In the name of 'separation of careers': a reform of the Italian judiciary with systemic effects and the premise for a paradigm shift in our democracy

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1. We are in the middle of the referendum campaign and in an advanced phase of a debate that started soon after the "bulletproof passage" of the Nordio[1] constitutional bill through Parliament, which sealed a constitutional reform act of unprecedented scope and systemic effects[2].

As widely known, we came to this without an actual parliamentary debate: that was a one-sided constitutional reform, born out of a government's proposal, unchanged and unamended throughout the whole parliamentary process. It was the outcome of what could be defined – in the words of Mark Tushnet – a "constitutional hardball", played according to the rules, but pushing them to the limits in order to conquer its "partisan rivals"[3].

Along the same line, in the public debate that today should contribute to the citizens' informed vote by targeting the merits of the radical changes proposed, the reasons for a YES vote are still being promoted in the name of the "separation of judicial career paths". As Nello Rossi wrote[4], it is an "old label for a new product" concerning the actual key points of the dismantling of the current constitutional framework, starting with the High Council of the Judiciary.

The issue of the abnormal "genetic" colleagueship between judges and prosecutors - created by the common selection procedure and by the single High Council - which the reform should eventually break to ensure a *truly impartial justice*, is yet again proposed as an unquestionable truth defying any evidence and factual refutation. This applies to the data that disprove the alleged acquiescence of judges to prosecutorial requests, but the same is true if one considers the irrelevant number of judges and prosecutors who – according to a now well-established trend – change their functions along the stringent conditions imposed by the 2007 reform, in 2022 further restricted to only *one* change of functions in the whole professional life" [5]. But an equal absence of factual basis can be observed in the flood of statements that- oftentimes moving from pure anecdotal evidence affirming the existence of facts, informal rules and practices that would create a context of inappropriate *closeness/proximity* between the judge and the prosecutor- advance the disruptive thesis of a one-sided justice system, structurally incapable of ensuring the autonomy of judges vis-à-vis prosecutors, thus nullifying an entire system (*our* system) of institutional and procedural guarantees protecting judicial impartiality[6].

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[1] The constitutional reform bill was proposed by the Prime Minister and the Minister of Justice, Carlo Nordio.

[2] On 30 October 2025, the Parliament approved the government bill modifying the Constitution; since the proposal did not obtain the prescribed majority of 2/3 of its members, a referendum will be held on 22-23 March.

[3] In their famous essay *How democracies die*, Leven Levitsky and Daniel Ziblatt point at institutional forbearance as one of the key rules for the good functioning of democracies; the opposite of temperance, they write, is the tendency to "deploy its institutional prerogatives as far as it can extend them", as the one that unfolds with the "constitutional hardball": a form of institutional "combat" aimed at permanently defeating one's partisan rivals – and not caring whether the democratic game continues" (p. 109).

[4] https://www.questionegiustizia.it/articolo/separazione-carriere-66987

[5] The 2022 amendment to the so-called "Cartabia act" was passed few days after the failure of the "Fair Justice" referendum, which – by an abstruse question – was pursuing the same outcome, i.e. cutting ties between judges and prosecutors. With the new text, hastily voted by Parliament as a first step towards a constitutional reform (suffice it to read the parliamentary proceedings to have this confirmed), we came one step away from formally breaking with the unitary judicial framework enshrined in the Constitution. The possibility to change functions was not prohibited as such, but, in facts, hampered and limited so that it could remain just an option "on paper".

[6] The references in public debate to other Countries' experiences, aimed at confirming the alleged "Italian aberration" in the European context due to the "non- separated "prosecutor, are limited to aspects that are

The separation of career paths conceals a radical change, with far reaching systemic impact on the comprehensive constitutional framework of our democracy.

Reforming the Constitution does not mean making transient and contingent innovative choices based on short-lived needs and political majorities. It rather means to change the principles and basic rules upon which the foundations of our civil coexistence lay: regardless of the vote that each of us will cast in the ballot box, we should all be aware of the great responsibilities stemming from being called to decide upon such a relevant step for the pivotal balances that have contributed to preserve our democracy so far. In the short timespan separating us from the referendum, we should all commit ourselves to a debate that lives up to the stakes it brings along.

The harshness of tone, the instrumental attacks and arguments deployed in the current debate aim at delegitimising the judiciary (judges no less than public prosecutors) and its right to express its own views, thus downplaying the red flag alert raised by the National Association of Judges (ANM), that highlighted the effects of the constitutional reform on the independence of the justice system. All this shows us that we are getting closer and closer to the showdown. Many aim at diverting the debate from the substantive content of the reform to "who shall be punished", so to eventually end the game by redefining once and for all the balance between State powers and laying the foundations for further radical changes to be implemented at the same speed of the Nordio reform, should the YES side prevail in the referendum.

The reform for *premierato* (direct election of the head of government) is certainly the first and most significant goal in sight. In line with what we have witnessed across Europe in recent years, this reform would bring along a shift of paradigm for our democracy perpetrated at the hand of election-winning political majorities that altered the functioning of the essential institutional checks and balances of liberal democracies. This would entail a new constitutional breakdown capable of amplifying the effects of the Nordio reform on the checks and balances system and of tilting the balance between powers even more in favour of the executive branch.

2. The Nordio reform intervenes on the main structure of the current institutional framework of the judiciary to weaken in various ways its solidity vis-à-vis the safeguards ensuring a truly independent jurisdiction.

The reform abandons the Public Prosecution Service to its "fate", and only leaves uncertain when its time will come. Its direction is, in facts, clear: once the constitutional safeguards of independence grounded on the unity of the judiciary are gone, once the corner of the separation of career paths is turned, the public prosecution service will be easily placed under the control of the executive branch. Several politicians have already declared – in a fit of frankness – the need to take a further step towards the introduction of an external control once the reform will have created a separate body of "two thousand *ronin*, lone samurais[7]".

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considered *useful* in confirming this thesis, and do not take into account the complexities and specificities of the different systems, nor the reasons behind the different regulatory frameworks. As for France, for instance, we hear a lot about the powers of the Ministry of Justice vis-à-vis the Prosecutor's Office, but not about the principle of the unity of the judiciary enshrined in French legislation, which implies a common recruitment and initial training system, a single High Council of the Judiciary (albeit with two sections) and the possibility of changing function during one's career. When it comes to Portugal, we can hear about the two High Councils, but the historical reasons leading to that framework as a guarantee of the independence of the Public Prosecutor's Office and its features are disregarded; so are the importance of the common training and the role that the country's strong democratic tradition has played in ensuring that the Prosecutor General, appointed by the President of the Republic on the proposal of the Government, has always been chosen from among the ranks of the judiciary, although in principle it is possible to select an external figure.

[7] According to the definition given by Nello Rossi, in *Separare le carriere di giudici e pubblici ministeri o riscrivere i rapporti tra i poteri?*, in *Sistema penale*, 16 November 2023 (www.sistemapenale.it/it/opinioni/rossi-separare-le-carriere-di-giudici-e-pubblici-ministeri-o-riscrivere-i-rapporti-tra-poteri)

In order to evaluate what will remain of the current judicial self-government system it is necessary to consider that the reform does not only split the High Council, but it also strips it of powers and competences key to its role of guarantor of judicial independence. It is the case of its disciplinary authority, one of the four "nails" (in the words of the members of Italy's constitutional assembly) through which they defined in art. 105 of the Constitution the key competences attributed to the High Council of the Judiciary that had to be safeguarded against external influences.

A new High Court will be born: a *special judge*, exclusively created for ordinary court judges; a judge *in its own case*. As the UN Special Rapporteur on the independence of judges and lawyers noted in her letter on the constitutional reform addressed on 23 October 2025[8] to the Italian Government, the new framework poses particularly worrying questions about the independence of the judiciary. Among these is the High Court operating as both a first instance and an appeal judge, without any guarantees of an independent review of its decisions.

These are radical changes in a particularly relevant field for judicial independence, which was used – as it emerges from the European Courts' decision – in recent years to silence or remove judges and public prosecutors. According to those supporting the reform, those changes were imposed by the need to finally ensure that the judiciary is made accountable for its own mistakes and that it will no longer be able to protect itself through its corporatist (or even factional) spirit. These arguments are once again suggesting allegations that are not grounded on reality nor on the current judicial discipline framework entrusted to the High Council's disciplinary section. This is *ex lege* presided over by the Vice-president (a lay member elected by Parliament) and operates with the same constraints and safeguards as ordinary courts. Its decisions can be appealed before the Civil joint benches of the Court of Cassation, and the data on disciplinary procedures refute any allegations of corporatist indulgence, reaffirming in turn a rigorous "internal" disciplinary system.

In the new "drawn-by-lots" High Council – purely randomly composed as far as the judicial components are concerned, while potentially influenced and guided by the pre-selection process of the lay members to be drawn by Parliament – the two components will inevitably have a different weight and internal consistency. This will end up handing the "guidance" of the Council over to its political component, notwithstanding the numerical majority of the seats formally attributed to tenured judges.

Composed by random draw, the Council will no longer have any of the distinctive features that the members of the Constitutional Assembly identified as those apt to make it an institutional crossroad, involve it in the democratic and institutional discourse and endow it with strong representativeness.

Draw as a method to select the judicial component of the High Council clashes against consolidated European standards prescribing that judicial council members are "elected" by their peers, thus ensuring the widest possible representativeness of such body with regards to the functions and composition of the judiciary. Representativeness and strong (internal and external) legitimacy are necessary requirements not only to protect the judicial self-governing body from external influences, but also to allow it to effectively perform its functions as the watchdog of the independence of the judicial system and take on the complex duties relating to the administration of jurisdiction[9].

Taking stock of this assumption and of the severe democratic backsliding experienced in recent years, European documents highlight today the "guiding role" of High Councils in protecting the independence of judicial systems, the need for their contribution in the promotion of a better balance between powers

[8] https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=30446

[9] https://rm.coe.int/opinion-no-24-2021-of-the-ccje/1680a47604
https://rm.coe.int/opinion-no-18-2023-final/1680ad1b36
https://pgwrk-websitemedia.s3.eu-west-1.amazonaws.com/production/pwk-web-encj2017-p/EGA%20Vilnius%202021/The%20ENCJ%20Compendium%20on%20Councils%20for%20the%20Judiciary%20-%20adopted%20EGA%2029%20October%20Vilnius.pdf
https://medelnet.eu/wp-content/uploads/2025/05/Rec-Odhr.pdf

and in raising awareness on the crucial function of a truly independent and accountable judiciary in a State governed by the rule of law.

In doing so, these texts are increasingly calling upon the Councils' leadership and even upon their "courage" in order for them to support - actively and by various available means - resilient, independent justice systems[10].

Against this backdrop, our lawmakers have pursued a reform of the pivotal institution of our judicial self-governing system to replace it with a hollow pretence of it, which will merely retain (just a part of) the current High Council's denomination.

When applied to the High Court and very much as it will be for the Council, draw – once again "guided" by a pre-selection stage in the case of the members elected by Parliament (and only them) – will ensure a lay component exhibiting a strong political connotation vis-à-vis "standalone" judicial components, drawn from among court of cassation judges. Through this, the reform manages to dismantle another constitutional principle, i.e., the equality of judicial functions[11]: the idea of a "top-down" judiciary resurfaces to seal the irrelevance in disciplinary procedures of the knowledge and experience gained in first instance and appeal courts.

This is complemented by the open-ended, blank delegation the reform leaves to ordinary legislation for it to regulate key aspects such as the actual composition of the judicial panels of the High Court and their functioning. Through these days' debate, we shall carefully reflect on "what the reform does not say" and on the wide breaches it leaves to future (and, by now, unknown) systemic solutions which would further weaken judicial independence.

3. A reform that leaves the Public Prosecutor to its fate and at the same time declares its aim to ensure judicial impartiality is actually putting judicial independence at serious risk. This reform is not "neutral" to the vital (current and future) balances of democracy.

It is not too early to ask ourselves *today* what the effects would be if the Nordio reform crosses path with the *premierato* reform and a new institutional framework is in place where the President of the Republic – not an impartial institutional figure anymore, but the consistent expression of a political majority – in this new capacity will "still" preside over the two High Councils and have the power to appoint three High Disciplinary Court judges.

As Medel recalled[12], in view of a now global scenario of democratic crisis, national authorities should strengthen their safeguards and security mechanisms; they should uphold their institutional and constitutional resilience, and secure the independence of justice systems as the cornerstone of the rule of law.

This is not the direction we have taken.

[10] https://pgwrk-websitemedia.s3.eu-west-1.amazonaws.com/production/pwk-web-encj2017-p/Declaration%20of%20Riga%20_final.pdf

[11] "The only distinction between members of the Judiciary shall be in the functions they hold" (art. 107 para 3 Constit.)

[12] https://medelnet.eu/statement-on-constitutional-reform-of-the-judiciary-in-italy/