LUISS Guido Carli
Dipartimento di Scienze politiche

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Working Paper
2/2015

LUISS
Academy

LUISS Guido Carli / Dipartimento di Scienze politiche
ICEDD International Center on Democracy and Democratization
Working paper n. 2/2015
Publication date: December 2015
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ISBN 978-88-6856-050-8

LUISS Academy is an imprint of
LUISS University Press – Pola s.r.l. a socio unico
Viale Pola 12, 00198 Roma
Tel. 06 85225485
e-mail lup@luiss.it
www.luissuniversitypress.it

State Unbounded

Extra Legal Professionalism and Goal Oriented Interventions in the Italian Judicial System

Daniela Piana (University of Bologna)

Francesco Raniolo (Univerisity of Calabria)

Introduction. The "State" as the best way between theory and historical practices

Gianfranco Poggi underlined (2009), and rightly so, that although it is both possible and legitimate applying the expression "State" to "the polity that had existed in pre-modern contexts", it would be methodologically more correct to assume that the term "State is more appropriately used to designate the characteristics of a modern political polity, which came to light in western Europe at the end of the Middle Ages, roughly between the thirteenth and fifteenth century and that later it had spread into the rest of the world". Only under this premise, the two expressions "State" and "modern State" are semantically equivalent.

Recently it has been even said that the State has been the naturally suitable solution to the habitat of Western politics until the age of liberal revolutions. Hence, it seems somehow that there is something historically necessary into the rise of the modern State into the Western culture. It remains, however, the fact that our societies are inconceivable without taking into account the fact that they are organized as States or, better, as nation-States. Nor there is a lack of people who saw the State a powerful and macroscopic force of civilization of the European society and the consequential structure of the mentality of the individuals.

Now, which kind of order is the modern State?

From the analytical point of view we can again find a "repère" in Poggi (1992; 2006; 2011). He argues that the basic defining elements, which outline the "small portrait" of the

State, as opposed to the optional accessories that might exist without being the core of the State, are: 1) the Weberian monopoly of legitimate violence; 2) territoriality; 3) sovereignty – an attribute that defines Poggi "somewhat mysterious and highly controversial" and that involves that "it is not possible to recognize a power greater than himself" (ibid, 41-42); 4) the relationship with the population (the "political community").

These original features are acquired during the initial stage of that historical process called "State-building". More exactly this early stage is the one that Poggi defines consolidation of the territorial domain. To detect the difference between the key elements and the broader picture of the States, it is appropriate to introduce the variable of "time". This opens up a dynamic perspective, reflected into the following steps: territorial consolidation, rationalization of the authority, expansion, and crisis. Obviously, this sequence outlines an *ideal type process, which deployed in fact in slightly differential manners in the different contexts where the real States have been built in the European region*. Once this has been formalised at the theoretical level, a number of relevant questions remains unanswered. They refer to the empirical and comparative deviations of the many different trajectories deployed by each historical State *in fact*.

Still, ideal types are of utmost richness in casting light onto empirical phenomena. For example, the first phase indicated by Poggi is at the center of the reconstruction made by Immanuel Wallerstein (1974), for whom the rule making process which took place in the sixteenth century is mainly the result of four processes: 1) the bureaucracy; 2) the creation of standing armies; 3) the legitimacy of the new political bodies and institutions; 4) the cultural homogenization of the political community. With these categories in mind, it is not only possible to observe the State building process, but detect also the corrosive effects caused by the comprehensive processes of change that affected the States over the centuries.

A further point, which should be mentioned as an introductory remark, concerns the rise of the nation-State as a phenomenon linked up to the rise the political representation (proto-democratic State). Following the point made by Weber, it means "the deliberate selection of available means at disposal of political actor". This process, if successful, would open the possibility of conceiving the State as a unitary actor, whose action is rational. However, this implies the acquisition of a number of aspects:

1) The government of the selection, training, promotion, and eventually sanction of those actors that serve in public institutions.

2) The development of legal specialised knowledge and the introduction of the necessary mechanisms ensuring the compliance of the judicial decisions to (and exclusively to) that legal knowledge.

3) The development of so-called State Police in the '700 and then the transformation of the State of law, including the law-oriented administration and results-oriented.

The economic and financial globalisation, the increasing complexity of the collective dilemmas (such as the environmental issues, the impact of scientific discoveries, and the new technologies) and the uneven economic growth proved to be challenging questions, which the State is unable to answer alone. Bruno Dente has rightly highlighted that the first consequence of this new scenario was "the reduction of political responsibility" of the States, which occurs in three separate directions:

a) *increase of technocracy*, which entails the devolution of powers and responsibilities to non-elected institutions, the so-called "non-majoritarian institutions" – Central Banks, independent authorities, professional bureaucracies;

b) the *multi-level governance*, where the State formation simply becomes parts into a complex system of decision making;

c) *the unbounding process* that takes place between the "private" and the "public", or differently said between the "market" and the "State".

Having these remarks as general premises in mind, this paper is going to unveil which components of the State has been put under pressure in the recent years. More precisely the authors intend to scrutinise the Italian case of judicial policies as a way to convey into the Italian State extra bureaucratic professionalism, new sources of rule making, and a goal oriented approach in the judicial system. The point made here, which definitely needs more research, is the *combination of bureaucratic and extra bureaucratic professionalism, rule driven and goal oriented approaches, and finally a State-based judicial system with an increasingly unbounded judicial system.*

2. The elephant (State) and the blind wayfarers

A few years ago a well-known English scholar in organization theory, Mary Jo Hatch (1999), addressing the issue on the post-modern organizational complexity, told a nice story, that of the Indian elephant and the blind. In short, "one day six blind men of Hindustan met an elephant and everyone tried to describe what they had touched. The first man said that the elephant was like a leaf. The second was not totally agree and said he looked much more like a wall. The third described the elephant as a large tree, the fourth like a spear, the fifth as a rope and the last thought that it was actually a snake. Each of them had touched a different part of the elephant and therefore had perceived it in a different way" (ibid. pp. 9-10). The lesson that should be drawn from the story is simple, according to Hatch: "Like the story of the blind men, scholars looking today at the State are in front of a large and complex phenomenon, seeking to define it with incomplete and certainly not appropriate instruments"

(ibid.). Otherwise said, there is a difference of complexity between the "object observed" and the "observing subject". The problem lies in the observer, in her glasses, in her epistemological premises and in her methodological instruments.

And what about wondering if things were a little more complicated than Hatch presented? *If the elephant was really exploded into many pieces*? Leaving the metaphors aside, though beyond our cognitive limitations, the State is really "broken"? The image of the State and the public administration (as its most crucial component) that comes out of the most recent literature is far from the weberian classic paradigm and from the linear view of the process of State re-building and unbuilding is now to be understood with new instruments and new glasses. Or, perhaps, from the very beginning the State was much more complex, imperfect and non-linear than the reconstruction of historical sequences pretend to say. More generally, not unlike the concept of organization, the State – which super-organization or following Hobbes "machinarum machina" – has undergone a radical complexification referring respectively to the structures, the rationality, and relationship it has with the surrounding environment.

This complexity is nowadays highlighted by a number of different transformations that can be observed despite the different contexts where the States developed and the different cultures of the "State" featured by the polities that experienced the modernity:

a) The State has become an arena (overcoming the issue of the State as a unitary actor dear to the traditional institutional and legal and international relations);
b) The State can be conceived as any organization that needs multiple knowledge, combining the rationality of purposes besides the compliance to the laws (passing of the exclusivity of formal rationality);
c) The State is now a space of multi-level or networking governance centered on connecting different areas: local-regional, national and supranational (vertical governance) and/or the private, public and semi-public or semi-private (horizontal governance).

a) *From actor to arena.* The first transformation (or deconstruction) of the State can be observed from two distinct points of view: the actors and the policies. In the first case, public action or State is increasingly carried on by many actors, some of them are public, some of them as private, or hybrid in their own rationale. In order to observe this "side" of the "elephant" it is important to unpack the observed object into pieces. But which pieces? First of all the "arenas" are located at different levels of governance among which no criterion of priority is necessarily given. Therefore, rules shaped and adopted in one arena may be sources of lesson drawing for actors moving into a different arenas without being, these rules, mandatory or compulsory. Secondly it is important to detect which resources

are available in which arenas for actors to take decisions. As an example, you may imagine actors that get resources from the arena A1 and use the same resources in the arena A2. The responses they get in the arena A2 do not necessarily have an impact on the arena A1. Therefore, the learning processes are more fragmented and uneven. Finally a piece that comes from the explosion of the elephant is the institution building process. Over the centuries the creation of new institutions, once the State was there, came exclusively from the center of the system, namely the center of the State. Nowadays, new institutions can be created outside the State or across the borders of the State. These new institutions can become new arenas crossing the different States, linking up domestic institutions into networks.

b) *From a cohesive professionalism toward a pluralistic professional arena*. This point relates to the organizational-institutional dimension of the State and lead us to focus on the type of knowledge that is used to take decisions and to shape the policies in the State.

c) *From rules to results*. There is also a different way of conceptualizing the State-arena to watch decision-making and life-cycle policies. A second area where the State appears completely transfigured is the policy process. Hence the growing complexity of the framework to want to be schematic took two routes: the definitive overcoming of the distinction between the time of decision and implementation, which means the functional division of role between politics and administration. According to some strict interpretation of Weber spread in the United States from the 40's (Clegg, 1995), the ideal type of bureaucracy would leave no room for consideration of bureaucratic power. The bureaucracy would certainly "servant". However, as already it emphasized Giorgio Freddi (1968), discussed in the light of the sociological and political analysis at the time, as the values accepted by Weber leave favor "the statement rules of the dichotomy between politics and administration", and then to "projecting a figure of bureaucrat neutral and objective, non- political" (ibid, p. 154), this dichotomy constituted "a constant but unreachable goal of political society" (ibid, p. 155). To say that the bureaucracy "should" be a docile servant but often becomes "mistress". This awareness has been the basis of a rich vein of research that focused on the "system of relations between factual and political leaders" (ibid. p. 147). To have a confirmation of this just look at one of the most systematic comparative research conducted in some advanced countries in the late '70s (J. Aberbach, R. Putnam and B. Rockman, 1981), this research brought to light that administrative systems contemporary between politics and administration there was a substantial lack of distinction, who frequently gave way to the "bureaucratic politics".

The shifts from 1) actor to arena, 2) unitary knowledge to multiple knowledge, 3) rule driven to goal-oriented create a new window for a regulative function, which is requested by

all actors moving across the arenas, combining different knowledge without a cross-disciplinary or cross-expertises standard to chose in case of conflict, and forced to stick to the procedures despite goals of effectiveness and efficiency are expected to be pursued. The point to be investigated further is how does the State exercise its "new" regulative power? Is there a new "regulative exercise" to govern the combination among arenas, rationalities, expertises and professionalisms?

To make a significant and empirically based move toward the formulation of a methodologically sound answer to these questions, we put forth a typology and we will suggest to make our inquiry by starting from a case study. Let's start with the typology. From what we said already we can infer that actors are key variables in explaining how, when, and with which degree of effectiveness new patterns of governance – i.e. rule making, rule enforcement, and rule revision/evaluation – are enacted in this world made of unbounded State. Our typology takes inspiration from this assumption and is structured over two criteria: the degree of agreement that exists among actors when goals and values are involved; the capacity actors have to control over the resources available in the arena they move. We then apply this typology to the case of the judicial systems. Judicial systems are particularly telling in this respect.

Tab. 1. Typology of situations of action in a scenario of unbounding State

	Full shared information among actors across arenas. Full control	Limited and uncomplete information shared among actors across arenas. Limited control
Agreement about goals	Hierarchical model with homogenous goal pursuing and full control of the center	Horizontal dialogue among courts
Conflict about goal	Territorial fragmentation and differentiation in the goal oriented strategies and judicial policies. Power spread among the judicial offices	Weaken chain of command from the center down to the periphery. The interaction between the center and the judicial offices is delayed and biased.

Unbounding the EU judicial systems: goal oriented rationality comes from a new transnational arena

In Europe the enterprise of constructing uniformities across legal and judicial boundaries still overlapping national political and geographical boundaries looks a fairly titanic venture, entailing a paramount work. Despite the availability of a concept of which had been operationalized to grasp the meaning of a democratizing and democratized judicial system in Central and Eastern European Countries (Coman and de Waele, 2007; Priban and Young, 1999; Piana, 2010; Dallara, 2014; Morlino and Sadurski, 2010), when the concept of rule of law had to be operationalized with specific reference to Western EU democracies (whose legal and judicial traditions carry the legacies of, in some cases, centuries of bounded and rule driven State-based regulation), the European institutions needed to find out an objective, neutral, a-cultural – or at least apparently so – basis from which drawing the semantics of the rule of law paradigm. It is with consideration in mind that one should observe the work of the European Commission for the Efficiency of Justice (herein CEPEJ). The key turning point in the European approach to the rule of law promotion dates to start ot the activities carried on under the auspices of the Council of Europe aiming at promoting the quality of justice (QoJ). Quality of justice relies on the rule of law but requires more than the formal guarantees of the rule of law. The concept of quality of justice refers mostly to the effective and efficient court administration and justice delivering. Instead of focusing exclusively on the rules and the procedures, the quality of justice focuses also on the results. CEPEJ represents a leading arena where the quality of justice as a concept is defined and the practices of quality of justice are debated.

The CEPEJ has been created with a *Resolution* of the Committee of Ministers of the Council of Europe in 2002 "recognizing that the on which European democracies rest cannot be ensured without fair, efficient and accessible judicial systems". The *Resolution* refers to the macro themes that have occupied the core of the CEPEJ's agenda ever since: 1) access to justice and proper and efficient functioning of courts; 2) the status and role of the legal professionals; 3) administration of justice and management of courts; 4) use of information and communication technologies. These four items are permanently on the menu of the CEPEJ's meetings and works.

The *Resolution* is also refer to a "normative anchor" (Kelley, 2004; Morlino, 2001) which consists into the European Convention of Human Rights art. 5 and 6 and creates a semantic bridge between the abstract and universal principle of "fair trial" and the concrete and practical conditions where courts operate. In other terms, the premise which stands at the basis of the CEPEJ's creation claims that the right to a fair trial, stated in the ECHRs, will be undermined or not fully enforced if the judicial offices are not capable to ensure equal access to the administration of justice to all citizens, if they do not ensure a reasonable

time frame, if they do not administrate efficiently and effectively the human resources they dispose of, and finally if they do not rely on a solid and reliable implementation of IT tools. These latter do not have a normative values in themselves. They are instrumentally valuable, since they might be very effective in reducing the backlogs, in speeding up the length of the proceedings, in making more easily accessible for users and citizens the services of the courts, etc.

In short the CEPEJ has been vested with the responsibility of intervening within the judicial systems of the States, without being vested with the authority of sanctioning the States that do not follow its recommendations though. The CEPEJ is not conceived as a supervisory body either. Therefore, the relationship that is set up between the CEPEJ and the States is not the one that can be worded in terms of hierarchy. The mechanism of influence, consequently, does not work with a top down scheme of governance. The States are not under the monitor of the CEPEJ. We observe instead the creation of an arena where the participants are expected to contribute to an institutional game where the normative inputs come from the multilateral dialogue of all of them and the intervention of a representative of CEPEJ takes place only if the State requests so.

Which resources are put in the hands of players of this game? The Council of Europe provides for a budget covering the costs of a regular calendar of meetings whereby the goal pursued is building four types of cognitive instruments:

1) indicators to collect data
2) country reports and comparative analysis
3) pilot studies
4) blueprints and guidelines

The bodies of CEPEJ "are a plenary session with representatives from all member States that meets twice a year; a bureau with four members elected from the representatives that function as the board of CEPEJ; one to three (or more) working parties or working groups with a maximum of six expert members; a secretariat provided by the Secretary General of CoE" (Johnsen, 2012).

This resulted in an impressive work to single out indicators and measurement methodology. The first two Reports, published in 2008 and 2010, are in this respect to be welcomed as an innovative way to go about the justice administration assessment. The idea underpinning this work can be summarized as follows: justice administration is a public sub-sector and should be held accountable from the point of view of its capacity to deliver a good service to users – citizens – and of its capacity to allocate money with a strict instrumental rationality. Remedies suggested come from best practices utilized in more advanced countries – countries that rank high in court efficiency –and from the

development of common standards which serve as common transnational reference points to assess the quality of national and sub-national judicial offices. Judicial offices respectful of the QoJ should be efficient in delivering judicial decisions in due time and transparent in the way they manage their resources. They should also introduce a comprehensive installation of IT instruments to facilitate information processing and public communication. To put it briefly, innovation has become common sense when policy makers are asked to cure the illnesses affecting the judicial system, such as unreasonable timeframe, difficult or unfair access to the courts, the general public's lack of confidence towards the bench, etc. (Frydman, 2007). This has entailed a growing commitment to inject new organizational practices and policies, originated in other systems or offices, within the traditional systems of judicial governance, new organizational practices and policies originated in other systems or offices.[1]

The different types of action undertaken by CEPEJ are ranging from the development of indicators of quality, the regular monitoring of the judicial system, the provision of in premise support (for instance to implement the satisfaction surveys within the courthouses), the listing and diffusing of guidelines and recommendations. They join the activities of reporting and developing recommendations which are undertaken by the European Consultative Committee of Judges and the European Consultative Committee of Prosecutors. Out of these range of instruments and tools come also the standards set by the European institutions to define a high quality justice administration. Standards are tools to construct uniformities across time and space, through the generation of agreed upon rules. The idea underpinning this work can be worded as it follows: justice administration is a public sub-sector and should be held accountable from the point of view of the capacity of delivering a good service to users – citizens – and of the capacity of allocating money along with a strict instrumental rationality. Remedies suggested come from best practices experienced in more advanced countries – countries that rank high from the point of view of courts' efficiency[2] – and from the development of common standards which serve as common transnational reference point to assess the quality of national and sub-national judicial offices. Judicial offices respectful of the should be efficient in delivering judicial decisions in due time, should be transparent in the way their manage their resources, should introduce massively IT instruments to facilitate the information processing and the public communication.

[1] We will now observe the flourishing of specialized groups working within CEPEJ, whose mandate spans from singling out a check list for quality management to monitoring the implementation of user-oriented tools to supporting the transfer of policies and organizational practices through a network of pilot courts – where pilot refers to keenness to innovate their organizational structure.

[2] The overall effect of this comprehensive change consists into a broad and spread growth of innovation within the realm of justice administration. Innovation has been praised alongside the development of several exercises of monitoring and policy transfer all of them supported by transnational judicial networks and welcome by the users and the legal professions as a resort for the problems encountered by increasingly overloaded judicial organizations.

According to the European discourse about the QoJ, one can detect three sub-dimensions which are comprised into the QoJ and which will come out as fundamental targets of the QoJ promotion in Italy:

- the reasonable trial timeframe;
- the progressive reduction of the backlog
- the use of IT tools to increase the transparency and the efficiency of the courthouses

To put it briefly, innovation has become a common sense when policy makers are referring to the judicial institutions and are asked to solve and medicate the illness affecting the judicial system, such as unreasonable time frame, uneasy or unfair access to the courts, lack of confidence granted by the general public to the bench, and so on. This has entailed a growing commitment to inject within the traditional systems of judicial governance new organizational practices and policies originated in other systems or offices.

From one rule driven system to many policycentric policy-based arenas

In Italy the judicial system has been gaining attention in the public discourse since the late '70s. For historical reasons first – judges and prosecutors engaged in the fight against the terrorism – and for political reasons then – cases of political corruption have been adjudicated in the early '90s – justice administration is a very contested and controversial issue in the Italian politics. Whereas institutional reforms, impinging upon the judicial governance, such as judicial appointment, promotion, disciplinary control and removal of judges and prosecutors, are handled exclusively by the central government and the Parliament, organizational innovations can be introduced at the level of the judicial office under the responsibility of the chief justice or the chief prosecutor. For example, the introduction of a front desk for the public, the human resource management system, the e-filing facilities, etc. belong to the agenda of the local institution.

It is only from 2001 that the Italian policy discourse is patently taking on board the issue of the QoJ. In fact, as witnessed by the increasing number of the violations of the art. 6 of the ECHR, the Italian Parliament adopted a law (*legge Pinto*) to impose a fine to those courts where the proceedings did not be treated in due time and therefore the trial timeframe did not respect the right to a trial in due time (art. 6 ECHR). After that time, a number of legislative and governmental actions tried to address the issue of the length of the proceedings, from several point of view. In table 1 these actions are summed up in a brief overview.

Tab. 1. **Legislative and Governmental Actions addressing the QoJ in Italy**

Year	Action	Actor involved	Goal	Results
2001: legge Pinto	Sanctioning the violation of the right to a fair trial	Courts of appeal	Create incentive to speed up the trial time frames	Negative side effects of the Pinto implementation; delays due to the timeframe of the Pinto's cases by the appeal courts
2006: decreto legislativo Castelli-Mastella	Incorporating in the professional evaluation of the chief justices and the chief prosecutors the managerial capacity	High Judicial Council; higher ranked judicial staff		Implemented without any monitoring process
2007-2013	Promotion of management tools into 191 judicial and prosecutorial offices under the funding scheme of the European Structural Funds	Department of Public Action; Ministry of Economic Development; Regions	Improvement of the services offered to the local communities	The programme is now ended. A new planning activity is on going under the ESF 2014-2020
2009	Promoting IT into the judicial offices	Ministry of Justice	Modernize the court management	Partially implemented
2012	Reduction of the number of courts and prosecutor offices. Revision of the judicial map	Ministry of Justice as a promoter	Rationalise the allocation of resources, increase the scale economy in the administrative services	Implemented
2013	Legally binding provision on civil trials to reduce the trial time frame	Ministry of Justice as a promoter, the Executive as adopter	Shorten the trial timeframe	Implemented

2014	Pre judicial mechanism of dispute resolution	Ministry of Justice as a promoter	Reduce the workload of the courthouses	On going
2014	IT based civil proceedings has become mandatory	Ministry of Justice as promoter.	Shorten the trial timeframe	Implemented; on going activities supporting judicial offices with structural difficulties encountered in the implementation
2015	Reform of the organisation of the Ministry of Justice	Ministry of Justice as promoted, the council of ministers as adopter	Reduce the public expenditure	On going
2015	Reform of the civil procedural code	Ministry of Justice as promoter. Ad hoc committee appointed to draft the text that has been submitted to the parliamentary scrutiny	Shorten the trial timeframe, ensure a positive impact of courts on the economy	On going
2015	Reform of the penal code	Ministry of Justice as promoter	To reduce the number of cases filed into the penal courts. To create better conditions of transparency and prevent corruption	On going

Sources: Author's elaboration on the basis of the data set available at www.giustizia.it

As the reader might easily spot, the Ministry of Justice has been joined with other authorities, local (regions) and supranational (Europe, with the ESF). Laterally, the High Judicial Council started to intervene with secondary regulation, creating specific mechanisms to promote the effective use of the ITs in the courthouses and to enhance the cooperation with the Ministry of Justice in the specific field of the judicial organization. On the overall table 1 highlights a high number of interventions, promoted by the legislator as well as by the ministry of justice, all targeting the management and the organization of the judicial offices. The key features shared by all them can be grouped along two dimensions:

- actors: actors involved into the judicial reforms are many and led by many different rationales; local (i.e. regional), national, European. Within the constellation of actors involved into this change process, even at the same level of governance – the center of the domestic system – the manifold nature of the agency is striking.
- enforcement mechanism: the manifold nature of the agency went hand in hand with the looseness of the enforcement mechanisms. The Italian system did not have any specific, clearly identified, and permanently responsible institution which is granted with the competence of monitoring and ensuring the trajectory of the implementation processes nor the coherence of the goals pursued across the borders of the judicial districts.

This general situation creates favorable conditions to promote local changes from the inside. This is even more prominent where chief justices and chief prosecutors serve in large sized offices. In fact, in these organizational contexts, the importance of leadership emerges with particularly high emphasis. The legal system requests the chief planning the strategies by means of which she expects to improve the management of the judicial office. These strategies take the shape of planning documents, where human resources are allocated to different court sections or departments, and mechanisms of case assignments for the public prosecutor offices are indicated. Therefore, the entrepreneurship is allowed and eventually encouraged.

To empirically support these statements, namely the emphasis put on the role played by local actors and local favorable conditions to QoJ promotion, I are going to present the qualitative analysis of three experiences: two first instance courts and a public prosecutor office. I will name respectively office A, office B, and office C. Three large sized offices, which can be compared on the basis of two axes. The first two cases are two first instance courts, in the Northern part of the country, so they might be considered as equally situated. The third case differs from two perspectives, it is located in the South and it is a prosecutorial institution.[3]

Case A. This first instance court can be considered as a frontrunner in the introduction of a modern, efficient and EU-compliant plan of backlog reduction. Between 2001 and 2009,

[3] The analysis offered herein relies on the qualitative research developed by the author during the period between 2009-2013.

97 per cent of all civil proceedings fell below the 3 years threshold prescribed for their settlements. «The practices were simple. First of all you had to count the pending files and classify them by date». Files started to be classified considering the risk factor, known as "Strasbourg risk", which is the risk that a file may give rise to proceedings before the European Court of Human Rights (ECHR) for violation of art. 6 of the European Convention on Human Rights. The number of files pending for over five years was visibly decreasing». The situation in 2009 was the following. A total backlog of 25,481 legal disputes was registered on 16th of February 2009 in the main building and on the 30the of April 2009 in the four separate buildings. The number of pending cases was as follows: cases "not a at risk" (pending for less than four years) were 25,134 out of 25,481: 98.63 per cent of the total; cases "at risk" (pending for five years) were 232 out of 25,481: 0.91 per cent; cases "at bigger risk" (pending for 6 years) were 89 out of 25,481: 0.35 per cent; cases "at strong risk" (pending for over 6 years) were 26 out of 25.481 (less the 1%). Between the 2001 and the 2009 the number of pending cases for over three years went down to zero. The practice has been introduced by the chief justice starting by making reference to the Strasbourg case law and by relying on the high degree of organizational cohesion featured by the first instance court. Two variables played a key role then. The leadership, exercised in the frame of a policy window opened by the Strasbourg' violations, and the intra-organizational accountability.

Case B. This office is located in a one of the most relevant in Italy for the visibility of the cases and the density of economic and financial transactions. The chief justice has solid connection with the central government. Furthermore, the personality of the president is marked by the managerial, goal oriented, and system vision of the court. She "likes responsible chiefs and goal oriented management". Since her presidency started the court has been largely transformed. First, given the size of the office, where serve more than hundred magistrates, a president board has been introduced, which has the same functions that can be performed in a private enterprise by the advisory board of the executive director. In 2010, in the frame of the national program "Diffusion of the best practices in the judicial offices" financed by the European Structural Funds (Piana, 2015; Dallara and Piana, 2015) the first instance court B launches the implementation process of a number of measures addressing, altogether, the efficiency and the transparency of the judicial organization. Since 2010, the Law Court B has adopted a Strategic Plan and built up a specific Innovation Office led by a magistrate in order to better manage the projects developed together with other partners. Does the CEPEJ matter in this context? It does. In the Social Budget Report it is written "The Cepej (Commission européenne pour l'efficacité de la Justice / European Commission for the Efficiency of Justice) analysis is one of the main information sources for the comparisons of the organizational performance of the Italian justice system with the ones of the other European countries". Three local conditions turned into a favorable context

for the project implementation. First of all the co-participation of the University.is intensively engaged in providing expertise and external monitoring capacity during the entire process of policy making. Secondly a rich Region, which has supported in several manners this comprehensive policy. Finally, the connection between the President of the court and the central governing institutions, something that has speeded up all processes of deliberation which are necessary for all interventions in the field of IT, court management, human resources management.

Case C. The judicial office C is unquestionably one of the most relevant in Italy because of its size, the complexity and the number of cases it handles, and its visibility on the media. This institutional salience is combined with a very critical location, since C is one of the districts of Italy with the highest rate of density of criminal organizations. During the last ten years favorable conditions emerged for the University being able to set up a new organizational unit with the task of raising money and managing research projects. Starting from 2010, within office C the vice-chief prosecutor promoted the introduction of organizational innovation within a comprehensive strategy aiming to foster the managerial accountability. Among the instruments foreseen, there was the development of a regular and formalized cooperation with the University. In November 2011 the University and the PPO signed a framework agreement. This joint partnership creates a new policy window for tailored services provided by the University or some of its sub-units. Up to now this has been put into motion by means of a number of micro-instruments, such as an agreement for the provision of expertise and knowledge in the fields of toxicology, information technology (to mention some of them) and prospectively in statistics. A further type of cooperation is the work experiences program. The work experience program was the initiative of one of the vice-chief prosecutors. It has been conceived to tackle three major problems faced by the public prosecutor office and, likely, by most of the Italian judicial institutions of big seize: the lack of personnel change in the administrative staff which deteriorates the motivation of clerks and administrative operators to engage in innovative experiences; the lack of specialized non legal training for the administrative staff; the low level of intra-organizational knowledge transfer and knowledge management (this latter problem affecting the judicial and the administrative staff as well). With the financial resources provided by the ESF and in practice put at disposal of the work experience project by the Region the university launched a call for graduates or undergraduates – but in the last year of enrollment – students.

The cases described herein offer a number of insights for the argument this work aims to unfold. First and foremost, they share as a common facilitating condition the presence of a leading change agent, whose resources rely on the skillfulness, the prestige, the capacity to morally persuade the lower ranked judges and prosecutors as well as to mobilise external actors to support the modernisation of the courthouses. Secondly, all cases show the pivotal

role played by the functional differentiation, which stands as organisational pre-condition to maintain the achievements of the change agent. The innovation office seems to facilitate the institutionalisation of the internal policies of quality promotion. Finally, the way "quality" is operationalized. All the cases fit perfectly with the European discourse on QoJ. In fact, they aim to reduce the backlog, to improve the trial timeframe, to improve the budgeting policies, and to make the judicial organizations more transparent toward the external environment. In this way, three different change agents, in three different organisational contexts, in two different areas of the country, converge from two point of views: the promotion of the QoJ and the reference to the European discourse in framing the local strategies of QoJ promotion.

The in depth analysis of the organizational and communicative strategies adopted in the judicial offices to enforce the right to a quality justice system brings new insights to discuss the initial point, made in the first lines of this article. Quality of justice is defined in terms of standards. The concrete significance these standards take within each organizational context may differ. Who decides the right standard implementation process?

Who should monitor the final result reached by standard-driven organisational strategies adopted in the judicial system? And, at the macro level, is the enforcement of the fair trial equally convergent? Can we expect that the QoJ converge toward common standards all over the national territory?

Lessons to be drawn from the Italian Case

This paragraph zooms out and aims to cast light onto the entire national judicial system. It does so to respond to the following question: once the QoJ is promoted, dependently on the local implementation of the European standards thanks to locally empowered change agents, is this a sufficient condition to ensure *a homogenous enforcement of the right to a fair trial*?

Let's first consider a possible counter-argument. Why can we generalize from the three cases presented in the previous paragraph? This can be easily replied. The three case studies above described show that the engine of the judicial policies in terms of QoJ promotion is local. These policies stand on the initiatives of specific judicial offices or, as mentioned already in the table 1, because of external financial leverage such as the European structural funds. The policies run locally, which means that the goals, the strategies, and the specific expected outcomes are context-sensitive. This is because it is the responsibility of the chief justice or of the chief prosecutor to adopt a QoJ plan, i.e. the "piano organizzativo". The key question is: after six years of QoJ promotion, is the country converging toward common standards of QoJ? Despite backlog reduction stands as a policy priority, the tool of court management introduced under the ESF financial framework did not target directly the trial timeframe and the capacity of the courts to reduce their backlog. Rather, the management

tool aimed to improve the efficiency and the effectiveness of the clerk offices and the administrative units, i.e. a necessary even though not sufficient condition to improve the trial timeframe and thereby improve the quality of justice. After 6 years of organizational innovations, still the trial timeframe varies considerably from one judicial district to the other.

Can we explain the divergences on the basis, for example, of the differential timing of the QoJ policies implementation, which in fact differs from one region to the other? If this would be the case, we should observe regional divergences whereas we should have intra-regional convergences. Let's see then if we have intra-regional convergences. From the empirical analysis of the data available by the Ministry of Justice, one can detect that the distribution of the trial timeframe in the provinces, which is an administrative unit located at a lower level of governance than regions. Even in the Southern regions, where the trial timeframe is worst, we have spots of QoJ. The same holds on the other way round. In the central regions, we have provinces coloured in blue, such as Bologna – center-North – despite the region – Emilia Romagna – is mostly coloured in yellow and green, which witnesses a high level of QoJ.

Firstly, there is not a clear and regular pattern of influence between the ESF funded policies of QoJ and the improvement of the QoJ sub-dimensions. Secondly, within each district one can point specific differences and divergences in the trial timeframe, which can not be explained with the local culture, nor with the degree of wealth nor with the type of demand of justice – if this had been the causal factor, we would have observed intra-regional convergences. One can safely argue that a key causal variable in the QoJ promotion is represented by the presence of change agents and beside this by the presence of mechanisms that institutionalize the innovations (see the cases). If this is so, how can we ensure that locally adopted innovations and punctually promoted policies of QoJ can end up in uniform services offered to users?

Judicial institutions stand at the core of the constitutional ideals. In order to put into motion the principle of a “limited power” and the right to a fair trial (likewise any other right) an independent and a modern judiciary is essentially needed in any political system, national or transnational. In this respect, the transformations undergone by the judicial functions are highly salient for the bounded and rule driven State-based regulation put into motion within a political system. Traditionally, judicial functions operate in a legal framework, which define the limits between the judicial branches and the other branches of the State, the legislative and the executive, and the legitimate spaces granted to the judiciary to act as right protector and right enforcer.

Nowadays, in the EU, this traditional view appears not updated and not timely any longer. In fact, judicial functions operate within a framework made of several components, among which legally as well as non-legally binding norms play a key role. The case analysed

in this text, the diffusion of the QoJ standards, provides a number of critical hints to put the EU bounded and rule driven State-based regulation in a new perspective.

The empirical evidence presented here unveils three important aspects. The first one refers directly to the homogenous implementation of the right to a fair trial. If the "right to a fair trial", which is one of the fundamentals in a constitutional State and in any constitutional system, is redefined, the implementation of this right should take into account the borders of this re-definition. The standards of QoJ assign to the right to a fair trial a broader meaning than the one traditionally (and legally) assigned to it. This right does not only award to the citizens the possibility to ask any judicial institution acting on the base of the strict application of the law, within the limits set by the procedural codes, and respectfully of the abstract principle of an impartial bench. This right, as it has resulted from the CEPEJ discourse, refers also to the timeframe of a trial, to the policies of communication court-users, to the access to the courthouse, etc. Managerial dimensions enter into the spectrum of the right to a fair trial. Consequently, the judicial function should operate on a broader base than the one considered in the past.

Nonetheless, standards are non-legally-binding mechanisms. They influence the national judicial policies by means of a soft power. Most of the time, they enter into the national systems by means of the punctual, local implementation supported or promoted by individual chance agents. The analysis of the Italian cases tell us that chief justices or chief prosecutors can take the opportunity of the external leverage to promote changes in organizational and managerial terms that otherwise would have been more difficult to achieve. If this is so, the homogeneity of the standards implementation is not "a given". Individual change agents may be capable to act in some courthouses and not in other ones, located in the same country (in some cases, as Italy shows, even within the same district).

Therefore, the mechanism by means of which the soft-law side of the EU bounded and rule driven State-based regulation influences the national institutions allows the differential implementation of rights, if the rights are conceived in the manner here exemplified by the right to a fair trial (legal and non-legal dimensions tightly linked up). For this reason, one may speak of "perverse effects" of the promotion of the QoJ. Which are the conditions that facilitate this perverse effect?

Here a second aspect highlighted in the above analysis comes in. Under conditions of weak statehood and without any mechanism of *in itinere* and ex post monitoring, the promotion of the QoJ depends mostly on the capacity and the resources of the judicial actors. Consequently it can create structural conditions for a differentially implementation of right to a fair trial. For a citizen who moves from one part to the other in one country may be confronted with two different standards of quality, which in fact means that the equality of the fair trial may be jeopardised. This does not mean that citizens are not granted with formal rights to a fair trial. This means that in practice a citizen located in a specific part of a country

where standards of QoJ are implemented may enjoy different services and goods (concerning the delivered justice) than an other citizens that is situated in a different part of the same country.

In terms of compliance, the differential implementation of the standards appears to be acceptable and legitimate. The organizational practices analysed in the three case studies fit with European standards of quality of justice. They are inspired by an efficiency oriented rationality and they aim at improving the organization of the judicial offices from the point of view of the accountability point of view. They aim at enhance efficiency, at reducing the trial timeframe, at improving the public communication system, and at controlling the budget expenditure. These cases show how concretely the organizational innovations praised by the European QoJ promotion are introduced into the courthouses. They highlighted the role played by the change agents, namely those agents who are in the right position to allocate resources, time, leadership, to promote the QoJ. This process of change unfolds under the general umbrella of the European standards of QoJ and the overall consensus raised in Italy by the QoJ promotion. Concepts such as process in due time, court management, IT based court management, etc. penetrated the domestic policy discourse and have been absorbed by the Italian legislator and the Italian governmental strategies enacted over the last years to improve the service offered by the courthouses to the citizens. Yet, something goes not in the right direction. At the aggregate level, the data presented in the previous paragraph portrait a country where intra-regional and inter-regional differences do persist. This does not means that within the national territory the QoJ has not been promoted sufficiently. Nor the divergences are indicators of the lack of any kind of improvement. Quite the opposite. Table 2 and table 3 show that several districts feature a positive trend, both from the point of view of the backlog reduction and from the point of view of the cooperative interaction with the local society.

The Italian cases cast light on a third point. If we consider Europe as target, the critical aspect of the judicial systems is not the law in the book. What matters are the strategies, resources, ideas, and possibilities with which judicial actors engage into the promotion of the QoJ in their daily working activities within the courthouses where they serve. If then the “rule of law in action” is a goal and not an “acquis”, how can we design a system of mechanisms and instruments where the judicial actors, situated in the multi-level and normatively pluralistic context as we have depicted it, can be held accountable? Law is part of the game. But we need more. An important part is now played by monitoring and assessing. Yet, monitoring and assessing are activities or better said “techniques” of governing which entail the existence of well functioning center which plays in the system the role of regulative agency. It is up to the center to ensure the clear existence of standards, which should be reached by the courthouses. Despite the differences the judicial offices may deploy in terms of demand of justice, in terms of capacities and skills of the staff, in

terms of presence/absence of change agents, in terms of high or low turn over of the staff, the center should play at the interface between the judicial system and the citizens. This innovative approach is worth to be pursued because of two different reasons. standards exchanges and hybridizations are made possible by mean of bilateral collaborations established – often on informal basis – among local organizational units of the national public institutions. The quest for a regulative center is particularly urgent in those countries where the judicial function is forced to adapt to a highly differentiated territory. This is, in short, a necessary condition to ensure that the large variety of organizational solutions adopted under the incentives set up at the transnational level in terms of QoJ promotion does not end up with a differential rule of law or less dramatically a differential offer of services supplied to right-holders, who are citizens in the same political system. The case of Italy plays herein the role of a negative case. Several facilitating conditions are in place to promote the QoJ: the awareness of the priority that should be granted to the issue, the existence of leading change agents serving in the judicial offices, the availability of external leverages, such as ESF, the number of legislative and governmental initiatives adopted to tackle with the problem of a poorly modernized system – at least in comparison with the EU standards of QoJ. The lack of a center which ensures that all activities taken at the local level converge toward a common level of rule of law enforcement or, as I would say, a common level of "rule of law in action" seems to be a critical domestic condition which may leave a gap to be filled between a patchy QoJ and non guaranteed equal treatment of citizens before each courthouse.

In short, the QoJ story seems to reveal a potential paradox. In order to respect the ideas of the bounded and rule driven State-based regulation we need to limit the exercise of power. Traditionally the power that is expected to be limited is the power of the State. That's the first meaning the bounded and rule driven State-based regulation and the ideas of the right to a fair trial have been conceived. Nowadays, the horizontal diffusion of the standards of QoJ and the possibility to put into motion the "redefined and broadened right to a fair trial" in a differential manner opens up a functional space where a regulative function should be performed. Standard implementation, assessment, monitoring, etc. are all functions typically performed by a regulative State. In contexts where the State is fragmented and historically weak – as the case of Italy has shown us – the functions that should be performed to ensure the equal implementation of the right of fair trial (in its post modern understanding) become even more critical and necessary.

The in depth analysis of a pattern of standards implementation, as the one instantiated by the Italian case, offers key insights to reflect seriously upon the mix nature of the bounded and rule driven State-based regulation which seems to be rising in the EU. On the one hand, hard laws are flourishing. They ties the hands of the domestic institutions and supply the EU citizens with new instruments to ask their rights been enforced even against the political will

of the sovereign States. On the other hand, soft laws and specially standards of quality of justice open up a new field where actors not democratically accountable adopted norms that may have an impact on the life of the EU citizens. Surely, these actors are accountable under professional and technical normative frameworks. However, a further point comes critical. Once the standards are adopted, their implementation depends on the decisions and the strategies of those domestic actors that feature the highest level of organizational, institutional, communicational capacity and entrepreneurship. In the case of Italy, despite the central role granted by the constitution of the High Judicial Council in the governance of the judiciary – as the pivot of the self-governing model the Italian democracy adopted after the instauration in 1946 – the ministry of Justice is turning out as more capable and endowed in terms of organizational capacity to bridge the gap between the abstract definition of a standard and the concrete organizational patterns that should be adopted to make this standard into a real practice. Without phrasing this in dramatic terms, it seems to us reasonable arguing that standards brought into the Italian system a new season in the interaction between the executive and the judiciary.

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