

Questionnaire

HOW CAN THE APPOINTMENT AND ASSESSMENT (QUALITATIVE AND QUANTITATIVE) OF JUDGES BE MADE CONSISTENT WITH THE PRINCIPLE OF JUDICIAL INDEPENDENCE

Country: **ITALY**

We do not consider the question of the initial appointment of the "judge", because we want to discuss the question of appointment together with the question of assessment. We therefore deal with the appointment of judges to another position/function. The question of (first) appointment has already been discussed by the First Commission several times.

FOREWORD: The Italian Constitution, which has been in force since January 1948, pays particular attention to the subject of the autonomy and independence of the judges. To achieve these principles, it establishes that the ordinary judiciary is *“an order which is both autonomous and independent from any other power”* (Article 104) and instituted a body for its own self governance: the High Council of the Judiciary (CSM), which has responsibility for the careers of all ordinary magistrates (Article 105)¹.

For this reason the Constitution gives the CSM responsibility for the administration of the judiciary (appointments, transfers, promotions and disciplinary matters) and thus the governing body is the guarantor of the judiciary's independence.

The Constitution also recognises the principles of independence and autonomy in respect of the public prosecutor, in particular because it provides for the obligation to prosecute all crimes (Articles 107 and 112)².

To this is added the fact that judges and public prosecutors belong to the same judicial order and are treated equally within it. It is, therefore, possible for a magistrate in the course of his/her career to pass from one function to the other (from judge to public prosecutor or vice-versa) on the basis of the CSM's evaluation.

Over the years, a complex system of norms has been approved, which puts these constitutional principles into effect and which allows all Italian magistrates (judges and public prosecutors alike) to carry out their own functions without being conditioned by legislative

¹ The terms "magistrate" has a different meaning in different countries. In Italy as well as in France it is used to include both judges and public prosecutors. In both countries they are jointly recruited and can move from one position to the other even recurrently in the course of their career.

²Article 107 [Disciplinary Action]

(1) Members of the judiciary may not be removed from office. They may not be dismissed, suspended, or moved to other jurisdictions or functions except either by decision of the superior council of the judiciary for reasons and with opportunity of defence as defined by the organizational law, or by their own consent.

(2) The minister of justice may initiate disciplinary action.

(3) Judges may only be distinguished by function.

(4) The public prosecutor enjoys the guarantees defined by the organizational law.

Article 112 [Criminal Proceedings]

The public prosecutor has the duty to initiate criminal proceedings.

and executive power, and enable them to prosecute all criminal offences, whoever may have committed them.

However, Mr. Berlusconi's government (2001-2006) presented in 2002 a cumbersome new project for reforming the whole judicial career. This project was based, essentially, on the following points:

- a) Access to the judiciary is by public examination for the two distinct careers of judge and prosecutor.
- b) Passage from the function of prosecutor to that of judge or vice-versa can take place only on the basis of a new examination.
- c) Positions in the Court of Cassation can be obtained only on the basis of a new examination.
- d) Managerial positions can be allotted only on the basis of a new examination.

Unfortunately, after an extensive debate this project was approved by the Italian Parliament (Law made under delegate powers No.150/2005)³ and its legal force will be completely affected as of 28 July 2006. It means that the magistrate's life will consist of continual examinations and, above all, it will create two separate magistracies: that of judge and that of prosecutor. As a result the latter would inevitably be put outside the judicial culture which would impact upon its own independence.

But, on the occasion of the last ballot (April 2006) the left side party won the political election. So, according to its programme Mr. Prodi's government has presented a bill asking the Parliament to stay the force of the above mentioned law⁴.

For that reason, I am replying to the questionnaire referring to the judicial organisation in place for the time being.

1. Are there assessments on the occasion of the appointment (of a judge) to another position or function?

Yes, there are. At present, access to the magistracy is by means of public examination, and magistrates advance to higher positions (Court of Appeal, Cassation, senior management) by means of assessments made from time to time by the C.S.M. on the basis of seniority, as required by law.

As far as judges'/prosecutor's career advancement is concerned, the 1941 judicial system laws envisaged that access to "higher" functions (Appeal and Cassation) could only be achieved through competitive examinations and regular assessment.

This point was substantially revised when the Constitution came into force and in particular by art. 107, paragraph 3 according to which "*Judges may only be distinguished by function*" (that means, distinctions between judges and prosecutors are based purely on the diversity of their functions).

Through a series of laws, career advancement through competitive examinations and regular assessments was in fact abolished and an automatic advancement based on seniority was introduced, except in cases of demerit.

The system is therefore organised as follows: the seniority required to be appointed to the rank of court judge/prosecutor is two years from appointment to trainee judge/prosecutor vested with functions; after eleven years with assigned functions, court judges/prosecutors

³ Italian Constitution, article 76 [Delegation of Legislative Power]: "Legislative power may not be delegated to the government unless parliament specifies principles and criteria of guidance and only for limited time and well-specified subjects".

⁴ Referring to the last news, that bill should be approved by the Parliament shortly.

may be assigned the rank of Appeal Court judge/prosecutor; the seniority required for assignment to the rank of Court of Cassation judge/prosecutor is seven years from the date of appointment to the rank of Appeal Court judge/prosecutor. After a further eight years, a judge/prosecutor holding the rank of Court of Cassation judge/prosecutor may be declared fit for designation to senior executive functions.

Once the necessary seniority has been reached, the advancement is decided by the C.S.M., after consulting the competent district judicial council. If the C.S.M. decides against the career advancement of a member of the judiciary, then the said judge/prosecutor will be appraised again after some time.

The system currently in force is based on the separation between rank and functions, and the assignment to a higher rank is independent from an effective assignment to an office corresponding to the attained rank. For example, in order to be effectively assigned to an appeal function (as that of Appeal Court counsellor) a judge/prosecutor must have effectively been awarded an Appeal Court rank. But a judge/prosecutor with an Appeal Court rank or a judge/prosecutor who has been granted a declaration of fitness for appointment to Cassation Court judge/prosecutor may, on the other hand, continue to work in his/her position – even though it corresponds to a lower rank – for an unlimited time.

The only immediate consequence of career advancement is a corresponding salary increase.

2. Are there assessments on other occasions?

Yes, there are. In Italy, as in all the other countries of civil law tradition having a similar system of recruitment (France, Spain, Germany, Portugal, etc.), recurrent evaluations of professional performance of the magistrates are provided for, to serve a variety of basic functions: in the first place to verify that young magistrates have actually acquired the necessary professional competence, and thereafter to choose among them those that are most qualified to fill the vacancies at the higher levels of jurisdiction. Last but not least, to ensure that magistrates maintain their professional qualifications throughout their many years of service and until retirement.

3. Who is in charge of the assessments?

In accordance to the above mentioned constitutional rules, the final assessment is always up to the High Council of the Magistracy.

4. Please describe how an assessment is conducted?

The procedure is the following. When a position is vacant (i.e., judge/prosecutor of Court of Appeal or of Court of Cassation) the High Council of the Judiciary publishes a competitive examination among all judges and prosecutors who qualify for appointment. They are invited to file an application, if they wish to, within a fixed delay, delivering all the useful documents. A Commission of the High Council of the Judiciary selects the most suitable applicant on the basis of a comparative evaluation according to rules of circular letters⁵.

⁵ The law setting up the C.S.M. entrusts it the power to issue quasi-statutory measures which may be divided into three categories:

a) Internal regulations and administrative/accounting regulation, both of which are envisaged by the law. These are measures of secondary legislation, which can be issued by political/administrative bodies recognised by the constitution, which aim at regulating the C.S.M.'s organisation and operation;

b) Regulations covering the training of trainee judges and prosecutors, which is also expressly envisaged by the law constituting the C.S.M. It regulates the training of the judges/prosecutors once they have passed the entrance exam;

c) Circular letters, resolutions and directives. Circular letters are used to self-discipline the exercise of the administrative discretionary power assigned to the C.S.M. by the Constitution and by ordinary laws. The resolutions

5. Has this assessment a quantitative character (eg. number of cases undertaken; files completed)? Please describe. What figures are taken into consideration?

Generally speaking, files completed and number of cases undertaken as well are considered for the positive evaluation of the candidate. But, impartiality, diligence, seriousness, professionalism as well as vocational training are most important at that end.

6. Has this assessment a qualitative character (eg. someone assesses how well the judge performs at various tasks)? Please describe. What aspects are taken into consideration?

Please see reply No.5.

7. Do the number and/or the outcome of the cases handled by the judge play any role in the assessment? Please explain.

No, the outcome of the cases handled by the judge does not play any role in the assessment unless the outcome of the case was filled in on the basis of a gross law mistake. As far as the number of the cases handled by the judge, please refer to reply No.5.

8. Is the duration of a case dealt with by a judge an item which is considered in an assessment? In what way? Please, explain.

No, it is not considered unless the delay was *de facto* totally unjustified.

9. How are judges who sit in court assessed?

The judges sitting in court are evaluated by the District Judicial Council on the basis of the report filled in by the First President of the Court. The latter refer on the judge's capability and daily performance.

10. What are the consequences of these assessments?

We need to distinguish two main cases: 1) the first one refer to the judge's assessment for his/her career advancement (rank of court judge/prosecutor, rank of Appeal Court judge/prosecutor, rank of Court of Cassation judge/prosecutor). In this case the assessment carried out by the District Judicial Council is mandatory for getting the CSM's final evaluation; 2) the second one refer to the judge's assessment for his/her application to higher position (function of judge of Appeal Court; function of Cassation Court; senior management). In this case the positive evaluation carried out by the District Judicial Council is an advantage for winning the competitive examination published by the CSM.

11. Is there any connection between assessment and remuneration?

No, there is not. But, when the judge's/prosecutor's assessment is made for his/her rank advancement higher salary is connected to the positive evaluation.

12. Do you see any infringement on the independence by virtue of the assessment of judges in your country? Please, explain.

No, I do not see any infringement.

13. What topic do you suggest for next meeting?

- **The transfer of magistrates requested by themselves or by the administration.**

and directives are used to propose and implement the application of judicial system laws pursuant to a systematic interpretation of the sources.

Italian National Association of Judges

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Please send the answers to this questionnaire by E-Mail to the presidency of the First Study