

Giovanni Salvi, intervenendo al FRANKFURT SYMPOSIUM nel novembre del 2008, commentava la situazione dell'indipendenza dei giudici. Dall'intervento emerge che il sistema di valutazione italiano non è conforme al modello richiesto o condiviso dagli altri paesi; esso infatti è strettamente collegato al modello adottato in Italia secondo cui i magistrati sono dipendenti pubblici che costituiscono un corpo separato; vengono assunti dopo un concorso pubblico e la progressione della loro carriera dipende da valutazioni scritte.

LEGGI DI SEGUITO LA RELAZIONE DI GIOVANNI SALVI PER IL FRANKFURT SYMPOSIUM DEL 7/8 NOVEMBER 2008 ***(e aderisci al rinnovato social network*** ***www.concorrenzaeavvocatura.ning.com***

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THE PROFESSIONAL ASSESSMENT

Giovanni Salvi

The foremost, indispensable bastion in defense of the autonomy and independence of magistrates is sound professional skills1.

The first step towards ensuring high levels of professionalism is the selection process. This, however, is strongly influenced by supply and demand which is itself dependant on factors entirely beyond the CSM's control (like remuneration in comparison with similar jobs, or the community's perception of the prestige attached to the office, and so on).

In Italy we also have to consider the strong bias in favour of permanent public sector employment, seen as the typical resource of graduates from the southern regions of the country.

Currently, admission is by public examination, partly by second degree qualification (former legal experience or an appropriate Masters) and partly by preliminary selection. The public exam consists of oral and written components. After a two-year training period, candidates are given their first assessment and assigned specific jurisdictional functions. Career promotion depends upon periodic assessments, which are the responsibility of the CSM, and carried out on the basis of information provided by heads of office and by District Councils for Judiciary.

These assessments "of professionalism" are one of the thorns in the side of the Italian judiciary. There is no doubt that the practice also involves a system of checks and balances, designed to prevent what is ostensibly professional career assessment from becoming a means of effectively censuring the content of the magistrate's rulings and his ideological bearings.

That said, the point needs making very clearly that, for many years, safeguarding the autonomy and independence of the judiciary has ended up by justifying automatic promotion and assessments which are repetitive and vacuous.

All too often, the magistrates' associations have failed to pay more than lip service to the notion

that professional assessment is a matter of real interest to the judiciary, designed not only to provide a better service to the community, but to guarantee the effective independence of the magistracy.
The CSM, in turn, reacted too late, tolerating inquiries (i.e. reports) couched in the most general terms and devoid of any specific reference to the professional career of any given magistrate. We were living in an improbable world where everyone was “excellent” and complimented (in a stilema) on their “gentlemanlike behaviour”.
On the other hand, political measures have also proved disappointing. The threat of professional inspections has been used as a stick to keep the judiciary within acceptable bounds, rather than attempting to grapple seriously with the numerous problems which arise in assessing the way in which a constitutionally protected function is carried out.
The 2006 Judiciary Statutory Law Reform Acts tackled the question in terms which were wholly inadequate, envisaging what amounted to a return to the system of internal examinations which had proved so unsatisfactory during the 50s and 60s that urgent corrective measures were necessary.
To arrive at a thorough understanding of the delicate balance of different interests, all of them of considerable constitutional importance, it is essential to consider the inseparable connection between professional assessments and the magistrate’s career.
In the beginning of 1970s, two changes were made to the magistrates’ career structure which turned out to be highly significant.
On the one hand, the link was abolished between rank (and relative remuneration) and effectively carrying out the duties which correspond to it. So, even a magistrate who had spent his entire professional career in the lower courts would nonetheless have reached the highest rank of “magistrate eligible to exercise high executive office”, (and corresponding salary).
At the same time, the ban on official regression was lifted. This meant that a magistrate from the higher courts (even the Court of Cassation), and who had effectively performed the duties, could, on application, go back to lower court work.
These two reforms aimed at something extraordinarily important from a constitutional point of view. They were designed to implement the constitutional provision according to which magistrates can be distinguished from each other solely on the basis of the functions exercised (art. 107 Cost), in keeping with the constitutional notion of jurisdiction as a diffused power, i.e. a power permeating the magistracy and not one merely delegated from above (potere diffuso).
This was the means by which it was intended to achieve the even more ambitious goal of making magistrates effectively autonomous and independent, even within the judicial body. All this would help to ensure that they judged without being preoccupied by considerations that their career prospects might be affected either by undesirable repercussions or by advantages, thus being free from fears or expectations.
These innovations went hand in hand with the abolition of internal examinations, which had allowed office executives to exert a tight control on subordinate magistrates.
Another factor driving the 1970s reform programme was the public’s growing discontent with the way the Judiciary seemed to find itself instinctively in harmony with prevailing political trends. The Judiciary was suspected of concealing reactionary and entirely politicized positions beneath a guise of neutrality, and proving generally incapable of satisfying the ever-varied demand for justice in a society which was complex, dynamic and, finally, “open”.
Thus it was that the CSM took firm hold of all aspects of the internal workings of the judiciary, as provided for by the Constitution.

This resulted in a substantial increase in the independence of the judiciary, demonstrable not only in the criminal sector (through the enforcement of penal law in areas hitherto immune) but also in the civil sector. Here the judiciary was assigned an increasingly important role in safeguarding rights in areas which had previously been neglected (including labour, the environment, and the individual).
In turn, the judiciary's expanded role led to its being drawn into frequent disputes with the political system.
The commitment of the judiciary in dealing firstly with terrorism and organized crime and, later, with widespread corruption marked a watershed, since when it can be said that the Italian institutional system is still seeking a lasting balance between the powers of the State.
These achievements cannot be diminished by the overall inefficiency of the system, with its unacceptable time scales. It would simply take too long to address these issues here. What is certain is that the judiciary as a body is only minimally responsible for such dysfunction.
It is enough to imagine a system of impugnment, devoid of all logic, which ends up by generating such a vast quantity of Supreme Court appeals as to be completely unmanageable (2007: 32278 in the civil and 43732 in the penal field). As a matter of fact, five judges and one Assistant Attorney General are obliged to deal either with civil disputes of no general interest whatever, and worth no more than a handful of euros, or with opportunistic penal claims aimed at profiting from the lapse of time.

However, there is no doubt that for a long time professional assessments have risked degenerating into a tired ritual. The great principles underlying the reforms of the 1970s are in danger of getting bogged down in the mud of corporatism.

The system of assessment which we know in Italy certainly does not conform to a model which is either necessary or shared by other countries. In fact, it is strictly linked to the model of judiciary which we have adopted in Italy, in which magistrates are civil servants who form a separate body; they are recruited through public examination, are familiar with traditional forms of career advancement and are promoted by means of periodic, specific kinds of assessment.
The machinery of assessment is deliberately designed and calibrated in such a way as to accompany the magistrate in the course of his career and verify that he or she is worthy of promotion. It is based essentially on documentary evidence such as written reports; it focuses on the logic of safeguarding the magistrate (from errors, abuse, external pressures); it is administered by the judicial body itself and, as a further guarantee, it is liable to administrative jurisdiction.
So, it is a model which grew out of the French experience (albeit with numerous differences) and differs fundamentally from the one adopted by common law countries and – here, too, with substantial differences – from the countries of northern Europe, not least as regards the means and ends of assessment.

We can, in some sense, say that the continental model assumes that improvement made by individual magistrates enhances the proficiency of the judiciary as a whole and, therefore, raises the standard of the service rendered. The other model, which basically “trusts” its own judges, invests in the organization and quality of its offices. That does not mean that these countries do not have ways of assessing individual magistrates, but they are indirect ways, part of the job of monitoring and coordinating carried on by office heads with a view to ensuring the smooth working of the offices themselves. Likewise, it would be a mistake to imagine that continental countries entirely disregard ways of assessing the performance of their judicial system, but the task is normally entrusted to structures which are not the same as those responsible for assessing magistrates. Most important of all, the two processes of measuring and evaluating are wholly independent of one another, as regards both aim and method.

The CSM found itself having to operate in the very specific institutional context described in the report on the constitutional role of the CSM and its relations with the Minister of Justice, who is responsible for the organization of the justice services. It therefore reacted to the failure of the assessment system in two ways:

Firstly, it undertook to collaborate with the Ministry of Justice on statistical matters, thus paving the way for an integrated system of indicators to be used in the task of assessing and comparing the efficiency of different offices of the judiciary. Medium standards are provided in order to allow a comparative statistic evaluation of the magistrate’s work (CSM’s Ruling n. 20691/07). Such standards are now under trial in different regions.

At the same time, it grafted a new stem onto an old plant. Alongside the traditional approach to assessment procedures, it introduced a very delicate practice, not to be found in the continental or northern European systems: assessment was also to include the analysis of a sample of the magistrate’s measures. It is immediately apparent that this represents an extremely delicate step and one which would not be comprehensible in judicial systems which had not experienced the long and troubled evolution of the Italian one. The idea that you can examine judges’ measures would certainly be unacceptable to the judiciaries of countries like France, Finland, Denmark, Portugal, and so on. They would detect a system for controlling the decisions and their content and a possible, inadmissible means of compromising the autonomy of the judge. In such circles, it is no easy task to gain recognition for the fact that the examination of measures need not necessarily touch on the content of the decision and that, thanks to control being invested solely in the CSM, it is possible to prevent the assessment from becoming a means of prejudicing the freedom and independence of the magistrate.

The main direction of the CSM’s reform initiatives has focused on the quality of the material to

be used for professional assessment.
The information made available through the autonomous government circuit is therefore also important in the statistics sector. It was therefore necessary to intervene to ensure that the information deriving from the autonomous government circuits was more cogent and convincing (Circular 16103 of 30 July 2003).

The key point is the provision of a standard, homogeneous grid for compiling the opinions of the judicial council and those, consequently, of the office executive.
What is really new about the introduction of the grid for drawing up assessments is firstly that it requires the inclusion of facts (rather than generalized, stereotyped opinions) and secondly it aims to standardize the appraisals of the different judicial councils.

Then, the introduction of the personal report was intended as an opportunity for self-evaluation, designed to make the magistrate under assessment more responsible for his own performance. The personal report is one of the key components in enabling the judicial councils to form an opinion. It also supplies factual details for each of the assessment criteria.

Recourse to samples of the magistrate’s measures for assessment purposes is also highly innovative.

There is no doubt that assessing the professionalism of a serving magistrate involves a risk to his independence within the judiciary. The more detailed the assessment is, the greater the risk that it will overstep the limit by subjecting his activities to value judgements. It is impossible to eliminate this tension between professional assessment and magisterial independence, but it is essential to remain aware of it so that his performance is not conditioned by influences, however indirect.

The defining criterion for ensuring that professional assessment does not turn into jurisdictional interference is expressed through the limits placed on that assessment: it is to be restricted, “to solely technical and professional aspects regarding the expounding of the questions and the argument in support of the decision taken, to the exclusion of any judgement whatsoever as to the merit of the decision itself.”

A further risk attached to the generalized introduction of the sample is that it may produce a

certain conformity. This could result from pressure to draw up “perfect” measures, such as can be “usefully” extracted or exhibited within the sample. However, the “perfection” of the measure is evaluated not in itself (and not therefore dependant on the wealth of references to doctrine and jurisprudence), but with exclusive reference to the aim of the decision vis-à-vis the typical parameters set up in accordance with norms concerning structure and motivation: i.e. serial acts should correspond to serial questions.

One particularly serious problem in the past was the regulation scheduling assessments at very long intervals. For example, the assessment following the one for becoming a lower court magistrate was time-tabled for ten years later, during which period no other assessment was allowed to take place. The normative provisions excluded any other solution. As a result, a whole series of measures became necessary to compensate for such legislative inertia, measures which have at least made it possible to continue gathering data on which to base the assessments.

The 2005-2006 reform of the judiciary has radically altered the frame of reference (finally requiring assessments at closer intervals) to one in which qualifications are no longer linked to career advancement2. Furthermore, the fixed terms for executive appointments (4 years, renewable only once) has at last made it possible to carry out a continuous assessment of the executive’s professionalism, including his aptitude for appraising the magistrates attached to his office.

If this combination of procedures bears fruit, as expected, it will eliminate those negative aspects of the previous system which have been highlighted. The open-role system has proved extremely successful in enhancing the internal autonomy of the magistrates and – as a result – ensuring that the judiciary is really (and not just nominally) a “diffused power”. At the same time, though, it has been guilty of major shortcomings in providing appropriate means of assessing merit (i.e. that range of professional endowments which qualify a magistrate for the duties he performs).

Consequently, the CSM has adapted the assessment system, described above, to comply with the new provisions3, without, however, altering its basic orientation. As has already been made clear, the CSM had compensated for the inertia of the law-making body by working hard to supply a set of secondary norms4. The law-making body also took over the system, devised by the CSM and described above, of using “objective indicators” in conducting assessments.

It should be stressed, however, that under the new dispensation, greater importance is given to the information provided by the lawyers' representatives who now sit on the judicial councils.

A major innovation as regards past practices is the outcome of the four-yearly assessments. As provided for under the terms of art. 11, law no. 111/2007, the assessment procedure can end with the CSM making one of three possible pronouncements:
a) Positive result. The result is positive when the assessment is positive in relation to all the parameters examined. In this case, the magistrate receives the award of professionalism, with consequent salary increase and authorization to proceed to other duties.
b) Not positive result: in the event of shortcomings being discovered. In this case, the CSM carries out another assessment after a year and solicits a fresh appraisal from the judicial council.
c) Negative result: in the event of serious failings. In this case the outcome may range from compulsory retraining, to exclusion from certain duties or executive positions, through to dismissal from the service. Dismissal is possible after a further two-year trial period followed by a second negative assessment.

The entire proceeding is obviously carried out adversially with the magistrate who is entitled to the relevant procedural guarantees.

Executives, too, are subject to assessment by the autonomous government circuit. Executive assessment can constitute an interesting test in two areas: firstly of his "amphibious" nature (at once acting magistrate and office head, responsible for ensuring efficiency, but with a particular stress on judicial autonomy and independence); secondly, of the intrinsic difficulty of assessing the jurisdictional "output", so to speak.
So, an absolutely vital factor in assessing an executive is his ability to respond to these complex requirements, starting with the need for an efficiently organized programme for the office, based on the active involvement of the resident magistrates, and capable of offering the necessary internal guarantees.
In the past, executive assessment was rendered especially difficult, not to say pointless, by the fact that he enjoyed guarantees which prevented his removal. The upshot was that his performance only ever came under scrutiny in really exceptional cases in which he was liable to be removed from office or face disciplinary proceedings (see below)
The law-making body finally intervened in 2006, decreeing that executive posts were temporary appointments, thus making it possible to carry out real assessments, not just in exceptional cases, but during the ordinary running of the offices and the ordinary turnover of staff.
It has been a ground-breaking development and the repercussions have yet to be fully felt. They will also affect the role of the CSM: the fact that the executives' performance will be assessed against specific objectives will tend to make the Tabelle increasingly important: that, in turn, will lend even greater weight to the "political-institutional" assessment, and hence to the

decision-making procedures of the CSM.
In my view, there is also likely to be a knock-on effect as regards the CSM's legitimacy and the importance of the judicial councils: it's difficult to imagine that they won't have to open up to local institutions, at least when it comes to drawing up the office programme and assessing the extent to which it has been carried out.

The CSM deserves to be credited with an extraordinary show of efficiency, one that may even have exceeded expectations. In the space of a few months, it has managed to implement the first part of the reform: the simultaneous replacement of over 250 executives whose maximum term of office had expired. Most importantly, this was achieved by means of resolutions which were predominantly unanimous.

The undoubted progress which the assessment system is achieving is, as we have seen, anything but consolidated. Added to the Justice Ministry's delays (or rather, to the crisis affecting its projects and means), there are the shortcomings associated with the system of self-government. The cultural growth which the judiciary has experienced has not yet produced a heritage of shared ideas and values on which to found a system of assessment which can count on a similar bedrock of agreement and support. Corporate defensiveness is still strong and frequently comes to the fore whenever the judicial councils and the CSM are called to take decisions involving individual magistrates. In addition magistrates tend to view the assessment process with widespread apprehension.

That said, there is now a general awareness that balancing the different constitutional interests involved in the assessment system is vital both for the independence of the judiciary and for its credibility. Never forgetting that the assessment of magistrates (even while ensuring that their guarantees are respected) must be a means of safeguarding the quality of the service and the rightful expectations of the citizens, who are entitled to judges who are well-equipped professionally and, not least for that reason, truly independent.

This awareness led, over the years, to the growth of an important area of activity in the CSM: professional training. Until the frequently-cited reform, training was the responsibility of the CSM.

The CSM opted for training on a voluntary basis with no final assessment. However, enrolment on training courses was considered extremely important for the purpose of professional assessment, generating objective data from which to deduce specific commitments and areas

of interest (following courses of study; publications, and so on).
The training programmes were run both centrally (by a special CSM committee) and peripherally (with decentralized training). Those responsible for the latter courses, though, were appointed by the CSM which coordinated their activities, together with the judicial councils.

Training has taken place on an impressively large scale. Every year it has involved half of the total number of serving magistrates: one out of two magistrates has followed at least one course and often several courses in the same year. Leading cultural figures nationwide, including hundreds of magistrates, have participated in the training programmes. They have been drawn from different fields, and not just the legal. The high level of training has been widely recognized and has even led to a number of publishing ventures.

The training programmes have absorbed a good deal of the CSM's energies. The 2006-2007 reform allows for putting in place a specific Training School, in response to a long-standing request by the magistrates' associations who see it as a way of guaranteeing continuity and means. However, in deciding on the practical business of setting it up, those responsible have been tempted more than once to remove such an influential body from the control of the CSM. At the same time, there have been attempts to stop participation from being voluntary and to turn it into compulsory training with final assessment. The risk is that that would involve very considerable outside influence on professional training, which is a cornerstone of the magistrate's independence, even within the judiciary.

In this context, the CSM has recently called attention to principles enunciated several years ago, in relation to another project, when it had suspected, "a possible conflict with art. 105 of the Constitution, bearing in mind the functions assigned to the organ of self-government in the basic Charter. In view of those functions, it is deemed inadmissible that judges be advised to adopt a given slant or approach to interpreting the law either by any organ of authority of the State, or by external powers or the power of the judiciary itself. Consequently, the judge, who is alone before the law which he must interpret without any outside assistance, stands in greater need than any other State official/civil servant (??), of ongoing training at the very highest level, having (as he does) to search out and acquire the means of interpreting the law, assuming full responsibility for so doing" (1994 Report to Parliament on the question of professional training for magistrates).

The Constitution entrusts the CSM with power related with disciplinary liability. The disciplinary action is taken by the Attorney-General or by the Minister. However, the Minister is obliged to implement the measures invariably and exclusively through the Attorney-General, responsible for ensuring their appropriateness and legitimacy.

In the past, disciplinary offences were not typified. However, the Disciplinary Division of the CSM had drawn up (from a jurisprudential viewpoint) examples of relevant conduct, based on the general principles laid down by the law-making body, as well as the conditions regulating the application of the sanction. (On the legitimacy of non-typified offences, see Constitutional Court no. 100/1981).

This interpretation was used as the cornerstone of the 2006 reform in which offences are typified in great detail.
It is a commonplace that the CSM's disciplinary justice is bland and pretty ineffective. The political debate talks about "domestic justice". Constant repetition of commonplaces has the effect of making them seem true, even when they are not. Statistical data proves beyond a shadow of doubt that the CSM's disciplinary justice is more rigorous than any of the comparable systems. It is the figures themselves which make it abundantly clear how efficiently the institution is run: over the past ten years about 900 magistrates have undergone disciplinary proceedings. That accounts for some 10% of serving magistrates, and, of these, about 40% have either been sanctioned or preferred to leave the service before any decision was taken.

If anything, the reverse might turn out to be the case. The difficulties encountered in the past in effectively assessing professionalism have led to an enormous expansion of disciplinary action: a disciplinary sanction ended up by equating to a negative appraisal in terms of professional assessment.

One hopes that a system of continuous monitoring, observant of jurisdictional duties, but efficient, might prevent the repetition in future of the sort of conditions which made such conduct possible.

Proposals are repeatedly being made to take the disciplinary section away from the CSM. I maintain that that would be a mistake. In the first place, up to now the CSM has shown itself to be the best and the most severe of disciplinary bodies, maybe even too much so. Secondly, the "domestic" nature of disciplinary justice should be a positive feature: it points in no way to the sort of justice which might be described as domesticated or corporate. In fact, quite the reverse: it is only by upholding the code of conduct (which is not just a matter of disciplinary offences) and by insisting on standards of professionalism that disciplinary justice can be a positive factor in the life of a professional body. The experience of the CSM shows this clearly.