



Strasbourg, 22 October 2019

**CDL-JU (2019)0012**  
English only

**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**  
**(VENICE COMMISSION)**

**18th meeting of the Joint Council  
on Constitutional Justice**

**Mini-Conference on**

**“INDEPENDENCE OF THE JUDICIARY,  
THE ROLE OF CONSTITUTIONAL COURTS”**

**Rome, Italy**

**24 May 2019**

**Case law of the Italian Constitutional Court**

**REPORT BY**

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To begin with, just two words about the meaning of the *Independence of the Judiciary*.

First of all, we can conceive of to the principle of independence regarding the judiciary as a whole.

In this sense, the Independence of the Judiciary is a guarantee of the autonomy of judges, and of the judicial system as well: a protection against interferences from other branches of Government. That is, independence from the Legislative and the Executive.

This is independence from undue and external pressure.

And we heard yesterday from Vice President Marta Cartabia the teachings of Montesquieu, that

*«There is no liberty, if the judiciary power be not separated from the legislative and executive»*

(C.L. de Montesquieu, *The Spirit of Laws*).

From a second point of view, we can consider the independence of every single judge, as a deontological way to follow his activity.

In this meaning, we refer in particular to the relations between judges, within the judicial system.

As written by Marta Cartabia

*«After the end of the Fascist regime, the main concern was to protect the Judiciary from any undue influence of the political branches [...] This independence was the key principle of the constitutional design concerning the Judiciary»*

(CARTABIA, *Italian Constitutional Justice in Global Context*, 156).

The Italian Constitution establishes (Art. 104) that:

*«The Judiciary is a branch that is autonomous and independent of all other powers»*

and that

*«Judges are subject only to the law».*

We also know that independence is strictly linked to impartiality. Indeed, some undue influence could

*«undermine the fair and impartial administration of justice»* (CARTABIA e altri, op.cit., 156)

and that

*«The lack of independence can degenerate in the absence of impartiality»*

(these are the words that I found in an old decision of the Italian Constitutional Court: Judgment no. 30/1967)

And we remember as well that the principle of impartiality must be considered in the light of due process: we have a rich constitutional jurisprudence on the rules that regulate the causes of incompatibility of the judges, especially in the field of criminal law (Art. 34 c.p.p.: *ex pluribus*, no. 177/1996; no. 183/2013).

A judge, in order to respect due process, must be independent of the Executive and Legislative powers and impartial.

Let us see how the Italian Constitutional Court highlights these different aspects I have told you about before:

*«Under the terms of the Constitution (Articles 101(2) and 104(1) of the Constitution), magistrates must be impartial and independent and these values must be protected not only with specific reference to the concrete exercise of their judicial functions, but also as a rule of professional conduct to be observed for all conduct in order to prevent the emergence of any well-founded questions as to their independence and impartiality» (Corte cost. 224/2009).*

I would now like to tell you, in a few words, the role played by the Italian Constitutional Court on this issue, starting from Judgment no. 224/2009.

Before I discuss this Judgment, I should explain that the Constitutional Court, in Italy, is a fully autonomous constitutional body, within a self-regulating structure, separate from the Judiciary, *id est* from the ordinary and administrative courts.

Therefore, in this case (Judgment no. 224/2009) the Italian Constitutional Court considered a provision of law which imposed a disciplinary penalty on a magistrate became a member of in a political party as president of its provincial federation, on the grounds that it violated the equality of political rights and the judge's right of association.

In particular, in the opinion of the Disciplinary Section of the Supreme Council of the Judiciary, which raised the question of constitutionality before the Italian Constitutional Court with reference to several Articles (2, 3, 18, 49 and 98) of the Constitution, the formal and absolute prohibition on magistrates joining political parties, reinforced by a sanction for its violation, went beyond the legal notion of a mere limitation, namely a regulation which reconciles the political right of the individual with the requirement of impartiality of the judge, including the need to appear impartial.

Moreover, for the Supreme Council of the Judiciary the contested provision was in conflict with the constitutional principle of the equality of political rights, starting from the right of association conferred on all citizens (Article 2 of the Constitution).

The Court ruled the question groundless.

First of all, the Italian Constitutional Court clearly affirmed that

*«It must be recognised – and there can be no doubts on this matter – that magistrates must enjoy the same freedoms guaranteed to all other citizens and that they may therefore, obviously, not only share a political idea, but also expressly manifest their own opinions in that regard».*

But after saying that, the Court clarified that

*«it must at the same time be accepted that the functions exercised and the role occupied by magistrates are not indifferent and without effects for the constitutional order».*

This is why in the Constitution we find some specific rules for magistrates, contained in Title IV of Part II (Articles 101 *et seq*): these arrangements, on the one hand, assure a special position, whilst, on the other hand, as a corollary entail the imposition of special duties.

This intends to introduce a weighing of interest between the freedom to associate oneself within a party, protected by Article 49 of the Constitution, and the requirement to guarantee the impartiality of magistrates and also the appearance of independence from the interests of the

parties which contend for power. In this sense, Article 98(3) of the Constitution delegates to ordinary legislation to establish

*«limits on the right of magistrates to join political parties»*

(as well as for other categories of public officials, such as career soldiers in active service, police officers and agents, diplomatic and consular representatives abroad).

Thus, the Italian Constitution makes it possible to introduce, through ordinary legislation, in order to protect and safeguard the impartiality and independence of the judiciary, a prohibition on joining political parties for magistrates. The purpose of this is, therefore, to reinforce the guarantee that they are subject only to the Constitution and the law and in order to prevent the exercise of their functions from being overshadowed by the fact that they are associated with a party structure, which also entails internal hierarchical constraints.

In the case law we are looking at, the contested provision has implemented the constitutional provision, stipulating that not only the fact of being a member, but also “the systematic and ongoing participation in political parties” amounts to a breach of the disciplinary code: therefore, alongside the formal fact of membership, the systematic alignment with one of the political parties in the struggle for power is of significance and is also precluded for magistrates since, as is the case for membership, it is also liable to affect the independent and impartial exercise of their functions and to compromise their image.

This is the reason why the Court found that

*«there has been no violation of the constitutional principles invoked by the referring court because, under the constitutional architecture, the independence of the judiciary from political parties and their methods is a value of particular significance and seeks to safeguard the independent and impartial exercise of the judge's functions, since the citizen must be reassured as to the fact that the activity of magistrates, whether as judges or public prosecutors, is not guided by the desire to favor one particular political party».*

In other words, according to the opinion of the Court, the requirement for the judiciary to be, and to appear, impartial is sufficiently significant to justify a restriction on the judge's political rights:

*«the introduction of the prohibition is the corollary of a duty of impartiality which applies to the magistrate, extending also to his conduct as an ordinary member of the public, at all times of his working life».*

Nine years after Judgment no. 224/2009, the Italian Constitutional Court has decided on a similar question: Judgment no. 170/2018.

In this case, the Court considered a referral order from the Disciplinary Section of the Supreme Council of the Judiciary, which questioned the constitutionality of a legislative provision making it a disciplinary offence for magistrates (even those not listed among the judicial staff) to enroll in political parties, or participate in their activities in an “ongoing and systematic” way.

The referring court also observed that freedom of political association, which is guaranteed to every citizen under Article 49 of the Constitution, is an expression of the broader freedom of association under Article 18 of the Constitution and, together with the freedoms enshrined in Article 2 of the Constitution, constitutes an essential pillar of the democratic system. Therefore, in balancing it with the need to ensure the independence of the judiciary, it may be limited, but not completely eliminated, in particular in cases where the judge has been placed on leave for election purposes.

Even in this case, the Italian Constitutional Court declared the questions unfounded.

The Court affirmed again, as a general matter, that

*«magistrates must enjoy the same rights and freedoms assured to all other citizens»*

but, at the same time, has specified that

*«the roles and positions taken on by magistrates are neither neutral nor devoid of effects for the constitutional system, in establishing limits to curtail the exercise of these rights».*

For the Court,

*«These limits are justified both by the particular quality and sensitive nature of the judicial role, and by the constitutional principles of independence and impartiality that define it (Articles 101(2), 104(2), and 108(2) of the Constitution».*

Moreover, the Italian Constitutional Court highlights that these constitutional principles

*«are to be protected not only with regard specifically to the exercise of judicial functions, but also as the criteria which define the deontological rules to which all publicly relevant acts must conform, so that citizens have no reason to doubt the independence and impartiality of their magistrates».*

The legislator has weighed the freedom to affiliate with political parties against the need to ensure the independence of magistrates and this should have, for the Court, a precise objective:

*«that of preventing the kind of influence on judicial activity that could result when magistrates form solid ties with a party or participate significantly in its activity. This is the purpose underlying the power to establish limitations, by law, on the right of magistrates to join political parties».*

With this decision, the Italian Court very clearly said that the Constitution

*«demonstrates its disapproval of activities or behavior likely to create stable bonds between magistrates and political actors, which are visible to the public eye, and which, therefore, compromise not only independence and impartiality, but even the appearance of the same. That is, they compromise the substance and the appearance of principles that form the basis of the trust the judiciary must enjoy in a democratic society».*

But how can the weighing of this freedom and ensuring independence be balanced in this sensitive case?

The question brought before the Court was whether the specific disciplinary offence, which punishes enrollment, or systematic and ongoing participation in political parties, also apply to magistrates who, in the exercise of their right to stand for election, remove themselves from the staff lists of the magistracy in order to take a leave of absence “for election purposes.”

In its reasoning, the Court said that

*«for magistrates, enrollment or systematic and ongoing participation in the activities of a political party, which is forbidden by the disciplinary offense, is one thing; having access to elected positions and public political office is another, and the law in force allows for this under certain conditions [...]. It is not unreasonable [...] to draw a distinction between these*

*two scenarios, considering the latter to be not only permissible, but the exercise of a fundamental right, while at the same time judging the former to be a disciplinary infraction. Particularly in a regulatory context that allows magistrates to return to their judicial role in the event they lose the election or when their time in office or political assignment is over, the meaning of the principles of independence and impartiality must be preserved, as well as their appearance, as necessary characteristics of the figure of the magistrate, in every aspect of his or her public life. The prohibition in question provides a staunch defense of these principles, and thus must be applied to each and every magistrate, regardless of his or her position».*

In this case, the task of weighing different constitutional interests is particularly difficult.

Indeed, the political representation is, in principle, representation through the political parties, which, under Article 49 of the Constitution, are the associations that allow citizens to contribute to setting national policies following the democratic method, including by means of participation in elections. The Italian Constitutional Court is well aware of this fact and knows that no citizen, not even a citizen-magistrate, runs for office “alone”:

*«Therefore, just like running in political, administrative, or European elections, taking on duties in executive bodies at various levels necessarily presupposes a link between the nominee and the political parties».*

I know it may be difficult to understand this decision. Perhaps the Italian Court had to find a compromise among different opinions (we do not have the dissenting opinion). But, I believe that this judgment must be read in his statement of principle, for which in our legal order there is a

*«disapproval of activities or behavior likely to create stable bonds between magistrates and political actors, which are visible to the public eye, and which, therefore, compromise not only independence and impartiality, but even the appearance of the same. That is, they compromise the substance and the appearance of principles that form the basis of the trust the judiciary must enjoy in a democratic society».*

We can find here an implicit reference to the jurisprudence of the European Court of Human Rights:

*«even appearances may be of some importance. What is at stake is the confidence that the courts in a democratic society must inspire in the public» (ECHR, San Leonard Band Club v. Malta Judgment, 29 July 2004, § 60).*

It seems to me that this is the same position as that of the Venice Commission, in the conclusion of the *Report on the Freedom of Expression of Judges* (June 2015). In its final part, the Report affirms that

*«the specificity of the duties and responsibilities which are incumbent to judges and the need to ensure impartiality and independence of the judiciary are considered as legitimate aims in order to impose specific restriction on the freedom of expression, association and assembly of judges including their political activities» (Report cit., p. 19).*

On the merit, declaring the questions of constitutionality of the law unfounded, the Italian Court refers to the prudence of the trial judge, saying at the end that

*«falls to the disciplinary court to determine, through a careful evaluation of the concrete case, whether the conduct of the magistrate taking a leave of absence may legitimately include involvement in party activities, or if this amounts to a disciplinary infraction, therefore incurring appropriate sanctions».*

Finally, the Court acknowledged that the magistrates' fundamental right under the Constitution to political association and to associate more broadly – is a right that may be limited but not eliminated. But the Court held that the question was unfounded, holding that the legislature had carried out a reasonable weighing of the fundamental rights of magistrates against the important value of ensuring the independence and impartiality (and even the appearance thereof) of the magistracy. The Court saw no unreasonable inconsistency between the legislator's choice to make enrollment in political parties, and systematic and ongoing participation in their activities, punishable offences, while simultaneously permitting magistrates to stand for election and accept political appointments, since enrollment and consistent participation in the activities of a party may be legitimate indicators of an alliance with a given party sufficient to raise doubts as to the impartiality of a magistrate.

One must also consider that the independence of the judiciary and of the judges means independence from all forms of economic power.

In this sense, the aforementioned Judgment no. 224/2009 stated that judges must be protected by the law of Parliament, avoiding

*«the conditioning, including the appearance of conditioning, resulting from the involvement in the activities of subjects operating in the business or financial sector».*

This issue is closely connected with another aspect of the independence of the judiciary, their remuneration, for which I recall the Judgment no. 223/2012 of the Italian Constitutional Court.

In this judgment, the Court said that

*«when ruling on questions relating to provisions on remuneration and rules governing pay increases for magistrates, also and above all with reference to the economic and financial measures that have delayed or otherwise regulated the operation of pay increases over time, this Court has held in general that the independence of the judiciary is also achieved through "the provision of guarantees relating to the status of the members of its various bodies regarding, inter alia, not only career progression but also financial remuneration" (see judgment no. 1 of 1978)».*

In Italy, an automatic adjustment system is applied to judges so as to guarantee a regular pay increase, which is assured by law.

This mechanism constitutes an "inherent element of the structure of magistrates' pay", the *ratio* of which consists in the implementation of

*«constitutional principle of the independence of the judiciary, which must be safeguarded also in financial terms (...) by avoiding inter alia their being required to make regular claims against other branches of state».*

The Italian Constitutional Court stated that this mechanism of salary increases

*«operates in such a manner as to avoid arbitrary interference of one branch of state with another. It should also be added that these principles are also supported by the travaux préparatoires of the Constituent Assembly, which indicate that the absence of a specific indication of the financial independence of the judiciary did not entail the exclusion of that aspect from the overall conditions necessary in order to give effect to its autonomy and independence [...]*

*Besides, the specific nature of that legislation is also a consequence of the fact that, within the organisation of a constitutional state, the judiciary performs a function that is vested in it directly under the Constitution. For this reason, in adopting a mechanism providing for automatic increases in magistrates' pay, on the basis of these constitutional principles the law safeguarded the autonomy and independence of the judiciary from any form of interference that could, albeit potentially, impair that function through a requirement for contractual negotiations. Under that constitutional arrangement therefore, the relationship between the state and the judiciary, as an autonomous and independent branch, goes beyond that of a mere employment relationship under which the contracting party-employer can at the same time be a party to and regulate that relationship».*

After all, one of the Founders of the United States of America, Alexander Hamilton, in 1788 wrote that

*«next to the permanency in office, nothing can contribute more to the independence of the judges than a fixed provision for their support» (HAMILTON, *The Federalist Paper*, no. 79).*

And this is the aim of Judgment no. 223/2012, which found unconstitutional a provision of the law that blocked the mechanism for automatic increases in magistrates' salaries.

To conclude: the Italian Constitutional Court plays an important and sensitive role, in effectively implementing the Constitution.

The Constitutional Court is the ultimate supervisor and the guarantor of the institutional framework, ensuring that constitutional rules and principles are respected by all: *«the Constitutional Court in Italy is in this way not only the “judge of the laws” but also the “judge of the powers» (CARTABIA, 159).*

It is a specific task of the Italian Constitutional Court to guarantee the independence of the judiciary, evaluating the conformity of the laws with the Constitution and striking a fair balance between different constitutional values, taking into account the principles of independence and impartiality of the judiciary and the judges.

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