



## **A judges' revolution? Political corruption and the judiciary in Italy**

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**Abstract.** During the investigations into political corruption in Italy, judges emerged in the eyes of the public as the 'heroes' of a peaceful revolution against the 'villainous' politicians. The established explanation for the active role of the judiciary against corruption stresses the unusual degree of independence of Italian judges. Without denying the importance of this institutional variable, analysis of the interactions between politicians and judges in the history of the Italian Republic allows one to discuss the role of other two important variables: the informal networking between politicians and judges, and the professional culture of the magistracy. The three sets of variables are in fact used to explain two different strategies adopted by Italian judges in their interaction with the political system: a strategy of 'role substitution', according to which some judges act as a surrogate power for the protection of the citizens against corrupt politicians, and a 'collusive strategy', consisting of various levels of hidden exchanges between judges and politicians. This article is based on an examination of judicial documents relating to 40 episodes of political corruption, in-depth interviews with experts, reports of relevant Parliamentary Inquiry Commissions, requests for indictment of Members of Parliament, official statistics and the daily and weekly press.

### **Political corruption and the judiciary: an introduction**

Italian politics has shown itself to be full of paradoxes: the Communist party was, at the grassroots level, the strongest in the Western World, but never came to power; Italian citizens have shown themselves to have a very low degree of interest in politics but a high level of identification with political parties; on the outside, the politics of Italy appeared to be ideologically polarised but hidden below the surface was a propensity for collusion between parties. And the most recent judicial investigations into political corruption have singled out yet another of these paradoxes: while the Italian magistracy has demonstrated a singular ability to uncover the corruption of politicians, a significant number of Italian judges<sup>1</sup> has nevertheless been accused of colluding in corrupt political practices. Italy seems therefore to have the most committed judges in the struggle against corruption, but also more than a few judges involved in impropriety.

In order to explain this apparent paradox, I will examine the role of the judiciary in the fight against corruption. Clearly, incentives to corruption in-

crease (as they do for any other illegal activity) as the probability of being discovered and punished decreases – that is, the less efficient the control mechanisms are. When cross-controls between elected politicians and career public officials do not work, it is the magistracy that takes on the role of the ‘natural’ adversary of corrupters and corruptees since corrupt exchanges are breaches of criminal law.

As far as this type of political crime is concerned, the efficacy of the magistracy is, to a large extent, determined by its degree of independence from political authority. Since Montesquieu’s time the separation of powers between legislative, executive and judiciary has been considered as the *conditio sine qua non* of a modern state. In more recent times, all democratic countries grant formal autonomy to the judiciary. In a functioning democracy, the judiciary should therefore be able to reduce corruption by increasing the costs of engaging in it.

The efficacy of the judiciary can, however, be limited in various ways. As we will go on to see in more detail, if at the formal level the magistracy is viewed as forming a separate power, holding a neutral attitude towards politics, in practice most democracies have introduced mechanisms allowing political interference in the activities of magistrates (Guarnieri 1992). This interference may be oriented in two directions: the repression of political opposition, and the tolerance of administrative misconduct. In the Italian case, the unusual degree of activism of the judges in the investigations against corruption has often been explained by the unusual degree of institutional independence of the judiciary from political power.

Institutional independence is, however, not sufficient to promote an effective commitment of the judiciary against political corruption. Informal linkages between judges and politicians may jeopardise the formal independence of judiciary. Moreover, the judges too may also be corrupted – that is, they may decide to exchange their autonomous power for bribes. In fact, judicial controls suffer from a congenital weakness: vulnerability to collusion between the controllers and the controlled (Elster 1989). In the Italian case, notwithstanding the prevailing image of the judge-hero against the politician-villain, high levels of political corruption seem to be reflected in high levels of collusion between judges and politicians.

For the judges, as for the members of any other profession, moral costs influence individual propensity to use the power connected with one’s own occupation to engage in criminal behaviour. More specifically, a professional culture that emphasises neutrality towards political power increases the moral costs of collusion with politicians. Italian judges have to date lacked such a professional culture – they have traditionally been divided along political lines, and contacts and exchanges of different types with politicians are toler-

ated (Morisi 1999). Lacking a strong commitment to a common professional culture, Italian judges have thus been more open to influence from the value systems of the various reference groups outside their professional environment. The different reference groups may explain the different strategies that different 'types' of judges develop towards the political system, and therefore the different uses they make of their institutional power and informal contacts.

In what follows, I use these different levels of analysis to describe and explain the actions of the Italian judiciary in dealing with political corruption. In the next part, I sketch the evolution of the interaction between political power and the judiciary in the history of the Italian Republic, singling out some significant shifts in the institutional resources of the judiciary as well as in the values and reference groups of the judges. In the third part, I analyse instances of collusive strategies between judges and politicians, singling out the type of resources each invests in its exchanges with the other. In the fourth part, I move to focus on the repression of corrupted politicians, reflecting on the resources and strategies of the judges involved in the struggle against corruption.

The paper draws on evidence about corruption in Italy based on judicial documents relating to 40 episodes of corruption, in-depth interviews with experts, the reports of relevant Parliamentary Inquiry Commissions, requests for indictment of Members of Parliament, official statistics and the daily and weekly press.<sup>2</sup>

### **Corruption and the Italian magistracy: from the 1950s to the 1990s**

Interactions between judges and politicians have changed throughout the history of the Italian Republic. Alessandro Pizzorno (1992: 62–3) has identified five distinct positions taken within the Italian magistracy as regards political corruption:

- (a) *class collusion*: 'typical of traditional magistrates, who are led to assume certain ideological positions and certain interpretations of the facts to be judged simply because their class perception does not allow them to consider, or more exactly to see, any alternatives';
- (b) *interest collusion*: where 'the conduct of the magistrates (normally belonging to the higher ranks of the judiciary) is influenced above all by their belonging to the same social environment (sometimes the very same circles and associations) as businessmen (political or otherwise)';
- (c) *ideological identification*: given that 'although they cannot actively participate in politics, many judges have more or less precise political views';

- (d) *role substitution*: where magistrates, faced with the evident collusion of the political system, consider it necessary for ‘another institution to fill the void and restore the threat of punishment for those indulging in corrupt practices’ and
- (e) *institutional impartiality*, as demanded by the law.

The importance of these five positions has varied over time.

In the 1950s, the magistracy – which included many judges who had been recruited during the fascist regime – aligned with the government, implementing tough measures in the repression of the labour movement and the Communist Party. Not only, in fact, did most of the ‘requests for the permission to proceed’ presented in Parliament refer to the opposition (Cazzola 1988: 130), but they were oriented more against ‘opinion crimes’ than against ‘appropriation crimes’ (Cazzola & Morisi 1995: 87; see also Cazzola & Morisi 1996). A sort of ‘class collusion’ pushed the judges, who often came from the upper classes, to take conservative stances. Occupying the top hierarchical positions, the senior judges, who were socialised during the fascist regime, had the power to punish any deviation from their standards. It has to be mentioned, however, that from the very beginning the judiciary claimed autonomy from political power, as well as the recognition of its corporate privileges.

It was only in the 1960s that changes in the electoral system for the *Consiglio Superiore della Magistratura* (CSM), the self-governing body of the magistracy (implemented in 1959), reduced the power of the higher reaches of the judiciary, paving the way for the political splits of the 1970s. From the very beginning, the formation of the CSM created strains between the higher and lower grades of the magistracy in the National Association of Magistrates (ANM), particularly over career issues. Because of this, some of the most senior conservative judges left the ANM to form another organisation, the *Unione Magistrati Italiani* (UMI) (Canosa & Federico 1974: 171ff, 224ff). In addition, disagreements over internal issues led to the formation of increasingly well-organised and ideologically rigid currents within the judiciary (Freddi 1978: 121ff).<sup>3</sup> The few political scandals that emerged in the 1960s derived, however, not from judicial investigations but from the spreading of compromising information (sometimes originating from the secret service) by politicians with something to gain from implicating others. In the scandal which erupted in 1961 over irregularities in the construction of Fiumicino Airport, for example, ‘not even the Minister of the Interior escaped attempts at blackmail, carried out by the secret services using information they had gathered and inspired by other Christian Democrat (*Democrazia Cristiana*, DC) leaders’ (Galli 1983, 90–1; see also Turone 1984).

Especially since the 1970s, a growing autonomy from the political class has interacted with the entry into the judiciary of a type of judge without

a social affinity to political elites. While mass education opened university entry to the lower classes, the protest cycle of the late 1960s influenced the political attitudes of a generation. In a climate that had been polarised by a wave of social and political conflicts, judges also became ideologically polarised. In particular, *Magistratura Democratica* moved to the left, and asked for a 'wide alliance' with other social actors for the implementation of the constitution (Ferraioli 1994). Most of the judges however remained loyal to conservative groups. In 1969, *Magistratura Indipendente* obtained its biggest electoral success, receiving 45 percent of votes in the election to the governing body of the *Associazione Nazionale Magistrati*, against a low 13.5 percent for *Magistratura Democratica* (only in the 1980s did this rise above 20 percent, see Guarnieri 1992: 101 ff). The image of a 'naturally' conservative magistracy re-emerged with the repression of social movements, while the secret services kept those judges who were suspected of leaning to the left under (Cipriano 1994). Some judges instead openly supported right-wing positions, thus helping, according to their critics, to block court cases involving the illegal behaviour of politicians and secret service agents. Indeed, the word *insabbiamento* (literally 'covering with sand') began to be used to describe the cases in which delicate investigations – such as the investigation into the 243 billion lira paid illegally by the public enterprise IRI to political parties, politicians and newspapers – were adopted by the Tribunal of Rome, which was referred to, ironically, as the 'foggy harbour', given its frequent acquittal of all the defendants in these cases (Galli 1991: 255).

In the 1970s and the 1980s, however, the voice of the left within the judiciary became increasingly audible. In the judicial system, the so-called *pretori d'assalto* often took anti-governmental stances on labour and environmental issues (Bruti Liberati 1996: 186). At the same time, especially in the fight against terrorism and the Mafia, the magistracy exercised a proactive power, and acted as a surrogate for a weak political will to take any action. The dedication of many judges, who often paid for their defence of Italian democracy with their lives, was contrasted with the collusion of a divided political class; public opinion endowed the magistracy with a form of direct legitimacy. Moreover an increasingly strong *esprit de corps* was developing among the judges (Colombo 1997).

In the late 1980s and the 1990s, a growing institutional autonomy of the judiciary resulted in a weakening of the attitude of complicity of some judges with those political forces which had partly hindered the activities of the magistracy. A new generation of so-called *giudici ragazzini* (child-judges) – lacking any sense of deference towards political power, and conscious of the high levels of collusion between politicians and organised crime – began a series of investigations into administrative and political misconduct. Judicial

investigations into political corruption have increased in frequency and magnitude over the past few years, culminating in the recent political upheavals caused by the ‘clean hands’ investigations of corruption, producing what has been termed as a ‘revolution by the judges’.

Recent research on corrupt exchanges has demonstrated, however, that the long tradition of collusion between (often highly-placed) judges and corrupt politicians continued to thrive well into the 1990s (della Porta & Vannucci 1994; 1998). The most recent corruption cases have involved several judges, who have been accused of having participated, directly or indirectly, in corrupt exchanges. According to statistics released by the Ministry of Justice, there were in 1998 203 judges under investigation for crimes such as corruption, abuse of power, and even participation in Mafia-type associations (*L'Espresso*, 17 December 1998).

In summary, over the history of the Italian Republic the judiciary has increased its formal independence from political power. Prior to this, however, and in parallel with recent developments, there has been an unusually high degree of ‘politicisation’ of judges, in terms both of their interactions with politicians and their adherence to ideological positions. The effects of these trends are clearly observable in the examples of collusion and conflict between judges and politicians which will be examined below.

### **Collusive exchanges between judges and politicians**

In the history of the Italian Republic there has been a ‘strong tendency towards the development of contacts and connections between the judiciary and the political world, between judges and political parties, and between factions of the judiciary and political parties or party factions’ (Guarnieri 1991: 25–6). In some cases, these ‘contacts and connections’ have included cases of political corruption. What resources have politicians used to thwart judicial investigations and even to push some judges towards collusion with them?

First of all, although weak, there are in Italy some institutional resources for political control over the judiciary which the political class can use, and has used, to impede judicial investigations into cases of corruption. During the development of the ‘clean hands’ investigations, for example, the inspections ordered at the Milanese *Procura* by the ministers of justice in Silvio Berlusconi’s and Lamberto Dini’s governments, respectively Alfredo Biondi and Filippo Mancuso, were perceived by many judges as attempts on the part of the executive to stop the investigations into political corruption, while the ANM criticized the proposed reform of the law on the *pentiti*, describing it as a delegitimisation of the magistracy as a whole.

Especially after the first investigations into political corruption, politicians made several attempts to increase their power over the judiciary (Neppi Modona 1993: 15). Indeed, even before the development of the 'clean hands' investigations, the growing activism of the judiciary in bringing politicians to trial provoked the hostility of both individual politicians and political parties, as reflected in their attempts to reduce the powers of the judges. One such attempt was the Socialist Party's campaign against the judiciary during the referendum on the so-called *responsabilità civile*, in which members of the judiciary were called on to accept responsibility for civil liability in the cases in which they took part. After the 'clean hands' investigations began, many attempts were made, in particular by the leaders of those parties which were more deeply implicated in the scandals, to stop the judges via amnesty schemes (the first was presented, in 1993, by the Minister of Justice in the Amato government, Giovanni Conso). Especially after the election of 1994, the conflicts between the magistracy and sections of the political class escalated – in particular, *Forza Italia*, whose leader, the media tycoon Silvio Berlusconi, is currently under investigation. During this period, the Berlusconi government approved a parliamentary bill supported by its Minister of Justice, Alfredo Biondi, to reduce judges' powers of arrest – giving rise to such strong protest by judges, public opinion and its governmental partner *Alleanza Nazionale* (AN) that the proposal was withdrawn.

Despite the fact that their institutional resources were weak, politicians made use of other types of resources to influence the judges. Collusion between corrupt politicians and judges in Italy has involved an informal political influence on the magistracy. For example, on the self-governing body, the CSM, a number of members (although still a minority) is elected by parliament, and this has led to the formation of partisan lists for the election of judges<sup>4</sup> – initially based on a first-past-the post, and since 1975 on a proportional system. A variety of matters, such as the nomination of the General Prosecutors in the most important cities, the distribution of scarce resources, and the punishment of politically 'rebellious' judges, became highly political issues on which the judges and lay representatives in the CSM split on a left-right cleavage. The same kinds of alliances were then maintained even for decisions referring to the careers of individual judges, who therefore had an incentive to align with one party or the other<sup>5</sup>.

Political support does indeed seem to have furthered some judges' careers. The former deputy leader of the Christian Democrats, Raffaele Russo, remarked, for instance, on the influence of Antonio Gava (the Interior Minister, investigated and charged for corruption and involvement with the *Camorra*) on the appointment of magistrates: 'No long-term position in either the magistracy or other institutional sectors could be acquired without the consent

or at least the acquiescence of Gava. This went for the heads of executive judicial offices and police chiefs . . . ’ (in Barbagallo 1997: 87). According to the boss of the Roman DC, Vittorio Sbardella, the career of Claudio Vitalone, ex-magistrate, senator and DC minister closely associated with Andreotti, was the result of a deal between the two men:

Since Vitalone had no electoral or political support of his own he gained Andreotti’s support by performing miracles in order to get him politically advantageous results by judicial means. What I mean is you can do something which will gain the appreciation of a politician either by judicial favours for their friends and supporters or, on the other hand, damaging political personalities who might inconvenience your friend judicially. (Public Prosecutor at the Court of Palermo 1994: 153)

Claudio Martelli, justice minister in Andreotti’s last government, confirmed that:

Claudio Vitalone was very close to Andreotti, and had, at the same time, considerable influence in Roman judicial circles; not just in the Roman Public Prosecutor’s office but also among judging magistrates and the Court of Cassation. You could say that Vitalone was the ‘long arm’ of Andreotti in judicial circles. (Public Prosecutor at the Court of Palermo 1994: 225–6)

To mention another much-cited example, the work of the pool of anti-Mafia magistrates in Palermo and other Southern courts was frequently undone by the decisions taken by the First Section of the Supreme Court, led by judge Corrado Carnevale. The court often overturned sentences against Mafia members and their protectors. According to evidence presented at the trial of Giulio Andreotti<sup>6</sup>, frequently appointed as prime minister in post-war Italy, the connivance of highly-placed judges with corrupt politicians and Mafia members developed through the special relationships which the judges maintained with leading national politicians who sought to secure special treatment for those they protected. According to the Palermo Public Prosecutor’s office, the Mafia bosses received a directive in prisons:

Stay calm, have faith in the DC and in the end everything will be resolved in the Supreme Court through the good offices of the Rt. Hon. Lima and the Rt. Hon. Andreotti, the latter having a special, personal relationship with Dr. Corrado Carnevale. (Public Prosecutor at the Court of Palermo District Anti-Mafia Direction 1994: 35)

This case does not appear to be unique. According to the *pentito* Leonardo Messina, ‘There are magistrates very close to *Cosa Nostra*. In my

own province I have never heard of any magistrates who actually belong to *Cosa Nostra*, but there are magistrates who are very close to it' (Parliamentary Committee of Inquiry on the Mafia 1993: 56).

Collusion was also bought via money. Some magistrates have long been compensated for favours through indirect benefits, when not directly by a share of the proceeds of corruption. One such indirect benefit which made judges more sensitive to external pressure was the availability of highly remunerative payments for the extra-judicial arbitrations that were used to settle conflicts between businesses or between businesses and public bodies – a mechanism that often replaced the slow and inefficient system of the civil courts. Indeed, with civil tribunals so greatly overloaded with cases, there was an increasing demand for such extra-judicial arbitration, a service for which career judges were handsomely paid. Judges' favours could therefore be obtained legally, through nominating the judges concerned as arbitrators with the fees being paid by a friendly businessman or public body. The case of the reconstruction of Irpinia after the earthquake of 1980 illustrates the way in which the magistracy's role in scrutinising public decisions was subverted by its involvement in the distribution of public and private resources: 'Presidents of the Tribunal, the Court of Appeal and the Regional Administrative Courts (TAR), State Prosecutors and magistrates of the Audit Court were all appointed as inspectors to the very public works whose pharaonic developments they should have been regulating' (Barbagallo 1987: 87). Although the CSM refused authorisation for magistrates to accept such commissions, the Campania Regional Administrative Court (over which presided a judge who had himself received a grand total of 22 such appointments) decreed the CSM's authorisation as unnecessary. The compensation for each inspection was around 100 million lira and 'busily involved in this intricate business, the noble judges failed to notice the acts of corruption and embezzlement on which these wonderful works rested (many of which were, in truth, falling to pieces)' (Barbagallo 1997: 89).

Corrupt politicians showed themselves to be well aware of ways in which their power could be used to recruit allies among the judiciary. One corrupt Sicilian politician, for example, 'invited judges or their wives to teach courses in specialist schools, offered consultancies to important members of the profession, attaching themselves to the professional and entrepreneurial circles of Catania and transforming corruption into the rule' (interview quoted in della Porta 1992: 226–27). According to Leonardo Messina, a member of the Mafia who became witness for the state, when a new magistrate arrived 'an entrepreneur (close to the Mafia) would always see to finding him a house, see to the garden (usually with the mediation of a local politician) ... and

then wait . . . . Some do, some don't, some die' (Parliamentary Committee of Inquiry on the Mafia 1993: 72).

Corrupt politicians often used their informal contacts in the senior ranks of the judiciary to intimidate those magistrates who pierced the circle of political illegality through pressure from superiors who were more sensitive to 'political needs', by isolating them or arranging for them to be moved to another position. Inquiries which went in the 'wrong' direction were often taken away as quickly as possible from the magistrates responsible and were transferred to jurisdictions more inclined to suppress the matter. For instance, one of the judges who charged the socialist 'boss' Alberto Teardo was invited by other judges senior to him to abandon the case, and was marginalised when he did not do so (Del Gaudio: 1992). The same fate met another judge, Carlo Palermo, who raised the name of the then prime minister, Bettino Craxi, in his investigation into illegal arms trafficking. As David Nelken (1996: 88) observed:

Those, such as Judge Carlo Palermo, who initiated investigations which brought them too close to centrally organised plots involving networks of politicians, masons and organised criminals met fierce resistance; the case would be taken from their hands to be given to a colleague or taken over by another court. Just as in the fight against 'Organised Crime', troublesome judges could find themselves moved by disciplinary proceedings to other parts of Italy, and the policemen working with them could be transferred even more easily at the will of their respective Ministries.

If fees and favours sometimes worked as 'soft bribes', in other cases favourable judicial decisions were actually rewarded by regular pay-offs. Recent investigations have indicated that in the course of the 1980s and 1990s some judges seem to have participated actively and systematically in the division of bribery money. In 1996, Renato Squillante, former head of the investigative judges in Rome, was charged for corruption in judicial activity – together with Silvio Berlusconi and his lawyer (and a former minister in his government) Cesare Previti and arrested. In the same year, several judges were sent to prison accused of having protected various corrupt public officials. In 1997, Berlusconi and Previti were accused of having paid 67 billion lira to Squillante and his colleague Filippo Verde for a 'favourable' decision in a trial, thanks to which a private firm gained (illegally, according to the investigation) almost 1,000 billion lira. Other bribes to judges were discovered during investigations by the public prosecutor of Perugia. In the document ordering the precautionary arrest of a leading Roman judge, the charge of corruption was motivated by his having committed 'an unknown number of

acts contrary to the duties of his office, being regularly paid to put his public functions at the service of the donors' interests . . . in all the cases and other activities requested' (*Avvenimenti*, 27 March 1993: 13).

The development of political corruption favoured a similar spread of corruption in the judiciary. Not only were corrupt politicians unlikely to report cases of corruption among judges, but they were themselves the strongest suppliers of bribes, given their need of protection from serious investigations. Moreover, it is important to note that the diffusion of political corruption actually reduces its moral costs, clearly making it easier for the judiciary to engage in corrupt practices and to view such practices as part of an unwritten code. The presence of a professional culture that promotes the upholding of the rule of law usually inhibits the development of corruption. The mere application of the law is however not typical of today's Italian judiciary (Morisi 1999). Lacking a strong professional culture that would increase the costs of corruption, Italian judges are more dependent on the value system which is dominant in other non-professional circles of reference, and from which they derive their standards of conduct. Given the presence of strong informal ties between judges and politicians, at least some judges have over time adapted to the normative system which was dominant among the political class or better, among the networks of friendships and business contacts to which judges belonged together with politicians and other professionals. Scattered evidence indicates in fact that in several cases the corrupt judges were linked to corrupt politicians by personal networks.

Collusion of this kind has long obstructed investigations into political corruption. Even regardless of its immediate, material consequences on particular investigations, uncertainty over the outcomes of judicial action against entrenched powers has also had more general effects. Particularly in areas where organised crime has been involved in corrupt exchanges, the widespread conviction that leading judges and corrupt politicians were in collusion with each other has further strengthened the impunity enjoyed by the politicians. One person interviewed in the course of research on political corruption in Catania, for example, explained the absence of official complaints or moralising campaigns by the 'atavistic distrust of the magistracy, strengthened by the fact that no-one has been punished' (in della Porta 1992: 248). It comes as no surprise, therefore, that the leading magistrates of that city, including the Attorney General of the Republic, have been removed following charges of collusion with corrupt politicians.

### The judges and the investigations against corruption

Only with the development of the ‘clean hands’ investigations, did the fight against political corruption become a primary objective. Although there was some internal resistance, some of the judges who had been considered ‘troublesome’ by the governing parties were appointed to head some of the most important investigations. These investigations went as far as exposing the activities of corrupt colleagues, and in a few cases these have already received administrative and penal punishments.

If we look at the 1990s, in fact, judicial statistics indicate a steep increase in crimes against public bodies. In particular, if we look at crimes which are more strictly connected with political corruption, the annual average of 252 crimes and 365 people charged between 1984 and 1991 has risen to an average of 1,095 crimes and 2,084 people charged between 1992 and 1995 with, however, a decline in 1996 (see Figure 1). The number of people sentenced for crimes of corruption also increased during the 1990s – 159 in 1991; 185 in 1992; 263 in 1993; 369 in 1994; 549 in 1995; to 856 in 1996.<sup>7</sup> The tally of the ‘clean hands’ investigations in Milan, updated to 1998, was 4,000 people investigated, 2,970 requests by the prosecutor to the investigative judge to press charges, 1,063 people charged by the investigative judges, 438 sentenced by the court (*La Repubblica*, 14 April 1998). We can therefore conclude that, in recent years, collusion with, and deference to, the politically powerful seems to have diminished among Italian judges.

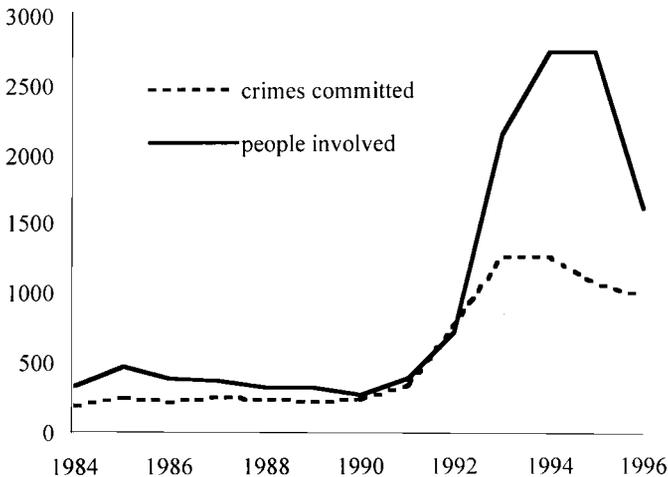


Figure 1. Corruption in Italy 1984–1996. Source: Istat data quoted in della Porta & Vannucci (1999b).

What resources have been available to judges wanting to fight corruption? First of all, as has been mentioned, in Italy there is an unusually high level of (at least formal) independence of the judiciary from political power (see, for example, Guarnieri 1992). Mechanisms which can allow for a certain degree of control by politicians over judges<sup>8</sup> are not available in Italy; the Constitution ensures that the magistracy could not become, the 'long arm of the government' as it had been during the fascist regime. In particular, since 1959, the CSM has taken on responsibility for several tasks, mainly those of career and disciplinary decisions, which were formerly those of the bureaucratic élite. A system of promotion based on years of service also reduced the possibility of blackmailing the most 'troublesome' judges. In addition, on many occasions the CSM has acted as a corporate body to defend and increase the autonomy, status, and pay of judges. We should add that, since both judges and prosecutors are part of the same profession, and incumbents can freely move between these roles in the Italian legal system, they can enjoy the same degree of autonomy from government.

Another principle that has limited political interference is the formal rule of compulsory prosecution for all offences reported. Since the law obliges the prosecution of all crimes, 'the doctrine of compulsory prosecution prevented the government from raising considerations of public interest even when the investigations came to involve leading government figures and the Minister of Justice himself' (Nelken 1995: 196). Even if the principle of compulsory prosecution remained unimplemented more often than not (Di Federico 1990) – as even the judges who support it tend to admit – it is nevertheless perceived by the judges themselves as an important barrier against a political use of the law (Morisi 1999: 93–95). Unlike the position in common law countries, recruitment into the magistracy – based on competitive examinations open to all with a university degree in law also increases the autonomy of the judges. This institutional level of independence has certainly been a very significant resource for those judges who have carried out investigations against corrupt politicians.

However, the Italian case indicates that institutional autonomy is hardly enough to ensure the success of investigations into corruption. Corruption is in fact a so-called 'white crime' – that is, in most cases at least, the two parties involved in corruption both gain from it. Many investigations into corruption have underlined the fact that it involves collusion rather than extortion. The entrepreneur who pays the bribe does not take the money from his profits; instead, he usually receives some 'extra rents' for the business, as corrupt public administrators pay above market prices for the goods they buy with public money. This means that neither the entrepreneurs nor the politicians have an interest in denouncing the corrupt deal. There is a victim, of course: it is the

tax-payer, who pays more for poorer services. However, since the damage in any individual act of corruption is distributed among millions of tax-payers, and since they usually know nothing about the details of the corrupt act, it is very unlikely that they can denounce acts of corruption. Moreover, in a world of 'global' finances, proof surrounding illegal money transactions involved in corruption is even more difficult to find. These circumstances make investigations into corruption particularly complicated (Davigo 1998) – even for the most 'independent' judiciary.

An important additional resource on which the 'clean hands investigations' could rely was in fact a high degree of support from public opinion. During the years of terrorism, in the 1970s, public opinion supported investigating magistrates as the defenders of citizens in the face of a weak and internally divided political class. This reserve of legitimacy increased in the 1980s, when the assassinations of Falcone, Borsellino and other anti-Mafia judges testified to a commitment to the State among the judiciary that politicians were unable to show. Politicians seemed rather more resolute in their support for organised crime than in their struggle against it. It was in fact in the investigations into organised crime that the judges started to practice what Pizzorno (1998) called a 'control of virtues' of the political class, discovering the high levels of collusion of local politicians as well as MPs and even ministers with the Mafia and Camorra.

While trust in the judiciary increased, corruption, and the maladministration it brought about, dramatically eroded an already chronically low trust in the way democracy worked. In the 1990s, a difficult economic situation, the expectations (and anxieties) related with the increased international competition, and, especially, the breakdown of the socialist regimes in Eastern Europe converged to produce the collapse of the political system of the 'first' Republic.

Following the decline of the main parties in the elections of 1992, judicial investigations into corruption set in motion a kind of 'virtuous' circle. The delegitimation of the political class provided a new impetus for investigations into political corruption, the results of which further reduced the legitimacy of the political class. Arrests and charges undermined the authority of party leaders, reducing their capacity to act against those who accused them. At the same time, the judges were ready to profit from the growing number of confessions by politicians and businessmen, and indeed they encouraged them to cooperate with anti-corruption investigators by sowing suspicions that others had already 'talked' and holding out the prospect of a period of preventive custody in prison if they remained silent, as opposed to immediate release if they confessed. Isolation in prison forced those charged with political corruption to face a true-life 'prisoner's dilemma'. Given the suspicion that other

accomplices had confessed or would confess, the best choice was to cooperate with the judges, thus avoiding the most severe punishments. This growing awareness that the judges had access to an increasing mass of information stimulated a rash of confessions.

The dynamics of the 'clean hands' investigations indicated that, up to a certain point at least, public support grew with each judicial victory. During the first few years of the political scandals, 'the role of the judiciary was not limited to unveiling and repressing corruption: public prosecutors and judges took on a much larger symbolic function, that of the representatives of public morality' (Giglioli 1996: 388). Especially in the face of the contemporary decline of confidence in other institutional actors (Morlino & Tarchi 1996), the struggle against political criminals initially made the judges not only some bitter enemies, but also some fervent supporters. During the 'clean hands' investigations the judges found two main allies: (a) public opinion which expressed its support for the judges with protest demonstrations as well as with its defection from the traditional governing parties during the crucial elections of 1992 and 1994, and (b) the *Partito Democratico della Sinistra* (PDS), successor of the Communist Party, credited for a long period with being the 'party of the judges'.

It is true that as the scandal unfolded, with its processes of ceremonial degradation and institutional transformation, the risk emerged that the magistracy might also end up with its public legitimacy reduced. In many political transitions, those actors who play a central role in the breakdown of the previous regime leave the stage during or after the new one has settled in. As with the armed mobs of the French Revolution, or the allies' army in Germany after the Second World War, so the Italian judges cannot legitimately keep the power they obtained during the transition. As in other processes of regime change, also in Italy one main challenge has come through the reconstruction of the main actors of democratic mediation: the parties. The need to restore 'business' as usual is evident in many of the speeches by the representatives of the judges' associations – in particular those from the *Associazione Nazionale Magistrati*. At the same time, however, in particular in the debate on institutional reform, the fears of many judges that the political class cannot yet be trusted has re-emerged. In turn, some politicians have attempted to delegitimise the magistracy by denouncing an alleged ideological bias by the investigating judges, alleging that they are pursuing a political agenda as well as by claiming the superior legitimacy of elected politicians over the judiciary.<sup>9</sup> Public debate often polarises between 'pro-judge' and 'anti-judge' positions.

Public approval, carefully cultivated by the judges, tended to view the role of the judges as defenders of citizens in the face of a corrupt political

class. The political attacks mentioned above, which increased the tensions between the executive and the judiciary, probably strengthened the internal cohesion of the magistracy. Interestingly, in the 1990s, the weakening of the politicisation of the magistracy – regarded as a consequence of deference towards politicians – combined with an increase in intervention by the judges in the political process, and with the development of an autonomous strategy of communication with the citizens (Righettini 1995). Indeed, the same development of the ‘clean hands’ investigation was interpreted as part of a struggle between the judges and the politicians for the control of the support of the ‘public sphere’ (Pizzorno 1998: 98). If the ‘judicialisation of politics’ (or the ‘politicisation of the judiciary’) is a general development in advanced democracies (among others, see Guarnieri & Pederzoli 1997), the Italian peculiarity is that the judiciary tried to win the support of public opinion mainly through the exercising of a ‘control on the virtues’ (Pizzorno 1998) of the political class.

Some characteristics of the professional culture of the Italian judiciary legitimized the search for support in public opinion. As the research conducted by Massimo Morisi (1999) has shown, many Italian judges perceive themselves to be motivated by a civic mission; charged with a general responsibility towards society and community, even more so than to the State. They not only want to discover the ‘truth’, but also develop ‘reasonable’ solutions. Together with the principle of the ‘certainty of the law’, they seek to assert the principle of ‘equity’; they take into account in their professional choices their own moral convictions as well as the collective consequences of the decisions they take. This professional culture does not encourage ‘institutional impartiality’; it may instead support ‘role substitution’. Especially when the political class appears to have failed, many of the judges tend to perceive themselves as the last line of defence for the community: this was certainly true in the struggle against terrorism in the 1970s, the Mafia in the 1980s, and corruption in the 1990s.

### **Corruption and the judiciary: a summary**

The judiciary should act as a strong constraint on corruption. The logic of the separation of powers assigns to the judiciary the defence of citizens against transgressions by politicians. Recent political scandals also seem to indicate that investigations into corruption have been thwarted where the political class maintains more institutional resources of control over the judiciary. If the political class attempts to reduce this autonomy, seeking to make the situation in Italy more like that prevailing in other democracies, sociological

research in other countries indicates that political control over the judiciary has often hampered judicial inquiries into corruption.

In France, for example, 'a number of articles of the penal code allow the executive to deprive judges conducting sensitive investigations of their power to investigate' (Ruggiero 1996: 119). A law of 1974, remaining in force until 1993, stated that prosecutors could not investigate mayors. These were entitled to a special hearing with a judge nominated by the Supreme Court from among the magistrates of the High Court of Justice. The law further stated that any investigation of public officials had to be transferred to the senior members of the judicial hierarchy (Ruggiero 1996: 119ff). As demonstrated by the case of Jean-Pierre Thierry, forced to leave the magistracy after investigating a scandal linked to the illegal funding of the French Socialist Party, the dependence of junior magistrates on those above them in terms of promotion and salary can easily become an effective means of blackmailing them. In France, obstacles to the investigation of corruption have come from the power exercised over prosecutors by the Ministry of Justice, to which investigators must answer, particularly where more delicate investigations are concerned (Ruggiero 1996: 122). Only following a wave of political scandals at the beginning of the 1990s did the French magistracy succeed in gaining greater autonomy, *privilège de juridiction* being abolished and a series of matters relating to careers and salaries being transferred to the French equivalent of the CSM.

In Japan, the discretionary element in penal actions – 'a prosecutor may abandon any legal proceeding on the grounds of the "context surrounding the offender" or "circumstances subsequent to the offence" ' (Bouissou 1996: 140–41) – has led some to talk of a 'domesticated' justice system. Judicial action against political corruption has been considered particularly weak because judges are reconfirmed in office every ten years and their careers are in the hands of the Supreme Court, nominated by the executive and accused of faithfully serving the interests of the governing party, 'relegating the independently-minded to minor posts in distant provinces' (Bouissou 1996: 141). In Belgium, a series of failures in sensitive investigations has been blamed on the 'party politicisation' of the magistracy, nominated (usually after extensive negotiations) by the political parties (van Oustrive 1996: 376). The surfacing of corruption in Belgium has led to proposals for reform based on the Italian model, introducing an autonomous council for the magistracy and recruitment through state examinations (van Oustrive 1996: 380ff). As far as the Anglo-Saxon model is concerned, commentaries on the Italian 'clean hands' investigations have revealed the British 'puzzlement in seeing judges turning on their own government (which) may only reflect the English ethno-

centric assumption that the judiciary consists of a small group of middle-aged and middle-minded members of the establishment' (Nelken 1996: 99).

Although the independence of the judiciary is of course a relevant variable to explain the action of judges against corrupt politicians, in this article I suggest that the institutional resources of the magistracy as a body are only part of the explanation of the strategy that the judiciary in general, and individual judges in particular, adopt towards the politically powerful. Not only may their actions be affected by (formal) institutional autonomy, as well as by (informal) political dependency, but concrete behaviours are also influenced by systems of norms and values that are shaped by the professional culture as well as by the reference groups of individual judges. The evolution of the interaction between judges and politicians in Italy from the 1950s to the 1990s has confirmed not only the relevance of these variables, but also the differences within the judiciary as far as strategies towards the political system are concerned.

Institutional resources, informal contacts and the professional culture have all played a role in the development of strategies of collusion between corrupt politicians and judges, as well as in the repression of corruption. As for strategies of collusion, politicians have deployed some resources of an institutional type – such as, for instance, ministerial inspections – in the attempt to thwart investigations. More important, however, have been informal political contacts: the composition of the CSM increases the possibility of political protection to promote judges' careers, facilitating ideological commitments as well as clientelistic ties between judges and politicians. Different types of bribes have also been used to buy the favourable decisions of corruptible judges. The spread of political corruption has interacted with the lack of a professional culture which could firmly defend the law and reduce the moral costs of corruption. As for the repression of corruption, Italian judges have been protected by an unusual degree of autonomy from political power. This type of resource has, however, been insufficient to support the action of the judges against corruption. During the 'clean hands' investigations, a professional culture that emphasised civic involvement over institutional neutrality pushed many judges actively to seek the support of public opinion. I have suggested that the differences between the judges who colluded in corrupt activities and those who were committed to the struggle against corruption are probably related to differential moral costs, connected with the different reference groups to which the different judges belonged. The lack of a common professional culture that stresses institutional neutrality has probably increased the role of reference groups which are external to the magistracy, pushing in some cases towards collusion in corruption and in others towards a role substitution. More research is needed, however, to test this hypothesis.

## Notes

1. In Italian, the term *giudice* – translated here with judge – includes investigating magistrates and judges of the bench as well as public prosecutors.
2. The results of this research are presented in della Porta (1992), and della Porta & Vannucci (1994; 1999b). In English, some results have been published in della Porta (1993; 1995; 1996a; 1996b); della Porta & Pizzorno (1996); della Porta & Vannucci (1995; 1996; 1997a; 1997b; 1999a). For a comparative perspective, see della Porta & Mény (1996).
3. For example, on the right-wing of the political spectrum, *Magistratura Indipendente* reiterated an image of the judicial system as 'non-political'. On the left-wing, instead, *Magistratura Democratica*, founded in 1964, proposed democratic reform of the judicial function. In a centre-left position, *Terzo Potere* focused especially on salary and jurisdictional issues.
4. Two thirds of the CSM is composed of representatives elected by the judges and one-third from politically appointed representatives.
5. Among the overwhelming majority of judges who support the CSM, a high percentage believes that it represents only the professional and associational elites of the magistracy. Moreover, even while supporting their career autonomy, many judges admit that career decisions are not based on merit (Morisi 1999: 134–138).
6. Andreotti was acquitted.
7. According to statistics published by Istat, quoted in della Porta & Vannucci (1999b).
8. Such as the functional and organisational dependency of public prosecutors on the Ministry of Justice in France and Spain, their public election in the USA, the entrance into the magistracy, at a late stage in their career, of individuals who have already demonstrated loyalty to the establishment in Great Britain (Guarnieri 1991; Nelken 1996).
9. In 1998, Berlusconi denounced the Milanese judges for 'attacks against constitutional powers', 'attacks against the political rights of the citizens', 'abuse of power' and 'revelation of secrets connected with the office' (*Panorama*, 21 May 1998). He has often spoken of a 'political conspiracy by 'red' judges' against him and his party.

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