Self-government and Constitutional Law: The Italian Experience

Deep Roots – The Importance of Constitutional Court Rulings.

Looking back from the ruins of World War II, it seemed clear to the Constituent Assembly that fascism was not just a parenthesis in Italian history. The weakness of liberal institutions had allowed the rapid spread of a totalitarian regime. Judiciary was an important part of such a weakness. Judges depended on the Government as regards recruitment and careers; the executive branch appointed chief justices – at all levels. Prosecutors were accountable to the Minister of Justice. The Albertine Statute provided a series of formal guaranties, but it was easy to disregard them. That depended on a number of causes; firstly on a not rigid fundamental law and on the inextricable links between judiciary and executive.

In actual fact, independence was a mere word, not much more than a dream. Prosecutors and judges were inert during the violent rise of fascism.

The founding fathers of a new democratic state were aware of the inextricable nexus between effectiveness of rights and independence of judiciary.

The Consiglio Superiore della Magistratura (High Council for Judiciary – hereafter CSM) provided for by the Republican Constitution is something completely different from the former, homonymous body, as regards both statute and attributions.

Such a difference was at the basis of the troubled history of its implementation. The law that effectively gave life to the CSM lasted ten years (1958); the complex relationship between the CSM and other institutions developed during more than 30 years, in a context of conflicts and judicial statements. A fundamental role was played by the Supreme Court: at the beginning through judgments about the constitutional legitimacy of laws regulating the CSM's life; afterwards by decisions on power struggles between institutions (see below).

Various rulings by the Constitutional Court, some of which date back to the earliest years of the CSM, make it clear that the Council's tenure of all powers relating to the status of magistrates represents a guarantee of the independence and autonomy of the judiciary, but does not imply complete self-government (most recently 379/92, which refers to 168/1963, 44/1968, 142/1973 and 4/1986). Such government also relies upon constitutionally regulated powers, primarily those of the Minister of Justice (see below). Thus, while it is inappropriate to talk about self-government (as the Court itself observed in passing) the expression "autonomous government" may give a better idea of the complexity of the institutional relations involved.

However, the Court declared the first paragraph of art. 11, law 195 of 24 March 1958 to be unlawful, insofar as it attributed the initiative of the council activity to the Minister and not to the Council itself. This decision was crucial in clarifying the concept of autonomy and the role of the CSM.

CSM's Structure – Interactions with the Institutional System.

Today, the CSM is made up of 24 elected members, 16 of whom are elected by magistrates and 8 by parliament (Chamber of Deputies and Senate in joint session), plus 3 by right of office (President of the Republic, President of the Court of Cassation, Attorney General). The parliamentary appointees (so-called "lay" figures, as opposed to the "robed" members) have to be selected from among university professors of appropriate legal disciplines and lawyers of long experience. The vice-president is elected by the Council from among the lay members.

In the past, parliament had favoured the idea of associative pluralism by granting it recognition and encouraging the broadest representation by means of a proportional

system, with contrasting lists, designed to elect an adequate number of members (30 elected, 20 of whom "robed" and 10 lay, plus 3 by right of office). This system had also meant that the parliamentary opposition was well represented. Over time, the electoral system was modified, with a view to making it less proportional without affecting the underlying principle of an electoral contest, involving contrasting lists, about programmes of a political-ideal nature.

The CSM is elected for 4 years and the nominees cannot be appointed again: so the CSM is completely transformed every 4 years (with the exception of the 3 members by right of office). However, following the 2002 reform (law 44, 28 March 2002) magistrates are no longer elected on the basis of lists and according to a proportional system, but through a single preference for an individual candidate, on a national basis. In the event, a reform which was designed to reduce the weight of the Magistrate' Associations (which presented the lists and the respective programmes) has had the effect of hampering the quest for agreement on an associative basis: only a candidate with strong backing from a particular group could realistically hope to be elected. In tandem with this development, the decrease in the number of lay members (and hence in representation), together with the growth of what is tendentially a majority political system have produced results diametrically opposed to those extolled. The parliamentary nominees have ended up by acting simply as the representatives of a political majority and not as high scientific and professional figures.
Such experience serves as a warning of the potentially disastrous results once majority logic takes hold in an autonomously governed body, and as a measure of the importance of the choice of electoral systems.

Judges and Prosecutors – the Rationales for a Single Body
The High Council is one and the same for judges and prosecutors.
The reason that the Constitution provides for a single autonomously governed organ is to be sought in the role that it assigns to the prosecutor who is the judicial authority in the strictest sense (and hence the potential assignee of powers bearing on constitutionally protected interests such as personal freedom, etc.). This is strictly connected with the constitutional principle of penal action as mandatory. Sanctioned by art. 112 of the Constitution, this principle does not imply an obligation to proceed in the case of all offences. In actual fact, the principle is the expression of a criterion for distributing responsibility for the options on penal action: which in a mandatory system remains entirely within the jurisdiction and which must be carried out according to the legal criteria established by law. From this principle, the Constitutional Court has drawn a series of implications (some of them systematically affecting the legal system as a whole) which highlight the role of the prosecutor as an independent and autonomous organ.
These premises are crucial to a thorough understanding of the process of constitutional revision now under debate: one which links (and it is no accident) the reform of the CSM to an erosion of the principle of penal action and to a clear-cut divide between judges and public prosecutors. In fact, this process was already under way in 1999 with the redrafting of art. 111 of the Constitution, in the part emphasizing the nature of the judge as a "third" player, as a value different from and additional to the independence which is shared with the public prosecutor.

CSM's High Responsibilities – an Extended Perspective
Its varied composition, including members elected by parliament, and the fact that it is an elected body chaired by the President of the Republic (deemed the supreme guarantor by the Italian Constitution) are all factors which combine to justify the claim that the CSM is

responsible for governing the judiciary, not merely in terms of managing a bureaucratic class, but also in acting as the main interlocutor in dealings with the political institutions. This character of the CSM has been inferred from its composition and from the roles assigned to it.
The CSM's amphibious composition and its attributions are also linked with the way in which the Constituent Assembly approached the issue of the democratic legitimacy of the Body, and more generally, of the Judiciary. It's a choice aimed to answer to the great question: *quis custodiet custodes*? Democracy is not only the will of the majority, the primacy of the Law: it's also – and fundamentally – rules, intended at governing the proceeding aimed to build the will of the People, to guarantee the minorities and to protect the basis of constitutional pact.
As a matter of fact the Constitutional Court has stated that the notion that the CSM, "represents, in a technical sense, the judiciary" must be ruled out, declaring that the presence of lay members on the Council, together with the constitutional discipline of its presidency, "responds to the need (perceived by the members themselves) to avoid the judiciary having to present itself as a separate body." Hence the "appropriate measures to bring about and maintain a permanent bond with the unitary machinery of the State, without, however, compromising the declared and guaranteed autonomy and independence of the CSM." (Constitutional Court ruling 142/1973).

With the ground-breaking resolution of 28 October 1982, the CSM reformed its internal regulations, arranging for its council sittings to be open to the public (with the single exception of cases in which the need to safeguard the privacy of the magistrate or third parties is paramount), thus emphasizing the role pointed out by the Constitutional Court in the above-mentioned ruling.

Art. 105 Cost. ascribes to the CSM, "appointments, assignments, transfers, promotion and disciplinary measures relating to magistrates".

The functions specified in the Constitution do not exhaust the role which it assigns the CSM as an organ of constitutional guarantee designed to safeguard the autonomy of the judiciary as an order independent of all other state powers (Constitutional Court no. 44/1968), and protected from interference by centres of power, ensuring that its jurisdictional function may be exercised independently.

There have been repeated attempts to restrict the role of the CSM.

The existence of a rigid constitution and of practices and institutions (like the Constitutional Court) aimed at safeguarding the correct implementation of the Constitution have proved indispensable in preserving the sense of autonomous government.

The Roots of a Permanent Clash
It is difficult to grasp all the nuances of this institutional dispute without placing it in the broader context of a quest for an "actio finium regundorum" which had been in progress for years over the question of the spheres of attribution of the powers of the state.
From the 1980s onwards, the judiciary has been playing a high-profile role firstly in the large-scale investigations into mafia and terrorist activities (with all the obvious political and institutional implications) and later, from the early 19990s, in those directly involving the organization of the Italian political system and its leadership (so-called Clean Hands inquiry).

Italy achieved extraordinary successes in coping with organized crime and corruption; in the '80s and '90s for the first time in its history, mafia-type organizations like Cosa Nostra were severely hit, with thousand of convicted criminals serving their sentences, hundreds of fugitives (some of whom for decades) captured, billions of Euros seized and now utilised for the benefits of the citizenship. A hard price in human lives was paid (the single first Cosa Nostra maxi-trial cost the lives of the Palermo's Procurator Office Chief, Costa, the Chief of Investigating Judges Office, Chinnici, with two policemen of his escort, the Investigating Judges Falcone, with his wife and four escort policemen, and Borsellino, with five escort policemen, the General Prosecutor Scopelliti, in the Supreme Court of Cassation, and a number of officials, like Montana e Cassarà).
Those successes were gained without disregarding constitutional liberties and guaranties, even in the terrible days in which it was impossible to switch on the TV without seeing slaughter and bombing in our cities, or when organized crime accounted for a number of murders second only to Colombia.
It is difficult to imagine that such a series of successes in sensitive fields could have been achieved without the premise of independence (also for the prosecutors), granted by the liberation of the magistrate from the internal hierarchy and by the shield offered by the CSM against a political power which was becoming daily more invasive.

This is not the place to examine the complex question in depth, but there should be absolutely no doubt that it is at once the premise and the background to every recent dispute concerning the powers of the CSM and its constitutional role.

In previous years, tensions had reached one of their highest points in response to measures taken by the CSM to prevent the secret Masonic lodges from covertly conditioning the judiciary. In another watershed case, caused by the declarations of the former Prime Minister, Bettino Craxi, about investigations into corruption cases, the conflict arose again, and again the legitimacy of the CSM's debating the matter came into question. Faced with the CSM's determination to proceed nonetheless with discussion of the issue, the President of the Republic initially ordered the debating chamber to be occupied by the armed forces; however, strong opposition from political sources and from public opinion caused the order to be rescinded, and so the debate went ahead.

The resulting resolution reaffirmed the CSM's constitutional role as guarantor, responsible for guaranteeing the independence of the judiciary as a whole and of that of individual magistrates, "also from outside influences from whatever source" (Resolution of 19 December 1985).

These principles were affirmed once again, in a renewed climate of hostility to the independent exercise of jurisdiction - this time on the grounds of its having failed to take account of the will of the people as expressed in recent elections – with the CSM's resolution of 18 June 2003 which argues that "if the essence and value of a constitutional democracy reside in the sovereignty of the people…the rule of law provides for the separation of the powers, in which context the institutional guarantors… derive direct legitimacy from the Constitution".

The Relationship with the Legislative Power

Relationship with the legislative Power is an interesting point of observation about the CSM's institutional role and its legitimacy in the democratic balance of power, designed by the Constitution.

The issue under debate once again in these days is the limits in the interactions between the two Bodies.
The first issue at the stake is the interpretation of art. 10 of law n. 195/1958.; the second concerns relations between the powers of the state, and particularly between the CSM and parliament.

Art. 10 of law no. 195/1958 expressly stipulates that the Minister of Justice should seek the statement of the CSM on the legislative initiatives promoted by the government in parliament which have a bearing on matters of jurisdiction. It's questioned if the CSM's assessment could discuss the amendments to the proposed law, discussed in the Parliament.

As regarding the second issue, it must be stressed that the Constitution recognizes that the Minister of Justice is responsible for the organization of the judiciary (see later). Furthermore, it is the Minister who countersigns the decrees issued by the President of the Republic to implement the resolutions of the CSM. This structuring of relations between the three organs (President of the Republic - in his capacity as Head of State and not President of the CSM - the CSM, Minister of Justice) derives from the fact that the first two organs are not responsible politically and gives rise to a whole series of institutional and interpretational problems which it would be inappropriate to consider here, however summarily.

Suffice it to say that the possibility of direct dialogue between the CSM and parliament was ruled out; however, at the same time, the legitimacy of the interlocutory role played by the CSM in matters of relevance was recognized, so that resolutions are always communicated to the Minister of Justice, even when they relate to bills resulting from parliamentary initiative.

The issue led in 1968 to a compromise solution which worked for a good number of years, but was effectively called into question in the course of the second Berlusconi-led government by the Minister of Justice, Roberto Castelli.

In fact, a Senate resolution – issued on 29 January 1968 - in support of a statement from the Italian President Saragat, expressing concern at direct dialogue between the CSM and parliament on the grounds of the CSM's being exposed politically (and consequently liable to forms of responsibility) urged the CSM to express its assessments on the state of justice in a message addressed to both houses, but via the Minister of Justice. Since then, that is what has happened every year, and the CSM's message has always been examined with considerable interest, resulting at times in the drafting of government or parliamentary bills.

However, the Justice Minister, Roberto Castelli, refused to convey the CSM's 2003 message to parliament, leading the Speaker of the Senate to lodge a formal complaint with the Head of State on the grounds that the CSM had in any case printed the text of the message and copies had been sent to the Speakers of the Chamber of Deputies and the Senate.

Just recently, this aspect has emerged again under a new guise. The CSM expressed its response both to bills presented by the government as well as to the amendments to them proposed in Parliament. In so doing, the CSM has also raised doubts as to the constitutional legitimacy of some aspects of the ongoing legislation. This had happened on numerous occasions in the past and, as a matter of fact, the point had been made in

several quarters that it is difficult to see how a legal opinion may be voiced which is not founded on the Constitution. That said, a strong parliamentary majority protested vehemently, claiming (incredibly, as it may seem) through their leading representatives, supported (it has to be said) even by certain jurists, that the Constitutional Court alone is authorized to assess the constitutionality of the laws: almost as if voicing an opinion were tantamount to passing a binding statement as to constitutional legitimacy.
These discussions have, however, prompted the government majority to set about reforming the CSM in the manner described below.

CSM as a Self-Regulating Body – the Relationships between the President of the Republic, the CSM's Assembly and the Vice-President.
The above-mentioned 1985 debate was instrumental in giving prominence to the question of the CSM's relation to the President of the Republic (in his dual guise as president of a collegial body and Head of State) in the drawing up of the agenda – a seemingly minor matter, but one which, in actual fact, touches on the essential role of the CSM and its necessary self-determination as a means to the end of effectively safeguarding interests, the role entrusted to it in the Constitution.

The right to self-regulate its own activities is therefore inherent in its role. Thus the CSM is empowered to regulate and draw up its own agenda, even if with the consent of the President.
What is not included in the right to self-regulation is *autodikia*. In fact, the Constitutional Court has ruled that the CSM's role as guarantor ("organ of significant constitutional importance") does not exempt its measures from the general principle of jurisdictional protection of subjective positions ("great rule", stipulated by Constitutional art. 24). As a result, the CSM's measures may be challenged in independent administrative courts. (Constitutional Court no. 14/1968 and 189/1992).

A further provision aimed at enabling the CSM to carry out its work is its financial autonomy.

The role of vice-president is crucial in determining the effective autonomy of the CSM. It is no accident that this role is still an open question; neither is it coincidental that the reform projects aimed at curbing the scope and autonomy of the CSM envisage the removal of the vice-president.
At present, the vice-president is elected by secret ballot during the CSM's first sitting. Each election is a reminder of an unresolved dispute, one which to all appearances is not particularly significant but which, in actual fact, goes to the heart of the different conceptions of the CSM and its range of officials. It revolves around the legitimacy or otherwise of a preliminary debate in the Council, aimed at spelling out the reasons determining the choice. Those who claim that such a debate is legitimate, point to the political nature (in the broadest sense) of the election and the importance of the position in the life of the CSM; those who, on the other hand, argue that the election must be the Council's first act claim that a public debate would violate (substantially if not formally) the secrecy of the ballot (required by law) and end up by casting the vice-president as the exponent of a clear-cut political persuasion.
The compromise solution finally arrived at (albeit precariously) does not provide for a real debate, but merely offers the possibility for votes to be declared.

The Minister of Justice

A further field of institutional conflict concerns relations with the Minister of Justice. As above-stressed, the Constitution (art. 110) assigned to the Minister the duty of organization and implementation of the services for the judiciary. The boundary line between CSM and Minister's respective attributions is a perpetual battlefield. As a consequence, clashes have focused on contested attribution, resulting in claims to be heard before the Constitutional Court.

The major issues have been (a) the role of the two organs in appointing the heads of the judicial offices, and (b) the extension of ministerial powers in issuing decrees intended to implement the CSM's decisions.

The Constitutional Court (Ruling no. 379/1992 and 380/2003) has decreed that in the procedures governing executive appointments, the Minister must be consulted in a manner which goes beyond the merely formal and thus satisfies the principle of "loyal collaboration" between institutions. The last word, however, lays in the CSM's hands (point A).

The Minister's issuing of a decree to implement the deliberations of the CSM does not imply authority to judge its contents; it is simply a duty, once the preliminary stage of agreement-reaching has been completed and it is clear that there are no essential flaws (point B).

The CSM's Role in Organizing the Offices: "Tabelle", the Tabular System

In the shared responsibility for the judiciary, an important part is played by the "Tabelle" system, a tool that has been developed over many years by the CSM and intended to fill the void of normative rules governing office organization, distribution of duties and affairs and so on.

In fact, the head of the office is required periodically to draw up an organizational programme. On it depends the distribution of responsibilities among the magistrates, the structure and articulation of the office and the criteria that need to be observed for a series of decisions. This is a structured programme known as "tabelle", that means grids or schedules. Its present structure is the outcome of a lengthy process of formulation by self-government, in the absence of normative sources. The tabular programme was designed, over time, to channel the organizational power of the office along predetermined courses, with the dual aim of restricting the discretional powers of the executive members and making it possible to monitor the organizational choices by applying homogeneous criteria.

In short, the tabular system highlights the *aporia* of a jurisdictional organization which aims to ensure that administration is well conducted, while, at the same time, guaranteeing its senior magistrates exemption from political responsibility, not least in their executive capacity. It represents an attempt to balance a range of interests which are not easily reconcilable. From the above comments, as a whole, it becomes clear why the 2005/2006 reform, in aiming to concentrate organizational powers (and the choices on penal action) in the hands of the head of the Prosecutor's office, had intended to repeal the tabular system for these offices, keeping it only for the courts.

Different Aspects of Independence: the Extra-Judicial Appointments

The point should be made in passing that even the area of extrajudicial appointments (ranging from consultancy for public institutions, teaching, to assignments on behalf of supranational bodies) was, for a long time, devoid of all normative regulation, so the CSM

found itself obliged to fill the legislative gap with normative measures of its own. The increasing rigour with which the CSM has attempted to balance the two interests at stake in authorizing an extrajudicial appointment (on the one hand, the desire to offer scope to the magistrate's professional expertise and sense of civil obligation; on the other, the need to safeguard his independence and autonomy from any centre of power) has not always been viewed favorably, precisely because it precluded a possible means of secret or occult conditioning.

Hence, paradoxically, it was one of the CSM's own measures which put a stop to ordinary magistrates accepting particularly lucrative appointments which were seen as tarnishing the image of the magistrate (as arbitrator or guarantor in contracts in which the state is a part) while the administrative justice and the law-making body itself did their best to obstruct this significant move.

Autonomous Government as a Circuit, Starting from the Bottom

Autonomous government is vested supremely in the CSM, but it takes the form of a complex circuit whose starting point is the individual magistrate. This is not rhetoric of a vaguely demagogic nature. The magistrate is an integral part of a complex mechanism whose function is to produce the Council's measures. This way of considering the individual magistrate as the basic component in the circuit is indissolubly linked to two constitutional principles, the first of which is explicit while the second may be deduced from the sum of constitutional provisions: magistrates are distinguished from one another solely on the basis of their functions (art. 107); these are the expression of a "diffused power", one permeating the judiciary, and hence not delegated by the higher echelons of the judicial organization. The interaction between these principles has had important consequences in a number of different ways. In the present context, the focus should be on the importance of safeguarding the independence of the individual magistrate, not merely vis-à-vis external pressures or interference, but also from such as may result from operating within an organizational structure.

The role of the individual magistrate is not limited to casting his vote, according to procedures whose political and institutional importance has already been examined. The magistrate is also entitled to take an active part in the preparatory stages of the office's key organizational measures.

The magistrate exercises his role as a founder-member of the circuit of autonomous government through the possibility of appealing against both the measures intended for the various ramifications of the office and those assigning affairs and duties.

A fundamental role within the autonomous government circuit is played by the chiefs of the offices.

The Constitutional Court has frequently highlighted the importance of the role of the executive in the context of the independent status of the judiciary (also citing his tenure of powers over the drawing up of the schedules and the assignation of duties (no. 379/1992).

The executive role is not confined to the admittedly crucial matter of the *tabelle* (from preparation to approval and through to implementation); it also involves constant liaising with the other members of the circuit, from the District Council for Judiciary – *Consigli Giudiziari* (hereafter c.g.) to the CSM.

The measures adopted by the executive, when approved through the proceeding above-described, are then forwarded to the c.g. which expresses a reasoned response, and then to the CSM.

Executives are required to draft periodic reports on the magistrates attached to the office which will then be used in assessing professionalism or determining promotion. Assessments are made on various occasions, of which one of the most important is when authorizing a magistrate to take up extrajudicial appointments, as seen above. It is the CSM's right to decide, but the office executive and the c.g. have to express their opinion as to the compatibility of the appointment with the magistrate's work and, even more importantly, with ensuring his independence.

The c.g. is a body whose importance has sometimes been underrated. It is not required by the Constitution, but was set up as a result of the law regulating Council proceedings and serves as the main link between the offices and the CSM. Its members are elected by the magistrates of the District; the body is supplemented by representatives of non-professional magistrates. Those who have stressed the importance of the CSM's varied composition in interpreting its role have long tried to open up the c.g. to local ramifications of society, starting with representatives of the Bar Association (Ordine degli Avvocati, which in Italy is a public body). This has met with resistance: sometimes merely corporative; at other times, stemming from concerns that particularist interests might condition the functioning of the c.g.. Only with the 2005/2006 reform has it been possible to achieve the first major breakthrough, with the admission of the Bar Association's representatives to a part of the c.g.'s activities.
In my opinion, a further step is desirable: the admission of eminent jurists at a local level, elected on a regional basis, to supplement the normal composition of the c.g. in its organizational responsibilities and in protecting the independence of individuals.
Recently (2008) an important step was accomplished, with the institution of a Governing Council in the Supreme Court of Cassation. The name changes but not the role and composition: it is the equivalent of a c.g. It is too soon to evaluate the consequences of such a reform in an elitist body. In any case, with the Governing Council the autonomous government circuit is completed.

As a conclusion, in the Italian institutional context, the CSM has offered an important shield to protect the autonomy and independence of judiciary.

Such a role has been possible mainly by making itself the voice and the representative of the judiciary, allowing the struggle between powers to be confined within institutional borders, also in climates of great conflict.

Furthermore, on more than one occasion, the CSM has provided the tools, required to cope with different problems affecting the efficiency of judiciary, acting more punctually than a divided and often immobilized Parliament.

The most important of these solutions could be considered the involvement of each component of the judiciary in a decision-making process, intended to create autonomous government starting from the bottom, from the individual magistrate. Such a pattern was intended to enhance the role of the individual magistrate, as embodying the conception of judiciary as a "diffused power".

In this contest, the "Tabelle System", as described above, allowed the CSM and the Minister of Justice (under their respective responsibilities) to organize the courts and the Prosecutor Offices within a scheme intended to balance the interest of efficiency and that of guaranteeing the independence of the judiciary.

On other hand, the importance of the CSM's assigned duties and its amphibious nature (elective but not politically liable; composed of lay and robed members; chaired by the President of the Republic but with an elected vice-president; having the last word on the matters within its jurisdiction but not able to enforce its own decisions….) have been experienced in a period of frequent clashes between politics and judiciary.

This is made even more significant considering the recurrent appeal to the "primacy of the law", a sort of mantra, often understood in a very superficial way that seems completely unaware of centuries of debate and formulation regarding the rule of law.

What is at stake in this struggle are important differences in understanding liberal institutions and achieving a balance of powers. It involves much more than the CSM: the idea of judiciary and its role in a complex, open society.

Italy, in these regards, presents more than one unique feature, due to its history and relatively recent democracy (determining weak liberal institutions and habits). It is not a model to be shared. At the same time, the experience of my country, the effort it made to free itself from organized crime and corruption, preserving a high level of guarantee, the importance accorded – also through judiciary – to individual and collective rights, makes it a relevant focus of observation (a sort of laboratory), able to offer other countries good suggestions as to what to adopt and what to reject.

It seems to me of great importance that also countries far from the Italian institutional system are discussing the benefits of a strong, autonomous Council, as a fundamental premise for enforcing the independence of the Judiciary.
Giovanni Salvi – 24 September 2008