

THE EVALUATION OF PROFESSIONAL PERFORMANCE OF JUDGES AND PROSECUTORS IN THE ITALIAN SYSTEM

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(presentation at the Conference: “Modernization of Justice in Europe” – Lübeck (Germany), October 26th, 2007)

SUMMARY: **1.** Introduction. – **2.** Open issues on evaluation of professional performance of judges and prosecutors. – **3.** International documents. – **4.** The road towards a system of permanent professional evaluation in Italy. – **5.** Principal aspects of the new system. – **6.** Parameters for evaluation. – **7.** Evaluation of heads of office. – **8.** Conclusions.

1. Introduction. – On July 30th 2007, the Italian Parliament, with the narrow majority derived from the general elections of April 2006, approved a law (n. 111) containing some radical modifications to law 160 of 2005, through which the previous parliamentary majority had struck a serious blow to the Statute of judges and prosecutors in Italy ¹.

Among the many aspects which the “reform of the reform of the judiciary” addressed, one of particular interest is the new system of permanent evaluation of professional performance of judges and prosecutors.

What follows are some very general remarks on this issue, as well as a brief overview on this system, whereby I will try to underline some points of general interest.

2. Open issues on evaluation of professional performance of judges and prosecutors. – Today the topic of evaluation of the work of judges and prosecutors is extremely critical. In obedience to a more generalized call for efficiency in public administration, governments of every country and political orientation have shifted their attention to the productivity of the single judge and prosecutor.

While on one hand we are fully aware of the need to streamline proceedings in all fields of jurisdiction, in order to adapt them to a world which is becoming increasingly complex, where the readiness of a decision counts almost as much as its content, it is not difficult to detect in this enhanced attention traces of the political will to exert control over judges and prosecutors, even in systems where there are strong safeguards to their independence.

¹ In several occasions we have informed MEDEL about the events concerning the “Reform of the Judiciary” which has been one of the qualifying points of the government program of the executive presided by Mr. Berlusconi in the years 2001-2006 (see the reports published on www.medelnet.org). After the elections of 2006, the new government presided by Romano Prodi, contrary to what had been stated a number of times during the electoral campaigns, has decided to maintain law 160 of 2005, and to modify its most critical aspects, mainly concerning selection and appointment, career, in-service training, judiciary school, and evaluation of professional performance.

This is especially so when professional evaluation of the work of judges and prosecutors oversteps the threshold consisting in the evaluation of the content of decisions.

The very concept of “Professional evaluation” presents a deal of open issues, some of which can here only be mentioned – and left unanswered.

- a) relationship between evaluation and independence: how deep can a judge’s work be scrutinized without actually interfering with the core of judicial activity, consisting in interpretation of law?
- b) consequences of professional evaluation on career: should a system of evaluation be used to set a minimum acceptable standard of performance (what is performance is of course an open question to which I’ll come later), or can it at the same time (and with the same parameters) serve the purpose of ensuring progression in career of the “most gifted”?
- c) the parameters for professional evaluation: as of today, the characteristics of a “good magistrate” have yet to be defined. An easy answer could be to say that “a good magistrate is he/she who delivers a just decision”. But on one hand we must reply that this is not always true: because the process through which this decision is reached is just as relevant as the final outcome. On the other hand, the very concept of “just decision” implies on one side the impossible task of defining what is just (maybe as opposed to “what is lawful”) and, on the other side, inevitably aims at that non-negotiable core of independence which, as said above, is legal interpretation.

What we are left, then, is a series of parameters defined through general experience which are (in a very superficial way) connected to the idea of the “good magistrate”:

- numerical productivity;
- punctuality;
- absence of objective misinterpretations of law;
- theoretical legal culture;
- organizational skills;
- as well as a set of very vague concepts on how the magistrate should behave in respect to parties, lawyers, court staff, witnesses, etc.

3. International documents. – Having pointed roughly the guidelines for a reflection, I will briefly recall the international legal framework concerning professional evaluation of judges and prosecutors.

a) Recommendation (94) 12 R on “Independence, Efficiency, and Role of Judges” adopted by the Committee of Ministers of the Council of Europe on October 13th, 1994:

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“c. All decisions concerning the professional career of judges should be based on objective criteria, and the selection and career of judges should be based on merit, having regard to qualifications, integrity, ability and efficiency. The authority taking the decision on the selection and career of judges should be independent of the government and the administration. In order to safeguard its independence, rules should ensure that, for instance, its members are selected by the judiciary and that the authority decides itself on its procedural rules.

d. In the decision-making process, judges should be independent and be able to act without any restriction, improper influence, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason. The law should provide for sanctions against persons seeking to influence judges in any such manner. Judges should have unfettered freedom to decide cases impartially, in accordance with their conscience and their interpretation of the facts, and in pursuance of the prevailing rules of the law.”

However,

“Judges should not be obliged to report on the merits of their cases to anyone outside the judiciary.”

b) “European Charter on Statute of Judges” adopted by the CoE on July 8th-10th, 1998:

“1.3. In respect of every decision affecting the selection, recruitment, appointment, career progress or termination of office of a judge, the statute envisages the intervention of an authority independent of the executive and legislative powers within which at least one half of those who sit are judges elected by their peers following methods guaranteeing the widest representation of the judiciary.”

c) As far as Medel’s “Proposal for a Statute of Judges” (adopted at the meeting in Palermo, 1993) is concerned, this does not include any reference to methods of professional evaluation and its limits.

4. The road towards a system of permanent professional evaluation in Italy. – a) A systematic debate on the issue of evaluation of professional performance began in Italy, within the Associazione Nazionale Magistrati (A.N.M.) in the 1980’s. Indeed, one of the founding principles of the association “Movimento per la Giustizia”, which I belong to, was exactly the call to the Italian judiciary to think up its own system of evaluation.

b) In the following years, and especially after 1992, when (in connection with the investigations carried out by the prosecution office in Milan on the criminal liaisons between politics and finance, also known as “Mani pulite”) the relationship between jurisdiction and politics became particularly tense, the topic of efficiency in connection with magistrates’ work has been “discovered” by the general public and widely debated in the political world. Needless to say, much of this debate was instrumental in strengthening the position of those sectors of Italian politics which addressed their personal judiciary troubles much more than the pressing needs of Italian justice.

c) The topic was taken up with particular vigor in the course of the legislature 2001-2006, when the government presided by Mr. Berlusconi took as a qualifying point of its action the so-called “Reform of Justice” (which, in the light of the questions addressed, should have been more pertinently defined as “Reform of the Judiciary”).

The proposed reform (eventually approved, after years of struggle, through law n. 160 of 2006) had at its center several concepts. The most important was, surely, the return to the hierarchization of the judiciary through:

- meritocratic selection;

- permanent evaluation through a complicated system of theoretical courses and examinations;
- awarding the Supreme court with the professional assessment of lower degree judges, and through this influencing the interpretation of the law on part of these;
- reduction of the Superior Council of the Judiciary's (Consiglio Superiore della Magistratura – C.S.M.) role in promotion, transfer, and training – initial and in-service – of magistrates.

d) The opposition of the A.N.M. to this project was fierce. “Meritocratic selection”, indeed, is a system which in theory could be acceptable. However, it must be adversed when it is designed as a system of permanent evaluation in which magistrates are forced to spend most of their time, not dealing with affairs, but preparing for theoretical examinations. Furthermore, this “selection” in the proposed reform should have been carried out by commissions composed mostly by Supreme court judges and lay members nominated by the Ministry of justice, leaving the C.S.M. with only the appearance of freedom to chose exclusively among magistrates included in the rankings thus formed.

e) This part of the Reform has been among those corrected through the approval of law 111/2007, though which the new political majority has tried at least to reshape the most critical aspects of the Berlusconi project.

The new legislation has recently been completed through the approval by the C.S.M. of a comprehensive set of general and specific guidelines for the implementation of this new model of professional evaluation (²).

5. Principal aspects of the new system. – In brief, these are the outlines of the new system of professional evaluation and career of Italian judges and prosecutors.

a) Magistrates are divided into seven “loan classes”, each corresponding to a “professional evaluation” (“valutazioni di professionalità”) and each accessible after four years of service in the previous class; the progression through these classes allows magistrates to apply for higher instance courts or prosecution offices (³);

b) This means the substantial preservation of the “open rolls” (“Ruoli aperti”) system, which means that economic treatment is not bound to the type of function but only to length of service (⁴);

c) As said above, every four years each judge and prosecutor is subject to evaluation for the progression to the next loan class. This evaluation (another critical point) is kept within the system of self-government. The basic documents which come into consideration are:

a self-evaluation by the magistrate concerned;

a report by the head of the office where the magistrate works;

² The regulation (“Circolare”) has been approved by the C.S.M. in its plenary session of October 4th, 2007.

³ E.g., the law states that in order to concur for the post of judge at the court of appeal the candidate must have positively passed through the second “valutazione di professionalità”, i.e. have at least 8 years of service behind him/her; likewise, to be able to access the post of judge at the court of cassation, the fourth “valutazione di professionalità” is required (16 years of service).

⁴ See G. NATOLI – L. DE MATTEIS, *Judicial Career in Member States of Medel – Italy*, presented at the conference held by Medel in Krakow, September 30th, 2005.

a sample of acts and decisions written by the magistrate in the period subject to scrutiny; comparative statistical tables summing up the number and types of decisions or other activities carried out by the magistrate concerned;

The first evaluation is prepared by the competent Consiglio giudiziario (a local organ of self government, elected by judges – although now it comprises some lay components) which proposes an outcome; the proposal then goes on to the C.S.M. for a final decision.

- d) The “valutazione di professionalità” by the C.S.M. can have three possible outcomes:
- positive
 - not positive, which implies that the evaluation is postponed one year and then carried out from start;
 - negative: a new assessment is carried out after two years, during which the magistrate can be assigned to different duties; if, after two years, a positive evaluation is reached, the magistrate proceeds to the next loan class; in case of a second negative evaluation, the magistrate is removed from office.
- e) In practice it will be interesting to see if the entire structure will be able to perform in time all needed evaluations, considering that the four-year term implies an average of roughly 2500 magistrates evaluated every year.

6. Parameters for evaluation. – The most critical part of the new system concerns the list of parameters to be taken into consideration in the course of the evaluation.

a) Law 111/07 and the C.S.M. guidelines state very clearly, in the first part, what cannot constitute the object of professional evaluation:

- issues concerning the private life of the magistrate, except for matters of criminal relevance;
- political, ideological, religious views of the person under scrutiny; and most important of all,
- legal interpretation and assessment of facts.

b) Having said that, the relevant issues have been divided into two main areas.

1) Independence, Impartiality, Equilibrium: this is considered a prerequisite of jurisdiction, to the point that they are, in a way, taken for granted: indeed, only facts constituting a breach of these requisites are included in the evaluation, while in all other cases the report will simply state that there is “nothing of relevance”.

On the other hand, while only negative facts on each of these issues are pointed out, failure to comply with any of these (regardless of the outcome of the evaluation in the other areas) will lead to a negative evaluation.

2) Professional skills: the relevant parameters have been further subdivided into four subgroups:

i) Capability

- juridical skills;
- methods of argumentation in decisions;
- follow-up to decisions in further instances, whereby this has been interpreted by C.S.M. in a restrictive manner, to imply only the relevance of “anomalous” percentages of quashings (or, for prosecutors, rejection of requests);

- conduction of proceedings;
- organization of collaborators;
- cooperation with other judicial offices when required;
- ii) Industriousness
 - amount and quality of cases handled, in relation to the general workload of the court or prosecution office;
 - relative speed in treatment of proceedings, also weighed against the global workload of the office;
 - collaboration with other magistrates of the same office;
- iii) Diligence
 - attendance at the office;
 - respect of timelimits for the deposit of decisions and other acts of office;
- iv) Commitment
 - availability to step in for missing magistrates;
 - participation in continuous training;
 - collaboration, if required, to solve juridical and organizational problems of the court.

7. Evaluation of heads of office. – To conclude, although we may here only mention this topic, we must point out that, for the first time, a system of evaluation is devised (although in very general terms) also for heads of offices, whereby these are now appointed for a four year period, renewable – in case of positive evaluation – for a further four years. However, unlike the “ordinary” evaluation which concerns other judges and prosecutors, the law does not lay down a list of relevant issues for this evaluation.

8. Conclusions. – It is of course premature to express a judgment on the system. Much will depend on the capability of the Consigli giudiziari to carry out their preparatory work, since it is very unlikely that, given the amount of evaluations to be passed each year, the C.S.M. will actually deal with any except the most critical cases (such as those where the removal of a magistrate is in question).

a) In principle it is a system which should guarantee a fair standard of performance. What is most important is that it conserves and enhances the separation between administrative direction of offices and evaluation of magistrates, since the reports of the head of office are only one of the many elements that come into question, which is a relevant safeguard of the independence of the single magistrate (in respect of the rule of “internal independence” laid down in the Italian Constitution: art. 107 § 3).

Also, contrary to the Berlusconi proposal, it removes the power to evaluate magistrates both from the School of the judiciary and from the Supreme Court: two bodies which, for evident reasons, should have nothing to do with the career of magistrates.

b) Of course, the criteria chosen, given the implications which I’ve pointed out in the beginning, are limited in scope, and those which might give a better insight into the work are going to be difficult to assess (such as, for instance, the behavior in court and especially during hearings).

c) A few personal remarks on the criteria chosen: two things have struck my attention.

On one hand, while Italian justice is sick (very sick) with the illness of lengthy proceedings, there is little attention to individual and collective organizational initiatives to reduce these, as far as possible given the existing workloads.

On the other hand, there is no attention paid at all to the commitment of magistrates to employ A.D.R. methods. In this respect, an occasion may have been lost. Since in this context we are speaking of modernization of justice, and in my opinion the progressive increase of negotiated justice in respect to imposed justice is of capital importance in reshaping the role of the judiciary in the globalized and polycentric world, maybe a word on the matter would have been a sign pointing in the direction of change.