Essays

The Performance of the Italian Civil Justice System: An Empirical Assessment*

Remo Caponi**

Abstract

The unreasonable length of Italian civil proceedings goes on filling pages of newspapers and magazines. According to some authoritative views, the inefficiency of the civil justice system helps explain why the Italian model of legislation and scholarship in civil procedure is not as influential on the European scene as it was in the past. Interestingly enough, a nearly diametrically opposed thesis has also been advanced, according to which the Italian procedural law and mainstream scholarship in civil procedure lack a clear, up-to-date, principle-oriented and comprehensive approach towards problems and challenges that contemporary civil justice systems face today. Such an outdated and overly complicated approach might contribute to the inefficiency of the Italian system of civil justice. The Italian Law Journal, which aims to both spread knowledge (and criticism) of the Italian legal system and foster international debate among lawyers of different traditions, may be an appropriate venue for deepening our understanding of the current performance of the Italian civil justice system. It may, in particular, assist us in ascertaining the major causes for its inefficiencies, with a view to assessing (in a subsequent article) whether the prevailing way of thinking of legal scholars may, in the end, exacerbate the relevant problems.

I. Introduction

When it comes to the features of Italian civil procedure that are best known abroad, its most powerful device comes immediately to mind: the 'Italian Torpedo'.

In 1997 a lawyer, Mario Franzosi, suggested how ruthless litigants could turn the undue delay of the ordinary civil proceedings in Italy to their advantage:

* The research leading to this contribution has received funding in the framework of the research project of national interest (PRIN) 2012 (2012SAM3KM) on Codification of EU Administrative Procedures, financed by the Italian Ministry of the University (coordinator Prof Jacques Ziller, University of Pavia). I am very grateful to Rónán Condon, research associate at the European University Institute (EUI), for the language and stylistic revision and valuable comments on an earlier draft of this article. All errors are mine.

** Full Professor of Civil Procedure, University of Florence, School of Law.

> 'And here comes the slow-moving ship. (...) If an action for declaration of non-infringement is started before a slow-moving Italian court (for obtaining a declaration that there is no violation of patent registered in Italy and/or in other European countries), all the other European judges must decline jurisdiction on their own motion until the Italian case is decided. And since an Italian case is decided when the three degrees of jurisdiction are exhausted (first instance, appeal and second appeal), this may take an outrageous length of time. During this time, the enforcement of the intellectual property right would be paralyzed. (...) The possibility of jeopardizing the system with an action for obtaining a declaration of non-infringement, in a slow-moving country, of a patent registered in various European countries is a serious challenge to the system of the enforcement of intellectual property. To continue to use the maritime analogy, the Italian torpedo could pose a real threat to an organized convoy.'[1]

Although Italian torpedoes have been somewhat disarmed by the recast Brussels Regulation, at least in the context of exclusive jurisdiction clauses,[2] the unreasonable length of Italian civil proceedings goes on filling pages of newspapers[3] and magazines.[4]

According to some authoritative views, the inefficiency of the civil justice system helps explain why the Italian model of legislation and scholarship in civil procedure is not as influential on the European scene as it was in the past.[5]

Interestingly enough, a nearly diametrically opposed thesis has also been advanced, according to which the Italian procedural law and mainstream scholarship in civil procedure lack a clear, up-to-date, principle-oriented and comprehensive approach towards problems and challenges that contemporary civil justice systems face today. Such an outdated and overly complicated approach might contribute to the

[1] M. Franzosi, 'Worldwide Patent Litigation and the Italian Torpedo' *European Intellectual Property Review*, 382, 384 (1997).

[2] See Art 31, para 2 European Parliament and Council Regulation (EU) 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

[3] See R. Scammell, 'Busy Italian judge defers case until 2019' *The Guardian* online, 4 January 2016, available at http://www.theguardian.com/world/2016/jan/04/busy-italian-judge-defers-case-2019-taranto (last visited 24 May 2016).

[4] 'The wheels of justice grind slow' *The Economist*, 20 February 2016, 46.

[5] V. Varano, 'Il diritto processuale civile italiano in Europa', in M. Bussani ed, *Il diritto italiano in Europa (1861-2014). Scienza, giurisprudenza, legislazione. Annuario di diritto comparato e di studi legislativi* (Napoli: Edizioni Scientifiche italiane, 2014), 125, 127.

inefficiency of the Italian system of civil justice.[6]

The Italian Law Journal, which aims to both spread knowledge (and criticism) of the Italian legal system and foster international debate among lawyers of different traditions, may be an appropriate venue for deepening our understanding of the current performance of the Italian civil justice system.[7] It may, in particular, assist us in ascertaining the major causes for its inefficiencies, with a view to assessing (in a subsequent article) whether the prevailing way of thinking of legal scholars may, in the end, exacerbate the relevant problems.

II. The Current Performance of the Italian System of Civil Justice

1. The Use of Quantitative Indicators

It has become a commonplace that the Italian system of civil justice is inefficient, largely because of the huge backlog of cases before courts and undue delays in ordinary civil proceedings.[8]

To assess the current performance of the Italian system one has to use some quantitative indicators, including the number of judges and practitioners, the flow of proceedings, the clearance rate, the disposition time, the litigation rate, et cetera.

The clearance rate can be used to ascertain whether courts are keeping abreast of the number of incoming cases without, thereby, increasing their backlog.[9] The clearance rate, expressed as a percentage, is obtained when the number of resolved cases is divided by the number of incoming cases

[6] See R. Stürner, 'Die Rolle des dogmatischen Denkens im Zivilprozessrecht' *Zeitschrift für Zivilprozess*, 271, 297, fn 139 (2014).

[7] For further remarks on the topic dealt with in the subsequent paragraph II, see R. Caponi, 'European Minimum Standards for Courts. Independence, Specialization, Efficiency. A Glance from Italy', in C. Althammer and M. Weller eds, *Europäische Mindeststandards für Spruchkörper* (Tübingen: Mohr-Siebeck, 2016) forthcoming.

[8] For Italian readers: 'ordinary proceedings' refers to proceedings encompassing a *cognizione piena*, a plenary assessment on the issues of fact and law of the dispute.

[9] See European Commission for the Efficiency of Justice (CEPEJ), 'Report on European Judicial Systems. Efficiency and Quality of Justice', 2014 Edition, 2012 Data, 190, available at http://www.coe.int/t/dghl/cooperation/cepej/evaluation/2014/Rapport_2014_en.pdf (last visited 24 May 2016): 'A clearance rate close to 100% indicates the ability of the court or of a judicial system to resolve more or less as many cases as the number of incoming cases within the given time period. A clearance rate above 100% indicates the ability of the system to resolve more cases than received, thus reducing any potential backlog. Finally, if the number of incoming cases is higher than the number of resolved cases, the clearance rate will fall below 100%. When a clearance rate goes below 100%, the number of unresolved cases at the end of a reporting period (backlog) will rise'.

and the result is multiplied by one hundred.

Moreover, the length of proceedings (or disposition time indicator) can provide further insight into how courts manage their flow of cases. This indicator, expressed in days, is obtained when the number of unresolved cases at the end of a period (normally a year) is divided by the number of resolved cases in the same period and the result is multiplied by three hundred sixty-five (days).[10]

One should be aware, of course, that using indicators is a somewhat risky business, as the researcher (especially the scholar in civil procedure working, so to speak, in a stand-alone position) has no control over its methodological premises. However, one has to 'step in', as it were, as the use of indicators for evaluating the performance of judicial systems has rapidly spread since the beginning of the twenty-first century. While it is quite possible that cultural factors difficult to reduce to quantitative data are the single most important determinant of the performance of legal systems, quantitative analysis is helpful insofar as it highlights key areas in which the legal system is under-performing and indicates where resources should be allocated.

In the subsequent subparagraphs, I take stock of several statistical data concerning the number of judges, the number of civil cases in the courts of first and second instance, the numbers of lawyers, and the litigation rates in Italy.

2. Number of Judges

[10] See ibid 190: 'A case turnover ratio and a disposition time indicator provide further insight into how a judicial system manages its flow of cases. Generally, a case turnover ratio and disposition time compares the number of resolved cases during the observed period and the number of unresolved cases at the end of the observed period. The ratios measure how quickly a judicial system (or a court) "turns over" the cases received – that is, how long it takes for a type of case to be resolved. The relationship between the number of cases that are resolved during an observed period and the number of unresolved cases at the end of the period can be expressed in two ways. The first measures the share of resolved cases from the same category in the remaining backlog (...). The second possibility, which relies on the first data, determines the number of days necessary for a pending case to be solved in court. This prospective indicator (...) is an indicator of timeframe, more precisely of disposition time, which is calculated by dividing 365 days in a year by the case turnover ratio (...). It needs to be mentioned that this ratio does not provide a clear estimate of the average time needed to process each case'.

A slightly different formula used to calculate delay is $(C1 + C2): (E + U) = g$. C1 is the number of proceedings pending at the beginning of a period (normally, a year), C2 is the number of proceedings pending at the beginning of the following period, E is the number of cases filed during the year, U is the number of cases disposed of during the year, and finally g is the average duration in years and fractions of years.

The number of career magistrates, as fixed by statute,[11] is ten thousand one hundred fifty-one: six thousand three hundred seventy-nine judges, two thousand one hundred fifty-seven prosecutors (among them, circa one hundred fifty are on temporary leave of absence to perform other duties, eg at the Ministry of Justice, and three hundred fifty-four are trainees). There are about two thousand seven hundred sixty-five career judges examining civil cases at first and second instance.[12]

In addition to career magistrates, there is an even higher number of honorary magistrates.[13] They have a legal education (mostly, they are practitioners) and are managed by the High Council of the Judiciary (*Consiglio Superiore della Magistratura*, CSM), but their status and remuneration is quite different from that of career magistrates. There are several types of honorary judges; among whom are those dealing more intensively with civil cases including one thousand eight hundred eighty justices of the peace, (*giudici di pace* who also deal with small minor criminal offences),[14] two thousand one hundred fifty-six honorary judges in the courts of general jurisdiction (*tribunali*), one hundred seventeen honorary judges in the courts of appeal, and one thousand ninety-six honorary judges in the juvenile courts.[15]

The trend towards the deployment of an increasing number of honorary judges is grounded in the need to reduce the costs of the administration of justice, but the differences of status and pay between honorary and career judges has caused tensions that need to be reconciled by the legislator.[16] Historical statistics, concerning the first decades of the twentieth century, show that the Italian justice system performed far better than today, when honorary judges adjudicated the largest number of civil disputes.[17]

3. Number of Proceedings at First and Second Instance

It is worth comparing the number of judges examining, exclusively or mainly, civil cases (two thousand seven hundred sixty-five career judges,

[11] Currently, legge 13 November 2008 no 181.

[12] This number emerges from a survey conducted in 2014 by the High Council of the Judiciary, available at www.csm.it. In reality, the number of career judges will be a little higher, as a few courts did not answer the questionnaire sent around by the High Council.

[13] Art 106, para 2 and Art 116 Constitution.

[14] For this number of currently working justices of the peace, see Ministero della giustizia, 'Piano della performance 2015-2017', 11, available at https://www.giustizia.it/giustizia/it/contentview.wp?previsiousPage=mg_1_8_1&contentId=ART1169110 (last visited 24 May 2016).

[15] These data are available at www.csm.it.

[16] See the draft law 2015 no 1738 currently pending in Parliament.

[17] See A. Proto Pisani, 'Che fare della Magistratura onoraria?' *Foro italiano*, V, 364 (2015).

one thousand eight hundred eighty justices of the peace, two thousand one hundred fifty-six honorary judges in the *tribunali*, and one hundred seventeen honorary judges in the courts of appeal) with the number of civil cases before the courts of first and second instance. The notion of 'civil cases' refers to all ordinary proceedings (including labour disputes, family matters, bankruptcy and insolvency, at first and second instance), summary proceedings (mainly issuing payment orders and provisional measures), and enforcement proceedings, unless otherwise indicated.[18]

Consider the statistics from 2013, provided by the Italian Ministry of Justice.[19] Concerning the justices of the peace, they were charged with some one million three hundred seventy-two thousand four hundred twenty-one new cases; one million four hundred fifteen thousand twenty cases were resolved, while one million two hundred ninety-six thousand seventy-five cases were pending at the end of 2013. Accordingly, the justices of the peace had a clearance rate of one hundred three, such that the backlog of cases was decreasing relative to the previous year. The average disposition time amounted to three hundred thirty-four days. The justices of the peace disposed of an average of seven hundred fifty-two cases per capita (one million four hundred fifteen thousand twenty divided by one thousand eight hundred eighty), without distinguishing between ordinary proceedings and special proceedings (mainly payment orders).

In the ordinary courts of general jurisdiction (*tribunali*), there were two million eight hundred thirteen thousand sixty-eight new lodgements, two million eight hundred ninety-nine thousand two hundred forty-seven resolved cases, and three million two hundred sixty-five thousand eight hundred seventy-five cases pending at the end of 2013. Accordingly, the clearance rate was one hundred three. The average disposition time, taking into account only the main body of ordinary proceedings (ordinary proceedings, proceedings regarding labour disputes, and proceedings regarding social security benefits), amounted to nine hundred twenty-three days (one million eight hundred thirty-seven thousand five hundred forty cases pending at the end of 2013, divided by seven hundred twenty-six thousand six hundred thirty-eight resolved cases, and the result multiplied by three hundred sixty-five).[20]

In the courts of appeal, there were one hundred twenty-three thousand two hundred forty-one new cases, one hundred sixty-four thousand five hundred seventy-seven resolved cases, and three hundred ninety-seven

[18] For detailed statistics distinguishing among the different types of proceedings, see Ministero della giustizia, n 14 above, 15.

[19] Ibid.

[20] For these data on ordinary proceedings, ibid.

thousand five hundred thirty-six cases pending at the end of 2013. Accordingly, the clearance rate was one hundred thirty-three, such that the backlog of cases in the courts of appeal is substantially decreasing. The average disposition time amounted to eight hundred eighty-one days.

4. Number of Judges and Number of Resolved Cases

Career judges as well as lay judges in the *tribunali* and in the courts of appeals (two thousand seven hundred sixty-five career judges, two thousand one hundred fifty-six honorary judges in the *tribunali*, one hundred seventeen honorary judges in the courts of appeal) disposed of an average of one hundred seventy-six ordinary proceedings per capita in 2013 (seven hundred twenty-six thousand six hundred thirty-eight resolved cases in the *tribunali*, one hundred sixty-four thousand five hundred seventy-seven resolved cases in the courts of appeal).[21] To these proceedings one should add, as far as the *tribunali* are concerned: bankruptcy proceedings, proceedings in family matters, executory proceedings, special proceedings (mainly payment orders and provisional measures).

5. The Overload of the Supreme Court

The heavy workload of the *Corte di Cassazione* has been a serious problem for a number of decades. The Italian Supreme Court decides cases in civil and criminal matters, and is charged with the task of reviewing appellate judgments on points of law[22] and ensuring 'the exact observance and the uniform interpretation of the law'.[23]

The Italian Constitution provides for a right to review by the *Corte di Cassazione* on grounds of violation of law.[24] Due to the extensive use of this guarantee, the number of appeals to the *Corte di Cassazione* has increased dramatically in the last decades. Just over three thousand appeals were submitted annually during the 1960s. In the 1980s the number had grown to more than ten thousand in civil cases only.[25] In 2013, there were twenty-nine thousand ninety-one civil cases lodged to the Court for review. In the same year the Court disposed of thirty thousand one hundred seventy-nine civil cases. At the end of the year there were

[21] I could not distinguish between courts in first and second instance, as I had at my disposal only the aggregate number of two thousand seven hundred sixty-five career judges dealing with civil cases in the *tribunali* and *corti di appello*.

[22] See Art 360 code of civil procedure. See M. De Cristofaro and N. Trocker eds, *Civil Justice in Italy* (Nagoya: Nagoya University, 2010), 24.

[23] Art 65 regio decreto 30 January 1941 no 12, law on judicial organisation (*ordinamento giudiziario*).

[24] See Art 111, para 7 Constitution.

[25] See M. De Cristofaro and N. Trocker eds, n 22 above, 26, fn 24.

ninety-eight thousand six hundred ninety civil cases pending![26]

The clearance rate of the Supreme Court for 2013 was one hundred three, meaning that the *Corte di Cassazione* is decreasing its backlog. As to the length of proceedings, in 2013 the disposition time by the Supreme Courts amounted to slightly more than three years and three months (one thousand one hundred ninety-three days).

Court delays are not the only consequence of the heavy workload and the flood of applications. The large numbers of decisions require a large number of judges: in 2013 there were one hundred twenty-one civil judges who decided approximately two hundred forty cases per capita:[27] subtracting thirty days of holidays and fifty-two weekends from three hundred sixty-five days, each judge of the Supreme Court writes slightly more than one judgment per day. Thus, conflicting judgments are unavoidable and, as such, the *Corte di Cassazione* has been for decades unable to guarantee the consistency and predictability of its decisions, which makes the uniform interpretation of the law a difficult task to be achieved:[28] 'Instead, the court has become a sort of judicial supermarket, wherein lawyers can often be sure to find any precedent they need to plead the case of their client',[29] which increases legal uncertainty and the litigation rate in the Italian legal system.

In the last decade certain 'internal' procedural devices were introduced to reduce the workload of the Court with modest results.[30] The best solution to tackle this problem would be to filter access to the Court in order to reduce the number of appeals only to those having a great significance, analogous to how access to the German Supreme Court is regulated.[31] This reform proposal is strongly opposed by the bar, on the

[26] See Ministero della giustizia, n 14 above, 15.

[27] See Corte suprema di cassazione, 'Relazione sull'amministrazione della giustizia nell'anno 2014', 61, available at http://www.cortedicassazione.it/cassazione-resources/resources/cms/documents/Relazione_amministrazione_Giustizia_2014_del_Primo_Presidente_Giorgio_Santacroce.pdf (last visited 24 May 2016).

[28] See M. De Cristofaro and N. Trocker eds, n 22 above, 26.

[29] S. Chiarloni, 'Civil Justice and its Paradoxes: An Italian Perspective', in A.A.S. Zuckerman et al eds, *Civil Justice in Crisis. Comparative Perspectives of Civil Procedure* (Oxford: Oxford University Press, 1999), 263, 267.

[30] See from the newest reform of the Art 360, no 5 Code of Civil Procedure (legge 7 August 2012 no 134); Art 360-*bis* Code of Civil Procedure (legge 18 June 2009 no 69, also introducing the Sixth Section of the Supreme Court 'Filter'); Art 366-*bis* Code of Civil Procedure (introducing in 2006 a new requirement of the application for review, the so called *quesito di diritto*, query on point of law, abolished in 2009); Arts 375, 380-*bis*, 380-*ter* Code of Civil Procedure (legge 24 March 2001 no 89, regulating an accelerated proceedings).

[31] Pointing in that direction, see the results of the General Assembly of the Supreme Court, held in June 2015, suggesting to Parliament and government to amend Art 111

basis that the constitutional right to review by the *Corte di Cassazione* implies an unrestricted access to courts up to the Supreme Court.

6. Backlog of Cases

Finally, examining all adjudicating bodies (justices of the peace, *tribunali*, courts of appeal, *Corte di Cassazione*) as well as all civil cases, there were some four million three hundred eighty-eight thousand five hundred ninety-one new proceedings initiated, four million five hundred sixty-nine thousand three hundred thirty-two resolved cases, and five million one hundred fifty-five thousand ten cases pending at the end of 2013 (with a four per cent decrease of backlogs, compared to 2012).

The number of cases pending at the end of year has steadily decreased in the last four years, with an average decrease of some five per cent per year. Of course, strictly speaking not all cases pending are delayed, because one has to subtract from the amount cases pending those whose duration is no longer than the 'reasonable' length.[32]

7. Average Performance of Judges as a Cause of Inefficiency?

In the light of these statistics, one can exclude that the average performance of Italian judges plays the key role in causing the unreasonable length of ordinary civil proceedings. This finding is confirmed by the 2016 European Union (EU) Justice Scoreboard, which states that the Italian rate of resolving civil and commercial litigation at first instance (clearance rate) is the second best in Europe (after Luxembourg).[33]

Constitution, by way of limiting the admissibility of appeals to the *Corte di Cassazione* in civil matters to cases in which this is needed in order to formulate 'legal principles of general validity', available at http://www.cortedicassazione.it/cassazione-resources/resources/cms/documents/20150625_DocumentoAssembleaGenerale.pdf (last visited 24 May 2016).

[32] The problem of assessing the reasonable length of ordinary civil proceedings in Italy cannot be addressed here. At any rate, the level of delay has become clearly unreasonable in many cases in Italy, giving rise to many complaints to the European Court of Human Rights for violation of Art 6, para 1 European Convention on Human Rights. To curb the number of complaints to the European Court, a law was passed in 2001 (legge 24 March 2001 no 89) and amended in 2012 and 2013 which entitles those who suffered damages from the undue delay of proceedings to claim monetary compensation. It should be kept in mind that the compensation may be claimed only when the duration of proceedings is over three years (in first instance).

[33] See '2016 EU Justice Scoreboard', figure no 8, available at http://ec.europa.eu/justice/effective-justice/files/justice_scoreboard_2016_en.pdf (last visited 24 May 2016) where one can find the clearance rates of 2010, 2012, 2013, and 2014. The extraordinary good performance in 2012 can be explained by a significant decrease in the number of cases initiated, particularly in the years 2010 and 2011, due both to the increase of court taxes (*contributo unificato*) that litigants are required to pay to initiate the proceedings, and the Italian Mediation Act 2010 (decreto legislativo 4 March 2010 no 28), which provides

Of course, this is not to say that the bench has no responsibility for the current situation of the civil justice system. As to the professional evaluations and promotions of magistrates, until the mid-1960s career advancement in the judiciary was based on evaluations by senior judges, who were expected to evaluate the written judicial opinions of their younger colleagues. Following a number of statutes enacted between 1966 and 1979, this system has undergone radical change. As a consequence, promotions have been based largely on seniority of service. Promotion to a higher position means the judge is entitled, but not obliged, to perform the higher level functions. Therefore, a judge may gain the status and the salary of an appellate court judge, but is permitted to continue to serve as a judge of first instance if he or she so wishes. As a consequence, several thousand judges enjoy the status and the salary of judges of *Cassazione* without being required to fulfil the attendant duties. These changes have certainly fostered the independence of judges. On the other hand, it has been acknowledged that the peculiar relationship which, over the past forty years or so, has been created between promotion and professional evaluation is unsatisfactory. In fact, it is quite uncommon for a judge not to be promoted or to be dismissed from office for inability or incompetence prior to the age of mandatory retirement.

Professional evaluations and promotions are now regulated by a new law.[34] Magistrates are evaluated several times in the course of their career with reference to four aspects of their performance: capacity, productivity, diligence, and motivation. The new law aims to make the conditions of professional evaluations and promotions more stringent. An analysis of the decisions of the CSM under the new regulation shows that all the magistrates that were evaluated were regularly promoted.[35] Additionally, the fixing of performance targets remains an open issue in Italy.[36]

8. Litigation Rate

In order to inquire further into the reasons for the unreasonable length of ordinary civil proceedings in Italy, it is worth recalling that the number

that mediation must be sought prior to the commencement of proceedings in a significant number of disputes. For further remarks on this point, see R. Caponi, Italian Civil Justice System: 'Most Significant Innovations in the Last Years (2009-2012)', in O.G. Chase et al eds, *Civil Litigation in Comparative Context*, 136, available at http://www.law.nyu.edu/sites/default/files/ECM_PRO_074529.pdf (last visited 24 May 2016); G. Pailli and N. Trocker, 'Italy's New Law on Mediation in Civil and Commercial Matters' *Zeitschrift für Zivilprozess-International*, 75 (2013).

[34] Decreto legislativo 5 April 2006 no 160.

[35] See G. Di Federico, 'Judicial Independence in Italy', in A. Seibert-Fohr ed, *Judicial Independence in Transition* (Berlin, New York: Springer, 2012), 374.

[36] See R. Fuzio, 'La misura del lavoro del magistrato tra standard e carichi esigibili. Problema nuovo? A che punto siamo (Nota a Consiglio sup. magistratura, 23 settembre 2015 e Consiglio sup. magistratura, 23 luglio 2014)' *Foro italiano*, III, 58 (2016).

of new first instance initiated cases per one hundred thousand inhabitants was two thousand six hundred thirteen in 2012.[37] Thus, the litigation rate is higher than in Germany (one thousand nine hundred sixty-one), the UK (one thousand eight hundred fifty-nine), and Austria (one thousand two hundred thirty-five), lower than Spain (three thousand eight hundred twenty-eight) and Greece (five thousand eight hundred thirty-four, which is extraordinarily high compared to all others European countries), and similar to France (two thousand five hundred seventy-five). Thus, the Italian litigation rate, compared to that of similarly positioned European countries, is high.[38]

This finding as to Italy might be rather a consequence than a cause of the undue delay of civil proceedings, as debtors who are unwilling to fulfil their obligations can to some extent rely on the duration of proceedings and are comfortable when facing lawsuits.[39]

9. High Number of Lawyers as a Cause of Inefficiency?

Although a self-regulated body, the legal profession has not been very successful in controlling admissions in the past decades. As of 2012, Italy has the third highest number of lawyers among the countries of the Council of Europe: two hundred twenty-six thousand two hundred twenty-two, that is to say circa three hundred seventy-nine per one hundred thousand inhabitants[40] (in Germany they are two hundred per one hundred thousand inhabitants, in France eighty-five, in Greece three hundred eight, in Spain two hundred eighty-five, in Austria ninety-three).

Apart from a fortunate minority of specialists in such fields as business law and administrative law, most lawyers must make what income they can out of handling large numbers of cases in low-value fields, such as car-accidents, credit recovery and employment law disputes.[41]

As Nicolò Trocker clarifies:

> 'The pursuit of sources of income contributes to the judicial burden, favours futile controversies and makes lawyers turn into a stimulus to

[37] See CEPEJ, 'Report on European Judicial Systems' (2014 edition), 202, table 9.4, available at http://www.coe.int/t/dghl/cooperation/cepej/evaluation/2014/Rapport_2014_en.pdf (last visited 24 May 2016).

[38] For an inquiry into the causes of litigation in Italy, dating back to the 1990s but still useful, see S. Pellegrini, *La litigiosità in Italia* (Milano: Giuffrè, 1997).

[39] On this point see D. Marchesi, *Litiganti, avvocati e magistratura* (Bologna: Il Mulino, 2003), 71: 'pathological component of civil justice demand'.

[40] CEPEJ, n 37 above, 377, table 12.1. The highest number of lawyers is in Luxembourg; the second highest is in Greece.

[41] M. De Cristofaro and N. Trocker eds, n 22 above, 49.

litigation instead of a restraint over it.'[42]

The work practices of law firms further enable lawyers to handle a large numbers of cases simultaneously.

As Sergio Chiarloni put it:

> 'In such hierarchically structured firms, a chief with managerial and representative functions supervises the work of a large number of employees. The lower level employees are often beginners, employed at the level that their talents allow. Some apprentices carry out jurisprudential and doctrinal research, others carry papers to and from the court. The present slow procedures allow practitioners to manage an increasing caseload while keeping the same number of employees. Most work can be performed in the office. Thanks to postponements, work can be scheduled in order to allow the most cost-effective employment of staff.'[43]

10. Structure of Proceedings

The work practices described by Chiarloni are also adopted by medium- and small-sized law firms, which make up the bulk of the legal profession in Italy. The reference made to 'postponements' synchronizes work practices with the structure of ordinary civil proceedings.[44] The civil procedure of Italy, as well as those of other countries belonging to the Romance legal family (such as France, South American countries and, until the new code of civil procedure of 2000, Spain) originates from the Italian-canonical procedure. Based on this model, a procedural model with three different stages has developed: the written introductory phase (made up of the statement of claim, the defendant's response, and the exchange of a number of briefs between the parties); the fact-finding phase (made up of the taking of evidence by the instructing judge); and the final decision phase, where the decision on the dispute is to be issued by the instructing judge (or a judicial panel in certain cases)[45] after the parties have been given the opportunity to exchange their final briefs. The fact-finding phase often requires several hearings for the evidence to be compiled. This model is characterized by a sequence of hearings and not by a concentrated main hearing, such as in Germany, England and (after the new Code of Civil

[42] Ibid.

[43] See S. Chiarloni, n 29 above, 267.

[44] See R. Caponi, 'Zur Struktur des italienischen Zivilprozesses' *Festschrift für Rolf Stürner zum 70. Geburtstag* (Tübingen: Mohr Siebeck, 2014), 1455.

[45] For these cases, see Art 50-*bis* Code of Civil Procedure.

Procedure, enacted in 2000) in Spain.[46]

This structure of proceedings not only enables law firms to organize their work for a significant amount of pending cases, but also makes it possible for most judges to handle their heavy workload. In these conditions, they are more comfortable with a number of hearings (where very little advances), postponements centred on a mostly written handling of the case by the parties, and a final examination of written submissions by the judge, rather than with proceedings centred on a labour-intense main hearing.

In conclusion, the current structure of ordinary proceedings coincides with the interests of law firms and the bureaucratic spirit of many judges rather than with the public interest in the administration of justice.

11. Backlog of Cases as a Driver of Undue Delay of Proceedings

The ratio of the number of judges examining civil proceedings to the number of cases to be dealt with has been unfavourable for decades. There are too few judges in relation to the disputes to be resolved. The number of career judges per one hundred thousand inhabitants in Italy is lower than that of most European countries (Italy ten point six; Germany twenty-four; France ten point seven; Spain eleven point two; Austria eighteen point three; Greece twenty-three point three).[47] The ratio of honorary judges per one hundred thousand inhabitants is even more unfavourable (Italy five point five; Germany one hundred twenty-two point three; France thirty-eight; Spain sixteen point seven; Austria N/A, Greece N/A).

Relatively low numbers of judges, coupled with a high litigation rate, results in the huge backlog of cases. As of 2013, the number of cases pending before the courts of first instance amounted to one million two hundred ninety-six thousand seventy-five before the justices of the peace, and three million two hundred sixty-five thousand eight hundred seventy-five before the *tribunali*.[48]

The huge workload of the courts plays the leading role in determining the undue delay of ordinary civil proceedings and making it difficult to implement procedural reforms aimed at changing the structure of proceedings by introducing proceedings centred on a main hearing, which would be the best solution from a comparative prospective.

However, it would not be fair to say that there is 'too much' litigation in Italy (and possibly anywhere) just as it would not be fair to say that there are

[46] For this comparison, see R. Stürner, 'The Principles of Transnational Civil Procedure. An Introduction to Their Basic Conceptions' *Rabels Zeitschrift*, 201-223 (2005).

[47] CEPEJ, n 37 above, 155, table 7.1.

[48] See Ministero della giustizia, n 14 above, 15.

too many sick people or too many people who want to make use of public transport. There are only governments which are unable to put courts, hospitals, and public transport companies in an appropriate position to perform their duties and to cope with their caseloads, patients and passengers.

In Italy, the problems caused by the unfavourable ratio of the number of judges to the number of civil cases to be dealt with has been underestimated for decades. The indifference and the inability of the political process to tackle this problem in a timely manner has contributed to the increase of the backlog of cases pending before the courts.

III. Legislative Changes in the Last Few Years

Italian policy makers and regulators have too often relied upon the reforms of the rules of procedure instead of developing more comprehensive remedies for the problems under discussion. In the last few years, however, one can detect signs of change, pointing to improving court organization; although the proposals are mixed with remnants of old approaches.

The following main innovations took place since 2012: (a) about seven hundred courts of first instance (more than thirty *tribunali* and more than six hundred sixty-five *giudici di pace*) were removed; (b) e-justice, in terms of digital communications between courts and practitioners have been further fostered; (c) summary proceedings were introduced before the courts of second instance, leading to the refusal of appeal if there is no 'reasonable prospect of success' (Art 348-*bis* Code of Civil Procedure), which has certainly contributed to the decrease of the backlog of cases in the courts of appeal; (d) powers of the Supreme Court to quash a judicial decision for defective reasoning were limited (Art 360, para 1, no 5 Code of Civil Procedure); (e) the possibility to change procedural track (from the normal to an accelerated proceedings) at the first hearing has been introduced (Art 183-*bis* Code of Civil Procedure); (f) the legal framework for lawyers to negotiate the resolution of the dispute has been enhanced (*negoziazione assistita*); (g) the possibility for judges to be assisted by law clerks has been improved; (h) further small changes in the fields of enforcement of judgments and insolvency proceedings have been introduced at the beginning of May 2016.[49]

IV. The Current Performance of the Italian Civil Justice System: An Evaluation

[49] Cf decreto legge 3 May 2016 no 102.

The current performance of the Italian civil justice system gives no cause for joy. Yet, the situation has been steadily improving in the last few years. One of the main factors of this change has been rather concealed. Since the end of the 1990s the collection of statistical data on the judicial system by the Ministry of justice has been enhanced, thus enabling scholars and policy-makers to obtain a better understanding of the real situation, which is very diverse from a region to region, from court to court, making it difficult to adopt uniform performance targets on a national basis for the time being.[50] As to the geographical distribution of backlog, the bulk of it is in southern Italy, while a number of courts, especially in northern Italy, are performing relatively well. By way of example, the *tribunale* of Turin adopted in recent years a very successful backlog-reduction programme[51] and the Ministry of Justice is currently attempting to expand this programme on a national basis.[52]

Special statistical inquiries focused both on the performance of single courts or certain regions can point to specific causes for inefficiencies depending either on abnormal litigation rates in some judicial districts or dysfunctions in certain courts.

V. Concluding Remarks

In the end, the question remains as to how to tackle the problems of Italian civil justice in an effective way.

One can start by recalling the main factors that may determine the success or failure of any given judicial system. In essence, three criteria stand out, and they can be placed on an ascending scale of importance: first, skilfully drafted procedural rules; second, appropriate financial resources; third, the attitude of parties, legal practitioners and judges.

The first factor requires that the procedural rules be skilfully drafted and adequate to meet the expectations of parties, practitioners and judges. This is only a first element, which is not conclusive; since there has never been a procedural law so well constituted such as to prevent all bad practices and, conversely, there has never been a procedural law so misguided as to prevent good practices of judicial proceedings (to paraphrase Virgilio Andrioli, an outstanding Italian scholar in civil procedure of the twentieth century).

[50] Cf the special statistical inquiry as of October 2014, available at https://www.giustizia.it /giustizia/it/mg_2_9_10_1.wp?previsiousPage=mg_14_7 (last visited 24 May 2016).

[51] So called '*Strasburgo*' Program.

[52] '*Strasburgo 2 Program*'. Mario Barbuto, former President of the *tribunale* of Turin has joined the Ministry of Justice as a chief of the Department dealing with the subject of court organisation.

Justice is administered in courthouses, not simply through written words in statutory provisions. It needs, in fact, considerable financial investment by governments. Thus, the second factor is the availability of financial resources such as to implement the procedural law in a satisfactory way.

Moreover, the performance of judicial systems does not depend only on carefully drafted rules and adequate financial resources, but also on the role played by a third factor: mindset, cultural views, ethical beliefs, style, usage and customs affecting policy-makers, people and professionals involved in the machinery of justice. For instance, the propensity of individuals to litigate depends considerably also on cultural and ethical attitudes, such as the degree of honesty, fairness, integrity and good faith that characterizes human relations in a given environment and in a given historical moment; the degree of individuals' social responsibility and awareness of their rights; and the habit of resorting to methods of alternative dispute resolution, and so on.

In particular, promoting mediation and others means of alternative dispute resolution, through proper education of the public and the legal profession,[53] can play a major role in reducing the disputes brought before the courts for adjudication. However, it should be clarified that ADR methods should not be seen as a remedy for the inefficiencies of the machinery of justice. Instead, they should have an 'added value', even though courts operate effectively and efficiently. The promotion of mediation should always be accompanied by efforts to improve the efficiency of public civil justice system and not by attempts at limiting access to courts. Thus the adjective 'alternative' is actually misleading in relation to out-of-court dispute resolution methods. The out-of-court dispute resolution methods ought not to be an alternative to the state civil justice system, but rather its complement.

A major role is also played by habits of mind, professional skills as well as the level of cooperation among judges, practitioners and judicial staff. For example, the fast-paced development of technologies, as it occurs today, requires also an adaptability to new standards of technology. Even the availability of adequate financial resources is of little benefit if it does not come with the managerial skills required to manage these resources in an efficient way.

Propensities to litigate, habit of resorting to ADR, professional and managerial skills, are mainly cultural issues. Thus, judicial practice is influenced by a number of factors, among which the binding force of legal

[53] A short period of mandatory mediation as it is envisaged in the amended version of the Mediation Act could be useful to that end. Cf legge 9 August 2013 no 98.

rules plays a less critical role than the mindset, the cultural views and ethical beliefs of parties, judges, and professionals.[54]

In short, the third factor, the cultural one, is the most important, since it enhances the role of skilful drafting and financial resources.

However, one should be cautious with simple causal assertions, like those treating culture as a factor external to law that shapes behaviour and institutional arrangements. In the end, one should treat culture as a set of shared meanings that make certain options more thinkable such as to enable one to act accordingly. This approach is in line with Clifford Geertz's thoughts,[55] which rejected interpretations of culture that placed ultimate significance on its capacity to produce particular social practices and argued that seemingly identical practices may have entirely different meanings, such that the value of cultural interpretation is to sift through those meanings rather than simply to assert that culture causes the practices themselves.[56]

The task of deepening the extent to which the attitudes of scholars of civil procedure may play a role with regard to these variables remains for another article.

[54] For a definition of 'practice of the law' as 'a whole series of legal relevant conducts engaged by a homogeneous social group', see J. Ghestin, 'Rapport de synthese', in Travaux de l'association H. Capitant ed, *Le role de la pratique dans la formation du droit* (Paris: Economica, 1985), 17.

[55] See C. Geertz, *The Interpretation of Cultures. Selected Essays* (New York: Basic Books, 1973), 6, 12.

[56] For further remarks on this point, R. Caponi, 'Harmonizing Civil Procedure: Some Initial Remarks', in B. Hess and X. Kramer eds, *From Common Rules to Best Practices in European Civil Procedure* (Baden Baden: Nomos, 2016), forthcoming.