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Toga Party: The Political Basis of Judicial Investigations against MPs in Italy (1983-2013)



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Although judicial behaviour does not rely only on political reasons, scholars agree that political affiliation usually affects judicial decision-making. Unlike most studies, this work shows the impact of political affiliation where judicial career does not depend neither on the preferences of political institutions nor on competitive elections. Focusing on the investigations of Italian trial courts against MPs from 1983 to 2013 and estimating the political orientations according to the support to the different factions within the National Judiciary Association, we find that political affiliation plays a relevant role in the activity of courts. As the share of leftist prosecutors increases, courts proceed more against the parties that stand on the right side of the political spectrum. On the contrary, where the members of courts are closer to right-wing positions, they are less prone to investigate moderate or rightist parties.

Introduction

To what extent does the partisan affiliation affect judicial behaviour? It is well established that courts are political institutions composed by individuals with contrasting ideological preferences. In particular, despite judicial behaviour does not rely exclusively on political reasons (e.g. Baum 1994; 1997; Posner 2008; Epstein and Knight 2013; Epstein et al. 2013), scholars point out that partisan affiliation may considerably affect judges' decisions (Nagel 1961; Tate 1981; Songer 1982; Songer and Davis 1990; George and Epstein 1992; Brace and Hall 1997; Humpries and Songer 1999; Kulik et al. 2003; Sunstein 2006; Clark 2009; Kastellec 2011; Garoupa et al. 2012; 2013).

However, most of studies focus on members of judiciary appointed by political institutions or through competitive elections. In other words, the literature emphasizes the effects of partisan

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affiliation in political systems where judges have incentives to align with a political party and behave according to its preferences in order to be reappointed or maintain their positions. On the contrary, scholars have paid poor attention to systems where judicial career is independent from on electoral and political institutions. Does partisan affiliation matter also in this case or its overall impact on judicial behaviour is negligible? The present contribution fills this gap in the literature and shows that political affiliation has a significant impact even where judicial career does not depend neither on the preferences of executive and legislative institutions nor on democratic elections.

We focus on trial courts in Italy, where judges and public prosecutors are selected through exams and political institutions are not involved in the process of appointment and re-appointment (Guarnieri 1992; 2004; 2011). Nevertheless, members of judiciary are strongly politicized and they are usually divided in factions, whose alignment reflects the traditional left-right conflict within the Italian society (Freddi 1987; Guarnieri 1992; Morisi 1999; Della Porta 2001). Although judicial career is formally independent from politics, as ideological divisions play a crucial role within judiciary, judges and public prosecutors may have interests to align with a faction in order to increase their chances to go up the judicial ladder or alternatively to jump into politics. In addition, we argue that they are willing to behave according to their partisan affiliation in order to further boost their opportunities to reach high-rank positions within judiciary or politics.

Estimating the political affiliations within the judiciary on the basis of the strength of the rival factions within the National Judiciary Association, we find that partisan affiliation has significantly affected the investigations against the Members of the Chamber of Deputies charged with crimes against public administration between 1983 and 2013. Where the share of leftist prosecutors increases, courts tend to proceed more against parties that stand on the right side of the political spectrum, while if the members of courts are closer to right-wing positions, they are less prone to investigate members of moderate or rightist parties. These results hold controlling for other relevant factors, such as the conflict within the Parliament, the relations between Parliament and judiciary, the degree of government alternation, the expected level of corruption within each party, or the institutional changes occurred in Italy after 1993.

In the next section we look at the relationship between mechanisms of appointment and political affiliation. Then we examine the features of the Italian case and we present our arguments about the effect of partisan affiliation on the investigations against the members of the Parliament. Hence, we describe the data and the operationalization of the variables. Finally, we show the results and collect the main findings.

1. Judicial behaviour and mechanisms of appointment

Judicial behaviour reflects multiple motivations, such as making public policy consistent with judges' policy preferences, maximizing court resources and autonomy, winning popularity and respect in the legal community, and maintaining the current judicial positions or to be promoted to an higher court (e.g.; Baum 1994; 1997; Posner 2008; Epstein and Knight 2013; Epstein et al. 2013). These are dominant goals that judges can reach according to the institutional arrangement and their personal attributes. As a result, judicial behaviour is influenced, for instance, by the relationship with executive and legislative institutions (Segal 1997; Vanberg 2001; Ferejohn et al. 2004; Clark 2009; Carrubba and Zorn 2010), the structure of the court (Bonneau et al. 2007; Carrubba et al. 2011; Kestellec 2011) and the personal attributes of judges, such as gender or race (Kulik et al. 2003; Kestellec 2013).

Focusing the attention on personal attributes, scholars seem to agree that political affiliation may considerably affect judicial decision-making. Although judicial behaviour depends also on other factors, many contributions stress that judges' ideological orientations have a relevant impact on their decisions (Nagel 1961; Tate 1981; Songer 1982; Songer and Davis 1990; George and Epstein 1992; Brace and Hall 1997; Humpries and Songer 1999; Kulik et al. 2003; Sunstein 2006; Clark 2009; Kestellec 2011; Garoupa et al. 2012; 2013). Unfortunately, scholars have investigated the relation between political affiliation and judicial behaviour especially in common-law countries where members of judiciary are selected by political institutions or competitive elections. In other words, the literature shows that political affiliation matters in political systems where judges are likely to be interested in aligning with a political party and behave according to its preferences. Indeed, where judicial appointment involves political institutions either directly or indirectly, political affiliation is likely to influence the judicial behaviour. In this case, political parties tend to select those judges that are closer to their positions and judges have incentives to defer to the positions of the ruling parties and retention agents in order to have more chances to be appointed, re-appointed or reach high-rank positions. (Ramseyer and Rasmusen 1997; 2001; Sheperd 2009). Judicial behaviour is strongly affected by political pressures even when judges are selected by competitive elections, especially if they are appointed through partisan elections, where, in addition to raise campaign funds, they need to gain the support of party leaders (Hall 1992; Hansen 1999; Huber and Gordon 2004; Sheperd 2009).

On the contrary, few studies provide empirical evidence about the relation between political affiliation and judicial decisions where judicial career is more independent from executive and legislative institutions. A recent contribution focusing on the Spanish Supreme Court finds that judicial behaviour is influenced by judges' political affiliation despite judicial career is not

directly connected to executive and legislative powers (Garoupa et al. 2012). However, the present work intends to investigate more in depth the relationship between political affiliation and judicial activity decisions where the career within judiciary does not depend at all on political parties and voters. Our work focuses the attention on the activity of trial courts in Italy, which is the country where judiciary enjoys the highest degree of independence (Guarnieri 1992; 2004; 2011)

2. Independence and politicization: the judiciary in Italy

In Italy judges and public prosecutors of trial courts are appointed independently from the preferences of political institutions. They are selected through competitive exams by the Higher Council of the Judiciary (*Consiglio Superiore della Magistratura*) and the procedure of appointment does involve neither the Parliament nor the Ministry of Justice. In brief, judicial career depends only on the internal organization of judiciary: the Higher Council, which is composed mostly by members elected by judges², takes all the decisions concerning recruitment, appointment, promotion³, transfer and disciplinary proceeding. This formal independence has consolidated even effectively as, especially from the eighties, the level of collusive practises between judiciary and politicians has progressively decreased (Pizzorno 1992; Della Porta 2001). As a result, unlike the other European civil law countries, Italy constitutes a clear model of judicial self-government (Guarnieri 1992; 2004).

Such independence has roots at the beginning of the democratic experience, when the constituent assembly agreed to consolidate the formal independence of judiciary in order to preserve judges from the preferences of executive power. However, this independence did not prevent judiciary from being influenced by politics. On the contrary, also because of the broad discretionary power of members of judiciary, the judicial independence laid the basis for a strong politicization of Italian judiciary (Guarnieri 1992). Given the essential lack of control by external institutions, judges had the opportunity to interpret their role consistently with their policy preferences, or rather, according to their social and cultural background. Hence, the whole judiciary has reflected the different ideological position within Italian society.

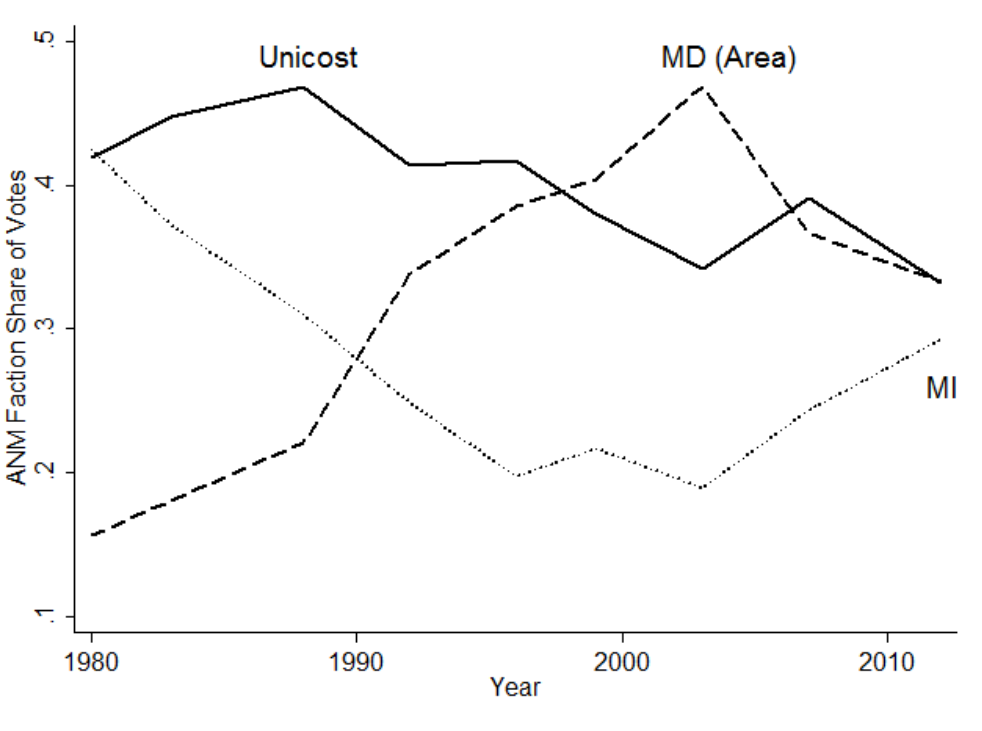
Far from being trivial, the judicial politicization is evident in the divisions within the National Judiciary Association (ANM) (Freddi 1978; Morisi 1999; Della Porta 2001). Since the '60s the ANM is organized like a parliament: it regularly holds congresses and internal elections

² The Higher Council is composed by twenty-seven members: sixteen are elected by judges, eight are lay members selected by the Parliament from experienced lawyers and university law professor, while the three other members are the President of Republic, and the President and General Prosecutor of the Court of Cassation (Guarnieri 2004: 176-177).

³ Promotions are based on seniority and merit, but they rely especially on the former (Guarnieri 1992; 2004).

contested by teams of candidates that group together creating rival factions and presenting contrasting motions to shape the ideological views and the behaviour of the association. These factions in turn are kind of parties, with their own ideology, conventions, membership card and press (Pepino 2002; Bruti Liberati and Palamara 2009). Throughout the ages we account four main relevant subgroups: *Magistratura Indipendente* (Independent Bench, MI), the most conservative faction; *Magistratura Democratica* (Democratic Bench, MD) and *Movimento per la Giustizia* (Movement for the Justice), the two progressive factions openly linked with the left, which rallied together forming the alliance *Area*; *Unità per la Costituzione* (Unity for the Constitution, UNICOST), the largest subgroup composed by moderate members.⁴ Figure 1 reports the percentage of votes gained by ANM factions during the internal elections held every 3 or 4 years between 1980 and 2012. The support of each group has changed over time and no faction gained a plurality of votes permanently.

Figure 1 – Electoral support of the three main ANM factions over time: Unicost (solid line), MI (dotted line), and Area (dashed line)



Source: Personal computation on electoral consultations within ANM.

Magistratura Indipendente was the main group throughout the ‘60s and the ‘70s while its support declined in the next two decades. The left-wing *Magistratura Democratica (Area)* was

⁴ ANM factions can be aligned along a classical ideological scale. For instance, *Magistratura Democratica* overtly defines itself as a left-wing group, based on a progressive cultural and political background, prone to support the stakes of underprivileged citizens and to look for a link with left-wing organizations. Conservative factions instead uphold the apolitical nature of the judiciary, even though judges belonging to *Magistratura Indipendente* were linked to right-wing parties and organizations and this faction share conservative values (Pepino 2002).

only a tiny faction until the end of the '80s when it started to grow up winning a plurality of votes in 1999 and 2003. Finally, *Unicost* has been leading unchallenged only in the '80s even though it never won a full majority of votes.

Despite judicial career should rely only on seniority and merit, as ANM plays a central role within the Higher Council, the ideological factions are able to affect the internal decisions on judges' careers. Factions increased their influence within the judiciary especially after the introduction in 1975 of a proportional system in the ANM elections (Guarnieri 2003:94-100; Guarnieri 2004:177). It follows that judges and prosecutors are interested to side with a faction in order to increase their chances to go up the judicial ladder. In particular, as high-rank positions have been gradually reduced, they are prone to align a faction to increase their opportunities of promotion to higher courts (Guarnieri 2004, 176-177). Furthermore, they could need to emphasize their political affiliation within the judiciary before jumping into politics⁵. In this circumstance they align with a faction in order to clearly disclose their affiliation with a political party and gaining support for a future career as politicians⁶.

In brief, members of judiciary need to rely on a political faction in order to increase their chances to be promoted or have a career as politician. However, we argue that judges and prosecutors have incentives not only to align with a faction but also to behave according to their partisan affiliation. More precisely, if judges and prosecutors act consistently with their political preferences, they are likely to win additional popularity within the legal community and among the members of their factions. Therefore, if they are deciding on controversial and weighty cases, they may have the backing of the leaders of their factions. Besides, since they are neither appointed by political institutions nor democratically elected, they do not pay any serious reputation cost for their unpopular decisions. Alternatively, if judges and prosecutors gain the media attention, they may get support among the voters closer to their positions, laying the foundations for a future career as politicians.

⁵ This issue was so relevant that in 1987 the ANM had to take position on it, declaring the incompatibility between political participation or membership in a political party and affiliation with the ANM itself. This formal ban, however, did not halt the politicization of the judiciary, as we will see.

⁶ Over the decades, many members of judiciary have run for the Parliament and became MPs. The list includes the former Head of State, Oscar Luigi Scalfaro (DC) and the former prosecutor, Antonio Di Pietro, who joined the centre-left coalition becoming senator and minister before creating his own party (Italy of the Values, IDV). On the whole, judges joined different parties, covering all the spectrum of the left-right ideological dimension (Paciotti 1999). To mention few recent examples, judges like Alfredo Mantovano, Nitto Palma and Franco Frattini (former minister of foreign affairs and EU commissioner) have sided with the centre-right coalition being members of Forza Italia (FI) and the People of Freedom party (PDL), while others like Luciano Violante (former president of the Lower Chamber), Giuseppe Ayala, Anna Finocchiaro became foremost politicians within the Democrats of the Left (DS) and the Italian Democratic Party (PD). In 2013 two famous anti-mafia prosecutors, Pietro Grasso and Antonio Ingroia ran in the general election. Grasso was elected in the PD list and became president of the Senate, while Ingroia created his own left-wing electoral cartel, Civil Revolution, together with Di Pietro and another former prosecutor, Luigi De Magistris. Ingroia ran for the premiership and, despite he failed to pass the election threshold, his attempt to create a rally with other former judges revived the debate over the existence of a 'toga party' (*partito delle toghe* or *partito dei magistrati*, in Italian) composed by left-wing judges united against Silvio Berlusconi.

In order to test the extent to which political affiliation affects the judicial behaviour we focus the attention on the investigations against MPs. Since such investigations usually gain the media attention and put the basis for debates among citizens, they constitutes a relevant case to investigate the relations between politicization and decisions in the Italian judicial system. In the next section we examine more in depth the expected relation between political affiliation and judicial activity against MPs.

3. The politics of judicial investigations against MP

The judicial activity against MPs represents a salient issue in Italy. Indeed, over the last decades public prosecutors have played a considerable role within the Italian political system. Their popularity and impact became relevant especially after 1992, when the judicial inquiry *Mani Pulite* (Clean Hands) shed light on the illegal linkages between politics and business showing that the party system was permeated by political corruption (for more details see Ricolfi 1993; Della Porta and Vannucci 1999; Curini and Martelli 2009: 177). This scandal, famous under the name of *Tangentopoli* (Bribesville), contributed to destroy the Italian party system and started the transition to the Italian Second Republic (1994-present). Parties that were leading actors during the so-called First Republic (1948-1993), such as the Christian Democracy (DC), the Italian Socialist Party (PSI), the Italian Socialist Democratic Party (PSDI), the Italian Liberal Party (PLI), and the Italian Republican Party (PRI) dissolved after the scandal. The clash between politicians and the judiciary continued in the Second Republic: one of the main actor involved in this strife is the leader of the centre-right coalition and former Prime Minister, Silvio Berlusconi, who has been repeatedly charged with different accusations⁷ (Bellamy 2006; Edwards 2005).

Politicians have usually complained about the effect of political bias on charges and prosecutions. Over the last decades, this issue has been raised particularly by Silvio Berlusconi, who has often claimed to be the victim of left-wing judges. Despite the partisan nature of Berlusconi's claims (Taruffo 1998), in many cases famous prosecutors have clearly revealed their political affiliation once they retired from the bench and run for the Parliament⁸. Therefore, the effects of the

⁷ To defend himself from alleged 'judicial persecution, the centre-right coalition passed legislation meant to 'prevent Berlusconi and his collaborators from being prosecuted' (Pasquino 2007: 49; Sartori 2002). Between 2001 and 2003, during the Berlusconi II cabinet, several such laws were approved: some forms of 'false accounting' were decriminalized; restrictions were imposed on the international requests for judicial assistance (*rogatorie*); a revised version of the 'legitimate suspicion' law was passed to protect the accused from any alleged prejudice of the judges; finally, the five most-important political office holders (such as the Prime Minister and the Head of State) were declared immune from criminal prosecution for the length of their office (so called '*Lodo Alfano*'). Most of these laws were rejected by the Constitutional Court. See Edwards (2005) for further details.

⁸ For instance, famous members of the *Mani Pulite* team, like Gerardo D'Ambrosio, Gherardo Colombo and Francesco Saverio Borrelli have been elected MPs or were openly affiliated with the Democratic Party while Tiziana Parenti quitted the same team to support Berlusconi and was elected MP with Forza Italia.

judicial politicization are worth examining in order to understand more in depth the relations between judiciary and political institutions. This is ever more intriguing since the judicial activity contributed to alter the Italian political system at the end of the First Republic, while in the Second Republic most of the political agenda was stuck on this heated debated topic.

According to scholars' claim that a number of trials involving politicians have been made for political aims (e.g., Kirchheimer 1961), we expect that public prosecutors investigate some parties more than others on the basis of their own political affiliation. Unlike common law systems and other civil law regimes, Italian prosecutors follow the same career pattern of any other judge (Guarnieri 1992; 2004). Therefore, as their career depends entirely on the decision made by the Higher Council, they have strong incentives to align with a political faction within the ANM. Furthermore, given the saliency of investigations against MPs in the legal community and the political system as a whole, we expect that their politicization may affect also their behaviour.

Also given the great discretion that prosecutors enjoys both in deciding how to use the resources available and selecting the cases on the basis of reports and complaints (Di Federico 1991; Fabri 1997), they may decide to focus more on crimes committed by MPs whose ideological views are far away from their own position. Precisely, prosecutors have to decide either to proceed against a MP or discard the investigation. In other words, according to the Italian Constitution, they have to choose if requesting the Parliament to lift the immunity or abandoning the proceeding. In fact, in order to preserve the Parliament and its activities from the accusations that are baseless or grounded on partisan affiliation, courts cannot proceed against a MP without prior authorization by the Parliament. It follows that prosecutors must submit a formal request to the Parliament, asking to lift the parliamentary immunity of the MP under investigation. Where they submit the request, the Parliament votes by simple majority, approving or rejecting the proceeding.

The political affiliation of public prosecutors may introduce a bias in the proceeding against MPs in two ways. First, where prosecutors' ideological orientations strongly diverge from the position of the MP under investigation, they are more likely to send the Parliament a request. Therefore, *the more prosecutors' political affiliation diverges from the positions of a party, the more courts are likely to proceed against that party*. Second, if prosecutors' orientations are close to the political position of the deputy under investigation, they are less prone to submit a request, because they prefer to use the resources at their disposal in other circumstances, where they can gain more popularity within their respective faction. Hence, *the more prosecutors' political affiliation converges with the positions of a party, the more courts are likely not to proceed against that party*. These two outputs can occur simultaneously, that is, prosecutors may both

proceed against the parties are more distant to their orientations and preserve the parties aligned to similar positions.

4. Data

The article aims to assess the determinants of Italian public prosecutors' behaviour in the investigations against MPs from 1983 to 2013. Given the nature of our hypotheses, political parties are the units of analysis. This section provides details about the dependent and independent variables employed.

Dependent variable

We measure the judicial activity against MPs employing the information about the requests sent by public prosecutor offices to the Chamber of Deputies (*Richieste di Autorizzazione a Procedere*, RAP). According to the Article 68 of Italian Constitution, judges cannot try members of the Parliament without prior authorization by the Chamber of Deputies or the Senate⁹. Therefore, if a public prosecutor intends to try a deputy, it has to request the Chamber of Deputies to lift the parliamentary immunity. This request is sent firstly to the Minister of Justice, which transmits it to the President of the Chamber. Then, the President announces the request to the deputies and sends it to a relevant committee (so called *Giunta per le autorizzazioni a procedere*)¹⁰. Once the committee has evaluated the content of the request, it submits to the deputies a proposal for approval or rejection. Hence, the deputies vote to approve or reject the request¹¹.

Members of judiciary cannot prosecute Deputies for opinions expressed or votes cast in the exercise of their office. Besides, after a constitutional reform made in 1993, prosecutors can request the Parliament to lift the parliamentary immunity only in a limited number of circumstances, such as when they ask to arrest or keep a parliamentarian in state of detention, to proceed in body or house search, to use interception of conversations or communications or to seize mail or correspondence.

So far, scholars used judicial requests to measure the involvement of MPs in cases of political corruption (Golden and Chang 2001; Chang 2005) and the effect of this involvement on the chances of re-election (Chang, Golden and Hill 2010). Although requests can be a relevant tool

⁹ Except when the MP is caught in the act (D'Aniello e Sclafani 1991: 3-4). Flagrancy, however, restricts the discretion available to the judge, hence it is not particularly intriguing for our purpose.

¹⁰ This constitutes the entire procedure that a request should follow. In real facts, as emphasized by Ricolfi (1993: 21), usually it has been in force a simplified procedure, involving a lower number of stages.

¹¹ From 1948 to 1987, Parliament approved about 20% of requests (Cazzola 1988: 113). According to the data available at the official site of the Chamber of Deputies, from 1994 to 2013, the Parliament has approved about one third of the requests.

to examine in depth the mechanism of political corruption, they are related to uncovered and alleged crimes only. For this reason, and given the wide discretion available to prosecutors, the RAPs seem more properly an indicator of judicial activity against MPs rather than a whole involvement in illegal practises. In other words, we claim that if party i is involved in more requests than rival parties, this does not necessarily implies a higher level of corruption of party i . Instead, this clearly attests that judiciary prosecuted it more than other parties.

We focus on the requests submitted to the Chamber of Deputies between 1983 and 2013, a period during which the judiciary is formally independent and not prone to collude with politicians. In this lapse of time public prosecutors sent, overall, 1256 requests involving 1399 deputies. However, only some of them are of political interest. Accordingly, we retain only requests concerning non-opinion crimes related with political activity because prosecutors have more discretion here, given that these investigations often do not rely on strong evidence.¹² Besides, we discard violations concerning organized crime (e.g., mafia) because they follow specific procedures and provide courts with additional resources.

The data include the information concerning the requests sent to MPs charged with crimes against public administration,¹³ such as corruption, misappropriation and abuse of power, as well illegal party funding¹⁴. From 1983 to 2013, the Parliament received 526 requests involving 589 deputies. The number of MPs involved reached its peak in 1993, in the middle of the *Tangentopoli* years, and fell afterward, due to the constitutional reform approved by the Parliament in 1993, which reduced the circumstances for asking the Parliament to lift the immunity.

The dependent variable - *RAP* - is the ratio between the number of party i 's MPs receiving a request in year j and the total number of MPs belonging to the same party in that year. Some MPs are involved in several requests in the same year. Since they often receive multiple requests concerning the same crime, we take account of the number of MPs involved in each year rather than the number of requests. Therefore, if a MP is involved in five requests in the same year he/she will be counted only once.¹⁵

Independent variables

The effects of prosecutors' political affiliation are tested through an interaction between the policy position of party i and the share of votes won by judicial factions in internal elections. To

¹² Opinion crimes have been excluded also due to their 'backlash effect', which can frustrate the judges' attempts to damage the reputation and the vote share of the party under investigation (van Spanje and de Vreese 2013).

¹³ These crimes are related to the articles 314 to 335 of Italian penal code.

¹⁴ We include the cases of illegal party funding, because often in Italy they are strongly related with other crimes against public administration (see Rhodes 1997; Hopkin 2004).

¹⁵ A different operationalization, taking into account the overall number of requests, does not alter our results.

assess the robustness of our findings we measure the ideological orientation of the prosecutors in different groups of courts¹⁶ through two different variables. *Leftist Courts* measures the average share of votes won by left-wing factions in the courts that proceed against party *i* on year *j*, compared to their overall share of votes at the national level (for parties that do not receive any RAP in that year); analogously, *Rightist Courts* records the share of votes won by the most right-wing faction (MI) in the same group of courts. *Party Position*, has been measured from the Italian Legislative Speeches Dataset (ILSD) using the categories traditionally included in the RILE scale (e.g., Ceron 2012; Curini 2011; Curini and Ceron 2013; Curini and Martelli 2009)¹⁷. These data are based on a manual codification of all the investiture debates of the Italian governments following a coding scheme similar to that of the Comparative Manifesto Project¹⁸. Negative values indicate left-wing parties while right-wing parties have positive values.¹⁹

We control the effects of political affiliation for some confounding factors. The dummy variable *First Republic* controls for the reforms occurred in Italy after 1993. In the Second Republic the Italian political systems has experienced institutional changes that are particularly relevant for our analysis, concerning, for instance, the procedure that judges have to follow in order to ask to lift the immunity of MPs, the organization of public administration, and the electoral system.²⁰ In addition, given that most of the RAP were sent in 1993, we include a dummy variable to detect the role of *Tangentopoli* period.

We also take in to account the relations between judiciary and the Parliament. The variable *Coalition size*, which measures the share of seats belonging to party *i* or to its allies, accounts for the ability of each party to resist and pose a veto on the judicial requests. This depends on party's strength but also on its link with other allies and it is partially related to the degree of party system competitiveness. For instance, in a low competitive parliamentary arena many parties have many allies and their ability to resist to the judiciary is higher. Therefore, if prosecutors are

¹⁶ According to the data of ANM elections, we examine the ideological orientations of the courts taking place in the same region.

¹⁷ The results hold when using the Gabel and Huber (2000) 'vanilla method' to estimate left-right positions.

¹⁸ For each debate, the authors selected and codified the speech released by the party leader (or by a relevant representative) plus the Prime Minister's programmatic speech. The method adopted to codify speeches was similar to that employed by the well-known CMP to analyse the contents of party electoral programs (see Budge et al., 2001; for a detailed description). In each legislative speech the authors identified the number of quasi-sentences and assigned each of them to a number of pre-established categories that form the classification scheme. To take account of the Italian political context the original 56 categories of the CMP dataset were increased to 68. The dataset contains the percentage of the total text of legislative speech that deals with these categories. The dataset has been updated until May 2013 and includes information about a few additional debates over crucial votes of confidence (i.e., the debate related to Prodi I vote of no-confidence and two debates faced in 2010 by Berlusconi IV cabinet).

¹⁹ Given the high number of cabinets (61 in 67 years), ILS data based on investiture speeches allow to track changes in party policy positions on the left-right scale and on the justice dimension almost year by year. Furthermore, compared with CMP data, ILS allows to assess the positions of parties that form between the elections (i.e., due to party fission) and to distinguish parties that run the election as a cartel and split afterwards.

²⁰ On the relation between corruption and the electoral system see, for instance, Chang (2005), Kunicová and Rose-Ackerman (2005) and Tavits (2007).

particularly interested in trying the MPs under investigation, we could expect a lower rate of prosecutions. On the contrary, in highly competitive arenas, when the parliament is usually split, the support that each party can enjoy against judicial activity is lower: few defections from their allied can make the difference in denying or approving the request. Finally, the coalition size is minimum for marginal parties in both competitive and non-competitive contexts. These parties are isolated and less able to resist to judicial activity, making prosecutors more prone to send a request.

Additionally, we control for attitude of the whole Parliament towards judicial activity through the variable *Attitude towards judiciary*. This variable is based on the ILSD data and records the average position on the justice dimension, weighted by the number of seats of all other parliamentary parties but the one involved in the judicial request, under the assumption that each party always protect its members. Negative values attest that on average the parliament favours a greater control by the cabinet, while positive values indicate that MPs support the autonomy of the judiciary. Hence, lower values implies that MPs are more willing to protect their colleagues from judicial investigations whereas higher values indicate that MPs are more open to judicial investigations.

Besides, we control for the effects of government alternation. Since the life of ruling parties is more under public scrutiny compared to opposition parties, prosecutors may have an incentive to investigate them in order to gain fame; furthermore, the link between political corruption and lack of alternation in power is well established (Horowitz et al. 2009; Pellegata 2012; Tavits 2007), hence we want to control for the potentially higher level of corruption within parties that have long been in power. For these reasons we include the variable *Years Spent in Office*, which records the number of years during which a party has been in power in the previous decade.

Analogously, parties whose support is rooted in particular areas of the country can be more exposed to political corruption. It has been shown that in the Southern regions politicians often rely on clientelistic relationships between voters and elected officials to gain consensus (Putnam 1993). We control for this aspect through *Share of Southern MPs*, i.e., the rate of deputies elected in the South over the total number of party MPs.

Finally, intra-party politics is another relevant determinant of political corruption (Golden and Chang 2001; Kato and Mershon 2006) as internal competition between rival party factions may foster the recourse to illegal party funding and clientelism (Chang and Golden 2006). This could increase corruption and the incentive to investigate on it, given that judges can take advantage of intra-party divisions to succeed when sending a RAP. We control for the internal level of fragmentation through the Effective Number of Factions, *ENF* (Ceron 2011). This index is built analyzing the congresses held by Italian parties and measures the number of factions that contest

each congress, weighted by their respective share of votes won in the internal election.²¹ It is equal to one if parties are not factionalized or their congresses are unchallenged, and increases as the number and the size of minority factions grow. Table 1 provides a detailed description of each variable.

Table 1 – Summary statistics of the variables employed in the analysis

VARIABLES	Min	Max	Mean	St. Dev.
RAP	0	0.500	0.014	0.054
<i>Party position</i>	-59.790	37.720	-1.600	20.362
<i>Leftist Courts</i>	0.089	0.484	0.334	0.099
<i>Rightist Courts</i>	0.072	0.457	0.249	0.063
<i>First Republic</i>	0	1	0.349	-
<i>Tangentopoli</i>	0	1	0.035	-
<i>Coalition size</i>	0.006	0.600	0.437	0.171
<i>Attitude towards judiciary</i>	-0.974	1	0.185	0.553
<i>Years Spent in Office</i>	0	10	2.910	3.154
<i>Share of Southern MPs</i>	0	1	0.299	0.198
<i>Effective Number of Factions</i>	1	4.861	1.382	0.716

Findings

The dependent variable, RAP, is a proportion whose values are bounded between 0 and 1. As a consequence, the assumptions required by the ordinary least squares regression might not hold due to heteroskedasticity or to the fact that errors might be not normally distributed (Wooldridge 2002). In addition, the predicted values could fall outside the unit interval. Accordingly, data have been analyzed by means of a fractional logit model (Papke and Wooldridge 1996). Since the dataset contains repeated observations nested within parties, we cluster observations by party, providing standard errors accordingly.²² Four different models have been provided. In model 1 we focus on *Leftist Courts* and include only the variables directly related to the politicization of the judiciary along with two control variables: *First Republic* and *Tangentopoli*. In model 2 we add the other control variables related to parliamentary equilibriums and the potential degree of corruption of each party. Model 3 and 4 are similar to models 1 and 2 but focus on the size of right-wing judicial factions. The results are reported in Table 2.

The empirical results provide strong evidence for the role of political affiliation. The interaction between party position and the ideological preferences within the judiciary is significant across all models and this finding holds even after the inclusion of several control variables.

²¹ The index has been measured applying to the intra-party politics the same formula used to assess the effective number of parties (Laasko and Taagepera 1979).

²² Using fixed effects or clustering observations per Legislatures does not alter the results

Table 2 – Determinants of judicial investigations against MPs

VARIABLES	(1)	(2)	(3)	(4)
<i>Party position</i>	-0.019 (0.031)	-0.081*** (0.019)	0.060*** (0.022)	0.023 (0.020)
<i>Leftist Courts</i>	7.129** (2.803)	3.852* (2.322)		
<i>Leftist Courts X Party position</i>	0.169* (0.090)	0.246*** (0.054)		
<i>Rightist Courts</i>			-11.734*** (3.288)	-7.258** (3.241)
<i>Rightist Courts X Party position</i>			-0.150* (0.081)	-0.130* (0.076)
<i>First Republic</i>	3.862*** (0.593)	3.162*** (0.629)	3.274*** (0.452)	2.987*** (0.651)
<i>Tangentopoli</i>	1.787*** (0.366)	1.849*** (0.355)	1.676*** (0.314)	1.856*** (0.248)
<i>Coalition size</i>		1.522 (1.097)		0.401 (0.932)
<i>Attitude towards judiciary</i>		0.248 (0.242)		0.106 (0.207)
<i>Years Spent in Office</i>		0.185*** (0.031)		0.186*** (0.035)
<i>Share of Southern MPs</i>		3.758*** (0.724)		4.163*** (0.903)
<i>Effective Number of Factions</i>		0.087 (0.181)		-0.009 (0.124)
Constant	-9.531*** (1.328)	-10.945*** (1.046)	-3.996*** (0.680)	-7.379*** (0.924)
Observations	344	344	344	344
AIC	0.118	0.136	0.116	0.136
BIC	-1964.935	-1939.856	-1965.859	-1939.807
Log pseudolikelihood	-14.381	-12.319	-13.919	-12.344

Note: Fractional logit. Dependent variable: RAP. Clustered standard errors in parentheses.

*** p < 0.01; ** p < 0.05; * p < 0.1

Figure 2, based on model 3, provides a substantive interpretation of this result and plots the marginal effect of an increase in *Leftist Courts* as a party's ideological placement changes. When the support to left-wing factions increases, courts shifts to the left and will act more against parties that stands on the right side of the political spectrum. For instance, any 10% increase in the share of *Magistratura Democratica* (and *Movimento per la Giustizia*) raises by 1.5 points the RAP sent against right-of-centre parties and by 0.5 the requests related to centrist parties if compared to left parties, which are not damaged by the growth in the number of left-leaning judges thus, comparatively, facing an advantage.

The politicization does not affect only the investigations of left-wing courts. Models 3 and 4 confirm that political affiliation matters also in right-wing courts, even though the effect takes

place in a different way: as the support of right-leaning factions grows, we will observe a decrease in the rate of investigations made against MPs of moderate and right-wing parties. All else being equal, as shown by Figure 3, if the vote share of the rightists faction *Magistratura Indipendente* increases by 10%, right-wing parties will receive 1.2% less requests left parties.

Figure 2 – Marginal effect of Leftist Courts on RAP according to different policy positions of Italian parties (with 90% confidence interval)

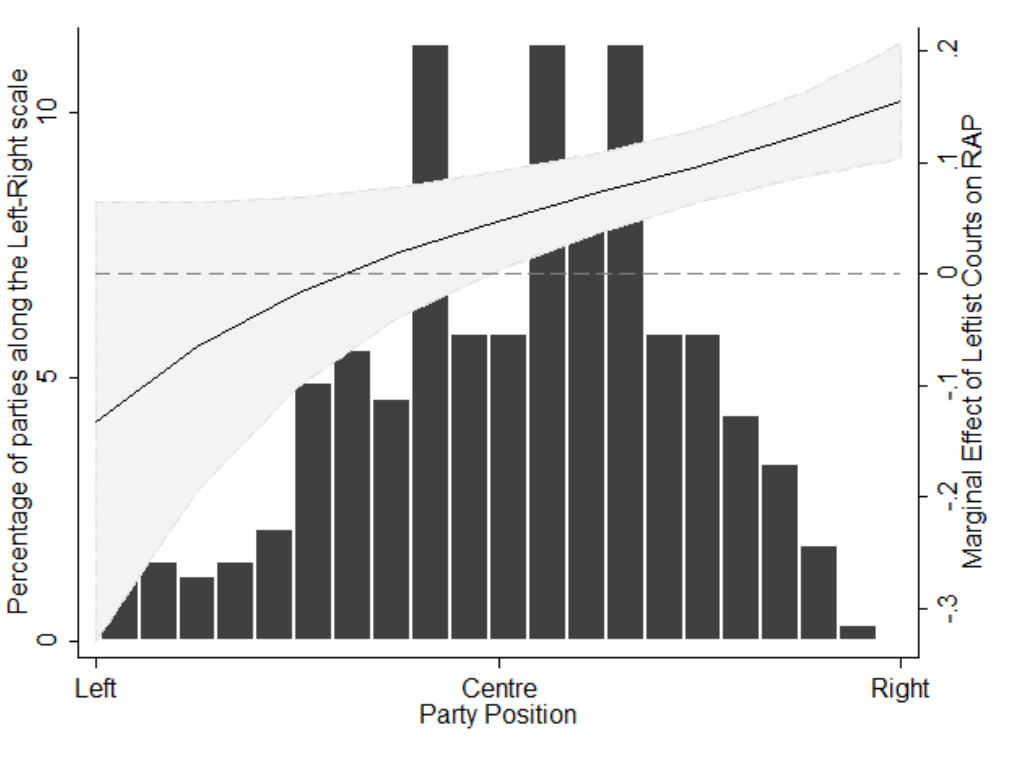


Figure 3 – Marginal effect of Rightist Courts on RAP according to different policy positions of Italian parties (with 90% confidence interval)

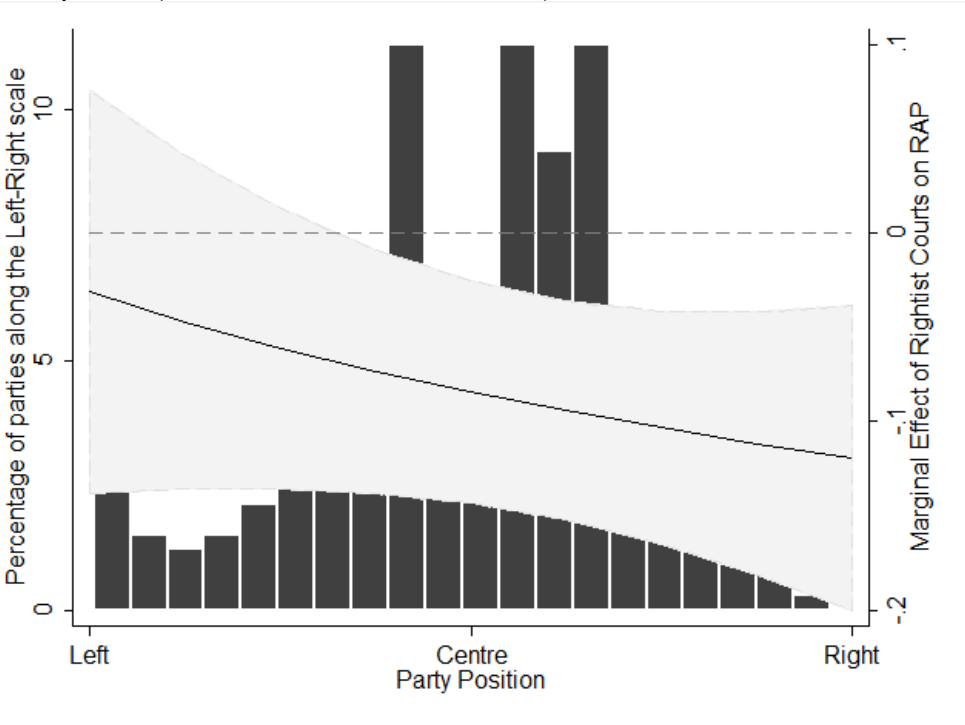
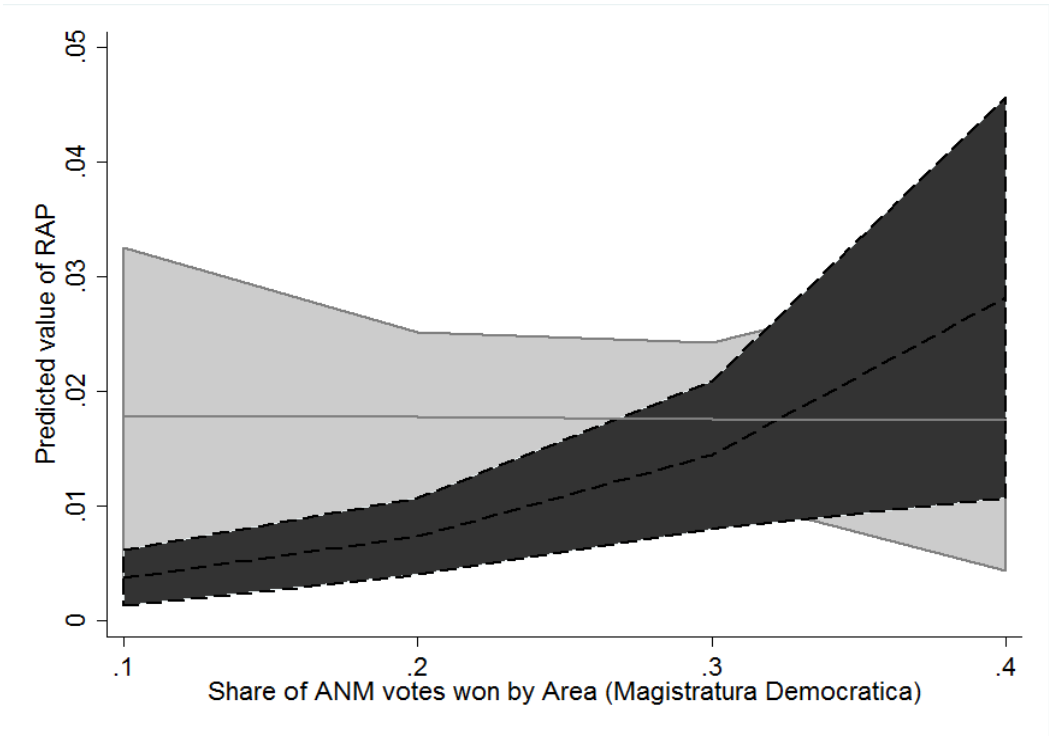


Figure 4 provides a more substantive interpretation of these results. It focuses on the two most important parties in the Italian First Republic (1948-1993), the centre-right Christian Democracy (DC, black) and the left-wing Italian Communist Party (PCI, gray) showing the predictive value of RAP for each party as the support to the leftist faction *Magistratura Democratica* grows. As we can see, the number of RAP received by the PCI is constant while the prosecutions made against the DC sharply increase as the members of courts are closer to leftist positions. We could notice a similar picture also comparing the effect on the centre-right party Forza Italia and the centre-left PD in the Second Republic during the Second Republic.

Figure 4 – Predicted value of RAP for the Christian Democracy (black) and the Italian Communist Party (gray) according to a different size of left-wing ANM factions (with 90% confidence interval)



Looking at the control variables, the dummy variables *Tangentopoli* and *First Republic* are both positive and significant, and attest that the number of investigations was higher during the First Republic (and particularly in 1993). Besides, two out of three variables related to the expected level of corruption within each party are significant as well. The number of *Years Spent in Office* seems to increase the number of judicial requests: due to their potentially higher level of corruption or to the willingness to act against mainstream groups to gain visibility, prosecutors intervene more against parties that have long been in office in the previous decade. In addition,

parties rooted in Southern regions of Italy tend to be more involved in prosecutions, probably due to the stronger role of clientelism and patronage in those areas of the country. Conversely, intra-party politics does not seem to matter. Finally, the effect of variables related to the Parliament is not significant: Neither *Coalition size* nor *Attitude towards judiciary* show that the parliament is able to affect judicial activity against MPs.

Conclusion

The present work examines the political basis of judicial activity. The effect of judicial politicization is tested on the Italian case (1983-2013) through a dataset containing updated information on the formal requests sent to the Chamber of Deputies as well as the ideological positions of the factions within judiciary, determined according to the vote share won by the rival (progressive or conservative) factions within the ANM.

Our results provide strong evidence for the impact of prosecutors' political affiliation on judicial investigations even after controlling for several variables related to the potential level of corruption of each party, such as the number of years spent in office, the connection in Southern regions, and the degree of intra-party competitiveness. All else being equal, courts with a higher number of left-leaning members supporting the ANM faction *Area (Magistratura Democratica and Movimento per la Giustizia)*, tend to act more against right-wing parties. However, the politicization of the judiciary yields effects on both sides: as the vote share of the right-wing faction *Magistratura Indipendente* increases, the judicial activity is lower against right-wing parties than left-wing ones. This finding holds even in the Italian Second Republic period.

In the light of Berlusconi's claim that 'part of the judiciary has swept away an entire political class' and *Magistratura Democratica* 'formed a tendency which carried out political activity in the form of investigations, trials, sentences [...] so as to attack political enemies' (Edwards 2005: 27), our findings show that this is not the whole story. First, we prove that the politicization of the judiciary started well before *Tangentopoli* and produced effects even when focusing on the Italian First Republic alone. On top of that, the politicization damages left-wing as well right-wing parties depending on the share of leftist or rightist prosecutors. In sum, right-wing parties receive more RAP when the share of prosecutors voting *Magistratura Democratica* grows, while they tend to be more protected against judicial activity as the number of prosecutors supporting *Magistratura Indipendente* increases. Since we do not know the actual distribution of corrupt MPs along the left-right scale (which can be uniform, normal, or skewed), and we can only adopt some control variable as a proxy, these findings suggest either that left-wing ANM factions over-attack right-wing MPs due to their ideological bias, or right-wing ANM factions over-protect

right-wing MPs even when they are corrupt. In any case, the judiciary is politicized and such politicization seems to matter indeed.

The fact that judges behaviour is affected by their partisanship may not sound surprising since previous studies disclose such relation in other countries, particularly in the United States where judges are directly elected. This work, however, improves on existing literature showing that a similar pattern applies to the Italian case, which is peculiar due to the non-elective appointment of judges and the striking *de jure* and *de facto* independence granted to the judiciary (on this subject see Riós-Figueroa and Staton 2012). Despite this strong independence, judicial decisions are affected by ideology even in the Italian case.

The politicization of the judiciary would not necessarily be problematic for the quality of the democracy if pluralism is guaranteed and a virtuous equilibrium is reached between left-leaning prosecutors investigating on right-wing parties and vice versa. In addition, the judicial politicization would not be much problematic if judges and prosecutors are selected through competitive elections, the relevance of political and factional partisanship raises some concerns about the legitimacy and accountability of their choices if they are not. Additionally, the strong autonomy of the judiciary combined with potential ideological biases becomes troublesome in term of equilibriums between the different political institutions given that independence is not a guarantee of impartiality.

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