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Long-term thinking: towards a further revision of the judicial map?*

L'autrice muove da alcune recenti proposte, volte a sfruttare le potenzialità dell'Ufficio del processo attraverso l'utilizzo di strumenti di managerial justice, per argomentare la possibilità, anche grazie alle nuove prospettive aperte dalla recente riforma del Codice di procedura civile, di avvalersi degli stessi strumenti al fine di predisporre una nuova revisione della geografia giudiziaria, svincolata dalla visione dell'accesso alla giustizia come accesso "fisico" alle sedi giudiziarie.

The author starts from some recent proposals, aimed at exploiting the potential of the Ufficio del processo through the use of managerial justice tools, to argue the possibility, also thanks to the new perspectives opened by the recent reform of the Code of civil procedure, to make use of the same tools in order to prepare a new revision of the judicial map, detached from the vision of access to justice as "physical" access to judicial seats.

SUMMARY: 1. Introduction: the growing attention for Court management – *1.1 Weighted case management systems: a brief overview – 1.2 Some proposals for Italian Courts* – 2. Revision of the judicial maps, Courts specialization and economies of scale – *2.1 Similar reforms, different objectives: cost savings… – 2.2 … Court specialization and economies of scale* – 3. Changing perspective: delocalizing the natural judge – *3.1 Economic-organizational issues – 3.2 Legal issues* – 4. Concluding remarks

1. Introduction: the growing attention for Court management

The first impact of the recent Covid-19 crisis on justice administration systems throughout the World was, as known, the substantial interruption of proceedings, except for some categories of urgent disputes[1]. But further side effects are expected: the delay which accumulated in the most acute phases of the pandemic is likely to produce negative impact on justice systems in the years to come, especially in those Countries – such as Italy – with a huge stock of pending pre-Covid cases, since economic analysis of judicial process studies has already outlined how stock affects even new cases' disposition time[2].

However, every cloud has a silver lining: in exacerbating existing problems and urging

* This is the basic text of the lecture delivered at the Workshop 'Innovation and Digitisation of the Justice System', held at the University of Turin, Department of Management, on 13 October 2023, as part of the 20th conference of the Italian Chapter of AIS (Association for Information Systems - itAIS 2023.

[1] For a short, comparative overview of the consequences of the pandemic in civil cases, see B. KRANS - A. NYLUND (eds.), *Civil Justice and Covid-19*, Septentrio Reports5, 2020, https://doi.org/10.7557/sr.2020.5, and the articles published in *International Journal For Court Administration*, 2021, 12(2), *The COVID-19 crisis – Lessons for the Courts.*

[2] M. FINOCCHIARO CASTRO - C. GUCCIO, *Bottlenecks or Inefficiency? An Assessment of First Instance Italian Courts' Performance*, in *Review of Law & Economics*, 2015, 11(2), p. 317 ff.

Governments to deal with them quickly, including through innovative techniques (beginning with those that make use of ICT technology), the Covid-19 outbreak also provided «a unique opportunity to finally revise and change [working rules and practices] that are obsolete and dysfunctional»[3]. This was the aim of the Italian Government, which, in preparing a series of reforms concerning both the Code of civil procedure and the organization of justice, on the one hand implemented some of the solutions already tested during the pandemic (like remote hearings) and, on the other hand, attempted to increase the system's responsiveness by recruiting a large number of Court assistants, thus giving new vigor to the so-called Ufficio del processo. It is true that both series of measures have been questioned since their announcements, because they not only require a long time both to be implemented and to show practical effects, but do not even seem capable to ensure truly efficient management of existing resources. However, regardless of the merits of the criticism in detail, it must be admitted that the implementation of the Ufficio del processo testifies to the legislature's finally gained awareness of the need to mainly act on the supply side of the justice system, and constitutes a first step from which to build not only on the development of more efficient working models, but also to lay the groundwork for broader measures.
Indeed, in recent decades the idea has spread that the only way to effectively deal with the increase in caseflow is through the best management of already available resources. This is easy to understand: like any public service, justice can be seen as a market in which demand (claims) and supply (Courts capacity to respond to them) meet, but the power of Governments to correct distortions encounters both economic and legal obstacles. More precisely, in order to face the problem of Court backlogs, procedural reforms can only partially affect the caseflow (given the overriding need to guarantee access to justice), while, on the supply side, the apparently more immediate solution (that is, the recruitment of new judges) collides with budget constraints and with the awareness that the increase in the number of judges would likely produce inconsistent jurisprudence, which is in turn a source of new litigation.

[3] M. Fabri, *Will COVID-19 Accelerate Implementation of ICT in Courts?,* in *International Journal for Court Administration,* 2021, 12(2), p. 3.

This explains the increasing attention that has been paid in recent years to Court management and, more generally, to the so-called managerial justice, which incorporates the teachings of New Public Management (NPM)[4] and promises to increase judicial productivity without additional burdens on the State. And, despite the cultural resistance often encountered by the idea of corporatist management of justice and the difficulties faced when trying to adapt this logics to the peculiarities of the justice system[5], Italian scholars have recently started to claim

[4] Roughly speaking, NPM doctrines claim for the application of private sector business logic to the Public Administration, both at the organizational level (through the adoption of internal competition mechanisms) and the evaluation level (by parameterizing performance evaluation and accountability to the results achieved).

They have begun to spread and have been most successful in the U.S. (indeed, the very expression New Public Management is commonly linked to the theories of public governance presented by D. Osborne - T. Gaebler, *Reinventing government: How the Entrepreneurial Spirit is Transforming the Public Sector*, New York, 1992).

As to European Countries, the adoption of business management techniques of the Public Administration has had different rate and speed, and such heterogeneity was also reflected in the field of the administration of justice. Indeed, despite the interest shown by the OECD – which, in the four-year period 1994-1997 published 5 reports on the subject (namely: *Public Management Developments: Survey 1994* and *Performance Management in Government: Performance Measurement and Results-Oriented Management* in 1994; *Governance in Transition: Public Management Reforms in OECD Countries* in 1995; *Responsive Government: Service Quality Initiatives* nel 1996; *In Search of Results: Performance Management Practices* in 1997) –, at the beginning of 2000s significant differences in the degree and methods of implementation of the reforms were still reported: see J. Guthrie - O. Olson - C. Humphrey, *Debating Developments in New Public Financial Management: The Limits of Global Theorising and Some New Ways Forward*, in *Financial Accountability & Management*, 1999, 15(3-4), p. 209 ss.

Nor does uniformity appear to be achieved 10 years later; and this is well explained, if we consider that the very concept of NPM appears heterogeneous (if not intrinsically contradictory) and that, in any case, its elaboration and concrete implementation in a given legal system remains closely linked to the historical, cultural and institutional background of the latter: see C. Pollitt *Convergence or Divergence: What has been Happening in Europe?,* in V. Homburg - C. Pollitt - S. Van Thiel, (eds.), *New Public Management in Europe. Adaptation and Alternatives,* New York, 2007, p. 10 ff. A progressive managerial turnaround, especially in the justice sector, however, has over time also been prompted by exogenous factors: more recently, indeed, the adoption of NPM in the field of justice administration «in order to increase the quality and efficiency of civil justice in all Council of Europe States» has also been urged by Cepej, which suggests organizing the Courts «according to business models aimed at reducing trial times through better management of available resources»: R. Potenzano, *La ragionevole durata del processo civile. Uno studio di diritto comparato*, Torino, 2021, p. 77 (free translation).

[5] Indeed, it has already been noted that there have always been, «and there is still, an underlying difficulty in applying innovative managerial and budgeting techniques to the judiciary, which is also due to a rooted concern about judicial independence and, generally speaking, a non-managerial attitude of the legal profession» (F. Viapiana, *Pressure on Judges: How the Budgeting System Can Impact on Judge's Autonomy*, in *Laws,* 2018, *7*, 38, p. 2). Actually, it is generally understood that managerial organization requires a setting of objectives and a division of the workload according to logics which tend to be extraneous to both the structure of the judicial organization and to the heads of the Courts. On the one hand, judicial system is characterized by «a plurality of organizational units, basically autonomous, with low technological and/or hierarchical interdependence» (S. Zan, *Organizzazioni complesse*, Roma, 2011, 34; free translation); and this makes it unfit to be regulated according to corporate rules. On the other hand, the typical training of the average judge makes him/her little accustomed to share all the typical values of (only) efficient administration. Suffice here to mention a recent Swiss research which has shown that, while a cultural hybridization is in progress, only 12 objectives out of 27 proved to be common to the judicial and managerial culture (Y. Emery - L.G. De Santis, *What Kind Of Justice Today? Expectations Of 'Good Justice',*

for the application of some managerial justice tools, like weighted caseload management systems, also in order to fully exploit the potentialities of the Ufficio del processo[6].

1.1 Weighted case management systems: a brief overview

Weighted case management is a full-fledged NPM tool, based on the idea that not all cases are equal and therefore equally time-consuming, and that this should be considered both in the allocation of cases among judges affected to the same Court, and, at a higher level, in estimating the human capital need in each Court[7]. Regardless of their intended use, those systems ultimately consist of a rather simple calculation: once case types set and raw data on case count (that is, the number of cases of each types filed or resolved by the Court), case weight (that is, the average time needed to deal with cases of each type) and year-value (that is, available time per judge) collected, «the total annual judicial workload is calculated by multiplying the annual case count for each case type by the corresponding case weight, then summing the workload across all case types. The workload is then divided by the year value to determine the total number of full-time equivalent judges needed to handle the

Convergences And Divergences Between Managerial And Judicial Actors And How They Fit Within Management-Oriented Values, in *International Journal For Court Administration*, 2014, p. 8).

[6] For an overview, see F. AULETTA, *L'Ufficio del processo*, in this *Review*, 2021, p. 241 ff; S. BOCCAGNA, *Il nuovo ufficio del processo e l'efficienza della giustizia, tra buone intenzioni e nodi irrisolti*, *ivi*, p. 261 ff., and F. DE SANTIS DI NICOLA, *Addetti al nuovo "ufficio del processo" (artt. 11 ss. D.L. n. 80 del 2021)* vs. *assistenti legali presso la Cancelleria della Corte europea dei diritti dell'uomo: due modelli a confronto, ivi*, p. 265 ff.

[7] Such systems are well established in the U.S. since 1970s (A.M. BICKEL, *Caseload of the Supreme Court and what, if Anything, to do About It*, Washington, 1973; H. MCDONALD - C. KIRSCH, *Use of the Delphi method as a means of assessing judicial manpower needs*, in *The Justice System Journal,* 1978, 3(3), p. 314 ff.; J. JACOBY, *Caseweighting Systems for Prosecutors: Guidelines and Procedures*, Washington, 1987; V.E. Flango - B.J. OSTROM - C.R. FLANGO, *How do States Determine the Need for Judges*, in *State Court Journal*, 17(3), Summer/Fall 1993, p. 3 ff.; A.B. AIKMAN ET AL., *Designing a Judgeship Needs Process for Florida*, Gryphon Consulting Services, 1998), while in European Countries case allocation – with a few exceptions (like Norway: see CEPEJ, *Time management of justice systems: a Northern Europe study*, Strasbourg, 2006, available at *https://rm.coe.int*, p. 49-51) – has long been based on raw case counts. It is only since the second half of 2000s that scholars have intensified their studies in the field, and this reflects (and has been reflected in) the growing adoption of weighted caseload systems, depending on the case, to estimate the workload (and, then, assess the productivity) of a single judge, or to make rational case assignments among Court divisions, Courts and/or jurisdictions: see CEPEJ, *Case weighting in judicial systems,* CEPEJ Studies No. 28, 2 July 2020, available at *https://rm.coe.int › cepej-case-weighting-eng* and the series of studies carried out when a weighted caseload system was tested in Switzerland: A. LIENHARD - D. KETTIGER, *Caseload Management in the Law Courts: Methodology, Experiences and Results of the first Swiss Study of Administrative and Social Insurance Courts,* in *International Journal For Court Administration,* November 2010; ID., *Research on caseload management of courts: methodological questions,* in *Utrecht Law Review,* 2011, 7(1), p. 66 ff.; A. LIENHARD - D. KETTIGER - D. WINKLER, *Status of Court Management in Switzerland,* in *International Journal for Court Administration. Special Issue,* December 2012; ID., *Combining A Weighted Caseload Study With An Organizational Analysis In Courts: First Experiences With A New Methodological Approach In Switzerland*, in *International Journal for Court Administration,* July 2015, p. 27 ff.

workload»[8].

Whether the mathematical model is user-friendly, the real problem is how to get the information about the factors involved: in particular, methodological issues concern the collection of data on case types and on the estimated time to perform the judicial functions depending on the nature of the case. In this regard, two kinds of techniques are essentially used[9]:

- those based on experts' opinion, called upon to estimate the average time required for each case-related-event[10] and/or for the conduct of the entire proceedings to the end (of these, the most famous is the so-called Delphi method)[11];
- those based on time study, i.e. on the empirical assessment of the time required, by means of the collection of data provided by the judges and judicial officers themselves, who are called upon to record for a certain period the time they spend for each case-related activity.

Both methods show strengths and weaknesses: expert-evaluation methods, indeed, are faster and cheaper than quantitative methods, but suffer from the fact that they are based on (albeit reliable) opinions, thus possibly inaccurate and subject to human error[12]; time study method, by contrast, «considered the gold standard for case-weighting studies» because of its

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[8] M. KLEIMAN - R.Y. SCHAUFFLER - B.J. OSTROM - C.G. LEE, *Weighted caseload: a critical element of modern court administration,* in *International Journal of the Legal Profession*, 2019, 26(1), p. 23 ff.; Ph. LANGBROEK - M. KLEIMAN, *Backlog Reduction Programmes and Weighted Caseload Methods for South East Europe, Two Comparative Inquiries. FINAL REPORT Lot 3: Analysis of Backlog Reduction Programmes and Case Weighting Systems*, Sarajevo, 2016, 9, p. 38.

[9] A. LIENHARD - D. KETTIGER, *Research on the caseload management of courts*, supra note 7, p. 70 ff.; M. KLEIMAN - R.Y. SCHAUFFLER - B.J. OSTROM - C.G. LEE, *Weighted caseload, supra* note 8, p. 26 ff.

[10] The expression refers to any activity which occur during proceedings, like studying the case, preparing and conducting Court hearings, drafting orders and judgments and so on: CEPEJ, *Case weighting in judicial systems, supra* note 7, p. 3 ff.

[11] H. MCDONALD - C. KIRSCH, *Use of the Delphi method, supra* note 7, p. 314 ff.

[12] M. KLEIMAN - R.Y. SCHAUFFLER - B.J. OSTROM - C.G. LEE, *Weighted caseload, supra* note 8, p. 26 ff. In addition, it should be noted that «the process of data collection demands decision-making on a long list of methodological issues. For example, the questions presented to the participants in the Delphi method (or a variation of that method) can be open-ended, allowing the respondents to reply in their own words, or closed-ended with fixed alternative answers to choose from. Additional decisions are required on the manner in which the questions will be phrased; as well as on the number of respondents (the entire population or a sample of the population, a representative sample or a sample of experts alone etc.); and on the manner in which the questions will be presented to the participants. For example, questions can be presented via a survey or a questionnaire (in paper form or on-line), a face-to-face individual interview or a group interview followed by a group discussion etc. Additionally, the questions can be preceded by a presentation of relevant statistical data, case-studies or a review of the findings acquired through other research tools, as a frame of reference. Understandably, all these methodological issues have an influence on the validity and reliability of the data collected and therefore require careful, informed, and well-founded decision-making. Such decision-making is also required when adopting additional or alternatives methods of data-collection that raise similar and other methodological issues»: CEPEJ, *Case weighting in judicial systems, supra* note 7, 24.

accuracy[13], but it «has been criticized as expensive, time-consuming, and unduly burdensome to judges tasked with tracking time data»[14].

1.2 Some proposals for Italian Courts

This explains why, with reference to the Italian situation, it has already been suggested that law clerks – instead of judges – be employed for the recording and collection of data; more precisely, it has been stressed that a preliminary evaluation of case complexity may be useful «in two different respects: a) as an aid to the judge to rationally plan his overall workload and b) to enable him to better exercise his powers of direction in the context of individual litigation». Regarding the first profile, it was pointed out that «the adoption of a smart agenda would enable magistrates to organize their activities more efficiently. In fact, in order for the judge to properly plan his work, it seems necessary, on the one hand, for him to know the degree of complexity and status of the various disputes and, on the other hand, for him to have a general overview of the cases pending on his role». As for the second profile, case-weighting has been seen as a tool that «could constitute, at the various stages of the proceedings, a support for the judge's case management, i.e., the use of his powers of direction»[15].

Elsewhere, I have made a similar proposal, but suggesting that weighting be done even before the assignment of the case, in order to ensure a fair distribution among judges of the overall workload, to be evaluated on the basis of predefined parameters (directly extracted from the introductory and preliminary acts), thus also ensuring compliance with the principle of the natural judge pre-established by law. In this view, I claimed for an AI-oriented designing of the court claim models that the Ministry has been delegated to adopt, so that weak AI tools could perform this function instead of the law clerks[16]. In fact, although there are prospects for

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[13] M. KLEIMAN - R.Y. SCHAUFFLER - B.J. OSTROM - C.G. LEE, *Weighted caseload, supra* note 8, p. 27. Indeed, the Delphi method has been progressively replaced by time-study method in the US: CEPEJ, *Case weighting in judicial systems, supra* note 7, p. 21.

[14] Critics are summarized by M. KLEIMAN - R.Y. SCHAUFFLER - B.J. OSTROM - C.G. LEE, *Weighted caseload, supra* note 8, p. 27; for a deeper review, see V.E. FLANGO - B.J. OSTROM, *Assessing the need for judges and court support staff. Report presented at the State Justice Institute,* Williamsburg, VA, 1996, p. 21.

[15] E. BORSELLI – L. DANI, *L'organizzazione del lavoro del giudice alla luce della riforma del processo civile. Pesatura dei fascicoli e gestione della complessità delle controversie*, in *www.judicium.it,* June 26th, 2023, § 3.

[16] V. CAPASSO, *For an... «artificially intelligent» process: when access to justice and efficient Court management go hand in hand,* Presentation made during the 4th IAPL Summer School, Madrid, June 21st, 2023.

I made such proposal before the issuance of the decree August 7th, 2023, n. 110, Regolamento per la definizione dei criteri di redazione, dei limiti e degli schemi informatici degli atti giudiziari con la strutturazione dei campi necessari per l'inserimento delle informazioni nei registri del processo, ai sensi dell'articolo 46 delle disposizioni per l'attuazione del codice di procedura civile. (23G00120), which is virtually useless to the suggested purposes. This does not detract from the fact that the introduction of the fields required in order to implement the suggested solution may be done in the future.

stabilization, the recruitment of judicial assistants has been thought of as only temporary, so it seems appropriate, from a long-term perspective, to prepare strategies relying more on AI potential than on human resources.
In the same long-term perspective, I would like to go even further here, thus focusing on the management of the Courts as a whole, instead of the individual Court.

2. Revision of the judicial maps, Courts specialization and economies of scale

While the organization of work within each Court is certainly vital and is the first front on which to act in an effort to improve performance in the short term, it seems equally undeniable that the territorial distribution of the Courts is a critical factor both with respect to this issue (because its revision is likely to result in a change, up or down, in caseflow affecting each Court, and thus in individual workloads), and in the broader perspective of justice service delivery. It is therefore not surprising that, in recent years, many European Governments – including Italy[17] – undertook a revision of judicial districts, which led, in most cases, to the merger of smaller Courts. In fact, the original distribution of the Courts was often a result of historical and political, rather than rational, reasons[18]; and the widespread phenomenon of the ageing of the Courts geographical distribution, which ended up to be no longer adapted to that of the population, resulted almost everywhere in a highly unbalanced situation, which saw – on the one hand – an increase of overcrowded Courts backlog, and – on the other hand – the underutilization of other Courts which, often due to their small size, had difficulties in filling temporary vacancies in (judicial and administrative) staff and in coping with specialized litigation[19].

2.1 Similar reforms, different objectives: cost savings…

Nevertheless, it should be stressed that the reforms, although chronologically parallel, show extremely varied implementation methods and results, clearly influenced by local particularities, starting conditions and by the degree of adherence to NPM policies. Pursued objectives appear to be different too: according to ENCJ, some Countries, like Denmark,

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[17] F. AULETTA, *La lezione francese sulla revisione della geografia giudiziaria*, in *Riv. dir. proc.,* 2013, p. 165 ff.

[18] This was the case, for instance, for France and Belgium: as reported by J. FICET, *Trajectoires de réforme de la carte judiciaire et managérialisation de l'État. Analyse comparée des politiques de territorialisation de la Justice en France et en Belgique,* in *Revue internationale de politique comparée,* 2011, p. 91, in those Countries judicial geography had «hardly known upheavals since the 19th century. Successive attempts to reform […], with the notable exception of the Debré reform of 1958 in France, [were] systematically broken on the reefs of local resistance and parliamentary clientelism» (free translation).

[19] SCIENCES PO STRASBOURG CONSULTING - INSTITUTE OF POLITICAL STUDIES, *Comparative study of the reforms of the judicial maps in Europe,* 2012, available at *https://rm.coe.int*, p. 6 ff. The study focused on five Countries (Croatia, Denmark, France, The Netherlands and Portugal).

Norway and the Netherlands, undertook a judicial map revision «to enhance the quality of justice. […] These countries have not reached net savings or do not expect to achieve net savings by reducing the number of courts. […] In other countries it is expected that, besides higher quality, cost reductions can be reached by closing underused and sometimes even run-down courts and shifting the cases to nearby courts. This is the case in Portugal and Greece, but also in countries as diverse as Austria, Ireland, UK, Poland, Romania and Turkey»[20].
Actually, savings do not (or, at least, should not) translate so much into the reduction of fixed costs resulting from the abolition of physical seats, but into the optimal use of each structure. However, this does not appear to have been the perspective adopted in France: here, in fact, the French *Cour des comptes* positive assessment on the effects of the reform was mainly due to cost savings resulting from the redeployment of physical structures[21]; by contrast, scholars stressed negative effects of such concentration, which led to the appearance of the so-called *déserts judiciaires*[22] and, occasionally, to a clearance rate drop in some Courts: just think to the *Tribunal d'instance* of Bordeaux, which was already characterized by the highest rate of activity before the reform, and, following the merge, saw its coverage rate drop by 7 percentage points in the three-year period 2009-2011[23].

2.2 … Court specialization and economies of scale

Vice versa, empirical analysis carried out with reference to the Italian situation immediately estimated that the revision of the judicial map could draw a global increase in Courts performance[24]; suffice it to think of the Court of Naples, where, following the reform and the consequent «reorganisation of the sections *ratione materiae* [...] the percentage of cases settled with respect to the cases received by the eight sections dealing with civil cases increased by 11%»[25].
Predictions have been confirmed by empirical data, and such a result can be easily explained by considering the criticism that had long been levelled at the Italian judicial system, whose main element of inefficiency had been identified in the existence of unexploited economies of scale, due to the small size of the Courts, which prevented the allocation of cases on the

[20] ENCJ, *Judicial Reform in Europe. Report 2011-2012*, Dublin, 2012, 6. See also F. Van Dijk - H. Dumbrava, *Judiciary In Times Of Scarcity: Retrenchment And Reform*, in *Int. J. Court Adm.,* 2013, p. 6.
[21] Cour des Comptes, *Rapport public annuel 2015*, février 2015, available at *www.ccomptes.fr*, p. 57.
[22] N. Chappe - M. Obidzinski, *Demande en justice et nombre de tribunaux*, in *RJEP,* 2013, p. 858.
[23] Sciences Po Strasbourg Consulting - Institute of Political Studies, *Comparative study, supra* note 19, p. 15-16.
[24] M. Finocchiaro Castro, - C. Guccio, *Measuring Potential Efficiency Gains from Mergers of Italian First Instance Courts through Nonparametric Model,* in *Public Finance Review*, 2016, p. 1 ff.; R. Ippoliti, *Efficienza tecnica e geografia giudiziaria*, in *POLIS Working Papers*, 2014, n. 217, p. 19.
[25] World Bank, *Doing Business in Italia 2013*, Washington, 2013, p. 43.

basis of specialization criteria. Indeed, «specialization and concentration seem to go hand in hand […]. In fact, in small jurisdictions, judges would be on their own to face a variety of cases. They cannot handle these cases optimally»[26]; and comparative experience seems to suggest that the territorial reorganization of judicial seats is the most effective measure to ensure judge specialization[27].

Specialization is actually a point on which the managerial approach and the average jurist's point of view diverge: while the idea that specialization of work is the most efficient method of organization in any business is long-standing and accepted[28], it is common opinion that – if it is true that «[t]he fox knows many things, but the hedgehog knows one great thing»[29] – the judge must be a fox[30]. However, not only are theoretical assertions disproven by practice (think of case-assignment in the Supreme Courts, where the judge in charge of drafting the opinion of the Court is often chosen, more or less openly, on the basis of his or her expertise in the subject matter under dispute), but they are often founded on preconceptions lacking any real substantiation. For instance, one of the main arguments in favor of the generalist judge is that, in contrast, the special judge would be more prone to biases; but empirical evidence refutes this assumption[31]. And, while the disadvantages are still unproven, there is evidence – on the other hand – of the increase in efficiency due to judge specialization[32].

3. Changing perspective: delocalizing the natural judge

If benefits of Courts merging have proven to be crystal clear, no one has ever doubted that this operation also encounters limits, both of an economic and legal nature: on the one hand, it is apparent that the optimum size of Courts may not be determined *in abstracto* once for all, on the sole basis of the law of diminishing returns, given that the data to take into account (population density, performance indicators, level of business and so on) may vary in space and time and may reflect on expected caseflow. On the other hand, a certain proximity of Court facilities to the user has always been deemed necessary for the sake of access to justice;

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[26] Sciences Po Strasbourg Consulting - Institute of Political Studies, *Comparative study, supra* note 19, p. 12.

[27] Suffice it to think of the case of Denmark and of the Netherlands: both Countries first tried to ensure greater specialization through Court cooperation, instead of their merge; but the failure of such maneuvers led, in the end, to the *extreme ratio* of the revision of the judicial map: Sciences Po Strasbourg Consulting - Institute of Political Studies, *Comparative study, supra* note 19, p. 13 ff.

[28] A. Smith, *An Inquiry Into the Nature and Causes of the Wealth of Nations*, Edinburgh, 1827, p. 3

[29] R. Dworkin, *Justice for Hedgehogs*, Cambridge, 2011, p. 1.

[30] See E. Keyes, *Hedgehogs and Foxes: The Case for the Common Law Judge*, in *Hastings Law Journal*, 67(3), p. 749 ff.

[31] See, among others, A. Tversky - D. Kahneman, *Judgment under Uncertainty: Heuristics and Biases*, in *Science*, 1974, p. 1124 ff.

[32] D. Coviello - A. Ichino - N. Persico, *Measuring the gains from labor specialization,* in *The Journal of Law and Economics,* 2019, 62, p. 403 ff.

this remark perhaps explains why, for example, the law providing for the revision of the Italian judicial map was characterized by some stringent limitations, namely the directive to only limit revision to first instance courts and that of retaining of some Courts regardless of their workload and, therefore, the actual need to leave them standing[33].
However, both problems seem closely related to the traditional view of access to justice, understood as the ability to *physically access judicial seats*; they, therefore, appear to be possibly dealt with by virtue of ICT developments.

3.1 Economic-organizational issues

Starting with the issues of economic-organizational nature, it should preliminary be recalled that the best results of previous judicial map revisions were recorded in those States where impact studies had been conducted prior to the implementation of the reform; and it is clear that such studies could not be exhaustive without affordable data on Courts workload. Now, the already suggested implementation of weighted caseload management systems ends up fulfilling this purpose as well. As noted above, in fact, such systems allow for analysis on several levels, but the method remains the same: simply, when the chosen level is the one related to the system as a whole, the overall calculation is given by the sum of the values for each Court. Consequently, data extrapolated to individual Courts for case management purposes may easily be aggregated, for instance in order to assess demand downturns and/or identify new lines of litigation, and results may be the starting point for a rethinking of the territorial distribution of courts and for creating specialized sections or Courts.

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[33] It is worth noting that both limitations have been criticized by the new ministerial commission charged, among other things, with examining the possibility of a further revision of judicial districts: see Commissione di studio incaricata di predisporre uno schema di progetto di riforma dell'ordinamento giudiziario, nella prospettiva dell'aggiornamento e della razionalizzazione dei profili di disciplina riferiti, in particolare: a) allo sviluppo del processo di revisione della geografia giudiziaria, attraverso una riorganizzazione della distribuzione sul territorio delle corti di appello e delle procure generali presso le corti di appello, dei tribunali ordinari e delle procure della repubblica ed una collegata promozione del valore della specializzazione nella ripartizione delle competenze; b) all'accesso alla magistratura; c) al sistema degli illeciti disciplinari e delle incompatibilità dei magistrati; d) al sistema delle valutazioni di professionalità e di conferimento degli incarichi; e) alla mobilità e ai trasferimenti di sede e di funzione dei magistrati; f) all'organizzazione degli uffici del pubblico ministero relazione illustrativa, *Relazione illustrativa*, Roma, 17 March 2016, 3 ff. The commission on the one hand stressed that «[t]he presence of dozens of courts that were "intangible" because they were "provincial", regardless of their "size" and workloads, nipped in the bud any ambitions to rationalize such offices». On the other hand, while noting the efficiency gains due to the previous reform, the same commission pointed out that «the territorial redistribution of judicial offices would remain ineluctably incomplete without action regarding second-level offices, where moreover there are numerous examples of operational inefficiency and intolerable delays in service delivery» (free translation).
More recently, however, voices are being raised on the political front in the opposite direction: while the commission established in 2016 and the Scutellà bill, presented in 2020, claimed for the merge of appellate seats as well, the current Minister of Justice seems open to the possibility of reopening even some suppressed first instance Court seats.

That said in general, with regard to the latter profile (i.e., the one of specialization), one possible objection is that the mere availability of up-to-date data may be not sufficient when it comes to structural interventions such as the creation of new Courts or Chambers, since factors influencing the demand for justice (e.g.: population density and composition, litigation rate, and so on) are likely to change over time faster than venues are likely to be implemented or dismissed. At a closer look, however, it turns out that a truly, "physical", territorial reorganization may not even be necessary: as it has recently been suggested, at least in some fields, it would seem possible to ideally impute to territorially articulated Tribunals (thus, also to existing ones) an adjudication activity conducted by the same magistrates, avoiding that their geographic assignment reduces their productive potential and ensuring in any case the referability of the decision to the same and only Authority[34]. In other words, the physical assignment of a judge to a certain territorial Court does not mean that the same judge cannot be assigned specific cases relevant of the jurisdiction of a different, dematerialized Court, which would therefore not be linked to a specific seat.
If this idea seems acceptable, the problem of rapid adjustment of the judiciary to changing social needs is greatly diluted, since adjustments may be done by simply modifying judges caseload, without the need to make *structural* changes: and this can be done far more quickly and with lower transitional costs (e.g., in terms of prolonging the seat until pending litigation is exhausted) than building or dismissing of judicial seats.

3.2 Legal issues

Then all that remains is to confront the legal limitations referred to earlier: but even from the legal point of view the feasibility of the just advanced idea seems confirmed by recent developments. Indeed, the latest reform of the Code of civil procedure has moved a further step in the direction, already underway for years now, toward the obsolescence of the physical hearing, which can nowadays be replaced in most cases by written documents[35], or otherwise be held remotely[36]. And, as already stressed by Brazilian scholars, «[i]f the entire process is carried out digitally, [it] does not necessarily have to be linked to a specific court. This will make it possible to review the rules on territorial jurisdiction, looking for criteria that can justify the use of a fully digital court». Indeed, «[e]xcept in situations of absolute jurisdiction required by law, or in cases that require local evidence, the processing of lawsuits in digital

[34] F. AULETTA, *Riforma della giustizia «nel» Sud o «per» il Sud: come evitare che la marea montante del PNRR faccia galleggiare, con le barche, relitti*, in L. BIANCHI - B. CARAVITA (eds.), *Il PNRR alla prova del sud*, Napoli, 2021, p. 51 ff.
[35] See art. 127-*ter* c.p.c.
[36] See art. 127-*bis* c.p.c.

courts would not require the claim to be filed in a specific district»[37].
In referring to evidentiary intake, the author seems to refer exclusively to expert evidence or the need to conduct judicial inspections; in Italy, on the other hand, as is well known, reform prevents the physical hearing from being disregarded when it is necessary to examine witnesses. Such a limit is understood in the view of ensuring orality; and its opportunity seems to be confirmed by psychological studies suggesting that digital orality is inferior to the in-person experience, due to the decreased immediacy imposed by the screen and to the fact that e-hearing would prevent the judge from being aware of the nonverbal language of the person being heard[38]. Although these remarks seem reasonable in themselves, the benefits that remote hearing would bring, given the concrete situation civil proceedings, cannot be neglected.
First of all, the potential lower quality of orality at first instance is compensated for by its surely increased "quantity". Just think to appeal proceedings: in Italy, the guarantee of a renewal of oral evidence is only given in criminal trials, and only when the court is inclined to reform first instance judgement, whereas normally civil appellate courts review the case on paper. It is therefore possible that a totally opposite assessment of the same oral evidence is made after years, simply based on what is recorded in the minutes. Now, remote hearings are easy to record, using the same ICT tools allowing for the connection (and thus at no additional cost). In this way, the witnesses' statements, together with the attitude they took when speaking, can be preserved: it is clear that the availability of such recordings allows the appellate court to really revise the same material that had been available to the court of first instance.
It should be noted, however, that benefits do not only concern the appeal instance. As known, the triad of orality, immediacy and concentration of Chiovendian memory was understood by its author as inseparable, and pour cause, since the one without the other is meaningless. So, when there is a lack of concentration because the hearings are spaced out in time, as, again, in Italy, even the judge who took the evidence may find it more useful to review the video than to rely on memory to supplement the record in which witnesses' behavior can at most be described, at any rate in a summary manner[39]. In addition, the length of trials makes it not uncommon for a judge to be transferred during the trial, so that the deciding judge is not the same one who heard the witness: and this makes the usefulness of video recording even more obvious. Lastly, the same also applies to the defense of the parties, which, in addition to being

[37] M.A. RODRIGUES, *Tecnologia, resolução de conflitos e o futuro da competência territorial*, in *www.jota.info*, July 25th, 2020.
[38] M. ASTRUP HJORT, *Orality and digital hearings*, in *Int'l J. Civil Procedural Law*, 2022, p. 29 ff.
[39] D. CERRI, *Emergenza e provvedimenti dei capi degli uffici: il caso pisano*, in *Judicium online*, April 8th, 2020.

able to better challenge contrary statements, will also be able to draw the judge's attention to any non-linguistic signs that demonstrate the witness's reliability or unreliability.

In the light of these remarks, it does not seem possible to say that the shift from physical to remote hearings in itself entails a qualitative degradation of the process as a whole, such as to impair the parties' rights of action and/or defense; this is, moreover, both confirmed in the jurisprudence of the European Court of Human Rights – which already stated that «the defendant's participation in the proceedings by videoconference is not as such contrary to the Convention»[40] – and impliedly recognized by Italian legislator: indeed, at least in some areas, is it already admitted by legislature that videorecording may be an acceptable substitute for direct examination by the judge[41]; consequently, it does not seem at all implausible to envisage a complete dematerialization of proceedings, regardless of the tasks to be carried out in each hearing.

There remains only one, possible constitutional limitation, constituted by art. 25 Const.: not with reference to the need to guarantee the pre-establishment of the judge – which remains respected, as long as it is the law that establishes the assignment of magistrates, even possibly to a virtual seat – but with that of guaranteeing the natural territorial fragmentation of Courts. According to some authors, in fact, one of the meanings to be attributed to art. 25, insofar as it presupposes the existence of more than one Court with territorial jurisdiction, is to prevent the establishment of a single national judge. But, even if one were to admit such a reading, it should not be forgotten that art. 25, unlike art. 24 Const., does not require that the guarantee be extended to every state and degree of proceedings. This makes it possible to envisage several different solutions: for example, that of dematerializing the proceedings at first instance, allowing instead an appeal to the nearest territorial Court; or, and even more so, providing for the single national court to have jurisdiction only in the first phase of oppositional proceedings (e.g., the *ex parte* one which leads to the issuance of an injunction), while reserving the guarantee of fragmentation for the eventual opposition.

4. Concluding remarks

As I have tried to show, at least one of the techniques already suggested for the efficient use of trial clerks in the short term perspective – namely, the idea that they be entrusted with the analysis of cases in order to determine their weight – appears amenable to further uses in the long term perspective. Indeed, the fact that the availability and exploitation of judicial data is essential for the purpose of a rational Court management policy is now generally

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[40] *Marcello Viola v. Italy* (ECtHR 13 June 2019).

[41] F. VALERINI, *In difesa dell'udienza da remoto,* in *Judicium online*, April 29th, 2020.

acknowledged[42]; just as acquired is the awareness of the need to adapt the justice system to the changing needs of the population. It is then only a matter of taking a step further, and realizing that technological innovation can also bring about a rethinking of the traditional ways in which justice is delivered, without necessarily implying a lowering of its quality. And that, if «[t]echnology is here to stay, […] the best potential must be extracted from it in order to expand access to justice»[43].

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[42] F. CONTINI, *Una base dati condivisa per un dibattito informato sulla giustizia*, in questionegiustizia.it, February 23rd, 2023.
[43] M.A. RODRIGUES, *Tecnologia, supra* note 36.