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Editor

Handle with Care

Assessing and designing methods for evaluation and development of the quality of justice

Project partners

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The evaluation and development of the quality of justice in Italy

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1. The institutional context

1.1. The judicial structure overview

The Italian judiciary is split in two major branches: the “ordinary jurisdiction” and the “specialized jurisdiction”. The specialized jurisdiction comprises the administrative courts (the Regional Administrative Tribunals and the Council of State), the Court of Account, the Fiscal Boards and the Water Tribunals. The report does not deal with such specialised jurisdictions.

The architecture of the ordinary judiciary is a classical three-tier court system, with the Court of Cassation at the top, 26 Courts of Appeal (plus 3 detached sections), 135 courts of general jurisdiction dealing with civil and criminal cases (*Tribunale*) and 29 Juvenile Courts, handling cases involving minors. Furthermore, there are 441 Justice of the Peace Offices in which cases are handled by non-professional magistrates with a legal background. The Surveillance Offices and the Surveillance Courts supervise the execution of criminal sanctions. The Prosecutors’ Offices, not dealt with in this report, are attached to the Court of Cassation, Courts of Appeal, Tribunals and Juvenile Courts.

At the end of 2016, 6.396 judges were employed in Italian courts (Table 1), supported by 3.846 *giudici onorari* (sometimes translated as lay or auxiliary or honorary) judges (Table 2) in charge of adjudicating cases in specific matters¹ (hereinafter, honorary judges). In 2016, there were about 34.638 units of administrative staff employed at Italian courts, prosecutors’ offices, and at the Ministry of Justice (Table 3).

Since 2009 the overall budget of the Ministry of Justice is less than 1% of the State budgeted. This, however, include just the ordinary jurisdiction, while the budget for administrative, account and military jurisdiction are managed by other Ministries. A large share of the budget of the Ministry of Justice is taken by prison administration. The Ministry does not provide a separate budget for Courts and Public prosecutors’ offices.

1.2. The key functions in the administration of justice

The Constitution designs a dyadic governance structure for the national justice system. Article 110 entrusts the Ministry of Justice with the organization and functioning of judicial services (financial provisions, procurement, human resources including court managers, ICT development and deployment etc.). Hence, the handling of the general budget for the administration of justice², resource allocation to courts, human resource management for the entire non-judicial personnel, and

¹ The *giudici onorari* are appointed for a limited timeframe (such as four years) and paid for the work done. In most of the cases, this is a side job for a legal professions (mainly lawyers). All the *giudici onorari* have a legal background except for the “expert judges” that provide technical expertise to ordinary judges. We refer to this group as “honorary judges”.

² Art 110 Const. However, the leadership of the procurement division, ICT division, and administrative personnel within the Ministry of Justice are held by judges.

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ICT development are the main functions of the Ministry. The Ministry has also the power to issue by-laws and decrees regulating the matters assigned by the Constitution. This gives to the Ministry a policy-making function.

Table 1: Magistrates in service

	Total	Men	Women
Magistrates in service (Total)	9.356	4.472	4.884
• Apprentice magistrates (without judicial or prosecutorial functions)	662	252	410
• Magistrates non performing judicial functions (at Ministries etc.)	134	63	71
• Magistrates employed in judicial or prosecutorial offices (Total)	8.486	4.105	4.381
Judges	6.353	2.890	3.463
Prosecutors	2.133	1.215	918
Statutory posts: maximum number of magistrates as established by the Law 181/2008	10.151		
Vacancies	1.245		

Source: Consiglio Superiore della Magistratura, <http://astra.csm.it/organicoOrdinari/orgord.php> Visited 13 July 2017

Table 2: Honorary judges

Role/function	Statutory posts (2016)	In service (2016)
Expert judges at the Juvenile Court of Appeal Sections*	391	352
Expert judges at the Tribunal (first instance)*	738	694
Expert judges at the Surveillance Court*	497	428
Expert judges at the Water Tribunal*	30	30
Auxiliary judges at the Court of Appeals**	400	375
Justice of the peace**	3553	1341
Honorary Judge at the Tribunal (first instance)**	2685	2130
Honorary deputy prosecutor (first instance prosecutors' offices**	2064	1770

*Source: Consiglio Superiore della Magistratura, <http://appinter.csm.it/situffgiud/situffgiud.dll/EXEC/0/70CBFF0154008CF7D4DEE440?A&B>

**Source: https://www.giustizia.it/resources/cms/documents/anno_giudiziario_2016_dog.pdf (p. 29) Data refer to 2015. Expert judges at the Juvenile Court of Appeal Sections should be properly classified as experts (psychologists, criminologists etc.) providing their professional expertise to the professional judge. The other judges have real judicial functions. Honorary deputy prosecutors carry out limited prosecutorial functions, mainly at the hearing stage.

Article 105 of the Constitution entrusts selection, assignments transfers and promotions and disciplinary measures of judges and prosecutors to the Judicial Council (*Consiglio Superiore della Magistratura*). This body is the self-governance body of the magistracy (judges and prosecutors). It is composed of 27 members. Sixteen are judges and prosecutors elected by their colleagues,³ eight are law professors or lawyers with at least 15 years of experience in the legal profession elected by the Parliament.⁴ The three remaining components are permanent (*ex-officio*) members.⁵ Each member remains in office for four years, and members cannot be immediately re-elected.⁶

³ The composition and the electoral system of the Judicial Council were changed by statute no. 44 of 28 March 2002. Currently, the 16 judges and prosecutors (*magistrati*) elected members of the judiciary must be as follows: ten judges, four public prosecutors and two judges or public prosecutors working in the Supreme Court or in the Public Prosecutor's Office attached to the Supreme Court.

⁴ These members are elected at a joint session of the Parliament with a qualified majority of three-fifths of all the members (about 915 people), or a majority of three-fifths of the voters after the second ballot.

Table 3: Clerks and administrative staff (employed at courts, prosecutors' office and at the Ministry of Justice)

	2014	2015	2016
Statutory post	43.701	43.702	43.658
In place	35.625	34.534	34.302
Vacancies	8.076	9.168	9.356
Staff detached from other administrations (+)	450	51	503
Staff attached to other administrations (-)	176	16	167
Total in place	35.899	34.569	34.638

Sources: 2014: https://www.giustizia.it/resources/cms/documents/anno_giudiziario_2015_dog.pdf (p. 21); 2015: https://www.giustizia.it/resources/cms/documents/anno_giudiziario_2016_dog.pdf (p. 27); 2016: https://www.giustizia.it/resources/cms/documents/anno_giudiziario_2017_dog.pdf (p. 28)

The Judicial Council handles the transfer from one court to another, the judicial function performed, the warrant to an extra-judicial activity (e.g. secondment to a job in the executive branch, teaching, consultant activity for an international organization), the assessment, the election (appointment) as head of a judicial office.⁷ During the years, the Council has expanded its functions to various areas, including case assignment criteria, and court organisation⁸.

Table 4: Budget for the justice system for 2016

General State Budget*	824.312.752.000
Justice Budget (0,94%)	7.743.034.000
Justice (courts and PPOs)	4.689.669.000
Prisons administration	2.760.284.000
Juvenile and community justice	145.266.000
Other	147.815

Source:

<http://www.bdap.tesoro.it/sites/openbdap/cittadini/bilanciideglienti/bilanciofinanziariostato/leggedibilancio/Pagine/PrevisioniSpesaAnalisiMinisteroMacroaggregato.aspx> (year 2016)

Both judges and prosecutors belong to the magistracy (*magistratura*), and as members of the same body they are both called magistrates (*magistrati*). Hence, public prosecutors are part of the judiciary and do not have any tie with the executive. **Unless specifically mentioned, the report deals exclusively with judges and courts.**

Local judicial councils are decentralised self-governance bodies of the judiciary placed in each Court of Appeal district. Their composition entails two ex officio members (President of the Court of Appeal, Chief of the Prosecutors' Office attached to the Court of Appeal), magistrates elected by their colleagues, lawyers appointed by the National Bar Associations, and University professors

⁵ Permanent (*ex officio*) members of the Judicial Council are: the President of the Republic, the President of the Supreme Court of Cassation and the Chief (called General Prosecutor) of the public prosecutor's office attached to the Supreme Court. The President of the Judicial Council is the President of the Republic, who is elected by the Parliament for a seven year term, but for the day-to-day operations of the Council, the Constitution provides for the election of a vice-president from among the members elected by the Parliament. Art 104 Const.

⁶ Art 104 Const.

⁷ The increasing and complex functions carried out by the Council have also increased the number of employees of the Council that are supposed to be about two hundred (this data is not public).

⁸ Di Federico, G. (ed.) 2005. *Recruitment, professional evaluation and career of judges and prosecutors in Europe*, Bologna: Lo Scarabeo.

appointed by the National University Council.⁹ The number of the components is established considering the number of magistrates working in the judicial district. When decisions or opinions about non-professional judges, have to be taken, non-professional judges are admitted at the meeting of the Local Councils. The functions of the Local Judicial Councils are consultative. They report back to the (National) Judicial Council on various subjects: evaluation of judges and prosecutors, evaluation of candidates for the appointment to managerial position, case assignment, and monitoring of local courts. Hence, their role is relevant for the purposes of this work (see Sections 3 and 4). A body with similar composition and function is attached at the Court of Cassation. Both bodies express opinions and are not entitled to take decisions that remain under the competence of the (national) Judicial Council.

Other bodies with functions in the administration of Justice - The National Bar Association (NBA) (*Consiglio Nazionale Forense*) is the professional body in charge of the self-governance of Italian lawyers. The members of the NBA are elected by the lawyers and the body is formally attached to the Ministry of Justice as an independent structure. The law 247/2012 has reformed the organisation and functions of the NBA in various areas. Relevant for the purpose of this report are the institutional representation of the Bar, and relations with the Minister of Justice and the Judiciary in policy making. The law states that the NBA, “at the request of the Minister of Justice, [issues] opinions on draft laws that, even indirectly, affect the legal profession and the administration of justice”. This role is supported by a newly established Observatory on jurisdiction (*Osservatorio permanente sulla giurisdizione*), which “gathers data and prepares studies and proposals to encourage a more efficient administration of justice”.

Local and regional administration – Until 1 September 2015, the municipalities in which the courts were located were in charge of the management of the premises. The Ministry of Justice then reimbursed the facilities costs paid by municipalities. This created several problems, among which very different costs paid for similar or identical services (see section 2.5). At the end of 2014, the Parliament passed a bill that transfers the management of the premises to the Ministry of Justice,¹⁰ cutting the old ties between the judicial offices and the local administrations.

At the same time, other forms of collaboration between the justice system and local administrations were blooming all over the country. The attempt to co-finance the courts’ and prosecutors’ offices strapped budget with resource made available by local administrations is the common trait of such initiatives. In a nutshell, through various forms of “local agreements”, sometimes called “alliance for justice” (*patto per la giustizia*), local and regional administrations started to provide additional resources (grants for trainees, staff, or equipment). Two recent circular letters of the Ministry of Justice try to regulate this rising phenomena, providing guidance to avoid conflicts of interests and grant the independence of the local justice system. The circular letters establish that, before signing an agreement, the Court must get the approval by the Ministry.¹¹

Administrative Courts – As a general rule, most of the deliberations of the Ministry of Justice and of the Judicial Council’s are administrative decision. As such they can be appealed at the Administrative Court in Rome (and at the Council of State as second instance court). Such option is often followed in the case of appointment to managerial or quasi-managerial positions (head of courts or head of section, chief or deputy chief prosecutor). Even if the percentage of appeal on

⁹ Art. 9-16 del d.lgs. 27 Gennaio 2006 n. 253, as changed by art. 4, law 111/2007.

¹⁰ Regulation implementing Article. 1, paragraph 530 of the law 190/2014.

¹¹ Circolare 8 novembre 2016 - Convenzioni stipulate ai sensi dell’art. 1, comma 787, L. 28 dicembre 2015, n. 208 (cd. stabilità per il 2016). Necessità di una preventiva autorizzazione. Circolare 13 ottobre 2017 - Convenzioni con soggetti diversi da quelli di cui all’art.1 comma 787 L. 208/2015

such decisions of the Council decreased from 67% in 2010 to 23% in 2016¹², the administrative judges, and the criteria they have adopted, play a significant role in the appointment to such positions.

1.3. The current issues in the administration of justice

In Italy, the question of quality of justice is strictly connected with the timeliness of judicial proceedings and with the use of the limited available resources. This is because there is a high number of breaches of Article 6(1) of the ECHR due to the slow pace of judicial proceedings,¹³ a significant time to disposition (i.e. 952 days in first instance civil proceedings, 1.061 in appeal, and 1.222 in Cassation), and the public policies and debates are focused on efficiency and timeliness. In this context, the other dimensions of the quality of justice remain in the background. The delay issue may affect also the legal quality and the treatment of the public. The Court of Cassation is charged with an unreasonable number of incoming cases. This makes it difficult for the court to have a stable and consistent decision-making (“*isole di ordine*”) as recently mentioned by the First President of the Court quoting Taruffo.¹⁴ Furthermore, due to the slow pace of proceedings, when a new legal framework has to be applied, the lower courts (and the courts of appeal) have to adjudicate cases without knowing the jurisprudential orientation of the Cassation for a number of years. This lack of consolidated jurisprudence can further raise the entropy of the system. The current litigation rates can be reduced by a more consistent and uniform judicial decision-making, and the work to increase judicial consistency could result in a reduction of the number of recourses, with a positive impact on time to disposition: a higher legal quality can reduce time to disposition.

The backlog and the pressure to close a higher number of cases in a shorter timeframe push the judges against difficult dilemma (or tri-lemma) between productivity, legal quality (time to study the case and write well motivated judgements) and treatment of the parties (time to listen to the parties). In two recent training events organised by the School of Magistracy attended by one of the authors of this report¹⁵ the anxiety and outcry about the current working conditions and the embedded dilemmas were the most common reason of intervention by judges. However, the three key dimensions of the quality of justice – legality, economy and legitimacy – are neither independent nor necessarily opposed to each other¹⁶. As the case of the Observatories and other innovative practices demonstrates (see Section 3), some approaches can work simultaneously to improve effectiveness, legal certainty, treatment of the parties, and procedural efficiency (effectiveness).

Last but not least, the overall analysis about the quality of justice in Italy, and the policies implemented to improve some of their pillars, are strongly influenced by the governance structure of the judiciary. Any judicial policy, and almost any decision in the areas of governance or organisation requires the collaboration of the Ministry and of the Judicial Council, institutions with different constituencies, priorities and strategies. Hence, the much needed alignment between reform strategy and governance decision is often problematic. Not surprisingly, some of the

¹² <http://www.csm.it/documents/21768/137951/Analisi+sui+conferimenti+di+incarichi+direttivi+e+semidirettivi/f8af57b2-d4e2-4c21-9ebf-8515cf0c034a>

¹³ Carnevali, D. & Favari, R. 2007. La qualità del servizio giustizia nella percezione degli utenti. *Ministero della giustizia: Strumenti per la formazione* [Online]. Available: www.giustizia.it/ministero/struttura/dipartimenti/uffserv/pubblicazioni.htm

¹⁴ Di Federico, G. (ed.) 2005. *Recruitment, professional evaluation and career of judges and prosecutors in Europe*, Bologna: Lo Scarabeo.

¹⁵ The two courses involved 180 judges and prosecutors. Add names of the training courses etc.

¹⁶ Contini, F. & Mohr, R. 2008. *Judicial Evaluation. Traditions, innovations and proposals for measuring the quality of court performance*, Saarbrücken, VDM, Contini, F. & Carnevali, D. 2010b. The quality of justice: from conflicts to politics. In: Coeman, R. & Dallara, C. (eds.) *Handbook on judicial politics*. Iasi: Institutul European.

innovative practices stem from the willingness of judges and lawyers to find local solutions at problems that – for various reasons - were not resolvable at the central level.

2. The classical judicial evaluation arrangements

2.1. Introduction

The evaluation venues of the Italian justice system are multifold, and described in-depth in sections 2.2, 2.3, and 2.4. However, before discussing such key arrangements, it is worth to focus briefly on other evaluative forms: the judicial review at the level of the Court of Appeal and at the Court of Cassation, the checks of the Judicial Inspectorate, and some forms of complaint mechanisms. In this way, the report provides a comprehensive view of the multifold evaluation venues currently in place.

The proceedings heard by the Court of Appeal and the Court of Cassation are two classical forms of quality evaluation – As in any European judiciary, the Courts of Appeal and the Court of Cassation have the institutional functions to check the legal quality of the judgments. As noted in Table 5, these two courts suffer from huge backlog and long time to disposition. This affects their effectiveness in dispute resolution and their role as builders of legal certainty.

With the current time to disposition (see Table 5), it takes an average time of more than five years from the filing of the claim at first instance court to a judgment at appeal level, and almost ten years from the first instance filing to a decision by the Court of Cassation. The impact of such a litigation pace becomes even higher when cases deal with new legislation: first instance judges, but also lawyers, parties, and, generally speaking, citizens operate for various years without knowing the orientations of their court of appeal, and for many more years without a judgment at the Court of Cassation. It can be easily deduced that this state of affairs may affect the reversal rates.¹⁷

Table 5: Time to disposition in civil cases

	Time to disposition for each instance (days)	Cumulative Time to disposition (days)
First instance	952	//
Appeal	1.061	2.013
Cassation	1.222	3.235

Source: Ministry of Justice

The official statistics of the Ministry of Justice do not publish data on appeal and reversal rates. A recent research has published comprehensive data for the district of the Court of Appeal of Bologna (one of the largest districts in Italy). For this court, the appeal rate is around 30% of first instance decisions closed with sentences.¹⁸ The reversal rate (or overturn rate) is also around 30%, evenly split between partial and complete reversal. Data shows differences between the various tribunals, with reversal rates varying from 25% to 35%.

The **Court of Cassation** is the apex of the court system and has the institutional mission to lead and check the proper application of the law. Its task is to judge the interpretation of the law made by the lower courts. Differently from many other Courts of Cassation or Supreme Courts a permission to appeal is not required and filters have been introduced just recently for civil cases. Indeed, based on Article 111 of the Constitution, *“It is always possible to appeal to the Court of Cassation for a violation of the law against any sentences and against any measures affecting personal freedom”*. The *stare decisis* principle is not in place and the decision of the court is binding just for the case

¹⁷ With reversal rate we refer to the percentage of judgements of a lower court somehow changed by the higher court (appeal or Cassation).

¹⁸ Alt, E. 2008. La qualità della giustizia e i suoi presupposti. L'esperienza francese. *Questione Giustizia*, Jean, J.-P. & Marshall, D. 2005. Francia: Un controverso progetto per migliorare il servizio giustizia. *Ibid.*, 591-610.

decided. However, the authority of the Cassation, its institutional position as the apex of the judicial pyramid, and in some cases the clear jurisprudential orientations should ease a consistent application and interpretation of the law. Furthermore, consistent jurisprudence by the court reduces the complexity and uncertainty for all those working in the system, with relevant benefits for the judges working in lower courts. However, there are doubts about the capacity of the Cassation to build a consistent caseload, as noted above.

Inspectorate -The Judicial Inspectorate of the Ministry of Justice provides another classical venue of quality control. Its mission is to ascertain itself if the organisation and the procedures followed at court level are in line with the current regulations. Its role is therefore limited to formal checks in areas like privacy protection (if the case files are accessible just to staff and case parties, if the name of the parties is erased from case listing etc.), judicial expenses, and execution of penalties (law n. 1311/1962). Despite the possibility to deserve a more comprehensive approach to the evaluation and improvement of the quality of justice, the work of the Inspectorate remains largely focused on checks of legality.

Complaint mechanisms – Any person is free to send a complaint to the bodies in charge of supervising the judiciary, being the President of Court, the Ministry of Justice (in charge of disciplinary investigations and inspections), and General Prosecutors' Office attached at the Court of Cassation (in charge of disciplinary investigation) as well as to the Judicial Council that decides in judicial discipline matters. However, there are neither specific regulations, nor pre-established procedures set on how complaints should be handled. The subject who receives the complaint can dismiss it or proceed with an investigation or with an inspection, or start a disciplinary procedure. The person who filed the complaint has no right to be informed about the consequence of the complaint. The procedure becomes formalised and takes the features of an official investigation just when the complaint triggers an inspection, or a disciplinary proceeding. Based on information collected,¹⁹ the General prosecutor's office is now informing the complainer about the effects triggered by the complaint.

2.2. The recruitment and initial evaluation of judges

2.2.1. The selection bodies

The recruitment of Italian judges is based on a bureaucratic model: periodical public competitions between law graduate students, based on three written exams and one oral examination. The candidates are mainly tested looking at the knowledge of the law on the books. Previous professional experience is not taken into account in the selection process. As a result, apprentice judges have been for a long time young law graduates without previous professional experiences; hence, professionally trained exclusively within the system. In cases like this, “the process of professional socialization, ripening and development of the professional skills of magistrates will take place and be governed entirely within the judicial system”.²⁰ This could lead to an increased separation between the magistracy (judges and prosecutors) and the lawyers.

In order to participate in the competition, the candidates must first have basic personal features: political and civil rights (typically the passive and active voting rights), be of “irreprehensible conduct”, and have not failed to pass the magistrates' recruitment competition for three times.²¹ They must also have a law degree coupled with a post-graduate degree in law. This double requirement is due to have better prepared candidates, but also to reduce their number that, as

¹⁹ Personal communication with G. Di Federico, January 28, referring of the new approach of the General Prosecutor Office.

²⁰ Di Federico, G. 2012. Judicial Independence in Italy. In: Seibert-Fohr, A. (ed.) *Judicial independence in transition*. Heidelberg: Heidelberg. p. 365.

²¹ Legislative decree n.160/2006 as amended by the law n.111/2007.

discussed below, is always very high. Alternatively, the post-graduate degree can be substituted by the fact of being member of the Bar, or being a public manager for at least five years, or an honorary judge for at least 6 years, or have positively concluded an internship at judicial offices or have done eighteen months of professional training at the State Attorney Offices²². The Judicial Council assesses these pre-conditions. The alternative options to the post-graduate degree were introduced in 2006, and 2014. In the future, this may lead to a change in the traditional profile of apprentice magistrates, who until a few years ago had typically no previous professional experiences.²³ As a consequence of these changes, the majority of newly appointed judges are not in the twenties – as it was in the past – but tend to be in the thirties.

The competition should take place every year. The **evaluation commission**, appointed by the Judicial Council is presided by a senior magistrate (judge or prosecutor), and composed by twenty magistrates, three lawyers and five law professors.²⁴ The Local Judicial Councils do not have a role in this process, since the selection is centralized. The university professors are chosen by the Judicial Council among a list prepared by the National University Council, and Lawyers from a list drafted by the NBA. The chairman of the committee should be chosen from among judges who have passed their sixth professional appraisal (out of seven), the other magistrates must have passed the third professional appraisal. They are selected on the basis of a public call made by the Judicial Council. Usually, the number of magistrates available is much higher than those selected²⁵.

The number of **positions** available range from 200 to 360 per year. The number is established considering the number of vacant positions and the expected number of retirements in the following 4 years (law 111/2007). However, also other factors, particularly budget constraints are certainly considered. In the last competition (issued in October 2015), there were 16.144 candidates. A total of 5.991 candidates participated to the first written test. At the end of the three days of tests just 2.895 candidates submitted the three written exams.²⁶ All the papers (3 per each candidate) were, in the spring of 2017, under the scrutiny of the evaluation commission. The numbers of the examination makes it clear how demanding the evaluation can be. In the previous competition (2014 for 240 posts), about one third of the candidates which submitted the three written exams passed at the oral stage. Also in this case, the selection was not over in the spring of 2017. It can happen that the number of successful candidates is lower than the number of available posts. Once the Evaluation commission has finished its work and issued the rank of the candidates, it transmits the full dossier to the Judicial Council. Then, the Council check the correctness of the evaluation process, and approves the list of the winners of the competition.

²² Introduced by the Decree-Law 90/2014, converted into Law 114/2014; The rules of the competition are published on the official gazette. The last competition (*GU n.90 del 15-11-2016*) <http://www.gazzettaufficiale.it/atto/vediMenuHTML?atto.dataPubblicazioneGazzetta=2016-11-15&atto.codiceRedazionale=16E06074&tipoSerie=concorsi&tipoVigenza=originario> Visited 21 January, 2017.

²³ Di Federico, G. 2012. Judicial Independence in Italy. In: Seibert-Fohr, A. (ed.) *Judicial independence in transition*. Heidelberg: Heidelberg.

²⁴ The composition of the evaluation bodies can be found at http://www.laleggepertutti.it/91632_concorso-magistratura-2015-nominata-la-commissione-esaminatrice (for the 2015 competition) and at <http://www.altalex.com/documents/concorsi/2014/06/16/concorso-in-magistratura-per-365-posti-nominata-la-commissione>

²⁵ Sapignoli, M. 2009. *Qualità della giustizia e indipendenza della magistratura nell'opinione dei magistrati italiani*, Padova, CEDAM.

²⁶ Di Federico, G. 2012. Judicial Independence in Italy. In: Seibert-Fohr, A. (ed.) *Judicial independence in transition*. Heidelberg: Heidelberg.

2.2.2. The selection process

The three written exams deal respectively with civil, criminal, and administrative law. The oral examination deals with 11 subjects that are almost exclusively of legal nature.²⁷

The features of the selection process make it clear that the candidates are tested almost exclusively on their legal knowledge. Practical skills are not tested. There is no room to check their mental attitude towards the job, their interpersonal skills, or relational capacity; hence, the attitudes to treat parties properly or to teamwork - that are becoming essential requisites of contemporary court work - are not verified. The attempt made in 2004 to include psychological tests in the selection process has been abandoned after harsh critiques. Now, the issue is just occasionally debated in the media. At the same time, the large number of candidates involved in the selection process, would make such kind of evaluations either superficial (as a self-administered test) or rather expensive and time-consuming.

Minorities - In addition to the national selection, there are special competitions to recruit judicial offices in the autonomous province of Trento and Bolzano, where German and Ladin are official languages, and a special status is granted to the autonomous provinces. The structure and features of the competition are identical to those of the national one, but this is opened just to Italian citizens belonging to one of the three ethnical groups located in the autonomous province (Italian, Ladin or German). The exams can be done either in Italian or German, but the bilingualism of the candidates must be ascertained. Similar arrangements do not protect other linguistic minorities. This limitation, however, is not criticized probably because such linguistic minorities are fully bilingual. Religion, ethnicity, and other diversity issues are not debated yet. This could be explained by two reasons. First, the Italian society has been rather homogeneous until few years ago, and second, the recruitment process is designed to be purely meritocratic and neutral in respect of any kind of diversity. In the near future, however, it is reasonable to expect the request of affirmative actions to keep the composition of the judiciary representative of an increasingly diverse society.

2.2.3. The selected candidates

As noted above, previous professional experiences are not particularly relevant in the selection process. Nevertheless, since the age of the winners of the competition is rising, it is possible that a growing number of magistrates will have previous professional experiences. Recent socio-demographical profiles are not available.

Generally speaking, the data show a proper gender balance of the Italian judiciary: 52% are females and 48 males. At the same time, males are still the majority in managerial position as Court president (74%) and quasi-managerial roles as presidents of section (64%).²⁸ Since 1996, the data show that women are more successful in the competition for the recruitment. Since 2002, the average age of recruitment is around 31-32 years.

2.2.4. The training and internship of apprentice judges

The initial training takes eighteen months (Article 18 Legislative Decree N. 26/2006). During the training, a session of six months is held at the School of the Magistracy, while the other 12 months are carried out doing on-the-job training at judicial offices. The two sessions are, in turn, divided into a generic training phase and targeted training (based on the deepening of the subjects and

²⁷ The subjects are almost exclusively legal: roman law, civil procedure, criminal law, criminal procedure, administrative, constitutional and fiscal law, labour law, commercial and bankruptcy law, labour and social security law, EU law, international law and ICT applied to judiciaries, Italian judicial system and a basic test in a foreign language (art. 1 legislative decree 160/2016).

²⁸ <http://www.csm.it/documents/21768/137951/Donne+in+magistratura+%28aggiorn.+marzo+2017%29/330d42d5-ea52-1740-b5b8-9ef6fb74b231> (data at march 2017)

know-how needed at the office of the first appointment). The Judicial Council regulates the content of the initial training with annual guidelines²⁹ and other prescriptions³⁰.

The “general training” at judicial offices is split into two different internships: the first with courts (four months), the second at prosecutors’ offices (two months). The remaining six months of targeted training are spent in an office corresponding to the office of the first appointment. Such on-the-job training is complemented and integrated by seminars on various topics held at national and local level. While during the general training on the job the apprentice magistrates help and assist other judges, during the targeted training they start to handle and decide their own cases. Analogously, the training at the School of Magistracy is split into two different steps: four months of general training and two of targeted training. During this period, tutors play an active role providing teaching assistance to the apprentice judges.

The different training activities carried out by the apprentice magistrate at the school, at courts, and prosecutors’ offices are variously assessed, and a final evaluation report is transmitted to the judicial council (Article 22 of the Decree). On its turn, the Council decides if the apprentice magistrate can get the judicial functions. The decision is taken considering the evaluation reports and “every other relevant and objectively verifiable element eventually acquired”. In the event of negative evaluation, the trainee has to undergo an additional period of training, at the end of which a new evaluation is made. In the event of a second negative evaluation, the trainee is dismissed. The analysis of the records does not reveal any case of dismissal or prolongation of the training due to negative evaluation. However, this phase can be used to identify shortcomings of the apprentice magistrates.³¹

2.2.5. The debate on possible reforms

The debate and the data available do not show discrimination based on gender, race, sex, religion, political or other criteria. Although there are critiques about the malfunctioning of the selection procedures, pointing to cases of cheating.³² The phenomenon is not connected to political or other partisanship, and its scale has not been ascertained. However, the cheating suspicion does not contribute to the strengthening of the much-needed perception of high moral standing of the candidates.

A recent change, implemented by the legislative decree n. 168/2016, reduces the duration of the initial training for magistrates appointed after the competitions launched in 2014 and 2015. For these trainees, the length of the training was extraordinarily reduced to twelve months (instead of 18). In this case, the training is planned for two months, not necessarily consecutive, carried out at the School of the Judiciary and ten months, non-consecutive, made at judicial offices. The lack of judges and prosecutors working in the offices (see the question of staff posts below), the reduction of the maximum retirement age of magistrates, and the delays in court proceeding³³ pushed the legislator to implement such changes that raised various critiques. The impact of this decision on

²⁹ http://www.scuolamagistratura.it/images//2017/Mot/C_C_Form_Iniziale/DM_2017/Linee%20guida%20CSM%202017.pdf

³⁰ http://www.scuolamagistratura.it/images//2017/Mot/C_C_Form_Iniziale/DM_2017/NOTA%20CSM%20durat%20tirocinio%20generico%20%20MOT%20dm%202017.pdf

³¹ Di Federico, G. 2012. Judicial Independence in Italy. In: Seibert-Fohr, A. (ed.) *Judicial independence in transition*. Heidelberg: Heidelberg.

³² See for instance <http://www.corriereuniv.it/cms/2014/07/inchiesta-quel-concorso-per-magistrati-rabbia-dei-candidati-questa-volta-abbiamo-toccato-fondo/>

³³ Interview to the vice president of the Judicial council http://www.askanews.it/regioni/toscana/legnini-csm-ridurre-tempi-tirocinio-magistrati_711797227.ht

the professional qualification of the judges and prosecutors and, hence, on the quality of justice cannot be ascertained yet.³⁴

One of the experts attending the validation meeting in Utrecht raised another issue. The present recruitment system forces candidates to focus their efforts on the study of legal subjects for a very long time. It follows that, often, when they are recruited, they have lost the “fresh energy” that is much needed for newly appointed judges. “The preparation process for the national competition is not only long but also costly, because the large majority of candidates passes through private schools that have developed training courses targeted on the competition, but not on the future profession. As a consequence, access to the Judiciary can be afforded only by a part of the law graduates and, therefore, by a part of the Italian society.” For this reason, the National Magistrates Association proposed to go back to the previous system, so to recruit younger magistrates. Furthermore, despite the good technical knowledge of the newly selected magistrates, they tend to be weak in those soft skills as ethics, judicial resilience, communication skills, time management capacity, and personal leadership. Such competences have to be developed at the initial training stage because they do not get these qualities before.

2.3. The continuous evaluation of judges

2.3.1. The evaluation bodies

The Constitution assigns the professional evaluation of judges (and prosecutors) to the Judicial Council (Article 105). As a consequence, the Ministry of Justice is not involved in the exercise. Given the number of magistrates to be evaluated, the largest part of the work is done by the Local Judicial Council (or, for Supreme Court judges, by the Supreme Court Steering Council). The Presidents of the courts (and chief prosecutors) contribute to the evaluation by preparing a report on the magistrate that will be evaluated by the Local Judicial Council. The roles of the different subjects will be better exposed when describing the process.

2.3.2. The evaluation process

Judges – Since the end of the sixties and until the reforms implemented between 2005 and 2007, the career of the judges was *de facto* based only on seniority,³⁵ with four different ‘steps’ along the professional life of judges and prosecutors.

Between 2005 and 2007, various legal changes re-introduced an evaluation process for the judges (and public prosecutors). The harsh political debate that led to the current evaluation schema falls outside the scope of this work that focuses only on the functioning of the current mechanism. Now, a professional evaluation mechanism is in place. Implementing the law 111/ 2007, the Judicial Council has developed a complex scoring system to evaluate the performance of judicial officers (judges and prosecutors). The mechanism is coupled with a salary increase, but – strictly speaking – is decoupled from career advancements. Indeed, the salary is not connected to the position of the judge in lower or higher courts. For this reason, the system must be understood as a professional evaluation mechanism. The ratio of the reform was to assure stakeholders and citizens that there is professionalism in the judiciary in order to increase its legitimization.

The assessment takes place every four years. The general evaluation schema is identical for any magistrate working in courts, prosecutors’ office, or being employed in non-judicial functions (at a Ministry, in an international organisation, or being member of the Parliament). However, there are

³⁴ See above particularly Quaderni giustizia.

³⁵ Giuseppe, D. F. 2002. L’indipendenza della magistratura in Italia: una valutazione in chiave comparata. *Rivista trimestrale di diritto e procedura civile*, **LVI**, 100-128.

minor differences in the procedure to accommodate the peculiarity of the role performed by the subject that is evaluated.

Sources of information - The professional evaluation is based on multiple indicators and various sources of information.

More particularly:

- a) The information available at the Judicial Council and at the Ministry of Justice;
- b) The self-evaluation made by the magistrate;
- c) The caseload statistics
- d) A sample of judicial writings and decision (including minutes of hearings and sentences, not less than 20);
- e) The judicial appointments (i.e. the functions performed) and extrajudicial activities (i.e. side jobs) performed by the judge/prosecutor;
- f) The reports of the heads of the offices, which must take particular account of the specific situations represented by third parties (such as complaints or inputs received by the Bar³⁶).

Judicial writings are evaluated considering the clarity, completeness and synthesis in the exposition of factual and legal issues in judicial documents and decisions, and their appropriateness in respect to the procedural or investigative problems dealt with in such documents. This is ascertained through the examination of twenty judicial documents randomly selected and provided by the judge for the evaluation. The outcome of judicial decision such as reversals of sentences or of precautionary measures not confirmed by the appeal body are evaluated just in exceptional cases specifically reported by the President of the Court.³⁷

Criteria - The data and information collected through the different channels mentioned above are evaluated against a pre-established set of criteria defined by the law and further detailed by the Judicial Council. According to the law,³⁸ the assessment has to take into consideration three fundamental criteria: **independence**, **impartiality**, and **balance**. The circular note of the Judicial Council³⁹ defines the three criteria as follow. Independence must be understood as the performance of judicial functions without any conditioning, relationship or constraint that may affect or limit the way in which the judicial authority is exercised. The impartiality is identified as the correct and impartial attitude of the judge against all the procedural subjects. Balance (or equilibrium) is the exercise of the judicial function in a sense of measure, free from ideological, political or religious opinions and always grounded on objective, concrete and verifiable facts). These criteria are considered **pre-requisites** to the fulfilment of the judicial function; therefore, they must be rated as “nothing to remark” or the evaluation is immediately negative.

Then, four other criteria have to be assessed: professional skills (*capacità*), productivity (*laboriosità*), diligence (*diligenza*), and commitment (*impegno*). For each criterion, the Council has drafted a detailed definition.

Professional skill is understood as the magistrate’s legal knowledge and by the fact of being up-to-date in terms of law, doctrine, and jurisprudential changes. Professional skills should also take into

³⁶ There are not institutionalised channels to collect such complaints that, nevertheless, have to be considered by Court Presidents. Other inputs provided by lawyers about the performances of the judge cannot be considered in the evaluation process.

³⁷ Consiglio Superiore della Magistratura. By law 20691 (26 March 2015 update) implementing the law 111/2007. Available in Di Federico, G. 2012. Judicial Independence in Italy. In: Seibert-Fohr, A. (ed.) *Judicial independence in transition*. Heidelberg: Heidelberg.

³⁸ Law 111, 30 July 2007, art. 11/2, then the various very detailed Circular notes of the Judicial Council to implement it, see in particular Circular note n. 20691.

³⁹ Judicial Council. Circular note 20691 (updated 12/4/2017).

consideration the management of hearings as well as the capacity to coordinate personnel and the relationship with other judicial offices.

Productivity is defined as the number, quality, and timeliness of cases dealt with by judges taking also into consideration their specific working conditions (e.g. maternity leave, administrative tasks, complexity of the case etc.).

Diligence takes into consideration the days spent in the court office, punctuality during the hearings, the timeframes set for writing judgments and attendance of internal meetings.

Commitment is supposed to be assessed based on the availability of judges to make substitutions and attend at training classes organized by the School of the Magistracy.

The Judicial Council evaluates also the magistrates that do not perform judicial functions, and are temporary suspended from the judicial role (e.g. they are attached to a Ministry or are members of the Parliament). In such case, the assessment is based on a report drafted by the organization in which the magistrate is employed, and is based on the same criteria used for judges and prosecutors.⁴⁰ The evaluation, in this case, can be just ritualistic, and the magistrates-member of the parliament as well as those temporary employed by other institutions regularly pass the evaluation.

The role of court president as evaluator - The reform gives to the **President of the Court** a role in the evaluation of judges. As mentioned, the President has to draft a report based on a pre-established form approved by the Judicial Council. The form encompass the four area of performance mentioned above and provides several indicators to be filled in. Box 1 provides a summary translation of the form. This new function has raised the importance of the role of the Head of court that before the reform was, in most cases, a *primus inter pares* with mainly function of representing the office. Discussing the new role of court president, it must be stated that, in the large majority of cases, they do not interfere with the handling of cases and that internal judicial independence is not at stake. However, Italian judges are very independent also in purely organisational terms. Using a well-known classification of court culture,⁴¹ the Italian courts would have been labelled as “Autonomous” in which [...] “Centralized leadership is inhibited as individual judges exercise latitude on key procedures and policies. Limited discussion and agreement exist on court-wide performance criteria and goals”.

Hence, court presidents may have difficulties in organising offices in which the key professionals can be reluctant to follow basic organisational rules. This attitude, that was very strong ten or fifteen years ago,⁴² is now getting weaker, as the widespread adoption of the Civil Trial Online – that imposes significant functional and organisational constraints –demonstrates.

Now, various indicators (see in particular section 3) point to the fact that Italian courts are between the communal networked models. Communal since “Judges and managers [start to] emphasize the importance of getting along and acting collectively” networked because as the Common Praxis and the Best practice demonstrate, there are “Efforts to build consensus on court policies and practices extend to involving other justice system partners, groups in the community, and ideas emerging in society [...]”⁴³

Box 1: Form for judicial evaluation to be filed by the head of courts (selected issues)

⁴⁰ Art. 11/16 Legislative decree 160/2006.

⁴¹ Ostrom, B. J., Jr, C. W. O., Hanson, R. A. & Kleiman, M. 2007. *Trial Courts as Organizations*, Philadelphia, Temple University Press.

⁴² Zan, S. 2006. Il sistema organizzativo della giustizia in Italia: Caratteristiche e prospettive. *Quaderni di Giustizia e Organizzazione*, 1, 17–48, Fabri, M. 1998. Gli affanni dell’amministrazione della giustizia italiana. *Politica e Organizzazione*, 47-60.

⁴³ Ostrom, B. J., Jr, C. W. O., Hanson, R. A. & Kleiman, M. 2007. *Trial Courts as Organizations*, Philadelphia, Temple University Press.

[omissis]

C Evaluation of the head of court regarding the parameter of "Independence, impartiality and balance"

- Absence of critical profiles
- Profiles that show defects or critical (to be completed only if you deem)

D Evaluation made by the Court President in respect to the "capacity"

D.1

a) Judicial writings

- Technical drafting capacity
- Use of ICT
- Use of updated jurisprudential references and knowledge of updated jurisprudence

b) Investigation techniques:

- Fairness
- Use of updated jurisprudential references and knowledge of updated jurisprudence

D2. Anomalies emerging from reversals decisions made by superior courts [just in relevant cases]

D.3 Proper conduct (and/or participation) of the hearing

D.4 Level of the contributions [engagement] in the Chambers

D.5 The organisational capacity

D.6 The ability to interact in an effective, authoritative and collaborative way with colleagues and offices within the court

E. Evaluation made by the Court President in respect to the "effort" (laboriosità):

E.1 On "the level of satisfaction about the number of procedures and processes handled during each year by the judge. This has to be done considering the caseload, the incoming cases, the complexity of procedures dealt with by the judge";

E.2 Compliance with the standard (average) caseload definition (identified in accordance with Chapter V letter. B, Circular prot. 20691 8 October 2007))

E.3 Timeliness of judicial proceedings (according to the findings under letter. B, Chapter V. Circular prot. 20691 of 2007)

E.4 The cooperation offered for the good court performance

F. The evaluation made by the Court President in respect to the "diligence" of the judge:

F.1 Compliance with the commitments, the number of hearings and the time for drafting and filing of the judicial decisions or, in any case, for the performance of judicial activities:

F.2 Attendance at the meetings [art. 47/4 OG] for the analysis of new laws and for the knowledge and the evolution of law

G. Evaluation made by the Court President in respect to the "commitment":

G.1 The availability for replacements or the engagement in working group in order to solve problems of organizational or legal nature

G2 Availability to participate or actual participation to courses organized by the School of Magistracy.

We checked with a Court President with a long experience in the role (and former member of the Judicial Council) the effects of the change upon court functioning and judicial behaviour.

The president argued that the introduction of the evaluation report does not affect very much the behaviour of the judges and of the President, as well as their relationships. However, he noted that the judges who are evaluated to apply for a managerial position, and that for this reason need the specific evaluation report of the Court president (see below), are more available to collaborate to the organisation of the court.

The evaluation process - The dossier, collecting all the data and information is first discussed at the Local Judicial Council attached to the Court of Appeal. For this specific function, the composition of the board is restricted to judges and prosecutors. Lawyers and law professors are not

entitled to attend (see below). Then, the dossier is transmitted to the (National) Judicial Council where an internal Commission makes the final assessment.

The performance evaluation mechanism does not seem to be very harsh in filtering poor performing judges (and prosecutors). In the period October 2008- July 2010, 2300 judges (and prosecutors) have been examined: 2297 got a positive evaluation, 3 a “non positive” evaluation, and no judges got a “negative evaluation”.⁴⁴ The data recently published by the Judicial Council provide a slightly more severe picture. Out of a total of 16.097 magistrates evaluated in between 2008 to 2016, the negative evaluations have been 104, the non-positive 183, and the positive 15.810 (98,22%).⁴⁵ Also in this case positive evaluations occur in more than 98% of cases.

The difference between “non-positive” and “negative” is mainly in the consequences of the evaluation. “Non-positive” evaluations are mostly side effects of disciplinary sanctions.⁴⁶ In case of “non positive” evaluation, the judge must be reassessed after one year. In case of “negative evaluation”, the assessment must state if the judge has to attend training courses and if specific judicial or managerial functions are precluded until the following evaluation. Such evaluation must occur two years after the first one. If also this second evaluation is negative, the judge (or prosecutor) is dismissed.

The lawyers do not have a specific role in the evaluation of the judges and prosecutors. The National Bar Association asked to acknowledge the role of the lawyers in the evaluation process, so far without success.

Also, the circular letter of the Council made clear how the different criteria should be evaluated. Just to make some examples, it specifies in which cases statistical data should be considered, in which cases the report of the Court President is relevant, and in which other cases the self-report of the judge should be considered.

2.3.3. Focus on the evaluation of judgements and legal writings

Judicial argumentations - The codes of civil and criminal procedures provide the specification of the content of the sentence.⁴⁷ Article 118(1) of the Implementing rules of the Code of Civil procedure establishes that the reasons (justification) of the judgment require the summary exposition of facts and juridical reasons supporting the decision, also with reference to jurisprudence. For the cases discussed and decided in chamber, the judicial decision must include a summary exposition of the facts and of the laws and legal principles applied. The article states also that references to legal doctrine must be omitted.⁴⁸

In criminal cases, the Code of Procedure (Article 546) establishes that the sentence must include the charges, the statements of the parties and the concluding requests, a summary exposition of the facts and of the relevant laws, the evidence supporting the decision, the reasons why contrary evidence to the are not reliable, and the disposition with precise reference to the laws applied. Also in this case, references to legal doctrine must be omitted.

⁴⁴ Aghina, E. 2009. Reclutamento e carriera del magistrato. In: Albamonte, E. & Filippi, P. (eds.) *Ordinamento giudiziario. Leggi, regolamenti e procedimenti*. UTET.

⁴⁵ <http://www.csm.it/documents/21768/137951/Valutazioni/06706f39-ce6a-432c-bea2-45726330b9a4>

⁴⁶ Giustizia, M. D. 2017. Relazione del Ministero della Giustizia sull'amministrazione della giustizia anno 2016.

⁴⁷ Di Federico, G. 2012. Judicial Independence in Italy. In: Seibert-Fohr, A. (ed.) *Judicial independence in transition*. Heidelberg: Heidelberg.

⁴⁸ For a recent discussion on the mandatory omission of references to legal doctrine in judicial writings see Civinini, M. G. 2016. Reclutamento e formazione iniziale dei magistrati nel D.L. n. 168/2016. *Questione Giustizia* [Online]. Available: <http://www.questionegiustizia.it/stampa.php?id=1100> [Accessed 28 Settembre 2016].

Academic literature regularly discusses the judicial reasoning and the case law of the Court of Cassation focusing on various procedural and substantive issues. Also various judges and prosecutors publish books, handbooks, and articles on a variety of legal topics somehow connected with judicial reasoning, with procedural issues, or with the interpretation of the substantive laws. This is the normal dialogue between academics and practitioners. The judges or prosecutors, who authored such academic or professional publications, can ask to have them include their periodic professional evaluation. However, the effect of such dialogue on judicial practice is difficult to map out, also because judicial decisions cannot provide reference to doctrine.⁴⁹

A different kind of dialogue, often harsh, is the one going on for many years between the justice and the political system, but this will not be discussed in this chapter.⁵⁰ In this dynamic, the media played a major role in supporting the arguments and the interests of the contenders: some supporting the judges (or some “judicial groups”) and their political allies, others endorsing the other political groups. Not surprisingly, in this context, specific judicial decisions are subject to harsh criticisms, largely of partisan-political nature. This is the case when politicians, businessmen, or, more generally, persons with a high public profile are involved in judicial proceedings, but also when judges decide in areas that are at the same time poorly regulated and highly sensitive such as euthanasia or artificial insemination. Furthermore, usually critiques rise immediately after the communication of the court decision, and not when the motivation of the decision - with the judicial reasoning - is made public some weeks later.

With few exceptions, court presidents are not particularly active in the promotion of the quality of the jurisdiction, especially, the consistency in judicial decision-making. As noticed above, they are mainly entrusted with the management of available resources and in attracting new ones. Furthermore, given the strong emphasis on individual independence, steps in this direction could be considered with suspicion and scepticism. Actions towards a more consistent judicial decision-making are sometimes taken at the level of the court chambers (or sections), through sentencing meetings with the judges assigned to the chamber as established by the Italian Justice System Law. More in detail, Article 47^{quarter} states that the President of the Chamber promotes the exchange of information and experiences among the judges of the same chamber. “Exchange of information” may mean different things. As stated by various judges, the practices range from formal bureaucratic meetings to in-depth assessment of the current legislation. The latter are opened also to lawyers and legal scholars to identify consistent interpretations and to share sentencing schemas.⁵¹

The topic, however, has not attracted large interest, nor led to the development of specific methods to improve consistency. A remarkable exception is the work done by the “*Osservatori per la giustizia civile*” (Civil Justice Observatories – see in detail Section 3).

2.3.4. The consequences of the judicial evaluation on the quality of justice

The connection between performance evaluation and the judicial career is twofold. On the one hand, a positive mark is needed to get a salary increases and to reach the career level required to apply for a position with a higher court or a managerial position. On the other hand, results of the judicial evaluation are just loosely coupled with transfers to higher offices. More in detail, horizontal and

⁴⁹ Rinaldi, F. 2015. Sono costituzionali le normative che vietano la citazione della dottrina nelle sentenze? Brevi riflessioni tra storia del diritto e diritto comparato con particolare riferimento al “processo” costituzionale. *Forum di quaderni costituzionali. Rassegna n. 9/2015* [Online]. Available: <http://www.forumcostituzionale.it/wordpress/wp-content/uploads/2015/10/rinaldi.pdf>.

⁵⁰ Consiglio Superiore Della Magistratura 2016. Circolari, Risoluzioni e Delibere del Consiglio Superiore della Magistratura (raccolta aggiornata al 31 luglio 2016). Roma: CSM.

⁵¹ See, Cavallini, D. 2012. Le valutazioni di professionalità dei magistrati: prime riflessioni tratte da una ricerca empirica sui verbali del Csm. *Rivista trimestrale di diritto e procedura civile*, **66**, 1223-1250.

vertical transfers are based on calls open to all the judges with the qualification (rank) required. The judicial council lists the candidates also using the results of individual evaluation. However, since the “mark” is “positive” for the largest majority of the candidates (i.e. there are no points, marks or grading are assessed as ‘very positive’, ‘excellent’ etc.), the evaluation exercise does not help to differentiate judges on the criteria of merit. Hence, horizontal and vertical transfers remain almost exclusively a matter of seniority. A question still open when writing this is whether the complex judicial evaluation exercise should inform more precisely on key managerial decisions as the appointment of judges to a different office.

As noticed during the validation meeting,⁵² the system is mainly a bureaucratic exercise. The “self-evaluation report” is a very important tool that should be used by the judge for self-reflection and personal improvement, but it is conceived as a component of a larger bureaucratic mechanism. It has not been used for learning or professional development. Furthermore, the current system lacks the arrangements that are appropriate to improve the quality of the court services such as peer or external reviews.

The assessment is quite comprehensive. It includes both efficiency and legal quality while the opinions of the parties are not properly considered at individual evaluation level. A first summary assessment of the effects of the performance evaluation on quality of justice identifies two major consequences. First, the massive effort made to evaluate judges does not produce information useful (or used) to appoint judges to higher positions. Second, the introduction of a rather comprehensive evaluation mechanism and the role assigned to the President of the Court in evaluating the judges has contributed to a change of the attitude of Italian judges. They are now more committed and cooperative, aware of the constraints that are present in complex organisations. This last consequence is enforced by the special evaluations provided when judges apply to managerial positions. The previous organizational setting was often defined by scholars as organized anarchies⁵³ or loosely coupled organizations⁵⁴ in which each judge was free to adopt or reject any organizational tool or any ICT application. Now, courts are better organized, judges use standard ICT systems, and judicial independence properly protects the judicial decision-making.

2.3.5. The consequences of judicial evaluation on the appointment to managerial positions

Selection of chief judges and prosecutors – After the 2005-2007 reforms,⁵⁵ the selection of the Court presidents (also called head of courts) and chief prosecutors is formally based on ‘**merit**’ and ‘**attitude**’. The Judicial Council conducts another evaluation process, which ends with a vote (ballot) among a restricted number of candidates.

According to the Council’s Circular Notes, for the selection of the heads of offices, the ‘merit’ criterion is supposed to take into consideration the whole quantity and quality of the judicial activities of the magistrate. Hence, the process of continuous evaluation of judges should inform the evaluation of the merit that should be a kind of ‘consolidated evaluation’ of the assessment of each magistrate, which takes place every four years. Since 2015, the School for the Magistracy organises training courses on managerial subjects. These courses are to be attended by all those who want to apply to a managerial position.⁵⁶ Given the high number of participants the course is organised as

⁵² Source: the Italian judge that attended at the Validation meeting.

⁵³ Fabri, M. 1998. Gli affanni dell’amministrazione della giustizia italiana. *Politica e Organizzazione*, 47-60. p. 56.

⁵⁴ Cavallini, D. 2012. Le valutazioni di professionalità dei magistrati: prime riflessioni tratte da una ricerca empirica sui verbali del Csm. *Rivista trimestrale di diritto e procedura civile*, 66, 1223-1250.

⁵⁵ Law n. 150 of 2005, then Legislative decree n. 160 of 5 April 2006, and Circular notes of the Judicial Council to implement the Legislative decree P-19244, 3 August 2010, and then P-14858, 28 July 2015.

⁵⁶ Art. 26bis legislative decree 26/2006. See for instance the training programme for 2017 <http://www.scuolamagistratura.it/formazione-dirigenti/formazione-dirigenti-anno-2017.html>.

three or four full-immersion with classes and working groups. This is followed by homework that requests participants to prepare a report on court (or prosecutor office) organisation. The Directive Board of the School evaluates the results of each participant also taking into consideration the inputs of the teachers. Such evaluation is then considered in the selection procedure.

The ‘**attitude**’ criterion deals more with the candidate’s ability to organise, plan, and manage the resources of the office. This criterion must take into consideration previous experiences in managerial positions in courts or prosecutor’s offices. Merit and attitude are then subdivided into several other detailed items.

The appointment of the Court presidents is another decision that requires the involvement of the two governance bodies since the Judicial Council appoints the Court presidents with the “*concerto*” (endorsement) of the Minister of Justice. However, after a Constitutional Court decision (n. 72/1992⁵⁷), the opinion of the Ministry is not binding and the Council can appoint a President even without the endorsement of the Minister. As a consequence of this constitutional framework, the Ministry is not involved in the performance evaluation of Court presidents.

The complex mechanism in place still lack the capacity to make an appointment really based on merit and attitude. As it will be discussed below, the common understanding is that election/appointment are still based on political sponsorship by the different components of the Magistrates Association represented within the Judicial Council, i.e. the body that elects the Presidents.

Table 6: Summary of the distribution of Italian magistrates based on gender, and function⁵⁸

Function	Women		Man		Total
	Number	Percentage	Number	Percentage	
Managerial (ex. court presidents)	105	26	298	73	403
Courts	73	31	161	69	234
Prosecutors	32	19	137	81	169
Quasi-managerial (i.e. head of section etc.)	233	36	443	64	969
Courts	228	39	361	61	589
Prosecutors	25	23	82	77	107
Ordinary judges	4034	54	3379	46	7413
Courts	3173	57	2386	43	5559
Prosecutors	861	46	993	53	1864

As mentioned above, while ordinary positions are well balanced, males still occupy the majority of managerial positions as showed by Table 6.

2.4. The evaluation of courts activities

2.4.1. The actors involved

The evaluation of court activities is mainly the result of national policies, or of institutional mechanisms that are embedded in the judicial governance system. The local initiatives are limited

⁵⁷ <http://www.giurcost.org/decisioni/1991/0072s-91.html>

⁵⁸ <http://www.csm.it/documents/21768/137951/Donne+in+magistratura+%28aggiorn.+marzo+2017%29/330d42d5-ea52-1740-b5b8-9ef6fb74b231>

to few courts that have conducted court users' surveys (see below), and to the so-called "best practices" experiences described in Section 3.1.

The court evaluation system is made of different components seeking to design court organisation, and to establish annual plans and goals. The multi-faced components provide a background for the court evaluation. However, as will be discussed, the ways in which the mechanisms in place provide effective evaluation are limited. The entire system is not clearly linked to consequences. At the same time, the system is more effective in steering judicial organisations in given directions through normative constraints and, perhaps, to offer some learning opportunities. Since there are various evaluation mechanisms in place, each one is related to specific consequences, and each evaluation mechanism description and the assessment of its consequences are joined up to streamline the analysis. Lawyers and court users remain largely outside such evaluation exercise. This exclusion raised some critiques. These are discussed below. Individual courts have conducted some users' survey, but without the involvement or support of the Ministry or the Council. The roles of the actors in the court evaluation exercise are described more precisely in the following sections.

2.4.2. The evaluation processes and their consequences: From the organisational charts to the activity plans

The evaluation process is entrusted in three different components: the "organisational chart" (or blueprint), the "annual activity programme", and the "court activity plan". Laws, bylaws, and circular notes regulate the entire planning exercise in a very detailed fashion.

Step 1: establish the "organisational chart" (*tabelle*) – The evaluation of court performance starts with a complex regulatory mechanism addressed to distribute the judges to the sections, to define the criteria to assign cases to judges and to establish performance goals at various levels. From an organisational perspective it is essentially an issue of design of the organisational structure: to plan the division of labour among sections (based on subject matters and caseload) and judges.

The assignment of judges to sections and of cases to judges are basic organisational decisions since they determine the organisational chart, provide the criteria of specialisation, and affect the caseload of individual judges because these arrangements aim to secure a similar workload for everyone. Furthermore, the system allows the assignment of each case to a pre-established judge, empowering the constitutional principles of "natural judge" (Article 25 Constitution). The organisational tool used for such multifaceted purposes is called "*tabelle*" (literally tables). These should be understood as the Court's "organisational chart" or "organisational schema."⁵⁹

Such document is prepared every three years. It establishes some key issues among which the judges assigned to each section of the court, the subject matters handled by each section, and the criteria to assign cases to each judge (or panel). As in many other jurisdictions, the degree of specialisation of court sections is higher in larger courts.

More generally, the regulation establishes the "natural judge principle" by assigning whatever case to a pre-established judge. The organisational charts are built through a complex process that requires the contribution of each judge, the assessment of caseload, and the drafting of a document that presents the information collected, the criteria adopted, and justifies the choices made. The draft is then sent to the Local Judicial Council for a first check and then submitted to the national judicial council for the final approval. Quite often the National Judicial Council approves the chart with considerable delay. The charts are published on the Official Bulletin of the Ministry of

⁵⁹ Contini, F. & Fabri, M. 2007. Case assignment in Italian courts. In: Fabri, M. & Langbroek, P. (eds.) *The right judge for each case*. Utrecht.

Justice⁶⁰ and sometimes on the courts' websites. Such charts are considered an issue of organisation of the jurisdiction; therefore, the Ministry of Justice has no say in the entire procedure. The decisions to be taken should be based on sound statistical data. This need pushed the establishment of a new organ within the national Judicial Council and within each Local Judicial Council, called Caseflow Commission (*Commissione flussi*) composed of judges, prosecutors,⁶¹ and, recently, opened to lawyers. The collection and the analyses of caseflow data to be used to design organisational chart and provide a balanced caseload to each section and each judge are the main functions of such commissions. The statistician employed by the Court of Appeal usually does the technical work for the Commission. The data used are quite standard: incoming, decided, and pending cases per judge, per type of case, per type of definition, time to disposition etc. Also in this case, the procedure is regulated by a decision of the Judicial Council that has also established a common data collection schema.⁶² However, the data describes the caseload, but does not assess the workload (i.e. the time needed by judicial officers and clerks to define a case). This has several negative consequences as seen below.

Step 2: Couple the organisational chart with the annual activity programme. The blueprint provided by the “organisational chart” is then associated with the Annual activity programme (*programma annuale delle attività*) that establishes organisational goals, such as the number of cases to be handled or closed by each court section or by the judges working in each unit. Targeted initiatives addressed to the reduction of backlog called case disposal plans (“*smaltimento delle pendenze*” (sic!)) usually complement the annual activity programme. This second procedure involves only the judges. However, the activities must be coupled with the available resources. Case handling requires the engagement of technological and material means as well as of clerks and administrative staff. Such resources are formally under the control of the Court Manager (a civil servant appointed to that position by the Ministry of Justice), and not of the Court President. Hence, a third step has to be accomplished.

Step 3: Couple organisational chart and annual activity programme with staff and with material and financial resources (court activity plan) - The Court Manager (a civil servant) has a role in the annual planning exercise. As the person responsible for the management of financial, material and human resources assigned to the office, she has to make a further plan called court activity plan (*Programma annuale delle attività*) by taking into account various different kinds of inputs (programmes and priorities established annually by the Minister of Justice and the inputs of the Court President).

The annual priorities of the Ministry represent a legitimate policy input based on the Constitutional provision that assigns to the Ministry the responsibility of the functioning of the judicial services (Article 110). Also, results reached by the managers will affect their careers and their actual remunerations. Indeed, the results reached are connected to annual bonuses.

Since an agreement about the annual priorities and strategies of the Ministry and the Council is neither agreed, nor shared, the two governance bodies may provide courts with inconsistent or contrasting priorities. One institution can have as a top priority the deployment of a given policy while the other institution may consider that policy a threat to the judicial function or judicial independence. The reforms implemented by the centre-right government between 2005-2007 are an example of this state of affairs. This may lead to tensions and conflicts between the two senior

⁶⁰ <http://www.bv.ipzs.it/include/Pubblicazioni.jsp?TP=notRuoli&ricerca=ministero&emettitore=Ministero%20della%20Giustizia&codEmett=3&codPubbl=1>

⁶¹ This new body has been established by the same circular of the judicial council that precise how to create the organisational schemata. <http://astra.csm.it/circtabelle/pages/php/stampa2.php>

⁶² http://www.ca.milano.giustizia.it/documentazione/D_1138.pdf

figures, the President and the Court Manager. If the two leaders are unable to agree on the annual program, or radically disagree on its implementation, the legislation establishes that it is ultimately the Ministry of Justice that has to solve the conflict (Article 4), taking the decision on its own or delegating it to the President of the competent Court of Appeal. However, based on the information we have, such option has never been used. Agreements are always found at local level. Tensions emerge more in the “high-level” judicial politics debates than in the court practices, where agreements between the two sides of the office - the magistrate head of the court and the court manager - are usually reached on pragmatic bases, i.e. what can be done in the office considering the manifold constraints.

Discussion - The overall organisation of this complex planning exercise reflects the dyadic governance structure represented by the Council and the Ministry, and the lack of a legislative provision aiming to identify shared goals and priorities between the Ministry and the Council. This would be a much-needed pre-requisite in order to provide consistent and coherent inputs and goals for the courts. The entire planning exercise is also based on evaluation, particularly in statistical terms, measuring the caseload of the courts and of the sections within the court. But how are the evaluation, planning and quality of justice connected?

Quality dimensions – The organisational plans deal, first of all with the implementation of the natural (or legal) judge principle. In this respect, their introduction has assured the implementation of a key legal principle, and reduced the exposure of individual judges to undue interferences; hence, it secured internal independence. Also, it has pushed toward judicial specialisation that, as in any professional job, should improve the quality and efficiency of the individual and the performance. Even if complex and demanding in terms of time required for their development, they have contributed to improve some key legal principles.

Apart from this, the entire system deals with the economic (or managerial) dimensions of the quality of justice. Other quality areas, such as treatment of the parties, or policies to improve judicial consistencies – if and when existent – are not included in this document. Furthermore, the court activity plans drafted by the Court managers are rather modest in terms of goals and areas of improvement. They tend to outline plans that can be implemented without the involvement of the judges since they have no influence on the judicial side of the Court. Hence, such plans are rather self-contained and loosely coupled with the Court annual activity programme. But is the system effective in evaluating and in improving efficiency?

Data, workload and caseload – As aforementioned, the Italian Judiciary does not have a workload measurement system (or a standard cost system) that clarifies the average working time needed to define a case (or its average cost). Therefore, the Caseload Commissions and the courts do the planning exercise without the uniform and reliable measure of the workload that should inform the planners about how much work has to be done in each section, by each judicial officer and by each clerk. Due to this lack of information, all the planning is based on caseload measures that are just (rough) proxies of the workload of the unit. Indeed, the data used are mainly incoming, decided (or closed) and pending cases for different types of cases, plus some data about the number of cases below or above certain time standards. Also, another key component that is missing is the full-time equivalent. Human resources are often considered as heads (i.e. persons in post), but factors limiting their working capacity, ranging from sickness or maternity leave, to temporary assignment of a staff unit to another office are not taken into account. Hence, the entire machinery put in place is not very accurate in measuring efficiency and effectiveness.

Plans, results and consequences - A last relevant question is about the consequences of the evaluation. From a managerial perspective, plans guide the action needed to fulfil the expected

goals. Various kinds of consequences should be associated with it such as learning, the reward for a good achievement or a sanction for a poor result. The complexity of the multi-steps planning exercise should be mainly justified by the possibility to evaluate court operation against the goals and the activities planned. The research conducted so far point to the fact that consequences of the planning are not clear. Court budget and resource allocation are not influenced by this planning and evaluation exercise, and even symbolic rewards are absent. The planning is largely self-referential and ritualistic, while the results based on the annual performance program of the court are not officially or openly discussed.

However, when a Court President looks for a reappointment or for an appointment as president of another court, the Judicial Council can consider the goals established in the annual plans and the results reached. On the same line, the Council can consider problems emerged in the establishment of the “organisational chart” such as critiques by some judges for the method or the criteria used, or in the implementation of the activity programs. However, how these “results” are transformed into evaluation is not clear, as well as the weight of the results reached in comparison to other criteria.

As developed in Italy, the Annual activity programs (or business plans) may have a negative impact on the quality of justice. One of the experts that reviewed this chapter emphasised that there is no “proper ownership at a central level of such plans”, and they are not used for a proper allocation of resources among courts. The result is that they are “artificial”. At the same time, the planning exercises put a lot of pressure on the judges to increase productivity. This squeezes the time available for the study of the case and can result in getting decisions of a poorer quality. Another mistake is that all the judges of the court are requested to perform on an average (standard) basis, even if they have different capacities. As emphasised by an expert judge in the second validation meeting: “This is wrong. For me, in a proper organisation, the leader should ask different outcomes depending on the different capacities [...] different targets [should be established] depending on the capacities.”⁶³ Finally, the uniform performance standards negatively affect the outcome of the system.

The case of the less strategic plans prepared by Court managers is slightly different. Indeed, since Court Managers are civil servants appointed by the Ministry of Justice, they are subject to the general performance evaluation cycle as any other public manager. Therefore, the Court managers are evaluated also considering the goals and the results reached as established by their annual plans. Such results are one of the inputs of the evaluation exercise based on the “360 degrees approach” assessing the information provided by statistical data, self-evaluation, and inputs from stakeholders⁶⁴ and the Court’s president. A Commission appointed by the Ministry of Justice and composed of a high-rank magistrate, an official of the Ministry, and an external expert carry out this evaluation. The consequences can be some bonuses for the managers and a result to be considered for the next appointment. However, for reasons that are not clear yet, the evaluation for the last five years has not been accomplished yet. The consequence is that the Court managers are not receiving the bonus calculated on the bases of the results reached since 2013.

The third function of the evaluation is accountability. The organisational charts are public (even if not easily accessible) while the activity plans have not been published. Also, the analyses made by the Caseload Commission are not public. The new website of the Judicial Council provides a

⁶³ Validation meeting, Utrecht, November 10, 2017.

⁶⁴ The original plan was to collect such inputs every year through questionnaires addressed to the Bar Association, the Penitentiary Administration and the Local department of Notaries. Based on the information collected, this data collection process has not been implemented yet.
https://www.giustizia.it/giustizia/it/mg_1_12_1.page;jsessionid=AEYr4waeiyJoCVehnCFYraOB?facetNode_1=0_17&facetNode_2=0_17_4&contentId=SPS635811&previousPage=mg_1_12

relevant amount of data, studies, statistics etc., but the basic statistical analysis used to calculate statistics is not public.

2.4.3. The evaluation processes and their consequences: Statistical data, the Strasbourg project and Court users' surveys, and quality standards

Statistical data – The importance of statistical data for court management is growing also in Italy. The case management systems deployed at the national level for civil and criminal procedures collect detailed data about courts operations. However, the way in which such data are made available for statistical purposes vary.

Even if the case management system for criminal procedures is brand new, it is not yet interoperable with the data warehouse system. Hence, to collect data the Ministry of Justice has to make a request to the courts. The courts make queries to the systems, extract the data, and send them to the Ministry of Justice.

In the case of civil proceedings, data are extracted from the case management systems, their quality is checked, and then uploaded to the data warehouse system of the Ministry of Justice. Hence, in civil procedures the system does not work on a limited set of data collected locally (as in the criminal one), but on a large subset of data collected by the case management system. The data are elaborated by the Ministry and by statisticians working at the Courts of Appeal. Reports are then delivered to the courts, the Judicial Council and to the Local Judicial Council.

Discussion - The growing availability of analytical data – together with the growing attention to efficiency and effectiveness - have contributed to a change in the attitude of Italian justice professionals towards statistical data. Statistical data are now considered an appropriate means to analyse judicial operations. Some of the data collected by the data warehouse are made public through a dedicated website.⁶⁵ Furthermore, the availability of data contributed to the launch of the Strasbourg projects (see below). This project is one of the first attempts made in Italy to manage courts by keeping in stark focus caseload data.

The “Strasbourg” projects and the statistical monitoring – Since the end of 2014 the Ministry of Justice has tackled the question of delays with a new approach, based on a more precise statistical analysis, and a strategy customised on the specific reasons of delay. The Projects Strasbourg 1 and 2 (*Progetto Strascburgo 1 e 2*) aim to implement some of the best practices established by the CEPEJ to reduce the timeliness of judicial proceedings. To do so, taking advantage of the new data warehouse, the Ministry of Justice monitors caseload indicators of the Italian courts. The system has been developed first in the civil area, and then in the criminal one. The statistical analysis revealed that the timeliness problem is not associated with the (allegedly poor) productivity of judges, but with the poor programming of the individual calendar and poor management of caseload. Too many cases older than three years in the backlog were affecting the overall duration of proceedings. Furthermore, the analysis pointed to abnormal rates of litigation in social security and welfare cases in specific courts and identified a group of poor performing offices. Specific corrective measures have been identified and – at least partially – implemented.

Discussion - The monitoring results in ranks for the Italian courts are based on different indicators and tables with some data about the resources available with each court. The system is designed to spot and blame poor performing offices and symbolically prizes the efficient ones. This has had some media echoes and is going in the direction of the establishment of a statistical monitoring of

⁶⁵ See <https://websat.giustizia.it>. The 2015 criminal procedure data were not available in February 2017, while some data for 2016 were already made public.

Italian courts. From a judicial evaluation perspective, the system provides mainly a tool to steer the functioning of the courts, based on CEPEJ good practices, but it looks just at effectiveness (time to disposition) and efficiency (case decided by each judge). Furthermore, the system has helped to increase courts' accountability by providing for the first time caseload data (incoming, closed, and pending) correlated with human resources employed by each court. As previously seen, the evaluation is not connected with clear and sound consequences in terms of resource allocation, sanction for poor performing offices etc. These remain rather symbolic: the possibility to rank the offices based on time to disposition, but also visits of the Minister of Justice and top officials of the Ministry to the slowest courts to check the reasons of the poor performances. There are some methodological limits, mainly due to the lack of the data needed to estimate the workload and correlate it properly with resources. This is due to the lack of workload measures and the lack of the full-time equivalent of human resources as discussed above. Hence, fast courts may succeed due to an excess of resources, while delays may be the consequence of an inadequate number of judges and staff. So, the rank made public by the Strasbourg project is meaningful and proper just if the resources are allocated to each court based on their caseload or workload. We have checked this hypothesis in Section 2.5.3, calculating the cost per case in each Italian court, and found that this is very uneven.

Surveys - Despite the data published by the CEPEJ and reported by the EU Justice Scoreboard stating that Italy is regularly conducting users' survey, the data and the information we have been able to collect point to a different picture. A nation-wide court users survey has never been conducted or – if conducted by the Ministry or by other agencies - it has never been published. There are just local experiences. The first systematic exercise in this area dates back to 2007, with a survey conducted in courts and prosecutors' offices of a large judicial district. Since then, few works have been undertaken. The website of the Ministry currently publishes the results of 7 different customer satisfaction surveys conducted in 4 different courts in the last 5 years.⁶⁶

In 2013 and 2015 the National Institute of Statistics (ISTAT) has collected data about the experience of Italian citizens with the civil justice. The two collections are not proper users' surveys, since data have been gathered in the broader framework of a national survey called "Aspects of Daily Life", and are not collected, nor referred to specific courts. Nevertheless, the two surveys provide interesting views about the experience of the people about the services delivered by courts.

Various surveys have been conducted to estimate the trust of citizens in judicial institutions. The comparative work done by Eurostat for EU Member States shows that Italian citizens have a very low trust in judicial institutions, as well as in several other public bodies. A similar survey, with similar results, is carried out for the EU Justice Scoreboard. Interestingly, the opinions of the few court users surveys mentioned above are more confident than those emerging from the Eurobarometer surveys. Even with the well-known problems such as long waiting lines and procedural delays, the day in court experience is more positive than the representation citizens (not necessarily court users) have based on second-hand experiences and perception largely built by the media.

Discussion - The less developed areas deal certainly with the use of surveys and other tools to involve court users in the evaluation and development of the quality of justice. This is certainly true at central level where surveys are not used (or made public) and there is no discussion about their introduction as systematic means of evaluation. At local level, as noticed, there are initiatives in

⁶⁶ Rome First instance court (2015), Rovereto (2012), Turin (2010 and 2013), and Catania (2010). https://webstat.giustizia.it/_layouts/15/start.aspx#/SitePages/Studi%20analisi%20e%20ricerche.aspx

terms of both users' survey and other innovative practices discussed in Section 3, but such initiative are just local and not promoted by the Ministry or the Council.

Other quality standards in place - The rules, and particular the Circular letter of the Judicial Council establishing the procedures and criteria to be followed to define the organisational chart and the annual plans can be considered a quality standard. A rule that, if followed, should deliver quality regarding the proper assignment of cases and establish some annual productivity goals at court level. So, the standard is mainly normative, and the consequences are not clearly outlined.

Another standard is the result of pressure put by the European Court of Human Rights to reduce the number of complaints filed by Italian companies and citizens for unreasonable delays. In addition to the many structural and procedural measures introduced to shorten the length of litigation, in 2001 the Italian Parliament approved a bill (called Pinto Law 89/2001), which enables parties to court proceedings to ask for compensation for unreasonable length of litigation. The law establishes that the length of the proceeding should not exceed the duration of three years at the first instance court, two years at appeal level and one year at the Court of Cassation or an overall period of 6 years (called also 3+2+1). Once the sentence becomes final, and the term is passed, the claimant can ask for compensation. Since compensations paid by the state under the Pinto's law schema were 400M Euros in the period 2001-2014, and the estimates of the Ministry of Finance for the following years range around 500M per year, the 3+2+1 scheme established by the law became the core standard for the Italian justice system. This situation appears to be one of the reasons behind the launch of the Strasbourg projects.

A third standard is the **assessment and consolidation of the case law** established by Article 47 *quarter* of the "Organisation of justice system" law (*ordinamento giudiziario*). For this purpose meetings are held in each court section to discuss the case law orientations and look for shared case law approaches. Hence, it should be the primary venue to promote consistency and equality of treatment in substantive and procedural issues.

Since the meetings are held in chambers, there is no precise information about their real organisation and effectiveness. However, their functioning is debated in public meetings, and a common opinion is that there are relevant differences between court-to-court and chamber-to-chamber jurisprudential orientations. While in some courts the evaluation exercise is ceremonial, since the meeting - being established by the law - has to be held, but should not subtract time from other activities, in other cases the meetings lead to a high-level analysis of legal issues, and to agreements about standard procedures and substantive legal questions. In some other cases, it has been reported⁶⁷ that the case law orientations are made public. There are also cases in which the jurisprudential discussion has been opened to lawyers and law professors. We will return to this practice discussing the innovative practices of judicial evaluation.

Discussion - As examined, court evaluation in Italy deals mainly – even if not exclusively - with efficiency and effectiveness. Such a narrow approach has to be understood considering the huge backlog of the Italian justice system and its impact on the pace of litigation. This state of affairs, in years of budget constraints, can mainly be faced by improving the efficiency of the available resources.

In the justice sector, the interplay between resource allocation and court performance is complex. Court performances should play a role in resource allocation. If performances are weak due to inadequate management, additional resources can result in a waste of money. On the contrary, an

⁶⁷ Conferenza annuale Osservatori giustizia civile, Milano, 20 May 2016.

efficient use of resources should be rewarded. However, it can also be argued that a poor performing court should not suffer for a reduced amount of resources. This because the services delivered to the users will be further impoverished. Preferably, interventions should be focused on other areas, such as court management, but this should be handled with care since it could pose a risk to judicial independence. Despite these difficulties, some connections between the resources allocated and the evaluation of court performance and quality of justice delivered by the court is a reasonable pre-condition for resource allocation. This is certainly not the case in Italy.

The following statements and Table 7 sum up the findings related to individual and organisational evaluation. First, the evaluation mechanisms in place focus on various relevant values to be fulfilled, and, particularly, on economy and efficiency. Second, the treatment of the users is out of the radar in both cases. It is assumed that court users are just asking for speedier judicial proceedings, but other legitimate expectations may be ignored by the current system. Third, the mechanisms in place are very complex and highly regulated. Over the years, the Judicial Council has been particularly active in issuing regulation specifying methods, tools and limits of the various evaluation mechanisms. Fourth, the results of the individual and organisational evaluations are not clearly linked.

Table 7: Main venues of court evaluation in Italy

Type of venue	Established by the law	Types of values included			Types of evaluation
		Legality	Economy	Legitimacy	
Court annual activity programme (Court president)	Yes	Yes	Yes	No	Steering (with bottom up inputs)
Court annual activity programme (Court manager)	Yes	No	Yes	No	Steering (with hypothetical contradictory inputs)
Strasbourg projects	Official policy of the MoJ	No	Yes	No	Steering (reduction of time to disposition)
Court surveys	No	No	No	Yes	Learning
Chamber meeting	47/4 Judicial systems law	Yes	No	No	Learning, steering by agreeing

2.5. Resources allocation to courts

2.5.1. Actors involved

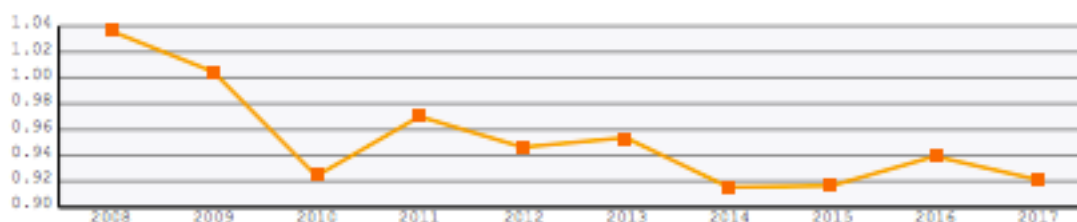
The Italian Constitution states: “the Minister of Justice has responsibility for the organisation and functioning of those services involved with justice” (Article 110 Cost.). Accordingly, the budget and resource allocation is largely a matter for the Ministry to handle. The budget proposal of the Ministry is discussed within the Cabinet, consolidated with the requests of the other public sector departments and submitted to the Parliament. After weeks of political discussions and bargaining, the Parliament approves the annual State budget, and, thus, the budget of the Ministry of Justice. Such budget covers the costs for ordinary courts, prosecutors’ offices, juvenile justice, legal aid, and penitentiary department. Even if the Ministry of Justice is the key player in resource allocation to courts and prosecutors’ offices, other actors are involved. The Judicial Council shares competences with the Ministry as far as this concerns the allocation of judges and prosecutors to judicial offices. The Local Judicial Boards, the Court President and the Court Manager have the roles of requesting

and justifying the need of additional resources. The role of different subject will be better specified in the next section.

2.5.2. The resource allocation process

From the Parliament to the Ministry of Justice - As previously mentioned, the process of assigning the budget to the Ministry of Justice is largely, if not exclusively, a political exercise. In the budget strapped by the cabinet, each Minister builds the case for a budget increase (or against budget cuts). The data shows a reduction of the budget of the Ministry of Justice as percentage of the State budget from 1.04% in 2008 to 0.92 in 2017.

Figure 1: Budget of the Ministry of Justice as share of the State budget



Source: Ragioneria generale dello stato. Il bilancio in rete⁶⁸

The budget provided by the Parliament to the Judicial Council covers just the functioning of the Council itself (and not the functioning of courts and prosecutors' offices).

From the Ministry to the Courts - For courts and prosecutors' offices the main entries of the balance sheets are the provisions for human resources (magistrates and administrative personnel), facilities, maintenance and security service, ICT and courtroom technologies, and "justice expenses" (i.e. the direct costs required by the fulfilment of judicial procedures). The system is highly centralised and fragmented at the same time. Each type of resource is allocated following a different procedure as described below.

Facilities: rents, utilities, maintenance, furniture, and security service - Courts and prosecution buildings are owned by municipalities, by the same Ministry of Justice, or rented on the market following national procurement rules.

Before 2015, local municipalities were charged with the direct payment of the rents, of the maintenance and the related costs including the building security. The partial reimbursements from the Ministry were granted on a yearly bases. The system was ineffective for various reasons and, particularly, for the differences paid for the same type of service by the different courts. Since 2016, the municipalities are not involved in this anymore. The Ministry and the judicial offices are responsible for such services. Now, the Ministry directly provides maintenance, furniture, utilities and security service through a centralized national procurement system.

ICT and courtroom - The General Directorate of Information and Communication Systems (Department of Justice Organization, Ministry of Justice) provides the ICT facilities and other technologies for judicial offices and courtrooms. Private companies, usually selected through public tenders, develop the software. The maintenance and systems assistance is provided by contracted companies and supervised by ICT specialists of the Ministry. All the ICT costs for courts and prosecution offices are covered by the budget of the Directorate.

⁶⁸ http://dwrgsweb-lb.rgs.mef.gov.it/DWRGSXL/pages/lb/ms_popup.jsp?index=3&type=rep&video=30

Table 8.1: Functions and key roles in resource allocation (staff)

Resources/ Key Actors	Ministry of Justice	National Judicial Council	Local Judicial Council (Consultative)	Head of Courts and Prosecution Offices
Magistrates (judges and prosecutors)	Staff-plan definition	Formal opinion (not binding) on staffing needs and on assignment criteria	Advice on staffing needs	Staffing needs
	Assignment within the pre-established staff plan			Request to cover staff plan vacancies
	Call for vacant position Yearly recruitment via public competition	Approval of the three-years case assignment plan for magistrates	Opinion on the proposal of three-years case assignment plan for magistrates	Proposal of three-years case assignment plan for magistrates
Head of courts and prosecution offices	Formal opinion (not binding) on appointment and assignment of Heads of Courts and Prosecution Offices	Appointment and assignment of Heads of Courts and Prosecution Offices		Report from the president of the Court in which the applicant was working (special evaluation). No inputs from the court in which the magistrate have applied.
Administrative and technical personnel	Staff-plan definition	Advice on staffing needs	Advice on staffing needs	Staffing needs
	Assignment within the pre-established staff plan Call for vacant position Switches from other public administration bodies	Advice on staffing needs	Request to cover vacancies	Request to cover vacancies

Judicial expenses - The Ministry of Justice covers the costs of “judicial expenses”, i.e. the costs directly associated with the handling of civil and criminal procedures (e.g. videoconference systems, wiretapping, custody of seized properties, translation and interpretation, expert witness fees, reimbursement for witnesses etc.). In this case the judge or the prosecutor order the specific activity needed for the judicial procedure. Once the activity has been carried out, and the payment authorised by the judicial authority, the request of payment is handled through a digital platform of the Ministry of Justice.⁶⁹

⁶⁹ <https://lsg.giustizia.it/>

Table 8.2: Functions and key roles in resource allocation (utilities and other resources)

Resources/ Key Actors	Ministry of Justice	National Judicial Council	Local Judicial Council (Consultative)	Head of Courts and Prosecution Offices
Rents				Paid to the owners based on annual account provisions
Utilities, maintenance and security service expenditures	Centralized, national procurement system			
Furniture and other facilities	Centralized, national procurement system			Limited by the annual account provisions
ICT	Centralized development carried out by the ICT Directorate	Advice and opinions		Mainly users
Videoconferencing systems	Centralized development carried out by the ICT Directorate and the Department of prisons.			Mainly users
Courtroom technologies	Centralized development carried out by the ICT Directorate and the Department of organisation.			Mainly users Direct access to an open budget for judicial expenses
Other expenses (wiretappings, translations, custody of seized properties etc.)	Establish the budget and change (increase) the budget based on on-going requests			Direct access to an open budget for judicial expenses

In this area, the Ministry made various efforts to reduce such costs without impinging judicial independence, such as providing framework contracts, or monitoring the costs for specific activities such as wiretapping.

Human resources: the staff-plans of magistrates and administrative personnel - As courts and prosecutors' offices are labour intensive organisations, staff planning is the real pivotal decision in terms of resource allocation. In Italy, such decisions are completely centralised and courts do not have the possibility to recruit staff.

The Law n. 1/1963 (Article 1.5) states that the national "staff plans of the courts and prosecutors' offices are established by decree of the President of the Republic based on a proposal of the Minister of Justice". On its turn, the Ministry makes the proposal after consulting the Judicial Council that takes information from the Local Judicial Councils and from the Heads of the Courts and Prosecution Offices.

The same law, amended several times, establishes the maximum number of magistrates working in courts and prosecutors offices (i.e. the national staff-plan for judges and prosecutors). This number represents a maximum value and do not correspond to the real number of units working in a given office at a given time. Also, the national staff-plan does not correspond to the total number of budget posts (i.e. the number of magistrates that can be paid considering the state budget). Indeed, the budget posts are regularly below the thresholds established by the staff plan due to limits in financial resources and problems in recruitment procedures. The same mechanism is in place for the staff-plan of the administrative personnel. In this case, however, the Judicial Council is not involved.

Once the national staff-plan is approved, it is time to establish the magistrates' staff-plan for each office. Staff-plans should be based on the real amount of work to be done in each operational unit, and should avoid the risk of overstaffed or understaffed courts based on workload criteria. It's a basic requirement to match the supply and the demand of justice. Therefore, the basic decisional criteria should be founded on workload measured of incoming cases for a significant time-series history. Since workload measures are not available, other criteria have been used.

The way in which such staff plans have been drawn has never been clear. The last staff plan is associated with a recent reform of the judicial map⁷⁰. The Ministry of Justice made public the criteria adopted,⁷⁰ and the main criterion adopted is the workload measured (incoming cases). The "additional criteria" is based on quantitative and qualitative data, such as: population (residents and city users), pending cases and delay, court clusters based on dimension (number of magistrates), socio-economical factors, litigiousness and criminality rates, preservation of social cohesion in mafia territories. Nevertheless, it was not declared how these "additional criteria" were weighed in the algorithm used for the staff planning. The algorithm used has not been published so far.

As mentioned, the large majority of the offices have vacancies. To fill in vacancies, the Judicial Council hears the requests of the Head of the Courts and Prosecution Offices and of the Local Judicial Councils, identifies the offices in which vacant positions will be filled, and twice a year publishes the "calls for vacant positions". This is opened to all the magistrates with the qualifications needed. Then, a public competition (largely based on seniority) is held to select the judges and prosecutors who will take that posts (see section 2.2.). The mechanism allows magistrates to progressively move from the office of first appointment, to another office more appealing for professional or personal reasons. It is through these mechanisms that the real number of magistrates working in a court is finally established. Additionally, there are special policies in place to reduce the vacancies in offices that are regularly understaffed. Financial and career incentives are acknowledged to the magistrates that decide to work in those courts. However, since transfers are on voluntary bases, it may happen that some offices remain largely understaffed. A last option is to identify offices with "mandatory possession". It means that some of the newly appointed magistrates – usually the last in the rank – have to serve there for at least three years. To sum up, with the current legislation, the possibility of the Council to move judges where needed is rather limited.

As said above, the assignment of administrative staff is a prerogative of the Ministry of Justice. Decisions are based on the requests made by the Heads of Courts and Prosecution Offices, following an assessment of the needs, and taking in consideration the vacancies in the staff-plan. Their staff-plan is calculated as a ratio of those of the magistrates: almost three units of administrative staff per magistrate. Since their distribution follows those of magistrates, it reflects the same problems observed above. Furthermore, due to budget cuts, the Ministry had to stop the

⁷⁰ Ministerial Decree December 1th 2016

turnover of administrative personnel. For almost 20 years, the recruitment has been exclusively based on transfer from other public administrations. As a result very few units of administrative staff have been recruited thanks to switches from other public administration bodies, which are overstaffed, and the total number of administrative staff working for the Ministry of Justice decreased roughly from 50.000 to 38.000. The result is that many judicial offices suffer from the lack of administrative support, and magistrates are increasingly engaged in administrative tasks. Furthermore there are relevant differences in the vacancies of judges and administrative staff.

2.5.3. An estimation of cost per case

As noticed, the resource allocation mechanism is not based on a clear criteria as the workload of each office. Various indicators point to the fact that the mechanisms in place to assign human resources to judicial offices are incapable of providing an even resource assignment to the different courts. To check this hypothesis, we have made an exploratory study to estimate the cost per case in each Italian court in 2015. The calculation is carried out considering civil and criminal caseload (number of defined civil and criminal cases), the number of professional and honorary judged, clerks administrative officers, and their average costs as published by the Ministry of Justice and the Ministry of Finance. From all the analyses we have excluded 6 Courts that have values that are too distant from the set of observed data, and therefore have to be treated as outliers.

Table 9: Cost per case per type of office: range per type of court

	Civil Less expensive	Civil More expensive	Criminal Less expensive	Criminal More expensive	Total More expensive	Total Less expensive
Very large	218	371	300	926	489	242
Large	198	721	216	948	582	243
Medium	191	520	261	830	577	272
Medium-small	139	651	223	813	764	139
Small	144	510	384	917	696	281

In an ideal world, the cost per case should be the same across the country. But the reality is far more complex: the different case-mix handled by the court (more or less complex, more criminal or civil, etc.) may explain some of the differences observed with cost per case ranging from a normalised value of 139 to 764 Euro per case. For this reason, we have clustered the courts based on different parameters, already used by the Judicial Council and the Ministry of Justice as detailed in the table: very large, large, medium, medium small and small. We have also considered the courts with special jurisdiction (i.e. courts dealing with more complex cases). As Table 2.4 shows, the cost per case in each type of court is extremely different. The gap between the most and the less efficient is regularly above 200%.

Finally, we have calculated with the same criteria the cost per case in civil and criminal affairs. The picture emerging from this elaboration is not that different as the Table illustrate. This analysis, however, identifies also other differences between courts. Some of them are very efficient in civil and inefficient in criminal and vice-versa. This points to an unbalanced distribution of resources within the court (see Figures 2 and 3).

This preliminary study is something that has to be further developed, using longer historical series. However, the preliminary finding clarifies both the great differences in efficiency of the Italian courts and the uneven distribution of resources among the courts of the country.

2.5.4. Consequences of resource allocation on quality of justice

The resource allocation mechanisms in place are not consistent with a well-balanced distribution of resources to each office and do not foster the quality of justice in term of effectiveness and statute

of limitation. The estimation of cost per case we made for this purposes demonstrates that human resources are unevenly allocated across the country and that there are wide differences in terms of efficiency among courts with similar features. This is probably the strongest weakness we have identified in the system. The lack of workload analysis makes difficult to ascertain if resources made available to the court systems are appropriate to tackle the caseload. Certainly the high variation of efficiency seems to demonstrate that deploying across the country the practices of best performing courts, the number of cases decided by the entire system in a given period would quickly rise. This finding is consistent with a new policy, enacted by the Ministry of Justice to speed up the pace of litigation. efficiency. As the discussion made in this section and the preliminary study point out, resources are allocated from the central governance bodies (Ministry and Judicial Council) to the judicial offices based on criteria that are not always clear. In this effort, the national staff-plans and the allocation of human resources to each office are the two main decisions.

The criteria used to establish staff-plans have been made public, but the way in which they operate, the different weight of each criterion, the algorithm used to increase or reduce the number of judges in a given court are not specified. Such indicators point to the fact that the process is largely political. As stated in a recent workshop by one of the top policy maker within the Ministry of Justice, the staff plan approved in 2016 has been established with the objective to “grant social cohesion: give more resources to the north east area [of the country that is under-stuffed], without affecting too much other areas and offices [that are over-staffed]”. So, a key criterion has been to make a staff-plan that is politically acceptable, while other criteria (incoming and pending cases, demand of justice, local peculiarities etc.) seem to provide the technical background to justify the decision. If so, the technical considerations stay – understandably - behind political feasibility.

Figure 2: Average cost in civil and criminal (first instance courts, all)

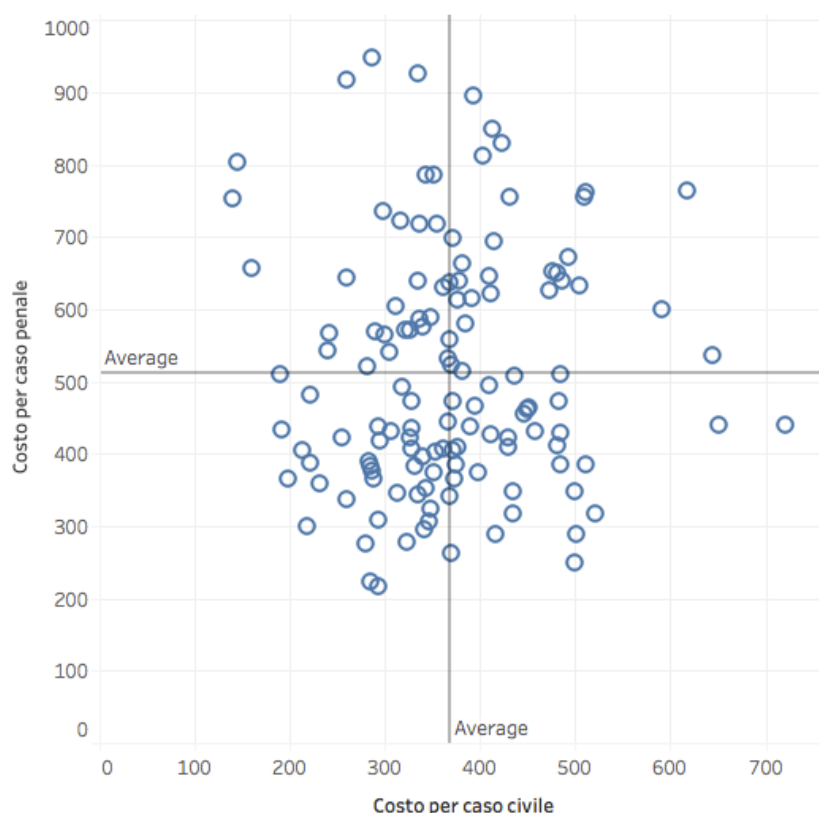
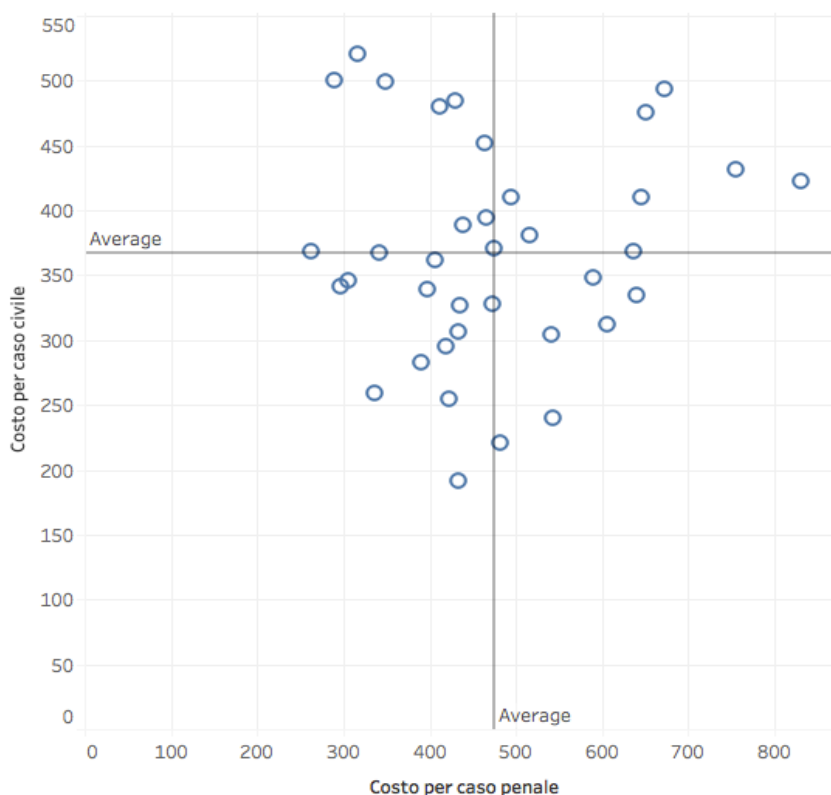


Figure 3: Average cost in civil and criminal (first instance office, medium)



As a result of this approach it can be observed that the ratio of judges per inhabitants ranges from 4.612 in Caltanissetta, (Sicily), to 32.304 in Lodi in Lombardia. The presence of organised crime in Caltanissetta, and of large mafia cases requiring dozens of hearings and a huge judicial effort, can explain just in a partial way such huge difference in the ratio. Indeed, the number of companies and business operating in Lodi is by far higher than the one in Caltanissetta. Hence, Lodi should have a higher workload in civil cases. Furthermore, when asked for consultation by the Ministry of Justice, the Judicial Council made similar observations about the patchy distribution of resources before endorsing the proposal of the Ministry. Similar considerations regard the staff-plan of the administrative personnel. The mechanism in place to promote the transfer of judges to understaffed offices does not correct the problem. Any solution, indeed, would require the reduction of the staff-plans in many courts and prosecutor's offices, and more radical mechanisms to facilitate the occupancy of understaffed courts. This policy option would raise harsh political criticism, and therefore it is difficult to sustain by the Ministry and the Council.

The Strasburg projects show remarkable differences between the courts of the same cluster the duration of litigation in civil cases and the frequency of lapsing of criminal proceedings due to the

Sometimes intermediaries such as "judicial foundations" bodies have been established to receive and manage the additional finances used to recruit staff or to reimburse graduate students in training. The foundations have been established to avoid some of the threats to judicial independence that may be embedded in this kind of approaches that are well known to the head of courts engaged in fundraising. This issue marks a shift towards a new approach, in which courts are necessarily proactive and open to society, but at the same time makes them more vulnerable to external pressures and raises potential issues of judicial independence and impartiality. As observed by a court

president “When I work to sign agreements and gather resources [from external actors] I always feel like walking on a thin line that separates good administration from the extortion.”⁷¹

Such additional resources have been looked for just for financing innovation or best practices projects, and are not stable channels for the funding of the courts. They are solutions have been searched to solve, at the local level, the problems that the central level is not able to tackle.

Resource allocation and quality of justice – The allocation of resources to court is probably the greatest weakness identified in the study. As noticed, it is also not very clear how the evaluation of resources-need (judgeship or clerical position) is made. Despite the efforts to provide technical justifications, the decision seems to be mainly based on political criteria. The system creates courts that are overstaffed and courts that are understaffed. It is compatible with a very large range of efficiency (variations in cost per case) and effectiveness (time to disposition). Also, these economic dimensions are decoupled from other criteria such as legal quality and treatment of users. So, efficiency could be pursued hampering other key values: a superficial study of the case, a careless treatment of the users. We have no data to affirm this is the case, but we have plenty of data to argue that resource allocation have no safeguards to avoid the risk.

2.6. Assessment of existing evaluation methods

The dyadic governance structure - The dyadic governance structure designed by the Italian Constitution may raise various problems with policy design and implementation. Indeed, many (if not any) policy addressed to change and improve the current state of affairs requires the collaboration of the Ministry and the Council. The two bodies have different constituencies. The Ministry got the confidence vote from the Parliamentary, the Council from the Italian ordinary magistrates. As a consequence, the strategies, policy preferences, and the values promoted by the two bodies tend to differ.

This affects policy making and many institutional and organisational decisions. By Constitution, the Ministry of Justice is in charge of the evaluation of organisational performance but also the Judicial Council is developing policies in such areas. The entanglements between the competences of the Ministry and of the Council make performance evaluation quite complex and specific. The alignment between strategy and structure, considered a condition sine qua non for effective management, is often problematic. Not surprisingly, their collaboration is always problematic, and the ‘pass the buck’ attitude is quite common.⁷²

Partisanship - Notwithstanding the very detailed procedure and instructions to collect ‘objective’ information for a comparative assessment of the candidates, the election to these prestigious positions is still heavily affected by the candidates’ membership in one of the factions of the Italian Association of Magistrates. Indeed, at the very end, the appointment is decided by a vote of an assembly (the Judicial Council) that reflects the political and cultural orientation of the magistracy and of the Parliament. Indeed, magistrates are elected also considering their membership to one of the 3 or 4 magistrates’ factions, and the Parliament elects its member on a clear partisan bases.

Hence, since it is extremely difficult to rank candidates to managerial positions based on pure technical consideration, the decision is facilitated by political affiliation. The practice of grouping several appointments to managerial positions in a single decision (called “appointment package”) in

⁷¹ President of a medium court, north Italy, May 2017.

⁷² Carnevali, D. & Resca, A. 2014. Pushing at the Edge of Maximum Manageable Complexity: The Case of ,Trial Online in Italy. In: Contini, F. & Lanzara, G. F. (eds.) *The Circulation of Agency in E-Justice*. Springer Netherlands, Fabri, M. 2009. E-justice in Finland and in Italy: Enabling versus Constraining Models. In: Contini, F. & G.F.Lanzara (eds.) *ICT and Innovation in the public sector: European Perspectives in the making of e-government*., Basingstoke: Palgrave.

which the Council elects simultaneously judges belonging to different factions as presidents of different courts is considered a clear evidence of this phenomenon. The “appointment package” is highly criticized by the same leaders of the judges associations,⁷³ but the solution to the problem is far from being identified.

Even if most of these appointments are below the radar of media scrutiny, in some cases also media gets involved. For example, the sensitive position of head of the prosecutor’s office in Palermo, the regional capital of Sicily, has generated much debate due to the election of the youngest professional and, apparently, the least qualified candidate. The candidate, elected in 2014, did not have any previous experience leading a prosecutor’s office, but he was sponsored by one of the factions of the Association of Judges, and he had served as member of Eurojust (European public prosecutors’ coordination office in The Hague), a political appointment made by the previous centre-right coalition. This is a typical case in which the membership and political ties of the candidate seemed to be much more appreciated than the assessment of ‘merit and attitude’.⁷⁴ One of the factions of the Association of Judges and Prosecutors, who sponsored a different candidate, voiced its strong disappointment on its website, stating that the magistrate elected had much less experience and professional skills than the other two candidates.⁷⁵ Of the same tone were the comments of some newspapers that highlighted that political ties were predominant in this selection process. To sum up, the several attempts made to establish ‘objective criteria’ have increased the complexity of the process that lead to the decision, probably it has also structured a kind of “*cursus honorum*” (career path) required to be appointed, but the political dimension is still relevant.

If on the one and the Italian Magistrates Association, with its internal groups, is a target of criticisms, the debates going on within the national association and the factions of the association also have positive features, being the primary venue for the discussion and the upholding of judicial values. The exchanges of ideas pass through various and very active mailing lists in which, every day, there are discussions about if and how such values are upheld, and how they affect the work of the judges and the judiciary as a whole. The discussions also occur in general meetings, and conclusions presented to political representatives.⁷⁶

3. Innovative practices in quality evaluation and quality development

Background - In the last 20 years, several reforms were adopted to improve the functioning of the judicial system. The problem of the lack of effectiveness and efficiency of the justice system became of general concern and its negative implications on the economic development were repeatedly stressed by international organizations (OSCE; World Bank, IMF),⁷⁷ the EU⁷⁸ and the Italian Government.

⁷³ See for instance the critique of the President of the judges association and the reply of the vice president of the Judicial Council.

http://www.repubblica.it/politica/2016/06/09/news/giustizia_davigo_attacca_su_nomine_al_csm_poi_smentisce_consiglio_se_vere_parole_gravi_-141607655/

⁷⁴ At the time of writing, the case has been brought before the Administrative Court, which has quashed the appointment for ‘lack of motivation’ by the Judicial Council, and sent it back to the Council for reconsideration.

⁷⁵ Magistratura Democratica, ‘Coordinamento Area: Palermo come Vicenza, anzi peggio’ (18 December 2014) <www.magistraturademocratica.it/mdem/intervento_all.php?a=on&id=2270> accessed 1 February 2016.

⁷⁶ Comment made by the Italian Expert during the validation meeting, Utrecht, November 10, 2017.

⁷⁷ The economic impact of the justice slowness is estimated on an amount around the 1% of the GDP (Gross Domestic Product). Malfunctions in the Italian justice system discourage investments and growth: according to the World Bank Report on “ease of doing business”, Italy ranks 158th in the world in relation to “enforcing contracts”: in part, this is certainly due to the course of the justice system.

The economic crisis and the public budget constraints of the last decade did not stop the reforming process. However, this process was not supported by adequate funds. Most reforms were, in fact approved as "zero costs reforms", as no specific funds were allocated for their implementation. Rationalization and better allocation of resources were at the forefront of the political agenda. Various public sectors' institutions (local administrations, health and justice) underwent a territorial and structural re-organization.

As for the justice sector, the Italian government has been taking a number of measures to address the inefficiencies and bottlenecks in the functioning of the justice system. These measures seek to:

- Reduce the case inflow (e.g. by increasing court fees, creating appeal barriers, and changing lawyers' fees structure);
- Promote out-of-court settlements (including by further enhancing mandatory mediation),
- Reduce the number of courts (by creating economies of scale and fostering specialization),
- Strengthen court management (e.g. by giving a greater management role to the President of the court, creating case schedules, managing judges' workload); and
- Speed up case processing.

The steps taken have had some positive effect, such as the 43% decline in the inflow of small claims as a result of increased fees,⁷⁹ while other measures described hereafter have had mixed results.

Further changes include streamlined first-instance court proceedings and mandatory e-filing in civil cases through the Civil Trial Online.

The so-called "*Decreto del Fare*" (Law 98/2013) includes, among other things, the following additional measures:

- Judicial assistants internships to support judges' work;
- 400 honorary magistrates task force to clear the backlog of the courts of appeal;
- Compulsory mediation;
- New honorary judges (*giudici ausiliari*) for the Court of Cassation.

The "Destination Italy" initiative presented in September 2013 reaffirms the government's commitment to tackling the problems of the judicial system. The first draft of Destination Italy initiative contains some proposals that are in line with the National Reform Program that outlines Italy's targets towards the Europe 2020 strategy. These include measures to:

- Extend the competences of the commercial courts to all commercial litigation;
- Introduce appeal limitations;
- Allow parties to mediation without compulsory representation by a lawyer;
- Improve assisted negotiation and arbitration;
- Extend the competences of the judges of the peace;
- Ensure the full online handling of the civil trial;
- Complete the "data warehouse" project to improve the use of case flow data for statistical purposes.

Furthermore, the Ministry of Justice has lately paid attention to the review of the judicial map with a reduction of first instance courts and justice of the peace offices.⁸⁰

⁷⁸ See for instance the country specific recommendations of the "European Semester" exercise, available at https://ec.europa.eu/info/publications/2017-european-semester-country-specific-recommendations-commission-recommendations_en

⁷⁹ Source: Observatory of Public Sector Innovation, 2016, www.qualitapa.gov.it

⁸⁰ By 2013, the reform has closed about 750 offices (from 1.396 offices down to approximately 650).

To sum up, over the years national policies devoted attention to changes in the Code of civil procedure, to the problems relating to court management and case management, as well as to the benefits coming from ICT (trial on-line, and data warehouse).

In addition to such central and top-down actions, several initiatives have been promoted at the local level. The Tribunal of Turin was among the first one to pioneer a new method of court management, based on constant monitoring of the pending cases, best practices and timeframe management (see the Strasbourg programme in section 2.4.3). The Prosecutors' Office of Bolzano, adopted a set of "Best practices" largely addressed to improve quality of the services delivered to users (see below). These two experiences sent a powerful message to other courts, the Ministry of Justice, and the Judicial Council. They showed that remarkable results could also be achieved without major changes in the law by "just" applying good managerial practices and a strong commitment to fighting delays and improve the quality of the services.

3.1. The Best Practices Project and its many offspring

The Strasbourg programme and the "Best practices" initiatives are just two out of many innovative bottom-up actions in the field of evaluation and promotion of the quality of justice. These practices are mainly initiatives promoted by the court managers or judges to face the decrease of human and financial resources and to improve the quality of justice – primarily efficiency and effectiveness – based on organisational and technological innovation. Some of these instances remained pure bottom-up actions, while others have been up-scaled by the central administrations through EU structural funds.

In 2009 the Minister of Public Administration, the Minister of Justice, the Italian Regions and the European Commission agreed on the implementation of a transnational-interregional project called "Dissemination of best practices in judicial offices in Italy" (BP project) to be funded within the European Social Fund (ESF). The goal of the project was the dissemination of the "best practices" developed during the period 2004-2007 by the Public Prosecutor's office in Bolzano (funded by European Social Funds). Following this example, the primary objectives of the projects were: a) to increase the quality of civil and criminal justice services; b) to reduce the operating costs of the justice system; c) to improve the information and communication capacity; and d) to increase judicial offices' social responsibility over the results and use of public resources. The following actions were undertaken to pursue these objectives:

1. The analysis and redesign of work processes, the reorganization of Judicial Offices, the self-assessment processes (including those based on the CAF – Common Assessment Framework – model) in order to improve the operational efficiency and effectiveness of performance directed to internal and external users;
2. The analysis of technologies used in the office to optimize their coherence and use in the organizational improvements;
3. Drafting of the Social Responsibility Budget Report;
4. Drafting a Service Guidebook and Charter;
5. Support to obtain the certification ISO 9001:2000;
6. Website and web communication design or upgrading.

To fulfil this goal, in 2011 the Public Administration Department launched an initiative called "Improving the Performance of the Justice System" (MPG) to support the Convergence Regions (ROC)⁸¹ and the judicial offices of these territories in the implementation of the interregional/transnational project. MPG is funded under the same umbrella of the European Social

⁸¹ The regions of the south of Italy are labelled as "convergence regions". As such they benefit of special financing by the EU within the Structural Funds Programme.

Fund, and it is meant to monitor, evaluate and disseminate the results and the good practices implemented by the judicial offices involved in the BP project. Further, it also compares the experiences and results of the offices placed in the ROC regions with those of other offices (nationwide) involved in the BP project. In order to present and promote the information and evidence regarding the offices involved, the projects activated the practices established as well as related materials on a specific online platform - RisorseperlaGiustizia - developed within the MPG initiative.⁸²

According to latest available data (April 2014), the number of judicial offices involved in the BP project and monitored by MPG is approximately 200. More than 1300 operative projects have been developed. Almost 50% of the offices involved are in the southern regions (Calabria, Campania, Puglia, Sicilia).⁸³ Among the participants, 66 are public prosecutor's offices and 58 courts; there are also courts of appeal, courts and prosecutor's offices for juveniles and to a much lesser extent, surveillance courts and offices of peace. All the Italian regions and autonomous provinces have gradually joined the project, and more than 200 courts have applied for participation. There are no clearcut data about funding, but estimates lead to conclude the project cost more than 40 million Euro.

According to the Judicial Council recognition of best practices, the follow up of the BP project shows some interesting data, although the information collected are fragmented.

Many judicial offices have implemented most of the project guidelines particularly the ones regarding the customer relations, the quality of the services, and the social budget report. The BP project has shown the possibility of taking part in pilot projects, disseminate solutions, and change management methodologies throughout the entire system.

Regrettably, most of these experiences have stopped once the funds were over. Keeping and managing innovation sometimes requires more resources than those made available by the project. In any case, the Ministerial initiative contributed to the creation of a positive attitude towards innovation and to a rise of the number of innovative local practices in fields that are not the six areas (objectives) identified by the BP project.

This new attitude toward innovation is, in the opinion of the authors of this report, the most relevant, unexpected, and enduring result of the BP project. The proliferation of innovative local practices pushed the Judicial Council to monitor their features and their results.

Hence, since 2010, the Judicial Council (CSM) monitors such "best practices", collecting data about the various experiences and their results trying to identify ways to transfer such local innovation practices from one office to another. The findings of the monitoring have been made public in 2015, when the Judicial Council has established a new project to analyse and make available online relevant data about such innovative experiences. In 2017, the Council published on its website data on 251 best practices (selected among the 700 received).⁸⁴

Within this framework, the following best practices are discussed in more detail in this section:

1. The InnovaGiustizia experience in the Lombardy Region and the case of the Monza Court (2011);

⁸² The platform can be accessed at www.qualitapa.gov.it.

⁸³ In detail, 97 offices have completed the activities, 19 are being implemented, 52 are at the initial stage, and finally 20 offices are in the preliminary procedures for the consulting activities.

⁸⁴ <http://www.csm.it/documents/21768/136300/Buone+Prassi+-+slide+di+presentazione.pdf/e5d15d28-cd56-5b13-024f-70c720004f8f>

2. The case of the Court of Florence: agreement between the Court and the Chamber of Commerce to make procedures faster via online for citizens and private companies (March 2016).
3. The office for innovation of the Catania Judicial District (December 2016).

In addition to these, attention will be devoted to the open data initiative, a stream which has been only recently developed in the justice sector.

3.1.1. The InnovaGiustizia experience and the case of the Monza Judicial Offices

Lombardy was the first region to benefit from the opportunity provided by the BP project. The region launched a call for the “Reorganization of Work Processes and Optimization of Judicial Offices Resources” then assigned it to a Consortium formed by University departments and Business consultancies. The project, named InnovaGiustizia,⁸⁵ was implemented over a period of two years (January 2010 - December 2011) and involved 12 Judicial Offices.

Within the *InnovaGiustizia* experience, the case of the judicial offices of Monza received significant attention from researchers and practitioners.⁸⁶ The project was implemented following the Structural Change and Innovation Management methodology,⁸⁷ seeking to respond to both citizen problems (e.g. reduction of waiting time for citizens and lawyers) and the need of change within the organisation (e.g. the elimination of routine activities and focus of the efforts upon more critical ones).

The project was developed and implemented by groups of judges, clerks, and administrative staff. A Steering Committee led by the President of the Court and the Chief Prosecutor was set up. Working groups implemented the project performing participatory analysis and redesigning various aspects of Court and Prosecutors’ office activities. Work processes and the actual organisation of various procedures (e.g. criminal decrees, execution of immovable property, voluntary jurisdiction) were redesigned. The administrative offices of the criminal law sections of the court have been reorganized. Tools for improving the governance and relationship with users and stakeholders were designed with the participation of judges and clerks and involved an effort to increase transparency for the users. Examples of such tools include: the Social Responsibility Balance Sheet and Common Assessment Framework, the Services Chart, the support to use information and communication technologies, a planning and control system and a management dashboard for the Court, a system for monitoring workloads of the Public Prosecutor’s Office, a Planning and Innovation Office, an Office of Relations with the territory, a website, a working group for justice with the participation of local institutions, and the establishment of a Foundation for Justice.

The primary results of the Monza project involved the reduction of backlog and of the waiting times for citizens and lawyers, the elimination of some routine activities with a focus on the most critical ones, the improved efficiency of the clerk’s offices, the transparency of proceedings. The effort contributed to improving the relations between the Court and the Public Prosecutor’s Office, judges and clerks, the Court and “third parties”. The work on organisational issues strengthened the managerial skills of judges and administrative staff, the increased awareness of all the employees over the entire set of service delivered by the Court.

One of the most successful “sub-projects” of InnovaGiustizia was the redesign of the Voluntary Jurisdiction office. Voluntary Jurisdiction concerns the legal protective measures granted in support

⁸⁵ See www.tribunali-lombardia.it.

⁸⁶ The project of changing Judicial Offices in Monza has received 4 European awards for innovation by Italian and European institutions and selected for the 7th Quality conference of the European Union.

⁸⁷ Butera, F. 2009. *Il cambiamento organizzativo: analisi e progettazione di reti organizzative*, Bari, Laterza.

of vulnerable persons such as mentally or physically disabled persons and elderly citizens. The court does not run a trial, but acts in the interest of these vulnerable citizens, called “beneficiaries”. In most cases, the citizens themselves or their relatives file the request of such measures, often without legal representation. The result of the procedure is the identification of a Tutor or Administrator that acts to support the beneficiaries under the supervision of the Court.

Two innovation groups run the project⁸⁸:

- Consultants, Judges and Clerks focused on the internal Judicial Office.
- Local administrators and members of the community focused on the delivery of the service.

Both groups worked on problem setting (e.g. reduce public access to the court’s front office) and on problem solving (e.g. designing a new website structure providing information and other measures described below).

The design and implementation of “Territorial Proximity Offices” (*sportelli di prossimità*) are the most crucial organisational innovation. They are detached offices placed in some towns under the jurisdiction of the Tribunal of Monza, managed in collaboration with local administrations and NGOs. In these offices the citizens can gather information and assistance for their requests as well as an expert advice. Many ICT tools have been realized for supporting the change, but mostly the organization and procedures have changed, modifying the behaviours and the organizational skills of individuals and institutions, through their consensus. Some of the results⁸⁹ reached with the new area of the Voluntary Jurisdiction are⁹⁰:

- 30% reduction in number of citizens accessing the clerk’s office;
- 20% reduction in the average time needed for filing applications;
- 80% of the applications filed using the new forms including bar codes that can be automatically uploaded into the court ICT application;
- Implementation of the section Services to Citizens of the new website of the Court (with 230.000 total annual visitors);
- More than 90% of the records received from July 2011 managed through the online Tracking System;
- Implementation of the service for the automatic sending of emails to citizens;
- Signing of protocols between the Courts and different Municipalities for the creation of 7 Territorial Proximity Offices, and action to start a free expert consulting service at the Territorial Counters;
- Training courses for Tutors organized by the Province of Monza and Brianza.

The results reached convinced many Italian Courts to implement the new organisational model.

⁸⁸ Actors involved:

- a) the Steering Committee composed of: the President of the Court, the Chief Prosecutor, the Judge in charge of project supervision, a group of judges, technical and operational supervisors, middle managers of the Civil and Administrative Offices, the President of Lawyers’ Professional Association.
- b) the Project Teams where almost all the staff within the organisation has been involved: Judges of Civil and Criminal sectors, Prosecutors and Assistant Prosecutors, Clerks and Administrative Resources.
- c) Consultants: Institutions of the Monza and Brianza Area within the “Table of Justice” established in November 2010. A permanent network included Province of Monza and Brianza, Local Health Authorities, Municipalities of Monza and Desio and other Municipalities under the Jurisdiction of Monza Court, Chamber of Commerce of Monza and Brianza, University of Milan Bicocca

⁸⁹ The indicators used to evaluate case results are: Number of visits to registry office; Number of Citizens who use new forms; Number of Citizens who use the new website and the dedicated section 'Services to the Citizen'; Number of dossiers managed by online Tracking system; Number of contact requests in Territorial Proximity Offices; Time for the first deposit of application.

⁹⁰ Vecchi, G. 2013. Systemic or Incremental Path of Reform? The Modernization of the Judicial System In Italy. *International Journal for Court Administration*, 5, 64-87.

3.1.2. The Court of Florence

The practice of developing cooperation with external parties is getting more and more frequent. An example of this new form of collaboration is the agreement signed by the Court of Florence with the local Chamber of Commerce, a public institution in charge, among other functions, to keep the Business Registers. The main areas of cooperation are the following:⁹¹

- 1) Online exchange of documents between the Court and the Business Register of the Italian Chambers of Commerce. The last one and the Tribunal are working together to manage hundreds of acts each year. Since December 2016, all these documents are exchanged exclusively online thanks to the support and collaboration with *Infocamere* (a private company owned by the Chamber of Commerce).
- 2) Digitalization of the “*ufficio per il processo*” (judges’ offices). The Chamber of Commerce of Florence is committed to provide free hardware for the online civil trials in an increasing number of judicial offices.
- 3) Arbitration will be encouraged for civil cases except for those regarding inalienable rights and labour and social security matters. The new rules adopted to speed up civil proceedings (Law 162/2014) give parties a choice to apply for arbitration even if the proceeding is already started. Since 2013, the first example in Italy of a joint arbitration Chamber involving the Chamber of Commerce and the professional associations of lawyers, accountants, and notaries is active in Florence. The new agreement will enhance the use of this method also helping to reduce the backlog in court.
- 4) Creation of a Mediation Information Point at the court. The Tribunal and the Chamber of Commerce of Florence are working to spread the “culture of mediation”. The plan is to set up an Information point for ADR (Alternative Dispute Resolution) where parties can explore the possibilities the alternative instruments, such as mediation and arbitration, can offer at national and international level.

ùAll these projects and other innovations will be monitored by the technical committee that will be based at the Court of Florence, and include representatives from the Municipality of Florence, the Chamber of Commerce and other agencies, foundations and professional associations. The purpose of the committee will be to coordinate activities at the local level to ensure the best implementation in the field of justice for the benefit of citizens and businesses.

3.1.3. The Office for innovation in Catania

Since 2010, judicial offices have launched a strategy aimed at improving court performance and quality of justice. To pursue such strategy the Tribunal of Catania has analysed the court organisation and services delivery with an inclusive approach. At the operational level, they have identified three leading ideas: a) improve the judicial services and reduce the burdens of access to justice for users, especially families, children, and businesses, b) increase the court accountability through commitments and public evidence of the results, and c) providing continuous monitoring. The European Social Fund and the Sicilian Region funded the project.

The Innovation and Organizational Development Office - which has been established by a Memorandum of Understanding signed by the Presidents of the Tribunal and the Court of Appeal – coordinates the project. Later on, other courts of the judicial districts have been involved in the project.

In detail, 45 innovative actions have been enacted in 10 judicial offices of the judicial district⁹²: 6 interventions at the tribunal (case management system, online civil trial, re-organization of

⁹¹ Press review, March-December 2016.

⁹² http://www.percorsigiustiziaticatania.it/progetto.aspx?id_progetto=43

internships, re-organization of the voluntary jurisdiction, projects to improve transparency and legality); 9 actions at the judicial districts level (Public Relations Office, Innovation Office, Courts Service Guide, Legal aid, Judge Agenda, “Migrantes Project”, Civil Affairs, Enforcement, Organizational Development); 6 actions at the Juvenile Court (Calendar of hearings, the Social Responsibility Report, the Register of tutors/ professionals, Organizational development, use of technologies, Services Guide); 24 interventions at the other courts and prosecutors’ offices. In detail, 45 innovative actions have been enacted in 10 judicial offices of the judicial district

The “*Migrantes project*” is an example of a good practice developed by the Tribunal of Catania. The initiative involves the Territorial commission for asylum seekers – in charge of deciding the status of asylum seekers. The project succeeded in making asylum application procedures faster and simpler, and to improve the number of cases dealt with by the court, that was in steep increase due to the well-known migration flow from North Africa. Its implementation required the involvement of various external parties: the Government Department in charge of the first reception and aid, the migrants’ Hot Spot, the Territorial Commission, the Courts of first instance and Appeal. The project demonstrates that a better coordination between independent actors placed within a “service delivery” chain can produce excellent results.⁹³ The *Migrantes* project has been acknowledged and awarded a special mention at the 2017 Cristal scale of justice award.

3.1.4. Opendata and justice

The considerable amount of data that is created and managed by the judicial offices has a social and economic impact, given that most disputes between people, companies, and institutions find a resolution within the court. Making such data freely available to the public would improve the knowledge of the many events affected or processed by judicial institutions, as well as the understanding of the functioning of courts and judiciaries.

Two examples, which may help to understand the potential impact of open data, are openmigration.org, and confiscatibene.it. The first provides information on the phenomenon of migration and refugees, to better inform media and the public on the subject. The second is a participatory project to promote transparency, re-use and valorisation of assets confiscated from organised crime.

The Opendatagiustizia.it project is a data-driven initiative aiming to make available to the public data collected by the justice system at national level. The action is a learning initiative based on data collection, analysis and dissemination of the data on the Italian judicial system. The main objectives of the project are:

- To support the measurement and benchmarking of the activities carried out by the judicial system;
- To enhance transparency policies and public accountability;

Opendatagiustizia is designed as a “civic hacking phenomena”: the “community” can be a stimulus for the Judicial Office, the Ministry of Justice, and the Parliament through data collection and analysis. This could only become possible if the community can act “out of the (justice) box”, by managing the data coming from the public authorities. As a result of the digital justice agenda, the open data issue is now included in the wider initiative called “Open Government Partnership Forum”, aimed to promote the use of strategic datasets into the public sector.

While the government actions for open data are expected, in December 2016 a consulting organization launched a public contest to promote the use of open data in the justice sector.

The contest aims to create a website that provides information on the state of justice in Italy. This is to be achieved with the involvement of analysts, community developers, data scientists, data

⁹³ https://www.coe.int/t/dghl/cooperation/cepej/Source/Crysal_2017/MIGRANTES_diapositive%20Bilancia%20di%20Cristallo.ppt

visualizers, designers, and startupper. The Opendatagiustizia is an open participatory project that wants to be an opportunity for improving the judicial performances and quality, and the national justice system as a whole.

On the one hand open data present opportunities to develop the economy, increase government effectiveness through information-based policies, and promote civic engagement and democratic accountability. On the other hand, despite these benefits, widespread use of open data poses privacy, security, and civil rights challenges. In any case, this action is more symbolic than substantive so far. The project that won the first contest provided a national map in which all the offices of the Ministry of Justice (Courts, prosecutors, prisons etc.) are geo-referenced, regrettably, with various errors.⁹⁴ A lot of work is still needed on both sides, Ministry and open data movement, to make effective this new approach.

3.2. The Civil justice observatories (Common praxis)

3.2.1. The rise of a the observatories and the establishment of local protocols

The “Civil Justice Observatories” (literary translation of *Osservatori per la giustizia civile*) are **court based groups** of judges, lawyers, court managers, clerks, and academics organised on voluntary bases to analyse (observe) different fields of substantive and procedural civil litigation and establish common practices.

Such initiative raised spontaneously in various courts as a bottom up attempt to solve some of the many problems affecting civil procedures. Since the nineties, the uncertainty generated by continuous changes in civil procedures, and later on the introduction of a new e-justice platform⁹⁵ pushed judges, lawyers and court managers to look for a different approach to reduce the uncertainty generated by the implementation of technological and legal innovation, and by the application of procedural rules.⁹⁶ The attempt was, first of all, addressed to build stable routines respecting the legal constraints and the functional requirement of the court and the practicing lawyers. The slow pace of litigation, and societal pressures ranging from low trust in the institution, ECHR sentences for violation of Article 6 of the European Convention on Human Rights,⁹⁷ frequent critiques by the media, difficult and inconsistent interpretation of newly enacted procedural laws are some of the reasons behind the rise of the Observatory.

The underlining idea is that the problems of civil justice cannot be solved without the involvement of the entire spectrum of actors concerned (magistrates, lawyers, clerks, Court managers, academics), without open discussion, and without the identification of common practices based on realistic choices that are coherent with the existing regulatory framework.

The “Common praxis” initiative that began in Bologna at the beginning of the nineties is considered the first step in this direction.⁹⁸ During the same period, Observatories raised in the tribunals of Bari, Salerno and Reggio Calabria, as well as Milan. Later on the process involved also Rome, Rovereto, Florence, Genoa, Verona, Naples and many other courts. Considering the clear goal of the groups,

⁹⁴ <http://www.opendatagiustizia.cloud/map/uffici>

⁹⁵ Fuochi Tinarelli, G. 2005. I flussi della mobilità dei magistrati. *Questione Giustizia*, 3.

⁹⁶ Consiglio Superiore Della Magistratura 2013. Parere in ordine alla proposta di rideterminazione delle piante organiche degli uffici giudiziari di primo grado trasmessa dal Ministro della giustizia ai sensi dell’art. 5, comma 4 del decreto legislativo n. 155 del 7 settembre 2012. (Delibera del 18 aprile 2013). Roma: Consiglio Superiore della Magistratura.

⁹⁷ European Convention of Human Rights and Fundamental Freedoms as amended by Protocols No. 11 and No. 14, Rome, 4 November 1950.

⁹⁸ Breggia, L. 2013. Gli osservatori e i protocolli civili. In: Miccoli, G., Sciacca, M. & Verzelloni, L. (eds.) *Giustizia in bilico*. Roma: Aracne.

and the problematic translation of the *Osservatori per la giustizia civile* in *Civil justice observatories*, the initiative will be hereafter referred to as the “**Common praxis groups**.”

How do they work – Over the years, the groups have developed a shared working methodology. Each Common praxis group is based in a city and involves at least judges of the tribunal and member of the local Bar. They work together to define and promote a shared interpretation of procedural or substantive rules, and address the multi-folded organisational problems that affect the court(s), including the poor predictability of judicial decisions. Substantively, the observatories develop standard practices in areas like adjournment policies, conduct of the hearings, case priorities, drafting of hearing minutes, summoning (including through electronic means), and structure of procedural documents such as complaints, briefs, and sentences.⁹⁹ The participants develop standard practices through processes that are neither linear nor peaceful. Tensions due to different interpretations of the law, the nature of the problem, or the advantages of alternative solution are present. However, the underling idea is that through a dialogue between the different interested parties - lawyers, judges, clerks, and academics - agreed solutions should be identified. Once a common solution is adopted, the agreement is brought to the attention of the president of the bar association and of the president of the court. It is quite common that the two apexes endorse the protocol with a formal signature, so to enforce its application. The protocol is not mandatory, but being developed bottom-up and endorsed top-down (by the two presidents) it provides a significant guidance for both judges and lawyers.

Over the years, the court-based groups have established some coordination mechanisms to share the analysis and the praxis (protocols) adopted in the different courts. The approach is now based on annual cycles of activities.

During the year some representatives of the various court-based groups attend two or three national coordination meetings. The meetings have two main goals. First, they contribute to the promotion and coordination of the on-going initiatives at local at national level through the organisation of “national laboratories” and to the organisation of the annual conference. The “national laboratories” are meetings on a specific topic (e.g. damage law (tort law), court organisation and resources, family law, judicial and legal writings, hearing organisation) attended by all those interested in that argument. Second, they contribute to the organisation of the annual conference. In such Conference, the work done in the “national laboratories” is shared and further discussed, while new activities are identified and planned.

The work done by these groups does not benefit of any support from the Ministry or the Judicial Council. This is a pure bottom-up approach (see below for more details) that has never looked for any kind of institutionalisation. Increasing procedural standardisation, predictability of judgment, standard treatment of the parties and of the cases, are some of the issues that the Common praxis groups has been able to tackle, with a comprehensive approach to quality of justice in which efficiency, legality, and treatment of the parties are consistently improved.

Over the years, the Common praxis approach focused on different subject areas. The choice of the subject(s) dealt with by each Common praxis group is the result of two major trajectories: the relevance of the problem (that can be “endemic” as resources or triggered by a legislative or technological innovation) and the availability of persons interested to deal with it. A first wave of protocols dealt with the organisation of the hearings. The goal was to find out how the current confusing legislation on the various types of hearings could be translated into practical and effective hearings. This offered the possibility to look at the problem from various directions as seen by the

⁹⁹ Fuochi Tinarelli, G. 2005. I flussi della mobilità dei magistrati. *Questione Giustizia*, 3.

different professionals involved, and to compare the different practices adopted by the different courts. The discussions led to the definition of hearing protocols in various courts. In a nutshell, such protocols tend to transform the nature of the hearing in accordance with international active case management principles. During the years, protocols have been approved in various areas, including ICT (Civil trial online). The last national assembly discussed consistency and predictability of judgements, resources, judicial drafting, ADR, damages compensation, and family law.

3.2.2. Up-scaling protocols: from local to national level

The damage compensation protocol - Damages compensation and family law are two interesting cases because they outline two different paths through which local protocols got a national influence.

The calculation of the compensation for personal damages caused by (car) accidents is one of the areas in which the Common praxis group of the Tribunal of Milan focused its activity. After years of work, the group approved the so-called “*Tabelle di Milano*” (hereafter referred as *Tabelle*) that provides an objective system for the calculation of the damage. The *Tabelle* has been progressively applied across the country by a growing number of first instance and appeal courts as the standard method to calculate the damages. However, some courts, such as the Tribunal of Rome, adopted a different standard. The question of which standard has to be applied has been solved by the Court of Cassation that in 2015 acknowledged that the damages have to be calculated by any Italian court according to the *Tabelle di Milano*.¹⁰⁰ Furthermore, according to the Court, the possible (eventual) use of a different calculation system has to be properly justified in the motivation of the decision.

The national guidelines in family law – The work made by the group on family law shows another possible path through which local protocols can be expanded at the national level. Since we attended the meetings in which the guidelines have been drafted and approved, the case provides a detailed description of how the Common praxis groups work.

The “extraordinary expenses” required by child maintenance after the separation of the spouses regularly trigger parental conflicts during and after the divorce. Such expenses comprise all the costs not included in the regular maintenance check paid by one of the parents such as medical treatments, a language course, or the purchase of a scooter. Their handling often requires the involvement of lawyers, and in several cases the disputes end up in court. The local protocols regulating how extraordinary expenses have to be managed have demonstrated to be successful in reducing the litigation rate. The lawyers can settle the case explaining to the parties that, based on the protocol, a given cost is covered (or not) by the regular maintenance check, and that if the party decides to file a case, the judge will most likely decide as established by the protocol. Indeed, at court level, the protocol is regularly used and referred to by the judges.¹⁰¹ This practice of referring to the protocol has been repeatedly observed in many court hearings.

Consequently, the local protocols succeeded in easing out-of-court dispute resolution, streamlined judicial decision-making and increased the uniformity of the decisions. The problem is that, due to various factors, just 24 courts out of 135 have such protocols. Some courts are too small to have specialised judges and lawyers. In other courts, no one was interested in triggering (or successfully concluding) the long process needed to get a local protocol. Hence, the national protocol (later on called guidelines) can work as a ready-made tool available to all those interested in developing local

¹⁰⁰ Sentence n. 12408/2012 and 10263/2015.

¹⁰¹ Sentence n. 12408/2012,

<http://www.diritto24.ilsole24ore.com/fuoco/R2V0RG9jdW1lbnRCeUlK/MTI0NzU0MTMmMyZndWlkYUFsRGlyXR0bw/document.html>

protocols or even available for single adoption. In May 2017, after a long working process, the national protocol has been established.

The first step in this process has been a **report** that compares the protocols of different courts in family law. The report, drafted by a lawyer specialised in family law, highlights the similarities and differences existing between the 24 protocols approved at the local level (out of 135 first instance courts).

The National Laboratory on Family Law (6 May 2017) attended by about 60 persons has been the second step. To avoid "credit seeker lawyers" (i.e. lawyers participating at events just to collect the points required for mandatory annual training) the organisers (Bar and Tribunal of the city that approved the protocol) decided to assign training points to the participants just once the registration was over. A similar approach has been taken at the Tribunal of Milan, for the National Lab of Damage Compensation. Participants were coming from different regions, particularly in the centre-north covering their own expenses. The majority were lawyers coming from various bar associations but there were also judges from the Court of Cassation, presidents of family law sections of large tribunals like Turin, Roma, and Bologna, judges from the Court of Appeal of Milan, just to mention a few.

The meeting was coordinated by the lawyer who drafted the report and by a judge. This format was chosen in order to show that both components are equally important in the groups. The lawyer made a presentation of the draft report, and then the discussion focused on different areas. On the one hand, it was a question of "regulative drafting": checking the coherence with the current jurisprudence of the Court of Cassation, identifying a minimum common denominator between the 24 protocols (i.e. basic rules applicable all over the country), selecting of the proper terminology, reducing ambiguities, etc. During the debate, a judge questioned the appropriateness of a national protocol. She argued that the protocols are designed to be effective at the local level since their effectiveness directly stems from those (judges and lawyers) who have invested time and knowledge in their development. The later emphasised that the "lawyers know I will apply our protocol because I have spent time and energy to draft and approve it, but this strength disappears as soon as this is placed out of the context in which it has been approved and developed". So, while at court level the protocol acts as soft law, but with direct enforcement by the same regulators, its peculiar strengths disappear if the context in which it has to be applied changes.

After a vivid discussion, the meeting approved the idea to go ahead with the national protocol. The argument was that the national protocol is not a "plug and play" tool, but something to be promoted with specific targeted initiatives in different tribunals: meetings with judges and lawyers of other courts, training, conferences [...]. Also, as speculated by a member of the Court of Cassation, "for the Court [of Cassation] it should be easier to endorse a national protocol than a local one".

At the end of the meeting, the participants agreed to propose to the National Conference - planned in Rome few weeks later - the approval of the draft of the national protocol prepared during the "national laboratory" on family law. Additionally, the participants agreed that the new document would have been called "national guidelines on family law." This choice was justified to differentiate the status of the new soft rules (i.e. the proposal of a good practice made by several local groups), and the local protocols (approved by the bar association and by the President of the Tribunal, and to be applied in that court).

The National Assembly that took place at the Court of Cassation (19-21 May, 2017) was the third step. During the Conference, the guidelines have been amended and approved first by the group of lawyers and judges interested in family law (working group), then by the plenary itself.

In the two national meetings, the working method adopted is the standard one used by the "Common practice approach", and is often referred as the "council chamber method" ("*metodo della camera di consiglio*"). The idea is to follow the type of work made by the judges working in panels to adjudicate a case: there is a stage of instruction, one of discussion and consensus building, followed by the decision. As in the chamber, the admitted participants discuss, look for the right solution, and if needed, vote the decision. There is, however, one difference: while the access to the chamber is restricted to the panel, the work at the "Common practice" meetings is open to all those interested.

This method gives rise to some oddities as judges and lawyers sitting in one of the most prestigious hearing rooms of the Court of Cassation, discussing a (soft) regulation with an egalitarian approach, voting on amendments to the draft regulation, and finally approve the guidelines. Such a dynamic is more similar to the ones occurring in Parliaments rather than ones of courts: a Parliament without official representation that vote within the Court of Cassation! Nevertheless the source of legitimation is clear: the genuine interest of improving consistency and predictability in judicial decision-making, effectiveness and efficiency in court proceedings, and offering a better treatment to the users by increasing the predictability of the judicial decisions.

Effectiveness of protocols and guidelines - The national guidelines have been approved in May 2017,¹⁰² and it is too early to describe their deployment and their impact. However, the local protocols are in place for many years. Statistical data are not available yet, so we can just provide pieces of evidence collected during direct observation of divorce cases to which we have been admitted. During the data collection, every time there was a question related to an issue regulated by the protocol the lawyer or the judge made direct reference to the protocol as an agreed way to decide the question. In one case, one lawyer suggested a solution not endorsed by the protocol (new criteria to share the unplanned extraordinary child maintenance expenses, see above), and the judge immediately closed the question saying: "we cannot consider this option. The protocol states a different criterion for sharing such costs". Even if it is soft law, its consistent use by judges and lawyers in a given court can make it very compelling.

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¹⁰² <http://ilfamiliarista.it/articoli/news/le-linee-guida-nazionali-sul-contributo-al-mantenimento-dei-figli>

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