Judiciary self-protection actions

1. The High Council for the Judiciary and the government of the judicial function in Italy

According to the Italian Constitution, the judiciary is an autonomous branch independent from any other power (art. 104 Const.).

Differently from other legal systems, in Italy judges and public prosecutors both belong to the only body of judiciary. Judges and public prosecutors share the same entry process and career, the same rules apply to every aspect of their professional life, and switching from judicial to prosecutorial functions is allowed, though with some limitations in terms of time and location as prescribed by the law.

Judges and public prosecutors are both subject to the High Council for the Judiciary (HCJ).

The High Council for the Judiciary already existed before the entry into force of the Constitution, but only performed consultative functions for the Minister of Justice, who was responsible for the overall administration of the judicial branch.

The Italian Constitution was drafted and approved between 1946 and 1948, after the end of World War II and the fall of the authoritarian Fascist regime. Under Fascism, limitations to individual civil rights and liberties was perpetrated through the absolute predominance of the executive branch vis-à-vis the other State powers. The judiciary was formally and substantively dependent from the executive branch. It featured a hierarchical structure and the Ministry of Justice had the power to decide over selection and entry processes, career management and advancements, and to exercise disciplinary powers.

The Constitution-makers' recent experience, ultimately marked by a ferocious civil war which some of them had joined as Partisans against the Fascist regime, led them to place the utmost focus on entrenching the rule of law through a rigorous separation of powers, with a view to protect the individual and collective rights of all, and those of minorities in the first place.

As seen above, in art. 104 they firstly established the independence of the judicial function. Independence relates to the functional exercise of jurisdiction, i.e., the condition of a judge or public prosecutor from any given judicial office, who shall not be compelled by hierarchy-based deference when taking decisions typical of his/her own function – investigation, indictment, judgement. Judges and public prosecutors shall be independent from the legislative and executive branches as well as from any other power. They shall be exclusively subject to the law, as prescribed by art. 101 Const. They exercise a technical function characterised by well-defined limits and restrictions, which consists of the impartial application of the rules making up the legal system. Therefore, they do not represent the citizens' will nor popular sovereignty, as expressed through the majority rule. Art. 1 of the Italian Constitution states that sovereignty belongs to the people, that exercises it according to the forms and limits established by the Constitution. Impartial -though (also)minority protection-oriented -application of the law(i.e., jurisdiction) represents one of the limits that the Constitution imposes to popular sovereignty and the majority rule.

Art. 111 of the Constitution lays down the fair trial principle, which shall be conducted in line with the adversarial principle by an independent and impartial judge.

Therefore, according to the Italian Constitution, judges and public prosecutors are officials enjoying technical – and not political – legitimacy, who shall ensure the impartial application of legal procedural rules by means of their competency and expert knowledge. As far as the public prosecutorial function is concerned, art. 112 of the Constitution imposes an actual obligation to initiate criminal proceedings. This expresses the principle of equality of all citizens before the law and aims at preventing discretional prosecution of criminal offence, thus ultimately replacing the exercise of an eminently political power.

In art. 106, the Constitution states that judges and public prosecutors shall be selected according to a "technical" public competition aimed at ascertaining expert knowledge and competency in the legal field.

In order to secure the independence of judges and public prosecutors, art. 107 of the Constitution stipulates the principle of non-removability, stating that judges may not be removed from their office without their consent.

Finally, independence is guaranteed by self-government. The High Council for the Judiciary was established as an autonomous body independent from the legislative and the executive branches. It is in charge of managing the career of judges and public prosecutors, considering that the power to appoint, transfer and promote them, or to impose them disciplinary sanctions, might influence their decisions, although the exercise of judicial functions is not subject to any formal hierarchy. Therefore, all powers relating to the career of judges and prosecutors are bestowed upon the High Council for the Judiciary. This is composed as follows: judges and prosecutors elect two-thirds of its members from among the ranks of the judiciary, while Parliament in joint sitting elects the remaining one-third of the Council's members, so to ensure adequate differentiation in its composition.Members elected by Parliament shall be "experts", too, i.e., full professors of law-related subjects or lawyers with at least 15 years of professional practice. While the Constitution remains silent on that, the law prescribes that the HCJ shall feature 24 elective members: 16 from the ranks of the judiciary and 8 lay members. The President of the Republic, the First President of the Court of Cassation and the Prosecutor General of the Court of Cassation are *ex officio* members. The High Council for the Judiciary is presided over by the President of the Republic. With a view to balance the quantitative predominance of members elected from among the ranks of the judiciary, the Constitution stipulates that the Deputy President of the High Judicial Council shall be one of the lay members elected by Parliament. He presides over the Council when the President of the Republic is busy and he is basically responsible for managing the Council's routine business.

The Constitution entrusts the High Judicial Council with the task of appointing, assigning, transferring and promoting judges and prosecutors, as well as of conducting disciplinary proceedings against them.

2. The powers of the High Council for the Judiciary.

The High Council for the Judiciary became operational in 1958, ten years after the entry into force of the Constitution. From that year on, it embarked upon an oft-difficult journey to build up its own role against the backdrop of a completely new constitutional landscape.

Scholars immediately started questioning and investigating the constitutional nature of the newly established body, its relationship with judges and public prosecutors as individual members of the judiciary, with the other bodies representing State powers, as well as with the Public Administration.

In particular, a dialectic though sometimes hostile relationship started with the Ministry of Justice, which originally held the powers and exercised the functions now bestowed upon the new body.

According to the Constitution, the Ministry of Justice is responsible for organising and operating services relevant to the administration of justice, i.e., judicial offices, administrative staff, judges and public prosecutors' allowances, etc. Tracing the borders between the administration *of* jurisdiction – whose functions belong to the HCJ - and administration *for* jurisdiction – entrusted to the Ministry of Justice – has not always been easy and controversies remain up to today.

For instance, the Constitutional Court decided a very important issue concerning the *concert* between the Ministry of Justice and the HCJ that the foundational Law no. 195 of 1958 on the HCJ requires whenever the latter appoints the heads of judicial offices from among a pool of candidates. In the 1990s, the Ministry of Justice stopped the Council from finalising a couple of key top-level appointment processes by denying his concert, as he maintained that he held substantive powers to intervene in the selection of the most appropriate candidate and to block unwelcome choices. The Council then raised a *conflict of attribution* before the Constitutional Court. In both cases, the Court ruled in favour of the Council, stating that the Constitution bestows the exclusive power to appoint the heads of judicial offices upon the HCJ, the Ministry's contribution being a merely consultative one. Therefore, the Ministry does not have any power to hold the HCJ from making its own choice, nor to hamper the finalisation of the process by denying his concert. The Minister is entitled to submit his critical observations and highlight potential objective or subjective aspects that might make that particular designation undesirable. In compliance with the general obligation of faithful institutional cooperation, the Council must take those observations into due consideration, and clarify controversial issues if needed. However, in the end, the Council decides autonomously and irrespectively of the Minister's concert.

The relationship with the administrative jurisdiction represents another crucial field in which the HCJ operated with a view to affirm the full independence of its institutional role. The foundational 1958 law stipulates that judge or prosecutor shall challenge HCJ acts before the administrative jurisdiction, which - in Italy as well as in other European legal traditions – stands as a separate, different judicial system from the ordinary one.

In 1968, the Council challenged such rule as unconstitutional, as allegedly incompatible with the constitutional provision stipulating that the HCJ shall be independent from and unaffected by any other power when performing its own mandate – that is, selection, appointment, transfer and promotion of judges and public prosecutors, and disciplinary liability. The Council maintained that its discretional powers in this respect are political in substance and cannot be subject to judicial review. Though recognising that the HCJ holds key constitutionally attributed powers, the Constitutional Court held the challenge ill-founded. The Court argued that the principle of judicial independence cannot prevail over the constitutionally entrenched due process principle according to which any act issued by a public authority and considerably affecting an individual's - in this case, a judge's or a prosecutor's - personal sphere can be subject to judicial review. The Constitutional Court stated that, as far as their validity, efficacy and judicial reviewability are concerned, HCJ acts share the same status as public administration authoritative acts, though expressing the exercise of a constitutionally attributed power.

Another long-debated and considerably controversial issue that has periodically emerged since the Council started operating refers to the opinion on bills that Law no. 195 of 1958 allows the HCJ to address to the Minister of Justice. In its text, the law explicitly mentions the possibility to adopt such opinion with reference to judiciary- and administration of justice-related bills. In time, and especially when particularly sensitive issues were involved, which might give rise to radically different opinions, it was maintained that the Council could express the aforementioned opinion only when explicitly requested to do so by the Minister.

The Council has usually constructed that power in the widest possible manner, expressing its opinion on any bill that it considered relevant for the administration of justice at large. Additionally, it did that irrespectively of whether the bill had been introduced by the Government or by Parliament's legislative initiative, or again with reference to decrees having the force of law or delegated decrees. The HCJ considered itself allowed to intervene even in absence of any formal request by the Minister in that sense. In past times, in cases when criticism towards proposed draft legislation was particularly strong, this behaviour was heavily criticised by members of the executive or legislative branch who considered such intervention from the judicial self-governing body an undue interference with other State institutions' own functions.

The scope of the Council's power to express opinions on amendment bills represents a tangible instance of an even more controversial question relating to the role and general mandates of the High Council for the Judiciary.

Since it was established, some commentators maintained that the HCJ was a standard administrative body: it did not hold any constitutionally attributed prerogative to represent judges and prosecutors, but – much to the contrary - was designed to perform those specific and typical routine business-related functions that the Constitution and the law bestowed upon it. Therefore, according to this view, the Council

is not allowed to perform any functions other than those explicitly envisaged under the Constitution (arts. 105, 106, 107) and the law (art. 10 law no. 195 of 1958).

According to a different theoretical construction, the Council –a constitutionally relevant body whose election-based membership and composition determines its (at least) partial or indirect representativeness, presided over by the President of the Republic - would hold general responsibility for performing, protecting and promoting judicial self-government with a view to pursue constitutional principles such as judicial independence and autonomy. Its substantively constitutional function would consist in representing and protecting those principles. Consequently, according to those in favour of that construction, the role of the Council would not be limited to performing those functions that the law explicitly and specifically attributes to it, but would rather include any other (though unspecified) power that might serve to protect and promote judicial independence and autonomy as constitutionally established principles.

This gave rise to the theory of the Council's "implicit powers", i.e., those powers that, although not specifically envisaged by the law and the Constitution, are nonetheless necessary to ensure that the Council fulfils its constitutional mandate to the fullest, thus guaranteeing the independence of the jurisdiction.

In particular, recognising that the HCJ does not represent judges and prosecutors as individuals, but the principles of judicial independence and autonomy, enables the Council to "express general views", that is, to intervene in the public debate and inter-institutional dialogue when it is necessary to preserve and defend those very principles and the values underlying them. This general and not explicitly regulated power was primarily exercised with reference to the so-called "judiciary self-protection actions". These consist in resolutions and formal declarations through which the HCJ intervenes in the public debate to defend judicial independence at large and the independence of individual members of the judiciary in particular, when they have been subject to public criticism. Such declarations aimed at protecting those members of the judiciary targeted by unlawful public insulting and defamatory statements. The Council intervened to condemn public statements perceived as detrimental to the reputation and credibility of the judiciary's action.

The Council's intervention is not intended to protect the individual member of the judiciary. It is rather designed to safeguard the citizens' trust in the jurisdiction at large and in the professionalism of those performing the relevant functions, and - ultimately- the overall legitimacy of the judicial system before the citizens, when challenged by defamatory or insulting public statements by representatives from other institutions.

In order to safeguard that very confidence, the Council takes action to correct those statements and to openly condemn those who failed to comply with inter-institutional loyalty obligations by altering the balance between State powers. Protection from HCJ aims at preventing a given member of the judiciary from being isolated and intimidated, basically threatened and subject to external pressure, and therefore influenced in the performance of his/her functions.

Obviously, any member of the judiciary, as a citizen, can seek protection for his/her individual rights by filing a claim in a civil or criminal court and request compensation from, or a sentence for, whom unlawfully accused or insulted him/her based on an intentionally misleading description of the relevant facts or behaviour. However, those are private, personally initiated lawsuits typically involving a judge's or a prosecutor's individual condition rather than the overall trustworthiness and reputation of the judiciary's action. Moreover, those lawsuits usually provide protection long after the disputed facts took place, thus making them ineffective for immediately challenging the effects that defamatory statements might have on the public opinion.

Additionally, the duty to act publicly to protect their operational choices cannot be placed upon the insulted or defamed judge or prosecutor, as he/she is directly involved in that very judicial activity that is now subject to criticism. Far from being in line with the judiciary's institutional role, his/her declarations or statements would trigger further controversy and undermine his/her public image, by questioning his/her independence and impartiality in performing his/her functions, thus creating a personal conflict with the litigant involved in a lawsuit he/she is called to adjudicate.

This is clearly a very sensitive activity on the institutional level, as when someone holding a public function or role expresses insulting or inappropriate comments, the HCJ is called to confront other State powers. Further complexities arise when – as is often the case – replies follow condemnation by the HCJ, thus paving the way to verbal crossfire between State powers and tensions between the judiciary and politics, which are extremely detrimental to the proper functioning and the public image of State institutions, and cause dismay, loss of confidence and general distrust among the public.

For this reason, since 1978, when this instrument made its first appearance in the administrative practice, until 2000 (that is, in the last 22 years), the HCJ only undertook judiciary self-protection actions in 8 cases when tensions between State powers were of such an exceptional nature that taking action was deemed absolutely necessary.

Between 2001 and 2009, judiciary self-protection actions were applied in 24 cases. From a historical point of view, the reason for that rests upon the intention of some then-emerging political actors to regain a pivotal role in steering the public opinion by downsizing the position and action of the judiciary. Such political attitude followed a time when judicial review - together with other crucial historical events and causes – contributed to mark the end of a whole political era, by bringing to light and imposing sanctions on deeply-rooted illegal practices in the management of the *res publica*. The public opinion inappropriately assigned the judiciary a crucial role in the Country's institutional architecture. This was complemented by the peculiar features of some political forces and of some of their most relevant personalities, who have been involved in a number of legal proceedings for personal reasons. This resulted in a governmental action where personal events and interests seemed to mix up with the main lines of political activity.

In the first decade of the 2000s, the implementation and final approval in 2007 of a comprehensive judiciary reform process triggered an extremely tensed debate between the political majority and the

judiciary's representative bodies. This was particularly true with reference to the HCJ, which often expressed criticisms towards those reform initiatives.

As far as contents are concerned, judiciary self-protection actions repeatedly highlight and stress the principle according to which "*loyal inter-institutional relationships rest on the assumption that the principle of power-sharing underpinning the modern State is respected; nonetheless, it also requires that each institution is rigorously and truthfully faithful to the task the Constitution bestows upon it. As often recalled by the President of the Republic, the HCJ's primary duty is to protect the independence and autonomy of the judiciary - and more specifically, that of each of its members in the actual exercise of his/her own functions - from undue attacks and influence, irrespectively of where they might come from and how they might be conducted".*

In this respect, Resolution 1 December 1994 is particularly relevant, as it underlines that protecting the judiciary against defamation is an *institutional duty* of the HCJ. More specifically, according to the judiciary self-governing body, "*protecting the reputation and credibility of the judiciary's action is part of this safeguard task, considering that individual members of the judiciary are not targeted by (legitimate) criticism, but rather by insulting defamation. Protection against attacks of this kind is an institutional duty that cannot be renounced, as the judicial function and public trust in its impartiality are an absolutely crucial safeguard of the democratic life. Such defence, that is also a judge's or a prosecutor's own right, must be taken up by the Council as its own function whenever it is possible, so to avoid that those who exercise judicial functions are forced to expose themselves in way that does not fit their institutional position. The unduly attacked, assaulted or defamed member of the judiciary must find in the Council the body empowered to publicly restore his/her image by virtue of its authority".*

Until 1999, all judiciary protection practices had referred to public prosecutors and their investigations. A judiciary self-protection action towards a judge was approved and applied for the first time in 1999. It affirmed the need to react to those attacks targeting members of the judiciary, as "*entailing the actual risk that the exercise of the judicial function might be influenced by the fear that a given judge or prosecutor could perceive of being exposed to defamatory campaigns due to decisions adopted towards representatives of public as well as private powers, thus seriously endangering the independent and impartial performance of that function".*

Since 2001, when undertaking judiciary self-protection actions, the HCJ started mentioning the names of those politicians whose insulting statements led the Council to initiate them.

Resolution 13 December 2001 resulted from a self-protection action initiated by the HCJ upon approval by the Senate of a motion denouncing judiciary members meetings aimed at devising ways to refrain from applying a State law. This demonstrates that in some cases inter-institutional conflict reached extremely high peaks.

In 2009, a particularly serious incident occurred when TV and press channels relating to the then-Prime Minister started a press campaign against a judge who sentenced to compensation a business

company that had been previously run by the President himself and whose key shareholder was connected to his family. The judge's professionalism was vilified, he was accused of being the instrument of a wider political plot aimed at the Prime Minister and the government's political action. He was even secretly tracked and filmed during his everyday activities. Footages were broadcasted on TV channels together with ironic and insulting comments concerning the judge's personal features, his dressing style in particular. In its resolution dated 21 October 2009, the HCJ firstly noted that "*the assumption that judges are pursuing goals different from those pertaining to their own function, and – on top of that – aimed at overturning a democratically established institutional order, in addition to being absolutely ill-founded, represents a most serious allegation, which -given the institutional level from which those statements proceed - constitutes an objective and severe attempt to downsize the authoritativeness of the judicial function at large and of its individual members in particular*".

Then the Council denounced the unlawful intrusion in the judge's personal life and the need *to "keep relationships between State powers"*– as characterised by dialectic and confrontation as they might be – *"within the limits of manners and mutual respect, since delegitimising one institution in favour of another is not admissible, or the entire constitutional order would lose its credibility".*

The Council recalled its consolidated doctrine according to which "*acts performed and decisions taken by judges can be subject to discussion and criticism, but they cannot become a pretext for declarations aimed at delegitimising the individual judge or prosecutor, or the judiciary at large. Against this backdrop, it is crucial that denigration of and undue influence on the judiciary and its individual members do not take place again, as these are seriously detrimental to the judicial function itself and therefore absolutely unacceptable".*

Until 2009, judiciary self-protection actions were not formally established nor regulated, and represented a mere HCJ practice: a purely organisational internal act distributing the different subject matters to the HCJ internal commissions assigned it to the First Commission.

For that reason, too, the actual existence and scope of this power, as well as the position of the individual member of the judiciary targeted by defamation have remained uncertain until now. For instance, in 1998, a member of the judiciary, who had been allegedly subject to unacceptable attacks by the press due to acts performed in the exercise of his functions, challenged the HCJ resolution dismissing his formal request for protection as ill-founded before the Regional Administrative Court of Lazio, which has jurisdiction over HCJ acts. The Administrative Court rejected the claim by stating that the constitutional system does not entrust the HCJ with the function of protecting individual members of the judiciary from actions aimed at damaging his/her reputation and credibility. In general terms, the HCJ may take action to protect the independence and autonomy of the judicial function, but this does not entail a specific and actual right of any individual member of the judiciary to have this kind of protection action initiated upon request.

In 2009, in the aftermath of a political season characterised by considerable inter-institutional tension, amendments to the internal HCJ Rules of Procedure were introduced to regulate judiciary self-protection actions. According to the most widely accepted explanation, the internal HCJ Rules of Procedure (explicitly envisaged by the law establishing the Council) are the only source regulating the organisation of the HCJ. Not even primary legislation could intervene on that, thus excluding its theoretical construction as a secondary source of law.

A comprehensive regulation of judiciary self-protection actions was promoted with a view to establish rigorous, specific and objective bases for the Council's action in times when inter-institutional confrontation was causing several conflicts between State powers. These stemmed from insulting and defamatory declarations made by representatives from the executive and legislative branches and targeting the conduct of specific judicial offices. Reactions from the HCJ usually triggered further criticism towards the Council itself, as well as towards its powers and mandates, thus publicly conveying the idea that State powers were confronting each other by means of mutual allegations of disloyalty and institutional disrespect. The subsequent feeling of general confusion and suspicion seriously undermined the confidence in the overall functioning of the democratic State.

The Council's actions were thought to add on to an increasingly tensed debate, which might causeit to be inappropriately portrayed as a political actor – almost an opponent to political forces or sometimes even to the government's political majority –rather than as a constitutionally vested guardian of judicial independence.

The new art. 21-bis of the HCJ Rules of Procedure (now art. 36, following the 2016 revision) stipulates that HCJ actions protecting individual members of the judiciary require "*tangible behaviours aimed at damaging the reputation of, and independence in, the exercise of jurisdiction, which might impact the standard performance or credibility of the judicial function*". Art. 21-bis also lays down the relevant procedure, establishing that the file be open by the HCJ Presidential Committee and then assigned to the First Commission. After performing the necessary investigations, the latter would either request dismissal if there is no ground for taking action, or draft a reasoned proposal and submit it to the Plenary Assembly for approval.

Therefore, the Rules of Procedure do not connect the power of the HCJ to take action with whatever kind of behaviour might prejudice the reputation of the judiciary and the independent exercise of its functions. They rather link it to their potentially *disruptive effects on the standard performance or credibility of the judicial function*, which is not so easy to ascertain in practice.

The message that a much-concerned President of the Republic addressed to the HCJ Plenary Assembly in his quality of President of the HCJ on 4 September 2009 - in times of rapidly deteriorating inter-institutional relations - further clarifies the intention to limit the above-mentioned procedure to exceptional cases only. In that message, the President of the Republic stressed that solid and rigorous grounds shall support its initiation, and recommended that the preliminary screening of relevant cases is

carried out in an *objective and balanced manner, in line with the need to responsibly and carefully implementing protection actions […]".* These are justified*"only when it is essential to protect the institution's credibility from attacks so detrimental that they question the impartial exercise of the judicial function and suggest its obedience to serious external influence: and not, in turn, when it aims at defending individual reputation, whose protection relies on actions undertaken by the affected members of the judiciary".* The President of the Republic clarified that, according to the constitutional precepts, the mentioned actions shall be undertaken only when directed at protecting the independence and impartiality of the jurisdiction; they do not represent a privilege of the judiciary, but rather a safeguard for the citizens aimed at fulfilling the principle of equality before the law.

In fact, following the introduction of the new Rules of Procedure, the number of judiciary self-protection actions fell dramatically. This also happened because the Country's institutional scenario has changed after repeated variations in political majorities.

Nonetheless, some protection actions were taken: for instance, in 2013 a resolution condemned a media campaign conducted by newspapers and TV channels relating to a top-level politician who had just been permanently sentenced for tax fraud. Again, the involved judges were accused of conspiracy and judicial persecution rooted in political loyalty and bad faith. By applying the standard procedure, the HCJ reacted by recalling that all State powers have the duty to respect public institutions.

On the other hand, in several cases the HCJ acknowledged that defamatory or insulting acts performed against judges or public prosecutors – though recognised as objectively and subjectively unlawful – were not disrupting the standard performance and public credibility of the judicial function, as they were either confined to local debate or characterised by the poor reliability of their perpetrators. The reporting commission or the Plenary Assembly dismissed those claims accordingly.

In the end, statistics show that between 2010 and today, the Plenary Assembly only approved four judiciary self-protection actions, even in times of political debate or conflict, as those were the only cases that possessed the requirements prescribed by the relevant regulation.