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ITALY

INTRODUCTION

ORGANIZATION OF JUSTICE – A PRELIMINARY SURVEY OVER THE ITALIAN JUDICIAL SYSTEM

a. Administration of courts[1]

The Italian judicial system is based on the civil law. The function of a judge, as well as a public prosecutor, is exercised by members of the judiciary whereas the administrative function is carried out by the Ministry of Justice.

The judicial function can be classified into five areas:

1) Ordinary (civil and criminal)
2) Administrative
3) Accounting
4) Military
5) Taxation

Jurisdiction over administrative matters is exercised by regional administrative courts (*Tribunali Amministrativi Regionali* or TAR) and by the Council of State (*Consiglio di Stato*), whereas the jurisdiction over accounting matters is exercised by the State Auditors' Court (*Corte dei Conti*). The office of its general public prosecutor is based at the same court. Jurisdiction over taxation matters is exercised by the Provincial Taxation Commissions and the District Taxation Commissions; jurisdiction in military affairs is exercised by the military courts, the military appeal court, the surveillance military court, military prosecutors based at the military courts, general military prosecutors based at the military appeal courts and by the general military prosecutor based at the Supreme Court. Jurisdiction over ordinary civil and criminal matters is exercised by magistrates belonging to the judicial order, which is divided into judges, on one hand, and magistrates of the public prosecutor's office, on the other, fulfilling the roles of judges and investigators respectively.

The Constitution, among the government structures, assigns to the Ministry of Justice those functions related to the court administration because of its special function, role and relationship with the judiciary.

[1] Articles 101-113 Constitution.

After a very difficult public examination, magistrates are assigned to courts in a certain area of competence, according to their personal choice. They cannot be assigned, promoted, removed, transferred or punished without deliberation by the *Consiglio Superiore della Magistratura* (C.S.M., the High Council of the Judiciary) and with special guarantees of protection.

Indeed, all matters related to magistrates must be evaluated by the C.S.M., which protects the independence of the magistrates and their status; the President of the Italian Republic is also the president of the C.S.M..

The Ministry of Justice carries out its administrative and organizational functions at two levels:

- within the central structures (called *department*), mainly in Rome;
- for special areas of competence, also in local sections, such as judicial offices, tribunals, courts and so on.

The administrative function is also responsible for the personnel assignment to judicial services.

At the top level of the courts (or public prosecution offices), there is:

- a chief magistrate, who is in charge of the judiciary and who takes the final decisions as to office issues;
- a court clerk (called *dirigente*) dedicated to the organization of judicial services for the public and internal assistance to judges and prosecutors. The *dirigente* is the highest position in the administrative personnel.

b. Types of courts – short description

Courts are set up as follows:

1. First instance

- Justices of the Peace (*Giudici di Pace*) – who are honorary (not professional) judges. They hear minor civil and criminal matters;
  - Courts or Tribunals (*Tribunali*) – hear more serious cases;
  - the penal office (*Ufficio di Sorveglianza*) – hears cases in the first instance involving criminal justice (questions about prisoners, convictions, etc.);
  - Juvenile court (*Tribunale per i Minorenni*).

2. Second instance

To claim against the first decision on factual grounds and on the interpretation of law:

- Courts of Appeal (*Corte d'Appello*);
- Penal tribunals (*Tribunale di Sorveglianza*) – second instance (and, in some special matters, first instance) courts in matters involving penal justice.

3. Third instance

In order to obtain recourse against a breach of law at the highest level:

- Supreme court (*Corte di Cassazione*) – with overall competence, this is the final instance.

Main tribunals are also divided into special sections. Courts of Assizes (*Corti d'Assise*) sit with two professional judges and six jurors. Jurors are chosen from the body of citizens, for short periods of time, to cooperate and represent the various sectors of society. These courts take decisions on serious crimes (murder, serious assault and similar).

Magistrates who play the role of the public prosecutors in the trials are:

- chief prosecutors of first instance (*Procuratore della Repubblica presso il Tribunale*) and their deputies (*Sostituti Procuratori*);
- chief prosecutors of second instance (*Procuratore Generale presso la Corte d'Appello*) and their deputies (*Sostituti Procuratori Generali*);
- attorney general for the Supreme Court (*Procuratore Generale presso la Corte di Cassazione*) and his or her deputies (*Sostituti Procuratori Generali*);

In Italy, the role of public prosecutor is played by career magistrates, who exercise their functions under the supervision of the chief of their bureau. The structure of this office could be compared to a hierarchy that applies only to the public prosecutors' offices.

Outline of the Hierarchy of Courts

<table>
<tr><th></th><th>Civil Jurisdiction</th><th>Criminal Jurisdiction</th><th>Juvenile Jurisdiction</th><th>Penal Jurisdiction</th></tr>
<tr><td>First instance</td><td>Justice of the Peace</td><td>Justice of the Peace</td><td>Juvenile Court</td><td>Penal Office/PenalTribunal</td></tr>
<tr><td rowspan="2">Second instance</td><td>Tribunal</td><td>Tribunal</td><td rowspan="2">Specialised Section of the Court of Appeal</td><td rowspan="2">Penal Tribunal</td></tr>
<tr><td>Court of Appeal</td><td>Court of Appeal</td></tr>
<tr><td>Infringement of law</td><td>Supreme Court</td><td>Supreme Court</td><td>Supreme Court</td><td>Supreme Court</td></tr>
</table>

c. Constitutional jurisdiction

This function is assigned to the Constitutional Court, which consists of fifteen judges. One third of these judges are appointed by the President of the Republic, one third by the joint session of the Parliament and one third by the highest-instance ordinary and administrative courts[2].

[2] Article 135 Constitution.

The Constitutional Court rules[3]:

a) on disputes concerning the constitutional consistency of laws and decisions having the force of law of the State and the Regions;

b) on conflicts on jurisdiction between powers of the State, the State and Regions, and the Regions;

c) on charges against the President of the Republic, pursuant to the Constitution[4].

Control over the constitutional consistency of laws may be exercised, directly, by specifically authorised entities[5] (State, Regional Authorities, Self-governing Provinces)but it may be also exercised, incidentally, by a judge, who in the course of a trial considers that the law to be applied to the case is of dubious constitutional consistency. In this latter case, the issue of constitutional consistency must be pertinent to the case's ruling and must not be manifestly unfounded[6].

d. Ordinary jurisdiction

Ordinary jurisdiction is exercised by ordinary judges/prosecutors (10.151 in Italy), who are considered judges and prosecutors because they are created and regulated by the law of the judicial system[7]. They have a separate status from other judges which derives from a) the privilege of independence envisaged by the Constitution[8] and also from b) the fact that they are subject only to the authority of their self-governing body: the *Consiglio Superiore della Magistratura*, namely the High Council of the Judiciary[9].

Ordinary jurisdiction is internally divided into: (i) criminal jurisdiction, where judges are called to make a decision on whether the criminal proceeding instituted by a public prosecutor against a given individual is founded and (ii) civil jurisdiction, aimed at the legal protection of rights in the relationship between private subjects or private subjects and the public administration (if in exercising its duties) the administration prejudices the subjective rights of a person.

As said above, all magistrates may lodge an application before the Constitutional Court demanding a ruling on the constitutional consistency of a law without the law having to be applied by a judge in a trial. When a Court must apply a law to a concrete case and there are doubts on the constitutional consistency of the said law, it may stay the trial and remits the case of constitutional consistency of the said law to the Constitutional Court.

[3] Article 134 Constitution.
[4] article 90 Constitution
[5] Articles 37-42 of Constitutional Law no. 87 of 11th March 1953
[6] Article 1 of Constitutional Law no. 1 of 9th February 1948; articles 23-30 of Constitution Law no. 87 of 11th March 1953.
[7] Article 102 Constitution; arts. 1 and 4 Royal Decree no. 12 of 30th January 1941.
[8] Articles 101 -104 Constitution.
[9] Law no. 195 of 24th March 1958 and Presidential Decree no. 916 of 16th September 1958.

Ordinary jurisdiction is administered by "professional" judges and "honorary" judges, who belong to the judiciary[10]. Honorary judges now consist of: a) Justices of the Peace[11], who are now competent, both in the civil and criminal field, for matters previously dealt by professional judges; b) court honorary judges linked to judicial offices; c) honorary deputy prosecutors linked to prosecuting offices; d) experts of the courts and the juvenile divisions of the Courts of Appeal; e) lay judges of the Courts of Assizes[12]; g) experts working for the *Tribunale di Sorveglianza*[13].

The court of highest instance, namely the Supreme Court (*Corte di Cassazione*), rules only on points of law.

Currently, civil and criminal justice is administered by: Justices of peace, the Courts (*Tribunali* - mainly single judge courts), the Courts of Appeal, the Juvenile Courts and the *Tribunale di Sorveglianza* sitting both as a single judge and as a panel of judges[14]. Pursuant to the reform of the single first instance judge[15], the first instance courts have been reorganised by abolishing the *Pretura* and assigning its competence to the *Tribunale*, which now sits both as a single judge court, for matters of minor complexity, and as a panel of judges for more serious cases.

Similarly, the public prosecutor's office attached to the *Pretura* has been abolished and its functions have been assigned to the public prosecutor's office attached to the *Tribunale*. In the same regard, honorary judges attached to the abolished *Preture* have changed their names from "honorary deputy *Pretore*" to "honorary court judge ".

e. The judiciary

In Italy the judiciary is made up of both judges and public prosecutors. As a right safeguarded by the law, criminal proceedings are instituted by a member of the ordinary judiciary exercising the office of public prosecutor[16]. Civil proceedings may be started by any public or private entity - known as the plaintiff - against another - known as the defendant - to whom the claim is directed. Civil and criminal proceedings are regulated by two separate series of procedural rules: the code of civil procedure and the code of criminal procedure.

- Civil procedure[17] has been partly changed by the law no. 353/1990, entered into force on the 30th of April 1995, for the purposes of expediting the settlement of civil cases and making them more effective. From time to time, some amendments have been introduced in order to guarantee speedy

[10] Article 4 of Royal Decree no. 12 of 30th January 1941.
[11] Law no. 374 of 21st November 1991; Presidential Decree no. 404 of 28th August 1992.
[12] Law no. 287 of 10th April 1951.
[13] Article 70 of Law no. 354 of July the 26th 1975.
[14] Article 1 of Royal Decree no. 12 of 30th January 1941.
[15] Law Decree no. 51 of 19th February 1998.
[16] Article 107, last paragraph, Constitution.
[17] Law no. 353/1990, entered into force on the 30th of April 1995.

trials, short written reasons of the decisions and ADR procedures. Civil procedure is conceived as an adversarial system and some subject matters receive specific regulations that upload the trial work also for cases of minor importance.

- Criminal procedure was completely amended in 1988 by switching from an inquisitorial-type system to a basically adversarial system, based, amongst other principles, on a) the equality of the prosecution and the defence and b) the creation of evidence before the judge during the trial[18]. In order to mitigate the adversarial nature of the procedure in the name of protecting society from organised crime, the recent amendment[19] of article 111 of the Constitution, implemented by constitutional law no. 2 of 23rd November 2000, has expressly guaranteed the basic adversarial principle of the creation of evidence during the trial in the presence of both parties and even protected the defendant's absolute right to evidence. The reformed article 111 of the Italian Constitution concerns every and each trial, both civil, criminal, administrative and accounting, in the part in which the rule of a fair trial is expressly safeguarded. Under said rule, each and every trial must be carried out in the presence of both parties, in conditions of equality, before an impartial judge with a third-party status and it must have a reasonable duration. The right to a reasonable duration of the trial[20] has recently been expressly recognised by Law no. 89 of 24th March 2001, which grants the parties the right to claim against the State in order to obtain a fair pecuniary compensation, in the event that the said right is breached.

For what concerns *in absentia* criminal trials, the validity of it is reached when the prosecutor demonstrates various attempts of service of notice; the defence is always guaranteed by the judicial appointment of a defence lawyer and the absence of the defendant doesn't necessarily lead to conviction because it is not considered in terms of proof against him /her.

With reference to first instance trials the duration shall not be longer than three years, while at the upper level should not be longer than two years for the appellate level and one year in the Supreme Court, under penalty of direct State responsibility. In recent times, virtuous case management by executive judges of the Courts reached the goal to reduce the length of proceedings in the majority of the courts of merits, but citizens still consider trial procedures as a waste in terms of time and money. The bottlenecks are mainly in the latter level, as there are not sufficient limits and filters at that stage.

f. Special jurisdictions

[18] Law no. 81 of 16th February 1987, enabling the issue of the new code of criminal procedure.
[19] Constitutional law no. 2 of 23rd November 2000.
[20] Law no. 89 of 24th March 2001.

The Constitution prohibits the establishment of "extraordinary or special" judges[21]. However, divisions specialising in specific sectors may be set up within the ordinary jurisdiction bodies, characterised by the concurrent presence in the same judicial body of ordinary judges and qualified citizens who are not members of the judiciary (e.g. the specialised agrarian divisions). Special judges are, in any event, prescribed by the law, such as administrative judges, the State Auditors' Court and Military judges, who were established before the Constitution came into force[22]. Generally speaking, the competence of ordinary and administrative courts is established by referring to the individual claim brought before the court; in the case of the so called "legitimate interest", the decision will be taken by courts of the administrative jurisdiction in order to void the administrative act.

SECTION I

ASSESSING EFFICIENCY TO UPHOLD INDEPENDENCE OF JUDGES

a. The role of the *Consiglio Superiore della Magistratura* (C.S.M.) - The High Council of the Judiciary

In Italy, the judiciary, composed of 10.151 judges and prosecutors, is part of an independent body. Indeed, the Ministry of Justice handles only the judicial system's administrative details and assigns court personnel and human resources to various roles within the system. On the other side, only the C.S.M. (High Council of the Judiciary) is responsible for appointing judges throughout the judicial system. Led by the President of the Republic (an independent organ) and mostly composed of judges who are elected to the Council by their peers or by the Parliament, the High Council of the Judiciary is the only organ that may transfer judges, assign them to different positions and set the rules that concern their organization and functions. Therefore, all matters related to magistrates must be evaluated by the C.S.M., which protects the independence of the magistrates and their status. According to the Italian Constitution, the judicial system is not controlled or even much regulated by the Parliament or the executive branch. Most judges are appointed through the judicial system and they are subject only to the law: they do not have a supervisor or a manager that may influence their choices and they cannot easily lose their jobs, even in the case of wrongful conducts. As far as the C.S.M.'s position is concerned, the Constitutional Court has established that, although the C.S.M. is an organ that performs basically administrative functions, it is not part of the public

[21] Article 102 Constitution.
[22] Article 103 Constitution.

administration, as it is extraneous to the organizational system directly under the control of the State or Regional governments.

With reference to the functions assigned to it by the Constitution, the C.S.M. has been defined as *a body of clear constitutional importance*. Its functions, which may be also defined as the *administration of the activities of the judiciary*, hinge primarily on the administration of the members of the judiciary; the C.S.M. deals with the employment, assignment, transfer, promotion and disciplinary measures concerning judges and prosecutors, including also the organization of the judicial offices aiming at ensuring and guaranteeing that each and every member of the judiciary is subject "only to the law" when exercising his office. In this latter respect, it should be stressed that at the proposal of the Presidents of the Appellate Courts, and after consulting the Judicial Councils, every two years the C.S.M. approves the personnel charts of the judicial offices of each district and, at the same time, approves objective and predetermined criteria for assigning the case files to individual judges.

The C.S.M. is, thus, the highest ranking body in charge of the administration of judicial activities. Judicial district Councils and heads of individual judicial and prosecuting offices also co-operate with different consultative tasks.

The C.S.M. has a quasi-statutory role. The law setting up the C.S.M. entrusts it the power to issue quasi-statutory measures which may be divided into three categories: a) internal regulations and administrative/accounting regulations, both of which are envisaged by the law. These are measures of secondary legislation, that can be issued by political/administrative bodies recognised by the constitution and which aim at regulating the C.S.M.'s organization and operation; b) regulations covering the training of trainee judges and prosecutors, which is also expressly envisaged by the law constituting the C.S.M.; it regulates the training of the judges/prosecutors once they have passed the entrance exam; c) circular letters, resolutions and directives. Circular letters are used to self-discipline the exercise of the administrative discretionary power assigned to the C.S.M. by the Constitution and by ordinary laws. The resolutions and directives are used to propose and implement the application of judicial system laws pursuant to a systematic interpretation of the sources.

b. Access to the ordinary judiciary

In order to uphold independence of judges it shouldn't been undermined the recruiting system[23] of candidates who shall be both competent in legal knowledge and faithful to the rule of law away from any governmental influence. National competitive public examination proved to be essential

[23] Article 106, paragraph 1,of the Constitution.

for this aim. Pursuant to article 106, paragraph 1, of the Constitution, access to the ordinary judiciary profession takes place through a public competitive examination.

Nevertheless, rules on the access to the profession of judge and prosecutor have been changed over the last few years, on one hand, to simplify and expedite the examination procedure and, on the other, to promote the development of a cultural basis common to all the members of the legal world: judges and prosecutors, notaries and lawyers. Thus, the legislator has constituted post-graduate schools within the universities for law graduate students that want to enter the legal professions[24]. Namely, graduated students are asked to either attend the *Scuola di Specializzazione per le Professioni Legali* or a 18 months traineeship at Courts of First Instance, Courts of Appeal, Surveillance Courts, State Procurator's Office, Regional Administrative Courts and Council of State. Indeed, since 2013 the possibility to serve as law clerk has been introduced[25] on a national basis by Law Decree no. 69/2013, converted into law no. 98/2013.

This latter training is alternative to the above school attendance and it is proving to work well in order to build good and responsible jurists, even as lawyers. The internal trainee is mainly responsible for drafting legal opinions according to the judge's directions, and the clerkship encompasses a variety of tasks, such as making legal research, drafting opinions, keeping research and trial memoranda, performing legal analysis and briefing the judge on various legal issues important to the ruling in a specific case. The work can be very demanding while assisting the judge under strict deadlines and a heavy workload.

In order to rationalize and speed up the relevant procedure of recruitment of good candidates to the judiciary and with a view to implement the assessment of the candidates in a reasonable time and with the required accuracy, the public examination for entry to the judiciary has been completely amended by the aforesaid Legislative Decree no. 398/97 and the amendment of Article 123 of the judicial system.

By law no. 48/2001, in addition to the competitive public examination for trainee judges/prosecutors, which is the main way to become part of the judiciary, and expected to fill 90% of vacant posts, another competitive public examination for First Instance Honorary Judges and Prosecutors has been introduced[26], it is reserved to lawyers under 45 years old who have been practising for five years or who have exercised honorary judicial functions for at least five years, as long as they have not been revoked from the said office.

Both the competitive public examination for trainee judges/prosecutors and that for Judges of Peace consist of three written exams on civil, criminal and administrative law, for what regards trainee

[24] Legislative Decree no. 398/97.
[25] Law Decree no. 69/2013, converted into law no. 98/2013.
[26] Law no. 48/2001.

judges/prosecutors and on civil law and civil procedure law, criminal law and criminal procedure law and administrative law as to Judges of Peace. For both of them and an oral exam on the main legal subject.

The competitive examinations for trainee judges/prosecutors and first instance judges/prosecutors is published by the Minister of Justice, according to the decision taken by the C.S.M., which sets the number of sits available. After the exam, if the number of eligible candidates exceeds the number of places available, the C.S.M. will ask the Ministry for the assignment of other positions that are already available or that will become available within six months from the approval of the list of eligible candidates. This would appear to provide for an appropriate planning and quantification of examinations, thereby averting the current inconvenient of not being able to meet - with the new trainee judges/prosecutors – the recent, and indeed foreseeable, personnel shortages resulting from delays in the examination procedures and retirements.

The examining committee, appointed by the C.S.M., is chaired by a judge/prosecutor with the rank and function of Supreme Court judge/prosecutor, who has been positively evaluated for further assessment for appointment to higher executive functions. It consists of one judge/prosecutor holding a rank no lower than that of a judge/prosecutor positively evaluated for assessment for appointment to the rank of Supreme Court judge/prosecutor, who acts as vice chairman, twenty-two judges/prosecutors with the rank no lower than that of an appeal court judge/prosecutor and eight university law professors.

The classification drawn up by the commission, which is based on the total sum of the votes given to each candidate in each individual test, is approved by the C.S.M.. The successful candidates of the competitive public examination for trainee judges and prosecutors are appointed as trainee judges and prosecutors, they are posted to a first instance judicial office assigned to a Court of Appeal for the prescribed training by the Superior School of the Judiciary, an independent and internal body of the judiciary which since 2010 is in charge of the continuous legal training of all members of the judiciary.

c. The training of judges and prosecutors and the role of the *Scuola Superiore della Magistratura*- Superior School of the Judiciary

Since 2010, the training of new appointed magistrates and all magistrates of the judiciary is governed through another autonomous organ of the judiciary, based in Florence: the *Scuola Superiore della Magistratura* (Superior School of the Judiciary, founded in 2010 as recommended by the European Council). The training period and schedule is directly organized, coordinated and entirely controlled by the *Scuola Superiore della Magistratura* , in cooperation with the C.S.M.,

with the support of peripheral joint bodies (district commissions of the *Scuola Superiore della Magistratura*) and available trained judges and prosecutors (collaborators and assignees).

The training of a new magistrate lasts eighteen months and it consists of attending a judicial office and co-operating in the judicial activity performed by other judges and prosecutors in the civil and criminal sector, either as single or associate judges or alternatively as public prosecutors. Intensive training courses are provided by the School during the same period of time. The C.S.M.'s new guidelines suggest to increase the practical experience and internship in judicial activity instead of following a theoretical approach.

The training aims at assuring the habit of undertaking continuous professional training in order to reach and to maintain adequacy while exercising judicial functions in almost all fields. On the specific issue of training new judicial forces, the *Scuola Superiore della Magistratura* organises study meetings reserved to both trainees and expert judges and prosecutors in order to favour personal commitment to the rule of law. A training in the prisons and in the police bodies or other public entities is also organised in order to ensure a good insight of the entire legal system.

Moreover, the attendance to several training courses organised, on both a local and central level, by the Superior School of the Judiciary, is required in order to progress in the magistrate's career.

The Superior School of the Judiciary, thus, works as precious and independent think tank of the judiciary.

d. Direct appointment

As an exception to the recruitment based on a competitive public examination, the Constitution envisages that regular university law professors and lawyers of at least fifteen years standing and registered in the special rolls, entitled to practise in the higher-jurisdiction courts, may be appointed as Counsellors of the Supreme Court "on exceptional merit" (article 106 Constitution). This measure has recently been enforced[27] by Law no. 303 of 5th August 1998, no. 303, and in this regard the C.S.M. issued circular letter n. P.-99-03499 of 18th February 1999.

e. Progression in career and assessments of magistrates

Career advancement in the judiciary is strictly structured in order to preserve both the independence of its members and efficiency of the judiciary. It is regulated by law and any change of regulation has to be evaluated by the High Council of the Judiciary. The latter governs the details of its application and enforcement.

[27] Law no. 303 of 5th August 1998, no. 303; circular letter n. P.-99-03499 of 18th February 1999.

After the training stage, trained judges and prosecutors may be allocated to first instance judicial offices. The C.S.M. draws up a list of vacant positions and convenes the trained judges and prosecutors, according to the examination's ranking. Therefore, vacant positions are assigned according to any preferential qualifications that those trained judges and prosecutors may have indicated.

As far as their career advancement is concerned, it should be stressed the fact that the procedure has deeply changed. In 1941, the law envisaged that access to "higher" functions (Courts of Appeal and Supreme Court) could only be achieved through a regular assessment. Such procedure has been substantially revised when the Constitution came into force, and in particular by article 107, paragraph 3, according to which "*distinctions between judges and between prosecutors are based purely on the diversity of their functions*"[28]. Throughout various legislative amendments of the relevant law[29], career advancement through competitive examinations and regular assessments was in fact abolished and an automatic advancement based on seniority and periodic assessment was introduced, except in cases of demerit.

Nowadays, the system is organised as follows: the seniority required to be appointed as a court judge/prosecutor is two years from the appointment as trainee judge/prosecutor vested with functions[30]; after eleven years with assigned functions, court judges/prosecutors may be appointed as Appeal Court judge/prosecutor[31]; the seniority required for being appointed as Supreme Court judge/prosecutor is seven years from the date of appointment as Appeal Court judge/prosecutor. After a further eight years, a judge/prosecutor holding the rank of Supreme Court judge/prosecutor may be appointed for designation to senior executive functions[32].

Once the necessary seniority has been reached, the advancement in career is decided by the C.S.M., after having consulted the competent judicial local councils. If the C.S.M. gives a negative opinion on the career advancement of a member of the judiciary, then the said judge/prosecutor will be appraised again after some time.

The system currently in force is based on the independence between rank and functions. Indeed, the fact of being classified with a higher rank does not imply an effective assignment to an office corresponding to the obtained higher rank. For example, in order to be effectively assigned to an appeal function (such as Appeal Court counsellor) a judge/prosecutor must have effectively been awarded an Appeal Court rank. Nonetheless, a judge/prosecutor with an Appeal Court rank or a

[28] Article 107, paragraph 3 Constitution.
[29] Law no. 570 of 25th July 1966 on appointments to Appeal Court rank; Law no. 831 of 20th December 1973, on appointments to Supreme Court rank.
[30] Law no. 97 of 2nd April 1979.
[31] Law no. 570 of 25th July 1966.
[32] Law no. 831 of 20th December 1973.

judge/prosecutor who has been granted a positive evaluation for the appointment as a Supreme Court judge/prosecutor may, on the other hand, continue to work in his position - even though such position belongs to a lower rank - for an unlimited time. Therefore, the possibility of the so-called reversibility of functions allows judges/prosecutors with Court of Appeal or Supreme Court functions to be respectively assigned, at their request, to a first instance office with functions of merits or to any other office with functions of merits, even though it does not correspond to the rank of Court judge/prosecutor[33]. As in the Italian judiciary is common to find senior magistrates at first levels according to their personal choice, this fact upholds efficiency and good quality of judgements and court management even at the very first levels of the judiciary .

In contemplation of changing from the function of judge to that of prosecutor, and vice-versa, all that is required is an aptitude appraisal. Nevertheless, in order to guarantee the independence of the judge or prosecutor, the law provides that the new assignment shall be asked for a different district. Periodical assessment for career advancement is based on the overall performance of the single judge compared with data records kept by the judiciary. The immediate consequence of a career advancement is a corresponding salary increase.

A magistrate is still personally liable for misapplication of law and negligent ignorance of law; a disciplinary procedure stops immediately any career advancement that otherwise is fairly automatic, unless notes of demerit occur. On the other side, disciplinary proceedings are carried out by the High Council of the Judiciary, under the due process of law principle.

In fact, the disciplinary procedure is governed by law[34] and led before a special section of the High Council of the Judiciary under the due process rule both with right to defence and legal assistance. The law predetermines and qualifies the types of illicit behaviours as well as the different sanctions that could be applied and that can progress up to the final removal of the judge.

Disciplinary proceedings, however, are firmly promoted by the Chief Prosecutor of the Supreme Court whenever he/she receives a specific notice of misconduct. A discretionary power to promote the procedure resides also on the side of the Ministry of Justice on the base of a specific notice of misconduct, although the proceeding and investigation shall be conducted still by the Chief Prosecutor of the Supreme Court. The investigation phase is secret and may lead to either to file the case or to an indictment.

Legal rules govern also the time of the proceedings. Illicit behaviours considered for disciplinary measures may not be sued after five years and the High Council of the Judiciary will take the final decision. This latter one may be appealed before the joint section of the Supreme Court.

[33] Article 21, (vi) of Legislative Decree no. 306 of 8th June 1992 converted into Law no. 356 of 7th August 1992.
[34] Law Decree no. 109/2006.

A disciplinary enquiry cannot last more than one year: within these time limits the Chief Prosecutor may either archive the case or request the indictment before the High Council of the Judiciary. After the specific indictment the procedure starts with all the guarantees of the adversarial proceeding and defence.

However, disciplinary proceedings are rare events inside the judiciary, mostly limited to extreme cases of serious misconduct. Indeed, the system provides for a set of personal rewards that spur the magistrate to comply with a model of virtuous behaviour in order to be promoted to a career advancement. Merit, which in the past times implied the application of excessive discretionary powers, has been replaced with a deep analysis of all the activity and personality of the magistrate in terms of lack of notes of demerit.

In these terms, the system provides tight rules aimed at delivering a periodical objective judgement that will cover main aspects of what is commonly considered virtuous behaviour by a magistrate (prosecutor or judge).

This judgement is strictly governed by rules laid out by the High Council of the Judiciary. Every four years the *Consiglio Superiore della Magistratura* assesses each magistrate independently from the demand of progression in career, in order to control the level of professionalism in terms of *capacity, industriousness, diligence, commitment*, as well as *independence, impartiality and mental balance*. Such assessment may interfere with the natural progression of the career, although a magistrate with a negative report would not necessarily face a disciplinary or a criminal proceeding. In the entire lifetime career seven different assessments are deemed as necessary in order to progress with advancement of the corresponding salary increase. While once this advancement was perceived as almost automatic, nowadays management rules to which magistrates must comply with guarantee a good scrutiny on the real efficiency and mental balance of the magistrate.

f. Professional evaluation

Professional attitude is evaluated on professionalism (with all the above mentioned subcategories in terms of capacity, industriousness, diligence, commitment), impartiality, independence and mental balance. This assessment requires strong internal guarantees as the stability of the position is at stake.

The organs called to fulfil this task with specific and detailed reports are exclusively composed by magistrates specifically appointed for such evaluation: the President of the chamber where the magistrate sits, the District Judicial Council who works as consultative organ of the High Council of the Judiciary and the High Council of the Judiciary that takes the final decision.

The evaluation is based on comparative statistical database, records of continuous traineeship in specific fields, written opinions of the office executives, absence of notes by the local Bar Association, analysis of decisions' reasoning and a self-report of the magistrate.

The final evaluation may be positive, non-positive or negative, without mention of other personal judgements or adjectives of any sort. A non-positive or negative judgement results in another evaluation after one year or two years. The magistrate involved in the procedure may be heard by the High Council of the Judiciary.

A non-positive evaluation occurs when there is either a deficit of at least two parameters of those used as criteria in order to analyse the magistrate's professionalism (in terms of lack of capacity, industriousness, diligence, commitment) or a serious deficit of only one of those parameters. Examples of elements that lead to a non-positive/negative evaluation are: lack in the decisions' reasoning, systemic delays, lack of organization, lack of good performance, lack of independence, lack of self-control, lack of periodical training and adjournment on digital process which became mandatory.

A negative assessment occurs when even more parameters of professionalism are not met, or there is a serious lack of independence, impartiality or mental balance.

The same periodical evaluation is made for executives judges in terms of good management compared to courts plans.

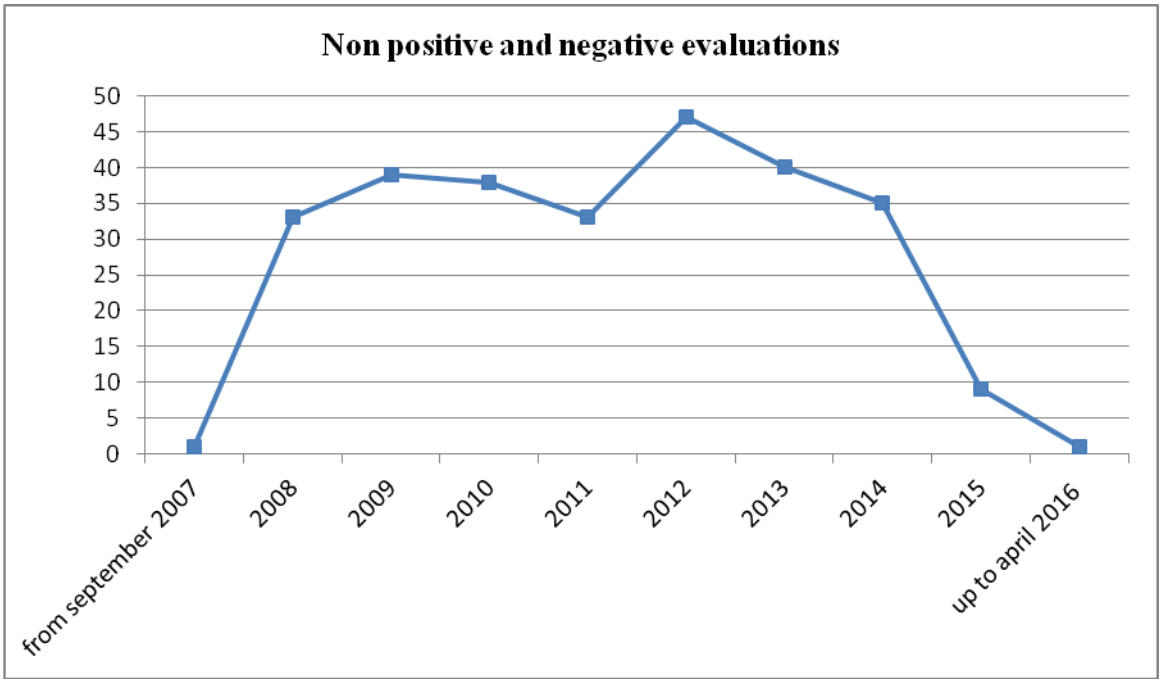
Executive magistrates may not exercise their function in the same place for more than eight years, even in the light of a positive evaluation, in order to guarantee a continuous flow of new managers with a new vision of justice and to avoid strengthening of personal power. A similar rule is applied to all magistrates: they should not exercise their functions for more than ten years in the same chamber. These rules favour circulation of legal knowledge, transparency and continuous adjournment of plants.

Therefore it may be assumed that the system provides for a strict system of assessment of the competence and efficiency of magistrates in order to guarantee both their own stability and advancement in career in absence of any kind of personal factors. The assumption is that the general efficiency of the judiciary may be better achieved with well regulated promotions instead of the threat of a disciplinary procedure and sanction. By contrast, periodical compulsory internal mobility rules are set in order to avoid excessive concentration of personal power.

g. Statistics and flowcharts

High Court of the Judiciary assessment results (*September 2007 - April 2016)*

Year of deliberation	Non positive or negative evaluations	Positive evaluations	Total	% of negative and non-positive evaluations
From September 2007	1	260	261	0,4%
2008	33	1.859	1.892	1,7%
2009	39	1.339	1.378	2,8%
2010	38	1.636	1.674	2,3%
2011	33	2.026	2.059	1,6%
2012	47	1.605	1.652	2,8%
2013	40	2.157	2.197	1,8%
2014	35	1.307	1.342	2,6%
2015	9	2.039	2.048	0,4%
Up to April 2016	1	338		0,3%
Total	**276**	**14.566**	**14.842**	**1,9%**
Non positive	***176 / 276***			
Negative	***100 / 276***			



The total number of magistrates with a negative or non-positive assessment is 180 (and not 276), considering that the same magistrate may have been evaluated twice or more. The last records show

that the system of internal assessment introduced in 2007 worked quite well in order to avoid de-professionalization and nihilism during the lifetime of the career.

h. Conclusions

Based on the above considerations, one might conclude that the true difference between civil law and common law systems consists mainly in a different cultural approach to independence and impartiality of the judiciary. In civil law systems, like the Italian one, the need for detailed, precise regulations stems from a cultural stance based on mistrust of one's fellow citizens and, more specifically, members of the public organs of the society. The imposition of rules and pre-defined procedures in order to preserve impartiality and independence of the judiciary is aimed at bridging this usual social gap. In common law systems, by contrast, there is no such need and the final objective is rather to appoint judges that are really worthy of the trust placed in them.

For what concerns present times, in Europe both those two legal systems share the same rule of law, by which the judiciary must be independent and autonomous from the executive body branch of the state, being the fundamental rule of Member States of the European Union. Moreover, in Italy the assessment of efficiency and professionalism of each magistrate is entirely self-governed by the judiciary through objective and strict rules, without any external interference. Such mechanism showed to work quite well, although the judiciary may be perceived as a self-protecting order, as it happened sometimes.

The Ministry of Justice, instead, has an organizational function and it mainly deals with the administration of internal human resources and judicial structures and premises. Its proactive function is aimed at issuing general and periodical records on the judicial activity as a whole, assessing the general performance in terms of efficiency of the judiciary work, proposing new governing rules on the internal administrative and judicial activity and drafting rational organic plants. Indeed, in order to guarantee a high degree of separation of powers, the government may not proceed either to assess personal efficiency of each magistrate or interfere with their career advancement.

Therefore it may be stated that inefficiency of the judiciary, if any, in such a system would be mainly due to insufficient structural reforms of the legal system, in terms of rational procedures that guarantee fast track trials and good administration of internal resources. In this respect, it should be stressed that during the past years the government didn't consider the lack of human forces in the judiciary: for more than twenty years the State hasn't hired new qualified human resources to support the judicial activity. This fact has stressed both the judiciary and the internal workers and clerks that feel themselves as undermined and overwhelmed by the work backload created by

administrative inefficiency. Digital procedure introduced in civil trials worked out well in order to save paper and money, to create a transparent and rational database and to speed up the proceedings, but still very few human resources are involved in supporting this new burdensome technological work that is put on magistrates' shoulders.

Besides that, statistics show that self-governed periodical assessment of professionalism and efficiency of magistrates, led by High Council of the Judiciary, plays an important role against individual negligence and upheld independence of judges.

Therefore, it may be asserted that the general lack of confidence in the Italian judiciary still lays in the structural inefficiency of the internal administrative machine that doesn't work proportionally to the high inflow of case-files. On the other hand, it would be erroneous to affirm a general mistrust in the efficiency and impartiality of judges and prosecutors, who normally demonstrate to comply with both deontological rules and high degree of independence.

It may be drawn the conclusion that the Italian legal system preserves and boosts professionalism and independence of members of the judiciary, but not its general efficiency, because of the general administrative inadequacy that characterizes the entire system.

SECTION II

THE SYSTEM OF ALLOCATION OF CASES

a. The case files distribution

The first experiences of case management in Italy, that aimed to a substantially decrease of the backlog and the time within which civil disputes are resolved proved to be essential steps, even though not sufficient. This important task has been addressed to executive managers of the Courts. Trust in judicial management with appointment of new executive judges in strategic places will be the first next task that the C.S.M. has to fulfill in the next years, since a law decree of 2014 lowered the retirement age for judges from 75 to 70 years old. Nonetheless, only 400 out of the 1.000 new vacancies have been covered by the C.S.M. so far.

Case management, in any event, is ruled by the High Council of the Judiciary in order to safeguard its independence and rational distribution of workload among judges.

In this respect, it would be considered only the allocation of work inside the courts, since the prosecutor's office is governed by rules that reflect some hierarchical relationship between the chief prosecutors and their deputies, who are still provided with a certain amount of autonomous powers in conducting investigations. As to this regards, it is fundamental to underline that by no means it may be asserted that there is a hierarchy among judges, even though the decision will be taken in a

panel form, like at some first instance levels and at the superior levels. Indeed, the President of the panel, being the senior judge, has only a personal persuasive role given by his/her major experience, and the system totally accepts that his/her opinion may not prevail over the majority one's. Distribution of work within a section is governed by the President of the section according not to a personal choice, but rather to objective guidelines that guarantee independence of single judges from their chief executives. Chief executives may intervene in order to redistribute the work when some inefficiency or lack of human forces occur.

In fact, courts work through different specialised sections as predetermined by the presidents of the Courts according to organic plans approved by the C.S.M.. With respect to the allocation of case files to different sections, as said above, at the proposal of the Presidents of the Appellate Courts, after consultation of the Judicial Councils, every two years the C.S.M. approves the personnel charts of the judicial offices of each district and, at the same time, approves objective and predetermined criteria for allocation of the case files to the different sections and to individual judges. The High Council of Judiciary gives general guidelines that every court shall follow in case files distribution and judicial force management.

Internal stability is also a rule that governs rational distribution and management of case files.

Judges can be part of the civil or penal sections through an internal competition governed by the chiefs of the Courts who should take into account the seniority in service and the special competence and attitudes of each candidate. Each new assigned judge may not ask to be transferred to another court unless after four years of service in order to guarantee stability inside the Courts. Internal stability rules, however, have to be counterbalanced by rules that guarantee some internal periodical assessment of internal efficiency and rational and fair distribution of workload among judges.

Judges may not even remain in the same section either for less than two years or more than ten years, in order to guarantee internal stability in terms of independence and continuous professional adjournment of the judiciary. Only labour law sections don't strictly share this latter rule, even though this difference is starting to be questioned. In fact, commercial sections are considered specialised sections, nonetheless they are subjected to the same rules that aim to stability and independence that apply to the other ordinary civil sections.

As to the rules normally applied in the case files distribution, it is necessary to consider that some of them are mandatory:

i. there should be a reasonable distribution of human resources in civil and penal courts;
ii. plans and reports should underline the goals for the future and causes of specific past failures;

iii. it should be prepared a program for the management of backload that is present in some sections;

iv. each president of a section should receive no less than 50% of the average caseload allocated to each judge;

v. a judge may choose another court not before four years of full assignment in a post;

vi. every section has to be organised in terms of rational distribution of work and efficiency with objective criteria for the composition of panels and dates of hearings. In other words, the President of the Court predetermines the number of annual hearings and dates for each section with predetermined and specialised competences; moreover, the allocation of case files to judges is programmed by the President of the section and it is normally automatic according to the files number of the enrolment, even though the President of the section may derogate to this rule with a reasoned decision;

vii. every two months the President of the section has to call a section meeting in order to discuss about the major legal issues that the section is facing and internal organizational aspects.

A new circular letter of 4th of May 2016 from the C.S.M. stressed the importance of this internal organizational system based on accepted and shared objective parameters as well as on some discretionary power and trust given to the Courts' chief executive judges in order to guarantee a rational and impartial distribution of judicial work[35]. Indeed, it is this essential possibility recognized to each Court to manage its own case assignment with a certain amount of discretionary power that allows the entire system to be also flexible for what concerns the internal organization.

Nowadays, particular attention is given to the status of digital procedure and to the management program that every President of each section has to draft in order to deal with the backload and the normal flow of case files, as well as in order to define the final goals. The President of the Court of Appeal is personally responsible for the compliance with the general plan (D.O.G.) as approved by the C.S.M.; however, such power is counterbalanced by the assignment to presidents of appellate courts of emergency powers before the C.S.M. approval of new plans.

[35] Circular letter of 4th of May 2016 from the C.S.M.

b. An example: the distribution of workload at the first civil section of the Court of Appeal of Milan

Pending case-files until September 2016

Judge	**1st section**	**Enterprise section**
President	39	5
A	89	9
B	98	11
C	98	16
D	87	16
E	53	5
F	90	12
G	113	22
H	114	21
I	99	18
L	130	22
M	90	13
N	65	14
O	31	0
P	1	0
TOTAL	1197	184

Decisions taken between January 2016 - September 2016

Judge	Number of judgements (1st section)	Number of judgements (enterprise section)	Other decisions	Total
President	36	10	22	68
A	44	4	18	66
B	45	12	40	97
C	3	0	6	9
D	46	7	20	73
E	0	0	0	0
F	62	1	27	90
G	67	2	29	97
H	30	1	31	62
I	60	12	50	122
L	71	0	26	97
M	49	0	23	72
N	5	37	97	139

c. Conclusions

Organizational aspects are dealt with particular attention and accuracy as they are the base upon which independence and efficiency standards can be safeguarded within the judiciary. However the above mentioned measures proved to be still insufficient in order to give a positive response to the enormous backload that each section suffers. Even if, so far, single sections proved to manage the normal flow of cases with an average + 10% performance, it will be difficult to deal with the backload accumulated in years if other task forces and measures will not be implemented by the government.

SECTION III

ENSURING QUALITY AND INDEPENDENCE OF JUDGEMENTS WHILE COPING WITH CASELOAD

a. The high level of quality and the instability of the decisions

Considering the possibility to correct human mistakes and to claim for judicial decisions before independent and professional judges, the quality of the Italian judicial system is definitely high. Professional judges are lifetime appointed and continuously trained in order to write full and clear reasons and to favour full knowledge of judgements. Mainly all scholars agree with the opinion that the average knowledge and competence of Italian judges is good and it complies with high standards. In this respect major perplexity lies on the side of honorary judges; indeed, the C.S.M is paying more attention to the assessment of this new workforce.

However, the system admits a high rate of instability of decisions.

In fact, the possibility to appeal against every first instance decision at fairly low costs for lawyers up to the third level of the judiciary increases the percentage of disputes that continue after the decision taken by the first level of the judiciary. The consequence of such nearly costless access to justice is the possibility even for small law firms to handle a considerable amount of files at the same time. The result is the impossibility to cope with such a high flow of proceedings that allows delays and easy adjournments of the time schedule.

Legislator's attempts to avoid such a lawyers' misbehaviour, so far, proved to be vain because of the big backload that almost every civil judge has to deal with. This is the reason why deferrals of civil trials are welcomed by judges who have to handle many cases at every hearing date. The amount of backload to be done and the strict performance rules given by the judiciary in the late times spurred judges to work in a fast but less accurate way than once, causing an increase in the number of appeals.

Moreover, the number of practicing lawyers in Italy is very high, since there are about 246.786 lawyers out of about 60 million of citizens. In addition, any lawyer of certain seniority can plea before the Supreme Court (in Italy more than 50.000 lawyers can plea before the Supreme Court , compared to 50 in France and 40 in Germany), while in other countries, only lawyers with certain specific qualifications are allowed to plead before the Highest Court. Easy to understand why this is considered one of the factors that caused the increase of the number of incoming cases, especially before the Supreme Court[36].

[36] President Lupo, Inaugural Address of 2012.

Instability of decisions means that civil decisions may undertake a long process in order to become definitive, but not that they are not generally confirmed.

Under this profile, statistics show that in 2015, for what concerns civil cases, the 50,8% (8.721) over the 17.166 appeals before the Supreme Court have been rejected, with the consequence that those decisions taken by the Courts of Appeal have been confirmed. Over the 17.166 appeals before the Supreme Court, the 30,2% (5.187) has been granted; in those cases the decision taken by the second instance judge has been annulled. The remaining percentage has been the result of settlements or declarations of inadmissibility of the claims before the Supreme Court.

	DECISIONS TAKEN BY THE SUPREME COURT IN CIVIL CASES 01.01.2015 – 31.12.2015				
SECTION	*GRANTING*	*REJECTION*	*INADMISSIBILITY*	*OTHER*	*TOTAL*
JOINED CHAMBERS	137	176	98	91	502
FIRST	630	1.055	516	235	2.436
SECOND	613	1.168	196	166	2.143
THIRD	617	1.505	360	144	2.626
LABOUR	1.250	3.349	433	254	5.286
TAXATION	1.940	1.468	546	219	4.173
TOTAL	**5.187**	**8.721**	**2.149**	**1.109**	**17.166**
VALAW %	**30,2%**	**50,8%**	**12,5%**	**5,5%**	**100%**

Focusing on the Court of Appeal of Milan, it should be stressed that during the year 2014 the 19,3% of first degree decisions were appealed before the Court of Appeal of Milan compared to the 20% of appeals registered on a national level. In the 52% of the cases, the Court of Appeal of Milan confirmed the first instance decision whereas a partial confirmation is taken in the 26% of cases. Only the 13% of appeals has led the Court to reverse the first instance, while the remaining cases have been closed by different decisions. In other words, since the 80% of decisions have been confirmed or partially confirmed by the Court of Appeal of Milan, it may be stated a low reversal rate of first instance decisions in comparison with the national percentage that amounts to about 68%. The 27% of the decisions have been appealed before the Supreme Court and the 80% of those have been confirmed. As on the second instance level, the reversal rate amounts to 20% compared to 32,2% registered on a national level. Based on such data, the stability rank of Milan district is of

substantial consideration: 98,2% of total district civil decisions remains stable or confirmed by the Supreme Court.

Recent data have not been published, even though the trend doesn't seem to have changed.

For what concerns the criminal proceeding, it is normally slow because of all the guarantees given to the parties in a trial governed by the adversary rule at fairly low costs. The amount of criminal proceedings at the appellate levels is huge (although there are alternative procedures like plea bargaining) because appeals may appear a good opportunity for the defendant in order to gain a revision of the decision or penalties or even to meet statute time limitations to criminal proceedings. Let's focus on this latter one in order to give a rough idea of the Italian legal system in terms of quality and stability of judgements as compared with their possible length. Even though quality of judgements is necessarily linked to independence of the judiciary, such quality doesn't necessarily guarantee the efficiency of the system.

b. An example: the Amanda Knox and Raffaele Sollecito criminal prosecution

In the light of a famous guilty first instance jury verdict in the case of Amanda Knox and Raffaele Sollecito, concerning the murder of a British girl by her mates during the night of Halloween in 2007, the Italian criminal justice system was under the magnifying glass. Foreign scrutiny of the case has so far been unflattering to the Italian legal system (and Italy in general), not helped by the seemingly endless twists and turns of a case that has been running for more than eight years. However, in this case there wasn't the possibility for the defendant to reach favorable statute time barriers, as statute limitation does not apply to the crime of murder. In particular, commentators have focused on the central role of the case's prosecutor – something poorly understood outside Italy's distinctive legal culture.

As said above, the Italian Constitution and Acts of Parliament set out a system whereby criminal prosecutors are fully independent; in particular, they have "external independence" from all the other constitutional powers. This means that they are not subject to external pressure of any kind when they exercise their functions. Their independence is protected because prosecutors are part of the judiciary, which in Italy is fully separated from the other constitutional powers. In addition, the Italian Constitution provides for the legality principle, which means that every case must be prosecuted and there is no judicial discretion. As stated by the Constitutional Court, this principle is intended to guarantee equality before the law within the criminal process.

External independence does not just apply to the moment when the prosecutor decides upon penal action: the prosecutor is fully independent even during the investigation phase, during which he or she directs the police. This is a very important legal power: while it does not mean that prosecutors

control the police during the investigation, prosecutors rely on the police which constantly interact with them. If the case is particularly problematic, prosecutors are effectively in charge of the investigation; indeed, investigations in important cases are not routinely conducted by the police. Even if the direction of the investigation is bureaucratic and reactive, prosecutors are still in a position to take very important decisions. Although this is a very short summary, it should help to clarify the reasons why during the investigation the prosecutor becomes a key figure and why prosecutors deeply influence political decisions with respect to responses to crime in Italy.

In the case we are now considering, the two codefendants have been prosecuted because of the suspicion of their involvement in the murder, considering that i) they were flat mates of the victim, whose body has been found in the apartment where they used to live all together; ii) they accused a third innocent person to be involved in the murder; iii) they proved to be in the criminal scene before the police intervention has started.

c. The trial and appeal

The trial of Knox and Sollecito was standard, meaning no special rules were used; whereas Rudy Guede's lawyers (the third codefendant) decided to use one of the special procedures that are aimed to speed up the criminal process, in this case a *giudizio abbreviato* or fast-track trial (this is something that individuals who are facing a trial can freely opt for in order to gain some benefits). Because of the standard trial, Knox and Sollecito went through a much more complex and lengthy judicial procedure than Guede, as they wanted to prove their innocence.

One aspect of the Knox-Sollecito case that most coverage omits to mention is that it has been analyzed by (at least) three prosecutors, a preliminary investigation judge, a preliminary hearing judge, a first instance court, two Courts of Appeal, the Italian Supreme Court and a significant number of skilled police officers. The factual context around the case is obviously very complicated, but from a legal point of view it is simply wrong to say that it was artificially pushed along by an obsessive, tyrannical prosecutor. Each member of the judiciary, involved in the case, had the time and the opportunity to fully analyze and evaluate the proof pavement.

d. The Supreme Court

The Sollecito and Knox case has, however, demonstrated a major problem with the Italian legal system: the criminal process takes long time to reach a final decision. In this case, a second appeal procedure was necessary because of the decision of the Supreme Court (*Corte di Cassazione*) that voided the first appellate decision.

In Italy there is a constitutional right to appeal on points of law before the Supreme Court, which can agree with the Court of Appeal's decision or can disagree with its interpretation of law. Indeed, it is important to underline that the Supreme Court in Italy does not review the facts of a case but only the applicable law; therefore, if the judges of the Supreme Court disagree with the interpretation and application of the law given by the second instance judges, the case must be assigned to another section of the Court of Appeal in order to be re-examined in the light of the Supreme Courts guidelines.

In this case, the Supreme Court decided that the March 2013 acquittal was "illogical" because the judges had not fully considered all the collected evidence: namely, the acquittal decision was not supported by sufficient evidence. So the second appellate judgment decided for acquittal on the grounds of all the gathered evidence, filling the factual and rational gap of the first decision. However, the prosecutor found cause for lodging another appeal before the Supreme Court.

This is a difficult case to interpret, but the criteria to make an appeal on points of law and the limits to the court's jurisdiction are clearly flexible. In essence, this means that many decisions taken by the Supreme Court substantially straddle the border between points of law and facts, in the view of correcting errors made by the lower level of the judiciary. This is what happened in this case when the Court of Appeal was told to review all the gathered evidence and to issue a verdict on the basis of a new logical and full evaluation of all the facts and circumstances around the case. The second appellate judgment still found the ground of evidence not sufficient in order to support a guilty judgment. This means that a new full evaluation of the collected evidence showed that the two codefendants could not be convicted beyond any reasonable doubt. This last decision has been appealed as well, however in 2015 the Supreme Court confirmed the second decision taken by the Court of Appeal, as it was acceptable and correct on points of law because based on a logical and well-structured reason.

From this point of view, it is not correct to assume that Knox and Sollecito have been tried twice or more for the same crime as in Italy all these decisions are, legally speaking, part of the same continuous criminal process.

e. The aim of procedural justice

The Italian criminal justice system is sometimes branded as semi-adversarial, but its legal culture and the Italian law in action in fact demonstrate an inquisitorial approach to fact-finding. Italian criminal procedure is a difficult concept to grasp for lawyers and citizens from other countries, who are used to adversarial systems. In Italy, procedural justice is part of the concept of justice: a decision is legally acceptable as long as it results from patterns of official activity that provide

protection to the defendant's rights and an opportunity to find the truth for both the prosecutor and the defendant.

This obviously does not mean that the Italian system is infallible and aspects of this case's progress have certainly raised eyebrows: Amanda Knox's statements of innocence, being a defendant, have been certainly difficult to accept as evidence, the media have exercised pressure on prosecutors as well as on the police that clearly acted in order to protect its credibility with the aim to give justice to the victim. These are certainly critical aspects that cannot be addressed without a clear understanding of how the Italian criminal justice system is set up to function, as well as how the Italian justice system allows error corrections in order to find the truth.

We must consider also that some imperfections of the Italian system comply with constitutional rules that are logical, respectful of citizens- rights and rooted in a strong legal tradition – albeit different from what non-Italian audiences are used to.

On the other side, still some international perplexity lies as regards to the Italian *in absentia* criminal proceedings, where there is not any possibility to renew the decision in presence of the defendant. As to this regard, it is important to notice that the German Federal Constitutional Court[37], in spite of ECJ's decision in the Melloni case[38], ruled that in individual cases, protection of fundamental rights may include review of sovereign acts determined by Union law. According to this decision , in individual cases, protection of fundamental rights by the Federal Constitutional Court may include review of sovereign acts determined by Union law, if this is indispensable to protect the constitutional identity guaranteed by Article 79 sec. 3 of the Basic Law (*Grundgesetz* – GG). Indeed, according to the decision taken by the Second Senate of the Federal Constitutional Court with respect to the principle of individual guilt (*Schuldprinzip*), any criminal sanction presupposes that the offence and the offender's guilt are proven in a procedure that complies with the applicable procedural rules. The principle of individual guilt is rooted in the guarantee of human dignity enshrined in Article 1 sec. 1 GG. Therefore, it also has to be guaranteed in the context of extraditions pursuant to the Framework Decision on the European arrest warrant, in the case the extradition is meant to ensure the execution of decisions that have been rendered in the absence of the requested person. Based on these standards, the Senate reversed and remanded an order of the Düsseldorf Higher Regional Court (*Oberlandesgericht*) to extradite a US citizen to Italy where he had been sentenced in absence to a custodial decision of thirty years. The complainant's submission was that, in Italy, he would not be provided with the opportunity of a new evidentiary hearing in

[37] 15.12.2015, RG. 2 BvR 2735/14.
[38] Case EUCJ C-399/11.

which he would be able to be present: therefore, this latter complain would have required further investigations by the Higher Regional Court.

SECTION IV

PROBLEMS OF ENFORCEMENT OF JUDGEMENTS

a. Numbers of the Italian inefficiency

Italy in recent past years had the highest number of violations of the "reasonable time"[39] required by Article 6 of the European Convention on Human Rights (ECHR). The Fraser Institute ranked Italy 112th in terms of legal enforcement of contracts and the World Economic Forum[40] ranks it 139th in terms of the efficiency of the legal framework. While 2012 has witnessed a reduction in the number of pending civil cases in courts because of some procedural reforms, these numbers remain high overall, with about 5.5 million pending cases in 2015, 4 million of which are civil cases.

Under an economic point of view, the Italian procedural regime certainly increases overall transaction costs and it generates general difficulty in accessing personal or business credit. Banks do not rely on the justice system in order to collect their loans, which results in a decrease in the number of investments down and in a slow national growth.

In the whole, the procedural regime has been characterized, on the one hand, by procedural rigidity, and, on the other hand, by a great number of interim and interlocutory procedures (internal flexibility). Those latters allowed for deferrals, and they opened the door to a fragmentation of the actual dispute into a large number of sub-disputes, which are often subjected to their own appeals and special procedures. For instance, the duration of disclosure in Italy is amongst the highest in European countries. As a result, the enforcement process itself, like the execution of court decisions, orders or title documents, is even more problematic, with a low recovery rate and a lengthy time for collection.

An example is given by the introduction of digital proceedings that although they guarantee very fast tracks for an order of payment and money saving (it is estimated that about 60 million of euro have been saved in 2016), they still don't guarantee payment itself, in the case of a following opposition to it or a forced execution. Oppositions may be lodged at very low judicial costs and , therefore, they result in a convenient way for debtors to avoid fulfillment of personal obligations.

The following figures show the amount of pending case-files in Italy and their average length.

[39] Article 6 of the European Convention on Human Rights.
[40] World Economic Forum 2013 Report.

TOTAL PENDING CASES **Tribunal – Court of Appeal – Supreme Court**		
Year	**Civil pending cases**	**Criminal pending cases**
2003	4.597.480	1.322.750
2004	4.748.615	1.373.698
2005	4.861.515	1.378.572
2006	5.096.850	1.439.779
2007	5.294.561	1.446.448
2008	5.447.662	1.428.393
2009	5.700.105	1.444.555
2010	5.395.102	1.511.069
2011	5.403.887	1.548.415
2012	5.081.163	1.618.071
2013	4.681.098	1.655.983
2014	4.359.696	1.642.817
2015	3.945.862	1.663.391
January-March 2016	3.896.700	1.643.606

CIVIL CASES BEFORE THE SUPREME COURT		
	Number of civil pending cases	*Average length*
2014	**100.778**	**3 years 7 months 15 days**
2015	**104.561**	**3 years 7 months 26 days**

Italy actually has a fair number and distribution of first instance courts (139 first instance tribunals on the national territory and 23 appellate Courts). In fact, in 2012 Courts geography has been revised with a reduction of minor and inefficient Courts and another proposal to still reduce the number of Courts has been analyzed by the legislator in order to increase the efficiency and to reduce costs, even though most jurists consider it as a restriction to the access to justice.

Traditionally Italy had low court fees. However, if, on the one hand, they assure an easy access to justice; on the other, they lead to larger inflow of cases and to a higher appeal rate, with a proportionate increase in public expenditure. In order to face the high flow of case files court fees have been slightly increased since 2012[41]. The issue of court fees has now been re-considered in Italy, even though it has been strenuously objected by the national bar association board because it would narrow access to justice .

[41] Law Decree no. 83/2012, converted in Law no. 134/2012 and revised in 2014.

Therefore, it should be assumed that the reason of inefficiency of the judiciary is the large number of pending cases in courts, still faced with poor administrative support, low state financial support and complex procedures at low costs. This has been mainly due to high inflow of cases, low clearance rates, extended disposition of procedural time and, last but not least, an excessive amount of practicing lawyers.

Both first instance courts and appellate courts have registered a high inflow of cases in the last decades. As to appellate courts, such inflow resulted from the non-strict requirements provided by the law in order to appeal first instance decisions or "jump" directly to the Supreme Court. Indeed, the easy access to the Supreme Court has increased its inflow of civil cases from 3.000 per year in the 1960s to nearly 30.000 in recent years. With this respect, it should be considered that at the top rank of the judiciary there is still an annual flow of about 50.000 penal disputes and 30.000 civil disputes.

Even the workload of appeal courts remains high, despite several legislative interventions. Law no. 83/2012 introduced new measures aimed, *inter alia*, at rationalizing the civil appeal system[42]. In particular, the law provides that, with a number of exceptions, a case shall be excluded from appeal *"if it does not have a reasonable chance of being accepted"*[43]. The usual question, however, is how a Court of Appeal can determine, at first sight, whether an appeal has reasonable chances of being accepted, without actually re-litigating the case in full again or at least re-hearing the parties (even if in summary form). In addition, a dismissal does not impede the appeal - again - before the Supreme Court.

An important factor which boosts litigation and delay enforcement of decisions is also the unpredictable outcome of court cases.

Reports indicate that the high volume of cases at the Supreme Court, in combination with frequent legislative changes of laws and procedures, make it extremely hard for the Supreme Court to deliver on its mandate of ensuring legal consistency. In addition, the lengthy Court process favour situations in which conflicting case law co-exists for a long time before an issue is finally settled before the Supreme Court. This fact definitely weakens the respect for case-law, which in turn invites litigation and undermines confidence of both individual and businesses in the justice system as a whole.

Certainly, the 105.000 civil pending cases to be still decided by the Supreme Court cannot be settled through the increase of judicial activity and performance of single judges that are already outstanding and far beyond any reasonable human effort. On the one side, in 2015 a criminal judge

[42] Law no. 83/2012.
[43] Article 348-*bis* civil procedure code.

of the Supreme Court *(Corte di Cassazione)* wrote 487 decisions; the average length of criminal proceedings at the third level has been 7,9 months as the rate of inadmissible claims has been very high (64,2%); indeed, only 1,3 % of the crimes is statute-barred according to the criminal law. On the other side, although there has been a minor inflation of new civil claims because of the appellate filter and the new ADR mandatory provisions, at the level of the Supreme Court *(Corte di Cassazione)* the number of claims has increased (+ 3,8%) with the total amount of 104.561 pending cases. Thus, the average length of a civil proceeding reached 44,4 months, although a civil judge wrote 215 decisions per year. Moreover, 32,7% of pending proceedings before the Supreme Court regards fiscal law and 20,2% concerns labor law disputes: the State is one of the major claimants. All this has showed the inefficiency of a legal system where every dispute, so far, has relied upon a judicial system that allows three instances. President Canzio at the 2016 inaugural address said: "*all this we can do, all this we will do and not let it do to future generations*"[44].

Complexity and lengthy of court's procedures contribute to the increase of delays in court proceedings and they definitely jeopardize the enforcement process. In turn, lengthier proceedings are associated with higher costs of trials and a poor enforcement rate. The time and quantitative inefficiency of Italy's judicial system is an important factor behind its poor enforcement rate, although the average good quality of judicial work shown in judicial decisions shouldn't be undermined. Till the recent past, the well-known inefficiency of the Italian civil judicial system has contributed to reduce investments, to highlight slow growth as well as to underline the existence of a difficult business environment.

By many metrics, the performance of the Italian justice system is well below European averages. For example, the Organization for Economic Co-operation and Development (OECD) reports that it takes an average of 1,185 days to enforce a contract in Italy, more than twice the OECD high-income country average[45]. Similar statistics from the 2013 EU Justice Scoreboard show that, compared to its European peers, Italy scores poorly on the time needed to resolve administrative, civil and commercial cases. The OECD average to complete a civil case up to the Supreme Court level is 788 days, while it is almost 8 years in Italy[46].

A civil decision of first instance or a mediation agreement may be executed right away. Nevertheless, the enforcement procedure offer grounds for delaying the execution, especially when the decision is not definitive and it has been appealed. If the execution is not spontaneous, the decision may remain vain for years in the hands of the supposed winning party as a useless piece of paper: this result comes from high judicial costs for recovery of damages and goods, that doesn't

[44] President Canzio, 2016 inaugural address.
[45] OECD, 2013, and Council of Europe's European Commission for the Efficiency of Justice 2012.
[46] OECD, 2013.

consider the risk of the revision of the decision. In fact, the enforcement of civil and commercial decisions suffers from excessive delays in court proceedings, resulting in another very large number of pending cases. Complexity and lengthy of court's procedures contribute to the increase of delays in the enforcement process. In turn, lengthier proceedings associated with higher costs of trials mitigate the advantage of receiving a favorable decision.

In 2015 the legislator[47] has amended the execution laws giving to the judges the possibility to appoint special agencies and experts in order to manage such delicate part of the proceedings, boosting the possibility to meet agreement with debtors and favouring public auctions through the so called "outlet sales" . Since the enforcement of this new procedure requires some time, nowadays it is still difficult to get records on the efficiency of these new rules at a national level.

The Italian authorities have, over the years, taken some steps to remove bottlenecks and speed up judicial proceedings to execute decisions. While these measures are generally steps in the right direction, more should be done.

As above said, in 2014[48] consideration has been given, *inter alia*, to review court fees, to improve the new mandatory mediation scheme that leads the parties to conclude a contractual agreement which is directly enforceable, to strengthen court management and digital procedure and to reform part of the appeal system. Plans aimed at reducing public costs initiated as well. The most relevant is the digital filing of pleadings, which for the first two instances has become mandatory in both civil and commercial proceedings since 2014. Plus, since late 2012 a filtering system has been introduced at the appellate level for civil proceedings. All these measures proved to work in order to reduce time decision-making and to reach a stable decision.

On the side of criminal procedure, the unusual length of trials may face the risk of encountering statute barriers for keeping on criminal prosecutions during the course of the same procedure, especially for minor crimes, since prosecution is mandatory for almost all offences (unless the look as petty offenses) . Prosecutors and judges are very sensitive in making efforts to avoid such an inconvenience while facing serious crimes. However mafia crimes and terrorism are subjected to a special regime that allows deeper coordinated investigations and that diminishes the risk of time expiring.

Rules concerning the criminal procedures, which are now in the process of being approved, are expected to lead to a reasonable reduction of appeals. Some crimes with minor social impact (such

[47] Law Decree no. 83/2015, converted into law no. 132/2015.
[48] Law Decree no. 132/2014.

as insult, falsification of private documents, theft of common goods), in 2016[49] have been reclassified as civil offenses, in order to clear the workload of prosecutors and criminal judges.

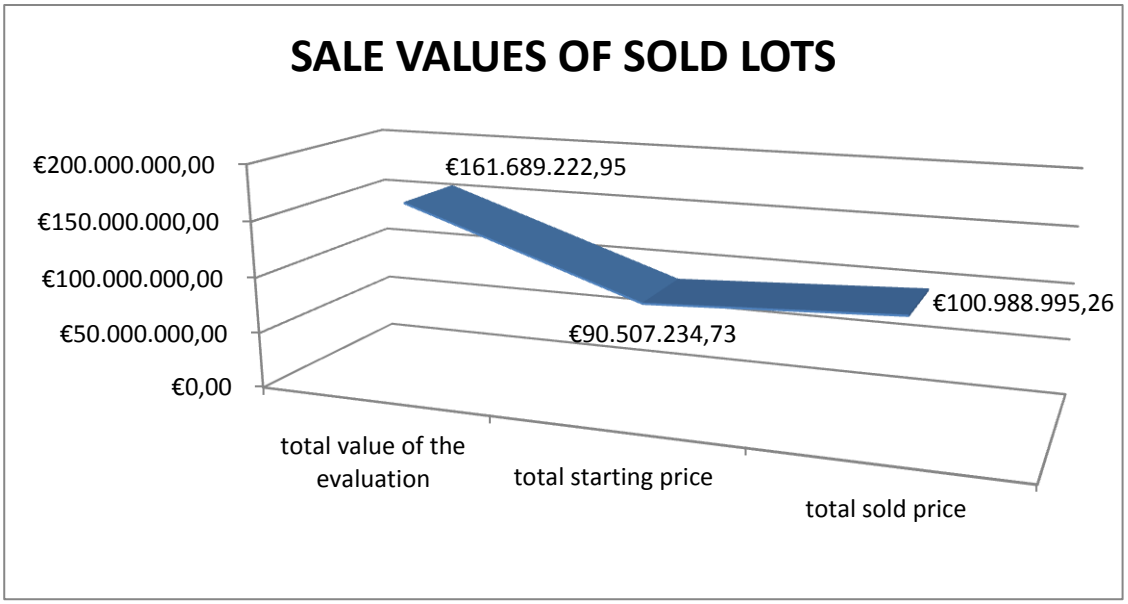
b. Main problems of enforcement: an example

We have seen how a combination of large number of practicing lawyers and case files at low court fees has been a source of inefficiency also in terms of guaranteeing the enforcement of judgments. Moreover, those proceedings are lodged before specialized sections of the first and second instance civil proceedings, as the law provides for a large opportunity to file a notice of opposition during the execution process. However something is moving on the side of guaranteeing a profitable execution thanks to of recent law changes, like the introduction of "outlet sales", as provided by article 572 of the civil procedure[50], which gives to the parties the possibility to take part to a public auction by offering a sum of money decreased of - 25% compared to what should have been the initial offer.

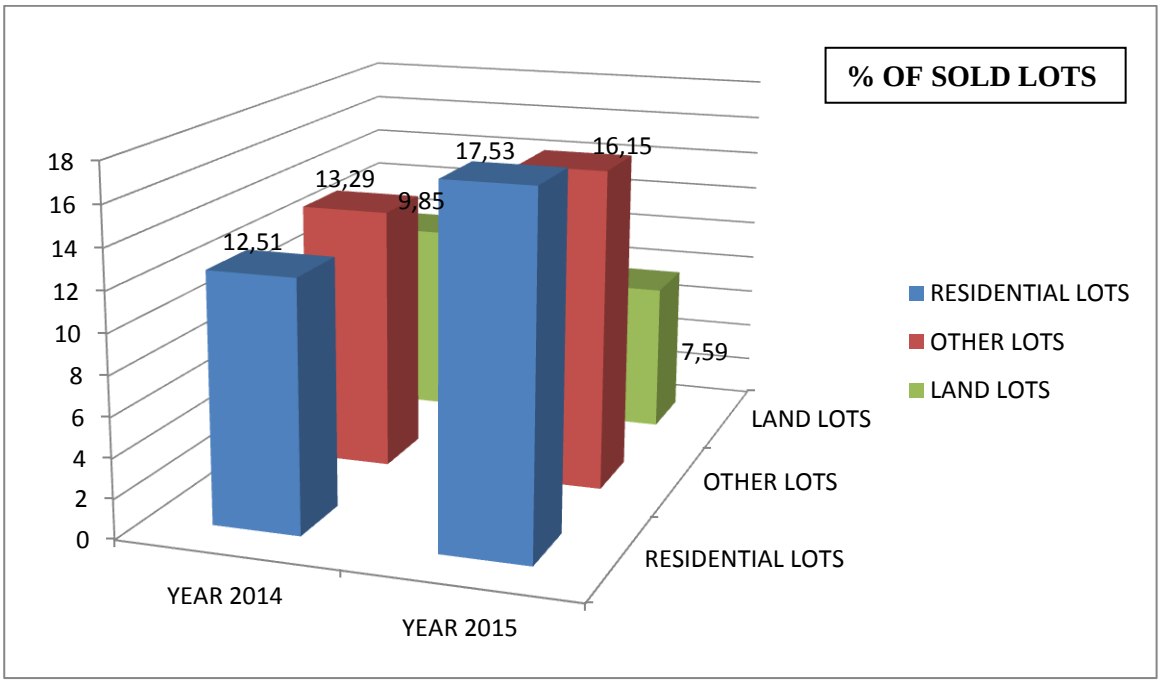
Let's analyze some data of the Tribunal of Milan.

LOTS ON SALE IN THE COURT OF MILAN			
YEAR	**NUMBER OF LOTS**	**SOLD**	**% SOLD**
1986/1999	46	10	22,22
2000/2005	163	25	15,63
2006/2007	253	47	19,26
2008	370	62	16,80
2009	635	121	19,18
2010	118	215	19,49
2011	1501	246	16,57
2012	1473	243	16,67
2013	493	66	13,72
2014	66	8	12,31
TOTAL	6118	1043	17,27

[49] Law Decree no. 7/2016; Law Decree no. 8/2016.
[50] Law no. 132/2015.

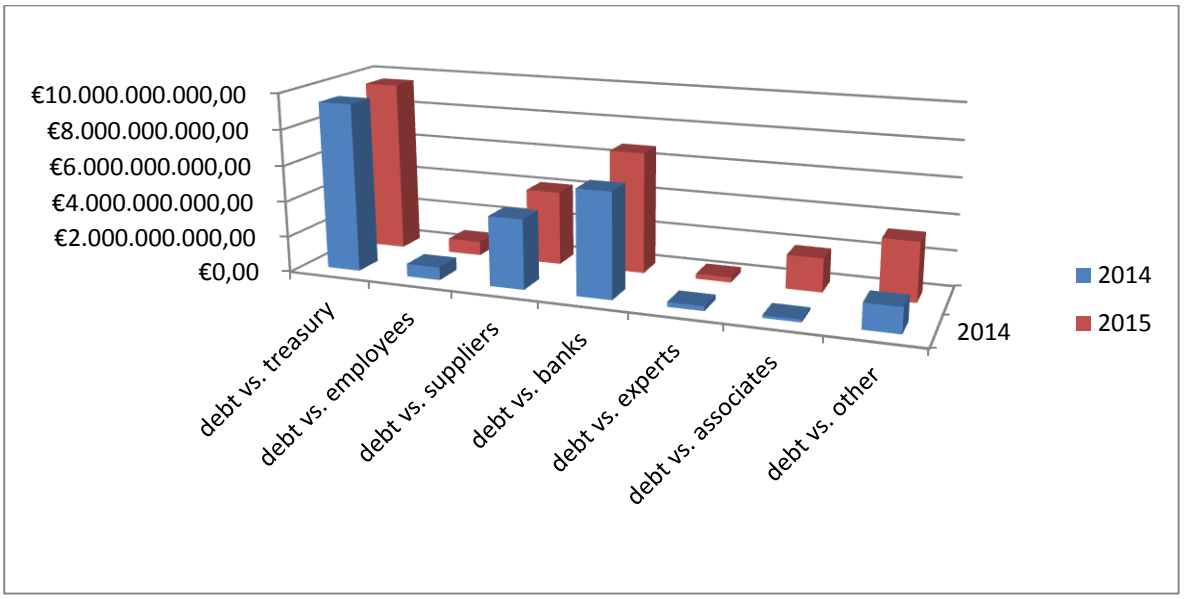


% OF SOLD LOTS			
	RESIDENTIAL LOTS	**LAND LOTS**	**OTHER LOTS**
YEAR 2014	12,51%	9,85%	13,29%
YEAR 2015	17,53%	7,59%	16,15%



In reading the last records, it may be said that, in general, the legislator has introduced a positive reform for what concerns the percentage of lots sold through the sale auction. Comparing data from 2014 and 2015, we can easily see how the national trend is, generally speaking, positive notwithstanding problems related to the economic crisis that has characterized the last decade.

DEBTS IN THE BANKRUPTCY **Data from the Court of Milan**				
	2014	**%**	**2015**	**%**
DEBT vs. TREASURY	€ 9.365.924.995,78	43,3 %	€ 9.580.483.512,68	38 %
DEBT vs. EMPLOYEES	€ 711.470.205,01	3,29 %	€ 789.042.120,99	3%
DEBT vs. SUPPLIERS	€ 3.887.812.956,15	18,00 %	€ 4.142.820.831,31	17 %
DEBT vs. BANKS	€ 5.821.030.851,91	26,96 %	€ 6.761.626.050,26	27 %
DEBT vs. EXPERTS	€ 258.064.893,47	1,20 %	€ 287.147.974,12	1 %
DEBT vs. ASSOCIATES	€ 151.541.130,19	0,70 %	€ 187.593.2878,73	1 %
DEBT vs. OTHER	€ 1.399.475.670,51	6,48 %	€ 3.296.459.322,14	13 %
TOTAL	**€ 21.595.320.703,02**	100 %	**€ 25.045.173.090,23**	100%



As seen above, the effects linked to the world economic crisis have also been registered in the increase of the total amount of debts in bankruptcy proceedings. Indeed, the number of debtors that are not able to fulfil their obligations has increased; in particular, such negative trend has been registered in the relationship between debtors and banks in terms of non-performing loans. Records show that the State is the principal creditor as well, while there is still great attention to workers conditions by corporations and firms in economic crisis. In certain cases state intervention in favour of workers avoid serious impacts on personal life and existence.

Due to lack of income, about 40% of the bankruptcy debt is represented by debts toward treasury, that, of course, it is not easy to recover. However, recent laws[51] have enhanced the possibility for creditors to reach some positive results through bankruptcy arrangements with debtors.

c. Impact of major measures undertaken by the authorities

The Italian authorities have undertaken a number of measures against the inefficiencies and bottlenecks in the functioning of the justice system, as, for instance, measures that aim to reduce the case inflow (e.g. by increasing court fees, creating appeal barriers and raising judicial costs).

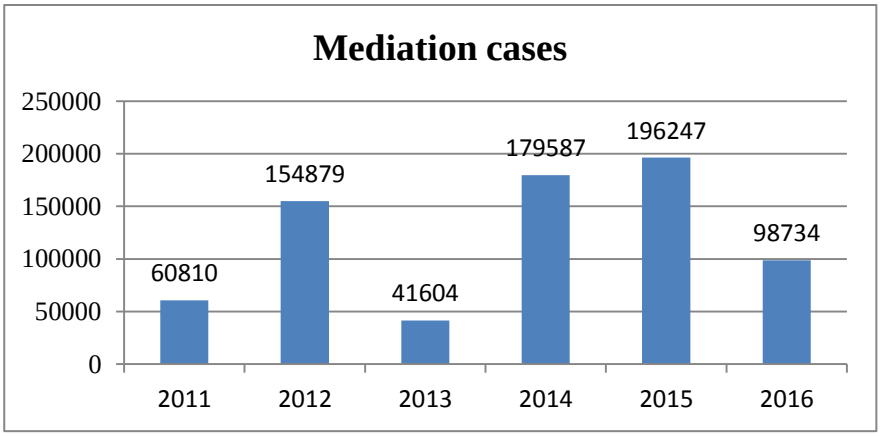
The Pinto Law[52] attempted to improve the situation in 2001 by giving litigants right to damages in case of excessively lengthy court proceedings. The Pinto Law, however, did not have the intended effect of speeding up the court process because it failed to build in the necessary incentives for the judiciary to reform; instead, it generated additional litigation and budgetary costs.

Indeed, funds used to compensate litigants for excessive delays in the judicial process could have been used to improve the efficiency of the justice system, considering that the compensation awarded for actions filed under the Pinto Law was significant (€ 200 million by 2011). In response to Council of Europe's Committee of Ministers Interim Resolution CM/Res DH (2010) 224, the government enacted legislation in 2012 which aimed at clarifying the scope of the Pinto Law, but it did not address the underlying incentive problems. However, it reduced incentives for opportunistic behavior by introducing caps. Indeed, the number of cases filed at Courts of Appeal has significantly decreased (from 15.300 new cases registered in the second semester of 2012 to 5.700 in the first semester of 2013).

The latter scores are also the result of the above mentioned strict monitoring activity made by the High Council of the Judiciary (C.S.M.) over the activity of judges in terms of career advancement.

The introduction of mandatory mediation in 2010 was another important corrective measure[53]. While it was originally limited to specific disputes only, the scope of the law was extended in 2011 up to case files of a maximum value of fifty thousand euro. Even if the new system faced a number of challenges, both logistical and institutional, reports indicate that the use of mediation increased following the enactment of the law and it was successful in siphoning off civil cases from first instance courts for at least some procedures[54].

[51] Law Decree no. 59/2016 converted into Law no. 102/2016.
[52] Law no. 89/2001.
[53] Decree Law no. 28/2010.
[54] Severino 2012, Bank of Italy Communication, June 29, 2013.



Further changes included streamlined first-instance court proceedings and online civil case management in pilot courts. Other measures such as "backlog-reduction teams" in certain courts, and civil procedure reforms were also adopted. These measures proved successful in some pilot courts, with the Torino and Bolzano courts often presented as successful examples. Some of the measures were supported by EU structural funds.

The so-called "*Decreto del Fare*"[55] included, *inter alia*, the following additional measures:

- law-clerk apprenticeships to work in courts and support judges;
- task force of 400 honorary magistrates to clear the backlog in the Courts of Appeal;
- compulsory mediation for most civil trials;
- new associate judges in the Supreme Court.

The central government has taken a stronger role in program management since 2010-2011, with the Ministry of Public Administration setting up an effective central monitoring system in 2011 and the Ministry of Justice putting in place professional management in 2012. This helped secure the EU structural funds.

The "Destination Italy" initiative presented in September 2013 by the legislator reaffirmed the government's commitment to tackle the problems in the judicial system. The first draft of "Destination Italy" initiative pointed to a number of proposals in the judicial area in line with the National Reform Program outlining Italy's targets towards the Europe 2020 strategy. These include measures to:

- extend the competences of the commercial courts, which, since 2010, has worked with specialized judges at a faster path to all commercial litigation;
- introduce value restrictions to appeals;
- allow parties to a mediation even if not assisted by a lawyer;
- extend the competences of judges of the peace;

[55] Law no. 98/2013, August 2013.

- ensure the full operation of the "digital process" (so-called *Processo Telematico Civile*);
- complete the "data warehouse" project;
- monitor the implementation of the Administrative Procedure Code, with a view to proposing improvements, as needed.

SECTION V

GENERAL MEASURES TO BE UNDERTAKEN IN CIVIL LITIGATION

a. Enrollment of new working and qualified forces within the administrative structure

In the analysis of those aspects that have caused delays and produced damages to privates linked to the length of the proceedings and, in other words, inefficiency in the Italian justice system, it could be said that the lack in the administrative structure represents one those elements that has definitely to be considered.

Indeed, the enrollment of new working and qualified forces within the administrative structure could be the positive answer against the unsuccessful backload that characterized Italian tribunal and courts. From this perspective, in the light of the spontaneous cooperation with young law graduates, in 2013 the legislator introduced the possibility for those students to take part in the work through an unpaid traineeship. The support given by the new working and qualified force has increased the work capacity of judges (plus 30%) and showed the first steps in the creation of a new motivated class of competent lawyers and judges.

In analyzing those institutions that have been involved into a reorganization process that aims to improve the efficiency of the justice system in terms of backlog reduction and better timing of the process, the Official Lawyers Association (OLA) definitely gave a substantive support to this complex project; in particular, concrete results have been achieved through its cooperation with judges. In fact, the Courts of Appeal and Tribunals cooperate with the local Official Lawyers Association in order to improve best practices in the light of a better system of civil justice. This cooperation commonly results in financial support by the OLA that shows its interest in the refinement of the digital process and reducing the administrative shortage. Moreover, continuous traineeship of lawyers and judges is locally organized by both the Superior School of the Judiciary and the OLA: this makes jurists coming from both sides feel as a part of a common project, in the sense of belonging to the same reality that increases the improvement of the entire justice system.

Such important role attributed to lawyers has also been highlighted by the legislator. As to this respect, Italian lawyers have been trusted in order to find new forms of ADR (negotiations) and to

increase the use of the existing ones. As an example, negotiation is now regulated by law, assigns a leading role to parties' lawyers in helping those involved in the dispute to find a joint resolution; in 2014[56] the legislator has introduced, over certain matters, a mandatory negotiation as a precondition for taking action.

In the light of the foregoing, the Italian recent experience proves that, at zero-costs, cooperation and joint traineeship between *Lawyers&Judges&Trainees* is essential in creating a reliable system of justice. Nonetheless it would be unreasonable trying to fill the lack in the administrative structure without a structural and permanent injectionof new working and qualified forces.

b. Public finance and litigation incentives—court fees

A comprehensive review of the economic incentives underlying the justice system is critical to the development of an effective and efficient judicial process. The objective should be to achieve a more reasonable and equitable distribution of the expenditure between the taxpayer and the market, while upholding basic principles of access to justice. Increasing or introducing court fees has three main beneficial effects: first, it helps prevent spurious litigation; second, it shifts the expenditure burden from taxpayers to litigants, and if carefully targeted, re-distributes the burden to those litigants most able to carry it; and third, it increases overall public revenue.

Recent measures adopted by the Italian authorities increase court fees to a certain extent. Notwithstanding, court fees remain modest and capped (even for high value commercial litigation). For both budgetary and legal purposes, the authorities should consider a comprehensive assessment (including both an impact and a policy assessment) of court fees for civil, commercial and tax cases, and increasing court fees, while upholding access to justice (e.g., through a properly developed legal aid system).

c. Strengthening the court dispute settlement

Compulsory mediation has been reinforced in 2013. However, thus far, mediation has not been widely and consistently used in Italy following its introduction three years ago. The reasons range from a lack of strong incentives for all parties to a limited knowledge among the general public about the importance of the "mediation avenue" in order to reach a fair solution of the disputes .

Indeed, the general knowledge of inefficiency of the justice system itself is a key obstacle. Cross country experience shows that mediation works well and it is widespread in countries characterized by an efficient justice system. Where the justice system is inefficient, parties (notably, a party that expects to lose the case) may not find it attractive to settle the disputes at an early stage through

[56] Law Decree no. 132/2014, converted into law no. 162/2014.

mediation and may prefer to take advantage of the lengthy judicial process. Notwithstanding, as seen above, data provided by the authorities indicate that mediation is starting to pick up. It remains to be seen whether this trend will continue as a result of the adoption of the new mediation legislation.

The compulsory presence of lawyers in mediation should be reconsidered as well. The compulsory presence of lawyers in all mediation proceedings may create an unnecessary reserved area for lawyers, increase costs, hamper competition and reduce the ability of other professionals (who may be more adequately trained to deal with the dispute at stake) to intervene in the mediation process. It is positive that the new legislation requires lawyers to be trained in mediation. However, this will take time and pose complications since compulsory mediation has been introduced for an initial period of four years only.

The authorities' efforts to actively promote out of court dispute settlement, including mediation, are steps in the right direction. However, these efforts could be strengthened by:

- allowing mediation to take place without the compulsory presence of lawyers in certain minor civil litigations;
- developing standards for the selection, responsibilities, training and qualification of mediators;
- informing market participants and the public at large about which procedures are subject to mediation (mandatory or otherwise) and about the time, process, and costs of mediation;
- creating expedited procedures for mediation decisions which are challenged in court.

d. Improving court management - data systems and performance accountability

Effective court organization and management could be strengthened with the objective of enabling the court to actively manage the case process and drive it forward. This includes a broad range of elements such as the reorganization of courts (notably consolidation aiming for professionalization of management and specialization of judicial functions), simplification of administrative procedures, digitalizing processes, proactive case management, improved budgetary mechanisms, and performance accountability.

The authorities have already taken measures in this area. These include a court retrenchment program, the development of a "data warehouse", and court work-plans based on individual caseload assessments. These are important steps since court management and accountability enable a cost-effective and rational use of court resources and maximize output, while preserving the quality of the justice system. Swift implementation of these measures would be the key in terms of proper use of public funds and cost-effective use of judges' time.

Court management and accountability require the development of transparent and objective performance indicators. In this context, the ongoing work of the Italian authorities to set a "data warehouse" of litigation in all courts is welcomed. In this vein, the Courts are encouraged to set performance targets for judges considering their real workload, with the performance of (each chamber of) judges being tracked for internal monitoring and publication purposes.

e. Strengthening and streamlining civil procedure and enforcement—the appeal system

The efficiency and effectiveness of civil procedure could be strengthened, with the objective to ensure a smooth process of cases in court. This includes (i) an effective regime of pre-trial disclosure and of interim measures; (ii) an enhanced role for judges in managing cases and an increased number of single judge processes; (iii) a simplification of the decision-format for lower courts; (iv) a review of the appeal system (in line with international recommendations), including to the Supreme Court; (v) a stronger IT-based processing; and (vi) effective enforcement.

Among these measures, priority could be given to a comprehensive review of the appeal system. The authorities are taking measures to rationalize the appeal system and to tackle the large number of cases pending in the Supreme Court. However, these reforms have not always led to the expected results. Various Supreme Courts in Europe have instituted filters to reduce the inflow of cases, including regimes of summary dismissals and pre-selection. For instance, some countries do not allow appeals to the Supreme Court if courts of appeal have upheld the first instance decision.

A more comprehensive review of the appeal system (both at court of appeals and Supreme Court levels) should therefore be undertaken.

Consideration could also be given to allow the court of appeal flexibility in the decisions it issues depending on the type of reply it wishes to provide to the appellant. This may include a new appeal judgment that fully re-well-discusses and replaces the first instance decisions or a simple, much shorter rejection of the appeal with a combined request to the first instance court to re-discuss the substance of the case. In order to perform at best, obviously, the judiciary must be self-governed in an autonomous and virtuous way, choosing executive judges capable to reach the goals.

Administrative and financial support from the government is necessary as well.

f. Conclusions

In Italy undertaken reforms so far proved being in the right direction but more could be done to improve the judicial system, in terms of effectiveness of the decisions taken. The process that aims to an improvement of the entire Italian judicial system cannot be reached without a further reform of the entire system, not only for what concerns courts number and fees, strengthening the new

mandatory mediation scheme, but with respect to court management and workforce as well as to the appeal system and civil and criminal procedures.

Those reforms are the key to reduce the overall number of incoming cases and to reduce the backlog in tribunals and courts, while preserving free access to justice and to ensure a timely and effective resolution of the dispute when it enters the judicial system.

As seen above, the performance of Italy's judicial system is still below European averages as regards to various aspects considering stability of decisions, length of proceedings and problems in enforcement of decisions. However, the lack of efficiency in terms of quantity of decisions taken within a certain period of time and length of the proceedings should be distinguished from the quality of judgments and independence of the judiciary, enhanced by the recognition of measures against the human error that may occur. All this is cause of great frustration for judges and prosecutors who feel somehow helpless notwithstanding their heroic efforts in building up a reliable system of justice.

From a national perspective, a strategic plan that aims to exceed weak points that, at the moment, characterize the Italian justice system must be an integral part of the State effort to lift a general development in terms of enhancing administrative efficiency of the judiciary, whose members show to be both competent and independent.

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