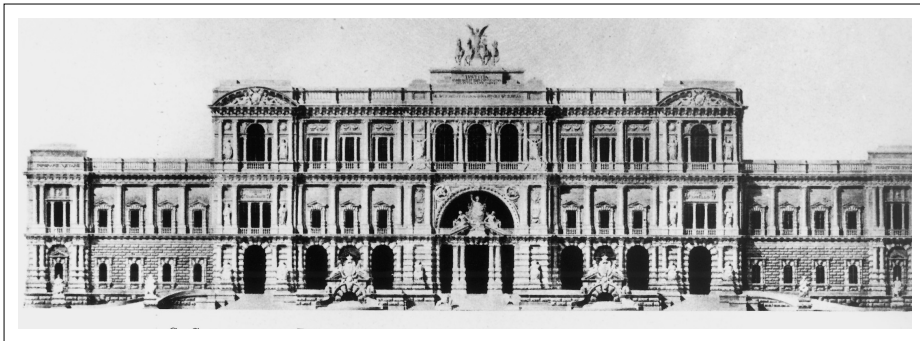


The Italian Judicial System

This book is the updated edition of the text published in 1999, which was designed to provide readily available information on the organisation of justice in Italy.

Part one is a concise illustration of the existing system. Part two is a discussion of the problems arising from the system's application. The last part sets forth the principal laws.



Palazzo di Giustizia, sede della Corte Suprema di Cassazione.

Part One

LAWS RELATING TO THE JUDICIAL SYSTEM AND THE ORGANISATION
AND OPERATION OF THE CONSIGLIO SUPERIORE DELLA MAGISTRATURA

1. THE JUDICIAL FUNCTION IN THE CONSTITUTION

1.1 Jurisdiction - The system by which judges and prosecutors discharge set out by the Constitution in the following manner.

Constitutional jurisdiction. - This is assigned to the Constitutional Court, which consists of fifteen judges. One third of these judges are appointed by the President of the Republic, one third by Parliament in joint session and one third by the highest-instance ordinary and administrative courts (art. 135 Const.).

The Constitutional Court rules (art. 134 Const.):

- a) on disputes concerning the constitutional consistency of laws and decisions having the force of law of the State and the Regions;
- b) on conflicts of jurisdiction of the powers of the State, the State and Regions, and the Regions;
- on charges against the President of the Republic, pursuant to the Constitution (see art. 90. Const.).

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Control over the constitutional consistency of laws may be exercised, directly¹, by specifically authorised entities (State, Regional Authorities, Self-governing Provinces) (see arts. 37-42 of Const. Law no. 87 of 11th March 1953) but it may also be exercised, incidentally², by a judge, who in the course of trial considers that the law to be applied to an actual case is of dubious constitutional consistency. In this latter case, the issue of constitutional consistency must be pertinent to the case's ruling and must not be manifestly unfounded (see art. 1 of Const. Law no. 1 of 9th February 1948; arts. 23-30 of Const. Law no. 87 of 11th March 1953).

Ordinary Jurisdiction.- Ordinary jurisdiction is exercised by ordinary judges/prosecutors, who are considered judges and prosecutors because they are created and regulated by the laws of the judicial system (art. 102 Const.; arts. 1 and 4 Royal Decree no. 12 of 30th January 1941). They have a separate status from other judges which derives from a) the privilege of independence envisaged by the Constitution (arts. 101-104 Const.) and also b) the fact that they are subject to the authority of their self-governing body: the Consiglio Superiore della Magistratura³ (in respect of the C.S.M.'s constitution and operation see Law no. 195 of 24th March 1958 and Presidential Decree no. 916 of 16th September 1958).

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Ordinary jurisdiction is divided into: (i) criminal jurisdiction, where judges are called to make a decision on whether the criminal proceedings instituted by a public prosecutor against a given individual are founded and (ii) civil jurisdiction, aimed at the legal protection of rights in relations between private subjects or private subjects and the public administration, if in exercising its duties, the administration prejudices the subjective right⁴ of a person.

¹ the said authorities may lodge an application with the Constitutional Court for a ruling on the constitutional consistency of a law without the law having to be applied by a judge in a trial.

² I.e. when a Court must apply a law to a concrete case and has doubts on the constitutional consistency of the said law, it may stay the trial and remits the case of constitutional consistency of the said law to the Constitutional Court;

³ Superior Council of the Judiciary.

⁴ a right safeguarded by the law

Criminal proceedings are instituted by a member of the ordinary judiciary⁵ exercising the office of public prosecutor (art. 107, last paragraph, Const.).

Civil proceedings may be started by any public or private entity, known as the plaintiff, against another subject against whom the claim is directed, known as the defendant.

Civil and criminal proceedings are regulated by two separate series of procedural rules: the code of civil procedure and the code of criminal procedure.

Civil procedure was changed in part by a law of 1990 (n. 353 of 26th November), entered into force on 30th April 1995, for the purposes of expediting the settlement of civil cases and making them more effective.

Instead, the code of criminal procedure was completely amended in 1988 by switching from an inquisitorial-type system to a basically adversarial system, based, amongst other principles, on a) the equality of the prosecution and the defence and b) the creation of evidence before the judge during the trial (see Law no. 81 of 16th February 1987, enabling the issue of the new code of criminal procedure). After the passing of numerous laws, which in the course of time mitigated against the adversarial nature of the procedure in the name of protecting society from organised crime, the recent amendment of article 111 of the constitution, implemented by constitutional law n. 2 of 23rd November 2000, has expressly sanctioned the basic adversarial principle of the creation of evidence during the trial in the presence of both parties and protected the defendant's absolute right to evidence.

The reformed Article 111 of the constitution concerns every and each trial, both civil, criminal, administrative and accounting, in the part in which the rule of a fair trial is expressly safeguarded. Under said rule, each and every trial must be carried out in the presence of both parties, in conditions of equality, before an impartial judge with a third-party status and must be of reasonable duration.

The right to a reasonable duration of the trial has recently been expressly recognised by Law n. 89 of 24th March 2001, which grants the parties the right to ask the State for fair pecuniary compensation, in the event that the said right is breached.

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Ordinary jurisdiction is administered by "professional" judges and "honorary" judges, who form part of the judiciary (art. 4 of Royal Decree no. 12 of 30th January 1941).

In particular, before the judicial system consisted of trainee judges, judges of all ranks attached to the Preture (single Judge Courts), the Courts, the Courts of Appeal and the Court of Cassation⁶, and public prosecutors.

Furthermore, the following judges also used to be members of the Judiciary as honorary judges: small claims judges and their deputies (they have now been abolished, but their office will continue to operate until the work load is completed).

Honorary judges now consist of: a) justices of the peace (Law no. 374 of 21st November 1991; Presidential Decree no. 404 of 28th August 1992), who are now competent, both in the civil and criminal field, for matters previously dealt with by professional judges, b) honorary judges (Law no. 276 of 22nd July 1997; Legislative Decree no. 328 of 21st September 1998 converted into law no. 221 of 19th November 1998), attached to the so-called sezioni stralcio (Temporary Divisions) established to go through the civil cases pending as at the date of 30th April 1995, c) court honorary judges attached to the judicial offices, d) honorary deputy prosecutors attached to the prosecuting offices, e) experts of the courts and the Juvenile divisions of the Courts of Appeal, f) lay judges of the Courts of Assizes (Law no. 287 of 10th April 1951), g) experts working for the Tribunale di Sorveglianza⁷ (see art. 70 of Law no. 354 of 26th

⁵ In Italy the Judiciary is made up of both judges and public prosecutors.

⁶ The court of highest instance ruling on points of law.

⁷ Court supervising the enforcement of sentences.

July 1975) and the specialised agricultural divisions (see arts. 2-4 of Law no. 320 of 2nd March 1963).

Currently, civil and criminal justice is administered by: Justices of the peace, the Courts, the Courts of Appeal, the Court of Cassation, the Juvenile Courts and the Tribunale di Sorveglianza sitting both as a single judge and as a panel of judges (art. 1 of Royal Decree no. 12 of 30th January 1941).

Pursuant to the reform of the single first instance judge (Leg. Decree no. 51 of 19th February 1998), the first instance courts have been reorganised by abolishing the Pretura and assigning its competence to the Tribunale, which now sits both as a single judge court for matters of minor complexity, and as a panel of judges for more serious cases. Similarly, the public prosecutor's office attached to the Pretura has been abolished and its functions have been assigned to the public prosecutor's office attached to the Tribunale. In the same regard, honorary judges attached to the abolished Preture have changed their name from "honorary deputy Pretore" to "honorary court judge".

Special jurisdictions. - The Constitution prohibits the establishment of new "extraordinary or special" judges. However, divisions specialising in specific sectors may be set up within the ordinary jurisdiction bodies, characterised by the concurrent presence in the same judicial body of ordinary judges and qualified citizens who are not members of the judiciary (e.g. the specialised agrarian divisions) (art. 102 of the Constitution).

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Special judges are, in any event, prescribed by the law, such as administrative judges, the State Auditors' Court and military judges, who had already been established prior to the Constitution coming into force (art. 103 Const.).

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The State Auditors' Court consists of auditor judges and prosecutors; an Office of the Prosecutor General entrusted with investigative functions has been set up and attached to this Court. The auditors' judiciary has recently been reformed, providing for autonomous regionally-based judicial and prosecuting divisions.

Its self-governing body is the Council of Presidency of the Court itself.

The State Auditors' Court has competence to review in advance the consistency with the law of a wide range of measures taken by the Government and other public bodies and to check the financial management and assets of public administrations. It also has competence to rule on issues such as public accounts, pensions and the liability of civil servants and officials of the State or other public bodies.

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Military judges, who have jurisdiction to hear military crimes committed by members of the armed forces, are a separate body from the ordinary judiciary, and are administered by a self-governing body called the Consiglio Superiore della Magistratura Militare (Superior Council of the Military Judiciary).

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Administrative jurisdiction is assigned to a series of bodies which are separate from ordinary courts: the regional administrative courts, which are first instance courts, and the Consiglio di Stato, which is the second instance court.

The self-governing body of administrative judges is the Consiglio di Presidenza della Magistratura Amministrativa (Council of Presidency of the Administrative Judiciary), which consists of the President of the Consiglio di Stato, four judges attached to the Consiglio di Stato, six judges attached to the regional administrative courts and also lay members, i.e. four citizens, of which two are elected by the Chamber of Deputies and two by the Senate of the Republic by absolute majority, chosen from ordinary university

law professors or lawyers having 20 years experience. This body also envisages substitutes, chosen from the judges of the Consiglio di Stato and the Regional Administrative Courts. The presence of lay members is due to a recent amendment of Article 7 of Law n. 186 of 27th April 1982, which sets forth the system of Administrative jurisdiction. The said amendment was implemented by Law n. 205 of 21st July 2000 and, in particular, by Article 18 of the said law.

An administrative judge assesses the lawfulness of administrative decisions (and not the merits): an application filed with an administrative court aims at obtaining the judicial annulment of an administrative decision which is assumed to be defective for lack of jurisdiction, breach of law or abuse of power.

Generally speaking, the competence of ordinary and administrative courts is established by referring to the individual claim brought before the court – whether it concerns a subjective right or a legitimate interest. Administrative jurisdiction deals with legitimate interests (without prejudice to specific subject matters which fall within the exclusive jurisdiction of administrative courts, recently increased by Law n. 205 of 21st July 2000).

Relevant laws:

Constitution, arts. 90, 101-113, 134-137

Constitutional law n. 2 of 23rd November 2000

Royal Decree no. 12 of 30th January 1941

Law no. 374 of 21st November 1991

Leg. Decree no. 51 of 19th February 1998, arts. 1-48

Law no. 186 of 27th April 1982, art. 7

Law no. 205 of 21st July 2000, art. 18

Law no. 89 of 24th March 2001.

2. THE CONSTITUTIONAL POSITION OF THE ORDINARY JUDICIARY

2.1 Independence and autonomy. - According to the Constitution, the judiciary is an autonomous body independent from the legislative and executive powers (art. 104 Const.).

Its autonomy refers to its organisation.

It is autonomous vis-à-vis the executive, in that the independence of the judiciary would be undermined if the measures pertaining to the career advancement of the members of the Judiciary, and in more general terms, their status, were assigned to the executive power. The Constitution therefore assigned the task of administering the members of the judiciary (transfers, promotions, assignments of duties and disciplinary measures) to a self-governing body (art. 105 Const.): The Consiglio Superiore della Magistratura, which thus guarantees the independence of the members of the Judiciary.

The Judiciary is also autonomous vis-à-vis the legislative power, in that judges are subject only to the law (art. 101 Const.).

Its independence refers to the functional aspect of judicial activity. It does not refer to the judiciary collectively - which is guaranteed by its autonomy, as described above - but to its members when they exercise jurisdiction.

Independence stems from, and is implemented on the basis of, the other constitutional principle that a judge is subject only to the law. This substantiates the derivation of jurisdiction from the sovereignty of the people.

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Independence and autonomy are principles which the Constitution also acknowledges in relation to the public prosecutor (arts. 107 and 112 Const.), especially where the obligatory nature of instituting criminal proceedings is concerned.

The obligatory nature of instituting criminal proceedings indeed contributes towards ensuring not only a public prosecutor's independence in exercising his duty, but also the equality of citizens before criminal law.

A public prosecutor's autonomy and independence have, however, special characteristics as far as relations "within" the prosecuting offices are concerned, as the office's unitary nature has to be taken into account, along with the power of authority acknowledged to the head of the office over his deputy prosecutors (see art. 70 of Royal Decree no. 12 of 30th January 1941).

2.2. Security of tenure – Judges/prosecutors are also ensured security of tenure.

A judge's independence could in fact be seriously compromised if he could be dismissed from service or transferred from one office to another.

To ensure that this does not occur, the Constitution envisages that a judge's suspension, dismissal or transfer can only be decided by the Consiglio Superiore della Magistratura either with his consent or for the reasons and with the guarantees of defence established by the judicial system laws.

Normally, therefore, judges/prosecutors can be transferred to another office or made to perform other functions only with their consent, following a decision by the Consiglio Superiore della Magistratura. Such measure is taken by the C.S.M. on the basis of the outcome of a competitive procedure between candidates. This starts with the publication of vacancies and the preparation of a classification list, which takes account of seniority, family or health reasons and aptitudes (the relevant rules are set forth in a special circular letter adopted by the C.S.M.: circular letter no. 15098 of 30th November 1993, and subsequent amendments).

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The cases where enforced transfers may be exceptionally permitted are quite clearly set forth.

In this respect, in addition to the case of first posting of a trainee judge/prosecutor, it should also be stressed where enforced transfers are affected to satisfy the administration's need to fill particular positions. Reference is made, in particular, to (i) arts. 4 et seq. of Law no. 570 of 25th July 1966, and subsequent amendments, pertaining to the enforced filling of Court of Appeal positions for which there are no applicants, (ii) art. 10 of law no. 831 of 20th December 1973 concerning the enforced posting to Court of Cassation posts (iii) art. 3 et seq. of Law no. 321 of 16th October 1973, and subsequent amendments, concerning enforced transfers to unwanted vacant positions and (iv) art. 1 of Law no. 133 of 4th May 1998 pertaining to the filling of unpopular posts in Southern Italy and the islands which are traditionally not sought-after and always vacant.

Furthermore, the Consiglio Superiore della Magistratura also has the authority to enforce the transfer of a judge/prosecutor for "environmental and/or functional incompatibility" (art. 2 of Royal Legislative Decree no. 511 of 31st May 1946): in that case, a departure from the principle of security of tenure, resulting from the enforced transfer, is indeed justified by the priority of ensuring the proper and peaceful exercise of the judicial activity, which would be prejudiced either by the judge/prosecutor continuing in loco or by the judge/prosecutor exercising specific functions (as far as these rules are concerned, see also the Consiglio Superiore della Magistratura circular letter of 18th December 1991). For the purposes of a transfer due to environmental and/or functional incompatibility pursuant to the aforesaid art. 2, what is taken into

account is the "objective" situation of the judge/prosecutor's "impediment" in performing a specific function and/or performing an efficient activity in a specific place thus jeopardising the prestige and good operation of the judicial office. Therefore, a judge/prosecutor's "guilt" is disregarded, as the transfer may also be ordered in cases of guiltless incompatibility. The reasons for adopting the said measure are therefore different from another case of enforced transfer which may be ordered as a collateral sentence if a more serious sentence than a simple warning is imposed at the conclusion of the disciplinary proceedings.

In this case, the transfer takes the form of a punishment and assumes the judge/prosecutor's guilt (see art. 21 of Royal Legislative Decree no. 511/46).

An enforced transfer may also be affected if the office where the judge/prosecutor is attached is abolished (art. 2 of Royal Legislative Decree no. 511/46).

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2.3. The Impartiality and establishment of judges/prosecutors by law . – The constitution further guarantees the judicial function, in particular, by prescribing the principle that judges/prosecutors are established by law (article 25 of the constitution.): on the one hand, it establishes that the jurisdiction of judges/prosecutors can only be decided by the law and not by secondary sources of legislation or non-legislative provisions; on the other, it also provides for the competent judge to be determined before the commission of the facts to be tried, thus preventing the judge from being determined ex post. The principle that the competent judge is established by the law also assures the impartiality of the judge while exercising his office.

In addition to the aforesaid constitutional principles, there are also judicial system laws covering the drawing up of the personnel charts of the judicial offices aimed at regulating the assignment of individual judges and prosecutors to the offices and the assignment of the case files (see art. 7 et seq. of Royal Decree no. 12 of 30th January 1941, and also the relevant rules recently introduced by the Consiglio Superiore della Magistratura by circular letter no. 8873 of 21st May 1997).

The principles of impartiality and establishment of judges by law are not contravened by the procedures of a) seconding (see, in particular, art. 110 of Royal Decree no. 12 of 30th January 1941, and the detailed rules set forth in the Consiglio Superiore della Magistratura circular letter no. 7704 of 2nd May 1991), and b) substitution (see, in particular, arts. 97, 105 and 109 of Royal Decree no. 12/41, and the detailed rules set forth in the Consiglio Superiore della Magistratura circular letter no. 7704 of 2nd May 1991). These procedures are designed to make up for personnel shortages in judicial offices by using other judges/prosecutors who are either regularly attached to other offices or attached to the same offices but assigned to different duties. In this respect, the importance of the recent Law no. 133 of 4th May 1998 should be stressed, as it holds important innovations designed to improve the system of justice. One of the most important innovations is the envisaged procedure of the so-called "inter-district charts" of the judicial offices. These charts do not replace those ordinarily envisaged in the single offices (see art. 7 (ii) of Royal Decree no. 12/41), but supplement them so as to provide for a more flexible and extended use of judges/prosecutors in several judicial offices ("combined" offices within the same district). This is also achieved by exploiting the equally innovative procedures of a) "co-assigning" the same judge/prosecutor to various judicial offices and b) "inter-district substitution" (see art. 6 of the aforesaid law). These procedures are indeed comparable to the aforementioned procedures of seconding and substitution, through which the legislator aims at implementing an even more effective system to offset frequent staff shortages and/or impediments affecting regular judges/prosecutors. The above procedures enhance the service provided by the judiciary in terms of quality and quantity.

In order to remedy the organisational difficulties of judicial offices resulting from the temporary absences of their judges/prosecutors, a recent Law no 48 of 13th February 2001 – which reformed the system for becoming a member of the Judiciary and increased the number of places by a thousand - provided for the establishment of district judges/prosecutors within each court of appeal to be assigned to substitute judges/prosecutors of the district when they are absent. District judges/prosecutors can be used in cases of: leave of absence, sick leave or other leave, obligatory or discretionary absence from work for pregnancy or maternity reasons or in the other cases regulated by Law no. 53 of 8th March 2000 (comprising rules supporting maternity and paternity); also in cases of: a) transfer of a judge/prosecutor to another office which does not take place concurrently with the enforcement of the order assigning another judge/prosecutor to fill the post left vacant, b) precautionary suspension of a judge/prosecutor from his office awaiting criminal or disciplinary proceedings and c) exemption of a judge from exercising his judicial office resulting from his appointed as a member of the examination board of the competitive public exam for judges and prosecutors.

The number of district judges/prosecutors is prescribed by Decree of the Minister of Justice, after consulting the Consiglio Superiore della Magistratura, and is decided on the basis of the average statistics of absences recorded in the district in the three-year period prior to the entry into force of the law and is subject to review always on the basis of the average statistics of absences recorded in the two preceding years.

2.4. The obligation to institute criminal proceedings. The public prosecutor's independence is further guaranteed by the constitutional rule prescribing that a public prosecutor is under the obligation to institute criminal proceedings (art. 112 Const.). This principle should be interpreted in the sense that, once the competent public prosecutor has been informed of an offence, he must conduct investigations and submit the outcome of his investigations to the judge's appraisal, making the relevant requests. This applies both when the public prosecutor requests the setting aside of the case because there is insufficient evidence to prove the alleged offence and when the public prosecutor requests the committal to trial of an individual in respect of a particular alleged offence.

As mentioned earlier, the obligation to institute criminal proceedings contributes towards guaranteeing not only the public prosecutor's independence in exercising his function, but also the equality of citizens before criminal law.

Relevant laws:

Royal Legislative Decree no. 511 of 31st May 1946

Law no. 48 of 13th February 2001, arts. 1 and 4-8

3. THE CONSIGLIO SUPERIORE DELLA MAGISTRATURA⁸.

3.1. Powers - The Consiglio Superiore della Magistratura is the self-governing body of the ordinary judiciary. Under the judicial system's laws, the C.S.M. is in charge of the employment, assignment/transfer, career advancement and disciplinary measures affecting judges and prosecutors (see art. 105 Const.) (with regard to the setting up and operation of the C.S.M., see Law no. 195 of 24th March 1958 and Presidential Decree no. 916 of 16th September 1958, and also the internal regulation approved by the C.S.M. itself).

⁸ The Superior Council of Judiciary.

3.2. Composition – Following the reform of Law no. 195 of 24 March 1958, introduced by Law no. 44 of 28 March 2002, the C.S.M. is currently made up of twenty-seven members:

- the President of the Republic, who chairs the C.S.M.;
- the First Chief Judge of the Court of Cassation;
- the Prosecutor General of the Court of Cassation;
- eight members appointed by Parliament (the so-called "laymen");
- sixteen members appointed by the judges and prosecutors (the so-called "togati" or professional judges and prosecutors).

The Constitution (art. 104 Const.) envisages that the President of the Republic and the First Chief Judge and Prosecutor General of the Court of Cassation should be members of the Council "by right". The only other restriction it imposes is to require two thirds of the other members to be elected by the ordinary judges and prosecutors belonging to the various ranks and one third by Parliament in joint session chosen from among regular university law professors and lawyers with fifteen years experience in the legal profession. Therefore, the number of elected members and the election procedures are regulated by ordinary law (see, as well as Law no. 195/58 and Presidential Decree DPR no. 916/58, also Presidential Decree no. 89 of 12th April 1976, Law no. 74 of 12th April 1990 and Presidential Decree no. 132 of 1st June 1990).

As mentioned earlier, the number of elected members is currently set at 24 (16 judges and 8 "laymen"). The eight "lay" members are elected by Parliament in joint session by secret ballot and by a majority of three fifths of the members forming the assembly. After the second ballot, a majority of three fifths of voters is, however, sufficient.

The sixteen members of C.S.M. to be elected by the judges and prosecutors are chosen as follows:

in one national constituency, two from the judges/prosecutors with the rank and function of Court of Cassation judge/prosecutor general;

in one national constituency, four from the members of the judiciary exercising the function of public prosecutor attached to Offices of the Prosecutor of the Republic, the Anti-mafia District Prosecuting Offices, or the Office of the Prosecutor General attached to the Court of Cassation, pursuant to Article 116 of the of the Royal Decree no. 12 of 30 January 1941, as replaced by Article 2 of Law no. 48 of 13 February 2001;

in one national constituency, ten from the members of the judiciary exercising the function of judge attached to courts ruling on the merits of cases, or attached to the Court of Cassation pursuant to Article 115 of the of Royal Decree no. 12 of 1941, as replaced by Article 2 of Law no. 48 of 13 February 2001.

Under the Constitution, the C.S.M.'s elected members hold office for four years, and are not immediately eligible for reappointment (art. 104 Const.).

The Constitution (Art. 104 Const.) also provides for the C.S.M. to elect a Vice President from among the members designated by Parliament.

The Vice President, who chairs the Presidency Committee, is entrusted with the task of promoting the C.S.M.'s activity and implementing its resolutions, as well as managing the funds in the budget. Furthermore, the C.S.M.'s Vice President will replace the President if he is absent or unable to attend and will exercise the functions delegated to him by the President (see, in particular, Art. 19 of Law no. 195/58 and Art. 4 of the C.S.M.'s internal regulation).

3.3. The C.S.M.'s constitutional position - As far as the C.S.M.'s position is concerned, the Constitutional Court has established that, although the C.S.M. is an organ that performs basically administrative functions, it is not part of the public

administration, as it is extraneous to the organisational system directly under the control of the State or Regional governments.

With reference to the functions assigned to it by the Constitution, the C.S.M. has been defined as "a body of clear constitutional importance". Its functions, which may be defined as the "administration of the activities of the judiciary", hinge primarily on the administration of the members of the judiciary; the C.S.M. deals with the employment, assignment/transfer, promotion and disciplinary measures concerning judges and prosecutors, including also the organisation of the judicial offices with a view to ensuring and guaranteeing that each and every member of the judiciary is subject "only to the law" when exercising his office. In this latter respect, it should be stressed that at the proposal of the Presidents of the Appeal Courts, and after consulting the Judicial Councils, every two years the C.S.M. approves the personnel charts of the judicial offices of each district and at the same time approves objective and predetermined criteria for assigning the case files to individual judges.

The C.S.M. is thus the highest ranking body in charge of the administration of judicial activities. The judicial Councils and the heads of individual judicial and prosecuting offices also co-operate, with different tasks.

3.4. The C.S.M.'s quasi-statutory role. - 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 and directives are used to propose and implement the application of judicial system laws pursuant to a systematic interpretation of the sources.

Relevant laws:

Law no. 195 of 24th March 1958

Presidential Decree no. 916 of 16th September 1958

Law no. 44 of 28th March 2002

4. ACCESS TO THE ORDINARY JUDICIARY

The competitive public examination - Access to the profession of judge and prosecutor takes place through a public competitive examination pursuant to article 106, paragraph 1, of the Constitution. Rules on the entry to the profession of judge and prosecutor have been changed over the last few years, on the one hand to simplify and expedite the examination procedure and, on the other, to promote the development of a cultural basis common to all the members of the legal world connected to the activities linked to the exercise of the judicial function: judges and prosecutors, notaries and lawyers. The legislator has thus constituted Post-graduate schools within the Universities for law-graduate students that want to enter the legal professions (Legislative Decree no. 398/97). These schools are expected to start operating as from the 2001-2002 university year.

With a view to rationalising and speeding up the relevant procedure, and with a view to implementing the assessment of the candidates in a reasonable time and with the required accuracy, the public examination for entry to the Judiciary has been completely amended by the aforesaid Legislative Decree no. 398/97 and the amendment of Article 123 of the judicial system. The – already envisaged - written and oral exams were sided by a computerised preliminary test on the subject matters dealt with in the written exam.

The computerised preliminary test was then subsequently set aside within the new framework of the public examination developed by Law no. 48/2001, by which, instead, the figure of an “external examiner” was constituted to expedite the correction procedure of the tests. The computerised preliminary tests will be set aside as envisaged when the regulation implementing the rules on external examiners is adopted.

Until the passing of Law no. 48 of 13th February 2001 covering the “increase in the number of judges and prosecutors, and the rules for access to the Judiciary”, access to the Judiciary could only take place by “competitive public examination for Trainee Judges/prosecutors”. A law degree was required, and is still required, to be admitted to take the exam. When the Post-graduate Schools for legal professions become operative, the candidates will need to have a post-graduate certificate in addition to a law degree.

By law no. 48/2001, in addition to the competitive public examination for trainee judges/prosecutors), which is the main way of entering the Judiciary, and expected to fill 90% of vacant posts, another competitive public examination for First Instance Judges and Prosecutors has been introduced, reserved to lawyers under 45 years old who have practised the profession for five years, or who have exercised honorary judicial functions for at least five years, as long as they have not been revoked from the said office.

Both the competitive public examination for trainee judges/prosecutors and that for first instance judges and prosecutors consist of three written exams (however some of the subjects differ: the first is on: civil, criminal and administrative law; the second on: civil law and civil procedure law, criminal law and criminal procedure law and administrative law) and an oral exam on the main legal subjects (see article 123 ter of the legal system).

The reform prescribed by Law no. 48/2001 is interlinked with the new aspects introduced by Legislative Decree no. 398 of 17th November 1997.

The provisions introducing the competitive public examination for first instance judges and prosecutors will enter into force when the post-graduate schools for legal professions become operative.

The competitive examinations for trainee judges/prosecutors and First Instance judges/prosecutors is published by the Minister of Justice, by decision of the C.S.M., which sets the number of positions. After the exam, should the number of eligible candidates exceed the number of posts, the C.S.M. will ask the Ministry for the assignment of other positions that are already available or that will become available within six months from the approval of the list of eligible candidates.

This would appear to provide for an appropriate planning and quantification of examinations, thereby averting the current inconvenient of not being able to meet - with the new trainee judges/prosecutors – the recent, and indeed foreseeable, personnel shortages resulting from delays in the examination procedures.

The examining committee, appointed by the C.S.M., is chaired by a judge/prosecutor with the rank and function of Court of Cassation judge/prosecutor, who has been declared fit for further assessment for appointment to higher executive functions. It consists of one judge/prosecutor holding a rank no lower than that of a judge/prosecutor

declared fit for assessment for appointment to the rank of Court of Cassation judge/prosecutor, who acts as vice chairman, twenty-two judges/prosecutors with the rank no lower than that of an appeal court judge/prosecutor and eight university law professors.

The classification drawn up by the commission, which is based on the total sum of the votes given to each candidate in each individual test, is approved by the C.S.M.

The successful candidates of the competitive public examination for trainee judges and prosecutors are appointed trainee judges and prosecutors and posted to a first instance judicial office attached to a Court of Appeal for the prescribed training (the relevant rules have recently been amended by Presidential Decree of 17th July 1998).

The length of the training is decided by the C.S.M. and is not normally less than twelve months. The training consists of attending a judicial office and co-operating in the judicial activity performed by other judges and prosecutors in the civil and criminal sector either as single or associate judges or alternatively as public prosecutors.

The training is directly organised, co-ordinated and controlled by the C.S.M., with the help of peripheral joint bodies (judicial councils and district commissions) and available learned judges and prosecutors (collaborators and assignees). The training aims at assuring the professional training of trainee judges/prosecutors and checking their fitness to exercise the judicial functions.

On the specific issue of training, the C.S.M.'s activity in organising study meetings reserved for trainee judges and prosecutors should also be mentioned. The judicial councils and the district reference entities in charge of peripheral training are also involved in this activity.

Lastly, Law no. 48/2001 has prescribed a considerable increase in the number of members of the judiciary (a thousand places), to be covered by three extraordinary examinations to be announced together by one decree.

Direct appointment. - As an exception to recruitment based on a competitive examination, the Constitution envisages that regular university law professors and lawyers of at least fifteen years standing and registered in the special Rolls entitling them to practise in the higher-jurisdiction courts may be appointed Counsellors of the Supreme Court of Cassation "on exceptional merit" (art. 106 Const.).

This measure has recently been enforced by Law no. 303 of 5th August 1998, no. 303, and in this regard the C.S.M. issued circular letter n. P.-99-03499 of 18th February 1999.

Relevant laws:

Royal Decree no. 12 of 30th January 1941, arts. 121-130

Law no. 127 of 15th May 1997, article 17, paragraphs 113 and 114

Presidential Decree of 17th July 1998

Legislative Decree n. 398 of 17th November 1997

Law no. 48 of 13th February 2001

5. THE CAREER OF THE MEMBERS OF THE ORDINARY JUDICIARY.

There is just one route to career advancement for both prosecutors and judges.

To change from the function of judge to that of prosecutor and vice-versa all that is required is an aptitude appraisal.

After the training stage, trainee judges and prosecutors may be allocated to first instance judicial offices.

The C.S.M. prepares a list of vacant positions and convenes the trainee judges and prosecutors. They are called following the order of the examination's classification list and any preferential qualifications they may hold, and are assigned a vacant position also on the basis of the preferences they themselves indicate.

As far as their career advancement is concerned, it should be stressed that 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 "distinctions between judges and between prosecutors are based purely on the diversity of their functions".

Through a series of laws (Law no. 570 of 25th July 1966 on appointments to Appeal Court rank; Law no. 831 of 20th December 1973, on appointments to Court of Cassation rank), 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 (see Law no. 97 of 2nd April 1979); after eleven years with assigned functions, court judges/prosecutors may be assigned the rank of Appeal Court judge/prosecutor (Law no. 570 of 25th July 1966); 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 (Law no. 831 of 20th December 1973).

Once the necessary seniority has been reached, the advancement is decided by the C.S.M., after consulting the competent 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 working in his position - even though it corresponds to a lower rank - for an unlimited time. The possibility of the so-called reversibility of functions was recently introduced, which allows judges/prosecutors with court of appeal or Court of Cassation functions to be respectively assigned, at their request, to a first instance office with functions of merits or to any other office with functions of merits, even though it corresponds to the rank of court judge/prosecutor (art. 21, (vi) of Legislative Decree no. 306 of 8th June 1992 converted into Law no. 356 of 7th August 1992).

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

Relevant laws:

Law no. 570 of 25th July 1966

Law no. 831 of 20th December 1973

Law no. 97 of 2nd April 1979

6. THE EXECUTIVES OF JUDICIAL OFFICES

The Chief Judge of the Court of Cassation, the Prosecutor General attached to the same Court and judges/prosecutors holding executive posts in first and second instance judicial offices head the offices, performing (i) "administration of the judicial function" duties pursuant to the Council's directives and (ii) "administrative functions" instrumental in the exercise of the judicial functions.

Assignment of executive posts is decided by the C.S.M., with the agreement of the Minister of Justice (see art. 11 of Law no. 195 of 24th March 1958 and art. 22 of C.S.M. internal rules).

Senior executives are chosen on the basis of their aptitude, merit and seniority, taken together. The comparative appraisal of the applicants is aimed at assigning the most suitable candidate to a vacant office, in view of the functional requirements of the office, and, perhaps, also some environmental aspects (see, C.S.M.'s circular letter no. 13000 of 7th July 1999).

In respect of the assignment to senior positions of the Court of Cassation and the High Court of Public Waters, the comparative appraisal procedure is limited to members of the judiciary who in the last fifteen years: have held senior executive offices for at least two years; have exercised Court of Cassation functions for at least four years; and when convened by the C.S.M., have accepted to be assigned to said senior post (see circular letter no. 13000 of 7th July 1999, as supplemented by decision of 7th March 2001).

THE DISCIPLINARY LIABILITY OF THE MEMBERS OF THE JUDICIARY

Breach of Discipline. A member of the judiciary who fails in his duties or whose conduct, inside or outside the office, is such as to make him unworthy of the trust and esteem in which he must be held, or who jeopardises the prestige of the judiciary, will be punished (see art. 18 of Royal Legislative Decree no. 511 of 31st May 1946). The general nature of the relevant rule gives broad powers to the disciplinary judge to effectively identify the facts pertaining to the disciplinary proceedings. As there are no strict patterns defining breaches of discipline, the judge/prosecutor's conduct must in fact be assessed by the disciplinary judge by referring to general models or clauses, which are reflected, according to the literal meaning of the aforesaid art. 18, a) in the trust and esteem that citizens hold a judge/prosecutor and b) in the prestige of the judiciary as a whole.

This system, which has been acknowledged as perfectly lawful (recently, *ex pluribus*, Cassation, single civil division, ruling no. 11732 of 20th November 1998), gives the disciplinary judge a particularly important task, when he is called upon to ascertain whether or not the conduct of an individual judge/prosecutor conforms to the aforesaid general models or clauses which refer to the trust and esteem in which a judge/prosecutor must be held, and the prestige of the judiciary.

7.2. Disciplinary sanctions. These are (see arts. no. 19 et seq. of Royal Legislative Decree 511/46):

- a) a warning, which consists of indicating the breach of conduct and inviting the judge/prosecutor to comply with his duties;
- b) a reprimand, which consists of a formal reproach for the breach committed by the judge/prosecutor;
- c) loss of seniority, which consists of postponing, by no less than two months and no more than two years, admission to a higher rank;

d) dismissal from office, which consists of the definitive exclusion from the judiciary in cases where, as a result of his conduct, the accused judge/prosecutor is objectively unable to perform judicial functions in any office and at any level;

e) loss of office, which is the same as a dismissal except for the fact that it is linked to a criminal conviction. This is not an automatic consequence of a criminal conviction, but depends on the seriousness of the offence.

The accessory sentence of enforced transfer can also be imposed by the disciplinary judge in addition to the sentence imposed, when the imposed sentence is more serious than a warning (art. 21, paragraph 6, Royal Legislative Decree no. 511/46).

7.3. Disciplinary proceedings. Disciplinary proceedings (in respect of the rules, see arts. 27 et seq. of Royal Legislative Decree no. 511/46) are instituted at the initiative of the Minister of Justice in the form of a request to the Prosecutor General of the Court of Cassation. This way, the Minister exercises the "power" assigned to him by art. 107 of the Constitution.

A disciplinary action may, however, also be commenced by the Prosecutor General of the Court of Cassation in his capacity as public prosecutor attached to the disciplinary division.

In any event, it is the Prosecutor General who pursues the action, whether by requesting the disciplinary Division of the C.S.M. to start an investigation or by advising the Division that he is commencing summary proceedings. The investigation may therefore be conducted either by the Prosecutor General of the Court of Cassation in the case of summary proceedings or by a member of the Disciplinary Division in the case of ordinary proceedings.

In the predisciplinary phase, the role played by the General Inspectorate at the Ministry of Justice is fundamental (see Law no. 1311 of 12th August 1962). The Minister may delegate the Inspectorate to gather the information required in order to make an informed decision in respect of the disciplinary action.

Disciplinary proceedings are judicial in nature and are regulated, until the disciplinary court's ruling, by the 1930 rules of criminal procedure integrated by the specific disciplinary proceedings rules.

In order to safeguard the person concerned, disciplinary proceedings must be commenced no later than one year after the day in which the entities in charge of instituting the disciplinary proceedings have been informed of the fact on which the charge is based.

The disciplinary court consists of a panel of judges known as the Disciplinary Division (see Art. 4 of Law no. 195 of 24th March 1958), which is made up of six members: the Vice President, who is a member by right and chairs the court, and five members elected by the C.S.M. from among its members, one of whom is a "laymen", one is a judge/prosecutor with the rank and functions of a Court of Cassation judge/prosecutor, two are judges and one is a prosecutor. In his capacity as President of the C.S.M., the Head of State may avail himself of the right to chair the Disciplinary Division and in that case, the Vice President is excluded from the panel.

The judge/prosecutor who is accused is entitled to defend himself in the disciplinary proceedings. Pursuant to the original legal framework, the accused can only be defended by another member of the judiciary at least the rank of court of appeal judge/prosecutor, and not by a lawyer (art. 34 of Royal Legislative Decree no. 511/46). The Constitutional Court ruled on this issue, setting aside the restriction on the choice of lawyer for one's defence (Const. Court, judgement n0. 497 of 13th November 2000). During the investigations or the trial, the Disciplinary Division may suspend the accused judge/prosecutor from his functions and freeze his salary at the request of the

Minister of Justice or the Prosecutor General. Suspension is obligatory in cases where the judge/prosecutor has been arrested (see arts. 30 et seq. of Royal Legislative Decree no. 511/46).

An appeal against a decisions made by the Disciplinary Division may be lodged with the combined Civil Divisions of the Court of Cassation by the Minister of Justice, the Prosecutor General and the convicted judge/prosecutor.

Relevant laws:

Royal Legislative Decree no. 511/46

8. THE CIVIL LIABILITY OF THE MEMBERS OF THE JUDICIARY.

Disciplinary liability is the result of a breach of the functional duties a judge/prosecutor undertakes vis-à-vis the State at the time of his appointment. Civil liability, instead, is the liability that a judge/prosecutor undertakes vis-à-vis the parties to the proceedings or other entities, and which results from any mistake or non-compliance affected in the exercise of his functions.

The civil liability of judges and prosecutors, which is similar to that of any other public servant, is based on article 28 of the Constitution.

Following the outcome of a referendum which led to the repeal of earlier rules severely limiting cases of civil liability, the issue is now regulated by Law no. 117 of 13th April 1988.

From a substantive viewpoint, this law affirms the principle of the right to compensation for any unfair damage resulting from the conduct, decision or judicial order issued by a judge/prosecutor either with "intention" or "serious negligence" while exercising his functions, or resulting from a "denial of justice" (art. 2).

After explaining in detail the notions of "serious negligence" (art. 2, paragraph 3) and "denial of justice" (art. 3), the law nevertheless clarifies that the activities of interpreting the law and assessing the facts and evidence (art. 2, paragraph 2) cannot give rise to such liability. In this respect, in any such cases, it is the procedure itself which safeguards the parties, i.e. by resorting to the system of appeals against the order assumed to be defective.

Without prejudice to the fact that in relation to the merits the judicial activity is unquestionable, something can nevertheless be done in respect of a judge or prosecutor's disciplinary liability in cases where - according to the C.S.M. Disciplinary Division's case law - an exceptional or evident breach of law has been committed, or the judicial function has been exercised in a distorted way.

From a procedural view point, it should be pointed out that the liability for compensating damage rests with the State, against which an injured party may take legal action (art. 4). If the State's liability is established, then the State may, subject to certain conditions, in turn claim compensation from the judge/prosecutor (art. 7).

A liability action and relevant proceedings must comply with specific rules. The most important of these rules provides that the liability proceedings are subject to: the lodging of all ordinary means of appeal, including any other remedy for amending or revoking the measure that is assumed to have been the cause of unfair damage; the existence of a deadline for exercising such action (art. 4); a decision on the action's admissibility, for the purposes of checking the relevant prerequisites; observance of the terms; an assessment of the evidence to see whether the charges are grounded (art. 5); and the judge's power to intervene in the proceedings against the State (art. 6).

In order to guarantee the transparency and impartiality of the proceedings, the system prescribes for the jurisdiction over such proceedings to be transferred to a different

judicial office (arts. 4 and 8), to ensure that the proceedings are not assigned to a judge of the same office as the office of the judge/prosecutor whose activity is assumed to have given rise to the unfair damage. The criteria for establishing the competent judge have recently been amended by Law no. 420 of 2nd December 1998, with the precise objective of avoiding any risk of prejudice while deciding such cases.

Relevant laws:

Law no. 117 of 13th April 1988

9. THE CRIMINAL LIABILITY OF THE MEMBERS OF THE JUDICIARY.

From a criminal point of view, in their capacity as public officials, judges and prosecutors can be made to account for offences committed in the exercise of their functions (e.g. abuse of office, corruption, corruption connected with judicial duties, extortion, failure to perform official duties, etc.). Parallel to this, they may act, in conjunction with the State, in their capacity as victims of a crime committed by private individuals against the public administration (a typical example is that of contempt of court and, in particular, contempt of court directed against the judge).

In this respect, it should be noted that under the aforesaid Law no. 420 of 2nd December 1998, the rules governing jurisdiction over such proceedings have radically been reformed. In addition to transparency, the aim of this reform was to ensure a judge's maximum autonomy of decision when called on to try cases in which other colleagues are involved for whatever reason. Significant changes were made to the rules of criminal procedure (arts. 11 of the code of criminal procedure and 1 of the implementing rules of the code of criminal procedure), by creating a mechanism for establishing the competent judge to avert the risk of "reciprocal" (or "crossed") jurisdictions, which had in the past given rise to serious cause for concern. A similar mechanism for transferring jurisdiction in civil proceedings has also been established to remedy a deficiency that has given rise to justified doubts of constitutional consistency.

PART TWO

IMPLEMENTING ISSUES IN THE CURRENT SYSTEM

1. THE FOUNDATIONS OF INDEPENDENCE AND AUTONOMY OF THE JUDICIARY.

In our judicial system, considerable importance is attached to independence and autonomy of the judiciary. This is due both to the underlying concepts and to history. As to the former, it should be considered that Italy is a civil law country. This means, at least from a general standpoint, that laws – i.e., the laws taken into account in a proceeding as the rules to be applied in solving the relevant case – are *made* by other public bodies: Parliament, but sometimes by Government as well and, nowadays, by bodies having jurisdiction on smaller geographic areas; conversely, courts are required to *apply* laws. Thus, judges participate in the law-making process only indirectly.

Given this conceptual framework, judges have come to be regarded as fulfilling a public function in compliance with certain *constraints*. Hence the idea that they can be appointed following a public competition, fill their positions as civil servants and be free from any control on the merits of their activity – such merits being set out in advance by law. Hence, again, the need for ensuring independence and autonomy of judges in order for them not only to be, but to be regarded as *impartial third parties* in discharging their tasks. In fact, third party status and impartiality are considered to be the features allowing the judiciary to be distinguished from other bodies that perform different public functions.

As to the latter reason, i.e. the historical one, it should be pointed out that our system was developed in its current version after World War II on the basis of the republican Constitution, whose democratic character was opposed to the previous – undoubtedly authoritarian – Fascist regime.

Indeed, justice had been somewhat mismanaged during that period on account of three main reasons: a) limitations on the right to take legal action, b) external pressure on the judiciary, and c) setting up of special courts.

Obviously, in re-founding our State the drafters of our Constitutional charter – whose first fifty years of life were celebrated in 1998 – took special care in preventing the danger of mismanagement and deviations.

2. JUDGES' THIRD PARTY STATUS AS A CONSTITUTIONAL PRINCIPLE.

Under Italy's Constitution, neutrality of judges is ensured, in particular, by the provisions concerning a) prohibition to institute *ex officio* proceedings (Article 24, para. 1), b) establishment of judges by law (Article 25, para. 1), c) prohibition to set up extraordinary (or special) courts (Article 102), and d) the requirement that judges be subject to law (Article 101, para. 2). The principles enshrined in these provisions were re-affirmed and enhanced by Article 6 of the European Human Rights Convention, which was transposed into Italy's legal system by Act no. 848 of 04.08.1955; these principles provided the foundations for the amendment made to Article 111 of the Constitution by Constitutional Act no. 2 of 23.11.1999. It is appropriate that they are briefly considered here.

The prohibition to institute *ex officio* proceedings can be derived from Article 24, which actually is worded in order to lay down the basic principle under which citizens may not be limited or hindered in defending their substantive rights in a proceeding if those rights have been granted legal recognition. Indeed, if in positive terms the respect for the rights recognised to individuals makes it impossible to impose any limitations on the defence of a claim in a proceeding, this same respect makes it necessary, in negative terms – this is the other side of the provisions made in Article 24 –, to only allow the claimant to decide whether to take legal action or not.

Additionally, the drafters of our Constitution were fully aware that no judge could be regarded by a community as the established judge where he had been appointed after a litigation or a proceeding had arisen or else on the basis of criteria developed after the latter events had taken place. Pursuant to these requirements, the established judge is the judge that is selected on account of objective criteria that have been set out in advance of the individual proceeding. Still, this is not enough in order to prevent all possible dangers, since the law-making body might override this principle by setting up *ad hoc* judges who would be competent for specific litigations on the basis of the aforementioned "objective criteria". Indeed, Article 25(1) must be read jointly with Article

102(2), prohibiting the establishment of extraordinary judges/courts – who are usually appointed exactly with a view to specific proceedings.

As to the requirement that judges be only subject to law, it should be stressed that paragraph 2 in Article 101 can also be construed in two different ways. In positive terms, it is aimed at ensuring autonomy and independence of the judiciary, which is protected against the influence of other constitutional bodies and is only subject to law. In negative terms, this can be construed as a limitation: indeed, if judges are only subject to law, they are not allowed to override it and are expected to search for and detect the pre-determined evaluation standards applying to the individual, concrete cases exactly in the existing laws. In order to re-inforce this limitation, Article 111(6) provides that judges must expressly account for their decisions so as to enable control not only by the parties directly concerned, but by the people at large – justice being administered in the people's name.

3. THE SUPERIOR COUNCIL OF JUDICIARY.

Special attention was paid by the drafters of our Constitution to the issue concerning autonomy and independence of the judiciary. To that end, ordinary judges and prosecutors were included into an “autonomous body, independent of any other power” (Article 104) and a self-government body was set up – namely, the Superior Council of Judiciary, which is competent for the career of all judges and prosecutors (Article 105).

The establishment of this body was the outcome of a debate that took place among the members of the Constitution Drafting Committee at the end of 1947. The “Fathers of our Constitution” realised that it was necessary to put an end to the “subjection” of judiciary to the executive power and turn it into “a body that, by being self-governed, i.e. independent of any other power” could ensure its members’ full independence (Rep. Leone).

The functions to be discharged by this new body were subsequently laid down; Mr Ruini, MP, referred to them imaginatively as the “four stakes”: appointing, promoting, regulating, transferring judges and prosecutors. Its make-up was the subject of a painstaking discussion. Two main views were held. According to one view, which drew inspiration from judges’ and prosecutors’ opinions and was supported by all those members who were in favour of a strict construction of the separation of powers principle (e.g., Reps. Cortese, Buozzi, Dominedò, Perlingieri), the Superior Council of Judiciary (SCJ) was to only include judges and prosecutors. This was considered to be the only way for preventing contamination (Rep. Dominedò) and “pol-

itics from penetrating into individual decisions, undue professional pressure and interference from affecting judicial bodies” (Rep. Caccuri).

The other view was based on the awareness of the need for avoiding establishment of a separate body, turning the SCJ into a tyrant governing the judiciary (Rep. Grassi). One should rather aim at achieving institutional harmony (Rep. Varani), ensuring the continuity of social and institutional life and letting in a small part of the life outside the judiciary (Rep. Leone), preventing the creation of a “State in the State” or a “closed, untouchable caste” (Rep. Preti), a “separate, reckless” body (Rep. Dominedò), a “mandarin government” (Rep. Persico), a body that was totally separate from the State’s administrative machinery and subject to no controls by either Parliament, media or the public opinion (Rep. Cappi). Under the text of Article 97 as included in the original draft Constitution, the number of judicial and non-judicial (lay) members was to be the same and the Prime President of the Court of Cassation was to be an “extra” member acting as Deputy-President of the Council.

A balance could be struck between the two views, and the amendment proposed by Rep. Scalfaro in the afternoon session of the 12th November 1947 was approved – i.e., two-thirds of the members would come from the judiciary, and one-third from non-judicial bodies.

Another much debated issue had to do with the office of president of the SCJ. Based on the initial proposal, either the Minister of Justice or the Prime President of the Court of Cassation would act as president or deputy-president of the Council. This proposal was rejected in order to ensure that the SCJ could be absolutely independent as to its organisation (Reps. Calamandrei and Buozzi). Preference was given to conferring this office to the Head of the State as the guarantor of its unity (Rep. Buozzi). This solution was also in line with “institutional symmetry” requirements (Rep. Leone) and the need for preventing the HCJ from becoming “a closed, rebellious entity”, a sort of “shooting star leaving the constitutional orbit on its own initiative” (Rep. Calamandrei). Knowing that the Head of the State would only be able to participate in the Council’s life on solemn occasions, the drafters decided to create an auxiliary office that would be conferred on the *actual* president of the Council. Again, the initial proposal reserved this office either for the Minister of Justice or the Prime President of the Court of Cassation (Reps. Leone, Condorelli, Perlingieri); a final balance could be struck by providing for the deputy-president to be elected by the Council among its lay members.

Following the establishment of a self-government body, the role of the Ministry of Justice came to be considered in a totally different light – so much so that it was even proposed to abolish this Ministry (Rep. Patricolo). Indeed, the Minister retained “residual” powers concerning organisation and man-

agement of judicial departments and administrative services, prevention of crime and execution of sentences, supervision over the lawful conduct of members of the judiciary.

4. FUNCTIONS OF THE SUPERIOR COUNCIL OF JUDICIARY.

After briefly outlining the reasons that led to setting up the Superior Council of Judiciary (SCJ), it is necessary to describe its role within the institutional framework of our country.

Under Article 105 of the Constitution, “the Superior Council of the Judiciary is competent for employment, secondment, transfer, promotion and disciplinary measures concerning judges and prosecutors, in pursuance of the provisions regulating the judicial system”.

There can be no doubt as to the fact that the Council was considered by the Constitution to be a body of constitutional importance. This entails that its provisions are administrative measures, which in Italy are subject to the control of administrative courts (as confirmed, of late, by decision no. 419/1995 of the Constitutional Court). This solution carries a few difficulties, especially as regards appointment by the Council of the heads of judicial departments. Indeed, in these cases the provisions regulating the judicial system require that the appointment be made in agreement with the Minister of justice – a requirement found to be consistent with constitutional principles by decision no. 379/1992 of the Constitutional Court. Hence, it can be argued that the scope of the control by administrative courts should be rather limited, at least as regards provisions that are made in agreement with the Ministry and entail political considerations as well.

As regards disciplinary matters, the SCJ is competent for all decisions. Disciplinary measures concerning judges and prosecutors are taken by a division of the Council including nine members (six from the judiciary and three lay members); its decisions are subject to lawfulness control by the Court of Cassation. This means that the last word on disciplinary measures applying to members of the judiciary is said by the highest body in the judicial system.

It should be pointed out that disciplinary breaches are not typified in Italy’s legislation; rather, reference is made in general to conduct making a judge/prosecutor unworthy of the trust to be placed in him/her or else affecting the repute of the judiciary. It is left to disciplinary judges to assess, on a case by case basis, whether a breach of trust has occurred or the repute of the judiciary has been affected, and subsequently to decide the appropriate measures to be taken – i.e., warning, reprimand, seniority loss, disciplinary transfer, dismissal from office.

Finally, based on the experience gathered during the past forty years, the scope of competence of the SCJ can be said to have widened in a stepwise fashion by way of circular letters, regulations and guidelines issued by the Council and, at times, by means of *political guidance* provisions. As regards circular letters, regulations and guidelines, they have been referred to as *quasi-statutory* provisions, which often entail interpretation of the laws in force and, at times, supplement them; although the effects produced thereby are not binding, they are nevertheless capable to influence both the scope of the provisions made by the Council and “the conduct of the possible addressees” (Sorrentino).

This development has been the subject of a lively debate.

5. TYPES OF INFLUENCE AFFECTING THE JUDICIARY.

Smaller attention, if any, was paid by the drafters of our Constitution to other types of influence possibly affecting the “neutrality” of the judiciary. They can be summarised as follows: a) influence exerted from inside the judiciary; b) influence resulting from specific relationships of a judge either with a litigation or with one of the parties thereto; c) influence due to specific opinions as related, in particular, to membership of political parties and associations; d) influence exerted by organised groups.

A) The provision laid down in paragraph 3 of Article 107 has been made use of to the greatest possible extent so far; under that paragraph, “judges/prosecutors can only be distinguished in terms of the functions accomplished”. This has practically voided career mechanisms, which nowadays operate as good as automatically and allow a judge to attain the position of member of the Court of Cassation, eligible for the office of head of department – as there is no connection with the tasks actually discharged by a judge. Indeed, it may happen that a judge sitting in a peripheral court climbs up the career ladder up to the office of member of the Court of Cassation without ever leaving his district. The reasons for this approach have been found in the fact that, under the previous arrangements, judges/prosecutors were subject to the power of the heads of their departments, prone to accept the decisions of the Court of Cassation and quite vulnerable if they nurtured career ambitions. These reasons are undoubtedly quite sound. However, it can be argued whether the approach chosen to achieve the relevant targets has been the best one. It is no mere chance that the Constitutional Court (decision no. 87/1982) declared Article 23(2) of Act no. 195 of 24.03.1958 to be unconstitutional where it provided that the posts assigned to members of the Court of Cassation within the SCJ could be filled by “members

of the judiciary that have been appointed to the relevant office, although they do not discharge the corresponding functions". Thus, the Constitutional Court has re-affirmed the principle that in order for members of the Court of Cassation to be elected to the SCJ, it is not enough that they are eligible for discharging the relevant functions: they must actually discharge them.

B) The specific relationships with either a litigation or the parties thereto have been addressed by ordinary procedural laws, rather than by our Constitution. Articles 51 and ff. of the Civil Procedure Code and Articles 37 and ff. of the Criminal Procedure Code regulate withdrawal of a judge from a case and challenge of a judge; the circumstances are specified – they are the same in both civil and criminal proceedings – under which a judge is compelled to withdraw from a case or a party is entitled to challenge a judge. Such circumstances consist in the judge having a stake in a case, being a relative of or on friendly or hostile terms with the parties, being a debtor or a creditor in respect of the parties, or else having already dealt with the relevant case.

The issue of withdrawal of a judge from a case and challenge of a judge has been attached considerable importance for the past few years; indeed, the more penetratingly judicial control is carried out, the more strictly one should consider judges' impartiality. It can be easily inferred that this issue has been raised, first and foremost, in respect of criminal proceedings. The Constitutional Court declared that Article 34 (2) of the Criminal Procedure Code was not consistent with the Constitution as it found that the judge applying a precautionary measure in respect of a person was disqualified for sitting in the panel trying the case in which that person was involved (see decisions no. 432/1995 and no. 131 and 155/1996). Doubts were subsequently raised as to whether Article 51 (1), no. 4, of the Civil Procedure Code was consistent with the Constitution, where it did not consider a judge to be disqualified for trying and deciding on the merits of a case if that same judge had dealt with the case in connection with a proceeding for taking precautionary measures prior to the proceeding on the merits. The Constitutional Court dismissed this claim (see decision no. 326/1997, as re-affirmed by decree no. 315 of 09.07.1998) on the grounds that, as a rule, in a proceeding for taking precautionary measures the case is dealt with in a summary fashion, and this does not interfere with the decision on the merits – which is only made after the court has dealt in full with a case. Hence, this problem may only arise in practice if the judge competent for the proceeding concerning precautionary measures departs from the relevant regulations and carries out inquiries that make as good as useless those to be subsequently carried out by the judge trying the merits of the case. In the

latter situation, the judge should consider – in the Court’s view – whether it is appropriate to apply to the head of his department for an authorisation to withdraw from the case.

On these grounds other claims concerning constitutional consistency were dismissed in respect of Article 669*octies* of the Civil Procedure Code (decree no. 193 of 20.05.1998), Article 354 of the Civil Procedure Code – allowing the appellate judge to refer the case, under certain circumstances, to the judge that has rendered the challenged judgment, see decision no. 341/1998 –, Article 186*quater* of the Civil Procedure Code – allowing a judgment to be rendered on a case by the same judge that has issued the so-called post-investigational order, see decision no. 168/2000 –, Article 703 of the Civil Procedure Code – where it allows the judge that has issued an order in connection with a possessory action to also deal with the proceeding on the merits, see decision no. 120/2000 –, Article 24 of the so-called Workers’ Statute – where it allows the judge that has issued an immediately enforceable order to also deal with the application to set it aside, see decision no. 387/1999 – and Articles 98 and 146 of the Bankruptcy Act – where they allow the bankruptcy judge to deal with the proceedings challenging the list of the bankrupt’s liabilities and the actions for damages that he has authorised himself, see decisions no. 167/2001 and 176/2001.

The above overview would appear to show that, after putting probably excessive emphasis on formal safeguards, the Court has adopted a softer approach as regards civil proceedings by trying to strike a balance in light of the existence of circumstances that *actually* affect judges’ impartiality.

B1) The lively debate that has been taking place for the past few years with particular regard to criminal proceedings has led to amending Article 111 of the Constitution. In order to enhance impartiality of the judiciary to the greatest possible extent, the need for a case to be tried by allowing both parties to be heard before a third-party, impartial judge and for the evidence in criminal proceedings to be *created* during the trial has been recognised as a constitutional principle.

Statutory provisions have been subsequently passed in order to allow implementing the above principles. Reference can be made to the most recent statutes, such as:

1. Act no. 397 of 07.12.2000, concerning investigations by defence counsel, which implements the principle under which both parties must be on a level footing as regards the right to submit evidence;
2. Act no. 63 of 01.03.2001, which streamlined criminal procedural rules applying to creation and assessment of evidence;

3. Act no. 60 of 06.03.2001, which amended the provisions concerning officially assigned counsel with a view to ensuring full representation of both parties in criminal proceedings;
4. Act no. 134 of 29.03.2001, which amended the provisions applying to legal aid with a view to granting full recognition to the right of defence.

C) No provisions regard philosophical opinions and/or membership of parties or associations as affecting judicial impartiality. Under Article 98(3) of the Constitution “limitations on the right to become members of political parties may be imposed by law as regards judges/prosecutors”. However, it is a fact that membership of political parties does not jeopardise impartiality, which is conversely endangered by the inability of a judge/prosecutor – i.e., by a circumstance related exclusively to his/her inner conscience – to prevent his/her specific opinions from prevailing over the objective, impersonal assessment of the case. Thus, whenever membership of a party or association has been invoked as a ground for challenging a judge/prosecutor, this has been actually the result of either maladjustment or else the feeling that judges/prosecutors do not always manage to keep their distance from a proceeding.

D) Nor are there measures to prevent judges/prosecutors from being influenced by other types of pressure – only think of campaigns waged by the press or TV – and therefore, being biased in their judgments. This issue is only partly addressed by Article 114 (formerly 164) of the Criminal Procedure Code – prohibiting publication of certain documents – and by Article 329 of the new Criminal Procedure Code – providing for secrecy obligations.

Indeed, media and politicians have been criticizing the activities of judges/prosecutors with increasing frequency in the past few years. Whenever the SCJ has considered that this might impair the legitimate discharge of a judge’s/prosecutor’s concrete functions, investigations have been started “to safeguard” the judge/prosecutor concerned; after considering all the points involved in the case, the Council has re-affirmed its full confidence in the judge/prosecutor whenever the latter could not be found to be liable for any breach.

Article 114 of the Criminal Procedure Code has taken account of the opinion given by the Constitutional Court in its decision no. 65 of 1965, highlighting the need to abide by the fundamental principle under which public information is to be ensured at all events. However, Parliament did not fully respect the Court’s views; indeed, the latter found Article 114 (3) unconstitutional (see decision no. 59/1995) where it imposed limitations on publicity of the documents included in the case file – which a judge is required to know by definition. The issue concerning the sensitive relationships between

justice and information is taking continuously new shapes, and is therefore the subject of an ever increasing number of legislation proposals.

6. DECISIONS BY THE CONSTITUTIONAL COURT.

Consideration of the provisions included in our Constitution could not provide, in itself, an exhaustive, significant overview of the system laid down by our Constitution; indeed, it is necessary to supplement this type of analysis by considering how those provisions have produced effects on ordinary laws by way of the implementing activity carried out by the Constitutional Court. In particular, the Court has repeatedly addressed the issue of established judges and the safeguards applying to independence of special judges, as well as the right of defence.

We saw that judicial proceedings are committed, as a rule, to ordinary judges and prosecutors, who are members of an autonomous, independent body under the guidance of the Superior Council of Judiciary. Article 103 of the Constitution provides for additional judicial bodies having specific jurisdiction – namely, the Council of State and other administrative judicial bodies, having jurisdiction on the defence of legally protected interests and, as regards specific matters, individual rights in respect of the public administration; the Court of Auditors, having jurisdiction on public accounts issues and other subjects as specified by law; and military courts, having jurisdiction on military offences committed by members of the Armed Forces in peacetime as well as on such matters as are provided for by law during wartime. It appears that the Constitutional Court holds the view that the jurisdiction of military courts in peacetime can be derogated from by Parliament in favour of that of ordinary courts on the basis of reasoned grounds – see decision no. 90/2000.

The setting up of special courts was prohibited by Article 102 (2) of the Constitution; as to the special courts that already existed at that time, under the 6th Transitional Provision it was decided that they would be the subject of revision within five years of entry into force of the Constitution. However, the five year term expired without any revision by Parliament; the Constitutional Court had therefore to face a first interpretation issue – namely, whether expiry of the five year term had made all the pre-existing special courts unconstitutional, or it was to be permitted that these courts continued their activities. The Court chose the latter solution, since it was considered that the Constitution implicitly recognised that special courts were compatible with the new system. This entailed additional work for the Court, however, since it became necessary to determine whether the laws regulating the individual courts did provide sufficient safeguards for the independence of

judges – pursuant to Article 108 (2) – and, at the same time, were compliant with the requirement resulting from the joint application of Articles 24 (1) and 113 (2) – namely, to provide citizens with full legal remedies.

The Constitution has only provided for a self-government body in respect of ordinary courts. As regards other types of court (administrative courts, court of auditors, military courts), Article 113 applies; under the latter, the respective organisation must be regulated by specific laws, which are also required to ensure independence of the relevant judges. It is therefore necessary to evaluate whether their independence is safeguarded to a sufficient extent. A few doubts that were raised in connection with military courts were dismissed as groundless by the Constitutional Court (see decisions no. 542/2000 and no. 116/1999).

A) Whilst the prohibition to set up special courts is necessary to fully ensure that judges are independent third parties, it is a fact that there is a concrete, non-negligible requirement underlying the establishment of special courts – namely, the consideration that the features of a case may require technical know-how and specific competence, which are usually not to be found in ordinary judges. With a view to meeting this requirement, Article 102 (2) provides that “it is only allowed to set up specialised divisions within ordinary judicial bodies in respect of certain matters, by including qualified citizens who are not members of the judiciary”.

Specialised divisions are therefore ordinary courts with a peculiar composition. However, this peculiarity should not be such as to surreptitiously override the prohibition to set up special courts. This is why the question has been raised as to whether a body in which members of the judiciary make up the minority of the panel is compatible with the overall system. The answer has been positive, on condition that other features applying to operation of the specialised division allow considering the aforementioned prohibition not to have been overridden; to that end, special importance is to be attached to the role assigned to specialised courts within the system as well as to the controls to be carried out in respect of their decisions. Conversely, the Court ruled that it was against the Constitution to provide for the appointment of lay members “from time to time” in connection with the individual litigations (see decision no. 83/1998). The main specialised divisions are currently the Juvenile Courts, the Regional Tribunals for Waterways, the specialised divisions for agricultural matters, the specialised division at the Rome Appellate Court – which is competent for the appeals lodged against the decisions of commissioners fixing the amount payable as compensation following expropriation in the public interest. However, the court divisions operating as industrial tribunals are neither special courts nor specialised divisions; indeed, their membership is not different from

that of ordinary courts – even though specific reference is made by law to the “industrial divisions” at courts and appellate courts, see Articles 38 and 39 of legislative decree no. 51 of 19.02.1998.

B) As regards, more specifically, the provision that judges are established by law, it was necessary for the Court to decide whether a few measures as allowed by our legal system were in conflict with the above principle.

Among the first issues to be addressed by the Court was the transfer of a criminal case to another judge either for ordre public reasons or on grounds of bias (Articles 55 and ff. of the Criminal Procedure Code). Although the Court had ruled that the relevant provisions were consistent with the Constitution (see decisions no. 50 and 109 of 1973), Parliament was led to amend them following a few instances in which they had been applied in a way liable to criticism; the Court of Cassation was therefore given stricter rules for selecting the *ad quem* judge – who is to be either a judge in the district of the same appellate court where the judge having initially jurisdiction is attached or a judge in a neighbouring appellate court district, see Article 58(3) of the Criminal Procedure Code as amended by Article 1 of Act no. 773 of 15.12.1973. This matter is currently regulated by Articles 45 and ff. of the new Criminal Procedure Code.

Doubts were also raised as to whether changes in jurisdiction criteria – due, for instance, to the elimination of certain judicial departments or else the modification of the relevant territorial jurisdiction – might result into infringing the principle enshrined in Article 25 of the Constitution. This issue was dismissed as groundless by the Court in decision no. 56/1967, since the principle under which judges are established by law cannot entail the ultimate determination of jurisdiction as based on the circumstances existing at the time when the Constitution came into force; additionally, changes in the concrete requirements and enhanced effectiveness objectives may well require changes in the structure of judicial departments – provided that these changes are not made in connection with individual, specific litigations but rather as regards whole categories of litigation.

It was also argued whether it was consistent with Article 25 (1) of the Constitution that heads of judicial departments might appoint a substitute or an alternate judge, in case the judge competent for a case was permanently or temporarily prevented from attending, respectively. This issue was dismissed as groundless by the Court, which stressed that heads of judicial departments cannot but have discretionary powers in order to meet the relevant requirements; additionally, the fact that the judge to be substituted is permanently prevented from attending can be regarded as an objective fact justifying exercise of the head of department’s powers (see decisions no. 156/1963 and

no. 173/1970) – provided that these powers are exercised in accordance with set criteria and by means of reasoned measures (see decisions no. 392/2000 and 571/2000). This issue is, however, quite sensitive – as shown by the repeated amendments made by Parliament to Articles 97 and ff. of the Act regulating the judicial system (see Presidential decree no. 449/1988, legislative decree no. 273/1989, Act no. 133/1998).

The Court ruled on the same grounds that heads of department are entitled to organise the relevant department via the so-called “charts”, defining, at yearly intervals, specific divisions in each department, assigning judges and prosecutors to such divisions and laying down the internal spheres of competence (see decision no. 146/1969 and, above all, decision no. 392/2000). In particular, biennial “charts” are drafted by the judges presiding over appellate courts, after hearing judicial councils, and subsequently adopted by the SCJ and included in a decree of the Minister of justice (see Article 7bis of Royal Decree no. 12 of 30.01.1941, no. 12 as added by Article 3 of Presidential decree no. 449 of 22.09.1988 and subsequently amended by Article 6 of legislative decree no. 512 of 19.02.1998 and Article 57 of Act no. 479 of 16.12.1999).

The power of heads of department to assign the individual cases to divisions and/or judges was also questioned.

The Court dismissed the claim as groundless and ruled that the discretionary powers recognised to heads of judicial departments in meeting the relevant requirements may be limited though not eliminated in full (see decision no. 272/1998). In particular, after recognising that, from a general standpoint, the principle under which judges are established by law is in conflict with the exercise of discretionary powers in actually appointing the individual judges, the Court highlighted that the discretionary powers granted to heads of departments in assigning the individual cases should only be aimed at meeting objective, inescapable requirements with a view to allowing operation of a department and enhancing its efficiency – all other purposes being excluded (see decision no. 272/1998). Based on these guidelines, two issues can be distinguished: a) how to ensure that these discretionary powers are exercised in connection with objective requirements, and b) what consequences may result from the misuse of those powers. As to the latter issue, one cannot but find that any incorrect and/or misguided application of discretionary powers will produce no effects on a proceeding unless there are grounds for the judge to withdraw from the case or be challenged. This is why preference is given to an *a priori* solution, by eliminating discretion in assigning the individual cases in that automatic criteria are implemented – even though the automatic assignment of cases may cause considerable inconvenience, irrespective of the criteria adopted. The SCJ has therefore

issued various circular letters to limit the discretionary powers of heads of departments, some of whom have considered that they were being limited in their jurisdiction and therefore lodged a claim with the Court on account of conflict of jurisdiction. The Court dismissed the claim as inadmissible and pointed out that the competence for appointing judges to deal with the individual proceedings is not related to the sphere of jurisdiction as laid down in constitutional provisions – since it is grounded on and regulated by laws defining organisational matters (see decision no. 90/1996).

The aforementioned Articles 7bis and 7ter were added to the Act on the judicial system – Royal Decree no. 12/1941 – by Articles 3 and 4 of Presidential decree no. 449 of 22.09.1988, as subsequently amended. They regulate the drafting of charts in respect of judicial departments with different divisions, appointment of the individual judges/prosecutors to such divisions, setting up the panels of judges and defining the criteria for assigning criminal cases and substituting judges that are prevented from attending. Since these provisions are not considered to be related to judicial capacity under Article 33 (2) of the Criminal Procedure Code, the question was raised as to their being consistent with Article 25 of the Constitution. The Court dismissed this claim and upheld its previous rulings on this matter, by stressing that the constitutional principle under which judges are established by law does not imply that the criteria for assigning the individual proceedings within the competent judicial department are to be regarded necessarily as constituent standards of judicial capacity (see decisions no. 419/1998 and 392/2000).

7. FINAL REMARKS.

Readers from civil law countries probably will not wonder at the existence of so many detailed, precise provisions aimed at ensuring independence, autonomy and impartiality of the judiciary; they might even value the – probably excessive – care taken by the Constitutional Court in clarifying, specifying, supplementing statutory provisions.

The final outcome of this exercise is a “living law” perspective, which common law experts will probably find hard to grasp. This is due to the deep-ranging differences between the two systems as also related to administration of justice. For instance, in England judges and magistrates are appointed and promoted by the Lord Chancellor, whilst the Prime Minister and the Sovereign are competent for the higher offices – on the basis of totally discretionary proceedings; disciplinary control is grounded on utterly informal mechanisms. The English actually acknowledge that this might facil-

itate the exertion of undue pressure by either Government or interest groups on the judiciary; still, they accept the risk on the basis of a line of reasoning that continental scholars could never agree with. Their system – so they say – is based on trust, and judges have proved fully worthy, so far, of the trust placed in them: they know that if their conduct were liable to criticism they would ultimately jeopardise their own independence.

On the other hand, they also point out that no constitutional safeguards can prevent government members in a country from exerting pressure and/or influence on judges and prosecutors if this is permitted by cultural custom – whereas in England, independence of the judiciary is a principle that is deeply rooted in the country's conscience rather than merely a handy slogan.

Nor is the situation much different in the USA. Not long ago, a Committee was set up in the USA to consider changes to the rules on disciplinary proceedings and dismissal from office of federal judges. The opportunity for doing so was provided by the fact that no federal judge had been charged with a crime before 1983, whilst five judges had been charged with criminal offences since then and four of them had been found guilty; this fact had been accounted for, *inter alia*, by the rapidly increasing number of federal judges. This Committee completed its work in 1993 by reporting that the existing system was not to be changed as its constitutional standards were fully adequate for the purposes to be achieved.

Based on the above summary considerations, one cannot but conclude that the true difference between civil law and common law systems consists in a different cultural approach to independence and impartiality of the judiciary. In civil law systems, the need for detailed, precise regulations stems from a cultural stance based on mistrust of one's fellow citizens and, more specifically, members of the judiciary; the imposition of rules and pre-defined procedures is aimed at bridging this gap. In common law systems, there is no such need and the final objective is rather to appoint judges that are really worthy of the trust placed in them.

Will it ever be possible to approximate these two cultural stances? Judicial institutions tend to develop towards uniformity, because we are increasingly citizens of Europe and will be citizens of the world in the near future. This can allow us to hope that the approximation will take place; at all events, we must endeavour to make it real in a not too remote future.

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NOTE

(¹) Superior Council of the Judiciary.

(²) The said authorities may lodge an application with the Constitutional Court for a ruling on the constitutional consistency of a law without the law having to be applied by a judge in a trial.

(³) i.e. when a Court must apply a law to a concrete case and has doubts on the constitutional consistency of the said law, it may stay the trial and remits the case of constitutional consistency of the said law to the Constitutional Court.

(⁴) A right safeguarded by the law.

(⁵) In Italy the Judiciary is made up of both judges and public prosecutors.

(⁶) The court of highest instance ruling on points of law.

(⁷) Court supervising the enforcement of sentences.