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SILVIA CIOTTI GALETTI

THE ITALIAN COURT HONORARY JUDGES

In 1998 the Italian normative about the judiciary changed in a considerable way. First of all, courts' composition and competence changed: before 1998, besides Justices of the Peace and the Court of Assizes, in Italy on the first instance there were a single judge court (the so called Pretura), appointed to matters of minor complexity, and a three components court (the Tribunale, with different judges) appointed to more serious offences. In 1998, as we are going to see, Pretura was abolished and its competence was assigned to the Tribunale, creating a new so called "single first instance judge", deciding as a single judge court about the matters of minor complexity and as a panel of three judges on more serious offences: but people deciding as a single or in the panel are the same. As a rule, these judges are selected with the old kind of complex examinations, they work as Ministry of Justice's employees and gain a regular salary.

On the other hand, the 1998 law created a new kind of first instance civil and criminal judges, the so called "honorary court judges": these judges are selected only by their academic titles, work as a kind of professional men, or women, (they are not Ministry of Justice's employees) and have no regular salary, gaining only a little reward for the single days in which they go to the sittings. Besides these characteristics, their work and competence are the same established for the other first instance judges. Their task last three years, but they can be confirmed for other three.

The aim was to have judges with simple and quick procedures, in a very brief time, to supply the vacancies in the role of the "regular" judges, trying at the same time to appoint them to the most simple cases. But the lacks in the judges roles are so wide and lasting, and so difficult to supply with the traditional examinations, that the honorary court judges started to work exactly as other judges, with the same number of sittings during the week and the same, huge competence. However, their rewards remain really lower than the other judges' salary and after the three years task (or the six years task, if they are confirmed) they have no perspectives, and have to change job.

These characteristics, added up to others, make this professional figure very weak, even if this kind of task is really a remarkable and increasing phenomenon in all the Italian courts.

In this work we try to explain why the honorary judge is so relevant in the actual Italian judicial system, why this professional figure is consider as a solution for the lacks and vacancies of the system itself and which are the perspectives, the weakness and the troubles connected to this particular kind of judge.

INTRODUCTION

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THE JUDICIAL FUNCTION IN ITALY. AN OVERVIEW

In Italy there are different kinds of jurisdiction: *constitutional jurisdiction* (deciding on constitutional consistency of laws and similar acts, on jurisdiction conflicts among the State powers, the State and the Regions, and the various Regions, and on charges against the President of the Republic), *special jurisdictions* (specialised divisions, as the Military Judiciary, the Administrative Judiciary and so on) and *ordinary jurisdiction*.

Ordinary jurisdiction is exercised by ordinary judges and prosecutors, who are considered judges and prosecutors because they are created and regulated by the laws of the judicial system.¹ They have a separate status from other judges which derives from:

- a. the privilege of independence, envisaged by the Constitution,²
- b. the fact that they are subject only to the law and to the authority of their self – governing body: the *Consiglio Superiore della Magistratura* (C.S.M., the Superior Council of Judiciary).³ Under the judicial system's laws, the C.S.M. is in charge of the employment, assignment/transfer, career advancement and disciplinary measures affecting judges and prosecutors.

Ordinary jurisdiction (still regulated by the Royal Decree no. 12 of 30th January 1941, simply modified during the years) is divided into:

- *criminal jurisdiction*, where judges are called to make a decision on whether the criminal proceedings instituted by a public prosecutor against a certain individual are founded or not;

- *civil jurisdiction*, aimed at the legal protection of rights among private subjects or between a private subject and the public administration (if this one, exercising its duties, prejudices the persons' subjective rights).

Criminal proceedings are instituted by a member of the ordinary judiciary exercising the office of public prosecutor⁴. Civil and criminal proceedings are regulated by two distinguished series of procedural rules: *the code of civil procedure and the code of criminal procedure*.

The code of criminal procedure was completely amended in 1988 by switching from an inquisitorial – type system to a basically adversarial system, based (amongst other principles) on:

- the equality of the prosecution and the defence;
- the creation of evidence before the judge during the trial.

After the passing of numerous laws, which mitigated the adversarial nature of the criminal proceeding (trying to protect society from organised crime), the recent amendment of the article no. 111 of the Italian Constitution has expressly sanctioned the basic adversarial principle of the creation of evidence during the trial in the presence of both prosecution and defence and protected the defendant's absolute right to evidence.

The reformed article 111 of the Constitution concerns every and each trial, both civil, criminal, administrative and accounting, in the part in which the rule of a fair trial is expressly safeguarded. Under said rule, each and every trial must be carried out in the presence of both parties, in conditions of equality, before an impartial judge with a third – party status and must be of reasonable duration. The right to a reasonable duration of the trial has recently been expressly recognised by Law n. 89 of 24th March 2001, which grants the parties the right to ask the State for fair pecuniary compensation, in the event that the said right is breached.

Currently, civil and criminal justice is administered by: Justices of the peace, the Courts (*Tribunale* and *Court of Assizes*), the Courts of Appeal, the Court of Cassation, the Juvenile courts and the *Tribunale di Sorveglianza* (the court supervising the enforcement of sentences), sitting both as a single judge and as a panel of judges.⁵

Pursuant to the reform of the single first instance judge,⁶ the first instance courts have been reorganised by abolishing the *Pretura*⁷ and assigning its competence to the Tribunale, which now sits both as a single judge court for matters of minor complexity, and as a panel of three judges for more serious cases. Similarly, the public prosecutor's office attached to the *Pretura* has been abolished and its functions have been assigned to the public prosecutor's office attached to the *Tribunale*.

Now, let's give a glance at the competence on criminal matters on first instance (Justice of the peace, *Tribunale* and *Court of Assizes*):

A. ***Justice of the peace***

To speak in general terms, the Justice of the peace has a competence on offences punished with a fine or a sentence to prison for a maximum of four months (but the imprisonment should be converted in something different from detention, like a fine), and on simple crimes, that need no investigations nor study of complex and controversial laws, as blows, some kinds of personal wounds and injuries (the less serious ones), abandonment of animals, killing or damaging of other people's animals, and similar crimes; it has a competence also on pubs serving alcoholic drinks to minors or to persons already evidently drunk.

B. *Tribunale*

Tribunale is the most important court in this study, because honorary court judges and honorary deputy prosecutors are attached to this criminal judicial offices, so we are going to see its competence in detail.

Table. 1 – Tribunale and its competence

As a single judge court	As a panel of three judges
Offences punished with a fine or/and the imprisonment for a maximum of four years, and crimes against public officers, the most serious kinds of personal wounds and injuries, insults, damaging, defamation, threat and thefts, the receiving of stolen goods, manslaughter, and so on.	Every serious offence not regarding the competence of the <i>Tribunale</i> as a single judge court or the Court of Assizes, and crimes committed by public officers and employees against the public administration, some kind of fraudulent bankruptcy (the most serious ones), insider trading, crimes concerning weapons, attempted murder, sex crimes and crimes connected to paedophilia, unlawful restraint, participation to secret associations, and so on.

It is interesting to notice that the *Tribunale*, when deciding as a single judge court, has a competence on offences punished with the imprisonment for a maximum of four years, but it can sentence to a longer period if there are some aggravating circumstances: for example, swindle is punished with a maximum imprisonment of three years, but if there are aggravating circumstances it can be punished with five years imprisonment, or more; and the competence remains in the hands of the single judge court.

C. *Court of assizes*

Has a competence on offences punished with life imprisonment or long – term imprisonment. It can be said that this court has a competence on "bloody crimes", as wilful murder, slaughter, genocide, instigation to suicide, slave trade, slave market, and so on. This kind of crimes are considered particularly hateful, and their nature request the presence of a jury (Court of Assizes is the only one court in Italy composed by two professional judges and a jury composed by six members coming from the common people).

ORDINARY JURISDICTION: "PROFESSIONAL" AND "HONORARY" JUDGES

Ordinary jurisdiction is administered by professional judges and honorary judges, who both form part of the judiciary⁸.

After the two reforms operated in 1991 and 1998, honorary judges now consist of:

- a. *justice of the peace*, who are now competent (both in the civil and criminal field) to deal with matters previously dealt by professional judges;
- b. *honorary judges*, attached to the so-called "*Sezioni Stralcio*" (Temporary Divisions), established to go through the civil cases pending at the date of 30th April 1995;
- c. *court honorary judges*, attached to the civil and criminal judicial offices;
- d. *honorary deputy prosecutors*, attached to the prosecuting offices;
- e. *experts* of the courts and the Juvenile divisions of the Courts of Appeal;
- f. *lay judges* of the Courts of Assizes;
- g. *experts working* for the *Tribunale di Sorveglianza* and for the specialised agricultural divisions.

Access to the professional role of judge and prosecutor (both in the civil and criminal sector) takes place through a public competitive examination pursuant to article 106, paragraph 1, of the Constitution.

In the last few years, the legislator has constituted post – graduate schools within the Universities for law – graduate students that want to enter the legal professions (not still totally activated), and written and oral exams were sided by a computerised preliminary test on the subject matters dealt with in the written exam. A law degree is required to be admitted to take the exam, and when the post – graduate schools for legal professions become operative the candidates will need to have a post – graduate certificate in addition to a law degree.

The competitive public examination consists of three written exams (on civil, criminal and administrative law) and an oral exam on the main legal subjects (more than ten subjects, like civil and criminal procedure, civil, criminal and administrative law, canon law, Roman law, statistics and so on). The successful candidates of the examinations are appointed trainee judges and prosecutors and posted to a first instance judicial office attached to a Court of appeal for the prescribed training. The length of the training is decided by the *Consiglio Superiore della Magistratura* (the self – governing body of judges and prosecutors), and is not normally less than twelve months; the training consist of attending a judicial office and co – operating in the judicial activity performed by other judges and prosecutors in the civil and criminal sector either as a single or associate judges or alternatively as public prosecutors.

Things are different for court honorary judges and honorary deputy prosecutors. As we said, they are not chosen by a competitive public examination, but they are simply appointed by the *Consiglio Superiore della Magistratura*. Who wants to become a court honorary judge or a honorary deputy prosecutor obviously needs a law degree; He, or she, has to present an instance to the *Tribunale* where he/she wants to work, with *a curriculum vitae et studiorum* and other documents, and the Tribunale shall express an opinion on the candidate (after some investigations on the person, his/her personality, actual work and family, and on the absence of criminal records) and send all the documents to the *Consiglio Superiore della Magistratura* for the final decision.

Doctors at law applying for this task have to specify if they want to be appointed as a court honorary judge or as an honorary deputy prosecutor: in fact, the two careers are divided, while the competitive public examination for the professional role of judge and prosecutor is unique, and unique is their career (there is only one classification, and everyone goes to work as a judge or as a prosecutor according to the needs of the Penal Court where is assigned).

The task of court honorary judge and honorary deputy prosecutor lasts for three years, but a confirmation for others three years is possible (on demand made by the judge or the prosecutor, and with a new evaluation of his/her work and career): after these six years, no more confirmations are possible, and the task ends definitively. The former court honorary judge has now the opportunity to apply as honorary deputy prosecutor, and vice versa; but, again, the task lasts only a maximum of six years, and after that they can apply as Justice of the peace (if they have all the legal qualifications for this role).

Court honorary judges and honorary deputy prosecutors are not Ministry of Justice's employees, and they haven't a regular salary, because they gain only a little reward for every single day in which they go to the sittings; they haven't any kind of social

security nor paid illnesses, pregnancies and holydays, and so on. In practice, appointed only according to their *curricula* and academic titles (if they have some), they work as independent professional men and women, but their competence and task are *the same* of professional judge and prosecutor appointed with the competitive public examination and assigned to first instance *Tribunale* (and in fact court honorary judges sit alone in *Tribunale* as a single judge court or, deciding as a panel of three judges, sit with other two professional judges, as equals; and the honorary deputy prosecutors regularly sit in front of the *Tribunale* when it's deciding as a single judge court).

We can now consider the number of honorary and professional magistrates actually working in Italy.

Table no. 2 – Professional judges and prosecutors⁹

A	PROVIDED BY LAW:	10.109	
B	FORMALLY ON DUTY:	9.099	
		Male 5.630	Female 3.469
C	ACTUALLY ON DUTY:	8.524	
		Judges 6.329	Prosecutors 2.195
D	FORMALLY VACANT (A – B):	1.010	
E	ACTUALLY VACANT (A – C):	1.585	

Table no. 3 – Court honorary judges and honorary deputy prosecutors¹⁰

A	PROVIDED BY LAW:	4.209	
B	ACTUALLY ON DUTY:	3.424	
		Court honorary judges 2.529	Honorary deputy prosecutors 1.680
C	ACTUALLY VACANT (A – B):	785	

We have to add something about these data.

First of all, the data regarding professional judges and prosecutors (table no. 2) are about *all* the judiciary: only some of the 8.524 judges and prosecutors are assigned to *Tribunale*, but the others are assigned to Court of Assizes, Court of Appeal, and so on¹¹. Instead, all the 3.424 court honorary judges and honorary deputy prosecutors are assigned to *Tribunale*.

After this preliminary remarks, it's obvious that it is not possible to compare the number of professional judges and prosecutors and of court honorary judges and honorary deputy prosecutors assigned to *Tribunale*; but it can be interesting to notice that in Florence, at the Second Penal Court, there are actually on regular duty *nine* professional judges (four male and five female) and eleven court honorary judges (two male and nine female). However, court honorary judges and honorary deputy prosecutors actually on duty are more than a third, compared to the *total* amount of professional magistrates actually on duty.

Another thing to point out is that in Italy nowadays there are 9.099 professional judges and prosecutors formally on duty, but only 8.524 are *actually* on duty: so the really vacancies are 1.585 (and are not 1.010). The difference is made by professional magistrates actually off duty owing to pregnancy, sabbatical, temporary different tasks and so on; but all the appointed 3.424 court honorary judges and honorary deputy prosecutors are regularly on duty, owing to the particular nature of their contract¹².

THE COURT HONORARY JUDGES AND THE HONORARY DEPUTY PROSECUTORS: A SOLUTION OR A PROBLEM

As we have seen, court honorary judges and honorary deputy prosecutors in practice work as regular professional judge and prosecutor, even if they are not.

At the beginning, law stated some differences between the tasks of court honorary judges and honorary deputy prosecutors and professional judge and prosecutor: for instance, court honorary judges could not decide as a single judge court on offences related to immigration nor decide as a member of the *Tribunale* as a panel of three judges, and could not ratify the arrests made by police; on their side, honorary deputy prosecutors could not manage criminal inquiries. Moreover, they could have a maximum of two sittings per week.

The aim was very clear: criminal jurisdiction, and most of all civil jurisdiction, were in a great arrear with trials, and it was evident that it was not possible to conclude all the trials in the proper time. For instance, in 2001 at the Penal Court of Florence the *Tribunale* as a single judge court had to decide on offences committed in 1990/1991; nowadays, in 2004, after the appointment of many court honorary judges and honorary deputy prosecutors, it's deciding on offences committed in 2003. The idea was that court honorary judges and honorary deputy prosecutors were a temporary solution, to solve the immediate difficulties and late, destined to disappear after the end of the "emergency".

But soon the needs of the judiciary requested a total participation of the court honorary judges and honorary deputy prosecutors at the *Tribunale's* work: now they have sittings almost every day, with approximately sixteen trials in every single sitting¹³, and court honorary judges ratify the arrests made by police (it became one of their most important task) and regularly decide as members of the *Tribunale* as a panel of three judges, also on matter of organized and transnational crime; and in many big cities (like Rome) honorary deputy prosecutors manage criminal inquires. In this way they manage a great amount of the *Tribunale's* work, and it's finally clear that their disappearance will definitively stop the regular work in every Penal Court¹⁴.

In fact, the number of proceedings started every year is unchanging: in Italy, since a long time, people start civil proceedings to solve every kind of private controversy, and prosecutors have the obligation to institute criminal proceedings.

The public prosecutor's independence is guaranteed by the constitutional rule prescribing that a public prosecutor is under the obligation to institute criminal proceedings. This principle should be interpreted in the sense that, once the competent public prosecutor has been informed of an offence, he must conduct investigations and submit the outcome of his investigations to the judge's appraisal, making the relevant requests. This applies both when the public prosecutor requests the sitting aside of the case because there is insufficient evidence to prove the alleged offence and when the public prosecutor requests the committal to trial of an individual in respect of a particular alleged offence¹⁵.

So, court honorary judges¹⁶ and honorary deputy prosecutors act as *professional* judges and prosecutors: but their professional position is really weak. Having sittings approximately four days a week (professional judges and prosecutors usually have two or three sittings per week), they can gain only nearly 600,00 every months, but they have to pay taxes, social security and so on, coming from this amount; and have to buy their books, codes, gowns (very expensive) and everything else they need for their work (as the paper for the computer, and the computer itself!). They are considered as independent professional men and women, not as employee; and to survive they usually have another job (an academic one, or they work as lawyers in another city, or as employee

somewhere else), even if it's very hard and difficult to consider this job a kind of "part time" (most of all because it's a "full time", indeed!). Moreover, they know that they can be, but also they can not be, appointed for other three years after the end of the first task; and, however, they have no guaranties at all about their actual job, so they prefer to maintain other work possibilities.

The real problem is that the sittings are only "*the top of the iceberg*" in their work, because honorary deputy prosecutors have also to manage criminal inquires and, most of all, court honorary judges have to write down all the sentences and have also a big amount of legal measures to take (as the ones regarding imprisonment). All these activities are not paid, and these magistrates spend hours and days working without any reward, because they can be paid only for the sittings.

So, why do they accept this tasks? Why do they apply for this job?

The answer is not easy.

Most of them are female. Judges and prosecutors appointed with the competitive public examination are assigned, according to the official classification, to Courts all over Italy, and you can be send to work miles and miles away from home for some years (two, or more). After the University (five years), the competitive public examination (usually lasting two years, from the beginning of the written exams to the end of the oral one) and, now, the previous two years post – graduate school, many women have got a family: they are more than thirty years old, and usually have an husband and a baby or more. They can not travel around Italy to work, and they surely can not settle down in another city, leaving their family; and it's very difficult to move away with all the family. But court honorary judges and honorary deputy prosecutors in practice can decide where to work, because they have to apply exactly at the Court where they want to work, and can not send to other Courts: they are appointed or not, but if they are appointed they remain exactly where they asked. So, for many women this is the optimal solution.

Moreover, the competitive public examination procedure is really long; considering also the two years post - graduate school and the training after the exams (at least one year, but usually more), you can start work seriously only after four or five years, and even if the training is a bit paid, many people could not remain without a work and a regular gaining for years. We can add that the competitive public examination is uselessly complicated, most of all in the oral exam: for instance, it's difficult to understand the relevance of Roman ancient law in our new criminal adversarial system, based on Anglo-Saxon experience.

The fundamental idea of the competitive public examination is that every judge or prosecutor have to know, in details, *everything* about Italian laws and their origin, with a special attention to the traditional items and less consideration for other languages and new technologies (considered only in the last few years as a matter of exam, and absolutely a minor one); but this firm belief is absolutely anachronistic, most of all because the Italian legal system is composed by thousands of laws, frequently changing, and a judge doesn't need "*to use*" hundreds of them all over his life.

CONCLUSION

The situation came to a deadlock: nowadays is impossible to grant the regular work of the courts without the court honorary judges and the honorary deputy prosecutors, but their professional position is really weak, and is impossible to assure their independence and the quality of their work. Moreover, they have no personal resources to bring up to date their professional knowledge¹⁷, and often have troubles to decide the most

difficult proceedings (as, for instance, the ones for bankruptcies and other financial offences, in which legal analyses are usually really complex, and laws change frequently).

A solution to bring this professionals out from the fog of vagueness and contradiction can be their "transformation" in a permanent support of the courts, with exactly fixed duties and a proper reward, with guaranties and social security, pointing out with clearness their real competence, function and responsibilities, but not transforming them in a kind of "B series" magistrates. The risk, in fact, is to create a role of "minor" judges and prosecutors, absolutely incongruous with the Italian judiciary; but only with a certain stability we can grant their real independence.

After these preliminary remarks, we have to add that it is not useful to simply transform court honorary judges and honorary deputy prosecutors in a "duplicate" of professional judges and prosecutors, most of all because their activity clearly demonstrates that the Italian judiciary needs more magistrates, qualified and ready to start to work in a very brief time, quickly, without the too long (and maybe useless) terms requested by the competitive public examination. And the actual assignment system, stated for the professional judges and prosecutors, can not guarantee in the proper way the rights of women and of their families.

However, the actual laws demonstrated their inadequacy to define and manage the role and tasks of court honorary judges and honorary deputy prosecutors, and only a timely legislative intervention will solve the dilemma.

ABOUT THE AUTHOR

Silvia Ciotti Galletti is a doctor at law and obtained a three – years post – graduate degree in criminology at the University of Genova; as a criminologist, she is Adjunct Professor at the University for Foreigners, Perugia, where she teaches "Language of the deviance" and "Theory of the international criminal communication". In 2001 she was appointed court honorary judge by the Consiglio Superiore della Magistratura and was assigned at the Second Penal Court of Florence. Trying to draw a portrait of the new Italian court honorary judge, this work is mostly a result of the author's personal experience as a court honorary judge in Florence (where she is still working).

ENDNOTES

- 1 Art. 102 Const.; arts. 1 and 4 Royal Decree n. 12 of 30th January 1941.
- 2 Arts. 101 – 104 Const.
- 3 Law n. 195 of 24th March 1958 and Presidential Decree no. 916 of 16th September 1958.
- 4 Art. 107, last paragraph, Const. In Italy the judiciary is made up of both judges and public prosecutors.
- 5 Art. 1 of Royal Decree no. 12 of 30th January 1941.
- 6 Leg. Decree n. 51 of 19th February 1998.
- 7 Pretura was a single judge court deciding on matters of minor complexity.
- 8 Art. 4 of Royal Decree no. 12 of 30th January 1941.
- 9 Source: Consiglio Superiore della Magistratura, June 2004.
- 10 Source: Consiglio Superiore della Magistratura, June 2004.
- 11 It was not possible to obtain from Consiglio Superiore della Magistratura, or other Authorities, data referring to the single courts.
- 12 As we said, working as professional men and women they have no paid holidays or leaves for pregnancy.

- 13 A court honorary judge usually manages, as a single judge court, at least 450 trials in a year; but we have to add the trials decided as a member of the panel of three judges, and other legal measures.
- 14 As the Consiglio Superiore della Magistratura recently admitted, deciding to organize free courses to bring up to date the professional knowledge of the court honorary judges and honorary deputy prosecutors.
- 15 The obligation to institute criminal proceedings contributes towards guaranteeing not only the public prosecutor's independence in exercising his function, but also the equality of citizens before criminal law.
- 16 Nowadays, it's obvious that they have all the competence pointed out in table no. 1, and more.
- 17 In fact the courses are very expensive, and request a great amount of time free from work; but, as we said, these professionals are paid only if they go to the sittings, and often have to keep also another work, so they have very little free time

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