

**Courts and the Making of Public Policy**

# Berlusconi on Trial:

Some Lessons for Judicial Accountability

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## Executive Summary

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- The criminal proceedings against Berlusconi are only the most visible example of a trend that has been occurring in Italy since at least the early 1990s, when the so-called 'Clean Hands' investigations had the effect of dismantling the traditional governing parties.
- Although there are several indications that Italy is more corrupt than other consolidated European democracies, criminal investigations are supported by an institutional setting entrusting independent prosecutors with wide powers in criminal proceedings and allowing them a remarkable influence on judges. In fact, today Italian public prosecutors enjoy wide investigative powers, are completely independent from the political branches, and form a unified corps together with judges.
- The high rate of criminal prosecutions involving politicians has fuelled a state of permanent conflict between courts and politics and has entangled courts in never-ending political controversies, with the effect of putting in question their impartiality, a fact clearly encouraged by Berlusconi and his supporters.
- The present trend in Europe toward strengthening judicial and prosecutorial independence can activate similar developments, especially in weak or consolidating democracies in which the boundaries between justice and politics are far from being settled.
- In any case, the growing prominence of public prosecution requires effective forms of accountability. Since political checks are often criticized, the effectiveness of judicial controls should be strengthened: above all, judges must also be – and appear to be – impartial toward prosecution.

## Berlusconi on Trial: Some Lessons for Judicial Accountability

On 6 April 2011, the trial of Silvio Berlusconi began, on charges of having sex with an underage prostitute and trying to cover this alleged offence by taking advantage of his official position.

In the last twenty years Berlusconi has been the subject of a large number of criminal investigations: his case is, without doubt, exceptional, and not only because of his real or alleged crimes. Notwithstanding all the proceedings against him, so far Berlusconi has always been able to escape a final conviction, to remain in power and to enjoy a strong electoral support: opinion polls on the recent sex case still suggest that Italian electors are almost evenly divided between those asking for his resignation and those thinking that he is actually the object of judicial persecution.

In the last decades, several democratic countries have experienced an unprecedented growth of judicial power, which is not any longer a prerogative of the United States. This expansion often manifests itself in constitutional review cases, with supreme courts striking down parliamentary statutes or expanding the content of political and social rights. In Italy this phenomenon is well-known – the constitutional court having played an increasing role since its inception in 1956 – but Italy can be singled out also for the higher political significance of its criminal justice. At least since the so-called ‘Clean Hands’ investigations in the early 1990s, criminal courts have played a crucial role in politics: thousands of politicians have been investigated and many of them brought to trial and sentenced. For instance, former Prime Minister Craxi had to flee the country in order to avoid prison and another former Prime Minister, Andreotti, underwent a long trial for collaborating with the mafia until he was finally acquitted. It is difficult to find a similar situation even in weak or consolidating democracies, but Italy could point to a new and emerging trend in the relationships between criminal justice and politics.

### *The rise of criminal justice in the ‘First Republic’*

Traditionally, the Italian judiciary was organized according to the model prevailing in civil law countries. Judges were considered to be civil servants, with only a few additional guarantees: they were part of a hierarchical organization controlled by high-ranking judges, with the Ministry of Justice at the top. Following the Napoleonic tradition, judges and prosecutors belonged to the same corps: both were, and still are, defined as ‘magistrates’ and during their professional life could, and still can, switch from one function to another. As a result, the role of the public prosecutor was defined in ways not too distant from that of the judge. If the judge was considered to be the ‘mouth of the law’, faithfully applying the will of the legislator, the need for impartiality on the part of the prosecutor was also emphasized; as was often remarked, s/he had to be considered an ‘impartial party’. As for criminal justice, it was characterized by a two-phase process: the pre-trial investigation, mainly entrusted to the instructing judge with the aid of the public prosecutor, was patterned along the century-long inquisitorial tradition, while the public trial was organized in a more accusatorial way, usually with a panel of judges adjudicating between prosecution and defence. It should be emphasized that, although judges and prosecutors enjoyed significant powers, an important role was played by the police, usually under executive influence. In fact, the police were able to filter the cases addressed to the justice system, in so doing significantly affecting the distribution of justice. Therefore, on the whole, courts played a subordinate role in the Italian political system.

The Constitution of 1948 introduced significant changes, among them, constitutional review of legislation and a significant increase in judicial independence. Constitutional review was assigned to a special court, allowing access to separation of powers questions, and to *any* court having doubts on the constitutionality of a statute it had to apply in a concrete case. The consequence was a more detached

attitude of courts vis-à-vis legislation, with a general increase in judicial law-making. As for judicial independence, it was guaranteed by entrusting all decisions regarding the status of judges *and* prosecutors to a body – the Higher Council of the Judiciary – composed by two-thirds of magistrates elected by their colleagues, the remainder being lawyers elected by parliament, as a rule with a political party imprinting. After the experience of the Fascist regime, the need to assure better protection of political and civil rights was deeply felt and the major political parties in the Constituent Assembly – Christian Democrats, Socialists, and Communists – did not hold much trust for each other: Christian Democrats were fearful of a possible communist-dominated executive and the Left was increasingly worried of becoming isolated in opposition and subjected to legal restrictions. Moreover, there was a great deal of uncertainty about which party would govern in the future. Therefore, the Constitution provided for an impressive array of guarantees against possible executive and legislative abuses.

Thus, the implementation of the Constitution brought about a significant strengthening of judicial independence. Changes in the structure of public prosecution were even more significant. The traditional powers of the Ministry of Justice over prosecution were progressively eroded. The Constitution had already recognized the principle of mandatory prosecution; it came to be interpreted as sparing prosecutors from any kind of supervision from outside the judicial system. Thanks to the role played by the 'democratically' elected Higher Council, the powers of the higher ranks were also gradually reduced. The final result was a steady expansion of prosecutorial discretion.

The traditional working of criminal justice began to change in the 1970s. This period saw the emergence of serious terrorist activities. The zenith was reached in 1978 when the President of the ruling party the Christian Democrats, former Prime Minister Aldo Moro, was kidnapped and murdered by the Leftist group 'Red Brigades'. At first, the fight against terrorist activities was dealt with mainly by the police. However, thanks to some initial police failures and to the rapid increase of terrorist acts, the judiciary began to play a decisive role. Public prosecutors and instructing judges already enjoyed significant powers in the criminal process. From the mid-1970s they began to act in

a more active way, by effectively taking the lead in investigations. In the process, the relationship with the police became stronger. The result was a more effective organization of investigations: trust between judges and the police developed and the powers of the instructing judge – above all, taking the evidence and deciding on pre-trial detention of suspects – were more smoothly employed. These developments were supported by a public anxious to see results in the fight against terror, and after a while results came: between 1978 and 1981, all major terrorist organizations were dismantled. Hundreds of terrorists were arrested, brought to trial, and sentenced.

The emergence of the judicial leadership in fighting terrorism was supported by the political context. First of all, the judiciary in the 1970s was able to convey to the public, and to political groups, an image of 'independence'. In fact, the reforms of the 1950s and 1960s had severed almost all channels of executive influence. The judiciary was able to dissociate itself from the declining political fortunes of the Christian Democrats and to develop relationships with a wide array of political forces. Above all, the relationship with the Communist party was particularly significant. The party was enjoying a growing electoral support and, after the 1976 elections, was able to enter into the governing arena. Its leadership was quick to perceive the risks of terrorism: an extreme Right reaction was considered possible and, in any case, the party did not want to have its image tarnished by association with violence. Therefore, it was happy to support the increasing power of the judiciary. In fact, magistrates, at least those of middle and lower rank, were considered to be more independent from the traditional ruling party. Increasing their power was also a way to check the police, considered to be under Christian Democrat, or even rightist, influence. Supporting the expansion of judicial powers over investigative activities was a way to be sure that these activities could not be misused.

The transformation of criminal justice brought about by the fight against terrorism had the effect of concentrating a considerable amount of power into judicial hands: supported by the police, independent magistrates became the leader of the anti-terrorist fight. This role was reinforced by the fact that prosecutors and instructing judges were also colleagues of trial judges: in fact, *all* magistrates directly elect two-thirds of the Higher Council

of the Judiciary. The skills and practices developed in this phase were soon transplanted: first, to the fight against organized crime and, in the 1990s, to the investigations on political and administrative corruption.

The 1980s introduced in the Italian political scene a new danger: organized crime. A series of dramatic mafia assassinations at the beginning of the decade signalled the fact that organized crime could no longer be considered the symptom of a backward, marginal society. Under the pressure of public opinion, the judiciary again took the lead in the fight. Although local politicians were often not enthusiastic about investigations hitting the politically powerful *padrini*, a large part of the national political class supported the fight. The general consequence was a further increase in the prestige and power of the judiciary.

In 1989 a reform aimed at introducing a sort of 'accusatorial' criminal trial, more or less modelled on common law (that is, American) experience did not substantially affect the situation. The instructing judge was abolished and the task of managing the investigation was entrusted to the prosecutor, although all decisions involving a limitation of citizens' liberties had to be taken by a judge. One of the goals of the reform was to contain somewhat the expansion of judicial power, but in fact the reform ratified the new, proactive role enjoyed by magistrates, only shifting the task of the investigation to the prosecutor, since all the remaining conditions went more or less unchanged – especially the proximity between prosecutors and judges and the judicial influence on the police.

### **'Clean Hands': criminal justice striking at the top**

In the early 1990s the political crisis gave courts a significant chance to assert the power already accumulated. The fall of the Berlin Wall had a deep influence on Italian politics. The failure of the communist experiment seriously damaged the electoral appeal of the Italian communist party. The dissolving of the 'red threat' had a corresponding effect on the main anti-communist party, the Christian Democrats. In the meanwhile, European constraints made it more difficult to pursue the policy of deficit spending that had supported the clientelistic

practices of governing parties: the governments had therefore to cut expenses and to raise taxes, with increasing popular dissatisfaction. This state of public opinion made itself known at the elections of 1992. The centrist governing coalition led by the Christian Democrats saw its support fall to under 50% of votes and only received a narrow majority of seats in Parliament.

The political landscape was ready for the so-called 'Clean Hands' investigations to erupt. The weak governing parties were unable to contain judicial power. In a few months judicial investigations involved prominent politicians of the governing coalition, as well as managers of state and private companies, with charges of corruption and other related crimes. The Amato government, formed in July 1992 after a three-month crisis, survived less than one year but saw seven of its ministers forced to resign after being notified of being under investigation. Judicial investigations continued to develop, thanks also to the radical curtailment of parliamentary immunity carried out at the end of 1993. According to one of the leading 'Clean Hands' prosecutors, Gherardo Colombo, more than 5000 people were involved: among them, four prime ministers, several ministers, and at least 200 members of parliament.

Prosecutors were able to exploit the resources accumulated in the past in the fight against terrorism and organized crime. Their more proactive stance allowed the development of investigations 'in search' for crimes, in contrast with the traditional attitude of acting only after a report of a crime has been notified to the prosecutor. Accused parties were induced to collaborate by giving evidence in exchange for more lenient treatment (especially, avoiding pre-trial detention). The previously discussed proximity between prosecutors and judges made judges more likely to satisfy prosecutors' requests, at least in the opinion of most lawyers.

Another important element supporting the development of judicial investigations was the role played by the media. The media had in the past vigorously supported judicial investigations against terrorism and organized crime. But in the case of political corruption this support was even stronger. Especially between 1992 and 1994, the media were overwhelmingly supportive of the investigations, siding with the judiciary and against the political class.

Only after 1994, part of the media – especially those under the influence of the new leader of the Right, Berlusconi – began to take a more critical stance, leading to a sort of division between those for and those against the tycoon. As a consequence, the impact of the ‘judicial-mediatic circus’<sup>1</sup> somewhat declined. Today, the Right-wing sector of the electorate seem to have been somewhat ‘immunized’ from political scandal: most of them tend to see the investigations involving Berlusconi as politically inspired.

### **The ‘Second’ Republic: criminal justice again**

Since 1994, the emergence of a relatively new, stable party system has not altered the situation. Criminal cases have continued to play a significant – and sometimes a decisive – role in Italian politics. The never-ending Berlusconi saga is, of course, the most relevant case in point. Recently, he claimed to have been put under judicial investigation 105 times. In any case, since 1994 he has been the defendant in at least fifteen trials, but so far he has always been able to escape a final conviction, often because of the statute of limitations or changes in the law brought about by his parliamentary majority. In fact, since 2001 the Right parliamentary majority has begun a systematic policy of reducing the significance of judicial investigations and circumscribing the guarantees of independence of judges and prosecutors.

An example of the first has been the reform of the crime of ‘false accounting’, in effect introducing a degree of tolerance whereby the difference between what is reported in the official financial statement of a company and the reality, as ascertained by the court, is not any longer to be considered a crime. The new law had the effect of dismantling several of the cases against Berlusconi. As for the reform of the judicial career and discipline, the effort of the Right has not had a significant impact, at least so far. The same can be said for the attempts at introducing some sort of immunity for members of the government. In 2008, the so-called Lodo Alfano was passed, ‘freezing’ all criminal prosecutions against the Prime Minister, but the new statute was quickly voided by the Constitutional Court. The Right has gone ahead with its policy, by passing a law

on the so-called *legittimo impedimento*, allowing the premier to postpone criminal cases for a period of up to eighteen months. Since this statute was also struck down by the Constitutional Court at the beginning of 2011, the Right parliamentary majority is trying to pass other bills, all more or less directly aimed at protecting Berlusconi from judicial initiatives. Early in March the government has also introduced a constitutional reform bill aiming at splitting prosecutors from judges and somewhat reducing their independence, but the immediate judicial prospects for Berlusconi seem, at least in Milan, rather bleak.

Although Berlusconi has been the main target of judicial investigations, other significant cases have characterized the period. The most important is that of the Justice Minister in the second Prodi government, Clemente Mastella. In January 2008, together with his wife and twenty-three members of his small party, he was put under investigation on several charges: ranging from abuse of power<sup>2</sup> to various administrative illegalities. As a consequence, the Minister resigned, denouncing the investigation as a ‘persecution’. After some days of uncertainty, the weak, fractious, centre-Left twelve-party government led by Romano Prodi collapsed, opening the way to new elections in which the centre-Right coalition, always led by Silvio Berlusconi, was returned to power. Although the Prodi government was far from stable, the judicial intervention was the trigger for the crisis.

After 2008 and up to present day, besides Berlusconi, other members of his government have been the object of judicial investigations: Economic Development Minister Scajola, Treasury undersecretary Cosentino, and Junior Minister Brancher all resigned because of their involvement with criminal justice. Whilst elsewhere criminal investigations have involved top politicians – for instance the trial against former president Chirac opened in Paris on 7th March – it goes without saying that criminal justice continues to exert a particularly significant impact on Italian politics.

1. The expression was coined by the French lawyer Daniel Soulez-Larivière in 1993.

2. The crime of Concussione is committed when ‘a public official, abusing her powers, forces someone to give or promise her money or some other value’ (art. 317 of the Criminal Code). In the ongoing trial Berlusconi should also respond to this crime.

### **Why criminalization?**

Italian criminal judicialization is often explained by pointing at the higher degree of corruption of the Italian political class. The developments of the last twenty years have to be understood as a reaction on the part of the courts to this situation and to the incapacity, or the unwillingness, to successfully fight this corruption by other means. At a more general level, the case of Italy is often seen in the context of long-term changes in democratic political systems. The traditional 'programmatic' politics – in which parties compete with different policy programmes – has given way to a kind of 'moralistic' politics, in which personal attributes of candidates play a major part, giving courts the chance to play a significant part in the political process.

Although a trend toward 'moralistic' politics can also be identified in Italy, and several indicators point to Italy as a relatively corrupt country at least in comparison to most European countries, the explosion of criminal justice of the last twenty years cannot be explained only in this way. It is difficult to consider the growing criminal judicialization as the consequence of an increase in corrupt practices. Data about judicial proceedings cannot be safely considered as an indicator of corruption, since they often signal only an increase of judicial activism. Other elements pertaining to the institutional setting of Italian criminal justice have to be considered.

As we have seen, the implementation of the 1948 Constitution has increased judicial and prosecutorial guarantees of independence to a significantly higher degree than that of other European countries. Moreover, the semi-inquisitorial setting of Italian criminal justice already entrusted instructing judges and public prosecutors with significant powers. These powers were further strengthened by the experience of terrorism and organized crime, and the 1989 reform has ratified this situation. Therefore, regardless of the level of political corruption, the Italian setting has made more likely the initiation of judicial proceedings.

### **What does Italy mean for Europe?**

In the last decades, a trend towards reinforcing judicial and prosecutorial independence in Europe has emerged, often sustained by the European Union and especially by the Council of Europe. The trend is supported by the pressure

exerted by judges' and prosecutors' associations, and finds a favourable audience all around Europe. For instance, public opinion consistently tends to express more trust in courts than in the political branches, not to mention political parties, which invariably fall at the bottom of the preference list.<sup>3</sup> This trend could damage the institutional equilibrium of the political system.

In his well-known defence of judicial independence, the Federalist no.78, Alexander Hamilton argued that the judiciary, 'will always be the least dangerous to the political rights of the Constitution', because it 'has no influence over either the sword or the purse... and can take no active resolution whatever'. Therefore, although judicial independence is a fundamental trait of democratic constitutional regimes, the increase of prosecutorial independence – especially if coupled with an excessive proximity between prosecutors and judges – can bring about a dangerous concentration of unchecked power. This risk is especially likely in those countries, such as Italy or France, in which judges and prosecutors belong to the same organization. However, even in civil law countries, judges and prosecutors are often socialized together before joining their corps, and tend to regard each other as the main point of professional reference, at the expense of other lawyers.

The result, which can be seen already at work in countries like France or Spain, can be an increase in prosecutorial or inquisitorial power, weakly checked by consonant judges, and in the growing criminalization of political issues. This trend can increasingly bring courts into politically controversial matters, negatively affecting their impartiality.

In conclusion, it is of paramount importance to design safeguards in the system to assure the accountability of the power enjoyed by public prosecutors. Above all, the emergence of proximity between prosecutors and judges must be avoided: recruitment and socialization models must avoid the risk of 'autism', and encourage the professional exchange between the broader legal profession and the judiciary. From this perspective, the common law tradition of appointing experienced lawyers to the bench must be safeguarded.

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3. See the Euro Barometer.



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