Italian Criminal Justice against Political Corruption and the Mafia: The New Model for Relations between Judicial and Political Power

Guido Neppi Modona

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ITALIAN CRIMINAL JUSTICE AGAINST POLITICAL CORRUPTION AND THE MAFIA: THE NEW MODEL FOR RELATIONS BETWEEN JUDICIAL AND POLITICAL POWER

BY GUIDO NEPPI MODONA*

I. THE ROLE OF CRIMINAL JUSTICE AND THE COLLAPSE OF THE PARTY SYSTEM .................................................... 394

II. THE RELATIONS BETWEEN THE JUDICIARY AND POLITICAL AUTHORITY IN ITALIAN HISTORY .............................. 395

III. THE REPUBLICAN CONSTITUTION OF 1948 AND THE INDEPENDENCE OF THE JUDICIARY ........................................................ 396

IV. THE "CLEAN HANDS" INQUIRIES: POPULAR SUPPORT FOR, AND POLITICAL DELEGATION TO, THE JUDICIARY ................... 398

V. THE NEW ACCUSATORIAL SYSTEM OF CRIMINAL PROCEDURE ............ 401

VI. THE "CLEAN HANDS" INQUIRIES: PROCEDURAL GUARANTEES AND OPERATIVE PRACTICES .............................. 403

VII. THE FUTURE OF RELATIONS BETWEEN JUSTICE AND POLITICAL POWER AND THE CRIMINAL PROCESS IN ITALY ............. 406

POSTSCRIPT ................................................................. 409

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* Professor of Law, University of Turin, Italy. This paper derives from a lecture given at Osgoode Hall Law School on 15 March 1994. It has been modified for publication.
I. THE ROLE OF CRIMINAL JUSTICE AND THE COLLAPSE OF THE PARTY SYSTEM

The principal reason for presenting this paper to a Canadian audience lies in the exceptional events of a political, institutional, and judicial nature that have taken place in Italy in the past two years. For the first time in Italian history (and in the history of Western democracy), a political regime—the one that has governed Italy for almost fifty years since the overthrow of fascism—has fallen as a result of the exercise of criminal justice powers against the pervasive corruption of the so-called system of the parties.

There has not been a revolution in the traditional sense of the word: there have not been uprisings in the street, blood, dead, or wounded. Simply stated, the leaders of the governing political parties, Ministers, members of Parliament, Senators, top civil servants, heads of regional governments, and leaders of the principal industrial and financial companies, have been forced to leave the stage. One after another they have become the focus of several judicial inquiries, known collectively as “Clean Hands,” into the illicit relations between business and government and the systematic violation of the laws of party financing. So great has been the political impact of these inquiries that among the candidates for the upcoming general elections, to be held on 27 and 28 March 1994, one can no longer find the leading exponents of the parties which up until recently had governed Italy. Indeed, some of these parties, starting with the Christian Democracy and the Socialist party, no longer exist, or have been forced to change their name.

It seems to me of the greatest importance to try and understand what conditions have allowed judicial authority—by definition neutral, impartial, above the fray—to play such a high profile political role.

I propose to deal with this general question by looking at three aspects of the Italian situation: (1) the relations between judicial authority and political authority in the Italian historical experience; (2) the procedural model utilized by the public prosecutors and judges conducting the “Clean Hands” inquiries; and (3) the relations between justice and politics in the passage from the polycentric democracy that has characterized Italy up until now (thanks to an electoral system of proportional representation) to a majoritarian democracy towards which we are moving with our new electoral system of single-member districts (which, I believe, is basically the Canadian model).
II. THE RELATIONS BETWEEN THE JUDICIARY AND
POLITICAL AUTHORITY IN ITALIAN HISTORY

To understand the exceptional nature of the role being played by
criminal justice in the last two years, it is necessary to devote a few
remarks to the changing relations between judicial and political
authority in the past century of Italian history. During the so-called
Liberal State, from 1870 until the advent of fascism in 1922, and then \textit{a fortiori} during the twenty years of the Fascist regime, the judiciary was
never independent from executive power. The public prosecutor was a
functionary under the authority of the Minister of Justice and was
required to follow the Minister's orders and directives. Even the power
to prosecute was subordinated to the will of the executive power: the
public prosecutor had to conform to the political needs of the
government and was not, therefore, at liberty to prosecute the crimes
committed by the political leadership and by the bureaucracy. The
political directions of the government in judicial matters were
communicated through ministerial circulars in which the public
prosecutors were, for example, encouraged to repress with particular
rigour crimes of a political nature or crimes committed in the course of
strikes or other social conflicts.

On the other hand, judges, as opposed to public prosecutors,
were formally independent from the government, in observance of both
the Enlightenment theory of separation of powers between legislative,
executive, and judicial branches of government, and the nineteenth-
century liberal state of the Rule of Law. In practice, however, the
judicial system left plenty of space for executive influence, interference,
and pressure: the appointment of judges, their assignments, promotions,
transfers, and liability to discipline were all determined by committees
under the control of the Minister of Justice. The freedom of the
judiciary was therefore limited. Any judgments contrary to the interests
of the government could negatively affect their careers.

The totalitarian Fascist regime merely strengthened the political
controls on both public prosecutors and judges. One must therefore
conclude that up until the fall of Fascism in 1945, the Italian judiciary
had never been independent and had never succeeded in exercising any
supervision over the parties of government or the state apparatus. It is
true that neither judges nor prosecutors were appointed by the
government, but entered their respective professions through public
competitions by examination and were all part of the same judicial
organization. Not even the public prosecutor was, therefore, a
government appointee (contrary to the common law system). But a technical background and means of appointment are not a guarantee of independence when both judges and prosecutors are subjected to the same direct and indirect influence of the executive power.

III. THE REPUBLICAN CONSTITUTION OF 1948 AND THE INDEPENDENCE OF THE JUDICIARY

With the fall of fascism and the enactment of the Republican Constitution of 1948, the relations between the judiciary and the executive branch underwent a radical change. For the first time in Italian history the Constitution affirmed the full and total independence of judges and public prosecutors from the government. The independence of the judiciary from the government (the so-called external independence) was to be guaranteed by the Superior Council of the Judiciary (csM), two-thirds of which consisted of judges and prosecutors elected by all of their peers, and the remaining one-third of law professors and lawyers elected by an enhanced majority of Parliament. To the csM, defined as an organ of judicial self-government, were given all the powers of regulation relative to the judicial function that had previously been exercised by the Minister of Justice, who was given jurisdiction only over the organization and functioning of judicial services. Judges and public prosecutors were required to obey only the law and no longer the directives of the political authorities.

The final link in the chain of judicial independence was the constitutional principle of mandatory prosecution, which imposed on the public prosecutor the duty of prosecuting every crime (so far as technically possible) no matter who had committed it, even crimes committed by members of the governing class or by officials in the various sectors of public administration.

For almost twenty years after the Constitution came into force, however, the Italian judiciary did not succeed in making use of these principles of independence and autonomy from the executive power. The basic reason for this is that after the fall of fascism there was no purge of the high judicial officers who had made their careers during fascism and they therefore continued to exercise their powers of control over the younger judges and prosecutors more sensitive to the new democratic climate.

Only in the 1970s did a new culture of legality begin to mature within the judiciary: the judges and prosecutors laid claim to the role assigned to them by the Constitution of striking at illegality and
supervising the workings of the executive power, the public administration, and the parties of government. On the one hand, the presence of the older generation of the judiciary, who had made their careers under fascism, began to decline through attrition; on the other hand, there emerged various “currents” expressing the diverse cultural, ideological, and political positions present within the judiciary. A dialogue was initiated by the judiciary with all of the constitutionally legitimate political forces, including the parties of the opposition. A new model of relations between justice and politics was established: the independence of the judiciary, prescribed by the Constitution, was accompanied by the pluralistic integration of the judiciary with all of the forces of political and civil society.

In the last twenty years, the effective independence of the judiciary from the executive power found two supporting pillars—institutional and political, respectively—in the self-governing functions of the CSM, and in a political framework characterized by a strong and attentive left-wing political opposition. This enabled the judiciary to meaningfully impose respect for the rules of legality on the governing parties and the governing class as a whole. It is only natural, in fact, that, in a democracy, the parties excluded from government would defend the independence of the judiciary and its capacity to oppose any abuses of power. For its part, the CSM protected the independence of the judiciary by checking possible political attacks against the judiciary as a whole or individual judges engaged in specific inquiries into the activities of government officials or parties of the majority coalition.

What resulted from this in the 1970s and 1980s was a series of inquiries into episodes of corruption and illegality by individual politicians and elements of the public administration including the security services. While the governing parties were at first able to raise many obstacles to these inquiries, by the second half of the 1980s the parties of the governing coalition realized the danger that these judicial initiatives could pose to the very stability of the government. Due primarily to the actions of the Socialist party, a campaign was launched against the judiciary intended to question the principle of independence of the public prosecutor from the executive, the principle of mandatory prosecution, and even the protective role of the CSM.

The campaign was carried out under the slogan of “governability of the judiciary;” in other words, a return to the subordination of the judiciary to the interests and needs of the political governing class. The attacks on judicial power found fertile ground in the grave crisis of efficiency and, therefore, of credibility which criminal justice was undergoing. This crisis of efficiency (which was increasing over the years
in all of the Western democracies) was aggravated by the coming into force of the new Code of Criminal Procedure in 1989, which was in fact supposed to ease the situation. The inquiries into organized crime and political corruption were forced to move slowly and through thousands of technical obstacles, some of which involved conflicts of jurisdictional claims between the government and the CSM, including attacks by the Minister of Justice Martelli and the then President of the Republic, Cossiga, against the judiciary as a whole and individual judges.

Recent inquiries have provided another explanation for the grave crisis of the judiciary, by bringing to light a system of exchange of favours between some high judicial officers on the one hand and exponents of the governing parties on the other. In the name of "governability" of the judiciary, these judicial officers for their part guaranteed the immunity of certain politicians and public administrators corrupted by, or in collusion with, the Mafia. In exchange, the politicians facilitated access by these judges and prosecutors to the most desirable judicial posts or assured them of a seat in Parliament or a prestigious and powerful post in the high bureaucracy of some Ministry. It appears that this infiltration of the judiciary had even reached the Superior Council of the Judiciary, which would be expected not only to appoint "faithful" chief judicial officers, but also to discipline or transfer "unfaithful" judges and prosecutors. The programme of "governability" had even involved the organ that was supposed to guarantee the independence of the judiciary.

In 1990 and 1991, the outlook for the fate of the independence of the judiciary was, therefore, very pessimistic. On the one hand, the weakness of the Superior Council of the Judiciary had undermined the legal pillar of the independence of the judiciary; on the other, the crisis and then the disappearance of the Italian Communist party had weakened the political pillar, which had until that time defended the role of the judiciary as guarantor of legality.

IV. THE "CLEAN HANDS" INQUIRIES: POPULAR SUPPORT FOR, AND POLITICAL DELEGATION TO, THE JUDICIARY

Given this grave crisis of the judiciary, we have to ask how it was possible, between the spring and summer of 1993, to have such a powerful revival of the judicial inquiries into the corruptive entanglement between politics, business, and public administration and against criminality of the Mafia type.
The reasons, strictly interrelated, are at the same time political and judicial, and it is difficult to determine whether the former or the latter were more important. Already in 1991, on the occasion of the local elections, but above all after the national elections of April 1992, the political party system was overturned by an irreversible crisis. The electoral losses of the Christian Democratic party, the Socialist party, and the other parties in the governing coalition were very serious, and new political groupings arose, the emblematic representation of which was the "League" of Umberto Bossi, which became the principal party in the North of Italy. Almost at the same time, at the beginning of 1992, first in Milan and then progressively in all of Italy, the judicial inquiries known as "Clean Hands" put the spotlight on an organic system of bribery in all public contracting for goods and services, at the international, national, and local level: public contracting had been systematically polluted for the purpose of illicit financing of political parties, and often, at the same time, for the personal enrichment of politicians and public administrators. The crimes most frequently encountered in the judicial inquiries were various forms of bribery, illegal party financing, proceeds obtained by crime, embezzlement, and tax fraud.

In 1992 and 1993, the prosecutorial investigations developed in geometric progression. Under official investigation came the leadership of all of the parties of government, and also elements of the opposition parties, numerous ministers and ex-ministers, the governments of almost all of the regions (equivalent to Canadian provinces), and the majority of state economic enterprises (similar to Canadian Crown corporations). There have been over 200 requests for the necessary authorization to proceed with charges against members of Parliament and senators. The personnel structure of the party leadership, the very formation and composition of the government depends on the development of the criminal inquiries, as yesterday’s portfolio holder for a party of the governing coalition is today’s subject of a request for authorization to proceed with corruption charges. Of equal impact have been the judicial initiatives against the criminality of the Mafia and the Camorra: here, too, politicians of the highest level—from the former Prime Minister, Andreotti, to the former Minister of Public Security, Gava—have been the subjects of requests for authorization to proceed for the crime of association with the Mafia.

No one speaks any more of subordinating the public prosecutor to the political control of the government or of abrogating the principle of mandatory prosecution. On the contrary, the conviction has taken hold in public opinion that the independence of the judiciary is an
indispensable presupposition of the great work of moral and political cleaning being conducted by the judiciary and the public prosecutors. The public prosecutors most heavily involved in the “Clean Hands” inquiries or in the relations between the Mafia and politics—I am referring, above all, to the Milan Prosecutors Borelli, Di Pietri, and Colombo, and to the Palermo Prosecutor Caselli—have established a direct dialogue with public opinion: their televised statements, interviews, and press conferences by now have a weight and credibility greater than such interventions by any politician.

This direct dialogue between the judiciary and society has established the most novel and important factor of judicial authority. It seems that the anti-bribery and anti-Mafia judiciary no longer needs its independence protected by either the institutional pillar of the CSM or the political pillar of the parties of the opposition, but has found a direct legitimation in the popular support that sustains its actions.

With the crisis and then the collapse of the old political system, the judiciary has received a sort of political and, at the same time, institutional delegation of power: it is the judiciary that is being asked to fill the void created in the political system, by using the instruments of the criminal process to put an end to the abuses and the corruption over which reigned the old regime of the parties of government. Functions which in normal circumstances should be accomplished by the dialectical encounter between the various political forces have been attributed the judiciary and to the criminal process.

One must, however, be clear that the public prosecutors, when they invoke criminal sanctions against the leader of a political party, or a Minister or parliamentarian who is corrupt or suspected of collusion with the Mafia or the Camorra, are only doing their constitutional duty of repressing all forms of illegality irrespective of who commits them. It was the particular political situation of transition from the old to the new political regime that loaded the “Clean Hands” inquiries with a political significance that is ordinarily far removed from criminal justice, and that objectively transformed the judiciary into political subjects, protagonists in the collapse of the old system of political parties.

The exceptional political role that the judiciary has been playing in the last two years provides, in my opinion, an explanation for the use that the public prosecutors have made of the procedural mechanisms in the new Code of Criminal Procedure.
V. THE NEW ACCUSATORIAL SYSTEM OF CRIMINAL PROCEDURE

In 1989 Italy adopted a new Code of Criminal Procedure, which replaced the 1930 Code passed during the Fascist regime. The new Code marked a shift away from an inquisitorial and authoritarian system towards an adversarial and more democratic model, very close to the major features of the common law systems. I consider the American system the main model for the Italian criminal justice reform.

The change-over of procedural models was a very difficult step. One must take into account that the inquisitorial way of dealing with crimes and defendants, characterized by the supremacy of the public prosecutor and the judge over the defendant and symbolically represented by the investigating judge, was deeply rooted in the Italian theoretical and practical judicial culture. In this respect Italy was only following Europe's continental juridical tradition: in fact, Italy was the first—and still the only—European country to adopt an accusatorial system.

The new Italian Code features the following major democratic characteristics of an accusatorial system:

1. The principle of an adversarial contest between opposing parties, contrary to the official inquiry of the inquisitorial system, is effected through the elimination of the investigating judge—that is, the judge as investigator—whose duty (strange as this must seem to Canadian lawyers) was to ascertain the truth before trial. As a consequence, the new Code no longer provides for the pre-trial file, in which the records and the transcripts of evidence gathered prior to the trial were collected and then handed over to the trial judge, to be used as proof for the final decision. Now, as in common law systems, only the evidence presented by the parties at trial can be used for the final decision.

2. The power to order pre-trial detention, i.e., measures affecting the personal freedom of the accused before conviction, is no longer granted to the public prosecutor (or to the investigating judge), but only to the neutral preliminary investigations judge.

3. Pre-trial detention can be ordered only in extraordinary circumstances, such as the likelihood that the accused will commit a serious crime against the person or of the type already charged, the possibility that evidence might be destroyed or tampered with, or the danger that the defendant might become a
4. Evidence is presented at trial, by the parties, before a neutral judge, who does not have at his or her disposal the pre-trial file of the preliminary investigation. The trial is no more a mere rehearsal of the pre-trial investigative findings: witnesses and experts are cross-examined, and, in contrast to the old system under which the trial commenced with the interrogation of the accused, in the new system the defendant can only be cross-examined at the end of the trial and only when he or she has asked to testify.

5. The principle of party control, instead of state (or judicial) control of the case, allows the public prosecutor and defendant to reach an agreement in order to avoid trial, through plea bargaining or a guilty plea. This was not possible under the old system (though I realize it may be somewhat controversial in Canada to consider this a democratic advance).

The shift from an inquisitorial to an accusatorial model does not mean that the new Italian Code accepted the whole machinery of the common law system. The independence of the Italian judiciary, mandatory prosecution, and indeed a general lack of discretion at both the prosecution and sentencing stages, continue to distinguish the new Italian Code from the traditional common law accusatorial systems and also account, in part, for other important differences which, unfortunately, I cannot elaborate here. The most important difference, however, is that the public prosecutors and judges essentially share the same career in the judiciary: they take the same exams and have the same technical training, their functions as judge and prosecutor are interchangeable, and they participate in the same governing body responsible for appointments and assignments. This means that the judge is much closer to the prosecutor than his or her common law counterpart. Perhaps this is one of the reasons why in the “Clean Hands” investigations, prosecutor Di Pietro’s requests for pre-trial detention were so frequently accepted by the preliminary investigations judge, Mr. Ghitti (that is also the reason why Mr. Di Pietro did not consider it strange to refer to Mr. Ghitti as “my colleague” when he spoke at Osgoode Hall Law School last November).
VI. THE "CLEAN HANDS" INQUIRIES: PROCEDURAL GUARANTEES AND OPERATIVE PRACTICES

The principles of the new criminal process, in force for more than two years since the "Clean Hands" inquiries began, should, therefore, have corrected the accused's position of subordination to the powers of the public prosecutor. In particular, in comparison with the old inquisitorial system, the principles of equality between the prosecution and defence and the presumption of innocence should have reduced pre-trial detention at the beginning of the preliminary investigations.

The political climate in which the prosecutors of "Clean Hands" operated and the direct relation established with public opinion can help us understand why, in practice, some of the typical guarantees of the accusatorial system in respect of personal liberty and the right to remain silent have had little application.

In the first place, the public prosecutors have renounced the requirement, expressly provided for in the new Code, of conducting their preliminary inquiries in secret up until the moment at which the accused has the right to be represented by counsel. On the contrary, they have sent official notification of charges to the accused from the very beginning of their investigations. Thus, the public was immediately made aware of all of the names of the so-called excellent (that is, illustrious) accused of the "Clean Hands" investigations and was able to exercise, through the media, a powerful form of public supervision. Any pressure on the public prosecutors and the judges thus became impossible, since their freedom and independence were assured by the very fact that, from the beginning, the charges against the accused were in the public domain.

Secondly, the diffusion beyond all limits of the system of corruption, the number of the people involved, and the realization that bribes were still being asked for and given after the beginning of the inquiries, convinced the judges that the accused, if left at liberty, could have tampered with the means of proof; for example, by destroying evidence, coordinating their alibis with their accomplices, or even committing new crimes of corruption and illegal financing of parties. These were the most important procedural grounds, expressly provided for (among others) in the new Code, that were used in the majority of the cases as the basis for requests by the public prosecutors for pre-trial detention, and almost always accepted by the preliminary judges.
The generalized recourse to pre-trial detention was certainly facilitated by the vast consensus of public opinion that considered the deprivation of liberty of those who for years, for party or, even worse, for personal ends, had robbed and depleted collective resources, fully justified.

The preliminary inquiry judges have generally gone along with the requests of the public prosecutors. To understand this, it should not be forgotten that under the old Code many of the preliminary inquiry judges had been employed as investigating judges and therefore shared, because of their background, the perspective of the prosecutors. This clearly anomalous situation is, however, already changing. For one thing, numerous preliminary inquiry judges have requested transfers to the office of the public prosecutor; for another, the positions left vacant have been occupied by younger judges immune from the experiences of the inquisitorial system. It may be predicted, therefore, that within a few years a more correct procedural dialogue will be established between prosecutor and judge, as the latter acquires the culture of a neutral third party which is appropriate to the judicial function.

For most of the accused, the period of pre-trial detention has been very brief—from a few hours to a few days, the time necessary to confess the crimes committed to the judges and the prosecutor. On the other hand, the few accused who have not confessed (above all, those belonging to the former Communist party of Italy) have spent considerable amounts of time in pre-trial detention (from three to six months, depending on the gravity of the crime). However, recourse to pre-trial detention has not been taken when the accused, after having received notice of the charges, has confessed to the crimes and has collaborated with justice and indicated the accomplices.

The so-called “party of the Accused” and their defence lawyers have complained that the prosecutors and judges of “Clean Hands” used pre-trial detention as an instrument of pressure to induce the accused to confess and to collaborate with justice. The constant and generalized use of pre-trial detention seems to justify these complaints. One must, however, keep in mind the political context of the “Clean Hands” inquiries: the accused—whether politicians or business leaders—saw the sudden collapse of the political and economic system in which they had operated for decades and realized that there was no point in defending the image of parties that no longer existed or in protecting people who had lost their positions of power. The existence of such an attitude is confirmed by the high number of accused who have resorted to plea bargaining.
Plea bargaining between the prosecution and defence has been enthusiastically greeted by the “Clean Hands” prosecutors. They have appreciated the inherent risks of the political role they have been forced to play and have understood that their political over-exposure might endanger their independence. They have therefore seen the rapid conclusion to the proceedings against the exponents of the old regime as the road back to the normal functioning of criminal jurisdiction: namely, the prosecution of individuals accused of individual crimes, without the responsibility of hurrying the end of a regime and of creating the premises for a new political system. The prosecutors and judges themselves have warmly supported legislative changes aimed at widening the sphere of plea bargaining, to be accompanied, however, by restitution and compensation for the damage done and by an accessory penalty of interdiction from political and public office. The most recent Italian Parliament, in which there were over two hundred members and senators for whom necessary authorization has been requested to proceed with charges against them, did not, in fact, approve this reform which would have meant the definitive exit from the political scene of corrupted politicians, before dissolution for the upcoming elections.

Finally, it is necessary to emphasize that up until today only the affair of the Enimont mega-bribe (of over 150 billion lire or roughly 130 million Canadian dollars) has come to trial, while in Milan alone those under investigation number more than 1,000, the orders for pre-trial detention, 500, and more than 200 motions for committal to trial are awaiting either argument or conclusion via plea bargaining. In the next six months the Milan prosecutors foresee a doubling of the accused, so that there will be another 300 to 400 requests for committal to trial. If all cases were to go to trial, the judiciary would be involved with them for the next ten years.

The striking disproportion between the number of accused under preliminary investigation and the cases actually carried to trial is testimony to the fact that in the past two years the centre of gravity of the criminal process has moved from the judicial phase to the preliminary inquiries of the public prosecutor. The hopes pinned by public opinion on criminal justice for changing the political system have exalted the importance of various aspects of criminal procedure, such as the notification of charges, pre-trial detention in prison, and the confession of the accused—aspects which should have a provisional significance until the hypothesis of the charge finds confirmation at trial or the case is resolved by a plea agreement. The exceptionality of the duties which have spilled onto the judiciary has resulted in a rapid shift from the culture of judgement to the culture of investigation: the
accused who receives a notice of charges or who is placed in pre-trial detention is quickly held by public opinion to be guilty, with gravely prejudicial consequences for the constitutional guarantees which should keep watch over the ascertainment of truth.

VII. THE FUTURE OF RELATIONS BETWEEN JUSTICE AND POLITICAL POWER AND THE CRIMINAL PROCESS IN ITALY

The role played by criminal justice against the corruption of the political system and collusion between the Mafia and politics poses delicate problems, therefore, for the future direction of both the relations between the judiciary and political power, and the guarantees of the criminal process.

I have already noted that the judiciary has established a direct dialogue with society, receiving from public opinion a sort of political delegation of power. It is from this popular legitimation that the prosecutors and judges have drawn the strength to carry the duties assigned to them by the Constitution of repressing all forms of illegality.

This new model, unheard of in Italian history, seems to anticipate certain characteristics of the relations between the judiciary and civil society in a democracy of the majoritarian type. In other words, the system towards which Italy is beginning to move is a result of the reform of the electoral system from proportional to majoritarian representation. Experience teaches us that in the democracies of the majoritarian type, the majority tends to dominate all the levers of power and, consequently, to limit the independence of the judiciary. It is no accident that Silvio Berlusconi, leader of the political movement “Forza Italia” (which can be loosely translated as “Go Italy”), the future Prime Minister in case of victory in the coming elections, has within the last few days severely attacked the prosecutors’ pool of the “Clean Hands” inquiries in Milan, distinguishing judges who do justice from those who act out of motives of political persecution. On the other hand, in a majoritarian system the minority excluded from power has less strength than do the opposition parties in a system of proportional representation. It is, therefore, predictable that the judiciary will find itself denied the political pillar of the opposition parties who, in a polycentric democracy, have better means to defend the independence of the judiciary. In the Italian situation the judiciary will have to put its faith, for the protection of its autonomy, in public support for its judicial initiatives.
But the public mood is changeable and contingent, and it would be very dangerous for the judiciary to put its faith exclusively in public support for its actions against political corruption and the Mafia. In order for the judiciary to maintain its independence from political power in the new majoritarian system, two conditions seem necessary. First, with unquestionably high levels of professionalism and efficiency, they have to appear as the natural defenders of all the interests and needs of the minorities which, in a system of majoritarian democracy, tend to be excluded from the circuit of political participation. Second, there must be a diminution of this over-exposure of the judiciary: the judges and prosecutors must no longer be perceived as political subjects and protagonists, but as ordinary dispensers of justice confronting individual authors of specific crimes. In order for this to happen it is necessary that the circuits of ministerial and other official responsibility are reactivated in Italy, because in reality they never functioned in the system of polycentric democracy. When a minister or parliamentarian commits, acts, or behaves in a manner susceptible to criminal investigation, he or she must be met immediately with the proper political sanctions: resignation or removal from office, exclusion from Parliament, official censure, etc. The judiciary would thus be called on to intervene only when the politician had already been punished by political sanctions. This would de-dramatize the political role played by the judiciary in the past two years.

As for the criminal process and the way in which public opinion has come to perceive criminal justice, I have already alluded to the crisis in the right of defence, to the constant use of pre-trial detention, and to the social perception that a notification of charges is equal to conviction. It seems that we are in fact returning to the culture of the inquisitorial system, when the proceeding exhausted itself in the collection of proof by the prosecutor or the investigating judge and the trial was merely a tired repetition of what had already been documented in the pre-trial file. This fear was justified by the fact that in the summer of 1992, after the Mafia massacre of judges Morvillo, Borsellino, Falcone, Falcone’s wife Francesca, and their young escorts, the legislature reintroduced, on the basis of a contemporaneous sentence of the Constitutional Court, the principle, typical of the inquisitorial system, that statements made to police and prosecutors by witnesses were admissible as proof at trial, even for cases that had nothing to do with the Mafia. A little more than four years after the coming into force of the new Code, the principles of the accusatorial system are undergoing a profound crisis.
The relations between the judiciary and political power and the structure of the criminal process have, therefore, transformed Italy into an institutional, juridical, and political laboratory of great interest and topicality. I would say that in Italy we have in effect a kind of wager, the result of which is capable of providing, for good or ill, valuable examples for Western democracy: how far is it possible to defend the independence of the judiciary when they are credited with having made a political regime collapse? How far can the criminal process, called upon to play such an exceptional role against political corruption and Mafia infiltration, succeed in holding firm the accusatorial system’s guarantees of defence and liberty?

The outcome of this double wager is more uncertain than ever: I would like to be able to report in one year’s time that in Italy the judiciary is still independent and that the accusatorial reforms of criminal procedure have not been betrayed by a return to the inquisitorial culture. But I am not so sure that will be possible. My great fear is that in the course of a few months one will read in the newspapers that in Italy, too, criminal prosecution is no longer mandatory, the public prosecutor has been subordinated to the political control of the Minister of Justice, and that the old inquisitorial system of 1930 is once again in operation.
POSTSCRIPT

At a distance of little more than three months from presenting this paper on 15 March 1994, the not-so-optimistic predictions with which I concluded it are unfortunately revealing themselves to have been, for the most part, well-founded. The elections of 27 and 28 March 1994, carried out under the new majoritarian electoral system, saw the victory of a centre-right coalition, of which the neo-fascist party also forms a part. The pre-electoral platforms of the parties of the majority have not as yet been translated into any legislative modifications of the relations between the judiciary and the executive power, but the climate that surrounds the trials against political corruption and the Mafia has been profoundly changed.

Especially with regards to these two sectors of judicial intervention, the governing majority has repeatedly manifested signs of intolerance and preoccupation for the "excessive" independence of the public prosecutor. For example, one proposal advanced was to separate the career of prosecutor and judge, for the purpose—it was said—of reinforcing the character of the judge as a neutral third party with respect to the prosecution. But really, the organization of the public prosecutor's office as a body separate from the judiciary would constitute the first step to a return to prosecutorial dependence upon executive power, as was the system in force until the fall of fascism. At the same time, the principle of the obligatory nature of criminal prosecution has also been called into question. The two proposals are strictly linked—as the common law experience teaches us—in as much as the opposite principle of discretionary prosecution is accompanied by the dependence of the public prosecutor on the government, which is called upon to respond politically to the choices made in the exercise of the prosecutorial power.

The independence of the judiciary was also indirectly questioned by a proposal that concerned the Superior Council of the Judiciary. In order to render this organ of self-government of the judiciary more "homogeneous" with the new political climate of the country, it has been proposed that a majoritarian system be introduced here as well, for the election of the twenty judges that participate in the CSM. The objective is evidently that of assuring a majority of judges who are "close" to the position of the parties of the governing coalition: since the CSM is responsible for the nomination of chief judges, for transfers from one location to another, and for the ascertainment of disciplinary
responsibility, the government could thus indirectly exercise a powerful form of control over the entire judiciary.

These proposals have been grafted onto a campaign against the excessive powers of the judiciary and, in particular, of the public prosecutors. Significant in this regard are the proposals to limit the use of "collaborators with justice" in the trials of the Mafia and to render less frequent the use of pre-trial detention in the trials for political corruption. Of an analogous nature are the polemics, which even translated themselves into a strike of criminal lawyers, against the inequality between prosecution and defence during the preliminary inquiries. One has the impression that there is in effect an attempt to erode the climate of confidence which has been established between the judiciary and public opinion, and to deprive the judges of the social consensus they have enjoyed these past few years.

These developments become even more troubling if one realizes that the passage from a polycentric system to a majoritarian system has not been accompanied by the definition of new rules and new guarantees, which are meant to protect the independence of the judiciary according to the majoritarian democracy model. It is true that in systems of majoritarian democracy (I am referring primarily to the North American model), the public prosecutor is nominated by the executive and is a dependent of the Department of Justice, but there are guarantees of independence in the exercise of prosecutorial power in the case of a conflict of interest, through mechanisms such as the nomination of an independent prosecutor. It is true that the federal judges, and also those of the Supreme Court, are nominated by the executive, but, at least in the United States, the President's nomination is subjected to an extremely incisive scrutiny on the part of Congress, so as to guarantee that the judges, even though selected from the political and ideological area of the governing party, have the requirements of indisputable professionalism and are capable of administering justice in an independent manner.

It is really not possible to propose this type of guarantee in a judicial system, such as the Italian one, where judges are recruited by examination competition. In the Italian model of majoritarian democracy the guarantees of judicial independence must above all be found in an increase in the majority necessary for the election in Parliament of the ten lay components of the CSM and of the judges of the Constitutional Court, in order to guarantee the ideological area of the opposition's representation in these two fundamental supervisory bodies.

On the different terrain of political and institutional norms of behaviour, there must be a recognition of the full legitimacy of the
judiciary's role of protecting the interests and rights of the minorities excluded from the political and institutional circuit. On the contrary, however, it seems that the current governing majority is mistaking this essential function of guarantee, carried out by the judicial power in a majoritarian system, for what they suppose to be a preconceived role of opposition to the government. Seen in this way, the attacks on the judiciary would have the effect of undermining the values of the judiciary's third-party neutrality, and of determining its delegitimation and progressive social isolation. There would be an interruption in the climate of trust and credibility in the judiciary and the direct dialogue between the judiciary and the country, which have, until now, given the judges of the “Clean Hands” inquiries and the investigations into collusion between the Mafia and the political world the strength to carry out their function as guarantors and supervisors of legality.

The passage from a polycentric democracy of the proportional type to the majoritarian system, therefore, presents itself as full of unknowns as far as the guarantees of judicial independence are concerned, seen both from the institutional level and from the relations between the judges and society.

It is too early to say what new model of relations between the judiciary and political power Italy is travelling toward. In any event, I fear that the judicial season of the “Clean Hands” inquiries and prosecutions against the collusion between the Mafia and the political world is drawing to a close. The principle of total independence of the public prosecutor and of the judges (thanks to which the Italian model for relations between judicial and political power has been the object of great interest, and even admiration, in political-institutional systems of a very different nature, such as the Canadian and American systems) will soon become a memory from the past.

Italians must, above all, study the established systems of majoritarian democracy in order to learn, and then apply, the new guarantees that ought to surround the judicial function. The independence of judges and prosecutors has to be defended from a majority that is manifesting a growing propensity for controlling the judiciary and rendering it homogeneous to the interests of the parties of government.