Judicial Independence in Europe
The Swedish, Italian and German Perspectives

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EXECUTIVE SUMMARY

- Understanding to what extent judicial independence is adhered to in various jurisdictions requires a theoretical framework of what the principle entails. On a preliminary analysis, the principle can be said to require the following: judicial systems must be free, in fact and appearance, from any undue influence that might prevent judges from adjudicating legal disputes solely on the basis of their legal merits.

- Analysis of the various institutional arrangements for the judiciary in Sweden, Italy and Germany will help to determine whether these countries adhere to the principle of judicial independence as outlined above. It will also help to get a clearer view of what the principle properly entails on a supranational level.

- Appointments procedures are similar in the various jurisdictions as judicial candidates have to undergo a lengthy period of training and pass public examinations or application processes. In Germany and Sweden judicial appointments are ultimately decided by the executive with a limited role for independent councils for judicial appointments. In Italy the Consiglio Superiore della Magistratura (CSM), a judge led body, is responsible for the appointment process.

- Constitutional law and ordinary legislation sanctions direct undue interference with the adjudicative function of judges. Thus, in all three countries, the tenure, remuneration and jurisdiction of the courts are guaranteed and only subject to specified restrictions. Criminal law also prohibits bribery, acts and threats of violence against judges.

- In none of the three countries are judges immune from disciplinary, criminal and civil liability in the exercise of their judicial functions. Disciplinary measures are heard by courts in Germany and Italy but heard by the National Disciplinary Board, a public agency, in Sweden. However, appeals from the Board are heard by a court. Liability cannot generally be incurred for interpretation and application of the law, unless done in a grossly negligent or malicious manner. The State is always responsible for paying damages for judges held civilly liable with a limited possibility of recourse against the liable judges.

- The relationship between the judiciary and politics varies in the various jurisdictions. In Sweden the judiciary has a general deferential attitude towards political actors. In Italy the judiciary and the Berlusconi government have had a very conflictual relationship. In Germany the judiciary, especially the Constitutional Court, contributes to the development of public policy.

- In all three jurisdictions political and judicial roles are considered incompatible, so that judges cannot be part of the bench while exercising political functions. Judges are generally not discouraged from pursuing political roles and expressing their political opinions. This must however be done with respect of their impartiality in adjudication.

- The administration of courts is a matter for the executive in Germany, it is controlled by a pseudo-governmental agency in Sweden and it is the responsibility of the CSM in Italy. With the exception of the Italian and German constitutional courts, the budget of the courts is set by the executive subject to approval by parliament. Constitutional courts set their own budgets and are more administratively autonomous.

- A comparative analysis of the three jurisdictions reveals that the principle of judicial independence is a dynamic concept. Its core resides in the protection of the judiciary from direct undue interference with adjudication. Thus, there is a wide consensus that protection from bribery, acts and threats of violence and jurisdiction-stripping are essential to promote judicial independence. However, beside this minimum standard, divergent institutional arrangements support the thesis that the understanding of the principle of judicial independence depends on normative arguments on the proper relationship between the judiciary and the other branches of the State.

INTRODUCTION: A THEORETICAL FRAMEWORK

Determining to what extent judicial independence is respected in any particular legal system cannot be done without a basic outline of what is understood by the principle of judicial independence. This is even more necessary when a comparison of several jurisdictions is attempted. Given that history and culture of a legal system determine its legal and political structure, it is not unlikely that the historical and cultural diversity existing in European countries have given rise to different conceptions and expressions of judicial independence. It is thus necessary, for a fruitful comparative exercise, to develop a theoretical framework against which the different European expressions can be measured.

Unfortunately, there is no globally accepted theoretical framework for judicial independence. Academic formulations of theories of independence do not always match. They vary widely between calls to dismiss with the concept of judicial independence altogether to calls for more in-depth theoretical research.[1] Several instruments developed by various European bodies sometimes conflict in the details of what they think the principle requires.[2] Other international instruments are not definitive or too vague.[3] However, despite the visible heterogeneity in the literature, it is possible to identify recurring themes. One of such is the notion that judges do not enjoy independence as a privilege in their own interest. Rather, judicial independence should be enjoyed to the extent that it allows exercise of proper judicial functions. The resulting conundrum is that we cannot know what judicial independence is without knowing what we want judges to do, or indeed, not to do.

The precise boundaries of appropriate judicial activities will be influenced by the peculiar circumstances of each legal system. However, it seems safe to argue, and indeed perhaps a truism, that the core function of the judiciary is to adjudicate legal disputes according to law. Judicial independence must thus mean that judges should be free from any undue influence that might prevent them from adjudicating legal disputes on the basis of their legal merits. However, this is not sufficient. In fact a second recurring theme is that judicial independence should not be restricted only to individual judges but must permeate the whole judicial system. Thus, appropriate procedures must be in place to ensure that the administration of the judicial system and the allocation of resources are secured in a way that allows judges to perform their adjudicative function properly. It is evident, for example, that the lack of adequate numbers of judicial personnel to deal with the caseload of any advanced legal system directly impinges on the quality of judgements and on the ability of citizens to have their cases heard within a reasonable time.

A third recurring theme is that judicial independence must be guaranteed both in fact and appearance. This has repercussions both on the level of individual judges and on the judicial system in general. On the former level, it is a necessity for judges to be perceived as being impartial adjudicators free from undue influence, in particular from political influence. At the latter level, it is a requirement that the institution of the judiciary be distinct, as much as possible, from the other institutions of state government. As it shall be seen, European jurisdictions respect the principle of the separation of powers in varying degree. However, public confidence in the judiciary appears to be directly proportionate to the realisation of this principle.

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1 Compare for example L. Kornhauser, "Is Judicial Independence a Useful Concept?" in S Burbank & B Friedman (eds), Judicial Independence at the Crossroads (Sage, London 2002) with Burbank, "What do we mean by 'Judicial Independence'?" (2003) 64 Ohio State LJ 323.

2 See (a) **Recommendation No. R (94)** 12 of the Committee of Ministers of the Council of Europe to Member States on the independence, efficiency and role of judges as revised in **Recommendation CM/Rec(2010)12**; (b) The **European Charter on the Statute for Judges** adopted by participants from European countries and two judges' international associations meeting in Strasbourg on 8-10 July 1998; (c) **Opinion no 1 (2001) of the Consultative Council of European Judges (CCJE)** for the attention of the Committee of Ministers of the Council of Europe on standards concerning the independence of the judiciary and the irremovability of judges.

3 See (a) **Article 6 of the Convention** for the Protection of Human Rights and Fundamental Freedoms; (b) **United Nations Basic Principles on the Independence of the Judiciary**, endorsed by the United Nations General Assembly in November 1985; (c) The **Latimer House Guidelines** for the Commonwealth (19 June 1998).

The relationship between public confidence in the judiciary and judicial independence is an issue which is not always clear from the literature. There is broad consensus that appearance of impartiality increases public confidence in the judiciary. However, it is not clear how public confidence influences judges to make impartial decisions. It is necessary to establish this link because all international instruments and the majority of commentators claim that appearance of impartiality is a stringent requirement of judicial independence. [4] There is an obvious way in which the link can be established: the lower the appearance of impartiality the higher is the probability that judges are in fact not impartial. However, it can also be argued that, because judicial independence requires adjudication based only on legal merits, judges should not be swayed by the way the public might receive their judgements. Thus, to resolve this tension, the requirement of appearance of impartiality might be said to demand transparency of the adjudicatory process coupled with immunity of judges from public pressure.

While uncertainties still exist about the relationship between public confidence in the judiciary and impartial adjudication, it has been suggested that the former aids the protection of the independence of the judiciary from political interference. [5] In countries where judicial independence is not constitutionally guaranteed, the only restraints to curtail politicians from creating laws which limit the jurisdiction of judges are political in nature. However, such political constraints cannot exist in countries where the judiciary does not enjoy wide public support. Thus, public confidence appears to be the main guarantee against undue legislative attempts to subvert judicial independence.

From the above, the principle of judicial independence can be said to require the following: **The judicial system must be free, in fact and appearance, from any undue influence that might prevent judges from adjudicating legal disputes solely on the basis of their legal merits.**

In the following sections, judicial systems in Sweden, Italy and Germany will be analysed in turn to investigate to what extent they respect the principle of judicial independence as outlined above. This theoretical outline should not be taken as definitive. It is only a tool which will be used to analyse and criticise judicial practices in the different jurisdictions. The analysis itself should at the end provide a finer understanding of what the principle properly entails. The analysis will proceed as follows. A brief description will first be given of the court's structure of each jurisdiction. The analysis will then focus on the threats to the independence of individual judges. In this respect, appointment procedures will be scrutinised to ensure whether the politicisation of the selection process might have any effect on the outcome of judgements. Furthermore, the effectiveness of existing mechanisms for protection against undue influence (i.e. protection from duress, bribery, tenure and jurisdiction stripping, liability in officio) will be evaluated. The analysis will then shift to the structural level to determine indirect threats to impartial adjudication. In this respect, the relationship between the judiciary and other state institutions will be scrutinised. Administrative and financial independence will also be assessed. Finally, the relationship between the judiciary and the general public, including the media, will be investigated to determine the level of public confidence in the judiciary.

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[4] See, for example, Masa Grgurevic-Alcin, "*Strengthening of Judicial Independence and Impartiality in the Framework of the Fight Against Judicial Corruption*", Venice Commission Seminar Paper CDL-UDT(2011)005, available at http://www.venice.coe.int/docs/2011/CDL-UDT%282011%29005-e.pdf (last accessed 08-07-2011). At page 2 she states "In a country in which we want to establish the rule of law, we must never forget that law is, first and foremost, a promise of impartiality. It not only involves actual impartiality, but also the preservation of an appearance of impartiality. It is the latter that is the best warranty for existence of trust in the judiciary and a lawful state. Impartial proceedings for citizens may only be provided by courts and judges that are legally, functionally and financially independent".

[5] Lord Judge, The Judiciary and the Media, public speech given in Jerusalem, 28 March 2011. Available at http://www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/lcj-speech-judiciary-and-the-media-100406.pdf.

I

THE SWEDISH JUDICIARY: ANOTHER ADMINISTRATIVE AGENCY?

The Swedish Court Structure

Sweden operates a binary system where courts of general jurisdiction perform their functions alongside administrative courts. Both are divided into local courts of first instance, regional courts of appeal and a Supreme Court. Constitutional review is not reserved to an autonomous constitutional court as all courts have the jurisdiction to determine whether provisions conflict with a rule of fundamental law or other superior statutes. [6] Alongside this binary system, Sweden runs some specialised tribunals dealing with issues such as labour, rent and patent cases.

It is of particular relevance that administrative courts in their present form and jurisdiction were introduced only relatively recently as a result of international pressure, especially from the European Court of Human Rights. [7] Sweden had in fact, until the introduction of the Instrument of Government 1974, one of the four Swedish Constitutional texts, operated a system whereby grievances against public bodies were mainly dealt with by an internal system of hierarchical review and adjudication by specialists agencies connected to the relevant body. The existence of the Parliamentary Ombudsman, in charge of addressing complaints against various public bodies, provided another administrative route of redress. Administrative courts were an institution of the central government until the reforms of the Instrument of Government established their independence. However, it was not until 1998 that a right to appeal to these courts, as opposed to seeking redress through administrative routes, was introduced. Yet, the distinction between legal and administrative redress continues to be extremely blurred at several levels.

There is a lack of substantial structural differences between administrative courts and administrative authorities in charge of addressing grievances against public bodies. In fact, until the amendments made to the Swedish Constitution in January 2011, the Instrument of Government regulated the activities of the judiciary and general administration under the same chapter. [8] Furthermore, the administrative courts are given a wide jurisdiction which allows them to review decisions of public agencies not only in terms of their legality but also in terms of their public policy implications. Essentially, administrative courts perform the same functions of adjudicative administrative agencies and are culturally and structurally considered as similar entities.[9] Even though all administrative authorities are constitutionally guaranteed independent decision making in relation to the performance of their public functions,[10] they are still subordinate and accountable to the Government. [11] Associating administrative courts with bodies accountable to the Government undermines the value of structural independence and might impact on public perception of the ability of the courts to reach decisions which are not influenced by the Government.

Judicial Appointment Procedure

Anyone with a legal qualification can be appointed to permanent judicial office in Sweden. However, in practice, the vast majority of appointments are made amongst qualified judges. Training to become a qualified judge in Sweden is highly structured and the procedure is as follows. Law graduates apply to become law clerks in district or county administrative courts for two years. A number of law clerks subsequently apply to become reporting clerks at a court of appeal or administrative court of appeal for a period of twelve months. They may then serve for at least two years as an assistant judge at a district or county administrative court. The assistant judge deals with

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6 See Instrument of Government, Chapter 11, art. 14.

7 See *Sporrong and Lonnroth v Sweden* (1982) 5 EHRR.

8 The amended Instrument of Government now regulates general administration under Chapter 12. However chapter 11 and 12 are extremely similar in content.

9 This was criticised by O. Petersson et al. in *Report from the Democratic Audit of Sweden 1999.* Democracy the Swedish Way (Stockholm 1999), 58-68.

10 Instrument of Government, Chapter 12, art. 2. It reads: "No public authority, including the Parliament, or decision-making body of any local authority, may determine how an administrative authority shall decide in a particular case relating to the exercise of public authority vis-à-vis an individual or a local authority, or relating to the application of law".

11 Ibid, art. 1.

all but the most complicated cases. Finally, the assistant judge returns to the general or administrative court of appeal to serve as a judge for at least one year. On completion of this period, the assistant judge is designated as an associate judge. Associate judges are not guaranteed permanent tenure in any court. Instead, they may occupy a series of fixed-term positions as they fall vacant or pursue positions outside the judiciary until they are able to obtain a position as a permanent judge.

It is worth noting that associate judges are encouraged to pursue positions outside the judiciary and, in particular, in public administration serving as legal advisors or secretary of committees in governmental departments. Such experience is, albeit informally, required as part of the qualifications necessary for appointment to a permanent role. As John Bell describes in an extensive study of European judiciaries,

"*Albeit there was talk in the mid-1980s that recruitment to [permanent judicial office] would be divided equally between those who had experience of government offices, those who had other external experience, and those who had purely judicial experience, the reality is that nearer 80 per cent are drawn from those who have governmental experience.*" [12]

Thus, membership of the judiciary requires, to some extent, previous membership of governmental role. The reasoning behind this is that working in Government provides expertise in specialised fields and enables understanding of the legislative procedure and thus the weight to be attached to preparatory materials and other legislative documents. [13] As we shall see, there are other factors which contribute to the highly deferential attitude of the Swedish judiciary, even on constitutional issues, to the legislative and political process. However, even at this stage it is clear that the interdependence of the Swedish courts with the public administration goes well beyond the structural level. The impression is that allegiance with Government's policy is a determining factor for judicial appointment. This was, until very recently, exacerbated by the judicial appointment procedure.

While non-permanent judges had to apply to and be interviewed by the *Domstolsverket* (DV), the body in charge of judicial administration, permanent judges were directly contacted in a secret process by the Government to be appointed to office. However, the constitutional reforms in force since January 2011 now require candidates for permanent roles to publicly apply to *Domarnamnden*, an independent committee composed of senior judges and lawyers. Suitable candidates are then ranked by the committee and a preferred candidate is recommended to the Government. The Government is not bound by the recommendation but must choose from the list of proposed candidates. The Government must consult with the committee in the event a decision is taken not to appoint the recommended candidate.

While judicial appointments will still be ultimately decided by the Government, the reforms should be applauded for opening up the appointment process to public scrutiny. However, it is ironic that many senior members of the judiciary have expressed a negative view of the reforms. They argue that many suitable candidates will abstain from applying for a position either for reasons of modesty or in fear of the impressions a negative decision by the committee might have in their current workplace. [14] Nevertheless, these views should be contrasted with the fact that trainee and associate judges have always been appointed in an open procedure. Since they constitute the vast majority of the candidate pool for senior posts, it is unlikely that they will feel uncomfortable with a procedure they have grown accustomed to over their entire career.

Measures against Undue Influence and Judicial Accountability

The Swedish legal system provides for the independence in adjudication of the judiciary at several levels. The Instrument of Government provides in art 3 that

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12 John Bell, *Judiciaries within Europe*, Cambridge 2006, p. 249.

13 Ibid.

14 See on this point Thomas Bull, *Choosing Judges and Judging the People's Choice*, 17 European Public Law, (2011) at 216-218.

"Neither the Parliament, nor a public authority, may determine how a court of law shall adjudicate an individual case or otherwise apply a rule of law in a particular case. Nor may any other public authority determine how judicial responsibilities shall be distributed among individual judges.

Art 5 further provides that the duty of settling legal disputes is a prerogative of the courts. This can be interpreted as a guarantee of the jurisdiction of the courts from interference by the legislature or the executive. The Swedish Constitution therefore clearly recognises and values the impartiality of the judiciary in adjudication. Furthermore, the Swedish Penal Code prohibits behaviour which might unduly influence a judge's decision. Therefore, acts and threats of violence to public officials, including judges, in the exercise of their public authority are criminalised. Bribery of judges is also criminalised. [15] The Constitution secures the tenure of permanent salaried judges. They may only be removed after they have reached retirement age or if they are shown to be manifestly unfit to hold office by committing a criminal act or by grossly and repeatedly neglecting their official duty. [16]

It should be noted that only permanent judges are guaranteed permanent tenure. This allows the Swedish practice of appointing associate judges only for fixed-terms. The compatibility of this practice with the principle of judicial independence requires further attention. Associate judges perform all the functions of permanent judges. Unlike assistant judges, they have completed their judicial training and are fully competent to decide cases autonomously even at appeal level. It is therefore possible that the wish to extend their tenure might influence associate judges to adjudicate in a way which is likely to please the body that is in charge of their appointment. Appointment procedure of associate judges is administered by the DV, the governmental judicial administrative body whose board members are judges, lawyers and political and union representatives all selected by the Government. There is therefore a possible link, albeit indirect, between adjudication of associate judges and politics. The lack of permanent tenure for associate judges might therefore be regarded as undermining their independence from the political process.

While there are several measures to secure the independence of the judiciary from undue influence, Swedish law ensures that there are mechanisms of accountability to ensure the behaviour of judges is morally acceptable in the exercise of their functions. Swedish judges are in fact not immune from criminal and civil liability in the performance of their duties. Albeit there are no specific criminal rules applicable to judges, the offence of misuse of office applies to any person who, in the exercise of public authority disregards the duties of his office, by act or omission, intentionally or through carelessness. [17] Furthermore, judges can be prosecuted for taking or requesting bribes. However, to ensure that these provisions are not abused, only the Parliamentary Ombudsman or the Lord Chancellor can prosecute in any of these cases and only the Supreme Courts can deal with cases against justices of the Supreme Courts. Cases concerning judges in lower courts are dealt with by one of the general appeal courts. As testified by research carried out by the European Commission for the Efficiency of Justice (CEPEJ), prosecution of Swedish judges is extremely rare and there are very few cases of convictions. [18]

According to the Swedish Tort Liability Act 1972 (TLA), the State is responsible for injury and damage caused by the negligent act of its employees, including judges. The standard expected from the judge is that of a lawful, judicious and careful official. The overlooking of a provision in a statute or the omission of words and figures in a written decision will generally give rise to liability. Overlooking a clear precedent will give rise to liability unless the court deliberately intended to depart from it and adduced reasons. [19] While liability can be established even though the negligent decision has not been overturned by a higher court, the failure to appeal the decision can be regarded as a kind of contributory negligence which might reduce or even annul compensation. [20]

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15 The Swedish Penal Code, Chapter 17, sec 1 and 7 respectively.

16 The Instrument of Government, Chapter 11, art. 7.

17 The Swedish Penal Code, Chapter 20 sec 1.

18 CEPEJ, *European Judicial Systems Edition 2010 (data 2008): Efficiency and Quality of Justice,* Council of Europe Publishing. Available at http://www.coe.int/t/dghl/cooperation/cepej/evaluation/archives_en.asp. At p. 223.

19 See *Liability of Judges*, study by the Network of the Presidents of the Supreme Judicial Courts of the EU available at http://www.network-presidents.eu/IMG/pdf/reponse_suede.pdf (accessed 19-08-2011).

20 B. Bengtsson, *Governmental Liability in Swedish Law*, 41 Stockholm Institute for Scandinavian Law 2001, at p 60.

However, claims based on alleged fault of the Supreme Court and the Supreme Administrative Court cannot be made unless the decision in question has been annulled.

While accountability of judges for criminal and negligent behaviour should be welcomed as strengthening public confidence in the fact that the judiciary will exercise their functions in accordance to the law, it could be argued that civil liability for judges further undermines the structural separation between the judiciary and administrative bodies. Judges are in fact seen as public servants who can be treated as ordinary tort-feasors when they have acted in good faith, albeit unwisely. [21] The lack of the need to appeal an allegedly negligent decision in the lower courts further undermines the function of the courts to give remedy to citizens through the judicial, rather than administrative, process.

Criminal liability can give rise to disciplinary actions towards a judge. A disciplinary sanction may also be imposed if a judge proves himself to be unfit in his role, by seriously or repeatedly neglecting his duties. Sanctions provided by law are warning, reduction of salary, dismissal and impeachment. Disciplinary actions can be initiated only by the court president, the Chancellor of Justice or the Parliamentary Ombudsman. It is the National Disciplinary Board who adjudicates on disciplinary matters concerning all Swedish senior officials, including judges. It is composed of a chairman and a vice-chairman, who must both have had experience as judges, and four other members, including a secretary. All the members are appointed by the Government. While decisions of disciplinary proceedings against judges by an executive body could easily be abused by the Government to single out judges they do not approve of, the Instrument of Government provides that judges have the right to appeal to administrative courts. [22] This provides a further guarantee against undue interference from the government in the lawful exercise of judicial activities.

Overall, it could be said that the law satisfactorily provides sufficient measures to secure that the Swedish judiciary is free from undue influence in the exercise of its adjudicative activities. The fact that prosecutions and disciplinary actions against judges are one of the lowest in Europe[23] could both indicate that Swedish judges exercise their functions legally and responsibly and that there are not subject to political repercussions. Furthermore, protection of the independence of judges is also ensured in practice by the activity of the Swedish Judges Association, a professional and trade union association which has the purpose of representing the judiciary in issues of law-making and the administration of the law, as well as protecting the independence of the judiciary. The Association also monitors and encourages debates on issues of importance to the courts and the judiciary. [24]

Relationship with Politics

As outlined above, the judiciary and the executive are interwoven at several levels. Associate judges work in governmental and administrative departments to increase their chances of appointment to a permanent position; the structural and functional differences between administrative courts and adjudicative administrative boards are extremely blurred; the executive largely controls the appointment process of and disciplinary proceedings against the judiciary. It will then come with no surprise that, given that there is no established government legal service, permanent judges are often brought into a ministry or other administration to provide legal advice or act as head of a particular administration with a limited legal element.[25] This not only undermines the structural separation between the judiciary and the executive but also raises question as to the impartiality in adjudication of the Swedish judiciary. In fact, given that one of the fundamental roles of the judiciary is to impartially resolve conflicts between the executive branch of government and the individual citizen, it is questionable whether the continuous exposure to executive and administrative environments allows the judiciary to adjudicate impartially. Even though judges might not receive directions on how to decide individual cases, the familiarity with

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21 Ibid, at p 59.

22 Chapter 11, art. 9.

23 See above 18, at 224.

24 See sec. 1 of the Constitution of the Association available on their website at http://www.domareforbundet.se/.

25 See J. Bell, 12 above, at 276.

executive circles might induce a psychological allegiance towards the executive which will be detrimental to impartiality in cases between the citizen and the executive or public administration.

This position is further exacerbated when consideration is taken of the role lay judges have in the adjudicative process. Lay judges are elected by the political parties in proportion to the votes for the county council, for a period of four years. Every Swedish citizen above the age of eighteen is eligible. All criminal cases and family law cases are decided by one professional judge and three lay judges, each having an individual vote. If these cases are taken to the Court of Appeal, the decision there is made by three professional and two lay judges. In the Supreme Court there is no lay participation. Even though it has been argued that in practice lay judges make no substantial difference to the outcome of cases,[26] in principle, the idea that political representatives and judges sit in the same court of law, both having equal right to dispense justice, fundamentally violates both the structural and functional independence of the judiciary from political influence. Albeit the lack of a jury system in Sweden, except in freedom of media cases, demands an alternative peer review system in criminal cases, the solution of politically appointed lay judges cannot be satisfactory because it is in collision with the principle of judicial independence.

The relationship between the judiciary and politics continues into the law-making process. As indicated above, associate and permanent judges can be seconded to governmental ministries. In some occasions they are selected as legal advisors or chairs to legislative reform committees sponsored by one of the ministries. In such roles they might be part of a group consisting of members of different political parties and interest groups whose aim is to draft a Bill. The compatibility of this practice with judicial independence has already been expressed above. More interesting is the fact that the judiciary as a whole is always involved in the consultative process by which legislation is made in Sweden. Before Bills are drafted, there is a long-established process of consultation of interest groups. Courts are always invited to express their opinion not as an interest group, except in cases of justice reform, but to give indications as to how the law might be implemented in practice. Negative opinion by the courts always weight heavily against proposals. [27]

The Instrument of Government establishes an additional way of judicial involvement in the law-making process. In chapter 8, art 20, it establishes a Council on Legislation composed of active or retired justices of the Supreme Courts to draft an opinion on the constitutionality of Bills due to be submitted to Parliament. Consultation of the Council is not mandatory; however, failure to consult must be justified to the Parliament by the sponsoring minister. The Council can only express an opinion on legislation which affects the Constitution, press freedom and a number of fundamental rights, or where the law is important from a private or public viewpoint. The Council cannot comment on the merits of the proposal but must only examine: a) the manner in which the draft law relates to the fundamental laws and the legal system in general; b) the manner in which the various provisions of the draft law relate to one another; c) the manner in which the draft law relates to the requirements of the rule of law;
d) whether the draft law is so framed that the resulting act of law may be expected to satisfy the stated purposes of the proposed law; e) and any problems that may arise in applying the act of law. [28]

As evident from the above, the judiciary is involved in the law- making process from the consultative to the drafting and pre-approval stage. From a judicial independence perspective, this might give rise to concerns because it violates the principle of separation of powers. This principle demands, in its extreme form, that the functions of enacting laws and applying them to individual cases be exercised by different bodies. However, as many common law traditions know, the ability of judges to make laws does not always undermine democracy. Swedish courts have a long tradition of judge made laws which however do not have strong precedential value. It can be argued then that judicial involvement in the pre-enactment stage of legislation does not fundamentally depart from what is globally accepted as a legitimate legislative role for judges. However, in Sweden, this involvement is one of the main reasons for the deferential attitude of judges towards the legislature both in interpretation and in constitutional review.

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[26] See C. Diesen, *Lay Judges in Sweden, a Short Introduction*, Revue Internationale de Droit Penal 2001/1-2 (Vol. 72). He shows that only in 1-3% of criminal cases has the verdict been the result of lay judges outvoting the professional judge.

[27] See John Bell, 12 above, at 270.

[28] Instrument of Government, chapter 8, art 21.

It is widely acknowledged that the role of Swedish judges is that of public servants meticulously applying the law as expressed by Parliament. [29] In this respect, interpretation of legislation relies largely on preparatory notes and commentaries to Bills by the sponsoring minister. Furthermore, constitutional review is limited by the Instrument of Government which does not provide for annulment of legislation in breach of fundamental rights but only inapplicability. It also provides *that in the case of review of an act of law […] particular attention must be paid to the fact that the Parliament is the foremost representative of the people […].*[30] Remedy for breaches of fundamental rights is also largely left to the administrative review process and the role of the Parliamentary Ombudsman. [31] Thus the main input of the judiciary in the protection of citizens from encroachment on their fundamental rights remains in the contribution to the pre-legislative stage. Even though, as evidenced by research of the World Justice Project, Sweden has the highest rate of respect for fundamental rights in the world, [32] it can be argued that a major purpose in having an independent judiciary is to secure the protection of citizens from unlawful interference with their fundamental rights. A judiciary which does not acknowledge its role in this respect cannot even begin to accomplish that function adequately.

There are no formal constraints on what political activities Swedish judges can undertake. It will come with no surprise then that there are a number of judges who ran political campaigns and were successful in obtaining a seat in the Swedish Parliament. There are currently two Swedish MPs who sat as full-time judges.[33] This clearly violates the pure principle of separation of powers and, perhaps less clearly, is in violation of the principle of judicial independence. In fact, while it cannot be expected from judges not to have political opinions or prefer one political party to another in their private lives, they can rightly be expected to leave their political allegiances outside of the courtroom because it might bias their decisions, especially if one of the litigants is the executive. Judges who have been publicly politically active cannot appear as politically unbiased. Especially in administrative courts, where citizens seek remedy against unlawful action by public officials, it is essential to have judges who appear and are as unrelated as possible from the political world.

Managerial and Financial Autonomy

The administration of the Swedish judiciary is largely carried out by the DV. It was established in 1975 as an autonomous judicial administrative body but it still remains accountable to the Government. Until January 2008 it was governed by a board which consisted of no more than ten members appointed by the Government from members of the judiciary, politicians and the legal profession. The board has now been substituted by an advisory council which supervises the activities of the DV and makes recommendations to the Director General. The current Director General was an appeal court judge before being appointed to the DV. The Council is composed of nine members, of which at present only three have held judicial office. The other members are mainly politicians and lawyers.

The DV is responsible for the overall management of the courts, their staffing levels and equipment. It is also involved in the organisation of training courses for judges and in the supervision of the working conditions of all the employees of the courts. One of its fundamental roles is the monitoring of the courts' activities and ensuring that targets set by the Government are met. In fact every year the Ministry of Justice publishes a detailed letter setting out its objectives concerning the management of the justice system. The targets by the Ministry to the DV mainly concern the timeframe within which cases have to be decided and the number of cases that should be heard. The DV must produce an annual report outlining what actions have been taken and to what extent the targets have been met. In relation to these targets, a fundamental role is played by the presiding judge of individual courts. The court president has to monitor performance of his judges and

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29 See T. Bull, above 14, at 215 and J. Bell, above 12, at 253-260. Also see I. Cameron, *The Protection of Constitutional Rights in Sweden*, [1997] PL 488, at 504.

30 Instrument of Government, chapter 11, art 14.

31 See I. Cameron, 29 above.

32 Agrast, M., Botero, J., Ponce, A., *WJP Rule of Law Index 2011*. Washington, D.C.: The World Justice Project. At p 109.

33 One of them is Anti Avsan who sits in Parliament for the Moderate Party. Due to his political engagements he is on leave from his job as a judge in Stockholm. Susanne Eberstein, for the Social Democrats, was also a judge in administrative court of appeal.

indicate how the court can achieve its targets. He also has the responsibility of managing personnel by producing reports on the progress of trainee judges and providing references for the members of his court. Among colleagues he is to provide leadership within the court. However, he must respect the independence of judges and cannot dictate how decisions should be reached.

The allocation of financial resources for the courts is decided by the Government in consultation with the DV. The Parliament must however approve it. The DV then distributes the budget to the individual courts. Each court president administers the budget for his court. The president is accountable to the DV for proper management of the budget. In turn, the DV must report on the management of the budget to the Government.

From the above, it can be gathered than the administration of the courts is largely controlled by the Government. In particular, the Government is able to control finance and administration by setting targets which the DV and court presidents must aim to achieve. Furthermore, the appointment of members of the DV is a political decision taken by the Government. The Government also indirectly decides who the court presidents are as they are selected by the DV.

The impact on judicial independence of the Government-centred administration of the courts should not be over-stressed. Individual judges are in fact always free to decide the outcome of the cases they have been assigned to. Furthermore, Governmental directions largely concern how to improve the administrative effectiveness of the general court system and never concern the merits of individual cases. However, occasionally complaints have been raised by some senior judges that the DV oversteps its administrative mandate. So, for example, when the DV established a criminal law group to draw up sentencing guidelines, the Swedish Judges Association protested that this conflicted with judicial responsibility and independence. Following the protests, the establishment of the group was withdrawn. Perhaps, to increase judicial confidence in the competency and impartiality of the DV, more judges should be appointed to its advisory council. In fact, including the Director General, less than half of its governing members are judges. This falls below the recommended amount of fifty per cent prescribed by the European Charter on the Statute for Judges, the Recommendation of the Committee of Ministers of the Council of Europe and other international instruments. [34]

Conclusion: Is the Swedish Judiciary Independent?

In the introduction judicial independence was said to require that judicial systems must be free, in fact and appearance, from any undue influence that might prevent judges from adjudicating legal disputes solely on the basis of their legal merits. While there is no evidence to suggest that in practice Swedish judges routinely decide cases on the basis of extra-legal factors, there is abundant material to support the proposition that no strong appearance of independence from the executive exists in the Swedish judicial system. Throughout their career Swedish judges pursue positions in governmental and administrative agencies; the appointment and promotion procedures are controlled either directly by the Government or by a body accountable to the Government; lay judges appointed by politicians dispense justice in ordinary courts; judges with public political profiles decide cases in administrative courts. All this is accompanied by a lack of cultural distinction between administrative courts and adjudicative administrative agencies, a general deferential attitude of the judiciary towards the political will and the administrative control of the courts by a Government-dependent body.

It can be concluded from the above that the Swedish judiciary is comparable to a governmental body which has the power to make independent decisions. In Sweden, all administrative agencies fall under that description. Thus, the Swedish judiciary can be described as another administrative agency. This cannot be satisfactory in a modern democracy that respects the principle of a judiciary autonomous of government and capable of performing its adjudicative functions with the dignity afforded to one of the three fundamental institutions of a state.

[34] See above 2.

II

JUDICIAL INDEPENDENCE IN ITALY: UNDER SIEGE

The Italian Court Structure

The Italian system does not know the distinction in principle between judges and public prosecutors. They are both constitutionally categorised as *magistrati* even though they have different functions. [35] Until recently, the roles could be interchanged almost at will but new reforms have stopped that practice allowing judges to become prosecutors and vice-versa only four times throughout their career. [36]

The Italian court system is divided in three categories. There are courts of ordinary jurisdiction, special courts and a constitutional court. The ordinary courts are divided into three instances, with specific appeal procedures. The default first instance courts are the Tribunale, of general civil and criminal jurisdiction, and the Corte D'Assise which adjudicates on serious criminal offences. However, the Tribunale hears appeals from the Giudice di Pace, an honorary first instance judge with jurisdiction over minor civil claims. Decisions of the Tribunale and the Corte di Assise are appealed to the Corte di Appello and the Corte d'Assise d'Appello respectively. The last instance court is the Corte di Cassazione.

The functions of the Italian Constitutional Court are regulated by art 134 of the Italian Constitution. The Court settles controversies on the constitutional legitimacy of legislative provisions issued by the State and Regions. It also resolves competency disputes between various constitutional institutions. Finally, the Court has the duty to ensure that the subject matter of public referendum is in compliance with the limitations set by art 75 of the Constitution.

The Audit Court (Corte dei Conti) and the Military Council (Consiglio Supremo di Difesa) are special courts. Administrative courts are also considered as such. First instance administrative courts' decisions can be appealed to the State Council (Consiglio di Stato). The structural position in relation to the Italian Government of the State Council is particularly interesting in terms of judicial independence. Under art 100 of the Constitution the Council is in fact not only an administrative court of appeal; it also performs an advisory role for the benefit of the Government and the Italian Regions (devolved regional governmental institutions). Four out of its seven sections advise the central administration in relation to proposed Government's legislative measures and generic legal issues in ministerial and regional departments. Judges annually change which section they are sitting in with the effect that a judge performing consultative role in a year can, in the following year, perform an adjudicatory function. [37] The jurisdiction of the administrative courts is limited by the fact that citizens can elect to have the President of the Republic undertake a *legal* review of unfavorable administrative decisions. Election to go through this route bars review in administrative courts. However, this review is only nominally exercised by the President. In fact, it is the Government who decides even though there is a mandatory duty to consult with the State Council. A Minister can however reach a different conclusion on the issue from the Council if he gains approval of the Council of Ministries. [38]

Analysis of the membership of the State Council and legal guarantees for the independence of the administrative courts will reveal further concerns of their relationship with the executive. However, the above already shows that the Council, in its advisory role, is an institutional partner with the executive. Such partnership should bar it, in principle, from exercising its judicial function because it is in contrast with the appearance of structural independence required to exercise appropriate judicial scrutiny. Furthermore, the limitation of jurisdiction of administrative courts can be seen as an attempt to subtract the review of political actors from scrutiny by a court of law. While this is not necessarily a direct attack against judicial independence, it vitiates the ability of citizens to enjoy the benefit of an impartial adjudicator when they have been aggrieved by a public body.

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35 Art 107 of the Italian Constitution.

36 D.Lgs n. 106/2006.

37 See Law 186/82, art 2.

38 On this procedure see Presidential Decree 24 November, n. 1199.

Judicial Appointment Procedure

Art 106 of the Constitution provides for the appointment of magistrati of ordinary courts through public examinations. Every law graduate who has obtained a post-graduate diploma from the Schools for the Legal Professions is entitled to sit the examinations. Experienced lawyers and academics, honorary and special courts judges, managers in public bodies with a law degree can also sit the exam. [39] The examinations are organised with the aid of the Ministry of Justice by the Consiglio Superiore della Magistratura (CSM) which is the constitutional body in charge of the administration of the judiciary. [40] Those who pass the exams are appointed as magistrati; they however need to undertake a further training period of two years, six months of which is spent in the School for the Judiciary. The remaining months are spent shadowing in the courts. At the end of the training period they are assessed and, if successful, confirmed as magistrati by the CSM.[41] Promotions are automatic based on seniority and subject to appraisals every four years by the CSM of professional capacity, diligence and commitment. [42] The system separates rank and function so that a magistrato of a higher rank can exercise, if willing, the functions of a lower ranking judging (e.g. judge ranked as an appeal judge exercising first instance functions).

This appointment procedure appears to be satisfactorily free from political influence given that it is predominantly controlled by the CSM. The majority of the executive members of the CSM are judges themselves. This indicates a large degree of self-selection of the judiciary. In fact art 104 of the Constitution provides for membership of the CSM as follows. Members by right must include the President of the Republic, as chair, and the President and Prosecutor General of the Corte di Cassazione. Other members are elected. Two-thirds must be elected by all magistrati, whilst one-third must be elected by the two Houses of Parliament in joint session from out of a shortlist of university professors and lawyers with at least fifteen years of professional seniority. Current members are twenty seven. The CSM also controls the appointment of the Giudici di Pace, first instance honorary judges. Every Italian citizen above thirty qualified to practise law can apply for an advertised vacancy and undertake the necessary training. At the end of the training period, the CSM chooses the most apt trainees and appoints them to office.

The CSM has no influence on the appointment of members of the special courts and the Constitutional Court. Membership of the latter is regulated by art 135 of the Constitution as follows. The Constitutional Court is composed of fifteen judges; one-third of them are appointed by the President of the Republic, one-third by the two Houses of Parliament sitting in a joint session, and one-third by the highest-instance courts. Members must be chosen from among current or retired magistrati of the ordinary and administrative higher courts, university professors of law and lawyers with at least twenty years practice.

Appointment procedure of administrative judges is much more political. First instance administrative judges are appointed through public examinations controlled by the Government in consultation with the Consiglio di Presidenza della Giustizia Amministrativa (CPGA), a comparable body to the CSM for administrative courts. Half of the judges of the Council of State are selected by the CPGA from among first instance administrative judges who indicate their interest. A quarter is directly appointed by the Government from among experienced lawyers and law professors, judges of ordinary appeal courts and professionals having managerial responsibilities in public institutions. The other quarter is selected through public exams. [43] The president is directly appointed by the Government.

While it might be expected that appointment to the Italian Constitutional Court would be a more politicised process since judges of constitutional courts are often called to adjudicate on highly politically controversial issues, it is somewhat surprising that in Italy it is the appointment procedure to administrative courts which is the most political of all. In fact, while members of the Constitutional Court are chosen in equal measures by all fundamental State institutions (the executive is directly excluded but makes its contribution through party control of MPs), it is the executive which controls the appointment procedure of administrative courts, especially of the

39 See Legislative Decree 160/2006, as amended, art 2.
40 See the Constitution, art 105.
41 See Legislative Decree 26/2006.
42 See Legislative Decree 160/2006 as amended.
43 See Law 186/82, arts 16 and 19.

Council of State. The incompatibility of this practice with judicial independence is evident: the executive appoints those who will judge its actions in legal disputes with citizens.

Measures against Undue Influence and Judicial Accountability

The independence of the judiciary from undue influence is constitutionally protected by art 101, which provides that magistrati are subject only to the law, and art 104, which dictates that the judiciary constitutes an autonomous order independent of any other power. However, these provisions only relate to judges in courts of ordinary jurisdiction. In fact, art 108 provides that the independence of judges of special courts is to be guaranteed by ordinary legislation. The jurisdiction of ordinary courts is protected by the constitutional prohibition of creating extraordinary or special judges (except those of the special courts). [44] Also, the Italian Penal Code prohibits behaviour which might unduly influence the decision of individual judges. Thus bribery, acts and threats of violence against judges are criminalised. [45] The Italian Constitution also secures the tenure of ordinary magistrati as they may only be suspended or removed from office following a decision of the CSM.

Independence of public prosecutors has its special place in the Italian legal order as they are considered members of the judiciary. As such they enjoy the constitutional guarantees afforded to judges of ordinary jurisdictions. They however also enjoy guarantees which are peculiar to their functions. These are the constitutional obligation of mandatory prosecution and the ability of directly controlling the judicial police. [46] Mandatory prosecution fosters judicial independence in the sense that an individual prosecutor cannot be coerced by anyone to initiate or drop prosecution, not even by the head of his office[47] (but the head can revoke in certain circumstances the assignment of a case). However, mandatory prosecution does not necessarily imply that a prosecutor must always plea for conviction of the accused. An independent analysis and scrutiny of the legal merits of evidence accrued can in fact lead the prosecutor to a plea for acquittal. The ability to dispose directly of the judicial police fosters judicial independence because investigations and collection of evidence are carried out under strict terms of legality and unbiased by political or other extra-legal interests.

The guarantees for protection for administrative judges are regulated by Part 3 of Law 186/1982. Art 24 secures their tenure and subjection to disciplinary proceedings only via deliberation of the CPGA. However, membership of the CPGA raises issues about the autonomy of this body from the Government. Its president, whose vote is decisive in case of a tie among voting members of the CPGA, is directly appointed by the Government and he is also the president of the Council of State. The other members are elected by administrative judges. Four of them must be Council of State judges while other four must be judges of first instance administrative courts. The two chambers of Parliament elect two members each among experienced lawyers and law professors. It is thus apparent that the selection process of the members of the CPGA is heavily politicised. Reasonable doubts must thus exist about the ability of an essentially political body to ensure the independence of administrative judges from political and extra-legal pressures.

Unlike the CPGA, the CSM is heavily judge-controlled. Its constitutional role is to manage ordinary courts in terms of employment, assignments and transfers, promotions and disciplinary measures against judges. [48] In relation to this last role, the CSM makes a fundamental contribution to ensure that the stringent Italian disciplinary proceedings are not abused. These proceedings must be initiated by the Prosecutor General of the Corte di Cassazione or by the Minister of Justice and are heard by the disciplinary division of the CSM. The duties to be respected both in the exercise of judicial functions and ex-officio are regulated by the Legislative Decree 109/2006. [49] Breaches of duty in officio include seriously wrongful interpretation of law and facts due to inexcusable ignorance or negligence; habitual and unjustified neglect of office; seriously wrongful conduct to the parties in proceeding etc. Breaches of duty ex-officio include association with known criminals; using judicial title to obtain an unfair advantage; registration or systematic and continuing

44 Art 102.
45 Art 319ter, 321 and 338 of the Italian Penal Code.
46 Art 112 and 109 respectively of the Italian Constitution.
47 See Italian Code of Penal Procedure art 53.
48 Art 105 of the Italian Constitution.
49 Art 2 and 3 respectively.

participation in political parties (this does not however prevent judges to take a break from their judicial functions to run in political elections). Sanctions vary from a formal warning to removal from office.

Judicial accountability in Italy is also obtained through criminal and civil liability in the performance of judicial roles. Judges can be held civilly liable for damage caused intentionally or through serious negligence which ensued through denial of justice to the citizen. The magistrato can however never be liable for interpreting the law and assessing facts and evidence. Remedy for this should be obtained through normal appeal procedures. Compensation is to be paid by the State, but only after all appeal measures have been resorted to. The State may, within a year, elect to recoup from the responsible judge the amount it has paid out. However, the judge cannot be deprived through this action of more than a fifth of his monthly salary, except in cases of intentional harm. The Prosecutor General of the Corte di Cassazione must initiate disciplinary action against the judge responsible for the damage. [50] There are several criminal offences which a judge can be charged of (e.g. abuse of office, corruption, extortion etc.). They are all regulated by the Italian Criminal Code in Book II, Title II. There are no extraordinary procedures relating to prosecution of magistrati, except that they are never tried in a court where they held judicial office. [51]

The provisions illustrated so far paint a mixed picture of the desirability of the measures to protect the judiciary from undue influence in the exercise of their functions while ensuring that the performance of those functions are in accordance with the law and professional ethics. While it is apparent that the law values the independence of magistrati of general courts, it seems not to value at the same manner the independence of magistrati of administrative courts since disciplinary actions are controlled by an executive-minded administrative body. Furthermore, relatively recent cases also create serious doubts as to the effectiveness of the procedure for protecting magistrati of general courts from political repercussions.

One such is the case of the ex-public prosecutor Luigi de Magistris. In 2007 he was in charge of two serious investigations which suspected various economic, judicial and political personalities, including the then Minister of Justice and the then Prime Minister, of illegally using public funds for personal gain. The Minister of Justice used his powers of prosecution to initiate disciplinary investigations against de Magistris. He referred him to the disciplinary section of the CSM accusing him of having carried out his investigations inappropriately and being responsible for the public scandal that followed inappropriate disclosure of the investigations. The CSM decided against the latter accusation but upheld the earlier. The two investigations were transferred from de Magistris to another prosecutor who decided to drop charges. Furthermore, de Magistris was transferred from his office and suspended from his judicial functions. While the case is extremely controversial and has several other facets, it illustrates the real possibility of an Italian Minister using his powers to stop judicial investigations against himself. It is thus apparent that members of the executive can potentially abuse the disciplinary process to occult real or alleged malpractices committed by them.

On a final note, it worth mentioning the role of the Associazione Nazionale Magistrati (ANM) and the Associazione Nazionale Magistrati Amministrativi (ANMA), professional organisations aimed at defending the interests and independence of judges of ordinary and administrative courts.

Relationship with Politics

There has been an on-going battle between the political and judicial world. Since the advent of Berlusconi to political power in 1994, the interaction between the Government and judges, especially public prosecutors, has been an unkind one. The now ex-Italian Prime Minister has been charge with several serious criminal offences, [52] including tax fraud and corruption of judges. He publicly accused magistrati of abusing their prosecutory and adjudicatory powers to run a political campaign against him. [53] Various political personalities, the ANM and individual magistrati have publicly rejected these accusations. The ex-Berlusconi Government promoted several pieces of legislation which have helped to avoid the conviction of Berlusconi to date, not least including a

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50 See generally Law 117/1988 as amended.

51 See Law 420/1998.

52 The exact number is unverified but varies between 16 and 106.

53 See M. Calabresi, *Silvio Berlusconi: The Magic Is Gone,* published in Timeworld May 31, 2011 available at http://www.time.com/time/world/article/0,8599,2075014,00.html.

constitutional law which excused all senior political figures from presenting themselves to court for trial because they were too busy in their political roles. This law was abrogated by the last constitutional referendum in 2011.

The ex-Berlusconi Government initiated a reform of the judicial system which has been criticised by the ANM as undermining judicial independence. The legislative proposals are still under parliamentary scrutiny and will most probably have to be the object of a referendum. However, should they be implemented, the structure of the judicial system will be fundamentally changed. A brief description of the relevant proposals follows below.

The main aim of the reform proposal is to separate the career of judges and public prosecutors. It will no longer be possible for a magistrato to change his functional roles. While the independence of judges will continue to be constitutionally guaranteed, the independence of public prosecutors will be regulated by ordinary law. Furthermore, public prosecutors will no longer have the obligation of mandatory prosecution and will no longer have direct control over the judicial police. On a more structural level, the CSM will be divided into two separate entities each having responsibilities for judges and public prosecutors respectively. Furthermore, the two entities will no longer have disciplinary powers which will instead be allocated to a new disciplinary tribunal. Half of the members of the new administrative bodies and the new tribunal will be chosen by Parliament from experienced lawyers and law professors. The other half will be chosen by magistrati from among their respective ranks. The Minister of Justice will have new powers of inspection and organisation of the court system. He will also report annually to Parliament on the administration of justice and the use of prosecutorial and investigative powers. Finally, magistrati will be directly civilly liable for violation of legal rights, especially for unlawful detention and limitation of personal freedom. This liability will extend to the State.

The compatibility with the principle of judicial independence of the proposed reforms is mixed. On one side the separation of the careers of judges and public prosecutors should be welcomed as promoting the principle of a fair trial and equal opportunities for the accused and the public prosecutor. In fact, under the current system, a judge hearing a case and the prosecutor pleading against the accused are colleagues who work in the same office. Furthermore, it is also theoretically possible for a prosecutor who has collected all the evidence against an accused to change his role and become the judge who decides the outcome of the case. The incompatibility of this with the principle of fair trial is apparent. However, the way the reforms will be implemented actually detracts from the apparent advancement. In fact, the public prosecutor will become in essence dependent on the Ministry of Justice. It will be the Ministry who will supervise which cases are to be to prosecuted and allocate the investigative force to this effect. The traditional Italian notion of the independence of public prosecutors will therefore effectively cease to exist. This should not be welcomed. As the ANM has argued, [54] the independence of public prosecutors from the executive power has been the reason for major investigations and convictions of corrupt political elites. If politics controls the investigative power, it will be de facto immune from scrutiny.

The reforms also increase the influence of politics in the administration and disciplinary procedures of magistrati. While the separation of the careers of judges and prosecutors logically demands the separation of the body in charge of their administration, there is no apparent justification for increasing the powers of the Ministry of Justice in the organisation of the judicial system and reducing the amount of self-governance of the judiciary in those administrative bodies. In fact, the effect of an equal composition of members elected by Parliament and elected by judges is the increased politicisation not only of the administration of the judiciary but also of the composition of the judicial body. In fact, it should be remembered that the CSM has responsibility for selecting magistrati after public examinations. If that selection procedure is inherited by the new politicised bodies, it is possible that magistrati will be selected on the basis of their political allegiances. Furthermore, the creation of a new disciplinary tribunal composed by half of politicians increases the likelihood of undue interference by politics in the lawful administration of justice. Cases like that of de Magistris illustrated above will probably become more common.

[54] See the position of the ANM on the reforms on their website at http://www.associazionenazionalemagistrati.it/2011/06/10/audizione_camera_riforma10giu11.aspx.

Finally, the proposed direct civil liability of magistrati appears unnecessary as the existing measures strike a right balance between accountability and respect for the special and delicate functions of magistrati in a civil society. They also guarantee remedy to citizens that have been damaged by judicial incompetence through compensation payable by the State. Direct liability equates magistrati with ordinary public servants without taking into consideration the peculiar role which they are invested with.

While the relationship with politics is evidently negative, it should be noted that some commentators have argued that some magistrati have been able to exploit this tension to their advantage to gain relevant political positions. The case of de Magistris will illustrate the point. His political persecution attracted a great deal of media attention. He gained popularity as a magistrato who was courageously fighting corruption and paid for his commitment to the rule of law. After being banned from his judicial function, he used this popularity to gain a position as a European MP and then to secure an outstanding victory in his campaign to become Mayor of Naples. His story was a reiteration of what had happened to another prominent politician in Italy: Antonio di Pietro. He was the public prosecutor in charge of a large anti-corruption investigation called Clean Hands which led to the dismantling of the main Italian political parties in the 90s. After this operation, he resigned from his judicial office and formed one of the most influential parties in contemporary Italian politics, L'Italia dei Valori. It has been argued that this exploitation of media popularity to gain political power is in contravention of the principle of separation of powers and of the ideal of pursuing the rule of law without ulterior motives. [55] If this argument is accepted, then it can also be applied to impose a general ban on participation of magistrati in politics generally. Albeit not through exploitation of media coverage, a number of magistrati run political campaigns and sit in the Italian Parliament. There are currently fifteen of them sitting in both chambers. [56] At the end of their term they can return to exercise their judicial functions. The incompatibility of this practice with the appearance of impartiality required from a magistrato is evident.

It is also worth mentioning that Italian magistrati have a turbulent internal politics. As illustrated above, membership of CSM is determined partially by general elections by magistrati. There are several quasi-parties inside the ANM which compete amongst themselves to obtain posts in the CSM. Some of these quasi-parties have historically been associated with prominent political parties. For example, Magistratura Democratica, a judicial quasi-party, is regarded as sympathising with the Italian left wing. This political division within the judiciary has been the object of much controversy and has given a layer of credit to some of Berlusconi's accusations of being persecuted by left-wing magistrati. [57]

Managerial and Financial Autonomy

As illustrated at various points above, it is the CSM that has the main responsibility for the management of judiciary as a whole with the exception of the Constitutional Court which is administratively autonomous. [58] The Constitution assigns its jurisdiction for employment, assignments and transfers, promotions and disciplinary measures of magistrati. [59] The CSM is also empowered to issue quasi-legislative instruments to fulfill its functions. These are a) statutory instruments to establish internal regulations and administrative/accounting regulations; b) regulations concerning the training of trainee magistrati; c) circular letters to accomplish discretionary administrative choices pursuant to the Constitution or legislation; d) resolutions and instructions to address the implementation of legislation related to the administration of the judiciary.

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55 See Daniela Piana, *Speaking Aloud Would Make You Better? Courts and Politics in the Italian Media,* in Matthew Barker, *The Court of Public Opinion: Justice, the Media, and Popular Will*, FLJS Report 2011.

56 In the Second Chamber Caliendo, Centaro, Giuliano e Nitto Palma for Partito delle Liberta'(PL); Carofiglio, D'Ambrosio, Della Monica, Finocchiar oe Maritati for Partito Democratico (PD). In the First Chamber: Ferranti, Tenaglia, Lo Moro for the PD; Papa for the PL; Di Pietro and Palomba for L'Italia dei Valori.

57 See *Giudici, Nuovo Affondo di Berlusconi"Magistratura Democratica è Sovrana"*, La Repubblica, 21 March 2010.

58 See art 5bis of *Regolamento Generale della Corte Costituzionale* (Gazzetta Ufficiale 19 febbraio 1966, n. 45, edizione speciale).

59 Art 105.

The CSM is assisted in its function by local Judicial Councils. [60] The role of these Councils is to provide opinions to the CSM on the advancement in career and changing of functions of magistrati and assist with any other circumstances in their professional lives, including disciplinary actions. The Councils are ancillary and functionally subordinate to the CSM. However, their importance should not be underrated as, being local bodies, they are in a better position to adequately determine the cases on which the CSM is called to decide. Their opinions will therefore be extremely influential in the final decision to be taken by the CSM. The membership of Judicial Councils in districts with less than 350 magistrati is composed of six magistrati elected among those from the district judicial offices, one university professor appointed by the National Council of Universities and two lawyers appointed by the National Council of the Bar. In districts with over 350 magistrati the Council is composed of ten magistrati, one law professor and three lawyers. Heads of courts, who are always magistrati, are appointed by the CSM, with agreement of the Minister of Justice, to be in charge of the daily management of individual courts.

It is apparent from the above that the administration of the judiciary is heavily judge-based. Thus the Italian judiciary enjoys a wide margin of managerial autonomy. This situation will change if the proposed reforms by the ex-Berlusconi Government take place. The role of the Ministry of Justice will in fact become primary in the general administration of the court system. The role of the Ministry of Justice and politics is already prominent in the financial allocation of resources to the courts. It is in fact the Ministry of Justice and the Treasury that decide and prepare the courts' budget on approval by Parliament. The Ministry then allocates and manages the budget among individual courts. The Ministry is also in charge of the provision of essential services to fulfill its constitutional responsibility for the organisation and functioning of those services involved with justice[61].

While the limited role of the Government in the administration of the judiciary is a good sign for judicial independence, it might not be an equally positive sign for the general efficiency of justice in the country. Italy has the most ECHR judgments, after Turkey, for breaches of art 6 ECHR due to excessive lengths of proceedings. [62] It cannot be automatically concluded that the reason for this excessively slow system of justice is due to the great administrative autonomy enjoyed by Italian magistrati. However, the desirability of an alternative system to enhance efficiency and speed is apparent. To this effect, the ex-Berlusconi Government proposed legislation which will vary the statute of limitation. If confirmed in its present form, serious criminal proceedings will have to be concluded within four years (five years for terrorism, three years for less serious crimes). Failure to this effect demands notification to the CSM and the Ministry of Justice. The effects of the notification are still unclear but, in its previous versions, the Bill provided for automatic extinction of the trial. Some have argued that this is a provision designed by Berlusconi to get rid of all of his ongoing trials. However, if implemented adequately, it could be an incentive to speed up criminal proceedings.

Conclusion

Overall, the legal measures in existence in Italy aid autonomy and independence of the judiciary. However, none of those measures have been sufficient to secure the efficiency of the justice system and the insulation of the judiciary from attacks from the political world. In particular, the lack of legal and political restraints to ensure that public confidence in the judiciary is not undermined by strong criticisms by politicians has perhaps created the environment where legal reforms which will undermine the independence of the judiciary are considered permissible. Thus, the Italian experience illustrates the strong link between public confidence in the judiciary and the protection of the independence of courts from legislative attacks. In fact, the damage of the public profile of judges created by the campaigns of Berlusconi coupled with widespread dissatisfaction for the inefficiency of the justice system justify politicians to undertake reforms which undermine judicial independence. The main priority for the Italian judiciary is thus to restore its public image. Isolation from external and internal politics would very much contribute to that task.

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60 As regulated by Dlgs 25/06.

61 Art 110.

62 See *Violation by Article and by Country 1959-2010* of the European Court of Human Rights, Council of Europe available at http://www.echr.coe.int/NR/rdonlyres/2B783BFF-39C9-455C-B7C7-F821056BF32A/0/Tableau_de_violations_19592010_ENG.pdf.

III

THE GERMAN JUDICIARY: THE DOMINION OF THE RECHSTSSTAAT

The German Court Structure

The organisation of the German court system follows the federal structure of the country and is dictated by Art 92 of the Basic Law (the German Constitution). Thus, there are state courts of first instance and appeal; federal courts of last instance and a Federal Constitutional Court. The jurisdiction of these courts, except for the Constitutional Court, is divided into five categories: ordinary, administrative, financial, labour and social. [63] Courts of financial jurisdiction only have first instance courts at state level and an appeal court at the federal level.

The competency of the federal courts of final instance is to review the points of law of the state courts and ensure the uniformity of interpretation of federal law between the various states. However, such task is theoretically incompatible with the lack of precedential value of the jurisprudence of German courts. Nevertheless, decisions of the federal courts are generally followed in practice by the lower courts allowing consistency of interpretation throughout the state courts. [64] In case of conflicting decisions by the federal courts, Art 95 BL establishes a Joint Chamber of judges of the federal courts of the various jurisdictions to agree on a univocal interpretation.

The Federal Constitutional Court plays a vital role in the judicial and political system of the country. It is composed of sixteen judges who sit in two equally divided chambers exercising mutually exclusive jurisdiction. Although the Basic Law does not provide for a special status for the judges of the Court, the Federal Constitutional Court Act and the judges of the Constitutional Court themselves qualified it as a constitutional organ at the same level of the two German Parliaments and the Federal President. [65] Furthermore, the claim by the Constitutional Court to enact its own rules of procedure without explicit constitutional authorisation - the Basic Law authorises the other constitutional institutions to do so[66] –speaks of the high political power the Court exerts in German politics. This power is even more extensively visible in the adjudicatory role of the Court. It has struck down a great number of state and federal laws. [67] This has led the German legislature to follow strictly the jurisprudential views of the Court with a consequential judicialisation of German politics. [68]

Albeit definitely much less powerful than their federal counterpart, almost all states have a constitution and a constitutional court. States' constitutions must not be in contradiction with the Basic Law but can grant more extensive rights. [69] It is thus the duty of the states' constitutional courts to guarantee the adherence of state legislation with the state constitution and ensure interpretations are in accordance with the Basic Law under the supervision of the Federal Constitutional Court. [70]

Judicial Appointment Procedure

The appointment procedure of German judges varies according to the level of the courts judges are appointed to. However, the general rule is that judges are selected by political representatives in order to install a degree of democratic mandate inside the judiciary. While appointments to lower courts are, in practice, meritocratic and free from party political screening, the same cannot be said for the appointments to appeal courts, especially at the federal level. However, whether too political

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63 Art 95(1) BL

64 See Werner Heun, *The Constitution of Germany*, Hart Publishing, Oxford 2011. At p. 167.

65 See Sec 1 of the Federal Constitutional Act. Also see Status Report of the Federal Constitutional Court 27.6.1952 (6 jahrbuch des öffentlichen rechts 144 (1957)).

66 Arts 40 I, 52 III, 65 BL.

67 E.g. Between 1951 and 1990 it had struck down about 200 federal laws. See See C. Lanfried, *The Judicialization of Politics in Germany*, International Political Science Review (1994), Vol. 15, No. 2 at 114.

68 Ibid, pp. 116-119.

69 Art 28 BL.

70 Art 100 BL.

in nature or not, the appointment procedures are set by the Basic Law[71] and are therefore a specific choice of the German legal order. While that choice can be criticised as undermining the principle of judicial independence, it cannot be said to be unconstitutional.

At state level, first instance judges are appointed by the State Justice Ministry after passing a state examination. Access to this exam is open to law graduates that have successfully passed a first state examination and completed a traineeship period of two years in courts, prosecutors' offices, administrative agencies and private practice. Law professors can also be appointed without the need of such qualifications. In most states, appointment by the Justice Ministry is aided by a judicial selection committee composed of legislative and executive officials as well as tenured judges and lawyers. [72] Federal law also provides for the creation in each state of a judicial appointment council composed of judges to express its opinion on the personal and professional aptitude of the candidates. [73] The opinion is not binding but it has been suggested that it is usually followed. [74]

Although appointments are ultimately decided by the State Justice Ministry, political screening of the candidates is unlikely as the main objective factors for selection are the academic achievements and accomplishments in the traineeship period of the candidates. Successful candidates are appointed initially for a probationary period of three years during which they are subject to continuous evaluations. The probationary period is generally in judicial office, but it is not unlikely that trainees may be appointed temporarily to a prosecutor's office or to a legal position in the Justice Ministry. [75] Albeit this violates the pure principle of the separation of powers, it has been justified as providing young judges with a broader experience which will enrich their judicial career. [76]

It has been argued that promotions to the state appellate courts is relatively free from political screening as appointments by the Justice Ministry are based on merit and following intense scrutiny within the individual court. [77] This is however inconsistent with a finding that an important number of judges at appellate level have had experience in the State Ministry of Justice. [78] This suspicion of politicisation of the judiciary is reinforced by the finding that political considerations seem to be important in the choice of the presidents, vice presidents and presiding judges of panels in the various state courts whether at first instance or appellate level. Donald Kommers reports of a general consensus within commentators of the finding that these positions of responsibility are filled with judges who mirror, to some extent, the political orientation of the ministry or government choosing them.[79] This is not a trivial point. As these judges are the ones that provide leadership in the courts generally and in the courtrooms, it can be said that judicial enforcement of the law is mainly in the hands of individuals who are sympathetic with executive ideals. Separation of powers and independence in adjudication are thus threatened, especially in the administrative courts.

The politicisation of the selection process at federal level is much more apparent. Art 95 II BL sets out that judges of the supreme federal courts must be chosen jointly by the competent Federal Minister (usually the Federal Minister of Justice) and a committee consisting of state ministers and an equal number of members elected by the Bundestag (the lower house of the German legislature). There are currently 32 voting members. The Federal Minister does not vote and acts as the chair of the committee. Not very surprisingly, among the factors that seem to influence the decisions of the

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71 Appointment to state courts, federal supreme courts and Federal Constitutional Court are set out respectively in arts. 98 IV, 95 II and 94 I. See also the German Judiciary Act, 301-1.

72 Art 98 IV provides for such judicial council committees in non mandatory terms. See also D. Kommers, *Autonomy versus Accountability, The German Judiciary*, in Russell and O'Brien (Eds), Judicial Independence in the Age of Democracy, 2001 University Press of Virginia. At p.144.

73 Sections 74 and 75 of the German Judiciary Act.

74 See D. Meador, *German Appellate Judges: Career Patterns and American-English Comparisons*, 67 Judicature 1983. At p. 22.

75 See German Judiciary Act sec 10(2).

76 Ibid, at p. 145. The need for young judges to develop a more mature attitude in the exercise of their functions has been illustrated in J. Bell, above 12, at p. 115.

77 See D. Kommers, 71 above, at 145. See also M. Kunnecke, *The Accountability and Independence of Judges: German Perspectives*, in Canivet et al. (eds), *Independence, Accountability, and the Judiciary*, The British Institute of International and Comparative Law 2006. At p. 225.

78 See D. Meador, 73 above, at p. 24.

79 D. Kommers, 71 above, at p. 145.

committee, aside the professional qualifications of the candidate are his geographical origin and political party affiliation. [80] Both factors are due to the fact that the committee is composed by half of members representing the interests of the states and the other half is composed of members representing party-politics interest in the Federal legislature. It is thus apparent that it is the political process, both regional and federal, that determines the membership of federal courts excluding self-selection of the judiciary. To counter-balance this, a role, albeit not particularly significant, is played by the federal judicial appointment council which is composed in its entirety by judges. Unlike its state counter-part, the opinion of the council must be received before a decision can be made by the committee. [81] Yet, it is not binding. [82]

Politicisation of the appointment process reaches its peak in the selection of the judges of the Federal Constitutional Court. The Basic Law provides that one half must be chosen by the Lower House of the German legislature, the other half by the Upper House. [83] The Upper House has delegated its constitutional duty to a judicial selection committee composed of 12 members whose political composition reflects that of the House. A third of the members to be appointed to the Court must be chosen from the judges of the supreme federal courts; the other members must simply hold the qualification of a judge, albeit need not to be practising as one. The general conditions for appointment to the Constitutional Court are set out in the Federal Constitutional Court Act, more specifically in sec. 3. Candidates must have reached the age of 40, be eligible for election to the Lower House, and have stated in writing that they are willing to become a member of the Federal Constitutional Court. It has been argued that there is a trend towards "judicialisation" of the Constitutional Court so that the number of members who have been members of the parliaments or of the executive has been gradually decreasing. [84] However, the present situation is that members of the Court are more or less equally divided between federal judges, politicians and law professors. [85]

The clear dominance of politics in the selection process of the German judiciary responds to the need of democratic legitimisation of the courts. This need is however not met at the state level, as it is the state executive, and not the state legislature, who has the final say on appointments. However, it has been shown that, at the state entry level, selection of candidates is based on objective criteria (i.e. performance in state examinations and traineeship). Yet, appointment to executive posts in state courts is highly unsatisfactory as primarily based on political affiliation rather than on objective criteria. Appointments to the supreme federal courts seem instead to achieve a fairer balance. While politicisation is more apparent, the political interests are several and heterogeneous: the interests of the executive at state level contend with the interests of parliamentarians at federal level both influenced by the opinion of a judicial council. It is admitted, however, that the voice of the judicial council needs to be afforded more power so as to grant a degree of judicial self-selection. This voice is completely lacking in the selection of Constitutional Court judges. This is however not entirely a deplorable state. The Constitutional Court has enormous political power in Germany (see relationship with politics below); that political power needs to be supported by a strong democratic mandate. Hence, the legislature, which has a direct democratic mandate, is in the best position to designate who can wield the political power of the Court.

Measures against Undue Influence and Judicial Accountability

The independence of the judiciary from undue influence is guaranteed by the Basic Law, federal and state legislation (including state constitutional law) and by several decisions of the courts. Art 97(1) BL states that judges must be independent and subject only to law. This has been interpreted by the Constitutional Court as meaning that adjudication must be free from any extra-legal influence, including recommendations, solicitations, suggestions or even psychological influence. [86] All actions concerning judicial functions, including activities in the preparation and execution of

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[80] See DS Clarke*, The Selection and Accountability of Judges in West Germany: Implementation of a Rechtsstaat*, S. Cal. L. Rev. (1987-1988). At 1825. See also J. Bell, 12 above, at 121.

[81] Sec 57(3) of the German Judiciary Act.

[82] For the politicisation of the selection process and the ineffectiveness of the judicial council see *Judicial Selection Controversy at the Federal Court of Justice*, 2 German Law Journal (2001).

[83] Art 94(1) of the Basic Law.

[84] C. Landfried, *The Selection Process of Constitutional Court Judges in Germany*, in K. Malleson & P. Russell, *Appointing Judges in an Age of Political Power*, 2006 University of Toronto Press. At p. 202.

[85] See Werner Heun, 63 above, at p. 169.

[86] BGHZ 57, 344, at 348.

decisions such as scheduling and summons, are covered by this guarantee of independence. [87] This has been further expanded by the Federal Court of Justice to protect a judge from the regulation of working hours so that, apart from court proceedings, a judge is entitled to work when and where he wants. [88] Art 101(1) BL protects the jurisdictions of the courts by banning the creation of extraordinary courts and prohibiting the removal of a case from the jurisdiction of its lawful judge. [89] Furthermore, the lack of a strict doctrine of *stare decisis*[90] allows individual judges to be independent in adjudication from each other and from superior courts. The German Criminal Code criminalises bribery, [91] acts and threats of violence towards judges. [92] The Basic Law guarantees the tenure and financial security of judges appointed permanently to full-time positions. Their tenure cannot be interfered with except when they have reached the age of retirement, been subject to disciplinary procedures in a court of law or for reasons of changes in the general structure of courts. [93]

These measures, which guarantee an extensive notion of judicial independence, are tamed by various forms of judicial accountability: internal supervision; disciplinary procedures; impeachment procedures; criminal and civil liability. Internal supervision in each court is carried out by a court presidium composed of the court president and an elected panel of judges. [94] The presidium can draw attention to inefficiencies in the conduct of judges in so far as this does not impact on their adjudicative independence. S. 26(2) of the German Judiciary Act empowers the presidium to censure an improper mode of executing an official duty and to encourage proper and prompt attention to official duties. However, if a judge thinks that a measure of supervision infringes his independence he can complain to a service court (Dienstgericht). [95] The jurisprudence of the courts has been extensively in favour of a judge complaining against internal supervision. [96]

Should a warning be insufficient for improper conduct of a judge, formal disciplinary proceedings can be initiated. The Federal Disciplinary Law, which applies to all civil servants, is applicable to the federal judiciary. State disciplinary laws will apply to state judges. [97] Generally, a disciplinary offence is defined as an intentional or negligent breach of a duty assigned to the judge by virtue of his office. The relevant statutes do not specify particular offences. Disciplinary proceedings are heard by the Federal Judicial Service Court or the respective judicial service court at state level. [98] Proceedings can be initiated by the court president, the judge himself, and the relevant ministry of justice which also takes the lead in running the inquiries. [99] Dismissal is authorised when a judge refuses to take the necessary judicial oath; becomes an employee of another body (including parliament); reaches the retirement age or becomes unfit for service or becomes a resident of a foreign country without permission. [100] Lesser sanctions can vary between an admonition to a reduction or complete loss of salary and/or pension. [101]

Impeachment procedures[102] apply only to federal judges. If a federal judge infringes the Basic Law or a state constitution, both *in* and *ex officio*, the Lower House can request the Federal Constitutional Court to transfer, retire or dismiss the judge. This provision has never been actually enforced but its use has been threatened in the *Deckert* case where a federal judge commented

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87 See Anja Seibert-Fohr, *Constitutional Guarantee of the Independence of the German Judiciary*, in E. Riede and, R. Wolfrum(eds), *Recent Trends in German and European Constitutional Law,* pp. 267- 287, Springer Berlin/Heidelberg/New York, 2006. At p. 268.

88 See BVerwG DÖV 1981, 632; BVerwGE 78, 211; BGH NJW 1991, 1103.

89 For the allocation of workload in courts see Title 2 of the Courts Constitution Act (GvG).

90 BVerfGE 87, 278; 78, 123, at 126.

91 German Criminal Code, s. 334(2).

92 Ibid, ss. 240 and 106.

93 See 97(2) BL and the Fourth Chapter of the German Judiciary Act.

94 See s. 21a of the Courts Constitution Act.

95 See s. 26 of the German Judiciary Act.

96 See M. Kunnecke, 75 above.

97 German Judiciary Act, s. 46.

98 Ibid, ss. 62 and 78.

99 See Federal Disciplinary ss. 17 and 18.

100 Ibid, s. 21.

101 Ibid, s. 7.

102 See art. 98(2) BL.

positively on the political dedication of a convicted anti-Semite.[103] Following great public pressure, the judge decided to retire early.

Criminal conviction for a wilful crime with a minimum one year imprisonment sentence results in automatic dismissal of a judge indicating that there is no *ex officio* immunity for criminal liability. There is also no *in officio* immunity as judges can be dismissed if they are found not to have the professional capability for public office, to have perverted the course of justice[104] and to have taken or requested bribes.[105] Sentences for public treason, endangering the democratic legal order or endangering the German national security will also result in dismissal. Forfeiture of civil rights for abuse of fundamental rights will disqualify a judge from his office.[106]

Criminal liability for *in officio* acts is fundamental to determine civil liability of a judge. In fact s. 839(2) of the German Civil Code establishes that if a judge breaches his official duties in a final judgment in a legal dispute, then he is only responsible for any damage arising from this if the breach of duty consists in a criminal offence. This provision aims to secure judicial independence in adjudication by setting a very high standard of liability. Temporary court orders are not covered and only final judgements which amount to criminal acts as outlined above are implicated (perversion of the course of justice and related offences will be particularly significant). However, for acts which cannot be considered final judgements in a legal dispute, s. 839(1) will apply. Unlike subsection 2, liability is based on negligent breach of a duty of care and not on criminal liability. Relevant breaches of duties are, for example, breaches of the duty to enforce the law, to decide without unnecessary delay, not to misinform the parties involved, or to abide by the procedural requirements. However, when a judge has erred in the application of statutory law or in the interpretation of the law, the courts have held that the principle of judicial independence requires that liability be imposed only when he has acted grossly negligently.[107] Civil liability will not be established if the aggrieved person has not first sought remedy through available appeal routes or has failed to mitigate his losses.[108] In all cases, liability of a state judge will extend to his state and liability of a federal judge will extend to the Federation. The right of recourse against the liable judge by the state or Federation is authorised by art. 34 BL only in the event of intentional wrongdoing or gross negligence.

Overall it can be said that both the measures to guarantee freedom from undue influence and the measures to secure judicial accountability tend towards a conservation of judicial independence. This is particularly due to the intervention of the courts in the interpretation of constitutional and ordinary provisions of judicial accountability. The decisions of the courts to limit internal supervision exercised by presidiums and to increase the benchmark of civil liability in the interpretation and application of law (s. 839(2) liability) have already been illustrated. The courts are therefore the guardians of their own independence and have been proactive to that end. In this respect, the role of various councils of judges both at the state and federal level should be noted. Their existence is given a legal basis in the German Judiciary Act. They have the minimum duties of representing judges and court staff in general and social matters and collaborating with professional organisations to this effect.[109] All local councils both at state and federal level participate in the work of the German Association of Judges. This central professional institution has within its aim the defence of the interests of the German judiciary and defending judicial independence[110].

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103 See M. Kunnecke, 75 above, at 228.

104 German Criminal Code, s. 339. This requires a wilful and plainly unjustifiable disregard of the law See BGH (23.05.1984). Only when this offence has been found in the first place can the further offences be found: false imprisonment (s. 239), obstruction of justice for failure to sentence or prosecute a guilty individual (258a), prosecution or execution of detention of a person known to be innocent (ss. 344 and 345).

105 Ibid ss. 331 and 332.

106 See generally s. 24 of the German Judiciary Act.

107 BGH (3.7.2003).

108 German Civil Code s. 839(3).

109 See German Judiciary Act ss. 72, 73, 50-53.

110 See the website at http://www.drb.de/.

Relationship with Politics

As has been exposed above, the appointment procedure of the German judiciary is heavily politicised. At state level it is controlled by the state executive while at federal level it is controlled by a mix of state and federal executive and federal legislature. At constitutional level it is dominated by the federal legislature. The politicisation is not only formal but substantive: candidates are selected, at least at the higher levels, on the basis of their political commitments and affiliations. Political screening is made possible through the existing doctrine that German judges have a right, like ordinary citizens, to join political parties, publicly express their political opinions and engage in political activities. Thus it has been estimated that about a third of all lower court judges are members of a political party.[111] It can be estimated that political membership of higher court judges is even more pronounced as the selection process is more explicitly based on political affiliation. Furthermore, it is accepted that political opinions by judges can be expressed in public without a necessary breach of their appearance of impartiality. However, they must distinguish when such opinions are made in personal capacity and when made in a judicial role.[112] In the latter role, a judge will be held to have violated the principle of impartiality when he divulgates his political views in a highly partisan and provocative manner or advances his political aims by means other than substantive argumentation.[113] Thus, when a group of 35 state judges published a letter where they expressed their strong opposition of the stationing of American cruise missiles on German soil, they were held to have failed to exercise the required restraint necessary for the maintenance of public confidence in their independence because they had not made clear they were speaking in personal capacity.[114]

German judges are allowed to run for political posts, both at federal and at state level. To this effect, s. 36(1) of the German Judiciary Act provides for a period of unpaid leave to allow judges to run political campaigns for legislative posts two months before the elections. However, there is a strong limitation on what political posts are compatible with their judicial office. In fact s. 2(1) of the Act provides that a judge shall not simultaneously perform duties of adjudication and legislative or executive duties and s. 36(2) establishes that, should a judge be elected to parliament or appointed as part of the executive, he must cease to hold judicial office. However, this does not apply to posts, even senior ones, in city councils even though such posts require quasi-legislative and quasi-executive powers.

The politicisation of the judiciary extends to lay judges in courts of ordinary jurisdiction in criminal cases. They are selected through a two stage process involving proposal and selection. The appointment of lay judges begins with the generation every five years of a list of nominees by the municipality.[115] It has been argued that this in practice translates into nomination by political parties of the candidates which are then finalised in the list by a two-thirds majority of the municipal authority.[116] Selection of suitable candidates is then finalised by a committee sitting in the local court composed of the presiding judge of the court as chairman, an administrative official to be designated by the state government and seven upstanding individuals as associate members selected by the public administration.[117] Although it has been argued that the impact of lay judges in adjudication in the criminal system is minimal due to the prominent role being played by professional judges,[118] it can be noted that the German inclination to politically appointed judges extends also to lay judges.

The obvious question is why the composition of the judiciary is mandated by politics with a very limited role for judicial self-selection. The answer, already illustrated above, relates to the German need for democratic mandate of judges, given their political prominence in the German order. Some

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111 D. Kommers, 71 above, at p. 140.

112 See 78 BverfGe 217 (1988).

113 Günther Schmidt-Räntsch and Jürgen Schmidt-Räntsch, *Deutsches Richtergesetz: Richterwahlgesetz: Kommentar*, (Munich: C.H. Beck'sche Verlagsbunchhandlung, 1995). As cited by D. Kommers, 71 above, at p. 138.

114 See 110 above.

115 See s. 36 of the Courts Constitution Act.

116 W. Perron, *Lay Participation in Germany*, 72 Revue internationale de droit pénal 2001. At p. 190-191.

117 See s. 40 of the Courts Constitution Act.

118 See W. Perron, 114 above, at p. 193 with accompanying footnotes.

commentators have argued that the judiciary is the backbone of the German state based on the rule of law (Rechtsstaat).[119] The horrors of the Nazi period and the division of the country throughout the cold war have resulted in a public need for limited and accountable government. The appropriate boundaries of state institutions are determined by the Basic Law, but it is the judiciary, and in particular the Federal Constitutional Court, that has the overall responsibility for the implementation of constitutional requirements. The Court is not restricted only to the letter of the Basic Law but must also give effect to principles of justice,[120] which are ultimately defined by the Court itself. Thus, in a sense, it is the judiciary that has the final say as to what is permissible in the German legal order. This results in extensive political power for the judiciary. This power is exercised through judicial review of executive decisions and through constitutional review of federal and state law. The role of the Constitutional Court as a policy maker is most evident in the latter use of its power. Not only does the Court regularly strike down legislation which is in its view incompatible with the Basic Law, it also extensively interprets it in a fashion consistent with the Constitution. Not surprisingly, it has reserved the right to rule on the legitimacy of a vote of no confidence by the Parliament in the head of the Government. [121] Also, the Court influences policy makers by setting guidelines for the development of legislation. For example, in a judgement where the Court struck down legislation which permitted private financial contributions to political parties, it suggested an alternative method of finance through public funds. This suggestion was immediately taken up by the legislature through subsequent legislation. A similar pattern was followed in the regulation of abortion. [122]

The above illustrates the immense political influence of the Federal Constitutional Court. However, extensive political power is not only restricted to that court. Judicial creativity and the rejection of a positivist and formalistic view of law in federal courts have led to a judicialisation of the political process. [123] Furthermore, the existence of state constitutions and state constitutional courts further exacerbates the judicialisation of German politics even at state level. It can be said that the dominion of the Rechtsstaat creates the appropriate culture for a politically supreme judiciary. This in turn demands a strong legitimisation of the judicial branch which is ultimately found in the indirect democratic mandate through the politically-centred selection process.

Administrative and Financial Autonomy

The administration of German courts is divided between political authorities and judges in a way which is designed to ensure the independence of judges in the exercise of their adjudicative functions. The ministry of justice, both at state and federal level, is responsible for the court buildings, the equipment and the support staff. Its predominant role in the recruitment and training of judges has already been illustrated. Labour courts are operated in a similar fashion with the exception that it is typically the minister of labour and not the minister of justice that has overall responsibility. The role of these political authorities does not extend to the management of the caseload of the courts, at least not directly. This is in fact administered by the court presidium. The Courts Constitution Act authorises the presidium to determine the composition of the court panels, appoint public prosecutors to individual cases, regulate representation and allocate court business. [124] The presidium must not operate independently of the judges of the court as these must be given an opportunity to be consulted prior to the allocation of the court business. [125] The decisions of the presidium can be subject to judicial review in a service court when a judge complains that its decisions infringe on his independence.[126]

The above arrangement ensures that while political authorities have responsibility for the bureaucratic organisation of the courts, the allocation of adjudicative business is regulated by judges themselves and subject to judicial review. However, political authorities have an indirect say even in the allocation of adjudicative business. A working group of ministers of justice at federal

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119 See D. Kommers, 71 above, at p. 134.

120 See art 20(3) BL.

121 See BverfGE 62 (1983).

122 For both episodes and more see C. Landfried, The Judicialisation of Politics in Germany, 15 International Political Science Review 1994, pp. 113-124.

123 For the social and philosophical attitudes of the German judiciary see J. Bell, 12 above, from p. 136.

124 See s. 21e(1).

125 See s. 21e(2).

126 See German Judiciary Act s. 26(3).

and state level set each year a benchmark for the workload of the courts. These benchmarks, which set the ideal number of cases to be processed by judges according to the appellate level and subject matter, are then used by the presidium as a guide for the distribution of cases to individual judges. It has however been argued that these benchmarks are used flexibly by the presidium and that individual judges generally complete their work without much regard to these benchmarks. [127] Thus, these benchmarks function more as indicators of performance to be used by politicians to develop policies related to the justice system (e.g. appoint more judges) rather than direction to courts on how to perform their functions.

The political authorities control the allocation of the courts' budget, with the exception of that of the Constitutional Court. The annual budget estimate is, both at state and federal level, prepared by the relevant ministry (usually the ministry of justice). It is discussed and approved by the cabinet and then sent for final approval to parliament where it can be further modified. The resources thus allocated are administered by the ministry itself with little or no input by the courts. John Bell has argued that the importance of the ministries in the preparation of the budget has had a detrimental effect on the staffing of the courts. The number of professional judges has remained constant between 1991 and 2006 despite a considerable increase in the number of cases decided at first instance. [128]

As for the budget of the Constitutional Court, it is the Court itself which prepares its estimate budget and then presents it directly to the Federal Ministry of Finance. The Ministry then sets up the final budget plan for cabinet approval and for final adoption by parliament. Should the cabinet decide to alter the initial budget proposal by the Court, it must annex the original proposal when submitting its alterations to the parliament. Also, unlike the other courts, the Constitutional Court is responsible for its own administration as it recruits and manages its entire extra-judicial staff. These procedures further testify the special constitutional status of the Court as a highly autonomous and politically powerful institution.

Conclusion

The German judiciary is extremely powerful. It is the Basic Law that confers it this power. The principle of judicial independence both legitimises this power and enhances it. The legitimisation comes from an apparent breach of the principle since the political process dominates the selection process of German judges. However, this breach remains only at the structural level. In fact it is the judiciary that self-regulates its adjudicative functions and has ensured that in this respect the rights it enjoys are extensive. Arguably, in relation to the relation of working hours for example, even too extensive. It is this extensive notion of independence in the adjudicative functions that enhances the power of the judiciary. The ability to interpret the Constitution independently of the legislature ensures that the courts have a fundamental role in shaping public policy in Germany. The dominion of the rule of law in post-Nazi and post-unification Germany places the judiciary in a central role which necessarily shapes the country's conception of judicial independence both in positive and negative terms.

[127] See Hans-Ernst Böttcher, *The German Judiciary System*, 5 German Law Journal 1317-1330 (2004). At p. 1324-1325.

[128] Ibid, at p. 1318. See also J. Bell, 12 above, at p. 112.

IV

CONCLUSION: WHAT SHAPES JUDICIAL INDEPENDENCE?

Admittedly, the limited number of jurisdictions examined does not allow generalisation about judicial independence for the whole of Europe. However, even through this limited analysis, some clear patterns can be evinced. The most evident is that there is no univocal institutional arrangement which can be held to satisfy the principle of judicial independence. In the introduction, a note was made of a series of international instruments which gave directions as to how the principle of judicial independence must be translated into constitutional practice. [129] From these instruments we have the impression that only some types of institutional arrangements can be acceptable in light of the principle. For example, there is broad consensus in these instruments that a council for the judiciary, primarily composed of and selected by judges, is essential to the promotion of independence in relation to the administration of the judiciary. However, out of the three countries analysed, only Italy has such a council (the CSM). Yet, as has been illustrated with the episode of De Magistris, the existence of this council has not been sufficient to insulate the judiciary from executive attacks. Conversely, in Germany, where the administration of the judiciary is in the hands of the state and federal ministries of justice, there are not known instances of blatant interference by the executive in the lawful jurisdiction of the judiciary. Actually, the inverse can be confidently affirmed: the German Constitution has allowed the judiciary to invade to some extent, through constitutional review, the domain of the legislature. In Sweden, a judicial council exists, however it is essentially a governmental department. Yet, after careful consideration of the political culture of the country, this cannot be said to undermine the independence of individual Swedish judges. We can therefore reject the assertion that only one particular institutional arrangement can satisfy the principle of judicial independence. It is a dynamic value which responds to various political factors.

But does being a dynamic concept imply that the principle of judicial independence has no minimum requirements? We could not have a meaningful discussion about the principle if we cannot point out to a minimum common understanding in the various constitutional practices. Again, the limited number of jurisdictions analysed does not guarantee that convergent practices reveal what is regarded in the whole Europe as the core of judicial independence. [130] However, the methodology might be right and might reveal more interesting results the more jurisdictions are considered. This methodology will be applied to the three countries in the following sections with the aim of revealing a minimum common understanding of judicial independence.

Court Structure

Seeking for convergence in the courts' structures does not appear as a promising exercise for the purposes of judicial independence. It is not clear how convergence on the typologies of courts or the existence of a constitutional court can tell us how and if judges reach independent decisions. However, an exception to this might be investigating how administrative courts are structurally positioned in relation to the executive. Italy offers an interesting perspective on this issue. The administrative courts, in particular the appeal administrative court (Consiglio di Stato), is essentially a governmental department which offers legal advice to the public administration. It is also called to settle disputes between citizens and the executive. This has been criticised as being in contravention of the principle of judicial independence but it might be interesting to know the German and Swedish perspective on the issue. The German experience condemns the Italian practice: German administrative courts are structurally autonomous from the federal and state executive and have wide powers of judicial review. [131] However, the Swedish experience is more ambiguous. It is only from the last few decades as a consequence of international pressure that Swedish administrative courts have gained their independence from the executive and offered a real opportunity to settle disputes between the State and the individual. Yet, their importance is still

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[129] See 2 above.

[130] Convergent practices also do not necessarily indicate a common understanding of judicial independence: political actors might understand what the principle requires but might still decide, for reasons of political convenience or malice, not to implement that understanding in constitutional practice. In this scenario, convergent practices do not indicate a common understanding of the principle but rather a common deviation from it.

[131] See M. Künnecke, *Tradition and Change in Administrative Law. An Anglo-German Comparison*, Springer Verlag, Heidelberg (2006).

undermined by the prevalence of dispute resolution through extra-judicial means. Can it then be said that structurally autonomous administrative courts are considered part of the core of the practice of judicial independence? The Italian experience clearly responds negatively. However, it is not out of the picture that the growing internal criticism[132] of the issue might change the answer in the future.

Appointment Procedure

There is a general convergence of the appointment procedures of judges, at least at the junior ranks. This is because access to the judiciary is mainly through a career route. In all of the three countries young law graduates must sit a state examination and complete a training period. Constitutional practice departs as to who makes the ultimate decision of appointments and the extent of participation of independent councils for judicial selection. Arguably, Italy has the most transparent mode of judicial selection: the CSM, completely autonomous from the Government and primarily composed of judges, runs the public exams and appoints the candidates. Promotions to higher posts are based on years of service so cannot be influenced by external pressures or dictated by politics. The only exceptions are appointments to administrative courts and to the constitutional court which are much more politicised. The Swedish and German appointment procedures are much more dictated by the executive. It is the executive that makes the final decision in both countries (except for the constitutional court in Germany) and party politics plays an important role in promotions to senior roles. In Sweden the appointment procedure has only been very recently made more transparent by the requirement of public applications for permanent tenured positions and scrutiny by an independent committee who draws up a binding list of suitable candidates. In Germany, the equivalent committees have only an advisory role in relation to the qualifications of the candidates and their opinions are not binding even though they are generally followed. The minimum common understanding is thus restricted to the existence of exams and training periods before judicial appointments. This can only be said to aid judicial independence to the extent that it provides objective criteria for selection of individuals to judicial office. However, there is a strong case for increasing the influence of the independent appointment committees as the prominence of the political process undermines the structural separation of the judiciary from the other branches of State power.

Protection from Direct Undue Influence and Judicial Accountability

Perhaps the major points of convergence between these jurisdictions are the measures to protect judges from direct acts of undue influence. The jurisdiction of the courts is always protected at constitutional level with the prohibition of the creation of extraordinary courts. The constitutions also secure tenure and remuneration subject to conditions generally set out in ordinary legislation. The respective criminal codes prohibit threats and acts of violence towards judges. They also prohibit judicial bribery. It can thus be argued that these countries regard the core requirement of judicial independence as protection from direct undue influence. This should hardly come as a surprise. If judicial independence ultimately means adjudication solely on the basis of legal merits, it is clear that constitutional practice must ensure that all clearly identifiable means of undue influence should be avoided. Thus measures against bribery, physical coercion and establishment of partisan adjudicators to take the place of judges. Convergence will instead be more problematic with sources of undue influence which are not clearly identifiable or are not univocally considered inappropriate. So while Italy regards judicial appointment by the executive as inappropriate and takes measures against it, Sweden and Germany are much more relaxed about this issue.

There is also broad convergence between the various measures of judicial accountability. In all three countries, judges can be subject to disciplinary action heard by courts (courts hear appeal disciplinary proceedings in the case of Sweden) and are not immune from criminal and civil liability in the exercise of their judicial functions. In the latter case of liability, the State is always responsible for paying compensation with a limited possibility of recourse against the individual judge. These measures of accountability highlight the widespread need to ensure that judges act within the remits of the law and therefore limit judicial independence in this respect. However, they

[132] See for example, R. Scarciglia, *Indipendenza e Terzietà del Giudice, "Giusto Processo" e Prospettive di Riforma della Magistratura Amministrativa,* Sofia (22.6.2007).

also enhance public confidence in the judiciary which has been argued to be fundamental for the protection from undue legislative attacks.

Finally, a note should be made about the existence of professional association of judges who have within their mandate the protection of judicial independence. The role these associations undertake should not be underrated as they act as a channel through which the anxieties and interests of the judiciary, even not in relation to their independence, can be expressed. This is particularly evident in Italy, where the ANM has been speaking publicly against the various legislative proposals by the ex-Berlusconi government.

Relationship with Politics

Convergence in the relationship between the various judiciaries and political players is varied. On one level the three countries generally accept the notion that judicial and political functions are not compatible. Thus, should judges decide to pursue positions of political power they must forfeit their judicial robes temporarily. There are exceptions to this. In Germany, leading posts in the municipal administration are not considered incompatible with judicial office. In Sweden, judges are often seconded to ministerial departments to be legal advisers. In Italy, judges of the Consiglio di Stato are institutional partners with the Government as legal advisors. Thus, even though in principle these countries perceive that judicial and political functions are not compatible they are often willing to sacrifice the appearance of judicial independence for reasons of convenience or because they do not regard that the exercise of some political functions undermines the independence of judges.

Administrative and Financial Autonomy

There is no convergence in the administrative autonomy of the judiciary. In Sweden, the DV, essentially a governmental body, has the overall administrative responsibility with the assistance of the courts' presidents for day to day governance. In Italy, the CSM and local judicial councils bear that burden. In Germany it is the responsibility of the state and federal government. What this tells us about judicial independence is that, contra theory, self-management of the judiciary is not taken as an indispensable part of the principle. In the theoretical literature there is the argument that judicial independence and the principle of separation of powers are interrelated so that a breach of the latter in relation to the judiciary generally comports a breach of the former.[133] However, this argument should not be exaggerated as the essence of judicial independence as argued above relates to the adjudicative functions of judges. While judges should enjoy an environment which is well managed in order to perform their functions without much bureaucratic distractions, this should not induce to think that judges are necessarily the best managers of themselves. The Italian system confirms this. Italy has the widest degree of judicial self-management among the three countries. Yet, the inefficiency of the court system is well known. The German system offers an attractive alternative: while the executive is in control of the general administration, strictly judicial matters (e.g. distribution of caseload) are administered by a judicial council (preasidium) internal to each court. The decisions of the council can be subject to judicial review.

The financial autonomy of the judiciary in the three jurisdictions is almost inexistent with the exception of the constitutional courts of Italy and Germany who are able to set their own budgets. While interference with the remuneration of judges is restricted, courts of non-constitutional jurisdiction do not enjoy the ability to set their own budgets. In Germany this has been criticised as the reason for the static number of judges despite a considerable increase in caseload. However, the German justice system is not renowned for bad management of cases or excessive proceedings.[134] Consequently, it can be said that as long as courts are reasonably well resourced and financial considerations do not influence the outcome of cases, the inability of courts to set their own budgets is not considered to violate judicial independence.

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133 I Kaufman, 'The Essence of Judicial Independence' (1980) 80 Columbia LR 671, at 688.

134 Compare for example the number of EctHR judgements against European states for excessive lenght of proceedings at http://www.echr.coe.int/NR/rdonlyres/2B783BFF-39C9-455C-B7C7-F821056BF32A/0/Tableau_de_violations_19592010_ENG.pdf. Germany, after consideration of the number of the population, fares excellently.

Conclusion

The analysis of the institutional arrangements of the judiciaries in Sweden, Italy and Germany has revealed that the notion of judicial independence is a dynamic concept which depends on various political considerations. While there is no univocal arrangement that can be deemed to satisfy the principle of judicial independence, convergent practices in these countries indicate that there is a shared intuition of minimum standards. In particular, measures to combat easily identifiable sources of undue influence in adjudication are provided at constitutional level and in ordinary legislation. However, outside this core, divergent institutional arrangements support the thesis that the understanding of the principle of judicial independence depends on normative arguments on the proper relationship between the judiciary and the other branches of the State.

Judicial Independence in
SWEDEN

The judicial system must be free, in fact and appearance, from any undue influence that might prevent judges from adjudicating legal disputes solely on the basis of legal merits.

DESCRIPTION OF COURT STRUCTURE

Sweden operates a binary system where courts of general jurisdiction cohabit with administrative courts. Both courts are divided into first instance, appeal and supreme courts. There is no constitutional court. There are also some specialised tribunals dealing with issues such as labour, rent and patents cases.

JUDICIAL APPOINTMENT PROCEDURE

Under recent reforms, judges with permanent tenure are appointed by the Government under an open application procedure and following recommendation by a committee composed of senior judges and lawyers. Suitable candidates are ranked by the committee and a candidate is recommended to the Government. The Government is not bound by the recommendation but must choose from the list of proposed candidates. The Government must consult with the committee in the event a decision is taken not to appoint the recommended candidate.

Junior judges (without permanent tenure) are selected on the basis of an application to an advertised post by a committee composed of senior judges and employee representatives.

Even though there is a highly structured training path to becoming a judge, anyone with a legal qualification can be appointed to the office. Work experience in government and public administration is considered an advantage for appointment to judicial office.

PROTECTION FROM DIRECT UNDUE INFLUENCE

The Swedish Instrument of Government (one of the four constitutional texts) provides for the independence in adjudication of the judiciary. Judges may be removed from office only by seriously or repeatedly neglecting their duties or by committing a criminal offence, or when they reach the age of retirement. The Instrument also guarantees that only a court can confirm the removal from office of a permanent judge. The Swedish Penal Code criminalises acts and threats of violence to public officials, including judges, in the exercise of their public authority. Bribery of judges is also criminalised. The Judicial Trade Union is active in protecting the interests of the judiciary in policy making and protects judicial independence.

Disciplinary procedures against judges can be taken by the court's president (a senior judge). Appeals can be heard by the National Disciplinary Board, subject to a further appeal to the courts. The Lord Chancellor's office and the Parliamentary Ombudsman can also deal with issues of malpractices in courts.

Swedish judges do not enjoy immunity for criminal or civil liability arising out of the exercise of their official authority. Only the Parliamentary Ombudsman and the Minister of Justice can prosecute in such cases.

JUDICIAL RELATIONSHIP WITH POLITICS

Trainee and junior judges commonly hold offices in government departments throughout their career as this increases the chances of appointments to tenured positions. Lay judges, who sit with and can outvote decisions of a trained judge at first instance, are appointed by the local authorities in proportion to the political representation at the last local elections. Senior judges often act as public committees' secretaries or chairs and spend time as legal secretaries in ministerial departments. They rarely run for political campaigns.

Judges have a deferential attitude towards the legislature in interpreting legislation. They commonly make reference to preparatory works to ensure the legislative intent is respected. This is partly due to the fact that the judiciary is actively involved in the legislative process through pre-legislative review of policy proposals. Constitutional review is rarely used to strike down legislation due to the fact that there is a political obligation to consult the judiciary on the constitutionality of major policy proposals. Several independent, efficient and inexpensive bodies exist to give redress to citizens aggrieved by administrative and executive decisions. This reduces the scrutiny of politics role performed by the administrative courts.

ADMINSTRATIVE AUTONOMY

A Judicial Administration Body bears the overall responsibility for the court's management, staffing and equipment. Its advisory council is composed of judges, lawyers and politicians all appointed by the Government. It prepares reports on the efficiency of the courts and creates working groups to suggest improvements. It is accountable to the Government.

The Court President (the most senior judge in a court) conducts the daily management of the courts. She is responsible to the Administration Body for achieving performance targets set by the Ministry of Justice, usually related to load and time-scale of cases. She is responsible for the career development of junior judges and for personnel, discipline and remuneration matters.

MECHANISMS FOR ALLOCATION OF FINANCIAL RESOURCES

The Government decides the courts' budget in consultation with the Judicial Administration Body. The Parliament approves it. The Administration Body distributes the budget to the individual courts. Each Court President administers the budget for her court. The Court President is accountable to the Administration Body for proper management of the budget.

JUDICIARY AND THE PUBLIC

Public confidence in the judiciary is generally positive. The deferential attitude of the judiciary towards the political process helps to avoid confrontation with politicians which impacts positively on public confidence.

Relations with the media are not structured. Traditionally, the judiciary will abstain from responding to press enquiries. However, they occasionally write in the press and more rarely make academic contributions.

Judicial Independence in
ITALY

The judicial system must be free, in fact and appearance, from any undue influence that might prevent judges from adjudicating legal disputes solely on the basis of legal merits.

DESCRIPTION OF COURT STRUCTURE

There are three different categories of jurisdiction: the constitutional court, ordinary courts and special courts. The ordinary courts are divided into three instances, with specific appeal procedures. The default first instance courts are the *Tribunale,* of general jurisdiction, and the *Corte D'Assise* which adjudicate on serious criminal offences. However, the *Tribunale* hears appeals from the *Giudice di Pace,* an honorary first instance judge with jurisdiction over minor civil claims. Decisions of the *Tribunale* and the *Corte di Assise* are appealed to the *Corte di Appello* and the *Corte D'Assise D'Appello* respectively. The last instance court is the *Corte di Cassazione*.
The Constitutional Court deals with challenges to the constitutionality of legislation.
Special courts are the Audit and Military Courts. Administrative courts are considered special courts and their decisions can be appealed to the *Consiglio di Stato*, an administrative court under the Government.
Judges and public prosecutors both hold judicial office, although their functions are different. They are collectively called *magistrati*.

JUDICIAL APPOINTMENT PROCEDURE

The Italian Constitution provides for appointment of *magistrati* through public examinations administered by the Consiglio Superiore della Magistratura (CSM), the autonomous judicial administrative body, in conjunction with the Ministry of Justice. Generally, law graduates have to obtain a diploma from a School for Legal Professions in order to sit the public examination. Following successful completion of the exam, a further 18 months of training in judicial office is required before the CSM confirms the appointment. Law professors and lawyers of at least fifteen years standing can be appointed as Counsellors of the *Corte di Cassazione* on the basis of exceptional merit.
Promotions are automatic based on seniority and subject to appraisals every four years by the CSM of professional capacity, diligence and commitment. The system separates rank and function so that a *magistrato* of a higher rank can exercise, if willing, the functions of a lower ranking judging (e.g. judge ranked as an appeal judge exercising first instance functions).
The Constitutional Court is composed of fifteen judges; one-third of them are appointed by the President of the Republic, one-third by the two Houses of Parliament sitting in a joint session, and one-third by the highest-instance courts.

PROTECTION FROM DIRECT UNDUE INFLUENCE

The Italian Constitution provides that *magistrati* are autonomous and independent from all other powers and are subject only to the law. The Constitution also provides for the structural independence of *magistrati* by establishing that the management of the judiciary in relation to personnel, career and discipline is to be under the control of the CSM. The Constitution prohibits creation of extraordinary tribunals to determine a particular case. The Italian Criminal Code criminalises corruption of *magistrati*. The *Associazione Nazionale Magistrati* (ANM, national association of *magistrati*) is active in protecting the interests of the judiciary in policy making and protects judicial independence.
Disciplinary procedures against judges are judicial in nature and heard by the CSM. They are instituted at the initiative of the Minister of Justice and the Prosecutor General attached to the *Corte di Cassazione*. Sanctions span from formal warning to removal from office.
Magistrati do not enjoy immunity for criminal or civil liability arising out of the exercise of their official authority. However, they can never be liable for their interpretation of the law, assessment of facts and evidence.

JUDICIAL RELATIONSHIP WITH POLITICS

Relationship with the executive is particularly strained. The Berlusconi government has initiated a campaign to demolish public confidence in the *magistratura*. Ministerial criticism of members of the judiciary is very frequent. The ANM plays a fundamental role in this respect to defend the judiciary from these criticisms. Individual *magistrati*, in particular public prosecutors, sometimes reply individually through the media.
There is a record of public prosecutors to resign from their role in order to pursue significant political positions following popularity gained from extensive media exposure of some of their investigations. Magistrati are banned from being members of political parties or engaging in political activities if this will compromise the exercise of their functions or spoil their public image.
The Berlusconi government has initiated a reform of the *Magistratura* which is going through the legislative process. If approved, the reform will completely separate judges from public prosecutors. Only the independence of the earlier will be constitutionally guaranteed. Their career paths will also be distinct. The CSM will be divided in three branches: one to administer judges, the other to administer public prosecutors, the third to deal with disciplinary procedures of both.

ADMINSTRATIVE AUTONOMY

The Constitution establishes the CSM as the organ responsible for recruitment, allocation, transfer, promotion, and disciplinary measures in respect of *magistrati*. Its membership must include the President of the Republic, as chair, and the President and Prosecutor General of the *Corte di Cassazione*. Other members are elected. Two-thirds must be elected by all *magistrati*, whilst one-third must be elected by the two Houses of Parliament in joint session from out of a shortlist of university professors and lawyers with at least fifteen years of professional seniority. Current members are 27.
The CSM is empowered to issue quasi-legislative instruments concerning internal and administrative/accounting regulations; regulations on the training of trainee *magistrati*; resolutions and instructions addressing the implementation of legislation related to the judicial system.
The CSM is assisted by local Judicial Councils who make non-binding recommendations mainly on career progression of *magistrati* and appointment of *giudici di pace*. Heads of courts, who are always *magistrati*, are appointed by the CSM, with agreement of the Minister of Justice, to be in charge of the daily management of the court.

MECHANISMS FOR ALLOCATION OF FINANCIAL RESOURCES

The Ministry of Justice and the Treasury decide and prepare the courts' budget on approval by Parliament. The Ministry then allocates and manages the budget among the individual courts. The Constitutional Court prepares its own budget subject to Parliamentary approval.

JUDICIARY AND THE PUBLIC

The campaign run by Berlusconi against the judiciary seriously undermines public confidence in the judiciary.

Judicial Independence in GERMANY

The judicial system must be free, in fact and appearance, from any undue influence that might prevent judges from adjudicating legal disputes solely on the basis of legal merits.

DESCRIPTION OF COURT STRUCTURE

There are five categories of jurisdiction: ordinary, administrative, financial, labour and social. The judicial system generally has three levels, two at state level and final instance at federal level. The courts of financial jurisdiction are the exception as there are only first instance courts at state level and an appeal court at federal level. There are also constitutional courts for each state. The Federal Constitutional Court ensures that both state and federal laws are in compliance with the Basic Law.

JUDICIAL APPOINTMENT PROCEDURE

State judges are appointed by the state ministry of justice after passing a state examination. Access to this exam is open to law graduates that have successfully passed a first state examination and completed a traineeship period of two years. In some states appointments are assisted by a committee only in part composed of judges. A council of judges is called to give a non-binding opinion on the qualifications of the candidates. Promotions to appellate state courts are decided by the state ministry following scrutiny of the candidates by a council of judges internal to the courts.

Judges of the supreme federal courts are chosen jointly by the Federal Minister of Justice and a committee consisting of state ministers and an equal number of members elected by the Lower House of the legislature. Political screening of the candidates is an integral part of the process.

One half of the twelve judges of the Federal Constitutional Court are chosen by the Lower House of the legislature, the other half by the Upper House. The Upper House has delegated its constitutional duty to a judicial selection committee composed of 12 members whose political composition reflects that of the House. Party-politics plays an essential role in the selection of the judges of the Court.

PROTECTION FROM DIRECT UNDUE INFLUENCE

The independence of the judiciary from undue influence is guaranteed by the Basic Law, federal and state legislation (including state constitutional la and by several decisions of the courts. The Basic Law establishes that judges must be independent and subject only to the law. Their jurisdiction, tenu and remuneration are secured by the Basic Law. The German Criminal Code criminalises bribery, acts and threats of violence towards judges.

These measures are tamed by various forms of judicial accountability: internal supervision; disciplinary procedures; impeachment procedures; crimina and civil liability. The courts have intervened to limit these measures in their application in order to promote judicial independence.

There are various councils of judges at state, federal and central level to promote the interests of the judiciary and defend judicial independence when necessary.

JUDICIAL RELATIONSHIP WITH POLITICS

German judges are politically active. They are members of political parties, they are allowed to engage in political activities and publicly express their political opinions. They are given the opportunity of running for political posts in parliament and the executive but cannot exercise these together with their judicial functions.

The judiciary, especially the Constitutional Court, is extremely influential in German policy making. Judicial and constitutional review ensures that acts of the executive and legislative proposals abide by a substantive notion of the rule of law and the provisions of the Basic Law. Constitutional review constrains the ability of the legislature to exercise its function indiscriminately and provides occasion for the Constitutional Court to suggest ways in which public policy is to be developed. The extensive political power of the courts is legitimised by the extensive input the political process has in the selection of the judiciary.

ADMINSTRATIVE AUTONOMY

The administration of German courts is divided between political authorities and judges. The ministry of justice, both at state and federal level, is responsible for the court buildings, equipment and support staff. The management of the caseload of the courts is instead carried out by the each court praesidium composed of the court president and a panel of elected judges. The praesidium takes into account an annual target set by the state and federal government in allocating the court's caseload.

MECHANISMS FOR ALLOCATION OF FINANCIAL RESOURCES

The political authorities control the allocation of the courts' budget, with the exception of the budget of the Constitutional Court. The annual budget estimate is, both at state and federal level, prepared by the relevant ministry. It is then discussed and approved by the cabinet and then sent for final approval to parliament.

The Constitutional Court prepares its own budget which is then approved by the cabinet and adopted by the parliament.

JUDICIARY AND THE PUBLIC

Public confidence in the German judiciary is generally positive. German judges have a limited presence in the media so they do not play an active role in developing confidence in the legal system.