Reforming the Italian "Magistracy"

Context, Content, and Risks

Chiara Gentile & Paolo Mazzotti

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On 30th October 2025, the Italian Parliament approved a constitutional amendment ("the reform") that will be put to a referendum currently scheduled for 22nd-23rd March 2026. A brainchild of the Meloni government, the reform redesigns the constitutional framework governing Italy's judicial system.

The reform consists of three main pillars. First, it separates previously unified career paths for prosecutors and judges, also splitting the "High Council of the Magistracy" (the currently unitary organ for judicial and prosecutorial self-governance) into two distinct bodies. Second, it strips the resulting High Councils of their disciplinary functions, bestowing them onto a newly-created "High Disciplinary Court". Third, it introduces a mechanism of appointment by sortition for members of all these bodies.

In the run-up to the referendum, the reform is heatedly debated amidst allegations that it threatens the rule of law. However, while the reform's content was previously analysed on this blog, the current controversy has received limited attention in the English-speaking debate (although see here, here, and here). This blogpost critically reviews the reform in its historical and political context. We will focus on the reform's first and third pillars, which in our opinion do indeed raise concerns. For reasons of space, we will not address the second pillar – although this aspect is not free from controversy in turn (see e.g. here, here, and here). Overall, we contend that the reform problematically weakens the third branch of the Italian system of government.

Legacies of fascism

The reform's first pillar introduces rigidly separate career paths for judges and prosecutors. This caters to long-standing predicaments which, inter alia, animated two failed referenda in 2000 and 2022. In order to understand the relevance of this question, it is necessary to sketch out the historical trajectory of Italian criminal justice.

Under the fascist regime, prosecutors were subordinated to the executive branch. The 1930 Code of Criminal Procedureadopted an inquisitorial system which split prosecutorial functions between two officials: the prosecutor ("PM", from the Italian "*Pubblico Ministero*") and the investigating judge ("GI", from "*Giudice Istruttore*") (see here, pp. 579-581). However, the PM was predominant in practice. Whereas the GI was part of the judiciary and enjoyed some independence, Art. 69 of Royal Decree No. 12/1941 placed the PM "under the direction" of the Ministry of Justice. This entailed a high politicisation of prosecutions.

The IC of 1948 overcame this state of affairs. Title IV of Part II outlines judges and prosecutors as jointly forming part of a "magistracy" which, according to Art. 104(1) IC, "constitutes an autonomous order and is independent of any other power". While Arts. 107(4) and 108(2) IC still envisage prosecutors as functionally distinct from judges, the overall framework provides both with common structural guarantees vis-à-vis the other branches of government. Arts. 104-105 IC operationalise this principle by setting up the "*Consiglio Superiore della Magistratura*" (CSM) – a self-governing "High Council of the Magistracy", exercising administrative and disciplinary functions over judges and prosecutors alike.

The IC thus suppressed one of the most disturbing features of fascist criminal justice. However, controversy remained over the unapologetically authoritarian approach of the 1930 Code, which remained in force. Even without structurally politicising the PM, the code put the defendant at a disadvantage. This

largely inhered in the inquisitorial system, which increasingly came under pressure after WWII. This process resulted in a new Code of Criminal Procedure in 1988, which roughly adopted the adversarial model. The GI was repealed, leaving the PM with a monopoly over the prosecutorial function. Art. 111 IC was then reformed to constitutionalise several pillars of the adversarial system.

The reform's proponents view the "separation" of career paths as the last necessary step in this process (see e.g. here, here, and here). The main concern is cultural. Currently, PMs and judges are recruited under the same procedure, jointly exercise self-governance in the CSM, and can switch from one path to the other throughout their career. In this view, PMs and judges hence develop an esprit de corps which skews judges towards sympathising with PMs in trial. Worse still, if a magistrate starts their career as a PM and subsequently switches to the judging path, their mentalité will be shaped by their previous prosecutorial role – again, to the defendant's detriment. Unitary career paths would thus be responsible for the reported endurance of inquisitorial mindsets in Italian criminal justice.

"Separating" career paths

The reform purports to create the institutional preconditions for adversarial values to thrive. Practically, this consists of two changes (more details here). First, the reform mandates magistrates to decide whether to become a judge or a PM at the beginning of their career. Once this choice is made, switching from one path to the other will no longer be possible. Second, it splits the CSM into two separate CSMs – one for judges and one for PMs (while disciplinary jurisdiction will remain unitary under the newly-created High Disciplinary Court).

Preventing career switches enjoys widespread support amongst both the Italian electorate and commentators (including, for that matter, the two of us). Indeed, the underlying principle caters to a reasonable preoccupation with safeguarding judicial impartiality, in both its objective and subjective components. However, articulating that principle through a constitutional amendment appears more questionable. In fact, the Constitutional Court clarified that the IC is agnostic as to whether career paths should be separate or unitary – meaning separation does not require a constitutional amendment. Furthermore, the 2022 "Cartabia reform" already allowed magistrates to switch paths only once in their careers. Data shows that this has significantly curtailed career switches. In fact, for each year between 2022 and 2024, less than 1% of serving magistrates switched career paths (e.g., in 2024, 42 out of 8.817).

Therefore, career switches have already become a marginal occurrence. Even if they were to be completely prohibited, the only aspect requiring constitutional reform would be the split of the CSM – an organ explicitly declared unitary by Art. 104 IC. However, as the Government itself has formally acknowledged, this is a somewhat secondary complement to the prohibition of career switches as the reform's "core". Some scholars thus argue that the reform's first pillar is but a façade, strategically mobilised to pursue ulterior purposes.

This reading is convincing. In fact, the Italian government routinely accuses magistrates of being "politicised" whenever they scrutinise contentious issues. The separation of career paths is then appealed to as a necessary measure against long-standing judicial activism (see e.g. here, here, and here). However, there is no obvious correlation between unitary career paths and (alleged) judicial activism. Besides, this line of argument is not limited to criminal justice. Rather, it is invoked across a range of legal fields, including family law, public finance, and migration law – where there is no question of adversarial justice. The government thus seems driven more by a political project of delegitimising judges and prosecutors than by genuine concerns about adversarial values.

Furthermore, as mentioned above, the reform's first pillar appears key in driving a majority of voters towards approving the reform. In fact, the reform is often narrated as primarily (or even exclusively) consisting of its separation component. However, the possibility of achieving separation through non-constitutional legislation raises doubts about the

reform's intentions. Couching it as a constitutional package deal might hence signal a strategic choice: using separation to muster support for the reform's other facets, which could otherwise be opposed as threatening the magistracy's independence. This is the issue we now turn to.

"Factionalism" and its discontents

As mentioned, the reform's third pillar introduces a new mechanism of appointment by sortition for members of the CSMs and the High Disciplinary Court. Under the current system, two-thirds of the CSM's members are elected amongst serving magistrates by the magistracy itself; one-third is elected amongst non-magistrates by Parliament (so-called "lay members"). While we will focus on the former quota, the reform also controversially modifies the mechanism for appointing the latter (see here and here).

Under reformed Arts. 104-105 IC, magistrates sitting in self-governance bodies will be drawn by lot within the respective "constituency" (PMs for the prosecutorial CSM, judges for the judicial CSM, and PMs jointly with judges for the High Disciplinary Court; more detail here). This mechanism aims at countering "factionalism" within the "National Association of Magistrates" ("ANM", from the Italian "*Associazione Nazionale Magistrati*"), an organisation representing about 96% of Italian magistrates. Also in this respect, the reform can only be appraised in historical perspective.

The ANM roughly works as a trade union for Italian magistrates. It engages in cultural activities and expresses collective grievances through lobbying and strikes. The ANM itself has no clear axiological positioning. However, it is articulated through "factions" which do. Indeed, "factions" are groupings of magistrates sharing broad political-cultural sensitivities and approaches to the profession, ranging from "conservative" ("*Magistratura indipendente*") to "progressive" ("*Magistratura democratica*", "*Area*", and "*Unicost*").

The dialectic between factions has played a key role in the history of the Italian magistracy. The broader context was the post-WWII struggle on the (non-)implementation of the IC. Until the 1970s, key components of the IC's transformative project were left inoperative. In fact, the political organs failed to pass the legislation needed for the operationalisation of important constitutional provisions, such as those concerning the right to health, local government institutions, and referenda (see here, pp. 103-106). This led to strong societal expectations that judges and prosecutors partake in the implementation of the IC through adjudication.

Factionalism emerged to articulate different sensitivities about how to mediate between these expectations and the enduring role of the magistracy as an independent branch of government. The ANM thus partitioned itself into factions, which in turn drew up lists for the CSM's elections. This ensured that different normative conceptions of magistrates' role in transforming Italian society were reflected in both unionism and self-governance.

However, starting in the 1980s, factions began to be perceived as problematic. Amidst the decline of 20th-century parties and ideologies, their raison d'être seemed to wane. Rather than reflecting different cultural-political sensitivities, factions thus came to be seen as mere conglomerates of corporatist power (see here, pp. 5-6). This phenomenon has long been framed by scholars and politicians as an illness to be weeded out. In fact, inter- and intra-factional quid pro quos, together with party-political affiliations, were recently found to systematically influence the CSM's activities. This major scandal decisively propelled the reform's adoption.

Self-governance by sortition

Sortition is presented as a reaction to this "degeneration" of factionalism. If membership in self-governance bodies is no longer predicated on electoral mechanisms, it is submitted, corporatist allegiances will no longer drive self-governance. Appointments, promotions, and disciplinary proceedings will be based on meritocracy and impartial assessment of the record, rather than on factional calculus and power bargaining.

However, this method raises two major concerns. First is a risk of losing "representativity" in the membership of self-governance bodies. To be sure, the relationship between voting and elected magistrates cannot be equated with the accountability of political representatives towards voters. The Constitutional Court underlined that the CSM represents magistrates in a functional sense: its members understand the needs of the administration of justice and possess the expertise to assess magistrates' performance. In this sense, magistrates' representation is guided by technical, not political considerations.

This notwithstanding, self-governance remains unavoidably imbued with pre-conceptions of a loosely "political"-cultural character. Depending on one's sensitivity, a judge's public statements might fall within the acceptable remit of the judiciary's public role in complex societies; or entail prejudice to judicial independence and thus be disciplinarily reprehensible. Likewise, a prosecutor's track record in investigating political corruption could show relentless professionalism, to be rewarded through career advancement. However, it could also be seen as a sanctionable exercise of the prosecutorial function for political purposes.

Electing the individuals called upon to make such determinations ensures that a variety of viewpoints are represented therein. Their articulation is rendered transparent, thereby ensuring accountability. The importance of this principle is recognised by European standards, which recommend that at least half of the members of self-governance bodies be "chosen by their peers from all levels of the judiciary and with respect for pluralism inside the judiciary". Sortition hence eliminates an important guarantee, also opening itself to supranational scrutiny (see here, p. 24). Magistrates will no longer be elected based on a contestable platform, but will be chosen by brute chance. The different sensitivities which inevitably structure self-governance will be concealed, potentially opening the way to further abuses.

A second, related concern is the higher risk that self-governance bodies be influenced by the political arena. In fact, magistrates will no longer be able to scrutinise through elections how members of the CSMs and the High Disciplinary Court interpreted the self-governance mandate and its relationship to politics. Succumbing to pressures from other branches of government will thus risk being more easily condoned. While this will not automatically translate into judicial capture, the reform removes important institutional safeguards against it. Amidst a global backlash against adjudication, it is then far from unthinkable that a weaker third branch will be more directly attacked in the future.

Conclusion

The reform purports to address long-controversial issues within the Italian judicial system. Such an objective is in principle to be welcomed. However, viewed in context, the reform appears problematic. Careers being already separate in practice, the reform seems to instrumentalise their separation to delegitimise magistrates. On its part, sortition subtly erodes institutional guarantees of judicial and prosecutorial independence. Overall, the reform will thus lead to an institutional weakening of the Italian magistracy.

Against this background, the upcoming referendum will be crucial. Both legally and politically, its outcome will be most consequential for the Meloni government's avowed project: strengthening the executive in Italy's constitutional balance. If approved, the reform may thus be the first step in a process of constitutional transformation – reaching well beyond its immediate scope.

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ABOUT THE AUTHORS

Chiara Gentile
Chiara Gentile is a Senior Research Fellow at the Max Planck Institute for Comparative Public Law and International Law.Chiara Gentile is a Senior Research Fellow at the Max Planck Institute for Comparative Public Law and International Law.

Paolo Mazzotti
Paolo Mazzotti is a Ph.D. candidate and Research Fellow at the Max Planck Institute for Comparative Public Law and International Law. He holds a Master's degree in Law from the University of Trento, as well as an LL.M. in International Law from the Geneva Graduate Institute, and is a recipient of the Diploma in the Law of the EU from the EUI's Academy of European Law.Paolo Mazzotti is a Ph.D. candidate and Research Fellow at the Max Planck Institute for Comparative Public Law and International Law. He holds a Master's degree in Law from the University of Trento, as well as an LL.M. in International Law from the Geneva Graduate Institute, and is a recipient of the Diploma in the Law of the EU from the EUI's Academy of European Law.

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