THE POLITICS OF JUDICIAL INDEPENDENCE: EXPLAINING THE TRAJECTORIES OF JUDICIAL COUNCILS IN ITALY AND TURKEY

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DECLARATION OF ORIGINALITY

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ABSTRACT

The Politics of Judicial Independence:

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This thesis presents a comparative historical analysis of the trajectories of judicial councils in Italy and Turkey from their inception at the beginning of the second half of the 20th century. Through a detailed analysis of relevant literature, laws and documents as well as complementary semi-structured in-depth interviews, it demonstrates that professional career courses of judges and prosecutors, which are by and large administered by judicial councils, play a central role in explaining judicial independence or lack thereof. Thus, reading in tandem developments at the macro level with career courses of individual judges and prosecutors, this thesis delves into a relatively unexplored area of political inquiry; that is the relations between different levels within the judiciary. It is specifically argued that the vertical, hierarchical setting of Turkish judiciary that stems from the nature of relations between higher and lower ranks of the judiciary as well as between judicial councils and individual judges and prosecutors renders it prone to takeovers by external actors in short time spans as seen recurrently after 2010, as opposed to the horizontal and decentralized structure of Italian judiciary.

ÖZET

Yargı Bağımsızlığı Politikaları:

İtalya ve Türkiye'deki Yüksek Yargı Kurullarının Gelişimlerini Açıklamak

Bu tez, İtalya ve Türkiye'deki yüksek yargı kurullarının 20. yüzyılın ikinci yarısının başındaki kuruluşlarından itibaren gelişimlerinin karşılaştırmalı bir tarihsel analizini sunmaktadır. İlgili literatürün, mevzuatın, belgelerin ve yarı yapılandırılmış derinlemesine röportajların yardımıyla, yüksek yargı kurulları tarafından düzenlenmekte olan hakim ve savcıların kariyer süreçlerinin yargı bağımsızlığının açıklanmasında temel bir rol oynadığını savunmaktadır. Yüksek yargı kurullarının yapılarında ve ilgili mevzuatta meydana gelen değişiklikler ile hakim ve savcıların pratikte tecrübe ettiği kariyer süreçlerinin harmanlanması sonucu, bu tez, literatürde bugüne kadar nadiren çalışılmış olan yargı içindeki farklı seviyelerin birbirleriyle (özellikle yüksek kurullar ve hakim ve savcılar arası ilişkiler olmak üzere ve fakat üst mahkemeler ile alt mahkemelerin ilişkileri de hariç kalmamak şartıyla) ilişkileri konusuna eğilmektedir. Özellikle yargı içi ilişkilerin doğası neticesinde dikey ve hiyerarşik bir biçimde yapılandırılmış olan Türkiye yargısının, yatay ve adem-i merkeziyetçi bir biçimde yapılandırılmış olan İtalya yargısının aksine, 2010 sonrası tekrar ve tekrar görüldüğü üzere, yeteri kadar güçlü bir dış aktör tarafından kısa sürede 'ele geçirilmeye' müsait olduğu gösterilmektedir.

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ABBREVIATIONS

AKP	*Adalet ve Kalkınma Partisi* Justice and Development Party
ANM	*Associazione Nazionale Magistrati* National Association of Magistrates
CDC	*Il Comitato Direttive Centrale* The Central Managerial Committee
CHP	*Cumhuriyet Halk Partisi* Republican People's Party
CSM	*Il Consiglio Superiore della Magistratura* The High Council of the Magistracy
DC	*Democrazia Cristiana* Christian Democracy
HSK	*Hakimler ve Savcılar Kurulu* Council of Judges and Prosecutors
HSYK	*Hakimler ve Savcılar Yüksek Kurulu* High Council of Judges and Prosecutors
MD	*Magistratura Democratica* Democratic Magistracy
MHP	*Milliyetçi Hareket Partisi* Nationalist Movement Party
MI	*Magistratura Indipendente* Independent Magistracy
PCI	*Partito Comunista Italiano* Italian Communist Party
PLI	*Partito Liberale Italiano* Italian Liberal Party
PSDI	*Partito Socialista Democratico Italiano* Italian Democratic Socialist Party
PSI	*Partito Socialista Italiano* Italian Socialist Party
TP	*Terzo Potere* Third Power
UMI	*L'Unione dei Magistrati Italiani* Union of Italian Magistrates
YARSAV	*Yargıçlar ve Savcılar Birliği* Union of Judges and Prosecutors
YBD	*Yargıda Birlik Derneği* Association of Unity in the Judiciary

CHAPTER 1

INTRODUCTION

On April 5, 2016, Haşim Kılıç, who had chaired the Turkish Constitutional Court between 2007 and 2015, asserted that "The judiciary, which had been under the *invasion* [emphasis added] of some people, was invaded by others after 2010. Now they are being purged, now we are under another invasion". First things first, Haşim Kılıç was not known for his antagonistic stance against the ruling party, Justice and Development Party (*Adalet ve Kalkınma Partisi*; "AKP" hereafter) which had been in power since 2002; in fact, had he voted otherwise in the party closure trial in 2008, the party would have been closed. Therefore what he said should not be merely taken as a bitter cry from a secularist judge, a remnant of the *ancien régime*, against which the AKP has fought and still fights so fervently. Nevertheless, what he said pointed out a structural problem in Turkish judiciary; in short time spans, "some people" could invade the judiciary in its entirety. The judiciary was nothing more than an object, rather than being a subject in itself, let alone being an equal power vis-a-vis legislature and executive as the classical doctrine of separation of powers would have it. Moreover, what he was pointing at was not merely a wholesale personnel change. To be sure, we are talking about a body composed of about 15.000 people back then, which obviously requires more than a change of personnel to 'invade'. Of course, staffing cadres with aligning people was not (and still is not) a topic alien to the judiciary of Turkey but getting rid of old faces was not an easy task as individual judges and prosecutors enjoyed a *relative* job stability until their retirement; and apart from 2016, the judiciary has not seen a grandiose purge. What he was pointing at, implicitly, was the ease with which the judiciary could be 'invaded' and the corps

did not have an autonomous scope of action whatsoever. 'Invaders', by occupying certain positions, could steer the whole body quite effortlessly. Needless to say, a judiciary this prone to be invaded by those who possess political power, or some overly-determined and organized groups, a religious sect in our case, is not independent.

But what explains the emergence of an independent judiciary? Or what explains the lack of independence of Turkish judges and prosecutors? There is an apparent tendency in the literature on judicial independence to explain the emergence of independent courts with the political context in which the judiciary is embedded and, furthermore, limiting the inquiry to the supreme courts to examine the relations of the latter with other branches of the state. However, the careers and statuses of individual judges, be it of lower courts or higher courts, are as crucial as the institutional independence of the judiciary, for career-wise sanctions in fact generally constitute the chief means through which independence of judges come under threat – of course apart from "harder" measures such as bribery, threat, violence, imprisonment and the like. This is precisely why judicial councils, though their competences and compositions differ, as autonomous bodies that are endowed with powers regarding the functioning of the judiciary, including matters pertaining to careers and statuses of judges, "distinct from the legislative and executive powers of the State and responsible for the independent delivery of justice" (ENCJ, 2008), have spread in numerous countries in recent decades, backed by various international bodies. It has been hypothesized that the greater majority of the council composed by judges, thus the closer it brings the judiciary to self-government, the more independent the judiciary will be (Guarnieri, 2001, p. 118). Same is asserted with

regard to competences of councils – the wider the competences, the more independent the judiciary (Garoupa & Ginsburg, 2009a, p. 127).

Although judicial councils have been advertised as a ‘best practice’ by various international bodies to shield the judiciary from other branches of the state, thus to increase its ‘external independence’, internal independence of individual judges and prosecutors have remained often underemphasized. Internal independence, that is, independence of an individual judge vis-a-vis other judges, and external independence, the independence of the judiciary against other branches of the state, interact in significant ways. However insulated the judiciary may stand from other branches, a lack of internal independence provides incentives for judges and prosecutors to be in line with their 'superiors' as who crosses the line deals with the threat of career-wise sanctions. Moreover, this state of affairs renders the judiciary as a whole prone to external pressures, thanks to a judicial elite that might serve as a 'transmission belt' through which these pressures are channelled. At the end of the day, judiciaries that are hierarchically structured and in which judges exhibit limited internal independence vis-a-vis higher echelons can be taken over as a whole by an outside actor that is willing and able since maintaining warm relations with, or, worse, simply coercing, the seniors is enough to subdue the whole corps. The logic is simple for an outside actor: influence the higher echelons, influence the whole judiciary. Even without such an outside actor, the judicial elite can exert unduly influence that is also detrimental to independent judicial decision-making.

Thus, drawing on the Italian example, in this thesis, I argue that the dependent nature of Turkish judiciary can be explained by examining the legal regime that governs the careers of individual judges and prosecutors, thus, their lack of internal independence vis-a-vis the judicial council and higher ranks. Moreover, I

argue that judicial associations allow judges to articulate and further their interests, overcome coordination problems and thus protect their independence. Finally, I also show that, in line with conventional wisdom, fragmentation of political power, i.e. a setting in which power is not consolidated in the hands of a single party or a principal, serves as a fertile soil on which judicial independence can grow.

A few clarifications are in order here. I do not claim that Turkish polity has performed decently in terms of institutionally insulating the judiciary from external sources of pressure and influence and the problem solely stemmed from lack of independence of individual judges and prosecutors vis-a-vis higher echelons. Albeit the formal and definite subordination of the judiciary to the executive came about in 2017, Minister of Justice had held some powers with regard to judicial governance even before that. Thus, my argument is not that the dependent nature of Turkish judiciary can be explained *solely* in terms of internal independence. I rather argue that internal independence is an inextricable piece of the judicial independence puzzle, since, as seen in the Turkish case, in which the actors 'captured' the Council seized the opportunity to do whatever as they pleased as lower court judges were bereft of any meaningful mechanisms of checks against the powers of their superiors. Capturing a council and steering the institution in one's wish without any meaningful checks and balances are two different things. In this sense, Italian example also demonstrates that formally insulating a judiciary from external pressures is not enough as insulating the Council did not translate into independent judges, as the Council was still dominated in its first years by seniors who retained a certain degree of affinity with the political elite. As for judicial associations, I do not claim that the existence of judicial associations inevitably translates into judicial independence either, as such organizations merely serve as channels to achieve such end.

Moreover, as shall be seen in the Turkish case, due to various reasons, judicial associations might not aim to further independence of the judiciary anyway and might even serve as "yellow" unions.

A bit of background information related to civil law context is needed to understand the spread of judicial councils. Civil law judiciaries, Turkey and Italy being two, have traditionally operated in a bureaucratic, and thus, hierarchical structure and have been organized more like state bureaucracies, as pyramid-like organizations, subservient to the executive branch (Guarnieri, 2001). Judiciaries of this sort typically have typically exhibited a low degree of independence, not just against other branches of the state through Minister of Justice who is at the top of the pyramid, but also individual judges traditionally have enjoyed a lower degree of internal independence, that is independence vis-a-vis other judges (their superiors mostly) as a result of a system of evaluations carried out often by senior judges which formed the basis for promotions and disciplinary measures, on which the final say typically belonged to the Minister. In the post-war context of Europe at the beginning of the second half of the twentieth century, judicial councils were instituted as a means to reduce this influence of executive branch and endow the judiciary with tasks regarding the administration of justice which, by definition, include the careers and statuses of judges.

One of the first judicial councils in its modern definition has been the Turkish one, Council of Judges and Prosecutors (*Hakimler ve Savcılar Kurulu*; "HSK" hereafter), established in 1961, following suit after its Italian counterpart. It is the central body in judicial governance of the country as to the statuses and careers of judges and prosecutors as "Admission to the profession, appointment, transference, granting temporary authorization, promotion, allocation as first class, distributing

cadres, making decisions about those who are not considered suitable to continue to perform their profession, rendering decisions about disciplinary punishments, suspension from office; and to issue circulars exclusively about the above mentioned subjects and the inspections, researches, examinations and investigations regarding the judges and prosecutors"[1] are within its competences. The HSK has been operating approximately for 60 years. Although possessing vital powers for the administration of the judiciary, it has flown under the radar most of the time and has not been much of a topic of public debate until the mid-2000s. But this period saw conflicts within the body to the point that rendered the Council dysfunctional at times, specifically between the senior judges sitting in the Council and the Minister and the undersecretary of an anti-systemic ruling party, which made the Council make the headlines. The prerogatives of the Minister was the hot topic. A series of reforms ensued thereafter to 'fix' the issue and since 2009, the Council has operated in three radically different compositions, all reforms being undertaken in the name of judicial independence yet it was nowhere in sight as shall be shown in greater detail below.

In the meantime, the actual statuses and careers of judges and prosecutors have seldom been a topic of public debate and the legal regime governing them has not undergone profound changes. However, with a more fine-grained analysis, one can see the 'iron cage' of hierarchy in which ordinary judges and prosecutors of Turkey operate in and this has a lot more to do than the composition of the HSK. The dependent position of individuals is ensured by the nature of the relations *between* Council and individuals rather than the composition of the body, although it is not totally irrelevant; the hierarchical essence of the relations remained largely

[1] See its website: http://www.cjp.gov.tr/About.aspx.

unchanged throughout decades, except for alms here and there. As will be explained in greater detail later on, we can safely assume that Turkish judiciary is governed strictly by a hierarchical regime.[2]

However, when one looks at Italy, a different picture emerges. In Italy, another civil law country, after the start of operations of the Italian judicial council (*Il Consiglio Superiore della Magistratura*; "CSM" hereafter) in 1959, the hierarchical structure inherited from the civil law tradition started to be transformed within, as an emerging generation of lower court judges of Italy waged an offensive against the ultra-conservative higher ranked judges who had been recruited under the previous fascist regime and who retained warm relations with political elite, possessing important powers against individual judges and prosecutors. As will be accounted for below, mobilizing and lobbying for this cause through their national association, they made favourable legislation pass between 1963 and 1975 and, consequently, they eliminated judicial hierarchy by dismantling the traditional career structure and promotions to higher ranks became de facto automatic, which resulted from the practical application of laws by the CSM, composition of which had also been altered in the meantime in favour of lower ranks by the new laws as it had been dominated by the higher ranks once. After reforms, freed from hierarchical bonds, by the end of 1970s, Italy started to see a judiciary that exhibited a remarkable political significance as a result of assertions of independence by portions of the judiciary, which would lead to constant clashes with political branches that would reach its culmination in 1992 with massive corruption investigations toppling the traditional political elite, known as Clean Hands (*Mani Pulite*).

[2] Muzaffer Şakar, a judge himself, presents a thorough analysis of this defining aspect of Turkish judiciary (Şakar, 2017).

How was this even possible? In a matter of two decades, a judiciary that had been traditionally servile to the political elite started explicitly vying to the latter which led to the end of the so-called First Republic and the transition to the Second. What was present in Italy that Turkey lacked? The trajectory of this contrast is what I aim to explore in this thesis. Evidently, creation of a judicial council created a breach in the hierarchical setting of the Italian judiciary, through which the hierarchy was progressively dismantled. A series of events following the establishment of the CSM enhanced internal independence of individual judges and prosecutors vis-a-vis judicial elite who, at the end of the day, remained devoid of any meaningful institutional mechanisms to be used as either carrots or sticks, such as evaluations, promotions, disciplinary sanctions or transfers, to ensure conformity with their politico-legal positions. The end result was such that in 1994, in the aftermath of corruption investigations that changed the political trajectory of the country, a leading Italian scholar would assert that "Italian magistrates currently enjoy higher guarantees of both internal and external independence than those found in any other democratic country" (Guarnieri, 1994, p. 248). Lacking internal accountability mechanisms from bottom to the top, it did not so in Turkey, as shall be seen below, not especially after 1972, as individual judges and prosecutors have been subjected to a strict, yet discretionary, career course wherein deviance from standards were regularly punished.

Why is internal judicial independence important? As shall be seen in the literature review chapter, judicial independence has been predominantly debated with regard to the external independence of the judiciary and more often than not, in the level of high courts, thus, downplaying the threats coming from inside the judiciary against lower courts. However, "Courts do not decide cases. The judiciary does not

decide cases. Judges decide cases" (Kosar, 2016, p. 41-42) and overlooking internal judicial independence, therefore, has the potential to be misleading as it might trick one into believing that insulating the judiciary from other branches, thus enhancing external independence would automatically promote internal judicial independence and translate into independent judicial behavior. Yet, those two correspond to two distinct dimensions of the concept of judicial independence. Judges who possess no checks and balances against a judicial leadership that holds vital mechanisms to keep them 'in line', will seldom stand against the interests of the latter, however incompatible those interests are with the laws or with the very notion of judicial independence. It is the little details that matter; the details mostly overlooked by the literature, such as promotions, transfers, disciplinary sanctions and the like.

In this sense, moving beyond the traditional executive – judiciary level of analysis, this thesis contributes further evidence to the centrality of the highly-understudied internal gradient of judicial independence by showing how mechanisms regarding judicial careers unravel in practice, thus attempts to widen the perspective of the judicial independence debate by revisiting an overlooked layer of analysis. This thesis, therefore, with its focus on the underlying structure, supersedes the existing accounts of Turkish political trajectory of late and judicial politics more specifically, which focus largely on the actors. The brittleness of the judiciary against outside actors is the focus. It furthermore contributes to the growing literature on judicial councils, especially that of Turkey which remains relatively neglected, especially after the series of institutional changes it went through after 2010 – all being in opposite directions in terms of internal composition of the Council, yet, all still rendering a dependent judiciary; what changed was the actors who controlled the body as the sources of dependence between individual judges and the HSK remained

intact. Not only that it relates to judicial independence, this study also relates to the accountability side of the coin since it also pertains to the gap in the literature identified by Kosar (2016, p. 6), which is "the impact of the judicial councils on the use of accountability mechanisms"[3] since the cases under consideration here demonstrate that same "sticks" or "carrots" can be used by different councils in totally opposite ways, thus, affecting the degree of independence enjoyed by individual judges and prosecutors.

1.1 Methods

Since I am interested in the trajectories of the judiciaries of Italy in Turkey, with judicial councils at the centre, the thesis is bound to offer a comparative historical analysis. Thelen and Mahoney claim that comparative historical analysis approach display three defining features: 1- a macro-configural orientation; i.e. a focus on large-scale outcomes and multiple factors associated shaping grandiose combinations, 2- a case-based agenda, 3- temporal processes occupying central stage (Thelen & Mahoney, 2015). With this emphasis on cases and processes, comparative historical methods seem well-suited for a study that aims to explain how the interplay between justice and politics has unfolded over decades in two countries that share the same legal tradition. I specifically employ John Stuart Mill's "method of difference", which seeks to "contrast cases in which the phenomenon to be explained and the hypothesized causes are present to other ("negative") cases in which the phenomenon

[3] The author defines accountability as "a negative or positive consequence that an individual judge expects to face from one or more principals (from the executive and/ or from the legislature and/or from court presidents and/or from other actors) in the event that his behavior and/or decisions deviate too much from a generally recognized standard" (Kosar, 2016, p. 57). Thus, sanctioning deviations, accountability mechanisms can amount to a reward or a sanction in holding judges accountable vis-a-vis the council; ranging from promotions to dismissal.

and the causes are both absent, although they are as similar as possible to the "positive" cases in other respects" (Skocpol & Somers, 1980, p. 183).

Comparisons with Italy, in this sense, offer valuable insight since the country is a case of "near absolute independence" (Garoupa & Ginsburg, 2015, p. 131) that demonstrates, of course among other things, how providing an increase in the internal gradient of independence can foster judicial independence in general. The Italian CSM played a crucial role in this process which presents an out-and-out contrast with the Turkish judiciary. Both adhering to civil law tradition, judiciaries in those two countries exhibited strict hierarchical properties, as is the norm in civil law setting, until the 1950s. As a response to the atrocities of preceding autocratic regimes, both of those countries set up judicial councils to free the judiciary from executive influence; the CSM started operating in 1959 and the HSK in 1961. Councils in those countries are among the first exemplars of modern judicial councils, the so-called "first wave" of judicial councils; in fact, the Turkish judicial council was inspired by the Italian model. However, the outcome turned out to be quiet different. In a matter of decades, Italian judicial ranks became more horizontally positioned, like in a common law setting, rather than a vertical system of hierarchy. Freed from the hierarchical ties, which had had the judiciary subdued under political will as a whole thitherto, since, judicial elite in line with the political elite could subdue the judiciary as a whole with 'sticks' in its disposal, this gradually led to conflicts between political and judicial realms starting from the 1970s that reached its culmination in 1992 with corruption investigation ousting the traditional political elite. Moreover, as shall be seen in following chapters, the Italian council, along with a strong judicial association, served as the headquarters via which the 'battle' for de-hierarchization and internal independence was carried out and via

which the case was made heard before the public eye, in stark contrast to the hierarchical *modus operandi* and invisibility of Turkish council. Indeed, it seems that Italian judicial council lied at the heart of the quest for de-hierarchization whereas Turkish one served to reinforce it. Put bluntly, apart from their inefficiencies and lengthy trials, at the end of the day, Italian judiciary became what Turkish judiciary was not, despite starting off in a similar setting.

To conduct a comparative historical analysis of above-mentioned cases, in conjunction with the cross-case analysis, I also carry out process-tracing as a means of within-case analysis, to link initial conditions and subsequent developments to the outcomes that are significantly divergent. Bennett and Checkel define process-tracing as "the examination of intermediate steps in a process to make inferences about hypotheses on how that process took place and whether and how it generated the outcome of interest" (Bennett & Checkel, 2015, p. 6). Going beyond identifying correlations, process-tracing, basically, examines the operations of the causal mechanisms that amount to an end result (Beach & Pedersen, 2013; p. 2-5). The aim of process-tracing is therefore to illuminate the causal chain between an independent variable and the variation on the dependent variable. Accounting for the use of process-tracing in order to overcome shortcomings arising from Mill's methods, George and Bennett argue that "process-tracing can identify single or different paths to an outcome, point out variables that were otherwise left out in the initial comparison of cases, check for spuriousness, and permit causal inference on the basis of a few cases or even a single case" (2005, p. 216). As a useful means of developing and assessing data on causal mechanisms, process-tracing furnishes a sound basis for causal inference "only if it can establish an uninterrupted causal path linking the putative causes to the observed effects" (p. 185), which is what I aim for in this

thesis. My goal is therefore to construct detailed empirical analyses of the causal processes that led to the current positions of Italian and Turkish judiciaries, with councils at the central stage, in order to juxtapose those two starkly different outcomes to reach conclusions about what happened, why it happened and how it happened.

Moreover, to grasp a firmer understanding of unseen aspects of a judicial career, the day-to-day working of courthouses and direct or indirect relations between power-holders and individual judges and prosecutors from their perspectives, I conducted semi-structured in-depth interviews with ten Turkish judges and prosecutors in five different cities of Turkey between February and April 2019. Although I incorporated the interviews into the thesis to serve a complementary purpose, I would have liked to increase that number of interviews but time constraints and the general 'prudence' of Turkish judges and prosecutors, which is understandable given the autocratic context in which they have little to no professional guarantees, prevented me from conducting more. Since a curiosity for the experiences of other people and the meaning they attribute to that experience lies at the heart of interviews (Seidman, 2006, p. 9), it is a valuable method to assess how the power relations in judicial realm unravel and resonate in the level of individuals. As opposed to filling a survey, the conversational nature of in-depth interview can provide a much-needed freedom for the interviewee, at least up to a point, to present profound information regarding the issue.

The issue of research on sensitive topics deserves a mention here. Lee defines a sensitive research topic as a “research which potentially poses a substantial threat to those who are or have been involved in it”. (Lee, 1993, p. 4). This was one for Turkish judges and prosecutors, of course, in their perspective. Since Turkish judges

and prosecutors have been and are being punished for publicly stating their opinions -as the old apolitical notion of "judges speak with their rulings" still prevails-, criticizing the state of justice in Turkey, taking a critical stance against power-holders and they practically could be punished because of anything if deemed necessary, I knew that finding judges willing to speak would prove to be a difficult task – which is one of the reasons why I could conduct interviews with only ten judges, as mentioned above. Although potential interviewees were informed that their names would not be disclosed, nothing would be recorded and the transcript would not be published anywhere anyway; and possessing mutual acquaintances, they knew that I was a plain man with neither political connections nor a shady background whatsoever, still, my interview offers were rejected quite a few times. They simply found it too risky. This also found its resonance in some of the interviews as most of them started slow and gained momentum as the conversation kept flowing – which is I believe, apart from my own flair in keeping a conversation going, had to with the open-ended nature of questions, supported by gentle follow-ups. As a result, the interviews ranged from an hour to four hours. I did not record anything and just took notes. Since most of the interviewees were quite upfront about remaining anonymous, interviewees quoted in this thesis will remain so.

1.2 The outline of the thesis

In the following chapter, I provide a brief review of the literature, focusing mostly on different explanations regarding judicial independence and its ambiguous relationship with judicial councils.

The third chapter lays down an overview of Italian politico-legal setting at the dawn of the reforms that gradually dismantled the hierarchical outlook. It specifically

touches upon the first years of operation of the CSM and the emergence of a grassroots movement within the judiciary which started to mobilize against the dominance of the hierarchy, engaging in legal activism to bring the outdated, conservative notion of jurisprudence in line with the progressive spirit of post-war Constitution of 1948.

In the fourth chapter, I trace the reforms that took place between 1963 and 1975 that altered the traditional judicial career structure and the composition of the CSM drastically. Then I proceed to examine the resulting legal regime that governs careers in Italian judiciary which demonstrates the degree of independence savoured by Italian judges and prosecutors, as threats to internal independence come mostly in the form of sanctions, or of the threat of a sanction, regarding the career course. The chapter wraps up with a lengthy conclusion that identifies several points standing out.

Moving on to the Turkish case, in the fifth chapter, I examine the legal framework in which Turkish judiciary is embedded. First, I demonstrate the trajectory of Turkish judicial council, the HSK, until 2010, which had a non-hierarchical, democratic and independent outlook at the outset only to turn into a hierarchically-structured, essentially oligarchic council in which the executive also held some important prerogatives. Then, I show the manifestations of the hierarchical setting and the legal regime haunted by vagueness, both in terms of daily working of justice and the career of an individual; *de jure* and *de facto*. This section serves to put into context the transformation (or lack thereof) the HSK and the judiciary went through between 2010 and 2017; when the judiciary recurrently 'changed hands', but the underlying structure remained essentially unaltered. What the newcomers

inherited was essentially a hierarchically-structured judiciary in which they could freely carry out their ploys.

The sixth chapter, therefore, in tandem with the developments in the political realm, examines the period between 2010 and 2017, and the legal reforms undertaken then on the structure of the HSK, two of which being constitutional amendments. All in opposite directions in terms of the composition of the Council, all these reforms were essentially attempts to bring the judiciary in line, and largely succeeded, given the hierarchical essence of the judiciary of Turkey which is conducive to takeovers. This chapter closes with another lengthy conclusion.

The concluding chapter, concludes.

CHAPTER 2

LITERATURE REVIEW

Why do we want an independent judiciary? Judicial independence is not an end in itself; among other things, independent courts are thought to be instrumental in safeguarding the central tenets of constitutionalism and since limited government is inherent in constitutionalism, an independent judiciary has been regarded as a fundamental institution to impose the constitutional constraints on political power, which is the chief reason why an independent judiciary is desired (Vanberg, 2008, p. 102). Limiting the government, as everyone, with rules fixed beforehand is inherent in the ideal of the rule of law (Hayek, 1944, p. 74-75) and the doctrine of separation of powers (see, generally, Vile, 1967). The doctrine of separation of powers, one of the most significant theories of government in the history of Western political thought, rests on the rationale of dividing the government into three branches (the legislature, the executive and the judiciary) to ensure that power does not accumulate in one hand which will in turn restrain the exercise of power of the government, enhancing political liberty (Vile, 1967, p. 15). The doctrine did not remain in its pure essence and fused into the theory of checks and balances wherein each branch exercises a degree of control over each other and a degree of participation in each other's functioning, resulting in a setting of interdependence (p. 19-20). Needless to say, for a setting interdependence to emerge, each unit must be independent from each other, otherwise, we would speak of one way dependence of a branch rather than interdependence. This is precisely what Guillermo O'Donnell pointed at when he coined the term “horizontal accountability”, which is conditioned on “the existence of state agencies that are legally empowered—and factually willing and

able—to take actions ranging from routine oversight to criminal sanctions or impeachment in relation to possibly unlawful actions or omissions by other agents or agencies of the state" (O'Donnell, 1998, p. 117) to complement "vertical accountability" which is provided between the electorate and the elected by free and fair elections. In this sense, independent courts are the first set of state agencies that come to mind with their potential to provide accountability of this kind insofar as they stay clear of political control.

Going beyond the dimension of limiting the government, a broader conception of judicial independence, however, would "aim at preventing interference with legal processes wherever it may originate" (Ferejohn, 1998, p. 365). Thus, an independent judiciary is thought to be a forceful mechanism in the preservation of the rule of law overall, which is an essential pillar of democracy (Larkins, 1996). But what is judicial independence?

2.1 Judicial independence

Although the very idea of separation of powers, thus a judiciary independent of political branches dates back to the 18th century to the seminal writings of Montesquieu, an all-encompassing causal theory of judicial independence is still not present. This should be regarded as natural since "There are too many relationships to unpack, too many dimensions and too many differences among judiciaries around the world to come up with one single general theory that can encompass it all" (Donoso, 2009, p. 13). Indeed, judicial independence is an intriguing concept given its multifaceted nature which gives rise to various definitions, differing both in scope and content. Not only there are broad differences in terms of conceptualizations carried out by political scientists, but liberal democracies also diverge in their

approaches to judicial independence with a vast array of legal arrangements in order to foster or secure it (Russell, 2001, p. 2-3). There is a large literature on judicial independence and courts, on which these variations are mapped on.

Melton and Ginsburg define judicial independence, in essence, as "the ability and willingness of courts to decide cases in light of the law without undue regard to the views of other government actors" (Melton & Ginsburg, 2014, p. 190). With differing types of conceptualization, there seems to be a common tendency in the literature to distinguish between what Rios-Figueroa calls "independence to" and "independence from" when accounting for judicial independence; former corresponds to the decisional dimension of judicial processes (independence to decide in this or that way) and latter grappling with the relations of the judiciary with other governmental branches (independence from executive or legislative), presumably defined by laws that govern such relations (Rios-Figueroa, 2006, p. 2-4). Yet the laws that govern the judiciary do not tell the whole story as "parchment barriers" might not matter much in every given context. In this sense, there is also a distinction drawn between *de jure* and *de facto* judicial independence in attempts to measure judicial independence; pointing to the fact that institutional guarantees of judicial independence does not always translate into reality or, on the contrary, independent courts can emerge in countries with relatively weak set of judicial guarantees (see, among others, Domingo 2000; Feld & Voigt, 2003; Hayo & Voigt, 2007; Helmke, 2002; Melton & Ginsburg, 2014; Rios-Figueroa & Staton, 2012; Salzberger, 1993; Voigt, Gutmann & Feld, 2015).

Indeed, in terms of the unit of analysis, one can distinguish between two understandings, located on a continuum between the institutional level as insularity of the judiciary from political branches and the individual level seen in the decisions

of an individual judge as the outcome (Spac, 2017). In this sense, for example, Tiede, while reviewing the literature and categorizing them under "institutional", "judicial rulings against the government" and "strategic interaction" approaches, defines judicial independence as "the judiciary's independence from the executive, as measured by the amount of discretion that individual judges exercise in particular policy area" which varies depending on the political context, in an attempt to connect two ends of the continuum (Tiede, 2006). Similarly, Popova identifies "institutional", "behavioural" and "decisional" components of judicial independence. Whereas the latter two operate at the level of the individual, the former refers to the structural insulation of the judiciary as a whole (Popova, 2012, p. 14-20). Answering "independence from whom?" question, Fiss identifies "political insularity", "party detachment" (independence from the parties in the litigation) and "individual autonomy" (vis-a-vis other judges) (Fiss, 1993). Russell (2001) too, identifies a two-dimensional notion of judicial independence. For the sources of dependency, he goes for a distinction between internal and external sources as coming from inside or outside the judiciary. For the targets of control and pressure, he goes for a distinction between individual judges and the judiciary as a whole (p. 11). Ferejohn (1995) hits the same spot when he speaks of "independent judges (and a) dependent judiciary" when examining the U.S. judiciary, hinting at the different dimensions of judicial independence by pointing out independence savoured by individual judges though the judiciary as a whole is embedded in a web of relations of interdependence with other branches. In the same vein, noticing the "individual versus institution" and "internal pressures versus external pressures" distinctions in the literature, Rios-Figueroa identifies three components of judicial independence: "autonomy" (the relation between the judiciary as a whole and other branches), "external

independence" (the relation between supreme court judges and other branches) and "internal independence" (the relation between lower and higher court judges) (Rios-Figueroa, 2006, p. 22-36). Kapiszewski and Taylor (2008, p. 749), replace the second component with "impartiality" of a judge against the parties of a case.

As is seen, the internal dimension of independence, the component of judicial independence that I am chiefly going to examine throughout this study, has not gone unnoticed in the literature. Still, as Landau asserts, "this is not normally the risk that is captured by the concept of judicial independence in the literature" (Landau, 2015, p. 7) as the dominant approach in the literature focuses on explaining when courts are independent and when they are not with regard to the political context in which it operates, thus implicitly placing stress on factors external to the judiciary as a whole (p. 5). Broadly speaking, those works generally link emergence or maintenance of an independent judiciary to rational-strategic interactions between justice and politics, in various forms (Hilbink, 2009). Political competition, both in terms of party politics and a separation of powers setting meaning wherein there is competition across different levels of government,[4] is the most dominant strand of them (Yadav & Mukherjee, 2014). In the case of electoral uncertainty, both in terms of the continuation of elections and its results, political elites can be motivated to provide an independent judiciary (Ramseyer, 1994; Stephenson, 2003). In this sense, judicial empowerment can take a form of political insurance by an outgoing ruling party that fears retaliation as a stronger judiciary can alleviate the risks associated with becoming an opposition party, since "an independent judiciary can limit the capacity of incoming politicians to change the rules of the game in ways that may hinder the

[4] This is natural as resulting coordination problems in the executive and legislative branches reduce the pressure on the courts and empower them to rule against the government (Ferejohn, 2002) since a fragmented government with differing interests would can not easily overrule a judicial decision (Cooter & Ginsburg, 1996).

former ruling party from returning to power*"* (Finkel, 2004, p. 61). Hirschl (2004) too, in his famous "hegemonic preservation thesis", argues that judicial empowerment can be done with creating ideological enclaves within the state apparatus in mind, to ensure that the interests of elites fearing electoral losses remain entrenched. A similar pattern of a fragmented polity and/or party competition and a relatively strong Supreme Court has also been shown by Iaryczower, Spiller and Tommasi (2002) and by Chavez (2003) in the case of Argentina, both on national and provincial levels. Aydın, on the other hand, argues that high level of political competition in advanced democracies enhances judicial independence while it has the opposite effect in developing democracies presumably because attacking courts bears less cost on a government (Aydın 2013).

However judges are not always at the receiving end of mind games and they can act strategically for various ends, sometimes to avoid unfavourable consequences, sometimes to send outward signals, sometimes to forge public support to raise the costs for ill-willed politicians in the case they plan an assault against the judiciary (Epstein, Knight & Shvetsova, 2001; Staton, 2006; Kapiszewski, 2011). Relatedly, Helmke argues that once a reigning government starts to lose its grip on power, to minimize the threat of sanction from its successor, judges, who lack secure tenure can be incentivized to rule against the outgoing government to 'send signals' (Helmke, 2003). Drawing on the Mexican example after the 1994 legal reforms implemented by PRI, the dominant party of the country for almost a century, and the party's eventual loss of power, Rios-Figueroa shows that after a fragmentation in the elected branches of government has occurred, the Mexican Supreme Court, which had been traditionally submissive to the government, 'pulled itself together' and emerged as a relevant actor (Rios-Figueroa, 2007).

However, political fragmentation thesis proved to be insufficient in some cases. Quasi-independent courts willing to rule against the incumbents can emerge in authoritarian settings too where competition is low to non-existent (Moustafa & Ginsburg, 2008; Hilbink, 2012, p. 592-593; Roux, 2008). Similarly, it does not explain Colombian Court's bold stance on Uribe's re-election in an increasingly monolithic polity (Landau, 2015) or Chilean Court's changing pattern of behavior although no apparent change of players in the game (Brinks, 2012; Scribner, 2010). In this sense it is not surprising that there is another strand in the literature that draws attention to historical legacies, and social and judicial culture which are frequently made utilized to conceptualize strategic accounts (see, among others, Couso & Hilbink, 2011; Landau, 2015, p. 10-12; Sieder, 2003; Hilbink, 2009; Kapiszewski, 2010; Yadav & Mukherjee, 2014, p. 6-7).

Most of the works mentioned above take higher courts, such as supreme courts or constitutional courts, as their unit of analysis. This is natural given the potential of their decisions to produce politically salient outcomes and related visibility. Indeed, lower courts and ordinary judges, supposedly more removed from political tumult, are seldom under examination. As Spac puts it, “The ordinary judiciary is generally understood more as an object than a subject in the political field” (Spac, 2017, p. 12) although in favourable circumstances they can further their interests which can bear important political consequences (Bobek & Kosar, 2014; Di Federico, 1989; Kosar, 2017; Ramseyer & Rasmusen, 2003). As a result of this lack of stress on lower courts, although the political context is of course inextricable from the operations of justice, be it at lower level or higher level, as courts do not operate in a vacuum, the internal gradient of judicial independence seems to have remained highly understudied (Basabe-Serrano, 2014). Some of the works should be

mentioned. Basabe-Serrano (2014) finds that better training, objective career considerations as criteria for promotions and judicial activism as factors that enhance internal judicial independence. Rios-Figueroa (2006) on the other hand, finds that incentives regarding career (promotions, evaluations, sanctions, etc.) consolidated in the hands of higher courts judges will exert influence on the decisions of lower courts. Perez-Linan, Ames and Seligson (2006) similarly put forth that judges' career expectations have critical importance in explaining judicial behaviour as lower court judges tend to conform to superior courts in their decisions if they fear their careers can be politically manipulated by the seniors. In the same vein, comparing Mexico and Brazil in terms of policy, judges of which exhibit diverging degrees of internal independence within relatively autonomous judiciaries, Rios-Figueroa and Taylor (2006) establish that plaintiffs can employ different tactics in pursuing their goals related to implementation of privatizations and expropriations – thus, judicialization of policy follows different paths depending on the internal independence enjoyed by lower courts. Drawing on the Chilean case, Hilbink (2003) also offer empirical evidence to demonstrate how a strict hierarchical control maintained by the judicial elite over careers of lower judges functioned to reproduce an illiberal approach among judicial corps that served to the interests of the conservative political elite. Japan offers another case wherein career matters have been made use of to maintain a dependent judiciary (Ramseyer & Rasmusen, 2003) through punishments of various types carried out by the judicial elite (O'Brien & Okoshi, 2001). Şakar (2017) also offers a historical analysis of Turkish judiciary and its essence as a hierarchical and a bureaucratic body which illustrates the limited degree of independence individual judges enjoy. Lastly, examining the case law of European Court of Human Rights, which has abandoned its conceptualization of judicial

independence solely through the lens of separation of powers and incorporated the concept of internal judicial independence during the last decade, Sillen (2019) finds that Dutch court system has potentially problematic aspects in terms of internal judicial independence; however, individual judges enjoy sufficient autonomy as a result of the legal culture.

2.2 Judicial councils

Notice how the above-mentioned studies on internal judicial independence emphasize judicial careers. Indeed, as human beings, judges too pursue happiness and care about the bread on their plate; thus, they too respond to ordinary incentives like we all do (Posner, 1993). Say, being moved to a remote place of the country for the sake of duty, would be, presumably, as frustrating for them as it would be for us. Thus, like normal citizens, concerns related to their careers are of utmost importance – which is why judicial councils as intermediary bodies have spread throughout the world in last decades with insulating career courses of judges from political branches in mind. Garoupa and Ginsburg define judicial councils as "bodies that are designed to insulate the functions of appointment, promotion, and discipline of judges from the partisan political process while ensuring some level of accountability" (Garoupa & Ginsburg, 2009a, p. 106). The term "judicial council" covers a broad scope in terms of competences. It can be said that councils mainly operate as "intermediaries between government and the judiciary in order to guarantee the independence of the judiciary in some way or in some respect" (Voermans & Albers, 2003, p. 9). Guarnieri too traces the modern conception of judicial councils in the aim of judicial independence: "The main aims have been to increase external independence, especially vis-a-vis the executive, and to protect lower-ranking judges from negative

influence by the senior judiciary, often considered to be too responsive to governmental wishes" (Guarnieri, 2004, p. 169). Garoupa and Ginsburg, on the other hand, state that external accountability is at play too and explain that the very idea of judicial councils seeks to strike a balance between judicial independence and external accountability (Garoupa & Ginsburg 2009b, p. 55). Indeed, independence and accountability can be seen as two sides of the same coin. Whereas a judiciary that is too accountable and thus dependent is undesirable as it can be used as a tool by the politically powerful, an unaccountable judiciary can be dangerous. Benvenuti (2018) too claims that the judicial council of Italy, known for its extreme independence and one of the pioneers of the spread of judicial councils with its 'success', was in fact designed with external independence *and* accountability in mind as evidenced by the debates in the Constituent Assembly where the Constitution of 1948, in which the judicial council is embedded, was drafted. Indeed, apart from the majority of judges sitting in the council elected by the judges themselves, the council has its lay members coming from the parliament one of whom acts as the vice-chair and the President of the Republic, an *ex officio* chair, which allows maintaining a flexible balance between independence and accountability (Benvenuti, 2018, p. 378).

Variances between councils naturally resulted in categorizations among them. The traditional categorization is between "Northern" and "Southern" models where Northern model stands for more minimal councils that are limited to housekeeping and general financial and administrative management of courts (e.g. Denmark, Netherlands, Sweden) and Southern stands for the councils that have broad competences over judges' careers and possess the power to appoint and discipline judges (e.g. France, Italy, Portugal, Spain, Turkey) (Voermans & Albers, 2003, p.

14-17). Gönenç classifies Northern model councils' competences under three topics: Administration of courts (e.g. determining the workload of each), management of courts (e.g. construction of courthouses and maintenance of judicial buildings) and financial affairs (e.g. budgetary work, supervision of expenses). Southern model councils, on the other hand, deal with judicial self-organization as their typical competences consist of appointment, promotion and dismissal of judges as well as disciplinary sanctions (Gönenç, 2011, p. 3). Garoupa and Ginsburg, on the other hand, in a more analytically structured fashion, classify councils with regard to their competences and compositions. A council's competences can be extensive (all career matters), intermediary (appointments only) or minimal (housekeeping functions) whereas its composition can be hierarchical (when judges from higher courts dominate), non-hierarchical (when judges from lower courts dominate) and politicized (when actors from outside the judiciary dominate) (Garoups & Ginsburg, 2009a, p. 122). In this sense, both Italian and Turkish councils are 'strong' ones whereas their compositions have shifted over time as shall be seen in following chapters.

Seemingly a good idea on paper to shield judiciary from external influences, as noticed above, last decades have seen a global spread of judicial councils, especially in civil law jurisdictions. Operating under a bureaucratic structure, traditionally, civil law judiciaries have been quite open to external influences as typically, Minister of Justice exert political influence through her extensive prerogatives. Moreover, through connections with higher echelons of the judiciary which maintain a hierarchical control over the rest of the corps via mechanisms regarding careers, political influence has been diffused throughout a judge’s career progression (Gee, 2012, p. 131-134). In this sense, insulating careers of individuals

from political bodies and leaving it to the judiciary itself represented an innovation, which found its peak in Italian judicial council. The strong preference international bodies have towards the Italian model as a self-governing body can be seen in the recommendations of the Council of Europe and European Union, the latter *de facto* setting it as a standard to be adopted in the accession stage for candidate countries of Central-Eastern Europe (Bobek & Kosar, 2014, p. 1274-1278). Benvenuti and Paris (2018) call the Italian judicial council model "a successful Italian export product" (p. 1642). Latin America was not spared from the trend either, as under the guidance of international organizations such as the World Bank, judicial councils inspired by the European experience are widespread there too (Hammergren, 2002).

Since Italian council model has *progressively* proved to be successful in ensuring the degree of independence that Italian judges savour by gradually expanding its scope of powers and asserting itself into the political realm, such that an Italian scholar would call the situation "weights without counterweights" in the wake of 1990s (see, generally, Benvenuti & Paris, 2018; Bruti Liberati, 2018; Di Federico, 1988; Guarnieri, 1992; Moroni, 2005; Piana & Vauchez, 2011), its reputation is hardly surprising. As mentioned above, with its council's majority composed of judges and its wide competences, Italian judiciary is indeed self-governing. However, setting up councils as a means of self-government of the judiciary and granting them a wide range of competences to ensure judicial independence from the executive, however, can come with its own price in different contexts. As Benvenuti & Paris argue, internal independence issues and a pluralist internal structure of the body in Italian context proved to be crucial in terms of independence, however this side of the story is often overlooked in recent experiences with judicial councils (Benvenuti & Paris, 2018; p. 1658-1659).

Countries that have 'transplanted' a judicial council to ensure independence without paying attention to the context and meaningful change of personnel within their judiciaries, especially in post-communist settings, seem to be experiencing problems with their judicial councils. For example, contrasting Slovakia (which opted for a European-backed judicial council model in the early 2000's that echoes the Italian model) with Czechia (where no such body exists and despite the influence of the Ministry of Justice, a certain degree of decentralization has occurred with the efforts of court presidents [Kosar, 2017]), Bobek and Kosar (2014) bring forth perils of judicial self-government via councils. First, as pointed out above, judicial independence is a manifold concept; independence from the political branches can be ensured via such model but individual independence of every single judge can be hampered as the judicial councils are prone to turn into “mafia-like” structures, as Bobek and Kosar put it, wherein higher level judges within the councils seek personal gain and use the councils to oppress recalcitrant judges. Second, as the democratic process is excluded in the name of insulation, the councils become prone to turn into wombs of corruption, nepotism that lack accountability and efficiency. Third, the judicial elites that control powerful councils have the opportunity to reproduce 'themselves' throughout the judiciary as they also control the admission to the profession and dismissal, therefore, designing a judiciary in the long run by certain aspects (ideology, interests etc.) becomes easier through providing incentives related to career consonant with those aspects they want to promote. Finally, great competences often point to great struggles, since the debates about the composition and the appointments to judicial councils bring the judiciary to the fore of the political arena instead of insulating them from politics as they become headquarters to capture (Bobek & Kosar, 2014). The account of Spac, Sipulova and Urbanikova

(2018) of Slovakian points to similar experiences in terms of usage of sticks and carrots regarding career course, such as promotions and disciplinary sanctions, which have been utilized to punish those critical of the judicial elite. Indeed, a body of work focusing chiefly on the Central-Eastern Europe experiences with judicial councils has been germinating, drawing attention mainly to (un)accountability and internal independence issues stemming from actual operation of judicial councils (Coman, 2014; Kosar, 2017; Kühn, 2012; Mendelski, 2015; Nussberger, 2012; Parau, 2012; Preshova, Damjanovski & Nechev 2017).

Although started in close proximity to its Italian counterpart institutionally, the composition of Turkish judicial council has been radically altered throughout its working life, sometimes recurrently in just a span of few years, especially after 2010 when Turkish political scene started to see a shift of power balances. Not much had been said and written about Turkish judicial council in the realm of political science until the mid-2000s – in contrast to another higher judicial body, the Constitutional Court which had drawn attention due to its remarkable activism in party closures and its stance as a 'guardian' of the regime, along with the military, when accounting for Turkish politics (Belge, 2006; Çınar, 2008; Koğacıoğlu 2004; Shamabayati, 2004; Shambayati & Kirdiş, 2009; Tezcür, 2007, 2009). It can be said that the judicial council of Turkey has been treated rather as an anecdote in political science literature, understandably so, as Stade puts it "The political role of the HSYK[5] went largely unnoticed in the Kemalist[6] era" (Stade, 2017, p. 59). This invisibility was not an accident as much as it was self-imposed, given the well-known apoliticism

[5] Back then, the name of the body was "Hakimler Savcılar Yüksek Kurulu" (High Council of Judges and Prosecutors). The word yüksek (high) was removed with the constitutional amendments of 2017, thus, now it is abbreviated as HSK.

[6] The founding ideology of Turkish Republic which can be very roughly stated as a secularist and nationalist ideology.

prevalent within Turkish judicial corps (Bakıner, 2016), as the body operated largely behind the scenes, excluded from public debate. Dominated by the higher echelons of the judiciary for decades, as shall be seen below, it is hard to disagree with Bakıner that the council was established "to regulate or, maybe more accurately, discipline the bench" (2016, p. 141).

To my knowledge, the existing body of work on the HSK has been written mostly in a legalistic fashion, generally focusing on its composition and related norms (see, among others, Baltacı, 2013; Kuru, 1966; Özbek & Ertosun, 2010; Gönenç, 2011; Keser & Niyazioğlu, 2011; Özkal Sayan, 2008; Ünal, 1994; Ünver, 1990) – apart from the recent work of Çalı and Durmuş (2018), which presents a chronology of the judicial self-government experience of Turkey with all of its institutional shifts ("experimentations") in tandem with some of major with political developments and Çelik's (2010) comprehensive study which examines the council in a comparative manner. Backed by concrete examples from cases, Madgwick, Orton and Richmond's (2001) study on legal norms and actual practices of justice in Turkey deserve a mention too. Moreover, except memoirs of judges and prosecutors, recent years also saw a incipient literature written by judges and prosecutors, focusing largely on judicial politics (elections to the HSK chiefly but not limited to) with some really thought-provoking 'insider' observations (Ertekin, 2011, 2016; Ertekin, Özsu, Şahin, Şakar & Yiğit, 2014; Ertekin, Özsu & Şakar, 2016; Köse, 2018; Şahin, 2016). Şakar (2017) also provides a unique radiograph of the bureaucratic structure of Turkish judiciary since its roots in Ottoman times to the actual practices of today.

2.3 Conclusion

At the end of the day, although there are socio-legal studies based on fieldwork that examine the relation between citizens and justice (Kalem, 2009; 2010; Sancar & Aydın, 2009) and regarding the perceptions and experiences of judges and prosecutors (Sancar & Atılgan, 2009), to my knowledge, a study that connects actual experiences of judges, backed by complementary fieldwork, the historical trajectories of the legal regime in which council and judges are embedded in and the political context in tandem in a comparative fashion does not exist. Thus, keeping in mind that "the judiciary is a 'they', not an 'it'" (Vermeule, 2005) and it is judges as individuals from whom we expect to decide cases independently after all, this study aims to shed further light on the interactions between internal and external gradients of judicial independence and provide evidence to the claim that especially in a civil law context, threats coming from within the judiciary are as detrimental to judicial independence as threats coming from outside – and even the latter does translate into the former. In the Turkish case, exerting influence on the higher echelons of the judiciary is enough to subdue the corps in its entirety, given the strict hierarchy maintained throughout decades between judicial elite and lower court judges, which is why different political junctures saw ones who "captured" and "lost" the judiciary, although judicial cadres, naturally, do not change overnight. It seems that, without 'fixing' the institutional norms that govern the behaviour of individual judges,[7] which lead to unpredictable careers and low job security, eliminating threats coming from outside the judiciary will not be sufficient to provide internal independence of

[7] Or, providing systematically a more lenient interpretations of pre-existing norms, which lend themselves to interpretation in either way with their vague wordings. This has been the case in Italy, which, in fact, is itself a form of institutionalization as long as coherent set of rules are developed rather than the Hobbesian state of affairs that currently governs the judiciary of Turkey.

individual judges as who 'captures' the council will continue to control the judiciary.[8] To echo Hammergren, rather than being too exposed to external influences, it is "insufficient or perverse institutionalization" (Hammergren, 2002, p. 17) that seems to be plaguing Turkish judicial corps.

[8] Of course, with the current legal regime governing the council and careers of individuals, one solution could be to provide a suficient degree of pluralism in the composition of the council to prevent it from serving to dominant interests, which will be touched upon in following chapters.

CHAPTER 3

ITALY: A QUEST FOR INDEPENDENCE?

In this chapter, I trace the development of a grassroots movement within the Italian judiciary in the aftermath of World War II that mobilized in order to do away with the hierarchical structure of the judiciary, which, following the wording of the Constitution of 1948, they thought to be conflicting with judicial independence. As seen from the debates in the Constituent Assembly, the founding fathers of the so-called First Republic were aware of the need to provide an independent judiciary as the preceding fascist era saw an instrumentalization of the body in the hand of executive.

In this regard, the institution of a judicial council, the CSM, with the Constitution of 1948, which started operating in 1959, represented an attempt to insulate appointments, promotions, and disciplinary sanctions of magistrates[9] from partisan politics to shield the judiciary from executive meddling and render it independent from the executive. However, providing insulation from political realm did not result in a clear rupture from the preceding era in terms of executive - judiciary relations, let alone enhancing its independence, thanks to the lenient relations and close contacts between the executive and the high judiciary seen in the early years of the First Republic; the latter being recruited predominantly in the fascist era and exerting hierarchical control over the whole judicial corps. Yet, a glance at the history of the First Republic reveals constant skirmishes between -parts of- two classes, lasting for decades. Some Italian magistrates have not been so

[9] The word 'magistrate' comprises both judges and public prosecutors in Italy as they are recruited jointly, belong to the same corps, can move from one role to the other and enjoy same guarantees (Di Federico, 2004). This constitutes quite an unusual deviation from the civil law tradition which would prove to be crucial in the future.

compliant against the politically powerful; in fact, there is a consensus in the literature that the investigations pursued by overly-zealous magistrates were the chief factor that brought about the end of the First Republic in the first half of the 1990s (Della Porta, 2001; Nelken, 1996b). Indeed, the Italian judiciary is essentially self-governing and enjoys a remarkable degree of independence from political powers (Benvenuti & Paris, 2018; Clark, 2003; Garoupa & Ginsburg, 2009; Guarnieri, 1994). But how did the traditional dependence on the executive of Italian judiciary turn into this kind of self-assertion? I argue, a high degree of 'internal' independence of individual magistrates, i.e. independence from other (higher ranked) magistrates, was provided through series of legislative reforms and the favourable implementation of the CSM, is crucial to explain the change, which resulted in the overthrow of traditional political system of Italy in the 1990s after a series of corruption investigations.

The reference group that magistrates have in mind will vary as the organizational arrangements vary (Guarnieri, 1994, p. 243-244). Despite being a civil law judiciary where the reference group lies within the judiciary, wherein professional socialization is expected to take place; as a result of dismantling the judicial hierarchy, Italian magistrates freed themselves from the undue influence of their 'superiors'. A hierarchical structure and a rigid career system, well into the 1960s, had conditioned judicial conduct of Italian magistrates since higher magistrates, recruited predominantly during the fascist period, controlled promotions, transfers, appointments and disciplinary proceedings. Once the gradual dismantling of the hierarchical structure was accomplished, thanks to the efforts of grassroots movements within the judiciary that mobilized for this cause via their strong judicial association, which continues to this day, Italian magistrates were freed from an

artificial legal conformism that marked the judiciary, mostly rooted in careerist concerns.

A natural result of the domination of higher ranks was the prevalence of conservative interpretations of laws which the up-and-coming class was looking to jettison. This de-hierarchization of the judiciary was rooted in the actual application of the CSM the related legislation once the domination of higher ranking magistrates within the body was broken. Dismantling of the hierarchy was mainly rooted in the career course becoming practically automatic, barring great demerits, which, as a result of lack of control mechanisms, naturally incited debates about efficiency and accountability. The whole story represents a stark contrast with the Turkish case in which the legal regime and the actual implementation of judicial council functioned to discipline individuals with a stringent career structure rather then freeing them. This chapter offers a narrative of the traditional, hierarchical setting and the emergence of a grassroots movement to destroy it. The following chapter will examine the institutional reforms that dismantled the traditional career system, step by step, and the changing composition of the CSM and their consequences.

3.1 The traditional setting

The organizational setting of the Italian judiciary has its roots in the pre-Unification states and particularly in the Kingdom of Sardinia which had been heavily influenced by the Napoleonic model of France (Alvazzi del Frate, 2004, p. 147; Del Mastro, 2014, p. 6; Guarnieri, 2011a, “Le strutture giudiziarie,” para. 1), which is quite similar to the judicial organizations of other countries of Continental Europe (Guarnieri 2001). Exuding a bureaucratic ethos, this organizational setting in which the judiciary operated was typical of a judiciary of the civil law system, which,

according to Carlo Guarnieri, often manifests following characteristics: 1- through written and sometimes oral examinations, recruitment takes place at an early age, usually right after the aspirant judge graduates from the university and the candidate's previous, professional or non-professional, non-judicial experience does not matter; 2- the professional training and socialization happens mostly within the judicial body; 3- organizational duties are arranged according to a hierarchy and the career advancement is competitive as the promotions take place after assessments, which combines seniority and merit, carried out by the judges of higher levels; 4- the roles are "generalistic"; the same judge, changing roles frequently in the course of her career, can rule on topics ranging from marriage to homicide as "the participants are supposed to be capable of playing all organizational roles formally associated with their rank", which in turn, weakens guarantees of independence as superiors enjoys a certain degree of influence in these decisions; 5- institutional guarantees of independence from the political system tend to be weaker – as a matter of fact, internal independence is also weaker because of the hierarchical structure. (Guarnieri, 1994, p. 242-243).

This typical civil law setting of the judiciary, on the top of which the Court of Cassation was located as a point of reference, ensuring legal uniformity, and which regards the magistrate as the "*bouche de la loi*" (Pederzoli & Guarnieri, 1997a, p. 253), the voice of the legislator – i.e. a formalistic, if not mechanic, arbiter that decides on cases with full adherence to the law regardless of the socio-political context, went largely unchanged until the fall of fascism in Italy after the World War II (Guarnieri, 1997). The judiciary was not independent from the political branches and the executive, the Minister of Justice in particular, could exert influence on judicial corps mostly through senior judges with whom it typically retained close

contact. The enactment of the Constitution of 1948 represented the first step as it laid a fertile ground on which judicial independence would later grow, albeit incrementally, as it would take some more time for the changes introduced by the Constitution would be implemented in practice. Still, having taken a lesson from the atrocities of the preceding fascist regime, the founding fathers of the First Republic opted for a structure of judicial organization formally separate from the executive to act as a check on the executive powers (Guarnieri, 1997, p. 171). The new Constitution, enacted in 1948, envisaged two novel institutions that would disturb the traditional hierarchical setting of the Italian judiciary: the Constitutional Court and the CSM.

3.1.1 The Constitutional Court

The Constitutional Court started working in 1956, only after the Christian Democrats (*Democrazia Cristiana;* "DC" hereafter), a conservative party that had emerged with the absolute majority in both chambers of the legislature after 1948 elections, lost their majority in the elections of 1953.

The pyramidal and hierarchical structure of the judicial power of the era had allowed the Court of Cassation, as the apex of the pyramid, to impose a monolithic and authoritarian political orientation through the examination of the sentences of magistrates and the career system. The reference group that magistrates would look up to when passing a sentence was their seniors, the Court of Cassation particularly, who were entrusted with the duty to provide legal uniformity. The duty of constitutional review had been within the competence of ordinary courts and those courts had been exercising this duty with "extreme timidity" (Ferri, 2018, p. 14-15).

However, undertaking a Kelsenian-type centralized judicial review, formed outside of the 'pyramid' and assessing the constitutionality of laws, the Constitutional Court increasingly turned into a temple of judicial activism over time, since, magistrates of ordinary courts had the power to submit laws which had been largely enacted under the fascist regime on the grounds of unconstitutionality to have them abrogated. Albeit limited to case at hand, this was a convenient way of circumnavigating the monopoly of high magistrates. Magistrates could do this upon any objection of constitutionality raised during the lawsuit, or, even better, they could claim that a law that was to be implemented in the concrete case to be unconstitutional and refer the question to the Constitutional Court on their own initiative (Pederzoli & Guarnieri, 1997a, p. 256). The Court would not fail to satisfy the expectations of more activist magistrates and abrogated the laws from the fascist era most of the time – so much that some commentators hold that the Constitutional Court has been the body that has done the most to put into force the provisions of the Constitution (Di Federico & Guarnieri, 1988, p. 161).

The activist stance taken by the Constitutional Court (Volcansek, 1991), especially immediately after its establishment, proved to be crucial in two senses. First, it 'purified' the legal order, so to speak, at a time when the legislature and the executive were in a state of inertia to replace fascist laws (Guarnieri, 2011a, “La Corte costituzionale,” para. 5; Mandel, 1995). Second, the monopoly of legal interpretation of senior magistrates sitting in the Court of Cassation, who had been recruited and socialized under the fascist regime and known for their conservative tendencies,[10] and as shall be seen below, their general influence on the judiciary

[10] The general conservative tradition of the majority of the Italian judiciary until 1960s is well-known. To give an example, conservative tendencies of the Italian magistrates were so overwhelming that, during the transition from the Liberal to the Fascist era, only 16 out of more than 4000 judges had been purged in the 1920s (Guarnieri, 1992, p. 86). No cleanse was necessary as the ideological

would be increasingly put under question (Piana, 2010, p. 45) as the establishment of the Court induced younger magistrates to take a more activist stance – which, in the 1960s, ended up as a sort of de facto alliance between judges of lower grade and the Court (Guarnieri, 2011a, “L'accumulo delle risorse,” para. 1). Indeed, the monopoly of the Court of Cassation on the 'right' interpretation of the law until 1956, given the hierarchical structure of the judiciary explained below, had been the sword of Damocles hanging directly above Italian magistrates. The inception of the Constitutional Court opened a breach in the legal formalism that had dominated the Italian jurisprudence until then, which was reinforced by the pyramidal structure of Italian judiciary and the high magistracy dominating the lower ranks through a rigid career system (Moroni, 2005, p. 97-98).

3.1.2 The High Council of the Magistracy (CSM)

As a constitutional-administrative body that is entrusted with the recruitment, assignment, promotion, discipline, transfer and dismissal of magistrates, the CSM had an inception that was no less than tormented. After heated debates within the Constituent Assembly as well as during the legislative process, the founding law on the CSM (Law no. 195/1958) could enter into force only in 1958 and the body started operating in 1959, heavily disappointing the hopes for a truly self-governing judiciary as it had been delineated in Article 104 of the Constitution.

A decade ago, the Council had fomented heated debates in the relevant sessions of the Constituent Assembly already. Although it had largely been agreed upon that the judiciary must be released from its ties to the executive to secure its independence and signify a rupture from the past, the ways in which this could be

background of the overwhelming majority of the magistrates did not pose a threat to the regime – and time proved fascists right.

achieved had proved to be a fault line. Two opposing opinions can be roughly sketched: the proponents of a purely self-governing judiciary against the ones who would like to see a certain degree of linkage with the political branches to provide necessary checks and balances. The former was destined to become a minority against the latter as the alliance between the left, which held "the will of the people", i.e. the legislature, in high esteem and understandably skeptical of a high judiciary that is of conservative nature as revealed in the preceding era, and the DC who defended the "unity of the state" and maintained warm relations with a traditionally conservative high magistracy. Furthermore, the issue of internal independence presented another line of division (Benvenuti & Paris, 2018, p. 1643-1647; Piana & Vauchez, 2012, "Il gruppo di lavoro dell'Assemblea costituente sul «potere giudiziario»", para. 2-4).

The resulting articles with regard to the CSM and the organization of the judiciary in general (specifically articles 105 and 107), after two years of give and takes, were notably ambiguous in wording that they satisfied no one (and maybe, everyone). The founding fathers of the Constitution of 1948 foresaw a strong (in terms of competences, as mentioned above) entity where magistrates dominated. Two-thirds of the members were to be elected by the magistrates from among themselves, one-third of the members were to be elected by the legislative branch, from among law professors and lawyers of at least 15 years of experience, one of whom would be the vice-president of the body, therefore retaining a certain degree of linkage with the political system. The first group of members is called "gowned members" (*togati*), the second group is called "lay members" (*laici*). Lay members were to be selected by both chambers of the legislative through a secret vote and the majority needed was three-fifth, which ensures a certain degree of consensus

between political parties. The selection of gowned members and the number of members of the body were left for the subsequent legislature to decide. The CSM was to be presided over by the President of the Republic and the First President and the General Prosecutor of the Court of Cassation, both from higher echelons of the judiciary, were to be ex officio members. Those Constitutional provisions remain unchanged to this day.

However the normative articles that would affirm that the judiciary was independent and whatnot, words that are found even in the constitutions of dictatorial regimes; the founding fathers had left subsequent legislature, which would pass relevant laws, a wide scope of discretion that could go either way thanks to the ambiguous wording of provisions (Piana & Vauchez, 2012, "La riscrittura in seduta plenaria", para. 3-5). Therefore the fate of the Italian judiciary would very much depend on the following elections and the resulting parliamentary arithmetic and legislation, since, the Constitution had as many meanings as the actors involved in the constitutional debate.

It should not be surprising then that it took ten years for the law on the CSM to be promulgated and thus the body to start operating, given the unfavourable balance of political powers, especially in the first five years of the First Republic. The elections of 1948 saw a sweeping victory for the DC, which obtained the absolute majority in both houses. The party, conservative in nature, had a convergence of interests with the higher magistrates of similar ideological pedigree and with whom acted in collaboration, which led to an "equilibrium based on the external accountability of the judiciary to the Christian Democratic Minister of Justice filtered through the informal influence of the upper judicial hierarchy in appointments, promotions, etc, formally decided by the Minister of Justice"

(Benvenuti, 2018, p. 374-375). The DC would recurrently be the leading party until its dissolution in 1994 and always be the leading coalition partner, although it could not re-achieve an absolute majority again. Indeed, the electoral setback of 1953 (down to 40 percent from 48 percent) was one of the reasons that would accelerate the inception of the CSM as a constitutional organ that was going to limit the power of other branches in meddling with the judiciary. Add to that the hostility shown by a part of the higher magistracy against a self-governing organ that has the potential to be dominated by lower ranks, given their strength in numbers, and the associated risk of losing their privileged statuses, and the difficulty of reaching an agreement about the elements that had been left open to contestation by the Constituent Assembly – the picture becomes clearer (Piana & Vauchez, 2012, "La tormentata nascita del Csm", para. 1; "L'abbandano della «grande riforma», para. 3). Yet, the law entered in force in 1958 would not present a rupture with the past, in fact, it would indicate that the will to subordinate the judiciary to political power would just change form.

The law on the CSM entered in force on March 24, 1958, three and a half years after whose draft had been presented to the Parliament on November 9, 1954. We can distinguish between two opposing lines in the debates about the interpretation of the constitutional norms pertaining to the organization of the judiciary and the law on the CSM in particular, one being the "constitutionalist interpretation" (supported by leftist segments of political spectrum, younger magistrates and academia largely, coming from a point of view fuelled by the doctrine of separation of powers and opting for a representative CSM, endowed, as a result, with the status of an autonomous constitutional organ). the other being the "statist interpretation" (supported by the judicial elite and majority of the DC, envisaging an administrative-consultative body in the CSM, acting in strict

collaboration with the Minister and therefore with the executive) (Piana & Vauchez, 2012, “La nascita del Consiglio superiore della magistratura”, para. 1). It is safe to say that the latter prevailed.

Envisioned and drafted by a small number of higher ranked judges, close to the Minister, the law rested on a restrictive interpretation of the independence of the judiciary, externally and internally. Rejecting its autonomous status, it attributed the CSM a merely administrative role, granting the Minister the power of initiative. To be sure, the proceedings regarding the statuses and careers of magistrates could be 'activated' only with the proposal of the Minister. Therefore, the Minister had the possibility to paralyze the working of the Council. Moreover, regarding the appointments to managerial positions, heads of courts in general and important posts such as the First President and the General Prosecutor of the Court of Cassation, the law provided that the decision could be taken only “in concertation” with the Minister (Piana & Vauchez, 2012, “La tormentata nascita del Csm”, para. 1; “L'abbandano della «grande riforma», para. 4).

Another element that pointed to the conservative tendencies in the design of the law was the creation of a “presidency committee” which was composed of the vice-president, coming from the Parliament (always from the DC), and the other two ex officio members, namely, the First President and the General Prosecutor of the Court of Cassation – all higher ranked magistrates. Not foreseen by the Constitution, this committee was endowed with remarkable powers: the committee was endowed with the management of funds for its operations and had the power to propose the President the formation of the internal commissions – evidently highlighting the tendency of the legislator to keep the CSM in line with the governing majority (Ferri, 2018, p. 27).

In addition to the subordination to the Minister, the composition of the Council favoured higher magistrates, traditionally close to the executive and who, then, comprised less than six percent of the judiciary (Piana & Vauchez, 2012, "L'alta magistratura e il governo del corpo giudiziario", para. 1), as the wording of the Constitution had made sure that two-thirds of the body would be comprised of magistrates elected by other magistrates, but had not elaborated *which* magistrates would be elected, further restricting the scope of independence of individual magistrates. Six of the fourteen gowned members was reserved to the high magistracy, four to the appellate magistrates four to the magistrates of tribunal courts. Another element in the law that would tilt (if not altogether wipe out) the balance in the favour of magistrates of higher ranks was the election system of the gowned members. In addition to the overrepresentation of the high magistracy, the law provided that magistrates could participate only in the election of their own categories, i.e. tribunal magistrates voting only for tribunal magistrates, Cassationists for Cassationists etc, thus shielding the high magistracy from yielding to the electoral pressures of their lower-ranked peers who comprised the majority of the judiciary.

Similarly, the acts of the CSM was subjected to the judicial review of the Council of State (*Il Consiglio di Stato*),[11] which is concerned with cases of administrative nature (Piana & Vauchez, 2012, "La tormentata nascita del Csm", para. 2). Last but not least, the CSM did not have a separate budget from the

[11] This might not necessarily, per sé, curtail judicial independence or mean that the CSM was under a tutelage – indeed it was, but via other mechanisms. Even if we leave aside accountability problems resulting from exempting a constitutional body from judicial review, the unquestionability of the acts of a judicial council can potentially subjugate magistrates to the will of the majority of the Council – which is endowed with the power of making decisions related to the whole career course of an individual magistrate. Di Federico claims that there are around 250 cases a year in which decisions regarding the statuses of magistrates are challenged and most of them are successful (Di Federico, 2012, p. 361).

Ministry. This would remain unchanged until 1967 (Piana & Vauchez, 2012, "Un organo di natura essenzialmente amministrativa" para. 3).

In short, the legislator did not make its move to change things in line with the spirit of the Constitution but opted to preserve the existing order in a new form (Ferri, 2018, p. 25-26). To put it in the words of Giuseppe Maranini, a renowned jurist: "even though we continue to call it the Higher Council, in reality, it is the Court of Cassation" (as cited in Alvazzi del Frate, 2004, p. 163) (see Appendix A, 1).

3.1.3 The hierarchy in practice and the first years of the CSM

Higher magistracy preserved its influence on judicial corps until the end of 1960s, thanks to the favourable founding law of the CSM and their prevalent position in the governing seats of the National Magistrates Association (*Associazione Nazionale Magistrati*; "ANM" hereafter), as the name tells, association of the Italian magistrates, dating back to 1909 and refounded in 1944 after it had been dissolved during the advent of fascism, which acted as a forum in which the magistrates discussed judicial politics.[12]

Briefly, institutional mechanisms that induced behavioral conformism were in the hand of the judicial elite. Indeed, the career was structured as a ladder and the competitions through which promotions were mostly based on were decided by commissions composed exclusively by senior magistrates, nominated until 1959 by the Minister and then by the CSM in which higher ranks were also overrepresented. Moreover, the opinions of the heads of courts, who were appointed by Minister until 1959, then by the CSM, did also weigh remarkably (Ferri, 2018, p. 19-25). Therefore, until the 1960s, the judicial elite had a monopoly on the assessments of

[12] The Association is still a crucial player in the game. Currently, about 93 percent of Italian magistrates are members of the ANM (Di Federico, 2012, p. 385, n. 85).

individual magistrates for promotions. Those assessments foresaw abstract requirements like “prestige” or “public esteem” which would largely be evaluated based on analyses of judicial opinions/decisions of magistrates. The analysis of Di Federico and Guarnieri shows that three types of judicial opinions have continuously gotten negative assessments: 1- ones that do not conform to the 'correct' interpretation of norms as elucidated by the Court of Cassation; 2- ones that reveal socio-political leanings of the magistrate and 3- ones that are correct but lack legal-technical craft (Di Federico & Guarnieri, 1988, p. 167). Due to limited posts available and sometimes due to equal merits of candidates, discretionary promotions were common, based mostly on the supposed conformity of candidates to the dominant judicial ideology. This made sure that corps would avoid coming into conflict with the higher ranks, would not look for innovative legal solutions and would refrain from carrying 'uncomfortable' investigations about those who held political and economic power, given their contacts with the high magistracy (Moroni, 2005, p. 103-105).

For disciplinary measures, the practice was also similar. Vague disciplinary criteria provided by law, coupled with the “intelligence” gathered about official and private conduct of magistrates, had been one of the traditional tools with which judicial elite ensured conformity to their ideal image of magistrate: an apolitical interpreter of existing legislation, living in the shadows. The analysis of Di Federico and Guarnieri demonstrates that private conduct that induced gossiping in the working place, criticism about the conservative tendencies of the judiciary and engagement in political activities (especially in leftist spheres) were regularly penalized whereas negligence in duties often went unpunished if not publicized (Di Federico & Guarnieri, 1988, p. 165-166). After the establishment of the CSM, the

disciplinary section of the CSM was also in the hands of the high magistracy with their overrepresentation being even more pronounced than in the plenary of the Council (Piana & Vauchez, 2012, “L’influenza della lettura statalista sul funzionamento del Consiglio” para. 2). This domination of the high magistracy rendered the judiciary as a whole vulnerable to external pressures despite a seemingly insulated Council from political branches; which was indeed the case, as influencing the top positions of the judiciary was enough to exert influence on the whole corps, given the discretionary power of the high magistracy on the careers of other magistrates (Ferri, 2018, p. 11; Tullio, 2016, p. XI).

Yet it would be misleading to picture the situation as an arbitrary tyranny of minority, in which a few hundred magistrates dominated coercively more than six-thousand magistrates who were trying to free themselves from the chains. The hierarchical principle reproduced itself not just through 'hard power', so to speak, but also through forming a family-like cultural basis, the "big family" that the former President of the Court of Cassation, Ernesto Eula (1954-59) refers to, that was uncontestable. By and large, this went uncontested through the 1950s apart from anecdotal instances (Piana & Vauchez, 2012, “L'alta magistratura e il governo del corpo giudiziario”, para. 1-3).

In this regard, the career system produced an effect which we can call 'conformism', undermining jurisprudential pluralism, given the ultra-conservative stance of the Court of Cassation (Crainz, 2003, p. 118), as a result of the efforts of the lower ranks to harmonize their decisions with higher ranks who controlled their careers rather just applying the law in accordance with their conscience (Ferri, 2018, p. 19-25). Moroni claims that the traditional bouche de la loi conception of the magistrate remained prevalent both within the academia and within the judiciary,

well into the 1960s, given the predominance of the hierarchical structure of the judiciary which coerced the magistrates into an artificial legal uniformity (Moroni, 2005, p. 97-98). Di Federico & Guarnieri define the state of affairs as an adherence of conformistic nature, “both to the image of the judge as a bouche de la loi totally aloof from the socio-political context, as well as to a work and life style formally characterised by social and political agnosticism” and put forth three dogmas pervading the era: the completeness of the codified legislation, legal certainty and indifference to the 'justness' of existing norms (Di Federico & Guarnieri, 1988, p. 154-155). Consequently, another direct result of the hierarchical structure was that it promoted legal formalism through the assessments of the superiors over the sentences of the lower ranks during the processes of promotion. The 'right' interpretation of the law was pre-determined. Magistrates had to conform to the 'right' interpretation to advance their careers and avoid the sticks. This formalism lent itself well to a degree of consistency with the executive's policies. Since the owners of the 'right' interpretation had in their minds mostly a statist vision of the judiciary that 'collaborates' with the executive rather than emerging as the 'third power', a form of political loyalty on the behalf of most Italian magistrates was a predictable consequence. This vision of a judiciary, subordinated to the higher interests of the State was crystallized in the words of Ernesto Eula, quoted by Piana and Vauchez (2012) in this regard:

> Autonomy and independence from every power: however, not in a closed and isolated position, let alone in antagonism with other offices and bodies, but with an open spirit, of conformity and cooperation with that immanent meaning of the State, in its superior, unitary ends. (as cited in Piana & Vauchez, 2012, “Il mantenimento di una cultura statalista dell’istituzione giudiziaria”, para. 3) (see Appendix A, 2).

Piana and Vauchez claim that this statist doctrine that glorifies the “superior interests of the State” transcends the magistracy, preceding even the fascist regime, therefore

infiltrating Christian Democratic elites because of their common formation. Given the dominance of the notion of the judiciary as a mere organ of the State, both among the judicial and political elite and given the predominance of the former on the judicial corps through hierarchical control and loyalty to the executive, it is no surprise that the statist interpretation of the Constitution prevailed in the passing of the law on the CSM and its consequent first years of operation. Contesting lower ranks could not break the firm alliance between the high magistracy and the leadership of the DC and, despite minor some amendments during the three and a half year drafting phase in between, the statist core of the law remained essentially untouched (Piana & Vauchez, 2012, "Una solida coalizione politico-giudiziaria", para. 1).

As one can naturally predict from the heated debates in the process of the drafting of the law, the law on the CSM encountered harsh criticism among which there were even claims of unconstitutionality, especially with regard to the wide array of powers conferred to the Minister (Alvazzi del Frate, 2004, p. 162) and the presidency committee (Piana & Vauchez, 2012, "L'influenza della lettura statalista sul funzionamento del Consiglio" para. 1). Nevertheless, the body started to operate, under a statist aegis, to which it would be subjected until 1968 (Piana & Vauchez, 2012, "Un organo di natura essenzialmente amministrativa" para. 1), thanks to the election system detailed above. Therefore, rather than presenting a rupture from the fascist legacy, the inception of the CSM represented a continuity in most aspects.

Albeit marginalized because of their minority position as well as the presidency committee acting as factotum, the owners of the constitutionalist interpretation were not absent from the plenary of the first CSM, at all: four out of seven of lay members coming from the Parliament and four out of fourteen gowned

members were constitutionalists. The fact that the 'constitutionalists' could secure all four seats assigned to the magistrates coming from the ordinary courts, i.e. lower ranks but that the others went in the favour of statists is well in conformity with the zeitgeist. The ANM “sponsored” eleven of the fourteen gowned members for the elections to the first CSM held in January 1959 (Piana & Vauchez, 2012, “Il «Consiglio dei notabili»” para. 1).

From the lay members, two of the there 'statist' members were nominated by DC with the other one being the representative of the neo-fascist Italian Social Movement (*Movimento Sociale Italiano*). On the other hand, the four constituionalists were representatives of different parties, mostly leftwardly-oriented: the communists (*Partito Comunista Italiano*; “PCI” hereafter), the socialists (*Partito Socialista Italiano*; “PSI” hereafter), the social democrats (*Partito Socialista Democratico Italiano*; “PSDI” hereafter) and the liberal-conservatives (*Partito Liberale Italiano*; “PLI” hereafter) (Piana & Vauchez, 2012, “Il «Consiglio dei notabili»” para. 2).

Although the introduction of the constitutionalists to a judicial body signalled a novelty, it soon became apparent that the discordant voices would be limited to the plenary of the CSM and the constitutionalists could exert minimal influence on the concrete operation of the body. As noted above, the statists, who had drafted the very law on the CSM themselves, had made sure that they would obtain the key positions to which they had attributed a wide range of powers, such as the presidency committee and vice-presidency, as well as the disciplinary committee, thus marginalizing the plenary in terms of decision-making – indeed, the plenary, in which the statists dominated too, soon turned into a 'yes-no organ', that ratifies or

vetoes the decisions already taken in relevant commissions (Piana & Vauchez, 2012, “L'influenza della lettura statalista sul funzionamento del Consiglio” para. 1-3).

As expected, the CSM mostly acted as a mere consultative organ of the Ministry of Justice during the first cycle. Far from being an exaggeration, the body did not even have its separate building and had to settle into one of the rooms within the Ministry of Justice (Alvazzi del Frate, 2004, p. 162). In the vague division of powers provided by the Constitution between the body and the Minister, the latter had the upper hand thanks to the dominance of the statists within the organ. Indeed, distinguishing between the cases concerning of the statuses of magistrates, which is the responsibility of the CSM according to the Constitution, and the cases concerning “the organisation and functioning of those services involved with justice", which falls within the responsibility of the Minister, was the most controversial topic of interpretation during the first term. However, there were other manifestations of the CSM's status as a secondary, administrative organ that can be traced in practice. For example, the procedure of appointment to managerial positions, heads of courts in general, which had been foreseen by the law on the CSM to be carried out 'in concert' between the Minister and the CSM, were interpreted in favour of the Minister, reducing the procedure to a simple approvation by the plenary on the excuse that the managerial positions at stake (the First President and the General Prosecutor of the Court of Cassation in the concrete case), the appointments were needed to be dealt with in a rapid fashion. Most importantly, the initiative power of the Minister in the cases concerning the statuses of the magistrates became quite binding in practice, therefore leaving the body incapable of dealing with cases that it had been constitutionally mandated to in the first place (Ferri, 2018, p. 27-29; Piana & Vauchez, 2012, “Una posizione istituzionale di secondo piano” para. 1-5).

On a closer inspection, rejection of the vice-president to publicize the opinion of the CSM on a particular draft law of the Minister of Justice is another example, as the opinions of the CSM should be, according to the vice-president, considered as an internal act[13]. On a similar but different vein, the issue of police violence, when brought onto the table by the PCI representative was excluded from the agenda, therefore implicitly affirming the limited political relevance (or lack thereof) of the CSM as a mere auxiliary body of the Ministry. Above all, even though being supposedly designed as to be the autonomous decision-making body in terms of careers of magistrates, the CSM did not even possess the means to be so, leaving aside the Ministerial initiative here, as the data regarding the judiciary -such as dossiers of individual magistrates, statistics etc.- were within the possession of the Ministry, creating an information deficit that contradicts the raison d'être of an autonomous body tasked with self-governance (Piana & Vauchez, 2012, "Una posizione istituzionale di secondo piano" para. 1-5).

Therefore, it is safe to claim that during its first decade, the CSM was under the tutelage of the Ministry from outside and the presidency committee from within and the designers of the law on the CSM, i.e. the judicial elite, part of which was overrepresented in the council, had won the first round. If we follow Garoupa and Ginsburg's (2009) typology of judicial councils, the CSM of this era fell under the category of "strong hierarchical judicial councils", with its extensive competences and its composition that favoured higher magistrates. Thus, far from constituting a representative entity of judicial power, the CSM was designed as a collegial organ in which different stakeholders meet – which placed the council, under a thinly-veiled

[13] This is quite remarkable when one thinks about more recent practices, outwardly-oriented as they are, as the CSM, after self-asserting itself into the politico-judicial agenda, recurrently published opinions and stirred public opinion about cases concerning justice, even during the processes of Parliamentary ratification of relevant legislation.

'collaboration with other powers' excuse, in a position of subordination vis-a-vis other powers. This notion finds itself an expression in the words of Andrea Torrente, a magistrate of the Court of Cassation and one of the first members of the CSM: “Independence, autonomy, self-governance can mean neither separation from other powers, nor, above all, release from supervision and control, (which are) indispensable in the complexity of the organization of the State” (as cited in Piana & Vauchez, 2012, “L'abbandano della «grande riforma»”, para. 3) (see Appendix A, 3).

3.2 The quest for internal independence

Although the 1948 Constitution had provided a favourable framework for judicial independence to flourish, as seen above, at the start of the 1960s, the practical experience was not quite affirmative since the executive could exert a high degree of influence on the magistracy via its contacts with the high magistracy thanks to the vertical structuration of the body, rather than possessing a diffuse power that spread horizontally (Moroni, 2005, p. 114). Disappointed by the non-fulfillment of the Constitution, in terms of the lingering hierarchical structure in the face of the Article 107 that reads “Magistrates are distinguished only by their different functions” and especially about the law on the CSM, the lower grade magistrates, towards the end of the 1950s, started seeking for allies for their cause – both inside and outside the magistracy. The ANM, in this regard, served as a platform through which the magistrates could articulate their demands.

3.2.1 The emergence of a grassroots movement

The conception of law and magistracy prevalent in Italian judicial spheres noted above was to be put into question incrementally, starting from legal scholars and

finding resonance among magistrates. According to Di Federico & Guarnieri, in the face of mounting evidence against the supposed completeness of law, the role of a magistrate as a mere interpreter of law started being increasingly questioned, as, in reality, they enjoyed a wide margin of discretion in applying the law and adjudication was inherently a political activity rather than being technical. Thus, magistrates made policy and in this regard had to conform to the principles laid down in the Constitution while making policy. Even the 'dogma' of legal certainty began to be denounced as a means of pushing a conservative agenda. For these reasons, the task of a magistrate was to interpret norms *in line with the Constitution of 1948*, exuding a democratic spirit, at the risk of differing from prevailing existing interpretations, and if the norm at hand was deemed unconstitutional, to submit it to the Constitutional Court (Di Federico & Guarnieri, 1988, p. 155).

Meanwhile, the balance of powers in the ANM had been shifting in the favour of the magistrates of lower ranks, especially since the second half of the 1950s. To be sure, even the draft law on the CSM, presented to the Parliament in 1954 had encountered strong criticism coming from among the lower ranking magistrates, along with various segments of the Parliament and academia. The non-application of the articles of the Constitution relevant to the judiciary had provoked a reaction from the opposition in the Parliament which aimed for the improvement of the draft law. This found its resonance in the lower ranks in the judiciary and the dominance of the Court of Cassation, incrementally, started to be put into discussion. The “iconoclasts” within the ANM that would be later known as “the renovators” (*i rinnovatori*), defending the democratic principle with regard to the elections to the governing bodies of the Association, had started to mobilize, little by little, in the aftermath of the Law no. 392/1951, the Piccioni Law, which had highlighted the

arbitrary nature of the career system, making it more difficult for younger magistrates to advance to higher ranks (Piana & Vauchez, 2012, "I conflitti sulla legge istitutiva", para. 1). To mobilize around the career issues, in the most important local branches of the Association, the faction (*corrente*) of renovators started to operate in a non-structured manner. The new voices did not hesitate to jar against the traditional leadership of the ANM, which had been, until the second half of the 1950s, more interested in bettering the overall economic treatment of magistrates (Guarnieri, 1992, p. 94).

The Napoli congress of the Association in 1957 saw the first sparks as it signalled the manifestation as well as documentation of the debate regarding the domination by the Court of Cassation and that it was put into question. The start of the discussion regarding the weight of the high magistracy in the upcoming law on the CSM provided the base for the subsequent bifurcation among the magistrates regarding the very notion of magistracy – one that was open to constitutional novelties, comprising mainly of younger magistrates whereas the other one being more conservative, that defended the maintenance of the hierarchical and bureaucratic structure and formalism (Mammone, 2009, p. 36-37). Briefly, the former position corresponded to an objection to the existing career structure and the power concentrated in the hands of the high magistracy, with the claim that they are not compatible with the new role assigned to the magistrate by the Constitution of 1948, progressive in nature, and a demand for a CSM emancipated from other powers and that is fully representative of whole judiciary, mostly supported by the younger corps; whereas the latter, supported mostly by the older generations, corresponded to a conservative position endorsing the sustainment of the career system, lenient relations with the political powers and a CSM in which the Minister

and high magistracy prevailed (Bruti Liberati, 2018, "L'evoluzione nell'Anm"; Guarnieri, 1992, p. 94; Moroni, 2005, p. 81-119).[14]

The establishment of the CSM (and relevant issues such as the electoral system and composition) and the career system were the two chief topics over which the division line within the judiciary made itself clearer. Nevertheless, the resolution published after the Napoli congress crystallized the change of the tide within the ANM, of which, until then, had been little evidence on paper (Mammone, 2009, p. 36-37). The motion, which was approved with 644 votes in its favour against 412 of 1.671 participants, put forth that "for the purposes of a correct administration of justice, it is essential that all magistrates are under conditions of absolute equality, regardless of their functions", that "judicial function is not susceptible to gradation of values, all its activities being immediate expressions of the sovereign power itself; and consequently that passing to a different position, including that of Cassation, must not constitute a promotion and thus economic advantages" and proposed that "the equal dignity of all magistrates exercising judicial function, abolishing -with immediate effect- every type of promotion and regulating the development of economic treatment exclusively on the basis of seniority and family situation be ensured" (as cited in "Sulla Riforma dell'ordinamento Giudiziario", 1957, p. 99-100) (see Appendix A, 5). The egalitarian stance is hard to miss out on.

[14] The response of Andrea Torrente and Ettore Favara, magistrates from the Court of Cassation, to those demands during the Napoli congress, crystallizes the latter position: "Now all this may seem accurate to a superficial and alien vision to the problem, but it does not correspond to an appropriate inquiry of the problem . . . The Council, does not really have a duty of representing the interests, feelings or demands of one or other category of magistrates. Instead, it is endowed by the Constitution with the duty of governing the judiciary, in the superior interest of justice and the country. If this is its function, its composition must necessarily reflect the structure of Italian procedural order, which is articulated in ranks, culminating, according to a precise constitutional precept (Article 11), organically in the Court of Cassation . . . Well, if the Italian judicial order implies this difference in functions and if the function of the first instance judge is institutionally subjected to the control of the appellate judge and the latter is that of the Cassation and if the task of the Council consists, above all, in the evaluation of the suitability of the magistrate to her functions or to the superiors, it results in the need of a greater participation of magistrates of the Cassation" (as cited in Bruti Liberati, 2018, "L'evoluzione nell'Anm", para. 12) (see Appendix A, 4).

Indeed, generally, albeit without sufficient maturation, revolutionary ideas, at least for the time, started to circulate among the magistrates, such as equality between magistrates, also in terms of economic treatment, dismantling the hierarchy, abolition of the career system, electability and temporariness of managerial positions – which, showed that a heterodox culture was evolving within the magistrates that would lead to fierce struggles in the coming years (Tullio, 2016, p. 8). Given the criticism coming from Ercole Rocchetti, a member of the DC and a future vice-president of the CSM and a future member of the Constitutional Court as well, regarding the election system of the ANM as it gave a window of opportunity for movements seeking a rupture with the tradition, it is safe to say that this emerging fracture within the judiciary did not go unnoticed in the political sphere (Fracanzani, 2013, p. 14).

Consequently, the intensification of the struggles within the ANM brought about a fissure and a segment, comprised of magistrates of higher ranks, left the association to form another one. Leaving the ANM to the hands of the lower ranks, to which 80 to 90 percent of the judiciary was a member of, the Union of Italian Magistrates (*L'Unione dei Magistrati Italiani*; "UMI" hereafter) was founded in 1961 by older magistrates (Guarnieri 1992, p. 96). Advertising an apolitical and a non-syndicalist agenda, defending the hierarchical setting in which the Court of Cassation was the apex of the judiciary as well as the continuation of the career system and a formalist role for the judge, bouche de la loi, the understanding of UMI corresponded to a defense of the status quo and represented a continuity from the early years of the Republic – an antithesis of renovators (Moroni, 2005, p. 93). It should not be regarded as a stretch to claim that it was counter-reformist association.

3.2.2 The development of factions within the Association

It was January 1962 when the president of the ANM, Amadeo Foschini indicated in a letter the existence of "organizations within the organization", acting in a proactive manner via their own rules and apparatuses, establishing connections with the political as well as governmental spheres (Mammone, 2009, p. 43). This was quite extraordinary for a legal culture that prescribed apoliticism for the ideal magistrate. While the direction the Association was heading to could have been foreseen by the time of Napoli congress, mentioned above, it was also evident in 1958 when two lists competed in the elections for the decision-making body of the association, the central managerial committee (*il Comitato Direttive Centrale*; "CDC" hereafter). Yet, with the split of the UMI, the progressive orientation gained a new momentum in the 1960s. Indeed, with the split, the weight of the high magistracy in the CDC diminished drastically, from 60 percent in 1947 to 11 percent in 1967 (Piana & Vauchez, 2012, "La nascita dell'associazionismo militante", para. 2). As Mammone notes, the split of the higher ranks created a cultural area that is more inclined to a notion of judiciary more responsive to societal demands and more willing to confront the political power – which was the perspective of the list that prevailed in the general assembly convened in Rome, on February 4, 1962 (Mammone, 2009, p. 43; Moroni, 2005, p. 94). Remarks of the new president Ugo Guarnera made his notion of the Association, externally-oriented, quite obvious:

> [The Association must be] the external aspect [of judicial order], the voice that the judicial order can not address to the country, except with its sentences; it must even intend to penetrate the mind of the citizens, making them know the judiciary with its problems and its need of constant elevation. (as cited in Mammone, 2009, p. 43-44) (see Appendix A, 6)

It is in this context, groups with political inclinations and their respective notions of the judiciary started to form within the ANM. If we think the ANM as the parliament

of the Italian judiciary, these groups, incrementally, started to act as political parties. Called *correnti*, these groups literally dominated the following 60 years of the Italian judiciary and proved to be crucial institutions in accounting for the trajectory of Italian politics in one way or the other, as they would be the chief means for the magistrates to exert pressure on political institutions, the instruments through which they articulated their demands both within and outside the judicial realm, especially those from lower ranks (Guarnieri, 1992, p. 97-99). These organized factions were a "side-effect" of the socio-political heterogeneity stemming from the advent of democracy and mass university education, adhering to different ideologies, and in the short run, willing to form direct relations with political parties from different poles (Clark, 2003, p. 6-7; Magalhaes, Guarnieri & Kaminis, 2006; p. 180). To quote Moroni:

> In the face of gradual impoverishment of the traditionalist judiciary, which lingers on an uncritical judicial formalism, the dogma of legal certainty and the myth of the judge as bouche de la loi, the dialectic within the ANM between correnti opened up new ideological horizons for the associative debate, a harbinger of a cultural renewal that will imprint a decisive acceleration for necessary reforms. (2005, p. 97) (see Appendix A, 7)

The birth of correnti, specifically that of the "Third Power" (*Terzo Potere*; "TP" hereafter), can be traced back to 1958 when they presented an alternative list in the elections to the CDC. The more moderate segments of the judiciary formed the Independent Magistracy (*Magistratura Indipendente*; "MI" hereafter) in 1962 which would enjoy the leading position among other correnti until the 1980s. Started as the most progressive part of the ANM, the internal heterogeinity of TP gave birth to the most progressive corrente, the Democratic Magistracy (*Magistratura Democratica*; "MD" hereafter) in 1964 (Mammone, 2009, p. 46). MD and MI still exist. Whereas it would be irrelevant to the topic at hand to present a chronology of correnti, given their numerous splits and merges over decades, the positions of correnti could be

regarded as follows, from left to right: MD, TP, MI. Initially, the first two adhered to a more progressive notion of associationism whereas MI favoured a more corporatist stance in its demands. MD is still on the left polar and MI on the right, whereas, over time, TP has given birth to multiple different correnti (Guarnieri, 1992, p. 100-101), though almost in all cases correnti, regardless of their differences, defended the corporate interests of the judiciary in an unanimous manner.

It must be added here, in a similar vein, after the split-up of the UMI, in terms of protecting its external independence, the Association mostly exhibited a unitary stance against political power, striking more often than not an imperious attitude. Already in 1963, after the Alghero congress, which drew the attention of both the public and the leftist press, the political class was being called upon to amend the category system in the elections to the CSM in the face of the “justice crisis” in the country and the need to 'activate' the principles found on the Constitution unreservedly was stressed, with a particular emphasis on the economic and social transformation the post-war Italy had been going through (Mammone, 2009, p. 44; Moroni, 2005, p. 96).

In this context of a new notion of associationalism on the part of the ANM, the amendment made to the statute of the Association by the general assembly in 1964 introduced a proportional election system which, naturally, further stabilized the impact of correnti that still continues to this day. The subsequent elections to the CDC in December saw four lists competing. To be sure, correnti had already presented itself as a reality within the community in preceding few years and competing list was not a novelty within the ANM, as described above. Still, the codification of a favourable election system concretized what had already been going on, giving the opportunity to the groups to present themselves and their respective

visions of the magistracy in general, and more specifically, their programmes with regard to the management of the Association in a more structured manner and present lists (Mammone, 2009, p. 45-46). TP got 41 percent of the votes, becoming the leading corrente, whereas MI and MD got 33 percent and 19 percent respectively (Guarnieri, 1992, p. 101). The non-corrente list could only obtain 8 percent. The resulting CDC elected a majority executive composed of TP and MD, just as the central executive council (*il Giunta Esecutiva Centrale*) (Mammone, 2009, p. 46) – it was only natural that this executive council had a progressive roadmap, given their tendencies, described above.

3.2.3 A new notion of justice?

With the emergence of a new generation of magistrates, recruited after fascism, it is quite safe to say that a new notion of magistracy did emerge; one that was looking to supersede the traditional bouche de loi conception of a magistrate and related legal formalism to engage in legal 'creativity', one that was attentive to the problems of the society, one that was trying to participate in the political debate, in line with the progressive spirit of the new Constitution. In a nutshell, this new understanding of magistracy, taking the Constitution as a reference point, aimed to bring the magistrate out of the courthouse and make her develop relations with other spheres of society, bearing the socio-political context in mind and tending to address the needs of society as opposed to the formalist understanding of the past (Bruti Liberati, 2018, “Corte Costituzionale e Consiglio superiore della magistratura nell’Italia del miracolo economico”; Mammone, 2009; Moroni, 2005; Piana & Vauchez, 2012, “Dalla legge alla prassi: la visione costituzionalista”). Perhaps the place this new

notion manifested itself most clearly was the Gardone congress of the ANM held in 1965.

Jurisprudentially, the congress signalled a concrete break from the legal formalism of the past that had traditionally marked the ideology of Italian magistrates. The motion that was accepted unanimously after the congress included an open call to magistrates to implement the Republican Constitution as the legal reference point (Fracanzani, 2013, p.16). Given the progressive nature of the Constitution of 1948 this was a logical, if not a pragmatic choice as it could provide the base for a progressive legal movement, rather than the ordinary laws that had the stamp of DC. Moreover, typically more abstract and more general norms found in constitutions provides the leeway necessary for legal creativity that could be used to address the socio-political problems of the age and to engage in legal activism, which was one of the dominant concerns for this emerging group of magisrates. Calling for the democratization of the judiciary and the abolishment of the career system, again, the renovators' reference point was the 101st and 107th Articles of the Constitution, which affirmed, respectively, that “Magistrates are subject only to the law” and “Magistrates are distinguished only by their different functions” (Luccioni, 2012, p. 1-3). The final motion approved after the congress is interesting not just because of the colourful and assailant language, but it is one of the first documentations to demonstrate the new ideological turn taken by the Italian magistracy; one that is conscious of the political connotations (if not straight-out political nature) of judicial activity and that aims to blend the magistracy into a society that is going through a process of modernization. The motion, approved unanimously, is telling in this regard and therefore a part of it deserves to be lengthily quoted:

> The congress affirms that the problem of political direction within the jurisdictional function does not arise, obviously, in terms of a contingent

> political direction . . . but [it emerges] rather in terms of protection of the politico-constitutional direction since the Constitution has codified determined fundamental choices, imposing them on all of the State powers, in which the judiciary is included and attributing to the latter . . . the duty of guaranteeing the compliance; . . . [The congress] affirms that it is therefore up to the judge, [who] is in a position of impartiality and independence against every political organization and every centre of power, 1) applying directly the norms of the Constitutions, when it is technically possibly regarding the concrete fact in question; 2) referring back to the examination of the Constitutional Court, also on her own initiative, the laws that do not lend themselves to be related, in the moment of interpretation, to the Constitutional dictate; 3) interpreting all laws in conformity with the principles contained in the Constitution, that represents the new fundamental principles of legal order of the State. [The congress] declares itself to be decidedly against the conception that demands to reduce interpretation to a purely formalistic activity that is indiferrent to the content and the concrete effect of the norm on the life of the country. The judge, on the contrary, must be conscious of the politico-constitutional significance of her function of guarantee, as to ensure, even within the impassable boundaries of her subordination to the law, an application of the norm in accordance with the fundamental purposes aimed by the Constitution. (as cited in Moroni, 2005, p. 100-101)[15] (see Appendix A, 8)

For the first time, a congress of the ANM received wide attention from external audiences and this could be seen from the press coverage it managed to garner, mostly in a positive manner, and "the question of judiciary" entered into public debate as the "justice crisis" would be a topic hotly-debated by judges, jurists, lawyers on newspapers and journals (Bruti Liberati, 2018, "1965. Donne in magistratura e congresso di Gardone", para. 14-17). The problems with the magistracy and general dissatisfaction with its services had already become a public

[15] Naturally, the UMI criticized the motion in the name of apoliticism of the judiciary as well as the strict, neutral application of law (Meniconi, 2013, "Un nuovo inizio: la svolta degli anni Sessanta", para. 7). However, throughout most of the 1960s, the high magistracy remained isolated from the rest of the corps and seemed unable to contain the uprising in an effective manner, despite initially having support of the middle-class of the judiciary mostly – the appellate judges. An ingredient of contingency here, as in all walks of life, because of the impact of the protests within the ANM in the final years of previous decade, the CSM and the Minister had suspended all competitions of promotion to the Court of Cassation between 1959 and 1963. Given the fact that the new promotions system introduced by the Law no. 1/1963 did not start to be implemented until 1966, practically, all promotions to the Court of Cassation were blocked for seven years. This convergence of interests between the renovators and appellate magistrates explains, to a large extent, the 'defection' of appellate magistrates, so to speak, leading to the isolation of the higher magistracy (Piana & Vauchez, 2012, "Dalla «crisi della magistratura» alla riforma del 1967", para. 3).

debate; but the denunciation of its archaism and its arbitrariness by magistrates themselves, its hierarchical structure, the deplorable economic conditions under which magistrates lived, was something new (Piana & Vauchez, 2012, "Dalla «crisi della magistratura» alla riforma del 1967", para. 2).

> As a future president of the ANM, Edmondo Bruti Liberati puts it:
>
> "The associative debate is now measured with political dimension of judicial activity, the judges confront with the great problems of the country and discuss the role of the judge in a society that is under a process of dramatic change: the ideology of separateness of corps is put under crisis." (Bruti Liberati, 2018, "1965. Donne in magistratura e congresso di Gardone", para. 16) (see Appendix A, 9)

In this sense, the congress marked a clear rupture from the image of an apolitical judiciary, isolated from society. In a similar vein, according to Moroni, Gardone signalled the "extraordinarily democratic flowering" of the seeds of dissent planted at Napoli in 1957 and represented "a clou moment" of the associative debate on the newly-recognised political value inherent in the judicial activity and the new role of the magistrate in adjudication. Seeing the roots of this movement in the new social class entering to the judiciary, breaking for good the consonance between the judiciary and the people who exercise political power which had prevented the judiciary from insisting on its independence and tackling the illegality of powerful, he claims that, overcoming the "priestly isolation from the society", "A new figure of magistrate is delineated, who begins to come down from the ivory tower and to compete with the criticisms and questions of justice coming from civil society" (Moroni, 2005, p. 101-102) (see Appendix A, 10).[16]

[16] Still, these remained in minority. A more sobering picture of the 1960s should firstly take into account that, according to the future Constitutional Court magistrate Guido Neppi Modona, even in 1968, in the midst of the coming to the fore of this new notion of justice, all of the magistrates of the Court of Cassation (524) and about 70 percent of the magistrates (1317) in appellatte courts had been recruited under fascism whereas 99 percent of the tribunal magistrates had started working after the fall of fascism. In other words, three quarters of the high magistracy, which enjoyed a dominance over the corps more than two decades and from among which heads of courts were appointed, had been

Moreover, especially in the second half of the 1960s, the renewal movement did not remain on paper and started producing legal outputs. Especially by the efforts of more progressive correnti, the judiciary led the way for a "fruitful work" of reform of the most backward parts of the legal system like family law, criminal law and so on; therefore striving to adapt the laws to the social reality of a country that had been undergoing profound transformation of all sorts (Del Mastro, 2014, p. 95). Especially between 1968 and 1972, a remarkable expansion of personal guarantees in penal process occurred, thanks to the diffuse constitutional review, which individual magistrates were able to initiate by submitting laws deemed unconstitutional to the Constitutional Court, therefore superseding for good, the traditional role cast to the magistrate as the mere implementer of the legislation, in favour of an active subject of the law (Meniconi, 2013, "Una giurisprudenza nuova", para. 1-4).[17] Bruti Liberati finds the root causes of this legal activism and this increasing affirmation of legality in generational turnover, in the expansion of social background but, above all, in the progressive adhesion to an institutional role of independence by wider sectors of the

socialized under fascism (as cited in Bruti Liberati, 2018, "Nuove posizioni nella magistratura e resistenza del modello gerarchico", para. 2). Obviously, not all magistrates recruited under fascism were fascists. Yet, as a former magistrate recalls: "In the 1930s, in a corporation such as the judiciary, the cultural climate was still affected by the previous liberal period . . . during all the 1930s, I came across older colleagues who were, at times, were avowedly anti-fascists and more often, the overwhelming majority, [was] afascists; almost never convinced fascists. Only in higher ranks you found magistrates supine to the regime. In the 1950s -on the contrary- magistrates situated at the top of the judiciary were the ones who had made a rapid career during the fascism: not always for [their] professional merits" (Galante Garrone, 1994, p. 41-42) (see Appendix A, 11). Similarly, in the 1960s too, another Italian giurist, Luigi Ferrajoli observed that the judiciary was a "closed, bureaucratic body, cemented by a rigid class ideology", based on the "objectivity" and "neutrality" of the laws, a preconception reinforced by the hierarchical structure of Italian judiciary (as cited in Crainz, 2003, p. 117-118) – basically everything this new generation of magistrates were fighting against. Surely, the enduring pyramidal design of Italian judiciary, seeping in well into 1960s, had reinforced a formalistic approach to the law given the career-wise carrots and sticks possessed by the conservative high magistracy, thus supporting the persistence of the portrayal of an apolitic magistrate as the 'ideal' (Moroni, 2005, p. 97-98). Therefore, by taking the first steps towards dismantling the internal hierarchy of the judiciary and carving out a movement against the status quo by carefully cultivating relations with external audiences, achievements of the renovators until the 1970s, explained below, though, to a degree, having to do with generational turnover, were nothing short of revolutional and should not be taken with a grain of salt.

[17] MD even advocated for non-application of legal norms that a magistrate finds unconstitutional (Di Federico & Guarnieri, 1988, p. 177)

judiciary which was made possible by the dismantling of hierarchy and an affirmative role assumed by the CSM (Bruti Liberati, 2018, “Il nuovo attivismo della magistratura penale e gli ostacoli frapposti” para. 6) – as shall be seen below. Meniconi claims what was witnessed between 1969 and 1981 was a “revolution” (Meniconi, 2013, “Una giurisprudenza nuova”, para. 14).

This blossoming progressive legal movement extended well into the 1970s, changing the conception of the traditional magistrate. Magistrates began to tackle socio-political issues such as corruption, terrorism, mafia and even pollution. The scope of protection the law granted on personal liberties and labour rights saw see an unprecedented degree of expansion. With the help of the Constitutional Court, old laws of fascist pedigree continued to be abrogated. This spirit of activism seeped into the traditionally traditionalist Court of Cassation too, which, according to Meniconi, started attaining to the substantial side of justice rather than remaining limited to the formal gradient (Meniconi, 2013, “Una giurisprudenza nuova”, para. 8). With its emancipation from the control of the high judiciary, a portion of the new generation of magistrates affected the culture and ideology of the judiciary deeply, asserting themselves in their reformist notion into almost every sphere of legal order and this episode marked a “relative conquest of freedom of the magistrate” (para. 1-15).

3.3 A favourable balance of political powers

Fragmentation of political power, despite the DC remaining as the dominant party for half a decade, and more specifically, the existence of an 'eternal' opposition party in the PCI surely was another factor in setting the terrain on which an independent judiciary could blossom.

The national elections held in April 1963 represented a minor tilt in the balance of powers in the party system of Italy. DC, still the first party, fell below 40 percent. PCI upped its share by 2.5 percent to surpass 25 percent, meanwhile, PSI remained more or less stable: 13.8 percent. Minors PLI and PSDI also saw some improvements. The resulting government was essentially a centre-left coalition comprised of DC, PSI, PSDI and the social liberal Italian Republican Party (*Partito Repubblicana Italiano*; "PRI"). For the first time in the Republican history, among mild objections within the DC, after the 1948 elections, PSI were given a place in the government to be pushed away from its alliance with the PCI, the traditional outsider of the Republican era, in order to prevent the left from eventually winning a majority (Hine, 1993, p. 42).

A centre-left coalition led by a conservative party may sound odd at first. But to assume that DC was a uniform and disciplined party would be even odder. To be sure, even in the 1960s the DC was an extremely factionalised party (Allum, 1973, p. 88-91) and given its broad range of constituencies and loose ideology, had its internal divisions, which would mark (if not plague) the working life of the party until its dissolution (Hine, 1993, p. 110,117-120; Leonardi & Wertman, 1989). It is quite striking that even in 1971, Giovanni Sartori could list nine different factions within the party, with congress votes ranging from 1.7 percent to 20.4 percent and most of them having their own respective media organs (Sartori, 1971, p. 650). Consequently, Aldo Moro became Prime Minister in 1963, representing the more progressive centre-left wing of the party though possessing the ability to win the favour of most factions at the same time (Zariski, 1965). He would remain as a Prime Minister until 1968 with the same coalitional formula (Hine, 1993, p. 101).

With the increasing contacts between the judiciary and the political class as a result of this new notion of associationism, this new centre-left coalition offered avenues of opportunities not only for the judiciary but also for the opposition parties. Indeed, the renovators had been seeking allies within the political class for abolishing the traditional career system since the late 1950s. The left, in the meanwhile, was cautiously distanced to an institution which had staunchly stood against the working class and had sided with power in the past (Tullio, 2016, p. XII). This perception would incrementally change as the signals sent 'outwards' by the renovators corresponded to a new understanding. With their increasing impact in the parliamentary politics, especially that of the PSI, moving to the governmental duties then, the opposition parties were willing and able to respond to the demands of the lower ranked magistrates. After all, they were eager to limit the power of an executive branch that they probably thought they would not ever be able to control fully, given the dominance of the DC (Guarnieri, 1992; Magalhaes, Guarnieri & Kaminis, 2006; p. 176-182).

This logic of limiting the executive should even be more stressed in the case of PCI, since, although they have represented between a fourth and a third of the electorate until their dissolution, they were never included in governmental coalitions; always left in the opposition role. Beginning in the second half of the 1960s, the almost-always-favourable stance of the PCI, the second largest party until its dissolution in 1991 and the strongest communist party in the Western world, but always excluded from the government, with regard to the demands of the magistrates, is another factor explaining the upcoming favourable legislative initiatives. In fact, their alignment with the judiciary and their constant opposition against the initiatives that would clip its wings would gain them the nickname “the

party of the judges" in the future (Di Federico, 1989, p. 36-40). With its remarkable number of seats in the parliament (its share of votes never fell below 22 percent) but always relegated to opposition, it is understandable that they were always in favour of strengthening the judiciary and opposing the legislative attempts in the opposite way (Guarnieri, 1992, p. 131). Yet, not all politics is strategy-driven politics. The support of the PCI was not solely due to being in the opposition, its stance also had an ideological mien. Although they supported in the Parliament the reform demands put forth by the ANM starting in the second half of the 1960s, especially in the first years of the surfacing of the renovators, PCI was mostly distrustfully distanced from the demands of this emerging class. The judiciary as a whole, but mostly the high judiciary, was considered a "separate corps" that had to be democratized, related overtly or covertly to the dominant classes. This view of communists was to be altered, thanks to magistrates engaging in judicial activism in issues such as labour and criminal law and especially after 1969 when MD started taking a more radical stance and aligned itself openly with the leftist spheres (Guarnieri, 1992, p. 130-132).

On top of these, one has to bear in mind the aforementioned internal divisions within the DC where the correnti were able to find new allies for their case (Di Federico, 2002, p. 107-108; Guarnieri, 1992, p. 129-131; Pederzoli & Guarnieri, 1997b, p. 333; Tullio, 2016; p. 12), then, the upcoming legislative victories of the renovators could be put into a more understandable context. To sum up, the political terrain was divided, and would be divided for decades to come, in such ways that the magistrates could, and would, fully make use of.

CHAPTER 4

INSTITUTIONAL REFORMS AND THEIR CONSEQUENCES

The practical application of a series of legislative reforms undertaken between 1963 and 1975, under the pressures of the ANM with its new direction and "the justice crisis" as a public debate in the background, practically eliminated the traditional career system that this new generation of magistrates were fervently lobbying against. Moreover, those reforms democratized the composition of the CSM, the headquarters of the magistracy, in which higher magistracy was overrepresented thanks to an unbalanced election system. Thus, hierarchical structure was practically dismantled. This chapter examines the reforms, first regarding to the career course and then regarding the operation of the CSM, and their impact.

4.1 An essentially automatic career course

Under the threats of a strike from the ANM (Moroni, 2005, p. 95), which it realized in November 1962 (Piana & Vauchez, 2012, "Dalla «crisi della magistratura» alla riforma del 1967", para. 2), the Law no. 1/1963, passed on January 4, 1963, abolished promotions via competitions based on qualifications (*il concorso per titoli*) and reduced the incidence of promotions via competitions based on exams (*il concorso per esami*) to limited posts (Bruti Liberati, 2018, "Verso l'abolizione della carriera in magistratura", para. 15), throughout the career and provided the possibility of supernumerary promotions, separating economic progression from functions concretely undertaken by the individual magistrate (Violante, 2009, p. 30). Thanks to this new law, supernumerary promotions became possible, therefore all candidates, if considered suitable, could be promoted even if they remained to

exercise the functions of a lower rank, while still getting to enjoy the economic and legal advantages of a higher degree (Guarnieri, 2011a, "La magistratura della Repubblica", para. 5). Therefore, for example, a tribunal magistrate could be 'promoted' to an appellate court even if there are no vacant posts there, thus, continuing her function as a tribunal magistrate while enjoying the advantages of the new rank. This was a step towards a system of automatic supernumerary promotions based on seniority, known as "*ruoli aperti*" (open roles) in the literature, which had been among the chief demands of magistrates of lower ranks.

Albeit looking good on the paper, for a start at least, "these timid reforms" (Tullio, 2016, p. XII) caused dissatisfaction within the ANM.[18] Moreover, the assessments for promotions were still in the hands of higher ranks – against the practical implementation of which, objections would be raised. In 1964, Salvatore Giallombardo, the director of the ANM's journal, La Magistratura, condemned the way the promotions are carried out by higher magistrates, still dominant in the CSM after the renewal of the members in 1963, by practically annulling the advantages brought on by the new law (Fracanzani 2013, p. 14):

> The majority of the actual Council . . . shows to be inclined to a proper address of that small part of the judiciary that heads the internal oligarchical groups, which does not want to alter anything about the old order, even when the State, with its laws (see the laws on promotions) has shown the desire to alter it radically. (as cited in Mammone, 2009, p. 45) (see Appendix A, 12)

The relative failure to reach their short-term goals and their relative inability to gain the support of progressive political forces as well as public opinion, would push the

[18] In fact, the disappointment was so stark that, in the general assembly convened in Bari on February 6, 1963, resignation of the CDC of the ANM was officially requested but after heated debates the CDC remained in position (Mammone, 2009, p. 44-45). What they had hoped was a complete system of "ruoli aperti" and therefore abolishment of the career system. Even though with the abolishment of competition based on qualifications among the magistrates (Meniconi, 2013, "Un nuovo inizio: la svolta degli anni Sessanta", para. 12) the lower ranks had practically neutralized one of the instruments of control by the judicial elite, the law was a result of a compromise in which the ANM has sacrificed a part of its demands (Fracanzani 2013, p. 14)

leaders of the ANM to rethink their strategies since corporatist concerns such as career system had too narrow of a scope to stimulate attention of wider audiences and influence public opinion as well as political parties. The judiciary had to be perceived as a promise of 'freedom' to all citizens (Moroni, 2005, p. 96).

Meanwhile ‘a justice reform’ had become a hot topic in legislative agenda as a result of a judgment by the Constitution Court that had annulled a central part of the law on the CSM, which shall be detailed below, and had made necessitated a reform. Along with the growing dissatisfaction about the services of justice and “the crisis of justice” becoming a public debate, already in 1964, there were legislative initiatives with regard to a judicial reform, coming from different parties, at first from PSI and PLI, then, in October 1964, from DC. The draft law put forth by DC passed only in December 1967, which will be touched upon below, and drastically altered the composition of the CSM – which, the outsider PCI also eventually voted in favour of (Piana & Vauchez, 2012, “Dalla «crisi della magistratura» alla riforma del 1967”, para. 6).

While the law was still in the process of deliberation in the Parliament, on July 25, 1966, the Law no. 570 passed which represented a huge leap towards an automatic career course. Called Breganze Law, after its first signatory of the draft, Uberto Breganze, a deputy of the DC (Ferri, 2018, p. 20), this law, in practice, completely abolished the competitions for promotions from ordinary tribunals to appellate courts and based the promotions on the assessments of local judicial councils (there is one corresponding to every single appellate court, members of which are partly elected by magistrates there) and the final deliberation by the CSM, which could be negative too, and the appointment of the CSM, after 13 years of service in ordinary courts (Bruti Liberati, 2018, “Verso l'abolizione della carriera in

magistratura", para. 15; Ferri, 2018, p. 21). Since the grade obtained and the functions undertaken had been essentially separated in 1963, a tribunal judge with 13 years of experience, just with positive opinions of the local judicial council and the CSM, could be promoted to an appellate court even though there are no vacant posts there, continuing to perform her function in the lower rank. As shall be seen above, these deliberations on which promotions were based would almost invariably be positive, resulting in automatic promotions.

The career course became completely automatic, not limited to its first 13 years (i.e. the promotions to the appellate level) after a new law in 1973, numbered 831, which extended the promotion regime foreseen for the promotions to appellate courts to the Court of Cassation. Therefore, under this law, nicknamed "Breganzone" ironically with reference to its predecessor, Breganze of 1966, automatic promotions to appellate courts, enjoyed by magistrates thus far, except for grave demerits, was expanded also to the Court of Cassation and to the superior managerial positions.

In other words, with the passing of "Breganzone", a judicial career was literally dismantled – as long as the majority of the CSM comprised magistrates who kept this favourable application of the law going. Indeed, based on a broad interpretation of 107th Article of the Constitution it was the practical application of the law by the CSM that rendered career progression "automatic" (Dal Canto, 2017, p. 676). Barbera holds that the application has neither a constitutional nor a legislative basis and the laws Breganze and Breganzone have been unfairly "blamed" (Barbera, 2007, p. 154). As one can guess, the CSM had been reformed in the meantime and did not resemble a bit the what it had been at its inception – which had been an auxiliary body subjected under the will of the Minister and dominated by a conservative judicial elite, which is what I shall turn to now.

4.2 The transformation of the CSM

The series of reform the CSM was to go through took off with a well-timed help from the Constitutional Court in 1963. With the Judgment no. 168/1963, the Article 11 of the law on the CSM, making the operation of the body regarding its most significant caseload, that is about the careers and statuses of the magistrates,[19] conditional upon a previous initiative by the Minister was declared unconstitutional by the Court, as it was deemed to be contradicting the Articles 104, 105 and 110 of Constitution, therefore conforming to the claim of the majority of the magistracy as well as the academia (Alvazzi del Frate, 2004, p. 166-168; Benvenuti & Paris, 2018, p. 1651). The articles concern the principle of judicial independence, the duties of the CSM and the Minister respectively. As explained above, matters pertaining to the careers and statuses of magistrates form the core of the competences of the CSM and conditioning the body in these issues to the Minister had degraded the body almost into a consultative position. From thereon, the CSM could initiate procedures and exercise its powers independently.

Whereas this constituted a major turning point on paper and provided the renovators with another tool in their arsenal for future offensives, the category-based election system and the resulting composition of the CSM, dominated by the high magistracy as seen after the elections to the body held in the very same year, was still there an proving to be another stumbling block. The second term of the CSM saw an average member age of 70, and again, the fracture dominant in the first term lingered on: eight constitutionalists vs thirteen statists from among elected members (Piana & Vauchez, 2012, “Il «Consiglio dei notabili»” para. 1). The ideological vicinity

[19] Recruitments, assignments of location and function, transfers, promotions and every other provision about the status of magistrates. Basically every power that the Article 105 of the Constitution had conferred to the CSM.

between the Minister, from whom the most acts of the CSM was finally freed, and the high magistracy, still dominant in the body, was bound to limit the practical effectiveness of the judgment.

The wording and the scope of the judgment was quite timid too. It did not even venture forth to define the nature of the CSM, as the status of the body had been a debated topic in the meantime within the judiciary and academia. Its interpretation implied a restrictive role for the CSM as an autonomous power as it prescribed a "relation of collaboration" with the Minister. In a similar vein, the Court did not declare unconstitutional the articles that had envisaged an overrepresentation for the high judiciary in the CSM, and upheld, and therefore, recognized the legitimacy of the power of dissolution of the President, the contestability of the acts of the CSM in front of the Court of Cassation and the Council of State, and finally, the concertation procedure with the Minister regarding the appointments to managerial positions within the judiciary.[20] The decision should not be surprising since the Court itself was partially comprised of high magistracy too (Piana & Vauchez, 2012, "Dalla «crisi della magistratura» alla riforma del 1967", para. 5).

The most practical relevance of the decision was that it stirred discussions about a possible reform of the law on the CSM (Piana & Vauchez, 2012, "Dalla «crisi della magistratura» alla riforma del 1967", para. 5). As mentioned above, the sentence had annulled such an essential part of the law that it made a reform necessary (Alvazzi del Frate, 2004, p. 168). This led the renovators to set their sights on the political, especially parliamentary, terrain, again, which had the potential to offer new avenues under the new centre-left coalition in 1963. Indeed, already in

[20] The concertation procedure would be fixed to a definite meaning only in 1992, by the Judgment no. 379/1992 of the Constitutional Court, which defined the term as an act aimed at the formulation of a common proposal, rather than implying a veto power for the Minister.

1964, various draft laws proposed by different parties regarding a judicial reform started flooding the Parliament (Piana & Vauchez, 2012, “Dalla «crisi della magistratura» alla riforma del 1967”, para. 6).

After three and a half years of deliberation in the Parliament, another piece of the jigsaw fell into place by the passing of the Law no. 1198 under the pressure of the ANM, on December 18, 1967. The law restructured the CSM drastically (Meniconi, 2013, “Un nuovo inizio: la svolta degli anni Sessanta”, para. 8; Moroni, 2005, p. 106-107). The reform represented a compromise between the left (PCI and PSI), which insisted on the total elimination of the category-based election system and the DC, that still maintained a degree of relationship with the high magistracy that was more in line with the party (Del Mastro, 2014, p. 95).

Acknowledging the decision of the Constitutional Court with regard to the CSM and the Minister's initiative power, the law recognized the autonomy of the CSM from the Minister and moreover, it granted financial autonomy to the body within the state budget, a separate item from that of the Ministry (Piana & Vauchez, 2012, “Dalla «crisi della magistratura» alla riforma del 1967”, para. 6)

For the elections of the gowned members from among the judicial ranks, the law provided a peculiarly complex majoritarian system. Stated basically, the law opted for a two-round system, first of which was to occur within each category. For the magistrates of the Court of Cassation, there was a single constituency, whereas for the appellate magistrates and tribunal magistrates there were eight (four each), geographically-based constituencies. For the first round, magistrates of the Court of Cassation were to elect twelve magistrates, whereas the lower eight constituencies would elect two each, equalling sixteen. From thereon, all twenty-eight magistrates elected by their respective constituencies were to form a single national final list, all

of whom eligible to be elected to the CSM in the second round. From twenty-eight members belonging to different categories, any magistrate could vote for any category, regardless of the categories the magistrate had been elected from but certain exceptions applied. Each magistrate could vote for a maximum of six magistrates from the Court of Cassation, four from among appellate magistrates and four from among the magistrates of tribunals. Each voter could vote for up to fourteen magistrates – the number of seats available for the gowned members in the CSM (Del Mastro, 2014, p. 90-94).

Briefly, although preserving the categories among magistrates, the law cast aside the vote-for-your-own-category system of previous years, allowed magistrates to vote (or not) for magistrates belonging to other categories, thus obliging senior magistrates to seek support from lower ranks, given their overwhelming numbers. This naturally diluted the weight of the high magistracy in the CSM, belonging mostly to the UMI, in the favour of magistrates belonging to the ANM. Moreover, given the fact that every voter could choose from different options among higher ranks, lower ranks could opt for the ones closer to their orientations (Ferri, 2018, p. 29). However, the overrepresentation of higher ranks lingered on as a result of the categorical representation in the CSM.

The elections to the CSM in March 1968 took place under these new circumstances. All three correnti of the ANM entered the elections, with MD and TP under a joint list, 'against' the UMI which represented the high judiciary.

The impact of the reform was augmented by the fact that the representatives of the UMI were in total isolation vis-a-vis the rest of the judiciary, as, in the meantime, most of the appellate magistrates as well as some of the magistrates of the Court of Cassation had sided with the renovators. As a result, each of ten of the

fourteen magistrates elected belonged to a correnti of the ANM – seven to the list of TP-MD, three to the moderate MI, the corrente with the largest share of votes in the elections to the CDC of the ANM in the previous year. Thus, the ANM clinched two out of six seats reserved to Cassationists. The remaining four were members of the UMI. The election of lay members by the Parliament clinched the triumph of renovators against the statists as PCI, PSIUP, PSDI, PRI and PLI sent one member each to the body whereas the DC delegated two (Guarnieri, 1992, p. 101; Piana & Vauchez, 2012, “L'emergere di un potere di indirizzo”, para. 1).

With the representativeness bolstered, for the first time the statists were in minority and consequently the CSM in the coming years took a leading role in spreading reformist ideas, by firstly creating a systematic structure of knowledge of the judiciary for statistical and sociological analysis (an idea that had been first put forth by the President Giuseppe Saragat in previous years) and taking a proactive stance in general (Piana & Vauchez, 2012, “L'emergere di un potere di indirizzo”, para. 2). This new, proactive stance was nothing shy of being blatantly 'political'. Indeed, according to the majority of the new CSM, the intended modernization of the judiciary, dysfunctioning by then, was to be attained by a new role assumed by the body to put an end to its 'isolation' as the bureaucratic apparatus of management of the judiciary and “aim towards a higher social, cultural and political function” (Piana & Vauchez, 2012, “L'emergere di un potere di indirizzo”, para. 3). This, of course, meant freeing the body from the tutelage of the judicial elite, from the administrative role and cultivating relations with other powers. Less than a month after the inauguration, the members of TP and MD proposed the creation of a committee within the CSM that would be in charge of “relations with the Parliament and the government for judicial planning”, to develop official relations with other powers for

the betterment of services of justice through reports and legislative proposals. Although President Saragat rejected the proposal on the grounds of a potential surpassing of the limits set by the Constitution for the body and the proposal had to be renamed and renewed (though not in its essence) to be accepted, even the attempt itself was valuable as to indicate an extremely activist stance to be taken by this new CSM. Such a proposal would have been quite unthinkable in previous years. Moreover, the controversy with the President had the 'side-effect' of bringing the CSM further under the spotlight in a degree never seen before. Annual reports addressing the Parliament, first of which was tellingly named “Social reality and administration of justice” in harmony with the new judicial ideology, were published which provided a degree of public visibility, in contrary to the isolation of previous times, thus giving the chance to renovators to make their cases heard, against the supposed bouche de la loi role of the magistrate, against legal formalism, and with regard to the supposed socio-political indebtedness of the magistrate and whatnot. The judiciary was finally participating in the national political debate. Those reports framed an open challenge against the Court of Cassation which had possessed the privilege to define the 'ideal magistrate' thitherto. Circulars were increasingly made use of to curb the effects of judicial hierarchy, strengthen the principle of natural judge and cut back on the margin of discretion the heads of the courts had enjoyed, especially in assigning cases to individual magistrates. Office assemblies were formed to foster collaboration and organization. Offices were created for the compilation of data and statistics with regard to the judiciary, thus creating an autonomous logistical expertise which had been within the dominion of Ministry before. Publications of newsletters and journals, aimed at both the magistrates and the public, regarding the activities of the Council started to circulate after the

creation of a press office. Finally, experimenting with the initial education of the magistrates was another element of novelty in this period (Bruti Liberati, 2018, “Il Consiglio superiore della magistratura nell’esperienza dei primi tre quadrienni”; Piana & Vauchez, 2012, “L'emergere di un potere di indirizzo”, para. 3-8).

In contrary to previous invisibility of the CSM, this new composition opened a period of affirmation for the body, reinforced by its representativeness and legitimacy, which was at the centre of justice debate that had already been germinating throughout the 1960s. As these years had been seeing the idea of a new type of magistrate developing, free from the rigidity of legal formalism within the judiciary; decrying the static nature of law in the face of the increasingly rapid dynamics of social reality, this new notion sought to make the institution participate in the ongoing process of modernization of Italian society by increasing its visibility and ensuring participation in the political debate (Piana & Vauchez, 2012, “L’assetto costituzionalista”, para. 1).

However, the most practical impact of the new CSM was the 'automatization' of the promotions to the appellate courts. As seen above, the Breganze law had granted a certain degree of discretion to the CSM. Upon the assessment of local judicial councils, the CSM would deliberate on the issue and decide. In practice, the deliberations of the CSM resulted almost always positive and the promotions to appellate courts basically became based solely on seniority, further damaging the hierarchy and undermining the impact of the judicial elite. The system became, in the long run, so automatized that even though there were no vacant posts in upper courts, the 'promoted' magistrate would still carry on the function associated with the lower rank but benefit from the perks of the status associated with the higher rank – barring grave transgressions, which is why the new system was called “seniority without

demerits" (*anzianità senza demeriti*) (Benvenuti, 2018, p. 384; Dal Canto, 2017, p. 676; Ferri, 2018, p. 21; Guarnieri p. 1992, p. 96).

Last but not least, the reform of 1975 with the Law no. 695/1975 introduced a proportional election system based on lists in one single national constituency for the elections to the CSM, as desired by the ANM; as well as a six percent electoral threshold, further reinforcing the strength of correnti which had become the chief means through which one can be elected to the CSM and around which judicial politics was revolving. The number of gowned members was raised to 20, in favour of lower ranks (eight Cassationists, four from appellates and eight from tribunals) and accordingly, the numbers of lay members was raised to ten, as the Constitution had not provided a number but a ratio between the lay and gowned members.

The underlying context dates back to elections of 1972 to the CSM. Thanks to a majoritarian system and an alliance with the magistrates of UMI, MI, the moderate corrente,[21] had literally conquered the CSM by obtaining all but one of the fourteen seats reserved to the magistracy, with just 40 percent of votes. This had even overshadowed the leftwardly composition of the lay members, for the PCI had otten two seats instead of one this time, equal with the DC, and the remaining seats had been assigned to PSI, PSDI and PRI – one each. This had meant that the activist

[21] Now we can actually call them the centre-right corrente, given the politicization seeping into the judiciary (and, therefore into the ANM) after the social movements of 1968. Thitherto, the differences between correnti had been largely regarding to the methods of modernization, the definition of ideal magistrate, the role of the magistrate in a society, the limits of her creativity and so on and a geographical gradient (MD in Milan, MI in Rome and Florence, TP in Naples) rather than a simple left-right dichotomy (Moroni, 2005, 98-99). These were redrawn along political lines. Among the correnti, MD radicalized in favour of left, which led to a split of its more moderate members to form a new corrente. MI in the meantime slid to centre-right positions and more importantly, started to endorse an apolitical stance for the judiciary. Nevertheless, these years marked the starting point of a process in which correnti differentiated themselves from each other, develop organizational structures just like political parties throughout the country (congresses, elections of central commissions, presidents etc.) and engage in acts of mobilization of local characteristics (see generally, Piana & Vauchez, 2012, "La nascita dell'associazionismo militante", "Evoluzione delle fratture all'interno dell'associazionismo"). However, this fragmentation would be mostly brushed under the rug in late 1970s and 1980s against clashes with terrorist groups and mafia.

policies developed by the CSM in the previous term, dominated by the progressives back then, would be reoriented, although not altogether reversed (Piana & Vauchez, 2012, "Verso l'autogoverno", para. 1).[22]

This landslide victory of the MI and the resulting tensions, led to debates about the election procedure in a Parliament where PCI was on the rise (Bruti Liberati, 2018, "Il Csm di Bachelet", para.1). In fact, despite making use of it, MI was in favour of the reform of a malfunctioning electoral system too, as all correnti included a promise of reform in their program before the elections to the CDC of the ANM in 1975 (Fracanzani, 2013, p. 79).

During parliamentary deliberations, it was evident that most of the political class had become adherents of constitutionalist reading of the CSM, that of the renovators – a stark contrast to the administrative role attributed to the body a decade ago. Its constitutional nature, its embedded pluralism and its function of representativeness had been acknowledged by most of the political actors which resulted in the jettisoning of the categorical representation system. The implementation of proportional system was an indisputable reflection of the representative quality of the body. Moreover, the reform represented a wider opening for the magistrates of lower ranks as seen from the increase in the number of members (Piana & Vauchez, 2012, "Verso l'autogoverno", para. 1-2).

[22] According to Fracanzani, this term of the CSM was marked by a notable conservatism compared to the previous term, which was shown particularly in the disciplinary measures the progressives, especially the isolated MD members were subjected to, and, the assignment of managerial positions. Indeed, some disciplinary instances had an obviously political stench in their application. The best known were three labor judges of Milan, even though they were acquitted eventually, they had been subjected to disciplinary proceedings because of their almost-law-bending (in favour of workers) judgments between 1971 and 1973. Surely, if the substance of the judgments were wrong, they could have been overturned by appellate courts (and indeed they were) but to initiate disciplinary proceedings was probably far too much and raised questions about internal independence. Nevertheless, the progressive magistrates were in the end acquitted by the conservative CSM. In the cases of "political disciplinary procedings", PCI and PSI stood in the defense of progressives. The stance of the PSI was more fierce, probably to reinforce its image in leftist circles after years of collaboration with the DC (Fracanzani, 2013, p. 80-81).

Passing from voting to a person to voting from a list, which entails a name or a symbol of representation (i.e. a party, a group; a corrente in this case) meant that the existence of correnti was acknowledged by the legislator on a formal level, contrary to the previous law of 1967 – inevitably strengthening further the base for correnti as highly-organized structures operating throughout the country. This, according to Ferri, drawing on the proportionalist principle of the Republic, signified that a political dialectic had entered the judiciary and finally "the judiciary had entered the country" (2018, p. 30-31). His colourful words deserve a lengthy quote:

> No more, thus, the one-way integration of the judiciary into the political class, which had characterised the first thirty years of the Italian State; no more, the apparent separation from politics, that disguises the subordinate role against the executive, according to the model experimented during the successive liberal period, the fascist regime, and the first twenty years of the Republic; but 'the pluralistic integration with all the political forces of the constitutional arch, of opposition too, and with vast instances of civil society'. It can be said that, after the Law n. 695/1975, which represents the most important electoral reform of the election system of gowned members, there is a very different CSM from its originis. It is a 'democratized' organ, where politico-cultural pluralism present in the judiciary is fully expressed, which constitutes a fundamental guarantee for the internal independence of magistrates. (2018, p. 31-32) (see Appendix A, 13)

4.3 The consequences

The aftermath of reforms saw a process in which the political salience of the Italian judiciary became increasingly evident. The judiciary in the 1970s was becoming more and more autonomous, thus, forcing the political parties to take positions accordingly; through formal and informal channels in order to thwart investigations in varying degrees of success (see, generally, Di Federico, 1989; Fracanzani, 2013). Della Porta (2001) asserts that "since the 1970s, a growing autonomy from the political class has interacted with the entry into the judiciary of a type of judge without a social affinity to political elites"; as a result of entry to the judiciary a new social class via mass university education and the social movements of the late

1960s, although collusive practices with politicians was also widespread. Nevertheless, this period saw politically sensitive cases being increasingly brought under judicial scrutiny (Clark, 2003, p. 7). Although a process of judicialization of politics and an expansion in judicial power have been underway in most democracies in recent decades (Tate & Vallinder, 1995), Italy has been "without doubt the strongest case" (Pederzoli & Guarnieri, 1997, p. 333). The struggle against mafia and terrorism throughout the 1970s and 1980s, which endowed the magistracy with broad public support as problem-solvers since the matters were largely judicialized and numerous magistrates have been assassinated in the process and, more importantly, provided them with legal and logistical resources that would be made use of in future offensives (Bruti Liberati, 2018, "Il terrorismo e il ruolo della magistratura"; Guarnieri, 2011a, "L'accumulo delle risorse"; Guarnieri, 2011b; Piana, 2010, p. 47) were particularly important and people began to see the magistracy, rather than the executive, a vital institution in the battle for maintenance of public order (Clark, 2003, p. 8). Italian magistrates, at least parts of it, started colliding noticeably with the political class. The oil scandal of 1973[23] and the Propaganda Due (P2) affair of the 1980s[24] were the first signs of a process of self-assertion, culmination of which

[23] The oil scandal of 1973 revealed that the assocation of oil derivatives producers had been funding all government parties to make favourable legislations pass (Rhodes, 1997, p. 56-57; Violante, 2009, p. 81). The investigations saw a reaction from the Parliament and 56 DC deputies submitted a draft law on March 1, 1974, aiming at reshuffling the composition of the CSM by reversing the proportion between gowned and lay members and removing the institutional guarantees of public prosecutors, who, enjoyed the same guarantees as judges, including their immovability. Predictably, the proposal provoked furious backlash from the judiciary in its entirety and even met criticism coming from the UMI, traditionally close to the DC. The attempt would subsequently be unsuccessful, given the internal divisions of the DC and the lack of support from the opposition (Fracanzani, 2013, p. 45-50).

[24] In 1981, when conducting investigations on Michele Sindona, a banker and a convicted criminal, two magistrates from Milan came across a list of names of 962 people, in which there were people from upper echelons of Italian society and the politics – like generals, heads of secret services, then-ministers (four), then-PSI secretary, parliamenterians, magistrates, businessmen (for example, future Prime Minister Silvio Berlusconi) and journalists, which, along with other documents found, hinted at a web of systemic corruption. It turned out that it was a membership list of P2, a secret Masonic lodge headed by Licio Gelli, activities of which had been rumoured about but with little concrete evidence. At the risk of oversimplification here, it turned out that the lodge, anti-communist and conservative in nature, functioned much like a crime syndicate, a state within the state, so to speak, with its extensive

was a series of massive corruption investigations collectively named Clean Hands (*Mani Pulite*),[25] involving some of the top names of the political realm who were indicted from numerous crimes ranging from illicit financing of political parties to association with organized crime, from bribery to abuse of public office (Nelken, 1996b), carried out between 1992 and 1994, and led to the total disappearance of the already-weakened traditional party system that had governed post-war Italy, for almost about half a century. Their grandiose corrupt exchanges, their "privatizing of

network of influence and corrupt exchanges, to control key positions in Italian state, army and economy. Moreover, the lodge has also been implicated with mafia, as Koff and Koff (2000) claim, "Apparently, Masonic judges, of whom it is believed there are a large number, interfered in many trials which involved those affiliated with the Mafia, arms trafficking and kickback" (p. 96). The exact scope of activities of the lodge is still unknown but P2 has been implicated with numerous crimes and murders. These investigations reversed the position of the PSI, whose leadership was involved in the scandal, against the magistracy (Bruti Liberati, 2018, "La scoperta della loggia P2 e il crack del Banco Ambrosiano", "La loggia P2, la magistratura e le istituzioni"; Fracanzani, 2013, p. 166-181; Ginsborg, 2003, p. 144-148; Willan, 2002; Zoff & Zoff, 2000, p. 95-97).

[25] Right before the election in April 1992, on Februrary 17, 1992, Mario Chiesa, a local politician of PSI, was caught collecting bribes and was put under arrest. Both the name and the amount (about 8.000 dollars) seemed relatively insignificant – just another act of malfeasance in a country where corruption had become systemic and unresolved mysteries were not seldom (Alberti, 1995; Vanucci, 2009). Media did not pay much attention to incident, reporting it for few days and the issue was forgotten quickly (Giglioli, 1996). Chiesa's confessions set off a pyramidal set of investigations as his accusations implicated subsequent suspects, whose confessions, in turn, implicated others and others (Newell & Bull, 1997, p. 87). A pool of magistrates was formed by the chief prosecutor of Milan, Francesco Saverio Borrelli. Still, the information flowing, not just from Chiesa but also from his counterparts, was too much. The chain of confessions started to involve increasingly important people – the political elite, who had never been in a weaker position given the electoral erosion of traditional parties. Technically, leaving aside the practices of factionalism, the governing coalition still had the majority in both chambers by slim margins – in fact, just by one in the Senate. But with the public opinion by their side, the 1992 election results giving them the room they needed, the context was well-suited for the investigating magistrates to march on (Della Porta, 2001; Giglioli, 1996; Ginsborg, 2003, p. 257; Nelken, 1996b). They did so. What the magistrates uncovered was essentially a web of political criminality, flowing reciprocally between countless stops and various spheres – business, political and criminal. The consequences were probably even more far-reaching then the investigating magistrates could have imagined in the beginning. With intense media attention and hostile public opinion, the traditional party system collapsed in its entirety, marking the end of the so-called "First Republic". The principal party of the Republic, DC had to be dissolved in January 1994 and was refounded under three different names; their legal successors, PPI would only obtain 29 seats in the lower chamber in the elections of 1994 – about 15 percent of what the DC had had after 1992 elections (206 seats). After obtaining 2 percent in 1994 elections, the PSI was simply dissolved in November 1994, 102 years after its founding (Ginsborg, 2003, p. 280-282). The PLI was dissolved too. The effect of Mani Pulite was not felt only through faltering public opinion, but the investigations effectively cut financial and organizational resources, illicit in nature, of parties. Devoid of sources of funding, the PSDI went bankrupt in March 1993 (Newell & Bull,1997, p. 87-88). President Oscar Scalfaro dissolved the parliament in January 1994, three years before its completion of term. Therefore the investigations created a vacuum, which could only be filled after 1994 elections. With the new electoral system, a highly complex one (Donovan, 1994), the right-wing alliance formed by Silvio Berlusconi, the media tycoon, recently entered into politics, took over.

public sphere" (Clark, 2003, p. 1) uncovered, parties had to change names, some of them disappeared or lost electoral relevance, resulting in the passage to the so-called "Second Republic" under a brand new political setting.

How come? How could magistrates belonging to a judiciary traditionally dominated by the judicial elite, who retained close contacts with politically powerful, emerge as national heroes vying with the political elite? The insulation of the judiciary from political branches, i.e. external independence, was provided by the 1960s via institution of the CSM and the subsequent annullation of the initiative power of the Minister and the competences of the CSM stayed the same throughout the First Republic but concrete judicial conduct has differed over time. As it should be obvious now, a closer look at the career path of Italian magistrates as a consequence of the reforms detailed above and their set of solid safeguards of internal independence, should give us the answers. Contrary to their Turkish counterparts, as shall be seen in the next chapter, Italian magistrates did not have much to fear, since their career, while abundant with carrots, contained few sticks – thanks to the CSM acting as the facilitator. Indeed, not just in terms of the lenient application of the law about promotions but the 'new' CSM reduced the wide margin of discretion that had governed the career course, as detailed at the beginning of the third chapter, by enacting detailed and publicized regulations. Not only that, the new leadership dispensed with the previous 'intelligence gathering' system on the conduct of magistrates which formed a basis on discretionary decisions and expurgated such dossiers (Di Federico & Guarnieri, 1988, p. 168). A closer look at the turning points of a typical magistrates career should demonstrate the high degree of internal independence enjoyed by Italian magistrates.

4.3.1 Recruitment

In the post-war Italy, magistrates are recruited via regular public competitions, based on written and oral exams that tests the theoretical knowledge of a candidate on various branches of law. The CSM, since its inception, has been fully competent in recruiting magistrates. The examining commission is appointed by the CSM and the subsequent appointments of candidates as well as their training are directed by the CSM. Thus, the recruitment process has traditionally been shielded from any political influence (Di Federico, 2012, p. 365-370).

4.3.2 Promotions and professional assessments

Thanks to the reforms detailed above, careers of Italian magistrates, for decades, have followed a practically automatic course.

The practical results of the system were that, during their whole course of career, the assessments of candidates who have fulfilled the seniority requirements to promote were no longer based neither on exams (written or oral) nor on examination of their written judicial work, but on assessments done by CSM based on the opinions of local judicial councils (Di Federico & Guarnieri, 1988, p. 169). The assessments by the CSM were almost always positive and promotions were essentially automatic once required seniority (years spent at a given position) was achieved. Tellingly enough, between 1979 and 2007, only 0.4 percent to 0.9 percent of magistrates suffered negative assessments and those were usually at the receiving end of criminal charges or a disciplinary sanction (Benvenuti & Paris, 2018, p. 1661). Similarly, Di Federico finds that, between 1993 and 2003, the CSM made 9.646 evaluations and only 117 of them were negative (1.21 percent) (Di Federico, 2005, p. 138-140).

As noted above, those who were to be promoted were promoted in excess of vacancies available in the upper rank, therefore carrying on the functions of the lower rank whereas enjoying the benefits of the higher position. To quote from Di Federico and Guarnieri:

> Nowadays the young graduate in law, by simply passing an entrance examination where his or her general scholastic knowledge of some basic principles is tested, often in a rather benevolent, unsystematic fashion, can more or less rest assured that the mere passing of time will ensure that in twenty-eight years he or she will reach the peak of the judicial career, until recently reserved for only a little over 1 per cent of the magistrates. (Di Federico & Guarnieri, 1988, p. 169)

As they note, such circumstances disencumbered magistrates of their "traditional anxious dependence" on higher ranked magistrates "and of the need of anticipating in their behaviour and performance the expectations of the judicial elite in order to attain organisational gratifications" (Di Federico & Guarnieri, 1988, p. 169-170). Yet, as one can guess, this lack of oversight has produced side-effects over time and raised questions about efficiency, accountability, professionalism and politicization, given the quasi-dominance of correnti in 'sharing' important posts among themselves since every candidate has positive evaluations and political loyalties become an important factor in division (the so-called *lottizzazione*).[26] Although the General Inspectorate of Ministry of Justice had inspection power over magistrates, this bore little relevance in practice, since it could not affect neither the independence of magistrates in the carrying out their functions nor the substance of judicial decisions. Moreover, this kind of supervision was carried out by magistrates themselves (Benvenuti & Paris, 2018, p. 1649).

[26] The magistrates were actually aware of the malfunctionings of the justice system in the face of its politicization and inefficiency, as seen from the stress on "professionalism" in judicial circles starting from 1980s (Bruti Liberati, 2018, "Il Csm da Pertini a Cossiga", para. 42-43; Piana & Vauchez, 2012, "Evoluzione delle fratture all'interno dell'associazionismo", para. 11-13). Still, Italian justice is notoriously slow as seen in the excessive number of condemnations the country has received by the European Court of Human Rights (Di Federico, 2012, p. 399).

Nevertheless, after several decades, in 2005 and in 2007, two reform laws,[27] passed by centre-right and centre-left coalitions respectively, altered the situation. The first law introduced merit-based assessments for promotions to higher positions, through written and oral examinations in the time of promotion. These exams are held at the national level and all qualified magistrates can apply. If there are more candidates than available slots, the CSM evaluates their merits on a comparative basis. The second law introduced periodical assessments that take place every four years for the first twenty-eight years of the career, carried out by local judicial councils and court presidents. The law lists in a detailed and concrete manner the basis on which magistrates are to be evaluated and further specification has been provided by the CSM. The CSM finally decides on the matter (Di Federico, 2012, p. 371-375). The evaluation can be positive, not positive or negative, each outcome affecting the career course of magistrates. Of course, the final decision of the CSM, like its any decision concerning the status of magistrates, can be brought under judicial review. Moreover, until these reforms, promotions to the Court of Cassation did not follow a different path, as detailed above, but these reforms foresaw creation of an advisory committee to assist the CSM in its decisions to promotions to the Court of Cassation, composed of three high magistrates, one university professor and one lawyer (Di Federico, 2012, p. 396).

Still, in practice, between 2008 and 2016, out of 16.097 assessments, only 287 were negative or not positive, equalling *less than 2 percent* – not a great improvement from the 0.4 to 1.2 percent of previous regime. This demonstrates a collective refusal to apply new rules rigorously. Benvenuti and Paris claim that the composition of judicial boards, whose members are elected by magistrates in the

[27] Legislative Decree n. 160/2006, and the Law no. 111/2007.

same district, carrying out assessments together with heads of courts, can explain this – thus hinting at the corporatist tendencies still in force (2018, p. 1660-1662).

4.3.3 Transfers

The principle of immovability, a safeguard to protect judicial independence and carved into the Constitution (Article 107), has found a quite rigid application in Italy.

Until the 1960s, before the promotions became automatic, the evaluations and promotions ('real' promotions then, leading to a change of office, rather than enjoying the benefits of higher rank and remaining at the lower) could induce a degree of mobility within the judiciary. However, with the promotions becoming essentially automatic, a magistrate can be transferred by the CSM only upon her request. Apart from detailed exceptions and a vague general exception in which a loss of full independence and impartiality is foreseen, an Italian magistrate can be quite content that she will remain at her post unless she wants otherwise. This remained unchanged with the reforms of 2005 and 2007. Thus, only newly recruited magistrates can be assigned to unpopular locations in an ex officio manner in their very first assignment. A magistrate can even practically remain in her first post until retirement, without any disturbances. As a consequence of this strict application of immovability, the CSM encounters difficulties in filling vacant and unpopular posts. For this end, incentives of different sorts, such as an additional stipend, had to be provided, but those attempts remained partially effective (Di Federico, 2012, p. 375).

This rigid application manifests itself in numbers too, since, according to the statistics published by the CSM, among the magistrates recruited from 1965 to 2017, 26 percent of the magistrates did not move from their posts and finished their careers where they had started. 33.2 percent of them were transferred only once and 22.2

percent twice (Ufficio Statistico, 2019, p. 13-14). Given that those numbers include voluntary changes, since magistrates generally start in unfavourable places and considering the instances in which courts have been merged, moved, dissolved or new courts have been set up over years, it is quite safe to safe that Italian magistrates are, barring exceptions, immovable.

4.3.4 Disciplinary procedures

In Italy, the Minister of Justice and General Prosecutor of the Court of Cassation possess the power to initiate disciplinary proceedings, though the proceedings initiated by the latter prevail in numbers in practice. Investigations are carried out by the General Prosecutor (usually by the magistrates in the office). The disciplinary section of the CSM is in charge of proceedings.

As hinted at in the third chapter, until recent decades, disciplinary procedures were marked with a high degree of ambiguity. Such vagueness had to be concretized by the disciplinary section of the CSM through detailed opinions and circulars. However, the corporatist consensus between correnti resulted in relaxed interpretations of the norm which made disciplinary sanctions go underused (Benvenuti & Paris, 2018, p. 1663)

Moreover, until the 1970s, it was ambiguous whether disciplinary proceedings were of administrative or judicial nature. In 1971, Constitutional Court decided that they were of judicial nature and declared that disciplinary section equivalent to a court and possessed jurisdictional character – which is why the decisions are appealed against before the Court of Cassation in a joint session. In line with this jurisdictional rationale, after 1985, disciplinary hearing became public (Benvenuti & Paris, 2018, p. 1662-1663). As Guarnieri points out, turning

disciplinary hearings into proper penal trials brought on with it all relevant guarantees in favour of the accused (Guarnieri, 2011a, “La magistratura della Repubblica”, para. 6).

On this subject, the Parliament approved a new law in 2006, providing 37 different disciplinary violations in *numerus clausus*. The magistrate is notified by the initiative and the charges within 30 days. Disciplinary proceedings are public. Opinions and decisions are publicized. The accused magistrate can be assisted by one of her colleagues or a lawyer. As noted above, decisions can be appealed before the Court of Cassation. In any case, due to statute of limitations, proceedings are terminated “when the investigation phase exceeds two years, when the decision of the CSM is delayed for more than two years, or when the violation becomes known more than ten years after its occurrence” (Di Federico, 2012, p. 380-383). In practice, disciplinary sanctions remain limited (Benvenuti & Paris, 2018, p. 1664-1665), but this can be interpreted in different ways – a lax set of disciplinary practices, or a healthily functioning disciplinary regime in which magistrates follow professional rules, or even a subservient (or consonant, for whatever motive) group of magistrates who cannot stick out their necks because of the fear of disciplining authority. But, for example, although affiliation to a political party is among the violations to be sanctioned, magistrates still openly retain contact with political parties and even assume duties (Di Federico, 2012, p. 380).

4.4 Implications of the Italian case

Several points stand out from the preceding account on the 'liberation' of the Italian judiciary, to conclude.

For a start, it is safe to say that Italian magistrates enjoy a remarkable degree of independence compared to their counterparts in other democratic countries – both externally and internally (Guarnieri, 1994). Externally, the channels through which other powers can exert influence are indeed very narrow. In addition to the very limited scope of authority of the Minister on judicial processes (Di Federico, 2004), the creation of the CSM, a separate entity from the executive as a measure of self-governance, formally independent from the executive, created a favourable institutional setting. According to Article 105 of Italian Constitution, the CSM "has jurisdiction for employment, assignments and transfers, promotions and disciplinary measures of judges", thus protecting the magistrates from arbitrary interferences coming from other branches. Yet, this external independence on paper did not automatically turn into a self-assertion on the behalf of the judiciary. The competences of the CSM have stayed largely the same throughout the First Republic but judicial behaviour has differed over time. Neither did the fact that the body was composed mostly of magistrates, as opposed to members of other branches, enhanced judicial independence concretely – despite a judicial council composed mostly by magistrates consists an 'ideal practice' put forth forth by various European bodies and largely accepted idea that it fosters judicial independence (Bobek & Kosar, 2014). In spite of the constitutional provision that foresees a distribution two-thirds of which is comprised of magistrates remained intact, judicial conduct has significantly altered over time. Indeed, the Italian case provides anecdotal evidence to the assumption of Garoupa and Ginsburg (2009a) that the creation of a judicial council does not necessarily enhance judicial independence. As seen above, Italian judiciary, thanks to the high degree of hierarchical control enforced by magistrates of higher grades who

were always in harmony with the executive, was subordinated to the political will even after the establishment of the CSM.

Internal independence, the more neglected gradient of the ever-lasting judicial independence debate, seems to be at play in the Italian case. As Nelken points out when accounting for the durability of Clean Hands investigations, dismantling of hierarchical controls rendered Italian magistrates much freer than their counterparts in other civil law countries as it blocked a channel through which political power could exert influence (Nelken, 1996a, p. 196-197). The creation of the CSM did not reproduce the hierarchical structure but rather created a breach in it as lower ranked magistrates participated in judicial politics and decision-making processes for the first time. Through reforms adopted between 1963 and 1975, the hierarchy was gradually dismantled, freeing the magistrates from the will of their senior colleagues: "Rather than being accountable to more senior colleagues, individual magistrates became increasingly responsive to the colleagues they were collaborating with within their own judicial offices and, in some noteworthy cases, to civil-society or political actors" (Piana, 2010, p. 46). Particularly crucial was the 1967 and 1975 reforms that restructured the system of election to the CSM thus leading to a recomposition of the body. With the CSM "captured" by reform-minded magistrates, the promotion became practically automatic, thanks to a lenient (an understatement) application of the law by the Council in fact, the same could be said for the set of guarantees that the magistrates enjoyed, ranging from disciplinary measures to transfers as they have been all applied by the CSM in a lax manner with corporatist leanings,[28] which fostered internal independence. Indeed, this was also due to corporatist tendencies

[28] Marco Ramat, one of the notable names of MD and a former member of CSM (1976-1981) claims that, in addition to a notion of independence, the movement against career structure "also profusely fed on corporative motives" (as cited in Moroni, 2005, p. 110).

prevailing in Italian judiciary and a 'side-effect' of the relation between 'electorate' and 'incumbent'. Although leading to inevitable quality and accountability problems in the long-run given a lack of oversight, this new career structure, or lack thereof, emancipated the magistrates from pondering about the potential career-wise consequences apart from marginal instances, which could be corrected since acts of the CSM could be brought under judicial review, when they engage in judicial activism that would go against their 'masters'. There is no doubt that such non-hierarchical setting has increased autonomy of individual magistrates tremendously.

In a similar vein, under its new direction and despite unsuccessful measures to curb its power coming from political class, the CSM incrementally expanded its scope of jurisdiction to go beyond a simple administration of justice, via administrative acts, directives, measures aimed at coordination, highly detailed regulations, public statements etc (Benvenuti, 2018, p. 383), thus, transforming from a mere constitutional body of administrative nature into a “policy arena” (Piana, 2010), a bulwark of judicial independence, so to speak. Indeed, over time, the CSM has assumed the role as the “apex of the judiciary” from the Court of Cassation with its increasingly activist stance and became a natural point of reference in judicial matters which further undermined any remnants of judicial hierarchy. Additionally, it became the main channel between justice and politics with the decline of Ministry (Clark, 2003, p. 7). According to Piana, throughout the 1970s and 1980s, the CSM turned into a “clearing house” to develop more progressive ideas regarding judicial matters. To quote from her directly:

> The fundamental goal of the new CSM leadership was to link the body to other social and political institutions, in order to enable it to overcome its isolation. The CSM, which had been created to insulate the judiciary from the political and social environment, was transformed into an instrument to enable it to contest that insulation (Piana, 2010, p. 46-47).

From a pragmatic perspective, were Italian parliamentarians fool enough to load a gun that could eventually turn against them when passing these reforms? Political contingencies obviously matter. To begin with, despite the existence of a dominant party system, the Italian party system was highly fragmented. Moreover, parties even exhibited internal fractions which further undermined their cohesion when deciding on judicial matters and, certainly, created a room for maneuver for magistrates to exploit. To exploit such a margin, a side willing and able to exploit is necessary. Surely, the ascent of centre-left in the 1960s created a favourable balance of powers for the magistrates who were aspiring to dismantle judicial hierarchy. But what mattered at the end of the day was the existence of magistrates willing to exploit the fragmentation and more importantly, the existence of a judicial association, the ANM, that has incrementally adopted a novel notion of the judiciary and that provided channels through which the lower ranks could articulate their interests – correnti. Favourable circumstances explain the outcome up to a point. What the lower ranks of Italian judiciary had to surpass was a traditional, apolitical notion of the judiciary to be 'politicized' (no negative connotations here) and to articulate their demands through formal and informal channels both to the society and the political parties. With increasing contacts with political classes, and with the ascent of the PSI to the government, but also with the crucial and steady help of the PCI in the long run as “the party of the judges”, the renovators were able to incur a “competition” between political parties to satisfy their corporate demands, as the ruling party found itself having to take the initiative in some cases against the “dangerous competitors” who were getting closer with the judiciary, as Guarnieri puts it, and develop contacts with some sectors of the judiciary: “The fact is that, against a united magistracy -at least on more 'corporative' themes- there was a divided political classes [that was] in

competition to obtain favours" (Guarnieri, 1992, p. 131). None of this could have happened without the overcoming of the 'cage' that insulated the judiciary from the rest of the political landscape and magistrates willing to develop contacts with the political class.

Giuseppe Di Federico (1989) identifies several channels through which the judiciary could influence the legislative processes in their favour. The first is the existence of over a hundred magistrates employed in the Ministry of Justice. Minister is the chief potential interferant that can exert influence the judiciary, therefore, magistrates (on whom the Minister depends entirely to perform her duties) able to work in favour of the judiciary, thus averting the Minister from interference, is crucial. Occupying top positions within the Ministry, these magistrates have an absolute control over the organizational capital that affects the actions of the Minister, which are;

> the processing and use of information, the formulation of professional opinions, the preparation of ministerial memoranda, the identification of problems to be resolved and initiatives to be taken, the drafting of bills and reports on selected issues, the assessment of initiatives originating in other quarters, the formulation of proposals and answers by the minister to questions and inquiries raised during the course of parliamentary proceedings. (Di Federico, 1989, p. 37).

Moreover, on the basis of interviews he conducted there, he asserts that those magistrates in the Ministry conceive their duty "as a necessary means to prevent the Minister from using the powers allocated him by the Constitution in such a way as to undermine the autonomy of the judiciary" (p. 46, n. 26). Here, we understand that these magistrates are not simple yes-men and their loyalties, as well as incentives, do not lie in the Ministry (or in a related ideology, party, etc). Appointed by the CSM, the bastion of judicial independence, so to speak, those magistrates work for the judiciary in the end, not for the Minister (Di Federico, 2004).

A second channel is extra-judicial activities (Di Federico, 1981). Italian magistrates enter politics frequently. As a result, they often take charge in justice committees, participating in debates regarding the legislation concerning the operation of justice, lobbying and whatnot, thus, furthering the collective interests of the judiciary. Moreover, they can also assume duties in other public bodies and even in local administration (Di Federico, 1981 1989, p. 37-38). The CSM endorses engagement in extra-judicial activities. In fact "Italian magistrates can shop around for additional revenue in the public sector without losing any of the advantages of their judicial career" (Di Federico, 2012, p. 391) as the time spent on such duties count towards their seniority. This surely raises doubts both about performance, efficiency and impartiality, which have been topics of serious debate in Italian politico-legal circles. In fact, two referenda have been made to forbid extra-judicial activities of magistrates but turnout could not reach 50 percent, thus falling short of the necessary quorum (p. 394).

A third channel identified by Di Federico is the ANM, which around 90 percent of the Italian judiciary is a member of. As Benvenuti (2018, p. 373) points out, a tradition of judicial association dating back to as early as 1909 indicates an interest on the part of magistrates to judicial politics. As explained repeatedly above, to further their case, over time, representatives of the ANM have developed a web of contacts with the political class – both from the governing and opposition parties. These contacts gave them the opportunity to exert influence, which, more often than not, reached a degree of 'pressure', on legislative processes (Di Federico, 1989, p. 37-38). Indeed, these magistrates, operating in different spheres and bodies of the political life in general, have formed a tight network, a grid, so to speak, "to exchange information, coordinate strategies aimed at moving or supporting particular

proposals and discouraging or preventing others" (p. 38), which enables them to keep an eye on any proposal that pertains to the judiciary and lobby in favour or against it.

A logic of fragmentation of power, which allowed the magistrates to put pressure on politicians, applied *within* the CSM too. From 1968 and onwards, pluralism between parties coming from the parliament and the ANM, especially that between different correnti of the ANM, lingered on for decades and still continues this day (with changing names obviously) which allows for a degree of checks and balances between them and makes sure that the body is not captured by a single principal (Benvenuti & Paris, 2018, p. 1658-1659). This is confirmed by the term between 1972 and 1976, in which some progressive magistrates, although acquitted in the end, saw disciplinary proceedings of blatantly political nature undertaken against them – the CSM in this term was dominated by the centre-right corrente MI.

A secondary factor in accounting for the overly zealous activities of Italian magistrates and their willingness to confront political power could be the fact that Italian judges and prosecutors belong to the same corps and enjoy same guarantees and the principle of compulsory prosecution carved into the Constitution. Of particular importance is the guarantee of immovability that ensures that a magistrate cannot be transferred from his seat without her consent, the exceptions of which are carefully implemented by the CSM (Bruti Liberati, 2018, "Il trasferimento d'ufficio e le inchieste del Csm") – a stark contrast with the Turkish case that shall be detailed below, in which the guarantee of immovability has no practicality. Nevertheless, obviously, enjoying the same guarantees with the judges and belonging to the same corps, instead of being hierarchically subordinated to the executive, especially when combined with the principle of compulsory prosecution, is something that can incentivize magistrates to press charges, acting as problem-solvers to address their to

direct the country's criminal policy and even to pursue individual fame (Di Federico, 1995). This fits into the overall narrative of internal independence put forth in this chapter as well.

Public support as a result of their activist stance has also proven to be a 'resource', even though being fickle in nature. Indeed, the fight against terrorism and mafia endowed the judiciary during the 1970s and 1980s with a new legitimacy and public support (Piana, 2010, p. 47) – though the latter turned out to be volatile. Similarly, as the Clean Hands unfolded, enormous media attention and public opinion as manifested in public demonstrations fuelled the fire (Giglioli, 1996). Yet, as one can notice, in all these instances it was magistrates who stirred public opinion by their actions, though inconsistently, as shown in the referendum of 1987.[29] A more fitting term could be *visibility* rather than public opinion as the latter implies a one-way support on the part of public in this case. It should be pointed out here that the progressive Italian magistrates strove to overcome the isolation of the CSM and the judiciary in general by establishing unusual relations (at least for a civil law judiciary) with other spheres that worked not just from political to judicial but reciprocally. Contacts with political parties, an election more or less every year that garner national coverage in the media (consider, not just the ANM and CSM elections here, but also the congresses of correnti which have gained media visibility), the fight against organized crime, frequent clashes with the politicians, annual relations, public statements, acts of mobilization in local nature, more

[29] In Italy, with the initiative of 500.000 citizens or 5 Region Councils, it is possible to go to an "abrogative referendum" to partially or totally abolish a law. For the result of an abrogative referendum to be effective, turnout must be greater than 50 percent, otherwise it is invalid. In this case, a referendum was held in 1987, asking voters if they wanted to abolish the law that had excluded any type of liability of magistrates in events of judicial error. It passed. Nevertheless, the positive result of the referendum was frustrated by a subsequent law supported by the DC, PCI and PSI, n. 117/1988, which provided the liability of the State, with the possibility of latter to resort to the magistrate but only limited to a third of her annual salary (Del Mastro, 2014, p. 118).

transparency – all of those served the same set of goals, one of which was surely independence.

Notice how the elements described above point to a high degree of internal independence. Influenced by a professional culture that stresses civic involvement and justice as a civic duty to be fulfilled, a portion of Italian magistrates, which would become decisive in the long run, was willing to act even though collusion with corrupt politicians have also been widespread and tolerated too (Della Porta, 2001).[30] Even though there were those who chose to co-operate with politicians and engage in corruption, for those willing to act, for those owed nobody nothing, the path was open as a result of unusual degree of independence enjoyed by the judiciary – both external and internal. Put simply, looking to undermine the domination of the judicial elite, portions of the Italian judiciary developed a new notion of magistracy, engaged in judicial activism, participated in the national political debate in contrary to the prescribed aloofness of the past and set their sights outside of the judiciary: political parties, society, media, public opinion and the like. Once favourable legislation passed and amended the election system to the CSM, they dominated the body and altered the raison d'être of the body – from a monitoring device to a "judicial parliamentary" (Nelken, 1996b, p. 100), so to speak, where interests of the lower-ranking magistrates, comprising an overwhelming majority of the judiciary and

[30] Collusion was indeed a common practice. The word 'insabbiamento' started to be circulated throughout the 1970s, which literally means "covering with sand", referring to turning a blind eye to some sensitive cases by magistrates and 'disappearance' of politically-salient cases, occurring more often than not in the prosecution office of Rome, ironically nicknamed "The foggy port" (*il porto delle nebbie*) (Della Porta, 2001; Pederzoli & Guarnieri, 1997b). Along the same lines, Bruti Liberati claims that "The history of criminal justice in the 1970s is largely characterized by a laborious affirmation of legality and conquest of independence, in a clash within the judiciary, often very hard"1 (Bruti Liberati, 2018, "Il nuovo attivismo della magistratura penale e gli ostacoli frapposti", para. 10), pointing to the politicization of the judiciary in this decade and as a result, wide portions of magistracy siding with politicians to do their best to "cover with sand" important cases. Della Porta too, sees collusive practices between magistrates and politicians as a side-effect of politicization within the judiciary (2001).

strengthened by the electoral logic, prevailed. The CSM undermined judicial hierarchy by rendering the career progression practically automatic through consistently positive evaluations and decentralized the judiciary, leading to a horizontal setting rather than a vertical one, thus, fostering internal independence which, along with favourable political circumstances, provided a path for magistrates willing to take action against the powerful. The reference group of the magistrates were not the judicial elite who retained a certain degree of contact with the political elite anymore. To quote from Pederzoli and Guarnieri in a similar vein:

> Even though the extent to which the judiciary intervenes in the political process is strongly conditioned by the evolution of the political system and by the way the judicial system is organized, the connections between judges and the political system influence their reference groups, their conceptions of judicial roles and, therefore, their decisions. The institution of a Higher Council induces a radical change in the traditional hierarchy, with the result that the composition of the reference group is diversified and, at least in part, placed outside the judicial corps, a process supporting the evolution of activist conceptions of the judicial role (Pederzoli & Guarnieri, 1997a, 264).

However, the picture is not as bright as it seems in terms of delivery of justice. As noted above, lack of oversight in the long run brought about in terms of efficiency and merit. Since everyone was perfect on paper in terms of merit, important posts were shared on the basis of loyalties to correnti. The impact of correnti had been stabilized by a proportional representation system in elections to the CSM, introduced in 1975 and despite electoral reforms to curb their power in 1990 and 2002, they still have remarkable impact of judicial politics. Election to the CSM has almost exclusively depended on adherence to one corrente or another. So much that Benvenuti and Paris argue that, although they are not tied to specific political parties, loyalty to correnti became a new form of internal dependence, however, as the composition of CSM has remained essentially pluralist over the time, this has

prevented a single corrente to dominate decision-making process regarding professional careers of magistrates (Benvenuti & Paris, 2018, p. 1654-1659).

The stark contrast between Italian and Turkish cases, with the latter being literally dominated by their superiors, many thanks to a strong judicial council which has enforced a strict judicial hierarchy throughout decades and that has almost always been in line with the political power, will make clear the mostly overlooked internal aspect of the judicial independence debate. As shall be seen below, the average Turkish judge has been what an average progressive Italian magistrate was not trying to be, an apolitical, risk-averse, career-driven bouche de la loi in isolation, under the domination of his seniors who have the absolute last word on her career. This lack of internal independence has resulted in, over the years, a bitter contrast between the situation of Italian and Turkish magistrates – the former being able to stand out as an independent power in the separation of powers setting whereas the latter being subjected to the will of the political power as influencing the higher echelons in a hierarchical structure is enough to subdue the whole corps. Decisions about the careers of individual judges and prosecutors, on which the Council has almost a monopoly, are the chief means through which internal independence can be endangered. As one of the interviewees pointed out, during the fieldwork I conducted, “Can you expect judicial activism [given the recent purges in Turkish judiciary] from a judge who is still paying his mortgage?”

CHAPTER 5

TURKEY: "THE JUDICIAL 'OFFICE' OF THE STATE"?[31]

The year 2010 saw heated debates on the judiciary of Turkey, provoked by the constitutional amendments brought on by a referendum held in September 12, 2010 – exactly 30 years after the 1980 coup d'état, which the ruling AKP and its leader Erdoğan were advertising to be settling the scores with, since the Constitution of 1982 had been drafted and put into force practically by the junta, responsible for grave human rights.

The debate was centered mostly on the judiciary precisely because of two articles that radically restructured the high judicial bodies of the country: the Constitutional Court and High Council of Judges and Prosecutors (Kalaycıoğlu, 2011, p. 6). As of 2019, it would not be too bold to call remaining twenty-two articles as window-dressings – Arato even calls the package as a scheme of court-packing in a highly sophisticated form, "more so than any previous attempt elsewhere" (Arato, 2016, p. 249). To be sure, other provisions were generally seen as positive ones, yet along with the two most controversial articles, the package was voted as a whole and ratified by 58 percent of the electorate.

It is possible to roughly sketch two opposing lines in the constitutional debate of the time. The "Yes" campaign was led by the ruling party, Gülen movement,[32] and

[31] A very informative book about 2010 HSYK elections by Orhan Gazi Ertekin (2011) has in its cover a Swiss army knife, symbolizing Turkish judiciary, that has "The Judicial Office of the State" written over it.

[32] An oversimplifyingly brief account of the Gülen movement is in order. The movement is originally a religious one led by Fethullah Gülen, an Islamic preacher, but the scope of his community has gone well beyond the scope of a modest religious movement; forming an international network primarily through schools it operates in various parts of the world. The movement has achieved positions of unduly influence in various state institutions of Turkey, including bureaucracy, judiciary and police force, peaking mostly during the time of the AKP government which sought allies in its fight agains the so-called Kemalist center of the state – yet the infiltration of Gülenists of the state institutions goes back few decades. The alliance with the AKP fell apart in 2013 and two sides began to clash and the

the aligning liberals mostly. Fethullah Gülen, the leader of the movement, personally campaigned for the "Yes" campaign in his preaches and Erdoğan, after the victory, personally thanked those 'beyond the ocean', as a reference to the Fethullah Gülen residing in the U.S. (Taş, 2017). Stated briefly, this party held that the restructuring of the judiciary was highly consistent with practices of more stable democracies and it was going to democratize the judiciary (see, among others, Bâli, 2010, 2012; Can, 2010; Çakmak, 2012; Özbudun, 2010, 2011; Yazıcı, 2010). The "Western-democracies-do-so" card was played heavily by the AKP, fuelled by the backing the package received from the European Union (European Commission, 2010; Giegerich, 2008, 2011) to which Turkey was an aspiring candidate – a nostalgic adjective that now really does sound like from pre-historic times. Of course, Western democracies was not the only ammo in the arsenal as themes of democratization of the judiciary and judicial independence against "tutelage" were omnipresent. The central argument undergirding the official AKP discourse about the autonomy of the judiciary was that the higher judicial bodies had been the "backyard" of traditionally secular main opposition party, Republican People's Party (*Cumhuriyet Halk Partisi*; "CHP" hereafter), and more broadly the Kemalist elite; hence, the amendments by which the lower category judges would rise to prevalence in the Council would democratize the judiciary and put an end to the "judicial tutelage" sustained by the judicial elite of Turkey. Given the party's preceding clashes with the high judiciary, it should not be surprising that the officials and surrounding circles were not shy of calling the judiciary a "backyard" (of Kemalist elite as epitomized in the main opposition party, CHP), "a caste system", "an oligarchy" or whatnot ("Başbakan

government started to oust Gülenists seeped into the state institutions. The clash allegedly led to the coup d'état attempt of July 15, 2016, carried out by the Gülenist units also seeped into the military. The organization has been treated as a terrorist one by the Turkish state since then.

Erdoğan'dan", 2010; "Direnenlere demokrasi", 2010; "Erdoğan: Evet diyene", 2010; "'Memur Kemal Efendi'ye, 2010"; "Yargıda 'kast sistemi'ni", 2010). The "No" side, on the other hand, was adamant that the amendments constituted a blatant attempt to 'capture' the judiciary by the AKP (see, among others, Arato, 2010, 2016; Gözler, 2017; Öztürk, İlkiz & Kocasakal, 2010).

The amendments passed. Whereas the opposition was mourning for the loss of the judiciary and first assertions of an autocratic regime were being put forth as the ruling party was thought to be tightening its grips on state institutions, Erdoğan was of the opinion that "The hand of the people has touched the judiciary", referring to the so-called democratization of the judiciary. "The hand of the people" proved to be a banana skin though. Things did not go out as planned as the ruling party came in great conflicts with certain parts of the judiciary at the end of 2013. As shall be explained below, The Council saw sweeping changes to its founding law in the beginning of 2014, again in the name of judicial independence, and a complete reshuffling of its composition again in 2017 by another package of constitutional amendments, unsurprisingly, in the name of judicial independence and preventing a form of tutelage from forming – yet, again. All in all, the Council has operated under three radically different compositions in a short span, yet, the results did not differ much. The judiciary did not seem to be independent whatsoever.

As of 2019, it would be absurd to claim that Turkish judiciary is independent from the executive. In an increasingly authoritarian context, if not straight out autocratic, the 2017 amendments gave the ruling party (Erdoğan, more specifically) a complete control over the HSK for the first time in its reign of fifteen years, thanks to his control in parliament and his newly-found satellite-party, Nationalist Movement Party (*Milliyetçi Hareket Partisi*; "MHP" hereafter). On a symbolic level, the

appointment ceremony of 1.236 new judges and prosecutors took place in the Presidential Palace in March 2018 in which to-be-appointed judges and prosecutors gave a standing ovation to Erdoğan and his yes-man, then-Prime Minister, Binali Yıldırım. The high courts of the country were already restructured in 2014 in a way to make room for judges and prosecutors aligning with the AKP (Özbudun, 2015, p. 51-53; Saatçioğlu, 2016, p. 140). Judges that are thought to be 'dissidents' are frequently sent to 'exile' in less desirable posts (Köse, 2017). As a rational person who resides in Turkey I am not touching upon the dismissal of approximately a quarter of judges and prosecutors for their ties to Gülen movement after the July 2016 failed coup d'état attempt, carried out by the Gülenists seeped into the military, yet, it is imperative to point out the fact that those judges were dismissed with ease, presumably without reasoning and right to appeal (European Commission, 2018) – therefore to hint at the precarious status of any given Turkish judge. It does not seem that the changes to the Council did not bring upon the much-desired independence upon Turkish judicial corps. There must be more than a simple reshuffling of a judicial council to contribute to judicial independence and one has to look beyond councils.

This is what I am going to pursue in this chapter. I am going to try to point out that Turkish judiciary has been -dare I call traditionally- structured as a hierarchical body in which seniors exert a towering influence over their 'inferiors' in quite unreversible ways without any meaningful checks on their powers. Indeed, having their governing laws drafted mostly by juntas, the internal structure of Turkish judiciary highly resembles a military body (Şakar, 2017). The Council has had “the power to do anything but a man a woman or viceversa” as a judge puts it (Özsu, 2014b, p. 189), with little to no accountability. This lack of internal

independence of judicial corps, this one-way dependence on superiors, leads to a winner-takes-all game in which the will that 'captures' the higher body, the Council in this case and the supreme courts to a lesser extent, has an insurmountable effect on corps in general, therefore facilitating an ill-willed external influence to penetrate the body quite smoothly – as proven many times by different outside actors in Turkish case. I will specifically argue that internal independence of individual judges and prosecutors have been quite restricted and this stems from their lack of any checks and balances against their superiors, more specifically the HSK which relegates them into a precarious position which is why Turkish judiciary is not independent.

The chapter is organized as follows. First, I present a brief historical background of the AKP to put into context the reason why we have seen constant meddling with the Council in recent years, starting from 2010, in the first place. Then I examine the trajectory of Turkish judicial council, the HSK, since its inception and related legal changes regarding the careers of Turkish judges and prosecutors, in tandem with the political context until 2010. It will be increasingly evident that a hierarchical essence has governed judiciary of Turkey, especially from the 1970s and onwards wherein the HSK was tasked with ensuring a hierarchical sort of control rather than creating a breach in the hierarchical setting as demonstrated in Italy as a result of non-participation of judges and prosecutors of lower courts to the elections to the HSK. The vagueness of related legislation and absolutely zero legal remedies against the acts of the HSK served to tighten the grip of the body on individuals by rendering them practically defenseless against arbitrary acts carried out by the judicial elite, unrestrictedly, thus hindering; if not altogether quashing internal independence of individual judges and prosecutors. Put simply, life is “nasty, brutish and short” in Turkish judiciary. Then, I examine the manifestations of this dog-eat-

dog world in the careers of individual judges and prosecutors, by taking a closer look in the legal regime through which their careers are administered. I examine the relations between the HSK, supreme courts and judges and prosecutors how such relations are built in a strict hierarchical sense. After that, I turn to the position of the Minister of Justice in the day-to-day operations of Turkish justice. Ministers have had a say in how the Council was to operate as a result of their position as a 'limited veto player', thus, potentially harming external independence of the judiciary. But the channels of influence is not limited to the HSK. Lastly, I turn to the brief Turkish experience of judicial associationism until 2010, which could not escape the dire consequences of the legal setting in subsequent years. Remember, associationism was the primary means through which Italian magistrates could articulate their demands and make their cases heard. Turkish ones did not have the opportunity – although it is another question whether they would have done so had they had the opportunity. All in all, this chapter will serve to understand the post-2010 context which saw different outside actors 'capturing' the judiciary with relative ease, which will be accounted for in the next chapter.

5.1 A brief historical background

AKP's roots, both in terms of cadre and ideology, can be traced back to Islamist Welfare Party (RP) from whose ashes it was born.[33] After its leader Necmettin Erbakan being forced to step down from Prime Ministry after a memorandum by the Turkish Military, in famous February 28 "post-modern coup d'etat" as some put it in 1997 and being dissolved by the Constitutional Court in 1998, because of allegedly anti-secular acts and discourse, pretty much the same cadres formed a new party,

[33] Though the roots of Islamist parties date back well into the 1970s.

Virtue Party, which faced the same fate in 2001. Given these dissolutions, the party's leaders realized that with an entirely Islamic roadmap the party stood no chance against its secular rivals and as demonstrated by İhsan Dağı (Dağı, 2006), over time, the party developed a language of human rights and democracy as a shield and formed alliances with secular/liberal sectors that led to the recognition of AKP as a legitimate political actor. A pro-EU stance and the backing of the EU in return, and legal reforms in line surely did have a legitimizing effect too. After November 2002 elections in which AKP gained about 34 percent of the votes but 66 percent of the seats in the parliament, the leader of the party, Recep Tayyip Erdoğan even went further to claim that AKP was not religion-centric but rather was a conservative democrat party (p. 89). This was mostly due to the threat of a secularist Turkish Military which had staged four coups since 1960.

With its conservative-yet-not-Islamist approach, AKP managed to hold its ground against the military until 2007 when the former secularly-oriented President Ahmet Necdet Sezer's tenure was coming to a close and the AKP-dominated parliament was to elect the new President. During the election process, on April 27, 2007, the Turkish Armed Forces issued a statement, which would be called an e-memorandum later, emphasizing that the military was a staunch defender of the constitutionally-entrenched principle of secularism. Moreover, the Constitutional Court interpreted the relevant articles on the Constitution in an interventionist manner and annulled the first round of presidential election, deciding that a quorum of two-thirds was necessary in a bizarre fashion, which was impossible without support from the opposition – a support which AKP got from MHP eventually, not a satellite-party back then, after the July 2007 early elections, and elected Abdullah Gül, one of the founders of AKP, as the President.

Having the upper hand by the election results in 2007 and with the ascendance of Gül to Presidency, the party was now finally in a position to challenge the traditional secularist hegemony. Utilizing the courts packed by its ally Gülen movement, the party went on to criminalize military interference in politics and "to subdue and intimidate the rank and file in the armed forces, often through fabricated evidence and violation of due process" (Doğan & Rodrik, 2014; Esen & Gümüşçü, 2016, p. 1585). In those cases, which would Erdoğan call "ploy" (*kumpas*) later in 2015 ("Cumhurbaşkanı Erdoğan: Balyoz ve Ergenekon'da", 2015), after the alliance with Gülen movement fell apart, hundreds of military personnel, both active and retired, politicians, academics and journalists were arrested in waves and faced allegations of conspiring a military coup against the elected AKP government (p. 1585). All in all, in the long run, these cases harmed the untouchable image of the army and signified that army was no longer in a position to intervene in politics and consequently reduced its sphere of influence.

The tension between secularly-oriented Constitutional Court and AKP gained a new dimension especially after the famous headscarf decision of the Court in 2008. The Court struck down a constitutional amendment, which was going to pave the way for women wearing headscarf to get university education without any restrictions, claiming that the amendments were against the unamendable articles of the Constitution and therefore the secular core of the Turkish State. According to the Article 148 of the Constitution, the Court was originally restricted to the review of procedural prerequisites of the constitutional amendments, however, in this case, it developed this jurisprudence in order to review the content too – as it did in the 1970s (Roznai, 2017, p. 200).

The annulment of the amendment by the Constitutional Court led to the expectation that a closure trial for the party was on its way as well, which also fell within the authority of the Court. Expectations turned into reality despite the solid electoral backing the party had received in 2007, 44 percent, but the AKP survived the trial barely with six of eleven judges voting in favor of closure – a total number of seven was needed (Shambayati & Sütçü, 2012). Therefore, before the constitutional amendments of 2010, despite the popular support and having gained the upper hand against the military, AKP was still on the defensive vis-a-vis the traditionally secular higher courts. Hence, viewing the amendments that would restructure the Constitutional Court and the HSK, again, without keeping in mind this then-ongoing struggle between higher judicial bodies and AKP and the alliance between AKP and the Gülen movement which had a considerable amount of judges and prosecutors in its command, would be misleading.

5.2 The Council over time

The organization of Turkish judicial system is similar to the other countries of Continental Europe as it adheres to the civil law tradition (Benvenuti, 2011). Therefore the explanations made at the beginning of the third chapter regarding the typical features of a civil law judiciary apply also to the Turkish context.

The competences concerning the administration of courts and the career of judges and prosecutors are shared between the Council, the Justice Academy, and supplementary self-government bodies including the justice commissions and the supreme courts, though the Ministry of Justice continues to play a significant role in the process (Çalı & Durmuş, 2018, p. 1674). The competences of the Council are stated as follows in its website: “Admission to the profession, appointment,

transference, granting temporary authorization, promotion, allocation as first class, distributing cadres, making decisions about those who are not considered suitable to continue to perform their profession, rendering decisions about disciplinary punishments, suspension from office; and to issue circulars exclusively about the above mentioned subjects and the inspections, researches, examinations and investigations regarding the judges and prosecutors". Its roots as a constitutional body can be traced back to the "High Council of Judges" (*Yüksek Hakimler Kurulu*) of 1961 Constitution that was enacted after the 1960 coup d'état that put an end to the Democrat Party's authoritarian reign which had seen an enormous amount of power amassed by the executive. Simply put, fates of individual judges and prosecutors had been in the hands of Minister of Justice. The ruling party had used its powers to intimidate judges and prosecutors it saw as 'dissidents' through arbitrary acts, as seen in the forced retirement of 16 judges of the Court of Cassation (Aldıkaçtı, 1982, p. 345) or its change on the laws which allowed the executive to force judges who had spent more than thirty years in profession into retirement (Ünal, 1994, p. 72).

The Constitution of 1961 foresaw a separation between judges and prosecutors as they belonged to different corps. A similar body for public prosecutors was established by Law no. 45 in 1962 but constitutionalized in 1971: "High Council of Public Prosecutors" (*Yüksek Savcılar Kurulu*): The bodies were merged, as with the corps, in 1982 to form "High Council of Judges and Public Prosecutors" (*Hakimler ve Savcılar Yüksek Kurulu*), which had the word "High" removed from its name, in line with the zeitgeist, in 2017, hence, the "Council of Judges and Prosecutors" (*Hakimler ve Savcılar Kurulu*), as it operates today.

HSK has seen sweeping changes to its composition and its internal operations five times after it was established; in 1971, 1982, 2010, 2014 and 2017 (Çalı & Durmuş, 2018, 1674), the ones until 2010 are explained below.

5.2.1. 1962 – 1972: "A brief period of rejoicing"

The Constitution of 1961, put as "the revenge of the bureaucracy" by a political scientist of the time, could be seen as a response to the "bitter experiences" of the preceding era as it contained a remarkable bill of rights and empowered the judiciary since the text entrenched a set of guarantees for judicial independence (Shambayati & Kirdiş, 2009; Soysal, 1969; Ünsal, 1980, p. 72, 103). As mentioned above, the preceding period had seen an unchecked ruling party sliding into a blatantly authoritarian governance which had ended with a military takeover. The Constitution contained a set of checks on elected governments which could be seen in autonomous institutions such as the Constitutional Court, the National Security Council, the State Planning Organization and finally, the Council (Belge, 2006). After having skimmed over the judicial organizations of other developed democracies, a leading legal scholar of the time was quite confident to conclude that the Constitution of 1961 contained a more developed regime of guarantees for judges that ensured judicial independence (Kuru, 1966, p. 4).

The Council, inspired by the Italian model as stated in the legal justification of its founding Law no. 45 (Mumcuoğlu, 1989, p. 285; Ünal, 1994, p. 77) and started operating in 1962, was conferred the power to rule on all matters pertaining to statuses of judges by the Article 144. The composition of the body was a highly pluralist one that maintained a degree of connection with the political realm and the Italian influence was quite obvious. A third of eighteen regular members of the

Council were elected by the judges of first class from among themselves,[34] whereas each half of the other two-thirds was elected by the Parliament (half and half by each chamber and with a simple majority) and the General Assembly of the Court of Cassation and respectively. Judges of the first class were to elect a substitute member whereas the Parliament and the Court of Cassation were to elect two each (Gözler, 2000, p. 88-89), equalling the number of total substitute members to five. Members elected by the Parliament had to be judges who had worked in higher courts or people who had been qualified to do so. The Council was to elect a chair from among its members with a simple majority. Acts of the Council was subject to judicial review.

The Council had a completely autonomous scope of action from the Minister, as the latter could participate in meetings but could not even vote. In fact, the Minister had no supervision power over neither the Council nor on individual judges thanks to the Judgment no. 1963/90 of the Constitutional Court, dated June 28, 1963, that annulled the 83rd Article of the Law on Judges, numbered 2556, which had foreseen such a competence (Kuru, 1966, p. 13). In the meantime, fuelled by the spirit of the new Constitution, the newly-founded Constitutional Court annulled different provisions on different laws that had provided the Minister with the power to decide on the fate of individual judges (p. 14-15). The Council could act in its own initiative without any initiative act of other bodies. The most important competence conferred to the Minister was to activate the disciplinary procedure by individual complaint, of which the ultimate decision-maker was the Council (Ünal, 1994, p. 75).

As for prosecutors, a separate High Council of Prosecutors was established. Even though it was established by ordinary laws and did not possess a constitutional

[34] An early trace of the hierarchical mindset here. There is simply no plausible explanation as to why elections were exclusive to the first class judges.

status, prosecutors had a sound majority in the Council: nine prosecutors (seven from higher courts, including the Chief Prosecutor of Republic who chaired the Council) against three bureaucrats from the Ministry (Sever, 2007, p. 155).

Yet the picture was not so bright in terms of judicial independence as the Council was not economically independent from the Ministry since it did not have a separate budget (Kuru, 1966, p. 16-19) – a problem that would last until 2010. Moreover, often a neglected side of the story, thanks to the Article 90 of the founding law, soon-to-be judges and public prosecutors were subjected to control of the Ministry during their candidacy process that included disciplinary sanctions and dismissal – candidates would be accepted into profession and appointed by the Council via a separate act after completion of the candidacy process. Nevertheless, despite some shortcomings, there is a sound consensus in the literature that the period between 1961 and 1971 was marked by a high degree of external independence exuded by the judiciary, epitomized especially in the relatively few competences of the Minister on the careers of judges.

5.2.2 1972 – 1981: "All things move toward their end"

With the military memorandum of March 12, 1971, the single-party government of the centre-right Justice Party (*Adalet Partisi*) stepped down and a government of technocratic origins was formed. The subsequent period between 1971 and 1974 saw legislative processes uninterrupted but being maintained under the shadow of the military until the formation of a new civilian government in January 1974 after the elections held in October 1973. This period was marked by a series of constitutional amendments with the intention to bolster the executive branch (Gözler, 2000, p. 89-90; Özbudun, 2018, p. 44-46) that had been under the surveillance of relevant checks

foreseen by the 1961 Constitution – because of which Prime Minister Süleyman Demirel had claimed that "The country cannot be governed with this Constitution" (see, generally, Bakır, 2005), referring to the endless checks on the powers of elected governments. The amendments overall represented a backslide from the liberal perspective of the Constitution of 1961 and bolstered the executive.

One of the amendments, dated September 20, 1971 and published two days later, and the subsequent Law no. 1597 dated June 23, 1972, reshuffled the Council and the legal regime to which judges and prosecutors were subjected to radically. Partly as a response to the partisan members appointed by the Parliament, partly due its inability to appoint members from time to time[35] and finally due to logistical impracticabilities of the time in the process of election among judges (Ünal, 1994, p. 76-77), the number of members was reduced from 23 (18+5) to 14 (11+3), who were to be appointed solely by the General Assembly of the Court of Cassation (Berkin, 1971, p. 21; Sever, 2007, p. 67; Soysal, 1979, p. 189; Ünal, 1994, p. 73-82). Thus, lower court judges, who had already had their career progression subjected to grades given by the judges of higher courts and thus had had to be conforming to their legal precedents (Sever, 2007, p. 173-176), were brought under further control of their superiors, as the body who controlled almost every aspect of their careers was now composed solely by supreme court judges. Although it has been seen as a change that fostered the independence of the judiciary by a part of the literature, as it cut almost all ties to the political realm (see, for example, Kuru, 1966; Ünal, 1994; Ünver 1990), it is quite safe to say that this was the first and the biggest step towards hierarchization and a "tutelage of higher courts", as predicted by Turkish Bars

[35] In fact, the Law no. 868, passed on May 12, 1967 and entered into force on May 24, 1967 had tried to solve the problems caused by delays in appointments.

Association back then (Ünal, 1994, p. 78-79) within Turkish judicial corps that hinders internal judicial independence as will be seen below.

To make the matters worse, the amendments provided that the acts of the Council were exempted from judicial review via a restructuring of Article 144/1 of the Constitution. In other words, the decisions taken by the Council were non-justiciable and could not be filed a lawsuit against. Prior to the changes, judges could proceed against the decisions before the Council of the State. Although there are scholars who saw this as a precaution against executive meddling (see, for example, Postacıoğlu, 1975, p. 41-42), this amendment particularly ensured a subservient position for lower grade judges vis-a-vis their superiors. Even though it was annulled by the Constitutional Court in its Judgment no. 1977/4, dated January 27, 1977,[36] on the grounds that it was against the unamendable provision of the Constitution that foresaw that the Republic was one that was governed by the rule of law, it returned in full force with the Constitution of 1982 as shall be seen below (Aldıkaçtı, 1982, p. 346-347; Soysal, 1979, p. 189-190).

Another change brought on by the amendments was the improvement in the position of the Minister within the Council. The Minister was now allowed to vote and could take the chair when deemed necessary. This could be seen as a symbolic move though due to the Minister's extreme minority position, lacking veto power (Soysal 1979, p. 189-190; Ünal, 1994, p. 77-82).

The amendments also provided the creation of a permanent inspection committee appointed by the Council to fulfill regular supervisory duties (Article 144/5), as the previous regime had foreseen an ad hoc type of inspection wherein the

[36] For the full content of the decision, see: http://kararlaryeni.anayasa.gov.tr/Karar/Content/3d520e05-f8ca-41b9-aa99-72fee620c660?excludeGerekce=False&wordsOnly=False

procedure could be activated only upon a complaint, request or a related activity, carried out by judges more experienced than the defendant judge rather than a separate committee, thus preventing the Council from carrying out inspections neither on its own initiative nor on a regular basis (Sever, 2007, p. 187-190). Whereas independence-wise it could be seen as a backward step, surely, efficiency-wise it was a step forward. Moreover, even though an inspection committee of an organ composed solely of higher judges did tighten the grip of the latter on lower ranks, it was surely a more positive solution compared to the disciplinary regime came to being with the Constitution of 1982 as shall be seen below.

Another step that undermined judicial independence was the new prosecutorial regime. The Constitution of 1961, a bit more "unsure" about the guarantees of public prosecutors compared to judges whose guarantees and provision about their related Council had been delineated blow-by-blow (Kuru, 1966, p. 73-79; Şakar, 2017, p. 222-223), left the matter to the legislature and urged it to provide guarantees for public prosecutors (Article 137/1). Despite having their own Council just like judges since 1961, the application on the ground had unfolded in such a way that Minister still retained a remarkable degree of influence on the statuses of prosecutors,[37] especially on their transfers. A prosecutor, Mehmet Feyyat, known for his activist inclinations, brought the matter before the Constitutional Court after he was transferred to a new post against his will (Biçer, 2011, p. 32-33). The

[37] For example, a prosecutor on duty in the second half of the 1960s, after complaining about the lack of guarantees of prosecutors and that their careers were solely dependent on the Minister, claims that thanks to a non-partisan Minister, he was relatively free from external pressures – however, he does not fail to mention that he still did undergo several disciplinary proceedings because of his articles, critical of Turkish justice system, he published on newspapers and, more importantly, that he owed this relative lack of problems to the protection of a Chief Prosecutor (Biçer, 2011; p. 6-8). These patrimonial, nepotistic relations; protection of an 'elder brother', knowing people who know people or whatnot, would prove to be chronic in Turkish justice system.

Constitutional Court, with its Judgment no. 1967/45, dated December 18, 1967,[38] annulled the provisions that gave a quasi-total freedom for Minister to transfer individual prosecutors and provided a domination for the executive in the appointment processes. As a response to the annullation (Mumcuoğlu, 1989, p. 295), the High Council of Public Prosecutors was constitutionalized with the amendments of 1971, instead of being arranged with ordinary laws, in the same logic with the High Council of Judges but with a certain degree of leeway for the executive and headed by the Minister – since it had been included in the latest amendments that public prosecutors were administratively tied to the Ministry (137/1). It was composed by the Minister as the chair, Chief Prosecutor of Republic, two bureaucrats from the Ministry and three original two substitute members from the General Assembly of the Court of Cassation. This Council's decisions were exempted from judicial review as well, but like its counterpart, the Constitutional Court annulled this provision with its Judgment no. 1977/117, dated September 27, 1977.[39] In a similar vein, supervision and inspections of public prosecutors were a duty of inspectors of the Ministry (137/5). Last but not least, in the case of emergencies, the Ministry could assign public prosecutors with a temporary warrant which would subsequently be submitted to the approval of the Council (137/4) – rendering prosecutors precarious to manipulation by the Minister.

This period saw the immovability of judges, included in the set of guarantees of judges (*hakimlik teminatı*) that a judge was entitled to once reached to the seventh degree of third class, eroded (Sever, 2007, p. 105-106). The rationale behind the new regulation was that the geographical guarantee was a response to the executive

[38] For the full content of the decision, see: http://kararlaryeni.anayasa.gov.tr/Karar/Content/7d3c56e4-b5e9-4385-858a-72a92bd78d93?excludeGerekce=False&wordsOnly=False
[39] For the full content of the decision, see: http://kararlaryeni.anayasa.gov.tr/Karar/Content/b1202ec3-8ee0-4e05-8263-2de1e7348869?excludeGerekce=False&wordsOnly=False

influence of pre-1960 and since the influence had been removed, there was no need for the principle of immovability anymore (Şakar, 2017, p. 225-226). Muzaffer Şakar, a judge himself, finds the basis of these changes in the (still) widely-held belief that solely entrusting the powers regarding the careers of individual judges and prosecutors in a body composed of high judges and prosecutors again, excelled in their profession, thus isolating them from the interferences from executive and legislative, would suffice to provide judicial independence, since, judges know the best concerning their own business (see, in a similar vein, for example, Ünal, 1994, p. 90-91) – yet, according to Şakar, since justice and impartiality are not traits inherent in judgeship, establishing such a body does not automatically translate into justice and independence, since, higher judges too, with their decisions regarding careers, can hinder justice and independence (p. 226-227).

All in all, this period was marked by a total isolation of the High Council of Judges from the political realm. Leaving aside the potential questions raised in terms of democratic theory and accountability, it can be argued that, cutting almost all ties, these changes increased the independence of the judiciary from other branches. However, this period fostered the already existing hierarchy within judicial corps as the Council was formed solely by supreme court judges, already in a prominent position with regard to careers of lower court judges with grades on their judgments, thus consolidating their influence even further by now having a total control on lower court judges. There is no doubt that this is potentially problematic in terms of internal independence of individual judges. Moreover, prosecutors were vulnerable also in terms of external influences given their ties with the Ministry. Briefly, even though a less nuanced assessment can view the changes as ones fostering judicial independence, these changes formed the basis of the judicial regime foreseen in the

Constitution of 1982, problematic in terms of both external and internal judicial independence, to which what I turn now.[40]

5.2.3 1981 – 2010: Back to basics

Another military takeover on September 12, 1980 and the resulting Constitution of 1982, renowned for its militaristic spirit and its aim for a strong executive after years the latter had become constrained by relevant checks, signalled a step backwards in terms the scope of liberties and broadened the scope of powers of the executive (Gözübüyük 2017; Özbudun, 2018, p. 49-68). Of a blatantly authoritarian nature and tilting the balance between liberties and authority in favour of the latter, rationale of this new Constitution was not limiting the State but rather protecting it; justified recurrently by the military with references to the tumultuous times the country had been through in preceding decades, resulting in a political turmoil and infighting between opposing civil groups.

As shall be detailed below, this phase saw the strengthening of the hierarchical structure to which Turkish judges and public prosecutors were subjected by a legal regime that resembled an iron fist. Called "National Security Council of the judiciary" by Ertekin to hint at its militaristic essence (Ertekin, 2011, p. 171), this is a logical consequence of the dominance of the junta during the adoption of the new

[40] On a side note, in this era, particularly alarming in terms of executive meddling with the judiciary was the creation of State Security Courts (Devlet Güvenlik Mahkemeleri) with a subsequent constitutional amendment published on March 20, 1973, which signalled yet another chapter in Turkish tradition of extraordinary justice (Ertekin, 2014, p. 39-45; Tanör, 1994, p. 222-232). Possessed the jurisdiction in the matters pertaining to a vaguely-defined "crimes concerning state security", almost half of the members of this court were appointed from among military judges who were subjected to a parallel hierarchical setting as a consequence of their military affinity. Moreover, the executive had almost a total domination in the appointments of judges as it was to nominate members two-times in number of empty slots who would subsequently appointed by each Councils and relevant military authorities (Article 136/1-3). Unsurprisingly highly-politicized courts under the tutelage of the executive (Göktürk, 2006, p. 147), in the long run, these courts had the consequence of "producing a steady stream of political prisoners that included journalists, publishers, human rights advocates, politicians, and other peaceful activists" (Işıksel, 2013, p. 718).

Constitution and related laws (Gözler, 2000, p. 97-98; Özbudun, 2018, p. 49-70), which made subjects such as promotion, seniority, status etc. to be influenced by a military mindset and increased the already-existing bureaucratic structure of judicial apparatus (Şakar, 2017, p. 220). Moreover, though having been amended numerous times after its adoption, the new Constitution provided important channels for executive to exert influence on the third branch.

The first novelty to be introduced is that in this era, judges and public prosecutors were now organized within single corps and subjected mostly to the same regime (Şakar, 2017, p. 215), similar to that of Italy. This was reflected also in the Council, as separate councils of the preceding era were now merged under a single body in 1981, named High Council of Judges and Public Prosecutors (*Hakimler ve Savcılar Yüksek Kurulu*). The hierarchical structure of the Council was maintained as ten out of twelve members were judges from supreme courts: six being nominated from among the judges of Court of Cassation (three of which were substitutes) and four being nominated from among the judges from the Council of the State (two of which were substitutes). Three members for each slot nominated by those courts were subsequently appointed by the President. The other two members were the Minister, who presided the Council and the undersecretary – both being ex officio members this time (Article 159). Given its broad competences and it was composed of judges of higher ranks mostly, it can be said that the Council was a strong and hierarchical council, to follow the classification of Garoupa and Ginsburg (Garoupa & Ginsburg, 2009a, p. 122). This restricted composition ensured that the high judiciary remained relatively uniform in terms of ideology, as the Council also controlled promotions to supreme courts (Bâli, 2012; 300-301).

The position of the executive was far more pronounced in contrast to its minority position. As pointed out by Ömer Faruk Eminağaoğlu, one of the rare media faces of Turkish experience of judicial associationism, "Two is greater than five in HSYK" (Eminağaoğlu, 2007, p. 37). Indeed, despite its minority in numbers, the dominant position of the executive in the Council was manifested in six points. The first was that the members from high courts were appointed by the President of the Republic, as mentioned above. The second was that the chair of the Council, that is the Minister, had the initiative to convocate a meeting and set the agenda. The third was that, the undersecretary (whose membership is something unseen with regard to comparative constitutional law [Çelik, 2010, p. 184]) had the possibility to block the operation of the body simply by abstaining to join the meetings if there was no designated deputy (the Council elects a deputy chair to act as a substitute for the Minister and every member has a substitute except the undersecretary) (Çelik, 2010, p. 187-188).[41] The undersecretary is directly tied to the Minister hierarchically and it is not surprising that in practice, undersecretaries have always acted in conformity with the will of the Minister (p. 187-188), thus relegating the Council to a body whose operation could be activated only when the executive wants to do so.[42] Fourth, adding that the Council did not a have neither a separate budget and nor a secretariat and had its paperwork carried out by the Ministry, thus, logistically, was dependent on the Ministry, what we have as an output is a subordinated, second-rate body.

[41] This not an outlandish scenario as in 2007, the undersecretary Fahri Kasırga was even filed a criminal complaint against by the members from the judiciary because he simply delayed the working of the Council. The appointment to supreme courts were a hot topic back then in a period that was marked by constant clashes between the representatives of the executive and members from the judiciary within the Council, even more so than preceding times (Çelik, 2010, p. 156-161).

[42] On the other hand, the executive is responsible of smooth operation of justice to the legislative, thus a Council blocked for months is also undesirable. It has been used more as a bargain chip especially during the meetings concerning critical appointments.

Fifth, initiation of disciplinary as well as criminal proceedings was subjected to the prior permission of the Minister according to the Article 82 of the Law no. 2802. Finally and relatedly, the Council did not have a separate inspection committee (as it did not have its own personnel) and supervision and inspection of judges and public prosecutors were within the competence of the Ministry and carried out by an affiliated Board of Inspectors (*Teftiş Kurulu*) – even though the last word was the Council's as it was within the competence of the Council to impose disciplinary sanctions (Çalı & Durmuş, 2018, p. 1678). Still, in practice, the reports provided by inspectors weighed significantly as a Council composed of seven members had to rely on reports given the burden of the caseload, sometimes in thousands, and logistical impracticalities (İnceoğlu, 2008, p. 329-343). I must stress here that this shall not be taken lightly given the political status of the Minister. Indeed, a similar case could be made for the recruitment of judges and prosecutors, since, as a result of the lack of personnel, the Council did not have the resources to organize the exams through which judges and prosecutors were to be recruited. As a result, and thanks to the Article 9 of the Law no. 2802, the recruitment progress was largely left in the hands of the executive. Surely, the Council had the last word on recruitment as well via "acceptance to the profession", as a separate act that was in the hands of the body, therefore it could reject the entry into the profession of a candidate. Still, with the dossiers of candidates prepared by the Ministry personnel (Eminağaoğlu, 2007, p. 37),[43] who could always 'play around' and remove the aspects of a dossier that could be deemed unfavourable by the judges and prosecutors that held a majority in the Council and with the exams (part of which is interviews, which, to say the least, have been less than controversial in Turkey in terms of impartiality) carried out by

[43] Which does not escape from rightful accusations of politically-motivated staffings.

committee dominated by the Ministry, it is not a surprise that Ministry had the upper hand in recruitment too.[44] [45] It is highly unlikely that a Council composed of seven members could extensively scan a list consisting of few hundred people in a limited amount of time anyway.

Considering the initiative power and agenda-setting prerogative of the Minister and the logistical dependence of the Council, coupled with the dominance of the former on recruitment and disciplinary processes, it is not far-fetched to claim that the 1982 Constitution rendered Council quasi-subordinated to the Ministry.

Marking a continuation of the amendments of 1971-74, repealed by the Constitutional Court towards the end of the decade as seen above, the Constitution of 1982 also exempted the decisions of the Council from judicial review thus leaving individual judges and prosecutors in an incredibly precarious position vis-a-vis their superiors who now possessed total dominance over the course of their careers, maintaining an oligarchical structure of authority. Decisions could be appealed against before the Council for another go, this time with the participation of substitute members, but this new composition cannot be considered too distinct from the first instance authority that decided on the case and therefore as an impartial authority – as a natural result of an odd confluence of positions of a first instance court and an appellate court (İnceoğlu, 2018, p. 338). This, highly resembling a military setting in which orders of the seniors are unquestionable, is probably the most critical aspect of the regime that governed the careers of judicial corps that subjected the judges and prosecutors, as fragile as they were before their superiors.

[44] This also explains the infiltration of Gülenists.
[45] This is also demonstrated in the fact that when YARSAV, the first judicial association of country, was formed in 2006, not a single candidate became a member to the association as it took an openly critical stance against the ruling party who controlled the executive (Eminağaoğlu, 2007, p.36).

This regime lasted until 2010. However, the resulting hierarchical career system that Turkish judges have been subjected to needs to be accounted for more thoroughly. Although the new Council has been criticized fervently in politico-legal circles, as Ünal shows (1994, p. 85-86), objections were largely clustered around the powers of the Minister from a separation of powers perspective, thus, mostly overlooking the internal aspect of judicial independence. What is more, the Law on Judges and Prosecutors, numbered 2802 and drafted by the junta is *still* in force today, still regulating the careers of judges and prosecutors along with other related regulations, despite changes after 2010 on the composition of the Council and a new law on Council entered into force in 2010. Though the Law no. 2802 has been subjected to many changes in the meantime it is safe to say that its hierarchical core has remained largely unchallenged.

5.3 Institutional mechanisms of hierarchy or how to erode internal judicial independence from within

It is quite plausible to argue that Turkish judges and prosecutors have been under a strict regime of hierarchy, governed mostly by two different institutions: the Council and the high courts to a lesser extent. But firstly, their career, which in stark constrasted to their Italian counterparts, structured as a ladder, typical of a bureaucratic body, will be briefly described.

5.3.1 A career structured as a ladder

The Law no. 2802, the Law on Judges and Prosecutors and related regulations of the Council regulate the careers of judges and prosecutors in a rigidly careerist manner. There are four classes (*sınıf*) and eight ranks (*derece*) within a judicial career. As one

can guess, higher rank means bigger paycheck and more prestigious posts to work and better places to live in as certain positions and cities are "available" only to judges and prosecutors of upper classes.

In a great contrast to the Italian case, promotions of judges and prosecutors from one rank to another are decided based on a litany of requirements: 1- assessment reports written after the inspections carried out by visiting inspectors and resulting grades (once in every two years), 2- grades that they get from their judgments appealed to supreme courts that need to meet a minimum (the higher court simply grades the aptitude of the decision, among other elements relating to the course of the concrete case, but it can also abstain from doing so), 3- ratio of the number of cases "finished" to the number of cases dealt with and their quality, 4- having passed required time at current rank, 5- absence of any disciplinary sanctions or any final court orders and 6- their "moral standing" and likewise abstract norms, 7- miscellaneous norms.[46] Moreover, there are three different sorts of promotions, depending on the success of a person. Through a combination of promotions based on seniority and merit, judges and prosecutors promote once in every two years until they are 'reserved' to the first class, in which they must work for three years to be promoted to the first class.

As one can guess, "moral standing", as abstract as it is, provides a huge leeway to the Council to decide on the career course. As a judge puts it, "Despite having fulfilled all objective requirements, moral standing can end your career" (Şakar, 2017, p. 219). As will be touched upon below, it is not a secret that even personal lives of individuals have been a matter of inspection for a long time from their hobbies to the clothes of their spouses (p. 259-260) sometimes even through

[46] Like their works related to alternative legal remedies, their participation in vocational training, their *obiter dicta* etc. For the full list see the Article 21 of the Law no. 2802.

'intelligence' the inspector gathers from people outside the courthouse, especially in small towns.

As for the first two, the first thing that attracts attention is that judges and prosecutors are 'graded' both by the higher courts and visiting inspectors. Both archived and 'haunt' judges and prosecutors throughout their careers, the former forces an obvious conformism to the decisions made by higher courts, the latter has the potential to put them under constant surveillance with its periodic nature. Moreover, the assessment reports had been 'secret' until 2010 which had been subjected to lawsuits against the Ministry – the authority that carried inspections back then. Although the Council has the last words on promotions, what is quite unquestionable is that both 'grades' reinforces hierarchy as they subject judges and prosecutors to the control of their higher-ranked peers or the institutions (the Council or the Ministry[47]) that their careers are dependent to. In practice, the quantity/ratio of the cases "finished", which are published by the Council in terms of exact numbers and percentages, and grades from assessments and higher courts weigh most, though other requirements come into play too when necessary. As some of the interviewees suggested, the Council can block the promotion path of a judge or a prosecutor it deems problematic via various means; low grades and disciplinary proceedings being the most utilized ones.

5.3.2 The dominance of supreme courts

Until 2016, when regional appellate courts started to operate, Turkish judicial system had had a two-tiered regime consisting of tribunals as first instance courts and the

[47] The Board of Inspectors used to work under the Ministry until 2010, as seen above. It is an affiliate of the Council now.

Court of Cassation and the Council of the State (for cases of administrative nature) operating as supreme courts.

Turkish higher courts are probably among the busiest of the world. In 2015, the Court of Cassation had approximately 2.4 million cases before it, with more than 1.1 million cases carrying over the next year.[48] Considering the fact that there were about 6 million civil and criminal cases in first instance courts in the same year,[49] we can roughly state that almost 40 percent of all cases are submitted to the Court of Cassation. Given that some cases are withdrawn and some are unappealable, this estimation is a bare minimum.

The Council of the State is even more congested as the numbers were 639.988 before administrative courts and 378.132 before the Council of the State, thus the ratio surpassing 50 percent. As a natural result of these, 286 public prosecutors and 2.200 judges worked in supreme courts in 2015,[50] of course, including reporting judges who are not members of supreme courts by definition but form the majority given the enormous caseload. Number of original members of those courts amounted to 516 and 195 respectively which were cut down in 2016 to 310 and 116 to purge Gülenist members that had been appointed before when they were allied with the government ("AKP ve MHP'nin", 2018), then raised by 100 and 12 members respectively ("HSK'den Yargıtay'a", 2018b). Regardless of political ploys, numbers are astounding, given that the country had about 15.000 judges and prosecutors the same yar. For a comparison, in France, the Court of Cassation had about 150 members in 2006 (Vigneau, 2006). In Germany the number is 128.[51]

[48] See: https://www.yargitay.gov.tr/documents/istatistikler/2015.pdf
[49] See: http://www.adlisicil.adalet.gov.tr/pdf/Bulten_2015.pdf
[50] See: http://www.adlisicil.adalet.gov.tr/istatistik_2015/PERSONEL%20SAYILARI/3.pdf
[51] See: https://www.bundesgerichtshof.de/SharedDocs/Downloads/EN/BGH/brochure.pdf?__blob=publicationFile&v=1

This should not come off as a surprise given the controlling nature of Turkish supreme courts. Not limiting themselves to the reasons of appeal and examining merits of cases in an incredibly detailed manner, Turkish supreme courts have been acting almost as first instance courts, intervening and repealing the decisions even in the matters wherein the first instance court has a certain margin of interpretation as a natural result of the command of the first instance court of the parties, the circumstances, the background of the case and the like. Almost as a bureaucratic body where the information is created and dispersed by the central unit in a top-down fashion, as a judge puts it, this dominance of supreme courts of Turkey have turned the first instance courts into units that are responsible for preliminary examination of the case after which the supreme court, as the main authority, decides on the case (Şakar, 2017, p. 237-240).

As one can predict now, the chief means for this legal conformism in which first instance judges and prosecutors are compelled to is the grading done by higher court judges and prosecutors on the judgments of first instance courts. These grades have the potential to affect the career course of an individual judge and prosecutor – in their promotions, in their transfers, in their appointments to certain positions – thus binding judges and prosecutors to 'get along well' with their seniors both in jurisprudence and also in real life. Indeed, to promote, judges have to maintain their grades at certain levels and since there are three different types of promotions, ranked in terms of merit, more harmony may lead to better promotions (as stated above, there are other factors too). Although in practice neither every repeal equals to a negative grade, nor every approval equals to a positive one, it is clear that lower grades have a detrimental effect on the career of an individual.

The consequences of this system can be seen in numbers. Having most of the higher judiciary against it, and a portion of newly-recruited (presumably mostly Gülenist-tied) judges and prosecutors on its side, the AKP government put an end to the grading system with the Law no. 6217, passed on March 31, 2011 and published on April 14, 2011. As a judge takes notice, this was an attempt to loosen the hierarchical control of higher courts on specially authorized courts, in which Gülenist judges and prosecutors were mostly organized and under whose jurisdiction the most politically-salient cases of the time were placed, including the lawsuits of some high-ranked officials of the secularist army – the traditional enemy of the AKP. To be sure, the grading system returned in 2016 when the government finally got the supreme courts in its pocket (Köse, 2018, p. 113). Nevertheless, to give an example of how binding and salient the grading system was, this period between 2011 and 2016 saw a *boom* in the instances in which the lower courts insisted on their original decisions that had been repealed by the Court of Cassation – an increase ranging from two-fold to four-fold (p. 114).

The importance of good grades is not something new. A prosecutor says that "I had never thought grades were this important before I started this career" and claims that he never prioritized it although he could not ignore it altogether either, because of its important consequences such as better paycheck and higher prestige (Kayasu, 2007, p.90). A judge similarly claims that, worrying of their grades, first-instance judges cast aside their views on the case at hand and choose to conform to the precedents of high courts (Şahin, 2016, p. 23). Jurisprudentially speaking, it is not a thunderbolt that this system leads to a "precedent fetishism", in the words of Sami Selçuk, a renowned Turkish jurist (Selçuk, 2007, p. 13). A state of conformism marks Turkish judiciary now, in which, from time to time, a judge can even tend to

seek for legal precedents that are suitable for the case at hand to be on the safe side, rather than just applying the law to the case (Şakar, 2017, p. 263). Although I have personally interviewed with several judges who claim that they do not care about grading that much, probably because they are first class anyway, a prosecutor I interviewed with, who has been in the profession for 24 years asserted that,

> "Judges are affected more profoundly. In X [a city], I used to work with a judge. He could not advance to the first class, had nothing to lose, so we would insist on our judgment [that had been repealed by the Court of Cassation]. But generally concern over grades is really intense for judges, they would say 'this [judgment] can return [from the Cassation], do not appeal against it'[52] . . . Concern over grades prevails over justice. I have not seen much people who prioritize justice." (Interviewee 9, personal communication, April 18, 2019) (see Appendix A, 14)

A judge who has 25 years of experience asserted that grading done by higher courts is not quite objective:

> Grading is not done with objective criteria. There are criteria but they cannot implement them in practice. Grading also discourages judges. The reason they brought back the grading system is that insistence had increased a lot. If a judge believed in her judgment, she insisted. (Interviewee 5, personal communication, March 27, 2019) (see Appendix A, 15)

When asked about whether he thinks Turkish judges are independent, a judge of 21 years, after laughingly telling "No", directly brought up grading system: "I do not think so. If a promotion or a transfer of a judge is affected by her decision, that judge is not independent. I am against grading of judgments. This is against [judicial] independence" (Interviewee 4, personal communication, March 26, 2019) (see Appendix A, 16). Another judge asserted that although one is generally forced to

[52] There is an interesting tension between judges and prosecutors about grades. If a judge appeals against a judgment of a judge she is working with and if the higher court repeals the judgment, there is a good chance that the judge gets a negative grade whereas the prosecutor gets a positive one or viceversa if higher court upholds the judgment (not in all cases as a result of margin of discretion of higher courts – higher courts can simply restrain from grading or can even give a positive grade to a judge whose decision it has repealed) (for an example, see: Biçer, 2011, p. 79-81). Sometimes this concern translates into turning into a blind eye on the part of the prosecutors (especially when the needed quota of positive grades for promotion has been reached by the prosecutor) or judges requesting from prosecutors to not to appeal against the judgment.

comply with the decision of higher court rather than insisting on own original judgment, the Court of Cassation should not be taken lightly as most of its reversals are quite persuasive (Interviewee 3, personal communication, March 7, 2019).

The fact that membership of Council, which has complete authority over careers of individuals, had been reserved exclusively for supreme courts for decades, seems to have provided incentives for seeking 'friends' in the high judiciary, resulting in nepotism – though it can also be asserted that the causality operates otherwise too. It is not an occasional scene to see first-instance judges pursuing their seniors in the halls of supreme courts in attempts to reverse their low grades or, given the dominance of higher judges and prosecutors in the Council that has lasted for about four decades, compete for certain positions, look for favourable posts, or whatnot, sometimes with 'gifts' in their hands; there have been even instances in which lower judges have acted as intermediaries for the sales of books published by their seniors upon their requests – sad views, really, against which the Ministry had to publish circulars to discourage judges and prosecutors from such acts (Şakar, 2017, p. 265). Having identified the chief threat to judicial independence as the composition of an unaccountable Council solely of higher judges and prosecutors, a judge posits that first-instance judges and prosecutors are filled with a great degree of obedience, admiration and dependence towards judges and prosecutors of supreme courts, with, of course, careerist concern in their minds (Şahin, 2006). When asked about the practices of career advancement over the years under different time spans, most judges and prosecutors I interviewed with told that before 2010, "references" from higher courts weighed considerably, when needed. There was a sound consensus that references mattered, though of different nature, depending on the timeframe. When asked about whether references matter in the course of a career a

judge asserted: “[They matter] A lot, I do not even know where to start. But I can say that personal acquaintances used to be important. Now connections of political an religious nature are important” (Interviewee 6, personal communication, March 28, 2019) (see Appendix A, 17). Another judge was quite adamant when summarizing the changing nature of references: “Before 2010 it was Kemalist-bureaucratic. 2010-14, exclusively Gülenists. 2014-17, another type of coalition, you know, like pre-2010. After 2017, exclusively the Palace [referring to Presidential Palace of Turkey]. Bring a reference from AKP and MHP, you are directly in contact [with higher echelons]” (Interviewee 1, personal communication, February 3, 2019) (see Appendix A, 18). Another interviewee, a judge of 30 years, claimed that this type of favouritism was immanent in Turkish judiciary:

> Of course there are references . . . This tendency to develop relations, in order to promote, is longstanding. [For example] there were mediocre judges with rapidly rising careers with references. It caught my attention, I got in contact with a Council member. He called me back again in a few hours, he told me that my request would be taken into consideration. However good you are [at your work], if your demands remain on paper, people will get ahead of you. It has always been like this . . . I had to catch their attention. But now it is completely political. (Interviewee 3, personal communication, March 7, 2019) (see Appendix A, 19).

All in all, it seems that the grading done by higher courts with its potential impact on careers is quite binding in practice and affects the decision-making process of an individual in one way or other. It is quite probable that the grading system can have an effect of promoting certain precedents and making, in some cases, certain worldviews or even ideologies prevail within the judiciary. Degenerating a means of legal uniformity into a means of legal control, it is not hard to predict that with the grading system, owners of certain 'legal interpretations', if we are being naive, can be left as outsiders and find themselves at disadvantage to further their careers. Needless to say, judges and prosecutors from supreme courts have a great margin of discretion

when grading. This also results in seeking connections with higher echelons to be on the safe side though this kind of reflex used to be more prominent before 2010. Now the channels seem to have changed nature.

As delineated above, in a self-perpetuating system where the Council appoints the members to the high courts and the high courts appoint members to the Council in return, the dominance of judges and prosecutors from supreme courts undoubtedly double, given that the Council is omnipotent. Therefore, there is another, and far more pronounced link of hierarchy to be traced between an individual judge and prosecutor and the Council. This is what I turn to now.

5.3.3 O Council, almighty

The Council, set up in 1962, has been dominated by supreme court judges and prosecutors from 1972 to the constitutional amendments made in 2010. There is no doubt that this reinforces the already-existing hierarchical ties between lower and higher court judges and prosecutors. However, regardless of the composition of the Council, the body possesses some extraordinary competences over the careers of judges and public prosecutors. The fact that the Council has broad competences, i.e. being a "strong" one, is not the source of this extraordinariness – how these competences unravel in practice is.

First and foremost, apart from the short period between 1962 and 1972, the acts of the Council were exempted from judicial review. Administrative in their nature, the exemption of the acts of the Council from judicial review, not only blocks the way of concrete judicial review of the laws that govern judicial conduct,[53] it also undoubtedly puts the image of rule of law in jeopardy. The 2010 amendments made

[53] Hypothetically, a judge seeing the case can always refer the provision in question to the Constitutional Court with the question of unconstitutionality.

an exception for decisions of dismissal but did not go further. The vagueness of related regulations (see, generally, İnceoğlu, 2008; Şakar, 2017, p. 254-256) that has chartered the Council an extremely broad margin of discretion, as one can guess, does undermine the position of individual judges and prosecutors vis-a-vis the body.

Moreover, until 2010, all deliberations and acts of the Council were carried out under secrecy. To make matters worse, this was interpreted in such a broad manner that acts of the Council did not even possess legal reasoning (İnceoğlu, 2008, p. 343; Yet, 2007, p. 21). As a result, until 2010, disciplinary decisions were not even publicized (Şakar, 2017, p. 251). Given the vagueness of related regulations,[54] the first consequence is that it prevented legal precedents, i.e. a coherent set of disciplinary standards, to accumulate, thus, providing a huge amount of discretionary power to the Council that allowed the body to decide similar cases with drastic divergences (İnceoğlu, 2008, p. 343). In a similar vein, even the performance assessment reports prepared by the inspectors of the Ministry of Justice were confidential and thus, in a bizarre fashion, a judge could not see a report prepared in her name, until Union of Judges and Prosecutors (*Yargıçlar ve Savcılar Birliği*; "YARSAV", hereafter), the first judicial association of the country, filed a lawsuit against the practice in 2007. Moreover, disciplinary proceedings were not (and are still not) carried out in a way that resembles adversarial proceedings. Granted, the judges and prosecutors formally defend themselves but this does not make the procedure a proper penal suit, like the case of Italy in which defendants have numerous guarantees in their defense and can defend themselves with a lawyer – in Turkey, this is limited to dismissals. The Council relies heavily on the reports of

[54] For example, "Losing dignity and respectability of own or the honour and leverage of the profession by one's own fault" (Article 68/2-a of the Law no. 2802) requires transfer of a judge/prosecutor whereas "Harming the dignity and honour of the profession and the leverage and prestige of civil service" (Article 69/5) requires dismissal. How to distinguish between the two?

inspectors, who gather evidence freely and witness statements included in their reports, though witness testimonies are not heard before the Council. Simply put, the proceedings before the Council do not give equal weight to the claims of the prosecution and the defendant (İnceoğlu, 2008, p. 335-343). Rightfully, a judge I interviewed with, who had been through two disciplinary proceedings, called the right to defense "utterly meaningless" (Interviewee 10, personal communication, April, 19, 2019).

Although the new legal regime provided modest improvements especially in terms of transparency in the realm of disciplinary proceedings (Baş, 2016), procedural deficiencies still can take different forms, mostly stemming from lack of concretization of procedures and vague regulations (p. 354). They could still be carried out sometimes neither with the notification of the exact offense the individual has been accused of, nor with legal reasoning, like when a prosecutor was accused of two different offenses in a short span of time was forced to defend himself in response to the wrong accusation (İnceoğlu, 2008, p. 311, 319, 341-342; Kayasu, 2007). A judge that I interviewed with claimed that recently he was formally requested to defend himself because he was seen during the press statement of a judicial association. He does not know the exact offense he is charged with. As one can guess, the association is a kind that is not deemed politically favourable by the will that is currently dominant in the Council. His assertion is quite straightforward:

> Now I am going through one [disciplinary proceeding]. I do not think the proceeding will result in accordance with the conscience of the investigator. This is an intimidation. Or the preparation for a future exile . . . I presented my defense statement. The accusation is not even clear anyway. It is a sort of "What were you doing there?" kind of thing. What constitutes an offense is anybody's guess. (Interviewee 8, personal communication, April 10, 2019) (see Appendix A, 20)

He even goes for a distinction when asked whether he thinks he would be likely to go through a fair trial when subjected to disciplinary proceedings:

> I do not. But may be we can distinguish in terms of the nature of the case. If it is of political nature, [it is] completely insecure. But in non-political cases, a fair trial may be possible. But if a lot of money or harsh penalties are at stake, or complaints from lawyers with governmental connections, that judge can go too. Influential people may have to intervene but they have to be of high significance. (Intervieree 8, personal communication, April 10, 2019) (see Appendix A, 21)

Another judge, who has five different disciplinary proceedings under his belt, also complained about the vagueness surrounding the proceedings:

> They still do not notify us about the norm we have violated. The accusation behind an investigation remains unknown . . . They did not even use to let us see investigation reports [but in this one case] we insisted, we resisted and did not give our statements. It is an indictment [after all]. There is no routine in this. (Interviewee 6, personal communication, March 28, 2019) (see Appendix A, 22)

Finally, although he thinks "the process of collecting evidence and defense statement is fair", a judge thinks that in its entirety, the process is not a subjective one:

> I can not say that they are subject to truly objective rules. It is not like an adjudicative process. Not very fair. Ahmet says that, Mehmet says that… She collects these kinds of statements. During the proceedings those [witness testimonies] are filtered, there is cherry-picking there. If they want to cross you off, they do. All disciplinary proceedings are like this . . . Even to carry out disciplinary proceedings against a basic civil servant at district governorship one needs a prior permission. (Interviewee 5, personal communication, March 27, 2019) (see Appendix A, 23)

Discretionary acts carried out in secrecy that are exempted from judicial review is not the ideal recipe for judicial independence. This lack of guarantees compels judges and prosecutors to conform to the will that is dominant within the Council, making the judiciary easier to be 'captured' as a whole by an external influence that is willing and able. Indeed, as one judge puts it "Judges, in the hierarchy of powers, puts the will that is reflected on the Council in the first place. All other centres of power, including the Prime Minister and the President, are secondary" (Özsu, 2014a,

p. 214).[55] Unsurprisingly, this defenseless position of the individual against the Council results in a hierarchical relationship between them, subordinating the former to the latter.

Add to these the local surveillance network of the Council, consisting of chief prosecutors (*başsavcı*) and members of justice commissions (*adalet komisyonları*) in courthouses (one of the three members is the chief prosecutor), who act as heads of courts and carry out administrative duties, appointed in a fully discretionary manner by the Council and sometimes act as "intelligence units" as a judge I interviewed with claims them to be; the hierarchical iron cage in which judges and prosecutors operate becomes a bit clearer. Indeed, people at those positions are generally 'people who know certain people', given the immanent clientelism in Turkish judiciary. A prosecutor I interviewed with, who was openly and proudly aligned with the governing party, was quite adamant that apart from few exceptions it could be said that all chief prosecutors were people who maintained personal relations with the Council and/or have strong references from the judicial/political elite. This was a prevalent opinion among the judges and prosecutors. Nevertheless, acting as the representative of the will that is in charge of the Council, people at those positions can possibly make the working hours of a judge and prosecutor they are at odds with especially difficult: "[A chief prosecutor] can do mobbing if she wants to, turning your life into hell. But since this is a large courthouse I rarely see her. In small towns, there is a lot more contact." (Interviewee 9, personal communication, April 18, 2019) (see Appendix A, 24). Especially in smaller courthouses, relations with the

[55] Today such assertion might seem meaningless since the wills that the President and the Council represent largely overlap as shall be seen in the next chapter. In a power setting where the government is at odds with de facto power-holders who exert influence on Council is a better setting to trace this relation. An example is the briefings given by the military during the February 28 memorandum, when an Islamist governing party jarred with the military who was the de facto powerholder and thus had a considerable influence over the judiciary.

people at those positions become vital. Given their vast array of powers (especially those that the chief prosecutor has over other prosecutors) (Doğan, 2013), from assignment of cases to almost all logistical needs,[56] it is quite easy to find it plausible when a judge asserts that "a judge-prosecutor is in the middle of hell if out of tune with the Chief prosecutor" (Özsu, 2014c, p. 119). Sometimes even acting as informants, people at those positions can draw attention of the Council to certain issues, such as a problematic judge, via their direct links – or the other way around, as the Council can ask their opinion on certain matters, considering that it does not have a full command of periphery. A judge asserted that:

> HSK is directly in contact with chief prosecutors. Which judge to be appointed, disciplinary proceedings etc. He is the man of the president. It is organized that way . . . If you have problems with him, you are walking on eggshells. Since he is in directly contact with the HSK, he can send you away [to different cities etc.] because you are 'incompatible'.[57] He has to be the 'bannerbearer' of the authority. (Interviewee 6, personal communication, March 28, 2019) (see Appendix A, 25)

The channels of information do not seem to be limited to formal ones though:

> To not be marginalized in the courthouse and do your job peacefully, you have to bear some things. The commission and the chief prosecutors are the formal channels of the HSK. You can not go against the commission. You can not go against the chief prosecutor. But there are informal channels too . . . 'Agents' etc. [They] denounce you. It is a jamaah culture [*cemaat kültürü*] we are speaking of here. (Interviewee 1, personal communication, February 3, 2019) (see Appendix A, 26)

Another judge explained the authority of chief prosecutors and justice commissions in a pretty candid manner:

> They decide on everything. What do they decide on? Chief prosecutor and the chair of the commission are appointed by the HSK. Law clerks are really important. A good clerk is everything for a judge. Commission appoints them. Or, say, which room you are going to occupy. Chief prosecutor is the spending authority. They can task you with drudgery work, temporary work... They have the authority over leave of absence. They can complain

[56] This was surprisingly a common matter of complaint among the judges and prosecutors I interviewed with.

[57] Even though HSK does not have to resort to disciplinary sanctions to transfer judges from one post to another, "being incompatible with co-workers" is one of the reasons for the second harshest disciplinary sanction: transfer of office. See: Article 69/2-d of Law no. 2802.

> against you to the HSK. They organize everything . . . Chief prosecutor is the chief of the prosecutors anyway, there is no legal remedy against her actions. What if there was one anyway? If you are strong, she will stay out of your way. If not, you can see every kind of dirty tricks until the case is over [had there been any kind of legal remedy against her actions] (Interviewee 2, personal communication, Februrary 5, 2019) (see Appendix A, 27)

It is not completely black or white though. Even though chief prosecutors *can* harass individual judges or justice commissions *can* make unpleasant decisions, conflicts do not arise often. Most of the judges and prosecutors I have interviewed with retained normal relations with chief prosecutors or with deputy chief prosecutorts in larger courthouses – but it was not clear whether this kind of relations were really heartfelt. But when conflicts arise, it does not have to be of political nature; a judge who calls himself "more in tune with this era in terms of lifestyle" talked about more logistical needs, such as uncomfortable chair and tables but law clerks were his particular concern: "I have been here for 2.5 years and I have had like 10 different clerks. They take away your clerk and appoint a new one, you do not have a say even in that. They do not even ask you" (Interviewee 4, personal communication, March 26, 2019) (see Appendix A, 28).

Surveillance is not limited to local units or informants though. Once in every two years, judges and prosecutors go through regular inspections,[58] in addition to the ad hoc inspections when an issue arises. Inspections are important and although ideally they ensure certain standards of quality in the administration of justice, they can be used as means of harassment too. Atılgan and Sancar even assert that professional guarantees of judges and prosecutors are largely dependent upon the supervision system, base of which is constituted by regular inspections (Atılgan & Sancar, 2009, p. 83). Even though inspections are usually limited to files and

[58] However, because of the recent purges, the regularity of inspections seems to have suffered as there are posts which have not seen an inspection for 5 years.

procedural aptitude and the substance of judgments is not assessed, they sometimes can include "intelligence" gathered by inspectors from people outside the courthouse, which can involve the private life of the inspected judge, if she is deemed questionable. A judge indicated that:

> Number of cases is the primary matter during the inspection . . . Procedural aspect of the job, caseload, how the trials are conducted etc. However if there is somebody to 'sort out', the inspector sorts out. Does every kind of investigation. Inspector can ask things about a judge to the greengrocer, to the tea-maker… In former assessment reports there was [a part that read] "health, outlook, her impression" etc. (Interviewee 2, personal communication, Februrary 5, 2019) (see Appendix A, 29)

Another judge claimed that this type of "intelligence" has become less prevalent in recent years, at least in bigger towns, however, inspections are still open to manipulation:

> Inspectors take the files and examine them procedurally. Order of the file, order of the court registry... The amount of whistleblowing has decreased in recent years, the ones before us had it way worse. In regular inspections they do not ask the shopkeepers [*esnaf*] around. But if there are complaints, they hear them. They still check out the way we dress. But you do not get much talking time with the inspector, it is largely limited to the files and it is procedures that we are chiefly assessed by. But this is like this in larger courthouses. In small towns, they see everything. One more thing, in our time the judiciary was recurrently captured, therefore, they fill assessment reports in ways to polish their peers; they hand out 90-95 [out of 100] to people whom they have not even met. So, when there is a vacancy for, say, the office of chief prosecutor, those people shine out. (Interviewee 5, personal communication, March 27, 2019) (see Appendix A, 30)

Another judge (Interviewee 4), pointed out that although an inspector and a judge spend a very limited amount of time together, there are parts to fill in the report that are pertinent to the personal qualities of a judge; therefore he believed that inspections are not carried out according to objective criteria. Indeed, a fixed assessment report contains various personal aspects, ranging from whether she has "attention-grabbing qualities that affect her duty in negative ways, in both her social

and private life" or "the impression she leaves on others".[59] Personal qualities are indeed included in assessment reports which can bring the private life under spotlight. In line with this, Interviewee 6, who has had a low grade because he was seen in an inappropriate place (a bar, to be precise) claimed that "Your personal qualities are graded too now. There is no chance of [judicial] review. Worldviews absolutely matter during inspections" (see Appendix A, 31). This has resonation in the words of another judge who is a religious person, pointing out the changing prominent lifestyle patterns in encounters with inspectors:

> Worldviews/lifestyles (*mezhep*) change depending on the period of course. Reflected lifestyles of people change. In the past, people would take inspectors to dinners with alcoholic drinks. Not anymore. Now people are at races to the Friday prayers. Judges and prosecutors wanted to show off some of their aspects then, now they show their different aspects. But there are men for all seasons [*her devrin adamı*] too. They are prominent at all times. I personally did not encounter any problems neither back then, nor more recently. (Interviewee 4, personal communication, March 26, 2019) (see Appendix A, 32)

Hinting at exactly the same thing, another judge affirmed that "During inspections, appearances and life practices alter depending on the authority of the day. Before AKP there used to be rakı on dinner tables, even if they do not drink it. Now it is ayran" (Interviewee 1, personal communication, February 3, 2019) (see Appendix A, 33).

In this sense, during the fieldwork, I encountered quite absurd stories regarding the burden of being a judge or prosecutor in Turkey. Disciplinary proceeding initiated for riding a bike, seniors advising on not to pick watermelons "like normal citizens do",[60] or not to carry plastic bags with them, a male judge encountering "problems" just because his spouse wearing hijab or another one

[59] See an example assessment report: https://www.hsk.gov.tr/Eklentiler/Dosyalar/9fef0aa5-53dd-4de9-bce3-da59c96fd015.pdf

[60] One picks a ripe watermelon by slapping it, since a ripe watermelon gives a distinct sound when slapped – not a decent view apparently; a judge slapping a watermelon.

getting an unfavourable inspection report because he was seen drinking alcohol... Examples are abound (see, also, Sancar & Atılgan, 2009, 84-92). Thanks to the vague wording of related regulation and absence of objective criteria in most aspects, deviations can result not only in direct disciplinary sanctions but also negative assessment reports by inspectors which can hamper career progression too. Relatedly, it is not a coincidence that multiple judges and prosecutors talked about the existence of "gunmen" (*tetikçi*) within the judiciary, i.e. inspectors sent on purpose to oust certain judges and prosecutors, especially during the period in which Gülenists prevailed. An unfavourable report is really hard to reverse as it creates prejudice for the next inspector.

Predictably, this constant surveillance, or the possibility of surveillance has its resonations in the personal lives of judges and prosecutors. This cage of hierarchy, this surveillance mechanisms push judges and prosecutors to keep a low profile, to conform their behaviours to accepted standards, not in just their careers but in all aspects of their lives, even without any seemingly evident sanctions. Along this line, judges and prosecutors have been traditionally advised to not to blend with the local people from the very first years of their careers and to be "asocial" as a former President of the Court of Cassation puts it ("Amerika'dan hakim", 2006). Especially in small towns during the beginning of their careers, but not limited to it, judges and prosecutors live solitary lives and do not prefer to engage in public life. As one judge I interviewed asserts, if one does not stand out in general, if one does not cut a swath and fulfill her duties, she can have a relatively smooth career course, especially if she does not possess high hopes for positions reserved for people with references (Interviewee 5). Another, relatively young judge indicated that she had to be "very careful" in small towns "since everyone knows everyone" and her environment was

composed mostly of “colleagues, civil servants, police commissioners, district governors and the like” (Interviewee 7, personal communication, April 2, 2019) (see Appendix A, 34), people of the state, generally. Still, on the other hand, as recurrently pointed out above, the Council possesses enough competences to shatter the career progression of any given judge with ease whenever deemed necessary. There is no doubt that having to adapt daily lives to the profession in its entirety fosters obedience and reinforce the existing hierarchical setting.

Nevertheless, even though I do not want to delve into a chicken or egg discussion here but it seems that there is a mutually-reinforcing relationship between the hierarchical setting and the uniform, army-like culture in which any notable deviations from the standards of various sorts set from above are punished. The local surveillance mechanisms are only one part of the story. The total unaccountability of the Council vis-a-vis individual judges and prosecutors lead to a complete subordination of the latter to the will of the former and opens up a great margin of discretion for the Council in its acts regarding careers of individuals which can result in undue ‘punishments’, eroding internal independence of judges and prosecutors. Consider Sacit Kayasu. An eccentric personality, first he filed a criminal complaint against Kenan Evren, the general behind the coup d'etat of 1980 and the subsequent President, in 1999 as a citizen. Notice the fact that he did not indict Kenan Evren with his capacity as a prosecutor, he filed a complaint against him as a plain citizen. What he received was a disciplinary proceeding and a criminal prosecution as a prosecutor, both initiated by the Ministry who had the higher hand in disciplinary proceedings back then, as mentioned above. The former ended up with an official written admonition by the Council whereas the latter did not produce concrete results. Predictably, his complaint was dismissed for non-prosecution. Moreover, he

received a further punishment of being transferred to elsewhere because of the offensive tone he used in his appeal against the admonition. This did not stop him. As a public prosecutor, he indicted Evren in March 2000 for his crimes and made a short, informal statement to the press. The indictment was 'buried' by the chief prosecutor. He was later expelled from the profession after a highly dubious disciplinary procedure (İnceoğlu, 2008, p. 309-318; Kayasu, 2007). It is not a coincidence that these occurred in an atmosphere where the military had made it dominance in the political realm felt again after the famous memorandum of Feburary 28, 1997 thus forcing the elected government to step down – a process in which more than 400 members of higher judiciary were given a briefing by the Presidency of General Staff. Oddly enough, the judges and prosecutors who could not make it to the briefing requested a second one and had their needs fulfilled (Tuna, 2009, p. 25-27). Not much of an improvement from 1980 when judges sitting in the Council visited Evren and declared their loyalty in the wake of the coup d'etat (Göktürk, 2007, p. 209).

One may consider Kayasu to be an exceptional personality – even overly-ambitious maybe and thus treat his case as an exception. Then, consider Mete Göktürk who had to go through numerous disciplinary proceedings and criminal prosecutions just because he expressed his ideas about the lack of independence of Turkish judiciary on TV and newspapers multiple times. Building his idea on the arbitrariness displayed by the Council in decision-making, he chiefly blamed the exemption of the acts of the Council from judicial review as a constitutional provision that destroyed judicial independence. Lack of legal reasoning in the acts of the Council, clientelism with concrete examples given, the general composition of the Council, fragility of the judiciary against dominant political trends, and the

prevalent position of the Ministry were the usual themes in his narrative that had a pretty mild tone – which did not escape him from being prosecuted numerous times with charges of 'insulting the judiciary' (Göktürk, 2006).

Examples are abound. A female judge, Arzu Özpınar, had to go through a disciplinary investigation in 2002 due to complaints about her private life, submitted by an anonymous group calling themselves “a group of nationalist police officers”. The complaint, totally lacking of concrete evidence, ranged from being 'too close' with a male lawyer that raised questions about her impartiality to putting on too much make-up and wearing mini-skirts. The investigator inspected her caseload and found no signs of irregularity. Still, after listening to more than 40 witnesses, whose statements Özpınar could not reach to, the inspector prepared an unfavourable report. Given the reliance of the Council on the reports of the inspectors, as mentioned above, unsurprisingly, Özpınar was expelled in 2003 (Kuyucu, 2015).

Of course, these are the instances that caught the national spotlight – the tip of the iceberg. Nevertheless, despite some improvements to the disciplinary procedures, the practices remain more or less the same today. Almost all judges and prosecutors I interviewed with, including the ones that are aligned with the government (despite finding the root causes in different places), were of the opinion that general course of careers used to be more apolitical and structured before the 2010 amendments and find them to be more politicized and discretionary as of today. Some claimed that before 2010, it was vital to have references in the higher courts or within the bureaucracy when needed for certain ends whereas today the references are purely political and sometimes of religious nature, as mentioned above. Nevertheless, Aydın Başar's case is revealing. A judge of Balıkesir, he acquitted a defendant in 2016, against whom a lawsuit had been filed with the allegations of

insulting the President, an offence in Turkish Penal Code that has been prosecuted vigorously in recent years after Erdoğan took office. He has been moved to three different spots in the span of two years: From Balıkesir to Zonguldak in July 2017, to Erzurum in July 2018, to Kars in May 2019 – the last one was a sanction of his 'offense', of which the decision was finalized in 2019, transfer of office, which is the second harshest sanction after dismissal. He is a judge of first class. According to the deputy President of the Council, Mehmet Yılmaz, the reason behind his transfer was not the sentence per se; it was the legal reasoning behind the sentence which contained political considerations and gave the impression that the said judge has lost his stance of impartiality ("HSK Başkan Vekili", 2019) – the sanction of which is the transfer of office according to the Article 68 of the Law no. 2802. A penal judge whom I conducted an interview with, having numerous cases of insulting the President before him, claimed that he is now forced to be more 'prudent' in those cases although he had ruled on acquittals, without an exception, in those cases.

Given the omnipotent-yet-totally-unaccountable position of the Council, it is hardly surprising that almost all judges and prosecutors I conducted interviews with claimed that they did not feel secure about their professional status. One even claimed that "The course house is a risk factor now. Like an earthquake. Anything can happen. A calamitous thing [but] once you are involved with. Everything that has been once given to you is now in a position to threaten you" (Interviewee 2, personal communication, Februrary 5, 2019) (see Appendix A, 35). Indeed, it can be argued that judges and prosecutors today have less guarantees than common civil servants, since the latter can resort to judicial review against the acts regarding their professional status. Apart from the dismissal decisions (against which one can take legal action only after 2010), the decisions regarding the statuses of judges and

prosecutors made by the Council are exempted from judicial review. When asked what he thought about the criticisms of a 'civil servant' mindset (*memur zihniyeti*) among judges and prosecutors, a judge affirmed that basic civil servants were better off:

> I wish we were civil servants. They have more job security than us. At least they have unions. They can sue [actions regarding their careers]. They can get involved in politics, I see them on social media. Judges are in a very problematic position. Judges and prosecutors are inferior to civil servants. Now their biggest fear is "Can I be a target of calumny and be expelled? Can someone gossip about me so that something bad happen to me?"; so that a judge stays afar from her colleagues in lodging buildings, in courthouses. (Interviewee 6, personal communication, March 28, 2019) (see Appendix A, 36)

Besides, there is a whole lot more than dismissal decisions that can be life-shattering. Take transfers. Apart from the "transfer of office", foreseen as a disciplinary sanction, ordinary transfers of posts have been traditionally used as a punishment by the Council after the principle of immovability of judges and prosecutors was abolished in 1972, as seen above. According to the current regime, the country has been divided into geographically heterogonous[61] five regions. A novice judge or a prosecutor almost always starts from a place that belongs to the fifth tier – remote areas that have small populations. As she furthers her career she moves to better places, usually after having worked at each region at least once.[62] When a judge and prosecutor promotes to the first class, she can move to the first region, which comprises the most developed areas of the country. But not all of them. Along with the biggest cities of the country, less developed places like Şanlıurfa, Isparta, Elazığ, Kırıkkale are also included in the first-tier. Thus, a judge who has spent her last two decades at the same office in İstanbul can be transferred to a more unfavourable first-

[61] The regions are not geographically whole. Different districts of same city can belong to different regions.
[62] There are practical exceptions, mostly because of the void created by recent purges.

tier city, without seemingly being demoted, since both districts are within the first-tier – a muchly resorted practice of the Council, especially as of late. With the legal reasoning typically consisting of two words "by the need of the service" (*hizmet gereği*) and a perfunctory right to appeal, the issue of transfer, as the Sword of Damocles, is hanging directly above judges and prosecutors. Building on this tradition, it is no surprise that the 'new' Council, much celebrated in 2010 but lamented in 2013, did not hesitate to move approximately 5.000 judges in its first year of operation (Şahin, 2012, p. 29) – even though most of them were related to promotions, this number corresponded almost to the half of the entire population. Transfers, in fact, occur in such an arbitrary way that, a judge of 25 years, who is currently at a relatively comfortable office, asserted that:

> When you do not have people, you do not have references, they send you out wherever they want when your time is up. Especially now. For example if someone is after my post and if she has sound connections, they can transfer me to another post. Favouritism is at its peak now . . . There is nothing such as "Well, now that I am at the first tier, I would stay here". Urfa, Mardin [sic], Afyon… They are all first tier cities now. Those are cities of exile now . . . They even send the most experienced judges of Istanbul in exile. I hear these a lot. I was also sent in exile in 2013, I know the exact Council member who messed around with me but I do not know why. (Interviewee 5, personal communication, March 27, 2019) (see Appendix A, 37).

All in all, judges and prosecutors have 'traditionally' been in a particularly fragile position against the Council. Its unaccountability vis-a-vis judges and prosecutors (certainly not vis-a-vis the political elite who is in power, formally or informally) is the main reason of this hierarchical relation. Simply put, lacking checks and balances against the Council, judges and prosecutors have to bear in mind the inclinations of the will that is in charge of the Council and act accordingly – though it may not suffice in certain cases, as a judge puts it, "The old Council used to punish the one who criticized it. The new one punishes even those who do not endorse its activities" (Şahin, 2012, p. 29). It is quite clear that this relation of domination is bound to

hinder judicial independence even when the judiciary is seemingly isolated from the formal, external influence of the executive and the Parliament. Even when the judiciary is ‘left alone its own’, the unaccountability of the Council renders individual defenseless against the body, thus giving the members of the Council every opportunity to hinder judicial independence with arbitrary acts targeting careers. Of course, the worst case scenario is when a will dominates the body and the members act uniformly, lacking internal balancing stemming from pluralism. Nevertheless, a situation of isolation from the political realm has not been the case in Turkey either, despite a 'headquarters' that has been dominated by higher judges for a long time. The Minister was vested with important prerogatives with regard to careers of judges and prosecutors for decades, in addition to her already predominant role in Council after 1981, which is what I account for next.

5.3.4 Additional channels for the Minister

Although the Minister had a sizable authority on careers of judges and prosecutors as the chair of the Council, it could carry out the acts pertaining to this authority formally only through the Council which had the last word. Therefore a formal, separate link of hierarchy between the Minister and individual judges and prosecutors does not exist, except the administrative duties. The prevalent position of the Minister within the Council until 2010 will not be touched upon here again as it was delineated above and the post-2010 situation will be accounted for in the subsequent chapter.

The constitutional Article 140/6, currently in force, that states that judges and public prosecutors are linked with the Ministry of Justice in terms of their administrative duties does not seem too intriguing at first, given that the link is

explicitly limited to administrative duties. However, coupled with the Article 159/9, which states that judges and prosecutors are supervised about whether they are doing their duty in conformity with laws and other regulations, "for judges, circulars of administrative nature", the Article delineates in parantheses, by relevant inspectors (inspectors of the Ministry before 2010); the provision provides a leeway for the Minister to give orders to judges via 'administrative' circulars. Surely, this does not violate the Article 138/2, which forbids any orders, circulars and suggestions directed at judges in using *juridical* power since it is limited to administrative duties. However, in practice, judges and prosecutors have been subjected to disciplinary proceedings because of their alleged non-compliance with administrative duties (Şakar, 2014). Thus, judges can face disciplinary sanctions because of things that are not normally within the scope of their juridical duties. Indeed, especially for judges, there is a thin line between juridical and administrative duties (Baş, 2016, p. 281). YARSAV, the first judicial association of the country, called out the Article 140/6 as one that creates a tutelage of the Ministry on the judiciary (Köse, 2018, p. 126).

Judges and prosecutors working at the Ministry deserve a mention here too. The Ministry's managerial staff is composed entirely of judges and prosecutors (Şakar, 2017, p. 242). There were 387 judges and prosecutors working in the Ministry in 2018.[63] In great contrast to the Italian experience where magistrates working in the Ministry formed a grid, so to speak, to protect judicial independence *from* the Minister, Turkish judge-bureaucrats have their loyalty lying with the Minister. Judges and prosecutors preserve their professional statuses during their duties at the Ministry – and the related (lack of) guarantees. A judge-bureaucrat working at the Ministry, can always find herself in an insignificant post in a remote

[63] See: https://www.hsk.gov.tr/Eklentiler/Dosyalar/5d7f48c3-7f89-4c3d-afc2-03923e3db661.pdf

part of the country anytime if deemed necessary, given the strong position of the Minister within the Council. In contrary to other bureaucrats working at other ministries, a judge does not have any legal remedies to resort against such decisions. Additionally, given the consequences of being practically 'demoted' to a courthouse and all the related impracticalities of 'returning to the field', it is no surprise that a judge who has built a career and a life around the Ministry in Ankara will be more prudent in terms of complying with the will of the 'superior'. Thus, judges at the Ministry are under a separate network of hierarchy, in a stricter fashion than that exists in any other Ministry (Eminağaoğlu, 2007, p. 36; Şakar, 2017, 246-247). In contrast to the Italian case, conflicting with the Minister is quite unthinkable for a Turkish judge-bureaucrat working at the Ministry, let alone lobbying against the Minister and protecting independence against her.

5.3.5 Judicial associations (or lack thereof)

If the Italian experience is the one that has been dominated by judicial associations, the Turkish one is quite the opposite. In contrast to a strong judicial association in the Italian case that has its roots at the dawn of 20th century, Turkish judges and prosecutors did not have a professional association until 2006, through which they can articulate their demands, protect their interests, overcome coordination problems, improve professional ethics and express their opinions on issues concerning their careers and administration of justice. An all-encompassing story of the trajectory of Turkish judicial associationism is beyond the scope of this study. However, a brief account of the situation until 2010 is in order.

As seen in most reforms in the late Turkish history, it is safe to say that the idea of forming an association did not arise in a bottom-up fashion among judges and

prosecutors but was rather stirred by the accession to the EU process which can be seen in the advisory visit reports of the EU in 2003, 2004 and 2005 (see, Björnberg & Richmond, 2003, 2004; Björnberg & Cranston, 2005; Köse, 2018). Indeed, with the pressures of the EU, a new favourable Law on Associations lifted the prohibition on judges and prosecutors to form professional associations in 2004. It is stated in the reports a 'reluctance' on part of higher judges and prosecutors and that a previous draft law that had enabled judges and prosecutors to form associations received a negative opinion by the Council of the State (Björnberg & Richmond, 2004, p. 39; Björnberg & Cranston, 2005, p. 15-16). This draft law, dating back to 2000, did not foresee the creation of a legal framework that enabled a multiplicity of association but rather the institution of an 'official' "Union of Turkish Judges and Prosecutors", under the tutelage of the Ministry and undersecretary as the head of the union, with logic of public professional organizations and possessing the status of a public law entity, like chambers, like bars and mandatory membership (Köse, 2018, p. 104-108; Eminağaoğlu, 2007, p. 40) – a bizarre logic given that judges and prosecutors are not self-employed people but still telling about the perception with regard judges and prosecutors in Turkey.

Nevertheless, with the new favourable legal framework, 501 judges and prosecutors formed an association called the "Union of Judges and Prosecutors" (different from the draft law had foreseen), known as YARSAV, in 2006. Comprised mostly of judges and prosecutors of higher ranks that largely represented the secularist judicial elite (Bakıner, 2014, p. 14; Köse, 2018, p. 102), the association was at odds with the AKP government right off the bat. The draft law mentioned above, prepared by the Ministry of Justice was even revived after the founding of YARSAV and foresaw that all existing associations (i.e. YARSAV only) to be

closed[64] after the formation of the Union. Still, after a tormented birth, in 2007, the chair of the association, Ömer Faruk Eminağaoğlu stated that the number of members of YARSAV was 888 (less than 10 percent of the entire judiciary) and despite 9 out of 10 members of the Council being members of YARSAV neither one of approximately 400 judges working at the Ministry nor a single judge candidate was a member of the association, pointing to the unduly influence of the Minister on careers of judges and prosecutors (Eminağaoğlu, 2007, p. 36).

Given this background, it is not unexpected that in the wake of the 2010 constitutional referendum YARSAV was a fierce supporter of the "No" campaign, even more so than some political parties at the same side, engaging into direct verbal conflicts with Erdoğan who questioned the legitimacy of judicial associationism by rhetorically asking "Can there be associations within the judiciary?" and asserting that they should "deal with this as soon as possible" ("Erdoğan'ın sözlerine tepki", 2010. The passing of the package signalled not just loss of influence as judges and prosecutors of higher ranks but also the 'change of hands' of the stick, that is the Turkish judiciary. On the other hand, an uneasy alliance of leftists, liberals and conservatives, the Democratic Judiciary (*Demokrat Yargı*), founded in 2009, was in the "Yes" campaign.

Having put things into context, the recurrent change of hands of the judiciary after 2010 and the ease with which it happened can be seen under a different light, which is what I turn to in the next chapter.

[64] This is blatantly against the law since an association, possessing legal entity, cannot be closed down by a law. Still YARSAV would be closed by an emergency decree in 2016.

CHAPTER 6

2010 – …: CAN YOU TEACH AN OLD DOG NEW TRICKS?

Against this background, the constitutional reform package of 2010 was bound to shatter the existing balances within the judiciary and present the 'loss' of the judiciary by the secularist bloc – as if the whole 'secularist cadre' of the judiciary was to turn into Islamists overnight. Given the period between 2006 and 2010 was marked by constant skirmishes between the high judiciary and the ruling AKP, it is not surprising that Council saw lengthy, heated meetings that came to the fore on the national press – especially after the Ergenekon trials that tried parts of the secularist bloc commenced (Kalaycıoğlu, 2011, p. 4). As one can guess, assignment and transfers of judges and prosecutors of critical cases were the hot topics. This was something quite unprecedented for a body that had mostly operated afar from the spotlight as the political salience of the Council had largely flown under the radar during the so-called Kemalist era (Stade, 2017, p. 59). Ertekin traces the end of this 'apolitical', undisputed status of the Council to 2006 (Ertekin, 2011, p. 179). Indeed, although calling the judiciary as a whole a Kemalist institution or "extremely secularist" (Oran, 2012) is a stretch,[65] as demonstrated by the elections to the Council in 2010 and 2014 too; the high judiciary, at least since the 1960s, had a sizable proportion of judges and prosecutors with Kemalist-secularist tendencies (Köse, 2018, p. 205, 251).[66] Thus, albeit YARSAV, by and large representative of he judicial elite, had the removal of the representatives of the executive from the Council as one of its chief demands (to which Erdoğan replied that "the judiciary

[65] Illogical also, given the influence of the Ministry in the recruitment process. Turkey has a tradition of right-wing governments.

[66] Of course there are nuances within the high judiciary too. The exchanges between the head of the Court of Cassation, a retired Chief Prosecutor of the latter and YARSAV in 2007 is an example.

cannot be left to the hands of the judiciary"), before 2006, apart from few instances, the Council had operated in a relative balance between its members from both branches – at least on surface.

6.1 The 2010 amendments: A wolf in sheep's clothing

The constitutional amendments of 2010 surely had the aim of reducing the influence of the high judiciary in the Council. Firstly, the number of the members of the Council was raised from 12 to a staggering 34 (22 original + 12 substitute members – the statuses of the Minister and the undersecretary remaining intact). Whereas the number of members coming from the high courts remained the same (3+3 and 2+2 respectively), their influence was greatly diminished given their smaller proportion. Four members were to be directly appointed by the President from among lawyers or legal scholars. Two members (one of which was a substitute) were to come from the Justice Academy, controlled by the executive. The remaining 16 members (six of which were substitutes) were to be decided by national elections held among judges and prosecutors though candidates had to belong to the first class.

The amendments introduced a set of novelties in terms of judicial governance which could be regarded as positive steps. Firstly, the Council membership became a full-time occupation, rather than being a part-time Council convened by the Minister. By the advantage of an increased number of members, the Council was divided into chambers, fostering division of labor. The scope of action of the Minister was lightly reduced. Although still chairing the Council, Minister could no longer participate in the works of the chambers. Dismissal decisions were no longer exempt from judicial review – though other decisions still were. However, since now the Council consisted of chambers, the decision of one chamber could be appealed against before

the plenary, thus, providing a bit more significant right of appeal, even though not enough to offset the insecurity caused by exempting the acts of the Council from judicial review. Most importantly, the amendments foresaw the creation of a separate Board of Inspectors, working under the Council, thus limiting Ministerial influence – though investigations were still subject to a prior permission of the Minister and this time, acts regarding the inspections would be exempted from judicial review as the conducting body would be the Council, not the Ministry. Last but not least, in the same vein, the Council now had a separate budget and secretariat, thus becoming logistically independent from the Ministry even though it was the Minister who appointed the general secretary. By curtailing the dependence on the Minister (and the undersecretary) only slightly, amendments signified an marginally modest step forward in terms of external independence of the judiciary. Also seen from the unrestricted appointment power of four members by the President and the involvement of Academy, under the control of the executive, showed that the step was a rather 'shy' one. Still, since out of 22 original members, judges had a sound majority with 15; 10 of which belonged to lower courts. This was undeniably a step forward for the lower court judges and prosecutors. Moreover, by pluralizing the composition and giving almost half of the seats to judges and prosecutors elected by their peers, changes provided an avenue for lower ranked judges and prosecutors to curtail the dominance of higher court judges whom they had been dependent on for decades via mechanisms described above. By breaking the monopoly of higher courts and through their significant presence in the Council, there appeared to be a chance that lower judges and prosecutors could finally check the power of the Council that had kept them line in the preceding decades.

However, the practice turned out to be different. The elections to the Council were held in October 2010, 37 days after the referendum, under insurmountable influence from the Ministry. To be sure, the dust had settled and previous promises of a new era, the celebrations of democratization of a tutelary institution such as the judiciary, this liberation, so to speak, this passage "from the law of the rulers to the rule of the law" as Erdoğan put it ("Erdoğan'dan önemli", 2010), did fade into background. The Ministry (that is, the AKP and co-operating Gülenists) endorsed certain people, Gülenists as is known, and made sure of their victory by circulating a "list of the Ministry" among judges and prosecutors, which made a clean sweep of every seat in the Council. Surely, the propaganda ban imposed by the Supreme Electoral Council *(Yüksek Seçim Kurulu*), a high judicial body tasked with overseeing elections, did not help as this basically meant that, with its organizational and logistical capabilities, the Ministry had the upper hand in upcoming elections by incorporating propaganda to its daily administrative tasks (Ertekin, 2011, p. 51), carried out by the traditional hierarchical units, i.e. its inspectors and chief prosecutors (p. 96). Neither YARSAV nor Democratic Judiciary, not even any independent candidate did gain a seat in the Council. Put simply, the elections were not fair. Following Ertekin, one might even call them "appointments", rather than "elections" (see, generally, Ertekin, 2011).

The infiltration of the Council by the Gülen movement did not happen behind the scenes. This list of nominees for the Council, which had been promoted as the "list of the Ministry" among judges and prosecutors, was prepared after a consensus between Gülen movement and AKP according to a Gülenist confessor, former deputy President of the Council ("FETÖ'nün liste oyunu", 2016; "Eski HSYK Başkanvekili", 2016). "The list of Ministry won" was even a headline one could see

on national media right after the elections, including the pro-AKP media ("Bakanlık kazandı", 2010; "HSYK üyeliği", 2010). The creation of a list endorsed by the Ministry was so blatant that Democratic Judiciary was even offered a few slots in the list of the Ministry which they rejected as they wanted the process to be a democratic one that is not dominated by the bureaucrats from the Ministry, which caused a split within the association as mostly conservatively-leaning judges left the association, one of whom asserted "if Ministry nominates a donkey, I would vote for it", endorsing the Ministry against the old bloc of secularist higher judges (Ertekin, 2011, p. 75-90). A judge's counter-argument is telling in terms of the prevailing attitude towards the Council, as a frontier to be captured: "Our aim is to reflect all colours of the society to the Council; that is, not capturing the Council but rendering it uncapturable" (p. 87). A pro-AKP columnist would later claim that when then-Minister of Justice presented the structure of the Council to Erdoğan, soon-to-be-dominated by Gülenists, Erdoğan endorsed their position, saying that they were religious people anyway, thus, would not do them harm (Taşgetiren, 2014).

Given the antagonism between the Ministry and the higher judiciary, represented mostly by YARSAV, it was no surprise that the list of the Ministry did become a fulcrum of the anti-high-judiciary sentiment within the judiciary, especially in the periphery, although its representatives would signal the continuation of the status quo as later demonstrated by the draft laws on new legal regime (Ertekin, 2011, p. 95-96). One thing should not be mistaken though – there is no evidence that this anti-high-judiciary sentiment was based on a class consciousness, as in the Italian case, i.e. lower-ranked judges versus the high judiciary, rather than carrying an ideological imprint. Nevertheless, the Ministry, and its partners, Gülenists, did pursue a strategy of demonizing YARSAV and its representative bloc in the eyes of

the majority of the judiciary, even though the Ministry, under different governments, had co-operated with it for last three decades – if not had had the lion's share in judicial governance (p. 97). If we could ignore the unduly influence of the executive and Gülenists' inclination of voting as a single bloc in a militarily discipline, we might even conclude that their strategy succeeded – not only every single name on the list, even the no-name ones, was elected with a minimum tally of 40~ percent, some candidates, like İbrahim Okur, deputy undersecretary of the Ministry then, were even able surpass 60 percent. But that would be too much.

6.2 2010 – 2014: The new judicial authority

The widely-held perception, manifesting itself overtly or covertly, that the judiciary 'changed hands', shared even by the 'losers', points implicitly to the structural organization of the judiciary. Stated more bluntly, the hierarchical organization of Turkish judiciary had made it sure that the ones that were able to capture the 'headquarters' could steer the whole of the judicial corps more or less in conformity with their will and everybody was aware of that. Judge Ertekin meant this when he asserted that practices from the preceding era, particularly stemming from the unequal and oligarchic sharing of judicial authority, was in full-force in the first six months of the 'new' era which pointed to an “institutional continuity” (Ertekin, 2011, p. 208). Through the manipulation of elections, the propaganda ban and the lack of a tradition of organized, independent judicial associationism vis-a-vis an alliance between a highly organized bureaucratic structure (Ministry) and an equally organized informal interest group that sought to infiltrate into what it could while it could (Gülenists) rendered malfunctional a set of institutional changes that could have had the effect of enhancing internal independence of individual judges and

prosecutors, at least to a degree. Yet both as a result of the factors above and other underlying institutional structure remaining the same, that is the overall relations between individuals and the Council through the career system, practices remained the same. In other words, even though the internal structure of the Council could have had a more pluralist outlook as a result of the new election system by preventing a monolithic majority from forming, the nature of relations between individuals and the Council remained largely the same as no sizable reforms were undertaken about the career structure and the capability of the Council to carry out discretionary acts over careers. No checks and balances were established between individuals and the Council apart from a dubious procedure of elections. To see a change in actual practices, the only chance lower judges and prosecutors had was a pluralist outlook in the Council but since the elections were manipulated, this proved impossible. What changed was merely the name of the authority. The newcomers inherited a machinery that knew no bounds.

Having conquered the 'headquarters', the first thing to do by this new 'judicial authority' was to exercise its 'right to loot', manifesting itself in the new appointments to the supreme courts. The influence exerted by supreme courts on judicial corps was delineated above. Thanks to the Law no. 6110 passed on February 9, 2011, which established new chambers in the supreme courts, the new Council appointed 160 members to the Court of Cassation and 51 members to the Council of the State to break the dominance of the former elite (Bardakçı, 2013, p. 423).

Statements of the parties before and after the elections with regard to supreme courts are illuminating. Two years before the amendments, Hasan Gerçeker, the President of the Court of Cassation was of the opinion that the Court needed extra chambers and new members, whereas a draft law, championed by the AKP

government and the Minister, had foreseen a decrease in the number of chamber and members, from 250 to 150 for the latter and beginning of work of regional appellate courts, again, to break the monopoly of judicial elite. After the 'capture' (or 'loss') of the Council, the roles were reversed. Now, Gerçeker was adamant that such a huge supreme court was unparalleled in other countries and an increase was not the answer to overcome the caseload whereas the Minister, Sadullah Ergin, who had ignored the calls for extra chambers and members before the 2010 amendments, was adamant that an increase in numbers was needed. So was the Gülenist media, 'informing' the public of the enormous caseload in supreme courts (Yiğit & Şahin, 2014, p. 142). Nevertheless, just ten days after the Law no. 6110 passed, 211 new members were appointed by the Council in an astonishingly quick manner. To be sure, the Council had to examine more than 5.000 candidates who were eligible to be appointed in ten days. What is more interesting was that even though the results were announced on February 24, newly-appointed members started working the very next day, therefore skipping the 15-day respite granted by the law when starting at a new post, coming from all around the country to Ankara where supreme courts are located at, in a matter of hours – two judges assert that the new members must have had a sharp clairvoyance to know for certain that they would be appointed, thus, fixing logistical needs such as plane tickets, accommodation and whatnot beforehand (p. 145-146). These appointment signalled essentially a Gülenist-controlled Council appointing their peers to the supreme courts, as later would be revealed.[67] These new members would vote as a single block during critical appointments within supreme courts to enable or prevent certain results (p. 146-147).

[67] Most of them are expelled now, because of their adherence to the Gülen movement (FETÖ, after 2014) (“FETÖ'cülerin Yargıtay'daki”, 2018; “Militan hakim uyarısı”, 2017).

This period saw an increasingly monolithic judicial authority as a result of the sound alliance between the Gülenists and the AKP, as opposed to the bifurcated power-sharing of pre-2010 setting, i.e. between the judicial elite and the government via the pronounced position of the Minister. It seems that this equilibrium used to have an offsetting effect in some respects. A judge of 21 years claimed that:

> [In 2010] The binary structure of the past was altered. It became increasingly more political. There was the Council before 2010 but the judicial elite could not seep into the [judicial] society. You can wear the Atatürk badge but it does not necessarily seep into you. After 2010 it became a totalitarian structure since the majority is conservative. They became the power-holders. There occurred a fusion of the authority and the society [within the judiciary]. This leads to totalitarian structure. (Interviewee 1, personal communication, February 3, 2019) (see Appendix A, 38).

This sits well with the anecdotal evidence I encountered during my interviewes, claiming blatantly unfair assessment reports, arbitrary low grades and invoked disciplinary proceedings by who later turned out to be, after the purges, Gülenist inspectors. In a similar vein, pointing to the consolidation of power in one hand in the Council and its impacts on judicial governance, another judge of 20 years, who claimed that Turkish judges and prosecutors have never been independent, asserts that:

> The state used to be run by the bureaucracies of the judiciary and the army. Politics was limited and there used to be no conflict with the Council [between politicians and the Council]. When the politics became independent from [the scope of] the army, conflicts arose [about 2007]. We lived through our widest [array of] liberties between 2007 and 2010. It was the opposite in 2010-13 – politics was in the hands of the AKP, bureuacracy was in the hands of Gülenists. For example we were more comfortable when AKP and Gülenists started to collide, until AKP won. When the authority was consolidated, these [liberties] were narrowed down. (Interviewee 2, personal communication, February 5, 2019) (see Appendix A, 39).

Çelik claims that though the amendments of 2010 represented some steps forward, the core of the system remained untouched with regard to Ministerial influence in the Council (Çelik, 2018, p. 1061). In addition to the external independence aspect, the

nature of the relations between the Council and individual judges and prosecutors remained also the same. When the management of a hierarchical body, that is the Turkish judiciary, is carried out by a militarily hierarchical organization, that is the Gülen movement, the outcome is bound to be a stringent one for the ones that are at the bottom of the ladder – especially the ones that are not conforming, even appearing to be not conforming, to the inclinations of the 'headquarters'. As stated above, this new Council moved thousands of judges and prosecutors to new posts in its first year of operation. Especially those judges and prosecutors belonging to 'dissident' judicial associations, namely, YARSAV, the Democratic Judiciary and the Union of Judges (*Yargıçlar Sendikası*), the latter being formed in 2012 and of social democrat nature, were frequently punished (Köse, 2018, p. 211). The first two, being former rivals in the 2010 referendum campaign, even protested the new Council after its first eight months of operation because of arbitrary transfers (İnceoğlu, 2011, p. 256-257), Strategically important hierarchical 'checkpoints' described above were shared among “veteran soldiers” as “war booty” (Ertekin, 2016, p. 112-113). Recruitment process increasingly started to resemble a filtration process, of course ideologically; a judge even claims that between 2010 and 2013 not even one single ideologically incompatible candidate was allowed to enter the profession (Özsu, 2014a, p. 213). A candidate judge, Didem Yaylalı, committed suicide after she was rejected to enter the profession, allegedly on the grounds that she consumed alcohol and wore tights (“Hakim adayı”, 2013; “Tayt giyiyor diye”, 2017; “Yaşam tarzı”, 2013) – a claim which the Council rejected (“HSYK’dan Didem Yaylalı açıklaması”, 2013). Finally and most importantly, acts and regulatory administrative enactments that used to be put into force by the Ministry were now enacted by the Council, thus were exempted from judicial review (Köse, 2018, p. 140). A logical conclusion of

this is that, before 2010, judges and prosecutors could file a lawsuit against unfavourable assessment report by inspectors of the Ministry or a ministerial circular since the issuing body was the Ministry and its acts were subject to judicial review. But not after 2010, since, apart from the dismissal decisions, all legal transactions of the Council were exempted from judicial review. It is no coincidence that there was a quasi-consensus among the judges and prosecutors I conducted interviews with that this period was marked with the greatest discretion in terms of career-related acts and nepotism, manifesting itself in unfair sanctions, discretionary assessment reports and, on the other end, rapidly rising judicial careers. The arbitrary potential of the Council has by and large remained intact. There is no doubt that internal judicial independence of judges and prosecutors was still lacking as those who did not conform to the will that is dominant in the Council were frequently punished and Gülenists who held the majority in the Council could act freely without any checks. Again, this lack of internal independence and the related lack of checks and balances against the Council was what made it easy for Gülenists to steer the judiciary in whatever direction they pleased, thus, making the body as a whole vulnerable to an external influence which made itself into the Council with a sound majority, that was the Gülenists this time; therefore eroding its external independence. In such a winner-takes-all setting, any majority in the Council could roam freely it seems, destroying any remnants of judicial independence.

An excursus: Alliance in tatters

By 2012, the Gülenist domination in the judiciary was undeniable. Erdoğan, seemingly content by the situation on the surface, as mentioned in the outset, was adamant that “hand of the nation” had touched the judiciary, referring to the former

supposed domination of the judiciary by secularists. His opinion was forced to change in a week though. On February 7, 2012, a Gülenist public prosecutor ordered Hakan Fidan, the Undersecretary of National Intelligence Organization, to testify. Being the "confidante" of Erdoğan and rumours about his impending arrest floating around, Fidan was protected from being tried by a subsequent "legislative manouvre" (Taş, 2017, p. 399). Although stated incrementally over months, Erdoğan's reaction was no less than harsh and called for "this state within the state" to come and try him too ("Zaman'da Erdoğan'a", 2012). This rift raised suspicions about the future of the alliance as specially authorized courts, Gülenists strongholds within the judiciary, were disbanded few months later, after their caseload is done with (in 2014) (Bakıner, 2014, p. 33-34).

However, spectators had to wait for another year and a half for an altercation in full force to resurface. On December 17, 2013, a major corruption scandal erupted and more than 50 people were arrested with charges involving four ministers, their relatives, high-level bureaucrats and businessmen (Taş, 2017). Had it been successful, a second wave of raids would have included the younger son of Erdoğan (Taşpınar, 2014, p. 52). The AKP government was quick to portray it as a plot carried out by Gülenist prosecutors and police forces and sought a remedy in changing related regulation to block the proceedings from proceeding. "The Regulation on the Judicial Police" was amended, obliging the police forces involved in a criminal investigation to notify relevant administrative authorities about said investigations – that is the executive. As Özbudun puts it, "This enabled the government to be informed immediately of any ongoing (secret) investigations and to take necessary measures, such as changing the police officers involved accordingly" (Özbudun, 2015, p. 46). Nevertheless, Gülenists in the Council, 13 out of 22, reacted

by a public statement; criticizing the amendment as being unconstitutional and against judicial independence ("İşte HSYK'nın", 2013). Predictably, this caused outrage on the part of Erdoğan, this time aimed at the Council in particular. Erdoğan attacked the signatories of the statement, accusing them with acting contrary to laws and said that he would have tried the Council if he had the power to do so ("Yetkim olsa", 2013). He also claimed that the AKP had made a mistake in 2010 by revoking the power of inspection of the Minister, therefore granting further autonomy to the Council ("Erdoğan: 'Orada bir yanlış yaptık'", 2013).

On the following days, the spokesperson of the government signalled their plans on restructuring the Council (Gürcanlı, 2013). However, as the party did not possess the supermajority in the Parliament to do so, amending of the constitutionally-entrenched status of the Council could not be accomplished and therefore, the amendment of the Law no. 6087, the Law on the Council, was set as the new goal. The controversial amendments to the Law no. 6087, by the Law no. 6524 entered into force in February 2014, with strong criticism from all opposition parties and objections of unconstitutionality coming from legal scholars (Özbudun, 2015, p. 47). Even the President, Abdullah Gül, one of the founding members of the AKP, declared that he found many of the new law's articles unconstitutional, however, he ratified it (Yetkin, 2014). The amendments practically rendered the Council dominated by the Minister, therefore the executive, transferring most of the powers from plenary to the Minister, raising the Minister's competences to an unprecedented degree and radically altered the internal operations of the body. Some of the new competences of the Minister included issuing regulations and circulars, assignment of the members to the chambers of the body, power to start disciplinary action against councillors as well as against ordinary judges and prosecutors,

unlimited discretion in determining the schedule of plenary meetings, therefore the power to act as a veto player and power to appoint the chair and the vice-chair of the Board of Inspectors.[68] Still, an independent and impartial judiciary as a goal and saving the judiciary from a tutelage once again were dominant themes in AKP discourse before the new law, for another go ("Erdoğan: '17 Aralık'", 2014; "Haksızlığa uğradığını", 2014; "İyi niyetimiz sömürüldü", 2014).

Predictably, this new law was challenged by the opposition deputies before the Constitutional Court, however, until the Constitutional Court ruled on the issue, the damage was already done. For example, firstly, judges and prosecutors involved in corruption investigations were relocated to less significant posts and their places were filled with their pro-government peers. This happened thanks to the alteration of the First Chamber of the Council, which had the power to appoint and transfer judges and public prosecutors. Whereas originally the assignment of the councilors to the chambers had been within the competence of the plenary, this new law granted this competence to the Minister. As one would expect, he "packed" the First Chamber with pro-AKP councilors, after which a mass relocation of judges and prosecutors involved in corruption investigation followed. Secondly, with its provisional Article 4, the new law foresaw a wholesale dismissal of serving bureaucrats within the body, from the Board of Inspectors to the general secretariat, as those positions were not entrenched in the Constitution. Thus, except for the elected members of the Council, whose positions had been constitutionally entrenched, this new law gave the Minister an almost unlimited power to redesign the internal operations of the Council (Özbudun 2015, 47). Even when the Constitutional Court declared the amendments unconstitutional, as mentioned above,

[68] For the full content of the amendment, see: http://www.resmigazete.gov.tr/eskiler/2014/02/20140227M1-1.htm

the damage had been done since the rulings of the Court cannot bear consequences retroactively.

Did the investigations symbolize an insistence on legality on the part of prosecutors who conducted them – ultimately thwarted by an overly-powerful government who held the majority in the legislature? Were Turkish prosecutors finally challenging the powerful, touching the untouchable? Hardly. First, just like Gülenist media which cheered for the investigations was controlled from one centre of power, so were these prosecutors. Rather than carrying out their duty of surveillance at the frontiers of legality, these prosecutors instrumentalized law for their own ends and had their own principals, which was the Gülen movement. More importantly, their ultimate defeat delineates the -still- very narrow scope of action of individuals vis-a-vis the Council, i.e., their lack of internal independence *and* their external dependence on the Minister. Through a legislature manuever the government sidestepped the majority in the Council and basically rendered it dependent on the Minister, limiting further the external independence of the judiciary at the end of the day. Building on that, through mechanisms already at the Council's disposal, the relevant chamber of the Council assigned those sensitive cases to more friendly prosecutors who buried them – basically pointing at the lack of internal independence of individual judges and prosecutors.

6.3 2014 – 2017: "Everybody knows that the boat is leaking"

After the alliance between the government and Gülenists fell apart, the former found itself at odds with a Council dominated by the latter, thanks to a set of constitutional amendments introduced under its own political domination. It was within this context of a newborn warfare the 2014 elections to the Council took place.

The AKP government, having been caught off guard, started seeking for allies for the upcoming elections in October. For this end, the Unity in the Judiciary Platform (*Yargıda Birlik Platformu*; "YBD" hereafter) was formed in April precisely against Gülenists ("'Paralel' isyanı", 2014; "Yargıda cemaate karşı", 2014), now pejoratively renamed as the "parallel state" in the governmental discourse, referring to their infiltration in state institutions which well predates the accomplicity of the AKP government, with which they had maintained partnership for about a decade. Nevertheless, YBD represented an uneasy coalition of social democrat (including Alevis, traditionally distanced to the Sunni Islam understanding that the AKP government champions; for example, the spokesperson of the organization was an Alevi, declared by himself), nationalist and conservative judges and prosecutors. A sizable portion of YBD were probably not AKP voters themselves but chose to co-operate with the government against Gülenists.

Gülenists opted to compete not as a group but "independently", yet their similar codes of action were telling similar stories (Ertekin, 2016, p. 72-73). Moreover, in the meantime, Gülenists had infiltrated YARSAV -who allied with the Union of Judges for the elections- comprising allegedly the majority of the association, because of which the founding chair of the association had been left out of the Board in favour of a relatively no-name candidate – the association even introduced a reference system to prevent infiltrations and aspiring members had to bring references from older ones (Köse, 2018, p. 223-245; Oğur, 2014). On the other hand, unsurprisingly, YBD, a governmental organization according to all parties, was eager to declare that they would "work in harmony with the legislative and executive branches" (Özbudun, 2015, p. 51). Put simply, lacking human capital, i.e. necessary

cadres, to control the judiciary, the government was relying on YBD this time, in contrast to the 2010 elections in which it relied on Gülenists.

The 2014 elections saw a burning competition between two opposing parties in contrary to 2010 elections where the dominance of AKP – Gülenist alliance was almost unrivalled. Just as the 2010 elections were conducted 'against' the high judiciary and YARSAV by the government, demonizing them, the 2014 elections saw Gülenists as the opponents but with a renewed fervour. Having the government's open support, in all aspects, ranging from a promise of salary increase after the elections (Ertekin, 2016, p. 68) to amnesty of disciplinary records, YBD won the elections by a slim margin, few hundreds of votes overall, thus giving the AKP a majority within the Council. Again, there were no official lists competing, voters voted for persons. Gülenist candidates got shares of votes ranging from 35 to 40 percent among civil and criminal judges and prosecutors and 40 to 50 percent among administrative judges and prosecutors ("HSYK'da 8 asıl üye", 2014). Gülenists' dominance in the ballots of the eastern parts of the country, places where young and inexperienced judges and prosecutors often work, hinted at the recent infiltration of the judiciary by Gülenists. (Ertekin, 2016, p. 103). Nevertheless, overall, out of ten members elected in the elections (substitute members not included), eight belonged to YBD (two for social democrats and three each for nationalists and the government), two belonged to the Gülen movement (Şahin, 2016, p. 165-169).

The 2014 elections represented a rough census regarding the inclinations within the Turkish judiciary. Even though not all YBD votes (ranging from 40 to 50 percent) were of conservative or nationalist nature, given that one leg of the troika consisted of social democrats, if we consider the pro-government and nationalist votes in favour of YBD, along with the share of the Gülenists, it is safe to say that

Turkish judiciary has predominantly right-wing tendencies; thus, once again, along with the 2010 elections, upsetting the pre-2010 hypothetical odds in favour of a staunchly secularist judiciary *en masse*.

For the first time, Turkish judges and prosecutors stood out and even competed transparently with their ideological stances[69] in great disappointment to the supporters of an apolitical judiciary. Indeed, this was a novelty, considering the supposed apoliticism of the Turkish judiciary (Bakıner, 2016). Still, the experience is incomparable to the Italian case where judges and prosecutors independently grouped. YBD operated in a top-down fashion with the organization of the government, in stark contrast to the Italian experience. To be sure, by 2014, especially after local elections of 2014 held in March with the results of which AKP was content and presidential elections of August, by which Erdoğan ascended to Presidency, it was obvious that the AKP government had fended off the shock caused by corruption investigations and the voice records of AKP elite, including Erdoğan, leaked just before the local elections, indicating corruption of enormous magnitude. The war was far from over but the government did not look as precarious vis-a-vis Gülenists. In line with the tradition among Turkish judges and prosecutors of aligning with the powerful (Köse, 2018, p. 246-256), that was the AKP government this time, the formation and management of YBD, in which, to reiterate, supporters of the government was not a majority, was therefore, hardly surprising. Moreover, there were signs that the war in the judicial realm, a realm in which the Gülenists were most powerful thanks to their cadres, was not going totally in favour of Gülenists as shown by the abolition of specially authorized courts. Nevertheless, managed by and aligned with the government, Ertekin even refers to YBD as a

[69] Barring Gülenists, as camouflage is a typical Gülenist attitude, though it was well-known that the 'independents' were Gülenists.

"company", through which aspiring shareholders were rewarded with parcels of "judicial terrain" i.e. comfortable and prestigious judicial posts (2016, p. 75-79). Indeed, rather than articulating and carrying into judicial governance their own notion of the judiciary, like in the Italian case, these groups were at the receiving end of a transaction that operated in a top-down fashion, in return of their services.

Just like the Gülenists appointed to supreme courts in the aftermath of 2010 elections, the aftermath of 2014 elections saw similar appointments, again, considering the high degree of influence supreme courts were able to exert on judicial corps. With the creation of new chambers by the Law no. 6572, in an astonishlingly swift manner new judges and prosecutors were appointed to the Court of Cassation and the Council of the State by the Council; 144 and 33 members respectively ("Yargıtay-Danıştay'a YBP damgası", 2014). The existing chambers were also reshuffled, both in terms of personnel and jurisdiction, in a way to ensure that Gülenists would not get hold of critical cases ("Yargıtay'ın kritik dairesi," 2015). Needless to say, YBD members took the lion's share in appointments.

Predictably, this period saw not just relocation of Gülenists initially, again in thousands, but a complete purge from the judiciary which reached its culmination after failed coup d'etat of July 2016, carried out by Gülenist cadres in the military (Singh, 2017). Although the sanctions were chiefly aimed at Gülenists as the main enemy of the government, other 'dissidents' were not reserved either from massive relocations,[70] [71] one of them being the relocation of a judge who submitted the provision about the offense of insulting the President in Turkish Penal Code with the request of annullation to the Constitutional Court ("Hakim Murat Aydın", 2016).

[70] For example, in 2016, the Council relocated a quarter of the judiciary in a single decree ("Yargıda en kapsamlı", 2016).
[71] For some examples, see: (Köse, 2016)

Thus, the same game was being played over and over again, this time by different actors. As the 2014 elections demonstrated, total number of Gülenists in the judiciary was about 5.000 to 6.000 out of 14.000 judges and prosecutors. Similarly, deputy President of the Council, coming from YBD, stated that the number of Gülenists (being referred to as FETÖ now, "TÖ" for "terrorist organization") in the judiciary was about 5.000 in March 2016 ("5 bin", 2016). In 2018, the Vice President Fuat Oktay stated that about 4.000 judges and prosecutors had been purged ("Oktay: 4 bin FETÖ'cü hakim ve savcı", 2018) which roughly equalled to a quarter of the whole judiciary. As Çalı and Durmuş put it, "it is not known whether dismissed judges had an opportunity to defend themselves before the decisions are made pursuant to the procedural safeguards enshrined in the law" (Çalı & Durmuş, 2018, p. 1696).

On a side note, marking the instrumental nature of Turkish judiciary in the hands of politically-powerful once again, the period following the fallout between Gülenists and the AKP saw the reversal of ongoing lawsuits, opened and carried on by Gülenist judges and prosecutors and based controversially on counterfeit evidence and in violation of due process, such as Balyoz and Ergenekon, used once to topple secularist elite (Taş, 2017; Yeşilada, 2016) – although reversals did not signal that the secularists were returning to the helm whatsoever; they were articulated into the prevailing anti-Gülen sentiment under the reign of Erdoğan.

6.4 Finally some truth: The 2017 reforms

Given the rapacious nature of Erdoğan, it was predictable that relying on a coalition of different backgrounds in the Council, rather than his own loyalists, was unsettling, especially after the bitter experience of Gülenists. Considering the alignment of the nationalist party, MHP, with the AKP, the coup d'etat attempt of 2016 created a

window of opportunity to amend the Constitution in favour of a superpresidential system, to concentrate powers in the hand of the President to an extreme degree as now the two parties possessed the supermajority to amend the Constitution, if subsequently ratified by a referendum (Gözler, 2017; Kaboğlu, 2017). Apart from a wholesale system change that resulted in abandoning the parliamentary system, the amendments served to restructure the Council dramatically, bringing it under the control of the AKP in a pretty straightforward manner.[72] Thus, the amendments saw the external independence of the judiciary further eroded whereas the lack of internal independence persisted as the underlying legal structure through which the superiors dominated the lower courts remained intact.

With the new amendments, the number of members of the Council was reduced to 13, without any substitutes. The statuses of the Minister and his undersecretary as ex officio members remained intact with the former being the chair again. Four members (all being judges and prosecutors belonging to first class) were to be appointed by the President and seven members were to be appointed by the Parliament (three from the Court of Cassation, one from the Council of the State and three from among legal scholars and lawyers) with a majority of two-third. If a majority of two-thirds is not reached, three-fifths shall be required in the second ballot. If unsuccessful again, the election shall be concluded by a lot between the two candidates who received the highest number of votes.[73] Putting an end to the democratic experience, albeit defective in numerous aspects, of Turkish judiciary, thus revoking the only -and very limited- channel of accountability the ordinary judges and prosecutors had vis-a-vis the Council, these amendments practically

[72] One upside of such a straightforward approach was that this time Turkish public did not have to deal with telltale stories about the supposed liberization of the judiciary in which the steering wheel of the judiciary was simply and deliberately delegated to a religious sect.
[73] See the package: https://www.tbmm.gov.tr/kanunlar/k6771.html

brought the Council under the control of Erdoğan, along with the members he appointed himself, as his party, thanks to the MHP, now an ally, possessed the three-fifth majority needed.

The amendments were ratified by a controversial popular referendum held under a state of emergency, declared after the failed coup d'etat attempt and lasted for two years. Whereas the amendments regarding the change of a system entered in force after the snap elections held on June 24, 2018, the amendments pertaining to the Council entered in force right after the referendum – perhaps hinting at how pressing 'the question of justice' was (Çelik, 2018, p. 1083). Indeed, according to the usual electoral schedule, next parliamentary elections would have been held in November 2019, thus allowing the judiciary to hold another elections in October 2018 when the term of the second Council would have ended, with possible unwanted results. Nevertheless, two members out of seven were reserved to the MHP whereas the remainder of members were pro-government (Çelik, 2018, p. 1083-1084; "HSK'ya üye seçiminde", 2017; Karakoyun, 2017).

Although Erdoğan promised prior to referendum that the "pluralist" structure of the Council would remain intact in the new era ("Cumhurbaşkanı Erdoğan: İtirafçı", 2017), no councillor of social democrat origin, apart from Mehmet Yılmaz, remained on duty. Moreover, this "new" era saw social democrats (especially the members of the Union of Judges) and segments of nationalists moved to less desirable or less prestigious spots too, in the very first decree of the new Council – some usual scenes from Turkish judiciary (Menteş, 2017; "Partili HSK'den", 2017; "Sosyal demokrat ve ülkücü", 2017; Uğur, 2018; 2017; Yavaşoğlu, 2017). A judge who was moved from Ankara to Şanlıurfa after a critical article he published, only to retire and become a lawyer afterwards, indicated the importance of adhering to

certain religious sects to be appointed to prestigious posts, implying the strength of religious sects within the judiciary (Karadağ, 2017). All in all, most of the judges and prosecutors I conducted interviews with, claimed that the judiciary had never been *this* politicized as AKP finally consolidated its power within the judiciary too:

> The period before 2010 was more secure. Transfers were less frequent, dismissals were quite impossible. Military spheres were protected though . . . [Now] we can not even say that nepotism has increased, they are directly recruiting militants. Not all of them are militants obviously. Maybe the Court of Cassation. But there are also innocuous people at heavy penal courts and appellate courts too. But, overall, there are grave problems in terms of merit. There are judges who must under no circumstances have superior titles [yet, they have]. (Interviewee 8, personal communication, April 10, 2019) (see Appendix A, 40)

The bureaucratic channels utilized to 'get things done', prevailed in former regime, have been seemingly replaced by political ones:

> The dependence [of judges and prosecutors] used to be subjected to a culture and a tradition in the past. There were rules. The inclinations of judicial authorities and political power were more pre-determined. There used to be certain traditions and certain practices within the judiciary. Now, you see, thousands of people were expelled at once. Nothing is foreseeable . . . There used to be steps on the way to authority. Now there are no steps. Thousands of judges can be purged in one go. The Council is still powerful against judges and prosecutors but it does not have a specific weight against outside. In the past, when you had a problem, you would seek for a Council member [to sort it out]. Now, all instutitional structure has been dismantled. Now, being close to the [Presidential] Palace solves it all . . . The Council used to protect judges and prosecutors against lawyers. Now, if the lawyer has political connections, it may not even protect itself. (Interviewee 2, personal communication, February 5, 2019) (see Appendix A, 41)

Another judge, who has an experience of 30 years, claimed that now even to become a judge or a prosecutor, one has to have references within the ruling party:

> In the past members from Court of Cassation used to be references [about transfers to certain posts]. Now there are other considerations… Fellow-townsmenship… Political ones… They have become increasingly more important. Now, to even become a judge or a prosecutor, one has to have backing within the AKP. In the past, MİT [National Intelligence Service] would carry out an investigation over you. Now it is enough if you pass the [investigation of] AKP (Interviewee 3, personal communication, March 7, 2019) (see Appendix A, 42)

Finally, another judge complained about the arbitrariness surrounding grading and inspections and compared it with previous times:

> This is arbitrariness. It has always existed. But it has never been as arbitrary as it is now. I say this, even though, in terms of lifestyle, I am more in tune with this era. I have never suffered a concrete unjust treatment, that is because I have never requested anything from anyone. But we see, we know what is happening. In this HSK, members who come from the profession, who know the difficulties of the profession are few. Most of them are there because of political considerations. They do not know how much work a judge puts in to reach Ankara, to reach İstanbul… Therefore they can send you from X to Y [referring to his most recent transfer] with ease. They do not know how it crushes your established order. They are unaware of the challenges of the job. (Interviewee 4, personal communication, March 26, 2019) (see Appendix A, 43)

6.5 Implications of the Turkish case

Although one can trace back the hierarchical and bureaucratic structure of Turkish judiciary to the Ottoman Republic, this has a lot to do with the construction of the judiciary as the "enforcer of the Republic", in the words of the founder of the Republic, Kemal Atatürk, when he participated in the opening ceremony of the Law Faculty of Ankara University (Şakar, 2017). Started as a 'missionary school' of the grandiose law reforms that the newborn Republic had to undertake, the faculty remained as one of the two law faculties of the country until the 1980s and as the chief source of the judges and bureaucrats of the Republic. This spirit found its expression also in 2007, when Osman Arslan, the President of the Court of Cassation then, in a speech delivered to judges and prosecutors, asserted that "A primary component of judgeship is impartiality. However, in some of your decisions, you will take sides in protecting and making the Turkish Republic live on . . . You will take sides in democratic, secular State that is governed by rule of law; protecting and ascending the flag. You cannot be impartial in these subjects" (Şahin, 2007). Indeed, along with the military, the judiciary, and particularly the high judicial bodies have

been tasked with the duty of guarding the regime, forming a quasi-alliance, so to speak (Bakıner, 2016; Belge, 2006; Çınar, 2008; Koğacıoğlu 2004; Shamabayati, 2004; Shambayati & Kirdiş, 2009; Tezcür, 2007, 2009). It is beyond the scope of this study to assess whether this hierarchical composition has been designed deliberately during the institution-making process, or to assess how well it speaks to the state (*devlet*) – government (*hükümet*) dichotomy in the literature where the unelected branches such as the military, bureaucracy and the judiciary within the former exerts tutelary powers on the latter that represents elected officials (for example, see, Bâli, 2012; Shambayati, 2008). However it must be pointed out that with regard to controlling the judiciary, ideological composition of the whole of the judiciary did not matter much as long as higher echelons remained ideologically homogenous as the rest had to conform their conduct, no need to be wholeheartedly, to their 'superiors', thanks to a hierarchical outlook that gravely hindered internal judicial independence. Who controlled the high positions mattered greatly.

Thanks to this structure that resembles a bureaucratic cadre of the State, quite open to influences coming from the powerful, Turkish judiciary has acted far from a neutral third party settling disputes that arise between citizens and between citizens and the state – some on-duty judges even claim that Turkish judiciary is not a judiciary at all (see, generally, Ertekin, Özsu, Şahin, Şakar & Yiğit, 2014; Şakar, 2017). An incredibly weak set of professional guarantees for individual judges and prosecutors surely was the chief mechanism through which intimidation of the bench was accomplished, and, stated bluntly, who "owned" the higher echelons, owned the judiciary as a result of this hierarchical setting. This is demonstrated by the recurrent change of hands in the judiciary between 2010 and 2017; an outside actor that is powerful enough to capture the headquarters could control the judiciary as a whole

according to its will. This is because a judge or a prosecutor is bound with hierarchical ties to her 'superiors' in ways that exceed the purpose of maintaining the proper functioning of judicial mechanism and administration of justice and has a very limited autonomous scope of action. Therefore the overall setting makes it quite easy for an outside actor to subdue judicial corps, since influence exerted on the upper echelons of the hierarchical ladder, de jure or de facto, finds its resonance quite smoothly, and strictly too, in the bottom.

This positioning that almost resembles a bureaucratic body can also be seen in the relative invisibility of the Council until the unchallengeable position of the traditional power bloc came to be challenged in mid-2000s by a coalition headed mainly by Islamists. The Council had seldom been an object of public debate until such juncture, just as other bureaucratic cadres were not. This sits well with Bakıner's identification that the period between 1980 and 2005 saw a relation of collusion between the military and high courts (Bakıner, 2016) – give or take a year or two. The period between 2007 and 2017 saw heated debates with regard to the Council, since a new, solid political centre of power within the state could not be established to replace the traditional bloc that had been weakened over the time. One can predict that with the period commenced in 2017, both in terms of judicial governance (the “new” Council, staffed with loyalists) and the political realm in general (a super-presidential system established), as long as Erdoğan hangs onto power, the Council will be an invisible body once again, serving to reinforce the prevalence of status quo – apart from few anomalous incidents here and there, just like in the preceding era. In a similar vein, the reshuffling era between 2007 and 2017 can be seen as a window of opportunity, missed of course, to truly restructure and democratize the judiciary and change its fate from the stick which the politically

powerful uses against the dissidents to a neutral arbiter of disputes, in the formation of which all potential parties have participated; but such restructuring needed willing and able parties. The Turkish experience did not have such parties. What happened in the end was the change of hands of the weapon.

Referred to as "politicized apoliticism" by Bakıner (2014, p. 11-13), pointing out the seemingly apolitical stance of the judiciary that served to reinforce status quo; this positioning of the judiciary subservient to the state power, especially after the 1980 coup d'etat, similar to a bureaucratic cadre wherein taking orders from superiors is considered normal, has prevented the judiciary from emerging as an independent power to limit state actions. Indeed, Turkish judiciary has always been reluctant to prosecute the powerful, especially when linked to the state (Bakıner, 2014, p. 12; Erdem, 2005). However, this does not correspond to a rigid ideology of "statism" as some would have it. Of course there are judges and prosecutors with statist tendencies, glorifying it and putting the interests of the state above other values, as shown in the literature (Sancar & Atılgan, 2009). However, aligning with the politically powerful that is embodied within the state and an ideologically coherent set of values that corresponds to statism are two distinct positions. Being the 'survivors' they are, I doubt that Turkish judges and prosecutors are more statist than an average Turkish citizen, rather being mere subjects who are trying get along with the powerful; the will that is in charge of the state. This is in line with Kemal Şahin's assertion, an on-duty judge:

> Let's get rid of the nonsensical telltale that the judiciary is statist. Statism in the judiciary means politically preferring the state. But Turkish judiciary and Turkish judges are without any preferences against every type of power and authority. They are vagrants. They are devoid of an environment that would direct them to a political preference. Therefore what is preferred in the judiciary is not statism. What is prevalent in Turkey is the meek tradition of the judiciary and the judges against dictatorships, which necessitates their

> reduction to mere subjects of this tradition, not their articulation into a tradition of statism. (Şahin, 2016, p. 124)

Indeed, Turkish judges and prosecutors do not have much ‘preferences’ as ones who deviate from standards are frequently punished. This lack of leverages against the Council who regulate their careers makes them vulnerable to pressures, undermining their independence. To reiterate, a great deal of disciplinary procedures is marked with vagueness and secrecy. Even the publicity of decisions was achieved in 2010. One has to resort to “certain people” when subjected to a disciplinary proceeding, rather than letting the proceeding run its course. There are examples of bailed out judges that have been caught red-handed, i.e. bribery, and judges who face harsh sanctions of political nature over trivial things. Regulations are easily bendt – maybe they are established in such manner to be bent when needed. Nevertheless, when finally one adds that, apart from the decisions of dismissal, all decisions of the Council are exempted from judicial review and that before 2010 so were the dismissals, one can grasp the one-way dependence of judicial corps to the Council.

Nothing is more contagious than a bad example. In line with Sancar and Atılgan's (2009) finding that judges and prosecutors are inclined to bow down to power, seeing the tormented career paths of 'dissidents'; the lack of guarantees that renders judges and prosecutors defenseless results in seeking refugee in power and aligning further with the powerful. Indeed, some interviewees pointed out that cultivating relations with higher echelons of the judiciary, especially when the Council was formed solely by higher judges, was a quite common practice with numerous judges and prosecutors from all over the country making visits to Ankara for personal gains. Weak professional guarantees incentivize judges and prosecutors to seek for patrimonial ties to ensure a relatively safe and stable career – such ties are imperative if one seeks for more prestigious positions. Still, aligning with the

powerful does not manifest itself in solely developing personal ties. Several examples can be put forth, especially from the realm of judicial associations. The rise and fall of certain associations can be explained by this inclination to align with power. YARSAV made a decent start to its adventure by 501 founding members which reached 888 in a year, in an atmosphere where there were suspicions about judicial associations since there had been literally no associations whatsoever. The association owed this start certainly to its founding members, composing mostly of higher judges and prosecutors and the majority of the Council members who shared the judicial authority with the Minister then. However as time went on and it became obvious that YARSAV was on the losing side of the battle, especially after 2010, general assemblies of the association saw dwindling numbers of members, most of whom were young and inexperienced ones coming from provinces (mostly Gülenists who were in the midst of a process of infiltrating the association) as experienced judges and prosecutors were becoming increasingly avoidant of being seen with YARSAV (Köse, 2018; p. 253-254).

YBD is a tremendous example of this inclination to align with the powerful prevalent among judges and prosecutors. Rather than constituting a focal point in which judges and prosecutors articulate their demands and coordinate to protect their independence vis-a-vis other powers, YBD was an instrument of cooptation. As it turned out that the Council after the 2014 elections would be composed mostly of members of YBD, and of course let's not forget the 'warm' relations with the executive here, YBD saw a spurt in membership numbers – surpassing 5.000 in a year. As of April 2018, the association had more than 9.000 members which corresponded to more than half of the entire judiciary. When asked whether he thought judicial associations furthered the interests of judges and prosecutors, an

interviewee, who is a member of YBD himself, indicated that “YBD is occupied with sucking up the government now . . . The sole point [of associationism] must be improving the working conditions of judges and prosecutors. But in our case, they become either partisan or contrarian associations” (Interviewee 5, personal communication, March 27, 2019) (see Appendix A, 44). Another judge was adamant that “If the government decided to cut down the salaries of judges, YBD would be the first to support it. The others do not have the leverage, they are not pro-government. People do not want to be seen with them” (Interviewee 3, personal communication, March 7, 2019) (see Appendix A, 45).

In the face of this boom of YBD, on the other hand, the association with a social democrat pedigree, the Union of Judges, whose members have been 'exiled' frequently, has less than 80 members. Same could be said for the Democratic Judiciary as the association, in the face of plummeting membership numbers, had to open its doors to legal professions outside the judiciary. The stark difference in numbers cannot be explained with the ratio of ideological orientations within the judiciary but rather with an inclination to cultivate warm relations with the powerful that is prevalent among judges and prosecutors (Köse, 2018, p. 246-256).

Finally, the case of İbrahim Okur is revealing. Aligned with Gülenists, now in prison, he used to be a run-after man during the times of AKP – Gülen movement alliance. In an election system in which the electorate voted for names, instead of lists, running in the 2010 elections as the deputy undersecretary of the Ministry, he was able come first by obtaining 6.401 votes out of 10.222, surpassing 60 percent. In 2014, he ran again but he tried to keep his foot in both camps in the midst of a war going on between Gülenists and the AKP and tried to give the impression of a neutral stance. He could obtain 791 votes out of 12.520 this time.

Speaking of associations, the absence of judicial associations for decades surely deprived judges and prosecutors of a platform to lobby for their interests and betterment of perceived injustices and lack of professional guarantees. In a bitter contrast with their Italian counterparts who organized, lobbied and made their cases heard (and indeed succeeded) via a long-established judicial association, Turkish judges and prosecutors did not have such an opportunity until 2006. The fact that regarding initiatives have occurred in a top-down fashion (the pressures from the EU) and the first association formed was spearheaded by higher judges and prosecutors point to a lack of mobilization with regard to ordinary judges and prosecutors who constitute an overwhelming majority within the judiciary. This has to do with the relative lack of "class consciousness", a lack of "*esprit de corps*" within the judiciary that the interviewees pointed at. Indeed, there was a quasi-consensus among the interviewees that solidarity in the face of injustices is almost always absent among judicial corps and the dominant perception regarding a judge in the receiving end of a sanction is that she must have done something wrong (to deserve it): "There is no sense of professional solidarity in the judiciary . . . If you are transferred to another post, the attitude of your colleagues would be 'I wonder what fault did she commit'. Nobody mourns [for you]" (Interviewee 9, personal communication, April 18, 2019) (see Appendix A, 46). Similarly, a judge who faces a sanction often finds herself in isolation as her counterparts do not want to be seen together:

> Almost half of the judiciary was purged after July 15. Nobody came [to help]. They were alone. Common civil servants had more support. Everybody removed them from their contacts, let alone calling [to offer support]. It is a jungle out there, nobody trusts anybody. Will those who only think of themselves fight for the justice for the people? There is nothing humane here. (Interviewee 1, personal communication, February 3, 2019) (see Appendix A, 47).

Along the same lines, another judge asserted that:

> There used to be a vocational field [*mesleki bir alan*]. A community. There was solidarity and there were fights. After purges, it loosened. People do not want to get together. There were people who were arrested because an acquaintance turned out to be a Gülenist. Don't get me wrong, when I say solidarity, I don't mean it against the Council or against the political power. They would topple you right off . . . What I mean by solidarity originates from friendship, more practical . . . There used to be a sort of solidarity in the past. But then, for example, the judge who arrested a judge was arrested. Nobody trusts anybody now. Everyone looks at it like "I have a life, I have a family" . . . Everyone had their lives shattered . . . A very limited sense of solidarity, that is personal, compulsive relations. Class consciousness, a sense of a caste, does not exist . . . If someone blatantly suffered from injustice here, nobody would raise a finger. (Interviewee 2, personal communication, February 5, 2019) (see Appendix A, 48).

All these seem to be in line with Atılgan and Sancar's finding, from more than a decade ago, that the idea of associationism/unionization was predominantly perceived to be a phantasm among judges and prosecutors (2009, p. 101). This seems to be further aggrandized especially after the grandiose purges in the wake of July 15 coup d'etat attempt which seems to have traumatized the relations within the judiciary.

To sum up, Turkish experience is one that demonstrates that internal judicial independence is as important as the external gradient for independent behaviour. External actors relied on the hierarchical structure by which Turkish judiciary is organized, reinforced by a weak set of professional guarantees that increases reliance to 'superiors', to exert influence on the whole of judicial corps via de jure or de facto channels. This has been proven many times after 2010 when different outside actors could mold the judicial corps easily when they 'captured' the Council. Individuals are in a pretty fragile position against the Council, which is an unquestionable authority in their career, as they do not possess legal remedies against its decisions. Moreover, supreme courts also impose their wills in the judgments of lowers via their interventionist approach and their grades, further reducing the autonomy of

first-instance courts. Nevertheless, given the ease with which 'superiors' can ruin the careers of their 'subordinates' and force them to be 'prudent' in judicial conduct, all of these 'change of hearts', all these ‘captures’ owe to the hierarchical structure of the vertically-designed Turkish judiciary which leads to a winner-takes-all gamble. However much the judiciary shall be isolated from the political realm, thus providing external judicial independence, judges and prosecutors have to bear in mind the inclinations of upper echelons. Or even worse, when the upper echelons are subordinated to an outside will, exerting influence formally or informally, what one will get at the end of the day is a judicial machinery that serves to the goals of said will.

CHAPTER 7

CONCLUSION: "WHERE DO WE GO NOW BUT NOWHERE?"

After more than a decade of struggle to render the judiciary independent, on May 30, 2019, President Erdoğan made an hour-long speech to introduce a new judicial reform plan. Consisting of nine different goals, the second chapter of the document set as a goal "Improving the independence, impartiality and transparency of the judiciary".[74] The reform package was introduced on the very same day when the U.S. President Donald Trump thanked Erdoğan after a U.S. citizen detained in Turkey was released upon a pre-arranged phone call between counterparts, raising suspicions about the independence of Turkish judiciary (Flynn, 2019). Nevertheless, aimed at a more "foreseeable career course", the package touched upon some important issues, mostly covered by this thesis; from recruitment of judges by a more pluralist exam committee, to the possibility of judicial review of the acts of the Council; from providing transparency, objective criteria in the disciplinary procedures and increasing safeguards, to restructuration of the promotions. The most important aspect that made the headlines was the aim to introduce a guarantee of immovability of judges and prosecutors who have reached a certain level of experience in the profession. Oddly enough, the very next day, the HSK relocated more than 3.700 judges and prosecutors ("Yargıçlar Sendikası üyelerine yine sürgün", 2019; "Yargıtay hakiminden tayin isyanı", 2019). Even though most of them were relocated as a result of their promotions, judges and prosecutors who are thought to be dissidents had their share from relocations as they were transferred without their consent, again, hinting at the arbitrary nature of transfers.

[74] For the full content of the reform plan, see: https://www.yargireformu.com/images/YRS_TR.pdf For the version in English, see: https://www.yargireformu.com/images/YRS_ENG.pdf

The recurrent emphases on “a foreseeable career course”, which the upcoming reforms were advertised to be aiming at, is precisely what this thesis has sought to demonstrate as a means to understand the dependence of the judiciary of Turkey. An unforeseeable career, regulated and administered by a judicial council, against which individual judges and prosecutors has no mechanisms of checks and balances, be it an election system or judicial review of the acts of said Council or a decentralization of the judicial governance, is not the ideal recipe for judicial independence. Turkish judges and prosecutors have indeed remarkably unforeseeable careers, through which a hierarchical relationship between them and their ‘superiors’ have been constituted via mostly sticks and carrots utilized arbitrarily regarding the career course. This subordination of individual judges and prosecutors to upper echelons of the judiciary, thus hinders judicial independence as judges and prosecutors seek to conform their behaviour, in and out of the courthouse, to the will prevalent in upper echelons.

In order to understand this subordination, I juxtaposed it with the Italian case. I examined how the Italian case has unfolded over time, throughout the second and third chapters. Both civil law countries and seemingly started at a similar, post-authoritarian setting in which a hierarchical judiciary was subordinated to the executive, the creation of a judicial council created a breach in the hierarchical structure of Italian judiciary. Increasingly having a say on judicial governance first through voting in elections to the CSM and then mobilizing through their judicial association and lobbying for favourable legislation to pass, Italian magistrates practically dismantled the traditional hierarchical structure – of course with the help of a fragmented legislature wherein they could find allies for their case. This enhanced internal independence of Italian judiciary translated into external

independence, as exerting influence on top positions was not enough to exert influence on the judiciary in a decentralized setting, since the career course became essentially automatic and magistrates were endowed with sound judicial safeguards regarding their career course. Moreover, the internal composition of the CSM became diversified in the meantime, thus making it harder for a single principal to 'capture' the Council and monopolize decision-making processes. Even though portions of Italian judiciary engaged in collusive exchanges as the politicians still had informal channels to exert pressures, for those unaffected and willing to act, avenues were open as politicians were almost completely devoid of formal institutional measures to curb judicial power. This inability was seen in full force during the massive corruption investigations unfolding in the first half of the 1990s, which put an end to the traditional political setting of Italy.

Turkey has been different. Possessing few guarantees with regard to their profession and having their careers at the mercy of the judicial elite, against whom they had practically no mechanisms of checks and balances, Turkish judges and prosecutors were 'tamed' quite effectively. The unforeseeable career course of a judge or a prosecutor, with endless legal mechanisms possessed by the judicial elite to bring them in line when deviations from accepted standards occur, resulted in a hierarchical structure in which 'capturing' the higher posts meant exerting influence on whole judicial corps quite smoothly and effectively. Moreover, judges and prosecutors did not have a platform, an association as in the Italian case, to further their interests, articulate their demands and defend their independence against a career course that had the potential to be arbitrarily driven, which undermined their job security gravely. This became quite obvious after 2010 when different outside actors 'captured' the Council in a short span of time could steer the judiciary in

directions they wished by utilizing carrots and sticks arbitrarily. Those deviated were frequently punished whereas those who conformed were continuously rewarded. The judiciary of Turkey was simply structured in such a hierarchical way that an external principal could control the judiciary by controlling higher echelons. Thus, newcomers of post-2010 setting, in fact, inherited a judicial machinery that was ready to be controlled rather than curtailing the independence of the judiciary themselves. Of course, they did their best to capture the higher echelons but the underlying regime which regulated and administered careers of judges and prosecutors predate by few decades those post-2010 change of hands. The fact was that the underlying regime remained largely the same in its essence, notwithstanding frequent reshufflings of the composition of the HSK, which facilitated takeovers by an aspiring, ill-willed external party. In this way, we can see today's AKP-dominated judiciary not one-dimensionally as a result of AKP's efforts to curb judicial independence per se, but as a consequence of a legal regime that rendered the judicial game a winner-take-all gamble. Thus, the lack of internal independence of Turkish judges and prosecutors was one of the main channels that at the end of the day rendered Turkish judiciary dependent to external power groups. Although we can trace the roots of this legal regime back to the era of the junta, between 1980 and 1983, the emergence of such a setting dates well back to -at least- 1972 and on a larger scale, to the Ottoman times (Şakar, 2017). In the thesis, this trajectory was examined in the fifth chapter as it served to contextualize the recurrent 'changing of hands' of the judiciary after 2010, which was accounted for in the sixth chapter.

Therefore, stated briefly, Turkish judiciary has been structured vertically, like in a military setting, as opposed to the horizontal framework Italian magistrates have been working under. As a result of this structure, Turkish judges and prosecutors

have to take into account the inclinations of their superiors, which, undoubtedly, hindered their capacity to decide cases according to the law and their own interpretation and conscience. To make matters worse, such a setting makes it easier for an outside actor to 'capture' the judiciary. As such, moving beyond the traditional focus on executive versus higher courts level prevalent in the literature, this thesis has contributed to see judicial independence in a new dimension; a dimension mostly overlooked until recent times. Indeed, as those two cases show, judicial independence can be hindered also by threats coming inside of the judiciary, taking a variety of forms and in turn erode external independence of the judiciary. Moreover, even in judiciaries relatively isolated from other powers[75] such threats can arise. Thus, this thesis provides further evidence regarding the centrality of career statuses of individual judges and prosecutors in independent judicial behaviour. Regardless of grandiose reforms undertaken at the macro level to detach judiciary from political centres of power, at the end of the day, it is individual judges and prosecutors whom we expect to act independently and settle disputes in an independent and impartial manner. Career-wise pressures, emanating from outside or inside the judiciary, naturally, contradict such an expectation.

However central a foreseeable and stable career course in breeding independent judicial behaviour is, the emergence of an extreme degree of internal judicial independence in Italy was contingent on a variety of factors, as explained above. A peculiar type of political fragmentation wherein the second largest party was an eternal outsider and a vibrant culture of judicial associationism through which a growing generation of magistrates was willing and able to develop contact with political classes to make a case were the ones that had been argued throughout the

[75] As mentioned in the second chapter, there is mounting evidence coming from Central-Eastern European countries in this sense.

thesis. Moreover, the existence of pluralism inside the judiciary rendered the CSM uncapturable as well. In this sense, bearing in mind that civil law judiciaries typically exhibit low degrees of internal independence as a result of their traditional hierarchical imprint, was the Italian case a historical fluke? How do other civil law judiciaries perform in terms of internal judicial independence? Have judicial councils created a breach in the hierarchical structure there as well? Or, what types of checks and balances mechanisms are in force in those countries to ensure that professional careers of individual judges and prosecutors are not subjected to the will that is dominant in a judicial council? Is pluralism in a council enough to ensure internal judicial independence vis-a-vis judicial councils? A certain degree of abstraction is inevitable in the laws and regulations that administer judicial careers, but what ensures not relegating into arbitrariness through the leeway provided by such abstraction? Moreover there seems to be an inherent tension between accountability and independence, and, judicial councils, as seen in the literature, have been designed in order to address this tension, but, in a civil law setting, does the degree of independence savoured by Italian magistrates lead to all its side-effects such as inefficiency and a weak accountability in an inevitable manner? Those questions were beyond the scope of this thesis but they were the questions that occurred to me as I researched for this thesis, which, I assume, provide interesting avenues for future research, in order to grasp the interactions between internal and external judicial independence better, which has been largely overlooked by existing literature.

However, even without answering those loaded questions, this thesis contributes to the literature in two different aspects. First, it sheds light onto a relatively understudied aspect of judicial independence debate, that is the internal independence and the nature of relations between different levels within the

judiciary; in a relatively understudied country, that is Turkey. Indeed, there is a prevalent focus in the literature on executive – judiciary relations, the higher courts usually being the unit of analysis and career courses of individual judges and their relations with the institutions who govern those careers, judicial councils for this thesis, have remained largely understudied. In this sense, it provides a new perspective and goes beyond the existing accounts of Turkish judiciary. Second, since it examines the interactions between internal and external gradients of judicial independence, it emphasizes a new dimension, that is how the nature of relations that unravel *within* the judiciary can render the judiciary as a whole prone to external influences and takeovers. This particular focus on judicial career structure as a facilitating factor to 'capture' the judiciary by an ill-willed outside actor has the potential to open a new chapter on the growing literature on democratic backslide, authoritarianism and populist surge of recent years. Not only that judiciaries are among the first institutions that aspiring authoritarian leaders seek to attack but also the very possibility that, at least to some extent, judiciaries can act as the bulwarks to forestall such regressions means that the underlying conditions that renders a judiciary resilient or vulnerable against such external attacks and captures surely deserve attention. In this sense, drawing on Turkish example, one of the most notorious examples of democratic backslide where the judiciary was walked over with relative ease, this thesis offers valuable insight also for the literature on authoritarianism and populism.

All in all, internal independence is an inextricable dimension of judicial independence overall as judges and prosecutors care for their career just like everyone does. The latest reform plan that the Turkish government introduced signals a recognition of this dimension even though we have every right to be

suspicious about the ends the AKP government pursue, given its overall score on respect to judicial independence and its frivolous commitment to the rule of law in general. In fact, given the anecdotal evidence claiming that the government has been strictly recruiting its loyalists as judges and prosecutors and the mounting evidence of harassment against 'non-conforming' judges and prosecutors which forces them to retire, providing internal independence to a potentially rigged or biased judiciary might not result in the emergence of an independent judiciary in Turkey in the long run whatsoever. Since judges and prosecutors, in normal circumstances, enjoy life-long tenure, a pattern of staffing has long-enduring consequences. Thus, only time will tell.

APPENDIX A

QUOTES IN ORIGINAL LANGUAGES

1. “Anche se seguitiamo a chiamarlo Consiglio superiore in realtà è la Corte di cassazione.” (as cited in Alvazzi del Frate, 2004, p. 163)

2. “Autonomia e indipendenza da ogni potere: tuttavia, non in posizione chiusa, isolata, e tanto meno in antagonismo con gli altri uffici e organi, ma con spirito aperto, di armonia e cooperazione con quell’immanente senso dello Stato, nei suoi fini superiori unitari.” (as cited in Piana & Vauchez, 2012, “Il mantenimento di una cultura statalista dell’istituzione giudiziaria”, para. 3)

3. "Indipendenza, autonomia, autogoverno non possono significare né separazione dagli altri poteri, né soprattutto svincolo da controlli e sindacati, indispensabili nella complessità dell’organizzazione dello Stato.” (as cited in Piana & Vauchez, 2012, “L'abbandano della «grande riforma»”, para. 3)

4. “Ora tutto ciò può sembrare esatto ad una visione superficiale ed esterna del problema, ma non corrisponde ad un’appropriata indagine di essa. [...] Il Consiglio superiore non ha, invero, il compito di rappresentare gli interessi, i sentimenti o le istanze dell’una, o dell’altra categoria di magistrati. Esso è, invece, deputato dalla Costituzione al governo della stessa Magistratura, nell’interesse superiore della Giustizia e del Paese. Se questa è la sua funzione, la sua composizione deve necessariamente riflettere la struttura dell’ordinamento processuale italiano che si articola per gradi, culminanti, secondo un preciso

precetto costituzionale (art. 111) sotto il profilo organico nella Corte Suprema di Cassazione. [...] Orbene, se l'ordinamento giuridico italiano implica questa differenza di funzioni e se la funzione del giudice di primo grado è istituzionalmente sottoposta al controllo del giudice di appello e quella di quest'ultimo a quello della Cassazione e se il compito del Consiglio superiore consiste soprattutto nella valutazione dell'idoneità del magistrato alle sue funzioni od a quelle superiori, risulta "more geometrico" dimostrata la necessità di una maggior partecipazione dei magistrati di cassazione" (as cited in Bruti Liberati, 2018, "L'evoluzione nell'Anm", para. 12)

5. ". . . Premesso : 1) che ai fini di una retta amministrazione della giustizia è essenziale che i magistrati siano posti in condizioni di assoluta parità, qualunque sia la funzione specifica ad essi attribuita ; 2) che la funzione giudiziaria non è, del resto, suscettibile di una graduazione di valori, ogni sua attività essendo espressione immediata dello stesso potere sovrano ; e conseguentemente che il passaggio ad una diversa attività giudiziaria, compresa quella di cassazione, non deve costituire una promozione e non deve importare vantaggi di natura economica . . . Propone : 1) che venga assicurata l'uguale dignità di tutti i magistrati aventi il pieno esercizio della funzione giudiziaria, abolendo — con effetto immediato — ogni forma di avanza mento, salvo le promozioni da uditore giudiziario ad aggiunto e da aggiunto a giudice, e regolando lo sviluppo del trattamento economico esclusivamente in base all'anzianità e alla situazione di famiglia; . . ." (as cited in "Sulla Riforma dell'ordinamento Giudiziario", 1957, p. 100).

6. “L'Associazione non può che essere unitaria, come unitario è l’Ordine giudiziario: essa deve vivergli accanto... Deve esserne l’aspetto esterno, la voce che l’Ordine giudiziario non può rivolgere al Paese se non con le sue sentenze; deve anzi proporsi di penetrare nell’animo dei cittadini, facendo loro conoscere la magistratura con i suoi problemi e con l’esigenza della sua costante elevazione.” (as cited in Mammone, 2009, p. 43-44)

7. “A fronte del progressivo isterilimento dell'azione della magistratura tradizionalista, che si attarda sull'acritica celebrazione del formalismo giuridico, del dogma della certezza del diritto e del mito del giudice bouche de la loi, all'interno dell'ANM la dialettica tra le correnti schiude al dibattito associativo nuovi orizzonti ideologici, forieri di un rinnovamento culturale che imprimerà una decisiva accelerazione alle necessarie riforme ordinamentali.” Moroni (2005, p. 97)

8. “Il congresso afferma che il problema dell'indirizzo politico nell'ambito della funzione giurisdizionale non si pone, ovviamente, in termini di indirizzo politico contingente . . . bensi in termini di tutela dell'indirizzo politico-costituzionale, in quanto la Costituzione ha codificato determinate scelte politiche fondamentali, imponendole a tutti i poteri dello Stato, ivi compreso quello giudiziario, e attribuendo a quest'ultimo . . . il compito di garantirne il rispetto; . . . afferma che spetta pertanto al giudice, in posizione di imparzialità e indipendenza nei confronti di ogni organizzazione politica e di ogni centro di potere, 1) applicare direttamente le norme della Costituzione, quando ciò sia tecnicamente possibile in relazione al fatto concreto controverso; 2) rinviare all'esame della Corte

Costituzionale, anche d'ufficio, le leggi che non si prestino ad essere ricondotte, nel momento interpretativo, al dettato costituzionale; 3) interpretare tutte le leggi in conformità ai principi contenuti nella Costituzione, che rappresentano i nuovi principi fondamentali dell'ordinamento giuridico statuale. Si dichiara decisamente contrario alla concezione che pretende di ridurre l'interpretazione ad una attività puramente formalistica indifferente al contenuto e all'incidenza concreta della norma nella vita del paese. Il giudice, all'opposto, deve essere consapevole della portata politico-costituzionale della propria funzione di garanzia, così da assicurare, pur negli invalicabili confini della sua subordinazione alla legge, una applicazione della norma conforme alle finalità fondamentali volute dalla Costituzione." (as cited in Moroni, 2005, p.100-101)

9. "Il dibattito associativo si misura con la dimensione politica dell'attività giudiziaria, i magistrati si confrontano con i grandi problemi del paese e ridiscutono il ruolo del giudice in una società che si sta vorticosamente trasformando: l'ideologia della separatezza del corpo viene messa in crisi." (Bruti Liberati, 2018, "1965. Donne in magistratura e congresso di Gardone", para. 16)

10. "Si delinea una nuova figura di magistrato, che comincia a uscire dalla torre d'avorio e a misurarsi con le critiche e domande di giustizia provenienti dalla societa civile." (Moroni, 2005, p. 101-102)

11. "Negli anni trenta, in una corporazione come la magistratura, il clima culturale risentiva ancora del precedente periodo liberale . . . Durante tutti gli anni trenta, mi imbattei in colleghi piu anziani che erano, a volte, dichiaramente antifascisti

(una minoranza devo dire); piu spesso, stragrande maggioranza, afascisti; quasi mai fascisti convinti. Soltanto nei gradi piu alti trovavi magistrati supini al regime. Negli anni cinquanta -al contrario- al vertice della magistratura si trovarono spesso giudici che avevano fatto una rapida carriera durante e grazie al fascismo: non sempre per meriti professionali." (Galante Garrone, 1994, p. 41-42)

12. "La maggioranza dell'attuale Consiglio . . . mostra di propendere per l'indirizzo proprio di quella piccola parte della magistratura che fa capo a gruppi oligarchici interni, i quali non vogliono mutare nulla del vecchio ordine, nemmeno quando lo Stato, con le sue leggi (vedi leggi sulle promozioni) ha manifestato la volontà di mutarlo radicalmente." (as cited in Mammone, 2009, p. 45)

13. "Non più, dunque, l'integrazione a senso unico della magistratura con il ceto politico di governo, che aveva caratterizzato i primi trent'anni dello Stato italiano; non più l'apparente separatezza dalla politica, in funzione di copertura del ruolo subalterno nei confronti dell'esecutivo, secondo lo schema sperimentato durante il successivo periodo liberale, il regime fascista e i primi vent'anni della Repubblica, ma l'«integrazione pluralistica con tutte le forze politiche dell'arco costituzionale, anche di opposizione, e con vaste istanze della società civile». Si può dire che, dopo la legge n. 695/1975, che rappresenta la più importante riforma elettorale del sistema di elezione dei membri 'togati', c'è un CSM ben diverso da quello delle origini. È un organo 'democratizzato', dove trova piena espressione il pluralismo politicoculturale presente nel corpo giudiziario, che

costituisce una garanzia fondamentale per l'indipendenza interna dei magistrati." (Ferri, 2018, p. 31-32)

14. "Hakimler daha çok etkileniyor burada. Bir yerde hakim 1.sınıfa ayrılamamıştı, kaybedecek bir şeyi yoktu, direniyorduk. Ama genelde not kaygısı hakimlerde çok yoğundur, bu döner temyiz etme derler . . . Not kaygısı adaletten çok çok ileridedir. Ben bizde adaleti ilk sıraya alan pek görmedim." (Interviewee 9)

15. "Nesnel bir kritere bağlanmadı not sistemi ama. Kriterler belirlemişler ama pratiğe dökülemiyor. Not hakimin cesaretini de kırıyor. Notun geri getirilmesinin amacı da, direnme kararları çok artmıştı. İnandığı karara direniyor." (Interviewee 5)

16. "Değil (gülüyor). Olmadığını düşünüyorum. Çünkü verdiği kararlar nedeniyle tayin-terfisi etkileniyorsa bağımsız değldir bu hakim. Ben mesela karar sebebiyle not verilmesine karşıyım. Bu bağımsızlığa aykırı." (Interviewee 4)

17. "O kadar çok ki hangi birini anlatayım. Eskiden şahsi tanışıklıklar önemliydi. Şimdi siyasal ve dini bağlantılar önemli." (Interviewee 6)

18. "2010 öncesi Kemalist-bürokratik referans. 2010-14 cemaat. 2014-17 2010 öncesine benzeyen bir koalisyon, biliyorsun. 2017 sonrası saray. AKP – MHPden direkt referansı getir, hemen ulaşırsın." (Interviewee 1)

19. “Referanslar tabii var . . . Bu ilişki kurma eğilimi, yükselmek için, eskiden beri var. Dikkat çekici şekilde referanslarla yükselen vasat hakimler olabiliyordu. Dikkatimi çekti, HSYK üyesiyle iletişime geçtim, birkaç saat sonra döndü, senin talebini de dikkate alacağız dedi. Siz ne kadar iyi olursanız olun, talepleriniz kağıt üzerinde kalırsa önünüze geçenler olur. Eskiden de böyleydi . . . Dikkat çekmem gerekti. Şu an ise her şey siyasal.” (Interviewee 3)

20. “Şu an 1 tane geçiriyorum. Bu soruşturma soruşturanın vicdani kanaatiyle sonuçlanacağını düşünmüyorum. Gözdağı bu. Veya sürgüne hazırlık . . . Ben savunmamı verdim. Zaten isnat bile belli değil. Orada ne ayaksın tarzı bir suçlama. Ne suç teşkil ediyor belli değil.” (Interviewee 8)

21. “Düşünmüyorum. Belki mahiyetine bağlı bir ayrım yapabiliriz. Siyasi ise tamamen güvensiz. Ama gayrı siyasi konularda adil bir süreç geçirilebilir. Ama çok büyük paralar, çok büyük cezalar varsa, hükümetçi avukatlardan giden şikayetler varsa o hakim de gidebilir. Hatırlı birileri girebilir araya ama çok önemli olması gerekir.” (Interviewee 8)

22. “Bize hala kanunun hangi maddesini ihlal ettiğimiz bildirilmez. Hangi istemle soruşturma açıldığı da bilinmez. Soruşturma raporları bile gösterilmezdi, biz ısrar ettik, savunma vermemekte direndik. İddianame yerine geçer. Bunun rutini yok.” (Interviewee 6)

23. “Çok objektif kurallara tabii diyemeyeceğim. Bir yargılama faaliyeti gibi olmuyor. Çok adil değil. Ahmet bunu diyor, Mehmet bunu diyor, bu ifadeleri

alıyor. Yargılamada bir süzgeçten geçiyor. Orada seçiyor istediğini, üstünü çizmek istiyorsa çiziyor. Bütün disiplin soruşturmaları böyle . . . Kaymakamlık memuruna karşı soruşturma açmak için bile izin vs almak lazım." (Interviewee 5)

24. "İsterse mobbing yapar, hayatı cehennem edebilir. Burası büyük olduğu için ayda yılda 1 görürüz. Küçük yerlerde daha çok ilişki olur." (Interviewee 9)

25. "Kurul direkt başsavcıyı muhatap alıyor. Hangi hakimin atanacağı, disiplin soruşturmaları vs. Başkanın adamıdır artık. Ona göre teşkilatlandırılır . . . Kötü geçinirsen her an diken üstündesin. HSYK ile doğrudan ilişkisi olduğu için seni uyumsuz diye yollayabilir. Tamamen iktidarın bayraktarı olmak zorunda başsavcı." (Interviewee 6)

26. "Adliyede dışlanmamak ve huzurlu çalışmak için bazı şeylere katlanman gerekir. Adalet komisyonu ve başsavcı HSK'nin resmi kanalları. Komisyona ters düşemezsin. Başsavcıya da ters düşemezsin. Ama gayrıresmi kanallar da var . . . Yerel muhbirler. Seni jurnallerler. Bir cemaat kültüründen bahsediyoruz burada." (Interviewee 1)

27. "Her şeye bunlar karar verir. Neler? Başsavcı, başkan, HSYK'nın görevlendirdiği bir hakim. HSYK seçer başkanı. Katipler çok önemli. İyi katip hakimin her şeyidir. Komisyon görevlendiriyor bunları. Hangi odada oturacaksın. Mal mülk harcama yetkisi onda. Mali yetkilerin tamamı başsavcıda. Geçici işle angarya kilitleyebilir. Mazeret izni ondan alınır. Hakkındaki herhangi bir şeyi Kurul'a bildirir . . . Adliyede her şey bunlardan sorulur. Başsavcı zaten patronu savcıların.

Kararlarına karşı yargı yolu yok. Olsa ne fark edecek? Güçlüysen zaten sana bulaşmaz. Güçsüzsen de dava sonuçlanana kadar her türlü pisliği görürsün." (Interviewee 2)

28. "Ben 2.5 yıldır buradayım. 10-12 katip olmuştur. Alıyor başka yere veriyor. Onun görevlendirilmesinde dahi etkin değilsin. Sana sorulmuyor bile." (Interviewee 4)

29. "Teftişte önce sayıya bakılır . . . Bir kitabi yönü, iş yükü, duruşma içerisinde kurallar vs. Canına okunacak hakim varsa okur. Her türlü araştırmayı yapar. Hakimi manavdan, çaycıdan sorabilir. Eski hal kağıdında "sağlık, kılık kıyafet, çevresinde bıraktığı intiba" vs vardı." (Interviewee 2)

30. "Müfettiş dosyayı alıyor inceliyor. Usuli yönden inceliyor. Dosya düzeni, kalem düzeni... Bu muhbirlik olayı azaldı. Bizden önceki dönemde çok fazlaymış. Normal teftişte esnafa vs sormak yok. Ama şikayet olursa çağırıp şikayetçileri dinliyorlar. Kılık kıyafeti hala kontrol ediyorlar. Müfettişle görüşme çok olmaz. Dosya üzerinden ilerler. Bizi asıl değerlendiren kriterler usuli kriterler. Bu büyük yerlerde böyle tabii. Küçük yerlerde görüyorlar her şeyi. Tabi şu da var, bizim dönemde sürekli güdüme girdiği için yargı, hep kendi kişilerini öne çıkarmak için hal kağıdını ona göre düzenliyorlar. Adam belki hiç görmediği birine 90-95 veriyor. Bir yerde başsavcı atanacak, yüksek puanlı öne çıkıyor doğal olarak." (Interviewee 5)

31. “Şu an da kişisel özellikler üzerinden not veriyorlar. Denetim imkanı yok. Kesinlikle teftişlerde dünya görüşü önem arz ediyor.” (Interviewee 6)

32. “Her döneme göre mezhepler değişebiliyor tabi. İnsanların dışarı yansıyan yaşam tarzları değişebiliyor. 2010 öncesi müfettişlere alkollü içki düzenlenirdi. Şimdi yok. Şimdi herkes cuma'ya gidiyor (gülüyor). Hakim-savcı eskiden farklı yönlerini göstermek isterdi, şimdi farklı yönlerini gösteriyor. Ama her dönemin adamı olan adamlar da var. Hep etkinler. Ben ama 2010 öncesi bir sıkıntı yaşamadım. Sonra da yaşamadım.” (Interviewee 4)

33. “Teftişlerde o dönemki iktidar neyse, kılık kıyafeti, yaşam pratikleri ona göre değişir. AKP öncesinde masada rakı olurdu. İçmeseler de olurdu masada. 2010 sonrasında da ayran.” (Interviewee 1)

34. “Küçük yerlerde görev yaparken herkes sizi tanıyor, bu yüzden çok dikkat etmeniz gerekiyor. Küçük yerlerde daha çok kendi meslektaşlarımız, kaymakamlar, emniyet müdürleri, memurlar hep çevremiz.” (Interviewee 7)

35. Page 150: “Adliye bir risk unsuru artık. Deprem gibi. Her şey başınıza gelebilir. Belalı bir şey, bulaşmışssınız. Size verilen her şey sizi tehdit eden bir şeye dönüşmüş durumda.” (Interviewee 2)

36. “Keşke memur olsak. Memurlar daha güvenceli. En azından sendikaları var. Dava açabiliyorlar. Resmen siyaset yapabiliyorlar, görüyorum sosyal medyada. Hakimler çok sorunlu durumda. Hakim-savcılar memurdan aşağı durumda. Şu an

en büyük korkuları bir iftiraya uğrar da ihraç edilir miyim, biri hakkımda bir şey der de başıma bir iş gelir mi diye meslektaşlarından uzak duruyor hakim artık lojmanlarda, adliyelerde" (Interviewee 6)

37. "Çok göze batmıyorsun, çok elemanın, torpilin yok. Süren doldukça seni yolluyorlar istedikleri yere. Özellikle şimdi, mesela birinin yerimde gözü varsa, torpili iyiyse beni tayin edebilirler. Torpil had safhada şu an . . . 1. bölgeye geldim, burada kalırım diye bir şey yok. Urfa, Mardin, Afyon hepsi 1. bölge. Buralar sürgün bölgesi oldu . . . İstanbul'un en kıdemli hakimleri dahi sürülebiliyor. Çok duyuyorum. Çok var. 2013'te ben de sürüldüm. Benimle uğraşan HSYK üyesini de biliyorum. Ama neden bilmiyorum." (Interviewee 5)

38. "İkili yapı kalktı. Fazla siyasileşti. 2010 öncesinde HSK vardı. HSK'daki egemen bürokrat kanal topluma sızamıyordu. Sen Atatürk rozetini takarsın ama sana sızamaz. 2010 sonrası ise totaliter bir yapı var. Çoğunluk muhafazakar zira. Artık iktidar sahibilerdir çünkü. Bir toplum – iktidar bütünleşmesi oluştu. Buradan totaliter bir yapı çıkar." (Interviewee 1)

39. "Devlet, yargı ve ordu bürokrasisi ile yönetilirdi. Siyaset kısıtlıydı ve HSK ile çatışma yaşanmıyordu. Ne zaman siyaset ordudan bağımsız kaldı, çatışma yaşanmaya başladı. Biz o dönem en büyük özgürlükleri yaşadık. 2010-13 arasında ise tam tersi. Siyaset AKP'de, bürokrasi cemaat elinde. 2013'teki çatışma mesela AKP kazanana kadar rahattık. Yine 2007-10 arası daha da özgürdük. Ne zaman iktidar konsolide oldu, bunlar daraldı." (Interviewee 2).

40. “2010 öncesi daha güvenceliydi. Yer değiştirme zordu, meslekten çıkarma imkansızdı. Askeri kesim korunurdu fakat . . . Kayrılma arttı diyemeyiz, artık militan alıyorlar. Tamamı militan diyemeyiz elbette. Yargıtay belki. Ama ACM ve BAM içinde başkanlar vs içlerinde kendi halinde insanlar da var. Ama liyakat yönünden büyük sorunlar var. Hiçbir şart altında unvan verilmeyecek hakimler kategorisi var.” (Interviewee 8)

41. “Eskiden bağımlılık daha belli bir kültüre ve geleneğe tabi idi. Kuralları vardı. Yargı iktidarının, siyasal iktidarın eğilimleri çok daha belliydi. Yargıda belli gelenekler, uygulamalar vardı. Şimdi binlerce adam meslekten atıldı. Öngörülebilir bir şey yok . . . İktidarın belli basamakları vardı. Şimdi basamaklar kalktı. Binlerce hakim tek kalemde meslekten atılabiliyor. HSK hakimler için hala güçlü ama özgül bir ağırlığı kalmadı dışa karşı. Eskiden bir sıkıntın olurdu HSK üyesinden çözüm arardın. Şimdi tüm kurumsallık çökmüş. Şimdi Saray'a yakınlık her şeyi çözüyor . . . Eskiden Kurul hakimi sıradan bir avukata karşı korurdu. Artık siyaset ile bağlantısı varsa kendisini dahi koruyamayabilir.” (Interviewee 2)

42. “Eskiden Yargıtay üyeleri referans olurdu. Şimdi başka etkiler de var. Hemşehrisi. Siyasi mülahazalar. Artık gittikçe daha etkin hale geldi. Artık hakim-savcı olabilmek için bile AKP'den torpil lazım. Eskden MİT denetimi yapılırdı, artık AKP'den geçsen yeter.” (Interviewee 3)

43. “Bu keyfilik. Her dönemde var. Ama bu dönem kadar nhiçbir dönemde keyfilik olmadı. Yaşam tarzı olarak bu döneme daha yakınım, buna rağmen bunu

söylüyorum. Hiçbir dönem somut mağduriyet yaşamadım zira kimseden bir talebim olmadı. Ama görüyoruz, biliyoruz yaşananları da. Bu dönemdeki HSYK'da meslekten gelen, mesleğin zorluklarını bilen üye sayısı az. Çoğunluk siyasi mülahazalarla gelmiş üyeler. Bir hakim-savcı ne kadar çalışıp Ankara'ya gelmiş İstanbul'a gelmiş bilmez, dolayısıyla seni X'den Y'ye rahatça verebilir. Senin kurulu düzenini nasıl bozacağını bilmez. Mesleğin dertlerinden haberdar değildir." (Interviewee 4)

44. "Şu anda hükümete yağcılık yapmakla meşguller . . . Bizim çıkış amacımız hakim ve savcıların şartlarını iyileştirmek olmalı. Ama bizde ya muhalif ya yancı oluyorlar." (Interviewee 5)

45. "Hükümet desin ki hakimlerin maaşlarını indireceğiz, ilk destek YBD'den gelir. Diğerlerinin zaten gücü yok, muhalif. Kimse orada gözükmek istemiyor." (Interviewee 3)

46. "Yargıda mesleki bir dayanışma yok . . . Meslektaşların yaklaşımı da tayinin çıktığında "ne kabahati oldu acaba" diye düşünür. Kimse ah vah etmez." (Interviewee 9)

47. "100 kişiden 48i derdest edildi 15 temmuzdan sonra, kimse gelmedi. Yalnızlardı. Sıradan memurların bile desteği daha fazlaydı. Herkes rehberlerden adlarını silindi, bırak aramayı. Kimsenin birbirine güvenmediği bir kurtlar sofrası. Sadece kendini düşünen adamlar halkın adaleti için mi savaşacak? İnsana ait hiçbir şey yok." (Interviewee 1)

48. “Eskiden mesleki bir alan vardı. Camia. Dayanışma ve kavga vardı. Fetöden sonra camiada artık güvensizlikten ötürü bir gevşeme yaşandı. İnsanlar bir araya gelmek istemiyor. Gezdiği adam fetöcü çıktığı için alınanlar oldu. Dayanışma dediğim de Kurul'a karşı veya iktidara karşı değil. Anında alaşağı ederler . . . Dayanışma dediğimiz pratik, arkadaşlık kökenli şeyler . . . Dayanışma bakımından eskiden dayanışma, taassup vardı. Hakimi tutuklanan hakim tutuklandı. Kimse kimseye güvenmez. Herkes 'benim de bir ailem hayatım var' diye bakıyor . . . Herkesin hayatı darmadağın oldu . . . Çok sınırlı bir dayanışma, o da kişisel mecburi ilişkiler. Sınıf bilinci, kast bilinci hiç yok . . . Şurada biri göz göre göre haksızlığa uğrasın, buradaki kimse parmağını kıpırdatmaz.” (Interviewee 2)

APPENDIX B

INTERVIEWEES

Interviewee 1: Judge. Male. 21 years of experience. February 3, 2019.

Interviewee 2: Judge. Male. 20 years of experience. February 5, 2019.

Interviewee 3: Judge. Male. 30 years of experience. March 7, 2019.

Interviewee 4: Judge. Male. 21 years of experience. March 26, 2019.

Interviewee 5: Judge. Male. 25 years of experience. March 27, 2019.

Interviewee 6: Judge. Male. 23 years of experience. March 28, 2019.

Interviewee 7: Judge. Female. 9 years of experience. April 2, 2019.

Interviewee 8: Judge. Male. 25 years of experience. April 10, 2019.

Interviewee 9: Public prosecutor. Male. 25 years of experience. April 18, 2019.

Interviewee 10: Judge. Male. 21 years of experience. April 19, 2019.

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