

POWER PLAY: HOW ITALY'S GOVERNMENT USES MIGRATION AND JUDICIAL REFORMS TO DISMANTLE DEMOCRATIC CHECKS AND BALANCES FOR SHAPING INTERNATIONAL LAW

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Migrants seem to be the first ground on which Giorgia Meloni's government has launched a direct attack on the separation of powers, a cardinal principle of our democracy. The increasing use of decree-laws is a well-established practice by the government, which frequently resorts to these instruments bypassing the normal legislative process. In doing so, the government increasingly concentrates legislative power in its hands, a power that should be exercised by parliament. This strategy has been particularly evident in migration policies, where decrees encompass increasingly broad and influential subjects. For example, the Decreto Flussi, which in fact legislates on issues that go far beyond access to work, or the decree updating the list of so-called 'safe countries of origin', a decision that effectively excludes protection for many vulnerable people.

The attempt of erosion of the separation of powers culminates with the introduction of a recent constitutional law, approved in the Chamber of Deputies in first deliberation, which provides for a reform advancing the separation of the careers of judges.

This means that the Superior Council of the Judiciary (CSM) will be abolished and divided into two smaller bodies and the mechanism of election of its components will change. Additionally, by separating the careers and dividing the training of those who are to become prosecuting or judging magistrates, there is a risk of creating officials who lack the impartiality that should characterize the public prosecutor. Indeed, as long as public prosecutors remain grounded in the culture of jurisdiction, they are trained as representatives of the law - rather than as one type of magistrate or another - representing the collective interest in criminal processes and upholding the Constitution. Separating the judicial careers seriously jeopardizes the independence and autonomy of the judiciary, threatening its detachment from political forces and risking compromising its ability to guarantee the rights of all citizens as well as the possibility to legally challenge decisions of the government. This effectively allows the government to influence the judicial culture of public prosecutors, by which the judiciary loses its role as a guarantor of constitutional rights and turns into a mere servant organ abiding to the governing majority.

In defense of the independence of the judiciary, many magistrates participated in a strike on February 27th, demanding the withdrawal of the reform. They pointed out that numerous limitations already exist regarding career transitions, that affects an average of four magistrates per year. There is no sense of urgency for this reform, therefore they emphasized that it appears to be driven by different interests and intentions to the ones state officially. Concerns were raised that the prosecutor could become subjugated by the executive, similar to what happens in other countries where the separation of careers already exists like Poland.

Another emblematic example of centralization of power is the decree that removed jurisdiction from the specialized sections of the immigration courts and transferred it to the courts of appeal. This legislative change reduces the ability of the judiciary to handle immigration cases with due competence, diminishing de facto its capacity to oppose government decisions when violating national and international law. This reform is part of a process of erosion of the judiciary function and seems to be a reaction to the numerous court decisions that, on several occasions, refused to validate deportations to detention centers in Albania, such as those in Gjadër and Shëngjin.

The reasons for these non-validations are not mere ideological positions, as is presented by the government, but are based on substantive legal reasons, related to the protection of human rights and compliance with international obligations.

This internal elimination of democratic counterweights also sheds light on another case, which goes hand in hand with these efforts in order to concentrate all power in the hands of the executive government to be fully capable of acting autonomously and making decisions internationally.



Palazzo dei marescialli, CSM Headquarter CC BY-SA 4.0

On January 19th the anti-terrorism unit of the Italian state police (DIGOS) arrested Osama Almasri, who is known for his crucial role as Chef of the Libyan Criminal Police. The International Criminal Court in Den Haag ordered his Detention on January 18th for being responsible for several war crimes and crimes against humanity in the prison of Mitiga. Nonetheless, Almasri was released on January 21st from Prison due to a claimed "procedural error". This error, following the argument of the Italian government, consists in the fact, that the arrest warrant was issued and executed without further personal conversation with the minister of justice, Carlo Nordio, who is responsible for the communication with the ICC.

This contrasts the official way of issuing the arrest warrant, which the ICC claimed to have passed to the ambassadors of six different countries, which then was forwarded to the respective ministers of justice, including Carlo Nordio.



Minister Carlo Nordio CC BY-SA 4.0

Also in this procedure, it can be claimed that the Meloni government abuses the inertia and the lack of executive power on the part of the international organizations in order to create hard facts. The same has been intended with the attempt to externalize asylum processes to camps in Albania and perpetrating the deportation of migrants even though as a final sentence of jurisdiction on the matter is still pendant by the European Court of Justice. In summary, the Meloni government is trying to create a precedence with its Albania project, filling an empty space in European Jurisdiction.

Internationally, Meloni does not seem to be isolated with these actions, rather being in the centre of a nationalist movement which is challenging the legitimation of international institutions worldwide in order to take back a claimed national sovereignty. This claim can also be seen in Meloni's justification for the repatriation of Almasri, which she framed as saving the Italians from a dangerous subject which had soon to be leaving the Italian territory. In order to present herself as the defender of Italian interests, she also shed light on the fact that Almasri was already stopped in Germany before the arrest warrant finally was issued at the moment he entered Italy.

This feeds the narrative that the international system is working against the Italian people in order to confront Italia with this problem, as the Italian state now needed to deal with Almasri just as the arrest warrant was issued.

The judicial system, both at national and European level, seems to be the last bastion against political decisions that could undermine respect for international agreements and the rights of the most vulnerable. However, the government is eroding this barrier, demonstrating an increasing willingness to weaken legal protection for migrants and asylum seekers. The danger that this is only the first step into a full dictation of societal uniformity, which does not allow opposing views, seems to be apparent. The cracks in this system of guarantees are already evident and visible, a clear example is the Open Arms case, which sets a precedent of prioritizing the defense of borders over the defense of human rights.

The paragon case, which consists in the spying on human rights activists and government-critical journalists, as well as the DDL Sicurezza, which limits severely the right to demonstration and the frame of action of SAR-NGOs is another critical example of this hegemonification of ideas on part of the government.

It eliminates the possibility of action to effectively counteract the narrative of the government and by this the fourth power, which exists beside the executive, the legislative and the judiciary – namely the freedom of information and expression.

The separation of powers is important to guarantee a democratic system because it prevents abuse of power on part of one actor alone. Democracy in a globalized world is a system of checks and balances whose basis is the rule of law framed in an international system. Until now, the law has been able to protect democratic principles while keeping the relationship with the European system intact. What is happening in the field of migration shows the worrying direction the government is taking towards the centralization of powers, abusing the inertia of the international system in order to create hard facts and hereby cementing its internal power, eliminating effective oppositions to its positions.

Implementation of the proposed Italian law on the separation of judicial careers

Italy is governed by the constitutional principle of the separation of powers:

- a)** Legislative power belongs to Parliament, which is divided into two chambers, the Chamber of Deputies and the Senate.
- b)** Executive power is exercised by the government.
- c)** Judiciary power is exercised by the judiciary.

The judiciary's role is to enforce the law, resolve disputes between individuals and institutions, and impose sanctions, such as restrictions on personal liberty.

All the fundamental principles governing the judiciary are contained in the Constitution. These provisions can only be amended through a complex procedural process designed to guarantee the principles established by the founding fathers after the Second World War.

Currently, the Italian judiciary is internally divided into the following branches:

A. Prosecutors, i.e. magistrates acting as public prosecutors, who serve the interests of the State by promoting actions aimed at:

- i.** Punishing those who have violated a legally protected right or interest by the State system.
- ii.** Protecting the fundamental rights of the most vulnerable.

B. Judges, both civil and criminal, who must be third parties to a dispute and who decide by interpreting and applying the law.

On 16 January 2025, the Chamber of Deputies approved a bill to reform the judiciary. The Meloni government is proposing to split the judiciary into two separate career paths and to differentiate the rules for prosecutors and judges through a far-reaching constitutional reform, which is likely to be put to a referendum for confirmation.[1]

[1] In June 2022, the Italian electorate was invited to vote on the separation of judicial careers. The referendum, which had been proposed by the Lega, did not attain the required quorum, with a voter turnout of only 21 per cent.

The **MAIN POINTS** to achieve the separation of the judicial careers' paths are as follows:

1. The two branches of the judiciary will have separate regulations (e.g. recruitment, training, organisation, promotions), all governed by ordinary law and not by the Constitution.

⇒ Magistrates will immediately have to choose their career path and will never be able to switch to the other branch.[2]

⇒ In future, the government will be able to modify judicial regulations without parliamentary approval in 'exceptional and urgent' cases, effectively ending the principle of equal justice for all at all times.

⇒ The figure of the magistrate as an independent and impartial judicial officer, subordinate only to the law, would be eroded.

⇒ Having the Public Prosecutor under the authority of the executive would undermine the protections currently guaranteed by the Constitution to the defendants and the investigated.

2. The High Council of the Judiciary (Il Consiglio Superiore della Magistratura, CSM) will be abolished.

The CSM currently functions as the judiciary's self-governing body, with disciplinary powers. It is chaired by the President of the Republic and its Vice-President, who is not a judge, is elected by Parliament.

The current composition of the CSM is:
i) Two-thirds composed of High Court judges (highly experienced magistrates), democratically elected by their peers.

ii) One third composed of legal experts elected by Parliament.

3. The current functions of the CSM will be assigned to three separate new self-governing judicial bodies:

a) The CSM for the Prosecution Service, with self-governance powers, but no disciplinary powers and jurisdiction only over prosecutors. Members are chosen by lot: two-thirds from among all Italian prosecutors; one-third from a list of legal experts drawn up by Parliament after each election.

→ Most members of the CSM will no longer be democratically elected by the magistrates themselves.

→ Judicial independence and self-governance is undermined, with interference by the executive power over the judiciary threatening the foundations of democracy and constitutional principles.

[2] Currently, as a result of the recent change brought about by the so-called Cartabia reform (minister of the previous Draghi technical government), the passage can only take place once, as opposed to four passages that were planned until 2022.

b) The CSM for Judges, with powers of self-governance but no disciplinary powers and jurisdiction only over judges. Its selection process will be the same as the one of the CSM for Public Prosecutors. The same critical points identified for the CSM for prosecutors (a) are noted.

c) The High Disciplinary Court, with disciplinary jurisdiction over all magistrates. It will be composed of 15 members: 3 legal experts appointed by the President of the Republic, 3 experts appointed by Parliament, 6 judges of the ordinary high courts drawn by lot, 3 prosecutors with experience in the ordinary high courts drawn by lot. The President of the High Disciplinary Court will be elected from among the legal experts and not from among the judges. Decisions of the High Disciplinary Court will only be appealed against before the High Disciplinary Court itself, with a different composition from the one of the initial decision (hence the internal organisation, procedures, disciplinary offences and sanctions will be determined by ordinary law).

→ Judicial autonomy and independence will be undermined and it will be subject to blackmail and attack by the executive, which will have a majority in parliament.

→ The method of drawing lots for the appointment of members is contrary to the principles of democracy and, particularly to the principle of representation. Judges chosen by lot will represent themselves and not entire ranks of their peers, as there will be no electoral representation.

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Final Conclusions

According to the proponents, this reform was deemed necessary to block the ideological currents into which the judiciary is divided and to which the members of the CSM belong. They argue that the prosecutor should be a government official, similar to the prosecutor in the North American and British systems.

According to some authoritative commentators, it would then be sufficient to impose the autonomy and independence required by the Italian Constitution in order to formally and de facto prevent the members of the CSM from belonging to or serving in the judiciary. Among the criticisms of the new constitutional bodies (2 CSMs and the A.C.D.), some argue that their creation would create a workload for appointments and management of the apparatus, burdening parliamentary work and creating further opportunities for political currents to grab appointments to prestigious posts.[3]

In any case, one thing seems indisputable: this reform will not solve the real and contingent problems of the Italian justice system. The real problems are linked to the shortage of magistrates, clerks of court and judicial police officers, and they manifest themselves in years and years of waiting for justice, in hundreds of trials that have expired, in miscarriages of justice and in prison overcrowding.

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[1] Throughout 2024, the Italian Parliament failed to elect a councillor to the Constitutional Court, following an end of term on 11.11.2023. In December 2024, the terms of two other judges ended. To date, no new magistrate has been elected, due to the lack of agreement between the different political forces engaged in the logic of dividing up public offices.