Constitution, creating a situation in which, before the eyes of the public, the Judiciary, if organized cohesively, will have become a formidable political pressure group which may be combated by opponents with the same forms of propaganda that are used in the struggle between parties; and, if it becomes divided within itself, the same disheartening spectacle of factions that depict the current struggle between established political parties will be duplicated.

And yet, in Italy, we see too often magistrates (especially those of the ubiquitous public prosecutors' offices, who are leaders in matters of competition, the environment, public morality, and so on) on the front pages of newspapers. They wind up being tempted by politics and aspire to become mayors, council chairmen of regions, and/or parliamentarians, by exploiting the popularity they gained as a result of their office. Since 1994, the number of parliamentary magistrates has tripled compared to the previous period.

This weight of magistrates in the public sphere causes us to wonder, first of all, if their career adequately prepares them for this new role. It should also be noted that "taking part", siding with a party, is the oppo-

⁴⁵ It is quite serious that the former Prime Minister Silvio Berlusconi has often condemned the work of judges. A distinguishing feature of the Berlusconi era has undoubtedly been his personal conflict with the judiciary. See C. Dallara, "Powerful resistance against a long-running personal crusade: the impact of Silvio Berlusconi on the Italian judicial system", *Cambridge University Press*, Volume 20 Issue 1, February 2015, pp. 59–76. Similarly, the author considers it to be equally serious that supreme court judges are not refraining from open criticism of other organs of the State. Piercamillo Davigo, one of Italy's most prominent judges, who headed Italy's national association of magistrates, has often said magistrates' powers to tackle corruption and tax evasion had been weakened by lenient legislation brought in by former centre-right Prime Minister Silvio Berlusconi and also by former centre-left Prime Minister Matteo Renzi. See Piercamillo Davigo, interview with/in the Italian newspaper «*Il Corriere della Sera*», currently available at: https://www.corriere.it/politica/16_aprile_22/davigo-politici-continuano-rubare-ma-non-si-vergognano-piu-86ad1ea2-07f3-11e6-baf8-98a4d70964e5.shtml [last accessed 30.6.2021].

site of the impartiality that is required by the Constitution from the Judiciary, pursuant to Article 98.

The Judiciary should contribute to the life of the legal system by limiting its expression to the field of its strict competence: issuing judgments, producing jurisprudence. Judges should increasingly adhere to the rule of not going on television, not giving interviews, not signing posters, not raising public protests against measures taken by political authorities. They should rediscover the obligation to abstain, which is, above all, one of the prerequisites for independence, the duty to break with politics, which is dominated by parties and is, by its very nature, the opposite of impartiality.

Moreover, it is inappropriate for the Judiciary to take part in associative structures that do more than protect their professional interests, but rather express an ideological-political orientation. With respect, the magistrates who belong to these “groups”⁴⁶ do not recognize that their bond can limit their full autonomy and freedom of conscience.

In the eyes of the public, if magistrates are divided into organized factions, the creative production of rules on their part comes to closely resemble the process of politics.

This would lead to the loss of prestige (at the very least) of a creative jurisprudence that is also not responsible to the electoral body. It is not superfluous to recall the teaching of the Strasbourg Court that judges must not only be independent but must also appear independent.⁴⁷

⁴⁶ Reference is made to so-called judges’ associations that are characterized by profound ideological differences. Italian judges have usually divided in factions, whose alignment reflects the traditional ideological left-right division. On this issue see Andrea Ceron and Marco Mainenti, *Toga Party: The Political Basis of Judicial Investigations against MPs in Italy (1983–2013)*, XXVII Convention of the Italian Society of Political Science (SISP), Firenze, 12–14 September 2013 currently available at: <https://www.sisp.it/files/papers/2013/andrea-eron-and-marco-mainenti-1512.pdf> [last accessed 30.6.2021]. The authors point out that the judges’ political affiliations are estimated based on the different levels of support for the different factions within the ANM (the National Judiciary Association). Results show that the political affiliation of judges significantly affects decisions over whether to prosecute certain parties rather than others.

⁴⁷ See *McGonnell vs United Kingdom*, 8 February 2000, European Court of Human Rights, Third Section, available at: <https://www.legal-tools.org/doc/190896/pdf/> [last accessed 30.6.2021].

In conclusion, although the principle of the division of powers is no longer the same as it was in the nineteenth century, and the judge is no longer the “mouth of the law”, the relationship of a Judiciary that shapes the law towards a Parliament that makes laws (and a Government that issues legislative decrees) must be, in a democracy, one of great formal respect.

A judge’s work is naturally performed through judgments. Judgments and jurisprudence, by way of reasonable arguments, can also correct any arbitrary will (should a law be deemed so) of the legislator. And the judge can in any event question the law by deferring to the Constitutional Court, in order to protect the essential values of the legal system. It is paramount that magistrates are aware of the grave risk of politicizing their role, a risk that the Constituent Fathers unequivocally understood, and that they avoid participating in pre-established formations. The fight against the politicization of the Judiciary can only begin with the judiciary itself.

To conclude I want to mention once more the warning of the eminent jurist Piero Calamandrei who stated that “When politics comes through the door of the judiciary, justice goes out of the window”.⁴⁸

We do not know where the current government’s efforts at reform will lead. It is to be hoped that the wise teachings of the Founding Fathers will never be lost sight of.

⁴⁸ Piero Calamandrei, cited in Indro Montanelli, *Il testimone*, edited by Manlio Cancogni and Piero Malvolti, Longanesi, Milano, 1992, p. 46.