Checking the Imbalance(s) of the Italian Judiciary

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Italian Garantismo (1975-2025)

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Cambridge
Scholars
Publishing

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This book first published 2025

Cambridge Scholars Publishing

Lady Stephenson Library, Newcastle upon Tyne, NE6 2PA, UK

British Library Cataloguing in Publication Data
A catalogue record for this book is available from the British Library

ISBN: 978-1-0364-5369-5
ISBN (Ebook): 978-1-0364-5370-1

DISCLAIMER

The initial title of this monograph, "Just Justice"—also used as a slogan by activist groups and associations—played on the double meaning of the adjective 'just,' as 'fair,' but also, in an adverbial sense, as 'only.' Indeed, as it will be clearly shown in the following pages, what Italian *garantismo* has advocated for over the last five decades or so is not only a fair administration of justice but—almost more importantly than that—an administration of justice which does not overstep its institutional boundaries and is restrained by a 'checks and balances' principle. Nonetheless, personal circumstances and other reasons led me to prefer another title.

In this essay I will necessarily quote several articles written in English by Italian scholars. Quite frankly, one can assert that sometimes their English leaves too much to be desired, in other cases it is barely sufficient, while being very good in others. Obviously, be this as it may, an author must cite all necessary passages as they are, without ever tampering with their sources. The expected kindness of our readers shall compensate for the various imperfection of those texts.

To my dad and to my uncle, Col. (Carabinieri) Antonio Malvestuto, LL.B.

"Judge Haywood... the reason I asked you to come… Those people… those millions of people...

I never knew it would come to that. You must believe it." "Herr Janning... it came to that the first time you sentenced a man to death... you knew to be innocent."

Judgement at Nuremberg, (1961), Stanley Kramer

"Whoever saves a single life is considered by scripture to have saved the whole world."

Talmud (*Sanhedrin 37a*)

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FOREWORD

In the Spring of 2016, an old friend of mine put me in touch with Dr. Mauro Mellini. We had a few interesting conversations on the phone and, ultimately, one could say that the reason why this book came to light is the memory of the budding friendship arising from those frequent, albeit rather fleeting, contacts.

Mauro Mellini, a lawyer of great renown and one of the founders of the Italian Radical Party[1], was very worried about the state of the Italian Judiciary. In his view, the Italian system lacked any kind of substantive 'checks and balances' principle altogether, and he also thought that the Italian judges and prosecutors had been acquiring enormous power over the last five decades or so. Therefore, he asked me to translate into English a very riveting sort of pamphlet, or, rather, 'instant book,' in which he highlighted all the flaws he could single out in the Italian legal system and judiciary branch at large.

Mellini's intention was to trigger a debate on the 'other side of the pond,' as it were (and especially within the field of American legal doctrine), to generate a critical mass of reflection on the topic of the Italian judiciary's

[1] For a general view, see Spadaccia 2021. Two more articles are worth mentioning, the rather descriptive Radaelli and Dossi 2012, as well as Bonfreschi 2024, more focused, as per its very abstract, on the real novelty introduced by the Radical party into the Italian political arena, i.e., what one could call 'engaged' or 'heavy-duty citizenship': "The article aims to sketch out the main features of the political culture of the Radical Party (PR). This political culture is paradigmatic of a much broader phenomenon that has affected the politics of Western democracies since the 1970s: the critique of traditional parties in the name of a party model formed by spontaneous groupings of society; the extreme emphasis placed on individual choices in political action, and the programmatic tracing of the latter back to the former; and the call for a less 'mediated' relationship between citizens and institutions. Yet, this culture contained certain ingredients that would distance it from the populist forms of the twenty-first century. After grafting anti-authoritarianism onto its liberal matrix, the PR identified the promotion of civil rights as the goal and battle for the transformation of the relationship between politics and the citizen."

perfectibility and, consequently, start a viable process of evolution. Indeed, he was convinced that the Italian system had to be radically reformed in the direction of a liberal (in the purest Lockean sense of the word) model, akin to that of the United States of America. Also, he was convinced that the greatness of Roman Law had been preserved much more in the Common Law tradition rather than in the Civil one—a statement which no jurist worth their salt would ever question.

I did not comply with Mauro Mellini's desiderata right away (i.e., ordering, analyzing, researching, and eventually translating his naked notes) because of the many and often chaotic demands of the academic profession. After seven years or so, however, I developed myself an historical interest in the American Constitution and its solid principle of 'checks and balances.'

Explanatory memories aside, it must be stressed in no uncertain terms how divisive this topic is, given the ongoing and extremely difficult reforms taking place in Italy,[2] and considering how the remarkably similar (and no less conflictual) situation generated in the United States by the legal mishaps of Donald Trump[3] risks producing the same disruptive effects. At any rate, in 2023, I felt that the appropriate time had come to honour Mellini's memory (he passed on in 2020) by going back to his manuscript (169 pages in a double-spaced font 12) and working out a translation of his thoughts and concerns. Alas, his draft did not include any bibliography or footnotes whatsoever, thereby making any attempt at publication in the English-speaking world rather difficult.[4] Consequently, I had to gather and study a sizable number of academic references. In so doing, I realized how, far from being an ephemeral political phenomenon, or simply a set of 'partisan' concerns morphing into a worldview, Italian '*garantismo*' should

[2] I am referring to the so-called 'Cartabia reform', named after Marta Cartabia, Minister of Justice in the Draghi government, which began with Law n. 134, 27th September 2021, and is still being enacted by Minister Nordio in the Meloni government, while this book is being completed. See the pamphlet: *Camera dei Deputati, XIX Legislatura*.

[3] See McKinley 2024.

[4] A large resume of his rather short essay can be found in Apollonio 2015. Unfortunately, Mellini 2015, like any other contribution by the lawyer, is still devoid of any references or meaningful bibliography.

be regarded as an important object of historical as well as doctrinal reflection.

I used the words 'set of partisan concerns' deliberately, because several distorted and intellectually dishonest readings of '*garantismo*' have lately tended to consider its noble philosophical, juridical, and political tenets as a convenient shield for corruption and malfeasance. Unfortunately, this is in part, but largely, due to the colourful nature of one of its political champions, i.e., Silvio Berlusconi, and the divisive nature of his fiercely factious, as well as quite tumultuous, government years.[5]

I just claimed the great relevance of *garantismo* as an object of not just legal but also historical scholarly consideration. In fact, it is my intent to show how all the problems highlighted by the great champions[6] of legal *garantismo*, like Mauro Mellini, Giuseppe Di Federico, and Domenico Marafioti, are the result of Italy's complex history and its policy makers' constant attempt at mediating between fiercely opposed political and societal views. I should like to quote the title of a famous essay by Christopher Duggan on the unification of Italy, *The Force of Destiny*.[7] In it, Duggan contends that Italy did not really have the time to mature into a homogeneous new state, given its rushed and unplanned process of unification led by the Kingdom of Piedmont. I do believe that the same happened when World War II ended, and the Italians gave themselves a new Constitution. The scholars working on it were mostly pressed by the urgent need for a foundational document, as well as the harmonization of very different ideas. From the (hopefully) dispassionate standpoint of historical analysis, it seems quite clear how certain flaws of the Italian judiciary system stem out of the extremely serious and difficult business of constitutional engineering after the fall of Mussolini, as well as Italy's major

[5] Suffice it, here, to recall the famous front cover of *The Economist* (April 28- May 4, 2001, issue) 'Why Silvio Berlusconi is unfit to lead Italy,' as an example of how controversial a politician he was.

[6] Quite appropriately, in Vitiello 2012, Mellini, Di Federico and Marafioti are defined 'veterans' of *garantismo*. More specifically, Vitiello calls Di Federico 'a lion in the desert.' The following pages will show how appropriate such definition is.

[7] Duggan 2008.

oscillation between a seriously liberal (again, in the Lockean sense of the word) and a Catholic-Marxist approach to societal issues.

As I wish to prove in the following pages, Italy appears to be trapped in an ongoing paradoxical and dichotomic dilemma: on the one hand it desperately needs to dispose of an excessively cumbersome state-apparatus and its almighty bureaucracy, but on the other, it cannot firmly bank on a liberal tradition, a high level of civic maturity, and a low level of corruption and organized crime in order to reach that goal. If one must fight Mafia, Camorra, and 'Ndrangheta, as well as ubiquitous corruption, maybe certain liberal attitudes and a jealous attachment to due process must be put (temporarily?) aside, but if one puts liberalism and due process aside for way too long the goal of a renovated, more impartial, and less invasive government fades.

Such a topic of historical and juridical research reveals its daunting nature right from the start. However, to facilitate the reader and comply with Mellini's will, I shall follow the sequence of his reflections as they emerge from a close reading of his rather stylistically pleasant but very content-scanty notes.

Once again, I should like to remind the reader that all legal academic references have been researched, philosophically analyzed, and reasoned (as well as the bibliography compiled) by the author of this book.

Mellini's (as well as Di Federico's and Marafioti's) critique of the Italian Judiciary can be subdivided into several categories, to each of which I shall dedicate a chapter:

1) the very questionable process of judges' and prosecutors' selection, lack of periodical evaluation, and inertial promotion through the ranks;
2) the unsettling lack of separation between the careers of judges and prosecutors;
3) the embarrassing length and inefficiency of both the Italian civil and penal proceedings and their negative impact on the economy;
4) the several (often serious) violations of defendants' civil liberties, with the consequent ECtHR (European Court of Human Rights)

appeals and sanctions—as well as the lack of any accountability on the part of the magistrates in the event of a major miscarriage of justice adversely affecting a defendant;

5) the politicization of the judiciary and the political use of justice (with special focus on the 'Tangentopoli' scandal);
6) the abuse of special legislation dictated by political emergency and the not always appropriate use of 'collaborators or justice,' or '*pentiti*' to defeat organized crime;
7) the uneven results of the 1988-1989 reform of the Italian Penal Procedure Code—meant to lead towards a more 'adversarial' rather than 'inquisitorial' model—assessed in this work through a contrastive analysis of the penal trial procedures followed in the US and in Italy.

The eighth section is a mini-essay on 'originalism' and the non-violation of the 'constitutional pact'—an issue specular, and germane, to that of a 'lazy' legislative branch (i.e., a legislative branch which tends to delegate political intervention to judicial review rather than legislating on its own), which we shall also assess elsewhere in this essay.

At any rate, it is a strong conviction of the author of this monograph that the spirit of the Italian Constitution,[8] as well as the nature of the Italian inquisitorial system—despite the 1988-1989 reform, as we shall see—is deeply seated in a 'continental', and hence 'strong,' conception of the State, whereas the kind of close 'attention' American Constitutionalism pays to due legal process and its fear of an invasive State—which *garantismo* fully advocates also for Italy—are rooted in a 'limited government' doctrine traceable back to John Locke and the intellectual background of the Founding Fathers.

Finally, the epigraph of this essay comes from a famous movie on the Nuremberg Trials, and, more specifically, from a scene in which a German judge who sympathized with the Nazis (played by Burt Lancaster) tells his American prosecutor (played by Spencer Tracy) that, once, he indeed

[8] The Italian Constitution, at least typologically, sits in the 'liberal-democratic' group of such foundational documents. See the very interesting Grimm 2012.

condemned an innocent man to favour the ascent of the Nazi party—which, at the time, he wrongly saw as a positive force of change—but that he had not at all foreseen—nor intended to bring about in the least—the Holocaust. The answer of the American judge is the quintessence of *garantismo*: 'one's good faith does not matter.' Even if only one innocent person is condemned in the name of an allegedly excellent principle, or even because of raison d'état, well, then the judge has already fatally wounded the whole judiciary system.

This is valid for any ideological approach, even if its intents are positive and meritorious. Only those who deeply understand the British jurist William Blackstone's dictum of 1769 in his *Commentaries on the Laws of England*: "the law holds that it is better that ten guilty persons escape, than that one innocent suffer"—and the elaboration thereof by the United States Supreme Court of 1895 in *Coffin v. US*: "it is better to let the crime of a guilty person go unpunished than to condemn the innocent"—can also grasp the true spirit of garantismo.[9]

As the specialized American reader knows very well, the appellate case *Coffin v. US* is a true systemic milestone because it establishes the 'presumption of innocence' principle in American jurisprudence. Very learnedly, moreover, the opinion of the court included the Roman Law antecedents to show the long-standing historical validity of the principle itself: "Let all accusers understand that they are not to prefer charges unless they can be proven by proper witnesses or by conclusive documents, or by circumstantial evidence which amounts to indubitable proof and is clearer than day" *Code*, L. iv, T. xx, 1, 1. 25. "The noble (Divus) Trajan wrote to Julius Frontinus that no man should be condemned on a criminal charge in his absence, because it was better to let the crime of a guilty person go unpunished than to condemn the innocent." *Dig*. L. xLvnr, Tit. 19, 1. 5. "In all cases of doubt, the most merciful construction of facts should be preferred." *Dig*. L. L, Tit. xvii, 1. 56. "In criminal cases the milder construction shall always be preserved." *Dig*. L. L, Tit. xvii, 1. 155, s. 2. "In

[9] See Halvorsen 2004.

cases of doubt it is no less just than it is safe to adopt the milder construction." *Dig*. L. L, Tit. xvii, 1. 192, s. 1."

Armed with the authority of this ancient and venerable doctrine propounded by the very inventors of legal reasoning, we should be able to better comprehend why people like Mellini, Di Federico, and Marafioti, always felt a gentle melancholy when acknowledging how the American legal system—in addition to celebrating the principle of *stare decisis*—had long ago elected to embrace the Ockham-like clarity of Roman Law much more than the continental civil-code-based systems seem to.[10]

[10] Good companions to my essay for the English-speaking reader are Miranda 2014, Venuti 2019, and Di Federico 2012.

FIRST BRIEF HISTORICAL PREAMBLE

The history of the Italian judiciary,[11] quite obviously, runs parallel with the destiny of its nation. I shall now delineate, rather briefly, the most important highlights of either one.

Italy was unified in 1861 by the Savoy House, the Monarchy of Piedmont. *Ipso facto*, Italy received and implemented both the *Statuto* (Constitutional Charter), octroyed by King Carlo Alberto to his subjects in 1848—after the Europe-wide riots of the same year—as well as the first Criminal Code of the Savoy Kingdom, produced in 1839. Later, after the unification and while the newborn monarchical state was struggling with the fight against Southern banditry, the implementation of compulsory military service, the revitalization and organization of the economy through exceptional taxation, and the creation of a new and centralized school system, Minister of Justice Giuseppe Zanardelli enacted the 1889 Criminal Code, which was replaced in 1930, under the Fascist regime, by a code compiled by Minister of Justice Alfredo Rocco. It was Mellini's anecdotal opinion (he often shared it socially with his close friends and some colleagues) that the Zanardelli Code was more protective of civil rights, due process, and fair trial than the Rocco Code (and this should not come as a surprise to any historical mind, given the 'liberal'—again, I must emphasize it, in a very technical Lockean sense—formation of the Italian elite at the time of Zanardelli). Also, it was Mellini's feeling that several patently outdated, or manifestly unconstitutional, portions of the Rocco Code were not promptly modified via legislation because of a poorly concealed and wide-spread parliamentary expectation that they be modified via judicial review by the Constitutional Court. Luckily for the Italian Justice system, however, there have been several legislative modifications to the code over the years.

This dangerous and 'lazy' posture of the legislative branch—waiting for the judicial review to intervene, instead of legislating *motu proprio*—will be assessed only in passing in the chapter dedicated to the politicization of the

[11] See the well written Meniconi 2013.

judiciary and the Tangentopoli investigation, but it will receive full attention in the self-standing essay on Originalism of this monograph. This attitude, i.e., judicial activism taken to the extreme with the acquiescence of the legislative branch, was another serious preoccupation of Mellini's and Marafioti's, who spoke of 'wrestling magistrates' and the 'regency' or 'hegemony' of the judiciary,' respectively (because of a not so productive—if not altogether absent—legislative branch, especially during the post-Tangentopoli period).

Italy was completely liberated from Nazi-Fascism on April 25th, 1945; it became a Republic on June 2nd, 1946; adopted a new Constitution on December 22nd, 1947; and, through the general elections of April 18th, 1948, ushered in a regime of 'blocked' democracy, whereby it was impossible for its Communist Party (numerically, the largest in the Western world) to be part of any government.[12]

Between 1955 and 1965 Italy underwent a powerful economic development, generally referred to as 'economic boom,' or 'economic miracle,' and, in 1963, it also engaged in a timid 'political engineering' foray by testing new political alliances within an otherwise rather dull political scenario. This led to the first 'center-left' Moro government including the Italian Socialist Party. It was a time of enormous societal transformation: in 1963 women were allowed to serve as magistrates, in 1964 Magistratura Democratica ['Democratic Judiciary,' my translation], the left-wing professional association of the magistrates, was founded, and, in 1968-1969, there occurred the first university students' protests and major workers' strikes.

The 1970s decade was tragically marked by political terrorism, both of communist and neo-fascist inspiration. The Italian Radical Party, of which Mellini was a founder and Di Federico himself a sympathizer, first proposed and won a referendum to retain the legal institute of divorce in 1974, and then, in 1981, prevailed in the one meant to retain the right to terminate one's pregnancy. During these years, a lively debate—begun in the early 60s—on the role of the judiciary with respect to the constitutional foundations of the state reached its peak: should the judiciary implement the

[12] See both Ginsborg 1990 and Ginsborg 2006 for an excellent description of the historical backdrop.

'spirit' of the Italian Constitution beyond its letter, in an 'evolution'-based approach, or should it just make sure that laws and citizens alike respect the Italian Constitution as is? This was, in fact, the topic of a famous convention held in Gardone Riviera in 1965, which we will discuss later.

In 1975, the Oronzo Reale Law was passed as a piece of 'special legislation,' i.e., legislation imposed by social emergency and intended to fight political terrorism (the law was then abrogated in 1978),[13] whereas in 1982 the Sicilian Mafia suffered a major defeat because the Palermo 'maxi-trial' established jurisprudentially the very existence of the Mafia, as well as implemented an equivalent of the American Racketeer Influenced and Corrupt Organizations Act (RICO) protocol also for those aiding and abetting mafia members.

In 1983, Enzo Tortora, an extremely successful television anchor and producer, was unjustly accused of being a member of the Neapolitan Mafia (called *Camorra*), and this eventually led to the 1988 and 2000 nation-wide referenda, actively promoted by the Italian Radical Party, whose content will be discussed in the following chapters. Suffice it to say here that in view of the intolerable and gravely negligent miscarriage of justice suffered by Tortora and the consequent first referendum—held in 1988 and overwhelmingly requesting accountability on the part of the judiciary—Law 117 of April 13th 1988 was passed, thereby establishing that a magistrate can be held responsible for a miscarriage of justice if they act fraudulently or with inexcusable negligence.

In such a scenario the State, and not the magistrate, offers redress to the plaintiff whenever required, and only later may the State, in turn, demand redress from the magistrate. As we shall see in detail at chapter four: the rarity of such grave occurrences; the composition of the self-governing judiciary body called *Consiglio Superiore della Magistratura* or CSM, for short ['Superior Council of Magistrates,' my translation]—which is itself mostly comprised of magistrates; the scarce impact of the Ministry of

[13] See Baravelli 2020.

Justice and the Presidency of the Republic on the CSM;[14] and the infamous 'clauses' of safeguard,' for both judges and prosecutors, all *de facto* protect the individual magistrate from any legal action (again, except in extremely rare cases of patent fraudulence or extreme negligence). The other referendum, aimed at obtaining increased judicial accountability for judges and prosecutors alike, was held in 2000, as mentioned above, but it was unfortunately unsuccessful because it failed to mobilize more than half of all the Italians entitled to vote, as per constitutional regulations governing the referendum institute.

The 1992-1993 years are of extreme importance. They were two truly *anni horribiles* for the Italian State, as its institutions engaged in an epic clash with the Sicilian Mafia of the Corleonesi clan (because of its indiscriminate terrorist massacres). Those two years also brought about an unprecedented investigation into the quietly and universally accepted corruption of both the political class and the most important national entrepreneurs. Many historians argue that such investigation—called '*Mani Pulite*' ['Clean Hands,' my translation]—leading to a veritable decimation of both legislative chambers and the disappearance of many long-standing political parties—was possible because the judiciary felt the weakness of a political power now deemed unnecessary to foster an old Cold War-based equilibrium after the fall of the Soviet Union in 1991. We shall revisit all this in chapters four, five, and six.

Suffice it to say, here, that in 1992 a piece of the 1975 Reale special legislation, passed to fight prison revolts, was revitalized and converted into a self standing law: the 41-*bis* special incarceration regime. This institute proved extremely controversial, and those concerned with substantive due process noted that the norm (establishing extremely harsh conditions of isolation for especially dangerous prisoners) blatantly violated constitutional norms.

By the same token, and as a final note, many enlightened jurists contested some of the prosecutors who investigated political corruption in 1992-1993

[14] Regarding the potential and fierce tensions involving also the President of the Italian Republic, who presides the CSM, see also Di Federico 2017 and Cossiga 2003.

because the latter allegedly abused pretrial detention—leading to the suicides of several defendants—and applied the norm even when there was no risk of flight, tampering with evidence, or repeated offences. As we shall see in chapter four, many cases of 41-*bis* incarceration, pretrial jail detention based on faulty or incomplete written motivation,[15] or degrading accommodations in prison have led the Italian Judiciary to losing many appellate cases before the European Court of Human Rights.

Completely altered by the above-mentioned corruption scandals, with their spectacular investigations and accompanying media circus, the Italian political scene—as mentioned above—saw the disappearance of almost all traditional political parties. This, in turn, was followed by the ascent of new parties. One of them, called *Forza Italia* ['Go, Italy!,' my translation], was led by controversial media and real estate tycoon Silvio Berlusconi, who also declared himself a champion of *garantismo*, most probably for reasons of expediency far less noble and philosophical than those of Mellini, Di Federico or Marafioti. Indeed, when looking at those years in retrospect, one can certainly state that the larger-than-life personality of Silvio Berlusconi has hindered more than benefitted the cause of *garantismo*. The other 'new' party was the 'Italian League,' supremely interested in the creation of a light, federal state, and more invested than any other political formation in establishing new judiciary rules more in tune with the American model (in a nutshell: strong regional autonomy within a federal framework, moderate taxation, and constitutional simplification).

[15] Refer to Giunti 2018 which seems to underline the Court of Cassation protection of the defendants' rights in this respect.

VINCENZO ROPPO'S *GARANTISMO*, A VERY SUCCINCT 'IN-WORD'

While preparing the necessary materials for this book, I ran into Vincenzo Roppo's essay on 'Garantismo' and read some of Luigi Ferrajoli's extensive work on due process in the penal system.[16] The latter scholar's sound and reasonable tenets need no exploration, in that they are fully compatible with the ideas of the historical champions of a radical revamping of the Italian judiciary, whereas Roppo's take on garantismo may, more than likely, leave one quite perplexed.

After a rather long and quite unnecessary etymological preamble, Roppo posits the existence of a type of 'garantismo' strictly related to the notion of due process in criminal proceedings and of another, roughly comparable to the principle of 'checks and balances,' a principle guaranteeing, at least in James Madison's thoughts, a healthy separation and equipoising of powers. In an astonishing pean of sorts, several perceived flaws seem to be mentioned to show that they are not indeed real flaws but just unavoidable and benign bumps on the Italian judiciary road.

In fact, the author does not seem to catch the serious constitutional imbalances present in the Italian governmental structure at all, and, quite like Voltaire's Candide before the best juridical world possible, does not acknowledge any major flaws in the Italian judiciary either. More specifically, and following our previously listed seven points of contention, Roppo does not seem to find the separation between judges' and prosecutors' careers necessary, he is not bothered by the unacceptable length of both criminal and civil trials, does not mention the reiterated censure of the European Court of Human Rights concerning improper infringements of personal liberties in Italy, and, quite disconcertingly, does not

[16] See Ferrajoli 2016 and Roppo 2022.

even acknowledge the heavy politicization of the Italian judiciary. What follows aims to prove that things stand—dramatically—otherwise.

In sum, either Italy must be seen as a tried-and-true liberal state with an excellent and mature judiciary branch, and therefore needing no reforms, or, conversely, the panoply of flaws which have emerged in the last five decades of judiciary practice do prove that Italy is not that ideal liberal state yet.

CHAPTER 1

SELECTION, RETENTION, AND DISCIPLINE IN AN ITALIAN JUDICIARY SAUCE. THE WORK OF GIUSEPPE DI FEDERICO

A friend of Mauro Mellini and a former Fulbright scholarship recipient, Giuseppe di Federico is a Professor Emeritus of Law at the University of Bologna[17] and one of the most remarkable representatives of garantismo in Italy. Over the last four decades, he has worked extensively on a thorough assessment of the Italian Judiciary branch. His deep and unrivalled knowledge of the Italian system is coupled with a long-standing familiarity with the American Common Law model and an excellent command of the English language. We shall constantly refer to his work in the following pages, and, indeed, his writings constituted an excellent academic complement to Mellini's rather anecdotal notes.

Indeed, in 2005 Di Federico was tasked by the Italian National Research Council, in partnership with the Research Centre for Judicial Studies (CeSROG) of the University of Bologna, to investigate the Recruitment, Professional Evaluation, and Career Development of Judges and Prosecutors in several European countries.[18] He supervised the production of such an anthology and wrote an extensive essay on the Italian situation. We shall now summarize his essay's main points.

Already in the Preface of this edited book, Di Federico states in no uncertain terms the core of the issue we are discussing: "In analysing and comparing those features in various judicial systems, the values of independence and impartiality are in many ways revealed in their multifaceted aspects. In fact,

[17] I am personally indebted to Dr. Di Federico's exquisite kindness for the time he dedicated to our discussions.
[18] Please, refer to the many relevant sections of the long and learned De Santis 2012 in addition to Di Federico 2005.

the higher the actual guarantees of professional qualifications in the various systems, the higher also are the guarantees of independent and impartial behaviour of the judge." This quote enshrines the core of garantismo's advocacy: the call for the independence, impartiality, and competence of the judiciary. In a nutshell, and from an American perspective, the call for the already mentioned 'checks and balances' principle as well as a 'substantive due process.'

In the section dedicated to Italy, after duly explaining that in the Italian context the word 'magistrate' can denote both a judge and a prosecutor, Di Federico discusses the crucial issues of selection, retention, and disciplinary dismissal of all magistrates. The key points are the following:

1) the selection process of Italian magistrates consists of a public competition based on both written and oral exams, but the candidates' previous practical experience in the legal field, if any, is not relevant at all. This is the so-called 'bureaucratic' system of recruitment (which elects to form the personnel of the judiciary by choosing within societal ranks), whereas the 'professional' recruitment system, in place in the States, looks for judges among practicing and established lawyers. Also, the Italian candidates who participate in these periodical public competitions tend to be extremely young for the reasons just explained;
2) in this Italian 'bureaucratic' system of selection, the successful candidate is presumed to be omniscient in all matters legal, whereas, in the 'professional' recruitment-frame, established lawyers are selected for specific jobs and/or areas of proven expertise;
3) The body in charge of monitoring the merits, discipline, and career of all magistrates is a very autonomous and, quite certainly, a very imbalanced one. In Di Federico's words: "The Italian Constitution, enacted in 1948, provides that all decisions concerning judges and prosecutors from recruitment to retirement (promotions, transfers, discipline, intervened disability management etc.) remain within the exclusive competence of the Superior Council of the Magistrates (*Consiglio Superiore della Magistratura*, or CSM) composed prevalently of magistrates (i.e., judges and prosecutors), themselves elected by their own colleagues. More specifically, the constitutional

norms prescribe that two thirds of those members must be magistrates and that one third of the members be elected by Parliament among law professors and lawyers with at least fifteen years of professional experience;[19]

4) The CSM—created only in 1959, and symbolically presided by the President of the Italian Republic—has acquired a very remarkable influence on the Ministry of Justice (arguably, even on the Government itself) over the years, and is the only European body monitoring magistrates which is comprised of an overwhelming majority of those who must be monitored;
5) to synthesize Di Federico's excellent taxonomy based on a scrupulous collection and comparison of data over a longitudinal span of two decades, we can say that, when it comes to promotions or disciplinary actions, the CSM has proved to be overwhelmingly laudatory and lenient, respectively;
6) the serious problems created by the principle of 'non transferability' of the magistrate, intended to protect its independence. Again, in Di Federico's own words: "The principle of non-transferability covers the entire working life of the magistrate from the very first assignment to judicial functions at the end of their initial training. The choice of the magistrates to fill the vacancies in the judicial positions reserved to the higher ranks of the career is always restricted to those that voluntarily apply for them. In other words, *ex officio* assignment of judges and prosecutors to fill the existing vacancies is *de facto* possible only for the first assignment of judicial roles to the newly recruited magistrates. Any one of them who is fully satisfied with the location and functions of first destination after initial training can remain in that position for the next 45 years and at the same time be promoted step-by-step up to the highest level of the career;"
7) the five possible disciplinary decisions of the CSM are a) admonition, b) censure, c) loss of seniority up to a maximum of two years, and d) expulsion or e) dismissal. Once again, the thorough case taxonomy provided by Di Federico, shows an astoundingly low

[19] Mauro Mellini himself became an elected member of the *Consiglio Superiore della Magistratura* in 1993.

rate of expulsions or dismissals, as well as a rather low rate of censure and loss of seniority;

8) the lack of periodical evaluations of the magistrates' legal knowledge which, in Di Federico's own words, does not necessarily mean lack of excellence, but, rather, and more alarmingly, a lack of professional 'drive': "Obviously the lack of substantive professional evaluations in the course of their careers does not mean that one cannot find a substantial number of Italian magistrates that are highly qualified, but it certainly means that the Italian judicial system does not provide the proper organizational *stimuli* that are necessary for the promotion of adequate diffused standards of professional qualification in a corpus recruited among professionally inexperienced graduates in law that as a rule remain in service for 40/45 years."

In order to better explain—and then elaborate on—point five of Di Federico's masterful essay, it is useful to quote an excellent piece of doctrinal writing by Simone De Santis (De Santis 2012) in which the author highlights how the principle of 'non-transferability' of any given judge or prosecutor, combined with the *Breganze* and *Breganzone* Laws of 1966 and 1973 respectively, have established a praxis whereby magistrates can be promoted and be paid at a higher hierarchical level irrespective of the unavailability of jobs at the aforementioned higher level. This, quite evidently, far from protecting the magistrates' independence, does in fact bestow on them the de facto status—and consequent power—of a political lobby.

De Santis very aptly points out how the Judiciary should, in principle, be completely disengaged from any political ideal, unlike the Executive and Legislative branches, which, by nature, can and must pursue certain political goals. This notwithstanding, De Santis posits, by quoting a famous essay by Piero Calamandrei,[20] that an absolute impartiality on the part of a judge is difficult to achieve, and, it is worth noting, said impartiality is even more difficult to achieve especially in times of crisis or dramatic societal transformation. Indeed, as we shall see later, it was Mellini's strong conviction that certain questionable judiciary practices had started during

[20] See note 85 in De Santis 2012.

the famous *Anni di Piombo* ['Years of Led,' my translation], i.e., during the years of Italian political terrorism (ca. 1969-1985), a notion which I shall elaborate on later. Thus, De Santis explains how, sometimes, the judiciary can morph from a 'function' into a 'power' and then concludes his long paper by drawing a causal nexus between the composition of the CSM—and its ever-increasing competences—and the politicization of the Judiciary. The absolute lack of any 'checks and balances mechanism,' in his view, leads to a disharmonic relation with the executive branch and the proliferation of 'currents', 'factions', or even veritable sub-associations within the CSM itself.

An important section of De Santis' essay must be mentioned here because it involves the international repercussions of the above-expounded lack of career-monitoring. Once again, basing his statement on another essay by a very prolific Di Federico,[21] the author points out how the European Union has inflicted many sanctions on Italy due to the inordinate length of its civil and penal trials. The core of De Santis' contribution, however—rather than the issue of the lack of monitoring in the selection, retention, and discipline of magistrates by the judiciary itself—concerns something that we will have to necessarily rehash at the appropriate time, and that is the negative influence of historical circumstances, political pressures—and often fears of past dictatorial demons—on the very notion of the judiciary power in Italy. The Italian constitutional framework, in fact, does not seem to boast a clear and effective 'checks and balances' principle, which—it must be clearly noted, for once—albeit clearly formulated by Montesquieu as well, relies mainly on Polybius' assessment of the ancient Roman government's synergy of branches in the tenth book of his *Histories*.[22]

This is certainly a very large object of study, but we must absolutely delve into it at this point—at least in part—to facilitate the reader's understanding of the Italian system, especially when it comes to my very strong conviction

[21] See Di Federico 2022.

[22] Umberto Vincenti writes some very interesting pages on the Roman Republic's invention of the 'checks and balances' principle, something the already critiqued Roppo does not seem to acknowledge either. If the Italian jurists also spent some time reading the *Federalist Papers*, they would probably understand the importance of this pivotal Greco-Roman precedent. See both Vincenti 2017, and Vincenti 2022.

that the Italian Constitution and its provisos are the fruit of a very difficult historical process, and, as such, are strongly slanted towards the excessive protection of the judiciary, the understandable fear of strong executives, and an inquisitorial type of prosecution meant to fight serious criminal cartels. Also, the Italian constitution tends to hyperregulate the life of the state and—after the section concerning its fundamental principles—the document turns into something quite akin to a long list of statutes. Finding the reason for this situation is a daunting question, but I shall try to give it a very personal, and, therefore, perhaps highly idiosyncratic, interpretation.

American 'exceptionalism' has always claimed a unique status for the United States of America, mostly based on the content of its societal values. I should like to deeply subvert this notion by proposing, instead, that American exceptionalism, if any, resides in 1) the sociologically homogeneous nature of the Founding Fathers elite; 2) the prospect of an almost infinite—at least at the time—set of resources—with the consequent invention of the concept of 'manifest destiny;' 3) the unique nature of the American Constitution's gestation (it was drafted and approved far away from continental Europe after a victorious war of independence, and it just 'dressed', or regulated, the costumes of an already functioning society);[23] and 4) its aim at tempering federal (centripetal) versus statal (centrifugal) forces—rather than preoccupying itself with any ideology.

Indeed, however benign and overenthusiastic any external observer or student of the Italian constitution may be, one must still admit the objective coexistence in the Italian Constituent Fathers' cohort (*Padri Costituenti* in Italian) of the most disparate—and very often antagonizing—ideologies, traditions, and personal experiences. This is obviously not a problem per se but, arguably, it can become one on occasion. A very good example, albeit—admittedly—only relatively controversial, is the very first article of the Italian Constitution. As many non-Italians know, it reads: "Italy is a democratic Republic founded on labour. Sovereignty belongs to the people

[23] Exactly as Edmund Burke noted in his *Letter to the Sheriffs of Bristol on the affairs of America*, (3 April 1777): "In effect, to follow, not to force the public inclination; to give a direction, a form, a technical dress, and a specific sanction, to the general sense of the community, is the true end of legislature."

and is exercised by the people in the forms and within the limits of the Constitution."[24]

We shall not even discuss the foundational role assigned to 'labour,' which can trigger quite a few perplexities. Why tie the essence of a democracy to a non-constitutional notion? (Even the *Padri Costituenti* felt that such call to labour had nothing to do with foundational rules but was, rather, a socio-economic and political characterization—and, as such, one might contend today, destined to potential obsolescence).[25]

What should, instead, give the American reader the exact measure of the hypercautious nature of the Italian foundational document is the fact that the 'power' is supposed to be 'exercised' by the people in the 'forms' and within the 'limits' of the Constitution'. The difference between the former statement and the portion of the American Declaration of Independence—even though such proposition never made its way into the Constitution proper—where it is clearly stated that: "Whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness. Prudence, indeed, will dictate that Governments long established should not be changed for light and transient causes [..]," is blatant.

To some extent, one could even claim that the very first article of the Italian Constitution, in the disastrous wake of twenty years of Mussolini's government,[26] is meant precisely to prevent any American Revolution

[24] The official web page of the Italian Senate offers an integral English translation of the whole document.

[25] Obviously, the bulky presence of the Communist Party in the constituent assembly played a major role in the drafting of this peculiar article. In the reports of the Constitutional Assembly one can see how the potentially class-based reference to 'workers' raised a few brows. See Falzone Palermo and Cosentino 1991, Art. 1.

[26] See the excellent Mastropaolo 2013, and especially note 32: "Con queste parole Meuccio Ruini commentava la scelta nella sua relazione al progetto: "Anzitutto: il primato dell'esecutivo, che ebbe nel fascismo l'espressione più spinta. Non si può dire che appartenga a questo tipo il sistema presidenziale, che fa buona prova negli Stati Uniti d'America, con un Capo dello Stato che è anche Capo del governo ed ha ampi poteri, ma non sembra poter essere trasferito da noi, che non abbiamo la forma