Medel Audit Project
Simplified Questionnaire

ITALY

General remark:
In the Italian system, Judges and Prosecutors are part of a unified system; in Italian, the two categories go under the common name of "Magistrati".
Although the word "Magistrates" has a different meaning in English, it is employed in this text as "literal" translation of the Italian expression.
Therefore, unless otherwise specified, all matters referred to "Magistrates" in the Italian system as outlined below concern both Judges and Prosecutors.

General questions

1.
As we have reported several times to the Board of Medel, the years starting from 2001 have seen a harsh struggle of the Italian Judiciary against political power. Especially the Government presided by Mr. Berlusconi in the years 2001-2006 took a punitive stance against the Judiciary, "guilty" of having started numerous investigations in matters concerning the Prime Minister, close associates, or other politicians belonging to parties of his center-right coalition. This brought to a proposal for a "Reform of Justice", which was much more a "Reform of the Judiciary", aimed primarily at reducing the independence of Judges and Prosecutors by abolishing many of the statutory guarantees based on the Republican Constitution of 1948.
The opposition of Italian Magistrates, of political parties opposing Mr. Belusconi's government, and large sectors of Italian civil society managed to delay this project until the elections of 2006, which saw a new parliamentary majority and a center-left government headed by Mr. Prodi.
Contrary to many campaign promises and expectations, however, the new government did not entirely cancel the Berlusconi reform but, rather, proceeded to amend it in order to reduce the grossest faults. What we are left with today is a compromise solution which contains some positive novelties (for instance, on the matter of professional evaluation) but also several critical points which must be checked against reality (concerning matters such as the hyerarchical organization of prosecution offices, Judiciary school, limited duration of directive posistions, discplinary proceedings, etc.).
After the return in power of Mr. Berlusconi with the elections of April 2008, a part of Italian public opinion hoped that the renewed political scenario would bring by a mutation in the attitude concerning the problems of justice, fundamental freedoms, and the judiciary.
Sadly, in just a few weeks this hope has been betrayed. After having taken charge of government for the fourth time in the month of May, Mr. Berlusconi and his majority have undertaken a series of initiatives such as, for example, the following:

- in order to address a pretended "emergency" concerning immigration of non-EU citizens, an aggravating circumstance has been introduced, whereby all crimes committed by illegal immigrants are punished with a penalty 1/3 higher than corresponding crimes committed by Italian or EU citizens;
- a proposal lies in Parliament to establish "illegal immigration" as a crime, punishable with prison from 1 to 4 years;
- in order to allow identification of immigrants prior to their expulsion, administrative detention up to 18 months is made possible;

- having to face a public opinion worried because of the purported "explosion" of crimes committed by non-Italian EU citizens (especially of Romanian nationality or of Roma origin), the government has proposed expulsion measures for all foreigners (EU citizens or not) who cannot prove to have sufficient economic means; furthermore, local administrations have been encouraged to dismantle Roma camps around the cities;
- still in view of a purported "crime-wave" which is completely contradicted by facts, the government has issued a proposal to employ 3000 military for nightly patrol activity in major Italian cities;
- while it is acting in order to establish the conviction in the general public that Italy lies under the siege of crime, the government has put a proposal to Parliament in order to drastically reduce the possibility to employ telephone interceptions in criminal investigations, limiting it only to extremely serious crimes and providing for the absolute prohibition for the press to publish any acts of a criminal investigation until this is closed; journalist who should violate this prohibition risk a jail sentence of up to five years;
- finally – and last in order of time – on June 16th 2008 Mr. Berlusconi has announced the intention to introduce a norm suspending for one year all criminal trials pending in Court referring to facts committed before June 2002; this norm has no logic other than the need to slow down the criminal proceeding pending before the Court in Milan in which Berlusconi is accused of fraud and corruption.

While it is too early to assess the real possibility for the Berlusconi government to enact these and other proposed reforms, we must stress that the Italian Judiciary is extremely worried for these attacks against the independent exercise of its powers and for these gross violations of the Italian Constitutions and international treaties concerning fundamental rights.

2.

The independence of the Italian Judiciary is the object of a number of articles in the Republican Constitution of 1948, among which the following are the most relevant:

- art. 101 par. 2: "Judges are subject only to the law" (Principle of external independence);
- art. 102 par. 2: prohibition to establish extraordinary or special jurisdictions;
- art. 104 par. 1: independence of the Judiciary from other powers of the State;
- art. 107 par. 1: "Magistrates may not be removed from office; they may not be dismissed or suspended from office or assigned to other courts or functions unless by a decision of the High Council of the Judiciary, taken either for the reasons and with the guarantees of defence established by the provisions concerning the organisation of Judiciary or with the consent of the magistrates themselves." (Principle of unmovability);
- art. 107 par. 3: "Magistrates are distinguished only by their different function" (Principle of internal independence);
- art. 109: direct control over the judiciary;
- art. 112: principle of mandatory criminal prosecution.

The guarantees of independence are completed by the introduction of a Superior Council of the Judiciary ("Consiglio Superiore della Magistratura"), organ through which the self-government of the Judiciary is exercised (see answer no. 8.).

3.

Magistrates enjoy (as do all other citizens, according to art. 18 of the Constitution) unlimited freedom of association, both in their private lives and in their professional

capacity. The only exception is that they may not join a political party; they may, however, stand as candidates in political elections (in which case, if elected, they are temporarily exempted from service: see answer no. 11).
The vast majority of Italian judges and prosecutors are members of the Associazione Nazionale Magistrati (A.N.M., National Association of Magistrates) (out of 8886 active professional magistrates, 8284 are members), which, as part of its activities, acts as "syndical" counterpart of the Government. It must be stressed, however, that the union activity is limited and atypical, since most of the questions concerning status and economical treatment are regulated by law (for economical treatment, a largely automatic system of periodical adjustments is provided). A.N.M. is among the founding members of the Union International des Magistrats (U.I.M.).
Within the A.N.M. are represented 4 sub-associations ("correnti"), acting as electoral lists for the elections of the organs of self-government (see answer no. 8.) and of the organs of the A.N.M.: Unità per la Costituzione, Magistratura Indipendente, Magistratura Democratica and Movimento per la Giustizia – Art. 3. These sub-associations represent different views with respect to judicial policy.

4. + 5.
Since 1992 (the year of the "Mani Pulite" investigations and trials) there has been, with varying intensity, a constant attack of political power of almost every color towards the judiciary and its independence. This has been most notably the case during the years 2001-2006, in which the Government presided by Mr. Berlusconi tried and partly succeeded in eliminating some of the guarantees for independence provided for in the Laws on the functioning of the Superior Council and on the Statute of judges and prosecutors.
Please refer to the many reports that Magistratura Democratica and Movimento per la Giustizia have presented to the Board of MEDEL over the years, informing of the development of this situation.
Since a vast section of the Italian media is controlled, directly or indirectly, by political power (and a large part directly by Mr. Berlusconi), this attack has been carried out also through a misinformation of public opinion on the Judiciary and its functioning. Inevitably, this has resulted in a widespread reaction of mistrust of public opinion towards the Judiciary. Although we have no specific poll results available at the moment, the general credibility of our Institution with the general public is at its historically lowest point.

6.
The budget for the functioning of the Justice system in Italy in 2007 has been set to € 7.6 billion. This represents roughly 1.5% of the entire budget for the functioning of the public administration.
Of these, about € 5.3 billion concerns the publishing of Courts, and the rest the functioning of prosecution offices.
The amount has been steadily rising in the last 3 years (after the 2001-2006 Berlusconi government); there are as yet no indications as to whether this trend will change with the return of the center-right government in April 2008.

<u>Status</u>

7.

a)-c) Selection of magistrates (as is the case with all public servants) is through competitive examination (written and oral), which should take place on a yearly basis. Basic prerequisite is a degree in Law; also, candidates must have a further qualification, such as: previous employment in a public administration for at least 5 years; bar examination; post-graduate university diploma; 6 years of service as non-professional magistrate (see answer no. 17.); etc.
The method of selection is solely based on theoretical knowledge.
The board for the examination is appointed formally by the Minister of Justice, but after indication of the components by the Superior Council of the Judiciary.
Once the ranking of the examination is defined, those eligible for the number of available positions are nominated with a decree of the Minister of Justice.
b) Once in service, magistrates are assigned for practical training to other magistrates and are at the same time trained at the Judiciary School (although this organ has not yet been established).
Ref. Law no. 160 of April 5th, 2006, as modified by Law no. 111 of July 30th, 2007

8.
The Italian Constitution states (Artt. 104 -105) that the self-government of the Judiciary is entrusted to a Superior Council ("Consiglio Superiore della Magistratura").
It consists today of 27 members: the President of the Republic (who, however, has a mostly symbolic role); the First President of the Court of Cassation; the Prosecutor General at the Court of Cassation; and 24 other members, 2/3 of which elected by judges and prosecutors, 1/3 nominated by Parliament in joint session. Out of these latter, a Vice-president is appointed, who conducts the daily functioning of the Council. Elected members are appointed for a 4 year period and are not re-eligible.
The Superior Council (Art. 105 Const.) is competent for the appointment, assignment and transfers, promotion and disciplinary measures concerning judges and prosecutors.
The Superior Council is aided in its function by 24 Judiciary Councils ("Consigli giudiziari"), attached to each district of Court of appeal, also composed of members elected by magistrates (there are now also representatives of lawyers and regions).

9.
a) – b)
The Italian system still today functions according to the so-called "Ruoli aperti" ("Open rolls") system, which can be roughly divided in two phases:
1) in the first, all magistrates (judges and prosecutors) – a certain number of years after their recruitment – are subject to evaluation by the Superior Council of the Judiciary (Consiglio Superiore della Magistratura - C.S.M.) and, should this evaluation be positive, are granted a "generic" (abstract) qualification (called "valutazione di professionalità",: there are 8 such steps) which entitles them to the nominal title and the correspondent salary (although for this second aspect the discipline is still in a transitional phase);
2) in the second stage, each magistrate – if he/she desires so – may concur for a specific functional assignment concerning a given position which is declared vacant (court of appeal, supreme court, directive or semi-directive position) and corresponds to his/her nominal qualification (e.g., to concur for an appeal post, the magistrate must have acquired at least the second "valutazione di professionalità").
This system means that advancements in career do not depend on the position the magistrate holds.
This means that a magistrate with abstract qualification as "supreme court magistrate" (which can be achieved after 20 years of service) may serve in a first instance court as

judge or public prosecutor until he/she decides, on a voluntary basis, to concur for a position in a court of appeal or in the supreme court.
This system allows magistrates to obtain economic progression without being forced to abandon the function and office currently occupied: this has fulfilled a fundamental principle of the republican constitution, that requires magistrates to be unmovable unless they demand to be transfered, to avoid that the executive power may (as it has been in the past) remove an undesired magistrate from his office (art. 107 par. 1 Cost.).
It also obeys another fundamental principle of the Constitution, according to which magistrates are all equal and are distinguished among themselves only according to the different functions they carry out (art. 107 par. 3).

c) For access to appeal and Supreme Court functions, and especially for the appointment to directive or semi-directive positions, the Superior Council of the Judiciary takes into consideration not only seniority (although this parameter still has a preponderant weight), but also "aptitude", judging the candidate's suitability for the type of function he/she is applying for.

d) As a general rule (according to art. 19 of Law no. 160 of April 5th, 2006, as modified by Law no. 111 of July 30th, 2007, and the subsequent regulations passed by the Superior Council), there is a time-limit of 10 years for permanence in the same position (section in Tribunals, workgroups in Prosecution offices, etc.). After this period, magistrates are required to change to a different position (e.g. by moving to a different tribunal or to a different section within the same office).
Particular rules and shorter time-limits apply to bankruptcy courts and for the sections of Prosecution offices dealing with Mafia related crime (see answer 19.).
Since 2007 (with the entry into force of Law 111 mentioned above), directive or semi-directive positions cannot be held for longer than a 4-year period, renewable once for a further period of 4 years subject to evaluation of the judge's/prosecutor's performance in the post.

10.
Please refer to the document: "The evaluation of professional performance of judges and prosecutors in the Italian system", by Luca De Matteis (presentation at the Conference: "Modernization of Justice in Europe" – Lübeck (Germany), October 26th, 2007) in www.medelnet.org for a description of the new system of professional evaluation introduced by Law no. 160 of April 5th, 2006, as modified by Law no. 111 of July 30th, 2007.

11.
The rules for secondment are laid down in art. 50 Law no. 160 of April 5th, 2006, as modified by Law no. 111 of July 30th, 2007, as well as by the Regulation of the Superior Council approved on March 18th, 2008.
In principle, secondment may not last over 10 years.
After the exercise of the different function, the magistrate may return to his original post, except in case of exercise of an electoral role, in which case he/she must be assigned to a post in a region different from the one where he/she was exerting his function when elected.
Secondments are authorized by the Superior Council of the Judiciary and may not concern more than a fixed number of magistrates at a time.

12.
At the beginning of their career and therefore while in training, magistrates are awarded today a net monthly salary of € 1,680.50=. After five years of service this rises to roughly € 3.500 per month.

Criminal Law

13.
In the Italian system, prosecution of criminal offences is mandatory: this principle is laid down in Art. 112 of the Constitution. Therefore, no choice is given to Prosecution offices as to which crimes to investigate and eventually bring before a judicial body. The only possibility given to prosecutors is to discontinue investigations if the author of a crime remains unknown, or if the evidence gathered in the course of the investigation does not appear sufficient to "uphold an accusation in trial" (art. 125 executive norms attached to the criminal procedure code of 1988). In this case, the prosecutor has to defer the request for dismissal to the judge for preliminary investigations.

14.
The principle of mandatory criminal prosecution excludes any centralized definition of criminal policy short of legislative action on defining crimes and misdemeanors.

15.
As anticipated under answer no. 8, there is no direct link between the judiciary (judges and prosecutors) and the Minister of Justice, which implies that no obligation to information exists.

16.
According to Art. 55 code of criminal procedure, judiciary police must, also acting on its own initiative, collect notices of crimes committed, prevent or stop them, identify the autho/authors and gather evidence.
Public prosecutors have direct authority over special "sections" of the judiciary police which are attached to the Prosecution offices (art. 59 c.c.p., "Sezioni di polizia giudiziaria").
Public prosecutor may also demand any other judiciary police organ to perform certain acts of investigation (art. 55 par. 2 and 58 par 3 c.c.p.).
After having collected notice of a crime, the judiciary police must inform the competent Public prosecutor office "without delay" (art. 347 par. 1 c.c.p.). This obligation, in accordance with the principle of mandatory criminal prosecution (see answer 13.), extends to all notitiae criminis.
Once this communication has taken place, the judiciary police is subject to the directives and orders of the public prosecutor in charge of the investigation; it may continue to investigate on its own initiative, but it must inform the prosecutor (art. 348 par. 3 c.c.p.).

17.
Citizens are involved in the exercise of criminal judges if called to form part of the jury in cases referred to Assize courts ("Corte d'assise") and Appellate Assize Courts ("Corte d'assise d'appello"). The members are drawn randomly from a list of suitable candidates residing within the district of jurisdiction of the Court. The Statute regulating the functioning of these Courts and their composition is Law n. 287 of April 10th, 1951.
The competence of Assize Courts is defined by art. 5 c.c.p.

There are several categories of non-professional judges ("Giudice onorario di Tribunale", acting as civil and criminal judges in first degree courts with limited competence; "Vice-procuratore onorario", acting prosecutors in minor criminal cases during court proceedings; "Giudice di pace", acting as civil and criminal judges with a reserved competence for minor civil matters and petty crime; as well as a number of expert lay judges attached to Courts for minors, Courts for the execution of penalties, Agrarian sections, etc.). All these figures must have specific training in law (except for the lay judges attached to specialized courts, which are selected according to their expertise in other fields) and are nominated for a long period of time.

18.
According to artt. 74-145 of Presidential Decree n. 115 of May 30th, 2002, persons with limited economic means are entitled to legal aid: this means that they may chose a lawyer to assist them in criminal and civil matters, and the expenses will be paid by the State. The threshold for admittance is set at € 9.723,84= income per year before tax considering the tax year before the one during which the request is presented (art. 76).
Also, lawyers may claim from the State the payment of their services for the defence of accused who are untraceable or unable to pay (artt. 116-117).

19.
For investigations concerning Mafia-related crimes, as well as investigations concerning organized crime in drug matters, terrorism and certain others laid down in the law, art. 51 par. 3 bis and par. 3 quater c.c.p. attributes a specific competence to the Office of the Prosecutor at the First instance Court of cities seat of Courts of Appeal. Within these offices, specializes groups of prosecutors are set up, who are relieved of ordinary duties.
With a much-disputed provision, in 1993 the Superior Council has introduced a maximum timelimit for assignment to such groups of eight years (six plus two for the conclusion of ongoing trials). This provision, while aiming at allowing a higher number of prosecutors to experience working in these areas, implies a rapid turnover in such offices with consequent dispersion of acquired professional skills.
For all other crimes, working groups are set up within Prosecution offices, with the aim of allowing single prosecutors to specialize in a certain area (economic and financial crimes, sexual crimes, crimes against the public administration, etc.). However, the attribution of affairs to such sub-sections is not rigidly disciplined.
As far as Courts are concerned, the only division in competence is based on the partition between Courts and Justices of the Peace; within Courts, roughly according to the seriousness of the offence, the competence to decide is attributed to single judges, a panel of three judges, or an Assize Court. There is no division of competence according to the matter treated.

20.
Having decided to abolish the death penalty with art. 27 par. 4 of the Constitution of 1948, in Italy the maximum penalty is life-long detention.
As far as the number of detainees is concerned, over the last years it has grown exponentially, especially with regard to immigrants. The capacity of Italian prisons has been widely exceeded, forcing Parliament to pass (in 2006) a much-disputed law providing for a wide pardon ("indulto"), which has brought prison numbers back to reasonableness. However, since nothing has been done thereafter to address the problem of prison population (by providing for alternative penalties or building new facilities), the number of detainees has immediately started growing again; it has been calculated that by mid-2009 the maximum capacity will be reached again.

It must be noted that a vast portion (roughly 40%) of the prison population is in detention on remand: this has obviously a connection with the ever-unsolved problem of trial duration in the Italian justice system.

Responsibility – Discipline

21.
a) – b) – c)
As provided for by Art. 105 of the Constitution, the competence for disciplinary proceedings against magistrates lies with the Superior Council of the Judiciary. The matter is now ruled by Decree n. 109 of February 23rd, 2006, which enumerates a series of disciplinary faults regarding the exercise of judicial duties (art. 2) and not regarding such exercise (artt. 3, 4).
Disciplinary sanctions are laid down in art. 5 and range from a warning ("ammonimento") for less serious breaches to loss of seniority, suspension from the exercise of functions up to 2 years, to removal in the most serious cases.
The proceeding is promoted by the Minister of Justice or by the Prosecutor General at the Court of Cassation; heads of offices, Consigli giudiziari and Superior Council have an obligation to report to these authorities any relevant fact (art. 14).
The proceeding in front of the Superior Council is judicial; the accused may be defended by a colleague or by a lawyer.
The decision can be appealed by the accused, by the Minister of Justice or by the Prosecutor General in front of the Joint Criminal Sections of the Court of cassation (art. 24).

22.
The adoption of a Code of Ethics has been imposed on all categories of public servants by Law no. 29 of 1993, of which art. 58-bis specifically concerns magistrates.
Even if it has expressed doubts as to the compatibility of this imposition with the statutory reserve for norms concerning the Judiciary, the A.N.M. has complied with the obligation and in 1994 has adopted its code of ethics (which may be read, also in English translation, on the site www.associazionemagistrati.it). In its preamble, the document specifically states that the rules laid down "are indications of principles without a juridical effect, that are to be considered at a different level respect to the juridical regulations of the disciplinary torts".