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Taking justice seriously: the problem of courts overload and the new model of judicial process

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Abstract: This article traces a profound world-wide metamorphosis of the judicial process. It analyses recent procedural legislations adopted in the United Kingdom, the Unites States of America, France, Germany, Spain and Italy fashioned to address the problems of unreasonable delay and access to justice. The main tendencies that emerge from the analysis outline the passage from an authoritarian model of adjudication to a more cooperative approach based on flexibility of the time schedule and availability of alternative choices. Moreover, an instrument generally adopted to reduce the demand for justice is the selection of meritorious cases on the base of the conformity to precedents. It is, indeed, a procedural law development that may change the perspective on the civil law-common law divide.

Keywords: civil procedure, reform, ADR, case-management, precedent, judicial overload, unreasonable delay of justice.

I. INTRODUCTION

The constant expansion of the role of judiciaries represents a common feature in civil law as well as in common law systems. Such a phenomenon has, indeed, assumed a world-wide dimension[1].

According to Professor Cappelletti[2], there are two forceful reasons for this development. One is the tremendous growth of parliamentary – and, more generally, of statutory- intervention in our epoch. Paradoxical as this might seem, the expansion of legislation has brought about a parallel expansion of judge-made law.

A further forceful reason for the expansion of the scope of judiciary law is the trend, in many countries, towards the adoption and judicial enforcement of declarations of fundamental rights. There can be little doubt that a judicially enforceable bill of rights, particularly if organically entrenched, adds greatly to the potential creativity of judges. More generally, the growth of the judicial role in modern societies can be seen as a necessary development to preserve a democratic system of checks and balances.[3]

Nonetheless, this constant expansion of the role of courts is strictly related to an overwhelming increase of the demand for adjudication. New generations of rights and statutory uncertainty have as a consequence the multiplication of individual instances for a judicial assessment of individuals' constitutional and social space. At the same time, old fashioned organization of the judiciaries has proved to be largely inadequate to fulfill the task. The consequent duty to manage the huge case-load within the limits of due process rises two main concerns: a) the need to limit the proceedings within a reasonable time, and b) the need to guarantee an affordable access to the justice service to the largest extent possible.

These concerns are currently at the center of debates around reform projects of judiciaries in Europe as well as in the US. However, under an economic perspective, the different approaches to the

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[1] A Zuckerman, *Civil Justice in Crisis: Comparative Perspective of Civil Procedure*, (New York: Oxford University Press, 1999), 13.

[2] M Cappelletti, *The Judicial Process in Comparative Perspective*, (Oxford: Clarendon Press, 1989), 10-6.

[3] For these reasons, the need to limit the scope of the present study led the research to focus mainly on civil and constitutional litigations, even if some due process considerations extend also to criminal proceedings.

problem show two main general tendencies: a) adjusting the supply-side of the justice service «market» by reorganizing courts, improving efficiency and differentiating the offer of dispute resolution systems; b) adjusting the demand-side of the justice service «market» by restricting access to the courts' system, transforming disputants in negotiators and better pursuing the certainty of the law. Even if a rough appreciation of these two approaches would induce to associate the first tendency with most European Continental systems and the second tendency with some common law traditions, it must be said that the different experiences are often transversal and a mix of various solutions. The purpose of this analysis is to compare the different experiences around the world and to draw contextualized models in order to appreciate their effectiveness and sustainability for judicial systems that have to deal with the problem of case overload.

II. MODELS, MECHANISMS AND PROCEDURES FOR DEALING WITH JUDICIAL CASE OVERLOAD

A. Cooperative management of the case and reallocation of resources

The need to deal somehow with the increasing judicial case-load has been an issue in American public debate since the nineteenth century. Indeed, beyond the common people perception of the justice service, some data had been progressively made available for the political debate on the justice administration.

When the Department of Justice assumed the responsibility for coordinating the legal business of the federal government, a first regular and sustained effort was made to document the workload of the courts.[4] In fact, the 1870 Act that established the Department of Justice required the attorney general to submit annually to Congress a report on the "business" of the Department and "any other matters appertaining thereto that he may deem proper".[5]

In 1873, Congress further instructed the attorney general to report "a statement of the number of causes, civil and criminal, pending during the preceding year in each of the several courts of the United States." Thereafter, the attorney general's annual report had also included statistics on private litigation in the courts.[6]

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[4] See DS Holt, *Debates on the Federal Judiciary: A Documentary History*, Vol. II: 1875-1939, Federal Judicial Center, Federal Judicial History Office (2013), available at www.fjc.gov .

[5] See the Act to Establish the Department of Justice, ch. 150, 16 Stat. 162 (1870). See also A Langeluttig, *The Department of Justice of the United States*, (Baltimore, MD: The Lord Baltimore Press, 1927), 9.

[6] See Holt (n 4).

Politicians, federal judges, and elite corporation lawyers in the American Bar Association have constantly pressed Congress to adopt innovations in court organization and administration to help the courts to process more cases and more efficiently use judicial resources. They advocated to grant the Court greater authority to manage the judicial system. Among them, Chief Justice William Howard Taft believed that greater judicial control over court resources and operations would have kept rising delays and costs of litigation in check and preserved the legitimacy of federal judicial power.

In 1922, Congress, in response to Chief Justice Taft's proposal, created a new Conference of Senior Circuit Judges[7] (then named, in 1948, as Judicial Conference of the US[8]), with the authority to study court conditions, to recommend the appointment of new judges, and to authorize the chief justice to transfer judges across circuit lines. Taft argued that judges were the best qualified to know how to manage the judiciary and wanted to take questions of where judges would be assigned away from the political considerations of Congress. Taft's plan generated strong criticism from those who saw all of those things as the proper realm of the legislative power.

By the 1930s, members of the Conference of Senior Circuit Judges, concerned about the influence that Congress and the executive branch had over court finances and administration—and with the ultimate support of the Department of Justice—persuaded Congress to usher in a new era of judicial branch independence with the creation of the Administrative Office of the US Courts.[9]

Debates over the federal courts also touched on the other hallmark of American government: federalism. Defenders of states' rights protested that the broadened diversity jurisdiction of federal courts[10] over common law disputes represented an unwarranted transfer of authority from state courts to federal courts. The Supreme Court's broad interpretation of the Fourteenth Amendment's Due Process Clause, as well as district judges' use of injunctions against state officials, signaled to many Democratic lawmakers that state government authority was being threatened by federal judges. Their proposals for limiting federal jurisdiction led the representatives of eastern business and financial interests to defend the authority of federal courts. They saw this level of jurisdiction as indispensable in an economy increasingly defined by commercial transactions and relationships that crossed state boundaries.

[7] Ibid, 180.

[8] See 28 U.S. Code, section 331.

[9] 28 USC, sections 601-612.

[10] See Art III, section 2 of the US Constitution.

The proposals to adapt the federal courts to handle their increased responsibilities also led to ongoing debate about access to justice. A major aspect of the debate over creating new circuit appeals courts in the 1880s was what kinds of cases could be taken to the Supreme Court. The new, intermediate level of appeal courts meant that the Supreme Court would no longer serve as—at least in principle— the final arbiter of disputes for all Americans.

Indeed, the debate over the 1925 Judges' Bill, which increased substantially the Supreme Court's discretion over its appellate docket, represented to many the further erosion of access to the highest court in the land.

The Administrative Office of the US Courts, based on studies conducted by the Federal Judicial Center[11], began in 1971 to present weighted case filings, which measured the amount of time and resources required to dispose of different kinds of cases. These statistics support decisions on a host of administrative tasks in the courts, including budget allocation for court staff and resources, equipment, and information technology; determining the location of divisional offices; defining the need for new judgeships and new courthouses and courtrooms; and developing long-range planning for the federal judiciary.

While the US Congress has recognized the need to reduce the federal court case-load, it has also realized the necessity of maintaining litigant access to federal courts in cases involving important federal questions.[12] Legislation has, thus, been introduced to ease the case-load burden in federal courts by: 1) increasing the numbers and types of judges and magistrates[13], 2) removing some cases from the judicial system altogether[14], and 3) shifting diversity jurisdictions cases to state courts.[15] In addition, the

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[11] Studies and data are available at http://www.fjc.gov/history/home.nsf/page/courts.html .

[12] See on the topic , RA Posner, *The Federal Courts: Crisis and Reform* 59 (Cambridge, MA: Harvard University Press, 1985); DR Cleveland, *Overturning the Last Stone: The Final Step in Returning Precedential Status to All Opinions*, (2009) 10 JAppPrac&Process 61, 63; W Shafroth, *Survey of the United States Courts of Appeals*, (1967) reprinted in 42 FRD 243; MJ Dragich, *Once a Century: Time for a Structural Overhaul of the Federal Courts*, (1996) WisLRev 11, 12; DP Lay, *Query: Will the Proposed National Court of Appeals Create More Problems Than It Solves?*, (1982–1983) 66 Judicature 437, 437; M Rosenberg, *Enlarging the Federal Courts' Capacity to Settle the National Law*, (1975) 10 GonzLRev 709, 711; PD Carrington, DJ Meador & M Rosenberg, *Justice on Appeal*, (West Pub. Co., 1976); WH McCree, *Bureaucratic Justice: An Early Warning*, (1981) 129 UPaLRev 777, 781–82; JH Wilkinson III, *The Drawbacks of Growth in the Federal Judiciary*, (1994) 43 EmoryLJ 1147, 1157.

[13] See, for instance, the so-called "*Omnibus Judgeship Bill*", Pub L No 95-486, 92 Stat. 1629 (1978) or the Bankruptcy Reform Act of 1978 that amended the Bankruptcy Code, 11 USC, sections 101-1501 (1979).

[14] See the Dispute Resolution Act of 1979.

[15] M Lakin & E Perkins, *Realigning the Federal Court Caseload*, (1979) 12 LoyLALRev 1001, 1002, available at: http://digitalcommons.lmu.edu/llr/vol12/iss4/8 .

creation of a National Court of Appeals[16] was proposed to reduce the caseload of the circuit courts of appeals by giving certain kinds of federal courts national appellate jurisdiction.

1. The cooperative model of case management

The adoption of a scheme of case management, including the tracking of cases into different categories of review, has also increased court efficiency and helped to deal with the increased volume of appeals.[17] Case management seeks to deal with case volume in multiple ways including: 1) diverting some cases from any judicial attention by promoting resolution between the parties; 2) reducing the judicial attention needed by placing some cases on a staff disposition track; 3) reducing or removing the need for judicial attention to motions and procedural matters by resolving them at the staff level; and 4) improving the efficiency of judicial attention by narrowing the focus of the appeal and improving the quality of briefs and argument.[18] This is true even where judges play a role in case management, though, typically the process is staff administered.

A key feature of the American case management is the pre-hearing conference. Early in the appeal, counsel meet with court staff to discuss the issues and process of the appeal. The staff attorney attempts to clarify and narrow the issues on appeal, explore the possibility of pre-hearing settlement, and set technical limits, such as scheduling or joint appendix contents, that will aid in resolution. Many case management programs have case diversion or pre-hearing resolution as a goal, and some go so far as to call them settlement conferences or to employ volunteer mediators.

While case management plans and experiences with them have varied among the circuits, in general, they are reported as being successful at improving efficiency and the processing of cases.[19]

The idea of a cooperative management of the case started taking place since the 1980s onwards, not only in the US, determining a radical change in the way of administering justice. As a

[16] *Report of the Study Group on the Caseload of the Supreme Court,* 57 FRD 573, 590 (1973).

[17] J Goldman, *The Civil Appeals Management Plan: An Experiment in Appellate Procedural Reform*, (1978) 78 ColumLRev 1209; IR Kaufman, *Must Every Appeal Run the Gamut?—The Civil Appeals Management Plan*, (1986) 95 YaleLJ 755; id., *New Remedies for the Next Century of Judicial Reform: Time as the Greatest Innovator*, (1988) 57 FordhamLRev 253; id., *The Pre-Argument Conference: An Appellate Procedural Reform*, (1974) 74 ColumLRev 1094.

[18] DR Cleveland, *Post-Crisis Reconsideration of Federal Court Reform*, (2013) 61 ClevStLRev 47, 69, available at http://engagedscholarship.csuohio.edu/clevstlrev/vol61/iss1/4

[19] See ibid, 70.

matter of fact, by that time in France, the heads of jurisdictions[20] have started stipulating collective covenants with the *Bâtonniers* (ie Presidents) of the local Bar Associations in order to regulate the judicial procedure.[21] These covenants are generally intended to rule in detail the so-called *mise en état* (ie the preliminary phase)[22] that is the judicial phase which characterizes the most complex form of judicial proceedings (ie the so-called 'circuit long' and the appeal procedure).

The positive tendency of the French trials to adapt to the object and to the complexity of the controversy under the supervision of the judge, but with the participation of the parties,[23] did let emerge the need to set forth homogeneous rules among the different jurisdictions and even before the same tribunal. At the beginning, therefore, the covenants were spontaneously adopted to pursue uniformity among jurisdictions in a system that allows the parties of a single case to decide, together with the judge, the progression of the case.

This model was, then, taken into consideration by the commission constituted by the government with the purpose to modernize the civil procedural law and to face the problem of unreasonable delay of the justice service.[24] The commission, headed by Jean-Claude Magendie[25] and composed of several magistrates, lawyers and law professors, eventually proposed to develop the collective covenant model[26] on the base of the success of this autonomous source of rules.

One of the most important features of the French collective covenants is the provision about the *contrats de procédure.*[27] These contracts of procedure are effectively arrangements agreed on by the judge and the parties during the *mise en état* in order to set customized deadlines for the specific controversy. This flexible and innovative tool has proved to be very helpful in order to speed up trials

[20] More specifically, Presidents of Tribunals de Grande Instance or Cours d'appel; see Canella, *Gli Accordi Processuali Francesi volti alla Regolamentazione Collettiva del processo Civile*, 399- 434 in G Berti Arnoaldi Veli, *Gli Osservatori sulla Giustizia civile e i protocolli di udienza*, (Bologna: Il Mulino, 2011).

[21] See J-C Magendie*, Célérité et qualité de la justice. La gestion du temps du procés*, (Paris, 2004).

[22] The phase of *mise en état* is present only before the *Tribunal de Grande Instance* (see Art 763 cpc) and before the *Cours d'appel* (see art 910 cpc).

[23] We see, therefore, also in the French context a sort of hybridization of the inquisitorial model with the adversary model.

[24] Magendie (n 21).

[25] Then President of the Tribunal de Grande Instance of Paris. See on this point Berti Arnoaldi Veli (n 20), 402-403.

[26] R Tudela, *Décret du 28 décembre 2005: vers une contractualisation de la procédure civile?*, in GazzPal, 2006, Doctr 789.

[27] L Cadiet & E Jeuland, *Droit judiciaire privé,* (Paris, 2009), 617.

and to save resources, as recognized in the *Rapport Magendie* of 2004.[28] For this reason, the French legislator decided in 2005 to formally introduce it in the Code of Civil Procedure (see new Art. 764 cpc).[29]

During the mid-nineties, a cooperative model of case management was also adopted in England through the extensive reform project of the civil procedure that followed the report on access to justice commissioned by the Lord Chancellor to Lord Harry K. Woolf.[30]

It is well known that the nature of England's adversary system had fostered for a long time an unrestrained climate of advocacy in which «the litigation process [was] too often seen as a battlefield where no rules apply. In this [adversarial] environment, questions of expense, delay, compromise, and fairness [might] have only a low priority. The consequence [was] that expense [was] often excessive, disproportionate, and unpredictable; and delay [was] frequently unreasonable».[31]

In Woolf's opinion, the adversary system's esteem for litigants autonomy and the authority of the parties to control and shape their proceedings without restraint remained at the core of the problems of English civil process. Expanding on his central insight into the «combative» adversarial environment, Lord Woolf found that the exorbitant cost of litigation rendered it unaffordable and deterred individual litigants from seeking relief—resulting in a denial of access to justice.[32]

For these reasons, Woolf proposed: a) to delineate a scheme of fixed costs, b) to simplify the High Court system by providing a single set of procedural rules, and, most importantly, c) to introduce a new system of case management.[33]

However, in contrast with the French experience, the English «fundamental shift» in the responsibility for the management of civil litigation was from the litigants to the courts, and not the

[28] See Magendie (n 2121), 83.

[29] *Décret* n. 2005-1678 of 28 December 2005, in JO, 29 December 2005, p. 20350, and entered into force on 1 March 2006.

[30] See Lord Woolf, *Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales* 4 (1995), *available at* http://www.dca.gov.uk/civil/interfr.htm [hereinafter Lord Woolf, INTERIM REPORT].

[31] Ibid, 8-9.

[32] SM Gerlis & P Loughlin, *Civil Procedure*, Abingdon: Routledge Cavendish, 2004. The Lord Chancellor appointed Lord Woolf to evaluate the rules and procedure of civil courts in England and Wales. The result of Lord Woolf's examination produced two reports issued by the Lord Chancellor's Department: an Interim Report in 1995; and a Final Report in 1996. The findings and recommendations detailed in both of these reports provided the foundation for subsequent legislative reform to England's civil procedural system.

[33] KM Vorrasi, *England's Reform To Alleviate The Problems Of Civil Process: A Comparison Of Judicial Case Management In England And The United States*, JOLeg. (2004) 30:2, 361

inverse.[34] Under this transformation, the methods in which cases proceed to trial not only changed, but, more markedly, the heightened responsibility of judges to engage in active case management drastically altered the former adversarial culture. Judges, rather than the parties, maintain the ultimate task of identifying and narrowing the issues and setting stringent time-tables in an effort to reduce cost and delay and to encourage settlement.[35]

At a broader structural level, Lord Woolf believed that judicial case management was the primary means by which the problems of common law process—cost, delay, and complexity— could have been resolved.[36] Lord Woolf's enlightenment and emphasis on judicial case management still constitute the foundational philosophy of the Civil Procedure Rules of 1999 (CPR) and of the English civil litigation system as a whole.[37]

A similar transformation occurred also in Spain as a consequence of the 1984 reform of the civil procedure. Spanish civil procedure was governed from 1881 until 2001 by the 1881 Code of Civil Procedure, as partially reformed from time to time.[38] The reforms that followed the promulgation of the 1978 Constitution are especially important for this Constitution reviewed the liberal inspiration of the old Code and did set up the main features of the so-called constitutional procedural law. As a consequence, the ideological faithfulness to the idea of liberal justice (ie that procedural steps should not be taken *ex officio)* left the pace to constitutional principles such as due process and fair trial.

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[34] See Lord Woolf, INTERIM REPORT, (n 30) 18. See also C Elliot & F Quinn, *English Legal System* (third ed. 2000) 103–04; J Resnik, *Managerial Judges*, (1982) 96 HarvLRev 374, 376.

[35] See id. Lord Woolf broadly defined case management to include: identifying the issues in the case; summarily disposing of some issues and deciding in which order issues are to be resolved; fixing timetables for the parties to rake particular steps in the case; and limiting disclosure and expert evidence. See Lord Woolf, *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* 14 (1996), available at http://www.dca.gov.uk/civil/final/contents.htm [hereinafter Lord Woolf, FINAL REPORT].

[36] See Lord Woolf, INTERIM REPORT (n 30) 21.

[37] 'A system of civil justice is essential to the maintenance of a civilized society. The law itself provides the basic structure within which commerce and industry operate. It safeguards the rights of individuals, regulates their dealings with others and enforces the duties of government': Lord Woolf, INTERIM REPORT (n 30) 2. 'The new landscape will have the following features: Litigation will be avoided wherever possible. (a) People will be encouraged to start court proceedings to resolve disputes only as a last resort, and after using other more appropriate means when these are available. (b) Information on sources of alternative dispute resolution will be provided at all civil courts': Lord Woolf, FINAL REPORT (n 35) 4.

[38] The most significant reforms to the 1881 Code of Civil Procedure were introduced by the Act n. 34 of 6 August 1984. The Act amended, amongst other things, the right to free justice (*derecho a la justicia gratuita*) and turned the *proceso de menor cuantia* into the standard procedure. This procedures includes an initial phase where procedural obstacles are cleared and where the subject matter of the proceedings is defined. Less important reforms were introduced by the Acts numbers 13/1983, 21/1987, 15/1989 and 10/1992.

Under the new constitutionally pondered civil procedure, judicial resources could be no more at the complete disposal of the parties and a case shouldn't develop exclusively depending on whether the parties - mainly the plaintiff- take the necessary procedural steps according to the prescribed formalities.[39] Before this transformation only the parties were able to avoid the paralyzation of the case and the end of the proceedings without a judgment on the merits as a result of 'non-suit' (*caducidad de la instancia*).[40]

By the Statute n 34 of 1984 the Spanish Legislature supported to a certain extent the introduction of proceedings *ex officio* so that also the judge was allowed to play some role in the development of the trial. The Legislature rightly declared that the public law aspects of civil procedure should prevail over the private nature of civil disputes. Thus, the Spanish Parliament decided that the social need for legal certainty in private relations was more important than the potentially changeable individual interests of the parties, whose legal protection is still a State obligation. However, despite this new conceptual starting point, a formal abolition of the institution of 'non-suit' (*caducidad de la instancia*) did not take place.

Nonetheless, it is clear how a sort of cooperative model to manage the trial emerged also in the Spanish legal system.

Furthermore, the four ordinary procedures that came into being with the introduction of the old Code did not allow the court to inform the parties about the fact that they did not meet the criteria for filing an action, that they did not meet the criteria for standing, or that they had not fulfilled any of the procedural formalities (*presupuestos procesales*).

It must be borne in mind that these criteria are the minimum requirements for a due process. Apart from jurisdictional and related issues, such as the capacity of a party, legal standing and legal representation - which the court could decide upon *ex officio* - the judge only had two possibilities left if the parties did not realize that certain procedural requirements had not been met: a) he/she could have declared the action void (*nulidad*)[41]; or b) he/she could have dismissed the action or issued a *sentencia formal* or *procesal*, which left the merits of the case undecided. In all these cases a new action on the

[39] According to the statistics in the *Libro Blanco de la Justicia (Consejo General del Poder Judicial del Reino de España*, Madrid, 1997, 157) the average civil case lasts 8.84 months.

[40] Cf Articles 411- 420 of the old Code of Civil Procedure.

[41] Cf Articles numbers 238(3), 243 and 240(2) Code of Judicial Organization.

merits could be started since the case would not have been decided upon its merits as the result of the above rulings.[42]

Obviously, the above situation was an important cause of delay and a reinforcement of the judge-parties procedural cooperation could have been expected as a result of the general trend. Instead, the Spanish Legislature tried to solve the problem by reforming the original complicated model of procedure (*juicio de mayor cuantía*) following the idea that a more simplified and customized set of procedures would have helped the parties to meet all the criteria.

Firstly, four types of ordinary procedure were created, depending on the value of the claim (*juicio de mayor cuantía, juicio de menor cuantía, juicio de cognición* and *juicio verbal*). These procedures were meant for solving cases that did not need special procedural regulations. The 1984 reform resulted in the *juicio de menor cuantía* becoming the ordinary procedure *par excellence.* Secondly, more than thirty special procedures were created though the overall system of civil procedure resulted, eventually, to be much more complicated so as to produce effects which were the opposite of those intended. Moreover, one of the several side-effects of the excessive plurality of procedures was the establishment of different time-limits for the fulfilment of identical procedural steps, depending on which procedure was being used.

2. Managing the case between the principle of preclusion and the State liability for violation of the right to speedy trial

In this respect, it should be kept in mind that, for many years, time-limits have played an important role as regards the principle of preclusion[43]: after a specific time-limit had elapsed, the performance of the procedural step for which it had been granted would not be allowed anymore to the parties. As a matter of fact, the application of such a principle has always tended to speed up the development of the trial curtailing dilatory strategies.

The role of preclusion rules in the progression of civil proceedings has been an issue also in Germany, especially after the enactment of the Simplification Amendment of 1977.[44] Indeed, such a

[42] CH van Rhee (ed), *The Law's Delay. Essays on Undue Delay in Civil Litigation*, (Groningen/Antwerpen: Intersectie Uitgevers, 2004), 315-334.

[43] See Article 306 of the old Code of Civil Procedure.

[44] *Bericht der Komission zur Vorbereitung einer Reform der Zivilgerichtsbarkeit*, (Bonn: Bundesjustizministerium, 1961), 178, 196.

piece of legislation was intended to exploit the function of procedural preclusions in order to favor the adoption of the model based on a concentrated hearing proposed in 1966 by Fritz Baur (a member of the Commission for the Reform of the civil procedure established in 1961).[45]

The idea at the base of the Amendment was that the judge (or the panel) shall prepare the case in such a way that it can be decided (or otherwise settled) after one oral hearing, the so-called main hearing.[46] The law requires the judge to prepare proceedings either in writing or in one preparatory hearing.[47] In addition, the parties are required to produce their evidentiary means at the correct time according to the standard of a litigant who is engaged in his/her lawsuit diligently with the intent to promote its due course.[48]

This duty of the parties to promote proceedings and to cooperate with the court is compelled by impending sanctions by the court. If the judge sets deadlines, means of attack and defense which are brought late are excluded if their admission would delay the settlement of the legal dispute and there is no reasonable excuse for being late.[49] This is the case even if the deadlines are set before the so-called first early hearing. Whether the judge sets deadlines or not is, however, subject to his free discretion, because all relevant rules declare that the judge "may" do so.[50] If the judge has not set any deadlines, he can preclude the parties only if the admission of their arguments would delay ending the proceeding and the party concerned has acted with gross negligence. Arguments and evidence which are rejected at first instance are also incapable of being brought afterwards in the appellate instance.[51]

However, the scheme provided by the Simplification Amendment left a significant problem unsolved in the German system.

In fact, whereas a party whose arguments were rejected in the first instance was also precluded in appellate proceedings[52], a party who was afraid to be late in the first instance and did not put forward the argument during that phase at all could plead it in the appellate instance and was only precluded if the argument would have delayed the second instance. As the Court of Appeal was obliged to prepare

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[45] F Baur, *Wege zu einer Konzetration der Mündlichen Verhandlung im Prozess*, (Berlin: De Gruyter, 1966).

[46] See Code of Civil Procedure (ccp), section 272.

[47] See sections 275, 276 ccp.

[48] See section 282 ccp.

[49] See section 296 ccp.

[50] Cf section 275 I 1, III, IV,section 276 I 2, section 277, ccp.

[51] See section 528 ccp.

[52] Ibid

and have an oral hearing on the appeal, the party could, as matters stood, escape the final preclusion in the first instance by raising the argument only in appellate proceedings. This possibility did let the parties to strategically allocate their argumentative burden between the two level of jurisdiction, making the appellate review almost unavoidable.

In the Spanish context, moreover, the interaction between the principle of preclusion and the disparity of time-limits for taking identical procedural steps in different types of procedures resulted in confusion and a slowing down of civil proceedings.

It's not of little importance, though, that the introduction of a similar system of preclusive rules as regards acts that had to be performed by the court was not possible. As a consequence, the Spanish Constitutional Court[53] affirmed that judicial delays had to be justified by the responsible court itself, eg, by referring to the heavy case-load. Such a justification does, however, not free the court from disciplinary measures.

After the enactment of the 1978 Constitution, the *Tribunal Costitucional* has distinguished three situations where the culpability for undue delays of judges and magistrates who allege the justification of excessive workload of the court, is at stake: a) the situation where for extraordinary reasons an unexpected accumulation of cases occurs (in this situation, the right to a process without undue delays is not violated); b) the situation where, for a prolonged period of time, delays occur as a result of the inactivity of a particular court (in this case the right to a speedy trial is breached); and c) the situation where delays occur as a result of deficiencies in the judicial organization due, for example, to a shortage of means and staff (also in this case the State would be liable).[54]

This shift of attention from the management of the case to the sanction of unreasonable delaying conducts seems to be a feature that characterizes also the Italian experience.

In recent years, in fact, the Italian government has taken a number of measures to address the inefficiencies and bottlenecks in the functioning of the justice system. Although some of these include measures to reduce case inflow (eg, by increasing court fees, creating appeal barriers, and changing lawyers' fee structure), promote out-of-court settlements (including by further enhancing mandatory mediation), reduce the number of courts (by creating economies of scale and fostering specialization), and strengthen court management (eg, by giving a greater management role to the Chief Judge of a

[53] See Cases n 133/1988 and n 144/1995 of the Spanish Constitutional Court.

[54] See, for example, Spanish Constitutional Court decisions n 24/1991, n 5/1985 and 20/1995.

court, creating case schedules, managing judges' workload), one of the most relevant innovation concerned the sanction of State officials' conducts that generate unreasonable trial delays.

To this end, the so-called «Pinto» Act[55] was introduced in 2001 giving litigants a right to damages in case of excessively lengthy court proceedings. The Pinto Act, 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.[56] As a matter of fact, the statute was the result of European pressures upon the Italian government due to the European Court of Human Rights decisions condemning the Member State for violation of the right to speedy trial.[57] The Pinto Act was, therefore, strictly tailored to endow individuals with a remedy against the State, rather than to address the problem of the unreasonable delay of proceedings from a systematic perspective. Not surprisingly, the statute ended up to generate additional litigation and budgetary costs.[58] The compensations awarded for actions filed under the Pinto Act amounted to € 451.633.735,96 by June 2015.[59]

In response to the Council of Europe's Committee of Ministers Interim Resolution CM/Res DH (2010) 224, the government enacted new legislation in 2012 which aimed at clarifying the scope of the

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[55] Act of 24 March 2001, n 89 "*Provision of equitable redress in case of violation of the reasonable lenght of trial and amendment of article. n. 375 of the code of civil procedure*", as then amended by the Act of 7 August 2012, n 134, and by the Act of 6 June 2013, n 64.

[56] Thus, even though the Pinto Act specifically gave the Italian Court of Auditors the right to impose on judges the obligation to contribute to the damages, this right was hardly exercised, if ever. The compensation for Pinto Act cases did not, in fact, cut into the budget for the courts since a special allocation was granted. The Pinto Act, therefore, failed to create individual and institutional incentives for change; see Dipartimento affari giuridici e legali (Presidenza del Consiglio dei Ministri), *Relazione al Parlamento anno 2010: l'esecuzione delle pronunce della Corte Europea dei Diritti dell'Uomo nei confronti dello Stato Italiano- legge 9 Gennaio 2006, n 12* (2010).

[57] See, among others, *Foti and others v. Italy 7604/76 [1982] ECHR; Milasi v. Italy*, 10527/83 [1987] ECHR; *Baggetta v. Italy*, 10256/83 [1987] ECHR; *Adiletta and others v. Italy 13978/88* [1991] ECHR. See also *Capuano v. Italy, 25 June 1987; Scopelliti v. Italy, 23 November 1993; Muti v. Italy, 23 March 1994*.

[58] By 2011, about 50,000 Pinto Act cases were filed before the Italian Courts of Appeal, a fair number of which involved complaints of late payments of compensation awarded under Pinto Act actions. See M Fabri, "The Italian maze towards trials within reasonable time," in *The right to trial within a reasonable time and short-term reform of the European Court of Human Rights*, (Report of the Council of Europe & the Republic of Slovenia, 2009), 15; E Bossi, *The execution of the European Court of Human Rights' judgments in Italy: measures to reduce domestic excessive length of proceedings*, (The Netherlands Helsinki Committee report, 2012), available at www.academia.edu/1909051.

Not surprisingly, as of 2011, approximately, 5,000 of the 14,500 pending applications against Italy before the European Court of Human Rights (ECtHR) concerned "Pinto" proceedings, with more than 300 such applications arriving each month.

[59] Report on the administration of justice for the 2015 year, Department of Judicial Affairs, General Direction for Litigation and Human Rights, 25 January 2016, available at https://www.giustizia.it/resources/cms/documents/anno_giudiziario_2016_dag.pdf .

Pinto Act, but it did not address the underlying incentive problems.[60] However, the new legislation reduced incentives for opportunistic behavior by introducing caps. Indeed, the number of cases filed before the courts of appeal has fallen significantly (from 15,300 new cases in the second semester of 2012 to 5,700 in the first semester of 2013).

It is worthy to note, furthermore, that the new extensive application by the Italian courts of art. 96, section 3, cpc (ie sanction of the parties for temerarious claims) seems perfectly coherent with the spirit of the Pinto Act.

3. Court efficiency as a constitutional value

The strong attention to prevent delaying conducts through the provision of sanctions must be seen, however, in the context of the new constitutional procedural law which contributed to give birth to a new approach to the justice service based on a balance between fundamental rights and the well-functioning of the system.

Indeed, this is the case of Spain where the constitutional framework of 1978 inspired the new Code of Civil Procedure which was enacted on 7 January 2000, and that came into force on 8 January 2002.

The new system of civil procedure that has been implemented contains important innovations as regards the prevention of undue delay in civil litigation. Following the dispositive principle (*principio dispositivo*), the new Code promotes with a higher intensity than the previous legislation amicable settlements as well as other means of enforcement (*subasta judicial*). Nevertheless, the judge has been given certain powers in order to speed up the development of the trial.

Following the example of the 1984 reform, the Spanish Legislature decided also to incorporate a preliminary hearing stage (*audiencia previa*) in the procedures of the new Code. The standardization of the preliminary hearing proved to be very useful for screening unmeritorious claims, adjusting irritual demands without a multiplication of cases and verifying procedural requirements.

Although the Italian Legislature was not able to adopt a new Code of Civil Procedure to better reflect the new constitutional framework, some structural changes were introduced in order to implement the new approach. Among these changes are included the adoption of streamlined first-instance court proceedings and the reform of the discovery phase by the adoption of the principle of

[60] See Article 55 Law-Decree n 83/2012 and converted by the Act n 134 of 7 August 2012.

"non-contestation" (see Art 115 cpc). Other measures such as "backlog-reduction teams" for specific courts, and the recent creation of an online platform for civil trials were also adopted. These measures proved successful in some pilot courts, with the Torino and Bolzano courts often presented as success stories. Some of the measures were supported by EU structural funds.[61]

The so-called "*Decreto del Fare*"[62] of 2013 included, *inter alia*, some additional measures such as: a) law-clerk apprenticeships to work in courts and support judges; b) a task force of 400 magistrates to clear the backlog in the courts of appeal; c) new compulsory mediation; d) new associate judges in the Court of cassation; e) first hearing to be mandatorily scheduled within 30 days and settlement of litigations expected at the first hearing in most cases.

In the German context, the influence of the new approach is testified by the adoption of the Baur model of trial after the enactment of the Simplification Amendment and, especially, by the extensive Reform of Civil Proceedings of 27 July 2001 (effective from January 2002).

The role of the first instance judgment in general has been enlarged by limiting the standard of review on appeal. Additionally, the provision addressing the proceedings in the first instance have been revised to ensure a more efficient disposition of cases. More specifically, the Legislature has extended the competence of single judges, improved the framework for settling cases, increased the obligations of courts in an oral hearing, extended the authority of courts to take evidence, and made it easier to withdraw claims. Finally, in order to avoid a curtailing of legal protection and party satisfaction, the Legislature has also improved the remedies against violations of the right to be heard.

However, the most dramatic changes in the field of appellate remedies have affected the second instance appeal of facts and law. The standard of review has been reduced from complete re-

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[61] Since 2004, the EU supported a roll-out of the Torino and Bolzano courts' experience to the entire country (Program Title: *Diffusion of best practices in the Italian Judicial Offices*). This program made some progress (eg for the Milan Court). However, the program faced implementation constraints as well as jurisdictional issues between regional and central authorities. 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. See G Vecchi, *Systemic or incremental path of reform? The modernization of the judicial system in Italy*, (February 2013) Inter'lJCourtAdmin, and http://ec.europa.eu/esf/main.jsp?catId=46&langId=en&projectId=416 .

[62] See Act n 98 of 9 August 2013. Greater integration of magistrates ("*giudici onorari*") into the "ordinary" court system could be considered, perhaps by amending Article 57 of the *Decreto del Fare* to allow the use of magistrates in proceedings before the Court of Appeal when it acts as single jurisdiction ("*Corte di appello in unico grado*"), such as the preparatory phase of proceedings under the Pinto Act.

examination of the case to correction of errors made in the first instance.[63] As a matter of fact, the problem related to the preclusion rules that was left unsolved by the Simplification Amendment was eliminated by the Reform of 2001. Additionally, the provisions on the proceedings in the second instance have been essentially streamlined. More specifically, the Legislature has adjusted the availability of an appeal, modified the requirements for filing and support of an appeal, increased the requirements for filing a cross appeal, extended the competence of single judges, enlarged the possibilities to dismiss an appeal, restricted the cases for demand of an appeal to the lower court, and eased the requirements for withdrawal of an appeal.[64]

B. Alternative Dispute Resolution frameworks

The second general trend that emerged as a consequence of the need to deal with the excessive judicial workload is the provision of mechanisms to settle disputes out of court. Indeed, this way of adjusting the supply-side of the justice «market» is intended to bring back some disputes to private rooms so as to employ public resources to the shortest extent possible. Although arbitration is the most well-known means of alternative dispute resolution, in recent years different countries have introduced (or at least improved) judicial frameworks to divert disputes out of court under the supervision of the judge.

The civil procedure has thus been adapted in order to regulate a sort of double binary system where the court adjudication is no more predominant as in the past. However, the authority of the judge still represents a guarantee of the fairness and equality of the procedure to the extent he/she is called to supervise the formation of the agreement.

These frameworks have been generally welcomed by the legal communities since they constitute opportunities for an easier access to a quicker and less expensive method of resolving disputes.

This was certainly the case of France where in 2000 the Minister of Justice instructed Paul Boucher, a high-ranking judge in the Conseil d'État, to review and assess the system of

[63] See Drucksachen des Deutschen Bundestages (BTDrucks), n 14/4722, 58 (2001). See also H Däubler-Gmelin, *Reformdes Zivilprozesses*, (2000) 33 Zeitschrift für Rechtpolitik (ZRP) 33-38.

[64] RA Miller & PC Zumbansen (eds.), *Comparative Law as Transnational Law. A Decade of the German Law Journal*, (Oxford: Oxford University Press, 2012), 259-285.

legal aid since access to justice was particularly expensive and some parts of the populations were prevented from obtaining legal protection. For the purpose, a commission called *Commission de Réforme de l'Accès au Droit et à la Justice*, headed by Boucher, and consisting of four members (two judges, one practicing lawyer, and one consultant in social affairs), was appointed and submitted its report to the government in April 2001. In its consultation, the Commission heard from a large and diverse number of individuals and organizations who were directly involved in the administration of justice – such as judges, practicing lawyers, civil servants of the Ministry of Justice – but also including those less directly involved, such as insurance companies, consumer associations, trade unions, and a broad range of lay organizations.

This influential report was in fact a follow-up to the 1996 Coulon Report entitled *Réflexions et Propositions sur la Procédure Civile* (1997) in which Jean- Marie Coulon, the then head of the Paris court of first instance (*tribunal de grande instance*), similarly to the Woolf Report in England, made recommendations on various aspects of the French system of civil justice. Some of these recommendations were later implemented in a Decree of 28 December 1998 modifying the Code of Civil Procedure in respect of court structure, legal aid, and, especially, alternative dispute resolution (ADRs).[65]

The new perspective adopted was based on the assumption that the recourse to a judge must not be considered as the first recourse but as a last resort and justice must not be without cost but an adequate cost, that is to say in the measure which does not limit substantially the requirements of equitable process. Cadiet observed that it's this new procedural culture that one can attach to the triple tendency of a) de-judicialization of cases, b) the rationalization of procedure, and c) the restructuring of the proceeding.[66]

Whereas the second and third tendencies consisted, as already mentioned, of extensive reform projects aimed to simplify and to make the procedure more flexible and customizable,

[65] E Steiner, *French Law. A Comparative Approach*, (Oxford: Oxford University Press, 2010), 277.

[66] L Cadiet, *Introduction to French Civil Justice System and Civil Procedural Law*, RitsumeikanLRev, n 28 (2011), 367.

the first tendency was mainly correlated to the introduction of new instruments of alternative dispute resolution.

In 2008 new recommendations were made by the Guinchard Report[67] towards a more balanced distribution of the litigation workload throughout the court system, a reduction of the courts' workload through the transferred allocation of particular procedures to specialized clerks, the further development of existing modes of alternative dispute resolutions, and, more generally, a move towards a culture of dispute settlement by way of the introduction of a new *procédure participative*[68], that is a collaborative dispute resolution agreement taken from the US experience, and the adoption of Decree n 2010-1165, of 1 October 2010 dealing with conciliation and oral proceeding in civil, commercial and social matters.

1. The "hard" approach of the formal preemptive mechanisms

Of the period around the 2000s is also one of the main innovations of the English CPR, that is, the introduction of pre-action protocols. Formally, they are statements of rules that have to be enforced prior to referring the dispute to the courts. Substantially, they consist of an amalgamation of formalities to be followed as well as recommendations submitted to the parties and their lawyers. To some extent, these recommendations constitute a code of good conduct to put into practice before the case is officially contested before the courts. The protocols aim to encourage the exchange of early and full information, and ultimately to enable parties to avoid litigation by agreeing on a settlement of the claim before commencing proceedings.

The pre-action protocols have been a key in encouraging the use of alternative dispute resolutions. Indeed, in the Woolf Inquiry the use of ADRs was greatly encouraged. The different types of ADRs available provide quick informal procedures that involve a neutral third party who has the legal expertise in the relevant area of law to give advice and assist the parties. So

[67] S Guinchard, *L'ambition raisonnée d'une justice apaisée*, Rapport au garde des Sceaux, Collection des Rapports Officiels, (Paris: La Documentation Française, 2008), 11-301.

[68] See Act n 2010-1609 of 22 December 2010 which modified articles 2062- 2068 of the Civil Code.

far it seems the English approach favored a formal preemptive mechanism the compliance to which constitutes a requirement to access the court system.

The purpose to reduce the courts case-load induced also the German lawmakers to consider introducing a limited mandatory mediation program although in this case the court system had been generally considered quite acceptable by the business community. The legislation that followed provided for an opening clause in the Introductory Law to the German Rules of Civil Procedure (*Einführungsgesetzzur Zivilprozeßordnung*, EGZPO). The new section 15a of the EGZPO authorized the 16 German states (*Länder*) to establish mandatory mediation programs in civil cases. The mandatory character of these mechanisms resulted in a formal requirement to prove that an attempt of mediation was done before bringing the case to the court. The lack of such a proof may lead to a dismissal of the case on grounds of inadmissibility.

While judicially hosted settlement conferences and arbitration have traditionally been quite common, until a few years ago mediation and other forms of ADR were not well known in the German business world. Most German people were only familiar with non-binding third party assistance in the context of political bargaining or collective bargaining negotiations. Over the last fifteen years, however, the landscape of dispute resolution has significantly changed and mediation has now become part of the dispute resolution process in private bargainings.[69]

Similarly, a mechanism of mandatory mediation has been introduced in 2010 as an important innovation of the Italian alternative dispute resolution system**.**[70] While originally limited to specific disputes only, the scope of the statute was extended in 2011.

The new system faced a number of challenges, both logistical and institutional. Despite the difficulties, reports indicate that the use of mediation has increased following the enactment of the law,[71] and has been successful in siphoning off cases from the courts for at least some procedures.[72]

[69] R Trittman, *Alternative Dispute Resolution in Germany*, (2002) ADR Bulletin, Vol. 5, n 4,.

[70] See Law-Decree n 28/2010.

[71] According to the International Institute for Conflict Prevention & Resolution, the number of mediation procedures increased from 1,000 to 250,000 over 2009–10.

[72] Cf Severino 2012, Bank of Italy communication, 29 June 2013.

This piece of legislation was, however, declared unconstitutional by the Constitutional Court in October 2012[73] on the base of a formal illegitimacy. Indeed, the piece of legislation was introduced within the framework of an Act of Delegation by the Italian Parliament[74] and the Constitutional judges found that the new statute exceeded the Act of Delegation in violation of Art 77 of the Italian Constitution. Compulsory mediation was, then, quickly reintroduced by the legislator in 2013.

Also in the Italian context, mediation has eventually been welcomed by the legal community although the government financial incentives were insufficient to support the reform. Nonetheless, the final costs of mediation make the new procedure still more convenient than a trial and its mandatory character implied, as for the German and English experiences, that citizen had to become accustomed to it.

It is true, though, that mediation programs are not the only alternative means of dispute resolution which have been implemented or improved in order to increase the supply side of the justice “market”.

2. The private expert assistance and arbitration as main instruments of the “soft” approach

Among other means that are now common in Germany there is also the *Schlichtung* which is usually used for negotiations where the parties have a third party assisting them by conducting the negotiations and presenting a proposal at the end.

For parties who are interested in conducting an early neutral evaluation, instead, it must be mentioned that under German law it is possible to obtain a private expert evaluation of a controversial set of facts or regarding a question of law (so-called *Schiedsgutachten*). Usually, this evaluation is binding unless it is clearly erroneous (because it is inequitable or incorrect). Parties tend to select this process if they agree that the dispute to be resolved requires legal, technical or other expertise, but does not require fully fledged arbitration proceedings.

[73] See Constitutional Court decision n 272 of 24 October 2012.

[74] See Act n 69 of 18 June 2009, “*Provisions for the economic development, the simplification and the competitiveness and also concerning the civil procedure*”.

The private expert evaluation procedure may be (and in practice is) combined with mediation. A binding private expert evaluation assists parties in mediation when an impasse on specific questions of law or science cannot be overcome. In other cases, parties have taken a non-binding expert opinion as a starting point for their final settlement negotiations.

In 2014 a new negotiation procedure with the assistance of one or more lawyers has been introduced in Italy by the Law-Decree n 132 providing for another instrument of dispute resolution that is similar to the French *convention participative*.[75] Although it is not explicit, this new instrument must be included among the «urgent measures of de-judicialization» rather than within the «other provisions for facing the backlog in civil procedure» as it is the new mechanism provided by Art 1 of the same piece of legislation for transferring ongoing civil proceedings from tribunals to arbitration panels.

The situation in Spain seems to be somewhat less advanced. Until very recently, Spain lacked a set of rules to govern mediation as an alternative dispute resolution mechanism. Indeed, it was only in 2012 that the Civil and Commercial Mediation Act was approved in order to transpose the EU legislation on the matter. Due to the delay, Spain has suffered in creating an adequate framework for the promotion of mediation; it is still in an initial phase. Indeed, courts do not require mediation as a necessary step and there is no specific instance in the procedure where it is properly encouraged; courts merely have to suggest it as a possibility in the preliminary hearing and refer the parties to a voluntary informative session, but the parties are free to reject it. The recent regulation seeks to turn mediation into a common practice, but time is still needed to confirm that this process will result in the actual creation of a real alternative dispute resolution mechanism.

In contrast, arbitration is a far more extended practice in the Spanish legal culture. The existing, numerous organizations and professionals devoted to arbitration continue to grow as arbitration becomes a true alternative to court proceedings.

Although Spain has a long history of domestic arbitration, the enactment of the Arbitration Act in 2003 – along with the different modifications it has undergone in recent years

[75] Law-Decree n 132 of 12 September 2014, converted with modifications by the Act n 162 of 10 November 2014 "Urgent measures for de-judicialization and other provisions for facing the backlog in civil procedure".

– has given a decisive boost to transform Spain into a more favourable and attractive environment for international arbitration. The most relevant institutions that administer arbitration proceedings – both domestic and international – are the Court of Arbitration of the Official Chamber of Commerce of Madrid (*Corte de Arbitraje de la Cámara de Comercio de Madrid*), the Civil and Commercial Court of Arbitration (*Corte Civil y Mercantil de Arbitraje*), and the Spanish Court of Arbitration (*Corte Española de Arbitraje*).

In Germany the recourse to arbitration is generally the second chance of alternative dispute resolution when mediation fails. Since the new Arbitration Act was adopted (1 January 1998), business people and lawyers were provided with a modern legal framework for arbitrations. The content and structure of the new Act are largely based on the UNCITRAL Model Law.

What emerges from the analysis is the collapse of the idea of judicial systems as expressions of State monopoly in the administration of justice. The contemporary evolution in law of the modes of resolving disputes tends incontestably to promote an offer for plural justice, combining voluntary modes and adjudicative modes, judicially or extra- judicially, which manifest a concern for economy of justice and management of the procedure. The development of alternative methods for resolving disputes represent eventually an instrument of judicial management that illustrates equally the tendency towards rationalization of the procedure.[76]

C. Filtering cases on appeal

Another important mechanism to reduce caseload is the possibility to terminate cases early on procedural grounds or to discretionally select cases to which give full review. Leave to appeal or certiorari represent the prototypes of such mechanisms. Each case would receive some level of review to determine whether any legitimate claim of error is presented or the case is of sufficient importance, but not necessarily a full review with briefing, oral argument, and written opinion.

[76] See Cadiet (n 66), 369.

This practice characterizes peculiarly American jurisdictions in the form of screening and summary procedures and Supreme Court's certiorari.

1. Case selection through leave to appeal

Leave to appeal is currently required for interlocutory appeals and for appellants who wish to proceed in *forma pauperis*. However, only a few legal systems in the United States do not guarantee one appeal of right in all cases.

In the state of New York, for instance, the bases for an appeal to the Appellate Division, that is, one of the four intermediate appellate courts, are very broad and virtually all decisions of the lower courts are appealable to the Appellate Division. Consequently, the state intermediate appellate courts in New York have very little power to select the cases they will decide.[77] Appealability from the four intermediate appellate courts of the Appellate Division to the New York Court of Appeals is more limited than appealability to the Appellate Division from the lower courts.

There are two types of appeals to the Court of Appeals: those said to be as a matter «of right» and those where permission is granted by the Court of Appeals or the relevant Appellate Division court. Appeals as a matter of right are limited, and may be had in specific circumstances.[78] With regard to the second type of appeal, the Court of Appeals and the intermediate appellate courts of the Appellate Division grant permission for an appeal before the Court of Appeals whenever two judges of either the Appellate Division of the Court of Appeals vote in favor of permitting the appeal to advance to the New York Court of Appeals.[79]

This sophisticated system of appeal represents an attempt to balance the fundamental right to a second instance review with the need to filter out unmeritorious or ungrounded claims.

The requirement of a so-called "leave to appeal" constitutes also a common feature of the English appellate jurisdictions.

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[77] See NY Code Civil Practice Law and Rules - section 5701: Appeals to appellate division from supreme and county courts.

[78] See NY Code (CPLR) - section 5601 (a-d): Appeals to the Court of Appeals as of right: a) from a decision where at least two justices dissent in the Appellate Division on a question of law in favor of the appellant ; b) from a final determination directly involving a state or federal constitutional question; c) from an order of the Appellate Division granting or affirming the granting of a new trial or where the appellant stipulates that judgment absolute shall be rendered against him upon affirmance; and d) from a final decision of a trial court, administrative agency or arbitrator, or from an order of the Appellate Division finally determining an appeal from such a decision where the Appellate Division has made an order on a prior appeal which necessarily affects the decision

[79] See NY Code (CPLR) - section 5602 (a): Appeals to the Court of Appeals by permission.

Indeed, although in the UK appeals against decisions of the Magistrates' courts (ie justices of the peace) are more or less unconditioned, appeals against Crown and county courts decisions as well as against High court decisions require a leave to appeal before the Court of Appeal.[80]

Generally speaking, the application for permission to appeal may be made to the lower court at the hearing at which the decision to be appealed was made.[81] If the lower court refuses to afford the leave, a further application may be made directly to the appeal court.[82] Whoever gives leave to appeal, it should be on the ground of there being a point of difficulty in law which it would be advantageous to have settled by the higher tribunal, or which is only capable of being settled at the highest level. Examples of the latter would be a conflict of precedents from lower jurisdictions, or a need to produce a common doctrine for all parts of the UK in place of a divergence in the precedents observed in different counties.[83]

It's interesting to note that the provisions which regulate the leave to appeal accord a significant margin of discretion to judges; Rule 52.3(6)(b) of the CPR requires "some […] compelling reason why the appeal should be heard", while the Criminal Appeal Act (Section 2) states that the appeal shall be allowed when judges think that "the conviction is unsafe", that is, there are realistic grounds for quashing the decision. Such a discretion allows judges to select cases and it helps them somehow keeping the workload under control.

A similar system is applied also for appeals before the Supreme Court of UK, since it accords the supreme justices an analogous margin of discretion.[84] Before the new Supreme Court was established[85], a permission was needed also for appeals before the House of Lords from courts of England, Wales and Northern Ireland[86], while appeals in civil cases from the Scottish legal system required two advocates to

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[80] See, for civil proceedings, Rule 52.3 of the Civil Procedure Rules and, for criminal proceedings, section 1(1) of the Criminal Appeal Act 1968, as amended by section 1(1) Criminal Appeal Act 1995.

[81] Cf, for example, Rule 52.3(2) of the Civil Procedure Rules.

[82] Cf, for example, Rule 52.3(3) of the Civil Procedure Rules.

[83] N MacCormick & R Summers, *Interpreting Precedents. A Comparative Study* (Aldershot, Brookfield USA, Singapore, Sydney: Dartmouth, Ashgate, 1997), 318. Cf Rule 52.3(6) of the Civil Procedure Rules and section 2 of the Criminal Appeal Act of 1968.

[84] See the Supreme Court Rules 2009 n 1603 (L 17), entered into force on 1 October 2009, Articles 10-17; see also section 2 of the Administration of Justice Act of 1960 and section 13 of the Administration of Justice Act of 1969.

[85] The Supreme Court of the UK was established by Part 3 of the Constitutional Reform Act of 2005, *Acts of the Parliament of the United Kingdom,* 24 March 2005, 3. (Retrieved 2 September 2009). See also Statutory Instrument 2009 n 1604, *The Constitutional Reform Act 2005 (Commencement n 11) Order 2009.*

[86] See the Administration of Justice Act of 1960 Ch 65, Article 1(2)

certify the appeal as suitable.[87] However, the judicial role of the House of Lords as the highest appeal court in the UK has ended by the Constitutional Reform Act of 2005; since 1 October 2009, the Supreme Court of the UK has assumed jurisdiction of last resort on points of law for all civil law cases in the UK and all criminal cases in England, Wales and Northern Ireland.

As for the New York Court of Appeals, also before the five German federal supreme courts appeals are possible in a twofold manner. The first manner consists in appeals being directly admitted by the law. This always applies to criminal cases where courts have no power to select.[88]

In all other cases, appeal depends on an admission by a court (the so-called '*verlassen Berufung zu*'). As for the American and English experiences, the German leave to appeal may be granted by the court of second instance against whose decision the appeal is filed, or directly by the respective federal supreme court; it is so provided, for example, in administrative cases[89], in labor law cases[90], in social law cases[91], and in fiscal cases[92] as well as in many civil cases.[93]

It's not surprising that a system based on a leave to appeal characterizes also the US federal appellate courts as provided by Rules 3 and 4 of the Federal Rules of Appellate Procedure. Unlike the Federal Supreme Court, however, the courts of appeals usually remain in the business of review for errors and do not exercise wide margin of discretion in case selection.

2. Case selection through limited jurisdiction and conformity to precedents

Limiting the court jurisdiction exclusively to the review of questions of law is, generally, a peculiar feature of the European supreme courts that follow the French model.

It must be preliminarily noted that the French *Cour de cassation* was not originally supposed to be a third level of jurisdiction, but rather a Parliament-affiliated organ which supervises and ensures the uniform application (and interpretation) of the law.[94] For this peculiarity, the Court of cassation cannot

[87] A similar procedure was abolished in English cases in 1934 and in Northern Irish cases in 1962.

[88] Cf section 333, Code of Criminal Procedure – Strafprozeßordnung (StPO).

[89] Cf section 132, Code of Administrative Court Procedure – Verwaltungsgerichtsordnung (VwGO).

[90] Cf section 72, Code of Labor Court Procedure – Arbeitsgerichtsgesetz (ArbGG).

[91] Cf section 160, Code of Social Court Procedure – Sozialgerichtsgesetz (SGG).

[92] Cf section 115, Code of Financial Procedure - Finanzgerichtsordnung (FGO).

[93] Cf section 546, Code of Civil Procedure - Zivilprozessordnung (ZPO).

[94] Cadiet (n 66), 297. Cf Article L 411-2 Code de l'organisation judiciaire and Articles 617, 618 and 618-1 Code de procédure civil.

have full jurisdiction over cases brought to its attention and doesn't have the power to check the assessment of facts made by lower courts.

The *Cour* can only say whether judgments are legally acceptable or not; it cannot deal with merits of the case. “Consequently, if the decision is wrong in law, the *Cour de cassation* cannot substitute its own judgment. It must send the case back to a new lower court (usually a different court of appeal) which is to decide the case again, in conformity with the principle of law as found by the Court of cassation”.[95]

The limitation of jurisdiction should constitute a filter by itself to the extent it gives a limited range of causes of action. However, the distinction between issues of law and issues of fact has only an appearance of objectivity, since it has been blurred in practice by policy considerations which has led several scholars to assert that it is not a clear distinction anymore. Practice has indeed shown that the *Cour de cassation* often characterizes an issue as a factual one, although it can be considered as a legal one, solely in order to declare the claim inadmissible.

Moreover, the Court of cassation review is today generally intended as a right of second appeal rather than as an instrument for the clarification of law, although, as already mentioned, the Court was not originally designed with such a purpose.

Beyond the unclear jurisdictional limitation, there is, however, some further weak selective mechanism in the procedure before the French *Cour de cassation*. For instance, if the appeal is inadmissible or is not founded on serious grounds, the case may then be fast-tracked by a streamlined procedure which is called the non-admission procedure. This procedure, which was established by an Act of 25 June 2001, has restored the preliminary review of appeals, albeit in a different form, which existed in civil cases at least until 1947.[96]

However, there are two principal differences. First of all, in the old system a specialized division existed which was called the *Chambre des requêtes* (ie Chamber of Applications) and whose purpose was to rule on the admissibility of appeals before they were examined by the Civil Division. Now each division, which is comprised of a bench of three judges is required to rule on this type of appeal. Secondly, the examination of appeals by the *Chambre des requêtes* was mandatory for all appeals except those in criminal cases whereas now only those appeals that are likely to fall within the scope of the non-admission procedure are considered by these benches.

[95] Ibid.

[96] The Act amended article L 131-6 of the *Code de l’organisation judiciaire.*

So far, it seems that a weak element of discretion has been introduced with the new procedure, allowing, in some sense, the Court to select the cases that deserve to be decided, especially where the review is invoked in the interest of the law.[97] In the context of this tiny margin of discretion, cassation precedents play a significant role in order to determine whether there is a reasonable probability that the impugned decision will be quashed.

Indeed, a recourse in cassation against a decision which was rendered in accordance to the *jurisprudence constante* will be very likely dismissed.[98] For the same purpose, the Conseil d'État had successfully adopted a filtering mechanism which has allowed the supreme administrative court to reduce its workload by 65 per cent.[99]

This screening process has a number of advantages. It is fast and simple and, although it naturally presupposes that a Judge-Rapporteur has carefully examined the case and that the Public Prosecutor's Office has been consulted, the reasons behind decisions of non-admission need not to be given. Moreover, by sparing the legitimacy jurisdiction of unmeritorious cases, the Court of cassation is able to focus on its foremost task which is to draw up case-law based on legal issues claims. A significant number of appeals are processed in this way : 30% in the civil divisions and 35% in the Criminal Division.[100]

The effectiveness of this mechanism and the consistent application of the doctrine of *jurisprudence constante* must have influenced the recent introduction of the concrete check of constitutional compatibility before the *Conseil constitutionnel* (the so-called "*question prioritaire de constitutionnalité*" - priority preliminary ruling).[101] In fact, whereas an abstract check (ie a priori review) has been traditionally allowed on instance of specific constitutional subjects since the Constitution of the Fifth Republic of 4 October 1958, the constitutional reform of 2009 enacted by President Sarcozy

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[97] With regard to the concept of judgment of the Court of cassation in the interest of the law cf Article 618-1 Code de procedure civil.

[98] J-F Weber, *La Cour de cassation*, Les Etudes n.° 5325, nouvelle edition, (Paris: La Documentation Française, 2010).

[99] C Elliott, C Vernon & E Jeanpierre, *French Legal System*, (London: Pearson Longman, 2006), 104-5.

[100] Data available at www.courdecassation.fr (18 May 2015).

[101] Cf *Comité de rèflexion et de proposition sur la modernisation et le rééquilibrage des institutions de la Vème République, Une Vème République plus démocratique*, Paris, 2007 (www.ladocumentationfrancaise.fr); M Guillaume, *La question prioritaire de constitutionnalité*, in Just. et cass., 2010, 1 (www.conseil-constitutionnel.fr) (Marc Guillaume is the Secretary General of the Conseil Constitutionnel). See, furthermore, the collected essays in D Rousseau (dir.) *La question prioritaire de constitutionnalité*, Paris 2010.

made it possible for individual citizens that are party in a trial before any French tribunal to ask for the Council to review the constitutionality of the law that must be applied in the case.[102]

However, the foreseeable new wave of individual instances determined the need to introduce some mechanisms for preventing the *Conseil* from being overwhelmed. For this reason, on one side, the French legislator imposed that the individual instances must be forwarded to the Council exclusively by the Conseil d'État or the *Cour de cassation* and, on the other side, some admissability requirements were established with the purpose to select only the cases that deserve the attention of the Council[103]. Among these requirements there are two particular conditions: a) the absence of a precedent where the Council already declared the contested law compatible with the Constitution, and b) the serious nature of the matter.

In other words, where a question of constitutionality is raised by one of the parties in the context of a first instance trial, the judge in charge of the proceeding should first verify that all the prescribed requirements are present and, then, submit the question to the relative supreme court and issue a stay of the proceeding at his/her attention. The *Conseil d'État* or the *Cour de cassation* are, hence, supposed to check the first instance judge's verification of the requirements and also the newness of the question posed.[104] In case the check of the relative supreme court is positive, the question of constitutionality will be referred to the Constitutional Council.

It is interesting to note, as some scholar highlighted, how the two types of French constitutional review intertwine.[105] In fact, the system, as delineated with the last reform, would not admit to raise a priority preliminary ruling in case an abstract review of the Constitutional Council already "certified" the constitutionality of the legal disposition. However, most of the doctrine agrees that the certified constitutionality of a legal disposition doesn't imply a certified constitutionality of the "norm". This difference seems to be represented in the formulation of the new Art 23-2 where it provides for an exception "in the event of a change of circumstances". What constitutes a change of circumstances for

[102] See new Art 61-1 French Const.

[103] Art 23-1, section 1, «*loi organique n° 2009-1523 du 10 décembre 2009 relative à l'application de l'article 61-1 de la Constitution*».

[104] Cf respectively articles 23-2 and 23-4, Ordinance n 58-1067 constituting an institutional act on the Constitutional council as amended by the *loi organique* n 2009-1523; cf also the relative comment of Guillaume (n 104) 12, 22.

[105] L Fontaine, *Le contrôle de constitutionnalité par voie préjudicielle en France*, Colloque de 16 fèvrier 2009 (www.unicaen.fr); C Amodio, *Au nom de la loi. L'esperienza giuridica francese nel contesto europeo*, (Torino: Giappichelli, 2012), 139.

the purpose of a constitutional review remains uncertain, but it is possible to advance an argument in favor of a new strong role of the evolutive power of constitutional precedents.

Indeed, the Constitutional Council itself has clarified in a 2010 decision that, in contexts of preliminary rulings, it will take into consideration not the abstract meaning of statutory provisions, but rather the effective meaning deriving from the interpretation adopted by a *jurisprudence constante*.[106] In this sense, whereas the effective meaning of the law changes as a consequence of consistent judicial interpretations, a priority preliminary ruling may be admitted even if the Council already declared the law as constitutional. In other words, judicial precedents may be used as parameters to apply the admissibility criteria for the constitutional judgment.

Another system inspired to the French model as it is Italy proved to be less advanced in providing effective filtering mechanisms. Even if the right to appeal before the courts of second instance[107] has always been almost undisputed, the recourse to the Court of cassation had been for a long time a cause of division among scholars. Indeed, what is today the Supreme Court of Italy was born as a Parliament-affiliated organ that was in charge of checking the judicial interpretation of statutes rather than as a dispute settler of last resort. Although the institutional history of the Italian Court of cassation is quite peculiar for reflecting the several problems derived from the process of unification of the State, the parenthood of the French *Cour de cassation* is out of question.[108] However, the importance of the nomophylactic function in the legal system proved to be not sufficient to preserve the original nature of such an important institution.

As a matter of fact, the first Italian Court of cassation was originally instituted for the Kingdom of Sardinia in 1848 by the Albertine Statute, following the model of the French brethren.[109] At that time the nomophylactic function and the pursuit of legal certainty were prevailing features of the Court.

A hundred years later, the Republican constituents marked an irrevocable change setting forth in Article 111 of the Italian Constitution that against decisions pronounced by judicial organs, be them

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[106] Cons. const. decision, 6 October 2010, n 39 and Cons. const. decision 14 October 2010, n 52 joined under the title *QPC et interprétation de la loi*, in www.conseilconstitutionnel.fr.; Cf Amodio (n 105).

[107] The Italian Courts of appeals are called "*Corti d'Appello*". Generally speaking, there is at least one court of appeal for each judicial district that, more or less, corresponds to a Region. See on this point Royal Decree n 12 of 30 January 1941, "*Judicial Organization*" (Head IV, Articles 52-59) as recently amended by the Act n 111 of 30 July 2007.

[108] See on the point, A Valio, *La Corte di Cassazione in Italia* , (London: Forgotten Books. Original work published, 2013 [1879]).

[109] G Di Federico, *La Corte di cassazione: la giustizia come organizzazione,* (Bari: Laterza, 1969).

ordinary or special, the recourse in Cassation for violation of the law is always allowed. In so doing, the Italian Constituents transformed an instrument for assuring the uniform interpretation of the law and the pursuit of legal certainty in an instrument of last resort for dispute resolution. In other words, the recourse to the Court of cassation is protected by the Constitution as an individual right rather than as a guarantee against the uncertainty of law.

In such a context, it's not surprising the difficulty of setting filtering mechanisms to access the Italian jurisdictions. However, some attempts in this direction deserve to be outlined.

In the context of civil procedure, after the extensive reform of 2009, the impugnability before a court of appeals and before the Court of cassation now depends on a preliminary verification of admissibility that substantially consists in a judgment of conformity to the case-law of the Supreme Court. With regard to the Court of Appeal, the admissibility requirement is explicitly provided by Articles 348bis[110] and 348ter[111] cpc and, with regard to the Court of cassation, the requirement is provided by Art. 360bis cpc.[112] In other words, those who want to challenge a judicial decision are required to allege the unreasonable departure from the case-law of the Supreme Court, and such a requirement is sanctioned with a pronouncement of inadmissibility of the case.

It is true, though, there is no similar positive provision in the contexts of criminal law or public administrative law, even if a nomophylactic function is explicitly attributed to both the United Criminal Sections of the Court of cassation[113] and the Plenary Assembly of the Council of State.[114]

This difference, however, may be due to the limit deriving from statutory reservations provided by the Constitution at Articles 13, section 2, 23, 25, section 2, and 28, by which the preeminence of the public interests pursued by the criminal and the administrative law emerges over the private

[110] Art 348bis cpc: Appeal inadmissibility. Out of the cases where the inadmissibility or the prosecutability must be declared with sentence, the appeal is declared inadmissible by the competent judge when it has no reasonable probability to be upheld.

[111] Art 348ter, section 1, cpc: Pronouncement on appeal inadmissibility**.** At the hearing provided by Art. 350 the judge, before the prosecution of the case, once examined the opinion of the parties, declares the appeal inadmissible on the base of Art 348-bis, section 1, with ordinance strictly motivated with regard to factual elements deriving from the acts of the case and to consistent judicial precedents. [...].

[112] Art 360-bis cpc: Recourse inadmissibility. The recourse is inadmissible: 1) when the contested sentence decided the legal issues consistently with the case law of the Court and the examination of the reasons doesn't show any element to confirm or to overturn the Court's jurisprudence: 2) when the action for the violation of the due process principles is manifestly not founded.

[113] See Art 618, Code of Criminal Procedure.

[114] See Art 45, Royal Decree n 1054 of 26 June 1924.

interests.[115] This interpretation found the favor of the Italian Constitutional Court in the decision n 230/2012 where the Judges held that the principle of retroactive application of new norms that are more favorable for the subject who was previously convicted by a court of law is not applicable if the normative change derived from judicial interpretation. This limitation of the general principle is justified, in the Court's opinion, on the base of the constitutional provision (Article 25) under which criminal conduct can be sanctioned exclusively by statute law. For this reason, a change of the sanction caused by a new judicial interpretation cannot amount to *jus superveniens*.

Notwithstanding that, the use of the conformity to case-law as a reliable instrument to filter out ungrounded cases seems a quite common feature in European judicial systems. Beyond France and Italy also Spain and Germany reformed the respective civil procedures introducing filtering mechanisms based on precedents with the explicit aim of reducing judicial workload and favoring consistency in the application of the law.

3. The Spanish «*doctrina legal*» and the German requirement of «fundamental importance» of the issue.

With regard to the Spanish system this change emerges clearly in the new cassation proceedings (*casación*). After the reform of 2000 a cassation claim can only be brought before the supreme bench if specific criteria are satisfied: a) the value of the claim must be above € 150.000, and b) the case submitted to the Superior Court must be of interest, either because the judgment of the lower court deviates from the established case-law of the Supreme Court, or because a substantive legal rule that entered into force since less than five years, has supposedly been misunderstood by the lower court.[116]

In other words, decisions that do not deviate from the cassation case-law may not be taken into consideration for review, while controversies of small value are clearly barred before the Court of cassation. It must be said, however, that the concept of «conformity to cassation case-law» did not appear from the beginning as an objective criteria.

The history of this rule is not without interest. A Royal Decree of 1838 permitted annulment appeals to the Supreme Court of Spain not only for violations of statute law but also for deviation from the *doctrina legal*, redefined as “doctrine established by the Tribunals” in the Code of Civil Procedure of

[115] Cf C Schmitt, *Constitutional Theory*, trans. by J Seitzer (Durham/London: Duke University Press, 2008, originally published in German as *Verfassungslehre*, Munich/Leipzig: Duncker und Humblot, 1928), 213

[116] See Articles 477, sections 2 and 3, and 483, section 2, n. 3), new Code of Civil Procedure (Ley n 1/2000, of 7 January 2000, de *Enjuiciamiento Civil*).

1855.[117] The Supreme Court interpreted these terms to mean rules laid down by two separate decisions of that Court, but not of inferior tribunals. Since Spanish civil law was not codified until 1889, this rule was accepted gratefully by the legal system as supplying a means of legal certainty not obtainable from the Legislature.[118]

The 1984 revision of the Code of Civil Procedure substituted the term *jurisprudencia* to *doctrina legal* as a ground for appeal to the Supreme Court.[119] However, Manuel Serra Dominguez[120] has deplored this displacement of a “genuinely Spanish term” since the concept of “*doctrina*” better represented, in the commentator's opinion, the principle of law underlying the cassation decision, avoiding to recognize the Supreme Court as a law-maker. In other words, the *doctrina legal* was supposed to represent a system of principles of law recognized and consistently applied by the apical court, while the *jurisprudentia* unmistakably represents a set of judicial pronouncements. Subsequently, the more recent *Ley* n 1/2000 on the *Enjuiciamiento Civil* allowed the scholars to reach a compromise through the term “*doctrina jurisprudencial del Tribunal Supremo*”.

Following this same path, the reformed version of Article 885 of the Spanish Criminal Procedure Act confers on the Supreme Court the power to reject those appeals which manifestly lack any foundation and those substantially equal to others already rejected.

In Germany the grounds on which an appeal has to be admitted are indicated by the codes of procedure of the five federal supreme courts. The most important and interesting grounds are[121] that a) the case must be of fundamental importance in principle (*grundsätzliche Bedeutung*), or b) the decision does not follow a precedent set by the respective supreme federal court, or the Common Panel of the Supreme Federal Courts, or the Federal Constitutional Court.

The term “fundamental importance” is interpreted to require that the case offers an opportunity to formulate a general legal thought that furthers the unity of jurisdiction for the future and is relevant to the further development of the law.[122]

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[117] R Schlesinger et al., *Comparative Law. Cases-Text-Materials*, , Sixth Ed. (New York: Foundation Press, 1998), 668.

[118] A Serrano, *Die “Doctrina legal” des spanischen “Tribunal Supremo” in der rechtshistorischen Analyse des Justizbegriffs*, (1989) 16 Ius Commune 219, 219-20 , 241.

[119] Cf Article 1692(5) of the Code of Civil Procedure. See also V Cortes (ed.), *Comentarios a la Riforma del ley de Enjusticiamento Civil* , 828, 852 (Madrid: Tecnos, 1985).

[120] Ibid.

[121] Cf sections 546 ZPO, 132 VwGO, 72 ArbGG, 160 SGG, 115 FGO.

[122] See on this point, BVerfGE 13, 90, (91).

This rather complex model of admission give the German federal supreme courts a considerable power to select the cases they will decide, but it is still less discretional than the US Supreme Court power to grant certiorari.

Indeed, the US Court gives full consideration to a very small fraction of the cases it has authority to review. With many important categories of cases, the party seeking Supreme Court review does so by "petitioning" the Court to issue a "writ of certiorari".[123] If the Court decides to review one or more issues in such a case, it grants certiorari. While a decision to deny certiorari let the lower court's ruling stand, it does not constitute a decision by the Supreme Court on any of the legal issues raised by the case. Rule 10 of the Supreme Court Rules lists some of the considerations that may lead the Court to grant certiorari, but the decision to grant or deny certiorari remain basically discretionary. Under long-standing internal Court practice, if four justices favor granting a petition for certiorari, it will be granted.

The certiorari system still represents one of the most effective methods for selecting cases to decide before a supreme court in order to clarify an important issue of law without congesting the bench. The Federal Courts Study Committee encouraged further study of a system of certiorari also for the American courts of appeals in order to reduce appeal cases, but characterized the option as one of last resort.

In fact, this system of summary proceedings, diminished proceedings, and lack of written opinion already engenders concern and disapproval, so it is unlikely to be made more forthright and public.[124] Such a system, while providing a substantial barrier to appellate review and lessening the overall court burden, does so "at a price to litigants in the quality of appellate justice which most Americans and their lawyers would or should be unwilling to bear".[125]

III. CONCLUSIONS: A NEW MODEL OF JUDICIAL PROCESS

What emerges from the present study is a profound world-wide metamorphosis of the judicial process. During the 90's Prof. Cappelletti already preconized this metamorphosis as a "justice revolution".[126] New kinds of adjudication, new types of procedure, and indeed new roles and

[123] See, eg, 28 USC sections 1254, 1257, 2350. It must be noted that some state appeals courts - eg, Ala., Ark., Colo., Conn., Fla., Ga., La., N.J. - employ the same terminology.

[124] See Cleveland (n 18) 85.

[125] GC Lilly & A Scalia, *Appellate Justice: A Crisis in Virginia?*, (1971) 57 VaLRev 3, 12–14.

[126] See Cappelletti (n 2).

responsibilities for judges, have emerged as a consequence of the development of the Welfare Constitutional State.

This world-wide transformation, however, has posed a problem of sustainability of the justice service as one of the several expressions of State monopoly. Indeed, also this bastion of the twentieth century conception of the State has proved to be fallen. The impossibility to allocate the wildly increased demand for justice within the State courtrooms required to review the justice systems under a different perspective. Budgetary issues and the duty to comply with the due process standards have made unreasonable delay and too high costs of access to justice unacceptable.

For these reasons governments around the world have undertaken vast reforms of procedural law that have progressively and eventually changed the main features of the traditional judicial process. Some general common trends emerged in the present analysis: a) hybridization of adversarial and inquisitorial judicial systems towards a collaborative case-management by the judge in accord with the parties; 2) standardization and concentration of the proceedings around a main hearing where the parties should disclose all of their argumentations; 3) availability of an alternative dispute resolution framework that includes mediation and arbitration as means to solve cases outside the court system; 4) provision of objective criteria for limiting access to a full examination of the case on appeal such as the conformity to the established case-law.

These trends are present, more or less, in all the systems taken into consideration. Putting these features into perspective, the new portrait of the judicial process imposes to abandon the traditional categories that belong to the past century and to cast a new constitutional light on procedural law. In fact, even if these issues are not frequently the object of analysis by the constitutional law doctrine, the background rights to speedy trial and to effective judicial protection permeate the constitutional jurisprudence on due process.

Indeed, constitutional courts around the world do not tolerate that lack of resources or inefficient organizations justify to make a mockery of the constitutional rights. Taking justice seriously means providing a sustainable system of dispute settlement that satisfy the demand of justice without jeopardizing the budgetary reasons of the government. In order to achieve this goal the judge should be allowed to plan the case development together with the parties so to better allocate the court resources (eg time, experts, clerks, etc) and, at the same time, he/she should be put in the condition not to waste an unreasonable amount of time trying to interpret cryptic or contradictory legislation.

Moreover, the parties should be prevented from carrying out dilatory strategies uncovering their "cards" as soon as possible. Indeed, the justice system must be protected from temerarious claims intended to post-pone as much as possible the execution of the first judicial pronouncement. Otherwise the fundamental due process guarantees become opportunities for rights abuse in the interest of the wrongdoer. In this sense the right to appeal cannot be configured as an absolute right and must be balanced with the need to preclude public resources from the protection of unmeritorious interests.

However, even within the meritorious claims the court system may not be sufficient to satisfy efficiently the demand. This is why the need to bring back some controversies to private walls became a public policy. In order to achieve this goal, governments have tried to find ways for incentivizing alternative means of dispute resolution transforming judicial parties in negotiators.

Private providers of mediation services started to make mediation more easily accessible for the public in the US since the late 1970s and in Europe from the 1980s onwards. Disputants in the US and EU have certainly welcomed mediation services in some areas (particularly in family/divorce) but certainly not in all areas of dispute. A trend has subsequently emerged for Justice Departments, both in the US and the EU, to establish schemes empowering judges or other functionaries of the court to refer litigants who had already reached the doorsteps of the court back to mediators. Where such referrals were given a mandatory character these schemes became known as "court-ordered mediation". The wider concept of "court-annexed" or "court-encouraged" mediation refers to schemes where referral to the mediator is either mandatory or voluntary.

Again, following the American experience, the interest in court-encouraged mediation first became visible in north-western Europe. In England, the first of such schemes emerged in 1993, at the initiative of the judiciary.[127] The new Civil Procedure Rules drafted by the Woolf committee standardized court-referred mediation in 1999, allowing the courts to penalize an uncooperative disputant with a cost award – an option that has actually been used several times by now. The French approach doesn't seem so hard to the extent it does not sanction *financially* the parties who would not be able to conclude a voluntary arrangement of their case. Here the carrot is preferred to the stick.

However, as emerged in this study, more compulsion leads to a smaller percentage of cases being settled through mediation. This finding is in line with the original concept of mediation as a consensual process, whereby the parties themselves remain the owners of their dispute. Moreover,

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[127] A de Roo, 'Some Reflections on recent ADR Developments in Great Britain and the Netherlands', in A Ishikawa & T Mikami, (eds.), *ADR* (Tokyo: Keio University Press, 1997), 217.

disputants are generally less willing to cooperate in a mediation effort if they have to pay for the mediator's services. This, indeed, may explain the limited effects of the newly introduced mediation frameworks in Italy, France and Spain as opposed to the success obtained in the Netherlands.

This general policy of allocating justice demand seems to ignore the traditional civil law/common law divide. More than twenty years ago, the general rapporteurs of the World Conference of Procedural Law could still maintain that in the common law tradition, a mediatory approach could only be institutionalized outside the courts in view of the traditional role of the common law judge as a passive trial umpire, whereas in the civil law approach the inquisitorial judge himself would be less hesitant to assume a mediatory role.[128] This distinction seems to be no longer valid for the process of hybridization already mentioned.

Common law judges have now been turned into active managers, and on the continent, judges are expected to refer to outside mediators too (although their traditional powers to hint at parties coming to an amicable settlement have not yet been taken away from them).

From a constitutional law perspective, any consideration about due process rights should be pondered with these procedural issues. It's not of little importance, indeed, that some of the trends emerged in the present study have also arisen the attention of the European institutions. This is evidence that it's not about a simple reform of the rules of procedure but it constitutes a radical change in the conception of the justice service. Far from the categories of the twentieth century, the new conception is based on the principle of subsidiarity and on a cooperative and selective method that takes into consideration the reasons of well-functioning of the system.[129]

Reasons of judicial system preservation are also at the base of the new role of case-law. As emerged in the present study, judicial precedents are increasingly used to maintain the system coherent and to quickly decide cases that appear *prima facie* correctly resolved. Today, analyzing the authority of judicial precedents without taking into consideration the procedural profile would be misleading.

As was correctly observed by the former Attorney General Jacob, judicial precedents are not technically sources of law; they are reliable instruments for providing legal information.[130] To this

[128] E Blankenburg & Y Taniguchi, 'Informal Alternatives to and within Formal Procedures', in W Wedekind, (ed.), *Justice and Efficiency* (Deventer: Kluwer, 1989) 335.

[129] This disenchanted and concrete perspective upon the instruments for guaranteeing rights was inspired by the approach of R Dworkin, *Taking Rights Seriously*, (Cambridge, MA: Harvard University Press, 1977).

[130] M Jacob, *Precedents and Case-Based Reasoning in the European Court of Justice*. *Unfinished Business*, (Cambridge: Cambridge University Press, 2014).

extent, case-law is, indeed, a very useful tool for judges in the vast majority of - if not all - the judicial systems analyzed.

This new life for the role of jurisprudence has found many confirmations in systems of civil law tradition such as France, Spain, Germany and Italy. Thus, also under this perspective, the traditional common law/civil law divide seems to be inadequate. Indulging longer on the debate about judicial decisions as sources of law turns out to be nothing else than a waste of time if we take justice seriously.

The very first question behind this research was «Can we afford rights beyond the enforcement resources?». Indeed, it's not just an issue of welfare standards, but an aware consideration that rights without an efficient judiciary are just words.

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