

ITALY

The Italian justice system continued to be hampered by excessively long periods of trial. Silvio Berlusconi, Italy's wealthiest business figure, and his centre-right coalition won the Italian general election held in 2001. For the first time in Italian judicial history, the serving Prime Minister is a defendant in criminal trials. Mr. Berlusconi has faced criminal prosecution in nine cases, but only three out of these have reached the final appeal court. The tangled relationship between justice and politics carries troubling implications.

Italy is a democratic parliamentary republic composed of regions, provinces and municipalities.

Following World War Two, the population voted to replace the monarchy, which had governed the country since unification in 1870, with a democratic republic. Italy adopted a written constitution in 1948, which strongly protected fundamental rights. The guardian of the Constitution is the Constitutional Court, which may judge the activities of Parliament by striking down unconstitutional legislation.

On 13 May 1999, the Parliament, consisting of the Chamber of Deputies and Senate acting in joint session, elected for a seven-year term Mr. Carlo Azelio Ciampi as President of the Italian Republic. He exercises mostly supervisory and guarantor functions. His most important political function is to mandate, after consultation with all political parties, the formation of a government by the political leader who has a majority in both houses of Parliament. Recently adopted legislation defines the tasks of the President of the Council of Ministers, and also distinguishes the competence of each ministry. In recent decades, Italy's head of government has been increasingly hampered by the need to form a coalition among the many political parties, some of which are very small.

The multiplicity of parties had been widely considered to result from the structure of Italy's electoral system, which until recently was one of almost pure proportional representation. In 1993 the law was amended to provide that 75 per cent of the members of the Chamber of Deputies be elected in "first past the post" single member constituencies, and 25 per cent by the parties, and that Senators be elected through a hybrid system. However, the number of parties has since actually increased and there is no majority support for increasing the threshold (four per cent of the national vote) required for parliamentary representation.

The "Clean Hands" anti-corruption investigations of the 1990's decimated two of Italy's major post-war parties, the Christian Democrats, who had ruled for decades, and the Socialist Party. The other major party of the post-war period, the Italian Communist Party, has changed its name and avowed its commitment to social democracy. Mr. Berlusconi's movement assumed its place in the vacuum that had been left on the right. In 1993, Mr. Berlusconi founded his political party Forza Italia and portrayed himself as a self-made man who had constructed a powerful television empire by breaking the monopoly of Italy's state-owned broadcasters. Mr. Berlusconi set up private networks with the benefit of specially tailored legislation pushed through by the later disgraced Socialist leader Bettino Craxi. Shortly before becoming Italy's Prime Minister in May 1994, magistrates had investigated numerous allegations against Mr. Berlusconi, including money-laundering, association

with the Mafia, tax evasion, complicity in murder and bribery of politicians, judges and the finance ministry's police, the *Guardia di Finanza*. Mr. Berlusconi, who strongly denied all of these allegations, has maintained that left-wing magistrates dominate the judiciary and that the "Clean Hands" investigations were politically motivated.

During the recent general election campaign, owing to his myriad legal problems and apparent conflict of interest between his own business and affairs of states, Mr. Berlusconi attracted critical attention in the international media. The Economist magazine carried a cover story concluding that Mr. Berlusconi was "unfit to lead Italy", and "the election of Mr. Berlusconi as Prime Minister would mark a dark day for Italian democracy and the rule of law". *Le Monde* ran an editorial suggesting that a vote for Mr. Berlusconi " would be in contradiction to the values of the European community of which the Italians are a key part". *El Mundo* made further allegations about Mr. Berlusconi's business connections in Spain.

On 22 April 1998, the Chamber of Deputies unanimously passed a draft bill which provided the Government with three different options regarding means to resolve conflicts of interest involving ownership by a person holding public office of significant economic holdings or possession of instruments of mass communication: resignation from office, sale of the holdings, or their assignment to a blind trust. When it reached the Senate, the bill was judged inadequate by the Ulivo. For three years the Constitutional Affairs Commission sought to come up with an alternative, but the solution proposed by the centre-left (ineligibility for office) was considered by the opposition to be authoritarian and designed to damage Berlusconi. On 28 February 2001, the Senate passed a bill which would require a person holding public office to entrust his or her holding to a "separate management" and introduced harsh sanctions for violations. Instead of a blind trust, the law provides for a "fiduciary manager" who, after consultation with the interested parties, would be chosen by the Antitrust Authority together with the stock market regulator, Consob. Mr. Berlusconi and his allies objected, arguing that the interested parties should have the right to select the fiduciary.

On 13 May 2001, Mr. Berlusconi and his centre-right coalition (House of Freedom) was elected by a comfortable majority in both Houses of Parliament. After the first 100 days in office, Mr. Berlusconi was still seeking to resolve his conflict of interest problems. His government has proposed to set up an "authority of "three wise men" appointed by the speakers of the two Chambers of Parliament, both of them members of Mr. Berlusconi's own coalition. This body would monitor all senior public figures, from the Prime Minister down to big-city mayors, and make representations to the Parliament or to courts if a conflict of interest arises. But they would not have the power to block suspect decisions or legislation.

On 7 October 2001, Italian citizens voted in favour of the federalist constitutional reform pushed through by the Ulivo centre-left government shortly before last May's general election, giving the central government exclusive competence on a series of matters and leaving such matters as health, education and local security to be shared by the Regions.

HUMAN RIGHTS BACKGROUND

In March 1999 the UN Committee on the Elimination of Racial Discrimination included in its principal subjects of concern " reports of acts of violence and ill-treatment by police and prison guards against foreigners and members of minorities in detention, concern was also expressed

about the apparent lack of appropriate training for law enforcement officials and other public officials regarding the provisions of the Convention". It recommended that Italy "strengthen its efforts towards preventing and prosecuting incidents of racial intolerance and discrimination against foreigners and Roma people", as well as "ill-treatment of foreigners and Roma in detention".

In May 1999 the UN Committee against Torture urged that "legislative authorities ... proceed to incorporate into domestic law the crime of torture as defined in article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and make provision for an adequate system of compensation for torture victims". The Committee highlighted its concern that "the prison system remains overcrowded and lacking in facilities which make the overall conditions of detention not conducive to the efforts of preventing inhuman or degrading treatment, that reports of ill-treatment continued and that many of them involved foreigners".

In April 2000, the European Court of Human Rights determined that Italy was responsible for failing to carry out a "thorough and effective investigation into the credible allegations of ill treatment by Pianosa prison officers" made by Benedetto Labita in October 1993. Labita alleged that he and other prisoners had suffered systematic physical and mental ill treatment, mainly between July and September 1992.

Recent reports by non-governmental organisation continue to include allegations of ill treatment by law enforcement officials and prison officers. Although the allegations related to both Italian and foreign nationals, large proportion of the victims were of African origin or Roma.

G8: Genoa investigations

On 20 July 2001, representatives from the G8 nations met in Genoa, Italy, for a three-day summit. Outside the meeting, over 200,000 persons, many of whom had travelled from abroad, took to the streets to demonstrate on issues such as world debt and globalisation. After two days marked by violence, one protester was shot dead by a young officer carrying out his military service in the *carabinieri* military force, 200 people were injured and over 280 protesters, many foreigners, were arrested.

The Italian policing operation appears to have breached a number of internationally recognised human rights standards. There are concerns that detainees were denied their rights to prompt access to lawyers and, in case of foreigners, consular officials, and prompt and adequate medical care. In addition, many were not allowed to have their relatives promptly notified of their whereabouts and were not informed of their rights.

On 1 August 2001 the Constitutional Affairs Committees of the Chamber of Deputies and Senate, decided to establish a fact-finding committee to examine events occurring in the context of the G8 Summit in Genoa, including alleged human rights violations by law enforcement officials and prison officers. They rejected the option of an ad-hoc parliamentary commission of inquiry with full judicial powers.

In addition to the work of the parliamentary fact-finding committee, eleven criminal investigations into the conduct of law enforcement officials and prison officers have been opened by the Genoa Public Prosecutor's Office. The full account of the events surrounding the G8/Genoa policing operation is still emerging

THE JUDICIARY

Pursuant to Article 104 of the Constitution, "the judiciary constitutes an autonomous and independent organ and is not subject to any other power of the State." This institutional independence is guaranteed by the Superior Council of the Magistrature, which is an autonomous organ presided by the President of the Republic and is composed of two members *ex officio* (President of the Supreme Court of Cassation and the Prosecutor General attached to it) and 30 elective members (two thirds are elected by the judges and are judges themselves and one third is elected by the Parliament and are lawyers or professors of law). The Superior Council of the Magistrature also attends to the judges' recruitment, assignments, transfer, promotions and discipline (Article 105 of the Constitution).

The lengthy process of justice, especially in civil actions, has resulted in rendering Italy the most frequent Strasbourg "offender" in the jurisprudence of the European Court of Human Rights in recent years. Nevertheless, in October 2000 the Council of Europe Committee of Ministers acknowledged that various measures to modernise the judicial system have in fact been introduced.

Structure

The Italian system of courts maintains two distinct categories, those of ordinary jurisdiction and special jurisdiction. The organs which form the ordinary administration in civil and criminal cases are the Juvenile Court (*Tribunale per i minorenni*); the Tribunal on Freedom (*Tribunale della libertà*); the Court responsible for the enforcement of the sentences (*Tribunale di Sorveglianza*); the Justice of Peace (*Giudice di Pace*); the Court of First Instance (*Tribunale ordinario*); the Single-Judge Court of First Instance (*Giudice Unico di primo grado*); and the Court of Appeal (*Corte d'Appello*). The Supreme Court of Cassation (*Corte di Cassazione*) is the highest tribunal in the country and has national jurisdiction to review sentences passed by lower courts, but only on questions of law.

The special jurisdictions of the Italian legal system consist of Regional Administrative Courts (*Tribunale Amministrativo Regionale*) and the Council of State (*Consiglio di Stato*), regarding the administrative jurisdiction; State Auditors' Department (*Corte dei Conti*), for matters concerning public accountancy; Military Courts (*Tribunali Militari*); Military Appeal Courts (*Corti militari d'appello*); Military Surveillance Courts (*Tribunali Militari di Sorveglianza*) for military offences committed by members of the Armed Forces; Provincial Fiscal Commissions (*Commissioni Tributarie Provinciali*) and District Fiscal Commissions (*Commissioni Tributarie Distrettuali*) for matters concerning taxes.

Special organs have also been established. The Court of Assizes, composed of two career judges and six lay judges, is competent to hear cases involving very serious crimes. The Regional Court of Waters (*Tribunale regionale delle acque pubbliche*) and the High Court of Waters (*Tribunale Superiore delle Acque Pubbliche*) have competency for matters related to water.

Career judges who exercise their functions under the supervision of the Minister of Justice hold the office of Public Prosecutor. Their task is to ensure that justice is administered promptly and regularly, promoting the repression of crime. They are entitled to start criminal proceedings. In addition, the District Anti-Mafia Division is present in each office of the State Prosecutor, attached to the courts located in district capitals. These Divisions are made up of prosecutors specialized in

investigating organized crime. Within the Office of the Prosecutor General attached to the Court of Cassation is the State Anti- Mafia Division, which co-ordinates the investigations carried out by the District Divisions. A legislative initiative is pending presently to separate the careers of public prosecutors and magistrates within the judiciary.

Judicial reforms

The Former Minister of Justice, Piero Fassino, commented on the Government's record on justice over the past five years at the opening of the 2001 Judicial Year. The ceremony coincided with the end of the Parliamentary session, which in 1996 had opened with the unveiling of the then-Justice Minister Giovanni Maria Flick's reform package, aimed primarily at improving efficiency within the judicial system. The announcement of that reform package was followed closely by a program to provide certain legal guarantees, which resulted in lengthening the legal processes, increasing cases of prescription, and leading to the early release of dangerous prisoners whose term of protective custody had expired. The trend therefore ran counter to improved efficiency.

The "single judge" reform

The single-judge reform was instituted for criminal courts on 2 January 2000 and for civil courts on 2 June 1999. Certain courts, particularly those within smaller jurisdictions, have achieved positive results from this reform. For example, Rimini courts went from processing 1,809 civil cases in 1999 to 1,906 in 2000 and from 2,754 to 3,892 criminal cases during the same period. However other courts have not fared as well, either because of the lag effect necessary during transition or the assimilation necessary for the complicated new legal code (especially regarding criminal law). There also remains a massive backlog of cases in a number of jurisdictions. Yet almost all court presidents agree that a lack of staff both on the benches and in the administrative offices is mostly to blame, and the presidents maintain that they cannot expect to implement such a complex reform without the necessary resources.

The Palermo Court president Carlo Rotolo has pointed out that in Palermo, "the ratio of judges to prosecutors is 1.7, whereas in Milan there are 3.5 judges per prosecutor despite the fact that the size of the jurisdiction is the same". The consequences of the reform, which places the first instance of judgment in the hands of a single judge, are clear. At the first level (*preture e tribunali*), each civil judge has seen his caseload rise from 450 to 670 in a year. However this caseload is nothing as compared to the 12,000 cases per year now faced by labour dispute judges.

Giovanni Salvi, vice-president of the national association of judges, has viewed the reforms as encouraging.

The "Fair Trial" reform

In common with other internationally recognised human rights principles, the European Convention on Human Rights (ECHR) does not yet enjoy constitutional rank. Therefore, article 111 of the Constitution was amended on 23 December 1999 by adding a paragraph that guarantees the right to due process of law in all judicial proceedings, thus giving effect to Article 6 of the ECHR.

The amendment provides that due process of law should be guaranteed in every proceeding before the courts, and, more specifically, in criminal proceedings where the accused shall have the right to be promptly informed of the charges against him/her and be allowed time and conditions to prepare

his/her own defence. The accused shall also have the right to examine or have examined witnesses against him/her and to present witnesses in his/her favour under the same conditions. The amendment also establishes the principle whereby all evidence being produced during trial should be subject to questioning by the other party. Finally, it establishes the legal right to be tried within a reasonable time.

This constitutional amendment has yet to be fully implemented, because the inquisitorial and accusatorial models are in a transitional phase, whereby old institutions continue to exist and overlap with the new. A major step towards the equality of arms between prosecution and defence was taken by the adoption of law 397/2000 on defence investigations, allowing defence attorneys to conduct their own investigation. They can move "parallel" to public prosecutors and the judiciary police to interrogate suspects, inspect the crime scene, and sift through papers in public offices to procure evidence. Private investigators and technical consultants may now aid the defence.

Administration and resources

The Minister of Justice governs the administrative services connected with the exercise of the judicial functions. In the offices attached to the Courts, the administrative personnel, under the direction of the Head of Office and of a director, carry out tasks which support the judicial activity. These tasks include maintaining the documents of the proceedings, publication of the judges' decisions, enforcement of sentences, as well as largely administrative tasks involving personnel and budget.

ANTI-MAFIA OPERATIONS AND ORGANISED CRIME

The Parliament adopted controversial legislation on 3 October in open voting, while in the previous secret ballot, 27 members of Berlusconi's coalition had voted to delay passage of the bill. The legislation ratifies a 1998 accord between Italy and Switzerland aimed at enhancing judicial co-operation in the fight against the Mafia, terrorism and financial fraud. It supplements and updates the 1959 European Convention on Mutual Assistance in Criminal Matters, to which both countries are party. However, amendments introduced by the Government will make it more difficult for Italian courts to accept evidence procured from Switzerland and other states unless it has been subject to rigid bureaucratic procedures, such as certification by the government in the country of origin. Italy's opposition has called for a referendum on a new law, arguing that the bill weakens the fight against terrorism at a time when co-operation among governments should be made easier.

At a summit of European Justice Ministers in Moscow on 2 October 2001, Ruth Metzler Arnold, the Swiss justice minister, warned her Italian counterpart Roberto Castelli that the new amendments "do not correspond to the spirit of the accord" and "in the fight against terrorism, it was barely conceivable that Italy was slowing down cross-border cooperation over justice, given the current climate of concern about international terrorism, and the Italian-Swiss accord was meant to speed up anti-criminal co-operation". A leading United States judge threw his weight behind expression of concern about the newly amended law, warning that Italy was going down "the opposite road to the US and the entire international community" in the fight against terrorism.

The National Association of Magistrates also criticised the new law saying it could render many cases impossible to prosecute. In addition, the measure is retroactive and likely to affect over 5,400 requests made since 1996 by Public Prosecutors throughout Italy.

The Government has explained the retroactive measure as a tool to protect defendants from possibly false information. Many critics of the Bill in the political opposition also noted that it would protect Mr. Berlusconi and his closest friends in pending corruption cases in which information about secret foreign bank accounts might be useful.

Mr. Berlusconi on trial for alleged bribery of judges

Before the election in May 2001, defense counsel in the cases of alleged bribery of judges in which Mr. Berlusconi and his closest friends were allegedly involved challenged the admissibility of evidence obtained by Italian prosecutors from their Swiss counterparts.

The complaint asserted that the letter of the 1959 European Convention on Mutual assistance in Criminal Matters had not been observed. For instance, the Convention provides that the country of request should certify copies of documents as authentic. As a matter of practice, the Swiss authorities do not certify documentation used to transmit the evidence. The Italian courts rejected all these complaints and ruled that no breach of Italian law had taken place. But the Bill's two controversial articles would almost certainly exempt Mr. Berlusconi and his friends from judge-bribery charges. At present, responses by the Swiss authorities to requests for judicial assistance do not usually comply with the letter of the 1959 Convention. Unless the authorities in Switzerland are willing to change the way they respond to such requests, the Italians may be unable to obtain admissible evidence from, for instance, Swiss banks.

CLEAN HANDS ANTI-CORRUPTION OPERATIONS

Reform of Italy's false accounting law has been under discussion for a considerable period of time. The magistrates who launched the "Clean Hands" investigations in 1992 have used the current legislation to prosecute a string of businessmen, including Mr. Berlusconi. The previous government had introduced a modest bill to reform the false-accounting law, but the Parliament was unable to enact it before the election. Mr. Berlusconi's government passed this bill in August in the Lower House, but with crucial amendments.

One amendment decriminalises most offences of false accounting in private companies. Prosecutors therefore will not be able to bring charges except in response to a complaint from a party (a shareholder or a creditor) who is able to show damage as a result of the alleged fraud. Secondly, prison sentences, currently up to five years, are greatly reduced. Thirdly, as a direct result of this reduction, the statute of limitation will expire much earlier. At present, a defendant can be convicted of an offence of false accounting for up to 15 years after the offence was committed. Under the bill, this period is cut to a maximum of seven years and six months. Thus, in many instances, the Magistrates' work will not come to fruition.

If approved in autumn without amendment by the upper house and signed by the President, the bill will become law. In that event, the verdict in two of the three criminal trials in which Mr. Berlusconi is currently a defendant would be irrelevant.

Mr. Berlusconi on trial for false accounting

The two criminal trials in which Italy's Prime Minister is currently a defendant on charges of false accounting involve private companies in which he has an ownership stake. The first relates to alleged irregularities in the purchase of a footballer by a.c. Milan football club. The case concerns alleged falsification of the accounts of Fininvest, his main holding company. He also faces further possible charges of falsification of the accounts of Fininvest. All of these alleged offences of false accounting took place in 1993 or earlier. Thus, under the new bill, the offences would be covered by the refined statute of limitations. Under the Italian penal code, this extinguishes the crime.

CASES

Jorge Olivera case

In August 2000, a former Argentinean Military officer, Jorge Olivera, was arrested in Rome on an international warrant issued by France for the abduction, subsequent torture and disappearance of a French citizen, Marie Anne Erize Tisseau, in Argentina in 1976. The French Statute of Limitations did not apply because the unresolved "disappearance" was seen as a continuous crime. While full examination of the relevant French extradition request was still pending, the Roma Appeal Court considered an application by Jorge Olivera for provisional release or house arrest. The Court, noting that Jorge Olivera's defence lawyers had presented a death certificate for the victim recording her death in 1976, said that the crime could not, therefore, still be continuing. He also stated that the crime of which Olivera was accused was covered by a statute of limitations, indicating that under Italian law, the statute of limitations normally applies to the crime of abduction after 15 years or, under certain circumstances, up to a possible maximum of 22 years and six months). On this basis, the court ruled that there were no grounds to detain Jorge Olivera who was released and who immediately returned to Argentina.

The Procurator General appealed against the court's decision. The Minister of Justice announced an internal disciplinary investigation into the conduct of the appeal judges and the Public Prosecutor opened an investigation into the apparently false death certificate presented to the court.

In February 2001 the Supreme Court of Cassation annulled a Rome Appeal Court sentence. It ruled not only that the appeal court had released Jorge Olivera on the basis of a false death certificate, but given the Argentine context, it should have considered the alleged abduction as one aimed at subverting the democratic order, a crime to which the statute of limitations does not apply. It returned the dossier to Rome appeal court for examination of the extradition request.

Sofri, Pietrostefani and Bompressi case

(See *Attacks 2000*)

After nine years of judicial proceedings and seven trials, in January 2000 the Venice Appeal Court confirmed a 1995 verdict by the Milan Appeal Court which had sentenced Sofri, Pietrostefani and Bompressi, three leading members of the former extraparlimentary left-wing group "Continuous Struggle", to 22 years of imprisonment for participating in the killing of police commissioner Luigi Calabresi in Milan in 1972.

In October, when the Supreme Court examined an appeal lodged against the January judgment, the Procurator General's Office asked it to annul the Venice judgment and order new review proceedings. However, the Court rejected the appeal.

After all domestic remedies had been exhausted, at the end of the year the three men lodged a complaint against Italy before the European Court of Human Rights, claiming violations of fair trial guarantees.